



CENTRE FOR RURAL REGIONAL LAW AND JUSTICE

**Submission to the Victorian Law Reform Commission's review of
the role of victims of crime before, during and after criminal trials**

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The Centre for Rural Regional Law and Justice

The Centre for Rural Regional Law and Justice (CRRLJ) sits within the Law School of Deakin University, at its Geelong Waterfront Campus. It is active in applied research, community engagement and advocacy for policy and law reform on issues concerning access to justice throughout rural and regional Australia, with an emphasis on rural and regional Victoria. These activities include:

- Undertaking and reporting on research into a range of areas where rural and regional communities experience disadvantage in their access to justice, including: family violence; access to legal help for people with mental illness; sentencing outcomes; conflicts of interest in legal practice and the overall administration of the law.
- Delivering regular legal education forums on a range of topics relevant to rural and regional communities, with a range of remote attendance options enabling people to participate at designated locations in a nearby town, or at work or at home. Topics are presented by experts and practitioners in the relevant fields across government, community, industry and academia, and allow participants to present questions and make comments on the issues discussed. Recent topics presented have included: sexting, young people and the law; youth justice reinvestment in Victoria; family violence and family law; the Legal Profession Uniform Act 2014; a panel of ombudsman and other complaints-handling bodies; and meeting legal needs of remote communities through digital technology. Complementing these forums, the CRRLJ has also published its report and guidelines *Linking Law: Practical Guidelines for Delivering Law to Rural Victoria using E-Learning Technologies*, which guides other organisations in technology-based delivery of high-quality and accessible legal education to rural communities.
- Participating in policy and law reform activities, particularly through submissions to government enquiries and reviews, focussing on the significance of these for rural and regional communities. Over the past couple of years, these have included: the Australian Law Reform Commission Inquiry into Legal Barriers for People with a Disability; the Victorian Parliament Family and Community Development Committee Inquiry into Social Inclusion for People with a Disability; the Productivity Commission Inquiry into Access to Civil Justice; and the Victorian Government Royal Commission into Family Violence.

The focus of this submission

While all of the matters raised in the Commission's Consultation Paper are relevant to rural and regional Victorians, this submission generally responds only to those where the relevance to regional and rural communities is particularly strong, or where there is a particular regional or rural aspect of the issues raised, or the questions put, throughout the Paper.

Where this submission does not respond to or comment on a particular question or issue, this should not be taken as suggesting that we do not think that it matters, but simply that we do not identify any significantly different issues arising for regional and rural Victorians than for those in metropolitan areas.

Therefore, this submission should not be read as a comprehensive commentary on the Commission's full Terms of Reference, but rather a more narrowly focussed submission on matters that are of particular, and sometimes specific, relevance to regional and rural Victorians who are victims of crime.

However, while stressing that this submission focusses particularly on issues from a regional and rural perspective, this does not mean that all regional and rural communities are alike. There can be some common characteristics and some shared experiences of limited access to justice, and justice-related, services; but the communities themselves differ from one another in the same ways that cities and suburbs and, indeed, individuals, differ from one another also. We stress that it is important to always be mindful of the diversity of our communities whenever issues of policy and law reform are being considered.

General comments

It is important to note from the outset – and this point will be reiterated from time to time throughout this submission – that rural and regional communities are all different from one another. The reforms being considered by the Commission in this review, like all law reform, must recognise and respond to the diversity of communities that go to make up Victoria or, indeed, anywhere. More specifically in terms of the current review, it is important to avoid the stereotype of rural communities as idyllic havens of cohesion and peace. As Hogg and Carrington (2006, 82) put it: 'Crime disturbs the idealised image of rural communities as wholesome, caring and cohesive: refuges from the woes of city life.' The points made throughout this submission should always be read with the diversity of regional and rural communities in mind.

