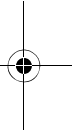
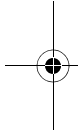


THE UNIVERSITY OF SYDNEY
FACULTY OF LAW

**CURRENT ISSUES IN
CRIMINAL JUSTICE**

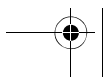
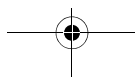


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The Need for a Federal, Australia-Wide Approach to Issues Concerning Crime Victims

Traditionally, in Australia, issues concerning crime victims have been a matter for State and Territory governments. The administration of most crimes that are commonly known to the public, such as murder, manslaughter, assault, rape, burglary and theft have, in the main, been the responsibility of State and Territory law enforcement personnel, and their criminal justice systems. What few Federal crimes there were did not generally involve natural persons who were crime victims.¹ Furthermore, Australia never enacted a comprehensive Bill of Rights that covered matters of criminal justice, and this meant that criminal procedure, the main area of the law that relates to victims' issues was, by and large, never 'constitutionalised' (thus becoming a federal issue) in the manner that criminal procedure has been in nations such as the United States of America and Canada. There were also very few international instruments that governed the treatment of crime victims, and thus even at the international level where the Federal Government has exclusive powers, there was little impetus for the Federal Government to consider victims' issues. Overall, there was very little need for the Federal Government and the Federal Attorney-General's Department to concern themselves with victims' matters.

All this has changed since the 1990s. There are now a number of significant Federal crimes that do involve natural persons as crime victims; there are more international instruments and issues that concern victims; and benefits and support for crime victims have increased, raising important Federal questions where crimes are committed overseas against Australians or where residents of one Australian jurisdiction are victimised in another jurisdiction. It is the major contention of this comment that the proliferation of these issues and others now requires a concerted and coordinated Federal response. During this comment we will identify and explore six important issues concerning crime victims that underlie the importance of such a Federal response. It will be shown that presently there are few mechanisms in place for a considered Federal reaction to these victim issues, and thus the Federal response has often been uncoordinated, inadequate and generally unsatisfactory. The comment will conclude by suggesting that a dedicated crime victims' unit within the Federal Government should be established.

1 Generally, the victim in these Federal crimes was the Federal Government. Note that the *UN Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985) defines 'victims of crime' in the following manner:

- i. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.
- ii. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

Six Federal Crime Victim Issues

1) *Cross Jurisdictional Issues in Relation to Victim Support Services*

Population mobility amongst Australians is greater than ever before. With enhanced services and other benefits now generally provided to crime victims in most Australian jurisdictions, cross jurisdictional issues will often arise, as these services are not the same in each jurisdiction. Thus if a resident of jurisdiction A travels to jurisdiction B and becomes a crime victim in jurisdiction B, he or she will generally be entitled to the victim services and benefits that jurisdiction B provides. These might include access to compensation and the provision of victims' rights during the criminal justice process. However, the person will usually need to travel back to their home jurisdiction A, and thus it will be very inconvenient for them to continue to access the services provided in jurisdiction B. If they are entitled to access the services in their home jurisdiction A, these are unlikely to provide the same entitlements had they been victimised in their home jurisdiction. The problem can clearly be remedied by cooperation between the services in the two jurisdictions in the form of reimbursement by jurisdiction B for the victim using the services of jurisdiction A, or, as in the European model,² by the adoption of an agreement between all jurisdictions that provides for a minimum level of services. The ideal and more comprehensive solution to this growing problem would be to obtain agreement between all Australian jurisdictions, but this would require federal intervention and support to facilitate a consensus on all the issues involved. An appropriate forum for this to happen would be the Standing Committee of Attorneys-General (SCAG), which in 1993, endorsed a National Charter for Victims' Rights in Australia (1993), and in 2005 re-affirmed their commitment to strengthening victims' rights.³

2) *Victim Entitlements when Crimes Occur in Territories or Other Places Where Australia has Jurisdiction where no Legislation or Policies Presently Exist*

Australia has ten Federal Territories. Both the Northern Territory and the ACT do make provision for crime victim compensation, victims' rights during the criminal justice system, victims' support services, and other significant help for crime victims. Norfolk Island does not have such provisions, and while serious crime is extremely rare on Norfolk Island (and thus issues concerning crime victims have not arisen in the past), the high profile murder of Janelle Patton in 2002⁴ highlights the fact that there may be victims of crime on Norfolk Island and that their entitlements need to be clarified. Other Australian Territories, such as the Australian Antarctic Territory and Christmas Island, make no provision for victims when a crime does occur on the Territory (instances of crime would admittedly be rare). The Federal parliament does have legislative power over all Territories (*Australian Constitution* s122), so once again, it seems that only a Federal approach will be sufficient in order to ensure that victims of criminal events in these Territories have access to at least a minimum level of entitlements that are available to other crime victims in Australia. Similar issues

2 On 15 March 2001, with a view to harmonising basic rights for victims of crime within the all territory of the European Union, the Council of the European Union adopted a Framework Decision on the standing of victims in criminal proceedings (2001). See also the European Commission, *Directive relating to compensation to crime victims* (2004).

