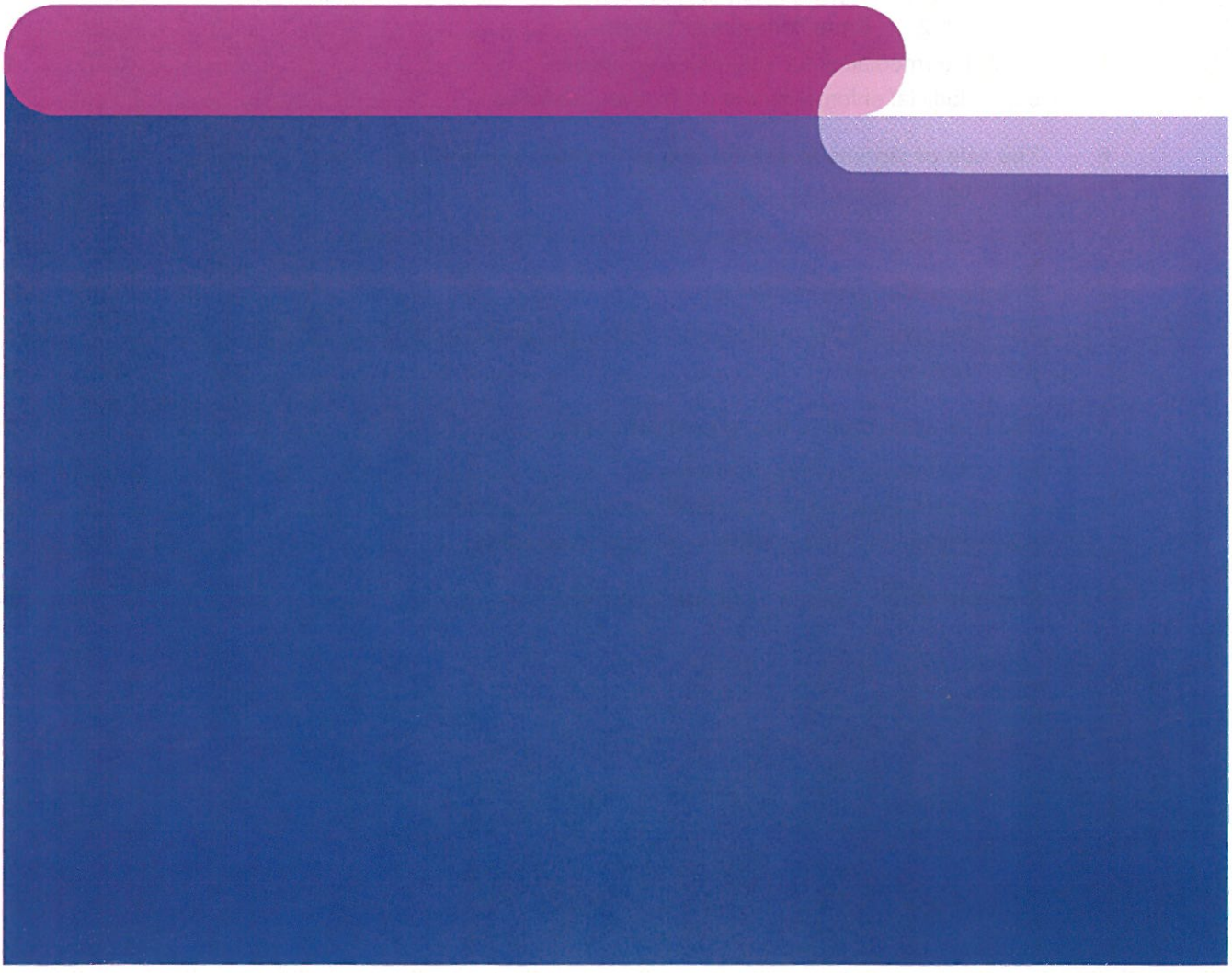
The Role of Victims in the Criminal Trial Process

Victims of Crime Commissioner Submission



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1 Support for victims of crime

Victims have been traditionally placed on the periphery of the criminal justice system as it is a two party adversarial system that primarily focuses on the prosecution and defence. However, it is important that the system provides for the needs and interests of victims, as this ultimately increases the efficacy of the criminal justice system by encouraging: the reporting of crime; reduction in secondary victimisation, and participation in the trial process.

In providing support for victims, lessons can be taken from recent therapeutic jurisprudence reforms adopted by courts that provide an accused person with access to streamlined treatment services to address the causes of their offending. These services are located at courts and are entrenched into court processes through prescribed referral pathways.

These same case management principles and coordinated provision of services do not apply to victims in the court process, with the exception of recent reforms supporting sex offence and family violence victims appearing in specialist jurisdictions.

There are a number of effective services available to victims in the course of criminal proceedings including:

- The Office of Public Prosecution's Witness Assistance Service;
- The Child Witness Service;
- Court Network; and
- support services provided as part of Family Violence Specialist Courts.

These services are often applied in differing courts and locations on an *ad hoc* basis or are prioritised according to the seriousness of an offence or offences that involve sexual assault and or particularly vulnerable victims. As noted by the Victorian Law Reform Commission (VLRC), there is a risk that victims of other violent offences as well as victims of non-violent offences will not be able to access the support they need.[1]

I have previously advocated with the Royal Commission into Family Violence, for the implementation of a network of victim support coordinators (or a Victims Liaison Office) and increased resourcing for existing witness support services to every court in Victoria.

It was suggested that this type of service and increased resourcing would ensure embedded referral pathways for all victims attending court and the application of case management principles and holistic service delivery in the context of victims.

It is envisaged that this type of service would be located in courts to ensure that its role and functions are embedded into the processes and culture of the court, as seems to be the case with the specialist court services that currently assist defendants.

Further, this type of service would also work in a coordinated way with existing victims support services in order to address service delivery gaps and ensure that all victims are supported through the trial process.

[1] Victorian Law Reform Commission, *The Role of Victims in the Criminal trial Process*, Consultation Paper, July 2015,170.

1.1 Victims' right to legal representation

The current legislative framework in Victoria imposes statutory obligations on prosecuting agencies to ensure they consider the concerns of victims of crime.[2] The *Victims' Charter Act 2006* (the Charter) also places an obligation on prosecuting agencies to provide victims with clear, timely and consistent information about possible entitlements and legal assistance.[3] However, as identified by the VLRC, "*notably (and appropriately) absent is an obligation to provide victims with personalised legal advice or assistance.*"[4] Whilst the Director of Public Prosecutions (DPP) has obligations towards victims of crime it ultimately represents the Crown and acts in the public interest.[5]

The Victorian legal system also provides the accused with a right to a fair trial.[6] This important human right shifts the burden of proof to the prosecution who must prove (beyond reasonable doubt) the accused is guilty of a criminal offence. This principle seeks to achieve a fair balance between the State and the accused.

Whilst the rights of the accused are accepted as a cornerstone of the fair trial system, victims are usually unfamiliar with the legal system and lack the support and legal rights of the accused.

The legal principle established in *Dietrich v The Queen* provides for an accused's right to legal representation in order to preserve their right to a fair trial.[7] This principle provides for the equality of arms in the criminal trial process.

In the context of victims, it is important to consider circumstances where a victim is unrepresented but their interests are pitted against or not aligned with the interests of the prosecution. This arguably constitutes an imbalance or unfairness and raises the question as to whether equilibrium could be provided to victims through the provision of personalised legal advice, as is the case for the accused. It is timely, at this point, to question whether the concept of "equality of arms" exists solely to benefit the accused, or whether the victim and the broader community are also entitled to a measure of equality.

Given the complexities of the trial process and the nature of the relationship between the prosecution and the victim, the provision of legal advice/representation for victims is supported. It is important to note, however, that this support should be limited to critical points in the trial process that demonstrably impact the interests of a victim and where those interests are not aligned, or in conflict with, the prosecution.

