

Victims of Crime in the Criminal Trial Process

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1. Background

[1.1] I am a Professor of Criminal Justice based at Nottingham Trent University, Nottingham, United Kingdom. I have been researching the needs and rights of victims and vulnerable witnesses in the criminal justice system for the past 17 years. I am author of the *Victims Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (2008, Hart Publishing) as well as numerous journal articles which were cited in the Commission's Consultation Paper as well as the background Information Papers. I have a longstanding relationship with the Victim Support Agency of Victoria, having delivered a number of seminars for them in May 2011 and having been invited to provide a keynote address at the forthcoming Victims of Crime Conference in Melbourne in 2016.

[1.2] I have a particular interest in international benchmarks of best practice governing the protection of victims and witnesses in criminal proceedings. I have recently been involved in researching the evolving case law concerning the position of crime victims under the European Convention of Human Rights, the Inter-American Court of Human Rights and the European Union's Victim Directive. Whilst Australian jurisdictions are not bound by such standards, they collectively indicate a growing international consensus surrounding the rights of the victim within the criminal process. Much of my comments below relate to this emerging consensus, and I hope that they provide some useful ideas for the Commission in considering how Victoria might amend its law, policy and procedure to promote and safeguard the rights of victims within the criminal process.

2. The Decision to Prosecute

[2.1] The decision whether or not to prosecute is rightly vested in an independent agency of the state and victims should not be entitled to exercise any form of veto over this process, either through compelling a decision to prosecute or to drop or alter charges. This independence is vital to the legitimacy of the Office of the DPP since it ensures that the public interest is not subverted by individual concerns and that fundamental prerequisites such as evidential sufficiency, objectivity, certainty and due process safeguards are adhered to.

[2.2] Nevertheless, victims have a legitimate and direct interest in the outcome of their cases, and there is evidence across many jurisdictions that they have historically felt alienated from the decision-making process. Specifically, studies have indicated that they feel let down or disenfranchised where prosecution agencies do not communicate effectively with them, particularly in respect of the reasons for any decision not to prosecute or (at a later stage in proceedings) to drop or alter charges. Victims have a legitimate expectation that offenders will ordinarily be prosecuted, tried and (if deemed guilty) punished for the crime that they have committed, and not for a lesser offence on the basis that the prosecutor's job might be made easier, or the courts made more efficient or cost-effective.

[2.3] There is growing recognition on the international platform that victims can and should be able to participate within criminal justice decision-making without jeopardising core principles of fairness, consistency and objectivity. The views and interests of the victim should be taken into account, as required by Guideline 13(b) of the UN Guidelines on the Role of Prosecutors, and paragraph [4.3] of

the International Association of Prosecutors' Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors.

[2.4] Article 11 of the European Union's Directive 2012/29/EU (hereinafter 'EU Victims' Directive') provides that victims have a right to request a review of any prosecutorial decision. In England and Wales, the Court of Appeal decision in *R v Killick* (2011) prompted a review of Crown Prosecution policy on the matter, which was subsequently altered to give effect to the terms of the Directive in 2013. Victims may now ask the CPS to look again at a case following a decision not to charge, to discontinue proceedings or offer no evidence. Those entitled to an 'enhanced service' under the Victims' Code (ie, victims of the most serious crimes, or those who may be vulnerable or at risk of intimidation) will also be offered a discussion with a prosecutor about the outcome of the review.

[2.5] Currently there is no obligation on prosecutors in Victoria to communicate reasons for any decision; my understanding is that the power to do so is entirely discretionary. **It is recommended** that measures are put in place to ensure that prosecutors take steps to communicate not only the decisions that are made, but also the reasons underlying those decisions. Consideration should also be given for decisions to be explained in person by prosecutors to victims of the most serious offences. **It is further recommended** that victims are conferred with a right to review decisions not to prosecute and should be able to access legal advice in order to enable them to consider this option. This right should not be confined to an internal review; where the victim is dissatisfied with the outcome of such a review he or she should have the right to seek a judicial review.

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[2.6] Victims in Victoria currently have no legal right to be consulted in any subsequent decision to drop or alter charges as the result of a plea agreement. In line with international standards, **it is recommended** that prosecutors are placed under a statutory obligation to consult with the victim prior to the dropping or altering of charges and to take account of his or her views as part of the overarching public interest in arriving at a decision. As is the case in New South Wales and under federal law in the USA, the victim's views should be recorded, communicated to the prosecutor and taken into account prior to engaging in any plea negotiation process.

