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Victorian Law Reform Commission Chair The Hon. Philip Cummins AM, Commissioners Liana Buchanan, Helen Fatouros, Bruce Gardiner PSM, and The Hon. Frank Vincent AO QC

#### Law Reform Commission - Role of Victims of Crime in the Criminal Trial Process Submission

I am writing to put my suggestions to you for consideration. Initially I will put these in the context of the 'agenda questions' devised by **Sector Sector** the Victim's Support Agency of the Department of Justice. Then I shall outline the recommendations for reform of the Victim Impact Statement situation in Victoria as devised by the Victim's Support Agency of the Department of Justice in their Interim Implementation Report. And lastly, I shall further put my views on necessary reforms to update the Justice system in Victoria.

# What should the criminal justice system aim to deliver for victims, society and the accused?

Victims:

The rights to: be informed; be included; be involved; be respected; protection from defamation by an accused or their defence counsel; legal representation throughout all legal processes; press different charges than the OPP (e.g. where plea bargaining has occurred or multiple charges are 'rolled into' less charges); call witnesses or submit evidence; give an account of the impacts of the crime upon them and have that taken into consideration for sentencing; be informed of a convicted offender's jail location, parole hearings, parole conditions and residential location (e.g. suburb/area); make submissions to bail and parole hearings; appeal bail or bail conditions and appeal sentencing.

Society:

The delivery of: fair and rigorous police processes of inquiry; state-of-the art evidence gathering techniques; respectful professional conduct by police for all parties; access to

information without excessive, political or unnecessary suppression of evidence; fair legal processes without bias to one party exceeding rights of another party; ongoing assessment and appraisal of effectiveness and fairness of officers and processes involved at every stage of management of accused/offenders and victims. "Justice should be done and be seen to be done" for all parties: victims; society; and accused.

## Accused:

The rights to: be informed; be respected; protection from defamation by a victim or their counsel or state prosecutor; legal representation throughout all legal processes; be involved in decision making by legal counsel; (via counsel) bring evidence and witnesses in their defence; (via counsel) cross-examine witnesses and object to statements, make submissions to the court, etc; a fair hearing where rights of state, victim and accused are all respected.

## What are the principal issues surrounding the current role of the victim in:

- pre-trial
- trial
- sentencing and
- reparations and restoration hearings?

## Pre-trial:

- variable communications from police during investigations some are informative and open to suggestions and questions, others are not. The victim needs to be kept informed about the progress of investigations, evidence gathering; and needs to able to suggest lines of enquiry as they come to mind, etc
- Bail is heard without input from the victim. This can lead to dangerous situations for a victim such as: an accused living too near the victim; victim being at risk of violence and intimidation; accused's right to freedom being given greater consideration than a victim's right to safety and life (e.g. Christie Marceau N.Z.)
- Poor instruction on dealing with the media while being advised to "not say anything that may prejudice a future trial" places the victim/their family in a 'cone of silence' while the media reports all manner of statements by the accused and speculates about individuals, seeking scandalous and catchy headlines, printing unproven allegations, undermining fairness to the accused and victims. Meanwhile the victim/their family can say nothing to defend themselves in the media.
- Exclusion from committal proceedings on the grounds they may/will later be called to give evidence is isolating and excludes victim/their family from the process as though they have no right to participate in the process but are only to be treated as witnesses. This practice also assumes that victims/their family will be likely to 'create' evidence or perjure their evidence in order to create a more substantial case against an accused, meanwhile the accused is able to be present for all parts of proceedings (as though they are less likely to create or alter their evidence) *this is bias against the victim/their family*.
- Plea bargaining by the OPP and defence counsels excludes the victim/their family. They are informed of the result rather than given a say. Plea bargaining also hampers society's expectations of the legal process by drawing conclusions that affect

sentencing prior to matters being heard by a jury or justice, thereby limiting the possible findings of the persons responsible for deciding what the accused/perpetrator is guilty of (or not). *It puts the OPP in the role of pre-determining the charges the accused is convicted of and this ought not be their role.* This practice undermines the justice system and victims are excluded from these decisions. Victims usually are only told that this has been decided, sometimes a reason is supplied but the victims are rarely given a right of veto or respectful inclusive consultation. Victims can be very emotionally affected by the crimes against them being minimised by negotiations between the defence and the OPP, left feeling that they are undervalued by the legal system.

