Prosecutorial Discretion, Accountability and Victims’ ‘Rights’?
Timely Reform or Unhelpful Chimera?
2017 National Victims of Crime Conference
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Any views are expressed in a personal capacity. This is part of a wider ongoing research project involving Dr Robyn Holder and Amy Teakle
Who is SALRI?

• The South Australian Law Reform Institute is an independent non-partisan body based at the Adelaide University Law School.
• Formed by an agreement between the Attorney-General of South Australia, the University of Adelaide and the SA Law Society.
• Based on the Alberta/Tasmania law reform model.
• Assisted by an expert Advisory Board.
• Staffed by Director Professor John Williams, Deputy Director Dr David Plater, Louise Scarman and Sarah Moulds. Ably supported by specialist researchers and draws on the linked Law Reform class.
• Draws upon the knowledge and expertise of local lawyers, law students (especially through the Law Reform class), experts, interested parties and academics when conducting research.
• Draws on inclusive community consultation.
What does SALRI do

• Receives references from Government or other body as approved by the Advisory Board.
• Conducts research in response to a reference and focus on both expert and inclusive community consultation to obtain the views of South Australians (law reform is not just for lawyers);
• Looks at laws and experiences in other jurisdictions
• Issues a report with recommendations to Government.
• Implementation issue for Government and Parliament
Functions and Objectives

To conduct reviews and research on proposals from the Attorney-General or elsewhere with a view to:

– The modernisation of the law;
– The elimination of defects in the law;
– The consolidation of any laws;
– The repeal of laws that are obsolete or unnecessary; and
– Uniformity, where desirable, between laws of other States and the Commonwealth
Overview: Prosecutorial Discretion, Accountability and Victims’ Rights? Timely Reform or Unhelpful Chimera?

- The History of the Prosecutorial Role: Partisan Persecutor
- The Transformation in the early 1800s to ‘Minister of Justice’
- The Modern Minister of Justice: The ‘Silver Thread’ of the Criminal Law
- The Prosecutor as both Advocate and Minister of Justice
- An Impossible Balancing Act?
- The Historical Role of Victims and Private Prosecutors
- Prosecution counsel ‘a duty to act in a way to cancel out partisan tendencies of private prosecutors’
- Prosecutor: Victims Advocate or Avenger for Justice?
- Prosecution Accountability vs ‘a creature of a private interest’
- Developments in England and Australia
- Judicial Review of DPP decisions
- Internal Formal Review
- Legal Representation for Victims
- Where fits the modern victim and proper prosecution accountability?
Prosecutor as Persecutor: The trial of Sir Walter Raleigh: ‘an unparalleled example of forensic brutality’

- Sir Edward Coke, when Attorney General, during the course of the notorious trial of Sir Walter Raleigh for treason in 1603 subjected Raleigh to an extraordinary tirade of abuse.

- Coke proclaimed his intention to Raleigh 'to make it appear to the world that there never lived a viler viper upon the face of the world than thou.'

- During the course of the trial Coke denounced Raleigh as a 'monster' with 'an English face, but a Spanish heart;' 'the most vile and execrable traitor that ever lived'; an 'odious man' whose 'name is hateful to all the Realm of England for thy pride' and 'the foulest traitor that ever came to a bar.'  \( R \ v \ Raleigh \ (1603) \ 2 \ St \ Tr \ 1. \)
The ‘Minister of Justice’ in England

• There was a fundamental transformation in the nature of the prosecutorial role in England by the 1820s in the newly adversarial system from a zealous partisan to a restrained minister of justice.

