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Through the Looking Glass: Victims of Crime and Confidence in the Courts

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THROUGH THE LOOKING GLASS: VICTIMS OF CRIME AND CONFIDENCE IN THE COURTS

The thoughts that I want to share with you reflect some of the concepts raised by David Rottman. I share too Judge Trenorden's idea that public confidence isn't just about confidence in judicial officers but rather 'the whole package'—although we may differ on what and how much is in the package.

I concur with many speakers that we need to get beyond the idea of '*the public*' to specific constituencies within it. My specific constituency is victims of crime in the criminal justice system. I would beg your indulgence with some generalisations I make about both! As the statutory advocate for victims of crime in the ACT,¹ I have a role in some of the specific and more general conversations about community confidence in the courts.

The key arguments I hope to make are that:

1. People who are victims of crime are rational choice actors who uphold the rule of law and express confidence in the courts through their preparedness to report crime and to cooperate with authorities.
2. Justice agencies, including courts, critically undermine that confidence by not providing the means or the mechanisms to enable people to undertake and fulfil these duties.
3. Victims' inherent respect as citizens for the legitimacy of the courts can be stabilised through procedural recognition and inclusion.
4. While judicial officers and courts may not necessarily have principal carriage of some of these measures, they are directly responsible for others, and certainly have a vested interest in exhibiting leadership to secure them in others.

To begin: *Sydney Morning Herald* journalist Tim Dick—in an article a couple of weeks ago (3/2/07) seemingly made for this conference—reached back to the Glorious Revolution of 1688 in his 'Defence of a Free Bench'. Perhaps—three or so centuries ago—judges were also considered to be 'out of touch' and 'unaccountable', but this was normal for the time for anyone in a position of power or authority—at least until 1789. Certainly the creator of the doctrine of separation of powers—Montesquieu—never had to suffer the outrageous slings and arrows slung by the Alan Jones' of the world!

But today—the article claimed—'attacking judges is an easy sport for MPs'.

In defending a 'free bench' from this sport, Mr Dick was not responding to the sensitivities of poor judges vulnerable to nasty pernicious bullying; rather for 'fear it could undermine respect for a system we're all expected to obey'.

¹ Under the *Victims of Crime Act 1994* at www.legislation.act.gov.au

Coming from a similar concern about judicial independence though addressing a different challenge, His Honour Chief Justice Spigleman—in a speech to the AIJA (Australian Institute of Judicial Administration) last year—politely questioned ‘the managerialist ideology’ of the public sector and its pressure for performance measures on qualitative decision-making. ‘Not everything that counts’ he argued ‘can be counted. Some matters can only be judged ...’²

The ‘un-countable’ values of the criminal justice system, His Honour said are accessibility, openness, fairness, impartiality, legitimacy, participation, honesty and rationality.

I have a strong sense that a significant, if not a majority, of people in Australia—from most socio-economic backgrounds—would say these are also the reasons why we want David Hicks brought back here for trial. People (including myself) might not know the technical arguments about what constitutes a fair trial, but we have a pretty instinctive sense of what is fair per se.

In our comfort ‘back home’ we have a subliminal feeling of security and satisfaction with ‘our system’. We feel pretty definite that we would rather be ‘here’ than ‘there’ if ever we got into trouble.

In thinking about the context for what I wanted to say for this conference, I felt that if Guantanamo Bay has done *any* good, it has had the effect of confirming peoples instinctive preference for a justice system that is transparent, has clear rules, is speedy, and where someone stands up for them in front of an impartial decision-maker.

When we think about the basis for peoples *Confidence in the Courts* I suspect that it is upon this most deep-seated of preferences that we could say ‘I rest my case’. The survey findings we heard about yesterday from South Australia and the United States suggest a reasonable robustness to this view.³ John Rawls in his *Theory of Justice* (1971) understood this preference as the rational choice of citizens who believed that the essential virtue of ‘justice’ was ‘fairness’.⁴

I suspect that many will not have considered the crime victim as sharing this preference or perspective. I suggest that the victim of crime is *first* a citizen who has views about and responds to the authority and legitimacy of the criminal justice system as a cornerstone of the democratic order. That is, they are an actor in the liberal contract.

