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26 April 2016

The Hon. P. D. Cummins AM
Chair, The Role of Victims in the Criminal Trial Process
Victorian Law Reform Commission
GPO Box 4637
Melbourne
Vic 3001

By email: law.reform@lawreform.vic.gov.au

Dear The Honourable Phillip Cummins AM,

LIBERTY VICTORIA SUBMISSION THE ROLE OF VICTIMS OF CRIME IN THE CRIMINAL TRIAL PROCESS

1. Liberty Victoria welcomes the opportunity to make this submission in relation to the Victorian Law Reform Commission's (Commission) review of the Role of the Victims of Crime in the Criminal Trial Process (Review).
2. Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. We are concerned with the protection and promotion of civil liberties throughout Australia. Liberty Victoria is actively involved in the development of Australia's laws and systems of government. Further information may be found at www.libertyvictoria.org.au.
3. The Commission's purpose is to review and report to the Attorney-General for Victoria on the role of the victims of crime in the criminal trial process.
4. Central to the Commission's review is the question: what should the role of the victim be in the criminal trial process? In relation to consideration of this question, the Commission has indicated that it will inform itself with respect to what can be learnt from practice and what can be learnt from theory.

Liberty's view on the role of the victims in the criminal trial process

5. Liberty has had the benefit of reading the Commission's consultation papers and submissions received by the Commission. Our submission is therefore informed by the views put forward by other stakeholders as well as the professional experience of our members practising in the courts.
6. Liberty notes that in answer to the question as to what is the role of the victim in the criminal trial process, the Commission has put forward three scenarios: the role of the victim is one of a protected witness; the role of the victim is as a participating witness; and the role of the victim is as a prosecuting witness. As the Commission notes, each of these proposals have different reform implications.
7. The role of victim as a protected witness leads to reforms to protect victims from being subjected to further harm in their role as witness for the prosecution; the role of the victim as a participating witness aims to empower victims by providing avenues for greater participation in prosecutorial and judicial decision-making, and for them to be heard during the trial process; the role of prosecuting witness leads to reforms that aim to give victims some or all of the functions, rights and obligations associated with the role of the prosecutor.
8. Liberty strongly opposes any reforms which would lead to victims assuming the functions of the prosecution and rights with respect to judicial decision-making. As already identified in a number of submissions, giving victims the role of prosecutor is fundamentally inconsistent with our adversarial system of criminal justice and may, as a consequence, result in wrongful convictions and miscarriages of justice.
9. Liberty's position with respect to the role of victims of crime in the criminal trial process is that of the protected witness. Further harm to victims should not arise from the criminal trial process whether it is a consequence of participation as a witness or harm arising through lack of information or advice with respect to procedural matters or decisions made by the prosecution.
10. It should be noted that in criminal proceedings that proceed to trial or contested hearing it is for a fact-finder, whether jury or magistrate, to determine whether a complainant is a victim. There is an increasing move towards describing complainants as victims or survivors prior to any such fact-finding process. While that is understandable, it inverts the presumption of innocence.
11. Further it should be noted that there are significant protections afforded to complainants and victims in the criminal justice system. That includes protections with regard to confidential communications and the general prohibition on adducing sexual history evidence.
12. Section 41 of the *Evidence Act 2008* (Vic) provides that a court must disallow questioning that is misleading or confusing; unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; belittling, insulting or otherwise inappropriate; or has no basis other than a stereotype.

13. The practical experience of Liberty Victoria members, who appear for both prosecution and defence, is that the courts take the duty to protect witnesses very seriously and the stereotype of the warhorse barrister challenging a complainant through confusing and/or belittling cross-examination is very much the exception and not the rule.
14. Complainants and victims should be protected by the criminal justice system, but not at the cost of interfering with the accused person's right to a fair trial.

RESPONSES TO ROUNDTABLE DISCUSSION 21 MARCH 2016

Legal Advice and Assistance

Procedural matters

15. Liberty strongly supports the view that victims of crime should be treated with courtesy, respect and dignity throughout the criminal trial process. We similarly support the governing principles set out in the *Victims' Charter Act 2006* in relation to treatment of persons adversely affected by crime.
16. The provision of advice and assistance to victims with respect to procedural matters can only assist with a better understanding and the better operation of the criminal trial process. Liberty does not oppose that the provision of advice in relation to procedural matters being provided by the Office of Public Prosecutions or the prosecuting authority.
17. In relation to the provision of legal advice and assistance to Aboriginal and Torres Strait Islander victims, and other victims from significantly different cultural backgrounds or legal systems, we would support the provision of culturally appropriate services and advice as a means to address the additional disadvantages these groups may face with respect to the conduct of the criminal trial process.
18. The provision of culturally appropriate services to Aboriginal and Torres Strait Islander victims is consistent with s 6 of the *Victims' Charter* which provides for consideration of a victim's indigenous background in responding to the needs of victims.
19. Support of Aboriginal and Torres Strait Islander victims is particularly important, as the Commission recognises that Aboriginal and Torres Strait Islander people, especially women, are over represented as victims of crime and are less likely to disclose victimisation compared to non-indigenous victims.

