

**Victorian Law Reform Commission Review: *The role of victims in the criminal trial process***

**Submission by Centre for Innovative Justice, RMIT University**

**Summary:**

This submission argues for the potential of the criminal trial process to be harnessed to greater effect. While founded on just principles and central to the development of the rule of law, the narrow parameters of the existing adversarial trial process too often fail victims and offenders alike - ignoring any prospect of repairing the harm caused by an offence, as well as of addressing factors that lead to its commission.

An opportunity exists, however, to expand the role of the criminal trial process, and to bring restorative, inquisitorial and therapeutic approaches into the heart of its operation. An opportunity also exists to acknowledge that there are often more victims involved in a criminal trial process than we first might perceive. By addressing past victimisation - in those who present as witnesses for the Crown, but also in those who appear as the accused - we increase the possibility that the law can be a positive intervention in people's lives and contribute to greater safety in the community.

## Introduction

The Centre for Innovative Justice (CIJ) welcomes the increased focus on improving the role of victims in the criminal trial process.

As the Victorian Law Reform Commission (VLRC) Discussion Paper so comprehensively explores, victims of crime have largely been excluded from the adversarial approach which now exists in most common law jurisdictions. Developed and refined over many centuries, the adversarial trial - whether civil or criminal - was intended to assert the right of parties to test any claim against them and, initially, to shield them from the inclinations of a king. The motives behind this design, therefore, were arguably just and many regard it as an overall success - the state assuming responsibility for prosecuting crime on behalf of the community, and doing so on an impartial basis.<sup>1</sup>

The byproduct of this imperative, however, was that the interests of what continued to be referred to as 'the Crown' – being, amongst other things, punishment, deterrence and rehabilitation - took precedence. The interests of those individuals who had experienced crime or even civil wrongs, meanwhile, were largely overlooked - understood at best through the lens of 'the reasonable' (and presumably propertied) man, rather than the diversity of people who most frequently feature as victims of crime or of civil wrongs.

As a result, the criminal trial process which evolved is often re-traumatising for victims, relegating them to the sidelines and failing to meet many of their more complex needs. This in turns leaves many victims unwilling to proceed or participate - the failure of the criminal trial process to consider the interests of victims ironically leaving the broader interests of justice unmet.

In more recent times, of course, governments and courts alike have gone to considerable lengths to redress this imbalance through a range of reforms. Requirements for victims to be consulted about the conduct of a plea process or trial; opportunities for victims to articulate the impact of an offence to the court; measures to limit the distressing effects of giving evidence, particularly through cross-examination; or simply steps to protect victims from being in proximity to the offender – all these have gone a long way not only to re-assert the role of victims in the criminal trial process, but to encourage their participation in it.

There is only so much, however, that these reforms can achieve within the detached operation of the existing adversarial approach. This positions the VLRC's review as an opportunity to explore and promote broader reform - to reconceive the criminal trial process in a way that better meets the needs of *all* those involved, including that of the state.

As this submission argues, this means identifying the potential of a criminal prosecution to do more than just test evidence and determine guilt. It means, instead, harnessing interaction with the criminal justice system as an opportunity to facilitate change and be restorative in nature - to address the *impact* of the relevant offending, as well as the factors that caused it to occur. It also means perceiving the experiences of all those involved – recognising the victim of the relevant offence as a central protagonist in the process, certainly, but also recognising that, often, there are more victims standing in that courtroom than we first might assume.

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<sup>1</sup> M King, A Frieberg, B Batagol & R Hyams (2014), *Non-Adversarial Justice* (2<sup>nd</sup> edn) The Federation Press, Armadale, p 1

### **The criminal justice process – doing more harm than good?**

Despite its undeniable value in maintaining the rule of law and the separation of powers,<sup>2</sup> the criminal trial process has long been criticised for failing to meet the interests of victims of crime. As the VLRC thoroughly canvases, these reproaches include that victims become relegated to the sidelines as witness or claimant, without the participatory rights or obligations of a party to the proceedings.

Equally of concern, many victims find not only the trial itself, but the process leading up to it, deeply re-traumatising. The pragmatic considerations involved in plea negotiations, including decisions about what is able to be proved, can seemingly dismiss or minimise victims' past experiences, as well as their current wishes.<sup>3</sup> The confrontational nature of an adversarial courtroom and its gauntlet of cross-examination, meanwhile, can leave victims feeling as if it were *they* who were actually on trial, rather than the accused.

If this is the case with victims, what of the criminal trial process's impact on the accused? Rather than encourage full acceptance and acknowledgment of an offender's actions, the adversarial nature of a criminal trial serves to cement denial and minimisation - the prospect of imprisonment understandably leading many offenders to sidestep responsibility or, at the very least, reduce its implications through a plea to a lesser charge. The narrow parameters of the examination process, too, discourage full disclosure, the focus of a defence case primarily being to undermine that of the prosecution. In this way, the confrontational proceedings only entrench hostility, rather than make an attempt to establish truth or fairness at trial.

