

**Increasing Victims’ Participation in the Victorian Criminal Trial Process: Submission to the
Victorian Law Reform Commission
by Annalise Roberts & Miranda Escott-Burton
Griffith Law School, Griffith University**

Table of Contents

Summary of Submission	1
Outline of Submission	2
Role of the Victim	2
The Effects of Crime on Victims	5
Addressing the Harm Done to Victims	6
Reform of the Victim Impact Statement	8
- Formalised Process for Victim Impact Statement	9
- Role of Victim Contact Officer	9
- Sentencing Options	10
- Rights of the Accused	13
Conclusion	13
Bibliography	15

We commend the Victorian Law Reform Commission for undertaking this Inquiry and appreciate the opportunity to provide a submission. The Terms of Reference have outlined a number of important points for consideration. This submission will specifically address:

- point (f): the role of victims in the sentencing process and other trial outcomes; and
- point (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.

In responding to these two points, this submission will also touch on other points in the Terms of Reference.

SUMMARY OF SUBMISSION

The nature of crime is such that criminal acts affect victims to different degrees and in many different ways, regularly affecting both victims' physical and psychological health and oftentimes leaving them feeling powerless and vulnerable¹. Victims also report that they commonly experience financial detriment, whether that be directly, through property damage and medical expenses, or indirectly, through the after-effects of victimisation.² Despite the role that they play in being significantly affected by crime, victims do not play an active role in the criminal trial process, whereby the state intervenes to 'process' an offender through the criminal justice system³. This has led them to be labelled the 'forgotten persons' of a criminal trial.⁴ In order for the harm experienced by victims to be addressed - to help these marginalised members of society feel empowered and in control of their own lives - the criminal trial process must be reformed such that victims play an active role, without impeding the rights of individuals whose innocence or guilt is being determined by the courts.

Such reform should include amending the Victim Impact Statement ("Statement" or "VIS") to consist of two sections as follows:

- Section A: will take the form of the current Victim Impact Statement, giving a victim the opportunity to inform the sentencing court as to how a crime(s) has affected them. Victims will be assisted in completing this Statement by a Victim Contact Officer ("VCO").
- Section B: will contain a list of sentencing options provided by the *Sentencing Act 1991* (Vic) and will allow the victim to indicate any court order(s) they think should be made by placing a tick next to the particular order(s). For example, a victim may feel that the best way to keep themselves safe is to place the offender behind bars, and that they deserve compensation for property damaged during commission of the offence. In this instance a person would place a tick next to 'imprisonment' and 'compensation'.

¹ White, R. & Perrone, S., (2010). *Crime, Criminality & Criminal Justice*, Oxford University Press, Australia, p108.

² Cook, B., David, F. & Grant, A., (1999). *Victims' Needs, Victims' Rights: Policies and Programs For Victims of Crime in Australia*, Research and Public Policy, Series, No 19, Australian Institute of Criminology, Canberra.

³ White, R. & Perrone, S., (2010). *Crime, Criminality & Criminal Justice*, Oxford University Press, Australia, p7.

⁴ Jo-Anne Wemmers. 'Where do they belong? Giving victims a place in the criminal justice system. (2009) *Criminal Law Forum* 20 395.

A Victim Contact Officer should be a legally trained professional employed by the Department of Justice and Regulation. They will be assigned to a victim as soon as a person is identified as a victim. It will be the responsibility of a VCO to provide information on possible entitlements and legal assistance available, as well as directing them to victim support agencies. A VCO will be responsible for explaining the criminal trial process to the victim. Once an offender has been found guilty, the VCO will meet with the victim to discuss the Victim Impact Statement. At this point they will explain Section B of the Statement, which allows the victim to make a submission to the sentencing judge about possible sentencing orders which they consider would provide justice for themselves and the convicted offender. The VCO will need to advise the victim that their Statement is in no way determinative, as the sentencing judge holds the ultimate decision-making power. If a victim selects such orders as compensation or reparation from the list, the VCO will be responsible for assisting the victim to make the appropriate applications under the *Sentencing Act 1991* (Vic).

OUTLINE OF SUBMISSION

This submission is presented in four sections. The first section examines the existing passive role of the victim in the criminal trial process in Victoria. This includes a brief discussion of the historic role of the victim in the criminal trial, through to their current level of participation. The second section outlines the common effects of crime on victims. The third section aims to demonstrate the gap between the needs of victims as a consequence of their victimisation, and how these needs are currently being addressed by the Victorian government. The fourth and last section outlines a proposed model for reform, expanding on the above reform summary by highlighting that victims can in fact possess a right to suggest the sentence of their convicted perpetrator without impeding on the rights of accused and convicted persons.

ROLE OF THE VICTIM

A summary comparison of how victims historically and currently participate in the criminal justice system is necessary to demonstrating the priorities of the current criminal justice system in Victoria, and therefore how it marginalises victims.

The first step in considering the role of the victim within the Victorian criminal justice system is to define who can be considered a ‘victim.’ Section 3(1) *Victims’ Charter Act 2006* (Vic) defines a ‘victim’ as:

“any person who has suffered injury as a direct result of a criminal offence, whether or not the injury was reasonably foreseeable by the offender; or a family member of a person who has died as a direct result of a criminal offence against them; or if a victim is under 18yrs of age or incapable of managing their own affairs because of mental impairment. Injury is defined singularly or as a combination of actual physical bodily injury, mental illness or disorder, or an exacerbation of these, whether or not flowing from nervous shock, pregnancy, grief, distress or trauma, or other significant adverse effect, or loss or damage to property.”

