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Victorian Law Reform Commission Chair The Hon. Philip Cummins AM, Commissioners Liana Buchanan, Helen Fatouros, Bruce Gardiner PSM, and The Hon. Frank Vincent AO QC

Family Violence and the Role of Victims of Crime in The Criminal Trial Process

I am writing to add further comment for enquiries into **The Role of Victims of Crime in The Criminal Trial Process**, which has been extended to include Victims of Family Violence, following the Commission of enquiry into Family Violence.

Family Violence can include violent assaults, sexual assaults and murder. Murder being the crime I have been most directly affected by personally, the prosecution of which and subsequent education I have received through Victims of Crime conferences and studies of the Juris Doctor art RMIT, have informed my opinions on reforms that I believe are necessary. To this end - reform - I have already made a past submission to yourselves in September 2015.

I now submit this further submission as I believe it is essential evidence to support my case for Victims of Crime, in serious violence offences, to be aided by their own independent legal advocate prior to and during committal and trial proceedings.

Your previous final report did acknowledge that there is a need to see there is a triangulation of interests, thus to acknowledge that the criminal process must be fair to the victims as well as the accused and the public. But did not go so far as to recommend a victims' advocate during proceedings, as occurs in many other jurisdictions worldwide, despite the experiences worldwide showing that the common fear that an accused or their defence counsel would be disadvantaged by facing two advocates, does not occur in practice. In practice the victims' advocate is an adjunct role, intervening only where the interests of the victim arise independent of the concerns of the prosecution (research by the SA Commissioner for Victims of Crime, for example, has shown this to be the case).^{1and 2}

Your previous report also identified various legal entitlement that a victim has and should have legal advice and assistance in exercising³:

- They include entitlements to:
 - appear in court in response to applications to subpoena, access and use confidential counselling and medical records
 - object to giving evidence where the accused person is their spouse, de facto partner, parent or child and they believe giving evidence will cause them harm
 - object to giving evidence if it may prove that they committed an offence or are liable to a civil penalty.
 - provide a victim impact statement and read it out in court
 - apply for a compensation or restitution order against the offender as an ancillary order to sentencing.

Additionally you recognised that there is no such service in existence and that a mechanism needs to be created but did not include such a service within a court room setting. I submit that it is impossible to see how such a service could practically intervene on a victim's behalf if they have no presence in a court room. Especially when, as you admitted 'The prosecution is unable to assist victims in asserting substantive entitlements if doing so conflicts with its duty to act impartially and independently'⁴. I shall illustrate my point.

During my experiences I was dismayed by my exclusion from the Committal proceedings, an issue which you have not addressed in recommendations in your report. I was excluded on the basis that I "might" be later called as a witness, despite my having no direct evidence as a witness. The stated reason was that my evidence might be altered if I attended the court - despite accused being able to attend and being equally likely to alter their evidence from what they hear. *Witnesses are no more likely to alter their evidence than the accused and, their honesty and reliability to give evidence should not be assumed to be more affected than the accused, justifying the Court excluding them from attending the Court* (Issue 1).

During the Committal hearing, the Defence sought to question two young women who had been in my murdered daughter's care. They were questioned about claimed (by the defence) sexual assaults of them while in Raechel's care. The defence sought to put claims that Raechel 'arranged' for the girls to be sexually assaulted. NOTE: If the Defence were considering Provocation it was no longer a partial defence to murder, having been abolished in 2005.⁵

At no point did the Prosecution object to these claims and questioning, despite these claims and questions being irrelevant to "matters in issue"⁶. At no point did the Prosecution object to these claims and questioning, despite these claims and questions being contrary to s 135 Evidence Act 2008 No.20 (Vic), 2016:⁷

- General discretion to exclude evidence The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might—
 - (a) be unfairly prejudicial to a party; or

- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time; or
- (d) unnecessarily demean the deceased in a criminal proceeding for a homicide offence

Also, at no time did the Court object to these claims and questioning, despite these claims and questions being irrelevant to "matters in issue", being a "a waste of time", or being "unnecessarily demeaning to the deceased in a criminal proceeding for a homicide offence" and despite this being the Court's prerogative.