The workload of an overburdened court system, meanwhile, leads to 'efficiencies' which, though well intentioned, can reinforce the tendency of existing processes to reduce genuine accountability. Though many reforms - such as sentence indications and others which encourage an offender to plead guilty - relieve victims of enduring a trial, it is arguable that a plea offered in this context does not involve an admission of genuine remorse or an exploration of the factors which lead to the offending. While this opportunity is addressed to an extent in the sentencing process, the narrow and somewhat detached calculation of a custodial or other sentence arguably does little to meet the full range of interests of the parties involved.<sup>4</sup>

In other words, the overarching objective to challenge and dismantle the opposition's case, rather than to repair the harm caused by the crime or prevent it from happening again, means that a conventional criminal trial at best addresses a very narrow aspect of the wrong which has occurred.<sup>5</sup> At worst it entrenches the impact of that wrong, with victims' faith in the community further eroded, and offenders relinquished to a path which neither acknowledges the full implications of their actions, nor addresses the factors that lead them to occur.<sup>6</sup> In this way the criminal trial process can not only fail victims, but offenders and the wider community as well. The task must therefore be to identify additional paths which offer not only a more purposeful approach, but more meaningful results.

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<sup>2</sup> Ibid.

<sup>3</sup> E Erez, J Globakar, & P Ibarra (2014) 'Outsiders Inside: Victim Management in an Era of Participatory Reforms', *International Review of Victimology*, 20(1): 169-188, p 171.

<sup>4</sup> D Wexler (1997), 'Therapeutic Jurisprudence in a Comparative Law Context', *Behavioural Science and the Law* 15: 233-246, p 234.

<sup>5</sup> F Strier, (1994) *Reconstructing Justice: An Agenda for Trial Reform*, Quorum Books: Connecticut.

<sup>6</sup> G Robinson & I Crow (2009), *Offender Rehabilitation: Theory, Research and Practice*, Sage: London

### **Opportunities for restoration – what types of justice are available?**

Discussed in the VLRC's paper in some detail, users of the justice system identify a wide range of different types of justice. Amongst others, these can include procedural justice which, for a victim of crime, demands their capacity to experience participation and voice, information and support, trust, neutrality and respectful treatment. Distributive (or substantive) justice, meanwhile, can involve material and emotional restoration, including validation and denunciation.

Far from being considered additional benefits in the criminal justice process, or even qualities experienced outside its operation, all of these elements should be primary objectives. Indeed, criminal justice processes should be as curative in function as possible, emphasising victim inclusion and offender accountability at every point, and doing so in a way that will ultimately contribute to greater community safety.

### Restorative justice – victim inclusion and offender accountability

In particular, this includes applying the benefits of restorative justice - explored at some length in the VLRC's paper - to the mainstream of criminal justice mechanisms. Described as a 'a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future',<sup>7</sup> restorative justice processes aim to repair harm; to encourage offenders to assume responsibility and be genuinely accountable; and to restore, to the extent that is possible, a victim to their position before the crime occurred.<sup>8</sup>

It is arguable, of course, that this should be the primary responsibility of *any* justice process or system. Restorative approaches are based on the premise that crime causes harm to people and to the community and it is to this harm that the adversarial process also attempts to respond, albeit in an unproductive way.

Restorative justice principles go considerably further, of course, than this limited adversarial reaction - emphasising the need to empower individuals; to engage in respectful dialogue; and for parties to collaborate in decision making to resolve the relevant issue.<sup>9</sup> Often taking the form of mediated and carefully structured encounters between victims and offenders,<sup>10</sup> the benefits of restorative justice processes are evident in the diversity of outcomes available for victims that the adversarial system is largely unable to produce, such as answers to specific questions, apologies, plans for reparation and many more.<sup>11</sup>

The task then becomes to bring these kind of benefits to the core of mainstream criminal justice. Currently, restorative justice approaches exist on the fringe of criminal justice systems in Australia, with the ACT the only jurisdiction to have developed a considered strategy.

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<sup>7</sup> TF Marshall, 'The Evolution of Restorative Justice in Britain', *European Journal on Criminal Justice and Research*, 4, 21-43

<sup>8</sup> J Larson (2014), *Restorative Justice in the Australian Criminal Justice System*, Australian Institute of Criminology Research and Public Policy Series, Paper No. 127, p 3

<sup>9</sup> King et al, above note 1, p 41.