Such critical points may include:

- the review of a decision to discontinue a prosecution;
- applications seeking leave to cross-examine a victim in committal proceedings;
- applications seeking leave in relation to leading evidence about a victim's sexual history;
- applications to access and use records of communications made in confidence by a victim;
- applications for compensation and restitution;
- appealing relevant interlocutory pre-trial processes;

[2] Ibid; see also: *Public Prosecutions Act 1994* (Vic) ss 24 (c), 36 (3), 41 (2) & 43 (3).
[3] *Victims' Charter Act 2006* (Vic) s 7 (a).
[4] Victorian Law Reform Commission, above n 1, 171.
[5] Victorian Law Reform Commission, above n, 44 & 88.
[6] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 24.
[7] *Dietrich v The Queen* (1992) 177 CLR 292; 109 ALR 385; 64 A Crim R 176 .

- requesting the DPP to consider an appeal.

This type of service may be a logical extension or part of the above mentioned Victim's Liaison Office. It would provide access to qualified legal representation to assist victims in relation to the above critical points in the trial process. This would also provide "as needs" legal advice to victims rather than a need for any attachment to a victim throughout the entire course of a trial. Relevant legal representatives could be available to move from trial to trial and negate any need for multiple representatives or allocation of representation to each victim.

1.2 Realising victims' rights

It has already been noted that victims have been traditionally placed on the periphery of the criminal justice system and whilst there has been incremental progress in recognising the interests of victims there is still significant progress to be made.

The VLRC refers to literature that suggests *effective oversight of enforcement mechanisms can drive desired changes, and that the threat of sanction encourages a culture of compliance*.[8] In support of that statement I offer the comment within the 2015 review of the *Charter of Human Rights and Responsibilities Act 2006:*

> ***Lack of consequence.*** *Without a clear way to remedy a breach of someone's human rights, the regulatory model for the Charter will continue to be flawed. The Likelihood of consequences drives change in behaviour, as in occupational health and safety, privacy and discrimination law.*[9]

The VLRC has also correctly noted that the principles set out in the Victims' Charter are unenforceable and a breach does not create any legal right or give rise to a cause of action.[10]

However, it also highlights that making victims rights enforceable raises a number of issues including:

- the fact that victims rights can conflict with the public interest;
- the two party adversarial system does not easily create space for a third party;
- enforcing victims rights through legal proceedings may cause delay and disrupt criminal proceedings;
- pursuing legal causes of action for victims whose rights are violated may be costly as it may require legal aid funding; and
- different rights might apply differently at different stages of proceedings, requiring various approaches to enforcement.[11]

Further to this, whilst the Charter places an obligation on the Secretary of the Department of Justice & Regulation to monitor the level of compliance with its provisions, it is silent on how this should be done and the regularity in which it occurs.[12] This, arguably, impacts on changing the way actors in the criminal justice system understand, treat and interact with victims.[13]

Assuming the above issues relating to the enforceability of victims rights are insurmountable and prohibitive, a viable alternative may be to establish set

[8] Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan Publishing, 2009) 210; Simon Evans and Carolyn Evans, Legal Redress under the *Victorian Charter of Human Rights and Responsibilities* (2006) 17 Public Law Review 264,281. cited in: Victorian Law Reform Commission, above n 1, 159.
[9] Michael Brett Young, From Commitment to Culture, The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006, Summary Report,(September 2015),10.
[10] Victorian Law Reform Commission, above n 1, 155 & 160; *Victims Charter Act 2006* (Vic) s 22 (1) (a).
[11] Victorian Law Reform Commission, above n 1, 160.
[12] Victorian Law Reform Commission, above n 1, 160; *Victims Charter Act 2006* (Vic) s 20.
[13] Victorian Law Reform Commission, above n 1, 159.

performance monitoring for key players in the criminal justice system. This may bring victims out of the peripheral focus of the criminal justice system by ensuring measurement of agreed relevant performance targets.

It is important to note that existing victim centric services currently operating within the justice system may already be subject to robust performance targets. The development of new performance measures may be most applicable to sections of courts or government departments that have not previously viewed victims as a priority or as part of their core business.

Finally, it is noteworthy that in the course of researching this submission it has become evident that a number of courts and key agencies have been unable to extrapolate key data specifically relating to victims. The fact that this data is not held or is only partially accessible is, perhaps, also indicative of the regard currently paid to victims and further proof that the system is in need of review and real change.

2 The role of victims in the decision to prosecute and negotiate pleas

2.1 The decision to prosecute

The criteria applied to determine whether to proceed with a prosecution requires expert knowledge and understanding of the legal process and are not easily understood by most victims of crime.[14] However, the same criteria often directly relate to the personal circumstances and capacity of a victim including:

- the availability, competence and compellability of witnesses;
- the credibility and reliability of witnesses;
- how witnesses are likely to stand up to giving evidence in court.

Whilst prosecuting agencies in Victoria are required to consider the interests of victims[15], their primary role is to represent the Crown and act in the public interest. These obligations often give rise to competing interests of individual victims and the public. This is to say that issues informing a decision to continue a prosecution including; whether an offence is of particular public concern or the attitude of the victim to a prosecution, may not always align.

As mentioned in section 1, in circumstances where the interests of individual victims are at odds with the primary function of the prosecution it is in the interests of fairness that a victim should be provided with independent legal advice. As previously mentioned, such advice could be provided through a Victim's Liaison Office.

Once again, it is important to note that victims of crime and prosecuting authorities are not always in conflict and the provision of legal advice may not always be necessary. In this context, it is also important to note the research referred to in the VLRC's Information Paper no. 2, which suggested victims seek transparency and accountability in relation to prosecutorial decisions that serve to promote the legitimacy of the process.[16] Legal advice in relation to the decision to prosecute or otherwise may strengthen the victim's confidence in the criminal justice system, even in circumstances where such advice simply affirms or clarifies the position of the prosecuting agency. There would be an educative component in this process that

[14] Victorian Law Reform Commission, *The Role of Victims in the Criminal trial Process*, Consultation Paper, July 2015, 45-46
[15] *Public Prosecutions Act 1994* (Vic) ss 24 (c).
[16] Victorian Law Reform Commission, *The Role of Victims in the Criminal trial Process*, Who are Victims of Crime and What are Their Criminal Justice Needs and Experiences, Information Paper no. 2, May 2015, 16.

could provide the additional benefit of assisting in the "management of expectations" of victims.

A further concern is a prosecuting agency's capacity to properly account for the circumstances of vulnerable witnesses/victims, particularly in the context of the three considerations listed above (i.e., competence, credibility and likelihood of a witness to stand up to giving evidence in court). In this regard, it is important to consider the findings from recent inquiries into the barriers to justice for people with disabilities.

The Australian Human Rights Commission suggested that prejudicial assessments of people with disabilities as being incompetent to give evidence as a witness to criminal proceedings potentially preclude people with disabilities from accessing justice.[17]

Reports from the Victorian Equal Opportunity and Human Rights Commission and the Australian Human Rights Commission also found:

> *Negative attitudes, assumptions and erroneous assessments about people with disabilities often result in people with disabilities being viewed as unreliable, not credible or incapable of giving evidence, making legal decisions or participating in legal proceedings.*[18]

Difficulties of this nature often mean that police do not proceed with charges or the DPP does not prosecute.[19] As noted in the Australian Human Rights Commission Report *"Equal Before the Law:"*

> *"A victim with a disability won't even get their day in court because the DPP won't run the case".*[20]

In considering the role of vulnerable victims and or people with disabilities in the decision to continue a prosecution, it is critical that vulnerable people are provided with adequate support and representation to ensure decisions regarding their competence and credibility are properly informed. This would involve providing vulnerable people and people with disabilities with adequate support and legal advice. As the Australian Human Rights Commission found, it is important that people with disabilities:

> *are treated with dignity when they begin or defend criminal matters, or participate in criminal justice processes, and the legal system provides the modifications, supports and aids needed to participate.*[21]

Section 6 of this Submission refers to a system of intermediaries to support people with disabilities through the criminal trial process. The provision of this type of support is supported at the earliest stages of the criminal trial process including informing a decision to prosecute.

