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JUSTICE FOR ALL – VICTIMS, DEFENDANTS, PRISONERS AND THE COMMUNITY

VICTIMS RIGHTS AND THE ROLE OF THE PROSECUTOR

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When I was at law school, talk of rights tended to be limited to courses in legal theory[1] and the emphasis was on legal rights; indeed some of those philosophers we studied considered legal rights were the only rights.[2] These were, generally, the legal rights of the private law.[3]

Thus, Professor David Derham could write in 1964

> "When a person claims a right he must show a title thereto. In a broad sense all rights flow from the law, since it is only through the protection of the law that a legal right gains its efficacy."[4]

Perhaps encouraged by Ronald Dworkin's seminal work,[5] the language of rights moved beyond the technicalities of private law back to include morality and, in particular, to the area of international law[6] where rights are recognised or created (depending on your point of view) through treaties[7] or other instruments.

The recognition (or creation) of such rights by international treaty or other instrument has also led to the increasing incorporation into domestic legal systems of Bills of Rights which purport to state in general terms the fundamental or human rights of citizens which must be respected. In some cases this legislation is directed to the executive arm of government,[8] and sometimes to the legislature which cannot legislate inconsistently with them.[9]

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1 Then called jurisprudence. See, for example, David Derham (ed) *A Textbook of Jurisprudence by George Whitecross Paton* (Oxford: Clarendon Press, 1964), esp chapter XII.

2 Philosophers such as Bentham, Austin, Ross: see HLA Hart, "Bentham on Legal Rights" in AWB Simpson (ed) *Oxford Essays in Jurisprudence* (Oxford: Clarendon Press, 1973) at 172.

3 K Olivecrona *Law as Fact* (London: Stevens & Sons, 1971) pp136-141. This was in distinction to the natural law theories of Grotius and Pufendorf, for example, who defined a right as a moral quality or faculty.

4 David Derham (ed) *op cit* (note 1) at p270.

5 R M Dworkin "Taking Rights Seriously" in AWB Simpson (ed) *op cit* (note 2) 202-227. Its influence may partly be attributed to the fact that it was first published in the *New York Review of Books* 18 December 1970.

6 Interestingly, Austin's view was that international law was not positive law since there is no eterminate sovereign whom the nations will habitually obey: David Derham (ed) *op cit* (note 1) at p78; D Lloyd, *Introduction to Jurisprudence* (London: Stevens & Sons, 1965) at p140, reproducing an extract from J L Austin, *Lectures on Jurisprudence* (1885).

7 Such as the International Covenant on Civil and Political Rights.

8 As in section 3 of the *New Zealand Bill of Rights Act 1990*.

9 As in the rights incorporated by various amendments to the US Constitution.

The movement towards the incorporation of such human rights into domestic law has accelerated in the last quarter of the twentieth century, especially in the English-speaking common law world,[10] such that Australia now stands out as the only such significant country without national domestic human rights legislation, though the ACT[11] and now Victoria[12] and perhaps other states[13] will try to fill this gap within the limits of their jurisdiction.

The recognition of the rights of victims, however, has a patchy history.[14] The principle international human rights treaties do not deal with them; the ACT *Human Rights Act 2004* does not include them. Indeed, the report[15] on which the latter was based refers to victims only eight times, mostly in passing, none really relevant to this discussion, save at one point merely to identify them as having been referred to in a submission which argued for their specific recognition.[16] That was rejected by the Committee, though there is no real discussion of the reason for that other than in the expression of the opinion that the two international covenants proposed to be enacted (though only one was) "have been interpreted and developed since their formulation to remain relevant to modern life"[17] and that "[t]he rights in the Covenants are cast in relatively broad terms."[18]

Nevertheless, the United Nations did in 1985 make a declaration, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[19]

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10 With enactments in Canada (1982), New Zealand (1990), South Africa (1996) and United Kingdom (1998).

11 *Human Rights Act 2004.*

12 On 2 May 2006, the Victorian Attorney-General, Mr Rob Hulls, introduced the Charter of Human Rights and Responsibilities Bill 2006 into the Victorian Parliament: Media release, Office of the Attorney-General dated 2 May 2006.

13 In the Media release referred to in note 12, the Victorian Attorney-General also said, "NSW, Tasmania and Western Australia have all expressed interest in a charter of human rights".

14 See the brief overview in Department of Justice and Community Services (ACT), *Victims of Crime*, Issues Paper No 8 for the ACT Community Law Reform Committee (Canberra: Department of Justice and Community Services, 1991) pp8-10.

15 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (Canberra: ACT Bill of Rights Consultative Committee, 2003).

16 *Ibid* p88 at paragraph 5.7.

17 *Ibid* p92 at paragraph 5.17.

18 *Ibid* p92 at paragraph 5.18.

19 Made at its 96th plenary meeting on 29 November 1985: A/Res/40/34.

This declaration required victims to be treated "with compassion and respect for their dignity"[20] and then used the words of rights that they are "entitled to access to the mechanisms of justice and prompt redress".[21]

Paragraph 6 of the Declaration itemised what might be called procedural amenities for victims, such as information, opportunities for their concerns to be expressed, proper assistance, minimising inconvenience and avoiding unnecessary delay.

There were no rights specified for their specific involvement in the process.

Partly springing from the UN Declaration, the ACT enacted a *Victims of Crime Act 1994*[22] and now a number of other Australian jurisdictions have similar legislation.[23] The ACT Act enshrines certain rights of victims of crime to participation in the criminal justice system,[24] supplementing other legislation such as that giving a right to give information about safety in bail hearings,[25] to provide a victim impact statement[26] and make submissions on parole decisions.[27]

The structure of the other Australian Acts is similar, though some of the rights dispersed among other legislation in the ACT are collected in the one State Act. The Acts all provide for a set of obligations to victims in the criminal justice system, called variously "a Charter of Rights",[28] "fundamental guidelines",[29] "guidelines",[30] "declaration of principles"[31] or ""governing principles".[32]

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20 Paragraph 4 in the Declaration.

21 *Ibid*.

22 Gazetted on 15 December 1994 and substantively commenced on 15 June 1995. In section 4 12 "Governing principles" are set out which "as far as practicable and appropriate, govern the treatment of victims" and section 5 obliges a "person who performs a function in the administration of justice … [20] have regard to the governing principles".

23 *Victims of Crimes Act 1994* (WA), *Criminal Offence Victims Act 1995* (Qld), *Victims Rights Act 1996* (NSW), *Victims of Crimes Act 2001* (SA). A number of States and Territories also have compensation or other assistance legislation and unlegislated schemes. In the United States, the legislation is the Crimes Victims Rights Act 2004, 18 USC section 3771, part of the Justice For All Act of 2004.

