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**VICTIMS AND THE
CRIMINAL TRIAL**

Tyrone Kirchengast



Palgrave Studies in Victims and Victimology

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Victims and the Criminal Trial

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Preface

This book brings together the diverse and fragmented rights and powers of victims constitutive of the modern adversarial criminal trial as found across the common law jurisdictions of the world. One characteristic of victim rights as they emerge within and constitute aspects of the modern criminal trial is that they are dispersed within an existing criminal process that largely identifies the offender as the benefactor of due process rights, originating in the seventeenth-century adversarial criminal trial. This trial increasingly excluded the victim for the Crown and state, and the role of the victim was slowly eroded to that of witness for the prosecution as the adversarial trial matured into the latter part of the twentieth century. Increasing awareness of the removal of the victim and the need to secure the rights and interests of victims as stakeholders of justice resulted in the last decade of the twentieth century, bearing witness to the gradual relocation of the victim in common law and statute. This relocation has occurred, however, in a highly fragmented and disconnected way, usually following spontaneous and at times ill thought-out law reform initiatives that may or may not connect to the spirit of existing reforms, foundational structures of the criminal process, or international or domestic rights frameworks that have emerged in the meantime.

The result of the emphasis on the victim is that the twenty-first century criminal trial is characterised by a fragmented range of rights and powers that affect normative criminal trial processes in varying, different,

and controversial ways in order to restore individual rights to victims. By interrogating the modern criminal trial on a procedural basis, this book sets out this framework as inherently fragmented and diverse. Put another way, it is impossible to tell the story of how the victim has been relocated into the modern criminal trial by explaining the range of rights and powers available to victims as manifesting from one, coherent framework. Rather, victim rights as they apply to and modify the criminal trial are informed by a range of diverse instruments—from international declarations and human rights norms to local policy for the management of at-risk groups and populations. Instead of corralling this diversity into a normalised process that attempts to tell how the victim participates in the modern criminal trial in a linear way, this book embraces the inherently diverse and at times incoherent range of victim rights and powers as they manifest across the criminal trial process, as the key and arguably defining characteristic of victims in the modern adversarial criminal trial.

As this book was being written, the Attorney-General of Victoria asked the Victorian Law Reform Commission (VLRC) to review and report on the role of victims in the criminal trial process. This reference is significant in terms of its breadth and coverage of the phases of the criminal trial. The terms of reference ask the VLRC to review and report on the common law origins of the criminal trial, comparative processes in civil law jurisdictions, recent innovations that affect victim participation in the trial process, the role of victims in the trial and sentencing process, compensation and restitution, and the need for victim support in relation to the criminal trial process. Although law reform bodies have considered the rights of victims previously, either in isolation or as relevant to the review of aspects of criminal law and procedure, few if any have had the opportunity to consider the role of the victim across the entire criminal justice system and trial process, with remit to make recommendations to redefine the way we characterise the criminal justice system as adversarial, or not. While the VLRC will produce its final report following publication of this book, the terms of reference indicate how the victim has emerged as a prominent stakeholder of justice in the adversarial trial context. Indeed, one can surmise that this reference alone establishes how victim rights and interests can be identified as a major site of law reform in the modern era.

There are several people to thank in the writing of this book. Mario Enio Rodrigues Jr. for his never-failing support; Thomas Crofts for his friendship and advice; and Murray Lee, Asher Flynn, and Mark Halsey for reminding me of the virtues of collegiality.

Sydney

Tyrone Kirchengast

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List of Abbreviations

A Crim R	Australian Criminal Reports
ABCA	Alberta Court of Appeal
AC	Appeal Cases
AAC	Administrative Appeals Chamber
ACHPR	African Commission on Human and Peoples' Rights
ACrHPR	African Charter on Human and Peoples' Rights
ACtJHR	African Court of Justice and Human Rights
ADRDM	American Declaration of the Rights and Duties of Man
AHRC	African Human Rights Court
All ER	All England Law Reports
ALRC	Australian Law Reform Commission
BOCSAR	Bureau of Crime Statistics and Research (NSW)
CAAF	Court of Appeals for the Armed Forces
Can	Canada
CAT	The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	The Convention on the Elimination of All Forms of Discrimination against Women
CEU DVC	European Union, Directive of the European Parliament and of the Council (2012), 2012/29/EU, 25 October 2012, establishing minimum standards on the rights, support, and protection of victims of crime, and replacing council framework decision 2001/220/JHA.

