The Royal Commission into Institutional Responses to Child Sexual Abuse
Submission in response to the Consultation Paper on Criminal Justice: September 2016

4 November 2016

Introduction

1. This brief submission examines, and advocates for, the separate legal representation for victims\(^1\) of institutional child sexual and other abuse, during a criminal trial process. Any such reform, it is argued, must be guided by the relevant theories of justice whilst addressing the specific justice needs as conceptualised by this cohort of people.

2. Separate legal representation for these victims will also ultimately be in the public interest in this area of justice and the law, as it could provide a mechanism for revealing more of the truth which, potentially, will lead to more criminal accountability of both the sex offenders and those who concealed those crimes. That is, such reform, it is submitted, may help address the grave harm suffered by victims and their families as a result of the widespread impunity of offenders.

Relevant criteria for justice for victims of institutional sexual abuse

3. Although the requisite criteria for justice for victims of institutional child sexual abuse are very broad,\(^2\) those that could be addressed with a successful criminal trial would include: The truth and its acknowledgement; accountability of the sex offender or those guilty of concealment of the sex crimes and the protection of the offender and, finally, the prevention of further sex crimes in the form of deterrence.

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\(^1\) The term ‘victim’ is not used in a pejorative sense, rather in a more legal sense in that crimes were committed against these people.

\(^2\) The full range of justice needs of victims of institutional sexual abuse have been identified as: The truth and its acknowledgement; criminal and financial accountability of the institutions, such as the Catholic Church; monetary compensation; accountability of the sex offender; an effective apology; counselling and other services, and prevention of further sex crimes. Judy Courtin, *Sexual Assault and the Catholic Church: Are Victims Finding Justice?* October 2015. <http://arrow.monash.edu.au/vital/access/manager/Repository/monash:162364>.
Theories of justice

4. The above criteria for justice broadly address the needs for victims to have a voice and be believed, vindicated, healed, released from shame and guilt and to be empowered. The pertinent theories of justice underpinning these needs are mainly retributive, restorative, transitional and procedural justice - that latter of which could apply to any one of the former theories in its requirement that decision-makers and the processes and procedures used should be fair and transparent.

5. Transitional justice is worthy of additional comment. Although this theory of justice has its origins in the Nuremberg military trials, and focuses, typically, on large-scale human rights abuses, this theoretical framework does have application in Australia and other countries where there has been widespread institutional child sexual and other abuse.³ Such countries have a responsibility to deal effectively with these past institutional abuses by discovering and acknowledging the truth, without which there can be no effective justice.⁴ One principal vehicle for helping find such truth about institutional child sex crimes is the criminal trial. Therefore, the role of the victim in such trials is critical.

The current position for victims within the CJS

6. It is submitted that the well-ensconced adversarial criminal trial process, in which the victim’s role remains primarily that of a tethered witness, must be reformed such that the victim becomes a more integral or central player, thereby, hopefully addressing more of their justice needs.

7. Many have advocated for separate legal representation of victims during the criminal trial process, either for the entire process from the laying of charges all the way through to the appeal process, or for certain elements or stages of the process.⁵

8. There are already multiple support services available for victim-witnesses - such as access to counselling, general information about the trial process, assistance with making a victim impact statement and general witness assistance support. Further, special measures such as the use of pre-recorded police interviews, CCTV and the presence of a support person have also been found to help reduce the stress for the victim-witness/complainant, thus improving the reliability of their evidence, and importantly, without compromising a fair trial for the accused.⁶

9. It is argued, though, that these services, essential as they are, are ultimately no more than ‘band aid’ in their application as they merely assist the victim-witness to survive their journey on the very periphery of the trial process - that of a witness only.

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² The concept of transitional justice could assist with not only the identification of past wrongs, but also with determining the reasons why institutions and the State failed to learn from those wrongs. Ibid.
10. Although, for example, the polices of the Victorian Director of Public Prosecutions attempt to ensure that ‘... the prosecutorial system gives appropriate consideration to the concerns of victims of crime’, the victim nonetheless remains largely disempowered and the need for the victim’s truth to be heard and acknowledged, as referred to above, can remain elusive.

11. Critical prosecutorial decisions such as entering a *nolle prosequi*, reducing serious charges as part of the plea bargaining process or making evidentiary decisions that disallow vital evidence for the victim, often cause great distress to the victim not only in their consequences, but also because the victim remains confused and ‘in the dark’ about the legal rationale for such decisions. That is, procedural justice is lacking. Such ‘secondary legal trauma’ could be prevented in part, if not in whole, by victims having their own legal representation in criminal trials.