Importantly, ‘criminal offence’ is defined as any offence or series of related offences committed at any time, whether or not a person has been accused or convicted of that offence that gave rise

to the injury suffered by the victim.⁵ The effect of the definition of ‘criminal offence’ is such that a person falling into the above category is not automatically excluded from coming under that definition because their perpetrator has not been identified, prosecuted or convicted. By acknowledging that an individual can be legally classed as a victim without their perpetrator being found or pleading guilty, the Victorian government is indicating that it seeks to acknowledge that victims of crime become participants in the criminal justice system from the point of victimisation.⁶ A contextual analysis of the historic role of the victim up until the present day is necessary to understanding why this is the case.

As observed by Gleeson CJ in *Doggett v The Queen*, and acknowledged by the Commission, the present-day Western criminal trial is a contest between the Prosecution, acting as representative of the state, and the accused.⁷ Legal capacity to determine whether to commence with criminal proceedings lies with the a Prosecutor employed under the Director of Public Prosecutions⁸, while the trial judge determines the appropriate sentence for an offender.⁹

It has been acknowledged by the Victorian Law Reform Commission that historically, this was not the case. Instead, the victim once played an active role in the criminal trial process by way of choice to bring an action as well as the mode of punishment (or retribution) if the low threshold of guilt was satisfied.¹⁰ Unfortunately, this opportunity to choose placed an onus on victims to prosecute and proceed with punishment¹¹, meaning that prosecutions were rarely brought, as they could only be conducted by fairly wealthy victims.¹² From the mid-1100s onwards, identification of this widespread problem lead the English Kings of the time - as representatives of the state - to maintain peace and the safety of their subjects through increased official involvement in the settlement of criminal disputes, in order to ensure subjects were not at the mercy of unscathed criminal offenders.¹³ Two main things were demonstrated by bringing under state jurisdiction control over prosecutions and state-sanctioned sentences: the former demonstrates that crime is now considered action against the state, and the latter demonstrates that the focus of rights is solely on individuals accused of crime, rather than a balance between individuals accused of crime and victims affected by crime.

Firstly, prosecutions have come to be deemed ‘public prosecutions’, whereby victims are now left side-lined from the trial process after focus shifted to determining the rights of the accused when

⁵ *Victims’ Charter Act 2006* (Vic), s3(1).

⁶ Victorian Law Reform Commission (2015). ‘The Role of Victims of Crime in the Criminal Trial Process: History, Concepts and Theory - Information Paper 1’, para [3].

⁷ 208 CLR 343.

⁸ Director of Public Prosecutions, Victoria (2014). *Director’s Policy: Prosecutorial Discretion*, para [3].

⁹ Director of Public Prosecutions, Victoria (2015). *Director’s Policy: The Crown’s Role on Plea and Sentence Hearings*, para [4].

¹⁰ Kirchengast, T. (2006). *The Victim in Criminal Law and Justice*, Palgarve Macmillian 60. O’Hara, E. A. & Robbins, M. M., (2009). *Using Criminal Punishment to Serve both Victims and Social Needs*, Law and Contemporary Problems, Vol. 72, No. 2, 199-217. Sanders, A. (2002). *Victim Participation In Criminal Justice*, Criminal Justice Matters, 49:1, 30-31, DOI: 10.1080/09627250208553497. 30.

¹¹ O’Hara, E. A. & Robbins, M. M., (2009). *Using Criminal Punishment to Serve both Victims and Social Needs*, Law and Contemporary Problems, Vol. 72, No. 2, 2.

¹² Sanders, A. (2002). *Victim Participation In Criminal Justice*, Criminal Justice Matters, 49:1, 30-31, DOI: 10.1080/09627250208553497. 30.

¹³ Kirchengast, T. (2006). *The Victim in Criminal Law and Justice*, Palgrave MacMillan, p25-26.

pitted against the power of the state. This was primarily through emergence of the employ of rational methods of proof for adjudication of criminal matters.¹⁴ The focus of the criminal trial process has shifted so far to that of the accused that not only do victims no longer hold the decision to prosecute, but their role has been confined to that of a witness.¹⁵ According to O'Hara, when a crime is committed, an offender commits two distinct wrongs: one against the victim, who is left "aggrieved and vulnerable", and the other against society by "engaging in conduct which violates social norms and thereby undermines others' sense of security".¹⁶ A prosecutor's dominant consideration is the latter: this is illustrated in the Victorian Director of Public Prosecution's policy on the considerations to be made by a prosecutor in exercising their discretion to prosecute.¹⁷ Specifically, a prosecutor, once satisfied of a "reasonable prospect of conviction", must make the dominant consideration as to whether a prosecution is required in the public interest, not in the interests of a victim(s).

Secondly, and most importantly, victims have been stripped of the right to decide the mode of punishment they believe a convicted perpetrator deserves, based on what they think constitutes justice for themselves and the perpetrator. Of course, such a transfer to what O'Hara refers to as a "state-centric system" has satisfied the objective of ensuring a fair trial for the accused, which in and of itself is a public interest.¹⁸ However, in focusing almost exclusively on the needs of the state and the accused, the current trial process excludes victims from having a say in how the perpetrator of crime against them ought to be sentenced, whether that be punitively or through rehabilitation, or both. This is despite the fact that victims are rendered a significant party to the criminal justice setting as soon as they are victimised. O'Hara argues that this "state-centric system" leaves victims' needs unsatisfied, explaining that an exclusive focus on the rights and needs of one - either the state or the victim - can "interfere with effective re-dress of the other"¹⁹.