[2.7] The Office of Public Prosecutions in Victoria is a completely independent agency which is not currently subject to any form of external, independent oversight. Victims have access to a complaints procedure, but not to request an internal review. In order to ensure that the Office fulfils its obligations to victims, **it is recommended** that some form of independent oversight mechanism is put in place. In England and Wales, such a function is exercised by the Crown Prosecution Inspectorate, and it may be that a similar mechanism might work effectively in Victoria.

3. Committal Proceedings

[3.1] There is extensive evidence indicating that victims often experience significant levels of secondary victimisation in their capacities as witnesses during adversarial court proceedings. Studies have reported victims feeling harassed, intimidated, badgered and constrained when giving evidence, particularly under cross-examination. These findings ought to be taken into account not only in considering their role at trial (see [4] below), but also in the role they may play during committal proceedings.

[3.2] The key problem with oral evidence at the committal stage is that victims of serious crime may have to undergo the stress of cross-examination not once, but twice, at both the committal and trial stages. In England and Wales, oral evidence has been excluded from committals since the enactment

of the Criminal Procedure and Investigations Act 1996, with the court relying on written evidence instead. Committals have been abolished altogether in Western Australia and New Zealand. **It is therefore recommended that** the right to call oral evidence of victims in committal proceedings should be abolished altogether. Not only would this spare witnesses the stress and inconvenience of unnecessary attendance at court, but it would also result in a more simple and cost-effective process. It is **further recommended that** this be replaced by the earlier transfer of serious indictable offences to superior courts, with the examination of vulnerable witnesses taking place in advance of the trial and before a trial judge with additional protective measures in place. For example, such evidence might be video recorded and substituted for live evidence at trial (see [5.3] below).

[3.3] The current law in Victoria allows the defence to undertake cross-examination of victims at committal proceedings, subject to certain conditions, with exceptions in place for victims of sexual assaults who are child victims or cognitively impaired victims. I am not convinced that there is a rational basis for drawing such a distinction based on these closed and fairly limited categories. If the Commission is of the view that cross-examination should be retained at committal proceedings, then **it is recommended that** any such cross-examination ought only to be permitted in the most exceptional of circumstances. As a minimum, the blanket prohibition should be extended to include all victims in sexual offence cases given the high attrition rate in these cases.

[3.4] If the Commission is of the view that cross-examination should be retained at committal proceedings, then **it is recommended that** the prosecutor should be obliged to consult with the victim as part of this process and that the court should be obliged to take into account any views expressed by the victim in determining an application to call oral evidence. **It is further recommended that** victims be granted standing and the right to submit evidence to counter any request by the defence to cross-examine them, or to make representations on issues of law or procedure.

4. Pre-trial matters

[4.1] Sexual history evidence is a vexed issue, and courts across the common law world do not have a good track record in exercising their powers to exclude it. As noted in the consultation paper, it has been frequently used to reinforce myths and stereotypes about the circumstances surrounding sexual offences and also serves to retraumatise victims undergoing cross-examination.

[4.2] Sexual history evidence is often of little or no relevance to the charges before the court, particularly where the behaviour in question involves the victim's history with third parties other than the accused. Yet such evidence undoubtedly adversely impacts upon the credibility of victims and thus partly explains the extremely low conviction rate. From a rational standpoint, it is difficult to justify the reception of such evidence given that consent to sexual activity is given to a particular act, with a particular person, at a particular point in time. As such, I am of the view that the 'interests of justice' test, as currently applied in Victoria, is too broad and does not adequately protect the victim's right to privacy.

[4.3] **It is recommended that** the test be reformulated by putting in place a presumption that such evidence will not ordinarily be of relevance to the case at hand. Section 41 of the Youth Justice and Criminal Evidence Act 1999 (England and Wales) provides an example of how this might be achieved, with four relatively narrow exceptions in place. Although the English legislation does not distinguish between previous sexual acts with the accused and those with third parties, the vast majority of commentators are agreed that previous sexual history with third parties should never be considered

relevant to the issue of consent in the case before the court. For that reason, **it is further recommended that** a blanket rule be introduced excluding any evidence of previous sexual history with third parties other than the accused, in all circumstances.

[4.4] It seems inherently unfair that victims are not currently entitled to receive notice of an application to the court to admit such evidence. It is unacceptable that victims are not forewarned about the possibility that they may be asked invasive and intimate questions relating to previous sexual behaviour. **It is recommended that** such an entitlement be introduced in legislation.

