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The Hon. Philip Cummins AM  
Chair, Victorian Law Reform Commission

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Dear The Hon. Philip Cummins AM

**Public Submission to the Victorian Law Reform Commission – The Role of Victims of Crime in the Criminal Trial Process**

Thank you for the opportunity to respond to the Consultation Paper, *The Role of Victims of Crime in the Criminal Trial Process*, dated July 2015 (the ‘Consultation Paper’).<sup>1</sup> The Consultation Paper presents the current range of rights and powers exercisable by victims of crime in Victorian criminal trials with reference to alternative common law jurisdictions. Where appropriate, these rights and powers may be exercisable by the prosecution or the court seeking to maintain the safety and integrity of the victim as a witness. Limited powers are enforceable by the victim themselves. International law and procedure as well as the criminal processes of civil law countries are also presented in the Consultation Paper for comparison.

The Consultation Paper presents the rights and powers of victims across the criminal trial in a comprehensive way. This is a difficult feat given that victim trial rights are spread broadly

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<sup>1</sup> VLRC (2015) *The Role of Victims of Crime in the Criminal Trial Process*, Consultation Paper.

across law, policy and practice. There is no one consolidating instrument.<sup>2</sup> Victim rights that form part of the criminal trial process in Victoria were inserted into law gradually, over several decades, following various policy initiatives to better position the victim at trial. As found across comparable common law jurisdictions, victim rights have been inserted into law by various instruments, spanning long periods of contested reform. Many reforms remain controversial. As a result, victim rights and interests have been addressed across different statutory and policy instruments that seek to support victims in multiple ways – as protected, participating and prosecuting witnesses.<sup>3</sup> Victim trial rights are therefore a combination of individual instances of law reform that may or may not speak to the same set of policy or legal considerations. As there is no consolidating instrument, the whole of criminal law and procedure must be canvassed in order to locate the various rights and powers that constitute victim participation in the criminal trial process. The scope of the task is all the more perplexing when the trial is considered from pre-trial mention through to sentencing and appeal.

The Consultation Paper makes a conceptual distinction between the types of rights which may characterise the victim at each stage of the criminal trial. The categorisation of victim between protective, participating and prosecuting sets out an important typology by distinguishing between the substantive character of rights available to victims in the criminal trial. This typology is instrumental to the consideration of the ways in which victim trial participation may be characterised in broader terms, and to any future determination of the type of criminal justice system envisaged in Victoria. Whether any one of the categories of victim ought dominate or be more significantly identified as the mode of victim participation in the Victorian criminal trial founds the basis of the recommendations of this submission.

The following includes a set of submissions that address the issues covered in the Consultation Paper. The questions put by the VLRC in the Consultation Paper have been addressed broadly in order to put forward recommendations to justify different options for reform. It is beyond this submission to address all questions, which taken together, present a comprehensive set of issues that require careful, detailed and individual consideration. The questions taken from the Consultation Paper are grouped by issue or theme, in aid of addressing the breadth of the Terms of Reference, which go toward an assessment of how victims participate, or ought to be able to participate, in a criminal trial in Victoria. The recommendations follow the different sections but not all sections lead to specific recommendations. The recommendations are grouped at the end of the submission and graduated in terms of degree of change.

## **1. Victim rights and processes relevant to the criminal trial are inherently diverse and fragmented, but the coherence of such rights is generally poorly acknowledged by trial stakeholders**

The Consultation Paper primarily sets out victim rights and interests in the criminal trial as relevant to Victoria and other comparable jurisdictions. The Consultation Paper traces different trial rights that have substantially development since the 1990s, granting victims

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<sup>2</sup> Part 2 of the *Victims' Charter Act 2006* (Vic) lists rights available to the victim and does so in a coherent way. However, the Terms of Reference address victim rights as they relate to the criminal trial, which raise rights beyond the declaratory or non-enforceable charter rights.

<sup>3</sup> Op cit. n 1, pars 4.6-4.23.

rights and powers that now traverse almost all phases of the criminal trial. The nature and scope of these rights, and whether they identify the victim as a protected, participating or prosecuting witness, vary significantly across phases of the criminal trial. This increases the risk that victim rights will not be identified as coherent, and thus be poorly understood, by trial stakeholders. The tendency toward variable and uneven rights perhaps derives from the fact that victims have long been identified as an ‘ambiguous participant’ in the criminal process.<sup>4</sup>

### ***Could victims have different roles at different stages of the trial?***

The rights available to victims have been inserted into the trial process through statutory reform over time. During this time, victim rights have gained impetus politically and socially, and people everywhere are increasingly concerned with the plight of the victim in the trial process. Many of the reforms address the removal of the victim from the criminal law and the perception that victims are not afforded a sufficient degree of participation in the trial process. This participation – either personally or through the police or public prosecutor – now spans the pre-trial period from arrest through to first mentions, bail determinations, pre-trial hearings, confidential communications, processes for testifying at trial, and participation in sentencing hearings. Restorative justice mechanisms are increasingly connected to the phases of the trial, particularly in the Magistrate’s Court where intervention orders are used to address offending behaviour that now connect the victim to the determination of the offender’s sentence in the summary hearing process. It is inevitable that victims will therefore have different rights and roles at different stages of the trial process.

