

## THE ROLE OF THE VICTIM DURING CRIMINAL COURT PROCEEDINGS

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Victims of crime are not parties to court proceedings in our adversarial system of criminal justice. Despite this lack of 'standing', their interests are often adversely effected. Should they be granted a formal role in proceedings? What should their relationship with prosecutors be? The purpose of this article is to examine these issues, keeping in mind the delicate balance that needs to be struck between the interests of victims and the interests of all other parties, including accused persons.

### I. INTRODUCTION

Since the middle of the nineteenth century, victims<sup>1</sup> of crime have not played a dominant role in our adversarial system of justice. At this time the State assumed

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1 The definition of a 'victim' is a complex and controversial question. See M O'Connell, "Who May Be Called a Victim of Crime?" (1992) 1/3 *Journal of Aust Soc of Victimology* 15. As this article primarily deals with Court procedure, a restrictive definition will be used. Thus, a 'victim' will refer to the direct or 'primary' victim of the crime; the person who has directly suffered injury and/or financial loss as a result of the crime.

the major prosecutorial role from victims in the criminal justice system.<sup>2</sup> A consequence of this restructuring was the virtual exclusion of victims from any formal role in the system, leaving them reliant on the prosecutor to represent their interests during criminal court proceedings.

The increasing interest and concern for victims of crime in recent years<sup>3</sup> has led many victim advocates to argue that the exclusion of victims from a formal role in proceedings has resulted in their alienation from the criminal justice process. As a result of this alienation, many victims have not reported crimes,<sup>4</sup> or where victims have become involved in criminal court proceedings, many have suffered a 'second victimisation'.<sup>5</sup> In order to alleviate these problems, victim advocates argue that more rights should be accorded to victims during the criminal justice process, including greater participation in proceedings<sup>6</sup> and the introduction of victim impact statements.<sup>7</sup> Some State governments, seeing political advantage in supporting victims of crime, appear to be moving towards providing substantive rights for victims during court proceedings.<sup>8</sup>

The purpose of this article is to examine the victims' role during criminal court proceedings, and in particular, the question of whether they should be granted substantive rights. By examining the relationship between the prosecutor and the victim it will be shown that reasonable consideration of the interests of victims of crime can be provided without granting victims substantive rights, but rather through a more coherent and structured relationship between prosecutor and

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2 For a historical account of how this occurred, see G Rude, *Criminal and Victim: Crime and Society in early Nineteenth-Century England*, Oxford (1985) and C Emsley, *Crime and Society in England 1750-1900*, Longman (1987).

3 This has led to the emergence of the academic discipline known as 'victimology', which can be defined as "the scientific study of victimization, including the relationships between victims and offenders, the interactions between victims and the criminal justice system...and other societal groups and institutions..": A Karmen, *Crime Victims - An Introduction to Victimology*, Brooks/Coles (2nd ed, 1990) p 3.

4 It is commonly accepted, by comparing police statistics of crime with victimisation surveys, that a large number of crimes go unreported. The NSW Task Force on Services to Victims of Crime, *Report and Recommendations*, 1987 at 21, in analysing the two victim surveys carried out by the Australian Bureau of Statistics, said: "Both the 1975 and 1983 surveys, which are consistent with overseas findings, found that approximately 60 per cent of crime of the type included in the survey is not reported to the police".

5 This terminology has been used consistently in victimological literature. See, for example, I Waller, "*Victims v Regina v Wrongdoer: Justice?*" (1985) 8 *Canadian Community Law Journal* 1 at 3, and the Council of Europe, *The Position of the Victim in the Framework of Criminal Law and Procedure*, Strasbourg: European Committee on Crime Problems (1985) p 15.

6 The best example of this is the sweeping final recommendation of the *President's Task Force on Victims of Crime* (USA), Final Report, December 1982 at 114, that the Sixth Amendment to the American Constitution should be augmented to include the words: "[I]ikewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings". For a detailed analysis and criticism of this and subsequent proposals to amend the American Constitution, see L Lamborn, "Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment" (1987) 34 *Wayne Law Review* 125.

7 These will be discussed in detail in Part V of this article.

8 For example, in Victoria, see the Liberal National Coalition Policy, *Law and Justice* (1992), pp 11-13.

victims. It is argued that this approach is preferable in order to maintain the integrity of our criminal justice system.

The victims' role in criminal court proceedings will be analysed in the following manner. Part II of the article examines the present relationship between prosecutors and victims in the light of our adversarial system of justice and the recent initiatives to define the rights of victims during the criminal justice process. In order to see if any reforms to the present relationship are justified, the theoretical question of the actual role of victims during criminal court proceedings, is explored in Part III. It will thus be necessary to specify what the interests of victims are during the criminal court proceedings.

It will be shown in Part IV that, given the interests of the victim during criminal court proceedings, the case for some reform to the relationship between prosecutors and victims is strong. However, if we are to maintain fairness within our criminal justice system, any reform should be subject to the important caveat of not interfering with the rights of accused persons. Thus, it is shown that suggestions for reform which negate the need for victims to rely on the prosecutor to represent their interests during criminal court proceedings are unacceptable.

Part V of the article critically examines various victims' rights in relation to the prosecutor during criminal court proceedings. This analysis shows that victims should only be able to receive and provide information to the prosecutor during court proceedings. The controversial issue of victim impact statements will be examined in detail. In Part VI, the article concludes that it is not necessary to grant victims substantive rights for their interests to be reasonably considered in a structured and sensitive manner during criminal court proceedings.

## II. THE PRESENT RELATIONSHIP BETWEEN PROSECUTORS AND VICTIMS AT COURT

It is a feature of our adversarial legal system that the real decision making power lies with the parties to the proceedings, who decide how to present their case and what evidence they will lead. The role of the judge or magistrate is merely to act as an umpire, ensuring that the proceedings are conducted fairly and in accordance with the rules of evidence and procedure. It is not their function to call witnesses,<sup>9</sup> or to question them, except occasionally to clarify specific points.

Thus, when the victim ceased to be a party in the adversarial system of justice, this had a profound effect on their power during court proceedings; in legal terms, they no longer had 'standing'. Their role in the criminal justice system has been reduced to the initial reporting of crime and supply of information to State investigators, and to providing evidence in Court if and when the prosecution requires. They can be subpoenaed to appear against their will, or the case can be dropped or a 'plea' accepted without any consultation with the victim, or even

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9 Except perhaps in the most exceptional circumstances. See *R v Apostilides* (1984) 154 CLR 563 at 575.

without their knowledge. Whether a victim receives any information about the case, or is considered, depends on the discretion of individual police, prosecutors and judges.

The only exception to this is the continued right of victims to commence a private prosecution. As all summary proceedings are, in theory, private prosecutions, victims are entitled, as members of the public, to summarily prosecute. In the case of indictable offences, victims may only initiate the process as far as the preliminary examination. Only the Director of Public Prosecutions (the DPP), or in rare circumstances, the Court,<sup>10</sup> has the right to decide to proceed with the matter. Victims are deterred from private prosecutions by reasons of cost, as legal aid is not available, inconvenience, the skill required to present a case in Court, the stringent burden of proof required for a conviction and the risk of having costs awarded against them.<sup>11</sup> These factors, in addition to the general lack of awareness of the existence of this prosecutorial right, make private prosecutions rare. Furthermore, underpinning the subservience of the victim in law is the fact that a private prosecution may be taken over by the DPP at any time.<sup>12</sup> Therefore, private prosecution cannot be classified as a significant right for victims within the criminal justice system.

