

Online submission to the Victorian Law Reform Commission

The role of victims of crime in the criminal trial process

Number	2
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Question 1	Should the role of victims in the criminal trial process be that of protected witnesses, participating witnesses or prosecuting witnesses?
Response	<p>First and foremost, the notion of enlisting a 'prosecution witness' is contrary to the presumption of innocence and should not be entertained. A victim of crime who chooses to testify should inherently be recognised as a neutral. Should the victim's testimony be advantageous for the prosecution's case, then be that as it may. As such, a victim who is a witness should not be referred to as a 'prosecution witness' except in the instance one is referring to which side is seeking to call upon that witness.</p> <p>A victim should be considered a participating witness within the criminal trial system. A witness should be allowed to present his or her views and concerns at one or more stages of the proceedings, usually through a lawyer, and subject to leave from the presiding magistrate or judge pre-trial. For instance, during the trial stage a legal representative might be permitted, on behalf of participating victim(s), to make oral and written submissions, call witnesses to testify, tender other evidence, and examine and cross-examine witnesses.</p>
Question 2	Could victims have different roles at different stages of the trial?
Response	<p>As stated above, victims should be allowed to make submissions, tender evidence, etc. This right should extend to all stages of the trial, including the pre-trial and sentencing stages. Submissions made during the pre-trial stage could potentially prevent a trial being heard, by either persuading the defendant to plead guilty or demonstrating to the prosecuting authority the unlikelihood of securing a conviction. Similarly, evidence provided by the victim during the sentencing stage would allow for a more complete picture of the subjective circumstances which relate to the case.</p>

Question 3	If changes to attitudes and behaviour are needed to achieve the intent of legislative reform, how might those changes be achieved?
Response	No response
The Role of Victims	
Question 4	Should victims have a greater role in the decision to continue or discontinue a prosecution?
Response	<p>Victims should be given a greater role in the decision to continue or discontinue a prosecution.</p> <p>Firstly, a large number of offences committed involve the offender's family and close friends. While it may be of the opinion of the state authority that the individual should be prosecuted, those involved, who are most likely witnesses in the matter, would disagree with prosecuting officials. This scenario causes difficulties for the state, the offender, and the offender's loved ones.</p> <p>Secondly, a victim's testimony is often the primary piece of evidence at trial in securing a conviction. However, the victim may be uncomfortable providing this testimony for numerous reasons. Given the hardship this puts the victim through, the victim should be given more autonomy in choosing to discontinue a prosecution.</p>
Question 5	If a victim wants to withdraw their complaint, should this determine whether the prosecution continues?
Response	No response
Question 6	Should a victim be able to require a prosecution to proceed where the DPP decides it should be discontinued?
Response	A victim should not be able to require a prosecution to proceed if the DPP decides it should be discontinued. Typically, the DPP will not choose to discontinue a prosecution without good reason, be it resource related or on a legal basis. Whatever the case, the DPP would be far more equipped to make a rational decision as to the prosecution's viability. At the most, the DPP should be required to disclose the reason for the discontinuation to the victim should they wish to be informed.
Question 7	Should victims have a greater role in the decision to accept a plea of guilty after plea negotiations?
Response	As discussed earlier, a trial can force the victim to endure significant hardship regardless of the need for that victim to appear as a witness. For this reason, the victim's wish for the DPP to accept a guilty plea should be given significant weight. This would be in addition to the other reasons to accept a guilty plea (e.g. efficiency, guarantee of conviction, etc.)
Consultation	
Question 8	Is there adequate consultation with victims before a decision is made to continue with charges, discontinue a prosecution or

	accept a plea of guilty after plea negotiations? If not, what additional consultation do victims require?
Response	No response
Question 9	If the prosecution fails to consult with victims about a decision to discontinue a prosecution, or to accept a plea of guilty after plea negotiations, should this attract consequences? If so, what should those consequences be?
Response	No response
Question 10	Should victims be given the opportunity to access legal advice or representation during any consultation with the prosecution?
Response	As discussed in response to question 1, a victim should be able to make an appearance at various stages of the criminal trial process. This would typically be done through a legal representative in order to ensure the safety of the victim. To this end, a victim should be given the right to access legal advice.
Review of decisions	
Question 11	11 Should there be a way to review decisions made by the DPP or Crown Prosecutor to discontinue a prosecution or accept a plea after plea negotiations? If so, what mechanism might be used?
Response	No response
Alternative procedures	
Question 12	Should victims be able to pursue restorative justice or other alternative processes instead of, or at any point during, a traditional prosecution? Why, or why not?
Response	<p>A restorative justice system should be open to victims. Such a process would offer multiple benefits, some of which are listed below. It should be noted separately that implementing such a process would give more autonomy to the victim, avoiding the potential disagreements which could arise in the scenario above (DPP and victim disagreeing on whether to prosecute, continue/discontinue prosecution).</p> <ul style="list-style-type: none"> • Re-evaluate crime, framing the offence as one with consequences for the victim rather than simply being a crime against the state • gives more autonomy to the victim(s), improving public confidence in the criminal justice system • allows for the efficacy of the justice system to be measured by reparation, rather than retribution • recognises the role of the community in responding and reducing crime as opposed to leaving the problem of crime to the government alone