#### Trial:

- Victims/their family are not informed of the evidence and arguments presented to the judge in 'hand up briefs', submitted prior to formal proceedings. They are therefore not told what legal arguments will be put, why, and what alternatives there are. *Even the Victim's Charter, which has no force at law, only states that the victim(s) have a right to be told, not involved and consulted, or to have a say/put their viewpoint.* This fact illustrates that the Victims of crime. If they acted as representatives of victims of crime those victims would be entitled to be 'fully informed' by OPP barristers and be able to 'give their instructions' to those barristers.
- OPP will make decisions without including the victim/their family in decision making. For example there are rights within statutes allowing victims to participate in various stages, put submissions, make applications, etc. The OPP is unlikely to inform victims of these rights proactively, instead they decide what they will do based on what is pragmatic for them. *So, even where the law allows for involvement and consultation, this is not done in practice.*
- Currently a victim has no means to put arguments, call witnesses, cross-examine, be informed of procedural protocols and their statutory rights to intercede in proceedings (where these exist). They have no means to prevent or influence 'plea bargaining', no means to contribute to summing up or sentencing advice to the judiciary. The Victim's Charter has no formal legal standing and is frequently ignored by the legal fraternity. That Charter is the tokenistic offering of the Victorian government but it has no guaranteed effects.
- Victims are currently treated as witnesses, not as intimately involved and affected persons, with a right to representation and participation.

#### Sentencing:

• The only current means for participation in sentencing is through making a 'Victim Impact Statement' to the judge. This is not a right at law and thus has been subject to opposition and demands for redactions, refusals to read out loud in the court, etc. Opposition has come from every side - defence, prosecution and the judiciary. There are still some difficulties . I will clarify this by giving the current recommendations for reform, proposed within the Justice Department, later in this document.

# Support for Victims:

- Current court assistants do little that is practical other than direct victim/their family to tea/coffee space away from the public, or sit with them in court.
- In the case of murder the family are in such shock they are unable to read pamphlets and booklets and need direct advice (verbal) and assistance to connect with support services (psychologist, counselling, home help, etc). A case worker would be ideal. These have existed at some times, then been de-funded in government budgets at other times. so, the experiences of victims vary greatly when it comes to support.
- Media support is lacking and questioning police is often unhelpful. I received quite contradictory advice from various police officers. One would say "be careful to say nothing that could prejudice the case" another said "you can say anything you like". Then I was sent a booklet to read but this was after media had already been contacting me for radio and TV interviews. Also, I wasn't able to focus on reading for quite a long time after the murder, so it was not helpful. If only a police person who knew that manual very well could have spoken directly to me that was what I needed.

## What reform proposals or alternative procedures should be considered?

Victims:

The rights to:

- Be informed; be included; be involved; be respected;
- Protection from defamation by an accused or their defence counsel;
- Legal representation throughout all legal processes, including pre-trial (for e.g. cases involving: sexual assault; aggravated sexual assault; threats to kill; deprivation of liberty; aggravated assault; grievous bodily harm; attempted murder; manslaughter; murder;
- Victims need their own counsel, with the same rights as the OPP and Defence counsel at all stages of proceedings. Such counsel could be enabled to put alternate arguments, refer to precedents, etc having the victims' needs and concerns paramount in their consideration.
- Victim's counsel press different charges than the OPP (e.g. where plea bargaining has occurred or multiple charges are 'rolled into' less charges); call witnesses or submit evidence; question; cross-examine; etc
- A victim's counsel would be able to put separate arguments in their own 'hand up brief. They could also inform the victim of the arguments put by OPP and defence counsel;
- Be fully informed of their rights within the statutes and be invited to give their instructions. This would ensure that the victim is not excluded from proceedings they have an ability to participate in (currently, often OPP makes these decisions without informing the victim of any existing options they have at law - choosing what is expedient for them, rather than involving the victim in decision making);
- Give an account of the impacts of the crime upon them and have that taken into consideration during sentencing;
- Be informed of a convicted offender's jail accommodation, parole hearings, parole conditions and location;