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CEU FD	European Union, European Council Framework Decision (2001) 2001/220/JHA, 15 March 2001, standing of victims in criminal proceedings
CIRCA	Cultural and Indigenous Research Centre Australia
CIS	Community Impact Statement
CLR	Commonwealth Law Reports
Cr App R	Criminal Appeal Reports
Cr App R(S)	Criminal Appeal Reports (Sentencing)
CVRA	Crime Victim Rights Act
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
EU	European Union
EUECJ	Court of Justice of the European Communities
EWHC	High Court of England and Wales
F 2d	Federal Reporter, Second Series
F 3d	Federal Reporter, Third Series
F Supp	Federal Supplement
HCA	High Court of Australia
IACHR	Inter-American Commission of Human Rights
IACtHR	Inter-American Court for Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all forms of Racial Discrimination
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICRPD	International Convention on the Rights of Persons with Disabilities
ICTR	International Criminal Tribunals for Rwanda
ICTY	International Criminal Tribunals for the former Yugoslavia
Ire	Ireland
LRCWA	Law Reform Commission of Western Australia
NATO	North Atlantic Treaty Organisation
NGO	Non-Government Organisation
NPS	National Probation Service
NSW	New South Wales
NSWCCA	New South Wales Court of Criminal Appeal

NSWSC	Supreme Court of New South Wales
PJVC	The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
PwC	PricewaterhouseCoopers
QB	Queen’s Bench Decisions
Qld	Queensland
QSC	Supreme Court of Queensland
RRRVGV	Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
SA	South Australia
SASC	South Australia Supreme Court
Scot	Scotland
TIAS	Treaties and Other International Acts Series
UKUT	Upper Tribunal (Administrative Appeals Chamber)
UN	United Nations
UNESC Guideline	Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor
UNTS	United Nations Treaty Series
USC	United States Code
UST	United States Treaty
Victims’ Code	Code of Practice for Victims of Crime
VIC	Victoria
VIS	Victim Impact Statement
VLRC	Victorian Law Reform Commission
VPS	Victim Personal Statement
VSC	Supreme Court of Victoria
VSCA	Victorian Supreme Court of Appeal
WA	Western Australia
WDNC	Western District of North Carolina
WLR	Weekly Law Reports

List of Statutes

Bail Act 1976 (UK)
Bail Act 2013 (NSW)
Bail Bill 2015 (Ire)
Canadian Criminal Code (RSC 1985 C-46)
Charter of Human Rights and Responsibilities Act 2006 (Vic)
Civil Claims Alien Tort Claims Act (28 USC § 1350)
Codice di Procedura Penale (Code for Criminal Procedure) (Italy)
Constitution of the Italian Republic
Correctional Services Act 1982 (SA)
Corrections Act 1986 (Vic)
Corrections Amendment (Parole Reform) Act 2013 (Vic)
Courts Legislation (Neighbourhood Justice Centre) Act 2006 (Vic)
Crime and Security Act 2010 (UK)
Crime Victim Rights Act 2004 (US)
Crimes (Administration of Sentences) Act 1999 (NSW)
Crimes (Sentencing Procedure) Act 1999 (NSW)
Crimes (Sentencing Procedure) Amendment (Family Member Victim Impact Statement) Act 2014 (NSW)
Crimes (Sentencing Procedure) Amendment (Victim Impact Statements—Mandatory Consideration) Bill 2014 (NSW)
Crimes Act 1900 (NSW)

Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014 (NSW)
Crimes and the Court Act 2013 (UK)
Criminal Appeal Act 1912 (NSW)
Criminal Injuries Compensation Act 1995 (UK)
Criminal Justice Act 1967 (UK)
Criminal Justice Act 1988 (UK)
Criminal Justice Act 2003 (UK)
Criminal Justice and Courts Act 2015 (UK)
Criminal Justice and Public Order Act 1994 (UK)
Criminal Law (Sentencing) Act 1988 (SA)
Criminal Procedure Act 1986 (NSW)
Criminal Procedure Act 2009 (Vic)
Criminal Procedure Act 2011 (NZ)
Criminal Procedure Code for Kosovo 2012 (Criminal No. 04/L-123)
Criminal Procedure Regulation 2010 (NSW)
Criminal Procedure Rules 2010 (UK)
Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)
Dangerous Prisoners (Sexual Offenders) Amendment Bill 2007 (Qld)
Data Protection Act 1998 (UK)
Domestic Violence, Crime and Victims Act 2004 (UK)
Evidence Act 1906 (WA)
Family Law Act 1996 (UK)
Federal Rules of Evidence (28 USC art. IV)
Graffiti Control Act 2008 (NSW)
Habitual Criminals Act 1957 (NSW)
Human Rights Act 1998 (UK)
Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)
Magistrates' Court Act 1989 (Vic)
Mental Health Act 1983 (UK)
Mental Health Act 1990 (NSW)
Offences Against the Person Act 1861 (UK)
Offender Rehabilitation Act 2014 (UK)
Police and Criminal Evidence Act 1984 (UK)
Powers of Criminal Courts (Sentencing) Act 2000 (UK)
Rehabilitation of Offenders Act 1974 (UK)

Rome Statute (Statute of the ICC) (A/Conf 183/9, 1998)
Sentencing Act 2002 (NZ)
Sex Offences Act 2001 (Ire)
Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 (Scot)
Statutes Amendment (Victims of Crime) Bill 2007 (SA)
Statutes Amendment (Victims of Crime) Act 2009 (SA)
Summary Procedure Act 1921 (SA)
Tribunals, Courts and Enforcement Act 2007 (UK)
Victim Compensation Act 1987 (NSW)
Victims and Witnesses (Scotland) Act 2014 (Scot)
Victims Bill of Rights Act 2015 (Can)
Victims Compensation Act 1996 (NSW)
Victims of Crime (Commissioner for Victims' Rights) Amendment Act 2007 (SA)
Victims of Crime Act 2001 (SA)
Victims' Rights and Support Act 2013 (NSW)
Victims Rights and Support Amendment (Transitional Claims) Regulation 2015 (NSW)
Victims Rights Bill 1996 (NSW)
Victims Support and Rehabilitation Act 1996 (NSW)
Victims' Charter Act 2006 (Vic)
Vulnerable Witnesses (Scotland) Act 2004 (Scot)
Young Offenders Act 1997 (NSW)
Young Offenders Regulation 2010 (NSW)
Youth Justice and Criminal Evidence Act 1999 (UK)

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Barton v The Queen (1980) 147 CLR 75
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Ewin v Vergara (No 3) [2013] FCA 1311
Fardon v Attorney-General (Qld) [2004] 223 CLR 575