Protection of citizens from criminal offenders and ensuring a fair trial for the accused are fundamental public interests which prosecutors, as objective legal parties who owe no lawyer-client duties, are uniquely positioned to uphold. However, in focusing almost exclusively on the needs of the state and the accused, the current trial process excludes victims from active participation in the criminal justice system. As such, it is reasonable to assert that providing victims with the ability to actively participate in the criminal trial process - for example by outlining to a sentencing judge what they would consider an appropriate sentence based on what they think constitutes justice for themselves and the perpetrator - while maintaining the operation of due process by not infringing on an accused's legal rights, would go a ways toward satisfying victims' needs.

¹⁴ Duff, A. *et al*, (2007). *The Trial on Trial: Towards a Normative Theory of the Criminal Trial* (Vol 3), Hart Publishing, p25.

¹⁵ Heather Strang and Lawrence Sherman. 'Repairing Harm: Victims and Restorative Justice' (2003). *Utah Law Review*, 1.

¹⁶ O'Hara, E. A. & Robbins, M. M., (2009). *Using Criminal Punishment to Serve both Victims and Social Needs*, Law and Contemporary Problems, Vol. 72, No. 2, 2.

¹⁷ Director of Public Prosecutions, Victoria (2014). *Director's Policy: Prosecutorial Discretion*, para [4].

¹⁸ Director of Public Prosecutions, Victoria (2014). *Director's Policy: Prosecutorial Discretion*, para [5].

¹⁹ O'Hara, E. A. & Robbins, M. M., (2009). *Using Criminal Punishment to Serve both Victims and Social Needs*, Law and Contemporary Problems, Vol. 72, No. 2, 2.

To understand why victims' needs are a valid consideration, the following section will outline the effects of crime on victims, as well as appropriate re-dress of those effects, which can be achieved by implementing the reforms proposed in this submission.

THE EFFECTS OF CRIME ON VICTIMS

This section will outline the common types of harm experienced by victims of crime, in order to highlight the needs of victims which are as yet not being addressed in the criminal court process.

In Victoria in 2013 the Australian Bureau of Statistics reported recorded direct victimisation rates to consist of 85 homicide victims, 4,369 sexual assault victims, 148 victims of kidnap, 2,608 victims of robbery, 45,122 victims of unlawful entry with intent, 12,518 motor vehicle theft victims and 180 victims of blackmail or extortion.²⁰ There is at the very least one person rendered a victim for every crime listed here. To put this in perspective, at least one in every 105 people was rendered a victim in Victoria in 2013. Shifting to the national level, a victimology compilation study published in 1999 by one of the foremost Australian Institute of Criminology victimologists, Bree Cook, states that in 1998, almost one in every 100 people was a victim of crime against the person, while over six in every 100 people was a victim of a property crime.²¹ These figures do not include the friends and family of victims, who are indirectly affected by their victimisation, albeit to a lesser degree.

In beginning the process of addressing victims' needs, the 1985 *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse* acknowledged the infinite effects of such crimes on victims by including them in their definition of what constitutes a victim of crime:

“Victims’ means any persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws.”²²

This Declaration also acknowledges that a person or their immediate family who fall into the above category by way of victimisation are not automatically excluded because a perpetrator has not been identified, apprehended, prosecuted or convicted of their crime(s). The difference between this all-inclusive definition and the definition currently employed under section 3(1) *Victims' Charter Act 2006* (Vic) is that injuries sustained as a result of victimisation, whether directly or indirectly, are not categorised as either physical or “mental illness or disorder”, but rather, acknowledges the myriad short-term and long-term effects of victimisation. It should also be noted that while neither definition distinguishes between primary and secondary victims, the latter definition is all-inclusive, and therefore does not need to distinguish between the two.

The Victorian Law Reform Commission has acknowledged that the effects of crime on victims can include shock, a loss of trust in society, guilt, physical injury, financial loss, psychological

²⁰ Australian Bureau of Statistics, *Recorded Crime Victims Australia*. July 2014. Cat No 4510.0. ABS Canberra.

²¹ Cook, B., David, F. & Grant, A., (1999). *Victims' Needs, Victims' Rights: Policies and Programs For Victims of Crime in Australia*, Research and Public Policy, Series, No 19, Australian Institute of Criminology, Canberra.

²² United Nations General Assembly (1985). A/RES/40/34 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Annexure 1.

injury, behavioural change and responses related to perceived risk of future victimisation²³. According to Achilles and Zehr, the most serious consequence of victimisation is that victims of crime suffer from a loss of autonomy, as they are rendered powerless during a crime and for long periods afterward²⁴. O'Hara *et al* adds that victims are also left vulnerable and aggrieved.²⁵ In reference to more serious crimes such as violent and sexual offences, victims of sexual assault can experience intense pain and terror during the crime, and ongoing fears, anxiety, post-traumatic stress disorder, feelings of self-blame, low self-esteem and suicidal ideation after the crime.²⁶ In the aftermath of victimisation, they may also experience disruptions in their close relationships; disruptions in relationships with their surrounding community; and financial losses such as loss of earnings and medical and counselling expenses. Family members of victims may also experience negative effects. According to Gale and Coupe, the evidence on victimology demonstrates that the effects of robbery on victims can include psychological distress, social dysfunction and fear of the incident re-occurring.²⁷

The above statistics indicate that the number of recorded crime victims is not low. Furthermore, the literature demonstrates that many victims of crime experience psychological and emotional distress on top of financial loss, and that serious common post-crime effects can include experiencing a sense of vulnerability and feelings of powerlessness or loss of autonomy.

