Mary Iliadis
Monash University
PhD Candidate

Submission for the Victorian Law Reform Commission Consultation Paper

Introduction

Victims' needs and perceptions of justice are complex and vary depending upon a range of factors relating to each victim's individual experience – such as the nature of the offence and the victim's relationship, if any, with the perpetrator. As Zehr (2003: 69) maintains:

> Victims have many needs. They need chances to speak their feelings. They need to receive restitution. They need to experience justice: victims need some kind of moral statement of their blamelessness, of who is at fault, that this thing should not have happened to them. They need answers to the questions that plague them. They need a restoration of power because the offender has taken power away from them.

In this context, the development of victims' rights based reforms is complex, multilayered and varied, and any changes may be limited in specifically responding to victims' expectations.

This submission responds to four questions (C, D, F and H) relating to the VLRC's consultation paper, and will draw from the preliminary findings of my doctoral research project examining sexual assault victims' rights across four focus jurisdictions (England and Wales, Ireland, South Australia and Victoria). My research considers the viability of different forms of legal representation for victims in adversarial legal systems. Whilst this notion contrasts quite significantly from the traditional adversarial approach to attaining justice – which sees the crime as an offence against the state, thus individual victims' interests are not represented – the use of legal representation for victims is not unprecedented even within an adversarial framework. Furthermore, it has been argued that within clearly defined parameters, there is scope to enhance the rights and interests of victims through some form of representation (Kirchengast 2011; O'Connell 2012). It should be noted that this submission focuses on victims of sexual assault (in light of my research topic), but I will refer to victims more generally where applicable.

Mary Iliadis
Monash University
PhD Candidate

(c) Recent innovations in relation to the role of victims in the criminal trial process in Victoria and in other jurisdictions;

Over the past three decades, there have been significant changes across western jurisdictions to legal policies concerning victims' rights (O'Connell 2012).

These changes emerged in large part due to the rise of feminist and victims' rights groups, which sought to apply pressure to governments to respond to growing concerns around the role and treatment of victims within the criminal justice process (Fattah 1978, 1994a cited in Fattah 2000: 25). Such movements have had a significant impact not only on the ways in which society have come to perceive and understand acts of gendered and sexual victimisation, but also the ways in which laws have developed (Heenan 2004: 1; Cook, David & Grant 2001: 1). For example, we have seen an increased focus on assisting and acknowledging crime victims through social responses and legal reforms, such as rape crisis centres and the recognition of previously unacknowledged offences as 'real' crimes, for example, domestic and family violence, and rape in marriage (Fattah 1978, 1994a cited in Fattah 2000: 25). Considering society's changing perceptions and attitudes towards victims and their rights, the victim now, at least to some extent, is recognised and given some involvement in criminal justice proceedings; "albeit this position continues to operate within an adversarial framework, which restricts the victim from having a determinative say in the prosecution of their case" (Flynn 2012: 75).

In Australia specifically, victim recognition and reform became a prominent focus in the 1980s. In the context of sexual assault law reform, its development has differed between Australian jurisdictions, taking place at various stages. However, Daly (2011: 3) explains that there has been a widespread emphasis on expanding the definition of rape and sexual intercourse and shifting attention away from the victim's character. Further reforms have focused on restricting the admissibility of evidence on a victim's sexual reputation (a reform which has been implemented in Ireland), and allowing victim witnesses to give evidence via video technology or while accompanied by a support person (Australian Law Reform Commission 2010: 1121-2; Braun 2014: 820).

The developments to rape law reform have included broadening understandings of rape and sexual assault to recognise these acts as offences in the context of intimate relationships. This notion challenged historical constructs of rape as only being 'simple rape'; that is, when a women is violently confronted and attacked by a stranger in a public place and is too vulnerable to defend herself (Estrich 1987: 4-7).

Changes to the Definition of Consent in Sexual Assault Cases

To date, significant progress to rape law reform has been made with regards to changing the definition of consent. Changes to the definition of consent occurred in many common law jurisdictions including the United States, the United Kingdom, New Zealand, Canada and Australia, to name a few (Daly 2011). These changes are considered pivotal in providing legal clarity during trials and reinforcing the notion that resistance and injury are not required to prove lack of consent (Australian Law Reform Commission 2010). In Australia, every jurisdiction (with the exception of the Australian Capital Territory) has a statutory definition of consent based on free agreement, free and voluntary agreement, or consent freely and voluntarily given (Australian Law Reform Commission 2010). These definitions are reflective of the recommendation put forward by the United Nations Division for the Advancement of Women which purports that legislation should approach consent as "unequivocal and voluntary agreement" and that the accused should be obligated to prove the actions taken to "ascertain whether the complainant/survivor was consenting" (Australian Law Reform Commission 2010; United Nations Department of Economic and Social Affairs Division for the Advancement of Women 2009). In Victoria, the *Crimes Act 1958 (Vic)* defines consent as "free agreement" and outlines consent negating circumstances in which a person does not freely agree to an act; such as if a person is intoxicated at the time of the offence; sleeping; unconscious; participating in the act due to fear of the perpetrator; and/or participating in the act as a result of being detained. Similarly, in South Australia, the *Criminal Law Consolidation Act 1935 (SA)* defines a person as consenting to sexual activity "if the person freely and voluntarily agrees to the sexual activity". The South Australian Act also lists consent-negating factors similarly to those outlined in the *Crimes Act 1958 (Vic).*

Whilst it is beyond the scope of this submission to comment on these Acts in detail, it has been argued that their effectiveness remains limited and they have not enhanced the rates of reporting, conviction rates or reduced misconceptions of rape (Larcombe 2011). However, the theoretical underpinnings of these contemporary definitions can be regarded significant towards acknowledging that sexual acts constitute as an offence against the person if consent, or more precisely, free agreement, is not obtained.

