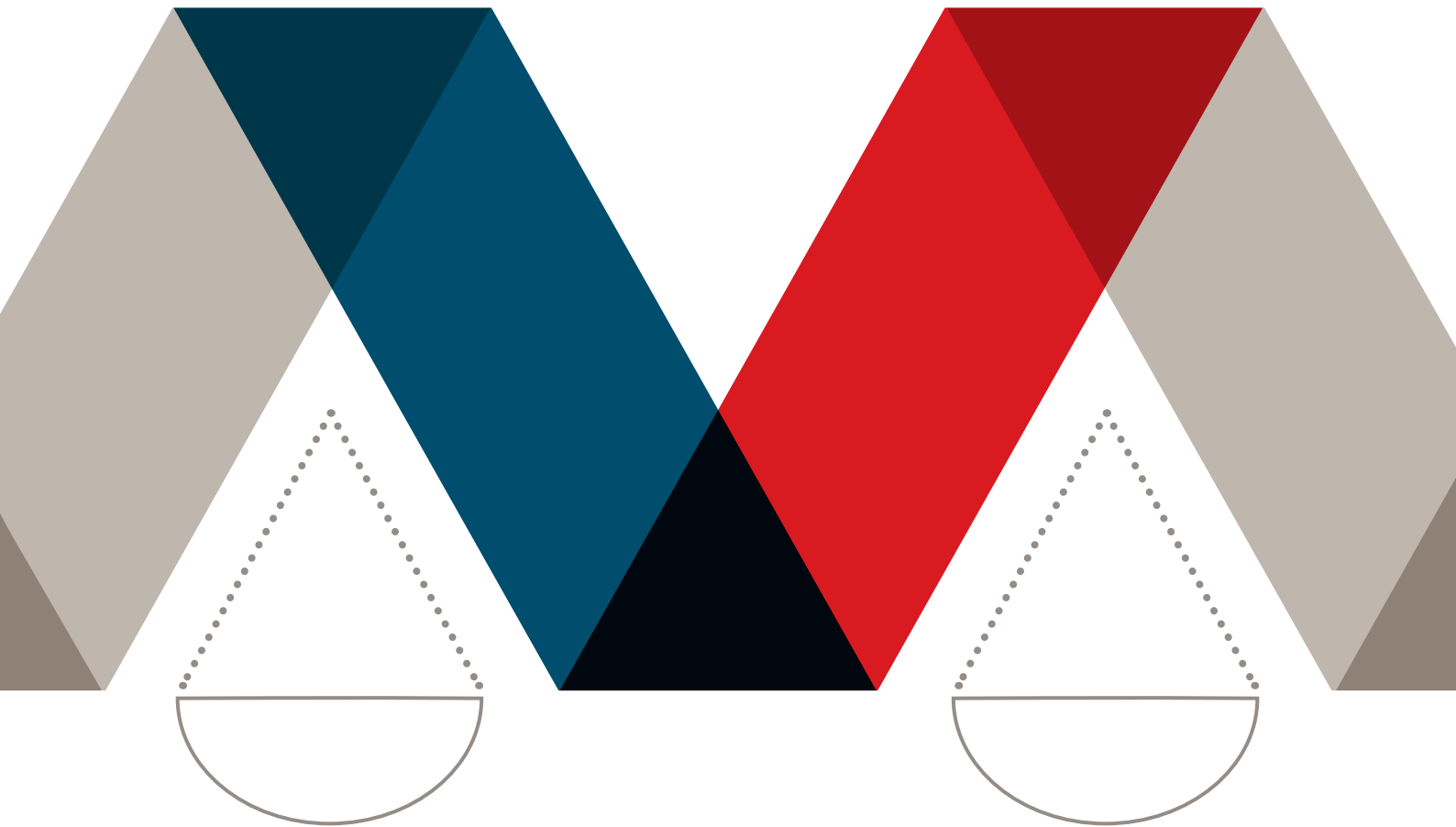


The Role of Victims of Crime in the Criminal Trial Process

INFORMATION PAPER 1

History, Concepts and Theory

MAY 2015





Published by the Victorian Law Reform Commission

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The Role of Victims of Crime in the Criminal Trial Process

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Contents

Preface	iii
Terms of reference	v
The Commission’s approach to this reference	vi
History, concepts and theory	1
Introduction	1
Common law systems and adversarial criminal trials	2
The history of the adversarial criminal trial	5
Vengeance and retribution	5
Private prosecutions and the emergence of official institutions	6
Transformation to the modern adversarial criminal trial	9
Australia	13
Victims and public prosecutions	14
Conceptual underpinnings of the criminal justice system	16
The purpose of the criminal trial process	18
Models of criminal justice	21
Conclusion	26

Preface

On 27 October 2014, the then Attorney-General for Victoria, the Hon. Robert Clark MP, asked the Victorian Law Reform Commission to review and report on the role of victims of crime in the criminal trial process. This important reference goes to the very heart of our criminal justice system, posing the challenging question: ‘What should the role of the victim be in the criminal trial process?’ Throughout this reference, the Commission’s consideration of this question will be informed by two interrelated sources of information—theory and practice.

Many academics and researchers approach the question of the role of victims in the criminal trial process by examining the underlying purposes of the criminal justice system and the relationship between the victim, the accused and the state. Why do we have a criminal justice system at all, what do we (as a society) want it to achieve, and for whom? The lessons of history, developments in human rights law, empirical research and a broad cross-section of academic thought (ranging across law, sociology, philosophy, political theory, and psychology) all make valuable contributions to the task of understanding and imagining a criminal justice system suited to purpose.

Of course, the criminal justice system is not just a theoretical construct. Every year in Victoria, hundreds of criminal trials and thousands of guilty plea hearings impact directly on the lives of victims, accused and witnesses. Listening to the experiences of these people—and of the people who work in the criminal justice system—is crucially important. It allows for a systematic identification of the issues that exist, and an informed consideration of practical initiatives for improvement which have been implemented or championed in Victoria and around the world.

Practice and theory are interrelated. They inform each other. The Commission encourages an approach to this reference which considers what we can learn from theory and what we can learn from practice, both individually and together (see Figure 1).

To facilitate and encourage this approach, the Commission is publishing a series of four information papers prior to consulting widely with the community. This is the first in that series. The four papers are:

- 1 The Role of Victims of Crime in the Criminal Trial Process: History, Concepts and Theory**
- 2 The Role of Victims of Crime in the Criminal Trial Process: Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences?
- 3 The Role of Victims of Crime in the Criminal Trial Process: the International Criminal Court: a Case Study of Victim Participation in an Adversarial Trial Process
- 4 The Role of Victims of Crime in the Criminal Trial Process: Victims' Rights and Human Rights: the International and Domestic Landscape.

The first and second information papers aim to provide background information about the history of the modern criminal trial and its underlying principles and survey the evidence about who victims are and what they need from the criminal justice system. The third and fourth information papers then examine the International Criminal Court as a case study of victim participation, followed by a review of the sources of victims' rights internationally and in Australia. The papers in this series do not necessarily reflect the Commission's views and do not contain policy recommendations.

The Commission will publish a consultation paper on the reference in August 2015. That publication will mark the commencement of public consultation on the reference, and will invite submissions to the Commission. It is hoped that these information papers will assist in the public consultation process by providing relevant background information to the public in a helpful and convenient form. The Commission looks forward to public submissions following publication of the consultation paper.

Terms of reference

The Role of Victims of Crime in the Criminal Trial Process

[Referral to the Commission pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic) on 27 October 2014.]

The Victorian Law Reform Commission is asked to review and report on the role of victims of crime in the criminal trial process.

In conducting the review, the Commission should consider:

- a) the historical development of the criminal trial process in England and other common law jurisdictions;
- b) a comparative analysis of the criminal trial process, particularly in civil law jurisdictions;
- c) recent innovations in relation to the role of victims in the criminal trial process in Victoria and in other jurisdictions;
- d) the role of victims in the decision to prosecute;
- e) the role of victims in the criminal trial itself;
- f) the role of victims in the sentencing process and other trial outcomes;
- g) the making of compensation, restitution or other orders for the benefit of victims against offenders as part of, or in conjunction with, the criminal trial process; and
- h) support for victims in relation to the criminal trial process.

The Commission is to report by 1 September 2016.

