

Chapter 15

Improving Access to Justice: Procedural Justice Through Legal Counsel for Victims of Crime



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Introduction

According to the common law jurist Blackstone (1758, p.5) whenever a crime happens there are two victims: the actual person who is harmed or suffers a loss and the state whose law is violated. Yet, until five decades ago the victim had become largely ignored, some say even forgotten. Given the victim was often a prime witness for the state as investigator and as prosecutor, Young's (2001, p. 6) summation of the victim's standing is apt: "[The victim was] saddled with enforcement and prosecutorial responsibilities for a process that did not address their needs or their losses". The disregard for the victim often caused him or her a "second injury". Such belies the victim's actual importance to criminal justice systems; however, since the 1960s interest for the plight of victims of crime has evolved.

The focuses have shifted from addressing the harm suffered through state-funded compensation to establishing support services, to proclaiming victims' rights, to demanding victims be genuine participants in the criminal justice system. In the 1980s declarations on victims' rights emerged internationally (for example, the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power [United Nations 1985]), multi-nationally (for example, the Commonwealth Nations Statement of Basic Principles of Justice for Victims of Crime [Commonwealth Secretariat 2006]) and domestically (for example, the South Australia Declaration of Principles Governing Treatment of Victims, Part II, Divisions 1 & 2 of the Victims of Crime Act 2001). Each is intended to, among other outcomes, improve victims' access to treatment and to justice.

The most contentious rights have proven to be victims' procedural rights intended to make victims integral players in criminal justice, rather than be peripheral ones

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(O'Connell 2004, 2012, 2013; O'Connell and Hayes 2019). These rights challenge the long-held concept of crime being a wrong against the state and the victim as a witness for the state. Instead the victim is also wronged and therefore entitled to be a party to the criminal proceedings. Arguably, this shift can happen without unduly encroaching on procedural justice for accused and convicted persons.

Several factors can contribute to victims' perceptions of procedural justice, but this chapter will focus particularly on giving victims opportunities to express their views and participate in decisions that affect them (that is, whether they have "voice") via the Commissioner for Victims' Rights or legal counsel engaged by the commissioner.

It is theorized, and evidence supports such (O'Connell 2012, 2013), that victims expect procedural justice. Moreover, when victims experience procedural justice they are more likely to be satisfied with the criminal justice system and accepting of the criminal justice outcome, as well as possibly better heal emotionally and psychologically.

Crime-Victims' Needs

Victimological research indicates victims tend to have three categories of needs: assistance needs (such as practical help and psychological treatment); informational needs (such as information about the progress of the police investigation); and, participatory needs (Cook et al. 1999; O'Connell 2004, 2012, 2015; O'Connell and Hayes 2019) has outlined stages in the evolution of victims' rights and assistance. Responses to victims' needs manifest initially in state-funded compensation schemes to alleviate the harm done to victims of violent crime. Next responses concentrated on protecting the victim from further harm. Shelters, for example, were set-up to physically protect victims escaping domestic violence, counselling programs developed to help victims cope with the effects of crime, and legal and procedural reforms sought to reduce secondary victimization. Since about the turn of the century, greater attention has been paid to victims' participatory needs, which has gone beyond victims having the right to tell a court how they have suffered.

On participatory needs, Rossner (2017) asserts that victims have expressive needs, such as the need to be consulted or express a view on a decision that affects them (see for example sections 7, 9A & 10 of the Victims of Crime Act 2001 (SA)); and, these needs are essential elements of procedural justice (see also O'Connell 2012, 2013; Cassell 2008, 2014; Haller and Machura 1995). Studies, however, show even when charters or declaration on victims' rights proscribe participatory rights, they are too often denied (Victorian Law Reform Commission 2017; O'Connell and Hayes 2019), which affects (as above) their attitudes about criminal justice practitioners, institutions and authorities, as well as fosters a deficit in legitimacy of decisions made (Wemmers 1996), such as charge bargaining (Flynn 2012) and reduces confidence in the criminal justice system (Wemmers and Cyr 2004). To counter victims' criticisms increasing attention is being given to enhancing procedural

justice for victims of crime by giving them a more active role in the criminal justice process (Doak 2005; O'Connell 2012, 2013).

