



# Victorian Aboriginal Legal Service Co-operative Ltd.

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## VALS Submission sent to the Victim Support Agency in response to the 'Victims' Charter Community Consultation Paper' (sent 7 December 2005)

Thank you for the opportunity comment on the Victims' Charter Community Consultation Paper. VALS has the following comments:

### **Indigenous Australian consultation**

VALS commends the Victim Support Agency on the level of consultations with Indigenous Australians. VALS would like to see the Report contain a chapter on Indigenous Australians, or an entire Report dedicated to Indigenous Australians.

### **WHAT DO YOU THINK A VICTIMS' CHARTER MIGHT ACHIEVE FOR VICTIMS OF CRIME?**

A Victims' Charter might achieve the following for victims of crime:

- Create a space for victims (ie: restorative justice, see below);
- Provide more certainty for victims (ie: provision of information, see below).

### **Strength of the Charter**

VALS is concerned about the strength of the Charter and what exactly it will give victims. VALS argues that the Charter should obviously embed rights and the draft Charter does not do this. Whilst the word 'right' is used in the Consultation Paper and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power is quoted in the Preamble to the Charter, the word 'right' is not mentioned within the Charter (note: the full title of the Declaration should be in the Charter). The language of the Charter should be couched in the framework of rights. This is disappointing considering that the mandate of the Victim Support Agency (VSA) to consult with Australians about a Victims Charter came from the Attorney General's Justice Statement (May 2004) which explicitly refers to the intention to develop a Victims Charters "that would clearly state the rights of victims of crime".<sup>1</sup>

VALS envisages that there will be much confusion about the Charter amongst victims, criminal justice agencies and service providers because it is not clear whether it is

<sup>1</sup> Victim Support Agency, Department of Justice, *Victims Charter Community Consultation Paper*, September 2005, p.4

enshrining rights or simply service standards. If the Charter is simply enshrining service standards it should be transparent about this, as service standards should not be disguised as rights. It appears that in England that because the Victims Charter (introduced in 2000) was more about service standards than rights a Code was proposed (the UK Victims Code of Practice is to be finalised by 2005).<sup>2</sup> Perhaps, Australia should learn from this example and call the document that arises out of this consultation process a Code if it does not enshrine rights.

VALS wishes to highlight a concern about the rights framework that some victims' activists adopt. Some argue that victims should have rights because offenders have rights. It is not helpful to discuss victims rights by reference to offenders rights as the rights of each are activated in different contexts. Victim's rights are in the context of support and broader community concerns etc and offender's rights are in the context of punishment etc. VALS agrees with the message in the consultation paper at page 15. A Victims Charter should "complement the existing framework of rights and obligations that apply to defendants in the justice system and not impinge on those rights".<sup>3</sup>

**• Could any aspects of the implementation mechanisms adopted in other jurisdictions be applied to Victoria? If so, which models do you think would be most relevant?**

It is essential that implementation mechanisms for the Charter exist, otherwise the point of introducing a Charter is questionable, as a Victims of Crime Act already exists. It must be mandatory that those who are subject to the Charter comply with it and that an independent body be given teeth to enforce the Charter. In the various jurisdictions there are numerous relevant versions of this:

- ACT: Victims of Crime co-ordinator (Independent statutory position that has a role of promote, receive and investigate complaints).<sup>4</sup>
- New South Wales: Victims of Crime Bureau and a Victims Advisory Board.

**SHOULD ALTERNATIVE JUSTICE MEASURES BE CONSIDERED IN A CHARTER?**

**Alternative Justice Measures Should Be Considered in a Charter**

VALS argues that the Charter should consider alternative justice measures. The Charter has the opportunity to create a place for a restorative justice, inside or outside the criminal justice system. From both a victim and offender's point of view we cannot afford to take restorative justice off the agenda.