Victim Impact Statements

Currently, each Australian jurisdiction has "provision[s] for victim impact statements in criminal proceedings and financial assistance or compensation schemes for crime victims" (O'Connell 2012). Overwhelmingly, these reforms are considered to have had a positive impact on victims, providing them with the opportunity to feel like "integral players … rather than mere bystanders" in the criminal justice process (O'Connell 2012). In particular, victim impact statements (VIS) are one of the earliest and most profound legislative responses that have encouraged victim participation in the criminal justice process (Daly 2011: 16). VISs vary in their implementation and scope across common law jurisdictions, however their main purpose is to provide victims with the opportunity to express the impact of the crime upon them to the court, including any physical, emotional or psychological damage they suffered as a result of the crime (Victims Support Agency 2009: 1; Erez, Roeger & O'Connell 1996: 205; Erez 1991). In turn, this may influence sentencing outcomes as the judge can take this into account in his/her sentencing submission.

In Australia, VISs were first introduced in South Australian legislation in 1989 (*Criminal Law (Sentencing) Act 1988 (SA)*). This occurred as a result of the South Australian Government establishing a committee of inquiry on victims of crime to review the varying complex and differing needs of victims, and make recommendations as to how those needs could be addressed (Erez, Roeger & O'Connell 1994: 205; Erez 1991). Victoria introduced VIS into legislation shortly after in 1994 (*Sentencing Act 1991 (Vic)*), with the intention of promoting "increased satisfaction by victims with the criminal justice system" (Victim Support Agency 2009). Debates over the effectiveness

of the VIS also make them one of the most examined victim-focused reforms (Daly 2011; Victims Support Agency 2009; Erez, Roeger & O'Connell 1996; Erez 1991).

The Limits of Victim Impact Statements

Despite many changes to their role and level of recognition, victims continue to experience alienation and exclusion from the prosecution process. A key reason for this is that even in light of the existence of victim-focused reforms, they are not routinely enforced. For example, under s 13 (1) of the *Victims' Charter Act 2006 (Vic)*, it states that victims are entitled to make VISs "unless the court orders otherwise"; thus this right may in some circumstances be taken away from victims. An example of this occurred in a Victorian Magistrates' Court in 2010 when the Magistrate, Richard Pithouse, refused to hear a VIS of a sexual assault victim due to his view that the plea hearing was running overtime (Johnston 2010). The victim in this case described this experience as feeling like she "didn't get justice at all. I feel let down. It's just shattered me" (cited in Johnston 2010). A Victorian participant also noted that approximately 50% of VIS are not heard in the Supreme or County courts (Participant O). Examples like this demonstrate that while victims' rights may be symbolically addressed, they are still not fully recognised as participants of the process. O'Connell (2006: 2) claims that the effects of judges and magistrates not supporting VISs, influences the ways in which victims come to perceive the criminal justice system, as they are more likely to lose confidence in the system and become dissatisfied with sentencing outcomes.

An additional concern associated with VISs has been identified in relation to plea negotiations (Flynn 2012). Flynn (2012: 79) defines plea negotiations as involving:

> [A] police prosecutor, or a Crown prosecutor or solicitor from the OPP engaging in an informal discussion with a defence counsel on an accused person's likely plea, and the possibility of negotiating the charge(s), case facts and/or the prosecution's likely sentencing submission.

The resulting outcome of a plea negotiation can mean that the prosecution reduce the seriousness of the charge(s), thereby downplaying the severity of the offence(s) committed, or withdrawing one or more charges in order to secure a guilty plea (Flynn 2012: 79). Early guilty pleas have been identified as having a range of potential benefits

for victims – for example, sparing victims from lengthy trials, which in some cases, can take between one to two years to resolve; and in the context of sexual assault cases, it can also make the prosecution process easier for victims as it removes the burden of having to testify in court and the likelihood of being re-victimised through the trial, especially during cross-examination (Flynn 2012: 82, 88; Doak 2005: 306). As Lees (1996) and others suggest, victims and witnesses frequently report feeling distressed during cross-examination, especially in cases of rape or sexual assault, considering the nature of questioning (Lees 1996; Bacik et al. 1998).

Notwithstanding these benefits, plea negotiations also present significant limitations for victims, especially in relation to their VIS. This is because plea negotiations will inevitably involve some amendment to charges and case facts, thus not only are the facts of the original offence(s) substantially altered – for example, murder becomes manslaughter – but it also limits how much information the court can legally take into account from a VIS prior to a sentence being imposed (Flynn 2012: 83-84). This means that victims have a limited opportunity to express their voice and have an input into proceedings, as their version of events are substantially curtailed, thereby not allowing the court to hear the "entire story" (Flynn 2012: 83).

The above examples demonstrate that whilst reforms like the VIS can assist victims to some degree – that is, if their VIS is heard in its entire capacity – they have not "necessarily altered the structural position of the victim in the criminal justice system" (O'Connell 2006: 1). This can be attributed to the fact that a VIS is a victim's only opportunity to formally participate in proceedings in Victoria, as victims have no other avenue to pursue to challenge any decisions made on behalf of the court or prosecution which adversely affects them. In this way, victims continue to remain "recipients of information rather than … participant[s] in the [prosecution] process" (Refshauge 2013). For these reasons, it has been argued that victims' rights remain a secondary consideration in the legal system and there exists scope for further reform (O'Connell 2012).