Procedural Justice

There are said to be two separable aspects of legal settings that can affect victims' fairness judgments: how the criminal justice process was conducted and the outcome of the process. Procedural rights during the process are important to empowering victims and reducing secondary victimisation (Wolhuter et al. 2009, p.195). Procedural rights are integral to procedural justice, which has several connotations. In discussions on justice administration, procedural justice is associated with the notions of procedural fairness, due process and fundamental justice, as well as natural justice.

Rawls (1971) in his seminal text on *A Theory of Justice* identified three types of procedural justice. A perfect procedural justice, for instance, would afford victims the right of voice and power to affect key decisions in the criminal justice process and an independent criterion would determine a fair outcome. Imperfect procedural justice would afford victims a voice but no power to affect key decisions but there would be independent criterion to determine a fair outcome; and, neither perfect nor imperfect, which is a procedural justice that has no criterion for a fair outcome other than the procedure.

More recently, two dominant models on procedural justice have been widely discussed in legal and non-legal contexts: the control model and the relational model. Thibaut and Walker's (1975, 1978) control model resulted from their study of civil disputes. The researchers found that participants preferred procedures that allowed them to have input above procedures that did not allow input. They also linked participant's concern with procedures to their desire to influence outcomes that affect them. Regardless of the outcome, however, they concluded that participants are more satisfied with decisions when they are included in the decision-making process. Thus, according to the control model, victims of crime do not only care about the fairness of a decision that affects them, such as the court outcome, but are also concerned about how the decision was reached. Victims are more likely to accept disagreeable decisions if they are reached through fair procedures.

Wemmers (2009a), however, reported that both the procedure and the outcome affect victims' fairness judgements. Several studies show a perceived just outcome can mitigate victim dissatisfaction with their treatment during the criminal justice process (Kelly 1984; Gardner 1990). Such said, many victims can distinguish issues that relate to procedural fairness or justice from those that relate to outcome, such as the court sentence (Wemmers 1996; Vinod Kumar 2018).

Lind and Tyler's (1988) later experiments led them to argue that procedural justice is associated with relational concerns. They concluded that procedural justice is dependent on factors such as status recognition, trust in the authority, and neutrality (Tyler et al. 1996; Murphy et al. 2009). For example, often victims of crime assess

the legitimacy of the police (Tyler and Huo, 2002; Sunshine and Tyler, 2003; Tyler and Fagan, 2008; Reisig and Lloyd 2009; Elliott et al. 2012) and prosecutors (Shapland et al. 1985; Gardner 1990; Spencer 2010) based on how these practitioners treat them. Yet, police and prosecutors tend to routinize the harm suffered rather than individualize it, which can weaken victims' sense of procedural justice (Kelly 1984; Erez and Rogers 1999; Lievore 2004; Reisig 2007).

Victims' procedural justice judgements of courts are determined by their perceptions on whether they were treated with respect and neutrality (Wemmers et al. 1995; Wemmers 1996). Although many victims feel criminal proceedings are an ordeal (Inquiry into Victims of Crime 1981; Shapland et al. 1985; Gardner 1990; Justice Strategy Unit 1999, 2000), victims who feel that they have been treated fairly and afforded their rights tend to experience less secondary victimization (Herman 2003). They also cope better with the impact of the criminal justice process (Laxminarayan 2012). Victims who feel that they have been treated fairly tend to be more satisfied with the criminal justice system than those who feel they have not been treated fairly (Gardner 1990; Erez and Bienkowska 1993; Wemmers 1996). For many victims, therefore, procedural justice is as important to them as a desired outcome (Elliott et al. 2012; Holder 2014).

Over ten years of advocacy for victims and inquiring on victims' grievances, the Commissioner for Victims' Rights, South Australia, found that victims hold a variety of views about what makes a procedure and/or a decision just, or unjust. Most victims expected fair, open and respectful decision-making processes and that their views would be considered, yet some felt their views were not considered. Many victims also presumed they would be afforded participatory rights equitable to those of the defendant; many of these victims were astounded they did not have a formal role besides as a witness. After receiving several hundred grievances about sentencing and noting results of victim surveys conducted in South Australia (Gardner 1990; Erez et al. 1994; Justice Strategy Unit 2000), the commissioner concluded that it would be inappropriate to ignore victims' perceptions on the fairness of court outcomes. Thus, the commissioner claimed that in the context of the discourse on procedural justice, victims ought to have similar procedurally fair, participatory rights to those afforded to the defendant and the state, and the failure to follow the exact course or obligation created by a victim's participatory right, offends the due process and the rule of law. Thus, a three-party criminal justice system is fundamental to justice itself.