VALS argues that Victoria can learn from the following examples of a restorative justice approach:

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<sup>2</sup> ibid 29

<sup>3</sup> ibid 15

<sup>4</sup> ibid 34

- NSW Victims Rights Act 2002 and Sentencing Act 2002 promote restorative justice.<sup>5</sup>
- United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: 7 (Access to justice and fair treatment) states: “informal mechanisms for the resolution of disputes, including mediation, arbitration and customary practice or indigenous practices, should be utilised where appropriate to facilitate conciliation and redress for victims”.<sup>6</sup>

VALS argues for a restorative justice approach to victimisation because:

*Benefits to the victim and in turn the community*

Restorative justice has the potential to benefit the victim, and in turn the community, by:

- giving an alternative option of seeking redress to victims, who would otherwise have no option as they do not want to use the criminal justice system. Arguably Indigenous Australian victims do not want to use the criminal justice system because:
  - they feel guilt towards family if they use the criminal justice system and do not want to lose family (nb: families within Indigenous culture is extended);
  - closeness of communities leading to fear of reprisals or shame;
  - fear that the victimiser will be sent to prison;
  - **What are the most important issues for victims of crime?:** There is an Australian community perception that the solutions to the problem are seen to lie in strategies that attend to the needs of all members of the community, particularly in ‘healing’ rather than punishing the offenders.<sup>7</sup>
  - Unfamiliarity with or negative experience with the police and the criminal justice system. Some examples are:
    - discrimination arising from a stereotype held by some that does not consider violence by an Indigenous Australian upon another Indigenous Australian as serious;
    - Under-policing in relation to alleged assaults due to a perception that family violence is part of Aboriginal culture

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<sup>5</sup> ibid 32

<sup>6</sup> ibid 59

<sup>7</sup> Calma Tom (Aboriginal and Torres Strait Islander Social Justice Commissioner) paper titled “Addressing the needs of Aboriginal and Torres Strait Islander peoples as the victims of crime” presented at the A Peaceful Coexistence—Victims Rights in a Human Rights Framework Conference (Canberra 16 November 2005) as at [http://www.hreoc.gov.au/speeches/social\\_justice/victims\\_of\\_crime\\_speech.html](http://www.hreoc.gov.au/speeches/social_justice/victims_of_crime_speech.html)

or a 'tribal norm' or Aboriginal women are undeserving of police protection;<sup>8</sup>

- intimidation by authority figures and white people in general and cultural alienation;
- giving victims the opportunity to have a say, as a space is created for victims to voice their opinion, such as in the Koori Court. Empowerment means listening to a victim, not just giving them information. The proposed Charter seems a bit top heavy in the area of information, as a lot of emphasis is placed on providing information to the victim (see below for a further discussion of the provision of information to victims).
- having the potential to be a healing experience which ultimately enables a victim to get on with their lives or reconcile with the offender, although it should not be an expectation that this will occur.
- having the potential to prevent victims in turn becoming offenders. Within the Indigenous Australian community there is a high rate of victims becoming offenders, such as the rate of sexual abuse among young girls involved with the criminal justice system is between 70%-80%.<sup>9</sup> Given the rate at which victims go on to be offenders themselves, if victims are satisfied by a restorative justice approach and their needs are met it is possible that they will not go on to re-offend.
- having the potential to avoid re-victimisation of the victim by the process. This contrasts with the criminal justice approach which is criticised as having a re-victimising effect. For instance, the fact that the Koori Court is more flexible than a mainstream court (ie: sit around a table rather than in a traditional Court room) reduces the potential of re-victimisation. Having said this, there are risks of re-victimisation via a restorative justice approach and this risk needs to be monitored.
- empowering the Indigenous Australian community, such as Aboriginal Elders and Respected Persons are involved in the Koori Court. The involvement of the community in turn makes the process more meaningful or relevant for the Indigenous Australians than a mainstream process.