Consultation	
Question 13	Should the prosecution be required to consult with victims before taking a position on a summary jurisdiction application or an application to cross-examine a witness, including the victim?
Response	No response
Question 14	Are measures required to ensure that the prosecution fulfils consultation obligations?
Response	No response
The role of the victim in the proceedings	
Question 15	Should victims have a role in relation to applications for summary jurisdiction or applications to cross-examine witnesses at a committal hearing?
Response	No response
Question 16	Should victims have a role during the committal hearing? If so, what should this role be?
Response	No response
Question 17	Should victims' views be a relevant factor in the magistrate's determination of an application to cross-examine the victim, or other witnesses? If so, how might victims' views be communicated to the magistrate?
Response	<p>A victim's view in regards to testifying should always be taken into account. It is virtually impossible for outsiders, a magistrate included, to understand the difficult a victim would face as a witness in a criminal trial.</p> <p>As discussed in the response to question 1, a victim should be allowed to be represented in various stages of the trial process by a legal representative. This representative should be allowed and even encouraged to communicate their client's views to the magistrate regarding any pertinent matters.</p>
Protected-witness measures	
Question 18	Should the prohibition on child and cognitively impaired victims giving evidence at committal hearings in sexual offence matters be extended to all, or certain other, victims? If so, what criteria should this be based on?
Response	No response
Question 19	Should the evidence of victims at committal hearings be video-recorded so that it can be played at the trial instead of victims giving oral evidence?
Response	Evidence given by victims at committal hearings should be video-recorded to avoid the need for the victim to be cross examined again in case the victim feels uncomfortable testifying a second time. However, parties should be able to call upon witnesses should they wish to investigate a matter not addressed at committal, subject to leave of the court.

Question 20	Should cross-examination of victims and other witnesses at committal hearings be replaced by earlier transfer of serious indictable offences to superior courts, with the examination of witnesses taking place in advance of the trial and before a trial judge?
Response	No response
Role of victims – confidential communications	
Question 21	Are victims exercising their right to appear in relation to confidential communications applications? If not, why not and how might that be addressed?
Response	No response
Question 22	Having regard to the practices in other jurisdictions, should victims have a greater role in pre-trial proceedings regarding confidential communications? Should the types of communications and the offences these proceedings relate to be expanded?
Response	No response
Role of victims – pre-trial proceedings generally	
Question 23	Should victims have a role in other pre-trial proceedings in which they have an interest? If so, what should be the test for determining whether victims have an interest?
Response	No response
Question 24	If victims are given a greater role in pre-trial proceedings, should disclosure obligations be imposed on victims? What other obligations might be imposed?
Response	No response
Question 25	How might any role for victims in pre-trial proceedings impact on or relate to the role of victims during the jury trial?
Response	No response
Question 26	If victims are to have a participating-witness or prosecuting-witness role, should the state provide legal representation for victims?
Response	No response
Pre-trial restorative justices procedures	
Question 27	Should restorative justice procedures be available in the pre-trial phase of proceedings? If so, should any limits be placed on the use of such procedures?
Response	No response
Protective measures	
Question 28	Are the protective procedures for the taking of evidence from vulnerable victims appropriate and effective?
Response	No response

Question 29	Should the current protective measures for vulnerable witnesses be extended to other categories of victim, or to victims of other types of offence?
Response	No response
Question 30	Are the existing evidentiary provisions being used, or enforced by judges, to prevent inappropriate questioning or to allow victims to give evidence in narrative form? Are there any further evidentiary reforms which might reduce victim retraumatisation?
Response	No response
Question 31	Should Victoria introduce an intermediary scheme? If so, for which victims? What functions should an intermediary perform?
Response	No response
Participatory and prosecutorial roles of the victims	
Question 32	Should victims be able to participate during trial proceedings? If so, how and when might this participation be exercised? Who should provide representation?
Response	No response
Question 33	Could victims be given a participatory or prosecuting role in Victoria similar to that provided for by the victim participation scheme of the International Criminal Court?
Response	No response
Question 34	Are there aspects of inquisitorial trial procedures which could be adopted in Victoria?
Response	No response
The victim's role in sentencing and the purposes of sentencing	
Question 35	Should the victim have a greater role in sentencing? If so, what should that role be?
Response	No response
Question 36	Should the purposes of sentencing explicitly include the needs and interests of victims?
Response	The purposes of sentencing should explicitly include the needs and interests of victims. The purposes such a factor would seek to achieve is already being met through victim impact statements
Victim impact statements	
Question 37	Should further limits be placed on the publication and distribution of victim impact statements?
Response	Broader groups of victims should be able to make victim impact statements. While a standing type nexus would need to be established, it would make little sense not to include the impact statements of other parties considered at slightly greater length to be victims.