As a result of individual instances of law reform and statutory intervention into the normative trial process, victim rights have been developed in a fragmented way. Some stakeholders of justice may be unfamiliar with different types of rights as they relate to victims – protective, participatory or enforceable – and thus the nature of trial participation for victims seems incoherent or disorganised. However, there has never been an attempt to draw together the rights available to victims to organise, list or codify these rights comprehensively across the criminal trial.<sup>5</sup> This has some very substantial implications for the perception that victims are ill afforded rights of participation in the criminal trial process. The Consultation Paper maps the rights of victims across all phases of the criminal trial process (and presents opportunities for reform arising out of identified gaps). Few documents internationally attempt to consolidate victim rights in this way, with the view of presenting such rights in a coherent framework and context, and as connected to the broader criminal trial process that must continue to grant the accused rights to a fair trial.

The Consultation Paper raises the point that ‘[m]any victims’ rights are directed at changing the way actors in the criminal justice system understand, treat and interact with victims: that is, changing legal culture and practice’.<sup>6</sup> However, where the comprehensive range of victim rights that are currently available are poorly understood by legal practitioners and the public at large, the positive changes hoped for may not eventuate.

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<sup>4</sup> Ian Edwards, ‘An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-making’ (2004) 44 *British Journal of Criminology* 967.

<sup>5</sup> Op cit, n 2.

<sup>6</sup> Op cit. n 1, para 12.34.

***If changes to attitudes and behaviour are needed to achieve the intent of legislative reform, how might those changes be achieved?***

The diverse range of rights and the lack of consolidating guidance about the standing of victims in the criminal trial process presents a real risk that the message of reform is not being fully communicated. It is not that victims lack rights and processes at law – the Consultation Paper demonstrates that without further law reform and despite some gaps, that victim rights in Victoria are significantly infused throughout the trial process. This issue is that society does not have available any coherently drafted legal framework through which to comprehend the rights of victims as they span the phases of the criminal trial. As such, most people understand victim rights through particular instances of injustice, where individual victims are denied access or information, or where victims are granted participation but where they are disappointed with an outcome. Parliament may legislate where there is an obvious gap, usually following a poor justice outcome for a victim, as raised by the media. Otherwise, few turn their mind to the fact that the victim actually participates – in a range of ways – throughout the current process and that a substantial rights framework is already in existence.

This conceptualisation of the victim in the adversarial trial process understands victim rights as individual instances of law reform that have been appended to existing trial processes. Otherwise, the trial is seen to cater for the interests of the accused and state to the exclusion of the victim. Victim rights are therefore seen not to be constitutive of the trial process to any extent. Victim rights continue to be identified as peripheral, as an assemblage of processes that attach to the trial but do not modify it (or perhaps modify it but in an undesirable way – by detracting from the fair trial owed to the accused).

Arguably, the issue here is one of perception, of a failure to realise the extent to which victims are already integrated into trial processes in a meaningful, beneficial and balanced way.<sup>7</sup> There may also be a degree of resistance to acknowledge positive changes, many of which have characterised the criminal trial for some time (eg. rape law reform and the protection of sex offences victims giving evidence beginning in the 1980s). The production of a guidance that sets out the rights, powers and obligations owed to victims would help educate legal practitioners and the public more generally in terms of the diverse modes of participation of victims in the trial process. Importantly, a course of continuing legal education would ensure that the different modes of victim trial participation are better understood and the perceived disconnect between victims and the trial process challenged.

**Recommendations:**

- A. Address individual gaps in the current trial process by statutory reform or policy guidance. Such reforms may introduce further protective, participatory and enforceable rights that build upon the existing legal framework but otherwise do not alter the fundamental character of criminal law and procedure or the criminal trial as an adversarial process.
- B. In order to facilitate an understanding of the coherence of recommendation A, produce a guidance that sets out the rights of the victim at law. This guidance should

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<sup>7</sup> See Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan Publishing, 2009) 197.

be detailed and annotated, and be disseminated to legal practitioners although it should also be made widely available to the public. The Office of Commissioner for Victims of Crime would continue to provide advice and monitor compliance of all existing victim rights, in addition to trial rights, as identified in the guidance.

