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Royal Commission into  
Institutional Responses to Child Sexual Abuse  
[criminaljustice@childabuseroyalcommission.gov.au](mailto:criminaljustice@childabuseroyalcommission.gov.au)

Dear Commissioners,

**Re: Victorian Victims of Crime Commissioner- Submission on Criminal Justice Consultation Paper**

The Royal Commission's Criminal Justice Consultation Paper (the Consultation Paper) focuses on systemic issues in criminal justice responses to institutional child sexual abuse and reforms that are likely to improve criminal justice responses. These issues are directly relevant to the Victorian Victims of Crime Commissioner, as the primary focus of my role is to inquire into and report on systemic issues across the justice system that affect victims of crime.

The specific functions and powers of the Victorian Victims of Crime Commissioner are contained in the *Victims of Crime Commissioner Act 2015* (Vic) and include:

- to advocate for the recognition, inclusion, participation and respect of victims of crime by government departments, bodies responsible for conducting public prosecutions and Victoria Police
- to carry out inquiries on systemic victim of crime matters
- to report to the Attorney-General on any systemic victim of crime matter
- to provide advice to the Attorney-General and government departments and agencies regarding improvements to the justice system to meet the needs of victims of crime.

The characteristics of child sex offences, including those perpetrated in institutional settings, are particularly insidious as they involve taking advantage of and or abusing a position of authority over the most vulnerable in our community. The true measure of any society is found in how it treats its most vulnerable people and this principle should extend to criminal justice responses to victims of institutional child sexual abuse.

The Royal Commission noted in its Consultation Paper that the Victorian Law Reform Commission (VLRC) has recently conducted a review into the *Role of Victims of Crime in the Criminal Trial Process*. The VLRC reference considers many similar issues relating to all victims in the context of the criminal trial process and in many circumstances in this submission I reiterate the recommendations I previously made to the VLRC.

## The importance of a criminal justice response

Victims of crime are traditionally viewed as playing a confined role in the criminal justice system. However, their participation and confidence in the system is critical as it facilitates the reporting and detection of crime and allows courts to hold offenders to account for their conduct.

This means a criminal justice system that supports and considers victims not only serves the personal interests of individual victims but also ensures the efficacy of the system that protects the welfare of the broader community. It is for this reason that I support the Royal Commission's view that all victims and survivors should be encouraged and supported to seek a criminal justice response. The criminal justice system should not discourage victims and survivors but actually encourage their participation in the legal process.

At the outset, it is important to acknowledge the many recent procedural reforms governing sexual assault and family violence proceedings that protect the interests of victims. However, these are incremental reforms and do not go far enough to preserve victims' rights and increase their confidence in the system.

In Victoria, *the Victims Charter Act 2006* (the Charter) also aims to support victims of crime by setting out principles to represent minimum standards governing responses to victims of crime across government agencies and victim service providers. Despite their importance to the criminal justice system and the proclamation of principles within the Charter, victims remain on the periphery of the system and the principles and standards owed to them are all too frequently not realised.

I note the Consultation Paper cited research raising similar concerns, suggesting the *criminal justice system is often viewed as not effective in responding to crimes of sexual violence*.<sup>1</sup> These concerns were further emphasised by making reference to common features or symptoms of the system's treatment of these crimes including:

- lower reporting rates
- higher attrition rates
- lower charging and prosecution rates
- fewer guilty pleas
- fewer convictions.<sup>2</sup>

The above mentioned Charter principles and recent reforms aim to encourage a culture that ensures appropriate understanding, interaction and treatment of victims by the participants within the criminal justice system. Whilst the intent of these principles and reforms is clear, there is no mechanism to ensure compliance. My dealings with Victorian victims of crime suggests the level or quality of support expected by the Charter often does not translate effectively into practice.

Further evidence of this issue can be found in the research and consultation undertaken by Victoria Police in the development of its own *Future Directions of Victim-Centric Policing* policy. Victoria Police's research and consultation found that:

*Overall, compliance with legislative requirements is low, and we are unable to accurately measure and report upon the provision of service delivery to*

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<sup>1</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper, Criminal Justice*, (September 2016), 9

<sup>2</sup> Ibid.

*victims of crime. More effective governance and oversight needs to be applied in this area by Victoria Police.*<sup>3</sup>

Victoria Police are to be commended on their current victim-centric policy which seeks to improve responses to victims of crime, and this is also indicative of their genuine commitment to enhanced service delivery to victims. However, there appears to be a disconnect between the written law and procedures and their practices within the entire criminal justice system.

This disconnect was identified as a significant barrier to reform of the criminal justice process (in the context of sexual assault victims) in a recent report by the Australian Institute of Family Studies.<sup>4</sup> The Report supported the following findings made by the Australian Law Reform Commission (2010):

*Despite extensive changes to the law and procedure, research continues to highlight a gap between written law and its practice- referred to as an “implementation gap.” This gap highlights the resistance to change evident in the legal system through its legal players who may still hold views about sexual assault characterised by myths and misconceptions.*<sup>5</sup>

The principles espoused within the Charter have existed for a decade. There must come a point where a so- called “implementation gap” is recognised for what it actually is; a blatant refusal to comply with legislation. Organisations and individuals get away with non-compliance because there are no consequences attached to their refusal to comply.

