

The Hon.P.D. Cummins AM
Chair
Victorian Law Reform Commission
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via law.reform@lawreform.vic.gov.au

Dear Mr Cummins,

Submission to the Victorian Law Reform Commission review on the Role of Victims of Crime in the Criminal Trial Process

The Victorian Equal Opportunity and Human Rights Commission (the Commission) welcomes the opportunity to provide input to the Victorian Law Reform Commission's (VLRC's) review.

1. Introduction

The Commission wishes to contribute to this review by highlighting key findings from our report *Beyond doubt: the experiences of people with disabilities reporting crime*. We also provide observations from our subsequent work on implementing recommendations from *Beyond doubt* – specifically, our current work on the development of a Disability Access Bench Book ('the Bench Book') with the Judicial College of Victoria (recommendation 11 from *Beyond doubt*). The Bench Book will aim to assist judicial officers to meet the diverse needs of people with disabilities in court.

Accordingly, this submission is limited to consideration of relevant issues arising from *Beyond doubt* and does not seek to exhaustively address the full range of consultation questions. Further, it is limited to a discussion of people with disabilities as victims of crime. The issues outlined in this submission are primarily relevant to the following three review questions and themes:

- Are the protective procedures for the taking of evidence from vulnerable victims appropriate and effective? (q.28)
- Should the current protective measures for vulnerable witnesses be extended to other categories of victims, or to victims or other types of offence? (q.29)
- Are there gaps in the provision of victim support services? (q.60)

2. Legal obligations of the court – human rights obligations

A court hearing is not a service under the *Equal Opportunity Act 2010* (Vic) because it is considered a public activity rather than a service to a particular individual. However, people with disabilities have a right to equal access to courts as this is

consistent with the Charter of Human Rights and Responsibilities (the Charter), public policy, community standards and the need for courts to be leaders in justice.

Courts are bound by the Charter to act compatibly with human rights and give proper consideration to human rights when they are exercising their administrative functions.¹ This means that courts must take into account all human rights, including the right to equality when they are acting in an administrative role. This includes the actions of the registry staff, listing cases and adopting practices and procedures from the administration of the court.

In addition, the Charter applies to the courts to the extent that they have functions under Part 2 of the Charter, which sets out all of the rights.² While courts are not always obliged to take into account all of the rights in the Charter, they have a clear role and obligation to ensure that people with disabilities are equal before the law. This right, which guarantees equality and fairness with regard to the enforcement and administration of the law, can only be realised through the work of the courts and other bodies in the justice system.

In the context of this review, the Commission would welcome improvements through law reform to improve experiences for victims of crime with a disability in the criminal trial process that will assist in realising these human rights.

3. Our concerns

3.1 *Barriers to reporting crime and in prosecutions*

Beyond doubt found that victims of crime with disabilities face significant and multifaceted barriers both when reporting crime and in courts. While the research focussed on police practice, there were specific findings and recommendations about improving access to courts. The research also confirmed links between police practice and access barriers in courts, particularly as they relate to issues of assumptions about credibility, and giving evidence.

Numerous comments from police and others participating in the research suggested police may make assumptions about the prospect of a successful prosecution, including that courts may assume people with disabilities lack credibility or will be unable to provide sufficient quality evidence. This suggests there is room for improvement on these matters – in particular through providing greater clarity on alternative forms of giving evidence and definitions of who may provide such evidence. This may include improvements through law reform, as well as through accompanying education and policy guidance for judicial officers on the exercise of their discretion under relevant provisions.

Additional barriers identified in *Beyond doubt* related to a lack of support for people with disabilities. In particular, the report noted that consistent and integrated support for people with disabilities, such as support through the assistance of Advocates, is essential.³ Support people may assist with a range of matters, including facilitating

¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 38, 4 (1) (j).

² *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6 (2) (b).