A Tripartite Criminal Justice System

In the mid-1980s Shapland, Willmore and Duff (1985) reported that throughout their study on victims of violent crime one theme was constant – victims “wish for recognition as an important and necessary participant in the criminal justice system” (p.176). Rather than being “an appeal for help or for charity”, the researchers found victims want the right to be involved throughout the criminal justice system.

They argued in favour of victims being given equity and a genuine role in the system (p.193). Like other “disputants”, for instance, victims want a real say on decisions that affect them (Welsh 2001; Flynn 2012), and for this, among other purposes, they should be genuine participants in the criminal justice system (Victorian Law Reform Commission 2017).

The concept of tripartite system was further articulated by British Law Lord Steyn in the 1990s. She said (see Attorney-General’s Reference (No 3 of 1999) [2001] 2 AC 91), “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.” Nearly two decades later, on the opposite side of the globe in the Victorian Supreme Court, Justice Cummins also asserted that a modern criminal justice system should ensure a “fairer balance between the rights of offenders and the rights of victims” (*DPP v Dupas*). Cummins pointed to the importance of the views of the victim’s family in helping fashion a just sentence. As Judge Cassell (*United States v. Degenhardt*) said, “[T]he sentencing process cannot be reduced to a two-dimensional, prosecution versus defendant affair. Instead, sentencing [should involve] a third dimension—fairness to victims—requiring that they be ‘reasonably heard’ at sentencing.”

Victims’ rights laws have nudged criminal justice systems to be more inclusive, however, the involvement of victims has largely been more akin to a recipient of information or an observer rather than a genuine participant. One way to achieve an equal and equitable justice system and ensure victims are treated as genuine participants, even a party, would be to allow victims to be represented by legal counsel throughout the process. Legal counsel enhances victims’ capacity to influence and deal with proceedings (Backik et al. 1998; Birklbauer et al. 2012; Braun 2014). Conversely, victims are often deterred from participating in legal proceedings because “simple, accessible and timely legal advice is not available to them, when they seek assistance and support” (O’Connell 2013).

Giving victims access to independent legal representation encourages prosecutors and defense counsel to take victims’ rights more seriously (Mohr 2002; see also Fine 2014). There is also a clear relationship between the victims’ access to legal representation and successful prosecution, especially in cases involving transnational and organized crime such as trafficking in human beings (United Nations Office of Drugs and Crime 2008). Furthermore, giving victims voice through legal representation can change the discourse before the judges as well as the balance of power in the court (Wemmers 2009b).

To ensure victims have access to legal counsel, the United Nations (2013) recommends that legal aid should be made available as part of the integrated support offered to victims of crime. Consistent, in Japan since 2009 victims have had the right to engage legal counsel to represent them as co-prosecutor, and if victims cannot afford counsel they might apply for legal aid. Waller (2011, 2019) describes the Japanese reform as progressive. Similarly, in South Australia, victims can approve legal counsel to exercise any of their rights (section 32A, Victims of Crime Act

2001), and the Commissioner for Victims' Rights has assisted victims by paying legal fees (ss16, 31(2) & 32A, Victims of Crime Act 2001).

Commissioners for Victims' Rights

Governments across Australia have sought to strengthen victims' rights. One development is the appointment of a commissioner in the Australian Capital Territory; New South Wales; South Australia; Victoria; and, Western Australia. The first commissioner was appointed by the Governor of South Australia in 2006 as an independent statutory officer whose term is up to 5 years (with no prohibition on reappointment). A minister of government, such as the Attorney-General, should not direct the commissioner but, if a minister does, he or she must publish the direction in the Government Gazette and table a copy of their direction in both Houses of Parliament (s16C of the Victims of Crime Act 2001).

