



Royal Commission into Institutional Responses to Child Sexual Abuse

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Dear Colleagues

CONSULTATION PAPER ON CRIMINAL JUSTICE

We are pleased to provide a submission to the Commission's Consultation Paper on Criminal Justice.

We commend the Royal Commission for the wide-ranging and in-depth examination of the issues confronting children and adults who have been victimised by abuse and violence and who seek justice.

We have chosen to focus our submission on the underpinning structural and conceptual problems that are intrinsic to our current system of criminal justice, and which we believe undermine efforts to reform its responses to people as victims. Together we have 30 years executive and senior experience within government and the justice system and working to promote the interests and rights of victims of crime.

For queries or further information on our submission, please contact Dr Robyn Holder on (07) 3735 3440 or at [r.holder@griffith.edu.au](mailto:r.holder@griffith.edu.au)

Yours sincerely

A handwritten signature in black ink, appearing to read "Robyn Holder".

Dr Robyn Holder

A handwritten signature in black ink, appearing to read "Suzanne Whiting".

Ms Suzanne Whiting

17<sup>th</sup> October 2016



**ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE**  
**CONSULTATION PAPER: CRIMINAL JUSTICE**

**SUBMISSION FROM DR ROBYN HOLDER AND MS SUZANNE WHITING**

**October 2016**

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## ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE

### CONSULTATION PAPER: CRIMINAL JUSTICE

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## ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE

### CONSULTATION PAPER: CRIMINAL JUSTICE

#### SUBMISSION

Our submission deals primarily with the underpinning structural and conceptual issues facing people as victims of crime and violence in criminal justice. The experiences of child and adult survivors of institutional sexual abuse with Australia's criminal justice system are shared by victims of other offences regardless of gender, age, ethnicity, disability and sexuality. Indeed, they are shared regardless of offence. The structural and conceptual problems are embedded within criminal justice itself.

We are of the view that criminal justice is about offenders, victims and the community. It is an abiding flaw to conceive that criminal justice is a contest between the state and the accused. Rather, state institutions are duty-bearers to all members of the public. In our view, piecemeal and superficial reform that does not understand these fundamental points will only reinforce the structural and conceptual problem of our contemporary criminal justice system.

We make this submission by drawing on a combined 30 years' experience at executive and senior management levels of state and territory government promoting and implementing victims' rights, reforms and services. Although we are both now outside direct involvement, we both feel considerable responsibility to the thousands of children, women and men who shared their experiences with us over our years in the sector. We both have extensive experience leading and managing victim-related reforms in criminal justice.

#### KEY STRUCTURAL AND CONCEPTUAL POINTS

##### ***1. There are different mechanisms that victims can and do access to achieve justice***

There is no one or best way for victims to achieve justice. We submit that it is unhelpful to think of competing 'models' or 'alternatives' for victims to achieve justice. We suggest that it is more helpful to describe different justice mechanisms such as criminal and civil, formal and informal, and so on. None of these are mutually exclusive or better or worse. They can be accessed at different times for different purposes by victims. Victims may access more than one mechanism in their quest for justice. It is profoundly unhelpful to see justice in terms of competing choices. All should 'work'.

We concur with the Royal Commission's view that criminal justice is but one justice mechanism and will always be accessed by a small proportion of the population of victims of abuse and violence. However, this does not mean that only small numbers of victims seek access to criminal justice. The sheer volume of people who bring the wrong of abuse and violence to the attention of criminal justice authorities must give serious pause to consider the importance of a formal and public system of criminal justice to victims. Criminal justice agencies and governments need to recognise people who have been victimised as adults or as children as intrinsic to the system. They should not be an afterthought to be managed at arm's length. Without people reporting crimes and voluntarily participating as witnesses, the criminal justice system could not operate.

