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RE: Consultation on a Federal Victims' Bill of Rights

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**SUBMISSION TO**

**THE DEPARTMENT OF JUSTICE ON VICTIMS' RIGHTS IN CANADA**

**In response to the Discussion Document on *Enhancing Criminal Law Responses to Better Meet the Needs of Victims of Crime in Canada***

Submitted by  
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Ottawa, Ontario

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## Introduction

The Federal Government has recently tabled legislation intending to improve the status of victims in Canada. Bill C-54 (*Not Criminally Responsible Reform Act*) proposes to amend the *Criminal Code* and *National Defense Act* by creating a “high risk” designation for certain persons found Not Criminally Responsible (NCR). The Bill also enhances the involvement of victims within the justice system, amending procedural and technical requirements.

Bill C- 479 (*An Act to Bring Fairness for the Victims of Violent Offenders*), is a private member’s bill. This Bill makes amendments to the *CCRA* to bring greater legislative support for the treatment of victims within the criminal justice process. One of the more significant changes is the extension of maximum mandatory parole review periods from 2 to 5 years. This extension intends to relieve what the Federal Government views as a process of “re-victimization”, resulting from repeated attendances at hearings.

In order to establish comprehensive reform of the status of victims in Canada, the Federal Government has sought consultation on the creation of a federal Victims’ Bill of Rights. Victims’ rights in Canada have traditionally been viewed as balance between the rights of the accused and the rights of victims.<sup>1</sup> Sufficient scrutiny of these initiatives is required to ensure amendments do not disproportionately imbalance these rights, or worse, make amendments that potentially jeopardize public safety in the long run. The following brief looks at these issues collectively, with consideration given to the mission and values of St. Leonard’s Society of Canada (SLSC)<sup>2</sup>, and puts forth recommendations and considerations for the construction of a federal Victims’ Bill of Rights.

The following presents a short background of existing victims’ rights legislation before proceeding to SLSC’s position on: the purpose for a federal victims bill of rights; the most important elements to be included therein; the points at which these rights should be provided; the limitations of such rights; potential rights to legal counsel; and finally, the scope of remedies to be granted. These topics are discussed in relation to the Department of Justices’ request for stakeholder feedback on the discussion document *Enhancing Criminal Law Responses to Better Meet the Needs of Victims of Crime in Canada*. We conclude with an analysis of concerns and recommendations.

## Issue

In consideration of a federal Victims’ Bill of Rights in Canada.

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<sup>1</sup> Department of Justice 2013. Victims’ Rights: Enhancing Criminal law Response to Better Meet the Needs of Victims of Crime in Canada. R v. NS (2012, SCC) Retrieved from <http://www.justice.gc.ca/eng/cj-jp/victims-victimes/vrights-droitsv/discuss-consult.html>.

<sup>2</sup> SLSC: i) endorses evidence-based approaches to criminal and social justice; ii) conducts research and develops policy; iii) supports its member affiliates; and iv) advances collaborative relationships and communication among individuals and organizations dedicated to social justice. –The Values of the Society include: Social Responsibility, Integrity, Vision, Commitment and Human Worth. For a greater description visit: <http://www.stleonards.ca/?s=about&p=purpose>

## Background of SLSC

St. Leonard's Society of Canada (SLSC) is pleased to have the opportunity to present this submission and recommendations to the Department of Justice after considering the multifaceted topics within Canadian victims' rights, and how these rights may affect the demographic we serve. SLSC is a membership-based, charitable organization dedicated to community safety since 1967.<sup>3</sup> The mission of SLSC is to promote a humane and informed justice policy and responsible leadership to foster safe communities. Our membership of twelve direct service agencies across Canada provides residential and day programs to more than 15,000 previously incarcerated youth and adults annually.

## Background of Victims' Rights

In Canada, there are both federal and provincial laws that apply to victims of crime. In Federal legislation, victims' rights are recognized in the *Criminal Code* and the *Corrections and Conditional Release Act*. Almost all provinces have legislation to varying degrees protecting the role of victims within the criminal justice process. Both Ontario and Manitoba examples will be touched on below. A more thorough presentation on the history of provincial legislation on Victims' Rights can be found through the Canadian Resource Centre for Victims of Crime.<sup>4</sup>

### *The Criminal Code*

Under section 722 of the *Criminal Code*, a victim of crime can file and read a Victim Impact Statement at the time of sentencing. Victim Impact Statements are given to the judge and considered in sentencing.

### *The Corrections and Conditional Release Act*

When enacted in 1992, the *Corrections and Conditional Release Act (CCRA)* marked the first time victims were formally recognized in any federal legislation governing the correctional and conditional release system. The Act entitles victims to receive certain information about the person who committed the crime affecting them. Such rights include the disclosure of the following information:

- The person's name
- The offence of which they were convicted
- The court that made the conviction
- The date of commencement and length of the sentence
- Eligibility dates and review dates applicable for escorted and unescorted temporary absences or parole.

In addition to these rights, the *CCRA* also provides the opportunity for further information to be released on discretionary grounds. This kind of information may be released if it is determined

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<sup>3</sup> Incorporation #12894 06600 RR0001. Online: [www.stleonards.ca](http://www.stleonards.ca). SLSC is not a religious organization.

<sup>4</sup> Victims' Rights in Canada: Prepared by the Canadian Resource Centre for Victims of Crime.2006.