2.2 Review of a decision to discontinue a prosecution

The current system places a number of obligations on the prosecution to inform a victim as soon as reasonably practicable of a decision to discontinue.[22] Further to this, the DPP's prosecutorial discretion policy also requires the views of the informant and the victim to be sought and recorded before a discontinuance is filed.[23] The

[17] Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies*, February 2014,21.
[18] Australian Human Rights Commission, above n 16; *Equal Before the Law: Towards Disability Justice Strategies*, February 2014, 8 & 16; Victorian Equal Opportunity and Human Rights Commission, *Beyond doubt>The experience of people with disabilities reporting crime- research findings*, July 2014, 8 & 9.
[19] Australian Human Rights Commission, above n 16, 20.
[20] Australian Human Rights Commission, above n ,23 (quote taken from Disability Advocacy Tasmania, Australian Human Rights Commission Access to Justice Public Meeting, (Hobart) 20 May 2013.
[21] Australian Human Rights Commission, above n 16,6.
[22] *Victims Charter Act 2006* (Vic) s 9 (c) (ii).
[23] Victorian Law Reform Commission, above n1,46; see also Director Public Prosecutions Victoria, *Director's Policy: Prosecutorial Discretion* (24 November 2014), 12.

VLRC also cite the OPP Complaint Policy which permits complaints from victims dissatisfied with a decision to discontinue a prosecution.[24] Significantly, for victims, it is unlikely that any complaint would cause such a decision to be overturned. It would, at least, provide an explanation to the victim, reducing the anxiety and dissatisfaction they may otherwise experience.

However, as noted by the VLRC, there is no publicly accessible DPP or OPP policy that sets out a process for review seeking reconsideration of a decision to discontinue a prosecution. Further to this, prosecution policy obligations to provide reasons for a discontinuance are discretionary and merely state: *the Director **may** provide a victim with reasons if requested.*[25]

The current discretionary system does not provide victims with a satisfactory level of transparency. A system of review needs to be developed to provide victims with an avenue to have a decision to discontinue re-examined and where relevant be provided reasons for these decisions. This is important because in the context of victims, a decision to discontinue a prosecution is a final decision.

The VLRC identified a number of options for reform including the UK system that provides for internal and judicial review of a decision by the Crown Prosecuting Service (CPS) to discontinue a criminal prosecution.[26]

It is proposed that a system of review, similar to the system applied in the UK, in regards to the decision to prosecute may sufficiently meet the needs of victims whilst simultaneously preserving the integrity of the system.

Whilst the current OPP Complaints Policy permits complaints from dissatisfied victims, it fails to set out a process for review.[27] The Victorian Ombudsman's *Guide to complaint handling for Victoria Public Sector Agencies*, states:

> *A good complaints handling system should be well known to clients and staff of the agency. It should include information about the right to complain, how to do it, where to do it, and how the complaint will be handled.*[28]

Additionally, it is reasonable that a victim (complaining of a decision to discontinue) be advised from the outset as to whether the decision can be overturned as an outcome of the process.

Current policies of the OPP and DPP on handling of complaints (including complaints re: a decision to prosecute) should comply with the standards set out in the *Victorian Ombudsman's Good Practice Guide*. Further to this, lessons could be taken from the UK's *Victims' Right to Review Scheme,* which provides accessible and detailed information in regards to the process to review a decision not to bring charges or terminate all proceedings.[29]

A well documented and accessible complaints process which clearly identifies processes for review of a decision to discontinue a prosecution would provide a victim with an avenue for recourse that is transparent and would inform and or clarify the position of the prosecution when in conflict with the victim.

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[24] Victorian Law Reform Commission, above n 1, 46-47; Office of Public Prosecutions, *OPP Complaints Policy*, (April 2015) 1.; **Note:** the Victims of Crime Commissioner requested data from the OPP in relation to the number of recorded objections made by victims (and informants) in regards to the OPP's decision to discontinue or continue a prosecution. The OPP responded by stating : they either do not keep statistics on these matters or they are not readily accessible.

[25] Victorian Law Reform Commission, above n 1, 46.

[26] Victorian Law Reform Commission, above n 1, 50-51.

[27] Victorian Law Reform Commission, above n 1, 46.

[28] Victorian Ombudsman, Guide to complaint handling for Victoria Public Sector Agencies, November 2007, 5.

[29] The Crown Prosecution Services, Victims Right to Review Scheme, http://www.cps.gov.uk/victims_witnesses/victims_right_to_review/, accessed 31 August 2015.

2.3 The decision to negotiate pleas

In regards to plea negotiations it is also important to note that the *Victims Charter Act 2006* (Vic) requires prosecutors to inform (but not consult prior to a decision) victims about any decision to:

- substantially modify charges
- proceed with some or all charges
- accept a plea of guilty to a lesser charge.[30]

The DPP's Policy on *Victims and Persons Adversely Affected by Crime* aims to give affect to the above provisions by stating:

> *From the date of the first committal mention, the solicitor with conduct of the prosecution must ensure that victims are informed if:*
>
> - *any new charges are filed*
> - *any new charges are withdrawn or*
> - *any charges are substantially modified.*[31]

Further to the above, the VLRC also refer to the DPP *Director's Policy: Resolution* document which requires prosecutors to consult with victims and police/informants prior to the resolution of a prosecution by plea of guilty to a lesser charge. [32]

If one is to rely upon the above legislative provisions and the policies of the DPP and OPP, then victims may be confident that the current justice system provides them with the necessary voice to meet their needs in the plea negotiation process.

However, there is often a disconnect between written law and procedures and their practice. This was referred to by the Australian Law Reform Commission as an "implementation gap."[33] Implementation gaps were also identified as a barrier to successful reform in the context of *Victim/Survivor- focused justice responses and reforms to criminal court practice*.[34]

In this regard, it is important to consider the observation of the VLRC that the obligations to involve victims in plea negotiations are not enforceable, and only require the victim be informed of the decision after it has been made.[35] The available evidence suggests that there are still occasions where victims are not being consulted on the withdrawal of charges or the substitution of the major charge with lesser charges.[36] In our submission, if consultation is supposed to happen and is still not happening then there must be an introduction of enforceability.

The NSW Court Certification Scheme appears to provide a viable alternative process that ensures compliance by prosecuting agencies. This process requires prosecutors to file a certificate with the court confirming consultation with the victim in regards to matters that resolve following negotiations about the charges on an indictment.[37] Whilst the views of the victim are not determinative or binding, the NSW model does provide for a system for review where, if a victim disagrees, a prosecutor should

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[30] *Victims' Charter Act 2006* (Vic) s 9.
[31] Director of Public Prosecutions Victoria , *Director's Policy: Victims and Persons Adversely Affected by Crime*, (11 August 2015), 7.
[32] Victorian Law Reform Commission, above n 1, 48; Director of Public Prosecutions Victoria, Director's Policy: Resolution (24 November 2014 (5).
[33] Australian Law Reform Commission, *Family Violence- A National Legal Response*, Final Report, (2010), 1125
[34] Australian Government, Australian Institute of Family Studies, *Victim/survivor-focused justice responses and reforms to criminal court practice*, Research Report no. 27 (2014), 15.
[35] Victorian Law Reform Commission, above n 1, 48.
[36] Victorian Department of Justice and Regulation, Victims Support Agency, Building the confidence of Victims in the Criminal Justice System, August 2014, 46 & 47.
[37] Victorian Law Reform Commission, above n 1, 52.

consult with a more senior officer within the prosecuting agency. In my submission the prosecutor **must** consult with a more senior officer in these circumstances.

As noted by the VLRC, the scheme is designed to provide a procedural safeguard to complement existing obligations to consult with victims, thereby promoting greater accountability and transparency in the plea negotiation process.[38] It is also noteworthy and similarly viable that this type of scheme (or a similar version) could also be applied in the context of prosecutorial decisions to discontinue a prosecution.[39]

As mentioned above, the VLRC noted numerous reports and research suggesting victims seek transparency and accountability in relation to prosecutorial decisions, which serve to promote the legitimacy of the process.[40] The NSW Court Certification Scheme model appears to provide an alternative to the current Victorian system that involves victims and meets their needs by promoting transparency and accountability in relation to prosecutorial decisions.

There are, quite clearly, a multitude of inquiries, reviews and reports on these issues, which we may all reference. The fundamental issue today is whether or not anyone is prepared to actually do anything to **fix** the problems.

I quote from Lord Denning:

> *"What is the argument from the other side? Only this; that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything that has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on, and that will be bad for both."*[41]

3 The role of victims in committal proceedings

3.1 The prosecutor as the gatekeeper

Whilst the question of whether committal hearings should be abolished is not addressed in the VLRC's Consultation Paper, the VLRC does raise this possibility as a potential approach to reduce the number of times victims are required to give evidence.[42] The trauma, stress and secondary victimisation that results from victims participating in this process is well known and makes the potential abolition of committal proceedings an issue impossible to ignore.