Some attempts have been made in recent years to provide victims with greater consideration, although not a formal role, during court proceedings. Two important recent developments need to be mentioned briefly.

The first has emerged from the increasing interest and concern for victims of crime in Australia. In the 1980's a number of State Government inquiries were commissioned to report on victims of crime,<sup>13</sup> and each recommended, inter alia, that victims be accorded greater consideration during criminal court proceedings.<sup>14</sup> Later, acting upon some of these recommendations, all State Governments issued Declarations or Charters of Victims' Rights, as administrative guidelines not having any legislative effect.<sup>15</sup> Many of the provisions of these documents attempt to set out the rights of victims during the criminal justice process, and some of the

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10 See R Fox, *Victorian Criminal Procedure*, Monash Law Book Co-operative Ltd, (1992) p 38, particularly the cases cited in footnote 58.

11 *Latoudis v Casey* (1990) 65 ALJR 151.

12 See s 9(5) of the *Director of Public Prosecutions Act* 1983 (Cth). DPP guidelines often lay down the criteria as to when this will occur. For example, see Commonwealth Attorney-General, *Prosecution Policy of the Commonwealth*, Canberra (1990) (the Cth Policy) at [4.10].

13 See, Legal and Constitutional Committee (Victorian Parliament) *Report Upon Support Services to Victims of Crime*, November 1987 (the Victorian Inquiry); NSW Task Force, note 4 *supra*; and the Committee of Inquiry on Victims of Crime, *Report of the Committee*, Adelaide: Attorney-General's Department, 1981 (the South Australian Inquiry).

14 See Victorian Inquiry, Recommendations 46, 48 and 54, *ibid* at 102-4; NSW Task Force, Recommendations 25-50, note 4 *supra*; and SA Inquiry, Recommendations 37-50, *ibid*.

15 Most of these have been published as brochures by the relevant Attorney-General's Department. The Tasmanian, Queensland, South Australian and Victorian documents can also be found in *The Vocal Voice* (March, 1990) at 9-13.

provisions specifically refer to the victims' relationship with prosecutors during criminal court proceedings.<sup>16</sup>

The second important development is the trend towards greater professionalisation of prosecutorial services in Australia. This has been evidenced by the formation over the last decade of the offices of the DPP in every State<sup>17</sup> and at the Commonwealth level.<sup>18</sup> The DPPs were formed with the aim of making prosecution services more professional, more independent from government, more accountable, and thus more in control of the prosecution process.<sup>19</sup> In order to facilitate a consistent, coherent, open and professional approach to prosecution in Australia, each DPP has published detailed guidelines for the exercise of critical prosecutorial discretions.<sup>20</sup> Such discretions include the decision to prosecute,<sup>21</sup> the decision to discontinue a prosecution<sup>22</sup> or enter a *nolle prosequi*,<sup>23</sup> and the practice of 'charge bargaining'.<sup>24</sup> These guidelines are relevant to the extent that they refer to the role of the victim in relation to the exercise of prosecutorial discretion.<sup>25</sup>

Despite the issuing of DPP guide-lines and Declarations or Charters of Victims' Rights, little real change has occurred as far as the role of victims is concerned, and they continue to lack any formal role in court proceedings. While the DPP guide-lines and the various Declarations or Charters of Victims' Rights may be of symbolic value, they have proven to be largely ineffectual for five reasons.

First, the DPP guide-lines provide that consideration for the victim be only one of many factors to be taken into account. Thus, it is always open to a prosecutor to justify a decision the victim may disagree with on the basis of the other considerations. Secondly, the 'rights' contained in the various Declarations and Charters are all dependant on victims being aware of these rights, and then making a request<sup>26</sup> for the relevant right in question to be granted. There is no legal obligation on the police prosecutions Department or the DPP to inform victims of these rights. Consequently, many victims remain ignorant of these rights, and even if aware, often have difficulty knowing how to exercise them.

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16 For example, see cls 6, 7, 8, 14, 17 and 18 of the NSW Charter of Victims' Rights.

17 For example, the office of the Victorian DPP was established in 1982, and the NSW DPP was established in December, 1986.

18 The Commonwealth DPP commenced operations in March 1984.

19 See I Temby, "Prosecution Discretions - DPP Act 1983" in I Potas (ed), *Prosecutorial Discretion*, Australian Institute of Criminology Seminar Proceedings (1984) pp 53-65.

20 See, for example, Cth Policy, note 12 *supra*; NSW DPP, *Prosecution Policy and Guidelines of the DPP*, Sydney, September, 1991; and Victoria, *Annual Report of the Office of the DPP for the year ended 30th June 1990* at 56-62.

21 For example, in the Commonwealth jurisdiction see Cth Policy, note 12 *supra*, Section 2.

22 *Ibid* at [4.2]-[4.13].

23 *Ibid* at [5.19]-[5.24].

24 *Ibid* at [5.12]-[5.18].

25 For example, see the criteria laid down in *ibid* at [2.7].

26 Even where mandatory words are used, as there is no remedy for a breach of the right, the reality is that victims must request the right in question.

The third reason is that time constraints often prevent prosecutors from considering the victim, even if they are inclined to do so.<sup>27</sup> Fourthly, even if a breach of the Rights or Guidelines can be proven, none provide for any judicial or administrative remedies. Finally, and most importantly, there is the largely hidden factor of bureaucratic resistance to change, particularly changes that add to the burden of a Department.

Andrew Karmen summarises the situation succinctly:<sup>28</sup>

Criminal justice professionals have little incentive to act in accordance with the wishes and needs of victims, since they are not directly accountable to them, either legally or organizationally. Official priorities are to achieve high levels of productivity and to maintain smooth coordination with other components of the system. Victims are viewed as a resource to be drawn on, as needed, in the pursuit of organizational objectives that are usually only incidental to the satisfaction of the interests of the individual victims.

### III. WHAT SHOULD THE ROLE OF VICTIMS BE DURING CRIMINAL COURT PROCEEDINGS?

To determine whether any reforms to the relationship between prosecutors and victims are justified, it is first necessary to examine the theoretical question of what the victims' role during criminal court proceedings should be.

One perspective is that victims should continue to have no role in the criminal justice system. Proponents of this view stress that the purpose of the criminal justice system is to decide on the guilt of the defendant, and then if the defendant is convicted, the appropriate penalty. The victim is not a factor in these determinations, apart from the assessment of the veracity of their evidence.

In fact, victims may disrupt the proper determination of these issues by being too motivated by their desire for revenge and retaliation for the harm inflicted upon them. The philosophical reason why the State took over the prosecution and punishment of offenders was the belief that criminal law should serve the interests of society as a whole, and not the individual victim. Revenge motives were seen as too arbitrary and severe, and thus more consistency in the prosecution and punishment of offenders could only be achieved through State control. Providing the victim with consideration is thus opposed on the basis of the proper functioning of the criminal justice system, particularly in respect of the civil liberties of accused persons. On this view, victims should use their rights outside the criminal justice system to satisfy their interests, such as the civil law, criminal injuries compensation and medical and psychological support services.