<http://www.crcvc.ca/docs/vicrights.pdf>

“that the interest of the victim clearly outweighs any invasion of the offender's privacy that could result from the disclosure”. Such information includes:

- The person’s age;
- The location of the penitentiary in which the sentence is being served;
- The date, on which the offender is to be released on temporary absence, work release, parole or statutory release;
- The date of any hearing for the purposes of a detention review;
- Any of the conditions attached to the offender's temporary absence, work release, parole or statutory release;
- The destination of the offender on any temporary absence, work release, parole or statutory release, and whether the offender will be in the vicinity of the victim while travelling to that destination;
- Whether the offender is in custody and, if not, the reason that the offender is not in custody; and
- Whether or not the offender has appealed a decision of the PBC and the outcome of that appeal.

### *The Canadian Statement of Basic Principles of Justice for Victims of Crime: 2003*

At the federal level exists The Canadian Statement of Basic Principles of Justice for Victims of Crime. This statement is not law, and so does not entitle rights beyond those set out in the *Criminal Code* and *CCRA*. All federal, provincial and territorial Ministers Responsible for Criminal Justice, however, endorse these principles as guidelines for the treatment of victims throughout the criminal justice process, which are to be reflected in resulting laws, policies, and procedure. The first statement came in 1988, with a renewed version in 2003.

The Statement supports a notion of victims’ rights in line with the *United Nations’ Declaration of Basic Principles of Justice for Victims of Crime*. A key recognition of the statement asserts that “the rights of victims and offenders need to be balanced”, in respecting the harmful impact of criminal victimization on individuals, and in recognition that all persons have the full protection of rights guaranteed by the *Canadian Charter of Rights and Freedoms*.<sup>5</sup>

### *Ontario Victims’ Bill of Rights, 1995*

In provincial legislation the rights afforded to victims vary. Ontario’s preamble states that victims of crime “should” be treated with “compassion and fairness”, and that the justice system “should” operate in a manner that does not increase the suffering of victims of crime nor discourage victims from participating in the justice process. These rights include laws that support victims being treated with courtesy, compassion and respect for their personal dignity and privacy by justice system officials. These rights include:

1. Victims should have access to information about:

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<sup>5</sup> Canada Department of Justice, Revised 2003 <http://www.victimfirst.gc.ca/serv/wvr-qdv.html>.

- Services and remedies available.
  - Compensations afforded by this Act.
  - The protection available to prevent unlawful intimidation.
  - The progress of investigation.
  - The charges laid, or why charges were not laid.
  - The victim's role, court procedures, dates and places significant to prosecution, pretrial arrangements, plea made, any interim release or sentencing, the right to present an impact statement.
2. If requested, victims should be notified of:
    - Any application for release, impending release, transfer, escorted or unescorted temporary absence pass, or any attempt or escape from custody.
  3. If found NCR, at the victim's request, a victim has the right to be informed of:
    - Any hearings in front of the Review Board, or any order for absolute discharge.
  4. If requested, victims should have the right to:
    - If sexually assaulted, to be interviewed by a member of the same sex.
    - Have their property released promptly once it is no longer required for justiciable proceedings.

This Act also makes it easier for victims to sue the person convicted for damages from physical harm or harm from emotional distress.<sup>6</sup> The Act provides added factors to ensure the fairness of these lawsuits, such as not considering the person's sentence in relation to damages owed; however, some victims' groups are calling for more, including the right to have punitive damages awarded without judicial consideration given to the sentence of the person convicted. The Ontario Victims' Bill of Rights currently states that a judge must take the sentence into consideration before ordering that person to pay punitive damages.<sup>7</sup> Punitive damages differ from damages in that they go beyond compensating the victim for a loss. Whether a judge does or does not consider the sentence of a person convicted of crime before ordering punitive damages does little to enhance a victim's specific right, does more to remove judicial discretion for fairness, and acts punitively on the person convicted.

Even though most of the provinces and territories have enacted legislation governing victims' rights, according to the Canadian Resource Center for Victims of Crime, most of this legislation is non-committal, does not enforce "true rights", and only stipulates what victims "should" have.<sup>8</sup> According

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<sup>6</sup> The Act makes clear that those who have been subject to sexual assault, domestic assaults, or attempted sexual assaults will be presumed by the courts of having suffered emotional distress, thereby alleviating the burden of providing further proof.

<sup>7</sup> 1995, c. 6, s. 4 (4)

<sup>8</sup> Victims' Rights in Canada: Prepared by the Canadian Resource Centre for Victims of Crime.2006.

<http://www.crcvc.ca/docs/vicrights.pdf>

to court decisions from 1999 many aspects of this type of legislation do not provide enforceable rights.<sup>9</sup>

## Defining a Victim

How a “victim” is defined is important for determining who is, and is not, eligible for protection under a Victims’ Bill of Rights. A definition of “victim” has not been provided for consideration during this consultation process. Although the *CCRA* and *Criminal Code* both assert relatively similar definitions of who is a victim, the provinces have legislation which can include a broader definition. An overly inclusive definition has the potential to water down specific provisions for certain types of victims. Alternatively, a narrow definition could be considered exclusive. Finally, the scope of the language may lead to difficulties of enforcement if stated too broadly, which may weaken the authority of the rights overall.

