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Victorian Law Reform Commission
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Via email: law.reform@lawreform.vic.gov.au

Public Submission to the Victorian Law Reform Commission- ‘Improving the Response of the Justice System to Sexual Offences: Issues Papers A-H’

Dear The Hon. Anthony North QC,

Thank you for the opportunity to respond to Issues Papers A-H ‘Improving the Response of the Justice System to Sexual Offences’ (‘Issues Papers’).

The eight Issues Papers (A-H) focus on different aspects of the justice system’s response to sexual offences. Issues Paper A ‘Working Together to Respond to Sexual Offences: Systems’ is concerned, *inter alia*, with pathways to justice as well as relationships within the system and with other systems. Issues Paper B ‘Sexual Offences: Key Issues in the Criminal Justice System’ focuses on issues including attitudes of people in the criminal justice system and their understanding of sexual harm as well as support for people who have experienced sexual harm. Subsequently Issues Paper C ‘Defining Sexual Offences’ raises questions about the definition of sexual offences and consent. Issues Paper D ‘Sexual Offences: Report to Charge’ contemplates the investigation process and alternative options for reporting. Issues Paper E ‘Sexual Offences: The Trial Process’ is concerned with the trial proper and ponders issues such as the charging and prosecuting decisions, pre-trial procedures and special procedures as well as alternative arrangements for giving evidence. Issues Paper F ‘People Who Have Committed Sexual Offences’ raises perpetrator-related matters. While Issues Paper G ‘Sexual Offences: Restorative and Alternative Justice Models’ contemplates approaches such as restorative justice and inquisitorial models, the consultation closes with Issues Paper H ‘Sexual Offences: Civil Law and Other Non-Criminal Responses’ concerned with civil liability and redress schemes.

The following submission addresses issues raised in the Issues Papers by responding to a number of questions put forward by the Victorian Law Reform Commission in Issues Papers A, B, D, E and G.

I BACKGROUND

I am a senior lecturer in criminal law and procedure based at the University of Southern Queensland. My research interests include criminal law and procedure with a focus on the treatment of crime victims in different criminal justice systems around the globe. My PhD analyses the role of victims in criminal procedure in Germany and Australia in relation to participation in light of the 1985 *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. I am the author of several articles in Australian and international journals and chapters in edited book collections, which ponder the parameters of victim participation in inquisitorial and adversarial systems.¹ My monograph *Victim Participation Rights-Variation Across Criminal Justice Systems* (Palgrave, 2019) was awarded the 2020 American Society of Criminology, Division of Victimology Robert Jerin Book of the Year Award.

I have a particular interest in participatory rights including victims' legal representation during proceedings and the question of what role an independent legal representative for victims could play in the Australian context. Much of my submission below relates to this notion and I hope that my ideas and comments can be useful for the Victorian Law Reform Commission in considering how to amend law and policy to better protect victims of sexual offences and improve their experience in the criminal justice system.

II. ISSUES PAPER G: SEXUAL OFFENCES: RESTORATIVE AND ALTERNATIVE JUSTICE MODELS

Question 3: Is there a role for an inquisitorial model or features for sexual offences? If so, what should this look like?

Issues Papers A-H are concerned with improving the response of the justice system to sexual offences. It is important to note that victims of sexual offences in Victorian criminal proceedings mainly act alone and frequently may not be aware of the rights already available to them, including, for example, the right to be informed about certain aspects of the proceedings, as well as the availability of specific protections. Consequently, although victims' rights in Victoria may exist on paper many victims may not or only sparingly exercise them in practice. The large number of different laws and policies relating to victims in general and particularly to victims of sexual offences may make it extremely difficult for a lay person to identify what their rights are and how to exercise them. While criminal justice authorities have been placed under the duty to inform victims of their rights in certain circumstances to enhance accessibility this does not always occur in practice.

¹ Kerstin Braun, 'Legal Representation for Sexual Assault Victims - Possibilities for Law Reform?' 25(3) 2014 *Current Issues in Criminal Justice* 819-837; Kerstin Braun, 'Giving Victims a Voice: On the Problems of Introducing Victim Impact Statements in German Criminal Procedure' 14(9) (2013) *German Law Journal* 1889-1908; Kerstin Braun, 'Self- or Cross-Fertilisation? Referencing ECtHR Jurisprudence to Justify Victim Participation at the ICC' in Paolo Lobba and Triestino Mariniello (eds) *Judicial Dialogue on Human Rights the Practice of International Criminal Tribunals* (Brill, 2017) 282-299.