One of the primary functions of committal proceedings is to determine whether there is enough evidence against the accused for him or her to stand trial. [43] Whilst the intent of this process is clear, the question remains whether this function more appropriately rests wholly with the DPP.

The current Victorian legislative framework provides for the DPP's, OPP's and Crown Prosecutors prosecutorial functions and independence. This also includes granting the DPP statutory powers to override a Magistrate's decision not to commit an accused person to stand trial.[44] Further to this, the DPP also has the power to

[38] Ibid.
[39] Victorian Law Reform Commission, above n 1, 55.
[40] Victorian Law Reform Commission, *The Role of Victims in the Criminal trial Process*, Who are Victims of Crime and What are Their Criminal Justice Needs and Experiences, Information Paper no. 2, May 2015, 16.
[41] *Packer v. Packer* [1954] P. 15 at 22.
[42] Victorian Law Reform Commission, above n 1, 60 & 68.

[43] Coldrey, J QC, Director Public Prosecutions, *Committal Proceedings: the Victorian Perspective*, (2009), 2. http://aic.gov.au/media_library/publications/proceedings/07/coldrey.pdf. See also *Criminal Procedure Act 1986* (Vic) s 97.
[44] *Criminal Procedure Act 2009* (Vic) ss 156 (a)-(b).

discontinue a prosecution where a magistrate has committed an accused person to stand trial.[45]

In view of these statutory powers, the ultimate decision of whether or not to continue with an indictable prosecution is a decision that rests with the DPP.[46] This discretionary power was noted at length in the VLRC Consultation Paper and arguably strengthens the case to abolish committal proceedings.[47] As Wilson J argued: *placing the responsibility for prosecutions in the hands of [DPPs], being independent, highly qualified professionals having status equivalent of a judge…. should render the committal proceeding unnecessary and pave the way for its abolition.*[48]

However, it has been suggested that committal proceedings *constitute the only independent public scrutiny of a prosecutorial discretion.*[49] In this regard, alternative systems in Western Australia, Tasmania and New Zealand are preferred as they provide for systems of review and disclosure whilst (in most cases) avoiding the trauma associated with cross-examining victims prior to the trial.[50]

Research conducted by the Australian Institute of Family Studies noted that many victims supported an expeditious committal process, similar to Tasmania and Western Australia whereby a magistrate may commit an accused to trial on the strength of the hand-up brief (containing full statements by all witnesses). This would reduce the time it takes for a case to proceed to trial and also spare victims from being called into court.[51]

It is also important to note, public scrutiny of prosecutorial discretion is afforded high priority in the context of committal proceedings and the rights of the accused. As mentioned in section 2, there appears to be little or no comparative priority for public scrutiny in the context of victims' interests and the prosecution's discretionary power to discontinue a proceeding or negotiate a plea.

A primary function of the committal process is to appraise the accused fully and in detail of the case that has been brought against him or her. A robust system of pre-trial case management or review as is the case in New Zealand may also provide for a process of appropriate disclosure for accused persons whilst simultaneously reducing secondary victimisation caused to witnesses and victims by giving evidence multiple times.

Further, the VLRC's Consultation Paper makes it clear that disclosure obligations are entrenched in the Victorian legal system through legislation, the common law and the policies of the DPP and may also be achieved through the provision of the prosecution's hand-up brief to the accused, prior to trial.[52] However, a pre-trial system that promotes proper disclosure through the provision of hand-up briefs and case review hearings may more effectively balance the needs of the accused and the interests of victims.

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[45] *Criminal Procedure Act 2009* (Vic) ss 156 (b) and 177.
[46] Victorian Law Reform Commission, above n 1, 45.
[47] Victorian Law Reform Commission, above n 1, 45-46.
[48] Cited in, Johnson, J, *The Case for Abolition*, in Vernon J (ed), *The Future of Committals* (Australian Institute of Criminology, 1990), 94 see also Flynn, A, Criminal Law Journal, *A Committal waste of time? Reforming Victoria's pre-trial process: Lessons from other jurisdictions*, (2013), 184.
[49] Fox, Richard, *Victorian Criminal Procedure*, (The Federation Press, 14 ed 2015), 207.
[50] Victorian Law Reform Commission, above n 1, 65 & 45; P*ublic Prosecutions Act 1994* (Vic), s 24(a)-(b), *Richardson v The Queen* (1974) 131 CLR 116, *Director of Public Prosecutions Victoria; Director's Policy: Prosecutorial Ethics* (24 November 2014) [16].
[51] Australian Government, The Australian Institute of Family Studies, Victim/survivor-focused justice responses and reforms to criminal court practice, (2014), 47-48.
[52] Victorian Law Reform Commission, above n 1, 45

3.2 Committal proceedings as a filter

Committal hearings are often referred to as a filter against unjustifiable prosecutions.[53] The filtering capacity of committal proceedings is brought into question when one considers the infrequency at which magistrates discharge matters after finding there is insufficient evidence to commit a person to stand trial. In the 2014/15 financial year, 2,859 cases were listed in the committal stream, only 24, or less than 1 per cent of these cases were discharged by a magistrate.[54] Further to this, the OPP have reported that in the same year there were 11 direct indictments and 111 matters were discontinued following committal for trial.[55]

However, the filtering function of committal proceedings is not limited to identifying prosecution cases with insufficient evidence. Committal proceedings also provide an opportunity for courts to identify early pleas.[56] Notably, of the 2,859 committal cases listed in the Magistrates' Court in 2014/15, 880 cases were heard summarily.[57] Whilst these numbers may be considered positive in the context of the early resolution of criminal cases, the question remains as to whether this function could not be achieved by alternative pre-trial means.

Additionally, as noted by the VLRC, there is no obligation on the prosecution to consult with the victim prior to a summary jurisdiction application.[58] The VLRC also noted the parallels of a prosecutor's decision to consent to charges being dealt with summarily and the decision to accept a plea.[59] As suggested in section 2, the NSW Court Certification Scheme would provide an additional measure to ensure that a court has considered the views of the victim before granting summary jurisdiction.

3.3 Committal hearings and testimony

Should the committal process continue, then reforms in relation to protective restrictions on victims multiple retelling of testimony and a prohibition on cross-examination of victims in committal processes must be considered. It is commonly recognised that victims' trauma may be compounded by the public nature of the criminal trial, aggressive cross-examination and a requirement to retell their experience on multiple occasions.[60]

Allowing the victim's initial statement to police to be audio visually recorded and to stand as evidence-in-chief at committal and trial stages will minimise the number of occasions a victim is required to recount their evidence. This will also strengthen the integrity of the victim's evidence by more accurately capturing the reality of the victim's evidence at the point of disclosure.[61]

The current Victorian system provides some consideration for the interests of victims by imposing an absolute prohibition on cross-examination of children and cognitively impaired victims of sexual offences in committal proceedings.[62] However, it must be noted that victims of crime are not a homogenous group, they do not all experience the same severity or frequency of violence and have varying levels of resources and

[53] Fox, Richard, *Victorian Criminal Procedure*, (The Federation Press, 14 ed 2015), 207.
[54] Statistics provided by Magistrates Court of Victoria, 2014. note: this includes cases committed for trial and cases heard summarily.
[55] It is not known whether the 11 direct indictments we matters that had been discharged by a Magistrate.
[56] Victorian Law Reform Commission, above n 1, 60.
[57] Statistics provided by Magistrates Court of Victoria, 2015.
[58] Victorian Law Reform Commission, above n 1, 63.
[59] Victorian Law Reform Commission, above n 1, 67.
[60] Victorian Law Reform Commission, *The Role of Victims in the Criminal trial Process, Information Paper no. 2 Who Are Victims of Crime and What Are Their Criminal Justice Needs and Experiences*, (May 2015), *13 &17;* See also Australian Government, Australian Institute of Family Studies, *Victim/Survivor-focused justice responses and reforms to criminal court practice,* Research Report No. 27, April 2014, xii.
[61] See also Australian Government, Australian Institute of Family Studies, *Victim/Survivor-focused justice responses and reforms to criminal court practice,* Research Report No. 27, April 2014,62.
[62] Victorian Law Reform Commission, above n 1, 61; *Criminal Procedure Act 2009* (Vic) s 123.

capacity to manage the expectations and requirements of the criminal justice system.[63] The one common theme that exists with almost all victims is that they are rarely conversant, or even vaguely familiar, with the judicial process.

