



**LAW  
INSTITUTE  
VICTORIA**

# Submission to the Victorian Law Reform Commission Inquiry:

## THE ROLE OF VICTIMS OF CRIME IN THE CRIMINAL TRIAL PROCESS

**To:** The Hon. P. D. Cummins AM  
Chair Victorian Law Reform Commission  
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**Date:** 9 October 2015

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# INTRODUCTION

The Law Institute of Victoria (**LIV**) is Victoria's peak body for lawyers and those who work with them in the legal sector and represents over 19,000 members.

The LIV welcomes this inquiry and is grateful for the opportunity to provide the Victorian Law Reform Commission (**VLRC**) with a submission to the Consultation Paper on *the role of victims of crime in the criminal trial process* (**the Consultation Paper**).

This submission has been prepared by a working group comprised of members from the LIV Criminal Law Section:

- Sam Norton
- Peter Rankin
- Joshua Taaffe
- Emma Turnbull
- Melinda Walker
- Ann Valos

All members of the working group have a long history of contributing to, shaping and developing effective criminal legislation, and have undertaken extensive advocacy on law reform issues. Our members have also participated in meetings with the VLRC during the consultation process.

Members of the LIV working group met for a VLRC Roundtable Discussion on 16 March 2015 and subsequently met again to discuss a number of issues. As a result of these discussions, this submission responds to the questions in the Consultation Paper.

The LIV notes that some of the questions raised in the Consultation Paper would be best addressed to the Director of Public Prosecutions (**DPP**), as our members predominantly practice as defence practitioners.

## General comments

The LIV acknowledges that victims undergo an arduous path through the criminal justice process. A victim's experience is deeply personal and often traumatic. This trauma is then often further exacerbated by the criminal trial process itself. Unfortunately, the criminal justice system was developed at a time when the rights and impacts upon the victim were not well understood or appreciated. The criminal trial process has been developed to protect the accused from the power of the State. As such, it has traditionally been insensitive, if not hostile, to the experience of victims.

Attempts have been made over decades to improve the experience of victims within the current system. However, those improvements are always limited by the need to preserve the protections built into the trial process.

It is not a matter of balancing rights of accused and victim, because the matter is not between the victim and accused. The model and language of civil disputes do not capture or reflect the complicated power imbalances and interests of the participants in the criminal justice system. Rather, there are two separate considerations - the need to provide a fair trial to the accused and the need to provide a safe, respectful experience to victims. For many years, we have tried to accommodate that within a single system. The hard question must be asked - are the protections for the accused and the purpose of the criminal trial system intractable barriers to improving the victim's experience within a single criminal law system?

The fundamental purpose of the criminal justice system is, first and foremost, to determine the guilt of the accused in the fairest possible way. A victim's experience does not necessarily equate to the accused's guilt. These issues are more complex and it may be that complex solutions are required, including identifying ways in which a victim's experience can be acknowledged by law, whether within or separate to the trial of the accused.

# RESPONSES TO QUESTIONS

## Chapter 4

### **1. Should the role of victims in the criminal trial process be that of protected witnesses, participating witnesses or prosecuting witnesses?**

The LIV submits that the role of victims within the criminal trial process should be of participating witness.

The trial process is not primarily about the victim; it is about whether the accused is guilty of the offence. While the victim should have a greater status in the sentencing process and during the trial process, our adversarial system of justice means that the role of the victim should remain limited to participating witness. Special arrangements are already in place to assist the victim, such as remote facilities and the use of privacy screens. These particular allowances are routinely adopted to reflect a victim's role within the trial. It is essential that, in reviewing the role of the victim, the importance of the accused's right to a fair trial is not undermined by an increased role of the victim.

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

The LIV submits that victims in the trial process should be the first witness called to reflect their importance in the trial process. Beyond that, the victim should not have any greater role than any other witness in the trial process. To inflate their role beyond that poses a risk to trial fairness and potential for sympathy or influence of a jury, which may not necessarily relate to the evidence tendered to prove the guilt of the accused.

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

The LIV submits that there may be scope to explore the feasibility of introducing a standard opening commentary made by the trial judge to the victim before and/or after their evidence to reflect their role. Such a statement should be made in the absence of the jury.