• ‘I hope… that in the exercise of the privilege granted by the new Act to counsel for the prosecution of summing up the evidence, they will not cease to remember that counsel for the prosecution in such cases are to regard themselves as ministers of justice, and not to struggle for a conviction, as in a case at Nisi Prius – nor to be betrayed by feelings of professional rivalry – to regard the question at issue as one of professional superiority, and as a contest for skill and pre-eminence.’ *R v Puddick* (1865) 4 F & F 482, 499 (Crompton J).
The Minister of Justice in Colonial Australia

‘In detailing the circumstances of the case, he would confine himself to a mere statement of the facts which he hoped to establish in evidence. God forbid! that he should employ any powers of exaggeration to deepen the guilt of the accused. For his part he held it as a principle that it was not the duty of a public prosecutor, a character in which he stood forth today, to employ means to secure a conviction, but to elicit the truth. And if the jury should, after a full consideration of the whole of this case, be of the opinion that the prisoners were not guilty of the crime imputed to them, he would say, with as much sincerity as his learned friend who defended them, ‘Let them go forth from that bar, for God forbid! that a hair of their heads should be touched unless legal guilt be established by legal proof.’

- *R v Anderson, Davis and Others [1832] NSWSupC 8 (Sydney Gazette, 17 April 1832).*
The Modern Prosecutor as a ‘Minister of Justice’: The ‘Silver Thread' of the Criminal Law

‘Always the principle holds, that Crown counsel is concerned with justice first, justice second and conviction a very bad third…the prosecutor is at all times a minister of justice, though seldom so described. It is not the duty of prosecuting counsel to secure a conviction, nor should any prosecutor ever feel pride or satisfaction in the mere fact of success. Still less should he boast of the percentage of convictions secured over a period…. It is no rebuff to his prestige if he fails to convince the tribunal of the prisoner’s guilt. His attitude should be so objective that he is, so far as is humanely possible, indifferent to the result…I consider it the duty of prosecuting counsel to assist the defence in every way.’


The 'silver thread' of the criminal law.

R v Pearson (1957) 21 WWR (NS) 337, 348.
The Prosecutor as both Advocate and Minister of Justice: Reconcilable Roles?

‘One might well ask how nineteenth-century lawyers and judges reconciled the non-adversarial role of prosecuting counsel with the adversarial trial of criminal charges. After all the adversarial system is based on the premise that justice is most likely to be achieved through the coming together in a controlled setting of opposing parties, each represented by a skilled advocate whose sole duty is to advance the position of his or her client. How can anyone have thought that this method of trial could properly work if one of the parties is not [my emphasis] obliged to act as an advocate.’

The Dual Roles of the Prosecutor

• See, for example, *R v Riel* in Canada in 1885 when during a famous treason trial prosecution counsel concluded his closing address in the following terms:

• ‘Now, gentlemen, the Crown in this case has a double duty to perform. In the first place, to see that the prisoner has had every impartiality and fair play and every consideration which it was in their power to give him, and which the law afforded him. Let there be no mistake about that. If this fair play has not been granted, if this trial has not been impartial, if we have omitted any part of our duty, all I can say is that the prisoner's life has been in our hands quite as much as in the hands of the learned gentlemen for the defence. But, gentlemen, we have another duty to perform; we have the cause of public justice entrusted to our hands; we have the duty of seeing that the cause of public justice is properly served, that justice is done.’

• See the transcript of counsel’s addresses available at: http://www.law.umkc.edu/faculty/projects/ftrials/riel/crown address.html.
The Conflicting Duties of the Prosecutor

• ‘Gentlemen, the situation of an advocate on an occasion like this, is a very painful one; we owe duties which are difficult to discharge; we owe a duty to the suffering individual [victim] and their relations; we owe a duty to the publick; who are interested that the guilty party should be brought to exemplary punishment; but we have other duties which stand in an opposite direction, we owe a duty of humanity and compassion to the unfortunate prisoners against whom we appear, and there is no man in this court that will feel a more sensible satisfaction at a verdict of acquittal, than I shall on this occasion, and on all occasions when the guilt of the party appears at all doubtful; but if you, Gentlemen, are fully satisfied in this case of the guilt of this wretched woman at the bar it will be your duty to declare her guilty by your verdict. If you have any doubt upon this case, I am sure your own humane minds will lead you to acquit her.’

Juggling Different Interests?