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27 For example, see Law Reform Commission of Victoria Report No 42, *Rape: Reform of Law and Procedure, Interim Report*, 1991 at [87], p 36.

28 A Karman, note 3 *supra*, p 212.

The counter viewpoint is that the victim, being the actual person that was harmed by the criminal act, is deserving of a role in criminal court proceedings. As already mentioned, victim advocates argue that the present exclusion of victims from a role in proceedings has led to many victims choosing not to report crime, or where they do, this often results in their 'second victimisation'. In this respect, there is much anecdotal evidence to suggest that victims are dissatisfied with the criminal justice system.<sup>29</sup> Such non-cooperation and dissatisfaction with the system indicates the need for victims to be shown greater consideration during the criminal justice process.

Furthermore, victims have specific interests in criminal court proceedings that need to be considered. Their rights outside the criminal justice system are not sufficient to satisfy these interests. Unless they are given a role in court proceedings, these interests are likely to be neglected. The prosecutor must represent these interests of the victim as they are the only party at court able to do so.<sup>30</sup>

It is possible to identify seven specific interests of victims during court proceedings. First, victims have a specific interest in receiving *information* concerning the case. They need to know if and when they must be available to give evidence, and if they are entitled to witness expenses. Victims also need information concerning court procedures and what is expected of them as witnesses, so that they can present their evidence with the minimum of trauma. Empirical data indicates that victims do want information about their case, and their level of satisfaction with court proceedings is related to the amount of information they receive.<sup>31</sup>

Secondly, victims also have an interest in recovering their property and receiving *compensation* for the harm done to them. All legislatures allow a criminal court, following conviction, to make a compensation order in favour of the injured party.<sup>32</sup> Thus, victims have a clear monetary interest in whether or not a conviction is recorded. Even if the Court does not order compensation,<sup>33</sup> victims still have an interest in the conviction of the offender. Criminal Injuries Compensation legislation generally provides that a conviction will constitute conclusive evidence that the offence has been committed.<sup>34</sup> Thus, while the lack of

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29 See Victorian Inquiry, note 13 *supra* at 83; I Waller, note 5 *supra*; and the Victorian Sentencing Committee Report, *Sentencing Vol 2*, 1988 (Sentencing Committee) at 525. There is also some quantitative evidence - see J Gardner, *Victims and Criminal Justice*, Office of Crime Statistics, South Australian Attorney-Generals Department Series C, No 5 (1990) at 57.

30 This is based on the assumption that victims are not entitled to be represented separately, an issue addressed in part IV of this article.

31 See J Gardner, note 29 *supra* at 27.

32 For example, see ss 53 (major offences) & 61 (minor offences) of the *Victim Compensation Act 1987* (NSW) and *Sentencing Act 1991* (Vic), s 86.

33 This may occur as most jurisdictions provide that the court must take into account the financial circumstances of the offender. For example, see *Sentencing Act 1991* (Vic), s 86(2).

34 See for example, *Criminal Injuries Compensation Act 1983* (Vic), s 12(3).

a conviction will not preclude an award of compensation,<sup>35</sup> it may make it more difficult to prove that compensation should be awarded.

Thirdly, victims have an interest in the *verdict* of the court. For example, in sexual assault cases, where the most common defence is that of consent, a verdict of guilty can make the rape victim feel that she was believed and her reputation was upheld. On the other hand, a not guilty verdict could be psychologically devastating, leaving the victim with an unjustified stigma.

Fourthly, the victim has an interest in receiving *protection* from the threat of further victimisation or retaliation. Whether or not such a threat is real or imagined, "it is hard for a victim whose feelings of security have recently been shattered to accept that this retaliation is rare".<sup>36</sup> On this basis, the victim has an interest, or at least a perceived interest, in the imprisonment of the offender.

Fifthly, the victim has an interest in an *adequate sentence* being passed by the Court. This is due to the generally accepted understanding that the longer the sentence, the more serious the crime. As Wardlaw states, "the punishment meted out by the courts is presumed to be 'psychological reparation' to the victim, which satisfies his desire for revenge".<sup>37</sup> Furthermore, "away from the retributive dogma, victims want to be sure that the court 'validates' the harm to them. Psychologically this recognition is crucial to their recovery".<sup>38</sup> Many argue, perhaps correctly, that victims' views on sentencing are irrelevant. However, the point is that relevant or not, victims often perceive that the length of a sentence reflects the way the court viewed the seriousness of the crime and the impact of the criminal act upon them.

The sixth interest of the victim is the protection of their *privacy*. Many victims will not want to reveal their name and address during proceedings, and will not want the media intruding into their affairs. They may thus desire the court to exercise their discretion to close the court to the public,<sup>39</sup> at least during their testimony.<sup>40</sup>

Finally, victims have an interest in ensuring respect of the protections afforded to them in law with regard to their *cross-examination*. Prosecutors have a right to object to improper cross-examination, and judges or magistrates also have the power and a duty to protect the victim.<sup>41</sup> Furthermore, all jurisdictions have specific rules in regard to cross-examining sexual assault victims concerning their

35 For example, *Criminal Injuries Compensation Act 1983* (Vic), s 21.

36 I Waller, note 5 *supra* at 4.

37 G Wardlaw, "The Human Rights of Victims in the Criminal Justice System" (1979) 12 *Australian and New Zealand Journal of Criminology* 145.

38 I Waller, note 5 *supra* at 4.

39 See *Crimes Act 1900* (NSW), s 77A (note Recommendations 38 and 39 of the NSW Task Force), and ss 13 and 19 of the *Crimes (Sexual Offences) Act 1991* (Vic)

40 See Report No 42, note 27 *supra* at [104]-[106], pp 44-5.

41 See SA Inquiry, note 13 *supra* at 37 and Recommendation 40 at 155; Victorian Inquiry note 13 *supra* at 94-5 and ss 37, 37A, 39 and 40 of the *Evidence Act 1958* (Vic).



prior sexual history.<sup>42</sup> Failure to fairly protect the victim clearly adds to their trauma. In recognition of this, some legislatures allow for 'alternative arrangements', such as closed circuit television or screens, in order to reduce the trauma of cross-examination for especially vulnerable victims.<sup>43</sup>

Given these specific interests of the victim, the laws of 'procedural fairness'<sup>44</sup> seem to suggest that victims should receive consideration throughout the proceedings, on the basis that they are substantially affected.<sup>45</sup> In weighing up these competing points of view, the recent decisions of the High Court, in *Jago v District Court of New South Wales*<sup>46</sup> and *Dietrich v R*,<sup>47</sup> stress the central concept of fairness in our criminal justice system. Professor Fox states:<sup>48</sup>

The pivotal place of fairness as a source of power to shape criminal law and procedure has been a constant theme in the High Court. But not merely fairness to the accused. In *Jago*, Mason CJ re-emphasised that the heart of the concept of fairness was a balancing of the interests of all directly affected including those of the prosecutor and the public.