## Chapter 5

### *The role of victims*

### **4. Should victims have a greater role in the decision to continue or discontinue a prosecution?**

Victims should not have a greater role in the decision to continue or discontinue a prosecution.

The decision to prosecute is a decision which requires careful consideration of the available evidence, the admissibility of that evidence, the defence position and evidence, the attitude of other witnesses and matters relevant to the prosecutorial discretion, which is a safeguard against the unreasonable use of the significant power of the State to prosecute its citizens. The role of the victim is but one of the many considerations. Victims are personally invested in the prosecution of an offender. While they should be consulted by

prosecutors, they should not play a greater role in deciding whether or not the Crown chooses to prosecute an offender.

**5. If a victim wants to withdraw their complaint, should this determine whether the prosecution continues?**

We submit that there is some merit in not pressuring a victim to go through a prosecution if they do not wish to proceed. In practice, members report that victims become unfavourable witnesses and struggle through cross-examinations from both defence and prosecution. However, in the current context of family violence, where many victims seek to withdraw their complaint out of fear, due to manipulation by the perpetrator, or promise of reconciliation or other considerations, there is also considerable merit in continuing the prosecution in order to prevent the repetition of such crimes, and to serve general deterrence.

**6. Should a victim be able to require a prosecution to proceed where the DPP decides it should be discontinued?**

As discussed above, the victim's desire to proceed with prosecution is but one of the considerations leading to whether a trial proceeds. The victim should not be able to override a decision of the DPP in not proceeding with a matter.

**7. Should victims have a greater role in the decision to accept a plea of guilty after plea negotiations?**

LIV members report that negotiated settlements are common place in practice, and the speedy and effective resolution of matters is in all parties' interest where possible. The victim should be consulted in the resolution process, but final decision regarding the prosecution must remain with the DPP.

Whether or not to continue with an indictable prosecution once proceedings have been commenced is a decision which rightfully rests with the DPP. It is a decision that is subject to constant and rigorous re-evaluation process throughout the entire criminal trial proceeding,

Members report that there is often an onerous process of negotiation between prosecutor and defence in relation to a plea. There may be evidentiary problems that make it difficult for the prosecution to prove a necessary element of an offence, or a legal issue that undermines the strength of the prosecution case. Often, there are issues with the availability, reliability or credibility of prosecution witnesses. These issues make resolution of the matter following negotiations a more appropriate course to take, rather than proceeding to trial. Victims are consulted throughout this process and often, while they sometimes do not get their 'day in court', they are satisfied with the admission of guilt.

## **Consultation**

**8. Is there adequate consultation with victims before a decision is made to continue with charges, discontinue a prosecution or accept a plea of guilty after plea negotiations? If not, what additional consultation do victims require?**

We submit that the DPP would be best placed to answer this question.

**9. 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 LIV submits that consultation between the prosecution and a victim in the resolution or discontinuance of proceedings is a valuable process. However, the LIV does not support imposing sanctions on the prosecution for failure to consult. The prosecution is represented by a number of people: the DPP, trial counsel, solicitor with conduct, and the police informant. To hold any one individual accountable for a failure to consult with the victim on discontinuance or a negotiated resolution is inequitable and, in practice, would be difficult to manage.

The LIV suggests that the possible creation of a "resolution checklist" would assist in managing this process. The checklist could include a section confirming whether victim consultation had been undertaken.

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

Victims, like anyone else, have legal rights and interests. Resolution of matters may affect their legal rights and limit their capacity to pursue civil action or limit any future 'victims of crime' claim. Victims should be encouraged to pursue legal advice to ensure they understand the consequences of a proposed resolution or discontinuance of a prosecution. This could be facilitated through the DPP's office. It is important that such processes do not abrogate the fluidity of the trial process and effective resolution of matters.

***Review of decisions***

**11. Should there be a way to review decisions made by the DPP or Crown Prosecutor to discontinue a prosecution or accept a plea after plea negotiations? If so, what mechanism might be used?**

LIV members report that trials resolve for various reasons. We submit that the current system ought to encourage more transparency around why some trials settle and others don't, where they share similar factual circumstances. We submit that any proposed review of process be undertaken in consultation with the DPP.