<sup>10</sup> Larson, above note 8, p vi

<sup>11</sup> Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending: pathways for victims, offenders and the community*, May 2014, RMIT University. At <http://www.rmit.edu.au/about/our-education/academic-schools/graduate-school-of-business-and-law/research/centre-for-innovative-justice/what-we-do/sexual-offences/>

Beyond this context, restorative processes are currently limited to discrete programs and to the juvenile justice environment, with most governments apparently cautious about introducing restorative approaches into the mainstream.<sup>12</sup> The reason for the relatively slow development of restorative justice in the Victorian context is unclear, particularly when compared with the success of these approaches in other jurisdictions such as the United Kingdom and New Zealand, where restorative justice is a mainstream option for all victims and offenders and legislation encourages the use of restorative justice 'wherever appropriate.'<sup>13</sup>

It may be that restorative justice is not yet well understood in Australian jurisdictions. Certainly it has been misconceived, for example, as being offender-focussed - a mechanism for delivering sentencing discounts, excusing offenders or 'letting them off the hook.' This concern is not borne out by the experience of victims involved in restorative justice, and may reflect a tendency for law and order politics to drive responses and a very narrow view of 'justice' as primarily retributive, rather than be based on evidence and research.

Nevertheless, this cultural resistance remains a challenge, even some decades after the concept of restorative justice was initially proposed.<sup>14</sup> So too do legitimate concerns that restorative processes might re-privatise crimes, such as sexual or family violence, which feminists have fought hard to bring into the public domain. In this context there is still argument about whether restorative processes provide any net benefit for victims.<sup>15</sup> Accordingly, restorative justice approaches must be approached with care, engaging victims and victim representatives, for example, in identifying ways to meet their needs in a more effective and meaningful way.

In pragmatic terms, this may mean offering restorative responses as a *complement* to the criminal trial process, as the CIJ has proposed in relation to sexual offences. Informed by national and international examples, *Innovative Justice Responses to Sexual Offending: pathways for victims, offenders and the community* outlines a phased and highly structured approach which jurisdictions can use as a blueprint which can be tailored and implemented to suit their circumstances.<sup>16</sup> Pathways in and out of conferencing are identified, as are safeguards to ensure that participation is both genuine and safe. Gatekeepers, such as judges, are also identified, to ensure that decisions to proceed are only made where appropriate.

The CIJ recognises that the area of sexual offences is a highly contentious one, of course, but suggests that it is precisely for this reason that any attempts by governments to explore options *other than* the adversarial approach should be applauded. Beyond this, however, the CIJ sees further potential for restorative justice conferencing to be applied in relation to offences such as driving cases that result in death or serious injury, as these often involve a longstanding relationship between the parties and 'justice needs' that the adversarial criminal trial cannot address.

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<sup>12</sup> Ibid

<sup>13</sup> See for example, *Sentencing, Parole and Victims' Rights Acts 2002* and the *Corrections Act 2004* (NZ).

<sup>14</sup> H Strang, *Restorative Justice Programs in Australia*, A report to the Criminology Research Council, March 2001, p 34.

<sup>15</sup> Some commentators suggest that 'there is insufficient evidence to support the view that there are inherent benefits in the restorative justice process that provide victims of sexual assault with a superior form of justice.' See A Cossins, 'Restorative Justice and Child Sex Offences: The Theory and the Practice' (2008) 48 *British Journal of Criminology*, 359-378.

<sup>16</sup> Centre for Innovative Justice, above note 11,

Certainly, fatal collisions can rupture family relationships and close-knit communities, particularly where victims perceive disparities between the legal outcome and the harm suffered. Accordingly, the CIJ applied for and received a grant from the Legal Services Board to develop and implement a restorative justice model to be applied in this specific context. This project will aim to deliver outcomes in cases where charges are not laid, where matters do not proceed to trial, as well as in pre and post sentencing, operating as either an alternative or an adjunct to criminal justice processes. Lessons gleaned from this process will help to build the case for the application of criminal justice processes in other contexts.

The question is, therefore, what would a criminal trial achieve if it made the inclusion of victims and the accountability of offenders core business - enabling them to repair the harm to the victim and to the wider community? Would it create opportunities for *all* parties to imagine a future beyond the harm?

While restorative approaches are not appropriate in all cases of crime, they nevertheless offer an important framework for thinking about and responding to *any* wrongdoing, including at a broader societal level.<sup>17</sup> That is why the CIJ strongly believes that a restorative response should be a primary port of call, rather than a sideshow or alternative, with the criminal justice system extending its capacity to deliver programs in a range of settings and stages of the process; adopting a flexible approach; and providing options for referrals at the community level, right through to pre and post-sentencing, including pre-release from prison.