Throughout provincial, national, and international legislation, some definitions require only that an “alleged” offence has occurred for a person to receive a victim’s status, while others imply that the victim must be a victim of a “criminal offence”.<sup>10</sup> Other definitions are seen to apply to “natural” persons, while some may apply to organizations on a broader spectrum.<sup>11</sup> Ultimately, how a victim is defined may play a crucial role with regard to the types of entitlements available, the mechanisms for enforcement, and the remedies available. Below are some examples from the *CCRA*, and the *Manitoba Victims’ Bill of Rights*:

### *Corrections and Conditional Release Act (CCRA)*

As defined in the *CCRA* Section 2. (1), “victim”, means a person to whom harm was done or who suffered physical or emotional damage as a result of the commission of an offence and, if the person is dead, ill or otherwise incapacitated,

- (a) the person’s spouse or an individual who is — or was at the time of the person’s death-cohabiting with them in a conjugal relationship, having so cohabited for a period of at least one year,
- (b) A relative or dependant of the person,

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<sup>9</sup> Victims’ Rights in Canada: Prepared by the Canadian Resource Centre for Victims of Crime.2006.

<http://www.crcvc.ca/docs/vicrights.pdf>

<sup>10</sup> The UK’s *Code of Practice for Victims of Crime* defines a victim as follows:

“Any person who has made an allegation to the police, or had an allegation made on his or her behalf, that they have been directly subjected to criminal conduct under the National Crime Recording Standard (NCRS).”

“This definition also includes bereaved relatives or partners in homicide cases, parents where the primary victim is a child or youth under 18; police officers (who are victims of crime); and a family spokesperson, entitled to receive services under the Code, where the victim is incapacitated as a result of disability”.

<sup>11</sup> European Commission’s report, entitled *Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime* Defines a “Victim” as:

(i) A natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss directly caused by a criminal offence;

(ii) The family members of a person whose death has been caused by a criminal offence;

:European Commission’s report entitled *Establishing minimum standards on the rights, support and protection of victims of crime* [http://ec.europa.eu/justice/policies/criminal/victims/docs/com\\_2011\\_275\\_en.pdf](http://ec.europa.eu/justice/policies/criminal/victims/docs/com_2011_275_en.pdf)

(c) Anyone who has in law or fact custody, or is responsible for the care or support, of the person, or

(d) Anyone who has in law or fact custody, or is responsible for the care or support, of a dependant of the person;

The *Criminal Code* maintains a similar definition of a “victim”.<sup>12</sup>

### *Manitoba Victims’ Bill of Rights*

The Manitoba Victims’ Bill of Rights has a rather expansive definition:

"Victim" means an individual, or a corporation, organization or other entity, against whom an offence is committed or is alleged to have been committed, and

(a) where the victim is an individual who is deceased, means an individual — other than the alleged offender — who, at the time of the offence,

(i) Was

A. Married to and living with the victim,

B. Cohabiting with the victim and together with the victim had registered their common-law relationship under section 13.1 of *The Vital Statistics Act*, or

C. Cohabiting with the victim in a relationship for not less than one year, or

(ii) Where no person qualifies under sub clause (i), is the victim's nearest relative, or

(b) where the victim is an individual who is a minor or is incapable of handling his or her affairs, means the person — other than the alleged offender — who is the victim's parent, guardian, committee or substitute decision maker.<sup>13</sup>

Within their submission to the Department of Justice on June 10<sup>th</sup>, 2013 the OFOVC recommended the government be “inclusive and consider the widest definition of victim”.<sup>14</sup> The Ombudsman does not qualify this recommendation, however, nor provide an example definition. It is important to note that “widest definition” may include inmates who have been victimized by correctional officers, persons victimized by others while incarcerated, or victims of a wrongful conviction.

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<sup>12</sup> *Criminal Code*

Definition of “Victim”

(4) For the purposes of this section and section 722.2, “victim”, in relation to an offence,

(a) means a person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence; and

(b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement referred to in subsection (1), includes the spouse or common-law partner or any relative of that person, anyone who has in law or fact the custody of that person or is responsible for the care or support of that person or any dependant of that person.

<sup>13</sup> *Manitoba Victims’ Bill of Rights*.1998. <http://web2.gov.mb.ca/laws/statutes/ccsm/v055e.php>

<sup>14</sup> Federal Ombudsman for Victims of Crime. 2013. Meeting the Needs of Victims of Crime in Canada: Submission to the Department of Justice for the Development of a Victims’ Bill of Rights.

## Federal Victims' Bill of Rights: SLSC Comments

For this consultation process a discussion document entitled *Enhancing Criminal Law Responses to Better Meet the Needs of Victims of Crime in Canada* was distributed for consideration. This document laid the foundation for a conversation on the purpose of a federal Victims Bill of Rights; the most important elements to be included therein; the points at which these rights should be provided; any limitations for such rights; the potential for a right to legal counsel; and finally, the scope of remedies to be granted in the event of a breach. The following section takes up this discussion more directly within the context of the existing environment.

