

**VICTIMS OF CRIME CONSULTATIVE COMMITTEE  
(FORMER VICTIM REPRESENTATIVES)  
SUBMISSION TO THE VICTORIAN LAW REFORM COMMISSION REFERENCE**

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

1. The six victim representatives of the Victims of Crime Consultative Committee 2013-2015 ('VOCCC')<sup>1</sup> welcome the opportunity to make a submission to the Victorian Law Reform Commission's ('VLRC') in relation to its reference on *The Role of Victims of Crime in the Criminal Trial Process*.
2. The VOCCC, established in 2013, is a high-level forum for victims of crime, prosecutors, judiciary, police and service agencies to discuss concerns with and reforms to the criminal justice system. The VOCCC advises the Attorney-General on issues relating to victims of crime, including policies, procedures, service delivery and legislative reform.
3. This submission reflects the views of the victim representatives and complements our individual submissions. It does not attempt to address all questions posed in the VLRC consultation paper but focuses on the broad themes and issues, which we believe are central to the reference and the victim's role in the criminal trial process. This submission is not a government submission but represents the views of the victim representatives and Chair of the VOCCC as supported by the Victims Support Agency within the Department of Justice and Regulation.

**Core principles**

4. The core principles that underpin a victim oriented criminal justice system are dignity, equality, inclusion, participation and accountability. These core principles are enshrined in international human rights instruments<sup>2</sup> and the Victorian *Charter of Human Rights and Responsibilities Act 2006* and *Victims Charter Act 2006* ('Victims Charter'). We firmly believe that these core principles should form the basis of any discussion of the role of the victim in the criminal trial process.

*Dignity*

5. As victims, we want a criminal trial process that treats us with dignity. We note that the concept of dignity is a recurring theme in international<sup>3</sup> and domestic studies<sup>4</sup> examining experiences of victims in the criminal justice system. It has become the touchstone of international and national human rights instruments and legislation, including the Victims Charter. For victims, this means being listened to, being believed and not being judged by police and prosecutors.

<sup>1</sup> We served on the VOCCC as victims' representatives for the 2013-2015 term, finishing on 30 September 2015. This submission reflects our views only and not those of the incoming victims' representatives on VOCCC.

<sup>2</sup> *Declaration of basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GAOR, 40<sup>th</sup> sess, 84 mtg, UNDOC A/RES/40/34 (29 November 1985).

<sup>3</sup> Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 664-680; Valerie M. Meredith, 'Victim identity and respect for human dignity: a terminological analysis' (2009) 91 *International Review of the Red Cross* 270-272.

<sup>4</sup> Victims Support Agency, Department of Justice, Victoria, *Building the Confidence of Victims in the Criminal Justice System, Final Report*, August 2014

6. We acknowledge that dignity is a multi-faceted concept. For us, dignity is about recognising and respecting our intrinsic worth as human beings, and being treated in a manner consistent with this respect. We do not believe our status as victims limits or reduces our intrinsic worth as human beings.
7. We strongly believe that dignity should not just be a core principle but an enforceable right. In the United States of America ("USA"), the *Crime Victims' Rights Act*<sup>5</sup> sets out a list of victim's rights,<sup>6</sup> including the right to be treated with fairness, and with respect for the victim's dignity and privacy.<sup>7</sup> These rights are enforceable in the District Court as well as on appeal.<sup>8</sup> There are also a raft of disciplinary and administrative sanctions directed at government employees and other service providers for failure to notify and accord these rights to victims.<sup>9</sup> Judges have a positive obligation to ensure that victims have been accorded these rights at different stages of the criminal trial process.<sup>10</sup>
8. In Victoria, the Victims Charter imposes a moral standard<sup>11</sup> on investigating and prosecuting agencies and service providers to treat victims with courtesy, respect and dignity.<sup>12</sup> However, the standards are not enforceable by the victim nor does an agency's failure to adhere to them attract any court or administrative remedies.<sup>13</sup>
9. We firmly believe that the Victims Charter standards should be obligations, breaches of which are subject to a range of administrative sanctions. In the United Kingdom, the Crown Prosecution Service Inspectorate (CPS Inspectorate) is an independent body that conducts reviews of prosecutorial decisions and compliance with the Code of Practice for Victims of Crime (Victims Code).<sup>14</sup> The Victims Code sets out minimum standards of service for agencies dealing with victims of crime. The CPS Inspectorate monitors the Crown Prosecution Service's compliance with the Code on a rolling basis, with all reports tabled in Parliament.
10. We acknowledge that the Victims of Crime Commissioner ("Commissioner") will have the power to conduct inquiries into systemic victim of crime matters, including failure of investigating and prosecuting agencies to adhere to the standards set out in the Victims Charter. While this is a significant step towards accountability of investigating and prosecuting agencies in their treatment of victims of crime, it could be strengthened further if it was mandatory for the Commissioner to make a report and for the Attorney-General to table the report in Parliament.