24 Section 4, *Victims of Crimes Act 1994.*

25 Section 23A, *Bail Act 1992.*

26 Section 343, *Crimes Act 1900.*

27 Section 46, *Rehabilitation of Offenders (Interim) Act 2001*.

28 New South Wales – section 4

29 Queensland – Division 2

30 Western Australia – Schedule 1

31 South Australia – Division 2

32 ACT – section 4

These set out "the principles that should govern the way victims are dealt with in the criminal justice system".[33] The various enumerations are different but all extend well beyond the matters set out in the UN Declaration.

They fall principally into 6 main groups:

(a) the manner of treatment of victims: courtesy, respect, compassion and dignity are the words commonly used;
(b) provision of assistance to access services: access to services, such as counselling, is mandated in some cases, information about services is commonly required to be provided;
(c) provision of information about the process: this is most common and includes information about the nature of the process, information about being a witness, the progress of the prosecution, the charges actually laid, any variation to the charges and the reason for the variation, bail hearings and results. Sentences imposed and parole hearings;
(d) opportunity for participation in the process: this varies but some mandate the victim's version of events is to be reported early, other matters include the return of the victim's property at as early a time as possible, provision of information about their safety to bail hearings, the making of victim impact statements, making submissions on parole applications;;
(e) consideration for the victim's safety and privacy: these include matters such as avoidance of unnecessary contact with the accused, protection of the victim's address, telephone number and other contact details, advice about crime prevention and lawful protection from violence and also intimidation by the accused;
(f) information and assistance with access to compensation and reparation: how this may be obtained, where compensation orders may be part of the sentence, facilitating application for it.

[33] South Australia – section 4

It is not always clear that these are rights in the sense in which David Derham used the term, for they provide for no remedy at law and there is little sanction (apart form complaint) if they are not respected. To this extent, they differ from the rights of an accused person, especially rights such as that to a fair trial.

It is also not clear that, while these rights have been enumerated and enshrined in legislation, they are all the rights that are or ought to be enjoyed by victims in the criminal justice system.

The task of respecting these rights mostly falls to the prosecutor or, sometimes, to the police, as they have most contact with the victim. Most Australian Offices of Public Prosecutions have established specialist services to attend to the needs of victims and vulnerable witnesses. All State and Territory Offices, except in Western Australia, have what are generally known as Witness Assistant Services. Western Australia did not establish one as the then Director considered that such a service located in his office may compromise its independence.[34]

In the other States and the Territories, the Services generally used trained social workers or counsellors who deliver such services as:

- information on outcomes and notifications regarding the particular matter;
- information about how courts operate and arranging court tours;
- attending with victims at conferences with prosecutors to explain matters in non-legal terms and to deal with the trauma and emotional effects of decisions, such as to discontinue prosecutions;
- crisis counselling, but not ongoing counselling;
- referrals to and arranging help from victim agencies, court companion services, counselling agencies and other support groups;
- arranging interpreters or special needs and dealing with safety concerns; and
- debriefing.[35]

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[34] The then Director, Mr John McKechnie QC expressed this view to the then Director General of the WA Ministry of Justice in a letter dated 15 August 1995.

[35] Nuala Keating, *Review of Services to Victims of Crime and Crown Witnesses Provided by the Office of the Director of Public Prosecutions for Western Australia* (Perth; 2001) at p 37.

Generally, prosecutors find these services very beneficial and have expressed the benefits to be:

- witnesses are better prepared;
- management of victims is more efficient;
- the commitment to victims and legislative requirements are better fulfilled;
- the working relationships with agencies with responsibility for victims are better facilitated;
- victims are generally more satisfied as information is delivered in a more personal way;
- the emotional aspects of dealing with victims is handled better as prosecutors are generally not trained to do it and can concentrate on their core functions;
- providing a "buffer" between victims and prosecutors;
- providing a more personal touch and ensuring that victims are recognised and accepted;
- helping to change the culture of DPP Offices to be more victim sensitive.[36]

Although these are primarily what might be called "relationship" matters, they are exactly what have been defined in the UN Declaration and Victim of Crime Acts to be among the entitlements o victims – their rights.

The identification of the rights that should be accorded to victims is, in my view, very important. Indeed, I have long thought that the content of rights is something upon which there is far too little concentration. Rights are often mentioned without the rigour of their precise specification and content being clear.[37] These then become mere slogans which do little to help the practitioner.

The issue I want, then, to address, is how these matters affect the role of the prosecutor. In this, I want especially to note that the prosecutor in Australia, and

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[36] Nuala Keating, *op cit* at pp 43-4.

[37] See, for example, the comments in my paper "The *Human Rights Act 2004* and the Criminal Law" presented to the Conference Assessing the First Year of the Human Rights Act, Canberra June 2005, at pp6-7.

more widely, is specifically an independent official, independent just as much of the investigator[38] as of the politician[39]and, indeed, the victim.[40]

The prosecutor, as an institution, is a relatively recent phenomenon in the common law world,[41] engrafted onto the legal system in a way that does not always sit easily with some of the norms and culture of that system.

A lawyer, in the common law system, when undertaking professional legal work for which remuneration may be charged and which is regulated by statute, is a professional trained in the law who acts for a client.[42] Without a client, any legal work that a lawyer does is either in his or her own interest ("acting for oneself") or a different kind of work such as academic work or policy work.[43]

While attempts have been made to define a client for the prosecutor: variously as the Attorney-General,[44] the Director of Public Prosecutions[45] or the community,[46] the prosecutor does not have a client in the same way as other lawyers do. This gives a special power to the prosecutor but also imposes a particular range of responsibilities on those who act in these positions.[47]

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38 A defect pointed out trenchantly in Justice, *The Prosecution Process in England and Wales* (London: Justice, 1970) at p 6; also to be found in [1970] *Crim LR* 668 at 673.

39 *Clyne v Attorney-General Cth* (1948) 55 ALR 92 at 99

40 *Mensinga v Commissioner Australian Federal Police* (2001) 161 FLR 149 at 152.

41 J Ll J Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964) p336; Sir Thomas Hetherington, *Prosecution and the Public Interest* (Waterlow Publishers: London, 1989) at pp 1-10; G A Woods, *A History of Criminal Law in New South Wales* (Sydney: Federation Press, 2002) pp22, 49.;John H Langbein, *The Origins of Adversary Criminal Trials* (Oxford: Oxford University Press, 2003).

42 Julian Disney et al, *Lawyers* (Sydney: The Law Book Company, 1986) pp61-63.

43 This may be a slight oversimplification, but it is clear that in private practice, all lawyers have to have a client of one kind or another.

44 or, perhaps more precisely, the Crown: *R v Bunting* (2002) 84 SASR 378 at 391-2.

45 *R v Bunting* (2002) 84 SASR 378 at 391.

46 *BWM* (1997) 91 A Crim R 260 at 267; *Mallard v The Queen* [2005] HCA 68 at [82]. This is the most common characterisation of the prosecutor's role. None of these provide any real "client" for the prosecutor.

47 The untrammelled discretion which this may be seen to give to the prosecutor and how that has been confronted is discussed in Richard Refshauge, "Prosecutorial Discretion – Australia)" in G Moens and R Biffot, *The Convergence of Legal Systems in the 21st Century* (Brisbane: Australian Institute of Foreign and Comparative Law, 2002) pp353-390.