#### Inquisitorial and therapeutic approaches

More broadly, adaptations to the criminal trial process need not be limited to the inclusion of restorative approaches. They may also involve applying inquisitorial approaches where the adversarial one has quite clearly failed. Sexual assault matters, for example, are just one area in which the majority of victims have been comprehensively left behind.

As the VLRC identifies, many international jurisdictions employ inquisitorial methods. With less emphasis placed on oral evidence from victims and witnesses, and with greater reliance on information contained in the case file, inquisitorial approaches can reduce the pressure on victims to tell and re-tell their stories, as well as be subject to cross-examination. In this way, the 'truth finding' approach of the inquisitorial process becomes somewhat of an anathema to the perceived ruthlessness of the existing criminal trial.<sup>18</sup>

Inquisitorial criminal justice processes also allow victims to participate more actively in a criminal trial, with the prosecution exerting less control over proceedings and judges playing a far more active role. By dispensing with some of the more adversarial tactics, and by 'levelling the playing field' of the courtroom to a greater extent, the interests of the parties come more readily to the fore.

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<sup>17</sup>Zehr Institute for Restorative Justice, At <http://emu.edu/now/news/2015/07/restorative-justice-experts-join-in-zehr-institutes-3-year-project-to-map-the-future-of-the-field/>

<sup>18</sup> N Bedford & R Creyke (2006), *Inquisitorial Processes in Australian Tribunals*, The Australian Institute of Judicial Administration Inc, p. 2

Beyond this, however, it is worth considering how the additional benefits of therapeutic approaches - ones which are viewed in some quarters as serving only the interest of offenders - can be incorporated to serve the interests of victims as well. It is widely recognised, of course, that the conventional adversarial model takes a largely hands off approach in addressing the underlying issues of offending behaviour.<sup>19</sup>

This means that, in asserting the interests of the state, the criminal justice system largely ignores behaviour that may be symptomatic of other factors.<sup>20</sup> These include homelessness, mental health issues, drug and alcohol dependency, a history of family or other violence, acquired brain injury, and/or poverty, with the choices available to people facing criminal charges (such as pleading guilty or not guilty) rarely doing anything to address the underlying needs or the issues pertaining to the crime committed.

Problem-solving, or therapeutic, processes aim to respond to the social and individual harm of offending by addressing the criminogenic risks of an offender.<sup>21</sup> Currently, however, these approaches operate outside mainstream adversarial proceedings - acting as an alternative, instead of incorporating problem-solving strategies into existing procedure. Access to these courts, meanwhile, are often limited,<sup>22</sup> while their operation can also be highly resource intensive, especially as many function as distinct jurisdictions.

Rather than tinkering at the edges of a victim's role in the process, therefore, the CIJ suggests that restorative, inquisitorial *and* therapeutic approaches can all be brought to bear, allowing the criminal trial process to be a more meaningful experience for victims and offenders alike. In other words, the criminal justice process itself could be a restorative one - seeking to give voice to victims' experience and views; as well as to address the causes of offending behaviour in a way that may bring greater assurance to victims, both existing and potential, that the offending will not be committed again.

### **Who are the victims in the criminal trial process?**

The question then becomes, of course, who the victims of this and any past or future offending actually are. The VLRC's paper acknowledges that a 'victim' should be defined broadly and, in doing so, notes that individuals from disadvantaged communities have an increased likelihood of being offended against.

Importantly, the paper also recognises that there are many who simply do not reach the criminal trial process, and whose needs therefore remain unaddressed. Indeed, the existing process often overlooks a significant proportion of people who are also victims of crime and therefore need additional support. Certainly, the structure of any legal proceeding within a formal adversarial framework does not take into account the interests of those who are not parties to the dispute, but who may feel victimised or wronged in some way.<sup>23</sup> As stated by the VLRC, this includes people who do not wish to report a crime for one reason or another, or those people who are excluded by disadvantage from accessing the criminal justice process.

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<sup>19</sup> Wexler, above note 4, p 234

<sup>20</sup> G Robinson & I Crow (2009) *Offender Rehabilitation: Theory, Research and Practice*, Sage: London

<sup>21</sup> King et al above, note 1, p 238

<sup>22</sup> A Freiberg, (2002), 'Specialised Courts and Sentencing'. Paper Presented at the *Probation and Community Corrections: Making the Community Safer* Conference, Australian Institute of Criminology, 23-24 September 2002, p 10

<sup>23</sup> King et al, above note 1, p 3

This said, the CIJ urges the VLRC to take this broad definition one step further and recognise that there are often more victims of crime standing in a courtroom than we first might assume. In addition to the person who has had an offence committed against them, the person in the stand is, often, also a victim of crime. In fact, a significant proportion of offenders have been victims of crime at some point, many of them repeatedly - of childhood abuse or neglect; of family violence; or of other forms of abuse.<sup>24</sup>

To assert this is not to suggest that these individuals should therefore be excused from the offence with which they have been charged. Nor does the CIJ suggest that there are not a proportion of hardened offenders that need to be met with the full force of the conventional criminal justice response. Nevertheless, it is important for reformers to ask what the role of these *other* victims are in the criminal trial process. Is the criminal trial process failing *them* as well? Is there an opportunity to address this victimisation that is not currently being seized? What's more, is the role of these additional victims simply to become further entrenched in institutionalization and disadvantage where the adversarial process runs its course?