A circumstance and its consequence lends the crime victim an opportunity (albeit thrust upon them) to gain direct experience of this contract in practice.

Now I might also be wrong about peoples’ partiality for the justice system as we know it. Or at least people’s partiality for a basic idea about what they think the justice system looks like. But I am reminded of a comment—and you will perhaps have heard similar

² See www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ for the full address.

³ See www.courts.sa.gov.au and National Centre for State Courts www.ncsconline.org

⁴ Rawls, J. (1971), *A Theory of Justice*, Belknap Press of HUP, Cambridge MASS

things—made to me at last year’s conference in this same venue by The Honourable Justice Bruce Robertson, President of the NZ Law Commission. We were talking about the Commission’s report *Delivering Justice for All—a Vision for NZ Courts and Tribunals* (2004)⁵ and the extent to which he thought its recommendations encompassed the interests of victims of crime. Indeed, whether the recommendations responded to the interests of victims of crime!

By way of reflection, His Honour said that if his son was accused of rape he would want him dealt with under ‘our system. But if my daughter was raped, I would not put her through our system’.

It is a shocking thing to say but I have never yet met a prosecutor who—if their own child was sexually assaulted—says he or she would disagree with this sentiment.

There it seems to me is the heart of the conundrum (or one of them) about *Confidence in the Courts*. If we were in trouble, we would want to be tried in this system (with all its flaws). If we were the harmed one, those in the know say ‘run a mile’.

It is these two extraordinarily divergent realities (about the same system) that inform the context for my questions today.

Obeying the Law

Because—to return to Mr Dick—we are all expected to obey this system! Not only obey but actively support its *raison d’être* and operation.

As citizens and members of communities we have a selfish interest in the existence of laws that regulate how we behave towards each other. Should another’s behaviour breach those laws then we certainly have some choices about how or if we respond. Through this formal system or not, for example.

If you were a victim of a property crime, you may not think twice about reporting the rule breaking to police. 74% of you would if your home was broken-into, and 90% of you would if your car was stolen.⁶

If you were a victim of assault, however, only 31% of you would chose to report it to police.⁷ And if you were a woman who suffered a sexual assault you would likely vote with your feet and only 19% of you would report.⁸

Beyond that most basic choice (though some say a dilemma is not a choice) then we as citizens find ourselves in the deep ‘obey the law’ groove. *That* groove has very high expectations of the responsibilities of victims of crime as responsible members of the

⁵ New Zealand Law Commission (March 2004), *Delivering Justice for All: a Vision for NZ Courts and Tribunals*, No.85.

⁶ Australian Bureau of Statistics (2005), *Crime and Safety Survey*, Canberra.

⁷ *Ibid.*, p.

⁸ Australian Bureau of Statistics (2006), *Personal Safety Survey*, Canberra.

community. And here I don't wish to imply that *all* crime victims are responsible and law abiding. Indeed, noted Canadian criminologist, Professor Ezzatt Fattah emphasises that the roles of victim and offender *in general* are 'neither fixed nor antagonistic but revolving and interchangeable'.⁹

Apart from reporting crime to the appropriate investigation body (and promptly report it), the citizen who is the victim is expected to:¹⁰

- Provide a full, truthful and accurate account of their experience to investigators no matter how traumatic and painful.
- Make their home and belongings, and—on occasion—their bodies, available for the gathering of evidence.
- Cooperate fully with an investigation process over brief or very long periods of time.
- Give up a significant degree of privacy and personal dignity.
- Be prepared to act as a witness for the prosecution when required.
- Be prepared to appear at and wait for court hearings whenever required—including those occasions when a matter may be adjourned—regardless of the personal or financial inconvenience.
- Offer themselves for cross-examination usually with no or minimal preparation and support, and
- Provide witness evidence that may draw on memory that can be months or years old.

In effect, the citizen who has become a victim is a prerequisite to and critical element of a functional justice system. Speaking about the prosecution for example, the ACT Director of Public Prosecutions, Richard Refshauge SC has said that 'the prosecutor is heavily dependent on the victim, without whose cooperation the prosecution will often founder ...' (2005:4)¹¹

Victims of Crime and the Criminal Justice System

In shouldering these responsibilities, all types of victim of all types of offence say remarkably similar things about the experience. These revolve around and flow from their lack of standing in criminal proceedings other than as a complainant to police, and as a witness for the Crown (Cook, David & Grant, 1999).¹² Throughout the process, it is assumed that victims of crime must disregard innumerable indignities and invasions of privacy in the overriding interests of the administration of justice. That is, because it is our duty as citizens.