Similarly, when engaged in litigation the prosecutor does not operate on a level of equality[48] or "mirror-responsibility" with his or her opponent in the way in which a lawyer engaged in civil litigation operates. This is not limited to the higher standard of proof – beyond reasonable doubt[49] – but includes issues of the burden of proof[50] (except in special, limited circumstances), disclosure[51] and professional conduct.[52]

Considering that the prosecutor is a representative of the State which has the power to interfere with the life, liberty and property of the citizen, this is neither surprising in a liberal democratic society nor inappropriate. I certainly do not complain of it. It does, however, lead to a tension in the prosecutor's relations with the particular players in the criminal justice system. It also influences and is responsible for the prosecutor's role in that system.

That tension with the legal profession, especially those who act for defendant, is usually overcome by the collegiality one expects from professional colleagues.[53] Indeed, it may be argued that it is no different from the kind of tension that may exist between those who regularly act for personally injured plaintiffs and those who regularly act for defendant insurance companies, though I suspect it is of a somewhat different kind because in such cases one can impute perceived baser motives or actions to the client, a device not available to the prosecutor. Thus, there can be a personal overtone to the tension.

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48 This is to be distinguished from the principle of "equality of arms" which is "generally agreed that it is an essential element of a fair trial": Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005) p94. The principle was described in *Dombo Behen v Netherlands* (1994) 18 EHRR 213 as implying "that each party must be afforded a reasonable opportunity to present his (sic) case – including his (sic) evidence – under conditions that do not place him (sic) at a substantial disadvantage vis-à-vis his (sic) opponent". In *Bulut vAustria*, (1997) 24 EHRR 84, the principle was applied to criminal cases but omitting the reference to evidence (perhaps because accused persons do not often present evidence) and omitting the word "substantial" before "disadvantage".

49 *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373-4.

50 *Woolmington v DPP* [1935] AC 462 at 481.

51 *McIlkenny v R* (1991) 95 Cr App R 287 at 312. Australian Directors of Public Prosecutions have now incorporated into their guidelines and policies an obligation to disclose material to the defence, probably wider than is presently required by law.

52 Most professional conduct rules for lawyers make specific provision for prosecutors. See, for example, rules 62-72 of the Australian Capital Territory Barristers Rules. The Office of the NSW Director of Public Prosecutions has a Code of Conduct.

53 See, for example, "The Work of a Barrister: A General Description" in DL Harper, AJ Kirkham and A J McIntosh, *The Victorian Bar, its Work and Organisation* (Melbourne: Victorian Bar Council, 1990);

The more relevant tension is with the victim (a term I use in the sense used in the UN Declaration[54]). Victims of Crime in the common law tradition are truly the forgotten of the criminal justice system,[55] their role in the prosecution of crime overtaken first in the 14th Century by the central government[56] and then further in the 19th Century by an increasingly professionalised prosecution system,[57] to the stage when the victim became almost an appendage to the system. This has, however, been challenged by the dramatic change in the approach to victim participation from perhaps the enactment of the first Victims Bill of Rights in Washington in 1979.[58]

Nevertheless, the victim remains largely a bystander to the criminal justice system in the contemporary common law tradition,[59] a witness to prove the commission of the crime and its effects but exerting little influence on the course of investigation, prosecution, trial or sentence. It is, therefore, hardly surprising that the increasingly empowered victims' movement is embracing restorative justice which gives centrality to the victim and his or her interaction with the offender.[60]

The prosecutor is, however, heavily dependent on the victim, without whose co-operation the prosecution will often founder, but whose interests the prosecutor in discharge of his or her duty may completely override in the charges that are laid, the

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Sir Gerard Brennan, "Ethics and the Advocate" Bar Association of Queensland, Continuing Legal Education Series, No 9/92 – 3 May 1992.

54 The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 29 November 1985, 96th plenary meeting: A/RES/40/34. The Declaration defines "victims" as "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. 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 indicates, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.

55 R Clerous, "Sweeping Reforms Proposed in Payment to Victims of Crime", *Toronto Globe and Mail* Nov 6, 1987 p2; Peter Grabosky "Victims" in George Zdenkowski, Chris Ronalds and Mark Richardson, *The Criminal Injustice System Volume Two* (Sydney: Pluto Press, 1987) p143.

56 Alan N Young, "Two Scales of Justice: A Reply" (1993) 35 *Criminal Law Quarterly*, 355 at 365-6.

57 Alan N Young, *loc cit*, p366; J Ll J Edwards, *op cit* (note 1), ch 16.

58 D Roland, "Progress in the Victim Reform Movement" (1989) 17 *Pepp L Rev* 19 at 40.

59 M Wolfgang, "Making the Criminal Justice System Accountable" (1972) *Crime and Delinquency*, January, 15 at 18.

60 Gerry Jonstone, *Restorative Justice: Ideas, Values, Debates* (Cullompton, Devon: Willan Publishing, 2002); Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford: Oxford University Press, 2002). Indeed, in the ACT, the *Crimes (Restorative Justice) Act 2004* provides that a restorative justice conference cannot proceed without suitable victim or substitute: section 42.

nature and conclusion of charge negotiation,[61] the way the prosecution is conducted, the way the victim is treated in cross-examination and, indeed, whether the prosecution proceeds at all. In the absence of a lawyer to protect his or her interests in the prosecution process, the victim not infrequently looks to the prosecutor to fill that role, a task the prosecutor cannot fulfil.[62] This tension is a most difficult one, for the prosecutor is both dependent on and independent of the victim and both of these are basic to the prosecutor's duties and, indeed, effectiveness and propriety of the role.

This tension can be evident at many points. Where it can often be at issue is in the concept of the fair trial. Prosecutors have a duty to ensure that a criminal trial is fair.[63] They do not bear this burden alone, of course. The ultimate responsibility lies with the judge or the appeal courts which supervise him or her. Defence counsel, too, play a role in that what may be seen as a breach of the fair trial may be accepted not to have been so in a particular case if ignored by defence counsel or at least not the subject of complaint at the time.[64]

Nevertheless, the prosecutor has an overriding duty to the fairness of the trial,[65] though this is not inconsistent with a firm presentation of the prosecution case, namely that an offence has been committed by the accused, pressed to its legitimate strength.[66]

The notion of the fair trial is not one created by the UN Declaration of Human Rights or the International Covenant on Civil and Political Rights.[67] Indeed, the notion is

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61 So-called after the Report by Gordon Samuels AC, QC, *Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Change Bargaining and Tendency of Agreed Facts Report* (Sydney, 2002) where he rejected the term "plea bargaining".

62 Denise Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (Canberra: Office of the Status of Women, 2004) p7.

63 *Mallard v The Queen* [2005] HCA 68 at [82].

64 *R v Ita* (2003) 139 A Crim R 340.