The Commission's approach to this reference

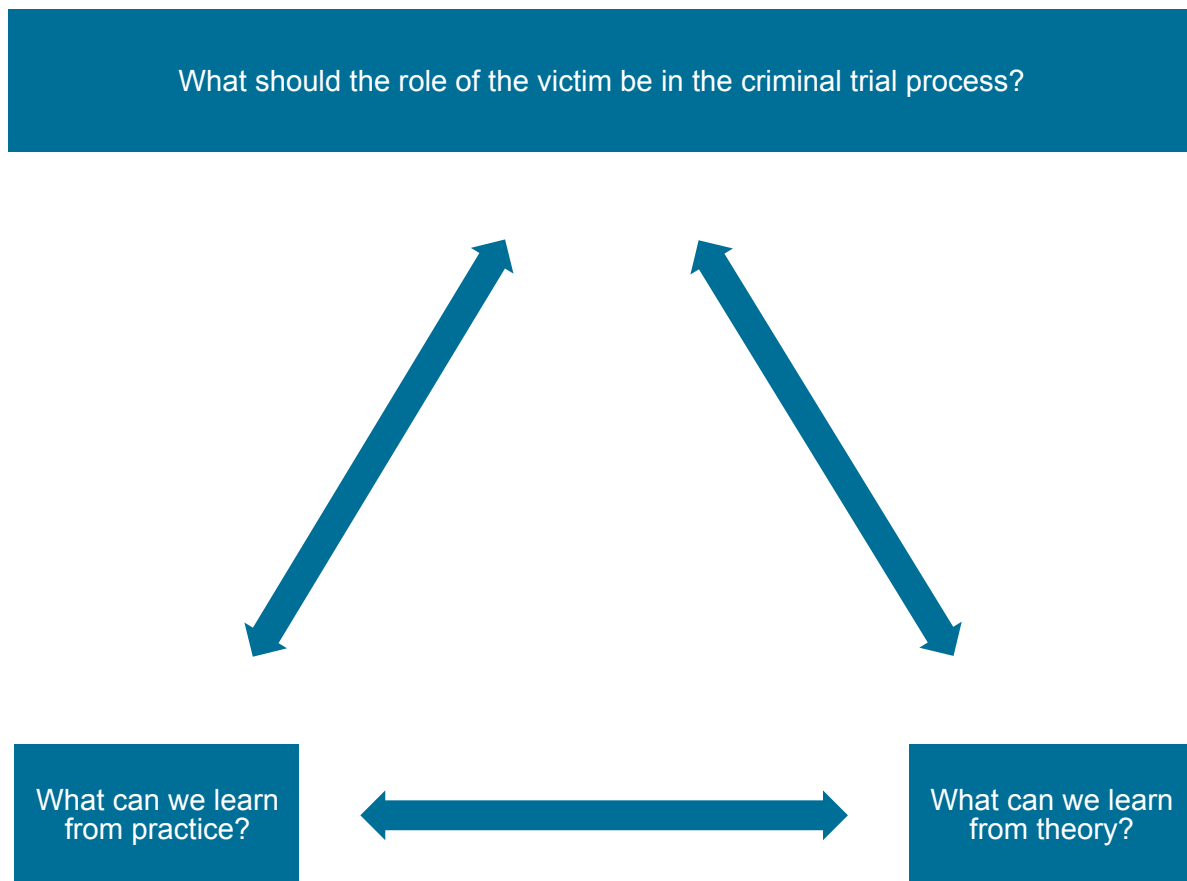


Figure 1: Practice and theory are interrelated

History, concepts and theory

Introduction

- 1 It is the start of a trial in Victoria, Australia. The accused sits in the dock. At the bar table are the prosecutor and the accused's counsel. Twelve members of the community—the jury—sit to the side of the room, ready to hear the evidence. The judge, with her robe and wig, presides over the court room. There is a smattering of people in the public gallery. The trial commences.
- 2 Where is the victim?
- 3 In theory and in reality, victims and crime are closely linked. In many cases, it is impossible to have one without the other. Despite this, in most criminal trials in Australia victims are absent from substantial parts of the process.
- 4 The aim of this information paper is to stimulate consideration of the role of the victim in the criminal trial process by:
 - describing in general terms the features of modern common law adversarial trial processes
 - providing an overview of the historical development of the common law adversarial trial process
 - introducing some of the theoretical concepts underpinning criminal law and criminal justice
 - outlining some academic models of criminal justice, in particular, a number which explicitly consider the interests and role of the victim.
- 5 This information paper is intended to be a starting point for consideration of the topics identified. It does not address all of the literature and commentary relevant to the topics listed above, particularly in relation to criminological, legal and political theory. It does not necessarily represent the views of the Commission. It is intended to inform and assist the consideration of the terms of reference.

Common law systems and adversarial criminal trials

- 6 Australia has a common law legal system.
- 7 Common law legal systems have their origins in the English system of law-making that emerged following the Norman Conquest of 1066.¹ In the absence of a central law-making body, such as a legislature, King's courts traveled across England presiding over local disputes.² Having limited or no local knowledge, the King's courts applied general rules and treated like cases alike.³ The approach taken by the King's courts—of applying rules developed in the context of previous disputes to new disputes with similar circumstances—is the foundation of the system of precedent that is central to contemporary common law.⁴ Over centuries, a large body of rules developed, which were binding throughout all regions of England.⁵ This set of rules became known as the common law.⁶
- 8 Although legislation is replacing case law as the primary source of legal rules in many common law countries, the use of precedent and the centrality of case law remain core elements of common law systems today.⁷
- 9 Such systems exist throughout most of the Commonwealth, and are generally associated with countries originally colonised by the British, such as Australia, Canada, New Zealand, India and the United States.⁸
- 10 A key feature of contemporary common law systems is the adversarial criminal trial.⁹ This is the type of trial with which many people would be familiar today, whether because of its depiction in popular culture or because of a general knowledge of the Anglo-Australian or Anglo-American legal systems.
- 11 Despite shared foundations, adversarial criminal trials are not uniform across the common law world. Nevertheless, adversarial criminal trials have some common elements:

¹ Frank Maher and Louis Waller, *An Introduction to Law* (Law Book Company, 6th ed, 1991) 30–31.

² Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison' (1967) 15 *American Journal of Comparative Law* 419, 425; Catriona Cook et al, *Laying Down the Law* (Lexis Nexus Butterworths, 8th ed, 2012) 17.

³ Dainow, above n 2, 424–425; Cook et al, above n 2, 17; Maher and Waller, above n 1, 30.

⁴ Cook et al, above n 2, 17.

⁵ Ibid.

⁶ Ibid; Dainow, above n 2.

⁷ Gary Slapper and David Kelly, *The English Legal System* (Routledge, 10th ed, 2010,) 2–3, 5, 100; Cook, et al, above n 2, 101.

⁸ Australian Law Reform Commission, *Discussion Paper 62: Review of the Federal Civil Justice System* (1999) [2.24]; Australian Law Reform Commission, *Report 89: A Review of the Federal Civil Justice System* (2000) [1.116], fn 174; Maher and Waller, above n 1, 32.

⁹ M E I Brien and E H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure* (WLP, 2001), 39.

- The trial is a contest between the prosecution, acting as the state’s representative, and the accused.¹⁰
- The prosecution and the accused (often represented by defence counsel) decide how their respective cases will be conducted, and define the issues for the jury to consider.¹¹
- The judge plays a relatively passive role. The judge presiding over the trial is not involved in investigating the alleged crime, deciding what charge(s) are laid against the accused, or how the prosecution or defence cases are conducted during the trial, except to ensure that the rules of evidence and procedure are followed.¹²
- The case is presented primarily by witnesses giving live oral evidence in court and being subject to cross-examination.¹³
- After the prosecution and the defence have presented their cases, the judge gives the jury instructions about the law to be applied to the evidence and their deliberations on the verdict.¹⁴
- The jury, after hearing all the evidence and the judge’s instructions, determines whether the prosecution has proven that the accused committed the crime or crimes charged beyond reasonable doubt. In coming to a verdict of guilty or not guilty, the jury must rely only on the evidence presented in court.¹⁵

12 The accused is entitled to a fair trial. The following principles, many of which are set out in Victoria’s *Charter of Human Rights and Responsibilities Act 2006*, should be adhered to for a trial to be fair:¹⁶

- The prosecution has the onus of proving, beyond reasonable doubt, that the accused committed the crime or crimes charged. The corollary of this principle is that the accused is presumed to be innocent until proven guilty.¹⁷

¹⁰ *Doggett v The Queen* (2001) 208 CLR 343, 246 (Gleeson CJ) cited in David Ross, *Ross on Crime* (Lawbook Co, 2nd ed, 2004), 231 [20.1405].

¹¹ *Doggett*, above n 10; Ross, above n 10, 231, [20.1405]; Law Reform Commission of Western Australia, *Project 92: Review of the Criminal and Civil Justice System in Western Australia*, 52, [73]. See also *Ratten v The Queen* (1974) 131 CLR 510, 517.

¹² *Doggett*, above n10, 246; *Crampton v The Queen* (2000) 206 CLR 161, 173, (Gleeson CJ). See also Ross, above n 10, [20.1430].

¹³ *Review of the Criminal and Civil Justice System in Western Australia*, above n 11, 52 [7.4]

¹⁴ *RPS v The Queen* (2000) 199 CLR 620, 637, (Gaudron ACJ, Gummow, Kirby and Hayne JJ), cited in Ross, above n 11. *Jury Directions Act 2013* (Vic), ss 17-19.

¹⁵ See *Jury Directions Act 2013* (Vic); *Review of the Criminal and Civil Justice System in Western Australia*, above n 11.

¹⁶ See in particular s 25.

¹⁷ Jeremy Gans, Terese Henning, Jill Hunter and Kate Warner, *Criminal Process and Human Rights* (The Federation Press, 2011) 379, 454. See also *Woolmington v DPP* [1935] AC 462; All ER 1; 25 Cr App R 72 (HL), (Viscount Sankey LC) (at 481; 8; 95); Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 2nd ed, 2005).

- The accused has a right to silence. This means that the accused cannot be compelled to give evidence or confess guilt.
 - The criminal trial should be conducted without unreasonable delay.¹⁸ In Australia, this principle focuses primarily on avoiding unfair prejudice to the accused, for example, evidence being compromised as a result of delay.¹⁹
 - The accused has the right to examine witnesses²⁰ in order 'to test the factual base of witness testimony and the credibility to be ascribed to the witness'.²¹ This right is linked closely to the often technical rules of evidence, which limit the questions that can be asked of witnesses, and the responses which they can give.²²
 - The prosecution is obliged to act independently, impartially and to conduct the case fairly.²³ This includes ensuring the disclosure of all evidence relevant to the charges against the accused, including information that might undermine the prosecution case or assist the defence.²⁴
 - If an accused is charged with a serious offence and lacks the financial means to engage legal representation, he or she should be provided with a lawyer.²⁵
- 13 Fair trial principles are aimed at ensuring equality of arms between the prosecution and the accused.²⁶ In reality, the state and the accused are not equal adversaries; the state has considerably more resources than the accused. The principles described above are directed towards remedying this imbalance.
- 14 The structure of the modern adversarial criminal trial limits the role of the victim to that of a witness who gives evidence on behalf of the prosecution. As such, victims' stories are constrained by rules of evidence and their testimony is subject to cross-examination. This reality has been the subject of comment and criticism for at least the last half century; the victim in the modern adversarial criminal trial has been described as 'evidentiary cannon fodder, of witness or claimant, not of citizen with participatory rights and obligations'.²⁷

¹⁸ Gans et al, above n 17 , 471.