The High Court has made it clear that as victims are directly affected by criminal proceedings, they also form part of this balancing process.<sup>49</sup> However, in order to achieve a fair and proper balance, one must also assess the interests of the accused during criminal court proceedings. What is at stake for the accused is their liberty. The above seven interests of the victim are important, but they do not compare to the interests of the accused not to be unfairly deprived of their liberty. In assessing reforms, we cannot undertake a simple balancing process between accused and victim. Such a process has been described by some authors as "an unprincipled utilitarian perspective...without investigating the qualitative differences between (the competing claims)".<sup>50</sup>

The rights of accused persons are particularly important as Australia's criminal justice system, unlike those in other Western democratic countries, is not subject to international standards of procedural guarantees for accused persons.<sup>51</sup> As Australian criminal courts have no power to strike down legislation that infringes civil liberties, changes to the criminal justice system must always be strictly scrutinised.

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42 See s 37A of the *Evidence Act 1958* (Vic). For a detailed discussion of these rules, see Report No. 42, note 27 *supra*, at [89]-[96], pp 38-41.

43 For example, see s 21A(1)(b) of the *Evidence Act 1971* (Qld) and s 37C of the *Evidence Act 1958* (Vic). The latter provision applies to victims in sexual assault cases with impaired mental functioning or those under the age of 17.

44 This terminology has in recent years replaced that of 'natural justice' in administrative law.

45 See I Waller, note 5 *supra* at 5-6.

46 (1989) 63 ALJR 640.

47 (1992) 67 ALJR 1.

48 R Fox, "Criminal Delay as Abuse of Process" (1990) 16 *Mon LR* 64 at 72-3.

49 For example, see *Dietrich v R* (1992) 67 ALJR 1 at 35, per Toohey J, at 12, per Brennan J.

50 M Jones and B Gaze, *Law, Liberty and Australian Democracy*, Law Book Co (1990) p 38.

51 See D Brown, D Farrier, D Neal and D Weisbrot, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales*, Federation Press (1990) p 7.

The challenge is to implement reforms that do not impact on the rights' of accused persons, but allow victims' specific interests to be considered.<sup>52</sup> It will be shown that the best way to reasonably achieve this is not to grant victims substantive rights, as this would affect the accused's position during criminal court proceedings, but rather to adequately structure the victim's relationship with the prosecutor.

#### IV. SHOULD THE PROSECUTOR CONTINUE TO REPRESENT THE VICTIM?

The first question for structural reform is whether the prosecutor should continue to represent victims' interests during criminal court proceedings. If victims are empowered so that they no longer have to rely on the prosecutor, their interests are likely to be more fairly considered.

However, this structural reform envisages a return to the former system of private prosecutions, either completely or partially (say for crimes below a certain level of seriousness). Such a reform can be dismissed easily, by examining why the criminal justice system initially moved away from private prosecutions. Many of the reasons, such as cost and inconvenience to the victim (thus favouring wealthier victims), the lack of control over the system and the discretion to prosecute, leading to many crimes being ignored, are still applicable today.<sup>53</sup> Furthermore: "entrusting the conduct of the prosecution to a private individual opens a wide door to bribery, collusion, and illegal compromise".<sup>54</sup> Returning to such a system in today's society would be even more dubious as, "it is clear that in a modern, complex, industrialized community the State must take the principal role in law enforcement and prosecution. Any alternative would be a recipe for anarchy and the antithesis of a civilised social order".<sup>55</sup>

A second possible reform is to provide for direct mediation between the victim and the offender. Many such mediation schemes have been operational in North America<sup>56</sup> and England.<sup>57</sup> A number of pilot schemes have recently begun in Australia,<sup>58</sup> although informal settlement of disputes between what the system may

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52 Note 50 *supra*, p 38.

53 Note 2 *supra*.

54 Select Committee on Public Prosecutors, (2nd Report), (1856), (UK) p 349.

55 C Sumner, "Victim Participation in the Criminal Justice System" (1987) 20 *ANZJ Crim* 195 at 203.

56 See A Karmen, note 3 *supra*, pp 340-47, for a detailed discussion of mediation and reference to the schemes operating in America.

57 See T Marshall and M Walpole, *Bringing People Together: Mediation and Reparation Projects in Great Britain*, Home Office Research and Planning Unit, Paper No 33, London: HMSO (1985).

58 The first, the Beenleigh Court Crime Reparation Project, was established in Queensland in February 1992. Two more pilot schemes have recently been established in Victoria - see J Mathews, *Alternative Dispute Resolution in Victim Offender Cases*, Attorney-General's Department, Melbourne, 1990.

regard as victims and offenders has always taken place. While a detailed discussion of mediation is beyond the scope of this article, some obvious limitations need to be highlighted. In Australia the concept of mediation as far as criminal justice is concerned, is in its infancy. It is readily acknowledged that in the main it can only work for certain limited categories of offences (basically property offences). Also, mediation is dependant on the consent of both the victim and the offender. There are still many issues to resolve, such as, what constitutes the true consent of the offender; procedural guarantees for the offender; the legal effect of a mediation settlement, and its relationship to the criminal justice system. Many 'victim advocates' question whether mediation actually benefits victims.<sup>59</sup> In conclusion, while not discounting mediation as a possibility in certain limited situations, it cannot be regarded as a serious alternative in the vast majority of criminal cases.

A more acceptable reform is to allow victims their own representation during court proceedings. Clearly, there is nothing preventing victims from engaging their own lawyer to advise them outside the court-room. However, our adversarial criminal justice system currently does not generally permit a third party to have independent representation in court.

However, the concept of victims being entitled to representation is common in inquisitorial systems. Thus separate representation for the victim's family is widespread in Australia during Coroners Inquests,<sup>60</sup> which are inquisitorial in nature. A right of victims to their own representation exists in most European systems.<sup>61</sup> For example, in France victims may join their tort action against the offender, to the state's criminal action, and thereby participate in the criminal case as a *partie civile*. Legal aid is even available for this procedure.<sup>62</sup> Furthermore, in America it is possible that a lawyer hired by the victim be allowed to assist the public prosecutor. If the prosecutor agrees, "the courts in most states have permitted the practice so long as the public prosecutor retains control of, and supervision over, the case".<sup>63</sup> Even where the prosecutor does not consent, the court may allow the victim's lawyer to appear as *amicus curiae*. This is a procedure generally available in civil proceedings in common law jurisdictions, whereby a court may allow a person having sufficient interest to participate in the proceedings to a limited extent.<sup>64</sup> As far as criminal proceedings are concerned, an *amicus curiae* has been allowed in England, but only if appearing in favour of the defendant.<sup>65</sup> Given the interest a victim has in criminal proceedings, it could be

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59 See B Mason, "Reparation and Mediation Programmes: The Perspective of the Victim of Crime" (1992) 16 *Crim LJ* 402.

60 For example, see *Coroners Act 1985* (Vic), s 45(3).

61 See M Joutsen, "Listening to the Victim: the Victim's Role in European Criminal Justice Systems" (1987) 34 *Wayne Law Review* 95.

62 See I Waller, note 5 *supra* at 7.

63 J Stark and H Goldstein, *The Rights of Crime Victims*, American Civil Liberties Union Handbook, Bantam Books (1985) p 55.