Mary Iliadis
Monash University
PhD Candidate

Victims' Charter Act 2006 (Vic)

All Australian states and territories have established a declaration or charter of victims' rights. In Victoria specifically, the *Victims' Charter Act 2006 (Vic)* is significant in that it provides some form of legal recognition to victims and recognises that they have been adversely affected by crime. The Act sets out twelve principles that criminal justice and victims' support agencies are obligated to follow when dealing with victims of crime (Office of Public Prosecutions Victoria 2014). Significantly, the Act requires that victims be treated with respect, courtesy and dignity by prosecuting agencies, investigating bodies and victim support services by means of being informed about their rights and being provided with information about available support services (*Victims' Charter Act 2006 (Vic)*).

The Limits of the *Victims' Charter Act 2006 (Vic)*

Notwithstanding the significance of the *Victims' Charter Act 2006 (Vic)*, s 22 (1) (a) highlights a potential limitation for victims as it prohibits them from pursuing civil action against the prosecution if there is a belief that the prosecution failed to uphold their rights. As Flynn (2011: 89) explains, s 22 (1) (a) essentially safeguards the prosecution from being held accountable for not adhering to their statutory requirements. This means that victims' rights can be, to some extent, disregarded – for example, if the prosecution fails to inform the victim about their right to a VIS, the victim is precluded from pursuing a civil action despite this diminishing the victim's right to participate in proceedings. Consequently, it poses a major barrier for victims' justice needs being met. On this basis, it can be argued that the provision of the *Victims' Charter Act 2006 (Vic)* does not constitute as an adequate right on its own for victims, particularly considering that victims are unable to contest prosecutorial oversights or have an input into the decisions that are ultimately affecting their lives.

A further issue related to the *Victims' Charter* revolves around the prosecution's role and the degree to which they will act in accordance with the victim's interests (Flynn 2012; Doak 2005: 306). This remains a highly contentious issue as the prosecution are fundamentally representing and acting within the best interests of the state, and thus, it raises concerns over who is acting within the interests of the victim (Doak 2005). To a

significant extent, the key principles governing responses to victims of crime in Victoria (as outlined in the *Victims' Charter Act 2006 (Vic)*), which stipulate that victims ought to be treated with respect, courtesy and dignity by prosecuting agencies, are upheld (Flynn 2012; Doak 2005). This is evident in Flynn's (2012: 91) study whereby participants from Victoria's Office of Public Prosecutions (OPP) generally identified being "conscious of the role and place of the victim in the criminal justice system" by adhering to the *Charter.* This illustrates that the OPP are endeavouring to balance their roles between accommodating the interests of the public whilst simultaneously having consideration to victims' interests.

However, in Flynn's (2011) analysis, various limitations associated with the practical application of the *Charter* were identified. In particular, workload pressures and victim perceptions stood out as two key issues by prosecutorial participants (Flynn 2012: 91). The increased workload that is legally required by prosecutors, as a result of what is stipulated under s 9 of the *Charter*, was described as "labour intensive" (Flynn 2012: 91). If prosecutors fail to comply with their statutory obligations, it becomes problematic for victims when considering that prosecuting agencies are their sole mechanism to pursue complaints, in addition to s 22 (1) (a) problematically prohibiting victims from pursuing legal action against the prosecution if they fail to carry out their duties (Flynn 2012: 91, 81).

The second limitation relates to victims' understandings about the prosecution's role. This is again demonstrated in Flynn's research whereby statements from prosecutorial participants such as, "the victim is not our client. I think that could be a misperception, they may think we are now acting for them"; and "this is the Office of Public Prosecutions, not the Office of Private Prosecutions, so we have regard to what victims have to say, but it is not determinative", exemplify that whilst regard is given to victims, the prosecution's role should not be misconstrued for one that is primarily representative of victims' interests (Flynn 2012: 91-92).

In the United Kingdom, Doak (2005: 305-308) similarly explored the parameters of the Crown Prosecution Service's role in relation to victims' needs, noting, "it is not clear whether the adversarial structures of the criminal hearing, or indeed the public interest

which underpins criminal prosecutions could accommodate any expansion in the role of the Crown Prosecution Service" (Doak 2005: 207). Albeit the Crown Prosecution Service taking on additional roles to enhance the rights and interests of victims, (refer to the discussion on the Victims' Right to Review Scheme later in this section**)**, Doak argues that additional duties and roles are unlikely to have a positive impact on victims' experiences with the criminal justice system. Instead, he argues that the imposition of a legal representative for victims of crime would "save the prosecutor from having to juggle two roles which are ultimately incompatible" (Doak 2005: 307).

This form of representation was traditionally quite unusual given the adversarial nature of most criminal justice systems. However, there have been several shifts in common law jurisdictions towards integrating some form of legal representation for victims in the criminal justice system, including in South Australia and Ireland. In the United Kingdom, the implementation of the Victims' Right to Review scheme is also reflective of elements of legal representation whereby victims now have the opportunity to challenge prosecutorial decisions.

Witnessing Change – Attaining Justice?