These problems could be overcome, or at least reduced, where an independent legal representative provides victims with the necessary information and exercises respective rights on their behalf. Overall, this could contribute to a strengthened position of victims of sexual offences in practice without necessarily affording them greater procedural participation rights as such.

Some suggest that legal representation for victims cannot be accommodated in adversarial criminal justice systems as they differ structurally to a great extent from inquisitorial systems, where such representation is frequently possible.² This overlooks, however, that legal representation can be tailored to fit existing adversarial parameters and does not have to take the same shape as some broad forms of victim participation available in some jurisdictions. A narrowly tailored role in which the legal representative is available throughout criminal proceedings and merely safeguards the victims' existing rights arguably does not violate the adversarial structure or defendants' due process rights.³

That legal representation can be accommodated in adversarial systems is further evidenced by the fact that an increasing number of common law jurisdictions have afforded victims legal representation during specific stages of the proceedings. Due to enacted crime victims' rights acts in most US states victims have the right to be represented by their own attorney. On the federal level, the *Crime Victims' Rights Act*, 18 USC 3771, provides that

The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a).

Since 2011, New South Wales has introduced a state funded legal representation scheme for sexual assault victims when addressing the court in relation to the prevention or restriction of disclosure of protected sexual assault counselling notes (*Criminal Procedure Act 1986* (NSW) s 299A). Similarly since 1 December 2017 in Queensland, a sexual assault counselling privilege has been introduced.⁴ Eligible counselled persons can request state-funded legal assistance for representation at domestic violence and criminal law proceedings in relation to assessing whether leave will be granted to subpoena protected counselling notes (regarding a related sexual assault) and/or whether material produced under a subpoena can be disclosed.⁵ In South Australia, victims have the right to apply to the Victims of Crime Commissioner to be legally represented in cases that involve 'consultation with prosecution, in criminal and civil proceedings and coronial inquests, as well as initiated legal matters that affect victims in general'.⁶

² See discussion in the British context in Laura Hoyano, 'Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants' 2 (2015) *Criminal Law Review* 107, 115, 117.

³ Similar argument concerning legal representation for victims of sexual offences at the trial stage in Fiona Raitt, 'Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings' 9 (2013) *Criminal Law Review* 729, 742.

⁴ See *Evidence Act 1977* (Qld) Division 2A.

⁵ The sexual assault counselling privilege legal assistance service in Queensland is referred to as *Counselling Notes Protect* and is delivered by Legal Aid Queensland (LAQ) and Women's Legal Service (WLS).

⁶ Michael O'Connell, 'Victims' Rights: Integrating Victims in Criminal Proceedings' Commissioner for Victims' Rights, Government of South Australia, 7 <https://aija.org.au/wp-content/uploads/2017/08/OConnell2.pdf>.

The introduction of legal representation schemes for victims in different instances in a number of jurisdictions shows that legal representation is not *per se* incompatible with the parameters of the adversarial criminal justice system.

It is recommended that victims of sexual offences in Victoria are entitled to an independent legal representative who acts on their behalf during criminal proceedings. The legal representative offers the victim legal support and guides them through the trial process. This includes the right to object to inadmissible questions during cross-examination. The recommendation is based on below analysis, which considers what role a victim’s lawyer could play in Victoria by addressing questions raised in Issues Papers B, D and E.⁷

III. ISSUES PAPER B: SEXUAL OFFENCES: KEY ISSUES IN THE CRIMINAL JUSTICE SYSTEM

Question 1: Is there a need to improve attitudes towards victim survivors or the understanding of sexual harm within the criminal justice system? If so, how?