## ***2. The criminal justice system has multiple objectives and victims have multiple justice objectives***

The contemporary criminal justice system is not only about retribution. It is also about deterrence, rehabilitation, denunciation and protection. It is for all of these objectives that people victimised by abuse and violence see value in participating. It is not uncommon that judicial officers will draw on more than one of these objectives in giving reasons for the component parts of their sentence of an offender. This articulation of and engagement with multiple objectives is to be encouraged.

Posing retributive and restorative justice as alternatives or choices is flawed and deeply unhelpful as both are simply sentence options (in this context). Both rest upon some version of culpability whether it is an admission or a finding; unless of course restorative engagements are fashioned as diversions away from a finding by a formal authority.

Victims as well as non-victims have multiple goals for justice (Gromet & Darley 2009; Holder 2013). To these goals they give different reasons. Too often victims are presumed to seek a singular objective. We understand that *achieving justice* is a process made up of different elements. Different objectives may be attained at different procedural points in the process and at different times.

## ***3. Achieving justice is a complex, dynamic and multi-layered notion***

Not every victimisation is perceived or experienced by the victim as criminal; but in our experience it is almost always experienced as a wrong. We distinguish the acceptance of responsibility by an offender from offender accountability. A person (or institution) who has done wrong to a victim may take responsibility for that behaviour and may do so in direct dialogue or some other form(s) of communication with a victim. That person (or institution) may or may not make undertakings to the victimised person to change their behaviour or make

organisational changes. To our knowledge there is little that a victim or others can do to ensure these commitments are undertaken. However, these arrangements may be satisfactory for some and should not be foreclosed.

We argue that achieving accountability for the wrong is distinctly different. A 'wrong' is something that is defined at a communal or societal level, and understood and enacted amongst individuals, as well as within and between social institutions. In our system these wrongs are categorised in the criminal law. Victims as well as offenders understand that it is a social norm that has been breached by offending behaviour, and that it has been breached against a particular individual (or population of individuals) (Duff 2001). This is one way to understand that private and public interests are co-determined and not separate.

As a step along the way to *achieving justice* we say that *bringing offenders to account* for the breach of the wrong is a key threshold for victims. It is also a process element of *offender accountability*. For many but not all people who have been victimised it is very important that this is done in a public and formal forum. Accountability in this light is where a public authority designated and understood by the community to hear evidence and make determinations does indeed make a finding. The finding is that *this accused person* has done *this wrong* to *this other person*. The decision (if it is a verdict of guilty) is a clear signal to the victimised person. It represents vindication. That is, vindication that a wrong has in fact been done, that this accused person did it, and that it was done to this victimised person (Daly 2014).<sup>1</sup> Vindication is in part an expression of social solidarity with the victimised person as well as reiteration of social rules (that are embedded within criminal law).

Achieving justice is as attractive to children as it is to adults; indeed, as it is to any member of our society. Justice is a complex vision that involves both substantive and procedural elements. It is deeply about individual humans being individually valued in a manner in which they can see and feel and receive equality of treatment and concern by state authorities (in particular).

#### ***4. Inclusion and meaningful participation are crucial to victims achieving justice***

Because justice is complex and involves a number of different elements that are encountered and delivered over time and by different criminal justice entities, it is vital that victims (as well as offenders) are included *throughout the process*. Hearing their voice is not, however, just about 'affect' or emotional catharsis; rather it is about having their concerns listened to, responded to, considered, incorporated, and addressed in ways that are meaningful.

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<sup>1</sup> Along with vindication, Professor Kathleen Daly adds the importance of participation, voice, validation, and offender accountability to her construction of victims' justice interests (Daly 2014).

Students of the criminal law are taught the importance of 'natural justice' and of 'due process' with regard to the individual accused. These concepts rest upon an assertion that individuals who are directly implicated (by the wrong or the event or decision) are fully informed and fully included in a process. They fail to see that these are fundamental expectations for individuals as victims who are also directly implicated. In consequence, many legal practitioners whether defence or prosecution, firmly believe and assert not only that victims have no role in the court process, but that they are owed nothing by them as practitioners.