I believe the most effective method to bridge implementation gaps between the written law and the practices and procedures of the criminal justice system is by creating a culture of compliance. The VLRC, in its review of the *Role of Victims of Crime in the Criminal Trial Process* refers to literature that suggests effective oversight of enforcement mechanisms can drive desired changes, and that the threat of sanction encourages a culture of compliance.<sup>6</sup>

This concept was also supported in the 2015 review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The review found:

*Without a clear way to remedy a breach of someone’s human rights, the regulatory model for the Charter (Human Rights Charter) will continue to be flawed. The likelihood of consequences drives change in behaviour, as in occupational health and safety, privacy and discrimination law.*<sup>7</sup>

Currently, the principles set out in the Charter are unenforceable and a breach does not create any legal right or give rise to a cause of action. Whilst this remains the case, the requisite standards of consideration and treatment of victims of crime by the criminal justice system will be merely aspirational. A failure to properly enforce minimum standards will make victims’ rights illusory and exacerbate the implementation gap between the written law and practices and procedures. This will

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<sup>3</sup> Victoria Police, *Victoria Police’s Response to the Consultation Paper, The Role of Victims of Crime in the Criminal Trial Process*, July 2015, released by the Victorian Law Reform Commission, 8

<sup>4</sup> Australian Government, Australian Institute of Family Studies, *Victim/survivor-focused justice responses and reforms to criminal court practice*, Research Report No. 27 (2014), 57

<sup>5</sup> Australian Law Reform Commission, *Family Violence- A National Legal Response*, Final Report, (2010), 1125

<sup>6</sup> The Victorian Law Reform Commission, *The Role of Victims in the Criminal trial Process*, Consultation Paper, July 2015, 159

<sup>7</sup> Michael Brett Young, From Commitment to Culture, *The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006, Summary Report*, (September 2015), 10.

ultimately lead to (and in many cases has already created) a crisis in confidence in victims' perception of the criminal justice system.

Making victims' rights enforceable will create a sustainable culture of compliance where victims' are respected, consequently translating into their increased participation and confidence in the system, resulting in a more effective criminal justice system.

## **Recommendation**

1. The Royal Commission consider methods and strategies to elevate the status, rights and needs of victims of crime as participants in the criminal justice system. This may include but is not limited to considering:
  - processes for obtaining a remedy under relevant victims' charters against key players in the criminal justice system that have acted incompatibly with victims' rights
  - the creation of consequences for those who fail to comply with legislation governing victims' rights
  - the establishment of agreed performance monitoring and targets in relation to compliance with minimum standards governing responses to victims of crime for key players in the criminal justice system.

## **Police responses**

In relation to police responses to institutionalised child sexual abuse, I reiterate the comments of Mr Michael O'Connell APM, the South Australian Commissioner for Victims' Rights, who emphasised the importance of the police response by stating:

*As the first point of contact, the police are in an ideal position to set a positive tone for the entire criminal justice system....*

*Victim surveys in modern industrialised countries consistently show that the attitudes of the first police officer with whom a victim first has contact can be a major determinant of victim satisfaction.<sup>8</sup>*

It is also important to note, the above statement is consistent with the evidence and submissions made to the Royal Commission by victims/survivors of institutionalised child sexual abuse.<sup>9</sup>

A recent survey about how the justice system meets the needs of the community, conducted by the Victim Support Agency, Department of Justice and Regulation Victoria (the VSA survey) also found:

*Victims of sexual assault and rape were more likely to attend their local police station to report the crime, while victims of assault and those in the 'other' category were more likely to report the crime by calling '000'.<sup>10</sup>*

This is particularly notable in view of the above findings which also emphasise the important role police perform in setting a positive first impression for the broader criminal justice system. In the circumstances I support the proposed principle that all

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<sup>8</sup> South Australia Commissioner for Victims' Rights, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, *Issues Paper No. 8 Experiences of Police and Prosecution Responses*, 2015,2

<sup>9</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse, above n 1, 107

<sup>10</sup> Victorian Government, Department of Justice and Regulation Victoria, Victim Support Agency, *A survey about how our justice system meets the needs of the community 2014 results*, March 2015, 9

police who may come into contact with victims and survivors receive some basic training about the nature and impact of child sexual abuse.<sup>11</sup>

Providing victims of child sexual abuse with information and access to crisis support services is also critical to ensure that victims/survivors remain engaged with the system. The provision of effective and integrated responses provides victim/survivors with confidence and support to report incidents and pursue them through the criminal trial process.

The Charter also places an onus on investigatory agencies, including Victoria Police, to provide victims with advice in relation to: the progress of investigations and the dates, locations and progress of any court hearings and support services.<sup>12</sup> In this context, once again, the gap between principle and practice appears to be elusive as Victoria Police reported in their submission to the VLRC:

*Victims are often required to 'chase' members for information and the analysis of Victoria Police LEAP data reveals that a large proportion of members (over 50%) are failing to provide requisite information from the first point of contact.*<sup>13</sup>

I previously advocated to the Victorian Royal Commission into Family Violence, the Multi-Disciplinary Services (MDCs) model that involves multiple agencies working collaboratively to provide an integrated and holistic response to victims of sexual assault.<sup>14</sup> There are a number of MDCs currently being piloted in Victorian police stations that involve the co-location of various services including: Victoria Police, the Department of Health and Human Services- child protection services and sexual assault counsellors.