ADDRESSING THE HARM DONE TO VICTIMS

This section firstly outlines how victims' needs are not currently being adequately addressed by the criminal trial process by providing an overview of the ways in which Victoria responds to its victims. Following this, a suggested model for reform will be introduced, which directly aims to re-dress the harm done to victims.

In an evaluative study of 33 publications regarding the needs of victims, ten Boom and Kuijpers argue that victims consider acknowledgement and the opportunity to provide input as necessary to recognising their status as not only victims, but parties to criminal proceedings.²⁸ Currently, victims can choose to provide input through their Victim Impact Statement. However, whilst the

²³ Joanne Shapland and Matthew Hall, 'What Do We Know About the Effects of Crime on Victims' (2007) 14. *International Review of Victimology* 175, 178; Diane Green and Naelys Diaz, 'Predictors of Emotional Stress in Crime Victims: Implications for Treatment' (2007) 7(3) *Brief Treatment and Crisis Intervention* cited in Victorian Law Reform Commission. *The Role of Victims in the Criminal Trial Process: Information Paper 2 Victims Who are Victims of Crime and What are Their Criminal Justice Needs and Experiences* (2015).

²⁴ Mark Achille and Howard Zehr. *Restorative Justice for Crime Victims: the Promise and the Challenge* in Godon Bazemore & Mara Schiff. *Restorative Community Justice: Repairing the Harm and Transforming Communities*. (2015)

²⁵ Erin Ann O'Hara and Maria Mayo Robbins. *Using Criminal Punishment to serve both Victims and Social Needs*. (2009). *Law and Contemporary Problems*, Vol. 72, No. 2. 199-217.

²⁶ Zoe Morrison. 'Caring about sexual assault: the effects of sexual assault on families, and the effects on victims/survivors of family responses to sexual assault' (2006). *Family Matters*, No. 76: 55-63.

²⁷ Julie-Anne Gale and Timothy Coupe. 'The behavioural, emotional and psychological effects of street robbery on victims' (2005) *International review of victimology*. 12 (1).

²⁸ Annemarie ten Boom and Karlijn F Kuijpers. 'Victims needs as basic human needs'. (2012) 2012; vol. 18, 2: 155-179 2.

opportunity to provide a Victim Impact Statement satisfies these two victim necessities, it does not offer opportunity for recompense for injury or loss.

According to Achilles and Zehr, victims consider that two main things are essential to their physical, psychological and financial recovery process. These include repayment for damages incurred and for the person who victimised them to be held accountable.²⁹ In order for these to be achieved, victims consider that telling their story to a sentencing judge is a necessity.

In a corrections setting, restorative justice processes such as youth and adult conferencing provide victims with an opportunity to articulate their needs, whereby they are given choices which aim to have the effect of a collective victim and offender empowerment.³⁰ Victims also expect to be given something akin to this opportunity in the criminal trial process. Chupp has acknowledged that by failing to provide victims with a distinct role in the criminal trial process, offenders have rarely had to face their victims.³¹ He explains that this has prevented offenders from gaining a full understanding of the harms they have perpetrated against their victims, whether known or unknown, or directly or indirectly. Providing victims with a distinct role would acknowledge their rights as stakeholders in the criminal trial setting, and their personal interests in achieving justice for themselves and their offenders.³²

In the civil trial setting, a plaintiff can bring an action against the person who aggrieved them, known as a defendant. A plaintiff makes a claim for a sum of money and the principles of civil liability determine whether the loss befalling them should or should not be shifted to the person whose actions affected them.³³ In almost all cases a finding of fault on the part of the defendant means that the aggrieved party will be awarded a sum of money, known as compensatory damages. In the case of personal injury, this will be for the purpose of covering the pecuniary consequences of a defendant's actions, such as medical expenses incurred or loss of wages, as well as non-pecuniary consequences such as pain and suffering.³⁴ Essentially, the practical aim of such tortious actions is to gain compensation to assist with a person's needs created by the defendant's actions, where a finding of fault has been made against a defendant. In doing so, society is recognising that one person can affect another person, and should be made restore the affected person as much as possible through a compensatory sum.

The civil trial setting is of course very different to criminal trials, in that civil actions aim to correct all types of civil wrongs from reneging on agreements in a contract to tortious negligence, whereby a civil defendant is oftentimes not considered to pose the same threat to society as does a person who has committed a crime such as serious assault. The seriousness of committing a criminal act

²⁹ Above n 23.

³⁰ Department of Communities, Queensland Government (2010). 'Youth Justice Conferencing: Restorative Justice in Practice', p10.

³¹ Chupp, Mark (1989). 'Mediation and criminal justice: Victims, offenders and community - Reconciliation procedures and rationale', Sage Publications, London.

³² White, Rob & Perrone, Santina (2010). 'Crime, Criminality and Criminal Justice', Oxford University Press, p121.

³³ Luntz, H. (2013). *Torts: Cases and Commentary - Chapter 1 Introduction: The Role of the Law of Torts* (7th ed.), LexisNexis, p59, [1.3.25].