Traditionally, victims are not considered parties in the adversarial criminal justice system and have no role to play except if required to testify as a witness. In adversarial criminal trials, much emphasis is placed on cross-examination to discredit unreliable or dishonest witnesses.⁸ This creates a ‘highly competitive atmosphere’ at trial, which can be traumatising for victims, especially victims of sexual offences.⁹ In cases where the defence is built on the consent of the victim to the sexual intercourse, the defence tactic during cross-examination can be to focus on the character of the victim in order to discredit their reliability.¹⁰ Studies have found that the sexual activities and history of the victim are raised during cross-examination frequently,¹¹ even though evidence concerning a victim’s sexual reputation is inadmissible and the introduction

⁷ A growing number of scholars is contemplating independent legal representation for victims in adversarial systems especially in the context of victims of sexual offences. See, for example, Jennifer Temkin, *Rape and the Legal Process* (2nd ed) (Oxford University Press, 2002) 293-305; Ivana Bacik, Catherine Maunsell and Susan Gogan, *The Legal Process and Victims of Rape* (The Dublin Rape Crisis Centre, 1998) 17-18; Fiona Raitt, *Research Report for Rape Crisis Scotland: Independent Legal Representation For Complainers In Sexual Offence Trials* (Rape Crisis Scotland, 2010); Kerstin Braun, ‘Legal Representation for Sexual Assault Victims-Possibilities for Law Reform?’ 25(3) 2014 *Current Issues in Criminal Justice* 819; Dee Smythe, ‘Moving Beyond 30 Years of Anglo-American Rape Law Reforms: Legal Representation for Victims of Sexual Offences’ 2 (2005) *South African Journal of Criminal Justice* 167; Margaret Garvin and Douglas E Beloof, ‘Crime Victim Agency: Independent Lawyers for Sexual Assault Victims’ 31(1) 2015 *Ohio State Journal of Criminal Law* 67. For discussion on the victim’s right to counsel in the context of pre-trial discovery see Tyrone Kirchengast, *Victims and the Criminal Trial* (Palgrave Macmillan, 2016) 76-80.

⁸ Louise Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford University Press, 2001) 11; Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (ALRC, 2010) 1334.

⁹ Jonathan Doak, ‘Victims’ Rights in Criminal Trials: Prospects for Participation’ 32(2) 2005 *Journal of Law and Society* 294, 297.

¹⁰ Jessica Kennedy and Patricia Easteal, ‘The Rights (Boxing) Ring: Australian Rape Trials’ in Helen Gavin and Jacquelyn Bent (eds) *Sex, Drugs and Rock&Roll: Psychological, Legal and Cultural Examinations of Sex and Sexuality* (Inter-Disciplinary Press, 2010) 131, 135-136.

¹¹ Analysed in Melanie Heenan, ‘Reconstituting the “Relevance” of Women’s Sexual Histories in Rape Trials’, 13 (2003) *Women Against Violence: An Australian Feminist Journal* 4, 4; Mary Ann Heath, *The Law and Sexual Offences against Adults in Australia*, ACSSA (Issues No. 4) (Australian Institute of Family Studies, 2005) 7; Victorian Law Reform Commission, *Sexual Offences: Final Report* (VLRC, 2004) 56-57.

of sexual history evidence heavily restricted in most Australian jurisdictions. As victims currently do not have the right to legal representation during the trial proper in Australian jurisdictions, they have to face proceedings alone and rely on courts, police and public prosecutors to safeguard their rights.

Affording victims the right to be legally represented may contribute to keeping checks on actors in the criminal justice system during different stages and may ensure that existing rights are complied with. For example, a legal representative will know where information or other support to which victims are entitled has not been adequately provided and will be able to address this shortfall. The knowledge that the victim's lawyer is tasked with identifying and raising potential breaches, thus bringing greater awareness to potential underperformances, may be enough to encourage criminal justice authorities to take their obligations towards victims more seriously. This is less likely to be the case where victims are informed and supported by a numerous different support workers at different stages of proceedings as consistency and continuity of support may be lacking. In 2014, O'Connell, South Australian Commissioner for Victims' Rights at the time, therefore outlined that 'if victims had legal counsel, that would better give them a sense of having genuine rights, legitimacy and identity in the justice process'.¹²

Giving victims of sexual offences the right to be legally represented could help to ensure especially that the cross-examination is less traumatic for them, and that only admissible and appropriate questions are asked. Studies on jurisdictions that have introduced legal representation for victims suggest that by being legally represented during the trial, victims have experienced less hostility from defence lawyers.¹³ Moreover, research has found that 'everyone takes it more seriously' where an independent counsel for sexual assault victims is involved.¹⁴ Being taken more seriously would, in itself, be a benefit for victims of sexual offences.