***Alternative Procedures***

**12. Should victims be able to pursue restorative justice or other alternative processes instead of, or at any point during, a traditional prosecution? Why, or why not?**

Appropriate 'alternative dispute resolution' (ADR) and restorative justice practices have proven to be advantageous and should be encouraged wherever possible. Such processes have multiple advantages to both sides of a prosecution in bringing closure to the police investigation.

Members report however that these proceedings must be considered on a case by case basis and there will be circumstances where this is method would not be appropriate. For example, engaging in an ADR or restorative conference with a rape complainant and an offender who staunchly denies the allegation is unlikely to be a positive experience for the victim.

We suggest that, where matters are negotiated into pleas of guilty, then there is scope for the introduction of restorative justice processes. Careful consideration of various factors, such as the type of offence, offender consultation, and the mode of the ADR, will need to be carefully considered.



## Chapter 6

### Consultation

#### **13. Should the prosecution be required to consult with victims before taking a position on a summary jurisdiction application or an application to cross-examine a witness, including the victim?**

##### Summary jurisdiction application

The question of jurisdiction is a legal question to be determined in accordance with the *Criminal Procedure Act 2009* (Vic). A victim will be provided with the opportunity to make a Victim Impact Statement (VIS) and to indicate how that statement is to be presented to the court. The exercise of the rights of an accused person to seek a matter to be heard either by a jury of his or her peers, or to seek that the matter be dealt with by a Magistrate is in no way the province of a victim. The question of jurisdiction is answered by reference to the seriousness of the crime and the adequacy of sentencing powers. With those matters given proper consideration and a victim given the opportunity to make (and read) a VIS, there can be no role for a victim in that process. To require a victim to be consulted on such an application will simply cause delay to proceedings.

##### Cross-examination

Our adversarial system relies upon cross examination as a method of testing the evidence. This is a fundamental part of the criminal justice system. No individual would voluntarily subject themselves to cross-examination if they have lied or withheld information. Providing a complainant with the right to be heard on an application to cross-examine would serve no purpose other than to restrict an accused person's access to the most fundamental tool available to a criminal defendant. Similarly with other prosecution witnesses – a victim may know that other witnesses will say something different to what they have said or expand the evidence in a way that assists the accused.

#### **14. Are measures required to ensure that the prosecution fulfils consultation obligations?**

*Please refer to Q 13.*

### ***The role of the Victim in Proceedings***

#### **15. Should victims have a role in relation to applications for summary jurisdiction or applications to cross-examine witnesses at a committal hearing?**

*Please refer to Q 13.*

#### **16. Should victims have a role during the committal hearing? If so, what should this role be?**

The victim's primary role in a committal hearing is to be available for cross-examination. We submit that the current restrictions on cross-examination for cognitively impaired and child witnesses should be lifted. There are numerous cases which settle, or are withdrawn, once cross-examination of a victim is undertaken. Often the parties will not know of various facts until cross-examination. Beyond being available for cross-examination, a victim should have no role during the committal hearing, aside from being consulted on proposed resolution.

Introducing victims into the process as a part of the prosecution runs the risks of eroding the independence of the prosecution and creating more trials than are currently running. This in turn will lead to more victims being cross-examined, greater delays in the courts and further traumatization of some victims.



**17. Should victims' views be a relevant factor in the magistrate's determination of an application to cross-examine the victim, or other witnesses? If so, how might victims' views be communicated to the magistrate?**

*Please refer to Q 13.*

***Protected-witness measure***

**18. Should the prohibition on child and cognitively impaired victims giving evidence at committal hearings in sexual offence matters be extended to all, or certain other, victims? If so, what criteria should this be based on?**

The LIV submits that there should be no prohibition on victims giving evidence at committal hearings in sexual offence matters, and consideration be given on the current prohibition being relaxed. There are substantial benefits to both parties to have a properly run committal hearing (*please refer to Q 16*).

LIV members report that having a witness give evidence at a committal hearing can often mean that cross-examination is the only time they are required to be called (as the matter often settles at this point), and the witness would not have to recount their evidence-in-chief (as the victim impact statement will be used). It means that their evidence is provided closer in time to the events with which the matter is proceeding and allows for a more efficient and timely court process.