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<sup>5</sup> 18 USC§ 3771.

<sup>6</sup> Ibid §3771(a).

<sup>7</sup> Ibid §3771(a)(8).

<sup>8</sup> Ibid §3771(d)(3).

<sup>9</sup> Ibid §3771(c),(f).

<sup>10</sup> Ibid §3771(b).

<sup>11</sup> Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice. Human Rights Law in Australia* (Federation Press, 2<sup>nd</sup> revised ed, 2004) 25.

<sup>12</sup> *Victims Charter Act 2006* (Vic), s6(1).

<sup>13</sup> Ibid s22.

<sup>14</sup> Ministry of Justice, Code of Practice for Victims of Crime (October 2015).

## *Equality*

11. The *Charter of Human Rights and Responsibilities Act 2006* ('Human Rights Charter') provides that every person is equal before the law and entitled to the protection of the law without discrimination.<sup>15</sup> The Human Rights Charter articulates the rights of the accused but is silent on those of the victim. While the Victims Charter imposes obligations on investigating and prosecuting agencies it does not influence or guide the conduct of the courts.

12. We support the guiding criminal justice principle as articulated by Lord Steyn<sup>16</sup>.

*"There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family; and the public."*

13. We feel that the courts should be more proactive in exercising their statutory and common law powers to facilitate a witness giving best evidence, and ameliorating the impact of the adversarial system on family members, particularly in those cases where the crime has resulted in the victim's death. We believe that the courts are the key to driving cultural change in the broader legal profession as to how victims should be treated in the criminal trial process.

## *Inclusion and participation*

14. These two principles go to the heart of the issues facing victims in the criminal trial process because it is a process from which they are excluded. As the criminal trial process is essentially a contest between the prosecution which represents the State and the defence which represents the accused, the victim has no standing other than as a witness for the prosecution, despite being the party who must bear the impact of the crime. In essence, how to facilitate the inclusion and participation of the victim in the process designed to deliver justice is the principal task to be addressed in this reference by the VLRC.

## *Accountability*

15. We believe that investigating and prosecuting agencies should be accountable for conduct that fails to meet the standards set out in the *Victims Charter*. For us, accountability requires investigating and prosecuting agencies to report on their compliance with the Victims Charter, and sanctions for non-compliance. As previously mentioned, we are attracted to an independent review body with functions and powers similar to that exercised by the UK CPS Inspectorate.

## **The role of victims in the criminal trial process**

16. In line with the core principles outlined above, we believe the primary role for victims should be as participating witnesses. Victims want to be informed, and consulted at each stage of the process. They want to have a voice and be heard. They want their opinion considered and respected. They want to be able to influence the decision making process; they do not want to control it.

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<sup>15</sup> *Charter of Human Rights and Responsibilities Act 2006*, s 8(3).