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<sup>8</sup> ibid

<sup>9</sup> CASA, Elizabeth Hoffman House, 'From Shame to Pride: Access to Sexual Assault Services for Indigenous People' 2004, p 18

- providing justice to victims as an “end in itself and not directly linked to the prosecution of the defendant”.<sup>10</sup> This quote is from the Consultation Paper and an aspiration that can be delivered via a restorative justice model.
- being a model that, whilst not providing a panacea for all social problems facing Indigenous communities, has highly encouraging early signs.<sup>11</sup>
- Having the potential to address the concern of Calma that we need to take a broad approach to victimization and address systemic issues. Calma stressed the importance of recognition that:
  - crime victimisation feeds a vicious cycle in communities. The problems in the community are as much a result of exposure to violence and crime, as drivers of it. Crime victimization feeds into a broader pattern of trauma experienced by many Aboriginal and Torres Strait Islander people.<sup>12</sup>
  - the high levels of victimisation of Indigenous Australians by Indigenous Australians “reflect a real crisis - a breakdown of community and family structures and a deterioration of traditional, customary law and practices”.<sup>13</sup>
  - many Indigenous Australians are exposed to high levels of chronic stress on a regular basis (ie: poverty, lack of education, trauma from dispossession of land or removal of children and intergenerational effects of such trauma). To the degree these things cause chronic stress they can manifest as mental health problems<sup>11</sup> and as substance abuse, which are noted as drivers of violent crime.

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<sup>10</sup> Quote from the Magistrates Conference Melbourne July 2001 as cited in the Victim Support Agency, Department of Justice, *Victims Charter Community Consultation Paper*, September 2005, , page 15

<sup>11</sup> Calma Tom (Aboriginal and Torres Strait Islander Social Justice Commissioner) paper titled “Addressing the needs of Aboriginal and Torres Strait Islander peoples as the victims of crime” presented at the A Peaceful Coexistence—Victims Rights in a Human Rights Framework Conference (Canberra 16 November 2005) as at [http://www.hreoc.gov.au/speeches/social\\_justice/victims\\_of\\_crime\\_speech.html](http://www.hreoc.gov.au/speeches/social_justice/victims_of_crime_speech.html)

<sup>12</sup> ibid

<sup>13</sup> ibid

### *Benefits to the offender and in turn the community*

Restorative justice has the potential to benefit the offender, and in turn the community, by:

- addressing the issue of recidivism as offenders who appear before the Koori Court are less likely to re-offend than those who appear before the mainstream Court. This is in contrast to the outcome of a punitive criminal justice system which is inefficiency in having a deterrent effect. A restorative justice approach is a smart on crime approach, whereas a criminal justice approach is a tough on crime approach. Arguably, the Koori Court has achieved this outcome because it:
  - involves the Aboriginal community which makes the proceedings more relevant to the offender than mainstream Court proceedings
  - more time is given to putting supports in place to assist the offender in the future. The problems of the offender and ways of addressing them are identified. It may be that the offender is himself/herself a victim of a crime that has never been addressed and this issue needs to be addressed so that they can step out of a cycle of violence of crime.

VALS argues that consultation should occur with the Aboriginal community on whether:

- the Koori Court should hear family violence;
- the Victim of Crime Assistance Tribunal (VOCAT) should learn from the lessons of the Koori Court and include Aboriginal Elders etc. The Koori friendly VOCAT might be more equipped to deal with the following issues associated with Indigenous Australian victimization:
  - The number of Indigenous Australian applications to the VOCAT is relatively low and this is inconsistent with what we know about the incidence of family violence in the Indigenous Australian community. This suggests there are barriers in the way for Indigenous Australians to access VOCAT
  - a barrier arises for Indigenous Australians to receive compensation due to their reluctance to report their victim status to police or seek assistance, such as with a mainstream service provider.
  - a barrier arises for Indigenous Australians, who have criminal records to receive compensation. The existence of a criminal record means that people cannot claim compensation (s54 Crimes Act). This issues relates to the trend outlined above of victimization leading to offending. VALS argues that the mentality that a person can only be either a victim of a perpetrator needs to be challenged and if a victim is an offender they lose their rights. In the Indigenous Australian community the separation between 'victim' and 'offender' is not clear at all. In reality many Aboriginal people, both men and women, in the criminal justice system

are both offenders and victims.<sup>14</sup> VALS notes that the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power sections on Compensation (12-13) does not limit who compensation is available to.<sup>15</sup> The Charter should be based on the United Nations Declaration consistently, not just in the Preamble.