⁹ Fattah, E. (1997), 'Toward a Victim Policy Aimed at Healing, No Suffering', in Davis, Lurigio & Skogan (eds), *Victims of Crime 2nd ed*, Sage; *Ibid.*, p.266.

¹⁰ See Shapland, J. (2000), 'Creating Responsive Criminal Justice Agencies' in Crawford, A. & Goodey J (2000), *Integrating a Victim Perspective Within Criminal Justice*, Ashgate, UK.

¹¹ Speech to the National Seminar, *Peaceful Coexistence: Victims Rights in a Human Rights Framework*, Canberra, October 2005 at www.hro.act.gov.au

¹² For judicial comment see Philip CJ (2002) 'Victims Of Crime, Not Forgotten But Sufficiently Remembered?', Paper for the *Comparative Law Conference*, Brisbane, July 2002.

It is, I think, important to touch briefly on the common themes identified in many research studies about victims in the criminal justice system.¹³ The studies show (apologise for a rather long list):

1. The absence of general information about the criminal justice process means that, as citizens, victim views about what may happen are likely to be drawn from TV shows usually bad American ones.
2. Victims receive little information specific to them about the progress of investigation and prosecution of their particular case resulting in a feeling of being 'left in the dark'. Many assault victims are often called to attend court with very little notice, and a significant proportion if not a majority of property victims receive no further feedback beyond that a person has been charged.
3. Victims are alienated from key decision-making about charging, bail and the decision to prosecute (and on what charges). They say that their views are not sought and when canvassed do not count.
4. The lack of opportunities for input into proceedings including the consideration of sentencing options and in offender management means that many victims feel invisible. This exclusion can often result in the sometimes harsh media comment from which so many of you will have gained your impression of crime victims.
5. Victims perceive that court processes revolve around the interests (indeed the convenience) of defendants. The resulting apparent unpredictability of proceedings crime victims find confusing, exhausting and traumatic.
6. The experience of being a witness—whether at examination-in-chief or cross examination—appears designed to hide more than it reveals.
7. The dismissive and sometimes disrespectful attitude of criminal justice practitioners and the absence of even common courtesies make the whole process even more unpleasant—and unnecessarily so.
8. The lack of practical, reliable and consistent advocacy for their interests throughout their passage through the criminal justice process (from police to parole) results in most crime victims feeling like an unwanted parcel.
9. The lack of access to and availability of support and rehabilitation services, and crime prevention advice and assistance is often expressed in bitter acknowledgement of benefits that are perceived to accrue for the offender's rehabilitation.

All of which hardly draw the picture of 'reciprocal responsibility' (p15) as envisaged in Professor Stephen Parker's 1998 report for the AIJA on *Courts and the Public*.¹⁴

In pondering an analogy to represent this situation I could only think of Alice tumbling through the Looking Glass and ending up at the Mad Hatter's Tea Party.

¹³ See for example, Hamlyn, B., Phelps, A. and Sattar, G. (2004), 'Key Findings From the Surveys of Vulnerable and Intimidated Witnesses 2000/01 and 2003', *Findings 240*, Home Office, London; Wemmers, J. (1996), *Victims in the Criminal Justice System*, Kugler Publications, Amsterdam; Gardner, J. (1990), *Victims and Criminal Justice*, Office of Crime Statistics, South Australia Attorney-General's Department, Adelaide; and Shapland, J., Willmore, J. & Duff, P. (1985), *Victims in the Criminal Justice System*, Gower.

¹⁴ Parker, S. (1998), *Courts and the Public*, Australian Institute of Judicial Administration, Melbourne.

When Alice [*perhaps the victim witness*] comes to sit down there is a universal cry ‘No room! No room!’ An offer of wine is made, but none can be seen at the table. The conversation skitters about til [*trying to keep up with defence counsel*] ‘Alice felt dreadfully puzzled. The [...] remark seemed to her to have no sort of meaning in it, and yet it was certainly English’. Meanwhile the Doormouse [*our prosecutor*] ‘shook itself, and began singing in its sleep.’