<sup>16</sup> Lord Steyn, United Kingdom House of Lords – Attorney-General's Reference No 3 of 1999 (2000) UKHL 63

17. In order to facilitate the full participation of victims, processes should be in place to facilitate equal access for victims who are vulnerable due to cognitive impairment, intellectual or physical disability or age.
18. Vulnerable victims are often perceived by police and prosecutors to lack credibility and are particularly vulnerable to aggressive forms of cross-examination. As a result, police may decide not to lay charges against perpetrators or the Director of Public Prosecutions may decide not to prosecute on the ground that there is no reasonable prospect of a conviction due to the credibility and reliability of the victim.<sup>17</sup> This perpetuates a cycle of violence against these victims as they are perceived by offenders as easy targets.
19. For vulnerable victims including people with cognitive impairments or low levels of literacy, non-verbal people, and children, we are attracted to the use of intermediaries to facilitate their communication with prosecutors, defence lawyers and the judge. The role of intermediaries should be expanded beyond that canvassed in the VLRC consultation paper to include the entire criminal justice process from investigation through to sentence. In the United Kingdom, the use of intermediaries early in the criminal investigation and trial process has resulted in a significant number of matters progressing to trial and conviction, as well as reduced rates of offending against this cohort due to increased likelihood of prosecution.<sup>18</sup>
20. Other vulnerable victims for whom mechanisms should be in place to ensure their equal access and participation in the criminal trial process include people from CALD and Indigenous backgrounds, traumatised people and people with mental illness or previous substance abuse issues. Traumatized people, including primary and related victims, may warrant the status of protected witnesses when subjected to cross-examination and where their interests are at odds with the prosecution. For example, a prosecutor may allow the defence to bully a victim on the witness stand as a strategy to elicit the jury's sympathy for the victim.

### **The Victim's Role in the Decision to Prosecute**

21. While we acknowledge that the ambit of the VLRC is the criminal trial process, we believe it is important to note that police decide which cases to investigate and refer for prosecution.

#### Prosecutorial discretion

22. The Director of Public Prosecutions (DPP) and Crown Prosecutors' exercise of prosecutorial discretion turns on whether there is a reasonable prospect of a conviction and the public interest. The DPP's prosecutorial discretion policy provides a non-exhaustive list of matters that may be considered by the prosecutor in deciding whether to prosecute or not, such as reliability and credibility of the witnesses and seriousness of an offence.<sup>19</sup> There is no obligation for the prosecutor to have regard to the concerns of the victim, or to advise the victim of the basis for their decision not to prosecute.

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<sup>17</sup> Director of Public Prosecutions Victoria, *Director's Policy Prosecutorial Discretion* (24 November 2014)[3].

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<sup>19</sup> Director of Public Prosecutions Victoria, *Director's Policy Prosecutorial Discretion*, 24 April 2014

23. The decision to prosecute needs to be transparent. We believe that victims have the right to receive an explanation as to why a prosecutor has decided not to proceed with a prosecution or to vary the charges. We believe it should be mandatory for prosecutors to provide written reasons to any victim adversely affected by their decision not to prosecute within a reasonable time. The current discretionary system for providing reasons to victims is not sufficient as it is at the discretion of the DPP and on request.<sup>20</sup>
24. We believe that a requirement to give reasons is essential to a transparent and accountable prosecutorial service. For victims, a more transparent system will (1) allow us to better understand the facts and basis for the decision not to prosecute, (2) reassure us that the decision was not made arbitrarily, (3) allow us to identify the extent to which our concerns were taken into consideration and (4) reassure us that we have been dealt with fairly. The requirement to give reasons will make the DPP, OPP and Crown Prosecutors more accountable as they have a greater incentive to rigorously and carefully identify and assess the relevant issues and properly justify their decisions. These reasons would form the basis of an external review mechanism of the DPP's decision not to prosecute or proceed on lesser charges.
25. We are attracted to an independent body to review the Office of Public Prosecutions decisions to prosecute, accept a plea negotiation or discontinue a trial and compliance with the Victims Charter. This oversight body should not have the power to overturn the prosecutor's decision, but simply refer the matter back for reconsideration. The UK CPS Inspectorate model is a useful model to consider, as it accommodates the need to review and monitor prosecutorial decisions and legal processes, as well as compliance with statutory obligations, including the Victims Code.

