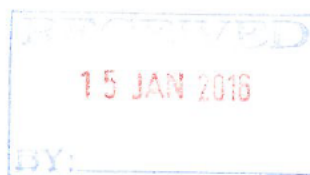




12 January 2016

The Honourable Philip Cummins AM  
Chair, Victorian Law Reform Commission  
Level 3, 333 Queen Street  
MELBOURNE VIC 3000



Dear Mr <sup>Philip</sup>Cummins

### **The role of victims of crime in the criminal trial process – response to additional VLRC questions**

Thank you for inviting Victoria Legal Aid (VLA) to meet on 30 November 2015 to discuss our letter of 30 September 2015 on this topic. On 1 December 2015 the Team Leader of the reference provided a list of further issues and requested VLA's response. We note that some of the additional questions raised come from the submissions of other stakeholders. The following responses do not seek to address every aspect of those submissions.

#### **Victim participation in pre-trial process**

VLA supports the Director of Public Prosecutions' submission (at paragraph 40) that the role of victims in pre-trial procedures "not be extended further than the provisions that currently exist" given the importance of ensuring disclosure and the right to a fair trial.

VLA supports the significant reforms made since 2006 to better support sexual assault victims during the pre-trial process. It is our experience that these reforms along with further legislative safeguards, such as Part 8.2 of the *Criminal Procedure Act 2009*, better protect victims in the pre-trial process.

In relation to confidential communications, VLA does not oppose a requirement that judges must consider and be satisfied the victim has received notice of an application to produce or adduce confidential communication before waiving the notice requirement. In VLA's practice experience, these waivers are rarely sought, given such applications are ordinarily made in a timely fashion. Should such an amendment be introduced the responsibility should lie with the prosecution to advise the victim expeditiously.

#### **Independent legal advice**

VLA supports exploring ways to provide independent legal advice to victims. Any such service should be independent from both the prosecution and the defence. VLA suggests considering

enhancing the co-ordination and integration of existing victims' services to enable the provision of such advice, rather than necessarily establishing an additional agency.

### **Committal hearings**

The Commission notes the Director of Public Prosecutions has recommended amending section 124(3)(a) of the *Criminal Procedure Act 2009* to only grant leave to cross-examine a witness where a "substantial" issue is identified. In VLA's view such an amendment would not offer any improvement on the current safeguards, and could in fact result in the inadvertent dilution of recent legislative amendments which tightened the thresholds for granting leave to cross-examine witnesses, including victims, at committal.

The *Criminal Procedure Act 2009* was amended in October 2014 to introduce a new test for determining when leave should be granted to cross-examine a witness at a committal hearing. The consent of the prosecution or informant is but one factor for the Magistrate to take into account and is not determinative of leave being granted. An accused must also identify each issue on which they propose to cross-examine, why the evidence of that witness is relevant and justify cross-examination of the issue. The prosecution can oppose the granting of leave.

The prohibition against the cross-examination of certain categories of sexual assault victims at committal could be extended to cover other particularly vulnerable classes of victims, for example family violence victims.

However, VLA's experience is that the current Special Hearing approach to children and cognitively impaired victims of sexual assault can sometimes lead to late resolution and discontinuances, given they do not occur until just prior to empanelment of a jury. Late decisions as to resolution and discontinuance of matters can have an adverse impact on both victims and accused.

As such, VLA does not support replacing cross-examination of all victims at committal with a *Basha* hearing, which would also have significant cost implications. Properly conducted committals allow for timely testing of the strength of the case, narrowing of issues for trial, discussions regarding resolution or discontinuance and the early and full disclosure of evidence. VLA's practice experience and recent consultation with stakeholders from across the profession and judiciary in relation to Delivering High Quality Criminal Trials revealed that there are issues across the board with late disclosure of evidence by police and the prosecution. Any amendments of this sort would need to consider additional legislative safeguards that ensure early and full disclosure by police and prosecutors.

### **Victim impact statements**

VLA believes the current definition of "victim" as described in section 3 of the *Sentencing Act 1991* is sufficient to afford those affected by crime the opportunity to express to the court the impact the offending has had on them.