³⁴ Luntz, H. (2013). *Torts: Cases and Commentary - Chapter 1 Introduction: The Role of the Law of Torts* (7th ed.), LexisNexis, p13, [1.1.20].

is reflected in the seriousness of its punishment (or rehabilitation, as the case may be), and the different orders handed down in criminal and civil trials reflect this. Nevertheless, in each setting, a judicial officer intervenes as adjudicator because an aggrieved person, whether a plaintiff or victim, or both, has suffered in some way. And yet, it is only standard procedure within the civil setting to hold a defendant liable to the person they have wronged for any damage they have caused. In fact, without a claim for damages, a civil trial falls short of being a legitimate claim.³⁵ In both cases, the aggrieved person may have suffered physically, psychologically, emotionally and financially, and yet reforms which allow Victorian victims to seek remedy through the award of a compensatory sum by way of a s85B Compensation Order in the criminal courts, are only relatively recent.³⁶ However, those who have had the opportunity to make application for and receive a s85B Compensation Order have reported that this 'ready access' to just compensation, without the rigours and expenses of pleadings and taxing interrogatories, demonstrates a shift in Victorian legislation to regard protection of the dignity of victims as necessary to the criminal trial process.³⁷

Lastly, Victim Impact Statements are an important aspect of provision of the opportunity for victims to voice their experiences and participate in the criminal trial process. These will be discussed in detail in the next section.

REFORM OF THE VICTIM IMPACT STATEMENT

Given the above consideration of victims' needs in Victoria, this section will provide a suggested model for reform. It will be shown that this suggested model not only provides benefit to victims through increasing their participation in the criminal trial process, but importantly, it does not infringe the rights of accused persons or convicted offenders.

Section 8K of the *Sentencing Act 1991* (Vic) enables a victim of an offence to make a Victim Impact Statement to the court for the purpose of assisting the court in determining the appropriate sentence in circumstances where a court finds a person guilty of an offence(s).³⁸ It is proposed that this Statement be broken into two sections, Section A and Section B. Section A will follow the format of the current Victim Impact Statement, allowing a victim to explain how a crime has affected them by making reference to such issues as financial loss; physical injury; property damage or loss; and emotional or psychological trauma suffered as a direct result of the crime(s).

The new section of the Victim Impact Statement, Section B, should contain a fixed list of sentencing outcomes. A victim can tick the the box next to any outcome they consider appropriate in achieving justice for themselves and punishing or rehabilitating the offender. This ticked list should be presented as part of the reading of the Victim Impact Statement in court by whomever a victim nominates, and can be taken into consideration a sentencing judge, whose aim is to determine a sentencing outcome based on all of the relevant factors in a case.

³⁵ Luntz, H. (2013). *Torts: Cases and Commentary - Chapter 1 Introduction: The Role of the Law of Torts* (7th ed.), LexisNexis, p13, [1.1.21].

³⁶ 2000.

³⁷ Freckleton, I., 'Compensation Applications Require a Watching Brief' (2009), UMonashLRS 5.

³⁸ *Sentencing Act 1991* (Vic), section 8K.

Formalised Process for Victim Impact Statement

It has been suggested that VISs should be prepared by professionally trained persons in consultation with the victim. This measure would inject impartiality, objectivity, the use of appropriate language and the restriction of the Statement to the provable facts, all of which are vital to ensuring fairness in the sentencing process. However, a criticism of this approach (ie. not implemented anywhere yet) is that it takes away the right of a victim to write their own statement, and in doing so, express their views and perspective on what took place when and after they were victimised.[s5] As such, the following model combines a victim's right to prepare their own VIS with the impartiality & legal knowledge of a proposed Victim Contact Officer. Such a combination would uphold a convicted offender's rights and manifest a victim's rights.

Role of Victim Contact Officer

The model for this role of Victim Contact Officer is reflected in the objective behind a number of recommendations made by the 1981 *South Australian Report of the Committee of Inquiry on Victims of Crime*. This Committee was established to review the needs of crime victims and comment on whether the South Australian criminal justice system's response to those identified needs was the most effective it could be. Among other things, a recommendation which was later manifested in the 1985 *Declaration on Victims' Rights* stated that, "prior to sentence, the court should be advised as a matter of routine of the effects of the crime upon the victim", in particular, any issues of "physical, economic, or mental well-being" which were relevant to the determination of sentence. One of the proposals implemented included the engagement of a Victim Contact Officer at all major police stations to answer queries from victims. This was in accordance with Principles 5, 6, 7, 10 and 11 of the 14 Principles of the *Declaration on Victims' Rights*, which concern the provision of information on a victim's responsibility to serve as a prosecution witness and the provision of information regarding the victim's injury, loss or damage to any sentencing court; as well as information on prospects of compensation. In particular, Principle 14 provides that a victim shall "be entitled to have the full effects of the crime upon them made known to the sentencing court either by the prosecutor or by information contained in a victim impact statement, including... any other information that may aid the court in sentencing, including the restitution and compensation needs of the victim".