That said, there are some challenges that are common to many regional and rural communities, particularly in relation to their access to justice and the law. As noted throughout *Postcode Justice: Rural and Regional Disadvantage in the Administration of the Law in Victoria* (Coverdale, 2011), one of the overriding issues impacting on regional and rural communities is the lack of access to services that are generally readily available in the cities and large towns. It can be difficult to get access to legal advice and legal information, courts sit only sporadically and often in buildings that offer little opportunity for privacy or have otherwise inadequate facilities, support services for victims and diversionary services for offenders are limited and often difficult to get to, and issues of conflict of interest can arise, both for lawyers and for police who may already have previous professional or personal relationships with one or both of the perpetrator or victim of a crime.

All of these impact on a victim's experience of the criminal trial process, and many of these issues will be further elaborated throughout the course of this submission. Some of the observations made on these matters are in part informed by research conducted in the Magistrates' Court, particularly in family violence matters. While the Commission's current review is concerned with criminal trials, and therefore with the County and Supreme Courts, we nevertheless submit that many of the issues can be generalised across jurisdictions but we will, in any event, note when we are doing so.

We also note that, by definition, regional and rural communities are smaller than metropolitan communities. This means that the relationships amongst their members are likely to be more entwined and more complex. People are more likely to know one another in a range of contexts and to have relationships with one another on a number of levels. In any area of law, where clarity and separation of relationships and interests is important, this can give rise to particularly complex challenges for the administration of justice. Once again, we will elaborate on some of these points throughout this submission.

But these two general points give rise to two general drivers which we submit should always be considered in any reform to the law, including in relation to the experiences of victims of crime. It involves always asking two questions:

First, what does the reform mean for communities where access to services and supports is typically less than in the cities and large towns? How can we ensure that those communities will have equal access to the resources that the reform requires?

Second, what does the reform mean for communities where people may know and relate to one another in a range of capacities and where, therefore, relationships may be more intricate and conflicted than in the cities and large towns? How can we ensure that the nature of relationships in smaller communities is taken into account in planning the reform?

Our submission now moves to address specific questions that the Commission asks in its Consultation Paper.

Responses to specific chapters and questions from the Consultation Paper

Chapter 4: What should be the role of victims in the criminal trial process?

Question 3: *If changes attitudes and behaviour are needed to achieve the intent of legislative reform, how might those changes be achieved?*

It is pertinent in answering this question to reiterate the remarks of the Hon. Martin Moynihan, quoted by the Commission in the Consultation Paper (p 39), from the Queensland Government's 2008 Review of the Civil and Criminal Justice System:

Simply because a reform has been effective elsewhere, does not mean, however, that it can be transplanted to a different cultural and social context and be assumed to have the same results. Local legal cultures must be considered and local refinements and adjustments will necessarily be required over time.

These remarks apply not only across jurisdictions, but also across communities. And, while the question relates specifically to the issue of the role of victims in the criminal trial process as protected, participating or prosecuting witnesses, they are, of course, relevant to all aspects of the review.

However, on this aspect of the issue in particular, we would note that any more active role for victims in the criminal trial process must be accompanied by accessible supports, in terms both of legal advice and of personal support. While a more active role for a victim in the criminal trial process can be empowering for them, it can also be threatening, particularly when that role is carried out in a smaller community where people know each other better. A victim in a small community may feel more intimidated cross-examining an alleged perpetrator who is well known and liked within the community, for example; or may feel more reluctant to participate actively in the trial process, especially where the crime might involve details that could be embarrassing or sensitive in a small community.

This is not to say that reforms such as those proposed in the Consultation Paper are less appropriate for rural and regional communities, but simply that their implications for those communities need to be matched with the appropriate supports and arrangements to enable victims to participate more actively without feeling that there will be repercussion from their community. Access to legal assistance, personal support and the adoption of restorative justice models that allow for less adversarial responses to crime can all help in this regard.

Chapter 5: The role of victims in the decision to prosecute

Question 10: Should victims be given the opportunity to access legal advice or representation during any consultation with the prosecution?