- B. Provide continuing legal education on the rights of victims across the phases of the criminal trial with a view to challenging the assumption that victims are poorly integrated and supported in the criminal trial process.

The format of a rights based instrument and options available are discussed at point 6, below.

## **2. Limited victim rights are already consistent with those of a prosecuting witness**

Certain rights and powers available to victims may be characterised as enforceable against the state or accused. The rights, identified here as enforceable rights or those of the prosecuting witness where the victim is able to make a submission to the court in order to influence a substantive decision of the court, are comparable to some of the rights and powers available to the accessory or subsidiary prosecutor in civil law, or the victim participant or *partie civile* before the International Criminal Court ('ICC').

The questions referred to below are cited in order to hone the submission that enforceable rights of a substantive character are already present, to a limited extent, through the criminal trial process.

Opportunities to extend enforceable rights have also been identified.

***Are victims exercising their right to appear in relation to confidential communications applications? If not, why not and how might that be addressed?***

The victim of crime may challenge an attempt to subpoena otherwise confidential counselling communications in sex offences trials. Presently in Victoria, the victim may participate in this pre-trial process with leave of the court.<sup>8</sup> While rights of participation are available without leave of the court elsewhere, once granted, victims may contest the attempt to subpoena their counselling notes or records. This right provides an example of pre-trial rights which may empower the victim to make submissions that directly influence a decision of the court. Where a decision is made that directly affects the recovery of the victim and where there is good reason to suspect that production of the evidence will unjustifiably interfere with the integrity of the victim, and that the evidence is not sufficiently probative, a personal rather than public interest is potentially raised. As such, the victim ought to enjoy the right to challenge the making of such decisions and to do this separately from the prosecution, if necessary. Funding and referral schemes similar to that of NSW Legal Aid may be useful.<sup>9</sup>

However, the consideration of this question leads to larger issues of victim interests and rights of representation in pre-trial processes. Rights conferred for challenging confidential communications may thus be cited as an example of pre-trial substantive participation that

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<sup>8</sup> Op cit, n 1, par 7.28.

<sup>9</sup> <http://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service>

may be expanded to other pre-trial processes (such as the calling of the victim during committal, or pre-trial motions that concern the protective arrangements for child or cognitively impaired victims, or whether the defence will seek to examine a sex offences victim on their sexual history, for instance). These are instances where the personal or private interests of the victim, and their right to integrity and personal autonomy, are squarely raised. Current criminal processes protect especially vulnerable witnesses or victims in the committal phase, although other victims may still be called for cross-examination, and no victim has a say in pre-trial directions hearings regarding their rights to protection, or the defence's request to examine on sexual history, when giving evidence at trial.<sup>10</sup> Where participation is granted, public interest requirements should continue to usurp the private interests of a victim, but this should not limit participation in the first instance.

***Should the victim have a greater role in sentencing? If so, what should that role be?***

Victims already enjoy certain rights in the sentencing process. Courts must have regard to the impact of the offence on any victim when sentencing an offender.<sup>11</sup> The victim does not enjoy representational rights in this regard. However, the right to present a victim impact statement ('VIS') provides participatory rights and, to a limited extent, substantive rights, given that the content of a VIS may be taken into account by the sentencing court as relevant to sentence. While opportunities for reform present here, to allow a personal representative or lawyer to read the statement to the court, to make submissions under sentencing law on behalf of the victim, or to allow a victim or their representative to make a recommendation on an appropriate sentencing option,<sup>12</sup> victim's already enjoy substantial levels of participation in the sentencing phase that could be made consistent with other rights across other phases of the trial process.

Where a mode of representation is deemed appropriate, considered at points 3 and 4 below, for instance through the Office of the Commissioner of Victims of Crime, such representation could begin much earlier in the trial process so that the victim does not feel that the opportunity to present a VIS is the only opportunity to participate directly (or via representation or counsel), coming so late in the trial process.

***Could the obligations set out in the Director of Public Prosecutions Victoria's Director's Policy: Victims and Persons Adversely Affected by Crime, particularly obligations to consult, be strengthened by incorporating them into the Victims' Charter Act 2006 (Vic) or other Victorian legislation?***

Various jurisdictions now provide the right for the victim to consult or confer with the prosecution regarding pre-trial decisions make. The Director's Policy provides for victim consultation where a charge decision is made. Rights to information are provided under the Victims' Charter. The right to consultation is not presently enforceable in Victoria. However, comparative jurisdictions have allowed this right as a compellable one such that the victim

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<sup>10</sup> Op cit. n 1, 7.3-7.12. The need for alternative arrangement for victims giving evidence during trial will ordinarily be raised by the prosecution during a pre-trial direction hearing.