#### ***5. The interests of victims are not the same as those of the state (prosecution)***

To understand the importance of inclusion and participation is to understand and acknowledge that people as victims of abuse and violence, whether adult or child, have interests that are different to the state in the form of the public prosecutor.<sup>2</sup> Of course these overlap but they are different. Indeed, people who have been victims also have interests that are distinct from those of the community as a whole.

In our experience, public prosecutors fudge this important point repeatedly. On the one hand, when confronted by victims and victim advocates asking for meaningful inclusion in decision-making, public prosecutors say that they "do not represent the victim" and/or are "not accountable" to victims for their decisions. On the other hand, when arguing with government for more resources to 'support victims', they say that they do so as protectors of victims' 'rights'. The situation is not only frustrating for people as victims, but deeply compromising of the integrity of a key public institution. It smacks of institutional self-interest.

In our experience, it is realising that the prosecutor does not act for them and indeed may act in ways that they see as against their interests, that shocks people as victims. "Who acts for me?" is a query that we have heard countless times over our public service careers.

Thus we concur with the substantive position that the public prosecutor represents the community. But to then assert that a member of the public who is directly affected by the proceedings has no standing, no status, and no recognised role other than as a witness for the state is a legal and historic fiction of recent design (Hay 1983; Langbein 2003; Rock 2004).

We argue, however, that people as victims should have access to independent advocacy and representation. What this may look like, and if and how it works in practice we elaborate below.

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<sup>2</sup> We focus on public prosecution in our submission because, in our experience, this is where the tension between the state's responsibilities to individuals, and the functional purpose of state authorities to simply process the volume of criminal cases is most acutely felt.

We do stress that the points we make in our submission and the principles outlined in the Consultation Paper that rightly emphasise a more inclusive and respectful approach are also in the interests of public prosecution. Keeping people as victims better informed, treated with dignity, supported and consulted are likely to lead to more effective and efficient prosecution processes.

#### ***6. People who have been victimised by abuse and violence have 'justice interests'***

We distinguish between justice needs (Herman 2005) and justice interests (Holder 2013). We do so on the basis that to have a 'need' can be viewed as something personal. Categorised in this way, the claims for justice made by people who have been victimised can be segregated as a private interest and even dismissed as not legitimate in a public interest system. Of course people who have been victimised have 'needs'. Within criminal justice we would agree that these are that any person, victim or accused, is treated with dignity and respect. However, we argue that the *interests* in justice articulated by victims are for themselves, the offender and the community; and those peoples' *interests* in justice are underpinned by the values of fairness and equality. All of these elements are public interest concerns.

Also, and critical to deep understanding of this key point, is that people as individuals are more than victims. They have *interests* in justice as victims, but also have *interests* in justice as community and family members, participants in social and political activities, voters and taxpayers (to name a few).

We say that, what is crucial to understand about this reconceptualization, is that it alters the basis for measures and interventions to support victim/witnesses. To date, these have been argued on the basis that the victim (child or adult) is 'vulnerable' or 'traumatised'. We say that these presumptions consequently require individuals to 'perform' a particular construct of what it is to be 'a victim'. The concept forces individuals into a box of labels and definitions of a victim who is deserving/innocent/good and so on. This is not only profoundly unfair, it is unrealistic. What can result are situations where a prosecutor may say, "we shall not make you give evidence unless you want to or if it would be traumatising to you". How is a member of the public to give an informed preference when lawyers study for years to gain knowledge about the criminal justice process!<sup>3</sup> An interests-based approach says, "we recognise that giving evidence can be confronting and confusing but there are a number of ways we can support you to participate and to be involved".

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<sup>3</sup> In our submission this approach is a misunderstanding (even a misappropriation) of the issue of victim 'consent' or victim 'agency'. By reporting the incident(s) to authorities the victim has already enacted their agency; they are seeking justice and expecting entities to make their best efforts to achieve this for victims, offenders and the community.