[4.5] Victims in Victoria have a right to seek leave to appear in pre-trial applications relating to confidential communications only. This right is very limited in its current form, and sits uneasily with the international trend towards participatory rights in relation to a broader range of interests (see eg, practice at the ICC where victims may make representations where their interests are affected). **It is recommended that**, following the approach of the ICC, this right be extended to a right to appear on all matters where their personal interests are affected with the assistance of legal counsel (this is not a role that ought to be carried out by the prosecution). Such interests should be distinguished from more general public or collective interests and might, for example, include (a) any application relating to disclosure of the victim's confidential records or communications; (b) any application relating to the admissibility of the victim's sexual history evidence; (c) any application relating to protective measures which might be made available to the victim at trial; (d) any application to sever the indictment (ie, hold separate trials) for persons jointly accused; and (e) any applications relating to the use of tendency and coincidence evidence (particularly evidence concerning the context and history of the relationship between the victim and the accused). **It is further recommended that** victims should also be granted standing to appeal any pre-trial decision which affects such interests, particularly regarding any decision on an application to adduce previous sexual history evidence or disclose confidential records.

[4.6] It is encouraging to note that the Consultation Paper discusses the potential use of restorative justice options at the pre-trial stage. The opportunity to engage in restorative justice is fast becoming a benchmark of international good practice. The UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, adopted in August 2002 provide that restorative justice programmes should be generally accessible at all stages of the penal procedure; and the Eleventh UN Congress on the Prevention of Crime and the Treatment of Offenders (2005) encouraged Member States to acknowledge the importance of implementing restorative justice policies, procedures and programmes that include alternatives to prosecution. The 2001 EU Framework Decision on the Standing of Victims in Criminal Proceedings calling on Member States to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure, and an obligation to put in place safeguards for victims using restorative justice processes is contained in Article 12 of the EU Victims' Directive.

[4.7] As the Consultation Paper notes, the use of restorative justice at any point in the criminal process raises significant issues concerning the normative boundaries of the criminal justice system, and it is not a risk free option. A myriad of issues arise in relation to both the protection of the victim and the accused. However, the extent of the challenge should not act as a barrier to innovative and far-reaching reforms; international benchmarks of best practice (which are underpinned by a panoply of underlying evaluator research) offer various mechanisms to reduce the inherent risks of restorative justice and provide safeguards to both victims and the accused. Research has consistently shown that restorative justice outperforms conventional court-based processes in terms of participant satisfaction. Providing it is properly resourced and effectively managed, restorative procedures hold tremendous potential to confer victims with a voice and a form of redress within the criminal justice system.

[4.8] **It is recommended that** restorative justice options are properly explored in relation to their potential application at the pre-trial stage of procedure. This would carry the benefit of giving victims a voice at a juncture of the criminal process where they have not readily been heard in the past. One possible option may be to empower the court to refer certain offences to restorative conferencing providing that both parties consent to the process and, crucially that the offender accepts responsibility for his or her actions. This could be done on a ‘without prejudice’ basis, meaning that nothing said as part of the process could be used as evidence in any subsequent trial. Where an agreement is reached, this could be returned to the court for consideration as to whether it was capable of disposing of the case without jeopardising the rights of either party or the public interest in punishing criminal behaviour (see further [6.8] below). Such a scheme need not necessarily be confined to offences at the ‘shallow end’ of criminal justice; research illustrates that restorative justice also holds significant potential to deal with serious offences, including grievous bodily harm and sexual assaults. **It is further recommended that** Victoria adopt the approach enshrined in the Victims’ Rights Act 2002 (New Zealand) which gives all victims the right, in principle, to request a restorative justice conference at any time during the criminal proceedings.

5. The Trial

[5.1] Although many jurisdictions have introduced reforms to ameliorate the experiences of victims in the adversarial trial, research continues to suggest that many continue to experience secondary victimisation throughout the process. In particular, victims are often distressed by aggressive cross-examination and feel structurally isolated from the dichotomous nature of trial proceedings.

[5.2] Whilst a range of protective measures are in place for vulnerable witnesses in Victoria under the Criminal Procedure Act 2009 (Vic), the system is not as robust as it might be in terms of both the range of measures available and the types of witness who might benefit from them. **It is recommended that** the eligibility of a witness for protective measures should depend upon the characteristics of an individual witness, rather than hinging on whether or not the witness falls within a list of closed categories.

[5.3] The risk with this approach, however, is that courts will not exercise their power to put protective measures in place unless they are obligated to do so under legislation. In line with the English approach, **it is recommended that** a mandatory presumption be introduced that all child witnesses and all witnesses suffering from a cognitive impairment (irrespective of the offence) should give their evidence-in-chief through a pre-recorded interview and that cross-examination should be pre-recorded in advance of the trial. This has been the case in England and Wales under the Youth Justice and Criminal Evidence Act 1999, though pre-recorded cross-examination has only recently been piloted under the Act. Such a provision should not apply where the victim communicates a desire to the court that he/she wishes to give live evidence.