Question 7: What other issues affect the criminal justice process as a whole, and what should be done to address them?

Sexual offences are underreported, not the least due to victims' fears of ill-treatment in the criminal justice system.¹⁵ Victims who report a sexual offence but subsequently do not wish to proceed can cause the prosecutor to withdraw the case.¹⁶ Smythe¹⁷ and Bacik, Maunsell and

¹² Michael O'Connell cited in Sean Fewster and Ben Hyde, 'SA Victims' Rights Commissioner Says Victims Should Be Represented by Lawyers During Criminal Sentencing Hearing' *The Advertiser* (online) (3 June 2014). <https://www.adelaidenow.com.au/news/south-australia/sa-victims-rights-commissioner-says-victims-should-be-represented-by-lawyers-during-criminal-sentencing-hearings/story-fni6uo1m-1226940821137>.

¹³ Jennifer Temkin, *Rape and the Legal Process* (2nd ed) (Oxford University Press, 2002) 293.

¹⁴ See discussion in Fiona Raitt, *Research Report for Rape Crisis Scotland: Independent Legal Representation For Complainers in Sexual Offence Trials* (Rape Crisis Scotland, 2010) 7.

¹⁵ See also, Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report 114, (ALRC, 2010) 1101.

¹⁶ Denise Lievore, 'Prosecutorial Decisions in Adult Sexual Assault Cases' *Trends & Issues in Crime and Criminal Justice No 291* (Australian Institute of Criminology, 2005) 4.

¹⁷ Dee Smythe, *Parliamentary Submissions to the South African Parliament by the University of Cape Town, Sexual Offences Submission Chapter 8: Legal Representation for Victims of Sexual Offences* (2002).

Gogan¹⁸ have concluded that victims who are legally represented feel more confident and less stressed with a legal representative by their side during the main trial. Affording victims of sexual offences the right to be legally represented could therefore increase their confidence in the justice system and contribute to reducing anxiety over their possible treatment. This could potentially increase the low reporting rates and reduce the high attrition rates in cases concerning sexual offences.

Furthermore, legal representation could help increase the low conviction rates for sexual offences as the cross-examination of legally represented victims could be speedier and produce more accurate testimony. Victims of sexual offences can perceive testifying in court a traumatising and stressful experience. Research suggests that court-related stress can make victims more vulnerable to suggestions by the questioning parties and lead to incomplete event descriptions as well as inconsistent testimony.¹⁹ Studies have suggested that the more support there is for a victim, the better prepared the victim will be to testify²⁰ and that the introduction of a legal representative at trial could improve the actual quality of a victim's testimony.²¹ Better quality testimony may increase the currently low conviction rates in sexual offence trials.

IV. ISSUES PAPER D: SEXUAL OFFENCES: REPORT TO CHARGE

Question 2: What other issues need to be addressed to improve the experience of the police investigation process for adults who have been sexually harmed? How can they be addressed?

The experience of the police investigation process for individuals who have been sexually harmed could be improved if victims were afforded their own legal representative prior to the police investigation. In both Sweden and Denmark, two countries with an inquisitorial investigation and a more adversarial trial stage, this has been the case for decades. There, victims of certain offences, including sexual offences, have had the right to early legal representation by private counsel since the 1980s.²²

In Denmark, legal representation developed in the early 1980s to accommodate victims of certain sexual offences including rape.²³ The Danish legal representation scheme derived from a single case in which a female lawyer sought court approval to represent a female victim during criminal proceedings. While this right did not exist under Danish law at the time, the court allowed the representation in relation to a civil damage claim by the victim.²⁴ Based on this ruling, the lawyer subsequently represented several female crime victims in different cases.

¹⁸ Ivana Bacik, Catherine Maunsell and Susan Gogan, *The Legal Process and Victims of Rape* (The Dublin Rape Crisis Centre, 1998) 18.

¹⁹ Louise Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford University Press, 2001) 21.

²⁰ Fiona Raitt, *Research Report for Rape Crisis Scotland: Independent Legal Representation For Complainers in Sexual Offence Trials* (Rape Crisis Scotland, 2010) 44.