- William Garrow was one of the first true barristers and modern ‘adversarial’ advocates.
- In *Radbourne*, not only was Garrow conscious of the tension of the minister of justice and adversarial roles but he was also aware of the additional tension caused by the interests of the victim.
The Prosecutor as Minister of Justice and Adversarial Advocate: Impossible Balancing Act?

• 'The prosecutor is left with an ongoing schizophrenia, acting simultaneously as an advocate and a minister of justice.'


• This inherent tension has never been satisfactorily resolved and, despite the view of many to the contrary, it is argued it is a ‘pipe dream’ to expect that the modern prosecutor can simultaneously perform both these potentially conflicting roles.

• See Janet Hoeffel, 'Prosecutorial Discretion at the Core; the Good Prosecutor meets Brady' (2005) 109 Pennsylvania State Law Review 1133, 1141-1142. Adding the modern expectations and interests of victims adds to the tensions upon the prosecutorial role.
The Pivotal Role of 1800 Victims: Private not Public Prosecutors

• ‘For many centuries, it must be remembered, the main responsibility rested with the private citizen whose sense of public duty must have been sadly dampened by the realisation that the costs of bringing a criminal to justice had to be met out of his own pocket.’

The Public Prosecutor: a Comparative Latecomer

• Allyson May notes that ‘[a]n historic, deep-rooted mistrust of an authoritarian state, and fear of abuses of state power . . . explains why criminal prosecutions [in England] remained in the hands of private individuals well into the nineteenth century.’

Private Prosecutors…’a sphere of private animosity, compromise and revenge’

- There were regular complaints throughout the 1800s of the often corrupt or vindictive agenda of private prosecutors.
- One prosecution counsel, a Mr. Swift, even petitioned in 1787 for a pardon on behalf of a defendant he had just successfully prosecuted, declaring his misfortune at having prosecuted a case where his clients, the private prosecutors, were motivated by 'the most rancorous malice and revenge' and volunteering that there were circumstances that rendered the accused an 'Object of great compassion'.
- T Swift, Letter, July 31 1787, Public Record Office, HO42/12 fol 98.
- ‘The object of the present Bill…was to withdraw from a sphere of private animosity, compromise and revenge that which ought never to be left to such chances and to see that justice was properly administered.’
- John Phillimore, introducing a Bill for public prosecutors in 1854 to the House of Commons
- As early as 1824, Lord Denman commented of 'a strange anomaly in the English criminal system …the entire want of a responsible public prosecutor.' Lord Denman asserted that to leave 'the administration of justice in almost every instance to be set in motion by individual feelings of resentment' was 'a strange abandonment of the public interest to chance.'
‘The injured party may be helpless, ignorant, interested, corrupt’

- Over two decades later Lord Denman, now the Chief Justice of the Court of Kings Bench, reaffirmed this view:

- ‘Our procedure for the purpose of the preliminary enquiry is open to great objection. The injured party may be helpless, ignorant, interested, corrupt. He is altogether irresponsible; yet his dealings with the criminal may effectually defeat justice. On general principles, it would evidently be desirable to appoint a public prosecutor and I have little doubt that such an officer might be invested with the necessary powers in such a manner as would be free from all reasonable objection, while it promoted the public interest by insuring the discovery of the truth.’
Prosecution not ‘to gratify the objects of an individual’

• The need was for the prosecuting lawyer to act in the objective spirit of a member of the bar in order to counter-balance the partisan efforts of the private prosecutor.

• Bayley J in 1819 in *R v Brice* (1819) 2 B & Ald 606 prevented the private prosecutor from addressing the jury and stating the case for the prosecution.

• Bayley J justified this refusal on the basis that a criminal prosecution was not instituted to ‘gratify the objects of an individual’. Rather a prosecution was brought in the name of the monarch for the interests of the public. Only counsel was afforded the privilege of addressing the jury as they were under some measure of control of the court and ‘from their professional education and habits of business, it is to be expected, that they will not state to the jury any thing but what is fit for them to hear.’

• The prosecuting counsel was expected to act as a judicious filter on the partisan or partial agenda of the private prosecutor.

