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The Hon P. D Cummins AM
The Chair of the
Victorian Law Reform Commission,
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**Review of : The Role of Victims of Crime in the criminal trial process
(referral on 27 October 2014).**

Thank you for the opportunity of making a submission to this important enquiry by the Victorian Law Reform Commission.

As the Consultation Paper has requested, I will answer the Questions which appear on pages 178 and following.

However, in relation to the over-arching question ' What should be the role of victims in the criminal trial process?' my response is that after 30 years as a practising Australian Legal Practitioner including 23 years as a Regional and Rural practising Lawyer, I believe that the victim's role should be a far greater one in the criminal trial process and from an early stage in the proceedings .

My submissions in relation to Questions in the following chapters of the Consultation Paper are as follows :

Chapter 4 -

1. The victim's role should be that of a 'participating witness' as summarised in 4.13.
2. Victims having different roles at different stages of the trial ? I doubt that this would work effectively in our legal system and would probably be confusing for the witness as well for the Accused and his/her defence counsel and

probably add to the length and complexity of trials. I favour the less radical model of the prosecuting victim witness as outlined in 4.19.

3. The intent of legislative reform is one for the Commission to address and for the Attorney-General's department. Cultural and attitudinal changes should be no barrier to improving the victim's role in the criminal trial process.

Chapter 5 –

4. Yes, victims should have a greater role in the decision to continue or discontinue a prosecution. Considerations of justice and fairness for the victim should have greater importance than the state's purse.
5. This is a very difficult question. Some victims have genuine reasons for wanting to withdraw their complaint. Some victims may be pressured, put under duress, threatened or alienated by family and friends to withdraw. This should then require the DPP to consult and engage with the victim so that consideration of and reasons for a withdrawal is fully understood by both the DPP and the victim.
6. On balance, no. The DPP's criteria of a 'reasonable prospect of a conviction' and that 'prosecution is in the public interest' are sound reasons. However, the DPP needs to fully engage and consult with the victim so that the victim is fully informed and understands the reasons why a prosecution should be discontinued (and explain about the requisite criminal legal burden of proof of 'beyond reasonable doubt').
7. Yes, the victim should have a greater role in the decision to accept or not to accept a plea of guilty after plea negotiations. Again, the victim needs to be fully informed and consulted and fully understand the reasons for the DPP's position.

Consultation :

8. On balance, there is inadequate consultation with victims before a decision is made by the DPP to continue, discontinue a prosecution or accept a plea negotiated position. The consultative process with victims in rural and regional areas is far from satisfactory.

My proposals are that there should be :

- (a) a dedicated Court appointed Victim's Support Person similar to that which is provided at the Ballarat Family Violence Court Division of the

Magistrates Court at Ballarat for Applicants (there is also one provided for Respondents);

- (b) Separate legal representation for the victim within the criminal trial process, then meaningful consultation would be guaranteed. Is the victim having an increased participation role in the criminal trial process and have legal standing at certain stages during the trial as a 'participating witness'.
9. This could be avoided if the Court certification procedure for plea negotiations and the NSW ODPP Prosecution Guidelines were implemented in Victoria. Refer to chapter 5 and paragraphs 5.68 – 5.73.
10. Yes, the victim should have the opportunity to access high quality, confidential and independent legal advice and representation during the consultation with the prosecution. This would of course exclude the Victoria Legal Aid where it represented the Accused person or persons. The victim should be given the right to choose a high quality, confidential and independent lawyer of their own choosing, not as dictated to by the state.

Review of decisions:

11. Yes, a review of the decision by the DPP or Crown Prosecutor could be available to the victim via an independent senior Counsel nominated by the victim from say a panel of independent senior Counsel (with no association with the accused person or persons or any co-accused or other victims in the case). The cost of this need to be borne by the State.

Alternative procedures :

12. Yes, Restorative Justice models have merit and should be 'sold' as an alternative process for the victim, say at the point where the prosecution is unlikely to proceed due to evidentiary problems.

The South-Eastern Centre against Sexual Assault Pilot (paragraph 5.99) project could be explored further. This pilot program called 'Restorative Justice for survivor-victims of sexual assault' is being conducted in conjunction with the 'Michael Kirby Centre for Public Health and Human Rights' at Monash University and has partial funding from the Department of Justice. An interim report as to this Restorative Justice Pilot Program would be of benefit to the Commission.