- Finkensieper v The Netherlands* [1995] ECHR 19525/92
Flynn v R [2010] NSWCCA
Griffiths v The Queen [1977] 137 CLR 293
Hill v Chief Constable of West Yorkshire Police [1999] AC 53
In re Dean [2008] 527 F 3d 39
In re: One Female Juvenile Victim and United States of America v Stamper [1992] 959 F 2d 231
Kostovski v The Netherlands [1989] 12 EHRR 434
KS v Veitch (No. 2) [2012] NSWCCA 266
KS v Veitch [2012] NSWCCA 186
Lee v State Parole Authority of New South Wales [2006] NSWSC 1225
LRM v Kastenber [2013] 13-5006/AF (CAAF 2013)
Maxwell v The Queen [1996] 184 CLR 501
McCann and Ors v United Kingdom [1995] 21 EHRR 97
McCourt v United Kingdom [1993] 15 EHRR CD 110.
Mile v Police [2007] SASC 156
Mohid Jawad v The Queen [2013] EWCA Crim 644
Muldrock v The Queen [2011] HCA 39
Opuz v Turkey [2009] ECHR 33401/02
Osman v United Kingdom [1998] 29 EHRR 245
Paull v Police [2015] SASC 25
Perez v France [2004] ECHR 47287/99
PPC v Williams [2013] NSWCCA 286
Prosecutor v Katanga and Chui (ICC-01/04-01/07 OA 11, 16 July 2010, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 entitled ‘Decision on the Modalities of Victim Participation at Trial’)
Prosecutor v Katanga and Chui, Appeal Chamber (ICC-01/04-01/07 OA, 22 January 2010, judgment entitled ‘Decision on the Modalities of Victim Participation at Trial’)
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R v Duckworth [2013] 1 Cr App R(S) 83
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R v Killick [2011] EWCA Crim 1608
R v Konzani [2005] All ER (D) 292
R v Loveridge [2014] NSWCCA 120
R v Lubemba [2014] EWCA Crim 2064
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1

Victims and the Criminal Trial Process

Introduction

The twenty-first century criminal trial is increasingly modified to benefit the needs of crime victims. Victims are increasingly participating in all phases of the criminal trial, with new substantive and procedural rights, many of which may be enforced against the state or defendant. This movement to enforceable rights has been controversial, and evidences a contested terrain between lawyers, defendants, policy-makers, and even victims themselves. By elaborating upon the various ways in which victims are appropriately placed in the modern criminal trial process, this book demonstrates how victims are significantly connected to and even constitutive of the modern adversarial criminal trial. In order to demonstrate the connectedness of the victim to the modern trial, all processes that seek to place the victim as a significantly determinative and even constitutive agent of justice will be considered. The role of the victim, and the rights and powers afforded to them, will therefore be considered in the context of pre-trial processes through to trial, sentencing, and corrections, within the primary context of the Western adversarial trial. Alternative pathways will also be considered, as will international law

and procedure, in addition to extra-curial or adjunctive rights provided by international instruments, ratified declarations of rights, or executive order. The twenty-first century criminal trial is increasingly reconceived in form and substance, yet victims remain controversial and contested participants of justice, despite being increasingly connected to the criminal trial.

Not only are victim rights a matter of contestation for those stakeholders of justice normatively connected to processes of the criminal trial, defendants, the police, state prosecutors, and lawyers and the judiciary, but individual victims, victim groups and organisations, and the community, generally, are increasingly concerned with the shape and form that the criminal trial takes. Such modification is controversial given the long-standing rights of the accused to a fair trial without interference from victims, whether by individual victims, by rights groups, or by political process. The movement toward pre-emptive crime control, expanded police powers, alternatives to being put on trial, such as control orders and preventative detention, has led to the expansion of a law and order critique that holds the criminal trial as an institution that is increasingly vulnerable to rapid shifts in policy. Victims have been implicated in the general criticism expressed against changes to the criminal trial, despite always having been connected to criminal trial processes, even in the modern age of the state control and domination of criminal justice, where victims have been largely identified as residing at the periphery of criminal law and justice.

Although contentious, the expanded role of the victim in the criminal trial process is founded in law and policy that substantially underpins the functionality of the criminal trial (see Hall 2009; Doak 2008; Roach 1999a). Victims are and always have been substantially connected to process of policing, prosecution, evidence, sentencing, and corrections and this book demonstrates this through a consideration of the proliferation of ways in which victims increasingly take an active role in the modern criminal trial process. By confronting those criticisms that seek to silence victims, and place the trial within the control of those who claim to be normatively connected to it, this book demonstrates how the rights of victims are now not only integral to, but significantly constitutive of, the modern criminal trial in adversarial systems of justice.