³ Victorian Equal Opportunity and Human Rights Commission, *Beyond doubt: the experiences of people with disabilities reporting crime*, 2014, 73.

communication access, or through providing more general support to assist the person to feel safe and overcome fear.

3.2 *Improving access to courts*

Beyond doubt found that while some progress has been made, the justice system and courts are not built for accessibility. This can include both physical access and the limitations of accessibility as dictated by court process. While there have been positive reforms to court procedures and rules of evidence, these need to be clarified and strengthened to improve access to justice for people with disabilities.

We wish to direct the VLRC to the issues and recommendations for improving access to courts provided in Chapter 12 of *Beyond doubt*, which are directly relevant to this review and include specific suggestions for law reform. Some of these are particularly relevant to question 28 in the review regarding the effectiveness of current protective procedures for the taking of evidence from vulnerable victims. In summary, these issues and recommendations included the following:

- minimising trauma and maximising participation by extending the use of special hearings to serious offences beyond sexual assault matters through amendments to the *Criminal Procedure Act 2009* (Vic) (p 112- 113 *Beyond doubt*)
- clarifying rules of evidence to ensure equity for people with communication disabilities. This included specific suggestions on definitions and the application of *Evidence Act 2008* (Vic) provisions defining ‘vulnerable witnesses’, and
- clarifying what is meant by ‘appropriate means’ of communication under section 31 of the *Evidence Act*.

The Commission’s interim recommendation was for the Judicial College of Victoria to amend the *Uniform Evidence Manual* to clarify that people with communication disabilities are included in the definition of a vulnerable witness contained in section 41 (4) of the *Evidence Act* and that Augmentative and Alternative Communication may be used by the courts under section 31 (2) of that Act. The *Uniform Evidence Manual* has since been updated accordingly. Similar clarity should also be provided in the legislation itself.

3.3 *Additional observations from Beyond doubt report implementation – Disability Access Bench Book*

The Commission is currently working with the Judicial College of Victoria to develop a Disability Access Bench book. During consultations to inform the development of the Bench Book, stakeholders have raised a number of issues regarding access to courts that are relevant to the VLRC’s review, including some of the following:

- the need to extend the application of video and audio recorded evidence (VARE) for people with disabilities and for a broad range of circumstances/charges
- the need for judicial officers to consider the effects of disability on a person’s manner and ability to participate in court. This may include the effects of



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- physical barriers to accessing court including transport, which may affect preparation or lead to fatigue during questioning
- the need for judicial officers to adjust communication as appropriate for victims and direct others in the court room to do the same where possible – for example, in directing cross-examination
 - that judicial officers currently have relatively wide discretion under the *Criminal Procedure Act* & the *Evidence Act*, which may be exercised more broadly to maximise participation for people with disabilities. Further, legislative reform may also assist with providing greater clarity on definitions and broadening this discretion to enhance participation, particularly for victims with cognitive and complex communication disabilities (see recommendations at section 3.2)
 - further work is needed to educate judicial officers about disabilities and associated needs generally – as well as to provide guidance on the exercise of their discretion under new and existing provisions relating to people with disabilities in court, and
 - the importance of planning by identifying disabilities and associated needs – particularly methods of communicating – before a trial occurs. This may be achieved through greater use of existing processes and procedure, such as directions hearings, briefings and the use of expert witnesses or through law reform to establish mechanisms to more effectively identify needs pre-trial.

The Commission has welcomed the opportunity to work with the Judicial College of Victoria to develop the Bench Book for judicial officers that will reflect best practice examples and suggestions to improve accessibility for people with disabilities in courts and tribunals. Once completed, the Bench Book will also be updated on an ongoing basis to reflect relevant legal and policy changes.

Once again, the Commission welcomes the opportunity to provide this input and looks forward to the result of this review. If you have any questions about this submission please contact Aram Hosie, Manager, Strategic Projects and Policy Unit

Yours sincerely



Kate Jenkins
Commissioner
Victorian Equal Opportunity and Human Rights Commission