[5.4] It is recommended that a mandatory presumption be applied in all sexual offence cases and cases involving domestic violence that such witnesses should give all their evidence from a separate room linked to the court through a televised link. Courts should also have a discretionary power to order that pre-recorded interviews and pre-recorded cross-examinations replace live evidence where the distress caused to the victim would likely outweigh an unfairness to the accused.

[5.5] While many of the empirical studies have focused on the experiences of child victims and victims of sexual offences, research has established that secondary victimisation at the trial is not limited to these groups. Other victims – particularly (though not exclusively) those at risk of

intimidation / reprisals (including victims of domestic violence), the elderly, and those suffering from emotional and mental health issues are also acutely at risk from experiencing trauma as a result of the adversarial process. The South Australian approach is to be commended, here protective measures may be ordered in cases involving victims of 'serious offences against the person', witnesses who experience a 'special disadvantage' because of personal circumstances or the circumstances of the case, and witnesses who have been threatened, subject to, or who have reasonable grounds to fear retaliation or retribution. In England and Wales, witnesses suffering from 'fear or distress' may be entitled to special measures where the court is of the view that it would improve the quality of their evidence. As such, **it is recommended that** a much broader range of witnesses be eligible for protective measures. A more general power should be conferred on courts to consider a range of protective measures that might assist such witnesses, such as the use of screens, the removal of wigs and gowns, giving evidence in private and giving evidence remotely via a televised link. There is no reason to believe that any of these options would negatively impact upon the quality of evidence nor interfere with the fair trial rights of the accused. **It is further recommended** that a statutory procedure be introduced to enable the court to take into account the views of all victims on the potential use of any protective measure.

[5.6] In exceptional cases, the court may determine that it is in the interests of justice for the victim to be called to court for further live cross-examination, notwithstanding that he or she has already been subject to pre-recorded cross-examination. **It is recommended that** under no circumstances should this exception be applied in the case of a child witnesses or a victim with a cognitive impairment. A blanket rule should be introduced to ensure that such victims should never be obliged to give live evidence in court against their will. It is further recommended that, in the event of a retrial, all victims are entitled to apply to the court to provide all their testimony in pre-recorded form.

[5.7] Following the lead of England and Wales, Western Australia and New South Wales, **it is recommended** that an intermediary scheme be introduced to be used in conjunction with pre-recorded evidence where the court considers that it would improve the quality of the witness's evidence. The role of the intermediary would be to help facilitate the witness's understanding of the questions posed and the court's ability to understand the answers given. The intermediary should be able to change the wording of certain questions, providing the central meaning of the question remains the same. This provision should be made available in cases involving child witnesses or witnesses with cognitive or physical disabilities that might impair their ability to understand the questions put to them or give coherent answers to the court.

[5.8] The structure of adversarial proceedings means that victims are generally unable to 'tell their story' to the court in their own words, at their own pace. Traditionally, their role has been that of evidentiary cannon fodder, with their evidence restricted according to the parameters of the questions asked of them. This situation is clearly unsatisfactory. It is to be welcomed that – as with most Australian jurisdictions – judges are empowered to allow a victim to give their evidence wholly or partly in narrative form. **It is recommended that** section 29(2) of the Evidence Act 2008 (Vic) be amended so that an evidentiary presumption applies that all such victims are provided with this opportunity, unless the victim does not wish to give evidence in this way or either party to the case can show that it would be contrary to the interests of justice to permit it.

[5.9] Research has shown that, even where protective measures are in place, their use can be impeded by cultural resistance among lawyers and judiciary. This is particularly true in regulating the nature of questions put to the witness. This stems from the fact that they are often perceived as interfering with the principle of orality, insofar as lawyers (in particular cross-examiners) ought to be able to rely on a myriad of techniques and forms of questions in order to undermine the witness.

Although it is encouraging that Victoria has already put legislation in place to address these concerns, these protections could be improved. **It is recommended that** no child witness, nor any witness suffering from a cognitive impairment, be asked any questions of a leading nature under cross-examination.

[5.10] In trials involving multiple defendants, **it is further recommended that** the court permit cross-examination by one counsel only on areas of common ground, who would act on behalf of the defendants. Where the interests of the defence diverge significantly, this role might be undertaken by an independent counsel appointed by the court. This would help to ease the experience of victims undergoing cross-examination by limiting the time they would spend giving evidence and would spare them the ordeal of having to answer similar questions of a repetitious nature from different counsel. The English Court of Appeal has recently approved of trial judges adopting such steps and has stressed the duty of the trial judge to protect witnesses from unnecessary and oppressive questioning: see *R v Jonas* [2015] EWCA Crim 562 and *R v Lumbebo & Pooley* [2014] EWCA Crim 2064.