#### Charge negotiation or Plea bargaining

26. The DPP in performing his or her functions has an obligation to ensure that the prosecutorial system gives appropriate consideration to the concerns of the victim.<sup>21</sup> The Victims' Charter sets out the types of information that prosecutors should provide to victims, including the charges filed against the person; if no charges filed the reason why; any decision to substantially modify those charges, including deciding not to proceed with some or all of the charges, and accepting of a plea of guilty to a lesser offence.
27. As victims, we feel aggrieved and excluded from the criminal justice process when prosecutors unilaterally decide to modify charges or accept a plea to a lesser charge without consulting us. Prosecutors should be required to inform and consult with us when considering a plea negotiation.
28. While we acknowledge that the DPP's policy on resolution requires prosecutors to consult with a victim prior to a plea negotiation, this does not always happen.<sup>22</sup> The requirement to consult with a victim prior to and during plea negotiations should be a statutory requirement, with an exceptional circumstance exemption such as the age or mental capacity of the victim.

<sup>20</sup> Director of Public Prosecutions Victoria, Director's Policy The Giving Of Reasons for Discretionary Decisions, 17 April 2015.

<sup>21</sup> *Public Prosecutions Act 1994*, s24(c).

<sup>22</sup> Asher Flynn, 'Bargaining with Justice: Victims, Plea Bargaining and the Victims' Charter Act 2006 (Vic)' (2011) 37 *Monash University Law Review* 79

29. The 'cloak of secrecy' surrounding plea negotiations in Victoria makes it extremely difficult to determine whether the plea negotiation is a fair and accurate account of the objective criminality of the offender.<sup>23</sup> Plea negotiations often do not reflect the full extent of the accused person's culpability or the full extent of the crimes committed against a person. This has a significant impact on the victim as it can be seen as trivialising the impact of the crimes against them by enabling the accused to minimise and deny their offence or offences. It also limits the victim's ability to have a voice at sentencing as their victim impact statement must relate only to the offence or offences of which a person has plead or been found guilty.
30. We are attracted to the New South Wales certification scheme for plea negotiations. In NSW, the prosecutor is required to file with the court a certificate confirming consultation with a victim. The certificate must be signed by the Director of Public Prosecutions (DPP) and verify that the victim has been consulted and that the statement of agreed facts constitutes a fair and accurate account of the objective criminality of the offender.<sup>24</sup> The court will stay proceedings until the certificate is lodged.
31. We are supportive of a similar certification scheme in Victoria, as it provides an important check on the DPP's discretion and ensures some degree of parity in plea negotiations across offences. We believe that it is necessary for the DPP to report or publish plea bargains. Given the confidential nature of plea bargains, the DPP may be required to report to an independent review body, similar to the UK CPS Inspectorate.
32. Throughout this submission, we constantly reiterate the requirement for prosecutors to notify, inform and consult victims on any matter that affects their interests, such as hearing dates. In the UK, the Crown Prosecution Service (CPS) is subject to strict requirements to keep victims informed of criminal proceedings and to notify them of any changes to court hearings or charges. The CPS Inspectorate, an independent body, monitors the CPS's compliance with these requirements, and has the power to require the CPS to rectify any areas of non-compliance.
33. We believe that a similar system of administrative accountability would improve outcomes for victims in the criminal trial process. The Victorian Auditor General's Office (VAGO) or an independent body could monitor the prosecution services compliance with these administrative obligations.

### **The role of the victim in committal proceedings**

34. We are committed to a fair and just criminal trial process. We recognise that committal proceedings operate as a procedural safeguard for an accused person by ensuring that there is sufficient evidence for the person to stand trial for an indictable offence. They also provide an essential check on what sometimes appears to victims as an arbitrary exercise of power by prosecutors, which goes to the heart of public confidence in the criminal justice system. In 2014-15 financial year, 15 % of cases at committal were discharged or withdrawn.
35. Committal proceedings also provide benefits for victims as they enable an accused person an opportunity to plead guilty early, thereby avoiding a lengthy

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<sup>23</sup> Ibid

<sup>24</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW), s35A

trial process. In 2014-15 financial year, 26% of accused persons pleaded guilty at committal avoiding the need for victims to give evidence and be cross-examined at trial.