65 Egbert Myjer, Barry Hancock, Nicholas Cowdery (eds), *Human Rights Manual for Prosecutors* (The Hague: International Association of Prosecutors, 2003) p1; *Guidelines on the Role of Prosecutors*, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, A/CONF/144/28/Rev.1 at 189 (1990), article 13.

66 *Boucher v R* (1954) 110 CCC 263 at 270.

67 So far as I can discover, the right to a fair trial was first mentioned in a criminal appeal judgment in the High Court in *Bridge v The Queen* (1964) 118 CLR 600 at 613. It had been mentioned earlier in *R v Macfarlane; Ex parte O'Flanagan* (1923) 23 CLR 518, a deportation case where Isaacs J referred to "the elementary right of every accused person to a fair and impartial trial". In the UK, it was referred to as early

almost inherent in the concept of the criminal justice system. Who would want to be convicted at an unfair trial? No legal system of which I am aware boasts that its trials are unfair, no matter how objectively that may be the case.

What is at issue, however, is the content of that notion and how is it to be framed. While the trial must be fair, to whom must it be fair? It is usually put that an accused has the right to a fair trial, but what does that mean? Does the victim, the prosecution or the community, or all three, have a right to a fair trial, too? Both the courts and the legislators (extended to include those who make international treaties) have contributed to the growth of a significant body of knowledge about that which is or ought to be done to ensure the fairness of the trial.[68] That this knowledge continues to grow is not only testament to the infinite variety of human situations and interactions, but also to the growing moral sense of society which develops the community's acceptable standards from time to time.

Initially, the reforms demanded by the victims reform movement to improve the position of victims in the criminal justice system had no direct effect on the fair trial characteristics. The duties of prosecutors to consult and inform victims, the introduction of victim impact statements, victim support schemes, sometimes supported by fine surcharge programs and greater restitution provisions, may affect sentence,[69] but otherwise had largely little or no impact on the fairness of the trial, though this was not always the view of the defence bar.

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as 1914 in *Ibrahim v The King* [1914] AC 599 at 615. It has been suggested that the right to a fair hearing in the Territory is to be found in Magna Carta (the Great Charter) of 1215: *Sl v KS* [2005] ACTSC 125 at [72]. This is, unfortunately, not quite correct. In the first place, the Magna Carta of 1215 is not in force in the Territory and probably never was; it is the constitutional document of Edward I's reign, the Magna Carta 1297, which is the Magna Carta of the Statute Book of England: Michael Evans and R Ian Jack, *Sources of English Legal and Constitutional History* (Sydney: Butterworths, 1984) p50. See Part 2, Schedule 3, *Imperial Acts Application Act 1986* (ACT). The reference in *Sl v KS*, *supra*, to Article 20 is also wrong; Article 20 of the Magna Carta 1215 does not deal with a fair trial, that is Article 39 which became Article 29 (see reference to it in *Ryan v Registrar of Motor Vehicles* (1997) 129 ACTR 4 at 10) of the Magna Carta 1297. It seems drawing a long bow to ground the right to a fair trial in Article 29 of the Magna Carta 1297 if you consider its actual terms.

68 See, for example, Egbert Myjer, Barry Hancock and Nicholas Cowdery, *op cit* (note 59); Stefan Trechsel, *op cit* (note 42).

69 Alan N Young, *loc cit* (note 16) p359.

A growing recognition of the unacceptability in the course of a trial, that vulnerable victims were re-victimised,[70] particularly victims of sexual offences and children,[71] has, however, led to the innovations which have impacted on the conduct of the trial itself. Thus, rape shield laws have excluded evidence otherwise thought to be of assistance to the defence;[72] victims have been permitted to give evidence from behind screens or by CCTV to remove the trauma of being too close to or seeing the accused otherwise thought to be required for the right of an accused to confront his or her accuser.[73]

The challenge for the prosecutor is to come to such reforms from the perspective of the fair trial.[74] The adversarial system, on which the common law is based, is rooted in the notion of a contest with winners and losers, yet the prosecutor is ethically forbidden from embracing that notion.[75] The question, then, is not what will make the prospects of a conviction more certain, but what is fair and what will contribute to justice. This sounds idealistic, but assumes a practical importance when law reform is proposed[76] or when a forensic point is confronted by a prosecutor, and these happen regularly, sometimes on a daily basis.

This is compounded by calls from time to time for changes to the trial because accused persons have too many rights[77] or new legal and constitutional rights for victims are promoted.

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70 Department of Women (NSW) *Heroines of Fortitude* (Sydney: Department of Women (NSW), 1996) pv. See also Patricia Easteal *Less than Equal* (Sydney: Butterworths, 2001) pp135-6.

71 C Eastwood, "The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System", *Trends and Issues in Crime and Criminal Justice* (Canberra: Australian Institute of Criminology, 2003).

72 Ian Freckleton, "Sexual Offence Prosecutions: A Barrister's Perspective" in Patricia Easteal *Balancing the Scales* (Sydney: Federation Press, 1998) pp151-155.

73 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure. Final Report* (Melbourne: Victorian Law Reform Commission, 2004) pp188-191; M Jones and T Crocker *Responding to Sexual Assault: the Challenge of Change* (Canberra: Australian Capital Territory, 2005) pp130-158.

74 M Jones and T Crocker, *op cit*, pp167-171.

75 *R v Boucher* (1954) 110 CCC 263 at 270.

76 An interesting example of this was the introduction of video recording of confessions, originally opposed by police and prosecutors but supported by defence counsel; now the process has regularly captured confessions on tape which may have earlier been challenged as concocted, sometimes to the chagrin of accused persons and their counsel!

77 This is an oft-repeated cry, especially in the US. See, for example, the colloquium "Do Criminal Defendants have too many rights" (1996) 33 *Am Crim L Rev* 1193. See also Jocelyn M Pollock *Ethics in Crime and Justice: Dilemma and Decisions* (Belmont, Canada: Thomson Wadsworth, 2003) p371; Esther Madriz *Nothing Bad Happens to Good Girls* (Berkley: University of California Press, 1997) p112. A survey in South Africa found that 70% of respondents agreed or strongly agreed that criminal defendants

Prosecutors are not immune from this atmosphere and it can be compounded by their contact with victims. As one Director of Public Prosecutions recently described it:

> "[Prosecutors] work in an environment which is stressful not only because of the amount of work that comes to [them] but also because the very nature of the work itself, in which [they] see on a daily basis statements, photographs, files that involve people who have been the victims of sometimes horrendous and always disturbing crimes.
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> [They] see the carnage that we, as a society, wreak upon each other in the black and white of the statements of witnesses, in the colour of the photographs of the injuries of the victims and in the faces of the families that we deal with every day. That's the nature of the working environment that [prosecutors] come to every day, day after day."[78]

The right to a fair trial must, however, override emotional or populist sentiment, though due regard can be paid to such considerations – due perhaps being the key word. It is not merely a human right in the abstract sense, that is, merely listed and recognised in a covenant, constitution or act, but it is the foundation for the civilised society that most of us want to live in, which places a value on justice as a cornerstone of that society.