When this broader understanding of victims is understood, the capacity of the criminal trial process to function as a restorative or positive intervention is extended - not only repairing some of the harm of the offence that the conventionally defined victim has experienced, but addressing some of the factors, including past victimisation in many cases, that have led to the commission of the relevant offence.

### **Histories of victimisation**

Limited research exists regarding rates of victimisation among offenders. That said, evidence of the high victimisation rates among certain groups, such as young persons in the juvenile justice system; female prison inmates; and the homeless population, reveals a range of ways in which offenders can have histories of victimisation. The recent Victorian Ombudsman's report, meanwhile, also identifies the profound disadvantage that is a feature of the majority of offenders in the Victorian Corrections system.<sup>25</sup>

One of the CIJ's three submissions to the Royal Commission on Family Violence, for example, explores the nexus between family violence, other trauma and the population in any female prison.<sup>26</sup> A high prevalence of victimisation certainly exists among Victoria's female prisoners, with women experiencing higher rates of sexual, physical and psychological abuse than male prisoners.<sup>27</sup> In fact, the Australian Institute of Criminology reported that 86 per cent of incarcerated women were victims of sexual, physical or emotional abuse, either in their childhood (63 per cent) or as adults (78 per cent), while some researchers suggest that 'exposure to traumatic events is nearly universal among incarcerated women'.<sup>28</sup>

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<sup>24</sup> D Deadman & Z McDonald, (2004) 'Offenders as victims of crime?: an investigation into the relationship between criminal behaviour and victimization', *JR Statist.Soc.A* 167, Part 1, pp 53-67.

<sup>25</sup> Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, September 2015. At <https://www.ombudsman.vic.gov.au/Investigations/Investigation-into-the-rehabilitation-and-reintegration>

<sup>26</sup> Mental Health Legal Centre, Inside Access, Centre for Innovative Justice (2015), 'Submission to Royal Commission on Family Violence', 29 May 2015. At <http://www.rcfv.com.au/Submission-Review>

<sup>27</sup> See Corrections Victoria, *Standards for the Management of Women Prisoners in Victoria*, Department of Justice, July 2014, p 10.

<sup>28</sup> B Green, M Jeanne, A Daroowalla & J Siddique, 'Trauma exposure, mental health functioning and program needs of women in jail', *Crime & Delinquency*, 51, no. 1 (2005), 133-151, p 134. At <http://cad.sagepub.com/content/51/1/133.full.pdf+html>.



While offending as a consequence of poverty and homelessness linked to family violence might be reasonably well known, less understood is the fact that women's offending behaviour is often linked *directly* to their experience of family violence. For example, many women are often mistakenly arrested as the 'primary aggressor' by police attending a callout;<sup>29</sup> others are arrested for driving without a licence while driving away from their aggressor in fear or for carrying a concealed knife when they do so for reasons of protection;<sup>30</sup> while others assume culpability for their partner's offences because they are too frightened of him to do anything else.<sup>31</sup>

Implications also flow when the status of a woman switches from victim to an offender and prohibits her from being able to access services or report her own history. For example, many women accumulate debt in the context of family violence, debt which is sometimes deliberately foisted on them by their partners and which makes establishing stable lives outside the prison environment difficult.<sup>32</sup>

Equally, women who have had housing difficulties in the context of family violence - property damage caused by a violent partner, for example, attaching to a woman's residential tenancy record - are often precluded from accessing further public housing.<sup>33</sup> Where referrals to community based services, such as those facilitated by Corrections Victoria designed to assist with prisoner reintegration, require an address, homelessness is not only perpetuated but compounded - a history of housing insecurity prior to incarceration only cementing further disadvantage upon release.<sup>34</sup>

Unsurprisingly, then, offending is frequently associated with homelessness or insecure housing as well. A study by the Australian Institute of Criminology indicates that homeless people who come into contact with the criminal justice system often have a complex set of criminogenic risks and needs which underlie their current offending and future propensity to offend.<sup>35</sup> Offences committed by this group are often directly related to their high visibility, as well as to various forms of disadvantage.<sup>36</sup> People who are homeless also struggle to access justice,<sup>37</sup> with poor literacy; the complexity and formality of legal proceedings; and the expense of legal representation all operating as barriers.<sup>38</sup>

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<sup>29</sup> Centre for Innovative Justice, *Opportunities for early intervention: bringing perpetrators of family violence into view*, March 2015, RMIT University.

