



THE VICTORIAN BAR AND
CRIMINAL BAR ASSOCIATION

**SUBMISSION TO THE VLRC
CONSULTATION PAPER ON
THE ROLE OF VICTIMS OF
CRIME IN THE CRIMINAL
TRIAL PROCESS**

14 OCTOBER 2015

INTRODUCTION

1. This submission is made by the Victorian Bar (the **Bar**) and the Criminal Bar Association of the Victorian Bar (the **CBA**) in response to the Victorian Law Reform Commission's Consultation Paper, *The Role of Victims of Crime in the Criminal Trial Process*.
2. The Bar is a private, voluntary, self-funded, not-for-profit professional association of the nearly 2,000 barristers who practise in Victoria. The CBA is the peak body for barristers in Victoria practising in the criminal law. Members of the CBA comprise almost one quarter of all barristers practising in Victoria, including barristers who mainly prosecute, those who mainly defend and those who have a mixed practice.
3. The Bar and the CBA welcome the opportunity to comment on issues raised in the Consultation Paper. This submission is not an exhaustive response to the issues and questions raised in the Consultation Paper, but is intended to collate the views of the Bar and the CBA on key aspects of the Consultation Paper.

SUBMISSIONS

THE ROLE OF VICTIMS

4. The Bar and CBA strongly support the role of the victim in the criminal trial process as remaining that of a witness for the independent prosecution service. Any reforms that are designed to provide improved protection and support to victims of crime, or to enhance their involvement in the prosecution process, must be carefully balanced against the need to ensure that prosecutorial decisions are made by independent legal experts and that the fundamental rights of accused persons to a fair trial are preserved.
5. We are concerned that the Consultation Paper does not appear to distinguish between persons who can clearly be identified and treated as victims of crime from the outset of criminal proceedings (such as those whose family members have been killed as a result of a crime), and those persons who are prosecution witnesses and potential victims of crime depending on the outcome of the criminal justice process. In our view, this distinction needs to be carefully considered in assessing the current and potential future role of victims in the criminal justice process. For ease of reference however, this submission uses the term 'victim' to describe both categories of persons.
6. Prosecutors should communicate with victims, and seek their views, about decisions to continue or discontinue a prosecution, to accept a plea of guilty to lesser charges. However, a victim's views about such matters should not be determinative of these matters, which are (as they should be) decisions to be made by the Director of Public Prosecutions (**DPP**) consistently with his statutory duties.
7. In our experience, adequate communication with victims often occurs prior to these decisions being made. Individual experiences of victims and witnesses may, however, vary significantly depending on factors including the following:
 - a) The victim's level of understanding of their role in the prosecution process, and the extent to which their expectations have been managed;
 - b) Whether the victim is linked to the OPP Witness Assistance Service and/or an appropriate

- support agency;
- c) The expertise and personality of persons involved in the prosecution (including lawyers, police and support personnel); and
 - d) Whether or not the victim resides in metropolitan Melbourne.
8. We would therefore support measures that contribute to victims' increased understanding of the criminal justice system and their role in it, and victims' improved access to information and support from suitably qualified persons. In our experience, social workers or similar professionals, rather than lawyers, are likely to be better placed to provide information, support and advice to victims throughout their journey through the criminal justice process. It is also critically important that such services be properly funded and easily accessible to victims throughout Victoria, including in regional areas.
 9. The Bar and CBA are strongly of the view that decisions of the DPP to file charges, and/or withdraw charges, should not be reviewable. Victim involvement in the selection of charges proved disastrous at the International Criminal Court. In the very first case, victim advocates intervened to persuade Trial Chamber 1 to add, well after commencement of the trial, 5 new charges: costly and confusing litigation ensued until the Appeal Chamber restored the existing charges as the prosecutor (and defence) desired (see *Prosecutor v Thomas Lubanga Dyilo (Judgement on the Appeal of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber 1` of 14 July 2009 Entitled 'Decision Giving Notice to the Parties and Participants that the Legal characterisation of the Facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court')* (ICC, Appeals Chamber, Case No ICC-01/04-01/06 OA15 OA16, 8 December 2009)).
 10. Nor should victims be entitled to separate legal advice or representation during consultations with the prosecution. The cost of legally aiding indigent victims would be high, as would the cost of assessing whether they are genuine 'victims'. Nor could victim involvement in any consultation be justly quarantined from disclosure. We note that the Consultation Paper does not appear to consider how the prosecution's duty of disclosure is engaged by communications and consultations that may occur between the prosecution and victims who are witnesses. In our view, where consultation with witnesses occurs (as opposed to the mere communication of prosecution decisions), matters are likely to arise that should be disclosed to the defence.
 11. Concerning disclosure of evidence, victims can have no role to play beyond that which affects their own interests. In our view, that role is already sufficiently protected by the confidential communications regime noted below.

ROLE OF VICTIMS IN SUMMARY JURISDICTION APPLICATIONS AND COMMITTALS

12. We have no difficulty with a requirement that, where practicable, prosecutors communicate or consult with victims regarding applications for summary jurisdiction.
13. In our view, however, prosecutors should not be required to consult with victims about applications to cross examine witnesses at a committal hearing. The attitude of the prosecutor to leave being granted to cross examination at a committal is a legal decision to be made by the prosecutor based on his/her analysis of the evidence and the relevant issues identified by the defence.
14. Committal hearings, and the cross examination of victims at committals, are valuable processes that, in our experience, frequently result in the resolution of trials or, at the very least, confine the issues

for trial. As noted in the Consultation Paper, any limitation or prohibition on the right to cross examine witnesses at trial will inevitably lead to lengthier pre-trial and trial processes.