<sup>11</sup> *Sentencing Act 1991* (Vic) s 5(2)(daa)-(db).

<sup>12</sup> These issues of reform are not specifically considered in this submission. They each raise substantial issues that would require detailed, individual consideration.



may insist upon a consultation that adequately addresses the concerns of the victim.<sup>13</sup> Arguably, transferring rights to consultation to the Victim's Charter or another statutory instrument would strengthen victim rights by rendering rights more consistent across a rights framework/ Where such rights were transferred as enforceable rights to consult or confer victims would be able to participate in decisions made much earlier in the process than is currently allowed. The current framework for non-enforceable consultative rights, in part, goes to the problem of the variability of victim rights as they relate to the victim's participation in the trial.

The need for a new instrument to consolidate victim rights is considered at point 6.

### **3. Gradual movement toward enforceable victim rights internationally**

The Consultation Paper identifies specific instances where victims are granted protective rights, following request by the prosecution, seeking to ensure that victims are not exposed to re-victimisation through the trial process. Participatory rights are also granted, usually on motion of the prosecution as relevant to different phases of the trial, such as appearing as a witness or by tendering a VIS during sentencing. Rights that characterise those of the prosecuting witness grant the victim some control over proceedings, or at least, the capacity to make a submission that may lead to or affect a substantive outcome or decision of the court that concerns the victim.

Enforceable rights are increasingly present across jurisdictions internationally; common, international and civil law, and result out of increased awareness of alternative policies and approaches that may assist victim satisfaction with justice process, as well as ensure a quality of evidence that may otherwise be compromised by the exclusion or ill treatment of the victim. The growth of international law and practice, and policy transfer from civil law jurisdictions where victims enjoy rights of greater trial participation, have encouraged the development of enforceable rights in common law countries.<sup>14</sup>

This section considers several established and emerging rights that provide for enforceable rights consistent with the prosecuting victim. Opportunities to extend or limit enforceable rights have also been identified.

***Should victims have a greater role in the decision to continue or discontinue a prosecution? Should a victim be able to require a prosecution to proceed where the DPP decides it should be discontinued?***

England and Wales have recently ratified into policy the Framework Decision of the Council of Europe with regard to the Victim's Right to Review a prosecution decision not to proceed.<sup>15</sup> Although the case of *Assange v The Swedish Prosecution Authority* [2012] UKSC

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<sup>13</sup> See *Crime Victims' Rights Act* 2004 (US). Other jurisdictions have addressed this issue in a different way, by requiring a certificate be produced attesting to a consultation with the victim prior to the court accepting a plea. See *Crimes (Sentencing Procedure) Act* 1999 (NSW) s35A(2).

<sup>14</sup> Jo-Anne Wemmers, 'Victim Policy Transfer: Learning From Each Other' (2005) 11(1) *European Journal on Criminal Policy and Research* 121.

<sup>15</sup> Official Journal of the European Union, *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA* (EU Directive).

22 calls into question the extent to which England and Wales binds itself to ratify directives of the European Union, or pledges to maintain international obligations through policy at the level prescribed or higher, the victim of crime undoubtedly enjoys rights to review as provided by Crown Prosecution Service ('CPS') policy.<sup>16</sup> This policy or guidance provides for in-house review and appeal of a decision not to proceed, in certain circumstances. Victims are still able to seek judicial review following the CPS process. The CPS scheme adapts an older complaints procedure.<sup>17</sup> Providing rights to review in a clear, publicised and accessible document arguably modify prosecutor conduct toward the casefile in the first instance with a view to the examination of the capacity to sustain a prosecution even where a victim's testimony may be incomplete or partly compromised.<sup>18</sup>

At the very least, as currently occurs, victims should enjoy a right to be informed of the decision not to proceed. The reasoning process should also be explained. An option to be consulted to voice concerns that may help inform the prosecution decision in the first instance should be considered. However, victims should not be able to take over a public prosecution. Although victims should not be able to continue a public prosecution, the right to initiate a private prosecution should be maintained, subject to the assessment of the evidence to found a charge in the Magistrate's Court.<sup>19</sup> As is the case in common law and even civil law jurisdictions where the right to private prosecution or to proceed without the support of the state is available, victims rarely exercise such powers and can usually only do so with leave of the court of first mention.<sup>20</sup>