64 Normally, this party is the Attorney-General.

65 *Faulkner v The King* [1905] 2 KB 76. See also R Fox, note 10 *supra*, p 52.

argued that a court should grant a victim's lawyer the right to appear on this basis. To the writer's knowledge, such an argument has never succeeded before an Australian criminal court.

Proponents of the concept of separate representation emphasise the different responsibilities, obligations and duties of the prosecutor that make it impossible for the prosecutor to represent the victim's interests. Judicial pronouncements and the Rules of Bar Associations clearly indicate that prosecutors do not act on behalf of private parties, such as the victim. For example, Justice Murphy has stated that: "those prosecuting on behalf of the community are not entitled to act as if they were representing private interests in civil litigation".<sup>66</sup> Rule 20 of the NSW Bar Association says that:

A barrister appearing for the Crown in a criminal case is a representative of the State and his function is to assist the court in arriving at the truth.

Prosecutors thus have two superior duties to any that may be owed to the victim; their duty to the Court and their duty to their employer, the State. If the interests of the victim coincide with these, then no problem exists. However, many victim advocates argue that this is often not the case, and therefore the victim should be entitled to be separately represented.

Different victim advocates stress differing interests of the victim that they claim prosecutors do not adequately represent. Those concerned with a more retributive criminal justice system stress the interests of victims in protection and an adequate sentence. Inadequate sentences are said to be a result of the traditional restraint of prosecutors during the sentencing hearing.<sup>67</sup> Nearly all victim advocates would stress the information needs of victims and the interest of the victims in compensation. Women's groups stress the interest of victims in maintaining their privacy and in not being unfairly cross-examined. They believe that many prosecutors do not do enough to prevent unfair cross-examination of sexual assault victims. This is particularly important as victims of sexual assault often perceive that they are on trial, especially when the main issue is consent.

A detailed submission concerning these latter issues was recently presented to the Victorian Law Reform Commission by the Real Rape Law Coalition.<sup>68</sup> In addition to addressing the concern of victims<sup>69</sup> during cross-examination, the submission also stressed that during the examination of victims, prosecutors often do not allow enough scope for victims to fully explain their viewpoint.<sup>70</sup> This may lead to relevant evidence being omitted or given the wrong emphasis. These problems are to a large extent due to the question and answer framework that is a

66 *Lawless v The Queen* (1979) 142 CLR 659 at 680. See also I Temby, "The Role of the Prosecutor in the Sentencing Process" (1986) 10 *Crim LR* 199 at 200-1.

67 See Rule 57A of the NSW Bar Association and I Temby, *ibid*.

68 See Appendix 7, Appendixes to Report No 42, note 27 *supra* at 145-86.

69 Instead of the word 'victim', they prefer to use the terminology "victim/survivor" in their submission.

70 Appendixes to Report No 42, note 27 *supra* at 158-9.

feature of our court proceedings, and the need of the prosecutor to depict the victim as 'ideal'.<sup>71</sup> The submission concludes that only by the victims having their own lawyers at court can this situation be rectified. Finally, the submission details the role and responsibilities of the lawyer<sup>72</sup> and argues that legal aid should be available.<sup>73</sup>

Those who oppose separate representation for victims at court do so on a number of grounds. Most importantly, separate representation is seen as a threat to the civil liberties of the accused. Clearly, a two against one situation is created at court, with two Counsels arguing for the conviction of the accused, opposed only by defence Counsel. Furthermore, the victim's lawyer may reflect the revenge motives of client, and would not be constrained by the duties of fairness and objectivity that bind prosecutors. In a legal system where accused persons are not entitled to state funded representation as of right,<sup>74</sup> and no overriding procedural guarantees exist,<sup>75</sup> it is more than enough to have the resources of the state pitted against the accused, let alone further representation from the victim.

From a practical viewpoint, separate representation entails added procedures that would result in longer trials and further costs. If legal aid was not available, only wealthier victims could afford separate representation, and this is clearly undesirable.

Furthermore, it can be argued that despite the prosecutors other duties, these do not necessarily preclude them from carrying out their duty to the victim. As Sumner states,<sup>76</sup>

I can see no inherent, irreconcilable conflict between the traditional duties of prosecutors and their taking on a greater role in the interest of the victim. Lawyers acting for clients are often faced with situations which can give rise to conflicting duties which have to be resolved. In case of conflict a prosecutor's duty to the court should take priority over his duty to the victim. In reality there will not be many instances where there will be conflict between the interests of Crown and victim.

Finally, the issue of separate representation was considered and rejected by all the inquiries into victims of crime that took place in the 1980's,<sup>77</sup> the recent Report of the Victorian Law Reform Commission,<sup>78</sup> and by other writers.<sup>79</sup> The limited empirical evidence available also suggests that victims themselves do not want separate representation.<sup>80</sup>

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71 See J Shapland, J Willmore and P Duff, *Victims in the Criminal Justice System*, Gower Publishing Co (1985) pp 66-7.

72 Appendixes to Report No 42, note 27 *supra* at 177-8.

73 *Ibid* at 174, 176.

74 This was the conclusion of all seven High Court Justices in *Dietrich v R* (1992) 67 ALJR 1.

75 See note 52 *supra*.

76 C Sumner, note 55 *supra* at 212.

77 See NSW Task Force, note 4 *supra* at 96; Victorian Inquiry, note 13 *supra* at 94 and the SA Inquiry, note 13 *supra* at 37.

78 Report No 42, note 27 *supra* at [77]-[82], pp 32-5.

79 See C Sumner, note 55 *supra* at 203-4 and K Boyer, "The Victim on Trial" in P Grabosky (ed), *National Symposium on Victimology*, Australian Institute of Criminology (1982) 75 at 77.

80 The South Australian study indicated that 75.4 per cent of victims were against the concept. J Gardner, note 29 *supra* at 42.

On balance, particularly given the affect on the civil liberties of the accused, the argument for separate representation is outweighed by the arguments against. To allow it would entail a fundamental alteration to our adversarial system of justice.

## V. WHAT SHOULD THE RELATIONSHIP BETWEEN PROSECUTOR AND VICTIM AT COURT BE?

Given that it is preferable for victims to continue to rely on the prosecutor to represent their interests at court, the question of their relationship with the prosecutor now arises. Although the victim is not the client of the prosecutor, the prosecutor is the only party at court that can represent the victim's interests, and the must do so, at least to the extent that this does not interfere with the prosecutor's other obligations.

This is an unusual situation in our court system, because normally a party with sufficient interest in proceedings will be represented<sup>81</sup> or, at least, be present and make submissions as an *amicus curiae*. By contrast the victim is not normally present during court proceedings,<sup>82</sup> except to give evidence.

As it is conceded that the prosecutor must remain in control of the Crown's case, the issue can be analysed in terms of what rights the victim should have in relation to the prosecutor. There are a number of possible victims' rights. First, there is the right to receive information from the prosecutor. A second right is the ability to provide the prosecutor with information and/or their views prior to a court hearing or the exercise of prosecutorial discretion. A third right is to have the prosecutor present the victims' information and/or their views to the court. Finally, there is the right of appeal against the unfavourable exercise of prosecutorial discretion.