In 2008 fundamental changes were made to the commissioner's functions (s16 of the Victims of Crime Act 2001). Since then, the commissioner's functions include: advising the Attorney-General on how to use available government resources to effectively and efficiently help victims of crime; assisting victims in their dealings with the criminal justice system; consulting with the Director of Public Prosecutions in the interests of victims and in particular cases about matters including victim impact statements and charge bargains; consulting with the judiciary about court practices and procedures and their effects on victims; monitoring the effect of the law on victims and victims' families; and making recommendations to the Attorney-General on matters arising from the performance of these functions.

Notably, the commissioner can intervene (in person or through legal counsel) in criminal proceedings as provided for under the Victims of Crime Act 2001 or under any other Act (s16 of the Victims of Crime Act 2001). Section 32A of the Victims of Crime Act authorises the commissioner, with the victim's approval, either in-person or through legal counsel, to exercise any right that victim is entitled to under the Declaration Governing Treatment of Victims (Part II, Divisions I & II of the Victims of Crime Act 2001). The combination of these powers coupled with the authority to assist victims has proven the means for the commissioner to enforce victims' participatory rights and improve both procedural and distributive justice for them.

Legal Counsel for Victims in South Australia

The passive and, in limited circumstances, active participation of victims is recognised in South Australian law (see Part II, Division II of the Victims of Crime Act 2001). Victim interests are better served, however, if victims have someone to represent them within the decision-making processes throughout the criminal justice

system (O’Connell 2012, 2013). Thus, between 17 July 2008 and 16 July 2018, the commissioner afforded legal assistance to over 200 victims of crime (Kirchengast et al. 2019). As the cases below illustrate, legal counsel assisted victims during charge bargaining (including requesting a review of a decision not to prosecute), helped victims prepare to give evidence and protect their rights as a witness, made submissions for victims during criminal proceedings, applied for adjournments to allow for the conduct of victim-offender conferences, negotiated restitution agreements, and represented bereaved victims’ families at coronial inquests.

Case A – Victim Competency and Compellability

A married couple, with two young sons, separated and then commenced divorce proceedings during which both parents had unsupervised access to the children on agreed days. While the sons were staying with the father, one of the sons was injured. The mother alleged the father was responsible and the father asserted that the injury happened during a mock fight. The victim’s brother was the only other witness. The mother insisted the police prosecute the father for assault. When the police prosecutor stated they were considering “tendering no evidence” and withdrawing the charge before the court, the mother threatened to make a complaint to the Police Ombudsman. The prosecutor asked the Commissioner for Victims’ Rights to intervene. The commissioner determined that the interests of the two sons should be a paramount consideration, so he engaged legal counsel to represent the two sons. Aided by counsel, the sons were able to express their views during the charge bargain consultation. Neither wanted to give evidence against their father; neither wanted to make their mother angry. They were in an unenviable position; however, their voices were heard, and the assault charge was withdrawn and the police warned the father that any future allegations would be vigorously pursued.

Case B – A Suppression Order to Prevent Undue Hardship

A single mother stood accused of neglect and abuse of her three children. After the mother allegedly perpetrated a serious assault on one of the children a state welfare agency removed that child and placed him in the care of his paternal grandparents. The police investigation resulted in the mother being prosecuted. Before the criminal proceedings concluded, a male adult murdered the mother and the other children (see *R v Peet*). On reporting the murders, mainstream media became aware that the deceased mother was accused of assaulting one of her children. The media wanted to publicly disclose the allegations as well as identify the surviving child. Fearing the media would fuel victim-blaming and keen to protect the privacy of the child, the commissioner instructed legal counsel to apply for a suppression order, which

happened. The presiding magistrate not only made a suppression order to stop the media reporting on the allegations and identifying the surviving child but also to stop the media reporting on the suppression order itself. The child's grandparents and staff for the welfare agency expressed their gratitude. Later, after the murderer was convicted, the commissioner made written submissions to the Supreme Court and the presiding judge upheld the magistrate's suppression order in the "best interests" of the child (for a similar case on a suppression order see *R v Walsh*).