As long as legal advice is available to the prosecutor and the accused in various negotiations and stages around the decision to proceed with a prosecution, it seems self-evident that any decision to give a greater role to the victim should include a similar right to access legal advice and representation. Participation must be, as much as possible, on a level playing field. Even if the role of the victim in decisions about prosecution remains relatively minor, it makes sense that the victim should still have access to legal advice, and possibly representation, even when engaging in consultations with the prosecution. The victim should be entitled to have access to expertise that is able to explain the consequences of various courses of action solely in terms of the victim's interests. It is only in this way that the victim can participate meaningfully in any discussions about decisions to prosecute, even if the victim's role in those discussions has no decisive influence.

However, the lack of access to legal advice and representation in rural and regional areas must be considered here also. Obviously this is largely because there are less lawyers, and this creates not only a lack of lawyers but also an increased likelihood of conflict of interest for legal practitioners. Research conducted by the CRRLJ has suggested that lawyers in more remote areas are less likely to decline to act when there is a conflict of interest (Kyle, Coverdale and Powers 2014, 68).

Once it is assumed that a victim can obtain access to legal advice, it can be easy for other parties – particularly the prosecution – to behave or communicate in ways that, through assuming access to legal advice for victims, is even more alienating for those who do not have that advice. This is an extension of a phenomenon that is seen more and more across many parts of the justice system: as lawyers participate more and more in legal processes, those processes inevitably become more complex and intimidating for people who do not have access to legal advice and representation. Procedures in Tribunals are an example of this. So, while the right to access legal advice and representation for victims may in many ways appear desirable, it is important to ensure that that access is equitable for all victims, regardless of where they live or of their ability to pay. Without such equity of access, the disparity that is already evident between represented and unrepresented litigants in other matters will begin to be seen in victims, too, throughout the process of making decisions in relation to a prosecution.

Question 12: Should victims be able to pursue restorative justice or other alternative processes instead of, or at any point during, a traditional prosecution? Why or why not?

We believe restorative justice can be an especially positive response to crime, especially in towns where relationships between the various people, including perpetrator and victim, may be likely to need to continue at some level because of shared connection to a small community. In these circumstances, it is important that the justice system does not unnecessarily exacerbate divisions and conflicts through its conventionally adversarial approach.

Restorative justice can, what's more, enable more whole-of-community responses to crime, which can serve not only to increase a perpetrator's likelihood of rehabilitation but can also give a victim a greater sense of safety and resolution into the future. Local communities can be involved in the administration of restorative justice programs. Overseas research has shown some impressive successes in community-based restorative justice programs in rural communities, in terms both of positive engagement of offenders and of establishing dynamic and creative relationship between the

sometimes competing interests of centralised State control and local community autonomy on matters of community safety and justice (Keet 2010, 114).

Chapter 6: The role of victims in committal proceedings

When courts sit in regional areas on a circuit basis, the processes and stresses for victims can be inordinately exacerbated by the extra delays that arise when sitting dates are so relatively infrequent. For these reasons, we question the merit of committal hearings being part of the process at all, leading as they do to extra delays in the process, and would advocate that consideration be given to reforms such as those adopted in New Zealand in 2011, as explained in the Consultation Paper (6.34 – 6.37), where committal hearings are abolished altogether in favour of a more case-management oriented approach.

Chapter 7: The role of victims in pre-trial proceedings

We note and support the overall sentiment of the Commission's suggestion in the Consultation Paper (7.71) that judges be required, before hearing a pre-trial application in which a victim is likely to have an interest, to be 'satisfied that the victim has been made aware of the application, received legal advice, and/or participated in consultation with the prosecution'.

While noting, as with committal hearings, that pre-trial proceedings can result in inordinate delays, particularly in regional areas where courts sit infrequently, we stress the need for additional efforts to be made to ensure that victims are kept informed of, and involved in, these processes. The issues of access to legal advice and consultation with prosecutors, give rise to slightly different issues for regional and rural victims.