Of course people find giving testimony distressing and confusing. We applaud the various suggestions made by the Royal Commission that are designed to enable and facilitate the giving of evidence by victims. But it is not *because* it is distressing that the criminal justice system should provide support to enable victims to participate; rather, it is because people as citizens, whether child or adult, are participating in a governance function for our society as a whole. The system simply could not function without this voluntary cooperation. Therefore criminal justice should provide the supports to witnesses as of right. People should not be put through legislative and procedural hoops proving trauma or vulnerability simply to report or to give evidence.

Further, we are of the view that understanding and working with children and young people as individual rights-bearers remains a confused and messy space within criminal justice. Legal practitioners and victim specialists necessarily need to work with the parents or guardians. However, it can become lost that it is the child or young person who is the primary victim and the recipient of the obligations of authorities. For this reason we are cautiously supportive of child representatives (often contained in evidence legislation) and of proposals for third party intermediaries.<sup>4</sup> These proposals may inadvertently distance the child's voice and the child's participation still further from proceedings and from active decision-making.

***7. Contemporary victims' rights legislation is anything but 'rights'; rights for people as victims remain to be articulated***

From our combined 30 years' experience working with victims' 'rights' legislation in Australia, it is our submission that these are a deceit. They are not rights, not actionable, not enforceable. We argue that contemporary victims' legislation sets out service standards. In administrative law, these are described as the reasonable or legitimate expectations of members of the public with authorities.<sup>5</sup>

If we understand that victims have interests that are distinct to those of the state then we submit that it is vital to understand and clearly articulate what are the obligations on duty-bearers (police, prosecution, courts, corrections, and victim services); what are the rights they are responsible to protect and uphold, and how might these be given effect in a robust and consistent manner? We submit that our communities are yet to have a detailed debate on and

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<sup>4</sup> Ms Whiting is more supportive of the potential in the 'intermediary' system than is Dr Holder. However, she also notes that the UK system may not be the most appropriate for Australian jurisdictions. There is much to learn from systems in, for example, Ireland and some areas in Scandinavia.

<sup>5</sup> The principle of 'legitimate expectations' is used in public and administrative law in order 'to strike a fair balance between the exercise of public functions and the protection of private interests' (Thomas 2000, p. 1). See also Shapland (2000, pp. 147–64).

examination of what could actually be the rights of people as victims (and witnesses) in criminal justice. A degree of consensus on the scope and content of such rights needs to be reached.

However, we submit that human and civil rights are a key way into such a discussion. Firstly, these rights demand that we understand that criminal justice entities are duty bearers, and that they bear obligations to all members of the public. Second, these rights frameworks demand understanding exactly how these obligations translate, within criminal justice, to particular classes within that public; that is, to victimised persons as well as to accused persons.

Both of the Australian jurisdictions with which we are most familiar have human rights legislation. However, in our experience human rights are not understood to extend to people as victims primarily because politicians, policy makers and administrators simply fail to *see the state* as a sometimes intrusive and oppressive power in the lives of people as victims, especially in criminal justice (Holder 2016). Indeed, we find it very telling that the *Human Rights Manual for Prosecutors* published by the International Association of Prosecutors does not elaborate on the applicability to individuals as victim of *any* of the human and civil rights contained in international instruments. All human and civil rights obligations on prosecution are conceived solely through a relationship with the accused and/or detained persons. The manual does not even contain a reference to the 1985 United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

#### ***8. People as victims of abuse and violence should have access to independent advocacy and representation***

Our argument for independent advocacy and representation rests on two grounds. First, no single agency has primary responsibility to inform, assist, guide, and manage a victim's journey through the entire criminal justice process. While some states and territories in Australia have organisations and processes to enable this for some victims some of the time, many if not most victims fall through the cracks between organisations. Each justice entity only has responsibility for informing, involving and assisting victims for the duration of its particular function. We strongly recommend that it is time for governments to structure a single responsible case managing organisation for victims in criminal justice. Our submission on this point does not absolve justice organisations from their duties and obligations to victims.