***If the prosecution fails to consult with victims about a decision to discontinue a prosecution, or to accept a plea of guilty after plea negotiations, should this attract consequences? If so, what should those consequences be?***

The policy to review a prosecution decision not to proceed is supported by alternative rights available elsewhere to consult with the prosecution regarding charging decisions. The *Crime Victim Rights Act 2004* (US) provides victims the right to confer with the state attorney. South Australia has amended the *Victims of Crime Act 2001* (SA) s 9A to provide a right to consultation for serious offences. Although SA does not presently have a record of enforcing the right to consult, the Federal Courts of the United States do.<sup>21</sup> Relief is only granted in extreme cases where prosecutors have neglected the right of the victim to consult or be provided with basic information on the progress of the case or plea-deal. Writs of mandamus are notoriously hard to attract and the litigation is expensive.

Despite the (relatively) low levels of litigation in the United States, these rights substantially underpin a victim's right to justice. The existence of the rights under the 2004 Act arguably modifies prosecutor behaviour toward victims and their inclusion in the decision-making process.

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<sup>16</sup> Director of Public Prosecutions for England and Wales (2014) *Victims Right to Review Guidance*, Crown Prosecution Service.

<sup>17</sup> *R v Christopher Killick* [2011] EWCA Crim 1608 provides a case example of a successful review, pursuant to prior methods of complaint review.

<sup>18</sup> Op cit. n 18.

<sup>19</sup> cf. *Criminal Procedure Act 1986* (NSW) s 49.

<sup>20</sup> Op cit. n 1, pars 5.8-5.11.

<sup>21</sup> Op cit. n 1, par 5.51.



***Should victims be given the opportunity to access legal advice or representation during any consultation with the prosecution?***

Victims should be provided some measure of assistance where their matter is complex and where the prosecutor is unable to provide the assistance required to facilitate the victim's understanding of the matter. Alternatively, if victims are granted rights to consultation then legal advice or assistance should be voluntary, and it is less desirable that the right to consultation proceed through private counsel. An option to seek help and advice from the Office of the Commissioner for Victims of Crime may be a better compromise between unfairly extending the duties or expectations of the public prosecutor, the undesirable consequences of engaging private counsel during the consultation phase, and the ongoing duty of the Office of Commissioner to the provision of victim support.

***Should victims be able to participate during trial proceedings? If so, how and when might this participation be exercised? Who should provide representation?***

The capacity to participate in a criminal trial, and in the jury trial phase, may be an important adjunct to victim rights but only where an issue of process or evidence is raised that neglects one of the existing procedural rights of the victim. Thus, the victim should not be able to introduce evidence, make submissions or address the jury. However, representation may be necessary where the protections that should be afforded to the victim are not made available to the victim at trial.<sup>22</sup> It would only be in the rarest of circumstances where victims are not afforded protections owed to them by law, and thus intervention by counsel would be rare.

The issue of who may be granted standing as a third party during proceedings is an important one. It would be highly undesirable if the fragmented nature of victim rights was further complicated by a movement towards enforceable or prosecuting witness rights that allowed different modes of more or less restrictive representation at different phases of the trial. Thus the broader point of who may represent the victim – if the victim is to be represented at all – provides a basis for facilitating coherence throughout the framework of victim rights.

There are sound reasons why victims should be better represented throughout the trial process. The issue is who may represent the victim consistent with the limits of existing criminal procedure. Should victim's rights to procedural protections be neglected (at a pre-trial hearing or possibly during the jury trial) consolidating the power to intervene on the part of the victim in the Office of Commissioner of Victim Rights would, arguably and based on the SA experience,<sup>23</sup> more likely lead to an amicable and out of court resolution. Consolidating these powers in the Office of Commissioner of Victim Rights would allow for a more integrated approach to the (rare) enforcement of procedural rights and stop unnecessary, controversial, costly and time consuming interventions by private counsel (by comparison to another option for representation).

Restricting rights of intervention to the Office of the Office of Commissioner of Victim Rights would also ensure that the issues raised in the Consultation Report are addressed in a more consistent way, and in accordance with existing policy.<sup>24</sup>

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<sup>22</sup> Hearings during the pre-trial phase will generally resolve protections that are owed to the victim under existing criminal procedure.

<sup>23</sup> See point 4, below.

<sup>24</sup> Op cit. n 1, pars 12.37.

***Could victims be given a participatory or prosecuting role in Victoria similar to that provided for by the victim participation scheme of the International Criminal Court?***

The rights granted to victims under the Rome Statute provide participation in ways that do not sit comfortably with the adversarial criminal trial.<sup>25</sup> Specifically, the right to call evidence and examine witnesses in order to locate the truth of the matter is not compatible with the requirement that the prosecution establish the elements of the offence and/or defence per *Woolmington v DPP* [1935] AC 462.

