

The Integration of Victim Lawyers into the Adversarial Criminal Trial

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Abstract

Various common law jurisdictions now allow for the representation of the victim in court in order to further integrate the victim into the criminal justice system. In certain common law jurisdictions, victim lawyers may now represent the interests of the victim during various parts of the criminal trial process, including pre-trial hearings and during sentencing. Such reforms have proven controversial and debate abounds as to the extent such lawyers may jeopardise the state's control of the prosecution process or otherwise jeopardise a defendant's right to a fair trial. While it is commonly agreed that various parts of the criminal trial process, including applications for bail, may significantly impact upon the victim and their family, the extent to which the victim ought to contribute to decision-making processes or contest substantive principles of law remains uncertain. This paper examines the extent to which victim lawyers may be usefully integrated into common law proceedings through a comparative analysis of the rise of victim lawyers in the United States and England. Possibilities for the integration of victim lawyers in Australia will be considered in the critical context of the ambit of the adversarial trial and the rights of the accused to a fair trial process.

Introduction

Victims have become increasingly critical of the way they are removed from the criminal justice system in favour of state processes that monopolise the policing, prosecution and punishment process. Seeking ways in which this removal could be practically redressed, victims formed social movements to lobby government in support of greater victim's services, such as state based compensation. Since the 1970s, various jurisdictions have responded to the needs of victims by offering compensation and modes of support to help satisfy their medical, emotional and financial needs following an offence. The need for redress, however, has now moved beyond the development of support services as adjuncts to the criminal trial towards the further integration of the victim into the criminal justice system,

Various common law jurisdictions now provide for the representation of victims in court. Referred to as a Victims' Advocate or lawyer, such counsel may represent the interests of the victim at each stage of the criminal trial process, from pre-trial hearings through to sentencing. The extent to which victim lawyers may limit the defendant's right to a fair trial remains controversial, however, out of adherence to the adversarial paradigm that limits victim input to representation through the public prosecutor alone. While it is understood that aspects of the criminal trial process, such as bail, may impact upon the victim, the extent to which the victim ought to be able to contribute to decision-making processes remains controversial. This paper examines the role of victim lawyers in England and Wales and the United States, and explores how such counsel may be integrated into Australian criminal law.

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England and Wales

In 2005, the then Secretary of State for Constitutional Affairs and Lord Chancellor, Lord Falconer, proposed that victim interests be further accommodated in homicide trials by providing victims' families an opportunity to be represented by private counsel. This proposal led to the establishment of a pilot program whereby family victims in homicide cases were provided the option of instructing a publicly funded lawyer, called a Victim's Advocate. (Ministry of Justice 2005). The original pilot recognised that the Victims' Advocate could be retained by family victims at any stage of the pre-trial, trial or sentencing process. The Victims' Advocate program was piloted from 24 April, 2006, to 23 April, 2008, in the Old Bailey in London and the Crown Courts in Birmingham, Cardiff, Manchester (Crown Square) and Winchester.

In June 2007, the pilot was extended for a further twelve months. The then Attorney-General, Lord Goldsmith, also announced that a variation of the pilot scheme would be made available throughout all England and Wales (Office for Criminal Justice Reform 2007:8). The new program, titled 'Victim Focus', reverted to the earlier practice of allowing victims to inform the sentencing court, through the public prosecutor, of the harms occasioned to them. The program, which is ongoing, directs family victims to the Crown Prosecution Service (CPS), who submit the victim's personal statement during the sentencing hearing. 'Victim Focus' is available to family victims where the offender has been charged with murder, manslaughter, corporate manslaughter, familial homicide, causing death by dangerous driving, causing death by careless driving while unfit through drink or drugs, and aggravated vehicle taking where death is caused.

Despite the nuances introduced under the Victims' Advocate pilot, Victim Focus reverted to the prior practice of proceeding through the public prosecutor. To this end, the CPS follows the Criminal Practice Direction of the Lord Chief Justice, which states that family impact evidence 'cannot affect the sentence that the Judge may pass' (CPS 2007: Pt 23). While this step is retrograde, it argues for greater balance between prosecution and defence in that it limits a family victim's capacity to intervene in any proceeding against the defendant by maintaining the prior practice where victim interests are only considered where they are broadly consistent with the public interest. This will likely affirm the earlier process of minimising the use of victim impact evidence in sentencing where it is out of step with the views of the prosecutor.

United States

Crime victims have been provided substantive rights of participation in the United States through amendments to the United States Code ('USC'). Amendments were introduced pursuant to the *Justice For All Act 2004* (US). Victims of federal offences were afforded access to private counsel by the enactment of new rights under the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn *Crime Victims' Rights Act* ('CVRA'). The CVRA does not grant victims private counsel *per se*, but sets out a schedule of rights that give victims the ability to intervene in certain matters, to be provided with information, or to participate in key decision-making processes, across the pre-trial, trial and sentencing phases. Although victims are granted standing in court, they do not become a party to proceedings unless they appear in a motion asserting their rights under the CVRA. The CVRA prescribes these rights under 18 USC s3771. This section requires the federal courts to ensure that victims are granted certain rights for offences prosecuted under the USC. Section 3771 replaces 42 USC s10606, repealed by the CVRA, which included a list of non-enforceable victims' rights, such as the right to a certain level of treatment by justice officials.