36. While we recognise that committals provide the accused person with an opportunity to hear the evidence against them, it is extremely traumatic for the victim. In the majority of cases, victims are cross-examined by the defence, which can be intimidating and stressful. Magistrates' Court data indicates that cross-examination of witnesses at committal is the norm (>90%), with less than 1% of applications for leave to cross-examine being refused by the court. This may reflect that often the only witness to the crime is the victim, such as a victim of an assault.
37. Given that cross-examination of witnesses is the norm and not the exception, it is important that there are safeguards for victims to limit the impact of cross-examination on their ability to give their best evidence at trial. Research suggests that aggressive cross-examination by defence at committal impacts on victim's ability to give their best evidence at trial, due to the stress and anxiety generated by their experience at committal.
38. We are attracted to a number of reforms that limit the requirement for cross-examination of a victim at committal. Cross-examination of victims should only occur in exceptional circumstances, where the defence can demonstrate that the issue in dispute goes to the heart of whether the accused should stand trial. We accept that the defence should be able to cross-examine a victim where they are the only witness to the crime and there is minimal forensic or other evidence available. We are supportive of the special rules for victims of sexual assault,<sup>25</sup> which enables them to give their evidence via video or audio recording and the restrictions placed on the defence in cross-examining the witness. We would like to see these rules extended to all vulnerable victims.
39. We also acknowledge that an application for cross-examination enables the prosecutor to identify issues with the victim's evidence earlier in the process, as well as narrowing issues in dispute, however while advantageous to the prosecutor it appears to be counterintuitive given the Victims Charter obligations. An offset for restricting the defence's right to cross-examine could be earlier and stricter disclosure requirements on prosecutors.
40. Another option is to make the majority of committals on the papers, with committal proceedings only occurring in certain cases, such as serious offences attracting a penalty of 25 years or more. In New Zealand, committal proceedings are the exception, with the majority of cases proceeding to trial after a case review process. This significantly limits the victim's contact with the accused and the court and provides them with an opportunity to give their best evidence at trial. NZ has found that the case review process reduces the trauma felt by victims throughout the criminal trial process, as they only need to experience the anxiety and stress of cross-examination at trial.
41. We were attracted to a couple of measures that have been introduced or piloted in overseas jurisdictions that reduce the impact of cross-examination on the victim. While we discuss these measures under the trial section, we mention them here for completeness. The use of intermediaries to facilitate communication between cognitively impaired persons and children and

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<sup>25</sup> *Criminal Procedure Act 2009*, s 133.

prosecutors, defence and the courts will reduce the trauma and stress experienced by this vulnerable cohort. An intermediary will work with the court, defence and prosecutor to establish rules as to the structure and format of questions asked during cross-examination to ensure that the victim is able to understand the question and provide an appropriate response. The other measure is a pilot operating in the UK where cross-examination of vulnerable witnesses by defence counsel occurs in the Judge's chambers or an out of court venue. The pilot does not breach the right of the accused to a fair trial as the questioning of the witness by defence is video-taped and played back to the jury at the trial.

42. We reiterate that prosecutors should be required to notify the victim of committal proceedings, and if the victim is not required to attend, the outcome of these proceedings. If the accused pleads guilty the victim should be informed of the next stages in the process and the need to start preparing a victim impact statement.