Question 38	Should a broader group of victims be permitted to make victim impact statements?
Response	No response
Question 39	Should community impact statements be introduced?
Response	No response
Question 40	Should victims be permitted to make submissions in relation to sentencing?
Response	No response
Question 41	What should be the role of the prosecutor in preparing victim impact statements?
Response	Prosecutors should not be involved in the preparation of victim impact statements. The prosecution at the very least inadvertently sway the views of victims, and thus for integrity sake should not be involved in the process. Victims are able and even encouraged to seek their own legal representation for this and other reasons discussed.
Restorative justice sentencing procedures	
Question 42	Should restorative justice procedures be available as either an alternative or supplementary part of the sentencing process? If not, why not? If so, in what circumstances?
Response	No response
Question 43	43 Do processes set out in Part 4 of the <i>Sentencing Act 1991</i> (Vic) deliver on the aim of a swifter, less complex avenue for victim compensation? Are any changes needed to improve outcomes for victims?
Response	No response
Question 44	Should there be a statutory presumption in favour of compensation and restitution in all cases?
Response	No response
Question 45	How should the financial circumstances of an offender be taken into account under Part 4 of the <i>Sentencing Act 1991</i> (Vic)?
Response	No response
Question 46	Should a victim be given the power to commence appeal proceedings in relation to a restitution or compensation order?
Response	No response
Question 47	How should restitution and compensation orders be enforced?
Response	No response

Question 48	Is there a need for restorative justice pathways as an alternative, or in addition to, <i>Sentencing Act 1991</i> (Vic) orders and VOCAT?
Response	No response
Question 49	Are there offences not covered by the <i>Victims of Crime Assistance Act 1996</i> (Vic) that should be?
Response	No response
Question 50	Should a victim have standing to seek leave to commence an interlocutory appeal? If so, should this be limited to circumstances where the ruling impacts on the personal interests or rights of the victim?
Response	No response
Question 51	Should victims have a right to be consulted by the prosecution or to request that the DPP consider an appeal on any or all matters that the DPP is permitted to seek leave to appeal?
Response	No response
Question 52	Should a victim have standing to participate in an interlocutory appeal commenced by the prosecution or the defence? If so, how and in what circumstances?
Response	No response
Question 53	Should a victim have standing to participate in a post-verdict appeal commenced by the defence or prosecution?
Response	No response
Question 54	Should the victim impact statement scheme as it applies in sentencing hearings also apply when the Court of Appeal re-sentences an offender?
Response	No response
Question 55	Could the obligations set out in the Director of Public Prosecutions Victoria's <i>Director's Policy: Victims and Persons Adversely Affected by Crime</i> , particularly obligations to consult, be strengthened by incorporating them into the <i>Victims' Charter Act 2006</i> (Vic) or other Victorian legislation?
Response	No response
Question 56	Should the <i>Victims' Charter Act 2006</i> (Vic) be amended to include other rights, or broaden existing rights for victims?
Response	No response
Question 57	Should victims have a legal right to enforce some or all of the rights contained in the <i>Victims' Charter Act 2006</i> (Vic)? If so, how might this be achieved, and in what circumstances?
Response	No response
Question 58	Should there be a legislatively prescribed process for investigating and resolving complaints about breaches of victims' rights? If so, what might this process look like? Should the

	Victims of Crime Commissioner in Victoria have a role in complaints resolution relating to breaches of the <i>Victims' Charter Act 2006 (Vic)</i> ?
Response	No response
Question 59	What remedies should be available for breach of a victim's rights?
Response	No response
Question 60	Are there gaps in the provision of victim support services?
Response	No response
Question 61	How should victim support services be prioritised?
Response	No response
Question 62	How might the delivery of victim support services in Victoria be improved?
Response	No response
Question 63	Do victims need personalised legal advice and assistance? If so, how should such support be delivered?
Response	No response
Question 64	What role could the Victorian Victims of Crime Commissioner have in relation to victim support services?
Response	No response