¹⁹ Ibid, 472.

²⁰ Ibid 498–500. See also *Review of the Criminal and Civil Justice System in Western Australia*, above n 11, 54 [7.13].

²¹ Ibid 498.

²² David Ross QC, *Ross on Crime* (Lawbook Co, 2nd ed, 2004) 805; Mark Findlay, *Criminal Law: Problems in Context* (Oxford University Press, 2nd ed, 2006) 53–54.

²³ Gans, et al, above n 17, 486–492.

²⁴ Gans et al, above n 17 , 489–490.

²⁵ Ross, above n 22, 333 [4.1010]; *Dietrich v The Queen* (1992) 177 CLR 292, 311 (Mason CJ and McHugh J).

²⁶ Mark Findlay, *Criminal Law: Problems in Context* (Oxford University Press, 2nd ed, 2006) 54.

²⁷ Jonathan Braithwaite, 'Juvenile Offending: New Theory and Practice', in L Atkinson and S Gerull (eds), *National Conference on Juvenile Justice*. (Australian Institute of Criminology, 1993) 36.

The history of the adversarial criminal trial

- 15 The adversarial criminal trial has not always taken the form described above. Since the advent of the common law system, it has gone through several different phases.

Vengeance and retribution

- 16 Prior to the Norman Conquest of England in 1066, crime was predominantly understood as a private affair between two parties. Nonetheless, the Anglo-Saxons had established a system designed to 'place restrictions on private vengeance to alleviate the disruption caused by the wild justice of vengeance'.²⁸ Under this system, groups of families (tithings) were bound together by a pledge, and it was the responsibility of members of the tithing to bring another member alleged to have committed an offence before the courts (which resembled open forums for mediation).²⁹ The King had no involvement in the process, other than to exact a fine from any offender who had agreed to pay compensation to a victim.
- 17 Following 1066, the Normans retained the underlying principle that trials were essentially private matters, often based on the pursuit of vengeance and retribution.³⁰ England's economy became based on feudalism, with the King owning all the land and devolving it to his supporters. Thus, wealthy landowners became powerful, and were delegated sovereign powers to adjudicate disputes and punish wrongdoers. Criminal law did not exist as a distinct jurisdiction, and 'law came to represent and empower those with property against those who infringed it'.³¹
- 18 Trials conducted during the period immediately after the Conquest did not involve a jury and used archaic methods of proof. The accused's guilt or innocence was established in three main ways: compurgation, ordeal or battle.³² Compurgation involved having the accused swear to his or her innocence and produce the requisite number of 'oath-helpers...to back his denial by their oaths'.³³ Ordeal involved either being lowered into water or made to hold a hot iron in his or her hand for a certain period. If the accused sank, or avoided infection from the burn, they were deemed innocent.³⁴ In trial by battle,

²⁸ Yue Ma, 'Exploring the Origins of Public Prosecution' (2008) 18(2) *International Criminal Justice Review* 18 190, 191.

²⁹ Christopher Corns, *Public Prosecutions in Australia: Law, Policy and Practice* (Thomson Reuters (Professional) Australia Limited, 2014) 52.

³⁰ Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (Palgrave MacMillan, 2006) 25–26; Ma, above n 28; Lynne N Henderson, 'The Wrongs of Victim's Rights' (1985) 37 *Stanford Law Review* 937, 938–939.

³¹ Kirchengast, above n 30, 24. Note that it was not until the Magna Carta in 1215 that law was held to be independent of the King.

³² See generally Sanjeev Anand, 'The Origins, Early History and Evolution of the English Criminal Trial Jury' (2005) 43 *Alberta Law Review* 407. See also Kirchengast, above n 30, 32.

³³ Anand, above n 32, 409.

³⁴ *Ibid.*

innocence was proven by surviving until night.³⁵ In each case, the outcome was believed to reveal 'God's judgment'.³⁶ Therefore, judicial involvement was limited to judging the final outcome, a decision which relied heavily on the clergy 'for the invocation of God's power and for the interpretation of his signs'.³⁷

- 19 Private settlements were commonly reached 'between propertied families' and were encouraged as the most appropriate form of dispute resolution.³⁸ For example, a dispute involving an assault might be resolved by a blood settlement, such as branding, maiming or torture, or by the offender or their family giving land or money to the victim.³⁹ The role of the state, in this case the King, was very limited; according to Tyrone Kirchengast, 'the choice to prosecute and the mode of punishment rested with the victim'.⁴⁰ Kirchengast also notes that private settlements favoured the landed elite, who could 'pay their way out of trouble, while the poor were subject to punitive terms the landed classes deemed just'.⁴¹

Private prosecutions and the emergence of official institutions

- 20 From the mid-1100s onwards, the King's interest in maintaining peace in England led to increased official involvement in the settlement of criminal disputes.⁴² The precise reasons for this shift from exclusively private prosecutions to increased official involvement are complicated and disputed.⁴³ However, a considerable factor was the need to control rising crime and restore law and order.⁴⁴
- 21 The King appointed sheriffs to implement royal edicts (assizes) in different regions of England (known as shires).⁴⁵ King's courts emerged, removing disputes from the original jurisdiction of the local courts and centralising justice.⁴⁶ The beginnings of the modern trial started to emerge.

³⁵ Anand, above n 32, 413. See also Ma, above n 2830, 192.

³⁶ Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, *The Trial on Trial: Volume 3: Towards a Normative Theory of the Criminal Trial* (Hart Publishing, 2007) 23.

³⁷ Ellen Sward, 'Values, Ideology and the Evolution of the Adversary System' (1988) 64 *Indiana Law Journal* 301, 321. See also Duff et al, above n 36, 23–24.

³⁸ Kirchengast, above n 30, 24–26. Ma above n 28, 192–193.

³⁹ Kirchengast, above n 30, 25.

⁴⁰ *Ibid* 29.

⁴¹ *Ibid* 25.

⁴² *Ibid* 43–5.

⁴³ See generally Kirchengast, above n 30, 56. See also Henderson, above n 30, 940 listing briefly as reasons for the transformation '[t]he lords' consolidation of power, the greed of kings, and the need for a coherent system of laws transformed criminal law from a mixture of public and private law, to law of an exclusively public nature'.

⁴⁴ Kirchengast, above n 30.

⁴⁵ Corns, above n 29, 52.

⁴⁶ Kirchengast, above n 30; Ma, above n 28, 193.

-
- 22 The Assize of Clarendon was enacted in 1166. A royal proclamation, it provided that in the absence of an accuser, the sheriff (appointed by the King) could swear in 12 men before a bishop, to declare the truth according to their conscience (known as a jury of presentment). This jury served dual functions of accusation and adjudication.⁴⁷ Following the enactment of the Magna Carta in 1215, which stipulated no one should be prosecuted except by the judgment of his peers, the jury of presentment gradually became a jury focused solely on adjudication,⁴⁸ and rational methods of proof began to replace archaic trial methods such as trial by ordeal.⁴⁹ Nonetheless, the possibility of trial by combat continued for some time, with the last judicial duel as settlement of a criminal matter occurring in England in 1456.⁵⁰
 - 23 The late 1100s and early 1200s also saw the emergence of offences which were deemed to be breaches of the King's peace, which came to include homicide, serious offences to the person, robbery, burglary, arson, and trespass.⁵¹ Richard I appointed knights in 1195 to maintain the King's peace throughout the counties by apprehending suspects and delivering them to the sheriff.⁵² A distinct criminal law began to develop, distinguished by a focus on public interests and the maintenance of a stable society.⁵³
 - 24 As the concept of an offence against the state emerged, so did official institutions for the administration of a criminal justice system.⁵⁴ These institutions included early versions of the modern jury, parish constables and justices of the peace, as well as prosecution associations for apprehending criminals, and lawyers engaged in an official capacity to represent the Crown in court.⁵⁵
 - 25 From the 1200s, the role of the King's Attorney as the Crown's representative in court included the power to place people on trial. In 1461 the Attorney became a member of the House of Lords and assumed the title of Attorney-General. From this time, the role of the Attorney-General developed progressively, so that by the 1700s the Attorney-General possessed the common law power to commence and discontinue a prosecution. This prosecutorial role was focused on the most serious crimes which threatened the

⁴⁷ Ma, above n 28, 193; Corns, above n 29, 53.

⁴⁸ With a 'grand jury' process emerging to indict suspected felons for trial.

⁴⁹ Abolished by a decree of the Fourth Lateran Council in 1215, which forbade clergy from officiating at ordeals. See Antony Duff et al, *The Trial on Trial: Volume 3: Towards a Normative Theory of the Criminal Trial* (Hart Publishing, 2007) 25.

⁵⁰ Anand, above n 32, 414.

⁵¹ David Seipp, 'The Distinction between Crime and Tort in the Early Common Law' (1996) 76 *Boston University Law Review* 59; Frederick Pollock, 'The King's Peace in the Middle Ages' (1899) 13(3) *Harvard Law Review* 177, 177–178.

⁵² Corns, above n 29, 53.

⁵³ Kirchengast, above n 30, 51–56. See also Henderson, above n 30, 940; Department of Justice, *Victims' Charter Community Consultation Paper* (Victorian Department of Justice, 2005) 7.

⁵⁴ Kirchengast, above n 30, 48–49.