However, aspects of the ICC model may inform the development of the adversarial criminal trial in Victoria. This includes the granting of participatory rights to victims to emphasise, as a matter of policy, that victims may have interests that come to bear on trial processes. Although victim rights before the ICC are described as participatory because the victim lacks party standing, these rights are better characterised as those of the prosecuting witness given that the victim attracts the right to call evidence and make submissions. The granting of standing to a third party in the trial phase (in the ICC this extends to all phases of the trial) may thus provide a basis for policy transfer to indicate that third parties, carefully managed, are compatible with adversarial processes. Importantly, the scope and extent to which the victim ought to be able to participate should be limited in accordance with the above substantive or doctrinal requirements that the prosecution proceeds on the establishing of the elements of an offence/defence, and it is not a ‘truth’ seeking process.

The introduction of a third part participant moreover requires careful consideration with a view to the consolidation of victim rights and access to justice. As stated above, this may mean limiting the capacity to introduce private counsel for a power vested in the Office of Commissioner of Victim Rights, as explored at point 4, below.

**4. Enforceable rights unlikely to be enforced often**

The opportunity presented by the Terms of Reference and as explored in the Consultation Paper allow for the better organisation of victim rights as they relate to criminal trials in Victoria. This includes, where desirable, opportunities to enforce victim rights through representation. The options for counsel explored above presents the risk of complicating trial rights and victims’ access to justice by allowing for different modes or forms of representation at different stages of the trial.

Opportunities to extend or limit enforceable rights have also been identified by reference to the Consultation Paper questions.

***If victims are to have a participating-witness or prosecuting-witness role, should the state provide legal representation for victims?***

Consistency of approach is paramount to the coordination and consolidation of victim rights in a jurisdiction. Should a mode of counsel or representation be advocated, and there is basis to suggest that victims already enjoy limited access to justice in this regard,<sup>26</sup> the scope of those able to represent victims requires careful consideration. Encouraging victim

<sup>25</sup> Op cit. n 1, pars 8.128-8.133.

<sup>26</sup> See point 2 regarding confidential communications, above.

participation through litigation is unlikely to gain support from the legal profession or community generally. It will complicate and prolong proceedings and probably increase victim disquiet with the justice system. However, providing victims' access to justice may be justified where their specific personal interests are raised in proceedings,<sup>27</sup> and where the prosecution does not seek to secure these rights. On this basis, intervention may be justified. It is arguable that where representational rights are granted that such rights ought to be made available and be organised through the one office.

The Office of the Commissioner for Victims of Crime presents as the present office best positioned to represent victim right during the phases of the trial. However, other options may present. A move to extend upon the number of enforceable substantive rights or rights consistent with those of the prosecuting witness may require that an office be established that enforces rights for victims in appropriate cases. While this may be a legal office within the Office of Commissioner, an independent office may also be desirable. The creation of a new office that enforces victim rights would be undesirable, however, where only limited enforceable rights are available. Should the current number of enforceable rights be maintained then there would be no basis for an independent office and the existing organisational framework should be utilised to cater for those rare situations where victims may require representation in court. A version of the SA model may be adopted in this regard.<sup>28</sup>

However, addressed at point 6 below, should a new rights framework emerge (more consistent with the prosecuting witness) that expands upon the number of rights for victims, an independent legal office may become more desirable and necessary, particularly where substantial rights are granted.

### **Recommendations:**

Alternatives include:

- F. Establish a jurisdiction within the Office of Commissioner for Victims of Crime for the enforcement of a revised Victims' Charter or new Bill of Rights for Victims (or where desirable, rights as contained or organised across current sources of law). This Office may build upon the Office of Commissioner or be consolidated within the current Office of Commissioner, by providing counsel for victims in appropriate cases. Legislation may deem that the Commissioner is the only person able to action such rights, to limit litigation by victims.
- G. Separately, or in addition to recommendation F, provide standing for victims of crime in any phase of the criminal trial where a relevant right afforded to a victim is raised. Grant the Commissioner for Victims of Crime take-over powers similar to those of the Director of Public Prosecutions, but limited to rights specified at recommendation

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<sup>27</sup> The relevance of the personal interests of the victim were covered at point 2 above. Such personal interests may include protection to prescribed victims when giving evidence, subpoena of confidential communications, lack of access to information where provided by right, or a right to consult if provided by law.