### *Purpose*

Even though there has been federal and provincial legislation on this front, many victims groups do not see these pieces to sufficiently address victims' needs. In fact, only Manitoba is said to have an adequate articulation of victims' rights, sufficient to provide *some* options for legal recourse in instances of a breach.<sup>15</sup> Generally, however, the current provincial legislation is not sufficient to render victims' rights in Canada enforceable, nor does it provide national standardized treatment.<sup>16</sup>

One of the motivations for a federal Victims' Bill of Rights (VBR) comes from the Office of the Federal Ombudsman for Victims of Crime (OFOVC). The Ombudsman has repeatedly expressed victims' dissatisfaction with their lack of rights, along with the need for their enforceability.<sup>17</sup> The OFOVC currently sees an imbalance within the system. The Ombudsman highlights that offenders have a right to be treated in a certain manner, to obtain important information, to be present and/or participate in most decision-making proceedings, and are often supported through various forms of programming and rehabilitation.<sup>18</sup> Further the Ombudsman has claimed that "almost none of these same protections or supports are offered to victims and, as such, victims feel that the criminal justice system, and the related supports outside of the system weigh *heavily* in favour of the offender".<sup>19</sup>

According to the Canadian Resource Center for Victims of Crime (CRCVC) "much of what remains to be done for victims of crime has more to do with changing attitudes than legislation"..."those within the system must accept that victims have a role in the justice system

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<sup>15</sup> Canadian Resource Centre for Victims of Crime: Victims' Rights in Canada.2006.

<http://www.crcvc.ca/docs/vicrights.pdf>

<sup>16</sup> Federal Ombudsman for Victims of Crime. 2013. Meeting the Needs of Victims of Crime in Canada: Submission to the Department of Justice for the Development of a Victims' Bill of Rights.

<sup>17</sup> Federal Ombudsman for Victims of Crime. 2013. Meeting the Needs of Victims of Crime in Canada: Submission to the Department of Justice for the Development of a Victims' Bill of Rights.

<http://www.victimsfirst.gc.ca/vv/rec1112-rec1112.html>.

<sup>18</sup> Federal Ombudsman for Victims of Crime. 2013. Meeting the Needs of Victims of Crime in Canada: Submission to the Department of Justice for the Development of a Victims' Bill of Rights.

<http://www.victimsfirst.gc.ca/vv/rec1112-rec1112.html>.

<sup>19</sup> Federal Ombudsman for Victims of Crime. 2013. Meeting the Needs of Victims of Crime in Canada: Submission to the Department of Justice for the Development of a Victims' Bill of Rights.

<http://www.victimsfirst.gc.ca/vv/rec1112-rec1112.html>.

and that this role must be respected”.<sup>20</sup> The CRCVC assert this as the “biggest challenge facing the victims' rights movement, especially with respect to Crowns and Judges.”<sup>21</sup> The need for legislative reform to strengthen victims' rights, however, remains a real priority. This is a priority that must fit within the broader need for changing attitudes throughout the system, not just to bring greater support, recognition, and respect to victims, but to safeguard a proper scope for legislative reform that ensures laws do not mistake punitive measures with victims' redress.

A federal Victim's Bill of Rights has its merits in initiating a national standard for the treatment of victims, a societal enhancement of victims' status and role within the justice process, and also in initiating a legislated cultural recognition of these rights. For the purposes of this submission, instances where rights may conflict are important to understand in order to maintain what the Supreme Court of Canada has viewed as “a just and proportionate balance ... based on the particular case before the court.”<sup>22</sup>

Despite the merits of a VBR, many challenges remain to be overcome in terms of how such legislation would apply. Concerns arise with regard to how the legislation defines a victim and who will be excluded from accessing the provisions granted by this title. At this point it is unclear what mechanisms would be available federally for applying remedies in the case of a breach, and how these would be standardized across all provinces and territories considering the administration of justice resides with the provinces.

The view of SLSC is that a Victims' Bill of Rights should not enhance the rights of victims by subtracting a corresponding or conflicting right from the accused. An example of this includes extending the maximum mandatory parole review periods, which has the effect of more people in jail for longer. Such outcomes require serious consideration as to whether this measure is fair when balanced against the burden victims face attending parole hearings more often. Legislation to enhance the status and rights of victims within the criminal justice process should not lead to an increase in the numbers of those incarcerated, the length of term served, nor reduce hope for rehabilitative success. Such initiatives better fall under the broader political debate of how to rehabilitate incarcerated persons, as opposed to the debate of how best to enhance the status of victims. These distinct debates should not be conjoined. Increasing punitive measures on sentenced persons, minimizing their rights, or an overall toughening of criminal justice policies are not sufficient to enhance the status or rights of victims in Canada. And, an imbalanced approach may in fact increase the risk of criminality within communities in the long run, leading to more victims in the future.

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<sup>20</sup> Canadian Resource Centre for Victims of Crime: Victims' Rights in Canada.2006.  
<http://www.crcvc.ca/docs/vicrights.pdf>

<sup>21</sup> Canadian Resource Centre for Victims of Crime: Victims' Rights in Canada.2006.  
<http://www.crcvc.ca/docs/vicrights.pdf>

<sup>22</sup> Department of Justice 2013. Victims' Rights: Enhancing Criminal law Response to Better Meet the Needs of Victims of Crime in Canada. R v. NS (2012, SCC) Retrieved from <http://www.justice.gc.ca/eng/cj-jp/victims-victimes/vrights-droitsv/discuss-consult.html>

SLSC submits that the purpose for a federal Victims' Bill of Rights should be to initiate a national scope for societal change regarding victims' treatment throughout the justice system in Canada. This begins with a unified statement, federally enforceable rights, with the correct hierarchy of mechanisms available for training officials, resolving conflicts, and providing resources and redress in cases of a breach. A federal Victims' Bill of Rights also should not create a separate world for victims of crime. It should deal with victims in relation to justice proceedings, should enhance restorative practices, and promote the overall consideration of victims' needs with an emphasis on services and access to financial assistance.