First, it is important to recognise, as noted frequently throughout this submission, that legal assistance can be difficult to obtain in regional and rural areas. So, while we encourage measures to require judges to be satisfied that victims have had access to legal advice in relation to pre-trial proceedings in which they have an interest, we stress the importance of considering how this will play out for regional and rural victims. A balance needs to be found between, on the one hand, seeking to ensure that victims have had appropriate access to legal advice before a pre-trial hearing can proceed and, on the other hand, not creating a process that results to even greater delays without any significant benefits for either the victim or the broader interests of justice. Less adversarial proceedings should therefore also be considered as part of the mix of options for determining matters that are currently dealt with at pre-trial hearings. In this regard, while acknowledging the challenges in adopting restorative justice processes in criminal matters as outlined in the Consultation Paper (7.77-7.80) we nevertheless support greater attention to the restorative justice model as an option, and to involving victims in discussions about whether or not it may be appropriate for them in their particular case. An independent representative of the public interest could be involved in that process to ensure that competing factors such as general deterrence are kept in the balance. Whether this should be the prosecutor, or a separate independent statutory body, is a matter that may require further consideration and consultation.

Second, we also note that prosecutors will be generally less readily accessible to a victim living in regional and rural areas. We note the value of existing and emerging remote technologies for facilitating easier communication between prosecutors and victims and while these cannot be assumed to be available to everyone, particularly those living in more remote areas, they at least provide some increased opportunities for some. We therefore stress the need for prosecutors to be

cognisant of the need to ensure greater accessibility for the regional and rural victims of the matters on which they are working, particularly if future reforms place a greater obligation on them to engage in consultation with victims.

Chapter 8: The role of victims in the trial

Question 28: Are the protective procedures for the taking of evidence from vulnerable victims appropriate and effective?

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

We again stress that regionality and rurality are likely to bring their own added layers of vulnerability for victims of crime.

In a 1991 report on allegations of systemic abuse of both staff and clients in a residential institution for people with intellectual disabilities in Western Victoria, Jude Wallace noted a range of small-town specific factors that contributed to victims being reluctant to report crimes to the police. These included such things as: fear that they would be stigmatised and ostracised by the community when making allegations against people who were known and liked locally; fears that when allegations related to crimes in the workplace that they would lose their job and be unable to find other work in the local area; fears that the close-knit nature of the community would lead to victims' family members taking revenge on alleged offenders; and a general fear of shame and humiliation, particularly where crimes involved sexual offending (Wallace, 1991). While most of Wallace's observations related to the decisions victims made about whether or not to report a matter to the police, they can undoubtedly also play out in victims' role in giving evidence in a criminal trial and in some ways even more, given the public nature of criminal trials.

These issues of public humiliation for victims, particularly of sexual offending, in small communities were reinforced in by the sentencing Judge in a matter where several teenage boys in regional Victoria were coaxed into providing pornographic material of themselves, online, for another member of their local community. In noting the victims' reluctance to report the matter after they had initially participated in providing images of themselves to a local man who they believed to be a teenage girl, His Honour noted:

In the situation where the majority of these victims came from the South Gippsland area around Leongatha and Korumburra, the fear of being exposed in that way would have been a very real one to them. I have got no doubt and the victim impact statements support that, that it caused anxiety and concern that they would be ultimately humiliated and I think the threats [from the offender to the victims to continue providing images or else risk earlier images being publically distributed] were designed for that purpose, even though they may not have been carried out or had the desired effect.

(DPP v Summer [2014] VCC 1539 (27 June 2014), 16)

In addition to these general issues about a victims' added vulnerability in small communities when they speak out about the crimes committed against them, we note that the court itself may add a further dimension to this because, as already noted, of the public nature of its hearings.

These issues were further reinforced, and elaborated, in recent research that the CRRLJ undertook in relation to women experiencing family violence in regional and rural Victoria. While that research

was concerned primarily with matters being heard in the Magistrates' Court, many of the issues it raises are equally relevant to the County and Supreme Courts when hearing matters in regional towns.