The desirability of each of these rights must be examined in turn, especially with regard to the effect they may have on the civil liberties of accused persons.

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81 The legal status of children before the Family Court is an instructive comparable situation. Clearly, their interests may be strongly effected by proceedings in the Family Court, although they are not parties to the adversarial proceedings. Section 65 of the *Family Court Act 1975* (Cth) does allow a child to have their own representation if: "it appears to the court that the child ought to be separately represented".

82 The purpose of the victim's exclusion is to ensure that their testimony was not influenced (deliberately or unconsciously) by that of other witnesses' testimony. See JF Archibold, *Pleading, Evidence and Practice in Criminal Cases*, Sweet & Maxwell (38th ed, 1973) p 240, s 487. It is within the discretion of the trial judge to permit a witness to remain in court. See *R v Tait* [1963] VR 520, and *R v Bicann* (1976) 15 SASR 20.

### A. The Right to Receive Information from the Prosecutor

There is a strong consensus that victims are entitled at least to receive information concerning court proceedings.<sup>83</sup> The provision of information from prosecutors can clearly benefit victims in a direct practical sense, and can also increase their satisfaction with the criminal justice system. In turn, this will benefit the prosecution, as victims will become more cooperative witnesses. Given that the provision of information does not raise any civil liberties concerns, this should constitute one of the underlying principles guiding the relationship between prosecutors and victims. In fact, most of the rights contained in the various Declarations or Charters of Victims' Rights embody this principle, and many prosecutors already, albeit in an ad-hoc manner, provide information to victims.

### B. The Right to Provide the Prosecutor with Information and/or their Views Prior to a Court Hearing or the Exercise of Prosecutorial Discretion

In one sense, the right of victims to *provide* information to the prosecutor is the corollary to the right of victims to *receive* information from the prosecutor. In another sense, this right is *dependant* on the right of victims to receive information; without knowledge that a court hearing is about to take place or an exercise of prosecutorial discretion is to occur, the victim will not have a chance to put forward view or provide information.

This right does not mean that the victims' views or the information provided are necessarily presented to the court. The prosecutor acts as a 'filter' and only the information or views of the victim that the prosecutor considers relevant and admissible are presented to the court, or are used in the consideration of the prosecutor's discretion. As prosecutors are almost always legally trained,<sup>84</sup> they can appropriately evaluate whether information provided by a victim would be admissible.

There may also be occasions when the prosecutor would not find it in the best interests of the victim to present admissible evidence to the court. For example, the prosecutor may believe that the evidence would subject the victim to rigorous cross-examination, outweighing any possible benefits of presenting it. On such occasions, it would be advisable for the prosecutors to explain to the victim the reason why they have taken that approach.

Currently, victims do have this 'right', at least on an ad-hoc basis, depending on the discretion of the individual prosecutor involved. It is submitted that there are considerable advantages in allowing this right to victims on a more structured basis. The provision of information to prosecutors should ensure they have the full facts before them prior to a court hearing or the exercise of their discretion. Also,

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83 See Victorian Inquiry, note 13 *supra* at 83-9; Sentencing Committee, note 29 *supra* at 525-32; SA Inquiry, note 13 *supra* at 159-61 and NSW Task Force, note 4 *supra* at 88-91.

84 Most writers are of the opinion that the police should no longer have a prosecutorial role in the courts. See Recommendation 37 of the NSW Task Force, note 4 *supra*; *Report of the Royal Commission to Inquire into NSW Police Administration*, April 1981 at 238-58 and K O'Conner, "Controlling Prosecutions", in J Basten et al (eds), *The Criminal Injustice System*, Pluto Press (1982).

allowing victims to present their views and provide information would strengthen their sense of worth and increase their cooperation with the prosecution.

Furthermore, this right of victims does not infringe the civil liberties of the accused. Victims motivated by revenge are not able to present distorted facts or opinions to the court. They are constrained by the professional judgment of prosecutors, who, in accordance with their duty of fairness,<sup>85</sup> should prevent irrelevant or inadmissible evidence from being presented to the court.

### C. The Right to have the Prosecutor Present Information and/or their Views to the Court

This right can be distinguished from those previously examined, as there is no prosecutorial 'filter' to be applied to prevent the victims' information or views from being presented to the court. Given that some victims may be motivated by revenge, allowing this right could result in the presentation to court of highly prejudicial or emotive evidence without providing prosecutors, acting under their duty of fairness, the opportunity to reject the presentation of such evidence. In this respect, this right is analogous to allowing victims their own representation, and consequently is as inherently dangerous to the civil liberties of the accused. Thus this right should not form one of the principles of the relationship between prosecutors and victims.

The presence of the prosecutorial 'filter' is thus critical to the question of what victims' rights are acceptable. This is not often appreciated. For example, the question of victim impact statements is one of the most controversial issues in relation to victims of crime. These are special reports, or a part of the regular pre-sentence report, submitted to the sentencing authority prior to sentence, which indicates the physical, psychological, and financial impact of the crime on the victim. Without provision for such statements, information on the impact of the crime on the victim is only presented to the court on an ad hoc basis. The effect of providing for victim impact statements is to oblige the prosecutor to present this information to the court in all specified circumstances.

So far in Australia, only South Australia<sup>86</sup> has passed legislation obliging the prosecutor to present victim impact evidence to the court. Most other states have only included it as one of the provisions of their Declaration or Charter of Victims' Rights.<sup>87</sup> It is now a common feature of the American criminal justice system.<sup>88</sup>

85 Note 66 *supra*, and the accompanying text.

86 *Criminal Law (Sentencing) Act 1988* (SA), s 7.

87 See cl 14 of the Tasmanian and Queensland Declarations; cl 8 of the Western Australian Charter and cl 17 of the NSW Charter. NSW has also enacted victim impact legislation: see *Crimes Act 1900* (NSW), s 447C, but due to the discretionary nature of the section, it adds little to cl 17 of the NSW Charter. Whilst the Victorian Declaration makes no reference to victim impact evidence, recent legislation allows, but does not obligate, a victim to make a victim impact statement to the court following the defendant's conviction: see *Sentencing (Victim Impact Statement) Act 1994* (Vic).



Academic opinion<sup>89</sup> and the results of government inquiries<sup>90</sup> are divided as to whether such provision is desirable. While there are many other aspects to this issue, the desirability of providing for victim impact statements can be examined on the basis of the above discussion.

First, it is important to decide what relevance the impact on the victim has to the sentencing of the accused. The accepted view today is that both criminal liability<sup>91</sup> and the length of sentence should be determined primarily by the subjective state of mind of the accused. Thus, only the impact that an offender could have subjectively anticipated is relevant to the length of their sentence. The full extent of the crime should only be attributable to the offender where the impact of the crime is beyond what would normally have been contemplated, and the offender *knew* of, or was reckless to the knowledge of, the victim's special vulnerability prior to committing the offence. This accords with the views of Vincent J of the Victorian Supreme Court of Criminal Appeal:<sup>92</sup>

There has been a significant shift towards the attribution of criminal responsibility both in terms of both conviction and the assessment of an appropriate penalty, on the basis of the knowledge and intention possessed by an offender, and away from such attribution being based upon the consequences of the offender's conduct whether or not the harm actually sustained was intended or contemplated.