²¹ Dee Smythe, *Parliamentary Submissions to the South African Parliament by the University of Cape Town, Sexual Offences Submission Chapter 8: Legal Representation for Victims of Sexual Offences* (2002).

²² Jennifer Temkin, *Rape and the Legal Process* (2nd ed) (Oxford University Press, 2002) 281.

²³ *Ibid* 287.

²⁴ Susan Caringella, *Addressing Rape Reform in Law and Practice* (Columbia University Press, 2009) 276-277.

This practice ultimately resulted in law reform and the introduction of an official legal representation scheme for rape victims in Denmark in 1987.²⁵

The lawyer's role in Denmark is to provide victims with legal advice before the trial, explain how the trial will proceed as well as offer moral support and advice on possible compensation and restoration claims. Victims have the right to be legally represented early on in proceedings, including when reporting an offence to the police and during initial questioning. Moreover, police officers must inform qualifying victims of their right to legal representation if they are unrepresented. Whether victims wish to have a lawyer is up to them. If they select to be legally represented questioning cannot commence before the lawyer is present.

Legal representation for victims has also been available in Sweden since 1988 and is state funded for certain victims, including victims of sexual offences. The law reform's main aim was to improve the situation for victims in the criminal justice system and reduce secondary victimisation.²⁶ Under Swedish law, the legal representative shall provide support and assistance for the victim. Comparable to Denmark, legal representation in Sweden is also available early on and Swedish victim lawyers can participate in police interrogations.²⁷ A 2012 study by Lindgren, Renck & Diesen²⁸ on the extent to which criminal justice is afforded to assaulted women in Sweden found that prosecutions are more prevalent in cases, where victims were legally represented. In this context, the researchers identified a link between the willingness of the victim's legal counsel to cooperate with authorities and the frequency of cases going to trial.

Similarly, under German law, victims, including those of sexual offences, have the right to legal representation in their role as a victim witness. The legal representative is neither witness nor party to the proceedings but exercises the rights available to their client. In relation to the investigation, the victim's legal representative has the right to be present during questioning by the police, the public prosecutor and the courts.²⁹ Where an unrepresented victim witness cannot protect his or her interests holistically during an interview, courts are under an obligation to order a legal representative for the duration of the interview at public expense.³⁰ Before the interview begins the legal representative must be informed of the main interview content and must receive the opportunity to discuss this, as well as rights and strategies, with their client. Rare circumstances allow for the exclusion of the representative from the interview, for example, if the representative is suspected of being a party to the offence in question.³¹

The legal representative's role in these instances focuses on the interview and examination of their client as a witness, reviewing judicial files and providing general advice. To illustrate this

²⁵ Amnesty International, *Case Closed: Rape and Human Rights in the Nordic Countries: Summary Report* (Amnesty International, 2010) 38.

²⁶ Marie Scheffer Lindgren, Barbro Renck and Christian Diesen, 'Criminal Justice for Assaulted Women in Sweden – Law Versus Practice' 4(1) 2012 *Review of European Studies* 167, 168.

²⁷ Ibid 168; see also Staten Offentliga Utredningar Committee Report, *Målsägandebiträdet-Ett aktivt stöd i rättsprocessen: The Injured party Counsel- An Active Support in the Legal Process*, SOU 2007:6 (Swedish Government Official Reports, 2007) 30-36.

²⁸ Scheffer Lindgren, Renck and Diesen, above n 26, 171.

²⁹ *Code of Criminal Procedure* (Germany) s 68b(1).

³⁰ *Code of Criminal Procedure* (Germany), s 68b(2).

³¹ *Code of Criminal Procedure* (Germany) s 68b (1) sent. 4.

further, the physical examination of a witness can occur against their will, for example, to secure evidence on the victim's body,³² and without court order if loss of evidence is expected. Examinations can include mucous and vaginal smears, depending on the offence in question. While the witness does not have to actively partake in the examination, they must attend, undress if required, and take certain poses necessary for the respective procedures. In this context, the legal representative can generally object to unreasonable examinations on behalf of the victim witness.³³

On the benefits of legal representation for victims during the police investigation process, a 2017 German study by Weisser Ring,³⁴ a nationwide victim support organisation, found that some of the surveyed victims felt that the investigation could have been less traumatic for them had they been legally represented early on in proceedings. Surveyed victims explained that the whole process would have been more transparent, and they would have been better prepared to encounter potentially difficult aspects.