[5.11] I have spent much of my academic writing directing criticism at the adversarial trial. In my view, not only does it result in trauma and distress for victims, but it is also a poor mechanism for uncovering the truth of past events. In all other walks of life, truth is accessed through inquiry, rather than ‘gladiatorial combat’ between opposing parties. That said, I recognise that it is beyond the purview of the Committee to recommend a wholesale move to an inquisitorial form of justice. However, I would strongly contend that adversarial jurisdictions have much to learn from various practices and procedures of inquisitorial systems, and there is no practical reason why certain features of these systems might not work if appended to an existing adversarial process.

[5.12] The International Criminal Court provides a useful example. Although its trial procedure gravitates around an adversarial model, the integration of various features of continental systems have ensured that – on paper at least – the victim has a more prominent role in proceedings. Article 68(3) ICC provides that the Court has a wide-ranging discretion to permit the views of victims and their concerns to be presented and considered at whatever stages in the proceedings it thinks fit, where the personal interests of victims are affected. This provision is conditional in several aspects. For example, the decision as to what constitutes ‘the personal interests of the victims’ is left to the Court’s discretion, as is the decision whether to admit the victims’ views and concerns at all. Article 68(3) simply mandates the Court to ‘*permit their views to be presented and considered at stages of the proceedings determined to be appropriate by the Court*’ and then goes on to qualify that possibility further by adding that any such presentation and admission must be ‘in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

[5.13] **It is recommended that** Victoria adopt a slightly modified version of Article 68(3). The modifications ought to be that (a) guidance is provided as to what constitutes the ‘personal interests’ of victims and that (b) it is mandatory to take such views into account in relation to issues pertaining to the questioning of the victim. It will not always be in the opposing side’s interest to object to a certain line of questioning. For example, an over-zealous cross-examination by defence counsel may – in the prosecutor’s calculation – work to his or her advantage if the victim is seen as particularly vulnerable or weak in the eyes of the jury. For that reason, **it is recommended that** vulnerable victims (those highlighted at [5.5] above) are entitled to legal representation during questioning in order to ensure that the victim’s interests and rights are adequately protected.

[5.14] A move to an auxiliary prosecution role for victims would raise serious issues in relation to equality of arms; significant procedural questions would need to be addressed as to whether, for

example, victims exercising such a role would be able to call witnesses, and to what extent the defence would be able to challenge such evidence or cross-examine witnesses. Likewise, it is difficult to see how the question of reparation might be addressed before the question of the accused's guilt is resolved against the backdrop of an adversarial trial process. For this reason, **it is recommended that** serious consideration instead be afforded to an amended version of the *partie civile* type procedure, but that this should be confined to the sentencing stage of proceedings (see [6.7]-[6.9] below).

6. Sentencing, Compensation and Restitution

[6.1] I combine my comments on the victim's role in sentencing with my views on compensation and restitution in this section of my submission. This is because the questions of punishment of the offender and redress to the victim are inextricably linked. The question of redress will inevitably impose some form of burden on the offender; in that sense reparative obligations should be viewed as part of the punishment meted out by the criminal justice system, alongside orthodox penalties such as fines, community punishments and prison sentences.

[6.2] The legal taxonomies of most common law systems have traditionally conceptualised loss or damage sustained through the actions of third parties as private wrongs, actionable through the civil courts. The criminal law, which began to break away from the law of tort following the Assize of Clarendon of 1166, has since been concerned with those offences considered sufficiently injurious to the interests of the state, and has thus been conceptually orientated towards the punishment of offenders as opposed to any reparatory interests of the victim. This distinction was clearly arbitrary from the outset; the decision as to which forms of harm to delineate as crimes rested with those who wielded power, in earlier times this was the monarch, whilst in later times it has rested with Parliament. It follows that the reparatory interests of victims ought to be considered alongside the traditional rationales for sentencing within the criminal justice system and to this end **it is recommended that** the Sentencing Act 1991 (Vic) be amended to include the restoration of victims as one of the statutory aims of sentencing.

[6.3] The international ascendancy of the victim movement during the late 1970s and early 1980s was instrumental in bringing about a realisation that crime is not only a legalistic offence against the state, but also carries far-reaching social ramifications for victims and communities. Such an understanding is now reflected in a range of international instruments. Obligations on the state to put in place mechanisms that allow compensation or restitution to be payable by perpetrators directly to victims were contained in the (non-binding) 1985 UN Victims' Declaration, and the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Council of Europe Recommendations 85(11) and 06(08) and the European Union's 2012 Victims' Directive. A growing interest in the idea of reparation generally has gone hand-in-hand with the exponential expansion of restorative justice programmes, which together have elevated the concept of a right to redress to a pivotal position in contemporary law and policy debates.