It is clear from many recommendations put forth from the OFOVC that the purpose of a Victims' Bill of Rights should be to establish the enforceability of specific rights. The most important elements should seek to help victims feel informed, considered, protected and supported. As federal legislation the Bill should set a minimum standard nationally, which will aid in the uniform protection for victims, along with a social transformation of attitudes within the system.

SLSC notes that many victims' groups currently perceive an imbalance between the rights afforded to the accused and victims. This perspective has led the OFOVC to state that "offenders have a right to be treated in a certain manner, to obtain important information, to be present and/or participate in most decision-making proceedings and are often supported through various forms of programming and rehabilitation", and further that victims lack access to similar provisions.<sup>23</sup> Considering this perspective, however, it is important to view the context in which these rights reside before determining the balance.

Incarceration by the state is an infringement on a person's right to liberty, and is the most severe sanction the state can impose on a person. Although there are *some* serious cases where the terms of incarceration may not feel satisfying, there exists a large spectrum of context sensitive cases where the rights of incarcerated persons to be informed and treated in a certain manner act only to ameliorate this most severe sanction, and make this infringement on liberty just and proportional. From this perspective, SLSC maintains that a balancing of the rights between victims and those convicted cannot be achieved through any measure which subtracts from the rights of those incarcerated. Often, the rights afforded to incarcerated persons are a testament to this country's historic development of increasingly humane correctional measures, and should not be minimized.

## **Elements Included in a VBR: A Review of Rights**

This section contains a brief selection of some key recommendations from the OFOVC to provide an indication of the scope envisioned for a Victims' Bill of Rights, to determine the risk of potentially conflicting rights, and to uncover any potentially penalizing or imbalanced outcomes.

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<sup>23</sup> Federal Ombudsman for Victims of Crime. 2013. Meeting the Needs of Victims of Crime in Canada: Submission to the Department of Justice for the Development of a Victims' Bill of Rights.

As seen through the OFOVC's submission, many of the most important elements of a VBR should seek to make victims feel **informed, considered and protected**, and **supported**. The principles which should guide these rights should be: courtesy; compassion; fairness; respect; privacy; dignity; and freedom from intimidation, harassment and abuse.<sup>24</sup> Along with these basic categories are times when these rights ought to be considered, such as: at the time of the crime; during the court process and proceedings; and during the post-conviction and release period.<sup>25</sup>

Access to information about their rights is important to help victims: understand their role and degree of involvement, feel considered, understand their co-existing rights, and to have an informed view of criminal justice process itself. Rights that support a victim's consideration by the system and provide protection are important for ensuring that the victim is included as much as possible. These rights are also important for assessing a victim's degree of comfort and proximity to the accused. When victims feel as though they are considered with sufficient supports they have a better chance of feeling respected. Victims who have experienced loss or trauma, furthermore, have a sincere requirement for protection from intimidation or harm from their involvement within the criminal justice process. They also require sufficient consideration to reduce their feelings of being bystanders. Also, due to the psychological, emotional and physical ramifications of having been victimized by crime, many victims may continue to experience serious disruptions to sleep and daily life long after the event. It is, therefore, important that rights provide key supports intending to aid victims in moving forward, and in dealing with ongoing disruptions to daily life as a result of the offence.

#### *Common Rights Proposed by Victims' Groups in Canada*

The following list of rights, while not exhaustive, represents a common set of recommended rights proposed by leading victims groups in Canada, which SLSC is in support of:

- The right to information about the progress of criminal investigations and prosecutions, and the sentencing and interim release of offenders from custody
- The right to information about plea and pre-trial arrangements and their role in the prosecution
- The right to be present, informed and not excluded from pre-trial and trial proceedings
- The right to information about the offender who harmed them, including corrections and conditional release of offenders from custody, release on parole, temporary absence or escape from custody
- The right to receive information about all conditional release procedures in a reasonable and timely manner
- The right to have access to view, upon request, a recent photo of the offender at the time of release

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<sup>24</sup> Federal Ombudsman for Victims of Crime. 2013. Meeting the Needs of Victims of Crime in Canada: Submission to the Department of Justice for the Development of a Victims' Bill of Rights. <http://www.victimfirst.gc.ca/vv/rec1112-rec1112.html>.

<sup>25</sup> Federal Ombudsman for Victims of Crime. 2013. Meeting the Needs of Victims of Crime in Canada: Submission to the Department of Justice for the Development of a Victims' Bill of Rights. <http://www.victimfirst.gc.ca/vv/rec1112-rec1112.html>.

- The right to have access, upon request, to listen to the audio recordings of parole hearings, regardless of whether the victim attended the hearing, or to have transcripts of the parole hearings provided at no cost
- The right to an individual assessment to determine their needs, comfortable degree of participation, and provisions for supports
- The right to be interviewed by the same gender in instances of a sexual offence
- The right to confidentiality
- The right to have information about investigation of offence
- The right to have information about escape from police or corrections custody
- The right to have personal property returned in a promptly manner if the property is no longer necessary for justice proceedings
- The right to have information about the prosecution office
- The right to have information from correctional services
- The right to information from the police regarding the charges being laid, or why charges will not be laid
- The right to a separate waiting area in court
- The right to information about court administration
- The right to request a meeting with the offender to describe the impact of the offence