‘Have you guessed the riddle yet?’ the Mad Hatter [*who will do as our judge*] said. ‘No, I give it up,’ Alice replied: ‘what’s the answer?’

‘I haven’t the slightest idea,’ said the Hatter.¹⁵

Many commentators (see for example Shapland 2000, van Dijk 1999, Parker 1998, and Ziegenhagen 1989) have pointed out the dangers that flow from the dissatisfaction of crime victims. That, for example:

- Citizens may chose not to report crime to authorities;
- This patchy crime reporting means reduced opportunities for detection and ineffective prevention strategies;
- Citizens provide less information and extend little cooperation to prosecution authorities;
- There is an erosion of confidence in the very concept of justice as well as in justice agencies;
- There is increased potential for social division and disharmony; and
- Faith in the concepts of integrity and accountability that are so crucial to both victims and offenders (as well as to justice practitioners) is deeply undermined.

Now as market researchers for the retail and service industries will tell you all this is not good news! A customer who receives good service (the market gurus say) will tell 5–7 others and no more. A dissatisfied customer will tell 8–10 people, and one in five of *those* will tell a further 20 people in total. Of customers who receive rude, indifferent or discourteous service—only 4% complain and 96% go away quietly. But 91% never come back.¹⁶

Professor Parker, in his report on the issue stated that: ‘legal systems in modern liberal democracies rely ultimately on public confidence and the consent of the governed. That confidence and consent may drain away over apparently small matters which, when accumulated, constitute a predominately negative image of the courts.’ (1998:6) An early hint at Duncan Kerr’s ‘judicial climate change’ idea.

The connection of ‘confidence’ with the courts to the idea of ‘the consent of the governed’ is not often made. We are more familiar with the idea that policing is done with the

¹⁵ Carroll, L. *Alice in Wonderland* (extract), in Sage, A. (1995), *Treasury of Children’s Literature*, Hutchinson, London, pp346–345.

¹⁶ Notes on Customer Service Training, provided to the ACT Magistrates Court Registry. On file with the author.

consent of the people. That is, that the task of the police is to ensure ‘the willing co-operation of the public in the task of securing observance of laws’ (Mayne 1829).¹⁷

In no other area of government or public administration would citizens be expected to perform such a function critical to the maintenance of our society but without support and assistance given as normal and routine. Indeed, to have their very interest in participating treated with deep suspicion and subject to hostile questioning as to motive. Sometimes, in my business, it seems as though the only way practitioners can envisage victim cooperation is through the service of a subpoena! And then you are considered ‘hostile’ so you just can’t win!

It concerns me deeply when day in and day out I hear crime victims say ‘I’m not doing *that* again!’ This, to my mind, is a citizen’s consent to be governed being withdrawn.

Despite more years than I care to remember working in the criminal justice field, I still find it extraordinary that this basic understanding about what forms one of the foundation pillars of public confidence in the courts is so little acknowledged and understood.

What is to Be Done?

I began this paper wanting to question some assumptions about what underpinned public confidence in the courts. Indeed, to question some assumptions about the nature of ‘the publics’ we were talking about.

I wanted also to show that, by the time a crime victim reached the court room, their previous experience of police and prosecution in particular would be highly influential upon their perception of the fairness, accessibility, impartiality and rationality of ‘the court’.

Judicial officers and courts administrators may well say ‘then we can’t be responsible for things that are not in our control’. To a degree they are right.

Over the past two decades, judicial officers and the professional associations have been to the fore in resisting indeed rejecting victim-oriented reform. There is no room at this table, no wine on offer and no place for ignorant emotionally-laden questions. And anyway, if there is any assistance to be offered, it is all the prosecuting agency’s responsibility! We have no role it is claimed.

The problem with taking that aloof position is twofold. First, it completely ignores that those fundamental underpinnings to confidence in the rule of law so clearly laid out yesterday by David Rottman (particularly procedural fairness) are shared by the citizen who happens in this situation to be a victim witness. And second, it fails to acknowledge that all parts of the system are inextricably linked and interdependent. The ‘whole package’ as Judge Trenorden said.