The subjective state of mind of the accused is a concept that legally trained prosecutors can readily understand. It would thus be appropriate that they use their discretion in deciding whether victim impact evidence should be presented to the court. If the provision for victim impact statements deprives prosecutors of their discretion, then it would allow victims a right to put information and/or their views directly to the court, including possible highly emotive and prejudicial evidence. As discussed above, this would not be an acceptable reform.<sup>93</sup>

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88 L Lamborn, note 6 *supra* at 151, and in particular the references in footnote 136.

89 Examples of those opposed to victim impact statements are E Fattah, "From Crime Policy to Victim Policy The Need for a Fundamental Policy Change" (1991) 29 *International Annals of Criminology* 43 at 53, and L Henderson "The Wrongs of Victims Rights" (1985) 37 *Stanford LR* 937. Examples of those in favour are C Sumner note 55 *supra*; C Corns, "Victims and the sentencing process" (1988) 62 *Law Institute Journal* 528 and E Erez, "Victim Impact Statements", *Trends and Issues in Crime and Criminal Justice No 33*, Australian Institute of Criminology (1991).

90 Those opposed were the Victorian Inquiry, note 13 *supra*; Sentencing Committee, note 29 *supra*; and the Australian Law Reform Commission Report No 44, *Sentencing*, 1988. Those in favour were the SA Inquiry, note 13 *supra* and the National Committee on Violence *Violence: Directions for Australia*, Canberra: Australian Institute of Criminology (1990). The NSW Task Force, note 4 *supra* was neutral on the issue.

91 For example, in relation to homicide, see the principles set out by the Law Reform Commission of Victoria Report No 40, *Homicide*, 1991 at [112], p 49.

92 *R v Mallinder* (1986) 23 *Australian Criminal Reports* 179.

93 It may be argued that in contrast with evidence presented to the court during the guilt phase of the criminal trial, prejudicial evidence presented during the sentencing hearing is not inherently dangerous to the civil liberties of the accused, as a judge (in contrast to the jury) is trained to properly determine the relevance of this evidence. However, this does not allow for the fact that, judges are bound to be effected by this air of emotionalism. Furthermore, to allow the victim to directly present impact evidence precludes the prosecutor from making the judgment that the evidence may subject the victim to cross-examination that would not be in their best interest.

However, if the provision of victim impact evidence does not deprive prosecutors of their discretion, it is acceptable as it would constitute a right of victims to only put information or their views to the prosecutor. This would give the prosecutor the discretion of deciding if the evidence is legally relevant,<sup>94</sup> that is within the subjective contemplation of the offender, and even if it is relevant, whether introducing it to the court would subject victims to cross examination that would not be in their best interests. Such provision would also solve the problem that often the full details of the crime escape judicial notice, including the extent of the physical injuries of the victim.<sup>95</sup> Victim impact information presented to prosecutors on a regular basis will help to ensure that courts are appraised of such information where the impact was clearly within the subjective contemplation of the offender.<sup>96</sup>

In summary, provided that prosecutors retain their discretion to omit such evidence, the provision for victim impact evidence should be supported. For the reasons referred to in the next part of this paper, it would be preferable if this provision took the form of a clause in the Declaration or Charter of Victims' Rights, rather than legislation. The clauses of the various Declarations or Charters of Victims' Rights that currently refer to victim impact evidence are ambiguous on the question as to whether the prosecutor retains a discretion not to present victim impact information to the court. For example, cl 17 of the NSW Charter of Victims' Rights gives victims the right:

In matters relating to charges of sexual assault or other serious personal violence, to have the prosecutor make known to the court the full effect of the crime upon them.

The critical issue of whether the prosecutor retains a discretion to omit such evidence is unclear, and thus needs to be clarified.

#### **D. The Right of Appeal Against the Unfavourable Exercise of Prosecutorial Discretion**

The final possible victim's right to consider is a formal right of appeal against the unfavourable exercise of prosecutorial discretion. In Victoria, while some internal review mechanisms exist within the DPP, no external review is allowed.<sup>97</sup>

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94 Even if the prosecutor makes an incorrect judgment, there is still the further procedural safeguard for the accused, in that it would still be the judge's decision as to whether the victim impact evidence is relevant to sentence.

95 See P Grabosky, "Victims", in G Zdenkowski et al (ed), *The Criminal Injustice System: Volume Two*, Pluto Press (1987) at 154.

96 The courts are particularly unlikely to be appraised of this evidence where the accused has pleaded guilty, which occurs in the overwhelming majority of criminal cases.

97 "Any decision to discontinue a prosecution, or accept a plea to a lesser offence, is already subject to an extensive internal review process involving Crown Prosecutors, senior members of the DPP's Office and, in the case of *nolle prosequi*, the Director himself or herself." Report No 42, note 27 *supra* at 55.

In examining these issues, the Victorian Law Reform Commission took the approach that whereas victims of sexual assault should have a formal right of appeal to the DPP against a police decision not to take further action,<sup>98</sup> this should not extend to DPP decisions, as:<sup>99</sup> "in contrast to the police, there are clear DPP guide-lines setting down the circumstances under which prosecutions will be discontinued by the DPP".

It is submitted that this approach should be followed. In the case of a non-professional exercise of discretion, there are strong grounds for allowing an appeal to the DPP, an appropriate body with the power and expertise to hear the appeal. However, where a discretion has been exercised by a professional officer of the DPP, and is subject to clear guidelines and internal review processes, the decision should stand. To allow a right of appeal would add unnecessary cost and delay. Furthermore, as DPP guidelines make it clear that consideration of the victim is only one of many factors prosecutors must take into account when exercising their discretion, it would be difficult for victims to succeed on appeal.

In summary, the above analysis of possible victims rights in relation to the prosecutor during court proceedings indicates that the rights that are justified are the provision of information to victims, and for victims to be able to provide the prosecutor with information and/or their views prior to a court hearing or the exercise of prosecutorial discretion. While this limited involvement of victims during criminal court proceedings may disappoint some victim advocates, and falls far short of providing substantive rights, it does accord with empirical evidence that victims desire to be kept informed of developments, but do not want to actively participate or alter the current system.<sup>100</sup> The last part of this article will discuss the best means by which these rights can be provided to victims within the context of our present criminal justice system.

## VI. REFORMS TO THE RELATIONSHIP BETWEEN PROSECUTORS AND VICTIMS

Despite the need to clarify some of the various Declarations and Charters of Victims' Rights, many of their provisions are aimed at the exchange of information between prosecutors and victims, in accordance with the desirable changes to the system outlined.

However, it was also argued in Part II that the Declarations and Charters are ineffectual, as they do not fundamentally change the role of victims - it continues to remain within the discretion of the prosecutor to provide or request information from victims. While it may be true that these rights are being provided to victims

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98 *Ibid* at 51-53.

99 *Ibid* at 55.