The public interest

12. The central role for prosecutors is to be impartial in their representation of the state and the public interest, and such a critical role would be unnecessarily diluted and weakened if the prosecutor were to also effectively and comprehensively represent the victim. In this sense, the functions of a public prosecutor and the legal representation of the victim-witness are largely incompatible.

13. At the same time, these roles are not entirely oppositional. The outcomes of institutional child sexual abuse trials, one way or the other, do impact significantly on the community. Therefore, a fairer trial for the victim-witness, as well as the accused, can only be in the ultimate public interest.

14. The rights and interests of the accused can be safeguarded when the rights and interests of the victim are also being championed. Such ‘fairness to all sides’ (the offender, the victim and the state) requires the court to consider a ‘triangulation of interests’.

15. One need only to look to international examples of criminal jurisdictions where the victim-witness can be granted their own state-funded legal representation and is considered a party to the case; can submit evidence and express their opinion on crucial decisions in the trial.

16. Even though victims of crime at the International Criminal Court do not have what is called ‘party status’, they are entitled to comprehensive participation in the trial which includes legal representation and the right to: question witnesses; make submission on points of law; submit evidence and make opening and closing statements.

17. Further, victims of crime have a right to their own legal representation in other jurisdictions such as the Coroner’s Court and Royal Commission proceedings – all investigative processes ultimately searching for the truth.

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9 Director of Public Prosecutions Victoria, *Director’s Policy: Prosecutorial Ethics* (24 November 2104) [3].
11 In several European countries, victims have a variety of rights, including a right: to legal support during the criminal trial process; to participate actively in the investigations; to be co-prosecutor and to be funded by the state for such legal representation. Michael O’Connell, *Legal Representation for victims of crime – Fairer Justice*, National Victims of Crime Conference, September 2013; VLRC, *The Role of Victims in the Criminal Trial Process - Consultation Paper*, July 2015, 26.
18. To more comprehensively address the justice needs of victims of institutional sexual and other abuse,\(^\text{13}\) and especially the finding of the truth, a far greater degree of victim participation in criminal trials is imperative. That is, the role of the victim needs to be augmented from that of a ‘protected witness’\(^\text{14}\) to that of a ‘participating witness’, in which the victim can ‘exercise agency’, express the impacts of the crimes and meaningfully participate in decision-making throughout the criminal trial process.\(^\text{15}\) Importantly, such a central role would also address the procedural justice needs of the victim by ensuring greater fairness and transparency of the major decision-makers and the processes and procedures of the trial.

**Barrier to the truth and, therefore, barrier to justice for victims of institutional child sexual abuse**

19. It is also submitted that to curtail what is mostly life-long and grave harm for victims, caused by the impunity of offenders,\(^\text{16}\) successful prosecutions are necessary, and, to improve the chance of a successful prosecution, greater and more meaningful participation of the victim-witness is essential.

20. It is submitted that legal representation of the victim-witness in criminal trials of the accused, can only assist in the burdensome task of bringing out more of the truth of not only the sex crime(s) themselves, but also, hopefully, some of the truth of what was happening ‘behind the scenes’ in that particular institution at the time – the protection of the offender and cover-up of the crimes.

21. In other words, there needs to be individual legal representation for the victim-witness for the duration of the criminal trial process.

**Conclusion**

22. To more effectively address the justice needs of victims of institutional sexual and other abuse, at the same time as satisfying multiple elements of many of the theories of justice, victim-witnesses need to have their own legal representation throughout the criminal trial process. Further, separate legal representation would be in the public interest as it may assist, ultimately, in revealing more of the truth and increasing the numbers of successful prosecutions in this area of crime.

Thank you for the opportunity for making this submission.

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\(^{13}\) Courtin, above n2.

\(^{14}\) See paragraph [8] above.

\(^{15}\) VLRC, above n14, 38.

\(^{16}\) Impunity is an absence, or exemption, of punishment for crimes committed and is based on the denial of the truth of what happened – whether behind the law or due to the insufficiency of the law – and the denial of justice for the victims, their families and the community, all of which are profoundly injurious. Paz Rojas Baeza, ‘Impunity: An Impossible Reparation’ (2000) 69 Nordic Journal of International Law 27, 28.