### **The role of the victim at pre-trial**

43. We are concerned that victims are required to protect their interests at pre-trial hearings, especially relating to confidential communications. Victims are emotionally and financially vulnerable as a direct result of the crimes committed against them. It is unrealistic to expect them to find a criminal lawyer experienced in these specialist areas, pay for them and to have the energy to defend an application.
44. It strikes us that pre-trial hearings represent a conflict between the obligation to treat the victim with respect and dignity and the prosecution's overriding goal of obtaining a conviction. Research indicates that a distressed victim during cross-examination on sensitive material, such as previous sexual history, is often beneficial for the prosecution as it paints the defence in a poor light. We do not believe that this justifies requiring the victim to defend an application relating to previous sexual history or confidential communications.
45. We believe that there should be a presumption that a victim does not consent to an application for access to confidential communications. The defence should be required to demonstrate to the court that the confidential communications are directly relevant and material to the case against the accused. The court should then be required to consider the statutory tests to determine whether to grant the application. If granted, the court should determine what, if any, information contained in the confidential communications is relevant to the defence and admissible as evidence.
46. Again, there should be stringent requirements imposed on the prosecutor to inform victims of any applications that affect their interests, including the nature of the application and potential consequences. We do not believe that it would compromise the independence of prosecutors to advise victims on their rights in these circumstances which creates a conflict between the interests of the victim and the state.
47. Access to legal representation to defend applications that affect our interests is another option that we find attractive. In New South Wales, a victim has access to independent state funded legal assistance to defend an application for access to confidential communications.



### **The role of the victim in the trial**

48. Based on our own experience, and the experience of other victims with whom we are connected, the trial process is a major cause of re-victimisation. There are a number of reasons for this but they all stem from the lack of recognition and inclusion of the victim.
49. For family members of crimes resulting in the death of a loved one, the exclusion from the trial process is particularly traumatic. There is a tension between the focus of the court process on objectivity and the raw emotions of the family members who feel an overwhelming need to attend trial every day as it is the last thing they can do for their loved one. They have no role in the trial process and are often kept isolated from proceedings.
50. Research conducted by the VSA in 2013/14<sup>26</sup> based on in person interviews with 104 victims of crimes against the person found almost two thirds of the respondents who went to court were not confident that the court listens to victims. Importantly, a negative experience<sup>27</sup> with the court process was the strongest predictor of lack of confidence in the criminal justice system overall.
51. Significantly, the low levels of confidence in the courts could not simply be explained in terms of case outcome. Whilst victims who felt confident the court listens to victims were more likely to have had a positive, rather than a negative outcome, the majority of respondents who were not confident the court listens to victims, also had a positive outcome. The primary reasons for victims' low levels of confidence in the courts were feeling excluded from the process and a view that their interests are not given equal weight to those of the offender.
52. These findings support the results of broader procedural justice research conducted nationally and internationally which highlights the centrality of inclusion and having a voice to victims' sense of fairness and the perceived legitimacy of the criminal justice system.
53. It is important to recognise however that not all victims are able to participate equally and may require special protective measures. The United Kingdom, for example, commenced a trial last year in three courts where the most vulnerable victims and witnesses will be able to give their evidence and be cross-examined away from the court room. The purpose of these pilots is to protect these victims from potentially aggressive questioning in front of jury, judge and the accused. Eligible victims to be considered for the pilot include people who may find it difficult to give their best possible evidence in a courtroom environment and all child victims<sup>28</sup>
54. There is support for a similar concept from Australian professionals and academics<sup>29</sup> who argue that the cross examination process itself can lead to unreliable evidence and further trauma to the victim. They advocate a system

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<sup>26</sup> Victims Support Agency, Department of Justice, Victoria, *Building the Confidence of Victims in the Criminal Justice System, Final Report*, August 2014

<sup>27</sup> A positive experience was deemed by the researchers to be where a case resulted in a finding or plea of guilt and the offender was sentenced to a term of imprisonment.

<sup>28</sup> <https://www.gov.uk/government/organisations/ministry-of-justice> 28 April 2014

<sup>29</sup> Phoebe Bowden, Terese Henning and David Plater, *Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?*, Melbourne University Law Review, Vol 37:539, 2012

introduced in Norway whereby cross-examination of vulnerable victims is conducted in advance of trial by a third party and video-recorded.