I continue to support MDCs as they deliver a wrap-around service from the point of first disclosure through to the criminal prosecution, and also provide victims with a range of services and information they deserve and are entitled to receive.<sup>15</sup>

## **Recommendation**

2. The principles identified by the Royal Commission in relation to police responses to child sexual abuse are fully supported, this includes:
  - a victim or survivor's initial contact with police is important in determining their satisfaction with the entire criminal justice response and in influencing their willingness to proceed with a report and participate in a prosecution
  - all police who may come into contact with victims or survivors of institutional child sexual abuse should be trained to:
    - have a basic understanding of complex trauma and how it can affect people who report to police, including those who may have difficulties dealing with institutions or persons in positions of authority (such as police)
    - treat anyone who approaches police to report abuse with consideration and respect.<sup>16</sup>

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<sup>11</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse, above n 1, 110

<sup>12</sup> *Victim's Charter Act 2006* (Vic) ss 7 & 8

<sup>13</sup> Victoria Police, above n 2,7

<sup>14</sup> Victoria Police, Multidisciplinary Centres , [http://www.police.vic.gov.au/content.asp?document\\_id=36237](http://www.police.vic.gov.au/content.asp?document_id=36237), accessed 4 October 2016

<sup>15</sup>The Royal Commission into Institutional Responses to Child Sexual Abuse, above n 1, 101

<sup>16</sup> *Ibid*, 112

3. In order to increase victims'/survivors' confidence in the service system it is recommended the Royal Commission promote the expansion of MDCs or a similar model that provides wrap-around services at a single point to victims of sexual abuse.

### **Prosecution responses**

I have previously noted the importance of providing information to victims of crime to ensure an efficient and effective criminal justice system. This principle is equally important in its application to prosecution agencies.

The Consultation Paper mentions mixed responses in relation to regular communication and the provision of information to victim/survivors during the prosecution process.<sup>17</sup> Further to this, the Royal Commission also notes, that guidelines suggest prosecution agencies are aware of the importance of keeping complainants informed, “*however, it appears as though the guidelines are not always being followed.*”<sup>18</sup> This provides another example of the above mentioned implementation gap between principle and practice and how it extends to practices within prosecution agencies.

However, it is also important to note the positive findings made in the VSA survey which reported:

*One hundred per cent of rape victims felt the information they received (from prosecutors) was helpful as did 86% of sexual assault victims. Conversely, only 54% of “other” victims and 52% of assault victims felt the information they received was helpful.*<sup>19</sup>

Whilst these results suggest issues in relation to the quality of information provided to some victim cohorts, it arguably indicates the success of a more specialised and consistent response to victims of sexual offences by both Victoria Police and OPP prosecutions.<sup>20</sup>

It is also important to acknowledge the generally positive experiences in relation to victim/survivor interactions with Witness Assistance Services (WAS), as noted in the Consultation Paper.<sup>21</sup> However, I also note the Royal Commission's concerns in relation to the caseload of WAS services and their ability to meet demand.<sup>22</sup>

I have previously advocated to the VLRC and the Royal Commission into Family Violence, for the implementation of a network of victim support coordinators (or a Victims' Liaison Office) and increased resourcing for existing witness support services. It was suggested that this type of service and increased resourcing would ensure embedded referral pathways for all victims attending court and the application of case management principles and holistic service delivery in the context of victims.

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<sup>17</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse, above n 1, 273

<sup>18</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse, above n 1, 274

<sup>19</sup> Victorian Government, Department of Justice and Regulation Victoria, Victim Support Agency, *A survey about how our justice system meets the needs of the community 2014 results*, March 2015, 18. (Note: this survey contained a sample size of 313 respondents/victims. The survey did not indicate the total number of victims who received information from Victoria Police or OPP prosecutions).

<sup>20</sup> Ibid

<sup>21</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse, above n 1, 274

<sup>22</sup> Ibid

It was also suggested that this type of service would be located in courts to ensure its role and functions are embedded into the processes and culture of the court, as seems to be the case with the specialist court services that currently assist accused persons.

Further, it was envisaged that this type of service would also work in a coordinated way with existing victims support services (including WAS) in order to address service delivery gaps, demand pressures and ensure that all victims are supported through the trial process.<sup>23</sup>

I support the Royal Commission's statement that the contribution of WAS should not relieve prosecutors and solicitors of the obligation to provide an effective prosecution response to victims/survivors.<sup>24</sup> It is important that prosecutors have a high level of understanding of the nature and impact of child sexual abuse.<sup>25</sup> This will not only increase the confidence of the victim but will also serve to make them a better witness. Further to this, a high level of training for prosecutors and solicitors will increase their ability to apply and navigate the legislative provisions relating to the improper questioning of vulnerable witnesses.<sup>26</sup>

## **Recommendation**

4. The Royal Commission consider methods and strategies to assist existing victim service providers, including WAS services, in order to better manage caseloads and demand. This may include:
  - the implementation of a network of victim support coordinators (a Victim Liaison Office) into courts and or
  - increased resourcing for existing witness support services.
5. The principles identified by the Royal Commission in relation to prosecution responses to child sexual abuse are fully supported, this includes:
  - All prosecution staff who may come into contact with victims of institutional child sexual abuse should be trained to have an understanding of the nature and impact of child sexual abuse and how it can affect people who are involved in the prosecution process.

