

‘The Role of Victims of Crime in the Criminal Trial Process’

Submission prepared by Dr Margaret Camilleri (Federation University)

Thank you for the opportunity to contribute to this important reference.

I would like to first briefly provide the context for my submission to this reference. My current role is as a lecturer and researcher at Federation University Australia. I have worked as an advocate and researcher in the area of victims of crime with disabilities and access to justice more broadly for approximately 20 years.

This submission is concerned primarily with victims with disabilities and their role in the trial process. Although the VLRC reference is not concerned with experiences of victims of the trial per se, but rather the victims’ role in the trial process, I would like to suggest that the experience and the role of victims in the trial process are inextricably linked in that, victims’ role in the trial process is informed by how the court responds to the needs of victims (e.g. adjustments required to ensure that victims can actively participate). In other words victims cannot participate, irrespective of their role, unless they are supported to do so. Hence, to consider the role of victims without considering the process and mechanisms by which participation will be achieved relegates the position of victims of crime with cognitive and or complex communication needs even further into the background.

Access is fundamental to the participation of any victim in the trial process. Although the heightened risk of victims with cognitive and or complex communication disabilities to victimisation is acknowledged, it is unfortunate that discussion about how courts can facilitate their participation has not been fully considered.

There is no doubt that the justice system and in particular the court process can be intimidating, daunting, alienating and at times a hostile environment for victims.¹ As research attests, this experience is compounded for victims with cognitive and complex communication disabilities.² Only those who have undergone years of training to understand the language, process and the roles of key players in the court process can navigate the environment with confidence. The experience of many victims (not all), is most commonly a one-off interaction with the criminal justice system. Victims and or witnesses are still recovering from the crime, while simultaneously required to actively interact with the criminal justice system by providing evidence. The equitable participation of victims with cognitive and complex communication needs in the trial process is critical in how this cohort are seen by potential perpetrators and the decisions made by police in determining the trajectory of such reports through the justice system.

One of the factors which inform police ‘downstream’ decisions about reports of sexual assault involving adult victims with a cognitive impairment is negative trial outcomes of sexual assault

¹ Edwards. C., Harold. G., and Kilcommins. S. (2012). Access to Justice for People with Disabilities as Victims of Crime in Ireland. School of Applied Social Studies and Centre for Criminal Justice and Human Rights, Faculty of Law. University College Cork; Cook, B., David, F. & Grant, F. (1999) Victims’ Rights Victims’ Needs. Australian research and Criminology. Research and Public Policy Series no. 19

² Australian Human Rights Commission (2014). *Equality before the law: Towards disability justice strategies*. Human Rights Commission; Victorian Equal Opportunity and Human Rights Commission (2014). *Beyond Doubt: The experiences of people with disabilities reporting crime*. Equal Victorian Opportunity and Human Rights Commission

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matters involving victims with cognitive impairment.³ Police are reluctant to progress reports of sexual assault made by adult victims with cognitive impairment if previous matters have not been successfully prosecuted or where victims have been treated particularly badly (from the police perspective) by defence because of their disability. These experiences and perceptions result in reluctance by police to put victims through the court process again or to progress matters through the justice system because of a perceived reduced prospect for success. Arguably, unless the participation of victims with cognitive impairment is considered and their needs addressed, the cycle of violence perpetrated against this group of victims is perpetuated, rendering victims disabled, more powerless, and more vulnerable to possible repeat offences.⁴

Although 'vulnerable witnesses' are mentioned in the discussion papers, there is no acknowledgement of the factors that impede access of people with physical, cognitive and complex communication disabilities to the court process. The consultation paper rightly refers to the humiliation that may be experienced by victims during cross examination. The level of humiliation by victims with disabilities is compounded and would be humiliating to the extent as to act as a barrier to accessing justice during the trial and also in the future.