<sup>30</sup> Professor Judy Atkinson, 'Trauma, Violence and the Law', Presentation at Centre for Rural Regional Law and Justice, Deakin University, Geelong, 28 October 2015.

<sup>31</sup> Mental Health Legal Centre, *Inside Access*, Centre for Innovative Justice, above note 26.

<sup>32</sup> *Ibid*, 15

<sup>33</sup> *Ibid* p 11

<sup>34</sup> *Ibid*, 16

<sup>35</sup> C Harvey, E Killackey, A Groves & H Herrman (2012) 'A Place to Live: Housing needs for people with psychotic disorders identified in the second Australian national survey of psychosis', *Australian and New Zealand Journal of Psychiatry* 46, (9): 840-850

<sup>36</sup> Crimes and fines accumulated by the homeless population range from trespass, offensive behaviour or public nuisance, S Forell, E McCarron & L Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Law and Justice Foundation of New South Wales, July 2005, p. xx.

<sup>37</sup> *Ibid*, p. iiv.

<sup>38</sup> *Ibid*

Given that housing or stable accommodation have been shown to be critical in the successful transition from prison back into the community, it is concerning that a significant proportion of prisoners do not have suitable accommodation upon release.<sup>39</sup> What's more, the association between poor accommodation and a lack of social integration impedes access to services; maintains disadvantage, and increases the likelihood that the cycle of victimization and offending behaviour will roll on.<sup>40</sup>

Meanwhile, people with disabilities are also overrepresented in the criminal justice system, both as offenders, and as victims of crime.<sup>41</sup> Acquired Brain Injuries (ABI) are often regarded as a hidden disability because they are not present or evident at birth and, while an estimated 2.2 per cent of the general population have an ABI, a study commissioned by Corrections Victoria revealed that 42% of men and 33% of women surveyed from the Victorian prison population had a confirmed ABI.<sup>42</sup>

Like people who are homeless (and obviously the categories can overlap), people with an ABI also face difficulties in dealing with the criminal justice system,<sup>43</sup> often having limited understanding of their legal rights or of how to respond in social circumstances; or simply having their ABI go undetected. These barriers can lead to higher rates of recidivism,<sup>44</sup> as well as limit access to appropriate support.

Finally, evidence heard at the Royal Commission into Institutional Responses to Child Sexual Abuse reveals all too clearly how swift the trajectory from victim to offender can be. Mental illness, isolation, loss of self-esteem - all those consequences of crime that we more readily recognise can propel people onto the wrong side of the law. With the majority of children in the juvenile justice system having experienced child abuse, and with experience of family violence in childhood recognised as increasing the risk of criminal behaviour,<sup>45</sup> it is difficult to conclude that past victimisation is anything but a major feature of offenders standing in our courts.

### **The benefits of recognising this victimisation**

Contact with the criminal justice system therefore represents an opportunity to address the past victimisation of more parties than may initially be apparent. Rather than a detached machine which takes no interest in whatever brings people through its door, nor responsibility when they keep coming back, the criminal trial process should be viewed as an opportunity for positive intervention with victims of *all* kinds, including those who have ultimately become offenders.

By insisting on this expanded role, we increase the chance that the current offence will not be repeated, and that the damage caused to the victim will not ultimately lead to more offending down the track. In other words, by seeking to remedy not only the current wrong, but past injustices and victimisation, we may secure more meaningful results for all involved.

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<sup>39</sup> E Baldry, D McDonnell, P Maplestone & M Peeters (2006) 'Ex-Prisoners, Homelessness and the State in Australia', *The Australian and New Zealand Journal of Criminology*, 39 (1): 20-33

<sup>40</sup> Ibid

<sup>41</sup> Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: the experiences of people with disabilities reporting crime*, July 2014.

<sup>42</sup> Victorian Ombudsman, *Investigation into prisoner access to health care*, 2011.

<sup>43</sup> S Brown & G Kelly (2012), *Issues and inequities facing people with acquired brain injury in the criminal justice system*, Report prepared for the Victorian Coalition of ABI Service Providers, p. 6

<sup>44</sup> Ibid

<sup>45</sup> Centre for Innovative Justice, above note 29

So how can this trial process be used more effectively for more parties? As the VLRC paper describes and as other submissions will explore in more detail, this may involve a range of improvements to the way in which the victim of the applicable crime is enabled to voice their opinion and to express the impact that the crime has had on them. It may also involve improvements to the way in which victims are treated by the prosecution and the information with which they are provided.<sup>46</sup>

Further, and as the CIJ has argued, it may involve bringing inquisitorial or restorative approaches into the heart of the criminal trial process - providing opportunities for processes to be victim-led and to encourage genuine accountability on the part of offenders.