55. We recommend that Victoria monitors the implementation of the United Kingdom initiative, with a view to trialling a similar program for vulnerable victims and witness in the Victorian criminal trial process.

### **The victim's role in sentencing**

56. It is important to reiterate that most victims do not want control of the judicial decision making process. We accept that is the role of the court. What we do want however, is to influence that process. We want to have a voice and for that voice to be recognised by the court and be taken into account when sentencing an offender.
57. As victim representatives, we accept that the court is required to take into account six sentencing principles of which the impact on the victim is one. The means by which that impact is conveyed to the court is through a Victim Impact Statement (VIS).
58. We find it significant that only after an offender has been found guilty and is about to be sentenced, is the victim able to have a voice in the criminal trial process. This highlights the need to ensure that mechanisms are introduced to facilitate the participation of the victim from the time the decision to prosecution is made and throughout all the stages of the trial.
59. The importance of VISs to victims is well documented and widely accepted. In interviews undertaken in 2009 with over 120 victims as part of the VSA's research into the VIS process, the importance of being able to submit a VIS was a strongly recurring theme.<sup>30</sup> Whilst victims often found the process of writing their VIS to be therapeutic in itself, they stressed the importance of judicial recognition. Those victims interviewed who submitted a VIS, which was not referred to by the judge in sentencing remarks, felt a strong sense of re-victimisation. Non-recognition of a VIS by a judge was equated with the victim's voice having been ignored.
60. Conversely, when the impact of the crime on a victim was referred to by the sentencing judge, it conveyed to the victim a sense of recognition and validation. In many instances, a victim may have liked a longer sentence but the knowledge that their views had been considered were more important than the sentence itself. As one support worker said "Although the victim was disappointed in the sentence, she had been supported and heard and that balanced it out for her"<sup>31</sup>.
61. The report noted the flexibility that the common law in Victoria had adopted to the content of VISs. In *R v Dowlan* for example, Justice Charles highlighted the need to balance a flexible approach to the reception of victim information with the principle that only admissible information should be relied when sentencing<sup>32</sup>.
62. As victims, we find it distressing when the prosecutor or court edits our victim impact statement to remove inadmissible material. We note that the same level

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<sup>30</sup> Victims Support Agency, Department of Justice, Victoria, *A Victim's Voice: Victim Impact Statements in Victoria*, October 2009

<sup>31</sup> Op cit.p81

<sup>32</sup> Op cit. p31

of scrutiny is not given to the material tendered by the defence for the purpose of highlighting mitigating factors present in the circumstances of the offence or in the background if the offender.

63. We note that since the introduction of the read aloud provisions in January 2011, victims are more likely to have the content of their VIS edited before or during the trial. Based on our own knowledge and experience, this can be devastating for victims and should not occur. Whilst we accept the need for some sort of guidance for victims around issues of admissibility, a VIS is the only opportunity for the victim to be heard, and it is important that that voice be respected and not subject to editing.
64. Victims welcome information about how to prepare a VIS, including information about what may or may not be admissible. Agencies such as the OPP Witness Assistance Service, Centres Against Sexual Assault and Victim Assistance Programs play an important role in providing this information and supporting victims to prepare a VIS. We do not believe that legal representation would assist in this process. Admissibility is not always a clear cut issue but a matter which can be interpreted differently by various legal practitioners. It would also introduce yet another person the victim had to deal with at a time when their need is for emotional support and continuity.
65. Whilst we understand that a victim's views on sentencing are not admissible and that a judge must take many other factors into account, we believe the current prohibition on any sentence comments is too restrictive. There may be times when a victim does not want to see an offender incarcerated. Such an example may be following a dangerous driving conviction where the driver is another family member or a close family friend. We do however, appreciate the need for caution in creating an expectation in victims that their views on sentencing will influence the judge's determination.
66. As highlighted throughout this submission, the trial process is a major cause of re-victimisation. Accordingly, when that process is protracted further due to an appeal, we believe a victim should be able to update their VIS to reflect the impact of the delay occasioned by the appeal and the uncertainty it creates. Victims often are unable to begin any form of healing until the criminal justice process is concluded.
67. We support the introduction of community impact statements, particularly in relation to crimes which affect a broader group of people than the immediate victim and their family and friends. Such an example would be the impact on the Tyabb community of the Luke Batty murder. There would however, be a need for guidelines as to who, how and when community impact statements were presented as in some cases, for example the murder of children, the whole Victorian community would be affected.
68. We understand that any reference that a judge makes to a VIS when sentencing an offender becomes part of the public record and that victims often seek to avoid public disclosure by requesting that certain parts of their VIS not be read or referred to. We are also aware of the restrictions on publishing identifying information about children or sexual assault victims. In small communities, these restrictions may not however be sufficient to guarantee the victim confidentiality as there are much closer ties between people in small communities than large urban cities.