⁵⁵ Kirchengast, above n 30, 40–41, 48, 57–58; Ma, above n 30, 194.

security of the monarch or the realm (for example treason, counterfeiting, riots), rather than on criminal offences against individual victims.⁵⁶

- 26 Up until the start of the 1400s, prosecutions were conducted almost exclusively by the victim or their family.⁵⁷ Even though the role played by justices of the peace and constables in prosecuting crimes significantly increased, victims remained responsible for apprehending the offender, filing charges with the magistrate, collecting the evidence, organising the witnesses and running the criminal trial well into the 1700s.⁵⁸

According to Gregory Durston:

in a country like England, that was characterised by weak policing agencies ... the role of the private individual in pursuing crime was paramount. The system was almost entirely dependent, normally, on people taking the burden of pursuing, arresting, initially detaining, and prosecuting criminals, an expensive and time consuming process.⁵⁹

- 27 R A Duff et al argue that 'the most significant development in the prosecution and trial of crime was the extension of the influence of the royal courts and the officers of royal justice'⁶⁰ from 1400-1700. Such officers included justices of the peace (JPs), who took on greater investigatory and judicial functions. Either individual victims or parish constables, (who were authorised to preserve the King's peace) would bring complaints to the JP. JPs would try petty crimes at what were known as magistrates' quarter sessions. The trial of more serious crimes, known as felonies (but still most commonly property offences), would occur in the sittings of the royal courts. Prior to a trial, the JP would examine the suspected felon, the complainant and witnesses, laying the evidence before a grand jury which would decide if the matter would go to trial before a jury.⁶¹
- 28 What did the early criminal jury trial look like? It was often very short, sometimes only 15–20 minutes.⁶² Trials began with reading of the depositions from the grand jury hearing, followed by the victim telling the jury his or her account of the alleged crime.⁶³ After the victim closed their case, the accused would often tell his or her own version of events, in response to the evidence.⁶⁴ The accused was not informed of the charge

⁵⁶ Corns above n 29, 56–57.

⁵⁷ Kirchengast, above n 30, 30–39.

⁵⁸ Kirchengast, above n 30, 58–59; Corns above n 29, 55.

⁵⁹ Gregory Durston, 'The Inquisitorial Ancestry of the Common Law Criminal Trial and the Consequences of its Transformation in the 18th Century' (1996) 5 *Griffith Law Review* 177, 181.

⁶⁰ R A Duff et al, above n 49, 29.

⁶¹ *Ibid* 32. Following passing of Marion Committal Statutes in 1154 and 1555, the JP played a greater role in assembling the prosecution case, ensuring that the private prosecutor and witnesses were bound over for trial.

⁶² Duff et al, above n 49.

⁶³ Durston, above n 59, 184.

⁶⁴ *Ibid* 184.

before it was read to the court, to 'prevent the fabrication of a defence'. The accused was usually detained before trial and had no means to compel the attendance of witnesses.⁶⁵ At the conclusion of the trial, the jury was responsible for delivering a verdict.

- 29 Judges played an active and central role, frequently questioning the accused and witnesses, and intervening with respect to matters of evidence and process.⁶⁶ In addition, judges engaged actively with juries, sometimes challenging their conclusions with respect to findings of fact and guilt or innocence.⁶⁷ Jurors themselves were also more active. Court records from the 1600s and 1700s 'regularly record them [jurors] asking questions of the witnesses, the accused and the judge, as well as asking, on occasion, that other witnesses not present in court be called'.⁶⁸
- 30 A key feature of these trials was that there were no lawyers.⁶⁹ In fact, according to John Langbein, defence counsel were 'forbidden' to appear in criminal trials during this period, even for serious offences.⁷⁰ At the same time, the victim, while not forbidden to engage a lawyer, rarely did so.⁷¹ As a consequence, '[t]he judge was supposed to act as counsel for the accused, detecting weaknesses in the prosecution and keeping questioning relevant', although, as a result of high case-loads, judges rarely played this role.⁷²
- 31 The victim did not have to prove their case beyond reasonable doubt, there were few restrictions on what evidence and witness testimony could be admitted, and it is unlikely there was a presumption of innocence.⁷³ The trial as it was conducted in England as late as the early 1700s has been described as an 'altercation'; it was a contest between citizen accusers and citizen accused.⁷⁴

Transformation to the modern adversarial criminal trial

- 32 As English society changed between the early 1700s and the modern day, so did the criminal justice system and the criminal trial. Arguably, these changes led to the sidelining of the victim, from centre stage to 'forgotten party'.⁷⁵ Duff et al argue that historical developments ultimately led to the common law adversarial trial becoming, by the early

⁶⁵ Duff et al, above n 36, 32.

⁶⁶ Ibid 34–35.

⁶⁷ Ibid 34; Durston, 59, 183.

⁶⁸ Durston, above n 59, 183.

⁶⁹ Ibid 185; Paul Rock, 'Victims, Prosecutors and the State in Nineteenth Century England and Wales' (2004) 4(4) *Criminal Justice* 331, 333.

⁷⁰ John Langbein, *The Origins of the Adversary Criminal Trial* (Oxford University Press, 2003) 253.

⁷¹ Ibid 12.

⁷² Duff et al, above n 36, 32.

⁷³ Durston, above n 59, 185–186.

⁷⁴ Langbein, above n 70, 13.

⁷⁵ Joanna Shapland, 'Victims Assistance and the Criminal Justice System', paper delivered to the 33rd International Course in Criminology, Vancouver, British Columbia (1983) 8.

1900s, 'primarily ... a mechanism for the effective enforcement and application of the law, a means of displaying the legitimate consequences of a criminal act, the representation of punishment as an idea'.⁷⁶

- 33 From the early to mid-1700s, the industrial revolution and the corresponding growth in urban populations (particularly around London) led to a rise in crime.⁷⁷ Kirchengast argues that '... there was increased need to rid the social of various threats ... [w]ith this shift, the criminal law came to be accepted as ordering the social over the needs of victims'.⁷⁸ Also, relying on victims to prosecute personal grievances and offences against the King's peace proved to be unsustainable.⁷⁹ This led to a series of formal and informal institutional responses that ultimately resulted in the highly adversarial criminal trial—prosecuted by the state and with a limited role for the victim—that is familiar today.
- 34 Informal associations for the prosecution of criminals ('prosecution associations') became common. Members joined these associations, for a fee, in order to share the costs of prosecution, including apprehending the offender, gathering evidence and navigating the trial process.⁸⁰ Frequently, these associations engaged lawyers to perform the investigation and conduct the prosecution.⁸¹ Prosecution associations operated largely without restrictions during the 1700s and the early 1800s,⁸² although they were ultimately displaced following the advent of the official police force and related police-run prosecutions.⁸³
- 35 Individual victims, in particular institutional victims such as banks, the post office and state-run organisations such as the treasury, also began to use lawyers to conduct trials from the early 1700s.⁸⁴ In contrast, defence lawyers remained forbidden, apart from on behalf of individuals charged with treason.⁸⁵
- 36 From the mid-1700s, inadequate prosecutions led the government to offer rewards and incentives to members of the public to encourage the apprehension and prosecution of criminals.⁸⁶ The outcome was a sharp increase in 'false witnessing and false prosecution' and related miscarriages of justice.⁸⁷

⁷⁶ Duff et al, above n 49, 46.

⁷⁷ Ma, above n 28, 194; Kirchengast, above n 30, 60.

⁷⁸ Kirchengast, above n 30, 150.

⁷⁹ Ibid 59–60.

⁸⁰ Ibid 61.

⁸¹ Langbein, above n 70, 135–136.

⁸² Kirchengast, above n 30, 62.

⁸³ Langbein, above n 70, 131–132.

⁸⁴ Ibid 113–123, 284–285.

⁸⁵ Ibid chapter 2.

⁸⁶ Durston, above n 59, 190–193.

⁸⁷ Ibid 190–191.

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- 37 The early 1800s saw the establishment of a modern police force in England, accompanied by a shift in responsibility for prosecutions from private individuals to police.⁸⁸ The reasons for this shift are ‘dimly understood’,⁸⁹ although they have been attributed to rising crime and the continued reluctance or inability of victims to pursue prosecutions.⁹⁰
- 38 Despite the establishment of a police force, private prosecutions remained the dominant mode of prosecution. Most scholars agree that, particularly for alleged thefts, pursuing a prosecution through the courts remained the responsibility of the victim, who appeared personally or briefed counsel to appear on their behalf, until well in the 1800s.⁹¹ It was only from the 1850s onwards that police played a more prominent role in conducting the prosecution of serious offences in the higher courts.⁹²
- 39 Nevertheless, the organised and state-run police force was more efficient at gathering evidence against the accused than were individual victims. The number of witnesses, including forensic and expert witnesses, increased noticeably. However, police prosecutors were often ill-equipped to assess evidentiary sufficiency or evaluate evidence objectively, which led to miscarriages of justice.⁹³ Concurrently, accused persons were regularly imprisoned between committal and trial with little opportunity or capacity to prepare a defence; they were not advised prior to trial of the evidence against them; they had no ability to subpoena witnesses; and in most cases were poor, illiterate and incapable of preparing a defence.⁹⁴
- 40 The combination of all these factors led to the perception that the accused was disadvantaged in the criminal trial process. Also, a series of treason trials in the late 1600s, characterised by ‘pre-trial manipulation, routine perjuring of witnesses, the denial of the opportunity to prepare or present a case, the packing of juries and bullying by bench

⁸⁸ Kirchengast, above n 30, 60–61; Ma, above n 28, 194; Durston, above n 59, 196.

⁸⁹ Bruce P Smith, ‘The emergence of Public Prosecution in London, 1790–1850’ (2006) 18 *Yale Journal of Law & the Humanities* 29, 38.

⁹⁰ Kirchengast, above n 30, 60–61; Ma, above n 28, 194; Durston, above n 59, 196.