Many victims may be particularly vulnerable and require similar protections provided to children and victims with cognitive impairments, irrespective of their age or cognitive capacity. Given this reality, it is critical to aim to minimise the number of times victims are subjected to cross-examination, or at least, in the context of committal proceedings (which are non-determinative), limit cross-examination to exceptional or limited circumstances.

There have also been broader reforms introduced in Victoria that place restrictions on the cross-examination of witnesses by requiring an accused to apply for leave to cross-examine witness including victims.[64] This reform seeks to reduce delays and avoid trauma faced by many witnesses and victims that may be required to give evidence and face cross-examination on multiple occasions.

The effectiveness of this reform is questionable particularly when one considers that in the 2014/15 financial year, only nine of the 1,335 applications to cross-examine witnesses in committal proceedings (less than 1%) were refused by a Magistrate.[65] Statistics of this nature suggest that perhaps these applications are being granted as a mere administrative formality with little or no regard provided to the interests, views and vulnerabilities of victims, who remain unrepresented in these applications. There is no "equality of arms" for victims, even in an application to the court that relates, specifically, to them.

If magistrates were required to consider the views of victims and or matters personal to victims as part of this test, as they should, it would further inform their decision as to whether cross-examination is justified and also provide for a more accountable and transparent criminal process.

We accept that the total abolition of committal hearings may be beyond the scope of the VLRC's deliberations.[66] It may also be thought that completely prohibiting cross-examination of victims at committal hearings may have risks. However, if we fail to act while the opportunity presents itself, to change a largely ineffective system, it may well be perceived that the system is believed to be more important than the people it is meant to serve.

Given the existing statistical data on committal proceedings in Victoria, and the above comments of Wilson, J it would appear that committal proceedings may exist solely as a convenience for some of the regular participants in the judicial process. If there is to be genuine reform in the participation of victims in the criminal trial process, it should, in our submission, not just expand their access but remove the unnecessary and onerous.

Many of the above mentioned risks may be mitigated by applying learning's and practices from alternative interstate and international jurisdictions that balance the needs of victims with the rights of the accused by providing for:

- an independent and expedient process of public scrutiny of prosecuting agencies decisions to prosecute or have matters heard summarily;

[63] Victorian Law Reform Commission, above n 1, 69.
[64] Flynn, A, Criminal Law Journal, *A Committal waste of time? Reforming Victoria's pre-trial process: Lessons from other jurisdictions*, (2013), 189; *Criminal Procedure Act 2009* (Vic) ss 124 (3) (4) and (6).
[65] Statistics provided by Magistrates Court of Victoria, 2015.
[66]

- robust alternative pre-trial processes (including case review and disclosure hearings) that meet disclosure obligations whilst reducing the likelihood of victims being subjected to the trauma of a 'mini-trial';
- the prohibition of cross-examination of victims or at least processes that seek to make cross-examination of victims in committal proceedings the exception, as opposed to the rule, by requiring magistrates to thoroughly and appropriately consider the views and/or vulnerability of victims.

4 Pre-trial applications

4.1 Evidence of sexual activities

As noted by the VLRC, recent reforms place requirements on an accused's lawyer to seek leave from a judge to cross-examine or lead evidence about a victim's sexual history.[67] A court may grant leave if it is satisfied that the evidence has substantial relevance to a fact in issue and it is in the interests of justice. [68] In considering whether it is in the interests of justice to admit evidence about sexual activities the court must, amongst other matters, have regard to:

- whether the probative value of the evidence outweighs the potential distress, humiliation and embarrassment of the victim; and
- the need to respect the victim's personal dignity and privacy.[69]

This protection is designed to preserve the privacy and reputation of the complainant/victim in sexual offence proceedings.[70] However, as further noted by the VLRC, there is no obligation to serve notice on the victim that an application is being made and the accused can request the victim not be present in court when the application is heard.[71]

Unless there is a genuinely held view (of which the court is convinced) that the previous sexual activity, of the victim, would specifically relate to a proposed line of defence, the prior sexual activity of any victim should not be the subject of any form of discussion, far less cross-examination. To permit cross-examination of previous sexual activity for the purpose of a "fishing expedition" (or the vague hope of defence counsel that something might just turn up) is the most egregious invasion of privacy and unwarranted scrutiny of the lawful activity of a victim.

Should there be no recommendation to prohibit such applications, in the absence of compelling reason, we submit the following:

- The process takes place prior to the commencement of a trial and there is no jury present.
- In our submission there appears be no sustainable contention available that any application to cross-examine could possibly allow that a victim might not be present, and competently represented, during that application.
- It is impossible to understand how a court can accurately assess the balance between the potential probative value of the evidence against the potential distress, humiliation, embarrassment and further victimisation of a victim without, at the very least, first hearing from that victim. Any decision to deny the victim the opportunity to be heard, in such an application, simply sends a

[67] Victorian Law Reform Commission, above n 1, 76.
[68] Victoria, *Parliamentary Debates*, Legislative Assembly, 17 September 2009, 3373 (Rob Hulls, Attorney-General). See also *Criminal Procedure Act 2009* (Vic), ss 342 & 349.
[69] *Criminal Procedure Act 2009* (Vic), ss 342 & 349 .
[70] Victoria, *Parliamentary Debates*, Legislative Assembly, 17 September 2009, 3373 (Rob Hulls, Attorney-General).
[71] *Criminal Procedure Act 2009* (Vic), s 348.

message to the victim and the community that the court is uninterested in the victim.

- Providing victims with an opportunity to be heard in relation to applications to lead evidence about their sexual history could not possibly diminish the court's capacity to properly determine the complex issues that must be considered in making such judgments. Neither could it possibly lessen the chances of the accused to a fair trial. "Fair" means fair, not overwhelmingly advantageous.

In our submission, granting victims standing in these types of proceedings would provide them with a voice in a process where the victim has an unarguably demonstrable personal interest. The VLRC's reference to the American model may provide a viable alternative or a base for future reform that provides victims with an avenue to be heard by the court.[72]

Given the legal complexities involved in considering these applications, consideration needs to be given to funding a service similar to the Sexual Assault Communications Privilege Service that currently exists within Legal Aid NSW to provide victims with legal support to navigate this type of proceeding.[73]

4.2 Confidential communications

As mentioned by the VLRC, the Victorian law restricts access to, and use of, records of communications made in confidence by a victim of a sexual offence to a registered medical practitioner or counsellor in the course of a professional relationship.[74]

These types of reforms are designed to protect the privacy of victims of crime and encourage victims to seek treatment for the harm caused by criminal offending. Conversely, public knowledge that these types of confidences can be breached and become the subject of court proceedings could well make future victims reluctant to seek treatment, ultimately adversely impacting their rehabilitation and ensuring their victimisation continues.

Once again, proceedings of this nature demonstrably impact a victim's privacy and it is important that pre-trial procedures not only pay regard to the rights of the accused but also the interests and needs of victims. It is important to note that in Victoria, victims (and the relevant medical practitioner or counsellor) may seek leave of the court to appear and make submissions in relation to the disclosure of confidential communications.[75] However, Victoria has a weak legislative framework, in regards to protecting victims' interests in the context of confidential communications, when compared to some other Australian jurisdictions.[76]

The *Evidence (Miscellaneous Provisions) Act 1958* (Vic) acknowledges that its provisions should be interpreted and applied in the knowledge that there is a high incidence of sexual violence in society and sexual assault is under-reported.[77] In view of these guiding principles the Victorian legislative framework does not go far enough to protect the interests of victims or encourage the reporting of sexual assault.