**19. Should the evidence of victims at committal hearings be video-recorded so that it can be played at the trial instead of victims giving oral evidence?**

The LIV recognises the benefit of the proposed video-recorded (VARE) evidence captured at the committal stage. It would ensure that the victim's account is given in a way which is transparent at the earliest point possible, and it would prevent the perception of police interference, which arises from time to time. However, often there are materials discovered in the course of the committal, and sometimes after the committal, which changes the complexion of the evidence. To restrict the cross-examination in this way would be counter-productive and unjust. Disclosure is a fundamental part of the committal process. It would also mean that every witness would have to give their accounts by way of VARE. We submit that this may be a costly exercise.

**20. Should cross-examination of victims and other witnesses at committal hearings be replaced by earlier transfer of serious indictable offences to superior courts, with the examination of witnesses taking place in advance of the trial and before a trial judge?**

The LIV submits that in some cases there would be genuine benefit in this process occurring. However there would need to be a period of time between the preliminary hearing and the trial proper, to ensure that materials could be disclosed and suitably considered, experts retained, etc. In the event that a superior court could offer a 'block' of time for such issues, and then a further 'block' of time for the trial at a later stage (preferably a far shorter gap than that which currently occurs between committal and trial), this proposal would have genuine benefits. We submit that there would need to be an expedient method of sending matters back to the Magistrates' Court where they have settled to less serious charges.

## **Chapter 7**

***Role of victims- confidential communications***

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

LIV members report that complainants often inform the prosecution of their position with respect to the release of confidential communications once the defence has filed their application. Complainants take a variety of positions and are, at times, willing for the information to be disclosed and, at other times, express their wish that confidentiality is maintained. The prosecution almost always conveys to the court the position that has been taken by the complainant. Members report that it is rare for a complainant to appear at a 32C application for leave to issue a subpoena or for the release of materials.

We submit that the prosecution is not well placed to represent the complainant in the area of confidential communications. A conflict can easily arise where the prosecution is aware of material in the communications which, were it in the possession of the prosecution, the prosecutor's duty of disclosure would require it to be disclosed to the defence.

LIV members highlight the following example in a recent sexual offence case with multiple complainants:

*The complainants and their mother had attended joint counselling sessions where the alleged offending was discussed. The complainants might take the position that they opposed the release of counselling records of the confidential communications. The prosecution would be forced to concede that these records would reveal the extent of information discussed and be important to issues of collusion, contamination, severance of the trials and the use of any material to be made of tendency and coincidence evidence.*

Medical practitioners and counsellors are often represented. If funding were made available for separate representation for complainants to receive advice and if desired, representation at the hearing, the interests of complainants could be better protected. The appearance of the complainant may necessarily have to be confined to part of any 32C hearing.

LIV members report that it is often necessary to explain the forensic significance of issues in the case and the evidence sought. Allowing the complainant to hear such legal arguments would contaminate their evidence and contradict the right to silence and the right to examine witnesses.

**22. Having regard to the practices in other jurisdictions, should victims have a greater role in pre-trial proceedings regarding confidential communications? Should the types of communications and the offences these proceedings relate to be expanded?**

The LIV submits that there is scope for a slight expansion of the role of complainants in proceedings regarding confidential communications. Beyond greater representation, there is no need to expand the types of communications and offences to which these proceedings relate. The logic of protecting confidential communications made to treating medical practitioners and counsellors in circumstances of sexual offences is self-evident. It is difficult to see why the protections should be extended to other types of offences. The starting point ought to remain that all relevant and available evidence should be brought to bear on the issues at the first instance.

To broaden the protections to other communications (such as complaints made to friends, family members or church figures) has the potential to deprive both the prosecution and the defence of relevant evidence. The LIV submits that consistency is one of the hallmarks of truth and the issues communicated by complainants at different times can serve as an effective test of credibility, supporting the complainant where appropriate and undermining credibility where inconsistent versions have been given over time. Where inconsistency is forgivable or explicable, it is for the jury to excuse. It is not the role of legislature to deprive juries of relevant evidence in cases.

### ***Role of victims - pre-trial proceedings generally***

#### **23. Should victims have a role in other pre-trial proceedings in which they have an interest? If so, what should be the test for determining whether victims have an interest?**

The LIV submits that the test for determining whether or not complainants should have a role in pre-trial proceedings requires a careful balancing act. The impact of any pre-trial ruling directly on the rights of the complainant must be weighed against whether or not their involvement in pre-trial litigation would interfere with their primary task – to appear as a witness of truth and be subject to fair examination by an accused.