It is concerning that there appears to be no identified position at the court (magistrates, county or supreme courts) who has responsibility to respond to the access needs of victims with disabilities, so as to ensure their equal participation in the court and trial process. The Australian Human Rights Commission⁵ identified several barriers to equal participation in the trial process including the absence of 'systematic approaches to identify disability...resulting in supports and services not being provided and no accommodation being made'. The potential for witnesses with cognitive or complex communication disabilities to participate equally in the court process ultimately depends on the willingness and commitment of the courts and the justice system more broadly, to reasonably accommodate the needs of this group of victims.

Data collection

The lack of data about victims generally including victims with disabilities, is a perennial issue. The availability of reliable data is fundamental in developing services and processes aimed at meeting the needs of service user. In this regard, if courts seek to enhance their response to those with whom they interact, then comprehensive data collection tools are particularly important.

Indeed, the report tabled to the Victorian Parliament in March 2013⁶ reiterated the need to quantify the level involvement of people with disabilities with the justice system through the collection of accurate data. The report recommended that a centralised data system between 'Victoria Police, the Office of Public Prosecutions, the courts and the Department of Human Services be established'. While I acknowledge that the recommendation put forward in the

³ Wacker, J. L., Parish, S. L., & Macy, R. J. (2008). Sexual assault and women with cognitive disabilities: Codifying discrimination in the United States. *Journal of Disability Policy Studies*, 18(2), 86-94; LaFree, G. (1989). *Rape and criminal justice: The social construction of sexual assault*. Belmont California: Wadsworth; Heenan, M., & Murray, S. (2006). *Study of reported rapes in Victoria 2000-2003: Summary research report*. Melbourne: Office of Women's Policy - Department of Victorian Communities.

⁴ Camilleri, M. (2010) *[Dis]abled justice: why reports of sexual assaults made by adults with cognitive impairment fail to proceed through the justice system* (PHD Thesis, The University of Ballarat; Equal Opportunity and Human Rights Commission (2014). *Beyond Doubt: The experiences of people with disabilities reporting crime*. Australian Human Rights Commission

⁵ Australian Human Rights Commission (2014). *Equality before the law: Towards disability justice strategies*. Human Rights Commission p.25

⁶ Law reform Committee (2013) *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*. Parliament of Victoria p.xxi

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report is an immense task, it does nonetheless illuminate a significant gap in data, without which an accurate account of the justice system response to people with disabilities cannot adequately or accurately be known.

Human rights obligations

Access to justice, including the right to have 'reasonable adjustments' made by justice agencies, including courts in order to facilitate equal participation is articulated in Article 13 of the Convention on the Rights of Persons with Disabilities (CRPD), which states

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.⁷

According to the Australian Human Rights Commission, 'reasonable accommodation' includes (but not limited to) access to the physical environment, court proceedings and 'the use of language which can be understood by a person with disability'.⁸

Substantial challenges exist for people with disabilities either as defendants or victims in their interaction with the criminal justice system, in particular the recognition of their rights to access the justice system on an equal level to other members of the society. Discourse about the role of victims in the trial process should be inclusive of all victims, including victims with disabilities. To ignore this important group would further compound the challenges, subsequent exclusion and further disadvantage already experienced by people with disabilities.

Determining and clarifying the role of victims in the trial process must include discussions about how this cohort will be facilitated to engage and participate at an equal level to other victims of crime.

29 Should the current protective measures for vulnerable witnesses be extended to other categories of victim, or to victims of other types of offence?

Response:

Consideration should be given to extend definition of vulnerable witnesses to include intimidated witnesses, similar to the definition used in the United Kingdom.

Intimidated witnesses could include witnesses who are victims of serious offences where fear and intimidation was used in the perpetration of the crime (e.g hate crime, human trafficking, attempted murder, kidnap and false imprisonment).⁹

All witnesses included in the current definition of vulnerable witness and those intimidated witnesses, as described above should be eligible for special measures

⁷ <http://www.un.org/disabilities/convention/conventionfull.shtml> Accessed 29 October 2015

⁸ Australian Human Rights Commission (2014). *Equality before the law: Towards disability justice strategies*. Human Rights Commission p.11

⁹ Crown Prosecution Service http://www.cps.gov.uk/legal/s_to_u/special_measures/#a03

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unless they choose to opt out. A hierarchy of witnesses eligible as a vulnerable and intimidated witnesses should be avoided.