Chapter 6 –

Consultation :

13. Yes. The victim is a key component to a criminal trial process and the cooperation of the victim is necessary and the rights of the victim should be respected. Further, the victim may have further information which has not been canvassed in previous statements and interviews.
14. Consultation obligations on the Prosecution should be improved and more in line with the NSW Prosecution Guidelines Model. Also, victim-oriented proposals specific to the committal phase of the criminal trial process should focus on increasing victim participation (see paragraph 6.43).

The Role of the victim in proceedings :

15. Yes, victims should have a role in these processes.
16. Yes, there should be increased victim participation at the committal phase.
17. Reforms by way of legislative amendments and DPP Prosecutor Guidelines could be implemented to increase victim participation at committal proceedings, with greater consultation by the prosecution with the victim, and a complementary obligation on the Magistrate to ensure, when making a ruling, that the victim has been consulted. I support the proposals in paragraph 6.44.
I also support the improvement of the DPP Guidelines for consultation with the victim, and more in line with the NSW certification process.
I support the suggestion (in 6.47) that as part of the test for the Magistrate to apply when determining applications to cross-examine the victim or to grant summary jurisdiction is to include the victim's views and matters personal to the victim.

Protected witness measures :

18. The prohibition on Child and Cognitively Impaired victims giving evidence at committal hearings in sexual offence matters could be extended to victims of sexual offences such as rape and also to victims of domestic and family violence .

The use of pre-recorded evidence can reduce the number of times a victim is required to give evidence in the criminal trial process, provides the court with the best evidence and taken at an early stage, and meets the needs of the vulnerable and intimidated and emotionally sensitive witnesses.

19. Yes, these reform proposals should be considered : as to whether the impact and effect of direct presentation of the victim's evidence before a Jury may be substantially reduced by the use of recorded statements and pre-recorded evidence. The right of the accused to a fair trial would be a major consideration in such considerations.

20. As above in 18 and 19.

Chapter 7 –

Consultation :

21. I am unable to comment on this. Does the Court or the DPP keep and retain statistics on whether a victim exercises his/her rights to appear in relation to Confidential Communications applications ? What proof is required to satisfy section 32C (4) of the EMPA that the Informant has handed a copy of the notice to the 'protected confider' victim and actually informed the victim about the notice and the victim's rights to appear ?

22. Yes, the victim should be given a far greater role in regards to Confidential Communications proceedings. I refer to my earlier suggestions set out in paragraphs 8 (a) and (b) above.

23. Yes. The victim should have a greater role in pre-trial proceedings apart from having the right to seek leave to appear only in Confidential Communications proceedings under the EMPA. Yet the victim is still not recognised as a 'party' to the proceedings as a whole.

24. Yes, disclosure obligations should apply to all parties to the proceeding including the victim which means that the victim needs to be given standing as a party at this stage of the criminal trial process.

25. The impact of any role of victims (in pre-trial proceedings) during the Jury trial would need careful consideration of other models in other jurisdictions. The NSW Criminal Appeal Act 1912 provides a right for a non-party (victim) to seek leave to appeal to the Court of Criminal Appeal (against a decision to allow access to or use of a protected confidence). This legislative protection

and the broader safeguards for Canadian victims' records that contain personal information 'for which there is a reasonable expectation of privacy' in Canada's Criminal Code should both be considered for introduction in Victoria. The victim's rights to privacy, personal security and equality should be a paramount consideration.

26. Yes, victims in the role of participating witness should have legal representation (of their choosing, of an independent senior counsel from say a panel of senior Counsel who is independent of the Prosecution and of the accused's and any co-accused's defence counsel). The State should pay for this legal representation, and not via Victoria Legal Aid as there would probably be conflicts of interest viz the legal representation funding of the accused and any co-accused.

Pre-trial restorative justice procedures :

27. Yes, Restorative Justice procedures should be available in the pre-trial phase of criminal trial proceedings. As to whether any limits should be placed on the use of such a procedure needs to take into account how other jurisdictions deal with Restorative Justice procedures at the pre-trial stage and what safeguards are put in place. The Restorative Justice conference would probably need to consist of at least a qualified, experienced and skilled mediator and the victim, the victim's support person, (possibly the victim's lawyer), and the accused/offender and the accused/offender's support person. The representative for the 'public interest' should not be the Prosecutor appointed to the criminal trial proceeding but an independent counsel from the DPP in order to prevent any conflict of interest.