- Make submissions to parole hearings;
- Communications, consultation and involvement at all stages of the process: police investigations; charges laid; witnesses sought; evidence obtained; bail application hearing; restrictive orders; committal proceedings; trial or guilty hearing proceedings; appeal proceedings; coroner's investigations and hearing;
- Lodge objections to bail or lodge for inclusions within bail conditions;
- Safety Assessment of their residence, where a risk of possible violence exists;
- Witness protection measures where a significant risk to their safety exists;
- Have included charges that the DPP and defence would otherwise agree to drop for a lower plea, i.e. a right to maintain that higher charges be included for the discretion of the jury or justice hearing the matter (if found not guilty at the higher level the lower level charges remain as an option in any case). NOTE: the DPP practice of plea bargaining deprives the right of judging bodies (jury or justice) to decide the level of culpability and de-facto makes DPP and defence lawyers PRE-judges of the, as yet unheard, case.
- Victims' legal counsel have rights to: complete copy of police brief; pre-trial consultation and negotiation with the OPP; submit alternate 'hand up brief' arguments and references to precedent case arguments; call additional witnesses, statements or other evidence where appropriate; cross-examine witnesses; actively participate in negotiations with defence and OPP; actively put submissions to the court and make suitable objections e.g. to statements that are made to tarnish the victim; put closing (verdict advice) statements to judge or jury; make sentencing submissions; lodge and prosecute appeals where appropriate
- Victims could be directly assisted by their counsel to edit their draft Victim Impact Statement. Counsel could also argue the victim's case to include various statements opposed by Defence counsel or OPP. (Significantly, some judges prefer the victim impact statement to be submitted as is, as they say they are able to exclude from consideration anything which would be inappropriate, yet much effort is made by Defence counsels to exclude large parts of VISs and some judges still do not support the submission of VISs and oppose the affected person reading them aloud, and so on).

# Victim Impact Statement Recommendations for Reform (Summary):

1. That the Sentencing Act 1991 be amended to provide greater certainty and choice for victims who choose to read their VIS aloud, with the witness box to be designated as the default location unless the victim chooses to make their VIS from the body of the court or the bar table.

2. That the VSA continue to offer tailored VIS training to front-line victims service agencies (Victim Assistance & Counselling Programs and Centres Against Sexual Assault [VACPs and CASAs]) to ensure they have the necessary knowledge and expertise to inform and support victims about the VIS process. VIS training to be:

• incorporated as a core component of DOJ induction training for Victim Assistance & Counselling Program (VACP)

• offered on an 'as needs' basis to Centres Against Sexual Assault (CASAs).

3. That a further review of VISs in the Magistrates' Court be undertaken by the VSA in mid 2014 using similar data collection methodology to this report to enable the outcomes of procedural reforms implemented by the court and Police Prosecutions to be assessed and reported upon.

4. That, subject to the availability of resources, the Judicial College of Victoria further develop the training provided to judicial officers in dealing with VISs and consider producing educational materials that incorporate reflective practices regarding interacting with victims, particularly when they elect to read their VIS aloud.

5. That the Office of Public Prosecutions review training and education provided to prosecutors to ensure they have the necessary skills and expertise to fulfil their statutory obligation to 'ensure that the prosecutorial system gives appropriate consideration to the concerns of the victims of crime

6. That the Department of Justice research and report to the Attorney-General on the role of victim advocates and victim representatives in other jurisdictions, including the way in which representation specifically at the sentencing phase might enhance the VIS process for victims of crime.

7. That the Department of Justice:

• revise VIS publications to include information about the appeals process and, in collaboration with the Court of Appeal and the OPP, produce a fact sheet for victims whose cases are subject to appeal.

following implementation of the above, explore whether legislative change to the Sentencing Act 1991 is warranted to provide for a further VIS to be made at the Court of Appeal stage.
8. That the Department of Justice:

• review VIS publications to include relevant information with respect to privacy of VISs, including relevant legislative provisions and the right to apply for the court to be closed to members of the public (including the media)

• review training and resources for victim support workers to ensure they are able to inform victims of the entitlements to privacy which already exist, as well as practical tools that might be employed to ensure optimum victim privacy

9. That the Department of Justice explore whether specific guidelines and information could be developed for support workers wishing to prepare a VIS on behalf of a victim who is incapable of preparing their own VIS.

(Victims' Support Agency, Department of Justice Victoria, 2014: 7)

#### Additional recommendations for Victim Impacts Statements:

"South Australia and the Northern Territory allow victims to make representations in their victim impact statement about the sentence that should be imposed on the offender. This is in distinct contrast to other Australian jurisdictions, including Victoria, which specifically prohibit victims from including suggestions about the sentence that should be imposed on the offender." (Victorian Law Reform Commission, 2015, "Victims of Crime: consultation paper": 117)

If a Victim is not to be allowed a representative in court (barrister) then, this option ought to be considered as an appropriate alternative amidst a raft of alternative measures in lieu of the lack of specific representation. I personally feel that only an advocate (barrister) is adequate and fair, as this would put victim and accused on level footing.

# What should be the role of victims in the criminal trial process?

The Victorian Law Reform Commission is focused upon three models:

- The role of the victim should be 'protected witness'.
- The role of the victim should be 'participating witness'.
- The role of the victim should be 'prosecuting witness'.

Only the 'participating witness' model allows for consideration of a victim's advocate (barrister) within its description. The 'protected witness' model is the status quo. The 'prosecuting witness model' requires legal expertise that a victim is not likely to have. The only viable reform is the adoption of a 'participating witness' model where the victim is accorded the same 'rights' and facilities as an accused person.