Case C – Consultation on Charge Bargain

A victim with an intellectual disability encountered difficulties dealing with a prosecutor. Rather than request a communications assistant to assist the victim, the prosecutor asserted they were adequately skilled to appraise the victim's competence to give testimony in court. The prosecutor proposed to withdraw the charge but also expressed reluctance to lay a lesser charge. The commissioner became aware of the victim's grievance, consulted the prosecutor, and then, with the victim's approval, engaged legal counsel. The counsel interviewed the victim and concluded that contrary to the prosecutor's assertion, the victim was a competent witness. The counsel then argued for a review of the prosecutor's proposal to withdraw the charge. The reviewing prosecution staff agreed to proceed with the charge, which went to trial, and the court found the defendant guilty. Without legal counsel, the victim would have been denied access to justice. As a barrister stated in a conversation with the commissioner, the review process is "an important and just means to hold prosecutors accountable for their charge decisions, which otherwise are rarely scrutinised" (W. Boucaut, personal communication, April 16, 2014).

Case D – Addressing a Victim's Safety Concerns

An intoxicated female adult hired a taxi. On arrival at her home, the taxi driver assisted her to gain entry but rather than leave, he then allegedly sexually assaulted her. She reported the assault to the police who later charged the taxi driver with rape. During the charge review, the adjudicating prosecutor determined that there was no reasonable prospect of securing a conviction, so the charge should be withdrawn. Both the police and the prosecutor asked the commissioner to assist the victim. On hearing the victim's worries about giving evidence and about her personal safety, the commissioner asked legal counsel to act for the victim. Ultimately, the charge was withdrawn; however, the defendant agreed to consent to an intervention order. That is an order to prohibit certain behaviours by the defendant to protect the victim (see Intervention Orders [Prevention of Abuse] Act 2009). Legal counsel for the

victim applied for such an order, the defendant consented, and the court made the order with conditions to prohibit the taxi driver ever having any dealings with the victim or attending the victim's home. In correspondence to the commissioner, the counsel stated that although the victim was disappointed with the prosecutor's decision, she was very appreciative her safety concerns were addressed – an outcome unlikely to have been achieved if the victim did not have legal counsel.

Case E – Ensuring Access to Justice

An unidentified person brutally attacked a female adult at her home. More than a decade later the assailant was identified by DNA evidence and prosecuted for attempted murder (see *R v Lowe* 2016). The defendant's counsel argued on several grounds for a stay of proceedings, which would have denied the victim access to justice. The prosecutor suggested to the commissioner that as the decision affected the victim, it would be appropriate for the court to hear her views. The commissioner offered the victim legal counsel, which she accepted. Counsel for the victim took instructions then applied as *amicus curiae* (that is, friend of the court) to be heard on the defendant's application. The judge agreed and the counsel made submissions as per the victim's instructions. After submissions, the judge refused to stay the proceedings and the matter proceeded to trial, which resulted in a guilty verdict. Both the prosecutor and counsel for the victim reported that the judge appreciated hearing submissions from all who were affected by the decision to proceed.

Case F – Procedural Fairness for Victim, Due Process for Defendant

A male adult appeared as a victim-witness before a Royal Commission inquiry into child sexual abuse. His testimony was protected by an immunity clause in the law governing the conduct of the inquiry. Later, the victim made a statement to the police that, after an investigation, led to the prosecution of the accused. A copy of that statement was given to the defendant under the disclosure rule. Counsel for the defendant became aware of the victim having given testimony to the Royal Commission. They strongly suspected there to be significant inconsistencies in statements, so they asked the judge to order the prosecutor and/or victim to produce a transcript of the testimony. The prosecutor was aware that there were inconsistencies in the victim's statements to the Royal Commission and the police, so they held it was appropriate to waive the immunity clause. The victim (then without legal counsel) was left to make a decision that would have significant ramifications, not least, bring his credibility into question. The judge, however, asked the Commissioner

for Victims' Rights to assist the victim. The commissioner, through legal counsel, took instructions from the victim, then made submissions to the court. Having considered the submissions of the defense counsel, the prosecutor and the victim, the judge ordered the victim to produce a copy of the transcript and allowed the defendant's counsel to draw on it during cross-examination of the victim. The judge also allowed counsel for the victim to remain in the courtroom and invited the victim to seek further advice from counsel if needed. The inconsistencies became so damaging to the victim's credibility that the judge told the jury they could acquit the defendant. Allowing the victim legal counsel was justifiable in terms of procedural fairness for the victim but also did not unjustifiably impact on due process for the defendant.