In furthering this principle which gave rise to Victim Impact Statements in South Australia, it is considered that a similar role fulfilled by individuals with legal training would aid in formalisation of the Victim Impact Statement process in Victoria. In particular, one criticism of these Statements is that they may result in a substitution of objective approaches by the court in considering a crime which has taken place, for the victim's subjective experience of their victimisation. Reducing this possibility through the vetting input of a Victim Contact Officer would reduce the likelihood of traumatic cross-examinations which some victims are required to endure.³⁹ To streamline the process for victims and reduce the chance of cross-examination, it would be beneficial that a VCO is under an obligation to provide clear, timely and consistent information about possible entitlements and legal assistance available to victims and persons adversely affected by crime,

³⁹ White, R. & Perrone, S., (2010). *Crime, Criminality & Criminal Justice*, Oxford University Press, Australia, p119.

operating similarly to the obligation imposed on the Office of Public Prosecutions by section 7(a) *Victims' Charter Act 2006* (Vic). This would include, but not be limited to, section 85B Compensation Orders⁴⁰ and financial assistance from the Victims of Crime Assistance Tribunal.

Sentencing Options

A Victim Contact Officer should take a victim through each of the possible sentencing outcomes, which are found in the *Sentencing Act 1991* (Vic), and include the following:

Imprisonment	
Drug Treatment Order or Residential Treatment Order ⁴¹	Available in the Drug Court Division within the Magistrate's Court of Victoria for mentally ill or drug-dependent offenders.
Youth Justice Centre or Youth Residential Centre ⁴²	Only available to offenders under the age of 21.
Community Correction Order ⁴³	<p>In higher courts: maximum length of a Community Correction Order is the maximum term of imprisonment for the offence OR two years, whichever is greater.</p> <p>In Magistrate's Court: lasts two years per offence, up to a maximum of five years.⁴⁴</p> <p>To be eligible, an offender must have been found or plead guilty to an offence punishable by more than five penalty units⁴⁵, and must consent to the Order⁴⁶.</p> <p>Each Order will attach at least one compulsory Order, including:</p> <ul style="list-style-type: none"> - Unpaid community work to a maximum of 600 hours.⁴⁷ - Treatment and rehabilitation.⁴⁸ - Supervision.⁴⁹ - Non-Association Order, where the offender must not associate with

⁴⁰ *Sentencing Act 1991* (Vic).

⁴¹ Available under *Sentencing Act 1991* (Vic), Part 3, Division 2, Sub-Division C and section 82AA.

⁴² Available under *Sentencing Act 1991* (Vic), section 32.

⁴³ Available under *Sentencing Act 1991* (Vic), Part 3A.

⁴⁴ Available under *Sentencing Act 1991* (Vic), section 38.

⁴⁵ Available under *Sentencing Act 1991* (Vic), section 37(a).

⁴⁶ Available under *Sentencing Act 1991* (Vic), section 37(c).

⁴⁷ Available under *Sentencing Act 1991* (Vic), section 48C.

⁴⁸ Available under *Sentencing Act 1991* (Vic), section 48D.

⁴⁹ Available under *Sentencing Act 1991* (Vic), section 48E.

	<p>certain persons or types of persons.⁵⁰</p> <ul style="list-style-type: none"> - Residence restriction.⁵¹ - Curfew.⁵² - Alcohol exclusion.⁵³ - Bond condition.⁵⁴ - Judicial monitoring.⁵⁵ - Electronic monitoring.⁵⁶ <p>Each Order will attach at least one additional condition, including:</p> <ul style="list-style-type: none"> - Undertaking medical or other rehabilitative treatment - Not entering, remaining within or consuming alcohol in licensed premises - Being supervised by a Corrections officer
Fine ⁵⁷	
Restitution Order ⁵⁸	Return of stolen or damaged goods where possible.
Compensation Order ⁵⁹	Section 85B Application to be made when this box is ticked.

A victim will not be able to place a numerical value on any of the potential sentencing outcomes. This is so as to minimise any conflict between the Prosecution's suggested sentencing outcome and a victim's suggested sentencing outcome. A criticism of victim participation in the criminal trial process is that victims, as lay persons without legal training, may make ludicrous requests or seek unjust measures of punishment.⁶⁰ Not only has the Victorian Law Reform Commission acknowledged that victims generally do not seek ultimate decision-making power due to such a level of authority carrying a substantial burden of responsibility⁶¹, but victimologists such as

⁵⁰ Available under *Sentencing Act 1991* (Vic), section 48F.

⁵¹ Available under *Sentencing Act 1991* (Vic), section 48G.

⁵² Available under *Sentencing Act 1991* (Vic), section 48I.

⁵³ Available under *Sentencing Act 1991* (Vic), section 48J.

⁵⁴ Available under *Sentencing Act 1991* (Vic), section 48K.

⁵⁵ Available under *Sentencing Act 1991* (Vic), section 48L.

⁵⁶ Available under *Sentencing Act 1991* (Vic), section 48LA.

⁵⁷ Available under *Sentencing Act 1991* (Vic), section 49.

⁵⁸ Available under *Sentencing Act 1991* (Vic), Part 4, Division 1.

⁵⁹ Available under *Sentencing Act 1991* (Vic), Part 4, Division 2.

⁶⁰ Wemmers, J. and Cyr, K. (2004). *Victims' Perspective on Restorative Justice: How Much Involvement are Victims Looking For?*, 11 International Review of Victimology 268.

⁶¹ Garkawe, S. (2002). *Crime Victims and Prisoners' Rights*, p271, in Brown, D. & Wilkie, M., *Prisoners as Citizens: Human Rights in Australian Prisons*, Federation Press, Sydney.

Strang⁶² have found that if given the opportunity, victims seek to repair their own and the offender's lives in preference to seeking revenge. Nevertheless, it is not a concern in the proposed model because Section B of the Statement provides a fixed list of sentencing options provided by the *Sentencing Act 1991* (Vic), without attributed numerical values.