The area of confidential communications is the perfect example where the rights of a complainant to confidential communication are impacted upon, completely separate from their interest in the criminal proceedings. It is possible to consider how the role of the complainant in protecting the rights at issue can be increased without compromising their ability to operate as a witness. It is difficult to imagine any other pre-trial area where the involvement of complainants should be increased or could be increased, without compromising the fairness of proceedings and the ability of the complainant to give evidence.

Fair examination must necessarily involve a witness not being aware of other evidence in the case and not having forewarning of evidentiary and credit issues. This must extend from the presumption of innocence and the onus and standard of proof. Forewarning of issues can also have negative impacts for the prosecution. A motivated but truthful complainant might tailor his/her evidence in anticipation of challenge. If such tailoring were exposed in cross-examination, this could have a disastrous effect on the jury's assessment of the credibility of the complainant.

#### **24. If victims are given a greater role in pre-trial proceedings, should disclosure obligations be imposed on victims? What other obligations might be imposed?**

The LIV submits that victims should not be given a greater role in pre-trial proceedings beyond the area of confidential communications.

#### **25. How might any role for victims in pre-trial proceedings impact on or relate to the role of victims during the jury trial?**

*Please refer to Q 24.* Heavy involvement in pre-trial proceedings will undermine the capacity of a complainant to appear as a witness in the proceeding.

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

The LIV submits that victims should not be given such a role. To provide for such a role would have the capacity to distort the fundamental nature of the criminal process resulting in potential injustice and wrongful convictions.

### ***Pre-trial restorative justice procedures***

#### **27. Should restorative justice procedures be available in the pre-trial phase of proceedings? If so, should any limits be placed on the use of such procedures?**

The LIV submits that increased restorative justice procedures should be available at all phases of criminal proceedings. The only limit placed on the use of such procedures should be the willingness of the prosecution, defence, and complainant and accused to participate.

## Chapter 8

### *Protective measures*

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

There have been significant amendments to legislation, which have developed over time, to protect witnesses, ensure their safety and minimise the impact upon victims while giving evidence with particular reference to sexual offences and family violence.

There are sufficient protections in place for victims and vulnerable witnesses not only pursuant to legislation<sup>1</sup> but by the protections enshrined in the *Victims Charter* to be upheld by prosecuting agencies. There are also expectations and obligations upon the professionals who operate within the criminal justice system to “minimise the trauma victims experience in the court-room without jeopardising a fair trial for the accused”.<sup>2</sup>

**29. Should the current protective measures for vulnerable witnesses be extended to other categories of victim, or to victims of other types of offence?**

The LIV submits that there is wide scope available to courts to order on their own initiative or by application that witnesses be able to give evidence. Courts regularly allow evidence to be given from remote locations to avoid the necessity of attending court in person or for safety concerns for that particular witness.

It is an important component of our justice system to allow an accused to confront his or her accusers. This ensures that witnesses understand the serious nature of the trial process and to allow an assessment of the credibility of a witness by observing their behaviour under cross-examination.

The LIV submits that there is no need for an extension of the protective measures for other categories of victim or types of offences.

**30. Are the existing evidentiary provisions being used, or enforced by judges, to prevent inappropriate questioning or to allow victims to give evidence in narrative form? Are there any further evidentiary reforms which might reduce victim re-traumatisation?**

The LIV submits that there are adequate protections enforced by judges to prevent inappropriate questioning. There is no need for any further evidentiary reforms required to reduce victim re-traumatisation.

**31. Should Victoria introduce an intermediary scheme? If so, for which victims? What functions should an intermediary perform?**

The LIV submits that there is no immediate requirement to introduce an intermediary scheme. The expected conduct of counsel for both prosecution and defence should be at all times with respect, clarity and non-aggressive, when questioning vulnerable witnesses. The presiding judge also has an obligation to ensure that a witness understands a question or is questioned in a way that is sufficiently clear for that witness to understand. These standards should be sufficient to protect vulnerable witnesses without introducing a third party.

If it is deemed appropriate to introduce an intermediary scheme, it should be restricted to the most vulnerable witnesses who are alleged victims of sexual and violence offences.