Case G – Furnishing Particulars on the Harm Done

A male adult employed at an Out of School Hours Care program sexually assaulted several young children. He was convicted and then sentenced to imprisonment (see *R v Harvey*). During the sentencing hearing, parents for the children made victim impact statements. The law also provided for others, such as students, teachers and other staff, affected by the offenses to make impact statements. A rough estimate put the number of people eligible to make such statements at over 200, which was impractical, so the Commissioner for Victims' Rights intervened. The commissioner attained information about the effects on the school community then wrote a "community impact statement", which legal counsel acting for the commissioner presented verbally to the court. The statement gave those affected a voice but also maintained their anonymity. The school principal stated that staff and he were grateful to know the effects on them were acknowledged, and that their sufferings mattered. It was an efficient and effective way to furnish particulars on the harm done to many. Various South Australia courts have acknowledged the value of this approach (see, for example, *R v Gerardis*, *R v Lenarczyk*, *R v McDonald*, *R v Templeton* & *R v Vawser*).

Case H – Negotiating on the Right to Restitution

A young adult assaulted another causing the victim the permanent loss of an eye. After pleading guilty and before sentencing, the assailant via his legal counsel offered to pay restitution as a sincere act of remorse but also advised that they would submit the offer as a mitigating factor for a reduced sentence. The prosecutor formed the opinion that they should neither advise nor act for the victim, so they asked the Commissioner for Victims' Rights to help the victim. The commissioner appointed legal counsel for the victim who, on the victim's instructions, negotiated the sum payable as restitution. The defendant paid a sum greater than the victim would have received under state-funded victim compensation but equivalent to the maximum payable under workers' compensation had the incident happened in a workplace.

Later, the judge became aware that the defendant's parents paid the restitution. The victim's counsel abstained from commenting on whether that prohibited the judge from treating the restitution as a mitigating factor. The judge noted the defendant's remorse as mitigating but not the restitution.

Case I – The Right to Cross-Examine Witnesses

A mentally incompetent male adult unlawfully killed an elderly male. The Supreme Court found the killer had committed the objective elements of murder but due to his mental illness incapable of forming the necessary malice or mens rea. The judge ordered the killer to be detained in a forensic mental health institution for treatment. Several years passed, then the killer lodged an application to vary the detention order so he could be released, under supervision, into the community. The application came before Justice Gray in the Supreme Court. The victim's family felt their concerns were not being heard, so they asked the Commissioner for Victims' Rights to assist them. The commissioner instructed legal counsel to ensure the victim's family were heard during the court proceedings. The counsel submitted to the court that the victim's family should be heard either as *amicus curiae* or as persons with a proper interest in the application (section 269P of the Criminal Law Consolidation Act 1935). Justice Gray held that the victim's family were "interested persons" and allowed them to be legally represented, to cross-examine witnesses and to make submissions (R v Steele). Since then, the Supreme Court and the District Court have followed the precedent by allowing the victim's family or the victim through legal counsel to make oral argument and cross-examine witnesses, and to be personally present in the court, during its consideration of an application.

In R v Bowen, for example, Justice Vanstone allowed counsel to make submissions for the deceased victim's family. She stated in her ruling on Mr. Bowen's application for supervised release into the community, "[the victim's family] recognized that if Mr Bowen's psychiatric condition remained stable then it was likely that at some point he would be released into the community. They appreciated that the regime of gradual exposure to the community would be far preferable to a sudden change in his environment and levels of support. Accordingly, Mr. Hurst's family in my view, showed great maturity in their response to the plan and in finding, as a fallback position, some common ground." Counsel for the victim's family reported that he was astounded by their "remarkable transformation" from strong opposition to Bowen's release to finding common ground. He had not believed before-hand in the "restorative value" of giving a victim the right to be heard as a "genuine participant" in criminal proceedings, yet he was now a "convert" (see also R v Wagner and R v Marshall).