In dealing with these issues, however, the compass is not always clear. The jurisprudence on the fair trial is, unsurprisingly, almost exclusively based on that from which the accused is to be protected or that to which the accused is entitled. As one commentator has it, "That is as it should be. A criminal trial is about determining guilt and just punishment of accused, not about personal redress for victims."[79]

It is tempting to suggest, however, that this is a false dichotomy. The real issue in the criminal trial should be the fair conviction and just punishment of the guilty and

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had too many rights: Nigel Biggar (ed) *Burying the Past: Making Peace and Doing Justice After Civil Conflict* (Washington DC: Georgetown University Press, 2003) p165.

78 Director of Public Prosecutions, South Australia *Annual Report 2004-05* (Adelaide: Director of Public Prosecutions, 2005) p1.

79 Don Stuart, *Charter Justice in Canadian Criminal Law* (Scarborough Ontario: Carswell, 2001) p37.

the acquittal of the innocent.[80] This is, of course, subject to human fallibility, but is nevertheless the ultimate aim. The tension is, of course, in the two parts. If everyone charged was convicted, no matter how expert and ethical our police forces we would convict all the guilty – but many innocent persons as well. Conversely, if we acquitted all those charged, we would achieve the acquittal of all the innocent – but all the guilty would go free. Statements that "Better that ten guilty persons escape than that one innocent suffer"[81] may indicate the trend of the balance to be struck but are virtually useless in providing a real basis for evaluation of the appropriate incidents of a fair trial.

An issue that is increasingly arising and I sense a question being asked by victims is whether the word "fair" in the notion of the "fair trial" has a meaning beyond fairness to the accused. Fairness to the victim and fairness to the community are terms that one hears more frequently in this context.[82] There are, perhaps, germs of this idea in article 4(d) of the UN Declaration, which calls on Member States, as part of their obligation to Victims of Crime under the Declaration:

> "To establish and strengthen the means of detecting, prosecuting and sentencing those guilty of crimes;"[83]

Does this not mean that the citizen, especially the victim of crime has a right that the guilty should be exposed, convicted and punished?

Indeed, in the European Court of Human Rights one decided case goes very close to suggesting that a victim may have a right under the European Convention that an

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80 William Pizzi, *Trials Without Truth* (New York: New York University Press, 1999) p24; Frederich Schauer and Walter Sinnott-Armstrong, *The Philosophy of Law* (New York: Oxford University Press, 1995) p936. There is, however, an important principle in the criminal law that the truth can be bought at too high a price: *Pearse v Pearse* (1846) 1 De G & Sm 12 at 28-29; 63 ER 950 at 957. For more modern examples of such an approach, see *The Queen v Ireland* (1972) 126 CLR 321 at 335, *Ridgeway v The Queen* (1995) 184 CLR 19 at 52.

81 William Blackstone, *Commentaries*, vol 4 at 358.

82 C J Sumner "Victims of Crime and Criminal Justice" in Office of the NSW Director of Public Prosecutions, *The Role of the Independent Prosecution Office in Ensuring Probity and Fairness in the Criminal Justice System* (Sydney: Office of NSW DPP, 1997) p44 at 47. Brian Russell "Prosecutors seek equal jury strikes", *The Albany Herald*, 17 January 2004; Press Release of Lee Rhiannon MLC, NSW Green MLC, 16 September 2005; Ian Munro "Getting a Fair Hearing", *The Age* 7 June 2003; UK Parliament, *House of Lords Hansard*, 16 June 2003, column 616. As one victim sourly put it after the killer of his step-son was acquitted of both murder and manslaughter, "Criminals have more rights than smokers".

83 Article 4(d).

alleged offender be prosecuted and, if guilty, punished.[84] Though this doctrine does not seem to have been specifically developed, more recently, that Court has found that a victim who, because of the particular system by which victims can participate in criminal proceedings, has become a party to criminal proceedings has a right to a fair trial even though no civil remedy is claimed.[85] Were such a doctrine to be developed further, it would clearly greatly challenge to the independence of the prosecutor.

Nevertheless, the common law courts have not developed the concept of the right to a fair trial to include any right that the representatives of the community might have, though there may be a basis for it in the fact that the right to a fair trial is not limited to criminal proceedings[86] and, clearly in civil proceedings, the fairness of the proceedings would not be limited to one only of the parties to the trial.

The right of a victim to have a fair trial has so far made no impression in common law jurisprudence at all. Some commentators, indeed, resist much involvement of the victim at all, suggesting that this is inconsistent with "the principles of substantive criminal law and a coherent system of criminal procedure."[87]

Thus, there seems little jurisprudence to help the prosecutor explain satisfactorily to a victim why apparently probative evidence is excluded from consideration by the jury, why they are made to feel that they are on trial themselves, why the accused can remain silent and it not be counted against him or her. Such difficulties can, of course, can lead to frustration for the prosecutor[88] and despair among victims.

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84 *X and Y v Netherlands* (1986) 8 EHRR 235.

85 *Perez v France* No 47287/99, 12 February 2004.

86 Article 6 European Covenant on Human Rights; Article 10 Universal of Declaration of Human Rights. See Nihal Jayawickrama, *The Judicial Application of Human Rights Laws* (Cambridge: Cambridge University Press, 2002) p481.

87 Professor Michael L.Perlin of the New York Law School recently wrote "…victims' families have far too much say in the criminal justice system and that this is one more step towards the entire defragmentation of a constitutionally-based system of criminal justice…I believe that the infusion of more victim-family involvement in the criminal justice system…is a mistake for anyone who takes seriously any of the principles of substantive criminal law and a coherent system of criminal procedure" in a e-mail list on therapeutic jurisprudence recently. See also Susan Bandes "Empathy, Narrative, and Victim Impact Statements" (1996) 63 *University of Chicago Law Review* 361, commenting on the US Supreme Court decision in *Payne v Tennessee* 501 U>S> 808 (1991) which established the use of victim impact evidence in capital murder cases.

88 See, for example, Margaret Cunneen's 2005 Sir Ninian Stephen Lecture at the University of Newcastle.

The orthodox analysis is that the fair trial of criminal proceedings refers to the rights of the accused that are protected to the extent necessary to ensure fairness for him or her.[89] After all, human rights generally refer to rights qua the state apparatus, not qua fellow citizens. Rights of the victim are not ignored but are then respected only to the extent that they are consistent with the fairness of the trial for the accused.

The approach now becoming more and more accepted, however, is that the relevant rights in a trial are not part of a "zero sum game";[90] that the respect accorded to the rights of a victim will not necessarily derogate from the rights of the accused.[91]

One example of where the victim's rights and the accused's rights directly conflict occurs in the ACT's Family Violence Intervention Program.[92] An alleged offender is, according to legislative fiat,[93] generally arrested, and only – and rarely – granted bail at the police station if the police officer is positively satisfied that the victim will be safe.[94] Bail is, of course, available at court but usually the lapse of time is, on the research that has been done in this area, sufficient to ensure the safety of the victim.