V. ISSUES PAPER E: SEXUAL OFFENCES: THE TRIAL PROCESS

Question 1: How well are charging and prosecution decisions for sexual offence cases working? How can they be improved?

It is recommended that an official scheme for review of the non-prosecution decision comparable to the *Victims Right to Review Scheme* in England and Wales is introduced in Victoria. This is a vital step as the non-prosecution decision is final for victims and avenues for judicial review are limited.

In Victoria, victims in general have not been afforded enforceable statutory rights to be heard in relation to the non-prosecution decision. Yet, prosecutorial guidelines and victims' rights acts contain obligations for prosecutors to seek the victims' views in the context of the charging decision and the discontinuation and modification of the prosecution of charges.³⁵ Given the legal quality of these obligations, however, victims do not have a positive right to express their views in this context and cannot enforce being heard where prosecutors fail to consult with them.

Moreover, because the ultimate decision to prosecute is discretionary, formal review schemes allowing victims to request an internal review of the non-prosecution decision are not currently

³² *Code of Criminal Procedure* (Germany) s 81c.

³³ *Code of Criminal Procedure* (Germany) s 81c (4).

³⁴ Weisser Ring, Forschungsprojekt Belastungen von Opfern in Ermittlungsverfahren Forschungsbericht (Weisser Ring Stiftung, 2017) 100 https://weisser-ring-stiftung.de/sites/default/files/domains/weisser_ring_stiftung/downloads/wrsforschungsbericht_1.pdf.

³⁵ See, for example, Office of Public Prosecutions (Vic), *Policy of the Director of Public Prosecutions for Victoria* (Policy, 17 September 2020) Chapter 3: Victims <https://www.opp.vic.gov.au/Resources/Policy-of-the-Director-of-Public-Prosecutions-for-Policy-of-the-Director-of-Public-Prosecutions-for>; *Victims' Charter Act 2006* (Vic) s 9B. Victims must also be given the reasons why an offence was not charged, see: *Victims' Charter Act 2006* (Vic) 9(b).

in place in Victoria.³⁶ In addition, victims have limited possibilities to initiate a judicial review of the discretionary decision not to prosecute.

Under the Victorian DPP's *Discontinuance Review Framework*,³⁷ the victims' views must be ascertained, unless it is not practical to do so, prior to making a discontinuance decision. The discontinuance decision is subject to review. In this context, victims must be asked if they wish anything further to be taken into account during the review process. Depending on the outcome of the review, the victim must then be informed what decision has been reached (discontinuance or decision to proceed). While the policy states that victims must be consulted when a discontinuance decision is made, it stops short of setting out a formal complaint mechanism against the decision to discontinue. Moreover, the consultation procedure is enshrined in a policy and does not give victims an enforceable statutory right to request a review.

In contrast, victims in England and Wales are now able to request a review of the decision not to prosecute within the Crown Prosecution Service ('CPS'). Prior to 2013, the only avenue available to victims to seek a review of the non-prosecution decision was judicial review by an administrative court in the form of court proceedings. In 2011, the Court of Appeal in *R v Killick* (2011)³⁸ dealt with a non-prosecution decision and internal as well as judicial review requests by victims. It found *inter alia* that the CPS is under the obligation to consider victims' requests for a review of the non-prosecution decision because that decision is final for victims. It also emphasised the importance of an internal review scheme in order to avoid victims having to seek a judicial review each time. Perhaps partially due to this decision, since June 2013, the *Victims Right to Review Scheme* ('VRR Scheme') has been introduced in England and Wales. As per the scheme, victims can initiate internal proceedings by complaining to the CPS and asking for a case review. During the review, various actors within the prosecution service can reconsider whether there is sufficient evidence and whether the prosecution is in the public interest. Based on the review, CPS may decide to recommence proceedings. Within one year of the scheme's operation in 2014, 146 decisions not to prosecute were reportedly successfully reversed by the CPS. This equals a success-rate for review applications of around 13 percent.³⁹

Question 8: What are other issues with the trial process for sexual offences, and how should they be addressed?

a. Lack of Protection

In relation to the trial process and sexual offences, it is important to note that it is the victim who is exclusively responsible for exercising their rights and protecting their interests and currently must do so without ongoing legal support. Introducing legal representation schemes for victims could better protect victims' interests during criminal proceedings. Legal

³⁶ Victims can fill the online complaints form on the DPP website, but a review of the non-prosecution decision as such is not a listed outcome in this process, see <https://www.opp.vic.gov.au/Resources/Complaints/Online-Complaints-Form>.