Issues raised in the research included: a lack of privacy at the front desk; lack of empathy and compassion in court front-desk staff; lack of facilities to ensure that victims do not have to encounter or feel threatened by the accused; the fear of giving evidence for reasons already noted; the under-use and limitations of onsite, court-based video-link technology; and feelings of compromised safety for victims when they are leaving court, particularly if the accused is acquitted or if relatives and friends of the accused are present (George and Harris 2014, 74-86). Obviously some of these issue will be more relevant to some criminal matters than to others, but the broad issue of needing courts that are safe, user-friendly and private is one that is particularly acute in regional towns, where the buildings are often smaller, older and less well equipped than in the city.

Questions 32-34: Participatory and prosecutorial roles for victims

We do not, from a regional and rural perspective, have a defined position on the question of how, and to what extent, victims' roles in the trial process should be strengthened. We do, however, note some overall points that are of particular relevance for regional and rural victims when considering this issue:

- A more active role for the victim in the criminal trial must be coupled with improved court facilities and services, as outlined in our answer to the previous questions, so that victims are able to feel safe and supported when they are attending court. This will be only all the more acute if the victim is playing a more active role in the proceedings,
- Access to legal advice and representation must be available to regional and rural victims on an equitable basis to their metropolitan counterparts,
- Where restorative justice and other alternative resolution measures can provide sufficient opportunity for the victim to be heard and to be active in the overall proceedings, these should be available and used instead of, or alongside, adversarial court-based procedures wherever possible.

Chapter 9: The role of victims in sentencing

Question 39: Should community impact statements be introduced?

We note the matter of *R v Miller* to which the Commission refers in the Consultation Paper (9.11) where the impact of a crime on the community was recognised in the sense of creating a generalised sense of shock and disturbance within a regional community. We would certainly support the point made by Their Honours in that decision, that it is appropriate for the court, when sentencing, to consider a crime's effect on a community. We would therefore support the inclusion of community impact statements as part of the sentencing process.

While the impact on community is an important aspect of any crime, it can be particularly important in smaller communities where, by definition, a small number of people impacted by a crime will constitute a much larger percentage of the local community. As noted before, relationships between the members of a small community are likely to be more complex and multi-faceted than in larger communities, through people knowing each other in a variety of contexts. Professional connections and social connections often overlap. When crimes are committed within these networks, the

ramifications can resonate much more deeply, and in many more directions, than in the larger cities where the relationships are likely to be more compartmentalised.

Further, the tendency of some small communities to have a strong sense of local identity, which can then form the basis for robust and productive social capital, can be a very potent means by which community safety and justice can be safeguarded. This can be seriously eroded through crime and, thus eroded, can easily enable further crime to fester. Put simply, a well-supported and functional community can be enormously effective in maintaining justice and safety of its members – but a poorly supported, dysfunctional community can facilitate the opposite. As the literature has noted, community cohesion can be both positive and negative: protecting people against crime, but also enabling its commission (Barclay and Donnermayer 2007, 54). In this way the relationship between crime and the community is a critical one and we therefore submit that it is relevant to consider this in the sentencing process.

Chapter 10: Compensation and restitution

We note, generally, that the financial and other material impacts of crime can sometimes be disproportionately great in regional and rural communities. For example, it can be inordinately difficult for a victim to continue living in a small community, even if the offender themselves is no longer in the community, if some of the offender's relatives or friends, are still there. This can force victims to move just to feel safe.

Where crime leads to disruptions in a victim's housing or employment, the opportunities to relocate either can be extremely limited and expensive. Even if housing can be found in another town, work might not be available there.

This should be able to be part of what the court recognises when considering compensation and restitution, and we would argue that it is reasonable to do so when, as discussed in our responses to the issues raised in Chapter 9, crime is seen as having a very significant relationship to community. It therefore follows that the community dimensions of crime, including the community's relationship with the offender, may need to be taken into account when considering both the impact of the crime on the victim and the costs the victim might incur because of this.