Thus, the victim's right to safety directly conflicts with the accused's right to liberty. Interestingly at least one magistrate continually objects to this balance by complaining from time to time that a particular accused may have been unfairly dealt with by an unthinking application of this policy. It would be more realistic if the magistrate were prepared to assume that the policy balance had been settled and that human frailty would occasionally be wrongly applied![95] This is, perhaps an example of how lawyers instinctively prefer the fair trial rights of the accused to those of the victim where they conflict.

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89 Stefan Trechsel *op cit*, (note 42) pp36-7; *Helmes v Sweden* (1993) 15 EHRR 285.

90 Marc Groenhuijsen "Conflicts of victims' interests and offenders' rights in the criminal justice system: a European perspective" in C J Sumner et al (eds) *International Victimology: selected papers from the 8th International Symposium* (Canberra, Australian Institute of Criminology, 1996) p163 at 164.

91 Peter Grabosky, *loc cit* (note 15) at 145-148..

92 Robyn Holder and Nicole Mayo, "What Do Women Want? Prosecuting Family Violence in the ACT" (2003), 15 *Current Issues in Criminal Justice*, No 1 (July 2003) p5 at pp8-13.

93 Section 212(2) *Crimes Act 1900* (ACT).

94 Section 9F, *Bail Act 1992* (ACT).

95 Personal communication with the magistrate concerned. There may be some public comments but I have no transcript and so do not feel able to provide further details.

They do not always conflict, however. Indeed, there are cases where respect for victims can arguably enhance the accused's position.

Recently, one of my senior prosecutors prosecuted a man for a charge of sexual assault. The young victim gave evidence by CCTV as is now mandated in such cases, unless the interests of justice warrant otherwise. The prosecution case was strong. The jury acquitted the accused. Prosecutor, defence counsel and judge were all surprised. The verdict was described by all as perverse. One analysis was that the giving of evidence by CCTV in fact undermined the victim's evidence and may well have contributed to the verdict.[96]

Certainly I am aware of a reasonably strong view among some prosecutors that the giving of evidence by CCTV does reduce the impact and, to some extent, credibility of that evidence.[97]

Such an issue raises a whole host of questions that are not always easy to resolve. Let me explore a few.

The role of the prosecutor is not an easy one in this situation. The duty of the prosecutor is to conduct the prosecution firmly to its legitimate strength, consistent with professional ethical obligations, including the duty to the court.[98] Clearly the prosecutor should aim for a conviction if the evidence justifies it and should use such legal skill and means to secure one as are permitted in this context.

Nevertheless, the prosecutor, whilst not the lawyer for the victim is now mandated to be sensitive to the victim's interests and respect the victim's rights.

If, then, the prosecutor is of the view that the case would be presented more strongly were the victim's evidence to be given in person and not by CCTV, should the

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96 *The Queen v Cobham*, SCC 25 of 2005, 17 October 2005.

97 J Cashmore, *The Use of Closed-Circuit Television for Child Witnesses in the ACT*, (Sydney: Australian Law Reform Commission, 1992) p3-5, 28-20; Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report No 55, Part 2 (Brisbane: Queensland Law Reform Commission, 2000) p200.

98 *Boucher v R* (1954) 110 CCC 263 at 270; Patrick Devlin, *Trial by Jury* (London, Methuen 1966) pp122-3.

prosecutor encourage the victim to consent to such a course despite the right to give evidence by CCTV?

An analogous situation arises in the cross-examination of witnesses, especially vulnerable witnesses. There is a view amongst some prosecutors that when defence counsel vigorously cross-examine such witnesses, objections by prosecutors can be counter-productive since they can imply to the jury that the witness is unreliable because she – or he – needs such protection or, perhaps, has something to hide from the cross-examiner.[99] There is plenty of power in the court to stop cross-examination which is unduly annoying, harassing, intimidating, offensive or oppressive and an objection should bring it to an end.[100] Has the prosecutor a duty to do so?

Other similar examples could be given.

The answer to such questions is not easy. As so often happens, it can depend on the precise situation at the time. The issue of whether to prefer the interests of securing a conviction over the re-victimisation of the victim in general is no easier to answer. Clearly the prosecutor has a duty to prosecute persons charged with crimes and if that is not done the value the criminal law provides to the community is lost. Nevertheless, the notion of a fair trial in itself says that such prosecution is not to be conducted at all cost and prosecutors have guidelines and policies to help them achieve that balance.

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99 Personal communications with various prosecutors. See, however, David I Gilbert, Michael E Gilfarb and Stephen K Talping, *Basic Trial Techniques for Prosecutors* (Alexandria, Virginia: American Prosecutors Research Institute, 2005) p7 for comments along this line, but in a different context. The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* (Sydney: ALRC and HREOC, 1997) found that "counsel, magistrates and judges rarely intervene" at p346.

100 Such as in section 41, *Evidence Act 1995* (Cth). See also Salvatore Vasta "Protecting Witnesses from Aggressive Cross-Examination", Paper delivered to the 10th Annual Conference of the International Association of Prosecutors, 29 August – 1 September 2005, Copenhagen. Nevertheless, judicial officers are recorded as being quite reluctant to intervene to stop such cross-examination even when harassing by being repetitive, incomprehensible or intimidating: J Cashmore and K Bussey, *The Evidence of Children* (Sydney: Judicial Commission of NSW, 1995) p19.

It may be time we, the Directors, worked out guidelines and policies to help prosecutors balance the task of securing a conviction with the interests and rights of the victim.

I have argued before that there is a respectable case for suggesting that the rights of the victim could be better protected were the victim entitled to legal representation at the trial.[101] This is done in a number of European countries, especially the Scandinavian ones.[102] It is true that in these countries the civil law provides for a so-called "inquisitorial" system of litigation as opposed to the Australian common law adversarial system.[103] It is clear, however, that both conduct fair trials, so the participation of a victim representative cannot be compromising that. It is also true that the primary concern of the victim's participation in those countries is compensation or restitution.[104] It is, however, not the sole or only legitimate concern in those systems and there is no reason to think that it should be so limited subject, of course, to the overriding supervision of the prosecution. We continue to permit private prosecutions, after all.[105]

Such representation would certainly clarify the clash of objectives and considerations I have mentioned above with which a prosecutor must grapple and would admirably fulfil the Declaration's injunction to allow "the views and concerns of victims to be presented and considered at appropriate stages of the proceedings."

Such proposals are rarely considered and, if considered, dismissed usually quite peremptorily as inconsistent with the common law system or because they "would

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101 Paper presented to the Victims of Crime Co-Ordinator Conference – Innovations – Promising practices in responses to victims and witnesses in the criminal justice system, Canberra, October 2003.