<sup>28</sup> See *Victims of Crime Act 2001* (SA) s 32A. Note that the SA scheme goes beyond representation by the Commissioner himself, and includes a right to appoint a representative includes the Commissioner of Victims' Rights but also includes an officer of the court, a victim or officer or employee of an organisation whose functions consist of, or include, the provision of support or services to victims of crime.

B, D, E and F (ie. prescribed victim rights only), where victims/counsel attempt to enforce victim rights privately, and not in the interests of justice.

H. Create an office for the enforcement of victim rights (however described) which is empowered to enforce victim rights across all phases of the criminal trial (protective, participatory and enforceable). This office would have party standing in any proceeding where they deem intervention is required. If victims are granted standing, take over powers pursuant to recommendation G would be advisable. Maintain the Office of the Commissioner for Victims of Crime as responsible for victim services in the justice system more generally.

## **5. Protective and participatory rights will continue to support victims**

*Are the protective procedures for the taking of evidence from vulnerable victims appropriate and effective?*

Victoria has embarked upon significant past law reform to better protect vulnerable victims and witnesses during the pre-trial and trial phases. Any rights framework which emerges from the present Terms of Reference ought to continue to promote protective measures for victims and these can form part of the assemblage of rights which comprise trial rights in Victoria. Where gaps present or new classes of victims emerge, law should react to extend the protective framework currently in operation. These rights should not be converted to enforceable rights, although if compliance with enforceable rights is mandated to the Office of the Commissioner for Victims of Crime or elsewhere, such authority may provide supervision to ensure protective rights are being offered appropriately to all vulnerable or special victims. As noted, in rare cases where victims are not afforded their due rights, an office may be granted standing to intervene to enforce the protective rights of the accused.

## **6. An instrument for the consolidation of victim rights including trial rights**

Where rights that ought to be afforded to victims are presently neglected or missing from the Victorian rights framework and where it is desirable to provide these rights as enforceable against the state or accused, the question remains as to the instrument that provides for their enforcement.

*Should the Victims' Charter Act 2006 (Vic) be amended to include other rights, or broaden existing rights for victims? Should victims have a legal right to enforce some or all of the rights contained in the Victims' Charter Act 2006 (Vic)? If so, how might this be achieved, and in what circumstances?*

The *Victims' Charter Act 2006 (Vic)* presents a ready vehicle through which to modify, expand or codify existing victim rights that relate to the criminal trial. However, the 2006 Act may not necessarily provide an appropriate place to consolidate trial rights that presently shape Victorian criminal procedure. These rights and powers may need to continue to be prescribed under existing criminal procedure legislation in order to consolidate the trial process but also to indicate that these rights are not extraneous to or separate from other trial

processes, that is, they form part of the assembly of rules that constitute the Victorian criminal trial.

However, the consolidation of the rights, powers and obligations owed to the victim of crime, as noted at point 1, may establish that victims are already provided a range of rights across the phases of the trial. The issue is how these rights may be organised or consolidated so as to make them more available to the profession and the wider public. Three options present depending on the extent to which victims ought to be afforded more enforceable rights.

6.1 Consolidate all rights, powers and obligations owed to victims across all phases of the criminal trial in a non-binding legal guidance. The Consultation Paper already provides some indication as to how this may be achieved – it sets out rights and processes in a way that explains how victims fit into the trial across all phases – although any publication issued that sets out these rights should do so in a way that departs from a report format. This may be produced as a legal guidance so that it does not affect the operation of current law – rather it presents existing rights in a comprehensive way that is accessible. The guidance should be written for legal practitioners, be annotated and updatable, but be available to the public. See point 1, above, for reasons as to why a consolidated guidance may be useful for facilitating changes to attitudes and behaviour in order to achieve the intent of past legislative reform.

6.2 Expand the Victims’ Charter as a place for the consolidation of all rights, powers and obligations as present in Victorian law (noting the possible issue of removing rights from the *Criminal Procedure Act 2009* (Vic) as mentioned above). The Victims’ Charter may need to be repealed and replaced or amend substantially amended.

6.3 Redraft all rights, powers and obligations in the form of a Bill of Rights for Victims. The recent approach taken by Canada may provide a working example.<sup>29</sup> Although certain rights may be consolidated under a Bill of Rights for Victims, this option is arguably more attractive where a decision is made to move toward the offering of more rights consistent with those of the prosecuting witness.<sup>30</sup> The law of criminal procedure may remain in current legislation but existing rights under the Victims’ Charter and new rights may be presented in a Bill of Rights for Victims to afford greater standing to victims throughout the justice system. The Bill may also prescribe the office responsible for enforcement – see point 4, above.

