



## **Victorian Law Reform Commission Role of Victims of Crime in Criminal Trial Process**

**October 2015**

**Northern CASA Response to Questions identified by the Consultation Paper**

### **Chapter 3 Alternative criminal justice models**

The Inquisitorial Criminal Trial Process as outlined in this chapter appears to offer a legal system which would be more conducive to meeting the needs of sexual assault victims who utilise NCASA. Our clients commonly express distress and dismay about aspects of our current criminal trial system including the passive role played by judges, the adversarial contest between the state prosecutor and the accused or their representative and the failure of the system to require the accused to give evidence while victims themselves are subject to lengthy cross examination. The underlying principles and features of the Inquisitorial System appear to address these concerns, in particular:

- the 'official investigations carried out by judicial officers in order to determine the truth' (p24)
- the fact that hearings 'often commences with an examination of the accused' (p25)
- the potential for victims to play a more active role in trial proceedings, including auxiliary prosecutor or legally represented victim-witness

### **Chapter 4**

#### **What should be the role of victims of crime in the criminal trial process?**

- Victims should be protected from being subjected to further harm in their role as witness for the prosecution however, Northern CASA clients continue to report that this is not their experience of the justice system
- Many NCASA clients describe the experience of not being heard during the trial process as well as a wish for greater participation in prosecutorial and judicial decision-making.
- In addition to a guaranteed role as protected witnesses, the role of victims should be expanded so that they have the opportunity to be participating witnesses and prosecuting witnesses.
- Some victims will prefer to assume different roles or victims may choose to adopt different roles at different stages of the trial therefore access to both these additional roles is required.

## **Cultural Change**

- Despite the significant sexual assault reforms in the recent past, many victims continue to report that they experience the justice system as traumatising. Further measures to promote cultural change are therefore required.
- New mechanisms need to be created which would enable victims of crime to provide ongoing feedback about how the system is operating. Examples could include – the employment of victims as consumer consultants as is now widespread throughout the mental health and disability sectors, victim representation on various levels on justice system committees, CASA Forum representation on the Sexual Assault Advisory Committee (as the peak body which advocates for sexual assault victims)

## **Chapter 5 The role of victims in the decision to prosecute**

- This chapter states that the DPP and the OPP act in the ‘public interest’ on behalf of the state and that they **do not** act on behalf of the victim. This assertion fails to recognise that victims are themselves members of ‘the public’ and also to acknowledge that many current OPP processes are, in fact, implemented as responses to victims, eg the pre committal and pre trial conferences for victims to meet with the legal staff conducting the case who often present themselves as working for the victim.
- NCASA experience is that victims feel minimised when their role is described as merely a ‘witness’ to the crime when clearly they have primarily been the subject of the crime. Similarly, CASA experience is that victims feel inadequately responded to and confused when the role of the OPP is described as acting not on their behalf but in the public interest.
- It is suggested that some acknowledgement of the dual roles of both the victim and the OPP is required and that this would contribute positively to the experience of victims

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

- NCASA experience is that a decision by the DPP to discontinue a prosecution causes great distress for victims.
- Victims have also negatively experienced the loss of the review process by the OPP when police decide not to lay charges

To improve the experience of victims a number of changes are required:

- There should be stronger obligations on prosecutors to consult with victims
- Clear processes for judges to follow to make sure that victims are consulted
- Access for victims to an independent review process of DPP decisions to continue / discontinue a prosecution or accept a guilty plea to lesser charges
- Clear consequences for prosecutors and judges when there is a failure to consult victims or adhere to these processes

## **Chapter 6 The role of victims in committal proceedings**

NCASA experience is that victims find their participation in the numerous stages of the justice processes highly traumatising and inhibiting of their recovery. A number of the reform options identified in the discussion paper would reduce these negative impacts including:

### **Consultation**

- Requiring magistrates to take into account the views of a victim whether charges will be determined summarily

### **Protected-witness measures**

- The extension of prohibition of cross-examination of child victims and victims with a cognitive impairment to all other victims
- The recording of evidence of victims' evidence at committal to be used in the subsequent trial

## **Chapter 7 The role of victims in pre-trial proceedings**

- In the overview of this chapter, the Consultation Paper Summary identifies a number of matters about which judges can make rulings on pre-trial applications. Included is a reference to 'whether the defence can use evidence about a victim's sexual history'. Recent sexual assault reforms have sought to eliminate this practice through education to defence prosecutors and judges however ongoing education is clearly required to embed cultural change.

### **Question 21 Are victims exercising their legal right to appear in relation to confidential communications?**

- NCASA's experience is that this right is not widely understood either by victims or by staff involved in supporting victims and therefore further education is required to address this.
- NCASA believes victims should not require permission from the judge but should always be allowed to appear in court and make submissions in response to confidential communications applications and any other pre-trial applications which affect their interests
- NCASA further supports the proposal that prosecutors and judges should be obliged to ensure that victims are informed, consulted and able to access legal advice about pre-trial applications that affect their interests.
- The state should be responsible for providing legal representation for victims.
- NCASA supports the provision of restorative justice processes such as mediation and conferencing for victims who seek an alternative resolution of their case or wish to consider a restorative process in addition to the traditional criminal trial. However victims who may choose to initially choose an alternative resolution process should not be excluded from accessing criminal justice processes at some later stage.