The CVRA prescribes that victims may be present at public court proceedings under 18 USC s3771(a)(2),(3), providing them the right to be 'reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding', pursuant to s3771(a)(4) CVRA. The CVRA, prescribed under s3771, sets out the following rights, *inter alia*: to be reasonably protected from the accused; to be given reasonable, accurate, and timely notice of any public court

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proceeding; not to be excluded from any public court proceeding (unless special circumstances exist); to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; to confer with the attorney for the government; to full and timely restitution; and to be treated with fairness and with respect for the victim's dignity and privacy.

Cases flowing from the CVRA have considered those persons recognised as a 'victim' for the purpose of exercising rights prescribed by the USC. In *US v Sharp*, the accused pleaded guilty to conspiracy to possess with intent to distribute. The partner of one of the defendant's customers sought victim status, and thus standing in proceedings, alleging that she was abused as a result of her partner's use of drugs, sold by the accused. The court considered whether the claimant was 'directly and proximately harmed', ruling that she was not sufficiently proximate under the CVRA. The court ruled that a partner of a drug user could not be proximately connected to the supplier in a way that was reasonably envisaged by the amendments. The relevant test is whether a claimant is able to demonstrate a sufficient nexus between the acts of the accused and the harms or injuries the claimant has experienced.

Kenna v US District Court further determined that the right to participate in proceedings, once a claimant is recognised as a victim within the terms of the USC, includes the right to be 'reasonably heard'. In this case, the claimant argued that the right to participate included the provision of oral or written statements during sentencing. The Ninth Circuit Court of Appeals ruled that the right to be reasonably heard afforded the victim the right to allocution: to read their victim impact statement to the court. The court thus granted victims similar rights of standing and address as held by the defendant. *Kenna* affirmed the intent of Congress to provide for the participation of victims in the sentencing process. The court ruled (at 1016):

... The statute was enacted to make crime victims full participants in the criminal justice system. Prosecutors and defendants already have the right to speak at sentencing, see Fed.R.Crim.P. 32(i)(4)(A); our interpretation puts crime victims on the same footing. Our interpretation also serves to effectuate other statutory aims: (1) To ensure that the district court doesn't discount the impact of the crime on the victims; (2) to force the defendant to confront the human cost of his crime; and (3) to allow the victim "to regain a sense of dignity and respect rather than feeling powerless and ashamed." Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 *Notre Dame L. Rev.* 39, 41 (2001) ...

In re Antrobus (2008) 519 F 3d 1123 limits the right of allocution to those deemed proximate under the CVRA. In this case, the accused pleaded guilty to the transfer of a handgun to a juvenile, who, after reaching the age of eighteen, shot several people at a shopping centre. The siege ended when the assailant was killed. The parents of one of the shooting victims petitioned the court hearing the transfer of handgun offence to recognise their daughter as a victim under s 3771(e) CVRA. Such recognition would have enabled the parents of the deceased to be heard at the defendant's sentencing hearing following conviction for the transfer of handgun offence. The Tenth Circuit Court of Appeals ruled, however, that the transfer of a handgun was not directly connected to the death of their daughter. The court ruled (at 1131):

If we were to hold, on this record, that petitioners' daughter is a crime victim within the meaning of the CVRA, we would effectively establish a per se rule that any harm inflicted by an adult using a gun he or she illegally obtained as a minor is directly and proximately caused by the seller of the gun.... But petitioners have directed us to no authority of any kind suggesting that harm inflicted by an adult with a gun purchased during the adult's minority is, without more, per se directly and proximately caused by the seller of the gun.

The CVRA also provides victims with the capacity to seek judicial review of plea deals made between the prosecution and the defendant. Although victims may participate in all stages of the criminal trial, many seek to participate in pre-trial decision-making processes, or in sentencing following trial. During the pre-trial period, victims have the right to be kept informed, to make representation, and to prepare for their appearance at each hearing, including the plea hearing. Where there is a clear lack of victim involvement in the plea-making process, the negotiation between

prosecution and defence as to the offence charged and potential sentence of the accused, a victim may petition a court for a writ of mandamus quashing any previous plea deal, requiring the prosecution to include the victim in any future negotiation. *In re Huff Asset Management Co.* set the standard for the issuing of a writ of mandamus at an ordinary standard of review (at 562). The test for issuing such a writ, however, was revised in *In re Antrobus*. In this case, the Tenth Circuit Court of Appeals found that a stricter standard ought to prevail over the nominal standard. Given that a writ of mandamus is only issued in extraordinary circumstances, the court determined that the relevant standard should be stricter, suggesting that a writ of mandamus 'is a well worn term of art in our common law tradition' (at 1127). *In re Dean* provides that a writ of mandamus ought to be issued where the petitioner has 'no other adequate means' of relief; where the petitioner has demonstrated a right to the issuance of a writ which is 'clear and indisputable'; and where the issuing court is satisfied that the writ is 'appropriate under the circumstances'.