[6.4] The challenge that besets domestic jurisdictions is to calibrate their sentencing procedures in order to give effect to such rights; the interests of victims must be factored into sentencing decisions. This means that sentencing judges must be afforded with some degree of normative flexibility to pursue more restorative outcomes for victims. Such an approach will also make it easier for courts to reach beyond the immediate families of victims to take account of 'interests' within the wider community when sentencing for serious crimes.

[6.6] The most obvious means of achieving this would be through the widespread provision of mediation and restorative justice programmes at various stages of the criminal process. **It is recommended** that Victoria take steps to mainstream the use of restorative justice for all offences. Rather than reparative measures being imposed by the court through sentencing, victims and offenders themselves – should they so desire - take ownership of the task of making amends. The court would then be empowered to defer passing sentence pending the outcome of such a process, which should be overseen by either a state agency or an approved third party provider (as provided for in New Zealand and England and Wales). Where agreement was reached, this should return to the court for ratification as the sentence in the case, ensuring that it respected the rights of all parties and complied with maximum and minimum proportionality standards. This might be taken into account as part of a reparation order, which I propose below at [6.14]-[6.18]. Failure to reach agreement or to comply with the terms of the agreement would result in the offender being returned to court for a more conventional sentencing process.

[6.7] Integrating restorative justice as a central, effective component of the criminal justice system presents a number of challenges. Fears have been expressed in the literature – and sometimes borne out in empirical research – that restorative justice may actually serve to exacerbate the victim’s experience within the criminal justice system where it is not carefully planned and properly resourced. **It is recommended that** any referral scheme would need to be reinforced with appropriate safeguards, which should include a rigorous multi-disciplinary pre-conference assessment of the suitability of victims and offenders for the programme, as well as a comprehensive risk assessment. Likewise, steps would need to be taken to ensure that the outcomes of conference agreements would be proportionate to the harm caused by the offence.

[6.8] Proportionality could be safeguarded through adopting Cavadino and Dignan’s ‘integrated restorative justice model’, whereby reparation is carried out within the criminal justice system according to proportionality principles.¹ The model gravitates around the idea of ‘public tariff’, which would effectively seek to transpose traditional penal sanctions to a form of redress. In simple terms, this might include rendering the amount payable by way of a fine payable to the victim through a compensation order, or community service geared towards helping specific victims. **It is recommended that** the nature and extent of reparation should be a decision for the court which, through clear guidelines, would seek to pass a sentence which reflected both the private interests of the victim alongside the public interests spelt out above. Private, informal agreements could be taken into account by the sentencer, who would also ensure that ‘retributive maximum’ and ‘retributive minimum’ standards were applied in order to strike a balance between the private interests and those of the wider community, including potential victims. In cases where such informal agreements proved impossible, the principle of proportionality should then provide a ‘default setting’ for determination of the final outcome.

[6.9] Such a restorative intervention, however, can only work where the offender accepts responsibility for the harm and both parties agree to the process. Where this is not the case, the matter must be dealt with by the court. In these circumstances, it is right and proper that victims are empowered to provide a statement to the court on the physical, emotional and financial impact of the offence. This will not only assist the court in measuring the seriousness of the offence, but will also enable it to tailor an effective reparation package to the victim.

¹ Cavadino, M., & Dignan, J. (1997). Reparation, retribution and rights. *International Review of Victimology*, 4(4), 233-253.

[6.10] The Sentencing Act 1991 (Vic) which governs the use of victim impact statements is innovative in many respects; the ability of the victim to read the statement aloud and to include photographs, drawings or poems is particularly welcome. It is correct that the material contained within the statement be used as one of a number of factors to be considered by the court in formulating the sentence, whether it is mitigating or aggravating in nature. However, victims should not be encouraged to make representations concerning the nature of the sentence itself as this could create the unrealistic expectation that they may be able to exercise some form of 'veto' over the exercise.

[6.11] **It is recommended that** procedures are put in place to enable victims to fully understand the function of the victim impact statement and its likely ramifications. **It is further recommended that** victims be offered independent legal advice as to the type of admissible material is admissible and how it will be used in the sentencing process. By the same token, however, it is clear that victims find it distressing for their statements to be edited and it is vital that the voice of the victim is not undermined by this process; beyond offering advice, lawyers should not push victims to edit or alter the content of their statements. If victims wish, for example, to include inadmissible material, they should be advised of this but the final decision of what to include within the statement should remain with them. Counsel for the victim could also play a role in oral proceedings through making additional statements to explain or supplement the content of the victim impact statement, lead evidence (including witnesses) to support it, or challenge evidence / cross-examine witnesses called by the defence as part of its mitigation plea. This should not pose a threat to the equality of arms since (a) the defendant's guilt has already been determined; and (b) the victim's interests ought to be considered a component of (rather than an addition to) the punitive burden imposed by the state (see [6.8] below).