102 This is comprehensively set out in Ernestine Hoegen and Marion Brennan *Victims of Crime in 22 European Criminal Justice Systems* (Nijmegen, Netherlands: Wolf Legal Productions, 2000). Thus a victim may be an auxiliary prosecutor (Denmark, Norway, Portugal, Sweden and Turkey) or a subsidiary prosecutor (Austria, Liechtenstein or Switzerland). In Iceland, victims have a right to a lawyer to protect their interests, though they do not participate in the prosecution. Almost all European countries permit a victim to bring a private prosecution.

103 For useful definitions, see Australia Law Reform Commission *Managing Justice* (Sydney: ALRC, 2000) Report No 89, pp90-1.

104 See Ernestine Hoegen and Marion Brennan, *op cit* (note 58).

105 A "useful constitutional safeguard": *Gouriet v The Union of Post Office Workers* [1978] AC 435 at 498. It has, however, been described as anachronistic: Editorial [1972] 1 *Crim LJ* 230. It has also been said to "becoming regarded with increasing disfavour": *R v Commissioner of Police of the Metropolis; Ex parte Blackburn* [1968] 2 QB 118 at 149. Given the costs, it may also be a largely theoretical option: John Bishop, *Prosecution Without Trial* (Sydney: Butterworths, 1989) p156.

hopelessly burden and confuse an already overtaxed and under-resourced criminal justice system".[106] Whilst I heartily endorse that description of the criminal justice system, I do not believe the criminal justice system would be burdened inappropriately and confused – at least not after the initial confusion – or, indeed, at all.

Nevertheless, while it is worth considering and considering seriously, I have no illusions about an early implementation if it ever eventuates.

The second issue is that the debate about victims rights in the criminal justice system is usually raised in terms of competing rights: the rights of the victim and the right of the accused to a fair trial.[107] We know that rights can compete[108] and that there is always a need for the balancing of competing rights.[109] It needs to be said, however, that not all rights of victims clash with rights of accused persons[110]*;* that is to say, as I have mentioned above, that the rights in a trial are not a "zero sum game".[111]

I wonder, however, whether what are described as rights always are so. In the ACT, a vulnerable witness certainly has a right to give evidence by CCTV; the relevant legislation says so.[112]

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106 Don Stuart, *op cit* (note 39), p37.

107 Peter Grabosky, *loc cit* (note 15), p145. See also Department of Justice WA, Court Services Division, *Discussion Paper on Victims' Charter of Rights* (Perth: Department of Justice, n.d.) p10 where it is noted, "The concept of rights also carries with it the potential for rights conflicts and clashes of rights. This has lead to imposing strict limitations on victims' rights. Victims' rights apply to the extent that they do not interfere with offenders' rights nor the concept of an accused being 'innocent until proven guilty'".

108 Generally a hierarchical approach to competing rights has been rejected: *Dagenais v CBC* (1994) 34 CR (4th) 269 at 298; *Crawford* (1995) 37 CR (4th) 197 at 216.

109 The rights of victims and the rights of accused persons is often referred to by politicians who sometimes speak of "rebalancing" these rights: Jon Stanhope MLA "Human Rights", Speech given at 9th International Criminal Law Congress, 28-30 October 2004, pp9-10. So widely is this terminology used that the NSW Board of Studies, *Legal Studies Stage 6 Support Document* (Sydney: Board of Studies NSW, 1999) p19 suggests a question in the Focus Study on Crime "To what extent is there a proper balance between the rights of victims and the rights of the community; and between the rights of the victim and the rights of accused people".

110 Some clearly do. For some examples, see J Miles "The Role of the Victim in the Criminal Process: Fairness to the Victim and Fairness to the Accused" (1995) 19 *Crim LJ 193 at 196.* On the other hand it is strongly asserted that current changes to make the criminal justice system fairer to victims and the community have not led to innocent people being unfairly convicted: C J Sumner *op cit* (note 42) at 47.

111 Marc Groenhuijsen, *op cit* (note 46).

112 Section 43, *Evidence (Miscellaneous Provisions) Act 1991*.

It is not so clear that a victim has a right to be protected from harassing or oppressive cross-examination. The *Evidence Act 1995* merely permits the court to disallow such questions.[113] Does that make it a "right"?

The Declaration, to which one would also turn as a source of rights, is quite silent on such issues, even at a general level. The highest it gets is in article 6(d) of the Annex to the Declaration which merely provides that

> "6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
>
> …
>
> (d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation."

Similarly the somewhat more fulsome Australian Victims of crime Acts are silent on such matters.

It is easy to convert one's wishes and desires into the status of rights, but in our growing culture of human rights, we must also be vigilant to protect that which is a right by ensuring that the concept is not diluted by the use of the term "right" for that which is a wish, an expectation or a hope.

That is not to say that the interests of victims, as opposed to their rights, are unimportant. Indeed, it seems to me that there is a proper case for saying that the Declaration, and the Acts based upon it, construed as a whole say that the victim has a right to have his or her interests considered and given proper value without needing to identify a range of arguable, perhaps even questionable, rights.

Prosecutors need to know what is asserted as a right and to understand it with precision. If, as I strongly maintain, prosecutors are guardians of the fair trial right, then they need to know what this entails so that they may ensure that it is protected.

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[113] Section 41, *Evidence Act 1995* (Cth).

The third issue is the question of balance[114] when one comes actually to have to resolve the conflict of rights.[115] Such a balance is usually effected by a judicial officer,[116] but, of course, prosecutors have to undertake that process from time to time, as perhaps the above examples show.

The traditional way in which decisions such as these are made is by assigning them to judicial officers[117] and ensuring that such officers are competent and skilled and independent.[118] They rely, of course, on the researches and submissions of those who appear before them, including prosecutors.[119] While all that is true, it seems to me that it is not enough.

The common law tradition relies on precedent[120] and precedent can be very important to develop a jurisprudence in which to ground such decisions so that they are not capricious – not in the sense that the relevant judicial officer would not be conscientious in making the decision, but in the sense that they depend alone on the personal sense of justice of the judicial officer.

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114 There are, of course, ways in which the interference with a right can be minimised or avoided by the adoption of alternative measure. For an example, see *Forbutt v Blake* (1981) 51 FLR 465 at 475.

115 There are various ways in which the resolution of such conflicts can occur. These are very helpfully discussed in Peter Bailey, *Human Rights: Australia in an International Context* (Sydney: Butterworths, 1990) pp20-25. Balance is not the only mechanism for resolving conflicts.

116 C R Ducat, *Modes of Constitutional Interpretation* (St Paul, Minnesota: West Publishing Company, 1976) pp200-209 posits 3 judicial approaches – the "absolutism", "balancing of interests" and "preferred freedoms".

117 Indeed, submission of disputes to a judicial officer is an important part of the constitutional framework of a civilised community. "A system of civil justice is essential to the maintenance of a civilised society. The law … safeguards the rights of individuals, regulates their dealings with others and enforces the duties of governments"; Lord Woolf *Access to Justice* (London: HMSO, 1995) p2. Not everyone is so enthusiastic, of course: "Modern Society has generally come to accept litigation as, at worst, a necessary evil, and perhaps with substantial redeeming features": Sharon Roach Anleu and Wilfred Prest "Litigation, Historical and Contemporary Dimensions" in Sharon Roach Anleu and Wilfred Prest (eds), *Litigation Past and Present* (Sydney: University of NSW Press, 2004) p19.