From a discussion of the aforementioned victim-focused and rape law reforms which have sought to increase victim recognition and participation in the criminal justice system, it appears that the shortcomings of these reforms can limit the applicability of any vast benefits arising for victims. Furthermore, research has indicated that despite the attempts of legal reform to integrate victims in the criminal justice process, victims of sexual violence continue to experience challenges within and beyond the criminal justice system. It has also been found that the small portion of victims who do report their sexual victimisation are dissatisfied with their treatment in the criminal justice system (Clark 2010: 31; Braun 2014: 820). Several reasons have been identified as to why victims choose not to report their sexual victimisation experience. These reasons have been identified as: (1) victims fearing the sort of treatment they may receive in the criminal justice system; (2) victims fearing the potential reaction of their perpetrator if they do report their victimisation; (3) victims fearing the prospect of not being believed by

criminal justice officials if they do report the crime; and, (4) the shame associated with reporting (Australian Law Reform Commission 2010: 1101; Braun 2014: 820).

In light of evidence suggesting that current legal reforms have neither increased low reporting rates of sexual assault nor improved victims' experiences or perceptions of the criminal justice system, it has been argued that these reforms alone are not going to achieve these goals (Braun 2014). As Stubbs (2003 cited in Braun 2014: 820) maintains, "law reform in the area of sexual assault has more 'symbolic value' than actual effect in practice". This argument can also be attributed to victim-focused reforms more generally, such as the victim impact statement and the *Victims' Charter Act 2006 (Vic)* – both of which inevitably apply to victims of sexual assault. For these reasons, it has been argued that there exists scope for new and more innovative ways of addressing these issues and enhancing victims' experiences and perceptions of the criminal justice system (Daly 2011 cited in Braun 2014: 820).

Legal Representation for Victims?

Increasing attention has been afforded to examining the ways in which victims can have more of an active role in an adversarial, prosecution process (Doak 2005; O'Connell 2012). This has included considering ways in which some jurisdictions operate, to grant the victim the right to be legally represented while they testify as a witness at trial (Braun 2014: 820). While contrasting quite significantly with the traditional adversarial approach to attaining justice, the use of legal representation for victims is not unprecedented. The International Criminal Court (ICC) for example, provides an avenue for victim representation, whereby victims select a legal representative who acts on their behalf during the hearing to present their interests and concerns (International Criminal Court 2013). Some European jurisdictions also permit varying forms of legal representation. This can be seen in Germany whereby the *nebenkläger* status for victims gives the victim's legal representative the role of a secondary prosecutor (Raitt 2010: 24). This right essentially gives the victim's lawyer the same participation rights as the prosecutor and defence lawyer at trial (Bacik et al. 1998: 237). Similarly, in Belgium and France, the *partie civile* procedure gives the victim strong participation rights

following the reporting stage (Raitt 2010: 24). The victim's legal representative has the right to:

- Access the dossier of evidence at the end of the pre-trial investigation;
- Be present in court throughout the trial;
- Speak on the [rape] victim's behalf in court;
- Call witnesses on behalf of the victim (subject to the judge's discretion);
- Object to questions put to the victim by the defence or prosecutor;
- Cross-examine the defendant;
- Make submissions to the court on the law; and,
- Address the court ... as to compensation (Bacik et al. 1998: 182, 218).

Many other European jurisdictions also have provision for victim representation, although the legal representative's role may vary between jurisdictions (Bacik et al. 1998: 288-289). However, it is important to note that these forms of legal representation operate in an inquisitorial framework, a process which can better facilitate such an approach given the increased role of the judge and victim during the investigation phase and in the presentation of testimony to the court (King n.d: 2).

Within an adversarial context, the right to legal representation is still a developing and contested concept, largely due to concerns that the structure of the "adversarial [legal] system does not allow for victim participation through a legal representative"; that is to say, the notion of introducing a third party (a victim's legal representative) may conflict with the two-sided contest between the prosecutor and the accused and may violate the defendant's procedural rights (Braun 2014: 820; Bargen & Fishwick 1995: 103). Notwithstanding these concerns, it has been argued that "legal representation for (sexual assault) victims within clearly defined and limited parameters would not necessarily infringe upon the rights of the accused" (Kirchengast 2011 cited in Braun 2014), thus suggesting that there may exist scope to integrate some form of victim representation in an adversarial, prosecution process.

While there are international examples of legal representation for victims in a range of contexts, outside South Australia, legal representation for victims is an alien concept in other Australian jurisdictions. This is despite the potential benefits of legal representation, which O'Connell (2012, p. 10) argues provides "increased attention to

victims' rights by police officers, prosecutors, magistrates and judges – and defence counsel". This view is similarly reflected in research conducted with the Canadian Crown Counsel which found that "everyone takes it more seriously" when there is independent victim representation involved (Mohr 2002: 16-17). An Irish study examining the impact of legal procedures which provide assistance, representation or support for victims of rape and sexual abuse, also discovered:

> A highly significant relationship ... between [victims] having a lawyer, and overall satisfaction with the trial process. The presence of a victim's lawyer also had a highly significant effect on victims' level of confidence when giving evidence, and meant that the hostility rating for the defence lawyer was much lower (Bacik et al. 1998: 17-18).

Victim representation can also provide a mechanism to ensure that any decisions made, such as those revolving around plea-negotiations and the decision not to prosecute, would ensure that the victims' rights are considered at all stages of the prosecution process, whilst simultaneously having regard to the rights of the accused. In light of these benefits, victim representation may provide victims with a greater opportunity to influence the decisions that ultimately impact on their lives (Raitt 2010: 70).