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<sup>1</sup> Criminal Procedure Act Vic. (2009) *Parts 8.1 – 8.2*

<sup>2</sup> *Charter of Advocacy – For Prosecuting or Defending Sexual Offence Cases (June) – Department of Justice Victoria.*

The LIV submits that an intermediary should not formulate or relay questions and answers to witnesses. The LIV also submits that where there are concerns with the independence of a support person who interprets for a vulnerable witness, an intermediary should not be permitted to interpret.

### ***Participatory and prosecutorial roles for victims***

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

*Please refer to Q's 21-23.*

Victims should not be permitted to participate in the trial proceedings beyond provision of their evidence.

#### **33. 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?**

*Please refer to Q 26.*

The LIV does not support giving victims a participatory role as the risk of lengthening the process of a criminal trial, and the risk of introducing a victim as a secondary prosecutor and the absence of disclosure obligations which are imposed upon the ordinary prosecution agencies, would significantly impact upon the accused's right to a fair trial.

#### **34. Are there aspects of inquisitorial trial procedures which could be adopted in Victoria?**

The LIV submits that currently, judges presiding over criminal trials will often ask questions of witnesses in circumstances where they believe that an issue that has arisen out of questioning where they may be confused or unclear, similar to that of an inquisitorial nature. Parties are then given an opportunity to address the witness further if the judge's questioning raises other issues which have not yet been explored.

Other aspects of inquisitorial trials such as auxiliary prosecutors, independent lawyers for victims, reduced need to give evidence or the use of intermediaries, increases the risk of unnecessary and unfair interference with the process of the criminal trial procedure in Victoria. Juries must be focused upon the evidence before them and assess that evidence impartially and objectively without prejudice or favour. A greater participatory role by victims in the process of a trial increases the burden upon an accused, and may extend the length of the trial process.

## **Chapter 9**

### ***The victim's role in sentencing and the purposes of sentencing***

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

The LIV submits that there should be no greater role imparted to a victim in sentencing other than those already provided for under current sentencing practices.<sup>3</sup> Sentencing is a very specific balancing process to ensure all purposes of sentencing<sup>4</sup> are reflected in the disposition imposed. The court must have regard to the impact of a crime upon a victim when sentencing; however, beyond that, a judge's decision on what sentence is to be imposed should not be interfered with.

Accepted and carefully considered sentencing principles have been well defined in our common law and reflected in Victorian legislation which includes the effect upon a victim and the harm to the community. It is

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<sup>3</sup> *Sentencing Act 1991* (Vic) S8K-R

<sup>4</sup> *ibid* s5

the Court's exclusive role to determine the appropriate sentence and any form of representation to a Court by a victim as to what sentence an offender should receive would not assist and merely interferes with the task in accordance with proper sentencing principles.

**36. Should the purposes of sentencing explicitly include the needs and interests of victims?**

The LIV submits that, presently, restoration and reparation are all relevant matters when considering an appropriate sentence and courts will often give general weight to the impact upon a victim, in the absence of a victim impact statement of their own initiative. There is no barrier to including restoration and reparation as a purpose of sentencing. However, an offender's capacity to make good reparation may act as an aggravating feature if they are unable to do so.

***Victim impact statements***

**37. Should further limits be placed on the publication and distribution of victim impact statements?**

The LIV submits that current limitations are sufficient and should only ever be published or distributed with the permission of the victim and as long as the statement to be published or distributed is consistent with the facts of a case.

**38. Should a broader group of victims be permitted to make victim impact statements?**

The LIV agrees that sometimes crime impacts upon others either directly or vicariously. Eyewitnesses are often traumatised by what they have seen and families are traumatised by the effect it has had upon their loved ones. We submit that the status quo should remain and the current limitations upon who may make a VIS are to ensure that only the direct impact upon a victim is taken into account.

**39. Should community impact statements be introduced?**

While the LIV agrees that communities are often deeply affected by crimes, we do not agree that community impact statements are necessary. The effect of these may be so broad as to become disproportionate to the crime to be punished and detract from the proper exercise of sentencing. We submit that the Courts adequately and appropriately reflect the community's expectations and the right to feel safe when assessing the risk a person poses at the time of sentencing.

**40. Should victims be permitted to make submissions in relation to sentencing?**

*Please refer to Q 35.*

The LIV submits that sentencing an offender is a complex balancing exercise. Sentencing should remain a matter of judicial discretion.