[6.12] Reading the victim impact statement to the court should not, however, be the end of the process. Drawing on aspects of the *partie civile* model and participatory mechanisms at the ICC, **it is recommended that** the sentencing process be restructured to facilitate some degree of deliberative encounter between victims and defendants whereby the reparatory interests of the victim are considered alongside the public policy interests of the prosecution. The lack of opportunity for such an encounter in conventional sentencing proceedings means that many victims are left with unanswered questions, and many offenders are not presented with an opportunity to apologise or explain their actions to the victim. Victims should be offered the opportunity, should they so wish, to address their statements to the offender, rather than the court. For their part, offenders should have the opportunity to respond – and potentially challenge - victims' statements. Mitigation pleas (which tend to be written and delivered solely by lawyers) might be either complemented or replaced by the opportunity for the offender to deliver an oral statement in person to the court. Offenders would then be free to recount aspects of their life stories and their emotions before, during and after the offence. Such emotions would not only cover the "acceptable" feelings of shame and remorse but offenders would also be free to make protests of innocence or defiance. Just as offenders would have a right to challenge aspects of the victim's evidence, so too would victims (or their legal representative) be empowered to challenge any aspect of the offender's statement.

[6.13] Reforming sentencing procedure in this way may pose risks insofar as a dialogue of this nature could quite easily spiral into a freewheeling fracas, or indeed the victim narrative could become dominant, thereby drowning or pre-empting the account of the offender. However, the risk of such complications would, however, be minimised under this proposal with carefully formulated ground rules, close liaison with legal professionals, and comprehensive judicial training to ensure robust judicial oversight.

[6.14] Such an exercise would give the court a more nuanced and comprehensive understanding of the background of the victim and offender and the impact of the offence, thereby enabling it to put in place a sentence and reparation package that is specifically tailored to address the needs of victims and offenders, as well as the public more generally. In order for this to work, **it is recommended that** Part 4 of the Sentencing Act 1991 (Vic) be repealed, and replaced with a legislative provision that would empower the court to order a more holistic form of reparation order which would speak more closely to the needs of victims and the individual circumstances offenders.

[6.15] As in New Zealand and England and Wales, **is recommended that** such a reparation order should properly be considered a form of criminal sanction. Since it imposes a burden on the offender, it should properly be viewed as part of the sentence that is handed down for the offence. Reparation orders could operate alongside other sentencing components, with the overall ‘punitive tariff’ being reduced for remorse, apology, forgiveness and any acts of contrition. Such an approach could also broaden the potential forms of reparation that might be made available. Crucially, this should not be limited to pecuniary compensation (since most offenders have relatively limited financial means), but might also include aspects such as an apology; an undertaking not to repeat the offence or commit any further act that would cause further distress to the victim; restitution or repair of damaged or stolen property; undertaking some form of work such as cleaning graffiti, picking up litter or giving time to assist with a charitable or community cause.

[6.16] As with any restorative justice interventions (see [6.8] above), the overall burden imposed on the offender should also be subject to the higher and lower limits in order to ensure that proportionality remains intact. Such an approach would ensure the delivery of a package of reparative measures which might go some way to meeting victims’ needs and expectations of the justice system, which is also a proportionate and just response to the offending behaviour.

[6.17] As with restorative justice interventions, **it is recommended that** the court rather than the victim should be responsible for enforcing the reparation order. In the event of any failure on the part of the offender to follow through with obligations imposed by such an order, he or she should be returned to the court for re-sentencing.

[6.18] Just as prosecutors have the right to appeal a sentence which they view as manifestly inadequate, **it is recommended that** victims are given the right to appeal on similar grounds.

7. Appeals

[7.1] As noted in [4.4] above, **it is recommended that** victims be conferred with a right to appeal interlocutory decisions which directly affect their interests. Such matters may include inter alia decisions concerning the use of protective measures, decisions to disclose confidential records, or decisions relating to the admissibility of sexual history evidence. If the Commission determines that victims should not have an independent right to appeal such matters, it is recommended that they are given standing to participate in any such appeals by the prosecution or the defence.

[7.2] **It is recommended that** Victoria adopt a similar procedure to South Australia in conferring the victim with a right to make a request to the DPP to consider an appeal. Such a representation may be made by a victim’s legal representative or by the Victim’s Commissioner acting on his or her

behalf. If necessary, the Commissioner should be empowered to compel the DPP to consult with the victim on such a matter.