## Accessibility

There are hurdles that specifically affect Indigenous Australians in translating their victim's rights into practice. This raises the need for the Charter to be accessible to the Indigenous Australian community and that equality of opportunity must be related to relative needs of different population groups. It is incumbent on services to proactively ensure they are meeting the higher need for Indigenous Australian victims.<sup>16</sup> This is because Indigenous Australians are the most disadvantaged people in Australia, experience a high rate of victimisation and face barriers in accessing their rights.

Figures, which are likely to be an undercount, indicate that:

- Aboriginal and Torres Strait Islander males were hospitalised for assault at almost 7 times the rate of the general population males, and Aboriginal and Torres Strait Islander females at 30 times the rate of that of females in the general population in 2003-2004<sup>17</sup> (Australian Bureau of Statistics and the Australian Institute of Health and Welfare in their excellent biannual report *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander People*).
  - Aboriginal and Torres Strait Islander deaths from assault were, for various age groups reported at, 10 to 18 times higher than the rate in the general population for males and 6 to 16 times the rate for females over 1999 – 2003. (*Health and Welfare* report)
  - In 2003 -2004 in Victoria, orders were made at ten times the rate of those made in relation to non-Indigenous children (*Health and Welfare* report).<sup>18</sup>

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<sup>14</sup> ibid

<sup>15</sup> Victim Support Agency, Department of Justice, *Victims Charter Community Consultation Paper*, September 2005, p.59

<sup>16</sup> Calma Tom (Aboriginal and Torres Strait Islander Social Justice Commissioner) paper titled "Addressing the needs of Aboriginal and Torres Strait Islander peoples as the victims of crime" presented at the A Peaceful Coexistence—Victims Rights in a Human Rights Framework Conference (Canberra 16 November 2005) as at [http://www.hreoc.gov.au/speeches/social\\_justice/victims\\_of\\_crime\\_speech.html](http://www.hreoc.gov.au/speeches/social_justice/victims_of_crime_speech.html)

<sup>17</sup> ibid

<sup>18</sup> ibid

Barriers that Indigenous Australians face in accessing their rights and services are:

- Their experience as a victim may not be valued because violence is presumed to be part of Aboriginal culture.
- Lack of culturally appropriate victims services. VALS welcomes the introduction of Healing Centres and argues that more than four are required.
- VALS agrees with the arguments in the VACCA submission about children.

**DO THE PRINCIPLES PROPOSED IN THIS CONSULTATION PAPER REFLECT WHAT VICTIMS OF CRIME WOULD LIKE TO SEE INCLUDED IN A CHARTER?/ WHAT SUPPORT MECHANISMS ARE ALREADY IN PLACE AND WHAT NEEDS TO BE IMPROVED?**

VALS suggests the following ways to make the Charter accessible to the Indigenous Australian community. The suggestions will benefit the community at large, not just Indigenous Australians (ie: culturally inclusive approach):

- provide an Advocate that can help the victim navigate the system from the beginning to end (ie: intermediary).
- introduce the role of Aboriginal Community Liaison Officer. This suggestion was specifically applied to the Victim Support Agency at the Dandenong Consultation. VALS is aware of a trend whereby upon a Community Liaison Officer doing outreach in the Indigenous Australian community there is a parallel increase in people accessing the service.
- provide Indigenous Australians with an investigative/outreach role so that they can handle clients, rather than simply do outreach and pass the client to a non-Indigenous Australian investigator (ie: complete carriage of a matter).
- employ Indigenous Australians within the organisation (ie: VSA, victim support services, Director of Public Prosecutions, independent body that implements the Charter), and also provide training. Alternatively train up people in Indigenous Australian organisations and mainstream organisations about the service so that they can pass on the message to Indigenous Australians.
- enable the community to control services.<sup>19</sup>
- develop service standards that outline what kind of service victims should expect.