Substantive interests

20. A victim of crime who has a question concerning any substantive matter in the criminal trial process should of course be able to ask that question and be provided with legal advice in relation to it. The provision of this advice should be independent. Current schemes whereby witnesses are able to obtain independent advice from a solicitor or barrister with respect to issues of the compellability of spouses and others in criminal proceedings, and in relation to issues of self-

incrimination, could serve as a model for addressing victims' concerns in relation to substantive matters. Victims ought to be able to obtain advice that is independent from the Office of Public Prosecutions or the prosecuting authority.

21. However, the courts need to ensure that those legal practitioners tasked with providing such advice are duly qualified. The criminal law is increasingly complex, and it is important that advice is provided by those who have experience in that sphere.

Confidential Communications

22. Liberty acknowledges there is a tension between the right to a fair trial for an accused person and the need to protect confidential communications of victims. Liberty opposes expanding the categories of confidential communications beyond those already contained in the *Evidence (Miscellaneous Provisions) Act 1958*.
23. The expansion of categories of confidential communications has, as identified by the Law Institute of Victoria in its submission, the potential to deprive both the prosecution and the defence of important and relevant evidence. The exclusion of such evidence has the potential to undermine the integrity of the trial process itself and may result in wrongful convictions.

The Use of Intermediaries

24. Victims of crime with cognitive impairments and child victims should be afforded equal participation in the criminal trial process. We recognise that while judges have powers to prevent inappropriate questioning of witnesses and that training can be provided to barristers with respect to witnesses and victims with cognitive impairments and child victims, this does not afford equal participation to these victims. Rather, they are directed at ensuring witnesses are not disadvantaged.
25. We favour the use of suitably qualified intermediaries in the criminal trial process on this limited basis, identified by the Commission, that their functions are clearly defined, and as officers of the court they have a duty to be impartial and to ensure that witnesses give their best evidence.

Improper questions

26. Liberty shares the views of the Law Institute of Victoria, the Victorian Bar and the Criminal Bar Association that there are adequate protections enforced by judges to prevent inappropriate questioning of witnesses and that there is no further need to reform to the *Evidence Act 2008* to reduce victim re-traumatisation.

Victim Impact Statements

27. The terms of reference consider the use of victim impact statements in relation to sentencing of offenders. The Commission notes that a range of stakeholders see victim impact statements as the only time in the trial process where victims are given any kind of voice.

28. The roundtable discussion paper identifies that victims, victim support workers and lawyers both for the prosecution and the defence have indicated to the Commission that they would prefer judges to have increased responsibility for deciding whether a victim's impact statement is admissible.
29. Two options are put forward as a means to address the tension between the admissibility of material in victim impact statements and the need for victims to have a voice. Option A provides for a review process where victim impact statements are reviewed so as they contain admissible material before being submitted to court. Option B gives sentencing judges responsibility to determine whether the contents of victim impact statements are admissible and what parts will be taken into account. It is noted that option B is a departure from current law in Victoria and may also undermine transparency in sentencing. It also risks inadmissible material being taken into account and, in turn, sentencing outcomes being affected.
30. Liberty Victoria recognises that the court must have regard to the impact of the crime on the victim when sentencing. This is appropriate and an important part of the sentencing process. In our submission the issue of admissibility lies, in the first place, with the prosecution which has a duty to ensure that only admissible material is put before a court. Anecdotal evidence is that Victim Impact Statements are not prepared by the prosecutor, and that prosecutors will not amend such statements to remove inadmissible material or are very reluctant to do so. We also note that the statements are often filed and served late thereby adding pressure on the defence and the court to examine the issue of admissibility at very short notice. Assuming such concerns can be addressed, Liberty Victoria favours a position whereby any remaining contentious issues are argued before the sentencing judge. The timely service of the Victim Impact Statements on the defence, coupled with a willingness by the prosecution to edit inadmissible parts of the statement, will enable defence and the prosecution to resolve most issues before the matter is heard.
31. Liberty Victoria opposes a process whereby the sentencing judge has responsibility for determining whether the contents of victim impact statements are admissible and the weight to be given to those matters without the benefit of argument. Such a process may inhibit transparency in relation to sentencing and has the potential to have an adverse impact on sentencing outcomes.
32. Liberty strongly opposes victims making sentencing submissions. We share the views put forward by the Supreme Court in its submission that victims cannot be expected to be impartial and may, for understandable reasons, seek retributive sentences.
33. Sentencing involves the balancing of a range of factors including an assessment of matters personal to the offender. These are not things the victim would be expected to appreciate or give appropriate weight.
34. Liberty also shares the concerns of the Supreme Court that submissions made by victims not informed by law could be counter-productive, as the courts could not

engage constructively with victims on this basis. This in turn could result in perceptions that victims are being ignored and also carries the risk of increasing the likelihood of appeals.

35. Thank you for the opportunity to make this submission. If there are questions with regard to it, or if we can provide any further information or assistance, please contact George Georgiou SC, President of Liberty Victoria, on 0419 541 471. This is a public submission and not confidential.

Yours sincerely



George A Georgiou SC
President
Liberty Victoria