A Platform for Victim Participation in Common Law Jurisdictions

South Australia

In South Australia, victims are entitled to apply to the Victims of Crime Commissioner for legal representation in matters that involve "consultation with prosecution, in criminal and civil proceedings and coronial inquests, as well as initiated legal matters that affect victims in general" (O'Connell 2012, p. 7). South Australia is the only Australian state or territory to have implemented this form of legal representation for victims. This form of representation can be considered a significant step towards acknowledging the varying and complex needs, wants and expectations of victims from the prosecution process.

Ireland

Ireland has also implemented a form of legal representation for victims of sexual assault through s 34 of the *Sexual Offences Act 2001* (IRE). Since 2001, this section allows a complainant to have legal representation to oppose a defendant's application for the introduction of a victim's sexual history evidence in court. These changes can be regarded significant insofar as victims can invest greater levels of confidence into the criminal justice system.

England and Wales

In England and Wales, following the decision of the English High Court in Killick (*R v Christopher Killick [2011] EWCA Crim 1608*), in which the court considered "in some detail the right of a victim of crime to seek a review [the decision] of the CPS [Crown Prosecution Service] not to prosecute", victims in this jurisdiction now have the opportunity to challenge the prosecutor's decision not to proceed with a prosecution (Crown Prosecution Service 2013). This process, referred to as *Victims' Right to Review Scheme*, allows victims to contact the CPS within seven days of the decision being made, and the decision is then reviewed and a full explanation detailing the outcome is provided to the victim. If the victim is not satisfied with the decision and explanation provided, the case is directed to the Appeals and Review Unit or to the relevant Chief Crown Prosecutor. This scheme is strongly reflective of elements of legal representation whereby it provides victims with the opportunity to challenge prosecutorial decisions.

The benefits of the VRR scheme are far reaching for both the efficacy of the criminal justice system and the victim. For the criminal justice system, the VRR scheme provides a greater sense of transparency to decision-making processes and enables the CPS to measure where certain failures have been made. This is important as it provides the CPS with the opportunity to rectify incorrect decisions, while also providing a greater sense of accountability around decision-making processes.

From the point of view of a victim, one of the key benefits of the VRR is that it provides a mechanism to pursue and challenge prosecutorial decisions – a right which is alien in most other common law jurisdictions. The importance of having the VRR scheme was noted in my research by Participant H's comment, who noted that victims:

> Should be able to request for a review to take place if they feel that their case ... hasn't been reviewed as thoroughly as it should have ... or they categorically disagree with the decisions made.

This view was simultaneously reflected by Participant B who claimed "they [the CPS] are not going to get 100 per cent of the decisions right 100 per cent of the time". Therefore, the significance of having the case reviewed by an alternate prosecuting authority can be viewed positively as it can result in a different outcome.

Participant I also advocated the benefit of oversight, particularly in sexual assault cases, whereby issues of consent can be difficult to ascertain and charges may not be laid or may be withdrawn due to insufficient evidence or legal argument. In describing the significance of the VRR in sexual assault cases, several participants argued that it could help increase victims' confidence in the validity, transparency and accountability of the criminal justice process by providing them with an oversight option.

Additionally, Participant I noted that in her experience, the VRR has been important because it has given her clients the opportunity to express their dissatisfaction with the outcome of their case by asking for it to be reviewed. In this sense, the VRR not only offers victims the opportunity to challenge decisions, but some degree of control over the steps they can take after a decision has been made. Despite victims not having the ability to directly influence the decision about whether a case is overturned, the mere existence of the VRR still provides scope for this to occur – the potential outcome being that a case results in conviction.

Another benefit associated with the VRR scheme is that it offers victims a greater sense of transparency around decision-making processes. All participants agreed that the VVR is essential for providing clarity to victims as to why certain decisions are made; for example, if a decision is made to not proceed with charges. This is important considering the complex nature of the criminal justice system, which can be difficult

for people without a detailed knowledge of the law to understand, especially victims who are experiencing trauma. As Participant H states, "it [the VRR] ensures victims ... a greater sense of transparency (hopefully) to a system that is very convoluted and very complex". Participant G expanded this view in relation to victims of sexual assault, stating:

> If they are told that there is ... no further action at any stage, to them that is often seen as 'oh you don't believe me', rather than [knowing that] it's quite a technical, evidential issue. So I guess that scheme [the VRR] could be another way to reinforce [the notion] that it's not about ... not being believed, there are all these very technical reasons [as to why] the case has not gone forward.

This comment suggests that the VRR can provide victims with a greater understanding as to why cases may not proceed, which in turn, can offer victims a sense of closure. Participants also observed that in some instances, victims are satisfied with the way the VRR operates because even in cases where a decision is not overturned, the justification provided gives victims the answers they need to move on with their lives. As Participant A explained:

> We do get people thanking us, saying thank you for at least taking the time to look at it, you've given an explanation, I didn't realise that was the reason and I'm happy now.

Participant H similarly argued that this was:

> ... the biggest benefit because the chances of a decision completely being overturned are probably small ... the main benefit is that there is a duty placed upon the CPS ... to actually look into it [the case] in-depth and get back to the victim within a time frame and give them a lot more information then what they probably would have had to do when they initially made the decision.