## **Determining charges and plea decisions**

The issues of determining charges and plea decisions were also considered by the VLRC in its *Review of the Role of Victims of Crime in the Criminal Trial Process*. In my submission to the VLRC, I noted the test applied (in Victoria) to determine whether to proceed with charges requires the consideration of factors that often directly relate to the personal circumstances of the victim/survivor, including:

- the availability, competence and compellability of a witness
- the credibility and reliability of a witness
- how witnesses are likely to stand up to giving evidence in court.<sup>27</sup>

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<sup>23</sup> Victorian Victims of Crime Commissioner, Submission to Victorian Law Reform Commission's *Review of the Role of Victims of Crime in the Criminal Trial Process*, (August, 2015), 3. See also Victorian Victims of Crime Commissioner, Submission to Family Violence Royal Commission, (June 2015), 7

<sup>24</sup>The Royal Commission into Institutional Responses to Child Sexual Abuse, above n 1, 275

<sup>25</sup> Ibid

<sup>26</sup> *Evidence Act 2008* (Vic), s 41

<sup>27</sup> Director of Public Prosecutions Victoria, *Director's Policy: Prosecutorial Discretion* (24 November 2014) [3]

I also identified concerns in regards to prosecuting agencies' capacity to properly account for the above factors, as they pertain to vulnerable witnesses, by referring to the findings of a report from the Australian Human Rights Commission, which found:

*Negative attitudes, assumptions and erroneous assessments about people with disabilities often result in people with disabilities being viewed as unreliable, not credible or incapable of giving evidence, making legal decisions or participating in legal proceedings.*<sup>28</sup>

The Australian Human Rights Commission further noted that difficulties of this nature often mean that police do not proceed with charges or the OPP does not prosecute.<sup>29</sup>

Whilst these findings were specific to people with disabilities, they are also relevant to victims/survivors of sexual abuse who may face similar barriers to justice because of their own vulnerabilities or, in some cases, disabilities. This further strengthens the argument for increased training of prosecutors and police officers who may come into contact with victims of sexual abuse.

In regards to the judicial review of decisions to discontinue charges, I have previously expressed concerns in relation to the adoption of judicial review processes that may place further burden on an already strained and complex criminal justice system.<sup>30</sup> However, I also acknowledge research suggesting victims seek transparency and accountability in relation to prosecutorial decisions that serve to promote the legitimacy of the process.<sup>31</sup>

The current Victorian OPP policy provides the Director with discretion to provide a victim with reasons if requested.<sup>32</sup> This policy allows for expediency, however it fails to provide victims with a satisfactory level of transparency.

Further to this, I also submitted to the VLRC that the current OPP complaints policy fails to set out a clear process for review or complaint. I recommended the OPP complaints policy should comply with the Victorian Ombudsman's *Guide to complaint handling for Victorian Public Sector Agencies*.<sup>33</sup> I also referred to the UK's Victims' Right to Review Scheme (VRR) as a well-documented system that clearly articulates its processes.<sup>34</sup>

I submitted to the VLRC that *a system needs to be developed to provide victims with an avenue to have a decision to discontinue re-examined and where relevant be provided with reasons for these decisions*.<sup>35</sup> I further stated that a system of review **similar** to the VRR may sufficiently meet the needs of victims.<sup>36</sup> However, I reiterate my concerns that any review process should be expedient and transparent and a scheme involving judicial review makes the process unnecessarily cumbersome and

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<sup>28</sup> Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies*, February 2014, 8 & 16 see also: Victorian Equal Opportunity and Human Rights Commission, *Beyond doubt>The experience of people with disabilities reporting crime- research findings*, July 2014, 8 & 9

<sup>29</sup> Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies*, February 2014, 20

<sup>30</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse, above n 1, 322

<sup>31</sup> The Victorian Law Reform Commission, *The Role of Victims in the Criminal Trial Process*, Consultation Paper, July 2015, 6

<sup>32</sup> Office of Public Prosecutions, *OPP Complaints Policy*, (April 2015) 1

<sup>33</sup> Victorian Victims of Crime Commissioner, Submission to Victorian Law Reform Commission's *Review of the Role of Victims of Crime in the Criminal Trial Process*, (August, 2015), 8

<sup>34</sup> *Ibid* 8.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid*.



bureaucratic. In support of this statement, I note the courts' general reluctance to review prosecutorial decisions and particularly the principles contained in *R v Christopher Killick*, where the court found: victims have a right to seek review of a decision not to prosecute and that they **should not** have to resort to seeking judicial review.<sup>37</sup>

I support the additional measures proposed in the Consultation Paper in relation to a complaints mechanism regarding a decision not to prosecute, these include:

- formalised complaints mechanisms with written responses and
- a right for victims to seek an internal merits review of key decisions, particularly in relation to decisions not to commence or to discontinue a prosecution.<sup>38</sup>

I also acknowledge the contents of written reasons may be challenging for some victims/survivors to digest. In view of this, I fully support the implementation of processes that provide victims/survivors with the opportunity to discuss the reasons in person, before written reasons are given. This process should also allow for the provision of appropriate support for victims/survivors in the course of relevant discussions.