Second, advocating and assisting people as victims requires particular skills, experience, and focus. It is a specialised justice function. Assisting victims to engage meaningfully with criminal justice has *achieving justice* as its focus. Other victim-related goals for recovery, healing or rehabilitation may flow from the primary focus on justice, but are not the primary goals of victim advocacy.

Our submission is that independent advocacy and representation should be established within an independent statutory authority. A body such as this, headed by an independent statutory appointment, may have case managing functions as described in the preceding paragraph. It may also be able to intervene in a proceeding to represent a particular right or issue of significant concern. We do not necessarily argue for representation in every single case. Rather we envisage something similar to the powers of a Human Rights Commissioner or a Public Defender.

Our proposal requires differentiation of what *representation*, in particular legal representation, may be for. Here we distinguish between

- Evidentiary representation,
- Direct interest representation, and
- Rights representation.

It is important to distinguish between these very carefully as they will carry different procedural implications as well as cost and structural considerations. Presentation of *evidence* is usually led by prosecution. There may be specific circumstances where it is useful to victims to have evidentiary representation but these instances may be more profitably linked to rights representation (below). *Direct interest representation* could potentially encompass submissions at sentence on reparation or compensation orders (post-conviction) and for victim impact statements for example. *Rights representation* would need to identify the human, civil or other legal right at issue. This may be, for example, the right to privacy and reputation.

We make this recommendation with full knowledge that it is radical and would require more detailed examination. Our submission identifies the structural and conceptual exclusion of people as victims as the most fundamental problem for victims in criminal justice. Therefore we have sought to identify in broad outline what could comprise a way to address the structural and conceptual problem. We are very aware, for example, that a key question would be whether the statutory advocate (representative) was directly engaged by the individual as instructing client, or whether the intervention was made pursuant to a statutory obligation to argue some right that was held for the victim population in general. Our preference would lean towards this latter approach. The core and primary focus on the statutory obligation was to protect the interests of victims whether child or adult, male or female and irrespective of offence.

We are, of course, very aware that responsibility for the administration of criminal justice rests with the states and territories. Thus, if the Royal Commission was minded to recommend

examination of independent advocacy and representation, then exploration of the proposal would need either one or more jurisdictions to implement it, and/or jurisdictions to come together to develop a broad consensus on how such an office may operate, and then leave it to individual jurisdictions to consider in detail for local circumstances.

### ***9. Accountability of criminal justice institutions***

We strongly agree that criminal justice should be independent of political and partisan influence. It goes without saying that this is especially so for the judiciary and courts. However, we do not agree with argument that independence necessarily means that only formal and supervisory accountability to the executive should exist.

Our justice system is built around a system of checks and balances where decisions taken at one level of the system can be subject to appeal at a higher level. It is possible for a local Magistrates' or District Court decision to be appealed right up to the High Court of Australia. The exceptions to this rule are decisions made by Directors of Public Prosecutions (DPP). DPPs argue that they have written policies and guidelines about their decision making processes which are readily available. This is not a convincing argument because policies and guidelines are open to interpretation. Simply knowing the broad basis for a decision is not to understand its application to an individual case or circumstance. We agree with the Royal Commission's Consultation Paper which notes, 'requirements in DPP guidelines may be of limited value if decisions are made without complying with the DPP guidelines in circumstances where there is no mechanism for a victim to complain or seek a review and there is no general oversight of DPP decision-making' (page 293).

Therefore, we particularly welcome the Royal Commission's close examination of issues of accountability for public prosecution. Knowing of the various developments that have been undertaken overseas, especially in the UK, we are of the view that there is much room to consider options for Australia.