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<sup>19</sup> ibid

- provide cultural awareness training to non-Indigenous Australian employees that is ongoing, not just a once off
- consult with Indigenous Australian organisations and community groups to develop appropriate responses to victimisation, such as building modifications to premises; artwork and amending service delivery practices
- require services to record the Indigenous Australian status of clients. VALS argues that the VSA should do this and argues that failure to do this is a significant oversight as how is a service to know it is meeting the needs of Indigenous Australians if monitoring is not taking place?<sup>20</sup> The impact of the Charter on Indigenous Australians should also be specifically monitored.
- make the VSA a 24 hour service. Ensure that that VSA is not only a referral point, but provides service delivery also.
- introduce a pro-active referral protocol that places the onus on a service to follow up a victim rather than the onus being on the victim to access the service. The current framework does not go far enough and leads to statistics such as the following: in the ACT although 30,000 incidents are reported to the ACT police every year (not all these involve a victim) the Office of the Victims of Crime Co-ordinator only receives between 200 and 400 contacts each year.<sup>21</sup> All victims must be provided with written information. Perhaps there should be incorporated into a Police Code of Conduct the requirement of Victoria Police to contact the Victim Support Agency with the consent of the victim. It may be necessary to limit this to particular cases. For instance, require that the police *must* use the pro-active referral protocol in serious matters (ie: violence) and leave it to the discretion of police to use the protocol in less serious matters. In both cases, the consent of the victim should be mandatory. An automatic email could be sent from the former to the latter, as is the case with the arrangement between Victoria Police and VALS. VALS receives an automatic email when an Aboriginal and Torres Strait Islander is in custody. Lessons can be learned from the following jurisdictions:
  - United Kingdom opt/out in system. In most cases, such as burglary, assault, robbery, theft arson, harassment or damage to your home the police pass a victims details to Victim Support within two working days of the crime being reported, unless the victims asks them not to. In cases involving sexual offences, domestic violence and homicide,

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<sup>20</sup> ibid

<sup>21</sup> Victim Support Agency, Department of Justice, *Victims Charter Community Consultation Paper*, September 2005, p.27

the victim's details will only be given to Victim Support if the victim agrees.<sup>22</sup>

- It was indicated at the Dandenong Indigenous Australian consultation by a VSA staff member that there was a pro-active referral system operating in Mildura for Indigenous Australians, that has since ceased. Further information should be sought on this system.
- WHW and Werribee police established the fax-back system three years ago, aiming to improve both referral and follow up. Police ask victims of family violence to fill in a form giving their details and consent to contact by Women's Health West within 7 days. The form is faxed to Women's Health West and they may contact within 24 hours.<sup>23</sup>
- In WA there is legislation that enables police to pass on automated referral details of all victims of serious crime, subject to their consent, to the WA Victim Support Service (Victim of Crime Amendment Act 2004 WA).<sup>24</sup>
- educate the Aboriginal community about services available.<sup>25</sup>
- develop a publication that specifically targets Indigenous Australians that informs them of their entitlements under the Charter. The existence of a Indigenous Australian publication is in line with the following clauses of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power:

14: Victims should receive the necessary material, medical, Psychological and social assistance through governmental, voluntary, community based and indigenous means.

17: In providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted or because of factors such as those mentioned in paragraph 3. Paragraph 3 provides: the provisions contained herein

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<sup>22</sup> The Victims Charter, a statement of service standards for victims of crime as at <http://www.cjsonline.gov.uk/downloads/application/pdf/Victims%20Charter%20-%20English.pdf>

<sup>23</sup> Women's Health West Annual Report 2004-2005, Page 8

<sup>24</sup> Victim Support Agency, Department of Justice, *Victims Charter Community Consultation Paper*, September 2005, p.18

<sup>25</sup> Calma Tom (Aboriginal and Torres Strait Islander Social Justice Commissioner) paper titled "Addressing the needs of Aboriginal and Torres Strait Islander peoples as the victims of crime" presented at the A Peaceful Coexistence—Victims Rights in a Human Rights Framework Conference (Canberra 16 November 2005) as at [http://www.hreoc.gov.au/speeches/social\\_justice/victims\\_of\\_crime\\_speech.html](http://www.hreoc.gov.au/speeches/social_justice/victims_of_crime_speech.html)

shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion cultural beliefs or practices, birth or family status, ethnic or social origin and disability. Arguably something to the effect of Paragraph 3 should be incorporated into section 1 (Treatment of Victims of Crime) of the Charter.<sup>26</sup>