These benefits are important considerations when taking into account what victims' needs are, and how communication is consistently being identified as an element that increases victim satisfaction in the criminal justice process. In this way, it can be argued that the VRR scheme can encourage victims to emotionally move forward with their lives and thereby contributes to the rehabilitation of victims.

The scheme also has its limitations. For example, several participants noted that whilst the VRR offers victims a perceived sense of transparency around decision-making

processes, the level of external transparency and accountability can be questioned on the basis that it's ultimately the CPS undertaking the review. As one participant claimed:

> The kind of anecdotal evidence that I have on a day-to-day basis is that whilst the review is a benefit of course, ... often there's not full independence of that review because obviously it's being undertaken by the same organisation ... so one could argue that whilst it provides victims with the impression of a greater sense of control, ... they are actually still within a system that control decision making very tightly (Participant H).

Therefore, it could be argued that despite being advocated as independent and transparent, in practice, the VRR scheme may not truly be autonomous and transparent.

This points to another potential limitation of the scheme, in that it could raise victims' hopes and expectations unnecessarily. As Participant H emphasised:

> You could argue that they are being re-traumatised by the sheer fact that they have got their hopes up again about something being reviewed and then ... the same decision is made.

Participant H further explains that "... it's not a victims' right to overturn the decision, it's a victims' right to review", which means that ultimately the decision rests with the CPS. This statement is significant as it acts as a reminder that the VRR operates within an adversarial system, where the interests of the state override those of individual victims. This may be an unclear outcome for victims as they formally constitute as witnesses to proceedings and although their views may be taken into account, ultimately the decision to prosecute (or not) is not in their hands.

Notwithstanding the potential disadvantages of the VRR scheme, participants in both England and Victoria viewed the VRR scheme as a welcomed avenue of justice within an adversarial setting. The reasons extend beyond the benefits that the VRR presents to the criminal justice system, to also acknowledge the vast benefits the VRR offers victims. As one Victorian participant claimed, "I think it's an excellent scheme. It's something that we have needed for years. I can only see advantages. It's a great way of handling the law" (Participant O). Another participant claimed that the VRR scheme is "a very important stage for victims' rights", and in this context, it demonstrates positive

steps in further promoting legislative changes to increase the role and status of victims in an adversarial framework (Participant J). Whilst some participants did not necessarily consider the VRR scheme as suggestive of a step closer towards victim representation in the prosecution process, others believed that there is a notable shift in terms of restoring some balance for victims in the criminal justice process (Participant B; Participant C). This is important in light of research indicating that victims continue to feel alienated and excluded from the criminal justice process (O'Connell 2012). Therefore, "... anything that can increase confidence or ... [victims'] sense that they have a stake and some rights within the process [should be welcomed] (Participant C).

In light of my findings thus far, I would suggest that a similar scheme could be implemented in Victoria. It would provide victims with a unique opportunity to have their cases reviewed (and decisions potentially overturned) where there is a belief the wrong decision was made. It also provides a mechanism for victims to invest more confidence into the criminal justice process and ensures accountability around decision-making processes. As a Victorian participant claimed, "sometimes the decision not to prosecute [is] made on the likely success of the case" (Participant N). This is particularly so for victims of sexual assault whereby charges can be withdrawn or not be laid due to evidence or legal argument (Participant D). Therefore, having a Victims' Right to Review provides scope to address some of the criticisms relating to the prosecution process for victims of crime (particularly victims of sexual assault). Another potential benefit is that it can have an effect on increasing the rates of reporting (Participant N).

(d) The role of victims in the decision to prosecute;

In an adversarial criminal trial, victims do not play a role in deciding whether to prosecute. In most Australian jurisdictions, the prosecution of summary offences is conducted by police prosecutors in local or district courts. For indictable offences, prosecution is undertaken by independent prosecutors (Victim Support 2007). The Australian Capital Territory is the only jurisdiction in Australia whereby all prosecutions are performed by one independent prosecuting authority (Victim Support 2007). In an adversarial framework, prosecutors are deemed as independent representatives of the state (Victim Support 2007). Therefore, in considering whether

to prosecute, the prosecutor must take into account the public interest grounds (Victim Support 2007). As the prosecutor is essentially acting on behalf of the state and public interest, their key focus is not necessarily what fits within the victim's best interest (Victim Support 2007). This demonstrates the benefits of having a scheme like the Victims' Right to Review in Victoria because it gives victims another avenue to pursue and challenge decisions when an undesired outcome has been reached. This is important considering the prosecution is not fundamentally representing the rights and interests of victims, but is rather acting on behalf of the state. Whilst regard is given to victims, as demonstrated in question 'e', there are many barriers that prohibit victims from having their wants, needs and expectations met during the prosecution process. The Victims' Right to Review scheme can provide a mechanism to overcome some of these barriers which prohibit victims from accessing justice, or more precisely, procedural fairness.

(f) The role of victims in the sentencing process and other trial outcomes;

In Victoria, victims have no direct involvement in the sentencing process; that is, a victim cannot make recommendations as to what type of sentence should be imposed on the offender (King YEAR: 2). Victims may however present a victim impact statement to the court after a guilty verdict has been reached. The statement will essentially give the victim an opportunity to explain how the crime has affected them physically, emotionally, financially and socially (Department of Justice & Regulation 2015). The victim impact statement can then be considered by the court at the plea hearing whereby the judge also takes into account the aggravating and mitigating circumstances of the offender and the context in which the crime was committed (Department of Justice 2014: 5) Accordingly, in making his/her sentencing submission, the victim impact statement is one of the many factors that a judge can take into account (King n.d: 2; Department of Justice & Regulation 2015).