We are aware, for example, from submissions made by a broad range of organisations and individuals to the Victorian Law Reform Commission's reference into the role of victims in the criminal trial process, that there is broad community support for improved complaints processes and oversight mechanisms to strengthen the accountability and transparency of OPP decisions. As the Royal Commission's Consultation Paper notes, whilst the defendant has the protection of his or her own representative, and the trial and appellate courts' obligation to ensure a fair trial, the victim has nothing, other than perhaps the opportunity to bring a private prosecution (p321). This provision is a chimera. The use of a private prosecution is almost unheard of in Australia and those that are undertaken are commonly swiftly 'taken over' by the DPP.

We urge consideration and adoption of three key accountability mechanisms: a Victims' Right of Review (VRR) as in the UK, scope for judicial review of DPP decisions, and a national prosecution inspectorate. As we understand the UK CPS VRR, it is essentially a robust and transparent internal process enabling review of prosecution decisions. A VRR should apply to decisions not to prosecute or to withdraw charges, as well as to accept a guilty plea to lesser charges as a result of a plea negotiation. The form and composition of the scheme should be subject to broad public consultation and include a website for information and submissions to be published. Whatever the form of the VRR scheme decided upon, we believe the right to review and the scheme itself should include panel members external to the DPP and be enacted in legislation and not just as guidelines.

We believe that a VRR scheme would reduce the likelihood of victims seeking judicial review of prosecution decisions.<sup>6</sup> We also agree with the Commission's observation that there is a 'gap capable of causing real injustice if a prosecutor makes a decision not to prosecute or to discontinue a prosecution without complying with the relevant prosecution guidelines and the affected victim is left with no opportunity to seek judicial review' (p321). We support moves towards judicial review and its inclusion in legislation establishing a VRR. We expect that the power of review would be sparingly used but the bar should not be set so high as to preclude any reasonable prospect of a successful application.

Any recommendations in this area, however, will also run up against the responsibility of states and territories. Therefore our third recommendation for a constructive and fruitful mechanism is to develop a body along the lines of the UK's HM Inspectorate Crown Prosecution Service Inspectorate (HMCPSI). This organisation

'inspects the work carried out by the Crown Prosecution Service (CPS) and other prosecuting agencies' for the purpose of 'enhanc[ing] the quality of justice and mak[ing] an assessment of prosecution services that enables or leads to improvement in their efficiency, effectiveness and fairness'.<sup>7</sup>

A national body would take a systemic approach inspecting, investigating and reporting on the activities of public prosecution. A national body could act as an external audit of compliance with DPP policies. All government departments and statutory authorities are funded from the public purse and are rightly subject to external audits. External audit processes are important for ensuring accountability and transparency, but may also identify opportunities to improve processes and outcomes and make better use of resources. There is currently a raft of DPP victim-related policies. These are of little value if compliance with them is not monitored by an external body and there are no remedies in the event that policies are not followed.

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<sup>6</sup> Indeed, only 12% of cases examined in the UK CPS VRR were overturned on review.

<sup>7</sup> See <https://www.justiceinspectorates.gov.uk/hmcpsi/>

## **10. Improving legal education on victim law**

Law schools within Australia's universities have failed to equip lawyers with knowledge of victim law across nearly all areas of jurisdiction. By *victim law* we mean those laws, regulations and procedures that are directly relevant to persons as victims whether in criminal, civil, family or in child protection. It provides expert training on victims' rights at pre-trial, trial and post-trial. There is not a single law school in the country that teaches victim law. In the study of criminal law and criminal justice, the focus is purely on the rights of the accused to due process and a fair trial. Core principles such as procedural fairness or natural justice are viewed as simply applying to the accused. If law schools have victim modules these are usually more theoretical and focus on, for example, the gendered or racialized nature of criminal law. The result, in our experience, is that many if not most legal practitioners from both defence and prosecution firmly believe that victims have no legal or procedural role in the court process.