⁹¹ Corns above n 29, 55; Smith above n 89, 33–34, citing Douglas Hay and Frances Snyder, ‘Using the Criminal Law 1750–1850: Policing, Private Prosecution and the State’, in Douglas Hay and Frances Snyder, eds, *Policing and Prosecution in Britain 1750–1850* (Clarendon Press, 1989) 3, 21; John Beattie, *Crime and Courts in England 1660–1800* (Princeton University Press, 1986) 35; Peter King, *Crime, Justice and Discretion in England* (Oxford University Press, 2001) 17 (and describing the ‘virtually universal understanding that private victims monopolized the prosecution of offences against property in England before the mid-nineteenth century’). Note that Smith disputes this conclusion, pointing to the growth of the summary jurisdiction allowing for the disposal of disputes without adhering to stricter rules of evidence, the numerous documented cases in which police officers ‘seemingly initiated the prosecutions, where no private victim or complainant is identified’, and the mis-characterisation of prosecutions initiated by police technically in their private capacity as ‘private’. (Smith, above n 89, 57–61).

⁹² Smith above n 89, 58.

⁹³ Ma, above n 28, 195–196.

⁹⁴ Duff et al, above n 49, 42.

and prosecution' had led to political unease and consequently fundamental reforms via the *Treason Trials Act* of 1696. That Act introduced a number of protections for accused in treason trials, including the right to see the indictment, the power to subpoena witnesses, and the ability to engage counsel for legal and factual matters.⁹⁵ Over the course of the 1700s and 1800s, reforms to the conduct of treason trials gradually impacted on the form and conduct of trials for other crimes.

- 41 From the 1730s onwards judges began to permit the accused to be represented by counsel,⁹⁶ with all restrictions on the presence of defence counsel formally lifted in 1836.⁹⁷ The growing availability of specialised criminal lawyers, and their increased willingness to object to evidence they believed to be flawed, contributed to the development of evidentiary rules and the modern style of cross-examination.⁹⁸ According to Duff et al, the introduction of lawyers into the trial had three additional impacts on the trial process. First, the role of the judge changed into that of 'neutral arbitrator'. Whereas judges had previously taken an active role by questioning witnesses, the accused and even challenging the jury, the trial process gradually became an adversarial contest between the prosecution and defence lawyers. Second, as lawyers took more control of questioning and cross-examining witnesses, juries became passive observers rather than active participants. Third, the advent of defence lawyers meant that the accused began to remain silent at trial hearings, obliging the prosecution to prove its case.⁹⁹
- 42 The first Director of Public Prosecutions (DPP) for England and Wales was appointed in 1879. However, his role was limited to the decision to prosecute,¹⁰⁰ and even then he dealt with only a small number of difficult or complex cases. Most criminal prosecutions in England, apart from murder,¹⁰¹ continued to be undertaken by the police on behalf of the victim.¹⁰² Many police offices had internal legal departments, or briefed counsel to prosecute on their behalf.¹⁰³ It was not until 1985 that the Crown Prosecution Service was

⁹⁵ Ibid 38.

⁹⁶ Langbein, above n 70, 110.

⁹⁷ See generally J M Beattie, 'Scales of Justice: Defence Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries' (1991) 9(2) *Law and History Review* 221.

⁹⁸ Durston, above n 59, 187–188, 196; Ma, above n 28, 194.

⁹⁹ Duff et al, above n 49, 43.

¹⁰⁰ The Treasury Solicitor undertook the prosecution. See the website for the Crown Prosecution Service, at <<http://www.cps.gov.uk/about/facts.html>>. (Crown Prosecution Service website).

¹⁰¹ Corns above n 29, 60.

¹⁰² As Sebba describes it, as late as 1982 English prosecutions were conducted 'at least notionally, entirely by private individuals'. Leslie Sebba, 'The Victims' Role in the Penal Process: A Theoretical Orientation' (1982) 30(2) *American Journal of Comparative Law* 217, 227.

¹⁰³ Corns above n 29, 61.

established through legislation as an independent agency headed by the DPP.¹⁰⁴ The DPP and the Crown Prosecution Service are now responsible for prosecuting criminal cases investigated by police in England and Wales on behalf of the state.¹⁰⁵

- 43 The move to public prosecutions was somewhat swifter in other common law countries. Scotland had a 'procurator fiscal' by the early 1800s, who 'essentially monopolised all serious criminal prosecutions'.¹⁰⁶ Many United States jurisdictions also had public prosecutors who investigated and prosecuted a broad range of criminal cases by the early 1800s.¹⁰⁷
- 44 Although the trial itself underwent a transformation, the traditional method of a prosecution commencing by an individual making a complaint to the court continued (and continues in Victoria today). A charge is laid before a magistrate by an informant.¹⁰⁸ The informant may be any citizen; it was traditionally the victim, as they were the person making the complaint that they had been offended against. With the advent of professional police forces, this role progressively became one undertaken almost exclusively by police (or other public officials) on behalf of the victim. However, the power to commence a prosecution in common law countries remained, and remains, in the hands of individual victims if they choose to exercise that right. It is rarely exercised. Police nearly always initiate prosecution.

Australia

- 45 Following colonisation in 1788, New South Wales inherited the English common law system and the laws of England in place at the time. However, between colonisation and 1823, New South Wales was essentially governed by military rule.¹⁰⁹ The Court of Criminal Jurisdiction had jurisdiction to hear all cases which were criminal offences under the law of England.¹¹⁰ It was presided over by the Judge Advocate and at least six naval or military officers.¹¹¹ The Judge Advocate conducted the prosecution and sat in judgment. Summary criminal matters were dealt with by the Judge Advocate, the Governor or the Lieutenant Governor, all of whom were appointed justices of the peace.¹¹²

¹⁰⁴ Above n 100. The CPS was established following the 1982 Philips Royal Commission on Criminal Procedure, which identified serious inconsistencies and failings in the legal capacity and decisions to prosecute of the police forces. See also Paul Rock, 'Victims, Prosecutors and the State in Nineteenth Century England and Wales' (2004) 4(4) *Criminal Justice* 331, 343.

¹⁰⁵ Crown Prosecution Service website, above n 100.

¹⁰⁶ Smith, above n 89.

¹⁰⁷ Smith, above n 89, 30.

¹⁰⁸ See *Criminal Procedure Act 2009* (Vic), ss 5, 6.

¹⁰⁹ Corns, above n 29, 64–65.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

- 46 From 1823, successive pieces of legislation established Supreme Courts (initially in New South Wales and Van Dieman's Land) and the office of Attorney-General, who while responsible for all criminal prosecutions, generally dealt only with the most serious and difficult cases.¹¹³ Policing developed from 1811 onwards, with police coming to conduct prosecutions in all colonial courts.¹¹⁴ As each of the colonies was established, so too were Magistrates' Courts. Most summary criminal prosecutions, heard before magistrates, were initiated by police officers—although landowners were known to initiate prosecutions against convict employees.¹¹⁵ Later, District and County Courts were established, being at intermediate level between the Supreme Court and the Magistrates' Court.
- 47 Legislation enacted in Victoria in 1875 allowed barristers from the private bar to be appointed as Crown prosecutors, instructed by the Crown Solicitor, and to prosecute serious criminal cases in the higher courts on behalf of the Attorney-General.¹¹⁶
- 48 In modern-day Victoria, the police have retained responsibility for the prosecution of summary offences, which continue to be heard in the Magistrates' Court. The Office of Public Prosecutions (OPP), an independent statutory body, was established in 1982 to conduct the prosecution of indictable matters in the County Court and the Supreme Court on behalf of the Victorian DPP. Prior to the enactment of the *Director of Public Prosecutions Act 1982* (Vic), prosecutions for indictable offences had been conducted by the Criminal Law Branch of the Crown Solicitor's office in the name of the Attorney-General. The DPP (and OPP) was created to remove 'the process of criminal prosecution from the political arena; and secondly, [to create] a more efficient system for the operation and conduct of prosecutions in the superior courts'.¹¹⁷

Victims and public prosecutions

- 49 As prosecutions in the Supreme Court and County Court became essentially the exclusive domain of the OPP,¹¹⁸ the victim's role in relation to the prosecutor changed. As noted above at [14], victims in modern criminal trials play the same role as other witnesses, a status that was reflected in how victims were treated by prosecutors. According to Christopher Corns, 'the victim was in essence, the same as all other witnesses, and consequently was expected to give their evidence in court and return home'.¹¹⁹

¹¹³ Ibid 70.

¹¹⁴ Ibid 68–69.

¹¹⁵ Ibid 69.

¹¹⁶ Ibid.

¹¹⁷ Victorian Office of Public Prosecutions, 'The Pursuit of Justice: 25 Years of the DPP in Victoria' (Victorian Department of Justice, 2008).

¹¹⁸ Noting that victims retain the ability to commence private prosecutions, although this right is rarely exercised.

¹¹⁹ Corns, above n 29, 260.

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- 50 There has been a series of reforms across all Australian jurisdictions aimed at improving victims' experiences of the criminal trial process.¹²⁰ For more information on victims' experiences in the criminal justice system, see *The Role of Victims in the Criminal Trial Process: Information Paper 2: Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences?* While the nature of these reforms, and their success (or otherwise), will be canvassed in more detail in the Commission's forthcoming consultation paper, it suffices to note for this information paper that such reforms have somewhat altered the nature of the relationship between the prosecutor and the victim. Specifically, prosecutors in all Australian jurisdictions, except the Commonwealth, now owe certain professional obligations to victims, which include: ensuring the victim is treated with dignity and respect; consultation; referral to support services; and the provision of information about court processes and victim impact statements.¹²¹
- 51 In Victoria, these obligations are contained in the *Victims Charter Act 2006 (Vic)*,¹²² the *Public Prosecutions Act 1994 (Vic)*,¹²³ and also in several published policies and guidelines, including most relevantly the *Director's Policy: Victims and Persons Adversely Affected by Crime*,¹²⁴ and the *Charter of Advocacy for Prosecuting or Defending Sexual Offence Cases*.¹²⁵ No Australian jurisdiction, including Victoria, gives victims enforceable rights against a prosecutor for failing to fulfill his or her obligations.¹²⁶
- 52 Despite the growing professional responsibilities that prosecutors have towards victims, the DPP is independent from victims and other criminal justice actors such as the police, the accused and corrections.¹²⁷ The independence of the DPP is inextricably linked to the obligation to act in the public interest. That is, on behalf of the community. In Victoria, the DPP has recently reiterated this position in the Director's Policy on Prosecutorial Ethics, which states: 'Prosecutors must act independently. Prosecutors represent the DPP, not the government, the police, the victim, or any other person. The DPP represents the Crown and acts in the public interest'.¹²⁸

¹²⁰ See for example, Corns, above n 29, 260; The Hon. Justice Geoffrey Flatman and Mirko Bagaric 'The Victim and the Prosecutor: The Relevance of Victims in Prosecution Decision Making' (2001) 6(2) *Deakin Law Review* 239, 238–239.