Victim impact statements are optional and a victim does not have to make one if they do not wish to do so. If in which case a primary victim does not want to do so, the court can still consider the impact the crime had upon the victim through the evidence of the court case (Department of Justice & Regulation 2015). Alternatively, secondary

victims, such as family members or friends can also make a victim impact statement as they can also be victims of crime (Department of Justice 2014: 5). However, as discussed in section 'e', issues associated with the victim impact statements can limit the applicability of any vast potential benefits being seen for victims, as the judge has the ability to either dismiss a victim impact statement or preclude certain aspects of the victim impact statement from being read in cases where plea negotiations occur.

(h) Support for victims in relation to the criminal trial process.

Victim advocates and support services have a crucial place in contemporary society, as they offer victims assistance outside the court process and prior to the initiation of court proceedings (Daly 2011; CASA 2010). Victim advocacy is centred on making referrals, accompanying victims to police stations or medical examinations and explaining options. Victim/witness support services can accompany victims during court and post-court processes (Parkinson 2010 cited in Daly 2011: 15). Although victim advocate and support services play a significant role in assisting victims with navigating necessary information pertaining to the court process and providing additional support, they have a limited impact on influencing court outcomes as they do not participate in proceedings.

In relation to victims of sexual assault, a range of national and local rape crisis centres exist world-wide which provide assistance, support, information and counselling for victims (Daly 2011: 5). Usually, rape crisis centres have telephone helplines that victims can call at any hour. Examples of Australian national helplines include: the National Sexual Assault, Family and Domestic Violence Counselling Line, Relationships Australia, Adults Surviving Child Abuse, or Lifeline which can put victims in touch with a crisis service centre in their state (White Ribbon 2014). State helplines also exist. In Victoria, these include the Women's Domestic Violence Crisis Service of Victoria and the Sexual Assault Crisis Line. South Australian helplines include the Domestic Violence Helpline or the Yarrow Place Sexual Assault Service (White Ribbon 2014). In England and Wales, there is a helpline called the Rape Crisis Centre, however it has limited operating hours (Rape Crisis Centre 2014). Many of these rape crisis services also have websites with information relating to the services they offer and the criminal justice system.

One of the most prominent support services in Victoria is the Centre Against Sexual Assault (CASA). CASA is a government funded organisation that offers free support to victims on a 24 hour basis by providing information about their rights and the legal process; explaining the options available; and offering advice and counselling (Daly 2011: 5; CASA 2010). CASA primarily assist victims upon the first point of contact, which is usually pre-trial, however they also offer follow-up support (CASA 2010). England and Wales similarly have Independent Sexual Violence Advisors (ISVA) which were introduced in 2006 and funded by the Home Office (Daly 2011: 5; Robinson 2009). ISVAs are modelled on Independent Domestic Violence Advisors and are situated in SARCs and voluntary organisations such as Rape Crisis Centres (Daly 2011: 5; Robinson 2009). There is limited research examining the impact they have had on victims of sexual violence, however an evaluation into ISVAs funded by the Home Office found that their role is necessary as they "help to fill a gap" in providing an exclusive service to victims through their practical help and advice from initial victimisation through to the various stages of the legal process (Robinson 2009: 6; Daly 2011: 5). Findings from my doctoral research project also indicated that without the support of ISVAs, victims would not often be aware of their right to review prosecutorial decisions or would not necessarily have the courage to pursue their case without the support of ISVA.

Conclusion

Drawing from the preliminary findings of my doctoral research project examining sexual assault victims' rights across four focus jurisdictions (England and Wales, Ireland, South Australia and Victoria), this submission has addressed four key questions in relation to the victims of crime consultation paper. Firstly, it made reference to recent innovations in relation to the role of victims in the criminal trial process in Victoria and other jurisdictions. It then continued to explain of the role of victims in the decision to prosecute and the role of victims in the sentencing process. Lastly, it provided an overview of the support mechanisms that exist for victims in relation to the criminal trial process. This paper also made a recommendation based on a reform that has been implemented in England and Wales, namely the Victims' Right to Review scheme, and

demonstrated the key benefits that can arise for victims from having the ability to purse and challenge prosecutorial decisions. The Victims' Right to Review scheme is a highly pertinent consideration when reflecting on the role of victims in the criminal trial process, and more importantly, how victims' rights can be enhanced within a common law jurisdictions without comprising or undermining the key principles that govern adversarial criminal trials.

Reference List:

Australian Law Reform Commission 2010, *Family Violence – A National Legal Response*, NSW Law Reform Commission, Commonwealth of Australia, NSW.

Bargen, J & Fishwick, E 1995, Sexual Assault Law Reform: A National Perspective, Office of the Status of Women, Canberra.

Basik, I, Mansell, C & Gogan, S 1998, *The Legal Process and Victims of Rape: A Comparative Analysis of the Laws and Legal Procedures Relating to Rape, and their Impact upon Victims of Rape in the Fifteen member States of the European Union,* Dublin Rape Crisis Centre, Dublin.

Braun, K 2014, 'Legal Representation for Sexual Assault Victims – Possibilities for Law Reform?', *Current Issues in Criminal Justice,* vol. 25, no. 3, pp. 819-837.

CASA House 2010, *About Casa House*, CASA House, Melbourne.