• Another problem in the period was many victims lacked the resources or will to bring a private prosecution.
'a duty to act in a way to cancel out partisan tendencies of private prosecutors'

• 'Historically, most prosecutions in England and Wales were brought by private persons. Private prosecutors have no reason to act fairly and independently. When Judges at the Bar tried to civilise the criminal procedure in the nineteenth century, part of the deal was imposing a duty to act in a way to cancel out partisan tendencies of private prosecutors...Now that prosecuting is part of the state, that is expected to act fairly during the pre-trial phase, the age of highly partisan prosecutors should in principle be over.'

The Victim: Relegated to ‘Court Fodder’

- With the advent of police and public prosecutions in the second half of the 1800s, the victim largely surrendered his or her hitherto pivotal role in the prosecution of offences and was increasingly rendered as a mere passive spectator to the proceedings or, to use a blunt, but not wholly misplaced expression, mere 'court fodder' whose role was to provide the initial complaint and to give evidence at trial but otherwise no more.

- Victims reported (and still report despite various reforms over recent years) alienation and frustration at being a passive spectator.

- With the growth of victims’ rights over the last generation this view has come under increasing challenge. It has even been suggested that the system is now returning to the practice of the 18th and early 19th centuries.

- As Fenwick notes, 'The emergence of procedural rights for victims may be said to herald a move back towards the position which victims originally occupied within the system. A discernable movement towards a private as opposed to a public ordering of the criminal process may currently be occurring.‘


- So what should be the role of the modern prosecutor and how does the interests and role of the victim fall within it?
The Prosecutor as the Victims lawyer or even ‘Crusader for Justice’?

- There are assertions the traditional prosecutorial role should be refined to reflect the recent prominence of victims and witnesses.
- It has been suggested prosecutors should act as ‘a quasi client centred counsellor’ or ‘pure advocate and representative of the crime victim’.
- Is this viable, desirable or realistic?

- There are even suggestions that modern prosecutors should act as ‘avengers’ and ‘seek justice’ on behalf of the wronged victim.
The Prosecutor: not ‘the creature of a private interest’

• The prosecutor as a minister of justice must not lose sight of the fact that he or acts on behalf of the public at large. The Crown Attorney is not simply the lawyer for the police (see *Dix v Attorney-General* [2002] AJ No 784) and/or the victim of the crime. The prosecuting lawyer must be astute to avoid been cast as ‘the creature of a private interest’ in the exercise of his or her powers. *R v Milton Keynes Magistrates’ Court; ex parte Roberts* [1995] Crim LR 225.

• *See R v Leominster Magistrates Court* [1996] EWHC Admin 384 where prosecution counsel in criminal proceedings fatally allowed his professional objectivity to be influenced by private interests in the cases to such an extent as to fatally undermine the integrity of the criminal proceedings.

• The modern prosecutorial role must be ‘scrupulous in attention to the welfare and safety of witnesses’, *R v Logiacco* (1984) 11 CCC (3d) 374, 379 (Cory J). But Prosecution counsel has wider interests to consider than just the interests of the victim.’ See also *R v Tkachuk* (2001) 159 CCC (3d) 434, 441-442.

• **Victims should obviously be treated with respect and courtesy. But the modern need for the prosecutor to be responsive to the views and welfare of victims poses real issues as to prosecutor’s status as a minister of justice acting on behalf of the public at large.**
"R v Tkachuk (2001) 159 CCC (3d) 434, 441-42: ‘a serious threat to the fair administration of criminal justice’

- ‘We are concerned that this comment was intended to convey the message that the plea arrangement had the victim’s blessing or approval. With respect, this is not normally a valid consideration.

- We are mindful of the recent legislation directing that victims of crime be kept informed of developments in cases which directly involve them (Victims of Crime Act, S.A. 1996, c. V-3.3). However, we do not understand that those initiatives intended to give victims of crime either the authority or the responsibility to decide whether a prosecution should proceed, and if so, on what terms. That responsibility can only be discharged by qualified prosecutors who have the training, judgment and courage to make the necessary decisions inherent in every prosecution. For example, whether to proceed, and if so on what charge, whether to oppose bail, whether to seek a particular sentence and whether to appeal. Many times these decisions will be difficult and even unpopular, but the responsibility for making them must always rest with the Crown and not with victims of crime, or other interested parties.