¹²¹ Corns, above n 29, 174, 267–268.

¹²² See in particular, *Victims Charter Act 2006 (Vic)* ss 6(1) (dignity and respect); s 7 (information regarding support services); s 11(1) (inform victim of support services); s 13(1) (advise victim regarding making a victim impact statement).

¹²³ *Public Prosecutions Act 1994 (Vic)*, s 24(c).

¹²⁴ Director of Public Prosecutions Victoria, *Director's Policy: Victims and Persons Adversely Affected by Crime* (January 2014).

¹²⁵ Victorian Government, *Charter of Advocacy for Prosecuting or Defending Sexual Offence Cases* (2013).

¹²⁶ See *Victims' Charter Act 2006 (Vic)*, s 22. See also Corns, above n 29, 265.

¹²⁷ Corns, above n 29, 174.

¹²⁸ Director of Public Prosecutions Victoria, *Director's Policy: Prosecutorial Ethics* (November 2014).

Conceptual underpinnings of the criminal justice system

- 53 What is ‘crime’? There is no simple answer to this question. As John Braithwaite has observed, ‘[c]rime is not a unidimensional construct. For this reason, one should not be overly optimistic about a general theory which sets out to explain all types of crime’.¹²⁹ Yet, the way in which crime is understood is inextricably linked to who is responsible for prosecuting crime and the relative place of the victim, the offender and society in the criminal justice system.¹³⁰
- 54 There are numerous theories about the meaning of crime from multiple disciplines. Crime is variously described as:
- simply what the law deems as criminal¹³¹
 - the ‘legal response to deviance over which the state has the dominant if not exclusive right of action’¹³²
 - conduct that ‘injures or threatens’ the common good¹³³
 - conduct that society finds inherently immoral¹³⁴
 - reflecting societal values about appropriate behaviour¹³⁵

¹²⁹ John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989) 1.

¹³⁰ Leslie Sebba, *Third Parties: Victims in the Criminal Justice System* (Ohio State University Press, 1996) 135 (‘Thus classifications that differentiate between criminal and civil law...are relevant in the present context, insofar as they involve various principles governing the relationships between offender and victim, offender and society, and society and victim’); Sandra E Marshall, ‘Victims of Crime: their Station and its Duties’ (2004) 7(2) *Critical Review of International Social and Political Philosophy* 104, 104–105, and 108 (describing the increasing rights claimed by victims ‘raises crucial questions about the way we think of the nature of the crime and the way we characterise the relationship between individual citizens and between citizens and the state’ and ‘the nature of the wrong done to the victims is crucial in determining their status’); Matt Matravers, ‘The Victim, the State, and Civil Society’ in Anthony Bottoms and Julian V Roberts, *Hearing the Victim: Adversarial Justice, Crime Victims and the State* (Willan Publishing, 2010) 2 (arguing that proposals to change the role of the victim in the criminal trial process should be evaluated ‘by asking about the relative position of the parties involved in criminal justice, where those parties include the victim, the offender, the State and civil society’).

¹³¹ Some legal theorists posit a narrow, legalistic definition, arguing that a crime is conduct that can be subject to criminal punishment following criminal proceedings. See Glanville Williams, ‘The Definition of Crime’ (1955) 8(1) *Current Legal Problems* 107; Andrew Ashworth and Lucia Zedner, ‘Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions’ (2008) 2 *Criminal Law and Philosophy* 21, 22. See also Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 2nd ed, 2005) 6 (pointing out that crime can be defined ‘by reference to the procedure adopted – public prosecutor, conviction and sentence’, rather than by reference to any inherent wrongful quality).

¹³² Celia Wells and Oliver Quick, *Lacey, Wells and Quick Reconstructing Criminal Law* (Cambridge University Press, 2010) 7.

¹³³ S E Marshall and R A Duff, ‘Criminalization and Sharing Wrongs’ (1998) 11 *Canadian Journal of Law and Jurisprudence* 7, 12.

¹³⁴ Lucia Zedner, *Criminal Justice* (Oxford University Press, 2004) 47.

¹³⁵ Wells et al, above n 132. Hulsman, L ‘Critical Criminology and the Concept of Crime’ (1986) 10 *Contemporary Crises* 63–80, 71, cited in Zedner, L *Criminal Justice* (Clarendon Law Series: Oxford University Press, 2004). As Zedner has noted, ‘[w]hat is theft in one

- a tool of governance¹³⁶
- a way to ensure public safety¹³⁷.

55 While there are important differences between these theories, a common theme is evident: crime is something more than a wrong against an individual—it has some sort of public or communal element.¹³⁸

56 It generally follows from the understanding of crimes as having a public dimension, that the state prosecutes offences on behalf of the public. According to Sandra Marshall and Antony Duff:

wrongs done to individual members of the community are then wrongs against the whole community—injuries to a common or shared, not merely to an individual good ... We can from this perspective begin to see... why the community should bring the case 'on behalf of' the individual victim—rather than leaving her to bring it for herself.¹³⁹

57 Ultimately, the meaning of crime and the corresponding public form of prosecution are tied more broadly to the relationship between citizens and state.¹⁴⁰

58 Liberal political theory, which dominates theories of criminal justice, proposes that the state's monopoly over the criminal jurisdiction, which includes crime, prosecution and punishment, is a result of the 'social contract' between individuals and the state.¹⁴¹ Part of the social contract is a compact between the state and the individual in which the state undertakes to regulate society, including making rules about crime and punishment, so as to protect society's individual members.¹⁴² In accordance with this function, the state also provides the institutions—the police, prosecutors and courts—to prosecute those who

society is legitimate appropriation in another; what is assisted suicide in one is euthanasia in another; what is child murder in one is lawful abortion in another...' Zedner, above n 134, 40.

¹³⁶ Jo Simon, *Governing Through Crime: Criminal Law and the Reshaping of American Government 1965–2000* (New York: Oxford University Press) cited by Zedner above n 134, 47.

¹³⁷ Wells and Quick, above n 132, 6.

¹³⁸ Marshall, above n 130, 110. Antony Duff, *Punishment, Communication and Community* (Oxford University Press, 2001) 63. Duff et al, above n 49, 214–215; Matravers, above n 130, 1. See also Claes Lernstedt, 'Victim and Society: Sharing Wrongs, but in which Roles?' (2014) 8 *Criminal Law and Philosophy* 187, 195–196 ('the offender is punished primarily for having broken the law, having challenged the norm (or even for having challenged the norm system of criminal law), and he or she has done this by assaulting [the victim]... It follows that victims should be understood as 'representing 'us'' (emphasis in original).

¹³⁹ Marshall and Duff, above n 133, 20.

¹⁴⁰ Matravers, above n 130, 3–4.

¹⁴¹ Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5th ed, 2010) 74–75; Neil MacCormick and David Garland, 'Sovereign States and Vengeful Victims: The Problem of the Right to Punish' in Andrew Ashworth and Martin Wasik, *Fundamentals of Sentencing Theory* (Clarendon Press, 1998) 18.

¹⁴² Ashworth, above n 141, 74–75; MacCormick and Garland, above n 141, 11, 17.

break the rules set by the state on behalf of the community.¹⁴³ It is this relationship between state and individual which is generally understood to underpin the state's role (and the victim's relative absence) in the prosecution of offences today.

- 59 An alternative, and less commonly advanced, explanation for the state's role in administering the criminal justice system derives from the state's responsibility to 'displace individual revenge and retaliation by maintaining a social practice that constitutes an independent and authoritative response to crime'.¹⁴⁴ This justification assumes the state is the repository of rule-of-law values, objectivity and rationality, and better placed than victims to deliver humane and impartial justice.¹⁴⁵

The purpose of the criminal trial process

- 60 It has been said that the 'general justifying aim' of the criminal justice system is to control crime by detecting, convicting and sentencing the guilty.¹⁴⁶ It follows that the purpose of the criminal trial process is instrumental; it is a means to establish that the accused committed the crime charged, so that punishment can lawfully be imposed.¹⁴⁷
- 61 Treating the criminal trial process as instrumental, as simply the means by which lawful punishment can be imposed, is the dominant approach in the academic literature. The following description given by Andrew Ashworth is illustrative: '[t]he purpose of the trial is to have an examination, by a court sitting in public, of the admissible evidence brought by the prosecution and defence, in order to decide whether the defendant did the act charged and, if so, was at fault for doing it'.¹⁴⁸
- 62 One of the few departures from this approach can be found in *The Trial on Trial*, by Duff et al. In this book, the authors acknowledge that an obvious and central aim of the trial throughout its history has been to establish whether the accused committed the offence, and that the trial process operates as the link between the criminal and the penal law, to facilitate the core aim of the criminal justice system to punish offenders. However, their argument is that there is also an intrinsic and not just instrumental worth in the trial process itself; that the search for the 'truth'¹⁴⁹ or otherwise of guilt has an inherent

¹⁴³ Ashworth, above n 141.