### *Concerns with Recommended Rights*

- **The right to reasonably confer with the crown regarding case pre-disposition:**  
It is the Crown's responsibility to ensure the accused has a fair trial, with proper disclosure, and without infringing on the rights of the accused. The Crown also has prosecutorial discretion in determining whether to proceed with a charge. This is independent of both victim and accused. This independence is essential for objectivity within the system. Increasing the ability of victims to influence justiciable proceedings may infringe on this objectivity.
- **The right to have a decision not to prosecute reviewed:** Crown offices already possess the ability to review decisions not to prosecute. Legislating this right does little to grant the sufficient protection to victims it intends to, and has the potential of leading to vexatious claims.
- **The right to give views on the prosecution, including decisions whether to lay or stay charges, the position of the crown in relation to sentencing, and decisions on whether to appeal:** Some parties take this right further by recommending that the crown provide "serious consideration" to the victims' views. Participatory rights such as these should be cautioned against because of their ability to endanger the standardized administration of justice. Legislation must be careful in regards to how it incorporates the subjective experiences of victims into the prosecution process. Such experiences should not be used to drive the system.

- **The right to provide input for plea bargaining process:** Victims' input regarding the plea options available is another measure which acts to remove objectivity from the prosecutorial process.
- **The right to give opinions on alternative measures and release:** The measures available for release should consider public safety and reintegrative success as paramount, and should be determined by experts in the field. Once a convicted person has paid their debt through incarceration, opinions on release measures should not be applied inconsistently nor punitively, nor be subject to the variable sentiments of individual victims.
- **The right to discuss release conditions**  
This right is vaguely stated and may have potentially adverse effects. It is important victims understand the release and reintegration process; however, if this right intends to implement the victims' input as requirement, then concerns are raised regarding whether victims can be regarded sufficiently objective and adequately informed to direct these conditions.
- **The right to have access to prompt redress (i.e. legal counsel to assert their rights in criminal proceedings)**  
An understanding of this right is supported by the rationale that to have meaningful right, means that the persons may be able to *exercise* and *enforce* it. A crucial aspect of enforcing a right is the victim's status within criminal proceedings. Generally, a VBR intends to enshrine rights to ensure a victim's role as 'participant' in proceedings and not necessarily as a full-party (i.e. such as the crown or the accused).<sup>26</sup> When it comes to enforcing the rights, however, if a victim is denied the right, enforcement requires that a victim is able to receive a ruling from a higher court to restore the ability to exercise that right. When a right is denied the victim would become a 'party' - instead of the former role as a 'participant' - in a higher-court's proceedings. In order to establish this procedural step, a victim is required to have 'standing' in order to seek a remedy. 'Standing' is the ability to present to a court and to have a court make a ruling on whether the right was violated. In order to have 'standing' there must be a statute which allows a court to provide a remedy. The recognition of this procedural requirement within the Canadian justice system has led to the OFOVC's recommendation that:
  - **Victims with standing have a right to legal representation to enforce their rights, and resources should be specifically allocated to ensure this.**<sup>27</sup>

<sup>26</sup> Dr. Douglas E. Beloof. Founder of the National Crime Victims Law Institute and Professor of Law at Lewis and Clark Law School in the United States. Retrieved from: <http://www.victimfirst.gc.ca/vv/rec1112-rec1112.html>.

<sup>27</sup> Federal Ombudsman for Victims of Crime. 2013. Meeting the Needs of Victims of Crime in Canada: Submission to the Department of Justice for the Development of a Victims' Bill of Rights. <http://www.victimfirst.gc.ca/vv/rec1112-rec1112.html>.

Accordingly to a recent interview, Supreme Court of Canada Chief Justice Beverley McLachlin said access to justice through adequate legal counsel is a growing problem for many Canadians.<sup>28</sup> Further to this point, the Canadian Bar Association is releasing a report this fall calling the current access to justice in Canada “abysmal”, while also noting the gaps left by underfunded and inaccessible legal aid. Considering the existence of this growing, and national problem, a right for victims to legal representation would suffer from significant difficulties regarding successful implementation, and further has the potential to exacerbate this already growing problem.

It is also worth noting that a right to legal representation for victims has been attempted in the United States, and was underlined by the OFOVC to have mixed success.<sup>29</sup> Increased costs, barriers to access, and an increase in adversarial tensions, are just some factors that present a significant challenge for ensuring this form of representation. Given the high costs consumed within the justice system, stern consideration should be given to the financial resources available to provide such a right. Currently the Manitoba Victims Bill of Rights ensures legal counsel to victims; however, it is provided *only* to victims who have had personal information requested of them by the crown. This kind of limitation on when and why a victim is provided legal counsel may protect victims in circumstances where in-depth legal knowledge is required. Crucially however, it also may help to constrain the negative possibility of ballooning public expenses and selectively mediate adversarial tensions.

- **Victims should have a right to restitution from offenders who harm them, and those who have received restitution orders should have the right to enforcement through the courts.**

These rights are intended to provide specifically financial restitution, to remove the use of discretion in its application, and to rectify its underutilization, its previous poor enforcement, and to enhance offender accountability. Such rights, however, are also an example of increasing the rights of one party by directly taking away from the other. Considering that many convicted persons often struggle with homelessness, addiction, poverty, and overall unemployment, removing the judicial discretion currently granted in these types of orders may lead to overly penalizing effects. Furthermore, in cases where persons are unable to meet these financial demands, if there is a recurrent inability to pay then this kind of right would lead to more costly justice proceedings and the potential for more jail time. The cost of crime is a societal burden in as much as a

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<sup>28</sup> Jennifer Graham. The Canadian Press. Access to Justice ‘Abysmal’ Report Says. August 18<sup>th</sup>, 2013.