Armed with such favorable comments, the Commissioner for Victims' Rights advocated for an amendment to the law governing variations to court orders in relation to mentally incompetent offenders, which Parliament enacted. Section 269P of the Criminal Law Consolidation Act 1935 (SA) now authorizes, in addition to other

persons, the Commissioner for Victims' Rights to apply for a variation or revocation of such court orders. In *R v Simper*, the commissioner through legal counsel, and on behalf of a bereaved family, tested the new law by applying for a variation to an order. Justice Bampton followed the law and, without objection from the defendant or the prosecutor (that is the other parties to the proceedings), made a fresh order consistent with the commissioner's submissions.

Nudging Towards a Tripartite Criminal Justice System

In summary, until recently the victim was primarily a witness for the state as the prosecutor, and his or her interests (including procedural justice, distributive justice, and retributive justice) were not important to the criminal justice system. Then and now some proponents of the traditional adversarial criminal justice system argue that consideration of victims' interests could interfere with the tenets of a just system. Yet, contrarily, providing victims with legal counsel on par to defendants has bolstered victims' participatory rights without, among other things, unduly impacting defendants' rights. In some cases, victims having legal counsel has contributed to the efficient administration of the system while also bringing about a better outcome.

Victims perceived having legal counsel as necessary for equity. As one victim observed, "The defendant has a lawyer. The state has a lawyer. Why don't I?" Some victims felt they were treated fairly and better able to contribute to decisions when they had legal counsel with them. A victim who gave evidence at two separate trials stated that in the first trial he felt like the sacrificial lamb in proceedings where the defendant's lawyer was out to get him. After court preparation with a lawyer, he was not overwhelmed by ordeal of the second trial. Although not grounded on empirical research findings at this time, the victims' views are consistent with research on restorative justice programs (Strang 2002; Daly 2003, Pemberton et al. 2007; O'Connell and Hayes 2019) that shows victims want a procedurally fair process in which they can express themselves. In addition, police, prosecutors and independent lawyers as well as judges and magistrates have reported favorably on this step towards making victims genuine participants in the criminal justice system. Anecdotal evidence suggests that giving victims a stronger voice through the commissioner or legal counsel has also helped change the legal culture with respect to observance of victims' rights.

Conclusion

Procedural justice is an important predictor of victims' satisfaction with the criminal justice system. Rawls' perfect procedural justice highlights how integral giving victims a voice and voice recognition on decisions that affect them is to their right

to access justice. Neither the control model nor the relational model exclusively describes all victims' sense of procedural justice. Outcome favorability, such as the perceived fairness of the sentence, is important to some victims; however, procedural fairness is more important to many victims than other factors, such as the outcome. Some victims' perceptions on the quality of decision making is an important determinant of their sense of justice while for others the even-handedness of treatment of defendants and themselves is important. For some victims, equitable due process (including genuine participatory rights) is most important. Thus, it is important to consider the effects of the processes on victims as well as the outcomes of legal processes throughout the entire criminal justice system.

It is evident from the discourse on procedural justice and the results of crime-victim studies that victims are more likely to have confidence in and trust in the criminal justice system if they feel that they are treated fairly and respectfully; and, importantly, in the context of this chapter, they are able to express themselves and have some influence over decisions that affect them. Procedural justice for victims would seem to require that victims no less than defendants and prosecutors be given a voice and voice recognition in decision-making in the administration of criminal justice.

In South Australia, the Commissioner for Victims' Rights is tasked with assisting victims dealing with the police, the prosecution and other facets of the criminal justice system. The commissioner, with the victim's approval can also exercise any right the victim has (for example, the right to consultation on charge bargaining) under the Declaration Governing Treatment of Victims or complementary legislation. Further, the commissioner can do so in person or through legal counsel.

Engaging legal counsel for victims of crime has advanced victims' rights to be heard at key points in that state's criminal justice system. Legal counsel have helped the victim play a more prominent role in the criminal justice process; albeit in South Australia that process continues to operate within an adversarial framework, which inhibits the victim from having a truly determinative say on decisions that affect them. Victim participation through legal counsel has forged opportunities for a better justice for victims of crime. Furthermore, the benefits that crime victims derive from having legal counsel may be one facet of iterative progress towards a tripartite criminal justice system in South Australia.

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