**41. What should be the role of the prosecutor in preparing victim impact statements?**

The LIV submits that the role of a prosecutor, in knowing the facts to go before the court, can assist a victim in making a victim impact statement to ensure that all relevant matters are adequately canvassed. Members report that Courts are often directed to ignore or put aside irrelevant matters contained in a VIS. The effect of this may be damaging to a victim who believes that all matters contained in the VIS are relevant and taken into consideration. With the assistance of a prosecutor, the process can be explained more carefully and avoid any unnecessary frustration by a victim whose VIS is edited and selectively considered.

## ***Restorative justice sentencing procedures***

### **42. Should restorative justice procedures be available as either an alternative or supplementary part of the sentencing process? If not, why not? If so, in what circumstances?**

*Please refer to Qs 12 and 27.*

As outlined in the consultation paper, forms of restorative justice already occur in the Victorian system by way of specialist services and courts such as:

- the Neighbourhood Justice Centre;
- Criminal Justice Diversion Program; and
- Koori Court in the Magistrates' Court and the County Court jurisdictions.

The LIV agrees that these specialist services and courts can be effective tools which encourage empathy and forgiveness and helps to heal those affected by crime.

As stated above, the majority of the current forms of restorative justice in Victoria are only available for less serious crimes. An expansion for more serious crimes remains untested and may be counterproductive and should not form part of a supplementary sentencing process where the crime is of a more significant nature. As discussed above in Q 12, crimes of a sexual nature or crimes in the context family violence are inherently complex, as there exists a dramatic power imbalance between victim and offender and would only serve to further traumatise the victim.

## **Chapter 10**

### **43. Do processes set out in Part 4 of the Sentencing Act 1991 (Vic) deliver on the aim of a swifter, less complex avenue for victim compensation? Are any changes needed to improve outcomes for victims?**

The LIV submits that current processes under the *Sentencing Act 1991* (Vic) allows for swift, less complex avenue for victim compensation. We submit that the status quo adequately provides compensatory avenues where the offender is financially unable to compensation.

### **44. Should there be a statutory presumption in favour of compensation and restitution in all cases?**

The LIV submits that there should not be a statutory presumption in favour of compensation and restitution for *all* cases. We submit that the New Zealand model outlined in the consultation paper<sup>5</sup> would lead to more trials and contested hearings and may impede early resolution. This model would be difficult when relying on the offender's financial circumstances.

### **45. How should the financial circumstances of an offender be taken into account under Part 4 of the Sentencing Act 1991 (Vic)?**

The LIV submits that these provisions adequately allow for consideration of an offender's financial situation and members report that often orders are made regardless of the offender's financial circumstances.

The LIV further submits that this issue is irrelevant if the offender is in custody, unemployed or has no assets.

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<sup>5</sup> page 143



**46. Should a victim be given the power to commence appeal proceedings in relation to a restitution or compensation order?**

The LIV submits that this is unnecessary. There are adequate civil actions available to victims in cases where they believe compensation or restitution is manifestly inadequate.

We submit that introducing an appeal process would be unworkable unless restitution is automatically enforceable, which would involve changes being made to the current process.

**47. How should restitution and compensation orders be enforced?**

The LIV submits that current civil remedies are sufficient and enforceable against offenders who have financial capacity.

**48. Is there a need for restorative justice pathways as an alternative, or in addition to, Sentencing Act 1991 (Vic) orders and VOCAT?**

*Please refer to Qs 12, 27 and 42.*

The LIV suggests that restitution and compensation may be included as a condition of any agreed plan.

**49. Are there offences not covered by the Victims of Crime Assistance Act 1996 (Vic) (VOCAT) that should be?**

The LIV submits that VOCAT covers criminal acts which result in injury. Its reach is sufficient in terms of criminal matters, but consideration could be given to some extension in terms of time limits, pain and suffering and mental health awards. LIV members report that VOCAT provides certainty for parties once an award is made, unlike some civil actions which may be lengthy and time consuming.

## **Chapter 11**

**50. Should a victim have standing to seek leave to commence an interlocutory appeal? If so, should this be limited to circumstances where the ruling impacts on the personal interests or rights of the victim?**

The LIV submits that this is not necessary and may cause further delays and interrupt the trial process. We submit that the DPP ensures sufficient protection of victim's rights and acts on their behalf appropriately.