- Abdication of this prosecutorial responsibility to others who are interested in the outcome of the case, but have little or no understanding of the complexities, or even the basic tenets of our justice system, is wrong, and represents a serious threat to the fair administration of criminal justice.’
Inevitable Dashed Expectations?
As one English Parliamentary Report concluded: ‘The prosecutor is not able to be an advocate for the victim in the way that the defence counsel is for the defendant, yet government proclamations that the prosecutor is the champion of victims’ rights may falsely give this impression. Telling a victim that their views are central to the criminal justice system that the prosecutor is their champion, is a damaging misrepresentation of reality. Expectations have been raised that will be inevitably be disappointed.’
Prosecutor: Acting for the Public at Large

• Despite major changes and reform over recent years, victims (especially sexual assault victims) continue to report frustration and dissatisfaction with the criminal justice system and a perception that their interests are still overlooked and there is no one to ‘represent them’ like the accused’s lawyer.

• It is inevitable that the wider overriding public dimension of the prosecutor’s role will conflict with any allegiance to the victim. The Attorney-General or DPP represents society at large and the public interest. The Attorney-General or DPP is not counsel to victim nor accused. The DPP cannot act as a victim’s lawyer.

\[M (K) v Desrochers (2000) 52 OR (3d) 742, [26]- [27]\]
\[Cannon v Tahche (2002) 5 VR 317, 340-341.\]

It is also significant that victims’ ‘rights’ legislation like the \[SA Victims of Crime Act\] does not confer enforceable ‘rights’. 
The Wisdom of Solomon?

• ‘Sometimes prosecutors will make very unpopular decisions but that’s part of the job. It is not part of the prosecutor’s job to be popular.’

• Nicholas Cowdrey QC, former NSW DPP

See Janet Fife-Yeomans, ‘Former Top Prosecutor Nicholas Cowdrey says his Advice on Scott Volker Sex Assault Charges was Valid’, *Daily Telegraph*, 14 July 2014.
We do not accept that the Director of Public Prosecutions has an absolute and uncontrolled discretion which empowers him to charge an accused person in whatever way he pleases, regardless of the gravity of the conduct of the accused, and then to require the court to give effect to his decision in that regard. There are substantial practical limitations upon the power of courts to control the exercise by prosecuting authorities of the wide discretion which they undoubtedly enjoy, and in practice the most important sanctions in this regard are likely to be political rather than legal. Nevertheless, in an appropriate case a court, paying due regard to the prosecuting authority's rights in relation to the formulation of charges, may need to give effect to its own right to prevent an abuse of its process. It is impossible to define the circumstances in which a decision to prosecute for a lesser offence might constitute an abuse of the process of the court, and it would be undesirable to attempt to do so.’

Need to give proper wide latitude to the role of the DPP.
R v Maxwell (1996) 184 CLR 501 (Gummow and Guadron JJ): DPP Immunity from Judicial Review in Australia

• ‘It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute, to enter a nolle prosequi, to proceed ex officio, whether or not to present evidence and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted. The integrity of the judicial process - particularly, its independence and impartiality and the public perception thereof - would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what. A decision by a prosecutor to accept a plea to a lesser charge, as permitted by s 394A of the Act, is a decision not to proceed, or, more precisely, not to present evidence on the more serious charge in the indictment and, at the same time, a decision as to the charge which is to proceed. It is insusceptible of judicial review. [This is subject] to two qualifications.’

• These decisions as to such issues as the prospects of conviction, the public interest and preferring or deciding on charges are all aspects of what is commonly referred to as ‘the prosecutorial discretion’.
‘Prosecutors prosecute and judges judge’

- The prosecution is not subject to judicial review in Australia (unlike England) and has a wide discretion (which should be used professionally) in deciding to bring or discontinue proceedings and in preferring or deciding on charges and in the absence of a genuine abuse of process, the court should not intervene.