Chapter 8 –

Protective Measures :

28. The protective procedures for the taking of evidence from victims of sexual offences and other vulnerable victims can be greatly improved. The victim needs to be consulted and informed about his/her rights and the applicable legislation and the Judge's powers of protected procedures for the giving of evidence and the victim's choices and ramifications of same.
29. Yes, the legislation needs to be amended so that the Judge 'must direct' similar protective measures for the giving of evidence by the victim of family

and domestic violence offences as the Judge is directed to for children and cognitively impaired victims in sexual offences.

30. This area can be improved as there is much anecdotal evidence from victims of the criminal trial process where the trial Judge has not followed the existing evidentiary provisions to prevent inappropriate questioning and victims have complained of being re-traumatised and being subjected to 'systems-abuse' by the trial process. Also, the role of the Prosecutor is very important in this regard to be the 'keeper' of good court evidentiary procedure and that is respectful and proper in order to protect the victim who is the crown's witness.

31. An 'intermediary scheme' has merit especially for child victims and vulnerable victims. England and Wales have used intermediaries since 2004 after a successful pilot was conducted. The role and qualification of the intermediary used in England and Wales has merit and the procedures used has merit. The 'ground rules hearing' before the Judge allows the use of an intermediary during which the 'communication techniques will be discussed and rules established as to the form and type of questions to be asked' also has merit. I refer to the summaries contained in paragraphs 8.75 - 8.80 in the Consultation Paper.

Other Australian jurisdictions such as Western Australia (since 2011) and New South Wales also allow the use of intermediaries but in limited circumstances.

Protective measures :

32. Yes, victims should be able to participate during the trial proceedings as a 'participating witness.' And the state should provide the funding for the victim to have their own legal representation – an independent, experienced senior lawyer or Counsel and one chosen by the victim, not chosen for the victim.

33. The victim should be given a participatory role if the victim can 'make a relevant contribution to the determination of the truth' and at stages of the proceedings as determined to be appropriate by the Court and that the victim's participation 'does not prejudice the principles of fairness and impartiality' of the court's proceedings.

34. Many of the aspects of the International Criminal Court's victim participation scheme could be adopted in Victoria, even if it was on a pilot basis initially. The inquisitorial trial procedures in the European Civil Law systems aim to find

out the 'truth' whereas the Victorian and Australian adversarial criminal trial process is on the basis that the accused as charged is innocent until proven guilty beyond reasonable doubt.

There are some aspects of the international inquisitorial trial procedures which could easily sit within our criminal trial procedures and these relate to the evidentiary rules of child victims and vulnerable victims giving evidence to the court.

There is one aspect which could work in our criminal trial system and that is that the victim can request that the accused leave the court room and be placed in the Remote Witness Facility room from where s/he can observe the court room and the victim giving evidence. Then the victim can remain in the court room (rather than the accused remaining in the court room) if that is more comfortable for the victim.

Chapter 9 –

The victim's role in sentencing and the purposes of sentencing :

35. Yes, the victim should have a greater role in the sentencing process. This means in the consultation with and involvement of the victim in the sentencing process including the preparation of the Victim Impact Statement (VIS). Section 5 (2) of the Sentencing Act 1991 needs to be amended to including more factors regarding the needs and interests of the victim as well as of the victim's family and friends.
36. Yes, the purposes of sentencing in the Sentencing Act 1991 should be amended to include the needs and interests of victims as well as restoration of and reparations to the victim of the offending behaviour.

Victim Impact Statements (VIS) :

37. Yes, there is anecdotal evidence of a victim's Victim Impact Statement getting into the wrong hands, to persons outside those who are currently mandated to be served with the document ie the Court, Prosecution, the offender (and their lawyer). The VIS should only be served on the accused person's lawyer and under strict circumstances that the document is not published beyond those persons mandated under the Act to be served with the VIS. As the VIS forms part of the Court record, it should be retained in a 'confidential' folder inside the Court record to protect the victim's privacy-related matters disclosed in the VIS. The jurisdictions in NSW and Western Australia have a

safer legislative regime as the Judge retains a discretion about whether to make a Victim Impact Statement available to the prosecutor and the offender. However, the New Zealand scheme prohibits the Victim Impact Statement from being retained by the offender and only allows the offender to view the statement. These safeguards should be considered for amendments to Section 8 of the Victorian Sentencing Act.