## • HOW MIGHT VICTIMS BEST RECEIVE INFORMATION?

### Information

It is positive that the Victim Charter is concerned with the dissemination of information. Victims have been disempowered by lack of information, and holding information will empower them. The need for appropriate information to the Indigenous Australian community is reinforced by the fact that lack of information leads to misinformation or rumours within the Indigenous Australian. Due to the lack of information rumours are generated that can instill fear in the victim (ie: the offender is going to get off). This is a result of the Aboriginal community being so close knit.

VALS agrees that information should be provided about the trial process and the role of the witness. VALS questions the breadth of information to be provided by victims in the form of parole hearing.

Victoria Police and other agencies that are required to provide information should be held to account for this as it important that there is confidence in the system. VALS has reservations about the ability of the system to provide information to victims because:

- Police and the Office of Public Prosecutions will face difficulties in taking on the role of providing information, especially without extra resources. VALS envisages that the situation will remain the same as it is now, where the more diligent people can be relied upon to perform best practice, whereas the less diligent people cannot be relied upon (ie: ad hoc).
- **Should police and justice agencies provide the same level of information to victims of all crimes? Or are there particular crimes for which more information should be provided, at more frequent intervals?** It may cause more problems in giving police more responsibilities as they struggle to manage their current load of responsibilities. VALS suggests that because of the limitations to the ability to provide information, perhaps there should be restrictions in the circumstances that information is provided. Perhaps for serious matters information *should* be provided, and in less serious matters the provision of information be in the discretion of the police or justice agencies.
- Poor relations between the Indigenous Australian community and Police.

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<sup>26</sup> Victim Support Agency, Department of Justice, *Victims Charter Community Consultation Paper*, September 2005, p.60

- The possibility of discrimination occurring in the provision of information. Discrimination may be direct or indirect, such as the structure of information provision disadvantaging people.
- There is the fear that discrimination will come into play. If stretched for time and agencies have to choose between informing an Indigenous Australian victim and non-Indigenous Australian victim, it is possible that they will choose to inform the latter over the former. This is especially the case if the victim and offender are both Indigenous Australian. This is another argument for setting the level of service delivery at a modest level, rather than attempting to cover the field.
- Disempowered people are not good at nagging. They have been bitten by the system before and are once bitten twice shy. Empowered people are capable of nagging and the police may know this and be more attentive to their needs.
- Indigenous Australians are victims of police. They are further victimised if they complain about police treatment as they are harassed by police. It may be that a victim of police (ie: assault) is denied information. It is essential that there is an independent watch dog for police to hold them accountable.

VALS suggests that the following factors need to be considered in the provision of information:

- Targeted information strategy to Indigenous Australians. This may take the form of:
  - Send information by registered post. This way there will be a guarantee that the information provider will know if the intended recipient received the information. Indigenous Australians commonly move house.
  - Ensure that someone reads the information to the recipient when they are unable to read.

Information about the Charter should be given to victims at least by:

- Police
- Court
- Lawyers
- Office of Public Prosecutions.

## CONCLUSION

A Victims Charter should obviously embed rights. It must be mandatory that those who are subject to the Charter comply with it and that an independent body be given teeth to enforce the Charter. The Charter should consider alternative justice measures. The Charter has the opportunity to create a place for a restorative justice. VALS supports restorative justice principles in the context of Indigenous Australian perception that solutions to problems lie in strategies that attend to the needs of all members of the community, particularly in ‘healing’ rather than punishing the offenders.

There are specific hurdles to Indigenous Australian victims accessing their rights and the Charter and the way that it is implemented should endeavour to assist Indigenous Australians. Indigenous Australians are the first people to approach in relation to how to go about this. This paper has mentioned some strategies that Indigenous Australians have identified in making sure the response to Indigenous Australian victims is culturally appropriate and accessible.

Thank you for the opportunity comment on the Community Consultation Paper for a Proposed Victim's Charter in Victoria. If you have any queries please contact Greta Jubb (Research Officer).

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