<sup>29</sup> National Victims' Constitutional Amendment Passage. "Statement of Paul G. Cassell before the United States House Judiciary Committee, Sub-Committee on the Constitution, on the Victims' Rights Amendment." April 25, 2013. p. 11. Cassell's statement contains a quotation from a U.S. Government Accountability Office document, *'Crime Victims Rights Act' Increasing Awareness, Modifying the Complaint Process and Enhancing Compliance Monitoring will improve implementation of the Act*. 2008. Accessed at: [http://www.nvcap.org/legis/113/130425\\_CassellTestimony.pdf](http://www.nvcap.org/legis/113/130425_CassellTestimony.pdf) (return to Footnote 24)

crime is also an act conducted against the state. SLSC asserts the need to bolster victims' services funds to meet these types of requirements.

## Additional Concerns

In line with the OFOVC's recommendations, SLSC supports the rights for victims to be informed, considered and protected, and supported, along with other principles previously stated such as: courtesy; compassion; fairness; respect; privacy; dignity; and freedom from intimidation, harassment and abuse.<sup>30</sup> The best solution, however, for informing, supporting and protecting victims of crime will not come from legislation alone that mandates restitution for a breach. As a priority, investments need to be made in training justice personnel, promoting awareness of victims' rights as set out in Canada's Basic Statement, and ensuring adequate resources to address the needs and concerns of victims as represented through the diversity of Victims Advocacy groups.

### Limitations

Setting limitations on rights has a long history of being subject to judicial discretion; however, a few salient concerns can be raised. *If* victims are granted the specific right to obtain detailed information about an incarcerated person's rehabilitative progress and participation, then it should be essential that this information does not become public information. Today information can be spread very rapidly through telecommunications or social media. If this very personal information were spread throughout a community there could be a significant potential for it to be unnecessarily stigmatizing and damaging to a person's re-integrative success.

Limitations should be placed on rights so that they do not directly take away from the rights of the accused/convicted. Rights intending to enhance the status of victims by supporting, protecting and informing should not have a negative impact on the accused/convicted. The rights should be limited to enhancing the treatment of victims by, and throughout, the justice process. Enhancing the status of victims throughout the justice process is a project that differs from one which strives to empower victims to have a say regarding punitive measures. Enhancing individual victims' rights to effect punitive correctional outcomes has the potential to disrupt the objective administration of justice.

### A Right to Legal Counsel

The *Criminal Code* currently states that victims are entitled to free and independent counsel in circumstances where the Department of Justice is seeking to obtain personal information from the victims.<sup>31</sup> Addressing the question of whether victims should receive the right to legal counsel in all cases requires an analysis of the role which legal counsel is intended

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<sup>30</sup> Federal Ombudsman for Victims of Crime. 2013. Meeting the Needs of Victims of Crime in Canada: Submission to the Department of Justice for the Development of a Victims' Bill of Rights. <http://www.victimsfirst.gc.ca/vv/rec1112-rec1112.html>.

<sup>31</sup> Right to free and independent counsel: [25] "A victim is entitled, on request, to be given access to free, independent counsel by the Department of Justice when access to personal information about the victim is sought under section 278.3 of the Criminal Code (Canada)."

to play, and the rights they would be entrusted to protect. The right afforded by the criminal code may be justified because victims may not be adequately informed of all their legal rights to privacy, or on the restrictions of access to personal information. If the complexity of victims' rights is increased, then legal counsel to assist in understanding these rights may be important. There are concerns, however, regarding the extent to which the legal counsel can increase the adversarial tension, delay justice proceedings, or antagonize the process or overall.

A possible approach could be to assign victims the right to legal counsel only in specific instances. The selectivity as to when and why the legal counsel is present may act to minimize the potential for unnecessarily adversarial proceedings. One example comes from the Canadian Resource Center for Victims of Crime, which has recommended that the VBR should provide independent legal counsel (through legal aid programs in all provinces and territories) to victims in serious personal injury cases.<sup>32</sup>

### *Remedies Available for Victims Following a Breach*

Section 35 of the *Manitoba Victims Bill of Rights* states that "An order, conviction or sentence may not be appealed on the grounds that a right granted by this Act has been infringed or denied".<sup>33</sup> It is quite possible that a breach to a victim's right may occur in a manner not owing to the person convicted. Therefore it would be inappropriate for such breach to lead to a remedy which penalizes the convicted person. An example may be one where a victim has failed to be informed in an adequate manner. If this breach led to an appeal of a parole board's decision for a certain type of release, then this outcome has the potential to directly penalize the person incarcerated. While it is recommended by OFOVC that victims receive legal standing in order to have the issue of a breach addressed in a higher court empowered to ensure redress, we consider this matter to require further discussion.

### *Economic Concerns*

Considering economic realities, and the fact that the cost of corrections is not cheap, there are serious concerns that the cost of successful establishment, implementation, and enforcement of a federal Victims' Bill of Rights may lead to the reallocation of funds away from an already strained corrections budget. This possibility has the potential to impact facility safety and rehabilitative success. The Canadian Resource Center for Victims of Crime is calling for an additional \$250 million across the provinces for victims' services alone.<sup>34</sup> These funds, which do not include others required to ensure effective enforcement and additional legal counsel, should not take away from the funds allocated to provide adequate corrections, correctional programming, and release options.