Australia

Victims do not possess the right to appoint private counsel under Australian criminal law. A victim may choose to participate in sentencing proceedings when delivering a victim impact statement, although this statement may be tendered by the public prosecutor. Victims may seek the services of a lawyer when applying for victims' compensation, although such applications are administrative and not considered an aspect of the criminal law or trial process (see Kirchengast 2009). However, victims may be able to appoint private counsel in two limited respects. Firstly, through private prosecution, and secondly, by challenging the Office of the Director of Public Prosecution's ('DPP') decision to prosecute or not.

In Australian law, the right to prosecute resides in the common informant. The common informant is any individual seeking to inform a court of an offence, albeit the common informant is usually a police officer seeking to lay charges in court. NSW procedure currently provides that an individual may seek a court attendance notice (CAN) from the registrar of the local court. The registrar will determine whether to issue a CAN by evaluating the case in favour of the charge. Should the registrar determine not to issue the CAN, a victim may, as represented by counsel, challenge the decision before a magistrate. Should the CAN be issued, the defendant will be summonsed to court to answer the charge in the nominal way (see s49 *Criminal Procedure Act 1986* (NSW)). Pursuant to NSW law, however, the DPP may step in at any time to take over the matter under s9 *Director of Public Prosecutions Act 1986* (NSW). This essentially gives the DPP the ability to take over any prosecution initiated by the police, a victim, or any other person, and includes the power to discontinue proceedings by entering a *nolle prosequi* (no further proceedings). Consents to prosecute increasingly limit the common informant such that the permission of the Attorney-General is required before a matter is proceeded upon (see, for example, s 78F *Crimes Act 1900* (NSW)).

The right to review a decision to prosecute is expressed by the common law, and may provide a further path for private representation. *Maxwell v The Queen* however, provides that decisions of the ODPP as to whether or not to proceed are generally not reviewable. Exceptional circumstances may exist warranting review of a decision not to proceed, but would nominally involve those circumstance that would ordinarily lead the court to reject a decision of the prosecution, the objections of the victim notwithstanding. Decisions contrary to the requirements of a fair trial would be one obvious example. *R v DPP, Ex parte C* provides further cause to suggest that a victim may challenge the decision of the prosecutor where a decision is made contrary to law, involves jurisdictional error, or where a decision contravenes forms of subordinate legislation, such as the Code for Crown Prosecutors. *Ex parte C* thus provides a means by which individual victim rights may displace a decision of the prosecution. Challenging prosecutorial decision-making by victims or other interested parties allows for the intervention of a victim lawyer otherwise excluded from the criminal law. Such representation would, however, be exceptional rather than routine.

Discussion

The future role of victim lawyers is largely dependent on the intent of parliament to afford victims actual standing in criminal law. Although victim rights are currently recognised as under a Charter of Rights, flowing from the 1985 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Doc A/Res/40/53, 1986), such rights are not enforceable in court. As such, as with the modification of the USC, victims would require a change in the law in order for victim lawyers to gain routine standing in a criminal court. The potential for development in this area is substantial, albeit highly controversial, given the need to cater for victim interests in a way that respects the rights of defendants and the independence of the prosecution. Lessons may be taken from the international experience to the extent that victim lawyers ought to be given defined powers, for instance, to negotiate with the prosecution at appropriate stages.

Another approach may be to afford victims private counsel for discrete offences, such as sex offences, where the interests of the victim may be at odds with those of the prosecution and defence. Such reforms may be best trialled with reference those victims already provided procedural rights that may require representation in certain circumstances. The need, for example, to provide out of court evidence or to challenge the discovery of otherwise confidential counselling notes, may justify private representation for victims of sexual assault. Allowing victim lawyer in such circumstances may provide a way of integrating such counsel into the trial, while preserving the integrity of the prosecution and defence as substantial stakeholders of justice.

Victim lawyers may be best integrated in accordance with current criminal procedure. This would address criticisms that plague the English and US experience, that the rise of victim lawyers detracts from the due process afforded to the defendant. It is crucial that the development of private counsel for victims respect the defendant's right to a fair process. This means that the role of the victim lawyer ought to respond to particular needs for representation, as with sexual assault victims. Victim lawyers should not be implemented out of a political imperative to grant victims wholesale access to all aspects of the criminal prosecution process, at least as an initial extension of victim rights.

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- Office for Criminal Justice Reform (2007) *Working Together to Cut Crime and Deliver Justice: A Strategic Plan for 2008-2011*, United Kingdom

Legislation

- Crimes Act 1900* (NSW)
- Criminal Procedure Act 1986* (NSW)
- Director of Public Prosecution Act 1986* (NSW)
- Justice for All Act 2004* (US)

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International Declarations

United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Doc A/Res/40/53, 1986)

Cases

In re Antrobus (2008) 519 F 3d 1123

In re Dean (2008) 527 F 3d 391

In re Huff Asset Management Co. (2005) 409 F 3d 555

Kenna v US District Court (2006) 435 F 3d 1011

Maxwell v The Queen (1996) 184 CLR 501

R v DPP, Ex parte C [1995] 1 Cr App R 136

US v Sharp (2006) 463 F Supp 2d 556