We also support any moves that enable compensation and restitution claims to be made and heard during the trial, rather than after sentencing. In regional and rural areas where courts sit infrequently, and often still a long way from where the victim lives, more streamlined approaches should be explored as much as possible.

Once again, we note the value of restorative justice processes in dealing with these issues, and often questions of compensation and restitution can be more seamlessly integrated into the restorative justice discussion.

Chapter 12: Victims' rights in the criminal trial process

Question 56: Should the Victims' Charter Act 2006 (Vic) be amended to include other rights, or broaden existing rights for victims?

We submit that S 6 (2) of the *Victims' Charter Act 2006* (Vic) be strengthened and extended. Rather than focussing only on the responsibility of agencies covered by the Act to take into account and be responsive the particular needs of persons adversely affected by crime, it should also affirm – either

in this section or elsewhere in the Act – the right of all persons adversely affected by crime to be experience the criminal trial process in a way that does not involve disadvantage on the basis of various attributes, such as those listed in S 6 (2), to which we would obviously ask that reference to rurality be included.

We believe that a general statement of principle along these lines is important as a basis for arguing for more service development for people in regional and rural areas and, more broadly, for more consideration of how any reforms to the criminal trial process impacts upon victims with particular needs arising from their rurality or other attributes as currently listed in the Act.

Other issues

Cross-border issues

The Centre would like to draw additional attention to the issues experienced by victims who live in, or are affected by crime in, towns close to State borders. This can give rise to considerable complexities, such as: cooperative relationships and reciprocal powers of police to investigate matters across borders; eligibility problems for victims living on one side of a border for whom the closest services they need, in relation to the crime, are on the other side of the border; complexities that arise when any combination of accused, victim, police, court and diversionary services are located across borders. Often when these problems arise, their solutions have been found in the ingenuity and goodwill of individual services and officers involved – initiated often by individual police, or grassroots communities and community services, willing to work flexibly across borders (Hufnagel, 2011, 340-341). A close investigation of this issue is needed, however, to ensure that the disadvantage sometimes experienced by victims of crime in border communities is addressed systemically rather than from one situation, or one community, to the next.

The diversity of victims, offenders, communities and crime

Aligned with the issue of victims' rights under the Act, is that of recognising the enormous need for more diverse procedures in dealing with criminal matters in ways that are fairer to victims and, indeed, to offenders and, beyond them, to communities more generally. The people who commit crimes differ, the people against whom crimes are committed differ, the communities in which crimes take place differ and the crimes themselves differ. Our criminal justice system already recognises this to some extent through specialist courts such as the Koori Court and Drug Court. It is important that the criminal justice system continues to look for opportunities to further respond to this diversity, including through embracing the diversity of our rural communities by enabling those communities to explore their own restorative and community justice systems that can work alongside those of the State. This does not mean that local communities make their own rules – but rather that they are recognised as crucial components of the whole criminal justice picture. As argued in the Keet article to which we referred above, the tension this creates between local communities and the state can be very creative and instructive for both.

It is important that the issues raised in the Commission's Consultation Paper are therefore addressed in a manner that allows for ongoing development and nuancing in response to the changing, divergent and dynamic needs of Victoria's many different communities, including its rural communities. As has been noted in international research on addressing crime in rural areas, it is vital to work with those communities, to talk with the people who live in them, and to actively involve them in the reform process (Weisheit, Falcone and Wells 2006, 179-180).

Victims of crime do not live, nor do they experience the effects of crime, in isolation from their communities. These are the communities they share with the people who have the potential to both help and to harm them. Communities are the places in which crimes can be both enabled and prevented, the places where offenders can be raised and rehabilitated, and where victims can be nurtured and negated. The multiplicity of ways in which communities, both big and small, can shape who people are and how they treat one another is typically concentrated, microscoped, in rural areas. This means that we all have so much to learn from closer engagement with rural and regional communities. And, as such, everyone becomes a beneficiary when we involve them more in the shaping and reform of law and public policy.

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