³⁷ Director of Public Prosecution (Vic), *Discontinuance Review Framework* (March 2019) s 7 'Consultation with Victims' <https://www.opp.vic.gov.au/Home/Resources/Discontinuance-Review-Framework>.

³⁸ [2011] EWCA Crim 1608.

³⁹ Danny Shaw, 'Victims' Right of Review Scheme Sees 146 Charged' *BBC News* (online) (19 July 2014) www.bbc.com/news/uk-28377445.

representatives could be tasked with providing information to victims and ensuring their protection and support. Some may argue that the introduction of such a role is unnecessary because existing actors in the criminal justice system already sufficiently support victims in this context. This overlooks that it is not the primary function of the courts or the public prosecution to act as the protectors of victims' rights and that both also have to consider the public interest and the interests of the accused to a fair trial.⁴⁰ Ultimately, leaving the protection of victims' rights up to the parties or the judge means allowing third parties, and not the victim, to determine the scope of victim protection in light of their own agenda. This essentially renders the victim powerless once more.⁴¹

The role of protecting the victim can also not be carried out as efficiently by witness assistance services or other victim support persons whose role it is to generally inform victims and possibly accompany the victim to court. Victim support services are not always staffed with lawyers and are unable to assist victims with legal matters.⁴² In addition, victims' rights are set out in different pieces of legislation and policy. Providing a holistic legal overview of available victims' rights therefore may not be possible for victim support workers with no legal background. Furthermore, the support victim services can offer is limited especially at court due to lack of legal standing, leaving victims in a very vulnerable position when testifying at trial.⁴³ A support person generally does not have the right to object to any questions during cross-examination, be heard concerning applications for the introduction of the victims' sexual history or apply for the use of protective measures when victims give evidence.

The introduction of an independent legal representative for victims could make the needs of victims overall more visible and increase the sensitivity surrounding these matters. The victims' legal representative could therefore perform the role that currently is not, or not holistically, performed by the courts, prosecutors and support services.

b. Insufficient Supply of Information

Policy guidelines and victims' rights acts require many different criminal justice agencies to supply victims with information on certain aspects of the justice process, including the investigation and trial phase. Due to high caseloads, however, the necessary information is not always forthcoming in practice. An independent legal representative can provide victims with information about the trial in general as well as their rights in particular. The legal representative can also follow up on missing information from respective agencies. This allows victims to better understand the process overall and has the potential to reduce negative experiences stemming from misinformation and lack of support.

⁴⁰ See discussion in Dee Smythe, 'Moving Beyond 30 Years of Anglo-American Rape Law Reforms: Legal Representation for Victims of Sexual Violence' 2 (2005) *South African Journal of Criminal Justice* 167, 180-181.

⁴¹ Margaret Garvin and Douglas Beloof, 'Crime Victim Agency: Independent Lawyers for Sexual Assault Victims' 13 (2015) *Ohio State Journal of Criminal Law* 67, 85.

⁴² Jonathan Doak, *Victims of Crime in the Criminal Trial Process: Submission 31 to the Victorian Law Reform Commission-* (20 October 2015) http://www.lawreform.vic.gov.au/sites/default/files/Submission_CP_31_Professor_Johnathon_Doak_20-10-15.pdf.

⁴³ Jennifer Temkin, *Rape and the Legal Process* (2nd ed) (Oxford University Press, 2002) 302.

VI. FINAL REMARKS

The current inquiry aims to examine how the Victorian justice system can improve its response to sexual offences. I hope my submission and recommendations can be useful and will inform the Victorian Law Reform Commission on how to advance and safeguard the interests of sexual offence victims during the justice process in Victoria in future.

Signed

Dr Kerstin Braun