Furthering the aim of this model, Canadian victimologists Wemmers and Cyr⁶³ found that victims who participated in youth crime offender mediations in Canada would find great value in being consulted, heard and given an opportunity to provide input in decision-making processes. Affording victims the opportunity to provide a sentencing judge with their suggested sentencing outcomes would go a ways toward this, whilst leaving ultimate decision-making power with the sentencing judge. Filling in Section B of the VIS would provide victims with an opportunity to be consulted and heard, therefore satisfying the findings of Wemmers and Cyr without placing on them the heavy burden of having to make a determinative decision on an offender's sentencing outcome.

It will be the role of a Victim Contact Officer to explain to a victim that their Statement is not determinative. The Victorian Law Reform Commission has acknowledged that it is this false perception can be potentially harmful or lead to disillusionment if victims are given unrealistic expectations about the impact of their participation. According to Hobbes, "victims cannot be given unrealistic expectations about what their participation may or will achieve.; where the participatory scheme does not effectively manage the relationship between victims and the court, problems may occur".⁶⁴ The suggested reform model does not provide victims with unrealistic expectations, as it should be the duty of a Victim Contact Officer to explain the role of a Victim Impact Statement, and if necessary, assist a victim in applying for any other Orders they think appropriate. In this case, it should be the duty of a VCO to advise a victim that a s85B Compensation Application may be rejected if for example an offender has limited financial resources.⁶⁵

At Sentencing Hearing

At a Sentencing Hearing, either a victim or their nominated person, or the Prosecution, can read out a Victim Impact Statement, outlining how the victim was affected by the convicted offender's actions, and the suggested sentencing outcome. The aim of this level of participation in the sentencing process is to ensure that a victim feels heard and included in the process of the conviction of their offender, while minimising the chance of a victim's suggested sentencing

⁶² Heather Strang and Lawrence Sherman. 'Repairing Harm: Victims and Restorative Justice' (2003). Utah Law Review. 2003(1).

⁶³ Wemmers, J. and Cyr, K. (2004). *Victims' Perspective on Restorative Justice: How Much Involvement are Victims Looking For?*, 11 International Review of Victimology.

⁶⁴ Hary Hobbes. 'Victim Participation in International Criminal Proceedings: Problems and Potential Solutions in Implementing an Effective and Vital Component of Justice' Texas International Law Journal 49 (1) at page 11.

⁶⁵ *Sentencing Act 1991* (Vic) S85H(1). 'If a court decides to make a compensation order, it may, in determining the amount and method of payment of the compensation, take into account, as far as practicable, the financial circumstances of the offender and the nature of the burden that its payment will impose.'

outcome coming into conflict with the Prosecution's suggested sentencing outcome, as well as not encroaching on the trial judge's discretion in determining the appropriate sentencing outcome.

After the Victim Impact Statement has been read to the court by whomever, the trial judge, in taking into account the impact of the offender's actions on the relevant stakeholders, will list all of the relevant factors which have been taken into account in determining the appropriate sentence for a convicted offender. The formalised process of delivery of the Victim Impact Statement by way of demonstration that the victim is a relevant stakeholder in the commission of the offender's crime(s) and their prosecution, means that the trial judge can consider the suggested sentencing outcomes of the victim as factors to be taken into account. Victim Impact Statement suggestions do not need to be referred to specifically by the trial judge, as the trial judge must at all times appear impartial.

Rights of the Accused

As acknowledged by the Commission the International Criminal Court under the Rome Statute allows victims to make an application to participate at any time during the proceedings.⁶⁶ A victim may be appointed legal representation.⁶⁷ The commission has acknowledged that most of the problems of the ICC's regime which are relevant to Australia relate to whether victim participation in criminal trial proceedings has an impact on the accused's right to a fair trial.⁶⁸ One principle argument acknowledged by the Commission is that allowing victims to participate in proceedings presumes that a crime has occurred which is something that must be proved beyond a reasonable doubt by the Prosecution.⁶⁹ According to Johnson victim participation during the guilt phase should be very limited and similar to *amicus curiae* because victim participation during the 'guilt phase' has the potential to jeopardise a fair trial to the accused by eroding the presumption of innocence, giving lack of notice of the charges to the defendant and producing delays in the proceedings.⁷⁰ These criticisms cannot be applied to the suggested model because victim participation occurs after conviction. According to Johnson, 'victim participation could play an appropriate role and constructive role during post-conviction reparations proceedings.'⁷¹ Therefore the criticisms of victim participation at the ICC are not relevant to the suggested model and the accused's right to a fair trial should not be jeopardised.

CONCLUSION

No matter how or to what degree they are recognised, people who are victimised become marginalised members of society and may be affected in a number of different ways, including

⁶⁶ Victorian Law Reform Commission. *The Role of Victims in the Criminal Trial Process: Information Paper 3: The International Criminal Court* (2015). 13

⁶⁷ *Ibid* 15

⁶⁸ *Ibid* 26

⁶⁹ *Ibid*.

⁷⁰ Scott Johnson. 'Neither victims nor executioners: the dilemma of victim participation and the defendant's right to a fair trial at the international criminal court.' (2010) *ILSA Journal of International & Comparative Law*. 16 (2) page 5.