In regards to the plea negotiations, I previously submitted to the VLRC that the obligations on the prosecution to involve victims in plea negotiations *are not enforceable and only require the victim to be informed of the decision after it has been made*.<sup>39</sup> I also referred to research by the Victorian Department of Justice and Regulation, (Victims Support Agency) suggesting, there are still occasions where victims are not being consulted on the withdrawal of charges.<sup>40</sup>

I endorsed the NSW Court Certification Scheme as providing a viable alternative process that ensures compliance by prosecuting agencies. This process requires prosecutors to file a certificate with the court confirming consultation with the victim in regards to matters that resolve following negotiations about charges on an indictment.<sup>41</sup> Importantly, as noted by the VLRC, this scheme is designed to provide a procedural safeguard to complement existing obligations and transparency in the plea negotiation process.<sup>42</sup>

## Recommendation

6. The Royal Commission consider models for internal review and or complaint in relation to decisions to discontinue charges. The model should:
  - be expedient, accessible and clearly articulated, to provide victims/survivors with a sense of transparency and confidence in the system
  - provide victims/survivors with written reasons for any decision
  - include processes that provide victims/survivors with the opportunity to discuss the reasons in person, before written reasons are given
  - allow for the provision of appropriate support for victims/survivors in the course of discussions relating to written reasons.

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<sup>37</sup> *R v Christopher Killick* [2011] EWCA Crim 1608

<sup>38</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse, above n 1, 313

<sup>39</sup> Victorian Victims of Crime Commissioner, above n 33, 9

<sup>40</sup> Victorian Department of Justice and Regulation, Victims Support Agency, *Building the Confidence of Victims in the Criminal Justice System*, August 2014, 46 & 47

<sup>41</sup> Victorian Victims of Crime Commissioner, above n 33, 12-14

<sup>42</sup> The Victorian Law Reform Commission, above n 31, 55

7. The Royal Commission consider models to ensure the proper consultation with victims/survivors regarding the withdrawal of charges. In considering a preferred model regard should be given to the current NSW Court Certification Scheme.

### **Delays in prosecutions**

As noted in the Consultation Paper, delays in prosecution outcomes contribute to complainant attrition and may have a negative impact on a victim's recovery from a crime.<sup>43</sup> As a possible option for reducing delays in the prosecution process the Royal Commission suggested replacing committal hearings with a system of case management.<sup>44</sup>

In my submission to the VLRC, I recommended the replacement of committal hearings with an alternative system of case management that provides for proper review and disclosure, similar to those in Western Australia and New Zealand.<sup>45</sup> However, the VLRC limited its considerations to the role of victims in committal proceedings and did not consider the abolition of committals.<sup>46</sup>

My principal arguments to the VLRC focused on the need to reduce the times victims are required to give evidence and the trauma, stress and secondary victimisation that results from victims participating in the committal process.<sup>47</sup>

However, I also made note that in Victoria, the ultimate decision of whether or not to continue with an indictable prosecution is a decision that rests with the DPP.<sup>48</sup> I referred to the current Victorian legislative framework which grants the DPP statutory powers to override a Magistrate's decision not to commit an accused person to stand trial and to discontinue a prosecution where a magistrate has committed a person to trial.<sup>49</sup> I also noted that in the 2014/15 financial year, 2,859 cases were listed in the committal stream, only 24, or less than one per cent of these were discharged by a magistrate.<sup>50</sup> Further to this, the OPP reported that in the same year there were 11 direct indictments and 111 matters were discontinued following the committal trial.<sup>51</sup>

Importantly, I note the Consultation Paper refers to research from the New South Wales Law Reform Commission which also made findings supporting my arguments, including:

- the great majority of cases that did not proceed on indictment in New South Wales were discontinued after review by the ODPP, with more matters discontinued after review by the ODPP after committal than are discharged by a magistrate

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<sup>43</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse, above n 1, 328

<sup>44</sup> Ibid, 340-341

<sup>45</sup> Victorian Victims of Crime Commissioner, above n 33, 10-14

<sup>46</sup> The Victorian Law Reform Commission, above n 31, 60

<sup>47</sup> Victorian Victims of Crime Commissioner, above n 33

<sup>48</sup> Ibid, 11

<sup>49</sup> Ibid,

<sup>50</sup> Statistics provided by Magistrates' Court of Victoria

<sup>51</sup> Statistics provided by OPP- It is not known whether the 11 direct indictments were matters discharged by a magistrate

- perceived benefits of the committal process relate to matters that are not related to testing the strength of the evidence against the accused (eg early engagement of the parties and proper disclosure).<sup>52</sup>

In the circumstances, I reiterate my submission to the VLRC that a robust system of case management would provide for a process of appropriate disclosure for the accused, whilst simultaneously reducing delays in the court process and secondary victimisation of victims of crime.

