VICTIMS IN THE COURT PROCESS

A Paper

by

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Victims of Crime

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I

In the 2008 Autumn Edition of the Victorian Bar News, the Editors, under the heading "Rights of Victims" in relation to sentencing issues, stated:

> All of this agitation is concerned with, or stems from, a concern with the rights of victims. All members of the community have rights. Victims are members of the community and as such they do have rights. But those rights are not relevant to the sentencing process. In the sentencing process it is the rights of the person being sentenced – having proper regard to the protection of the community, that are in issue.
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> Victims understandably want retribution and in few cases will they see the retribution imposed by the State as being adequate. However, the rights of victims do not include a right to retribution. When we come to sentencing we are dealing not with the rights of the victim, but with the rights of the person being sentenced. We are concerned with a decision which will deprive him or her of many of his or her rights.

Whilst as a judge I did not from the bench respond to statements in the public arena, on this occasion I did. My response was widely reported. In the Melbourne "Age" of 6 June 2008, under the banner headline "Judge hits out at barristers on victims' rights" the lead article stated that the article "attracted the ire of Justice Philip Cummins, who yesterday called the editorial 'misguided.'" The Melbourne "Herald-Sun" set out the following:

The rights of victims listed by Justice Cummins were:

> The right to a full and prompt investigation.
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> The right to be treated with respect and sensitivity during investigations.
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> The right to be informed and consulted by the prosecution.
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> The right to minimum delays in the court system.
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> The right to be treated by the court with respect, consideration and understanding.
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> The right to be heard at sentencing by way of victim impact statements.
>
> Respect for victims in the sentencing process.
>
> The impact on victims and their families to be taken centrally into account during the sentencing process.

II

At the ceremonial sitting to mark my judicial retirement, held in the Banco Court of the Supreme Court of Victoria on 24 February 2010, I said this:

> The courts, and the law, have a proud tradition of securing the lawful rights of accused persons. I wholly support that principled tradition. We should never descend into the mire of the unprincipled seeking of the ends by any means. Thus we should secure, and unequivocally secure, the principles of the onus of proof, the right of silence (both in investigation and in curial proceedings), proper process, and judicial discretion. But there is no inconsistency, and no

necessary alternative, between the securing of the rights of accused persons and the securing of the rights of victims. What of victims' rights?

I have no doubt that every judge respects, and has concern for, victims. But in my view the curial system does not sufficiently translate that respect and concern. I consider the courts have not sufficiently secured the rights of victims in doctrine, procedure and sentence. Doctrinally, it was not the common law or the courts that rid us of the blight of provocation, behind which much domestic and other violence escaped true consequence; it was public commentators, and the media, and Parliament that did so. Procedurally, it was not the common law or the courts that sufficiently acted to preclude the re-traumatisation of victims by court process – it was Parliament by procedural reform that did so. Witnesses should be relevantly tested – cross-examination is the proper means of doing so in the adversarial system – but should not be treated as objects of warfare. The litany of procedural amendments in sexual offence proceedings correctly introduced by Parliament is testament to how far short of this ideal at times courts have fallen. On sentence, there has been a like imbalance. We know that the best way to solve crime is to solve the causes of crime. We know that mere punishment is never enough. Sentencing centrally should involve reformation, especially with young persons. Daily we see young persons who through immaturity make one mistake and blight their lives. They should be addressed with the beneficent, not the punitive, elements of sentencing. But with sexual offences, violence, and especially domestic violence, I think courts have fallen short on sentence. Courts need to give significantly more attribution to personal

responsibility, and to the consequences of that responsibility. I think that sentences imposed should better reflect Parliamentary provision and community values. In the words of my much loved law teacher Professor Norval Morris:

> "…the community's sense of a just punishment will create the polarities of leniency and severity between which the law may work out its other purposes."

The even hand of justice requires that victims properly be acknowledged and properly be respected.

III

Following my judicial retirement, the Victorian Attorney-General, the Honourable Robert Clark, graciously invited me to chair a new committee that he was forming. I was pleased to accept. It is the Victims of Crime Consultative Committee. It is comprised of 11 judicial officers and senior stakeholders and 9 victims of crime representatives. Judicial officers are from all judicial levels including the Court of Appeal, the County Court of Victoria, the State Coroner, the Magistrates' Court of Victoria and the Victims of Crime Assistance Tribunal. Stakeholders include Victoria Police, the Solicitor for Public Prosecutions, the Office of Public Prosecutions Victims Strategy Service, the Adult Parole Board, Child and Family Services, and the Department of Justice Victims Support Agency. Its membership enables a unique sharing of knowledge and of insights. Its terms of reference are:

a) to provide a forum for victims of crime and relevant justice and victim services agencies to discuss victims' policies, practices and service delivery improvements.
b) To advise the Attorney-General on policies, practices and reforms relating to victims' issues and support services.
c) To promote the interests of victims in the administration of justice.
d) To promote the principles of the Victims' Charter Act 2006.
e) To report on any matters referred to it by the Attorney-General.