¹⁴⁴ Ashworth, above n 141, 75; John Gardner, 'Crime: in Proportion and Perspective' in Andrew Ashworth and Martin Wasik, *Fundamentals of Sentencing Theory* (Clarendon Press, 1998) 31, 31–33, 49–52.

¹⁴⁵ Ashworth, above n 141, 75; Gardner, above n 144, 35–36.

¹⁴⁶ Andrew Ashworth, 'Concepts of Criminal Justice' (1979) *Criminal Law Review* 412, 412, cited with approval in Lord Justice Auld, *Review of the Criminal Courts of England and Wales: Report* (The Stationery Office, 2001).

¹⁴⁷ Duff et al, above n 49, 4–5. Herbert Packer, 'Two Models of the Criminal Process' (1964) 113:1 *University of Pennsylvania Law Review* 1.

¹⁴⁸ Ashworth, above n 141, 22.

¹⁴⁹ It is highly contested whether the purpose of the criminal trial is to discover the 'truth' as to the guilt of an accused. Some argue that the trial is not about the truth as much as it is about settling disputes; others argue that the processes of the trial preclude a

declarative value. For the authors, a verdict of guilty means more than simply liability for punishment; attached to it is condemnation for wrongdoing, and fair procedures give a legitimacy to a verdict which allows the community to 'know' rather than 'believe' the guilt or otherwise of the accused. In this way the criminal trial process provides a forum to publicly call to account people accused of committing public wrongs, and to have those who are guilty answer for their wrongs.¹⁵⁰

- 63 The dominant understanding of the trial process as a means to arrive at the lawful imposition of punishment leads most writers who consider the purposes of the criminal justice system 'inevitably' towards a focus on the purposes of sentencing.¹⁵¹
- 64 The dominant theories or purposes of punishment are as follows:
- Retribution: to penalise the offender in a way that is proportionate to the harm caused and the blameworthiness of the offender.¹⁵²
 - Deterrence: to deter the individual offender from committing another offence (specific deterrence), and the general public from committing the kind of offence that is the subject of the punishment (general deterrence).¹⁵³
 - Rehabilitation: to address any socio-economic, physiological or psychological factors which contributed to the person committing that offence.¹⁵⁴
 - Incapacitation: to protect the community from that offender committing further offences.¹⁵⁵
 - Denunciation: to reinforce important social norms by denouncing, condemning, or censuring the type of conduct engaged in by the offender.¹⁵⁶
- 65 Deterrence, rehabilitation, incapacitation and denunciation are all utilitarian theories of punishment (or criminal justice).¹⁵⁷ That is, these purposes of punishment are justified as

search for the truth, it is instead a process of evidentiary proof of particular allegations. For citations of academic work in this area, see Duff et al, above n 49, 65, and fn 8, 9, 10 and 11.

¹⁵⁰ Ibid 305.

¹⁵¹ Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 2nd ed, 2005) 18. See also Leslie Sebba, 'The Victim's Role in the Penal Process: A Theoretical Orientation' (1982) 30(2) *The American Journal of Comparative Law* 217, 229 (arguing that in determining the role of the victims in a trial, 'an eye must be cast towards the outcome of these proceedings').

¹⁵² Bronitt and McSherry, above n 151, 19.

¹⁵³ Bronitt and McSherry, above n 151, 20; Ashworth, above n 141, 78–79.

¹⁵⁴ Bronitt and McSherry, above n 151, 22–23; Ashworth, above n 141, 86–87.

¹⁵⁵ Bronitt and McSherry, above n 151, 22–23; Ashworth, above n 141, 84.

¹⁵⁶ Richard S Frase, 'Punishment Purposes' (2005) 58(1) *Stanford Law Review* 67, 72; Ronald Rychak, 'Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment' (1990–1991) 65 *Tulane Law Review* 299, 331–332; *Sentencing Act 1991* (Vic), s 5(1).

¹⁵⁷ Zedner, above n 134, 89–101; Frase, above n 156, 70–71.

benefiting the common good, which is defined in this context as the prevention of further offending, either by the offender or others.¹⁵⁸

- 66 In contrast, punishment as retribution is not justified as a means to secure the common good, but as an end in itself.¹⁵⁹ It is therefore often characterised as ‘non-utilitarian’.¹⁶⁰ In retributive theories, punishment is not directed towards a broader purpose, but rather aims to ensure the offender receives their ‘just deserts’. Most retributive theories see punishment as exacted on behalf of the community as a whole, not on behalf of the individual who was the victim of the offence.¹⁶¹
- 67 As Leslie Sebba notes, ‘the recognised objectives of punishment in modern times have not directly been concerned with the victim, but have primarily been concerned with society as a whole, on the one hand, and the offender on the other’.¹⁶² It is only comparatively recently that countries such as Australia have placed greater emphasis on the principles of restoration and reparation as purposes of sentencing, arguably reflecting the ‘increasing recognition of the rights and needs of the victims of crime’.¹⁶³ According to Ashworth, fundamental to restorative theories of criminal justice is the notion ‘that justice to victims should become a central goal of the criminal justice system and of sentencing’.¹⁶⁴
- 68 Whether the trial process is intended to serve a purpose specific to the victim is generally not explored in the academic literature,¹⁶⁵ despite a large body of evidence focusing on what victims seek from the criminal justice process, such as restoration, validation and certain therapeutic benefits. One of the few scholars to specifically do so is Kirchengast, who has written a victim-oriented account of the development of criminal law and the common law criminal justice system.¹⁶⁶
- 69 Kirchengast argues that dominant theories of criminal justice focus on the state as the primary authority in criminal justice institutions, and fail to acknowledge the role of the victim in shaping the institution of the state in the first instance.¹⁶⁷ Kirchengast’s argument

¹⁵⁸ Flatman and Bagaric, above n 120, 246; Zedner, above n 134, 90–91; Frase, above n 156, 70.

¹⁵⁹ Frase, above n 156, 73.

¹⁶⁰ Ibid.

¹⁶¹ Flatman, above n 158.

¹⁶² Sebba, above n 151, 229. See also Sandra E Marshall, ‘Victims of Crime: Their Station and its Duties’ (2004) 7(2) *Critical Review of International Social and Political Philosophy* 104, 104.

¹⁶³ Ashworth, above n 141, 92–93.

¹⁶⁴ Ashworth, above n 141, 93.

¹⁶⁵ For more information on victims of crime, see the Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Information Paper 2: Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences?* (2015).

¹⁶⁶ Kirchengast, above n 30.

¹⁶⁷ Kirchengast, above n 30, 157.

is that 'our understanding of the victim is therefore central to our understanding of the state and criminal law, and the rise of administrative structures which support these'.¹⁶⁸

Models of criminal justice

- 70 Is our criminal justice system designed only to protect society and impose punishment on behalf of the community? Should its purposes go beyond these goals? And what would such a criminal justice system look like?
- 71 These questions are important, because the underlying purposes of the criminal justice system tend to inform the relationships between the offender, the victim, the state and society.¹⁶⁹ One method used by academics to consider these questions is the development of a model or models of criminal justice.
- 72 This information paper describes several models of criminal justice, starting with Herbert Packer's seminal models of criminal justice.¹⁷⁰ The paper then considers models that are particularly concerned with the role of the victim. The models described below represent a subsection of a larger body of work.¹⁷¹
- 73 Packer's work, published in 1964, remains one of the best-known models of the criminal justice system and is often used as the starting point for further academic analysis.¹⁷² Packer argued that policies affecting the prosecution of crimes and the imposition of criminal sanctions should be made by reference to an informed understanding of the values underlying the criminal justice system.¹⁷³ Packer advanced two models of the criminal justice system—the 'crime control' model and the 'due process' model—as starting points for evaluating whether the imposition of criminal sanctions in any given situation is appropriate.¹⁷⁴
- 74 Under Packer's crime control model, the core goal of the criminal justice system is to repress crime.¹⁷⁵ This model allows for informal and extra-judicial fact finding processes and rules which tend towards a presumption of guilt.¹⁷⁶ Under his alternative due process model, the core value of the criminal justice system is the fair punishment of offenders,

¹⁶⁸ Ibid 158.

¹⁶⁹ Leslie Sebba, *Third Parties: Victims in the Criminal Justice System* (Ohio State University Press, 1996) 135; Sebba, above n 151, 231; Kent Roach, 'Four Models of the Criminal Process' (1999) 89(2) *Journal of Criminal Law* 671, 672.

¹⁷⁰ Herbert Packer, 'Two Models of the Criminal Process' (1964) 113(1) *University of Pennsylvania Law Review* 1.

¹⁷¹ See for example some of the models referred to in Jo-Anne Wemmers, 'Where Do They Belong? Giving Victims a Place in the Criminal Justice Process' (2009) 20 *Criminal Law Forum* 395.

¹⁷² For example, see Roach, above n 169; Sebba, above n 151.

¹⁷³ Packer, above n 170, 1–5.

¹⁷⁴ Ibid 9–23.

¹⁷⁵ Ibid 9.