118 A Mason "The Appointment and Removal of Judges" in Helen Cunningham (ed) *Fragile Bastion* (Sydney: Judicial Commission of NSW, 1997).

119 *Stead v State Government Insurance Commission* (1986) 161 CLR 141; *Giannarelli v Wraith* (1988) 165 CLR 543; A Mason, "The Independence of the Bench; the Independence of the Bar and the Bar's Role in the Judicial System" (1993) 10 *Aust Bar Rev* 1 at 3.

120 See Rupert Cross *Precedent in English Law* (Oxford: Clarendon Press, 1977), J L Montrose, *Precedent in English Law* (Shannon, Ireland: Irish University Press, 1968), Alastair MacAdam and John Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (Sydney, Butterworths, 1998).

Appellate review can assist this process, but it is notoriously difficult where such decisions are involved since they rely on a discretion or a balance which is difficult to challenge on appeal.[121]

It does seem to me that these issues support the already strong case for widening the pool from whom we select our judicial officers.[122] That is not to say that learning in the law is not a pre-condition to selection, but that the personal situation and experiences of a wider range of appointees will lead to the cross-pollination of reasoning and decision which will provide for better decision-making.

In addition, it seems to me that mandatory judicial education is an important feature of such a system.[123] Lawyers in practice are learned and experienced in the law, but have recognised that continuing legal education or professional development is essential for the proper delivery of their services.[124] They have made it

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121 *House v The King* (1936) 55 CLR 499.

122 Much has been written and said about judicial selection, including the widening of the pool for candidates to include particularly women but also lawyers from a non-English speaking background and non-barristers. Some of the themes can be seen in publications such as S Cooney "Gender and Judicial Selection: should there be more women on the Courts?" (1993) 19 *Melb ULR* 20, Christopher Kendall, "Appointing Judges: Australian Judicial Reform Proposals in the Light of Recent North American Experience" (1997) *9 Bond LR* 175; A Marfording 'The need for a more balanced judiciary: the German approach" (1997) 7 *J Judicial Admin* 33; Max Spry *Executive and High Court Appointments*, Parliamentary Library Research Paper 7, 10 October 2001 (Canberra: Parliamentary Library, 2000); M Gleeson "Judicial Selection and Training: Two Sides of the One Coin", Speech to Judicial Conference of Australia Colloquium in Darwin 31 May 2003; M McHugh "Women Justices for the High Court" Speech to the High Court Dinner, Perth 27 October 2004; G Williams "High Time to Reform the High Court Selection Process", On Line Opinion, 30 November 2004; Kate Gibbs "Legal eagles thrash out judicial selection" *Lawyers Weekly* 24 October 2005.

123 Judicial education itself is now common. See Livingston Armytage, "Judicial Education on Equality" (1995) 58 *Mod LR* 160; Peter A Sallmann, "Judicial Education: Some Information and Observations" (1988) 62 *ALJ* 981. Support has come from the highest level: G Brennan "The State of the Judicature" (1998) 72 *ALJ* 33 at 36-7. Indeed, the Australian Law Reform Commission reported in 2000 that "[j]udicial education, once the subject of controversy, is now well accepted as a natural part of the professional development of judicial officers": Australian Law Reform Commission, *op cit* (note 59) p161 para 2.149. This was not always so: Peter Young, "Current Issues" (1999) 73 *ALJ* 609 at 610-1.
On the other hand, mandatory judicial education has been vigorously and almost universally opposed; the Australian Law Reform Commission has opposed it as has the Law Council of Australia: Australian Law Reform Commission, *op cit* (note 59) pp164-5. It is said that it "would tend to compromise judicial independence". This can only be so if, contrary to all proposals, it is not under judicial control. It is, in any event, hard to see how voluntary judicial education is compatible with judicial independence while mandatory judicial education is incompatible with it. Nevertheless, I acknowledge that this is an argument that is unlikely to succeed any time soon. Of course, the most significant problem of implementation of mandatory judicial education is that there could be no reasonable sanction to enforce compliance.

124 Consideration of mandatory continuing legal education was mooted as long ago as 1977: RAF Stewart, "Legal Education" (1977) 51 *ALJ* 470 at 478-9.

compulsory.[125] Despite some views to the contrary, the apparent metamorphosis of lawyer to judicial officer does not bring with it an omniscience which obviates that which the day before was compulsory. Indeed, often the transition from a narrow legal practice to a wider judicial jurisdiction makes that case the stronger. As to making it mandatory, there will, of course, be some difficulties but it is inevitable that those who would most benefit are those who are usually less inclined to participate.

It also seems to me that academic learning is under-appreciated in legal discourse in practice.[126] In this area, however, I regard it as having a potential to be very valuable. The complexity of the issues and the range of jurisprudence from especially international sources means that academic lawyers should be encouraged to develop research and to publish in these areas and that practitioners and judicial officers should be encouraged to read and seek assistance from such research.

The criminal justice system is now required to engage with victims. This engagement includes the development of a principled and cohesive integration of victim rights and issues into the fair trial. This is no easy matter and, in large measure, falls upon the prosecutor to initiate or facilitate and to support. The challenges that these present need further discussion and consideration but cannot be ignored. This cannot be allowed to infringe on the independence of the prosecutor but must be taken seriously. That is the prosecutor's challenge in this area.

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125 Continuing legal education has been mandatory for solicitors in NSW since 1985: Australian Law Reform Commission, *op cit* (note 59) p155. Continuing professional development is mandatory for barristers in NSW and is now an important part of the risk management scheme of the Bar needed for approval of its Professional Standards Scheme: Justin Gleeson "New South Wales Bar achieves Professional Standards Scheme" *Bar News* Summer 2004/2005, p15 at 16. On 1 July 2004, Victoria introduced mandatory continuing professional development for all the State's lawyers: F Wilkins "Continuing professional development: What do law firms want" *Lawyers Weekly* 15 October 2004. There is not uniform support: "Continuing legal education: Too little or too much" *Lawyers Weekly* 18 June 2004. Some still express concern about all continuing legal education: David Faram "Mandatory CLE raises professional standards" *Law Institute Journal*, September 2002, p2. The evidence for the effectiveness of these programs is certainly unclear: D Weisbrot *Australian Lawyers* (Melbourne: Longman Cheshire, 1990) p152.

126 It is regrettably common for practising lawyers to disparage academic lawyers, though there is an increasing interchange between the academy and at least law firms. Thus, in Canberra, a number of academic lawyers act as consultants to law firms in the city and there has been a stream of academics, or lawyers who have taught, joining the bar or the bench: Austin J, Weinberg J, Heydon J and Finn J are examples as are Robert Baxt and Nick Seddon. Of course, many practitioners have taught in law schools on a part-time basis, such as Gummow J and Meagher JA.