100 J Gardner, note 29 *supra* at 51; and in particular Table 3.26 at 50 for a detailed breakdown of victims' attitudes. This was also found to be true in the Shapland Study, note 71 *supra* at 180-82.

more often today as a result of these Declarations or Charters,<sup>101</sup> information is still not provided to victims in any structured, coherent manner. One potential solution would be to place these Declarations or Charters on a statutory footing. This was the approach recommended by the Victorian Sentencing Committee,<sup>102</sup> and is the approach taken in New Zealand.<sup>103</sup>

However, if the legislation does not also provide for a remedy or an adverse consequence in case of breach, it is difficult to see that its effect would significantly alter the present situation. This is the case in New Zealand. Prescribing remedies for breaches of these rights would be highly problematic. Furthermore, what also needs to be acknowledged is that in some situations victims do not *want* to be regularly informed,<sup>104</sup> and there are also situations where prosecutors may correctly surmise that providing certain information is harmful to the victim's psychological state. This shows that in designing any programs for victims' rights "there is a need for sensitivity, caution and flexibility".<sup>105</sup> For these reasons, the use of legislation to attempt to force prosecutors to provide these rights is not appropriate.

It is thus submitted that the basic approach of the various Charters and Declarations of Victims' Rights, which is to grant the rights upon the victims' request, is correct. What has been lacking is a structured method of informing victims of these rights, clear procedures as to how they go about obtaining them, and accountability mechanisms. While it is difficult to prescribe the exact manner in which each DPP and each state police prosecutors department should go about achieving this, as each has their own bureaucratic nuances, some general suggestions can be made.

It is important to start by clarifying exactly what is meant by the term 'information', which is to be provided to the victim. Within the rubric of 'information' are matters concerning Court hearings (dates, times), outcomes of Court proceedings or prosecutorial discretions (pre-trial hearings, committals, adjournments, decisions to accept a plea or enter a *nolle prosequi*), how the criminal justice system works and what is expected of witnesses. In these latter matters, which involve information that does not relate specifically to any individual case, it would not be necessary to have professionally trained prosecutors to undertake these tasks. A structured system of referral to a properly funded and reputable Court Support Service would thus be appropriate, and cost efficient as it would save the prosecutors' time.

For information that is specific to the case, although it would be preferable for the victim to deal directly with the prosecutor or the officer of the DPP handling

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101 No empirical studies have yet been carried out in relation to this issue.

102 See Sentencing Committee, note 29 *supra* at 529-30.

103 See *Victims of Offences Act 1987* (NZ), s 6.

104 J Gardner, note 29 *supra* at 24 showed that 28.6 per cent of victims did not want to be regularly informed

105 *Ibid* at 25.

the case, often this is not possible. The prosecutor may be too busy, difficult to contact, or reluctant to deal with the victim,<sup>106</sup> and the victim may lack the skills and knowledge to deal with the prosecutor, especially if they are still suffering from the psychological effects of the crime. In such cases, there are a number of alternatives that should be considered in order that a more coordinated and accountable system is implemented. First, the Court Support Service could act in a liaison capacity between the prosecutor or the responsible officer of the DPP and the victim. Secondly, victim liaison officers could be appointed within each DPP or police prosecutors department. A third possibility is to set up a victim/witness assistance program attached to each DPP or police prosecutors office.<sup>107</sup> These programs are widespread in America,<sup>108</sup> and differ from the second alternative in that they are generally staffed by outsiders to the prosecution department, and make extensive use of volunteers.

The most preferable alternative will depend upon the situation within each State and the bureaucracy involved. The role of the Court Support Service, victim liaison officer or victim/witness assistance program, whichever is the case, would be to ensure that a structured referral system is set up. This would enable all victims to obtain the information they require, and to present information to the prosecutor prior to court hearings or the exercise of prosecutorial discretion. In cases where this is not possible, the relevant person could sensitively explain to the victim the reasons why. They would not supplant the role of other support providers that victims may already use,<sup>109</sup> but the appropriate victim officer could also liaise with these people in respect of the specific concerns of the victim relating to the prosecutorial process. They also may have a role in requesting reasons for the unfavourable exercise of prosecutorial discretion, and would be able to advise and help the victim, if justified, to use the internal review procedures of the Department in question, or to complain when relevant information is not provided to the victim. In this respect, the appropriate Departments need to provide well publicised and accessible complaints mechanisms. Present evidence suggests that existing complaint procedures are infrequently used by victims.<sup>110</sup>

An additional key factor in ensuring that victims' interests will be properly considered during the criminal justice system is *education*. Criminal justice professionals and victims need to be more educated concerning the existing rights of victims of crime.

Greater education of victims concerning their right to receive and provide information to prosecutors during court proceedings would strengthen their sense of involvement in the criminal justice system, and force prosecutorial bureaucracies to be more accountable to them. Victims should also be educated concerning their

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106 See Report No 42, note 27 *supra* at [85] and [86], p 36.

107 An important policy question here is whether these programs should be located within the prosecution Department. See A Karman, note 3 *supra* at 178-82.

108 *Ibid* at 179.

109 For example, workers from Rape Crisis Centres.

110 See Report No 42, note 27 *supra* at [118], p 51.

rights outside the criminal justice system, such as criminal injuries compensation, civil remedies, and access to medical and psychological support services. These should be improved and used more frequently by victims.

More importantly, greater education of prosecutors is vital to help ensure that the interests of the victim are considered during court proceedings. Prosecutors need to be aware of the psychological impact of crime on victims, the rights of victims to receive and provide information during court proceedings, and their role and obligations to victims, particularly during the victim's cross examination in Court.<sup>111</sup> Prosecutors also need to request relevant information from victims, such as the extent of their financial loss or their concerns regarding retaliation. Education of prosecutors with respect to these matters could take place during Bar Reading courses and internal DPP and police prosecutor training courses. The trend towards greater professionalism of prosecutors should be accelerated, for professionals are far more likely to understand their obligations towards victims, and how to balance these with their other obligations. One can only agree that:<sup>112</sup>

As we move towards the adoption of an independent prosecution system, perhaps we could also try to produce a more human and humane system for victims.

These reforms will involve some extra procedures and costs to be born out of the criminal justice budget. Extra specific expenditure for prosecutorial departments needs to be allocated, to allow the handling of a greater workload and provide the required resources to properly implement these reforms. Also, money must be spent on education programs for victims and prosecutors, and for the setting up of properly funded Court Support Services, victim/witness assistance programs or victim liaison officers.

It is submitted that these extra costs are fully justified in the context of the total criminal justice budget, in the interests of fairness to the victim. By the use of properly trained volunteers, these costs should not involve large sums of money.

This approach is preferable to providing victims with substantive rights during court proceedings. Some governments may be attracted to this alternative on the basis that it is (allegedly) cheaper, or because they must be seen as doing 'something' for victims. However, such reforms would be in conflict with the basic aim of fairness within our criminal justice system, as they would effect the civil liberties of accused persons. As this article has shown, reasonable consideration of victims and their interests during court proceedings can be achieved by the use of properly implemented guidelines, of the nature suggested in this article, governing the relationship between victims and prosecutors, as well as education programs for victims and criminal justice professionals. This is the best way to achieve fairness for both victims and accused persons within our criminal justice system.

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111 See NSW Task Force note 4 *supra*, Recommendation 32 at 96.

112 Note 70 *supra* at 69.