Just as importantly, it may involve opportunities to cement therapeutic approaches into the core of the trial process. After all, the vast majority of offenders will be released from custody, while research suggests that imprisonment without any form of rehabilitation or support services will increase the risk of offending upon release.<sup>47</sup> This means that contact with the criminal trial process is a unique opportunity to identify and address the causes of offending, including past victimisation, *as a way of preventing future crime*.

Certainly, addressing the effect of victimisation on women's offending would be a substantive step towards a reduction in recidivism, as well as meeting the needs of these particularly vulnerable victims of crime. The effects of family violence, including trauma, mean that women affected by family violence are highly likely to reoffend upon release.<sup>48</sup> This may be compounded by various other factors such as mental illness; low educational attainment and unemployment; drug and alcohol issues, unstable housing and homelessness, and a lack of access to services such as Medicare.<sup>49</sup>

The experience of having been incarcerated can also directly contribute to women's vulnerability to subsequent violence from their partners, with access to assistance further restricted by a history of incarceration.<sup>50</sup> Addressing even this group's history of victimisation and its ongoing effects would likely see less expenditure on incarceration and less victims experiencing a criminal trial.

### **The importance of cultural change**

For any of this to occur, of course, *cultural change across the profession* is required. This means that the judiciary, the Bar and the wider legal profession must rethink their own role in the criminal trial process.

Currently, of course, the culture of the legal profession largely excludes ordinary members of the community. In many ways, the operation of the profession is shaped by the adversarial process and the disinterested treatment of the parties concerned. While the complexities of existing legal process remain impenetrable to those outside the profession, and the provision of legal services remains dependent on highly technical knowledge, the authority of the profession remains ensured.

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<sup>46</sup> Commentators note the importance of clarifying the purpose of victim participation in the criminal trial so that victims are not confused about where their responsibility lies. CM Englebretch (2011), 'The Struggle for Ownership of Conflict: An Exploration of Victim Participation and Voice in the Criminal Justice System', *Criminal Justice Review*, 36(2) 129 -151, p. 147.

<sup>47</sup> Victorian Ombudsman, above note 23.

<sup>48</sup> Mental Health Legal Centre, Inside Access, Centre for Innovative Justice, above note 24.

<sup>49</sup> Ibid p. 10-11

<sup>50</sup> Ibid p 13

Lessons highlighted in the VLRC's own consultation paper, however, point to ways in which the various players in the criminal trial process can perceive their role differently, a role which not only serves the court and the wider interests of justice, but which can also help to repair harm and prevent reoffending.

For the judiciary, this includes additional - and compulsory - training about the kinds of factors which lead people to offending, as well as the ongoing impacts of being a victim of crime. As a further CIJ submission to the Royal Commission into Family Violence explored, for example, a dearth of training in relation to the effects of family violence is only just beginning to be rectified, with the Magistrates' Court of Victoria this year introducing two days of compulsory training for all Magistrates in this important area of the law.<sup>51</sup> While this is welcome progress, the CIJ argued in its submission that this was insufficient to enable the full complexities of family violence to be understood, also calling for this training to be introduced at all jurisdictional levels, given that family violence underlies so many matters before our courts.<sup>52</sup>

Importantly, the CIJ's submission also identified a need for equivalent training at all levels of the legal profession.<sup>53</sup> The Law Institute of Victoria, for example, has only this year commenced offering practical support and training to its members on this issue, while professional development for members of the Bar remains ad hoc at best.<sup>54</sup> This is despite the fact that family violence - and, to a lesser but nevertheless relevant extent, mental health and drug and alcohol issues - is potentially a feature of almost any legal matter involving individual parties.

An exception to this which should be applauded is the provision of specialist training to VLA Duty Lawyers who provide advice to perpetrators of family violence as respondents to Intervention Orders. While the purpose of this role is, arguably, to minimise the culpability of their client in accordance with the objectives of the criminal justice process outlined at the beginning of this submission, VLA has taken the opportunity to reconceive the role of their lawyers and recognise an additional duty to prevent further offending. By training lawyers in the patterns and behaviour of those who use family violence, VLA enables their lawyers to use this contact with clients to reinforce that violence is unacceptable. By conceiving their role in this way, VLA Duty Lawyers are not only serving their clients' immediate interests but helping to prevent the creation of more victims down the track.<sup>55</sup>

More broadly, members of the judiciary and the legal profession as a whole can insist on the provision of training regarding all those different forms of justice that are highlighted as important by the VLRC itself. Procedural, substantive and distributive justice; inquisitorial methods; restorative and therapeutic approaches - all these need to be better understood if those who work amidst the criminal trial process are to leverage their role to the most beneficial effect.