- **Rationale:**
  1. Separation of powers; entrusted to the DPP not to the judiciary.
  2. Undermines judicial neutrality.
  3. Prosecution will know more than the judge.
  4. Lead to delays and costly satellite litigation.
  5. Lead to defensive and over cautious DPP decisions and reluctance to risk adverse reactions.

- **Question:** Is the DPP immunity from judicial review in Australia desirable? What of prosecution accountability, notably to victims?
‘In my judgment this is one of those rare cases where the Director of Public Prosecution's decision is shown to be flawed because Mr Naunton on behalf of the Director of Public Prosecutions did not approach the question which he had to decide in accordance with the settled policy of the Director of Public Prosecutions as set out in the Code.’

‘She [the victim] was newly married and in a strange country, unable to speak much English, with few people to turn to, and possibly feeling some concern about her status as an immigrant…The decision not to prosecute having been taken, the applicant was informed by a letter dated December 9, 1992 which we have read. To say as Mr Naunton does that “perhaps the letter could have been more helpful” is an understatement, and it is some relief to me to know that the standard letters and explanatory note are being revised, but frankly it seems to me that this applicant, with her poor command of English, should have been told of the decision either directly or through an interpreter in words that she could understand.’
R (B) v DPP [2009] EWHC Admin 106: Usurping the Role of the Jury and Impermissible Recourse to Stereotypes?

• ‘The reasoning process …for concluding that FB could not be placed before the jury as a credible witness was irrational in the true sense of the term. It did not follow from Dr C's report that the jury could not properly be invited to regard FB as a true witness when he described the assault which he undoubtedly suffered. The conclusion that he could not be put forward as a credible witness, despite the apparent factual credibility of his account, suggests either a misreading of Dr C's report (as though it had said that FB was incapable of being regarded as a credible witness) or an unfounded stereotyping of FB as someone who was not to be regarded as credible on any matter because of his history of mental problems.

• For those reasons I conclude that the decision to terminate the prosecution was unlawful. Unfortunately, because it was immediately followed by the prosecution offering no evidence, it was also irreversible.’
‘the only means by which the citizen can seek redress’

• ‘The power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no one else. It will often be impossible to stigmatise a judgment on such matters as [legally] wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied.’

• *R v DPP, ex parte Manning* [2001] QB 330, 343-44 (Lord Bingham CJ).
European Developments on UK Law


  1. Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.

  2. Where, in accordance with national law, the role of the victim in the relevant criminal justice system will be established only after a decision to prosecute the offender has been taken, Member States shall ensure that at least the victims of serious crimes have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.

  3. Member States shall ensure that victims are notified without unnecessary delay of their right to receive, and that they receive sufficient information to decide whether to request a review of any decision not to prosecute upon request.
Victims' Right to Review Scheme

• The Victims' Right to Review Scheme makes it easier for victims to seek a review of a CPS decision not to bring charges or to terminate all proceedings.

• The scheme applies only in relation to qualifying decisions made on or after 5 June 2013.

• In 2011, the Court of Appeal delivered its judgment in R v Killick [2011] EWCA Crim 1608) and the unsatisfactory treatment of the victim in that case.

• In the course of the judgment the Court considered in some detail the right of a victim of crime to seek a review of a CPS decision not to prosecute and concluded in clear terms that:
  • Victims have a right to seek a review in such circumstances
  • Victims should not have to seek recourse to judicial review
  • The right to a review should be made the subject of a clearer procedure and guidance with time limits.

• The scheme started in June 2013, gives effect to the principles set out in Killick (and also Article 11 of the European Union Directive establishing minimum standards on the rights, support and protection of victims of crime).

• Victims can seek a review of decisions not to charge, to discontinue or otherwise terminate all proceedings (but not to accept a lesser plea).
Postscript to *Janner*, Police threatening to Judicially Review the DPP!