3 See the South Australian Attorney-General's Media Release (2005) on the communiqué endorsed by the Standing Committee of Attorney-General.

4 See 'New evidence in Norfolk Island murder trial', *ABC Online: The World Today*, 11 August 2006, found at <www.abc.net.au/worldtoday/content/2006/s1712847.htm>.

may arise when someone is victimised on a ship or a plane that is registered in Australia (thus entitling Australia to have jurisdiction under international law) and outside the jurisdiction of any Australian State or Territory. A good example of this is the recent death (suspected as a result of a criminal act) of Diane Brimble whilst on a P & O Cruise ship.⁵

3) *Federal Crimes that Have Natural Persons as Crime Victims*

Prior to the 1990s very few crimes in Australia were Federal crimes. What few Federal crimes there were included matters such as tax fraud, drug importation, social security fraud, illegal fishing and migration matters. One of the distinguishing features of these crimes was they generally did not involve natural persons as crime victims, unlike most crimes that are prosecuted at the State and Territory level. The victim of these Federal crimes was primarily the Federal Government. In fact, because of the very few crimes at the Federal level, Federal courts in general are not used to try Federal crimes. The Federal government prefers to make arrangements with State and Territory governments for Federal crimes to be tried in their courts. Since the 1990s, however, there are a number of Federal crimes that are directed against natural persons as victims, including terrorist related offences,⁶ international crimes such as genocide, crimes against humanity and war crimes (*Criminal Code Act 1995 (Cth): Chapter 8 (Offences Against Humanity and Related Offences)*), and crimes related to sexual servitude and people smuggling (*Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Amendment Act 2002 (Cth)*). It is thus essential that 'victim entitlements' such as compensation, their rights during the criminal justice system, support services, and other significant help for victims be granted at the Federal level. For example, the Australian Federal Police (AFP) have appointed Family Liaison Officers to help victims and their families, and the Commonwealth Department of Public Prosecutions, like its State and Territory counter-parts, now does have a victim-witness service. Again, this underlines the need for the Federal Government to be involved in crime victim issues.

4) *Non-Terrorist Crimes Committed Against Australians Overseas*

It is estimated that about one million Australians are out of the country at any one time, either living abroad, or as tourists. It is not surprising that increasingly Australians are becoming crime victims whilst overseas. Such an event happening in a foreign country that has an entirely different language, culture, legal system and police service may prove very daunting for a person who is a long way from their loved ones. Such victims may need a range of help — immediate support, practical assistance, translation services, information concerning criminal justice and other legal matters in the foreign jurisdiction, being able to travel to the venue of the criminal trial (where one takes place), financial compensation⁷ and therapeutic interventions where necessary. Overseas countries offer varying degrees of help to crime victims in general, but even for those countries that do offer reasonable assistance, this may be difficult for a foreigner to access, or people who are not citizens or permanent residents of that country may simply not be eligible for such assistance.

Under the present arrangements, Australian victims may receive Australian consular assistance or assistance from the Department of Foreign Affairs and Trade (DFAT). The

5 See the many media reports of the inquest before NSW Deputy State Coroner Jacqueline Milledge, such as 'Brimble "may have been dead for hours"', *The Sydney-Morning Herald*, 16 November, 2006.

6 See the list of terrorist offences in the *Criminal Code Act 1995 (Cth)*, found in the Table in Bronitt & McSherry (2005:887–889).

7 There is only discretion to pay victims under the South Australian compensation scheme in such circumstances.

problem here is that consular officials and employees of DFAT are not trained to provide victim assistance, and they may therefore not be the best placed to assist victims. It is submitted that these situations show a clear need for the Federal Government to do more in this area. For example, the USA has established a separate Terrorism and International Victims Unit within the Office for Victims of Crime (OVC), US Department of Justice, to deal with US citizens who become crime victims whilst abroad. This Unit coordinates and delivers services to victims; ensures they receive counselling where appropriate; keeps victims informed of investigations and the progress of 'their' case; and helps victims obtain compensation and help in travelling for court proceedings.⁸