# The Plea negotiation process.

"New South Wales

Court certification

In New South Wales, for matters that resolve following negotiations about the charges on an indictment or the facts of an offence(s), prosecutors are expected to file a certificate with the court confirming consultation with the victim.

If this certificate is not filed, the charge negotiations, or any agreed statement of fact, cannot be taken into account by the court.

The certification scheme is designed to provide a procedural safeguard to complement existing obligations to consult with victims in the Office of the Director of Public Prosecutions' (ODPP) Prosecution Guidelines, and thereby promote greater accountability and transparency in the plea negotiation process.

The certificate filed with the court must be signed by the Director of Public Prosecutions (or an authorised person) and must verify:

- that consultation has taken place between the victim, the police officer in charge of the investigation and the prosecutor; or
- if consultation has not taken place, the reasons for that; and
- that the statement of agreed facts arising from the charge negotiation process constitutes a fair and accurate account of the objective criminality of the offender.

The New South Wales ODPP Prosecution Guidelines require prosecutors to seek the victim's views 'at the outset of formal discussions', or at least before any formal proposition is put to the accused's lawyers.

The views of the victim (and police informant) must be recorded in writing. If a victim disagrees with the proposed charges, and the matter is in a higher court, the prosecutor should consult a more senior officer within the ODPP. While the victim's views are to be taken into account, the ODPP Prosecution Guidelines make it clear that the victim's views 'are not alone determinative' and that 'it is the general public, not any private individual or sectional, interest that must be served.' " (Victorian Law Reform Commission, 2015, "Victims of Crime: consultation paper": 52)

Clearly, NSW has taken some care to ensure consultation with the victim and police informant. In Victoria the lack of such guaranteed measures inevitably mean that the OPP can and does do what is expedient to themselves, without consultation or accountability to any other involved parties.

A system such as this NSW procedural model should be employed, whether the victim has an advocate (barrister) or not. A right to appeal if the OPP takes a different view to that of the victim and police informant should exist for either or both of these parties.

The OPP should not be able to plea bargain with offenders and their counsel. At most, they might be allowed to submit a 'recommendation'. All police charges laid should come before the courts for evaluation. OPP officers are not judges, or magistrates, and it ought to be up to the presiding person to put a range of culpability to jurors, or to weigh the culpability of offenders themselves, without the OPP having removed their ability to evaluate across the appropriate range of offences.

There is "limited transparency" with plea bargaining because matters are dealt with promptly and without a trial. "As a consequence, the legitimacy of any plea agreements reached between counsel are questionable, particularly when the prosecutors motivations are shrouded in secrecy and their basis for accepting a guilty plea may not reflect the stipulated law' (FitzGibbon, K and Flynn, A., February 2012, Study into defensive homicide plea bargaining, Melbourne University Law Review <u>http://www.heraldsun.com.au/news/true-crime-scene/dealscould-let-potential-murderers-off-hook-in-victoria/story-fnat7dhc-1226407140868</u>).

"Negotiated plea settlements have been described as inconsistent with the inquisitorial trial procedures of civil law jurisdictions. This is because the inquisitorial criminal trial process is directed at searching for the truth—a process that cannot be negotiated or arrived at by consensus." (Victorian Law Reform Commission, 2015, "Victims of Crime: consultation paper": 53)

What a telling comment this is. It seems that the current functioning of our system in Victoria has too little focus upon "the truth". And too much upon expedience.

#### Other issues

Criminal forensic psychological assessment of 'serious violent offenders' (SVOs) must be undertaken, and must be well informed by detailed transcripts of evidence from previous trial(s), police brief(s) of information composed during investigations and any available statements regarding the offender's history and behaviour. These need to be tabled as evidence with every violent predatory crime, such as murder, sexual assault, threats to kill, torture, deprivation of liberty, etc.

The evidence given by any offender (serious or otherwise) must not allow any uncorroborated/unsupported/unverifiable claims by the offender to be taken as 'true'. Indeed such claims should not be admissible, due to the high incidence of lies by many offenders to create an appearance of disadvantage, or themselves as 'victims', rather than taking responsibility for their crimes and the situation they have caused for others and themselves by committing those crimes. Genuine disadvantage often does exist and in such cases is usually verifiable by witness statements, welfare reports, etc. which should be tabled in support of mitigating claims. John Leslie Coombes, for example, supplied stories: of being abandoned by his mother; of a twin brother adopted out by welfare while his father was away with the Army; of a paedophile ring sexually abusing him on the instigation of his step-mother; etc, all of which have been investigated by Police and shown to be lies and confabulations (and said by his father to be because "John has an active imagination"). Coombes had no twin brother and therefore no brother was fostered out (and could not have been fostered out if there was a the father was returning from Vietnam to take custody of John) - yet these claims were made in the Supreme Court of Victoria by Coombes' defence counsel. And there was no paedophile ring involving the family doctor, primary school principal, St Kilda mayor's office, etc. as claimed by Coombes during his most recent murder hearings, claims supported by a 'counsellor' in court, not reviewed by a forensically qualified psychologist.