The total prohibition on the disclosure of confidential communications (as is the case in Tasmania) will spare victims from the threat of their most intimate feelings being exposed in court and becoming a matter of public record. The Tasmanian model is

[72] Victorian Law Reform Commission, *The Role of Victims in the Criminal trial Process*, Consultation Paper, July 2015, 80. note: VLRC states American model provides: The defence must notify the victim or the victim's representative of a pre-trial application to have sexual evidence admitted at trial. The victim has the right to attend and be heard at the pre-trial hearing, which is held in closed court. The right to be heard appears to extend to actively participating in the hearing.
[73] Victorian Law Reform Commission, above n 1, 80.
[74] Victorian Law Reform Commission, above n 1, 77; *Evidence (Miscellaneous Provisions) Act 1958* (Vic) pt II, div 2A.
[75] Victorian Law Reform Commission, above n 1, 77, *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32 C(5).
[76] Victorian Law Reform Commission, above n 1, 78 & 19.
[77] *Evidence (Miscellaneous Provisions) Act 1958* (Vic) *s 32 AB (b).*

supported as it provides the greatest level of protection for the privacy and interests of victims.

However, consideration should also be given to broadening the scope of this type of protection to not only include all victims of crime but also a broader range of counselling communications, as is the case in NSW. The NSW system applies a broader definition to protected communications to include social workers records and school records.[78]

Should this be viewed as not providing adequate consideration for the accused's right to a fair trial, then a lesser alternative is to at least provide victims with legal representation to be heard in relation to the relevant application. The VLRC referred to the South Australian Victims of Crime Commissioner performing an intermediary role between the prosecution and the victim.[79] Whilst this type of support and advocacy is supported by the Victorian Victims of Crime Commissioner, such a role may not be transferable in the Victorian context, bearing in mind potential caseload, costs and differing oversight function of the Victims of Crime Commissioner.

It is important to note that the Victorian County Court statistics suggest, in the last three financial years (2012/13 to 2014/15) there were 168 applications seeking leave to access confidential communications. Of these applications 68 were granted, 19 were refused and 81 applications had the order that was originally made later modified. (the County Court were unable to provide outcomes in relation to the orders that were modified). We submit it is reasonable to, therefore, conclude that of 168 applications only 19 were refused at first instance.

The NSW Sexual Assault Communications Privilege Service is a model that provides advice and representation relating to confidential communications that would be appropriate and transferable to the Victorian context. Importantly, the Legal Aid NSW Annual Report 2012-13 reported that: *In its first full year of operation, the Sexual Assault Communications Privilege Service provided legal representation in 122 matters where complainants asserted the sexual assault communications privilege.*[80] This suggests there is considerable demand for this type of representation and participation of victims in a comparable justice system.

This type of protection will provide victims with confidence to seek treatment and rehabilitation and also empower them to report serious criminal offending. This is important, as the privacy and physical and psychological recovery of victims of crime must be viewed as a paramount concern and priority for our criminal justice system. This priority was emphasised by the Government when the *Victim's Charter Act 2006* (Vic) was introduced in Victoria:

> *The criminal justice process itself can exacerbate the trauma that victims have already experienced and can, in fact, become a source of secondary victimisation. This not only hinders the victim's recovery, but can impact on their future willingness to report crime and participate in the prosecution process. If this happens, the efficacy of the criminal justice system as a whole is undermined. If victims stop reporting crime and do not come forward to give evidence in the prosecution process, this makes it much more difficult to call perpetrators to account.*[81]

[78] Victorian Law Reform Commission, above n 1, 78 & 79.

[79] Victorian Law Reform Commission, above n 1, 83.

[80] Legal Aid NSW, *Annual Report 2012-13*, 24.

[81] Victoria, *Parliamentary Debates*, Legislative Assembly, 14 June 2006, page 2045, (Rob Hulls- Attorney-General).

5 The role of victims in the trial

5.1 Support for protective procedures

Whilst this submission supports providing victims with the opportunity to participate in the trial process where their interests are demonstrably impacted, it is accepted that criminal trials can be complex and most victims do not necessarily want the responsibility of taking on prosecutorial functions.[82]

However, the trial process also forces many victims into an entirely unfamiliar climate, where they must recount their experience in detail and submit to an often distressing process of cross-examination that may expose them to secondary victimisation. It is for this reason that the adoption and extension of protective procedures for victims participating in the criminal trial process are supported.

5.1.2 Protected witness reforms

Protective procedures currently in place in Victoria, for child victims and victims with cognitive impairments in sexual offence trials, go some way to protecting the interests of these specific cohorts. However, as previously mentioned, victims of crime respond differently and have varying levels of need and support requirements that may vary according to their personal circumstances and the nature of the violence to which they have been subjected.

This submission strongly supports the South Australian system which provides for a broader definition of a vulnerable witness. The South Australian model empowers a court to assess the merits and individual circumstances of each case before making an order granting special arrangements to give evidence including the use of screens, closed circuit-television, support people and pre-recorded evidence.

This model provides for the varying and individual requirements of victims by extending access to protective measures to a broader range of vulnerable witnesses/victims including:

- victims of serious offences against the person
- witnesses who experience a special disadvantage because personal circumstances or the circumstances of the case or
- witnesses who have been threatened, subject to, or have reasonable grounds to fear retaliation or retribution.[83]

Further, as mentioned in section 3, the use of pre-recoded statements to police being used as evidence-in-chief (at the preliminary stage, if committal proceedings are to be retained) and at trial is supported. This would minimise the number of occasions where victims are required to give evidence and also more accurately capture the reality of the victim's evidence at the point of disclosure, without compromising the right of the accused to a fair trial.[84]

5.2 Intermediaries for vulnerable witnesses

The use of intermediaries to facilitate communication between vulnerable victims and key players in the criminal trial process is also strongly supported. Section 2 of this submission also mentions the important role intermediaries and or independent third persons can play in informing a decision to prosecute.

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[82] Victorian Law Reform Commission, above n 1, 109.

[83] Victorian Law Reform Commission, above n 1, 96.

[84] Australian Government, Australian Institute of Family Studies, *Victim/Survivor-focused justice responses and reforms to criminal court practice,* Research Report No. 27, April 2014,62.

The role of an intermediary is equally important in the criminal trial process. The Australian Human Rights Commission found one of the major barriers to justice for people with disabilities was confusion associated with the styles of communication and questioning techniques used by police, lawyers and courts.[85]

In our submission, the provision of communication intermediaries, for vulnerable victims and/or witnesses with disabilities, cannot be ignored any longer. Intermediaries have been used in the United Kingdom for many years and in restricted forms in other Australian jurisdictions.

Whilst our criminal trial system provides non-English speaking witnesses with interpreters, the same obligation and level of regard does not extend to those who cannot communicate in English because of a significant physical or mental impairment. Fundamentally, a communication intermediary is no more than an interpreter, with their primary purpose being to ensure that the court receives accurate evidence from a victim. An intermediary plays no role in determining the truthfulness or otherwise of that evidence.

The intermediary models applied in Western Australia, New South Wales and more recently, South Australia provide a useful base for a comparable system in Victoria. However, consideration should also be given to extending the Office of the Public Advocate's Independent Third Person Program (ITP). The ITP program may provide a solid and cost effective foundation to build an intermediary program however, a model extending the ITP would require additional resourcing and training as the ITP is largely a volunteer program with very limited government funding.

Additionally, there is support for the United Kingdom's system as it includes access to intermediary services for a broader range of people in **any** criminal proceedings including an accused or victim with a mental impairment, significant impairment of intelligence of social functioning and physical disability or disorder.[86] As mentioned throughout this submission, broadening the availability of these types of services provides for a more appropriate and contemporary approach to the diverse and differing needs of individual victims of crime, and other trial participants, in modern society.

5.3 Judicial enforcement of protective measures

Beyond the protective procedures for victims of sexual offences and other vulnerable witnesses, there is no obligation on a judge to treat a victim differently to any other witness during the trial process.[87] However, a judge does have the power and duty to ensure that questioning of victims during a trial is respectful and proper.[88]

This discretionary power is important particularly when considered in the context of Justice Cummins comments, who stated in his retirement speech:

> *I have no doubt that every judge respects, and has concern for, victims. But in my view the curial system does not sufficiently translate that respect and concern. I consider the courts have not sufficiently secured the rights of victims in doctrine, procedure and sentence….. Witnesses should be relevantly tested – cross-examination is the proper means of doing so in the adversarial system- but should not be treated as objects of warfare.*[89]

[85] Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies*, February 2014,16 & 18
[86] Victorian Law Reform Commission, above n 1, 98.