Cook, B, David, F, Grant, A 1999, 'Victims' Needs, Victims' Rights: Policies and Programs for Victims of Crime in Australia', Australian Institute of Criminology, Canberra.

Clark, H 2010, '"What is the Justice System Willing to Offer?" Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs', *Australian Institute of Family Studies,* no. 85, pp. 28-37, viewed 22 January 2015, http://www.aifs.gov.au/institute/pubs/fm2010/fm85/fm85d.html.

Crown Prosecution Service 2013, *Victims' Right to Review,* Crown Prosecution Service, United Kingdom.

Daly, K 2011, 'Conventional and Innovative Justice Responses to Sexual Violence', *Australia Centre for the Study of Sexual Assault,* no. 12, pp. 1-35.

Department of Justice 2014, A Guide to Victim Impact Statements, Victorian Government.

Department of Justice & Regulation 2015, *Victims of Crime*, State Government of Victoria, Melbourne.

Doak, J 2005, 'Victims' Rights in Criminal Trials: Prospects for Participation', *Journal of Law and Society,* vol. 32, no. 2, pp. 294-316.

Erez, E 1991, 'Victim Impact Statements', *Trends and Issues in Crime and Criminal Justice*, no. 2, Australian Institute of Criminology.

Erez, E, Roeger, L & O'Connell, M 1996, 'Victim Impact Statements in South Australia', in Sumner, C., *International Victimology: Selected Papers from the 8th*

International Symposium: Adelaide 21-26 August 1994, Australian Institute of Criminology, Canberra, pp. 205-216.

Estrich, S 1987, *Real Rape: How the Legal System Victimizes Women who say no*, Library of Congress, United States.

Fattah, A, E 2000, 'Victimology: Past, Present and Future', *erudit,* vol. 33, no. 1, pp. 17-46, Google Scholar.

Flynn, A 2012, 'Bargaining with Justice: Victims, Plea Bargaining and the *Victims Charter Act 2006 (Vic)*', *Monash University Law Review*, vol. 37, no. 3, pp. 73-96.

Heenan, M 2014, Law week Event 2014: Victims of Crime in the Court Process, Victim Support Agency, Department of Justice.

International Criminal Court 2013, *Legal Representatives of Victims*, International Criminal Court, Netherlands.

Johnston, M 2010, 'Attorney-General Rob Hulls weights into magistrate row', *Herald Sun*, viewed 30 October 2013, http://www.heraldsun.com.au/news/lost-justice-for-sex-assault-victim/story-e6frf7jo-1225881777672.

King, V n.d, Criminal Procedure in Non-Adversarial and Adversarial Systems of Justice viewed from the Victim's Perspective, viewed at http://aija.org.au/NAJ%202010/Papers/King%20V.pdf

Kirchengast, T 2011, 'The Integration of Victim Lawyers into the Adversarial Criminal Trial' in Lee M, Mason G and Milivojeic S (eds), Proceedings of the 4th Annual Australian and New Zealand Critical Criminology Conference, Sydney Institute of Criminology, Sydney Law School, University of Sydney, 1–2 July 2010, pp. 1–6.

Larcombe, W 2011, '*Wornsnop V the Queen:* Subjective Belief in Consent Prevails (Again) in Victoria's Rape Law', *Melbourne University Law Review*, vol. 35, pp. 697-716.

Lees, S 1996, *Carnal Knowledge: Rape on Trial*, London, Hamish Hamilton.

Mohr, R 2002, Words are not Enough: Sexual Assault - Legislation, Education and Information, Ottawa: Department of Justice, Canada at pp. 16-17.

O'Connell, M 2006, 'Evolving Mechanisms for Engaging Victims in the Sentencing Process: Should Victims have a Stronger Voice in Court?', *Conference, Sentencing Principles, Perspectives & Possibilities,* Canberra.

O'Connell, M 2012, *Victims' Rights: Integrating victims in criminal proceedings*, Commission for Victims' Rights, Government of South Australia.

Office of Public Prosecutions 2014, *Victims' Charter*, State Government of Victoria, Melbourne.

Raitt, F.E 2010, *Independent Legal Representation for Complainers in Sexual Offence Trials*, Rape Crisis Scotland, Glasgow.

Rape Crisis Centre 2014, Rape Crisis England and Wales, England and Wales.

Robinson, A 2009, *Independent Sexual Violence Advisors: A Process Evaluation*, Home Office, United Kingdom.

United Nations Department of Economic and Social Affairs Division for the Advancement of Women 2009, *Handbook for Legislation on Violence Against Women*, United Nations Publication, United Nations.

Victim Support Australia 2007, Victims, Justice & the Law, Victim Support Australia.

Victims Support Agency 2009, *A Victim's Voice, Victim Impact Statements in Victoria: Executive Summary,* Victim Support Agency, Melbourne.

White Ribbon 2014, *Campaign to Stop Violence Against Women*, White Ribbon Australia.

Zehr, H 2003, 'Retributive Justice, Restorative Justice' in Gerry Johnstone (ed), *A Restorative Justice Reader: Text, Sources, Context*, Willan Publishing.

Legislation:

Crimes Act 1958 (Vic)

Criminal Law Consolidation Act 1935 (SA)

Criminal Law (Sentencing) Act 1988 (SA)

Sentencing Act 1991 (VIC)

Sexual Offences Act 2001 (*IRE*)

Victims Charter Act 2006 (VIC)

Cases:

R v Christopher Killick [2011] EWCA Crim 1608.