'Silent listing' of cases, under s.136 of the Magistrates' Court Act, which allows magistrates to make orders "to ensure effective, complete, prompt and economical determination of a hearing", instead of making closed court or suppression orders - which the media and other interested parties would be able to contest, by attending the hearing and making arguments before any order was made - appear to be preventing open access to the courts by the public and ought to be ceased. It is believed that four cases last year were kept entirely from public knowledge. (Hunt, E., 10 September 2013, "Courts use obscure law to hear cases away from public gaze" The Herald Sun). Justice needs to be done and to be seen to be done. Public services need to able to be scrutinised by the public.

# In closing....

Even the Victorian Victim's Charter does not afford the victims a status of 'involved party'. Items four and five illustrate this:

"4 **To be told** about the prosecution, including charges laid, court dates and times, court outcomes and any appeals lodged, as well as any substantial changes to charges.

5 **To be told** (if you request it) about the outcome of any bail application and any special conditions of bail which are intended to protect you."

To be told but not conferred with, consulted, or heard....

It is my belief that the two party structure of the current criminal trial process has proven to excessively exclude the victim/their family from the proceedings. The accused has a barrister, has many rights such as to call witnesses, cross-examine, put submissions, and so on. The victim needs equal rights at law. And the victim is involved in pre-trial and trial processes and should be putting submissions at, e.g. bail applications, should have a representative overseeing their interests during committal proceedings, 'hand up brief' submissions, and so on.

Then a barrister who can consider submitting points of law that the crown does not, who can object to unsupported claims against the victim used as tactics by the offender or their counsel, who can interrupt harassment of a victim by an offenders counsel (or in sexual assault claims tactics of irrelevant actions attempting to 'blame the victim', such as being out at night, what clothes they wore, wearing makeup, walking alone, etc being used as if they were 'criminal or causal' acts' against the victim), etc. Of course, this would increase costs and would have to be guaranteed by a government body - legal aid is hard pressed to meet current needs appropriately and grossly underfunded as it is and we cannot put a 'burden' upon victims and their families, most would be utterly unable to meet. NOTE: Victim's separate counsel is supported by: Justice Refshauge of the ACT Supreme Court; The S.A. Commissioner for Victim's Rights; The N.S.W. Commissioner for Victims Rights; the A.C.T. Commissioner for Victims Rights and is an available service in: Germany; Austria; Israel; the U.S.A.; the U.K.; Ireland; Japan; Canada; Sweden; and many other countries. (I refer you to the S.A. Commissioner for Victims' Rights and Justice Refshauge's recent key note speaker presentations at the Victims Of Crime Symposium in Adelaide, September 2013 - copies of these have been previously provided by myself to the inquiry's assistants). Currently, the victim is actually not represented and does not have the same sway over legal counsel that the perpetrator receives. There needs to be some way to improve the importance and rights of the victim and/or their families, so that a sense of true representation is included for them. Without this there is powerlessness, a diminishment of the worth of the victim as a citizen with rights as important as any other.

In the current situation the victims are isolated and treated as though they 'do not matter' and have 'no rights' and 'no representation'. The OPP represents the state and its laws. Victims need their own representative as they are individuals, citizens that deserve 'rights' and standing' in the courts.

It is important to note that 'de-humanisation' of victims is a huge problem in victims staying the length of time and legal processes to 'see through' a prosecution. This has been especially problematic in sexual abuses cases, paedophiles and rapists perpetrating threats to victims is trouble enough, but a de-humanising system that gives no representation or rights to the victim, only to 'the State' is heartless and not as effective as it would otherwise be.

The victim, or family of a murdered person is intimately involved from the moment of the offence, right through all processes, and beyond them into their future life. To have less rights and representation than the accused is unfair.

Freeing the OPP to serve the State without confusion about who is representing the victim is also important.

I thank you for conducting this essential review.

I hope that my submission will be well received and will serve to inform the Commissioners of a victim's point of view, gained by personal experiences during the proceedings related to the murder of my daughter Raechel Renee Betts.

sincerely,

Sandra Betts

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