[87] Victorian Law Reform Commission, above n 1, 90.
[88] *Evidence Act 2008* (Vic) s 41.
[89] Justice Cummins, *Retirement Speech*, Bianco Court Melbourne, 24 February 2010.

As judges play such an important role in protecting victims from unnecessary, inappropriate and irrelevant questioning by or on behalf of the accused, it is critical that the judiciary is provided with adequate education and professional development to properly assess the effect of questioning upon a victim/witness.

Every witness and, perhaps more so, every victim, is different. Every individual has a different capacity to deal with stress, anxiety and traumatic events. It follows that every victim will have different levels of ability to deal with rigorous cross-examination, or even the trial process itself.

Therefore, we completely support the notion that training in relation to victims' issues be embedded into the ongoing professional development and induction processes for judges. This will maximise their capacity to assess the effect of questioning on a witness and determine whether cross-examination is unduly harassing, offensive or oppressive, for a particular victim.

6 The role of victims in sentencing and restorative justice

6.1 Victim impact statements

Victim impacts statements (VIS) are critical as they provide victims with an opportunity to actively participate in the criminal justice system and have their voice heard in the sentencing process.

VISs are frequently accredited with providing victims with valuable therapeutic benefits associated with communicating the impact of their crime and having that acknowledged by the court.[90] VISs also provide courts with a mechanism to inform their prescribed sentencing considerations including:

- the impact of offending on any victim
- the personal circumstances of any victim and
- any injury, loss or damage (financial, medical or social) resulting directly from the offence.[91]

However, there are often complexities surrounding the content and admissibility of victim impact statements and this Office has received occasional reports of dismissiveness by judges towards victims, often directly related to their victim impact statements.

It is important to recognise the Supreme Court has issued a Practice Note (11/2015) that provides specific directions to Crown and Defence counsel regarding their obligations in the context of VISs. [92] The Practice Note clearly aims to ensure that admissibility issues relating to VISs are resolved prior to the plea hearing.

The aims of the Supreme Court Practice Note are supported however it should be strengthened by a legislative compulsion to provide for independent qualified persons to assist victims with the preparation of their VIS and advise on issues relating to admissibility of material. This type of support would:

- defuse tensions associated with inadmissible material in VISs;
- reduce the probability of appeals on the basis of a sentencing judge wrongly relying upon and being influenced by inadmissible material;

[90] Victims Support Agency, Department of Justice, Victoria, *A Victim's Voice: Victim Impact Statements in Victoria*, October 2009 pp 7, 9, 10, 12, 17, 33, 49, 50.
[91] *Sentencing act 1991* (Vic) s 5 (2) (daa)-(db).
[92] Chief Justice's Practice Note (11/2015).

- reduce the risk of trauma associated with modifying or amending a VIS at a plea hearing;
- improve outcomes in terms of victim satisfaction and the therapeutic benefit of preparing a VIS.[93]

It is also clear that the admissibility of evidence is not always a matter that is easily settled, even amongst legal professionals. Therefore, it is important the flexible approach adopted by Victorian Courts in determining what is admissible in a VIS is consistently maintained. As stated by Charles JA in *R v Dowlan* and Vincent JA in *DPP v DJK*:

> *it would be destructive of the purpose of victim impact statements if their reception in evidence were surrounded and confined by the sorts of procedural rules which are applicable to the treatment of witness statements in commercial cases.*[94]

Given the complexities and sensitivities associated with VISs this Office also supports the recommendation made by the Department of Justice in its *Interim Implementation Report on Victim Impact Statement Reforms in Victoria* which proposed:

> *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.*[95]

It is understood that judges are required to conduct a difficult balance between a number of considerations and principles when sentencing an accused. Whilst a victim's attitude can never solely dictate a judge's approach to sentencing, it remains relevant and victims should be afforded an opportunity to comment on the sentencing of the accused.

The VLRC understandably refers to the risk of raising victim's expectations in regards to affording them this level of participation, however, such risks and expectations could be easily managed and mitigated through the guidance and support of a victim's liaison officer and or counsellor.

Finally, one of the guiding principles a court is required to consider in sentencing an accused is to protect the community from the offender. The introduction of community impact statements is also supported as they provide an opportunity for a community to detail the impact a criminal offence has on an entire community.

By way of example, the arson attacks leading to many of the Black Saturday Bushfires affected whole communities. Community impact statements (CIS) prepared at grassroots levels (possibly by Local Government representatives) may have effectively explained the effects of the bushfires on the broader community to the relevant court. A CIS, in these circumstances, would also remove any burden on a court to receive multiple VIS that might cover exactly the same issues.

Appropriate procedures would need to be developed and may include the preparation of prescribed CISs by councils and or relevant neighbourhood groups/organisations which could be submitted to court through relevant prosecution agencies.

6.2 Restorative justice as an alternative sentencing procedure

The apparent merits of restorative justice processes are understood and their implementation in the Victorian justice system is not opposed. However, given the

[93] Victims Support Agency, above n 90, 70.
[94] *R v Swift* [2007] VSCA 52.
[95] Department of Justice, Victoria, Victim Impact Statement Reforms in Victoria, Interim Implementation Report, 2014, 7.

Office of the Victims of Crime Commissioner is primarily concerned with the interests of victims, reservation exists over the implementation and practical operating aspects of restorative justice, particularly in the context of crimes of violence that are beyond summary jurisdiction.

The primary concern is that victims of violent crime, family violence related crimes and sex crimes, may feel obliged to participate in restorative processes. Confronting an offender may exacerbate their trauma and reinforce existing power imbalances. Irrespective of any proposed robust referral mechanisms which may be put in place, the risk of exposing vulnerable victims to further trauma is too great, particularly in the context of serious crimes committed against the person.

Whilst there may be many victims that could potentially gain from structured restorative justice sessions which also potentially assist in the rehabilitation of the offender, its appropriateness and efficacy is largely dependent upon the nature of the offender and their offending. In this regard, restorative justice processes may be beneficial and appropriate in the context of the Children's Court where the prospects of rehabilitation of an offender are greater.

It is my view that restorative justice approaches provide greatest preventative benefit and an acceptable level of risk to victims and the community in circumstances involving lower scale summary offences, including property offences and minor assaults where the offender is in the 'early stages' of criminal activity and rehabilitation is more likely.

7 Compensation and restitution

7.1 Sentencing Act restitution and compensation orders

Expedient and efficient processes are vital when considering the compensation and restitution of victims of crime, as delays and complicated procedures often add to a victim's stress and trauma, deny them justice and hamper their recovery.

Whilst victims are permitted to seek orders for restitution or compensation for loss or injury arising from an offence, there is insufficient support for victims in making such applications. Victims must either rely on their own initiative, the DPP or the court's own motion in order to apply for compensation or restitution orders.

As mentioned previously, victims are often unfamiliar with the court environment and may also be traumatised as a result of a criminal offence or subject to secondary victimisation as a result of the trial process. Further to this, the DPP's policy suggests they will only apply for restitution or compensation on behalf of a victim if an exhaustive list of considerations is met.[96]

In the circumstances it is unfair to expect a victim to make an application to the court for compensation or restitution. It is our submission that there should be a statutory presumption in favour of compensation and restitution in all cases.

Applying for compensation and restitution is another critical point in the criminal trial process that demonstrably impacts the interests of victims and the provision of individual legal advice and or representation to assist victims through this process is also strongly supported.

In relation to the court taking into account the financial position of the offender and any burden caused to them by ordering an amount payable, the Australian Law Reform Commission's position is strongly supported:

[96] Director of Public Prosecutions, *Director's Policy: Victims and Persons Adversely Affected by Crime* (8 January 2014) 67.

Judges should not be permitted to take into account an offender's financial circumstances with a view to reducing the quantum of an award. Doing so was seen to undermine the central purpose of compensation and restitution orders, which is to ensure that victims of crime receive adequate compensation for the loss they have suffered.[97]

7.2 Enforcement

One of the purposes of the Sentencing Act is to "ensure that victims of crime receive adequate compensation and restitution."[98] It is our submission that this purpose is not fulfilled until a victim actually "receives" compensation and restitution. The true effectiveness of this provision of the Sentencing Act can only be determined through closer scrutiny of the:

- rate of compliance with such orders;
- number of orders that were pursued through judgment debt recovery processes; and
- emotional and financial costs to victims as a result of enforcing a judgment debt.