[7.3] Given the public function of the criminal trial, I am not convinced that victims ought to be able to exercise an independent right of appeal as to the verdict. However, **it is recommended that** such a right should be conferred on victims on the grounds that the sentence is manifestly inadequate (see [6.18] above) or on the grounds that his or her reparatory interests may be affected (see [6.16]-[6.17] above). **It is further recommended that** victims should be offered an opportunity to update their victim impact statement for consideration by the court in the event of an appeal against sentence by the defence.

8. The Enforcement of Victims' Rights

[8.1] From an international perspective, the rights contained within the current version of the Charter are somewhat limited and rather ill-defined. **It is recommended that** the Charter be broadened to include other rights for victims within the criminal process, viz:

- A right to be consulted in relation to all prosecutorial decisions and decisions on accepting guilty pleas to lesser offences and be provided with reasons for those decisions (see 2.6 above)
- A right to request a review of such decisions (see 2.5 above)
- A right to be informed of key information relating to their case (charging decisions, plea negotiation, time / venue of committal and trial proceedings etc).
- A right to make representations in committal and pre-trial hearings where their personal interests are affected (see 4.4 above)
- A right to personalised legal advice and, where appropriate, representation (see 5.13, 6.12, 7.2 above)
- A right to legal aid, advice and support (see 9.2 below)
- A right to make a victim impact statement (see 6.10 above)
- A right to be informed about and request access to restorative justice services (see 4.8, 6.6 above)
- A right to seek reparation from the offender (see 6.2 above) or (where applicable) state compensation
- A right to appeal certain decisions within their criminal process where their interests are concerned (see 7.1-7.3 above)
- A right to security and protection against secondary victimisation throughout the criminal process (see 5.5 above)
- A right to be informed of all rights within the Charter

[8.2] There is a widespread problem across many jurisdictions with the way in which language about 'victims' rights' is used in policy platforms. Often, reforms are introduced adopting language that purpose to give 'rights' to victims, but such rights are illusory unless they are accompanied by a robust mechanism of enforcement. The existing Victims' Charter (Vic) is an example of one such mechanism.

[8.3] Even where enforcement mechanisms do exist, they are often *external* to the criminal justice system (ie, it is pursued through an independent complaints / compliance mechanisms rather than *within* the criminal courts themselves). This situation is clearly unsatisfactory for victims, since even

if a complaint is upheld it will often be too late to take remedial action for the purposes of the criminal process.

[8.4] **It is recommended that** the Victims' Charter 2006 (Vic) be amended to enhance the ways in which victims' rights are enforced throughout the criminal justice system. The optimum means of achieving this would be through the creation of a right to pursue legal action against any agency that violates their rights under the Charter. As the Consultation document states, such a right could interfere with the efficiency of the criminal process and could also be costly to the public purse. Nevertheless, in my view this remains the most legitimate and effective means of realising victims' rights. If the Commission is of the view that such a right is not feasible, it should instead consider:

- Putting in place a clear and robust system of complaints for dealing with alleged breaches of the Charter which could be overseen by the Victims' Commissioner.
- Compelling all agencies to put in place systems to monitor compliance with the rights contained in the Charter as well as mechanisms to consider complaints.
- Creating a legal obligation for prosecutors and judges to take into account the rights provided within the Charter when reaching their decisions.
- Replicating the Canadian mechanism, whereby an interpretive obligation is imposed on all courts to construe all laws in line with the Charter insofar as possible.
- Empowering the Victims' Commissioner to oversee such mechanisms.

9. Support for Victims

[9.1] Having worked closely in the past with the Victim Support Agency, I have been impressed by the commitment and passion of its staff both in terms of formulating policy and providing practical support to victims on a day-to-day basis. In order to continue to provide an excellent service, it is vital that the Agency is properly resourced and funded, particularly in light of the current consultation and the resultant prospect of new laws and policies emerging in forthcoming years. This equally applies to the Child Witness Service, the Witness Assistance Service and the Court Network.

[9.2] As the Consultation document notes, the VSA is not staffed by lawyers and is therefore not equipped to offer legal advice to victims on issues such as charging, plea negotiation statements, review / appeal rights, and the content of victim impact statement. It is also not appropriate for the prosecutor to fulfil this role, since he/she represents the public interest rather than that of the victim. Therefore **it is recommended that** a system of victim advocates be put in place, who would be legally qualified representatives (independent from the ODPP) who would guide the victim and act on his or her behalf throughout their journey through the criminal process. This would be preferable to a court-based service which would only be accessible to victims when he or she was in the court precinct.

10. Concluding Comments

[10.1] The points above should be read alongside my oral consultation with the Commission, which took place on 14th October 2015. I hope my recommendations are useful, and will inform the Commission as to how best to advance and safeguard the rights of crime victims of Victoria for many years to come.

Professor Jonathan Doak

19 October 2015