• The English DPP’s decision in 2015 not to prosecute Janner for alleged sexual offences on the basis that it was not in the public interest on account of his dementia ‘led to an extraordinary rift with Leicestershire police, who spent two years investigating Janner in the latest inquiry and said Saunders’ failure to charge him was “perverse”. The force threatened legal action to overturn the DPP’s decision.’

• The family of the now late Lord Janner have stated that he is innocent of any of the allegations.


• See also Sandra Laville and Rajeev Syal, ‘Police consider challenge to CPS ruling not to charge Janner over abuse allegations’, *The Guardian*, 17 April 2015.
The victim review scheme has benefits in enhanced prosecution accountability but it is not a complete solution

An initial audit showed 146 cases where charges were brought after recourse by victims to the new CPS scheme. Between June 2013 - when the scheme started - and March 2014, 1,186 appeals were lodged, of which 162 were upheld, a success rate of 13.7%. The CPS made 113,952 decisions in England and Wales which could have been reviewed, meaning less than 0.14% were overturned.


See also Mary Iliadis and Asher Flynn, ‘Providing a Check on Prosecutorial Decision-Making: An Analysis of the Victims’ Right to Review Reform’ [2017] British Journal of Criminology:
An Issue that isn’t going to go away in Australia

• ‘The inadequacies identified above in the processes for recording the New South Wales and Queensland ODPPs’ reasons not to proceed raise issues of significance to the internal decision making of all DPPs.

• 1. Independence of DPPs

• 2. Any body that is given statutory independence and that cannot be subject to any external reviews is at risk of failure in its decision-making processes. When the decisions being made are critical to the lives of the individuals involved, be they the complainant or accused, and are being made on behalf of the entire community it is relevant to ask whether the current structure, where there is absolute immunity from review of any decision, is appropriate. Experience suggests that an absence of review increases the risk of administrative failure. The Royal Commission will consider whether there should be any process of oversight or review of ODPPs with respect to their administration and decision-making processes. The Royal Commission will consult widely on this issue and will report as part of its work on criminal justice issues.’

• Royal Commission, Report of Case Study No. 15, 21.

• See now Royal Commission, Report: Criminal Justice (August 2017).
Victim Legal Representation: a Square Peg in a Round Hole?

• Should victims to address the problems they still confront both in and out of court have the right to their own lawyer as in various civil jurisdictions like Germany and France and the ICC hybrid model.

• Is this feasible or desirable? What are the issues of policy and practice? What would be the model of victim representation?

Proposals for greater victim participation during the trial generally involve the exercise of victim participation through a legal representative or advocate. Proponents argue that legal representation for victims can be consistent with the structure of the adversarial criminal trial, provided their role is clearly expressed and they are properly integrated into the criminal justice process.

Legal representation for victims is not a new issue. Legal representation for victims was considered, but not adopted, by several inquiries into victims of crime in the 1980s and early 1990s. Since then, significant changes have occurred in the legal landscape, and in political and social attitudes about the way the criminal justice system can and should provide for victims.

A limited role for lawyers representing victims could involve facilitating victims’ participation outside the courtroom, through for example, providing legal advice, information and assistance, and consulting with the prosecutor.

A broader proposal might allow victims to be represented by a lawyer or a ‘victim advocate’ both outside and inside the courtroom, but only on matters that demonstrably affect their interests or rights. Proponents of this form of victim participation argue that victims should be entitled to intervene during the trial, including in front of the jury, to ensure that their interests and rights are enforced or protected. For example, the victim’s lawyer could object to improper questioning of the victim by the accused’s lawyer if the prosecutor or the judge have taken no action. Alternatively, a victim’s lawyers might be granted standing only to raise matters with the judge in the absence of the jury. This type of reform poses less of a challenge to the two-party contest that underpins criminal trials in Victoria.