**51. Should victims have a right to be consulted by the prosecution or to request that the DPP consider an appeal on any or all matters that the DPP is permitted to seek leave to appeal?**

Please refer to our comments in Q 13 in relation to consultation generally.

**52. Should a victim have standing to participate in an interlocutory appeal commenced by the prosecution or the defence? If so, how and in what circumstances?**

The LIV submits that this is unnecessary. LIV members considered procedures in New South Wales and the United States which permits victims to seek leave to appeal against a pre-trial ruling that impacts on their personal interests, as outlined in the consultation paper.<sup>6</sup> However, we submit that allowing victims to appeal in such contexts will only cause delays in the trial process, adding further complexity to the appeal hearing, and will unnecessarily impact on the rights of the **accused to a fair trial**.

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<sup>6</sup> page 152

**53. Should a victim have standing to participate in a post-verdict appeal commenced by the defence or prosecution?**

We submit that this will cause unnecessary interference in the appeal process. Neither party is allowed to introduce new evidence under current procedural limitations, so it would lead to unnecessary complexities. We submit that the DPP adequately represents the rights of the victim in an appeal process.

**54. Should the victim impact statement scheme as it applies in sentencing hearings also apply when the Court of Appeal re-sentences an offender?**

Please refer to responses in Qs 37-41 under victim impact statements generally.

## **Chapter 12**

**55. 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?**

The LIV agrees that the DPP policy, particularly obligations to consult, could be strengthened through incorporation into the *Victims' Charter Act 2006* (Charter Act). We also submit that there must be compatibility between the DPP policy and the Charter Act, as well other agencies' policies (e.g. Victoria Police) and the Charter Act.

**56. Should the Victims' Charter Act 2006 (Vic) be amended to include other rights, or broaden existing rights for victims?**

*Please refer to Q 55.*

**57. 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 LIV agrees that victims ought to have the legal right to enforce their rights as specified in the Charter Act. These legal rights are best put into effect through a formal complaint process lodged through the Victims of Crime Commissioner. The Commissioner ought to be able to conduct and coordinate complaint taking, investigation and resolution processes.

**58. Should there be a legislatively prescribed process for investigating and resolving complaints about breaches of victims' rights? If so, what might this process look like? Should the Victims of Crime Commissioner in Victoria have a role in complaints resolution relating to breaches of the Victims' Charter Act 2006 (Vic)?**

*Please refer to above at Q 57.*

The LIV agrees that the Victims of Crime Commissioner should have an active role in complaints resolution.

**59. What remedies should be available for breach of a victim's rights?**

The remedies for a breach of a victim's rights should include apology or acknowledgment from the appropriate government agency responsible for the breach. Those apologies should be made mandated by the Victims' Rights Commissioner.

We submit that compensation in extreme cases could be considered; however, we do not advocate for a United States style approach where victims may complain about being unable to speak at a sentencing hearing and can then make complaint (by way of a writ of mandamus) to the Court of Appeal.<sup>7</sup>

## Chapter 13

### *Support for victims*

In relation to the support for victims generally, the LIV submits that other bodies and agencies are better placed to address the provision of victims' support services, and how these services may be improved.

We make the following general points:

- Supports services ought to be culturally appropriate to ensure they provide victims with the best possible support;
- Support services should communicate with each other along with the relevant prosecuting agencies to ensure a wraparound service is provided to the victim; and
- Any personalised legal assistance afforded to victims must not interfere with the current criminal justice model by introducing an additional tier to the trial process.

## CONCLUSION

We thank the Commission for considering our responses to the questions posed in this paper and during the consultation process. We note that the paper considers a range of reform initiatives and proposals, many of which necessarily involve legislative change. However, as has been noted throughout the consultation paper, simply changing the law may still not be sufficient to address the underlying causes or symptoms of victim dissatisfaction with the criminal trial process.

We agree with the Commission's views that changes in culture, practice, and attitudes within the community and the legal profession must accompany any proposals for law reform. This is particularly relevant in the family violence context.

The LIV would be happy to participate in any ongoing work proposed by the Commission in addressing these issues.

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<sup>7</sup> Page 162