## **Recommendation**

8. The Royal Commission consider an alternative to the current committal process that provides for a system of review and disclosure, avoids delays and reduces the number of instances a victim is required to give evidence.

## **Evidence of victims and survivors**

I previously advocated for protective witness reforms to the VLRC and stated:

*the trial process forces many victims into an entirely unfamiliar climate, where they must recount their experience in detail and submit to an often distressing process of cross-examination that may expose them to secondary victimisation.*<sup>53</sup>

The Royal Commission also noted the difficulties that survivors of child sexual abuse face in giving evidence and alluded to evidence suggesting: *the cross-examination process is as bad as the child sexual abuse they suffered.*<sup>54</sup> It is for this reason, that I support the full suite of protective measures identified by the Royal Commission to assist complainants to give their best evidence and provide for a fair criminal justice system.<sup>55</sup>

The special measures include the use of screens, closed circuit television (CCTV), support people and pre-recorded evidence. These measures have been found to reduce a complainant's stress, improve the quality of their evidence and also influence the jury's view of their reliability and credibility.<sup>56</sup>

The Royal Commission referred to research identifying a need to improve the delivery of these special measures, including:

- improved training for police in the use and conduct of pre-recorded interviews
- overcoming technical problems associated with the use of pre-recorded interviews, CCTV or remote witness facilities
- improving questioning in court
- reducing delays in the prosecution process.<sup>57</sup>

In view of the high attrition rates relating to cases of child sexual abuse, the improvement of these measures is critical. The required funding, training and commitment to improve the standard of their delivery should be viewed as a priority by government and courts.

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<sup>52</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse, above n 1,341 see also NSW Law Reform Commission, Report 141, *Encouraging Appropriate Guilty Pleas*, NSW (2014), 197, 200, 194

<sup>53</sup> Victorian Victims of Crime Commissioner, above n 33, 17

<sup>54</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse, above n 1, 346

<sup>55</sup> *Ibid*, 357

<sup>56</sup> *Ibid*, 356 & 362

<sup>57</sup> *Ibid*, 356

In addition to the above, I also advocated to the VLRC for the introduction of intermediaries for all vulnerable witnesses. I have also argued above that one of the major barriers to justice for vulnerable witnesses and people with disabilities was confusion associated with the styles of communication and questioning techniques used by police, lawyers and courts.<sup>58</sup>

The use of intermediaries for children is particularly important as developmental factors associated with their age may bring into question their competence and reliability as a witness when exposed to particular questioning techniques.<sup>59</sup>

Intermediaries may address these issues by:

- assisting in police interviews
- interpreting questions from counsel and
- assisting the court in assessing a child's competence to give evidence in court.

This not only enables victims of child sexual abuse to participate in the trial but it also reinforces an accused's right to a fair trial by ensuring the most accurate and complete evidence is given at trials.

## **Recommendation**

9. The Royal Commission recommend government and courts prioritise and fund the implementation and improvement of special measures to assist complainants to give evidence. This includes:
  - improved training for police in the use and conduct of pre-recorded interviews
  - overcoming technical problems associated with the use of pre-recorded interviews, CCTV and or remote witness facilities
  - increased training for the legal profession in relation to questioning in court, including improper questioning of witnesses in court (see section 41 of the *Evidence Act 2008* (Vic))
  - reducing delays in the prosecution process.
10. The Royal Commission recommend the introduction of intermediaries for vulnerable witnesses (including victims of child sexual abuse) in criminal trials and for police interviews.

## **Tendency, coincidence and joint trials**

The primary issue surrounding tendency and coincidence evidence relates to the circumstances in which the prosecution may rely on 'bad character' evidence in the trial process, including evidence of an accused's prior criminal charges or conduct.<sup>60</sup>

Research and evidence, referred to in the Consultation Paper, suggests the relevance of tendency and coincidence evidence, as a consideration to determine an accused's guilt or innocence, is not in dispute.<sup>61</sup> The more contentious and divisive issue relates to courts' traditional concerns that juries may apportion too much weight to this evidence, causing unfair prejudice to the accused, consequently jeopardising their right to a fair trial.

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<sup>58</sup> Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies*, above n 28, 16 & 18

<sup>59</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse, above n 1, 365

<sup>60</sup> *Pfennig v The Queen* [1995] HCA 7; (1995) 182 CLR461,510. See also: The Royal Commission into Institutional Responses to Child Sexual Abuse, above n 1, 388

<sup>61</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse, above n 1, 413, 426, 441

The Consultation Paper provides a useful and thorough summation of the varying arguments relating to admission of tendency or coincidence evidence and the circumstances in which it should be admitted. However, the Royal Commission's reference to its Jury Reasoning research is extremely persuasive, particularly the key finding that: *there is no evidence of unfair prejudice to the accused*.<sup>62</sup> More specifically, the findings regarding juries' capacity for permissible reasoning and the exceedingly low probability for unfair prejudice, suggests more faith should be placed in properly directed juries and that the courts' scepticism is misplaced.