These concerns are significant, and questions regarding where the funds come from to support such an initiative is a debate which needs to be had. Whether Canada can afford a

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<sup>32</sup> Canadian Center for Victims of Crime. Consultation on Victims Bill of Rights: Department of Justice. June 26<sup>th</sup>, 2013. <http://crcvc.ca/>.

<sup>33</sup> Manitoba Victims' Bill of Rights. Section 35 : <http://web2.gov.mb.ca/laws/statutes/ccsm/v055e.php>

<sup>34</sup> Canadian Center for Victims of Crime. Consultation on Victims Bill of Rights: Department of Justice. June 26<sup>th</sup>, 2013. <http://crcvc.ca/>.pg7.

federal Victims' Bill of Rights (sufficient to ensure it successfully provides for, and implements, the number of recommended rights), is not a debate about whether people are for or against victims' rights. Rather, this is a debate about whether the need for such legislation is a higher priority for public expense than the requirement of safe and available housing for victims of abusive relationships, or the overall availability of programs and services for victims.

### *Judicial Discretion*

Some parties are calling for legislation that removes judicial discretion in the consideration of a convicted person's sentence when determining a victim's access to restitution. Whether a judge does or does not consider the sentence of a person convicted of crime before ordering punitive damages does little to enhance a victim's specific right, does more to remove judicial discretion for fairness, and acts punitively on the person convicted. Judicial discretion is a corner stone of our justice system. Proposals to limit it in any manner must be considered in light of the impact on the system's ability to manage individual cases with due consideration for their unique characteristics.

### *Victims Knowing offenders*

It is a tragic fact that the risk for victimization is highest in the homes and from spouses, acquaintances and relatives.<sup>35</sup> This fact has profound implications for the delivery of safe and effective services to victims of crime. It also means care must be taken not to devise victims' policies solely in response to those extreme examples of stranger to stranger violence, or extreme violence cases.<sup>36</sup>

### *Balancing Rights*

St. Leonard's Society of Canada supports the need to achieve balance between these rights without minimizing one group's rights over another. Considering the rights and conditions afforded to the accused are often a testament to the historic development of increasingly humane justice policy, subtracting rights from the accused is not an effective way to enhance the status of victims, and, does little to establish a just balance between their individual rights.

What the diversity of victims may need in terms of rights may vary widely. The construction of a federal Victims' Bill of Rights should be sufficiently broad so as not to promote unnecessary conflict within the justice process, but sufficiently detailed so as to prevent uncertainty and enable the protection of those most important rights. This is not an easy task; but, a starting point is to avoid constructing legislation in response to outlier cases. Although it is tempting to view such instances as a crack in the system requiring tighter laws, it is important to give due consideration to the potentially unintended demographics whom this legislation could impact, along with its long-term effects. This may mean greater consideration should be given to the precision of the tool itself; as one which can act nationally to enhance the overall

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<sup>35</sup> Hatch Cunningham, Alison. Victims of Crime and the Justice System in Ontario: An Issues Paper.1994.

<sup>36</sup> Cunningham, Alison Hatch. Victims of Crime and the Justice System in Ontario: An Issues Paper.1994.

status of victims' treatment, initiate standardized treatment, establish national funds for the assistance of victims, and begin a cultural change within the Canadian Justice System.

## Recommendations

St. Leonard's Society of Canada recommends that:

- Sufficient resources, training, and personnel be provided for its effective enforcement, implementation, and to ensure adequate access to justice and redress.
- A right to legal representation be provided only in specific and limited circumstances, with measures to protect against vexatious consequences. SLSC has concerns regarding whether an unqualified right to legal representation may unnecessarily increase adversarial tension within the justice process.
- The scope for the Victims' Bill of Rights should promote national standardization for victims' treatment. These rights should be sufficiently broad so as not to promote unnecessary animosity within the justice process, but sufficiently detailed so as to prevent victims from feeling excluded, uniformed, or disrespected.
- Any future legislation focus on the enhancement of procedural rights, and the sufficient sharing of information with victims about their currently established role. The CRCVC expresses the view that the biggest challenge facing victims' rights has more to do with changing attitudes than legislation, and also ensuring victims' role within the justice system is respected. St. Leonard's Society of Canada is in agreement with this view.
- Any Victims' Bill of Rights be equal and inclusive as to who may receive "victims" status. In similarity to the Manitoba Victims Bill of Rights, victims of an 'alleged offence' should include incarcerated persons who have also been victims of a crime either while in custody, or prior to any conviction.
- A balance be achieved through the manner in which these rights are prioritized within the justice system, instead of considering to what extent victims' rights should grant retributive authority over an accused. An enhancement of the status of victims cannot occur through any measure which subtracts a corresponding or conflicting right from the accused. The rights afforded to persons in custody are a testament to this country's development of increasingly humane correctional measures.
- If a victim's right is breached, and the breach is not the fault of the accused, then the remedies to the victim should not negatively impact the accused, (such as leading to a new parole hearing, delaying a trial, or more time incarcerated).
- Rights intending to enhance the status of victims also respect the concept of innocent until proven guilty. Persons held on remand or awaiting trial are not yet found guilty of a crime. Rights which entitle victims to personal information about an accused should be considered in light of this fact in order to avoid becoming overly invasive.
- The rights afforded to victims of crime not jeopardize the objective and impartial administration of justice. Empowering victims to make punitive determinations on the methods of release, or making the inclusion of their views mandatory may lead to an outcome where victims drive the system in a manner that applies unequally to convicted persons.