It is also vital that any special measures be appropriately resourced (for example, remote witness facilities) should be available as required, regardless of the witnesses geographic location.¹⁰ Once a decision is made that special measures are appropriate in certain matters (for example, family violence and sexual assault) access to such measures should not be influenced by where a witness resides.

31 Should Victoria introduce an intermediary scheme? If so, for which victims? What functions should an intermediary perform?

Response:

The Parliamentary Law Reform Committee's 'Inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers'¹¹ tabled on 5 March 2013, made eleven findings. Of these, three findings consider the impact of the court process or judicial awareness of disability and communication needs may impede equal access to justice for adults with communication and or cognitive impairment.

Importantly, the findings highlight the critical role played by the judiciary, the courts and other justice agencies in facilitating access to the justice system by simplifying and coordinating processes. Including by using accessible language, and ensuring that the justice system is fair and equitable by responding positively to the needs of adults with cognitive impairment as witnesses or accused.

The findings most relevant to this reference:

Finding 6: A significant barrier affecting the ability of people with an intellectual disability or cognitive impairment to access the justice system is the complexity of legal language used and the processes of the justice system. Lack of knowledge and understanding of the justice system can inadvertently result in a person with an intellectual disability or cognitive impairment having contact with the justice system and can exacerbate the challenges that they may experience.¹²

Finding 8: A client with an intellectual disability or cognitive impairment may, as a consequence of their disability, experience difficulties understanding and communicating with others. Lawyers can enhance their clients' ability to understand and participate in the legal process by modifying their approaches to communication.¹³

Finding 9: Members of the judiciary have an important role to play ensuring that people with an intellectual disability or cognitive impairment receive fair and equal treatment when they come before the courts. There is an increasing trend for the judiciary to recognise that people with an intellectual disability or cognitive impairment experience unique difficulties when involved in court processes. The needs of a person with an intellectual disability or cognitive impairment should be taken into account by all members of the judiciary.¹⁴

¹⁰ Magistrates' Court of Victoria Children's Court of Victoria Submission to the Royal Commission into Family Violence June 2015

¹¹ Parliamentary Law Reform Committee (2013) Inquiry into access to and interaction with the justice system by people with intellectual disability and their families and carers. p. 285

¹² Ibid

¹³ Ibid

¹⁴ Ibid p. xxxviii

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Research states unequivocally that communication enhances access to the court process and to justice more broadly, of people with cognitive impairment and complex communication needs.¹⁵ The principal of orality embedded within the adversarial system does not recognise communication difference reflected in society. Although the Evidence Act 2008 (Vic) section 31¹⁶ allows adjustments for 'deaf or mute' witnesses, it is silent on adjustments which can be made for witnesses with complex communication needs. Consequently, it is unsurprising that according to the VEOHRC 'courts remain cautious about using Augmentative and Alternative Communication'.¹⁷

The cautiousness of the court to accept alternative forms of communication as a legitimate mode of providing evidence is to some extent, symptomatic of a lack of understanding about their use. Indeed, the Parliamentary Law Reform Committee made recommendations which addressed the need for the judiciary to increase their understanding of the needs of victims or accused with cognitive and complex communication disabilities and how their needs can be met.¹⁸ The implication of a lack of understanding of communication needs and indeed other support needs for victims with cognitive and or complex communication needs, leads to embarrassment of victims who have relied on certain communication devices only to be told they cannot use it, or that no additional support can be given which would make the process of providing evidence over several days less exhausting.

Early identification of the needs of victims and accused with cognitive or complex communication disabilities is crucial in facilitating equal access to justice. The role of an Intermediary is to ensure that the needs of victims, witnesses and accused with cognitive or complex communication disabilities are recognised and addressed in order to enhance their participation in the justice process.