The VLRC suggested a New Zealand system of reparation as an alternative, where a reparation order (ie compensation or restitution order) is enforceable in the same way as a fine, and the court pursues the offender for outstanding money owed.[99]

At first glance, this alternative appears to be a more desirable option as it places the burden of enforcing the debt onto the Court. However, further analysis would be required before a system of this nature, or part there of, could be adopted in Victoria, as it would have considerable impact on offenders, the courts, the Victorian criminal justice system and (probably) its sentencing principles.

Regardless of any possible objections to achieving effective restitution and compensation for victims, such debts should be actively pursued; and they should pursued as a matter of some urgency. In the 21st Century, the impact of crime, on innocent victims, cannot be ignored if our justice system is to serve the entire community in a contemporary way.

8 The role of victims in the appeal process

8.1 Appealing pre-trial decisions

This submission has supported providing victims with legal representation and a voice in pre-trial processes that demonstrably impact their interests including; applications seeking leave to cross-examine, disclose confidential communications and admit evidence of past sexual activity.

As a consequence of this position, it follows that a victim should also be afforded the right to appeal such decisions and the interlocutory appeal processes applied in New South Wales provides a useful model for consideration and application in the Victorian context.

Providing victims with a right to appeal, in these most limited circumstances, may result in delays in the trial process. However, when balanced against the detrimental impact these decisions potentially have on victims, as members of our community, it

[97] Australian Law Reform Commission, *Same Time Same Crime: Sentencing of Federal Offenders* (Report 103) [8.27] taken from: Victorian Law Reform Commission, above n 1, 134.
[98] *Sentencing Act 1991* (Vic) s 1 (i).
[99] Victorian Law Reform Commission, above n 1, 138.

represents a fair balance between the rights of the accused and the rights of the victim.

It also provides a fair trial, in that there is a (limited) measure of 'justice for all,' including the alleged victim of a serious crime, in the proposal.

8.2 The right to request the DPP consider an appeal

As mentioned in section 2, victims (and the community in general) seek transparency and accountability in relation to prosecutorial decisions, which promotes legitimacy of the process. This requirement for transparency should also extend to a victim's right to request the DPP consider an appeal or provide reasons or explanations regarding decisions to bring or not to bring an appeal.

It is important to note that a similar call for transparency and fairness is enshrined in legislation in the context of providing legal aid representation for an accused's right to appeal. Where a defendant has been denied representation for a criminal appeal and is dissatisfied with the decision, Victoria Legal Aid (VLA) has a statutory obligation to review its decision. VLA has recently implemented a new system for reviewing these decisions.[100] This process involves an internal review conducted by the specialist in-house VLA Appeals Team and a review by an independent reviewer in accordance with section 35 of the *Legal Aid Act* (Vic).[101]

Whilst it is fundamental that an accused has a right to appeal and, where appropriate, a right to legal representation, it is unfair that a victim is not provided with at least an opportunity to request that an appeal be considered. The decision to appeal is currently a discretionary decision for the DPP and is not subject to review. It is therefore in the interests of transparency and fairness to provide victims with this opportunity.

It is also important to note that a recent VLA *Criminal Appeals Review* noted that:

> *While victims felt that great gains had been made over the last few years around giving victims a voice within the trial and plea process, many did not feel those gains had extended to appeals, and they continue to be under acknowledged in Court of Appeal proceedings.*[102]

It is understood the South Australian *Victims of Crime Act 2001* contains provisions allowing victims to request the prosecutor consider bringing an appeal.[103] Similar reforms granting victims the right to request the DPP consider an appeal or the right to be consulted in relation to bringing an appeal are supported.

Whilst the South Australian system provides for the provision of legal support through the Commissioner for Victims Rights, it is proposed, in the Victorian context, that this type of service more aptly sits with a separate legal entity or the aforementioned "victims' liaison office."

8.3 Provision of information in relation to appeals

Finally, the recent VLA *Criminal Appeals Review* also found that victims were often notified of appeals via media reports, which had a particularly traumatic impact on them.[104] Bearing this in mind, this submission also supports the recommendation made within that report suggesting:

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[100] Victoria Legal Aid, *Criminal Appeals Review*, September 2014, 10.
[101] Ibid 10.
[102] Ibid 5.
[103] *Victims of Crime Act 2001* (SA) 10A.
[104] Victoria Legal Aid, above n 100, 5.

> *VLA will work with the Court of Appeal and the Office of Public Prosecutions to develop processes that support victims by providing timely, accurate information when an appeal is lodged.* [105]

In addition to supporting the above, we further support the immediate implementation of such a notification process that would, no longer, see victims further damaged by the system that they (as taxpayers) help provide.

I reiterate that we do not advocate for full legal representation of victims, except in specific matters of direct and crucial interest to, and impact on, them.

9 The role of the Victims of Crime Commissioner

Victoria's first Victims of Crime Commissioner was appointed in October 2014 and legislation formalising the role and prescribing the powers and functions of the Commissioner is currently before Parliament.

The Government's express intention for the role is to focus on systemic issues that affect significant numbers of victims. The Victims of Crime Commissioner Bill 2015 (the Bill) states that the Commissioner's functions include:

- to advocate for the recognition, inclusion, participation and respect for victims of crime by government departments, bodies responsible for conducting public prosecutions and Victoria Police;
- to carry out inquiries on systemic victim of crime matters;
- to report to the Attorney-General on any systemic victim of crime matter; and
- to provide advice to the Attorney-General and government departments and agencies regarding improvements to the justice system to meet the needs of victims of crime.[106]

The Office of the Victims of Crime Commissioner is an independent and central point of contact for all victims who have experienced difficulties or confusion in their dealings with the criminal justice system and government agencies. This places the Commissioner in an ideal position to advise government on systemic issues and the future needs for victims of all violent crimes.

The Commissioner will receive complaints from individual victims of crime and where possible, provide advice and information to support victims. However, it is the Government's intention that the Commissioner will not be involved with individual cases, or become involved in particular prosecutions or investigations of individual complaints. Instead, it is anticipated the Commissioner will be provided with powers to refer particular cases to the Ombudsman, the Chief Commissioner of Police, the Director of Public Prosecutions or where there is evidence of corrupt conduct, the Independent Broad- based Anti-corruption Commission.

As one of the primary functions of the Commissioner includes carrying out inquiries on *systemic* victims of crime matters and reporting to the Attorney-General, it would not be appropriate for the Commissioner to administer victims' services as this would compromise the independence of the role.

Finally, the Victims of Crime Commissioner also performs a critical function of advocating for the interests and needs of victims in a public context. The adverse impacts and circumstances faced by victims of crime often means they are not in a position to publicly express their concerns or issues. The Victims of Crime

[105] Ibid.
[106] The Victims of Crime Commissioner Bill 2015, Introductory Print, cl 13.

Commissioner also supports victims of crime by acting as a voice to articulate their collective concerns and issues to the media and other public forums.

In closing, we believe that our call for the establishment of a Victims Liaison Office in each court complex, should become a reality. It would provide immeasurable assistance to victims at the lowest possible cost and would be a far more efficient and inexpensive use of government funds than a wholesale provision of legal representation to victims for the duration of, and lead up to, a trial (as has been called for in some quarters). It would provide targeted assistance when it is needed and the Office would become a part of the court administration.

I do not suggest that it will be the universal panacea for victims in criminal trials, but it will achieve much and should remove most, or all, of the "horror story" experiences too often recounted by victims.

In almost all criminal trials there will be one category of person who is regarded as totally innocent, completely blameless and absolutely at the mercy of a system with which they are unfamiliar. The victim is often re-victimised by our system and, more often than not, find themselves the worst treated of all witnesses.

"The system" has been what it is for decades, perhaps centuries, and does not have an impressive record of adapting to change. I submit that the system is not only long overdue for change, but must change markedly if it is to deliver the contemporary service that victims and the broader community expect in the 21st Century.

Treating victims with respect, dignity, fairness and a measure of equality would be a worthy first step in contemporising our criminal trial process.

Greg Davies APM

Victims of Crime Commissioner.