38. Yes, a broader group to include the victim's family and friends who have been impacted upon either directly or indirectly by the offending behaviour. Also, consideration could be given to third parties who have directly witnessed the offending behaviour and thereby been impacted upon.
39. Yes, Community Impact Statements should also be introduced into the Sentencing Act 1991. An example is the South Australian jurisdiction provides for community impact statements at the sentencing hearing. Also the Canadian Criminal Code has introduced community impact statements. As crimes are often now committed in the open public space and in the presence of the community, Community Impact Statements should be included in the sentencing process. The impact of the offending behaviour to the community should not be so remote as to be unreasonable and far-fetched.
40. This should only be done via the intermediary or the victim's lawyer (under the participating witness model). The purpose of the Victim Impact Statement, if prepared properly, is to inform the Court and the sentencing Judge of the impact of the crime upon the victim.
41. The Prosecution should have no role in preparing Victim Impact Statements. The VIS should be the sole responsibility of the victim and not a document prepared by the Prosecution on behalf of the Crown. The victim should have a court-appointed Victim Support Person who can advise and assist the victim in the proper preparation (so that it contains only admissible and relevant material) and service of the Victim Impact Statement in accordance with the Sentencing Act 1991.

Restorative Justice Sentencing procedures :

42. Yes, Restorative Justice procedures should be available as either an alternative or supplementary part of the sentencing process. Ideally, this procedure should be available at an early stage, namely at the pre-trial phase of the criminal trial process.

The Victorian Koori Court Division of both the Magistrates Court and the County Court have models of Restorative Justice Procedures which could be used in the other divisions of the criminal trial process. The Koori Division at the Magistrates Court level has been successful over many years now. Also, the Neighbourhood Justice Division of the Magistrates Court is successful but its jurisdiction is limited to dealing with summary criminal matters.

Other states such as Queensland, Western Australia and Tasmania have various Restorative Justice schemes, all of which have some good aspects to them. As well as the new Zealand model which also has some good aspects to it especially where the Judge must adjourn the sentencing proceedings for an assessment of suitability for restorative justice. A Victorian model could adopt the better aspects from each of these other restorative justice models.

Chapter 10 –

43. No, the right to apply for an compensation or restitution Order from the Court under Part 4 of the Sentencing Act 1991, ie after sentencing and separate to the offence's punishment, does not satisfy the aims of the Act. If the victim makes application under this Part 4 process, then such a hearing should be separate to and after the sentencing of the offender. The victim may wish to apply for compensation under the Victims of Crime Assistance Tribunal (VOCAT) which is far less adversarial and complex; Although it is a state-based compensation scheme as opposed to an order against the offender under Part IV.
44. Yes, there should be a statutory presumption in favour of compensation and restitution to the victim in all cases.
45. Yes. The financial circumstances of the offender under Part 4 should include all assets and financial resources standing in the offender's sole name and also in which he has an interest including any superannuation interest and interest in any trusts. The central purpose of compensation and restitution orders for victims is to ensure that victims of crime receive adequate compensation for the loss suffered.
46. Yes, a victim should be given the power to appeal a compensation or restitution order.
47. Enforcement of a compensation and restoration order should be enforceable as a civil debt Alternatively the victim could be given the right to appeal against a Part 4 order that the victim considers manifestly inadequate. Consideration could also be given to the Court ordering that the offender's property (or part thereof) be transferred to the victim in satisfaction of a Part 4 order.

48. Yes, Restorative Justice procedures could be used as an alternative or in addition to the compensation and restitution process under Part 4 but not for sentencing orders. I see no advantage to the victim in pursuant Restorative Justice procedures as an alternative to an application for compensation to VOCAT or as an alternative to the victim's appeal /review rights to VCAT. This would add an extra burden on a victim and make the VOCAT scheme complex and more expensive to operate.
49. Perhaps consideration could be given to expanding the eligibility criteria under the state- based VOCAT scheme to include victims of on-line fraud, non-violent offences such as property damage and burglary (with intent only).

Chapter 11 – (appeal processes)

50. No, unless in limited circumstances where the court's ruling impacts on the personal interests and rights of the victim.
51. Yes. Consultation needs to be greatly improved by the Prosecution with the victim.
52. Same as answer to number 50 - as a participating witness.
53. Yes, a victim should have standing to participate in a post-verdict Appeal, as a participating witness.
54. Yes, the Victim Impact Statement should apply in sentencing hearings when the Court of Appeal re-sentences the offender.