Victims' of Crime are not usually familiar with statutes and common law and can not thus speak up about such contraventions of their rights, and the OPP does not see representing victims and their rights as their role, so they do only what is expedient to them. This Act and these relevant sections were in force at the time of the Committal proceedings, i.e. 2010.

No amount of "in house" Policies of the DPP persuaded the prosecution to take the victim's honour and standing, irrelevance, or waste of time into account. No training for judicial officers persuaded the Magistrate to take victims into account. There is no compulsion created by "Policies" or "training" but the presence of a victims' advocate would have ensured that these available mechanisms of the Evidence Act would be applied (Issue 2).

As a result, the media were able to publish these defamatory claims in the newspapers. This resulted in direct harm to Raechel's relatives and misconceptions existing in the public domain. I have been told by persons 'Oh, that silly girl let those girls smoke bong's' (not knowing I am Raechel's mother - this by a masseuse I went to for treatment - I walked out without paying). I have had other members of the press question me about those allegations demeaning Raechel's character, on several occasions. I should never have been put in that position by the inactions of the OPP and the Court. *Only and advocate, present in the Court, would have ensured that these available mechanisms of the Evidence Act would be applied by being compelled to do so* (Issue 3).

Your conclusion that there needs to be drivers of cultural change and assumption that such will be effective flies in the face of your own evidence:⁸

Victoria's public prosecutions service has been required by law to give appropriate consideration to the concerns of victims of crime since 1994.⁹ Also that year, the courts were first required by law to have regard to the impact of the crime on the victim when sentencing an offender.

Twenty three years of requiring the OPP to 'give appropriate consideration to the concerns of victims of crime' has not resulted in success. I sincerely request that you reconsider the question of an in Court Victims' Advocate.

REFERENCES

1. O'Connell, Michael, 2013, September, *Legal Representation for Victims of Crime - Fairer Justice*, Commissioner for Victims Rights, Government of South Australia, Adelaide.
2. Griffiths, Melissa 2014 Churchill Fellow, *The Prosecution of Serious Crime in Victoria*, 2016, February, The Winston Churchill Memorial Trust of Australia: 23. Constitution of Illinois '... have present at court proceedings ... an advocate'; 24. ' ... the victim's right to retain an attorney, at their own expense... ; 25, Making Victims' Rights a Reality " Giving rights to victims does not need to be seen as a zero sum game in relation to the rights of the accused person. Rights for victims and rights for the accused are not mutually exclusive. They can coexist under the rubric of fairness to all those involved in the criminal trial process.'; 25. even when advocates for victims are allowed, as in Illinois, ' Giving rights to victims does not need to be seen as a zero sum game in relation to the rights of the accused person. Rights for victims and rights for the accused are not mutually exclusive. They can coexist under the rubric of fairness to all those involved in the criminal trial process.'
3. Victorian Law Reform Commission, 2016, August, *The Role of Victims of Crime in the Criminal Trial Process Report (Final)*, Victorian Law Reform Commission: xvii-xviii
4. Victorian Law Reform Commission, 2016, August, *The Role of Victims of Crime in the Criminal Trial Process Report (Final)*, Victorian Law Reform Commission: xviii
5. *Crimes Act 1958 (Vic)*, s.3B
6. *Evidence Act 2008 No.20 (Vic)*, 2016, s. 56 (2)
7. *Evidence Act 2008 No.20 (Vic)*, 2016, s. 135 (d) and (c)
8. Victorian Law Reform Commission, 2016, August, *The Role of Victims of Crime in the Criminal Trial Process Report (Final)*, Victorian Law Reform Commission: 250.
9. *Public Prosecutions Act 1994 (Vic)*.