⁷¹ *Ibid* page 6.

emotionally, psychologically, physically or financially. Despite the role that they play in being significantly affected by crime, victims do not in turn play an active role in the criminal trial process, whereby the state intervenes to 'process' an offender through the criminal justice system. In order for the harm experienced by victims to be addressed - to help these marginalised members of society feel empowered and in control of their own lives - the criminal trial process must be reformed such that victims play an active role, without impeding the rights of individuals whose innocence or guilt is being determined by the courts.

In accordance with the relevant considerations and needs identified, and in conjunction with the current processes which address Victorian victims, this submission has provided a suggestion for reform which grants victims an active role in suggesting a convicted offender's criminal sentence. It is hoped that this suggested reform will be given its due consideration, and provide another step toward the recovery process of persons rendered a victim in Victoria.

BIBLIOGRAPHY

A Articles / Books / Reports

Achille, Mark and Howard Zehr. *Restorative Justice for Crime Victims: the Promise and the Challenge* in Godon Bazemore & Mara Schiff. *Restorative Community Justice: Repairing the Harm and Transforming Communities*. (2015).

Andrew Sanders. 'Victim Participation In Criminal Justice' (2002) *Criminal Justice Matters*, 49:1, 30-31, DOI: 10.1080/09627250208553497.

Australian Bureau of Statistics, *Recorded Crime Victims Australia*. July 2014. Cat No 4510.0. ABS Canberra.

Chupp, Mark (1989). 'Mediation and criminal justice: Victims, offenders and community - Reconciliation procedures and rationale', Sage Publications, London.

Cook, B., David, F. & Grant, A., (1999). *Victims' Needs, Victims' Rights: Policies and Programs For Victims of Crime in Australia*, Research and Public Policy, Series, No 19, Australian Institute of Criminology, Canberra.

Department of Communities, Queensland Government (2010). 'Youth Justice Conferencing: Restorative Justice in Practice'.

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

Director of Public Prosecutions, Victoria (2015). *Director's Policy: The Crown's Role on Plea and Sentence Hearings*.

Duff, A. *et al*, (2007). *The Trial on Trial: Towards a Normative Theory of the Criminal Trial* (Vol 3), Hart Publishing.

Erin Ann O'Hara and Maria Mayo Robbins. 'Using Criminal Punishment to serve both Victims and Social Needs', (2009). *Law and Contemporary Problems*, Vol. 72, No. 2.

Freckleton, I., 'Compensation Applications Require a Watching Brief' (2009), UMonashLRS 5.

Garkawe, S. (2002). Crime Victims and Prisoners' Rights, p271, in Brown, D. & Wilkie, M., *Prisoners as Citizens: Human Rights in Australian Prisons*, Federation Press, Sydney.

Greene, Diane and Naelys Diaz, 'Predictors of Emotional Stress in Crime Victims: Implications for Treatment' (2007) 7(3) *Brief Treatment and Crisis Intervention* cited in Victorian Law Reform Commission, 'The Role of Victims in the Criminal Trial Process: Information Paper 2 -

Victims Who are Victims of Crime and What are Their Criminal Justice Needs and Experiences' (2015).

Hary Hobbes. 'Victim Participation in International Criminal Proceedings: Problems and Potential Solutions in Implementing an Effective and Vital Component of Justice' *Texas International Law Journal* 49 (1).

Joanne Shapland and Matthew Hall, 'What Do We Know About the Effects of Crime on Victims' (2007) *International Review of Victimology*.

Jo-Anne Wemmers. 'Where do they belong? Giving victims a place in the criminal justice system. (2009) *Criminal Law Forum* 20 395.

Julie-Anne Gale and Timothy Coupe. 'The behavioural, emotional and psychological effects of street robbery on victims' (2005) *International review of victimology*. 12 (1).

Luntz, Harold. 'Torts: Cases and Commentary - Chapter 1 Introduction: The Role of the Law of Torts' (7th ed.), LexisNexis. (2013)

Tyrone Kirchengast,. *The Victim in Criminal Law and Justice*, (2006) Palgarve Macmillian.

Scott Johnson. 'Neither victims nor executioners: the dilemma of victim participation and the defendant's right to a fair trial at the international criminal court.' (2010) *ILSA Journal of International & Comparative Law*.

Strang, Heather and Lawrence Sherman. 'Repairing Harm: Victims and Restorative Justice' (2003). *Utah Law Review*.

ten Boom, Annemarie and Karlijn F Kuijpers. 'Victims needs as basic human needs'. (2012) 2012; vol. 18, 2: 155-179 2.

Victorian Law Reform Commission (2015). 'The Role of Victims of Crime in the Criminal Trial Process: History, Concepts and Theory - Information Paper 1'.

Victorian Law Reform Commission. *The Role of Victims in the Criminal Trial Process: Information Paper 3: The International Criminal Court* (2015).

Wemmers, J. and Cyr, K. (2004). *Victims' Perspective on Restorative Justice: How Much Involvement are Victims Looking For?*, 11 *International Review of Victimology*.

White, R. & Perrone, S., (2010). *Crime, Criminality & Criminal Justice*, Oxford University Press, Australia.

Zoe Morrison. 'Caring about sexual assault: the effects of sexual assault on families, and the effects on victims/survivors of family responses to sexual assault' (2006). *Family Matters*, No. 76.

B Cases

Doggett v The Queen 208 CLR 343

C Legislation

Sentencing Act 1991 (Vic)

Victims' Charter Act 2006 (Vic)

D Treaties

United Nations General Assembly (1985). *A/RES/40/34 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*