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<sup>51</sup> Centre for Innovative Justice, *Submission to the Royal Commission into Family Violence regarding legal, professional and judicial education on family violence*. 29 May 2015, RMIT University

<sup>52</sup> Ibid

<sup>53</sup> Ibid

<sup>54</sup> Ibid

<sup>55</sup> Centre for Innovative Justice, above note 29.

In fact, if a concerted education and training program were the only outcome of the VLRC's review, this alone could have a significant and tangible effect. Where professionals understand and are looking for opportunities for the criminal trial process to be restorative; to be therapeutic; to deliver procedural justice or to dispense with the worst of adversarial tactics; the role of all the victims who might be standing in that particular courtroom is likely to be improved.

Combined, however, with systemic and procedural reform - reforms which not only open opportunities for restorative, inquisitorial and therapeutic approaches to become central to the criminal trial process, but which recognise the full number of victims in the courtroom - and the criminal trial process will start to realise the purpose for which it should have been designed.

### **Conclusion**

Rather than siloing our approach to justice - cordoning off adversarial, restorative, or other approaches from each other - the time has come when, as a community, we should demand that the benefits inherent in *all* of these approaches be merged to deliver up a justice system which actually does what it should. Currently, there is no approach which offers all the answers in every situation, and commentators have noted that, just as the adversarial system does not fully meet the needs of all its participants, it nevertheless has fuelled the creation of other innovative iterations.<sup>56</sup>

This means that there is no need, necessarily, to dispense with all that has come before. Instead, we have the information we need and a growing body of evidence which will only inform us further, making us well placed to apply the advantages of a range of different, yet currently distinct, approaches in the one setting – charging the criminal trial process with the task of meeting not only the interests of the state, not only of the victim and offender, but ultimately the interests of us all.

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<sup>56</sup> M Rossner & D Tait, 'Contested Emotions: Adversarial rituals in non-adversarial justice proceedings', Vol 37, No. 1, *Monash University Law Review*, 241 – 258.

## Recommendations

The CIJ asks the VLRC to consider recommending the following:

1. That restorative justice approaches be carefully reviewed by government and that a working group be established comprising of members of the public service, judiciary and courts administration to develop and implement the inclusion of restorative practices in the mainstream criminal trial process.
2. That this process should involve the identification of options, or 'pathways' which victims could elect to take at various points in the trial process, including pre-trial where the prosecution has determined that a conviction is unlikely; as well as pre- and post-sentence. The Centre for Innovative Justice's 2014 report on this subject provides a framework in which these options can be considered.
3. That government should resource this process on an adequate and sustainable basis.
4. That courts and government review and begin to incorporate inquisitorial approaches such as judicial questioning, and for a focus on 'truth-telling' to be adopted.
5. That courts work to incorporate therapeutic approaches into mainstream proceedings wherever possible, drawing lessons from existing specialist jurisdictions.
6. That government commit to resourcing these efforts in an endeavour to address offending behaviour and prevent future crime.
7. That the criminal trial process be employed as an opportunity to identify and address past victimisation, as well as current criminogenic risks and needs, in all parties.
8. That victims – including accused persons who have been found to be victims of crime at an earlier stage in their lives – be provided with appropriate support by the criminal justice process to assist them in recovering from the harm that their experience of crime has caused.
9. That interaction of a victim or offender with the criminal justice system be used, where appropriate, as an opportunity to identify and address past and current victimisation within the parties' immediate families. Children of offenders, for example, are particularly vulnerable to future contact with the criminal justice system, while female partners of male offenders may well be the victims of family violence.
10. Sentences imposed on offenders must not perpetuate the causes of offending or create future victims. Sentencing courts should therefore consider and address the needs and vulnerabilities of offenders including homeless people and people with disabilities, and those with prior histories of victimisation, to ensure that sentences effectively address the causes of offending and do not perpetuate victimisation and disadvantage.

11. That women in prison who wish to report incidents in which they have been the victim of crime are provided adequate support to do so, including access to relevant victim support agencies or legal assistance. Corrections Victoria could assist in this process by establishing a means of identifying as early as possible, throughout their incarceration, women who have experienced family violence, and for this information to be used, with informed consent, to guide service provision and case management, in order to reduce future victimisation.
12. That the Victims of Crime Assistance Tribunal investigate opportunities to incorporate restorative approaches into its hearings.
13. That victims within the criminal trial process be provided with options at different points of the legal process that extend their participation beyond that of the role of a witness.