## **Compensation and Restitution**

69. Access to State funded financial assistance is an important principle which is embedded in the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and in Victims Charters in both overseas and Australian jurisdictions. One of the strengths of the current financial assistance system which is accessed through the Victims of Crime Assistance Tribunal (VOCAT) is that it provides access to interim financial assistance so the victim does not need to wait upon the outcome of the criminal case or a final award.
70. We believe however, that the current court-based system is both lengthy and complicated and should be streamlined. Victims should be able to submit their own applications rather than rely on the involvement of a solicitor.

## **Victims' rights in the criminal trial process**

71. Whilst we believe that the obligations on the OPP as set out in the Director's policy on victims could be strengthened by incorporating them in the Victims Charter Act, this would still not provide a remedy for victims if those rights were not upheld. Inclusion of these policies in legislation should therefore be additional to the establishment of an independent body to review the decisions of the OPP.
72. It may be timely to consider strengthening the Victims Charter Act by the introduction of sanctions for non-compliance by agencies with designated obligations to victims. These sanctions need not be monetary but could include the type of options utilised in South Australia such as a written apology to a victim.

## **Support for Victims**

73. Becoming a victim of crime can be extremely traumatic and have a devastating affect on the lives of the people affected. It can affect people's psychological, emotional, financial and social wellbeing. The need to deal with the criminal justice system can exacerbate the trauma and delay recovery. We believe it is critical for victims to be linked to support services at the first point of contact by police.
74. We note and commend the implementation by Victoria Police of an e-referral system which enables victims to be linked to support services via the Victims of Crime Helpline at the time the crime occurs. Given the importance of this referral process, we would like to see it mandated over time to ensure that all victims have the opportunity to access support.
75. We support the case management model in which services are delivered through the Victim Assistance Program and in particular, their dual aims to assist victims to deal with the trauma of crime, as well as to navigate and participate in the justice system. We believe that case management should focus on empowering the victim to make their own choices and to provide them with the knowledge and tools necessary to develop long term coping strategies and self-sufficiency.
76. As noted in the consultation paper, the court system can be complex, confusing and alienating for victims as they are not a party to proceedings, other than as a witness for the State. The sense of exclusion is a particularly confronting experience for the families of victims who have died as a result of a criminal act as they often have no role other than as spectators.

77. We believe it is critical to ensure that victims and family members receive case specific information to ensure they understand and are prepared for the court process. It is also important that they are kept informed and supported throughout the trial and have the opportunity for a debriefing at the conclusion. The OPP Witness Assistance Service plays an important role in supporting the victim and in facilitating their communication with the prosecution team before, during and after the trial.
78. We believe that keeping victims informed about the trial is the responsibility of the prosecutor and that providing this information does not impinge upon their independence. Rather, we believe it is a matter of good communication. The fact that the prosecutor represents the State and not the victim should not be used a reason to avoid communication with the people who bear the brunt of the crime.

Submitted on behalf of the following six victim representatives on the Victims of Crime Consultative Committee from January 2013 to 30 September 2015:

Ms Janine Greening  
Ms Barbie McCarthy  
Mr Noel McNamara  
Ms Joy Membrey  
Mr Roger Membrey  
Mr Chris Soteriou