The Committee is an independent entity with an active and constructive link with the Attorney. Its splendid Secretary is Clare Morton, our chair today, and excellent services are provided to it by Suzanne Whiting of the Department of Justice.

The Committee was constituted in February 2013. It has met four times in plenary session. Between full Committee meetings three working groups, which report to the Committee, addressed allocated tasks. The working groups were on the interface of the courts and victims; the interface of support services and victims; and the interface of the community and victims. The important initial function of the full Committee was to listen and learn from each other's experiences, knowledge and insights. This was a significant and respectful process. We did all listen, and we did all learn. This function of the Committee was an indispensible and life-giving initial phase of the Committee. But it would not have been enough, important though it is, to listen and learn. The Attorney, rightly, was looking to outcomes as well as process. I sought to encourage the Committee, and the working groups under it, to formulate proposals that were practical, affordable and achievable – and all victim-affirming. It would not

be productive to put forward a lengthy list, a wish-list, of unaffordable proposals. We needed to be targeted and focused.

The Committee's fourth, and final, meeting for 2013 was held this week. The Attorney graciously attended. The Committee resolved to put forward to the Attorney six proposals. The proposals comprehended the areas of strengthening victim-centric service delivery; strengthening volunteers and support services; developing community education; improving information and support for victims and witnesses in the higher courts; developing a service model for witness support service in the Melbourne Magistrates' Court; and encouraging development of court protocols which acknowledge victims and their families and promote their recognition and inclusion in court decisions.

These proposals now go to the Attorney. I propose that in 2014, working groups of the Committee will be formed to develop and advance the six identified areas of progress in support of victims. I look forward to the continuing work of the Committee.

I commend the members of the Committee for their work, and in particular the representatives of victims of crime, the Office of Public Prosecutions, and Victoria Police. The Committee is a most significant development in the advancing and securing of the rights of victims in the criminal justice system in Victoria. It is also unique.

I warmly commend the Attorney for his initiative in forming, and supporting, the Victorian Victims of Crime Consultative Committee.

IV

I much look forward to today's Forum and to the benefit of sharing our knowledge, experience and insights. To that worthwhile end, I place before you four propositions for your consideration.

First, we can and should learn from other legal systems. Do not be parochial or limited. But be careful not to select a process or apparent solution from another legal system without regard to its context. Do not cherry-pick. Look to the nature of the inquisitorial system if the process or apparent solution is embedded in it; in particular, look to the actual procedural process – in Italy, a victim who joins the prosecution process becomes a *partie civile*; in Germany, a victim as auxiliary prosecutor is linked to civil process; and look to the culture of the system, before you propose that an element or process from a foreign jurisdiction be transposed to an Australian jurisdiction.

Second, be astute to, and resist, the inappropriate claiming of victim status by offenders. This is a growing trend. I do not here speak of women who have been victims and then respond; they truly are victims. I speak of perpetrators who later opportunistically claim to be victims. "There are victims everywhere" their lawyers claim. This false claim devalues victims, and should be resisted.

Third, beware the purveyors of a sympathetic option for victims of not having a formal and full court process. “Ease the burden on victims” these people say. “Acknowledgement and regret is enough” they say. It is not. It is a cruel illusion to say such an option will serve victims. It never will. It tends to fail to deter the offender from offending again; it fails to deter other possible offenders; and particularly in sexual offences, it fails the important public function of condemning and denouncing the criminal conduct. That function is pivotal to setting, affirming and maintaining community standards of acceptable, and unacceptable, conduct in the community.

Fourth, avoid developing a system of victim participation whereby the victim is blamed for the court process. Do not let the victim become the problem. This is a powerful general principle and one we need to maintain. A victim who seeks justice is not being unreasonable, inconvenient or vengeful; she or he is rightly seeking justice, and the community rightly is seeking justice. Justice is achieved by integrating the victim into the court process and preventing the victim being isolated and then blamed for the process; and by maintaining those other, important, elements of the criminal justice that are public, objective, and community based, including specific deterrence, general deterrence and condemnation and denunciation. I do not here speak of minor offences; I do speak of serious offences, and of sexual offences and violence in particular.

I commend the Department of Justice and the Attorney-General for their part in securing today’s Forum, and I warmly wish you well.