## **Recommendations:**

Alternatives include:

B. In order to facilitate an understanding of the coherence of recommendation A, produce a guidance that sets out the rights of the victim at law. This guidance should

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<sup>29</sup> See *Victims Bill of Rights Act 2015* (Can) introducing the *Canadian Victims Bill of Rights* (and other legislative amendments to introduce or amend existing laws, rights and powers).

<sup>30</sup> Note that the Canadian Victims Bill of Rights does not contain enforceable trial rights but a range of protective and participatory rights, including many of those currently identified under the Victorian Victims’ Charter. The Canadian Victims Bill of Rights does not consolidate rights either, and provides for a dispute resolution but not enforcement mechanism.

be detailed and annotated, and be disseminated to legal practitioners although it should also be made widely available to the public. The Office of Commissioner for Victims of Crime would continue to provide advice and monitor compliance of all existing victim rights, in addition to trial rights, as identified in the guidance.

- D. Repeal and replace or amend the Victims' Charter and offer a comprehensive Charter of protective, participatory and enforceable trial and other rights for victims.
- E. Repeal the Victims' Charter and replace with a Bill of Rights for Victims that consolidates, across the phases of the criminal trial, protective, participatory and enforceable rights. A Bill of Right for Victims may be preferred where there is agreement to expand the number of enforceable rights for victims.

## **7. The present system is not broken and a new system is not needed, but there are opportunities for change**

Several options of reform present from the points raised by the Terms of Reference and as addressed by the Consultation Paper, as summarised below. These have been organised in terms of increasingly levels of substantive and procedural change.

My submission is not that the VLRC should consider all recommendations listed below. Rather, more or less conservative options may be considered depending on the appetite for legal change and the extent to which that change is deemed necessary and appropriate. The capacity for change is not a reason to change. Recommendation A is positioned to maintain the current system and trajectory of law reform to help victims. I would submit that Recommendation A is an appropriate starting point consistent with current initiatives and policies of Victoria, and one that is less likely to cause unnecessary, controversial change. Recommendation H represents a substantial departure from current arrangements and may be considered a new but workable model of justice that substantially builds upon justice processes, despite preserving the central role of state and accused in the context of an adversarial trial.

Recommendations, as discussed and identified above, are set out and graduated here for convenience, as follows:

- A. Address individual gaps in the current trial process by statutory reform or policy guidance. Such reforms may introduce further protective, participatory and enforceable rights that build upon the existing legal framework but otherwise do not alter the fundamental character of criminal law and procedure or the criminal trial as an adversarial process.
- B. In order to facilitate an understanding of the coherence of recommendation A, produce a guidance that sets out the rights of the victim at law. This guidance should be detailed and annotated, and be disseminated to legal practitioners although it should also be made widely available to the public. The Office of Commissioner for Victims of Crime would continue to provide advice and monitor compliance of all existing victim rights, in addition to trial rights, as identified in the guidance.



- C. Provide continuing legal education on the rights of victims across the phases of the criminal trial with a view to challenging the assumption that victims are poorly integrated and supported in the criminal trial process.
- D. Repeal and replace or amend the Victims' Charter and offer a comprehensive Charter of protective, participatory and enforceable trial and other rights for victims.
- E. Repeal the Victims' Charter and replace with a Bill of Rights for Victims that consolidates, across the phases of the criminal trial, protective, participatory and enforceable rights. A Bill of Right for Victims may be preferred where there is agreement to expand the number of enforceable rights for victims.
- F. Establish a jurisdiction within the Office of Commissioner for Victims of Crime for the enforcement of a revised Victims' Charter or new Bill of Rights for Victims (or where desirable, rights as contained or organised across current sources of law). This Office may build upon the Office of Commissioner or be consolidated within the current Office of Commissioner, by providing counsel for victims in appropriate cases. Legislation may deem that the Commissioner is the only person able to action such rights, to limit litigation by victims.
- G. Separately, or in addition to recommendation F, provide standing for victims of crime in any phase of the criminal trial where a relevant right afforded to a victim is raised. Grant the Commissioner for Victims of Crime take-over powers similar to those of the Director of Public Prosecutions, but limited to rights specified at recommendation B, D, E and F (ie. prescribed victim rights only), where victims/counsel attempt to enforce victim rights privately, and not in the interests of justice.
- H. Create an office for the enforcement of victim rights (however described) which is empowered to enforce victim rights across all phases of the criminal trial (protective, participatory and enforceable). This office would have party standing in any proceeding where they deem intervention is required. If victims are granted standing, take-over powers pursuant to recommendation G would be advisable. Maintain the Office of the Commissioner for Victims of Crime as responsible for victim services in the justice system more generally.

Signed

Dr Tyrone Kirchengast  
29 September 2015