The Commission notes the Director of Public Prosecutions has suggested accused persons should not personally keep victim impact statements. VLA appreciates these statements contain very personal and sensitive information. It is difficult to know how much of an issue this is in practice. It is not always the case that accused people receive copies of the victim impact statements. In most cases, an accused person's legal representatives will read the statement

to their client. Although very rare in indictable matters, unrepresented accused would receive statements directly. VLA considers more analysis would be required to determine how such a proposal would be applied. Significant effort and costs would be required to follow up accused people post sentence and appeal. Furthermore, where a statement is tendered pursuant to the *Sentencing Act 1991* as part of the plea and sentencing process and the court has taken it into account, natural justice requires that an accused be able to access it at first instance and on any appeal.<sup>1</sup>

VLA supports introducing a requirement for victim consent to be required before any publication of victim impact statements.

VLA does not support the introduction of community impact statements, given the broad definition of victim in the *Sentencing Act 1991* already permits a wide range of persons to make statements. As part of the plea and sentence process the prosecution can also make wide-ranging submissions in relation to all of the sentencing purposes covered in section 5 of the *Sentencing Act*, including community protection and general deterrence.

The Commission has asked whether victims should be able to update their victim impact statements on appeal. Whilst VLA does not oppose such a proposal, the way in which this might be put into effect would need to ensure a fair and balanced approach. For example, tests which govern the use of fresh evidence on appeal should also apply to updated statements. VLA also notes that any understandable distress a victim may express upon being advised of an appeal should not limit the exercise of the right to seek appellate review.

## **Sentencing**

VLA supports the view of the Director of Public Prosecutions that the current role of victims in sentencing is appropriate.

VLA does not support introducing a requirement that the defence adduce evidence from an offender to substantiate submissions relating to character or remorse. VLA notes:

- The current sentencing process allows prosecutors to challenge submissions and evidence as to remorse and to cross-examine any character witnesses that may be called on an accused's behalf. Judges are responsible for making any findings as to remorse following this testing of the evidence. A significant body of case law and the *Sentencing Act* itself provide guidance on indicators of genuine remorse<sup>2</sup> and matters to be taken into account when sentencing.
- Requiring the defence to adduce evidence from the offender is likely to give rise to significant unfairness. This is particularly so where offenders have characteristics that limit their performance as witnesses (for example, cognitive disabilities or mental health issues).
- There is a real danger such a requirement would discourage early pleas of guilty.

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<sup>1</sup> See e.g. *Luciano v The Queen* [2015] VSCA 69.

<sup>2</sup> For example, *Brazel* [2003] VSC 95, *Lomax* [1998] 1 VR 551, *T* (2000) 113 A Crim R 439, *Starr & Smith* [2002] VSCA 180, *Fraser* [2004] VSCA 147, *Wilson* [2003] VSCA 89.

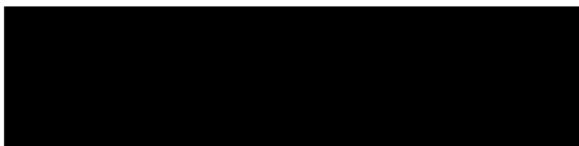
## **Restorative justice**

As stated in VLA's letter dated 30 September 2015, VLA supports the use of carefully framed restorative justice processes, provided there are sufficient safeguards, adequate oversight by skilled professionals, and that participants fully consent.

VLA is particularly supportive of restorative justice processes being used as part of the sentencing process, after pleading guilty. They could provide an incentive for an offender to deal with underlying behaviour driving criminal offending and also enable the development of insight and victim empathy that reduces the risk of re-offending. If restorative processes are used prior to the accused admitting guilt, additional safeguards are necessary, but such restorative processes could also lead to an experience of the criminal justice system that is far more beneficial both to victims and accused in certain types of cases or offending (for example cases involving young or vulnerable offenders, or historical sexual offences where there is an ongoing familial relationship and the victim is seeking an acknowledgment of harm rather than an uncertain criminal justice outcome following a traumatic trial process).

From VLA's practice experience in assisting victims with their VOCAT applications, careful consideration would need to be given to how restorative processes could be incorporated into the work of the Tribunal. In most cases, victims want to be able to have finality in obtaining compensation in an expeditious way with as little contact possible with an offender. Whilst VLA is open to a further exploration of restorative principles being built into VOCAT processes in some types of cases, such processes would need to carefully balance victim and accused rights in relation to both the civil VOCAT process and any criminal trial process. Importantly, particular attention would need to be given to the risk of harm that can flow to victims from prolonging even indirect contact with offenders or delaying access to compensation.

Yours faithfully



**BEVAN WARNER**  
Managing Director

Cc: Merrin Mason, CEO  
Lindy Smith, Team Leader