Victorian Law Reform Commission Models

• ‘Any reforms to the role of the victim that resemble the victim participation scheme at the ICC, or the role of auxiliary prosecutors in some European inquisitorial trials, would see victims taking on a role more akin to a prosecuting witness. Consideration should then be given to whether victim participation during the trial could involve the victim engaging in some or all of the following:
  • selecting the jury
  • challenging the admissibility of evidence
  • cross-examining witnesses (including the accused)
  • calling witnesses
  • tendering evidence
  • making legal submissions
  • making opening and closing statements to the jury.’

‘When considering any proposals for reform, and especially those that relate to the formal trial, it is important to bear in mind research that suggests that while most victims desire greater involvement in the criminal trial process, they do not necessarily want the responsibility of taking on prosecutorial decision-making functions.

8.152 There are various arguments against permitting victims a greater role in the criminal trial. Many criticisms focus, for good reason, on the consequences to the accused of adding a third party to the two-party contest of the adversarial criminal trial. Allowing victims to play a greater role in the trial is likely to impose additional burdens on the accused, and may lead to unfairness. The accused may have to respond to material placed before the court by the victim, which could include additional evidence and witnesses and legal submissions. Further, victim participation may undermine the jury’s ability to reach an objective verdict by creating the perception, which may be realistic, that the trial is a three-way contest with two parties—the victim and the prosecutor—both acting against the accused.’

VLRC Questions: the Future Role of Victims

• 4 Should victims have a greater role in the decision to continue or discontinue a prosecution?
• 5 If a victim wants to withdraw their complaint, should this determine whether the prosecution continues?
• 6 Should a victim be able to require a prosecution to proceed where the DPP decides it should be discontinued?
• 7 Should victims have a greater role in the decision to accept a plea of guilty after plea negotiations?
• Consultation
  • 8 Is there adequate consultation with victims before a decision is made to continue with charges, discontinue a prosecution or accept a plea of guilty after plea negotiations? If not, what additional consultation do victims require?
  • 9 If the prosecution fails to consult with victims about a decision to discontinue a prosecution, or to accept a plea of guilty after plea negotiations, should this attract consequences? If so, what should those consequences be?
• 10 Should victims be given the opportunity to access legal advice or representation during any consultation with the prosecution?
• Review of decisions
  • 11 Should there be a way to review decisions made by the DPP or Crown Prosecutor to discontinue a prosecution or accept a plea after plea negotiations? If so, what mechanism might be used?

• See now Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (REPORT, August 2016)
Time for Change

• ‘The time has come for the proper interests of the victim as a participant—whether a witness or not—in the criminal trial process to be recognised. This is part of the evolution of the criminal law. While securing the proper rights of the State and of the accused, this report shows a way forward for securing the rights of victims as participants in the modern criminal trial.’

• Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (REPORT, August 2016)
A Triangulation of Interests: the Need for Balance

• ‘It must be borne in mind that respect for the privacy of the defendants is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.’ Lord Steyn, Attorney-General’s Reference (No 3 of 1999) [2001] 2 AC 91,118.

• It is also notable that under the European Convention of Human Rights the rights of the accused are not absolute or the sole concern and that the rights and interests of victims and witnesses are significant and cannot be ignored.

• See, for example, Doorsen v Netherlands (1996) 22 EHRR 330.
Further Thoughts and Questions: a Timely Reform?

- Prosecutors are lawyers who act on behalf of the public at large, not for either the victim or police. To prosecute firmly but fairly on behalf of society at large.
- Need to respect fundamental right of accused to free trial.
- Need to address historical injustices of vulnerable witnesses.
- There are limits to how far prosecutors can go in their role to reflect or represent the views and welfare of victims.
- Victims’ welfare and views are important but cannot and should not be conclusive. Difficult decisions need to be made.
- Proper Prosecution Accountability vs Objective Independent role.
- The precise boundaries of the appropriate modern relationship between victims and prosecutors remains to be resolved.
- The triangulation of interests cannot be overlooked.
- The role of a Commissioner for Victims Rights? (And other avenues and solutions)
- Judicial review of DPP decisions or formal internal review mechanism as a substitute for victims’ own lawyers?
- Victim legal representation, whether pre-trial or at trial?
- **An issue that won’t be going away!**