Further to the above, I reiterate the point made by the Royal Commission, that the current system in England and Wales is considerably more liberal in admitting tendency and coincidence evidence and after 11 years of operation there is no evidence of injustice.<sup>63</sup>

The principle of a fair trial is fundamental to the criminal justice system, however fairness must also be apportioned to victims and the broader community. The system must ensure all relevant evidence is considered in the course of a trial. Restrictive rules in relation to the admission of tendency and coincidence evidence in trials relating to charges of institutional child sexual abuse, fail to provide juries with a complete picture and unfairly weigh the trial process in favour of the accused.

It is concerning that in a number of case studies considered by the Royal Commission it is likely that injustices have occurred as a consequence of the inadmissibility of tendency or coincidence evidence and the resulting severance of indictments.<sup>64</sup> This is completely at odds with the notion of a fair trial and makes the call for reform in this area imperative.

## **Recommendation**

11. The Royal Commission consider reform in the area of tendency, coincidence and joint trials. In considering a preferred model particular regard should be had to the approach currently in place in England and Wales.

## **Sentencing and post-sentencing**

Sentencing is important in the context of victims of crime because it impacts on their confidence in the legal system and influences their willingness to report crime and participate in the criminal justice process. This concept is particularly relevant in the context of victims of institutionalised child sexual abuse, bearing in mind the lower reporting rates and higher attrition rates for these offences.

I recently made a submission to the Victorian Sentencing Advisory Council's (SAC) *Reference on Sentencing Guidance in Victoria*. In my submission, I noted the Government of the day introduced baseline sentencing reforms in Victoria because:

*sentences for a number of crimes were out of step with community expectations and out of step with what is required to deter crime effectively and protect the community.*<sup>65</sup>

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<sup>62</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse, above n 1, 419

<sup>63</sup> Ibid 447.

<sup>64</sup> Ibid 446.

<sup>65</sup> Victorian Parliament, *Parliamentary Debates*, Legislative Assembly, 3 April 2014, page 1276, (Robert Clark- Attorney-General).

The Government illustrated this disparity by specifically referring to the gap between community expectation, existing maximum penalties, and the sentencing median for child sex offences. These types of offences were considered to be amongst the worst kind of offence and subject to a maximum penalty of 25 years imprisonment. However, the median sentence for these offences at that time was three and half years imprisonment, for sexual penetration of a child under 12, and six years imprisonment for sexual abuse of a child under 16.<sup>66</sup>

Victoria's median sentence for what is, therefore, effectively the rape of a child, is marginally above 10% of the maximum. It is incomprehensible that anyone could truly believe that the rape of a child should attract a term of imprisonment of only three years and six months, but that is the practice in Victoria. Without legislated reform that compels our courts to provide more appropriate sentences, nothing will change – regardless of all our best intentions and fine statements.

I submitted to the SAC that sex offences against children should be included in any sentencing reforms that seek to restore a balance between victim and community expectations and current sentencing practices. I advocated for a standard sentencing scheme that uses a combination of statutory maximum levels of imprisonment in conjunction with sentencing range levels to guide sentencing for specific crimes. I submitted there should be a range level for specific offences (including child sex offences) of between 50% and 100% of the maximum term of imprisonment. I further suggested, concurrent sentencing for crimes of this nature should be prohibited.

I submit the application of the above sentencing scheme to child sex offences will ensure a system that is more in line with community expectations, whilst simultaneously deterring crime and protecting the community and our children.

I also note the Consultation Paper referred to the issue of victims/survivors being required to narrow the scope of their victim impact statements, consequently limiting their capacity to fully explain the impact of the abuse on them.<sup>67</sup> Complaints of this nature have been made frequently to my office.

In my submission to the VLRC, I advocated for a more flexible approach to be adopted in regards to the content included in victim impact statements. The admissibility of evidence is not always a matter that is easily settled and this should be a matter left to the sentencing judge to determine. In support of my argument, I referred to the observations of Charles JA in *R v Dowlan* and of Vincent JA in *DPP v DJK*:

*that it would be destructive of the purpose of victim impact statements if their reception in evidence were surrounded and confined by the sorts of procedural rules which are applicable to the treatment of witness statements in commercial cases.*<sup>68</sup>

Further to this, I also submitted to the VLRC that victims/survivors should be provided with support to prepare a victim impact statement and also appraise them of complex issues, including admissibility of evidence, which are considered by the court.<sup>69</sup>

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<sup>66</sup> Ibid

<sup>67</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse, above n 1, 500

<sup>68</sup> *R v Swift* [2007] VSCA 52

<sup>69</sup> Victorian Victims of Crime Commissioner, Submission to VLRC's Review of the Role of Victims of Crime in the Criminal Trial Process above n 33, 20

In regards to post sentencing responses related to child sexual abuse offenders, the Consultation Paper refers to these responses as aiming to protect the community through treating offenders, keeping offenders in custody or restricting offender's activities in the community.<sup>70</sup> Notably, research, evidence and contributions made to the Royal Commission suggest that sex offender treatment programs are *not a 'cure', but rather, form part of necessary intervention and management measures that aim to reduce risk of reoffending.*<sup>71</sup>