¹⁷ The Nine Principles of Policing contained in the General Instructions issued, since 1829, to every London police officer.

Fundamentally, as the NZ Law Commission (2004:3) concluded, ‘*the degree of confidence people have in the court system will influence their belief in the rule of law*’. And hence their preparedness to cooperate—to obey.

Seen from this perspective I argue that one of the keys to sustaining if not restoring public confidence in the courts is for judicial officers and administrators to actively engage with measures that reflect the interests of specific of the citizen participants in the process. To do this on a systemic or institutional basis does not undermine judicial impartiality in deciding specific cases.

It is completely accepted that this leadership should be so in the courts responsibility to protect the fair trial interests of the accused. Why not the trial interests, indeed the fair trial interests, of the victim witness? Procedural acknowledgment and inclusion is central to how people experience ‘procedural justice’ such that they can say something is ‘fair’.

While there have been no specific studies to my knowledge of the application of procedural justice theory to victims within the criminal justice system, there are studies that are consistent with peoples’ preference for inclusiveness over outcome. For example, Jo-anne Wemmers study of certain victim reform in the Netherlands that obliged prosecutors to seek reparation orders showed victim satisfaction was heightened by the fact that reparation was attempted even if it was not ultimately awarded.¹⁸

The sense that they as an individual person matter, and that the social order shows respect through acknowledging the harm done and dealing with it effectively are clearly important on a number of levels to crime victims (Norris, Kaniasty and Thompson 1990).¹⁹ These personal beliefs interact with people’s preparedness to support the operation of the law and legal institutions in the psychology of procedural justice (Tyler 1990; Tyler and Huo 2002).²⁰

Procedural justice underpins many reforms in the administration of justice from restorative justice (Strang 2002) to problem-solving courts (Frieberg 2001). In these areas of reform, there appears now to be a reasonable level of consensus as to their viability as legitimate and credible aspects of justice administration. That they can be relied upon to protect the rights and interests of all parties, and that fair procedure and fair outcome are achievable.

Yet somehow this knowledge is considered not transferable to the workhorse courts of our system nor to the superior courts.²¹ I am reminded of the exasperated comment of the Tony Blair character in the movie *The Queen*, when he threw rolled his eyes about some rigidity of the Royal Family and said ‘save these people from themselves!’

¹⁸ Wemmers, *op.cit.*

¹⁹ Norris, F., Kaniasty, K., & Thompson, M. (1997), ‘The Psychological Consequences of Crime’ in Davis, Lurigio & Skogan (Sage), California.

²⁰ Seminal work on procedural justice includes: Tyler, T. (1990), *Why People Obey the Law*, Yale University Press, New Haven; and Tyler, T. and Huo, Y. (2002), *Trust in the Law*, Sage, NY.

²¹ Dr Kleinig’s speech at this conference suggested an alternative view that these ‘adjunct legal processes’ are examples of the system’s renewal rather than symptoms of its decay.

The Law Commission of Canada has suggested that these types of processes fall under the overarching term ‘participatory justice’.²² One might say that the term is applicable to any justice process that depends upon or requires citizen participation or engagement be they older style courts or new ones.

It is in this conceptualization of justice processes that we have a way forward that respects the fundamental principles upon which our system is based (and to which we want David Hicks returned), *and* actually and concretely includes the victim witness in procedure through the provision of information, active support, consultation on major decisions, and through opportunities for direct participation.

How can Courts Participate in Procedural Inclusiveness for Victims?

In October 2005 Commonwealth Law Ministers approved a Statement of Basic Principles of Justice for Victims of Crime (Oct 2005). It recalled the UN Declaration for Victims of Crime and Abuse of Power twenty years earlier and reaffirmed ‘the principle that victims must be treated with courtesy, compassion and respect for personal dignity.’