¹⁷⁶ Ibid 10–11.

and the criminal justice system should be designed to protect the individual from the coercive power of the state.¹⁷⁷ This 'due process' model emphasises the need for formal, adjudicative and adversarial fact-finding processes and the presumption of innocence.¹⁷⁸

- 75 Packer's classic approach to models of the criminal process did not concern itself with the interests or role of the victim. Victims are completely absent and the focus is exclusively on the relationship between the accused and the state.¹⁷⁹
- 76 The 50 years since the publication of Packer's models has seen the place of victims in the criminal trial process subject to scrutiny and criticism. There is now a large body of empirical research questioning whether existing common law adversarial criminal justice systems serve the purposes and needs of victims of crime. In large part, the conclusion reached is that they do not.¹⁸⁰ Reflecting this, scholars have since advanced a range of models of criminal justice explicitly aimed at recasting the relationship between the victim, the accused and the state.
- 77 Nils Christie's seminal 1977 article 'Conflicts As Property'¹⁸¹ started with the observation:

The key element in a criminal proceeding is that the proceeding is converted from something between the concrete parties into a conflict between one of the parties and the state...the one party that is represented by the state, namely the victim, is so thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena...The victim has lost the case to the state.¹⁸²

- 78 Christie argued that taking the victim's conflict with the offender away from the victim (as has occurred in the common law adversarial trial process) has ramifications for the victim, for society and for the offender. The victim loses the opportunity to participate in his or her case and 'to come to know the offender'.¹⁸³ Thus, the offender remains an inhuman, stereotyped criminal, of whom the victim remains frightened.¹⁸⁴ The offender also loses, because he or she has no opportunity to be confronted by his or her behaviour and to receive the type of blame 'it would be hard to neutralise'.¹⁸⁵ Finally, Christie argued, society loses; with criminal trials dominated by lawyers and therefore carefully

¹⁷⁷ Ibid 16–17.

¹⁷⁸ Ibid.

¹⁷⁹ A point made by Roach, above n 169, 673–4, and Sebba, above n 151, 238.

¹⁸⁰ A significant portion of this research is outlined in the Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Information Paper 2: Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences?*(2015).

¹⁸¹ Nils Christie, 'Conflicts as Property' (1977) 17(1) *British Journal of Criminology* 1.

¹⁸² Ibid 3.

¹⁸³ Ibid 8.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid 8–9.

managed, there is little opportunity to discuss the appropriateness of certain conduct and what should and should not be criminalised.¹⁸⁶ Ultimately for Christie, considerable value flows to society and individuals (offenders and victims) from members of the community, including victims and offenders, engaging with and solving their own conflicts.

- 79 Christie proposed a new model of criminal justice based on a 'victim-oriented, neighbourhood court'.¹⁸⁷ In Christie's model the criminal process has four stages:
- the determination of guilt
 - a consideration of the impact on the victim, in particular how the offender can assist the victim, and what the victim then needs from the community and the state
 - punishment of the offender, which should only be that which is necessary to impose in addition to the restitution the offender pays to the victim
 - measures to rehabilitate the offender.¹⁸⁸
- 80 Christie proposed that the court operate with a 'blend of elements from civil and criminal courts, but with a strong emphasis on the civil side'.¹⁸⁹
- 81 In 1982, Sebba attempted a 'truly victim-oriented examination of the criminal process' and advanced two alternative theoretical approaches to the role of the victim.¹⁹⁰ Sebba's first theoretical approach, which he called the Adversary-Retribution Model, maintains the basic features of a common law trial, but emphasises the role of the victim in the trial and sentencing stages of the criminal justice process. Specifically, the trial tends more towards a confrontation between the accused and the victim ('the aggriever and the aggrieved') and the sentencing process aims to deliver a punishment which would 'fit the crime', where the victim's injuries are a key component in the sentencing decision.¹⁹¹
- 82 Sebba's second theoretical approach, called the Social Defence-Welfare Model, seeks to avoid the victim-offender confrontation, instead focusing on the needs of victims. Under this model, the criminal justice process aims to 'control the threat to society represented by the offender, whether by incapacitation or rehabilitation, and simultaneously to cater to the needs of the victim'.¹⁹² This model envisages the state standing 'in the shoes of the victim in prosecuting the offender', while also ensuring adequate compensation of the victim.¹⁹³

¹⁸⁶ Ibid.

¹⁸⁷ Ibid 10–12.

¹⁸⁸ Ibid 10–11.

¹⁸⁹ Ibid 11.

¹⁹⁰ Sebba, above n 151, 217–218.

¹⁹¹ Ibid 231.

¹⁹² Ibid 231–232.

¹⁹³ Ibid 232–233.

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- 83 Sebba noted that, at the time of writing, trends in approaches to the penal system pointed to the increased popularity of the Adversary-Retribution model.¹⁹⁴ However, Sebba acknowledged that such a model was unlikely to be appropriate for prosecuting offences involving severe forms of violence. In such cases, Sebba argued, the state should prosecute on behalf of the victim, and provide compensation for harm suffered, while for all other offences involving a victim the state should provide the machinery for the victim themselves to achieve their desired objectives, whether prosecution or compensation.¹⁹⁵
- 84 Seventeen years later, in 1999, Kent Roach developed a punitive model of victims' rights and a non-punitive model, both based on the idea that victims' needs and interests are important considerations that should underlie the values of the criminal justice system.¹⁹⁶ Under his punitive model, punishment remains central to the criminal justice system; however the interests and rights of victims are explicitly incorporated and balanced against those of the accused.¹⁹⁷ In this model, victims' rights are equal to those of the accused, and the accused's fair trial is subordinate to establishing the accused's factual guilt.¹⁹⁸ This model tends towards an emphasis on laws creating new criminal offences and greater punishment for offenders, and in this way bears some resemblance to Packer's crime control model.¹⁹⁹
- 85 Roach's non-punitive model of victims' rights emphasises crime prevention and restorative justice.²⁰⁰ Under this model, prosecution and punishment are not relied upon as the primary source of crime prevention. Instead, '[c]rime prevention can be achieved through social development to identify and provide services for those at risk of crime'.²⁰¹ The non-punitive model focuses on reducing harm through restorative justice and compensation.²⁰² Roach argued that the non-punitive victims' rights model, and in particular, its restorative justice elements, provides options which are likely to give greater effect to victims' needs and interests and provide victims, offenders and their respective families with the opportunity to respond constructively to crime.²⁰³
- 86 Writing in 2008, Jonathan Doak posited that the needs and interests of victims can not be properly accommodated 'without wholesale reform at a structural level, nor without

¹⁹⁴ Ibid 239–240.

¹⁹⁵ Ibid.

¹⁹⁶ Roach, above n 169, 671. Like Sebba, Roach has also criticised Packer's models for failing to consider the role of victims (see 673–674).

¹⁹⁷ Ibid 700–701.

¹⁹⁸ Ibid 702–703.

¹⁹⁹ Ibid 701–706.

²⁰⁰ Ibid 673.

²⁰¹ Ibid 708.

²⁰² Ibid 709.

²⁰³ Ibid 714.

a re-evaluation of the theoretical assumptions that underpin existing structures and institutions'.²⁰⁴ He advanced two alternative approaches which recognise victims' legitimate interests in the administration of the criminal justice system:

first, radically increasing the use of restorative justice initiatives...could result in a more inclusionary means of sentencing in the vast majority of cases where the defendant pleads guilty. The second potential reform, the adoption of an inquisitorial method for the adjudication of guilt, could result in our trial process becoming better geared to accommodating the rights of victims in those cases where the accused contests the prosecution case.²⁰⁵

- 87 Doak argued that inquisitorial processes allow victims to give their account in a more narrative fashion, emphasising the value of finding the truth, and allow the victim a status during the trial.²⁰⁶ He also argued that processes aimed at restorative justice allow victims to participate and give their own account in an informal setting, to seek reparation from the offender and to pursue the truth.²⁰⁷ Doak acknowledged that restorative approaches should not remove the ultimate decision-making power from the state, and require further development—in particular with respect to whether they should exist inside or outside the formal criminal justice system.²⁰⁸
- 88 In her 2009 paper, Jo-Anne Wemmers asked what the best design might be for a criminal justice system which is capable of accommodating victim participation.²⁰⁹ In light of empirical research on victims' needs, Wemmers specifically considered the possible applications of restorative justice.²¹⁰ To Wemmers, 'restorative justice' is 'an umbrella concept' which encompasses any process in which victims and offenders actively participate. She argued that restorative justice is based on the values and principles of respect for the dignity of the individual, victim and offender participation, and reparation.
- 89 Wemmers first considered 'abolitionist' approaches, which involve replacing the entire criminal justice system with restorative justice process that are outside of the conventional criminal justice system and where the victim and offender are responsible for the resolution of disputes involving crime.²¹¹ However, she rejected such approaches as being

²⁰⁴ Jonathan Doak, *Victim Rights, Human Rights and Criminal Justice* (Hart Publishing, 2008), 251.

²⁰⁵ *Ibid* 254.

²⁰⁶ *Ibid* 269–284.

²⁰⁷ *Ibid* 263–264.

²⁰⁸ *Ibid* 264.

²⁰⁹ Wemmers, above n 171.

²¹⁰ *Ibid* 401. Victims' needs are generally information, participation, support, reparation, protection and status. For more information on victims' needs, see the Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Information Paper 2: Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences?* (2015).

²¹¹ *Ibid* 403–405.

unlikely to satisfy the interests of the community in punishing crime, or victims' interests. She also rejected the 'add-on' approach, which involves grafting restorative justice processes onto the traditional criminal justice system. According to Wemmers, this approach does not actually provide recognition and respect to victims in the criminal trial process; rather, victims only have a place in the restorative justice programs outside of the ordinary system.²¹²

- 90 Instead, Wemmers favoured a third approach of giving victims a formal status in the system (although not necessarily making them an equal party), which she describes as bringing 'restorative justice values instead of restorative justice procedures' into the criminal justice system.²¹³ Wemmers gave the procedural structure of the International Criminal Court as an example of this third approach. The third information paper in this series of publications by the Commission is a case study of the International Criminal Court.

Conclusion

- 91 The Commission will publish a consultation paper in August 2015 inviting public submissions, and will then commence a period of public consultation on the reference. The Commission looks forward to public submissions following publication of the consultation paper.

²¹² Ibid 408.

²¹³ Ibid.

Information papers in this series by the Victorian Law Reform Commission

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Victorian
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Commission

The Role of Victims of Crime in the Criminal Trial Process

INFORMATION PAPER 1

History, Concepts and Theory

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