The Consultation Paper refers to an academic view suggesting that, there is apparently "more efficacy" in community based treatment than those conducted in institutions.<sup>72</sup> This is a view which is, clearly, based on "efficacy" for the offender - not the victim or the general community. To me, it seems incredible to suggest that a person, who has committed sexual offences against children, should be released straight into the community in the hope that a few therapeutic sessions will do what years of imprisonment did not. A few therapeutic sessions will never be capable of changing a person who is a paedophile into one who is not. Whether it can prevent them from engaging in child molestation or rape is a closely aligned issue. Proponents of the notion that therapy is capable of preventing re-offending must surely be able to see that releasing a person of this type, without them having been rehabilitated first, simply places more children in more danger.

The above view, in my opinion, makes a mockery of the notion that sentencing is largely about rehabilitation and, certainly, pays little or no regard to the safety of the community at large; including our children. I suggest that the better option would be to change the way rehabilitation is delivered in our institutions.

I submit that where there is a risk of reoffending it is imperative that the criminal justice system provide the most robust measures to protect our children and the broader community from these types of offenders. In order to achieve this, any reforms to the treatment, sentencing, registration and release of child sexual offenders should be guided by an overarching principle that: the treatment and rehabilitation of these offenders is, absolutely, secondary to the risk of harm to the community.

## **Recommendation**

12. The Royal Commission consider the development of a standard sentencing scheme with a range level proposed between 50% and 100% of a maximum term of imprisonment for relevant child sex offences.
13. The Royal Commission consider reforms to allow for a more flexible approach to the permissible content contained in victim impact statements and for victims to be provided with support to prepare a victim impact statement.
14. In the context of reforms to the treatment, sentencing, registration and release of child sexual offenders, the following overarching principle must apply:  
*the treatment and rehabilitation of sexual offenders is, absolutely, secondary to the risk of harm to the community.*

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<sup>70</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse, above n 1, 530

<sup>71</sup> Ibid 535.

<sup>72</sup> Ibid 534.

## **Appeals**

The requirement for transparency and accountability in relation to the criminal justice system should extend to the appeal process. In my submission to the VLRC, I referred to a recent Victoria Legal Aid review that noted:

*While victims felt that great gains had been made over the last few years around giving victims a voice within the trial and plea process, many did not feel those gains had extended to appeals, and they continue to be under acknowledged in Court of Appeal proceedings.*<sup>73</sup>

To ensure greater transparency and participation in the trial process, I recommended that victims/survivors should have a right to request the OPP consider bringing an appeal and provide reasons/explanations regarding decisions to bring or not to bring an appeal. I expressed support for the South Australian system which contains statutory provisions allowing victims to request the prosecutor to consider bringing an appeal.<sup>74</sup>

I also submitted to the VLRC that given the complexities of the trial process and the nature of the relationship between the prosecution and the victim, the provision of legal advice/representation for victims is supported. Importantly, it was suggested support of this nature should be limited to: *critical points in the trial process that demonstrably impact the interests of a victim and where those interests are in conflict with the prosecution*. Such critical points included appealing relevant interlocutory pre-trial processes, for example, the severance of charges and or the inadmissibility of tendency or coincidence evidence.<sup>75</sup>

Further, in view of the above comments relating to sentencing, I also support extending a victim's right to request to bring an appeal where they consider a sentence manifestly inadequate.

In my submission to the VLRC, I also supported the NSW Sexual Assault Communications Privilege Service as a model that provides victims/survivors with advice and legal representation relating to confidential communications matters.<sup>76</sup> This type of model could also be considered as useful in providing victims/survivors with support in other interlocutory pre-trial proceedings that have a demonstrable impact on the interests of victims of crime.

## **Recommendation**

15. The Royal Commission consider reforms that provide victims/survivors with greater transparency and participation in the appeal process. This may include reforms that provide victims/survivors with a right to request the OPP to consider an appeal in relation to:

- interlocutory proceedings that have a demonstrable impact on their interests; and
- sentences that are considered by a victim/survivor to be manifestly inadequate.

This should also include consideration of a process for the provision of reasons/explanations regarding decisions to bring or not to bring an appeal.

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<sup>73</sup> Victoria Legal Aid, *Criminal Appeals Review*, September 2014, 10

<sup>74</sup> *Victims of Crime Act 2001 (SA)* 10 A

<sup>75</sup> Victorian Victims of Crime Commissioner, above n 33, 4 & 22

<sup>76</sup> *Ibid* 15-16



16. The Royal Commission consider reforms that provide victims/survivors with advice and legal representation in relation to:

- interlocutory proceedings that have a demonstrable impact on their interests; and
- sentences that are considered by a victim/survivor to be manifestly inadequate.

Importantly, this type of support should be limited to circumstances where the interests of the prosecution are in conflict with the interests of the victim.

I thank you for the opportunity to participate in this process, on behalf of victims of crime in Victoria.

Yours sincerely,



Greg Davies APM

**Victims of Crime Commissioner**