Chapter 12 –

55. Yes, the DPP's Victims Policy, particularly the obligations to consult with the victim, should be strengthened and expanded and incorporated into the Victim's Charter Act 2006.
56. Yes, the Victims Charter Act 2006 (Vic) should be amended to broaden existing rights for victims.
57. Yes, victims should have a legal right of enforcement of some or all of the rights in the Victim's Charter Act 2006. However, given the hesitation to include enforcement mechanisms by most common law adversarial criminal systems, then victims rights may be given greater force by being set down in legislation (ie to provide a VIS, to seek compensation or restitution at sentencing stage or apply for state-funded VOCAT assistance and compensation. Having robust complaints mechanisms may not be satisfactory for a victim who feels 'locked out', ignored or not taken seriously in the criminal process.
58. Yes, an independent Commissioner for Victims of Crime should be legislated for in Victoria. The NSW and South Australia and ACT models of an Independent Victims Commissioner should be considered. The NSW Commissioner of Victims Rights has

the power to provide a special report on any matter, including any breach of the Charter by an agency, to the Minister for presentation to the state Parliament which is an important power to be included in such legislation.

59. The remedy for breach of a victim's rights should be an Independent Commissioner for Victims of Crime with broad legislative powers to enquire, investigate, compel the provision of information including documentary information, recommend that a public agency or official issue a written apology to the victim, and provide a report to the Minister for presentation and tabling in State Parliament on any matter in the Charter of Victim's Rights including in relation to any breach of the charter by any agency.

Chapter 13 –

60. Yes there are gaps and inconsistencies in the provision of victim support services especially in the rural and regional areas.

61. The prioritisation of service delivery should be for the victims of serious offences and children and vulnerable victims of crime.

62. By a dedicated independent Commissioner for Victims Rights and a Court-appointed Victims Support Person at each court and also by information to victims that they can access independent quality legal advice and assistance or advocacy.

63. Yes. My suggestion is a Court-appointed Victims Support Person whose role is to advise, support and guide the victim through the criminal trial process.

64. The role of a independent Victorian Commissioner for Victims Rights could greatly enhance and strengthen victim support services and victim's rights and operate a complaints resolution process for victims of crime (and also the suggested functions as set out in paragraph 13.53 of the Consultation Paper). Other state jurisdictions such as New South Wales, ACT, South Australia and Queensland have been operating a Victims Commissioner for a number of years now.

IN SUMMARY, my main submissions are :

1. The role of the victim in the criminal trial process needs to be strengthened and improved upon. The victim needs to have a greater role in 'being heard' and greater weight given to the victim's wishes and meaningful and informed consultation by the Prosecution with the victim.

2. That further reforms around that of a 'participating witness' should be considered so that the Prosecution's obligations to consult with the victim are strengthened and expanded, giving victims legal standing during certain stages of the criminal trial process (especially where the victim's rights and interests are affected or likely to be affected or impacted upon) and giving victims the option of being involved in a Restorative Justice program as an alternative to an existing trial, sentencing process and as reparation for the offending behaviour of the accused.
3. A dedicated Court -appointed Victim Support Person, similar to that which is provided at the Ballarat Family Violence Division at the Ballarat Magistrates' Court, whose role would be to guide, support and advise the victim throughout the entire criminal trial process.
4. The introduction of 'Intermediaries' in criminal proceedings for witnesses who are child victims and vulnerable victims, based on the England and Wales well-established procedures since the 2004 pilot.
5. That the Victim Impact Statement (VIS) procedures be greatly enhanced and enforced and that the victim be given access to a court-appointed Victim Support Person to advise the victim regarding the legislative requirements of the VIS, to assist the victim in the preparation of the VIS, to advise the victim of the alternative arrangements for the reading out of the VIS in court, and to ensure that the VIS is filed and served at the relevant time.
6. The Victims Charter Act 1996 (Vic) be amended to include an independent Commissioner for Victims of Crime to assist victims in their dealings with Prosecutors and government agencies and to further the interests of the victim (see the NSW , South Australia and ACT legislative models).

Thank you once again for giving me the opportunity of making a submission to this important Review.

Yours faithfully,



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