5) *Terrorist Crimes Committed Against Australians Overseas*

Many of the above issues also apply when a terrorist attack on Australians happens overseas — terrorism is, in some ways, no different to other violent crimes in terms of its effects on victims. The advent of international terrorism, and in particular the Bali bombings of both 2002 and 2005, did show the problems of there not being a coordinated Federal Government approach to victims issues, and highlights the need for a Terrorism and International Victims Unit modelled on the OVC's Unit. The response to the Bali bombings shows the need for a prompt, caring and adequate response to an overseas terrorist attack involving Australians based on best international practice; the need for support services and practical assistance from personnel trained in dealing with victims to be on the ground as soon as possible after the event, and for a coordinated approach to longer-term counselling. Because all victim compensation schemes in Australia are jurisdiction-based (where the crime occurred), Australians victimised overseas are not entitled to any compensation from these schemes, with the exception of the discretion available under the South Australian scheme. The actual response to Bali thus highlighted the ad hoc nature of Australia's response — compensation did flow to victims only through an act of grace by the Federal Government (and the SA Government),⁹ and by the collection of public donations; Centrelink provided counselling; and consular officials, among others, were sent to Bali to provide practical assistance. It is submitted that none of these responses could be considered to be adequate until there is a proper Federal crime victims' policy, and services are provided at the Federal level.

6) *Responding to International Instruments that Contain Provisions Concerning Crime Victims*

The final area where there is a need for a coordinated Federal crime victim response is when Australia must consider its attitude towards international treaties and other international instruments that contain provisions that deal with crime victims. Examples of such treaties that have already been agreed to are the *Rome Statute of the International Criminal Court* (1998), the *UN Convention against Transnational Organized Crime* (2000) and its *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (2002). As well as endorsing the UN's *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985), the Federal Government in 2005 approved the Commonwealth Senior Law Officers' *Statement of Basic Principles of Justice for Victims of Crime* (2005). It is hoped that in the future a general Convention devoted

⁸ See <www.ojp.usdoj.gov/ovc/publications/factshts/tivu/welcome.html>.

⁹ See the South Australian Attorney-General's comments in parliament on 26 March 2003 regarding payments to victims of the first Bali bombings found at the following URL: <www.parliament.sa.gov.au/SAN/Attachments/Hansard/2003/HA/WH260303.HA.htm> or <www.parliament.sa.gov.au/SAN/Attachments/Hansard/2003/HA/Wh260303.ha.pdf>.

exclusively to victims will be agreed to by the UN, especially as the process has started with one of the authors of this article being part of an Expert Group in December 2005 that produced a first draft of such a Convention (*Draft Convention on Justice and Support for Victims of Crime and Abuse of Power* (2005)).

The treaties and other international instruments referred to in the above paragraph may involve a number of issues for the Federal Government — should Australia support these instruments during their passage through the UN system? If a Victims Treaty becomes open for ratification, should Australia ratify the Treaty? If so, should it do so with or without reservations? If Australia decides to become a Party to a Treaty it will then be required to implement the provisions of the Treaty that concern crime victims, and this again will require action and expertise at the Federal level. Overall, it is clear that, given the great number of international instruments that deal with crime victims already agreed to and that are being proposed, a properly coordinated Federal response is needed.

Present Mechanisms for a Federal Response and Options to Improve the Federal Response

Presently, responses to Federal victims' issues are usually carried out on an ad hoc basis by officials in either the Federal Attorney-General's Department or the Department for Foreign Affairs and Trade, or in the case of more significant issues, perhaps by the Federal Attorney-General, the Federal Justice Minister or the Foreign Minister. This often will mean that the people with the most expertise on victims' issues, generally found at the State or Territory level, are not necessarily utilised in order to obtain the optimal Federal response and advice. Another possible mechanism that sometimes examines victims' issues (from an Australia-wide perspective) is the Annual meeting of Attorneys-General and Justice Ministers. While there is no doubt this is a useful forum, it is a political body and not necessarily the best decision-making body to decide Federal victims' issues.

It is submitted that what is required is for a small branch of the Federal Attorney-General's Department to be created that can tap into and coordinate existing expertise around Australia on victims' issues. What has tended to happen in the past is that one person has been called upon to give an Australia-wide perspective to an issue, but this may not have been reflective of all Australian jurisdictions and expertise around Australia. One task of this branch would be to coordinate an administrative agreement on the provision of victim compensation and other services for crime victims amongst State and Territory governments. Another part of this branch should carry out similar functions to the International and Terrorism Unit that was created within the Office for Victims of Crime (OVC) in the US (see above).

In conclusion, Australia now needs a dedicated crime victims unit within the Federal Government (preferably the Federal Attorney-General's Department) that should be tasked to deal with the types of issues referred to above. Australia can no longer leave crime victim issues solely to the States and Territories as there is now too much at stake and too much to do at the Federal level.

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