The role of an intermediary is to an intermediary who seeks to ensure that witnesses understand the questions that are put to them during the trial, and that their answers are also understood.¹⁹ An evaluation of the Intermediary Program²⁰ in England found that the use of intermediaries 'did not did not affect the rights of the accused' and had the potential to impact positively on witness satisfaction and public confidence. The intermediary program has been used as model for other jurisdictions such as South Australia, who have opted for a 'communication assistant' model. Objective 2 of the Disability Justice Plan provides an entitlement for 'victims, witnesses or defendants, with complex communication needs to have a communication assistant present for any contact with the criminal justice system'.²¹

¹⁵ Victorian Equal Opportunity and Human Rights Commission (2014). *Beyond Doubt: The experiences of people with disabilities reporting crime*. Equal Victorian Opportunity and Human Rights Commission; Australian Human Rights Commission (2014). *Equality before the law: Towards disability justice strategies*. Human Rights Commission p.25

¹⁶ Evidence Act 2008 (Vic) s31

¹⁷ Victorian Equal Opportunity and Human Rights Commission (2014). *Beyond Doubt: The experiences of people with disabilities reporting crime*. Equal Victorian Opportunity and Human Rights Commission. p. 112

¹⁸ Parliamentary Law Reform Committee (2013) Inquiry into access to and interaction with the justice system by people with intellectual disability and their families and carers. See recommendations 26 and 27.

¹⁹ Plotnikoff, J. & Woolfson, R (2008). 'Making best use of the Intermediary Special Measure', *Criminal Law Review*, 2: 91-104.

²⁰ Plotnikoff, J & Woolfson, R. (no date) The .Go-Between.: evaluation of intermediary pathfinder projects. P.70

²¹ Department of Justice. Disability Justice Plan 2014-2017

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It is also important to keep in mind that intermediaries are not a panacea to communication barriers, but rather should be viewed one strategy in a suit of strategies, including, but not limited to training for the judiciary and other members of the legal profession.

- 42 **Should restorative justice procedures be available as either an alternative or supplementary part of the sentencing process? If not, why not? If so, in what circumstances?**

Providing a range of alternatives including those that are less adversarial, is necessary in order to improve the experience of victims’ within the criminal justice system. Similarly, research has identified the many issues that victims’ of sexual assault including those with a cognitive impairment may experience in the criminal justice system. Experiences which have led to secondary victimisation and a reluctance for victims to reengage with the criminal justice system.

Care should be taken to ensure that restorative justice remain victim centred. In that such an approach is chosen by the victim as the best option for them, rather than a more ‘manageable’ alternative for the justice system. If restorative justice elements or approaches are introduced it should be based on the express needs and wishes of the victim rather than its use being determined by the type of crime or a type of victim. For example, care should also be taken that restorative justice is not utilised as the ‘preferred’ option because a victim has a cognitive or communication impairments. Such an approach would potentially lead to a two tiered system of justice where those victims that the justice system finds particularly difficult to respond to are ‘encouraged’ down a restorative justice path.

- 55 **Victims Charter Act 2006 (Vic)**
Could the obligations set out in the Director of Public Prosecutions Victoria’s Director’s Policy: Victims and Persons Adversely Affected by Crime, particularly obligations to consult, be strengthened by incorporating them into the Victims’ Charter Act 2006 (Vic) or other Victorian legislation? Should the Victims’ Charter Act 2006 (Vic) be amended to include other rights, or broaden existing rights for victims?

Response

The Victims Charter would greatly benefit from further clarity about their rights and what they can expect to happen if their rights have been breached. In addition, the Charter would also benefit from greater detail about the responsibilities of each agency.

At times, terminology used in the Charter is particularly broad, potentially creating uncertainty about the responsibilities of each agency. For example, Section 12 of the Charter states that ‘Contact between victim and accused in court building to be minimised’ by ‘a prosecuting agency and the courts’. It is not clear however, who is ultimately responsible. In this instance, it should not be the victim’s responsibility to

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determine which agency has breached their responsibility to keep contact between the victim and the offender to a minimum.