The Statement proposed ‘for the consideration of the Chief Justices and other members of the Judiciary of their respective jurisdictions, the following suggestions that they believe will assist in the achievement of national adherence to the Basic Principles:

- encouraging participation in a training programme sensitising judges to the needs and interests of victims of crime in relation to the judicial process;
- allowing victims and witnesses to be on-call for court proceedings where practicable;
- in so far as possible, ensuring that their court officials establish separate waiting rooms for prosecution and defence witnesses;
- means by which members of the judiciary can bear their share of responsibility for reducing court congestion by ensuring that all participants fully and responsibly utilise court time;
- to allow, to the extent possible and appropriate taking into account all of the relevant fair trial interests, the views, if any, of victims to be made known to the court at bail hearings, postponements, sentencing and restitution or any compensation hearings;
- sensitising judges, where applicable, to consider ordering restitution to the victim in appropriate cases where such orders are possible;
- ensuring that, after having given any evidence, the victim’s attendance at the trial is facilitated if he or she so wishes and, as requested, a member of the victim’s family as well; and
- giving substantial weight to the victim’s interest in the speedy return of property before trial in ruling on the admissibility of photographs of that property as being sufficient evidence.

²² Law Commission of Canada (Nov 2003), *Transforming Relationships Through Participatory Justice*, Ottawa.

How the Commonwealth Attorney-General intends to implement the commitments he signed to is yet to be revealed. For the first time, however, the Australian Commonwealth appears to have understood that it has a role, in partnership with the States and Territories, to uphold the United Nations Declaration on Victims of Crime and Abuse of Power.

Significant developments have taken place—in the 20 years since that Declaration—in recognising and responding to victim interests. Every Australian jurisdiction has seen law and service reform especially in policing and prosecution. Jurisdictions have attempted to address systemic failings through (for example):

- a ‘one-stop shop’ arrangement (UK),
- an ‘opt-in’ process whereby a notified victim can elect to be placed on record to receive information (WA DPP),
- referral of certain matters with consent (WA Police & WA VSS, UK police and VSS),
- Witness Care Units whereby specialist staff from police and prosecution co-locate and act as a central source of information (UK),
- victim help-cards or booklets for distribution by police attending and incident, or in follow-up (NSW, ACT),
- Victim Notification System being web-based, toll-free phone or e-mail registration and notification systems related to federal and state offenders (USA), and
- victim registers for parole and/or other sentence administration (most jurisdictions).

You will notice, however, a significant absence in court-based initiatives. I wish to conclude with reference to a couple of relevant examples that we might explore in the Australian context. In the first instance is the multi-million pound initiative in the UK with its national *No Witness No Justice* program implemented since 2004.²³ The program recognised the extent to which the absence of victim/witness support led to ‘cracked’ trials, and is restructuring and refocusing basic aspects of pre trial procedure.

Second, after the *Victims Rights Act* was introduced in New Zealand in 2002, the Department for Courts implemented a network of court-based Victim Advisors whose central role is:

- ‘to ensure that victims are informed of the progress of the case against the accused and have more input into that process.’ and
- ‘to act as central sources of information about programmes, remedies or services available and to ensure that certain protections for victims be put in place’. (Dec 2002 Department for Courts Circular)

Finally when some of the great legal brains of the 20th Century convened to devise the structure and rules for the world’s first International Criminal Court²⁴ they made it the responsibility of the Court’s Registry to establish a Victims and Witnesses Unit (Article

²³ Home Office (2004), *No Witness No Justice: the national victims’ and witness care program*, Cabinet Office, Office of Public Service Reform.

²⁴ Rome Statute for the International Criminal Court (1998) and its Rules of Procedure and Evidence (2002).

43 and Chapter 2). The establishing charter set out the Court's responsibilities to ensure the protection of victims and witnesses and their participation in proceedings (Article 68 and Chapter 4), provided for the Court to seek reparations and invite victim submissions on these (Article 75), and even established a Trust Fund for the benefits of victims of crime within the jurisdiction of the Court.

Of course, the International Criminal Court is young and untested. It is nonetheless significant that this and the other initiatives I have mentioned show that court leadership and indeed court delivery of assistance to crime victims is not intrinsically incompatible with court independence and impartiality.

To return to Lewis Carroll in conclusion—Alice, in walking off from the Mad Hatter's Tea Party, 'looked back once or twice, half hoping that they would call after her ...' but they did not notice her leaving.

said Alice 'At any rate I'll never go there again! ... It's the stupidest tea-party I ever was at in all my life!'

So go on ... invite the crime victim to the tea party. It will still be a tea party after all!

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