## **Chapter 8 The Role of Victims in the Trial Protective Measures**

### **Question 29 Should the current protective measures for vulnerable witnesses be extended to other victims?**

NCASA experience is that the fragmented and protracted nature of Victoria's current criminal trial process, in particular the processes that subject victims to repeated evidence giving and cross examination, works against their recovery from the crime. Extending the provision of special hearings and the creation of audio-visual recordings of victims' interviews with police as their evidence in chief currently only available to child victims and victims with a cognitive impairment to **all sexual assault victims** would significantly improve the experience of victims.

### **Question 30 Enforcement by judges of existing evidentiary provisions**

NCASA clients' experience is that there is variable enforcement by judges of existing evidentiary provisions, eg some judges permit defence barristers to question victims about aspects of their sexual history, their alcohol consumptions and also to lengthy cross-examinations involving repeated questions which the victim has already answered. These practices serve to further humiliate and traumatise clients and in addition, waste the Court's

valuable and costly time. NCASA clients report experience of other judges who intervene swiftly and do not tolerate such practices. It is suggested that ongoing education for judges regarding their role in ensuring existing evidentiary provisions designed to protect victims are implemented.

### **Participatory and prosecutorial role for victims**

As previously identified the adoption of a number of features of the Inquisitorial System would greatly enhance the experience of victims including:

- Replacement of the method by which evidence is presented within the current adversarial system with the official investigations carried out by judicial officers in order to determine the truth.
- The commencement of hearings with an examination of the accused'
- The potential for victims to play a more active role in trial proceedings, including auxiliary prosecutor or legally represented victim-witness. Where the latter occurs, the state should be responsible for providing legal representation for the victim. It is acknowledged that this will increase the cost of the trial system however the current system, in which the accused is permitted legal representation but the victim is not is patently unfair.

### **Chapter 9 The role of victims in sentencing**

- In relation to victim impact statements NCASA experience is that some clients would prefer the accused not to be made aware of the contents of their victim impact statement. It is suggested that victims have the choice to restrict disclosure to offenders.

### **Chapter 10 Compensation, restitution and other orders**

#### **Question 47 How should restitution and compensation orders be enforced?**

- NCASA agrees that the state, rather than victims, should be responsible for enforcing compensation or restitution orders.

### **Chapter 12 Victims' Rights in the criminal trial process**

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

NCASA believes there is a need for victims' existing rights to broadening along the lines of the extended rights which victims have in other state and international jurisdictions (as outlined in the Consultation Paper), including:

#### **Increased rights relating to participation through consultation**

- The right to be updated about the police investigation at monthly intervals as occurs in the ACT
- The automatic right to be given reasons for a decision not to proceed with a charge as occurs in Queensland and to request a review of such a decision as occurs in EU member states
- The right to be consulted in relation to the possible amendment of a charge or the acceptance of a plea to a lesser charge as occurs in Qld, NSW and South Australia.
- The right to request that the prosecution consider an appeal if the victim is dissatisfied with a determination made during the criminal proceedings

### **Increased rights relating to protection, including protection from secondary victimisation**

- The right not to have to appear at preliminary or committal hearings as occurs in South Australia
- Consideration of further measures such as those which exist in EU members states which mitigate the risk of emotional harm and protect the dignity of victims when giving evidence. Eg, NCASA clients have reported feeling ridiculed and overtly disbelieved by defence barristers which has affected their capacity to give their evidence.

### **General issues with making victims' rights enforceable**

- NCASA is mindful of the numerous actions introduced under the Sexual Assault Reform Strategy which attempted to improve victims' experience of the justice system, such as the Code of Conduct which is intended to govern how prosecution and defence lawyers act. However, as observed by Matthew Hall and noted in the consultation paper, adequate attention needs to be devoted to the enforcement of victims' rights and interests within the justice system through ongoing education and clear accountability mechanisms for police, lawyers, magistrates and judges.
- NCASA experience is that not all victims are made aware of the Victims' Charter and hence that very few victims utilise the option of contacting the Victims' Charter enquiries and help line to make a complaint. More education needs to be provided so that victims are aware of these rights.

### **Compensation and restitution**

- The right to information from the prosecutor about how to apply for compensation and restitution and legal assistance from the prosecutor with this if the victim requests this as occurs in SA

### **Question 58 Victims of Crime Commissioner role in investigating and resolving victim complaints**

- NCASA agrees there is a need for a clear process for investigating and resolving complaints by victims and that the Victorian Victims of Crime Commissioner should play a role in this process. NCASA's experience with a Victims of Crime Commissioner in another jurisdiction has been that the Commissioner's involvement and intervention contributed crucially to a more positive experience of the justice system for our client.

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

- As occurs in SA, NCASA believes an acknowledgement and apology, both verbal and in writing, should be provided to victims where there is a breach in their rights, eg as identified by the Victims' Charter

## **Chapter 13 Support for victims**

### **Court Network**

NCASA identified significant potential benefit for victims in adopting the provision currently available in Qld where the Court Network has established a dedicated Victim Support Unit which offers victims a personalised court support plan which spans the duration of the criminal trial process.

### **Non-government victim support and advocacy groups**

- The lack of acknowledgement of the work of CASA's in this section (see p169) is most concerning.

### **Resources, coordination and integration of service delivery**

- This section again overlooks the significant advocacy work undertaken by CASAs to assist victims who are involved with the criminal justice system. It is suggested that it would be more efficient to adequately fund CASAs for this role than to create another tier in the service system such as the Independent Victims Advisors outlined in 13.36, p 170