Another example requiring greater clarity and more detailed description, is Section 2 below.

Section (2) Investigatory agencies, prosecuting agencies and victims' services agencies are to take into account, and be responsive to, the particular needs of persons adversely affected by crime, particularly needs relating to differences such as—

- (a) race or indigenous background;
- (b) sex or gender identity;
- (c) cultural or linguistic diversity;
- (d) sexual orientation;
- (e) disability;
- (f) religion;
- (g) age.

The meaning of the phrase 'take into account, and be responsive to, the particular needs' is ambiguous. The needs of each of the different target groups should be described in more detail. For example, 'to be understood and to understand – in your first language or through the use of your main form of communication'.

There are several other limitations of the Victims Charter Act 2006, these are:

- An underlying assumption that police will take all reports or that victims can successfully make a report to police. Research suggests that victims with cognitive impairments experience considerable difficulty in making reports to police, predominantly because police assume that reports may be false due to the presumption of unreliability of the victim.²²
- The courts appear to have no obligation to victims within the Victims Charter Acts 2006.
- Implied in the Charter is the assumption that all reports of crimes are taken. This is particularly problematic for victims with disabilities generally, but in particular victims with cognitive or communication impairments, as not being believed by police at the point of reporting is a common complaint made by victims with cognitive impairments.²³
- Currently, complaints are dealt with by the agency against which a complaint has being made. It seems logical that the position of Victims of Crime Commissioner is best placed to investigate breaches of the Charter. The Charter should also include a clear outline of the process of making a complaint and what victims can reasonably expect from the process and the investigating agency.

²² Victorian Equal Opportunity and Human Rights Commission (2014). *Beyond Doubt: The experiences of people with disabilities reporting crime*. Equal Victorian Opportunity and Human Rights Commission; Camilleri, M. (2010) *[Dis]abled justice: why reports of sexual assaults made by adults with cognitive impairment fail to proceed through the justice system* (PHD Thesis, The University of Ballarat; IP Piper (no date) *BACKGROUND Paper on Access to Justice for People with Disability in the Criminal Justice System*

²³ Victorian Equal Opportunity and Human Rights Commission (2014). *Beyond Doubt: The experiences of people with disabilities reporting crime*. Equal Victorian Opportunity and Human Rights Commission; Camilleri, M. (2010) *[Dis]abled justice: why reports of sexual assaults made by adults with cognitive impairment fail to proceed through the justice system* (PHD Thesis, The University of Ballarat

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60 Are there gaps in the provision of victim support services?

Victims who are required to provide evidence either in the magistrates’ court of the higher courts require assistance pre, during and immediately post court.²⁴ Many victims also require assistance well beyond the trial or hearing. Recovery irrespective of the crime, can take a different path depending on the victim, their back ground, age, disability, support, previous victimisation experiences.

The court and the justice process is not a familiar environment for most victims. Although a matter may take up to 12 months or longer before the matter is heard, many victims are still suffering the emotional impact of the crime. However, there is also an expectation that victims will interact with the court process in some way, whether to give evidence or prepare and deliver a victim impact statement.

A significant gap in the provision of victim support services is that not all victims who require support receive it. Access to support at court is provided by either Court Network, Child Witness Service (CWS) or the OPP Witness Assistance Service (WAS). All victims require some level of information or assistance to assist them to traverse the criminal justice system. However, the level of support will depend on the victim’s circumstances.

A victim’s eligibility for support should not be contingent of where they reside. While WAS and CWS provide services to victims in regional areas, these are small agencies with finite resources, hence it would be surprising, if they are able to meet demand.

²⁴ Ross, S., Lawrence, J., Holder, R., Politiis, A & Graham, J (2009) Fairness and Equity for Victims of Crimes: What do they want and why don’t they get it?; Victims Support Agency (2013) Information and Support Needs of Victims and Witnesses in the Magistrates’ Court of Victoria