15. We do not support the prohibition on child and cognitively impaired witnesses giving evidence at committal hearings in sexual offence matters being extended to other witnesses. Nor do we support the proposal that victim's evidence at committal hearings be video-recorded to be played at trial.

ROLE OF VICTIMS IN CONFIDENTIAL COMMUNICATIONS AND OTHER PRE-TRIAL APPLICATIONS

16. In our experience, victims rarely seek leave to appear in confidential communications applications. However, a victim's attitude to the application is commonly communicated to the court by the prosecutor (via the informant), particularly where the victim opposes the application. In addition, it is not uncommon for the subpoenaed party (eg CASA) to appear and make submissions.
17. We do not support victims having an increased role in confidential communications applications or other pre-trial processes. To implement such a procedure would increase the cost and burden of preliminary parts of the trial process. Ultimately, the proper place for scrutiny of the use of such material is at trial where it should be governed by the trial judge in light of all the circumstances and issues in the trial.

PROTECTED WITNESSES

18. Substantial reforms have already been implemented in Victoria to reduce the trauma and distress of giving evidence in criminal trials for vulnerable victims, particularly for children and cognitively impaired persons, and for complainants in sexual offence and family violence cases. These reforms, together with the cultural changes that have accompanied them, have dramatically changed the way that criminal trials in Victoria are conducted. In these circumstances, we do not see the need of any further protected witness procedures to be introduced.
19. The Bar and the CBA do not support the use of intermediaries for vulnerable witnesses. In our experience, judges already prevent inappropriate or complex questioning of victims and witnesses. In addition, education and training has been made available to criminal barristers (both prosecution and defence barristers) and the judiciary to assist them in formulating questions that are suitable for children and vulnerable witnesses. Further ongoing training can be provided.

PARTICIPATORY AND PROSECUTORIAL ROLES FOR VICTIMS

20. The Bar and the CBA are strongly opposed to victims having a participatory or prosecutorial role in trial proceedings. Such a role is fundamentally inconsistent with our adversarial system of criminal justice.

ROLE OF VICTIMS IN SENTENCING

21. Substantial reforms have been made in recent years to ensure that victims can participate in the sentencing process, particularly through the provision of victim impact statements. We do not see any identified need for further changes to be made to this process.
22. The Bar and the CBA oppose any notion that victims be permitted to make suggestions about the type of sentence that should be imposed. We also oppose the suggestion that victims be allowed to be represented by their own lawyer during the plea or sentencing hearing. Where victims require

assistance with preparing a victim impact statement and understanding their role in the sentencing process, this assistance should be provided by an appropriately funded and qualified support person (such as a worker employed in the OPP Witness Assistance Service).

COMPENSATION AND RESTITUTION

23. While the various avenues available to victims for obtaining compensation or financial assistance may be complex and confusing for victims, the Bar and CBA consider that there is merit in each of the three avenues being retained.
24. The Victims of Crime Assistance Tribunal (VOCAT) provides relatively easy access to state funded assistance and should be retained.
25. In our experience, Part 4 of the *Sentencing Act 1991* is fairly infrequently used. However, this may be reflective of the nature of criminal proceedings, being focused on the determination of guilt and imposition of penalties, rather than the provision compensation to victims. It may also be reflective of the reality that many offenders simply do not have the financial capacity to satisfy any order for compensation that may be made. In our view, any compensation or restitution scheme that is administered by the criminal justice system ought to take into account the financial circumstances of the offender.

ROLE OF VICTIMS IN APPEAL PROCESSES

26. The Bar and the CBA are strongly opposed to victims having a right to institute appeal proceedings, or having standing in such proceedings. Such roles are fundamentally inconsistent with our adversarial system of criminal justice. Decisions regarding appeals, and the right to appear, should remain solely with the DPP.
27. Prosecutors should communicate with victims, and seek their views about, decisions to appeal. However, a victim's views about such matters should not be determinative of these matters, which are (as they should be) legal decisions to be made by the DPP.

VICTIMS' RIGHTS AND SUPPORT FOR VICTIMS

28. The Bar and CBA do not support any amendment of the Victims Charter which would create enforceable legal rights. Complaints resolution processes are a more appropriate mechanism for victims to ventilate their grievances.
29. We would support improvements being made to ensure that a greater number of victims receive co-ordinated and integrated support services throughout the criminal justice process, such as that which is provided by the OPP Witness Assistance Service. As previously indicated, it is our experience that social workers or similar professionals are likely to be better placed to provide such services than lawyers. It is also critically important that such services be properly funded to ensure access by all victims throughout Victoria.

RESTORATIVE JUSTICE PROPOSALS

30. We would be interested in exploring restorative justice alternatives that might be an appropriate process to a criminal trial in some cases, for example, in cases involving historical sexual offending.
31. Appropriate safeguards would need to be in place to ensure that an accused person's participation in

any such process could not subsequently be used against him or her in any related criminal proceedings.

THE VICTIMS' RIGHTS MOVEMENT

32. The Bar and the CBA point out that the interests of the 'Victims' Movement' (so described in Information Paper 4) are not equivalent to the interests of the community. The criminal justice system is already significantly stressed by the increased complexity of criminal law, by reduced funding of courts, prosecution services and legal aid, and by the increase in incarceration arising from very recent heavy-sentencing initiatives. Nor are the interests of victims of crime necessarily equivalent to the interests of victim advocates.
33. Victim advocates are bound by none of the duties of fairness that apply to prosecutors. Those duties of fairness are owed to the court and the community, not merely to individual accused.
34. Therefore the Bar and the CBA urge great caution in weighing the claims of victim advocates, particularly those who seek to inject a formal role for victims or alleged victims (and their representatives) in the deliberations of the DPP.