We commend to the Royal Commission the example of the National Crime Victim Law Institute (NCVLI)<sup>8</sup> in the United States as an exemplar in developing expertise in victim law, extending the reach of legal advocacy for victims on a national basis and at state and federal jurisdictions, and in pushing the boundaries of independent legal representation. The NCVLI trains advanced law students through legal clinics, internships and mentoring. After graduation, it hosts and supports these advocates under the banner of the National Alliance of Victim Advocates. It is through the National Alliance that the NCVLI has built capacity to pursue rights enforcement for people as victims through independent advocacy, amicus briefs and technical assistance to non-government, government and military specialists working to improve responses to victims. Without adequate legal education on victim law in Australia then advances for people as victims will continue to be fragile and have little sustainability.

### **SPECIFIC FURTHER SUBMISSION POINTS**

#### ***(a) Proposed Approach to Criminal Justice Reforms***

We concur with the Royal Commission's approach to criminal justice reforms outlined in the Consultation Paper (page 12). We would moderate only one point. The Commission suggests that one element of the approach is to 'punish the offender'. We would suggest that this is too narrow and that a common interpretation of 'punishment' might assume incarceration. As stated earlier in our submission (Key Point 2), we strongly endorse the multiple objectives of criminal justice. Therefore we would suggest that a different form of words would be to:

'Bring the offender to account for their wrongdoing and to recognize the harm done to the victim.'

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<sup>8</sup> See [https://law.lclark.edu/centers/national\\_crime\\_victim\\_law\\_institute/](https://law.lclark.edu/centers/national_crime_victim_law_institute/)

We strongly endorse the guiding criminal justice principle, as articulated by Lord Steyn in the United Kingdom House of Lords:

‘There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family; and the public’ (Lord Steyn, *Attorney-General’s Reference (No 3 of 1999)* [2001] 2 AC 91,118).

*(b) Further Issues in Criminal Justice Responses*

Our submission has canvassed overarching issues regarding the public prosecution but we concur more specifically with the Royal Commission’s proposed possible principles to inform prosecution responses (page 32). The principles should apply not just to victims of institutional abuse, but to victims of all crimes against the person.

**Training:** We agree that prosecution staff who may come into contact with victims of institutional child sexual abuse or any other offences against the person, should be trained to have a basic understanding of the nature and impact of these crimes on their victims. In our experience there are similar training needs in relation to victims of other personal offences. We recognise that such training does not make ‘counsellors’ of investigators and prosecutors, and nor should it. It is vital to any victim-related training include the importance of case information to victims as well as focusing on enhancements to investigatory and prosecution practices.

**Specialisation:** In our experience victims whose case was dealt with by specialist police and specialist prosecutors generally report higher levels of satisfaction and inclusion than victims of general offences managed by general duties police and prosecutors. There are a number of reasons for this. First is that there is usually some policy and procedural requirement for the officer or prosecutor to provide continuous and ongoing contact with the victim and to keep them informed. Second, the specialist is trained and sensitized to the particular offence and its impact on victims. Many specialists adopt a trauma-informed approach to their work that does not compromise their impartiality and dedication to the objective collection of evidence. In our view a third and critical aspect of specialisation is that the challenges of investigation, evidence collection, witness preparation, and in-court advocacy for complex cases require a particular character for investigators and prosecutors. They develop and deepen their experience and practice in actively pursuing cases, supporting victims and, at the same time, maintain clear-eyed about the requirements for building a case. Within the specialist team environment, individual specialists have ready access to the expertise and experience of their peers but also to the expertise and experience of victim specialists with whom their organisation is in partnership. This collaboration is particularly important for high impact personal offences that are challenging to prosecute.

We do not necessarily advocate specialisation for all varieties of offences against the person. However, we are strongly of the view that there should be specialisation in all offences involving child victims, victims of sexual offences, victims of family violence, and related victims of crimes which resulted in the death of the primary victim. A key ingredient of specialisation in the judicial process from our experience with victims is Practice Direction that places tight timeframes on the processing of matters.

**Continuity of staff:** Victims are particularly unsettled with changes to prosecution personnel dealing with the case; changes moreover that are rarely explained. Continuity in prosecution team staffing for personal offences involving children and sexual offences should be maintained to the maximum extent possible to ensure regular communication and deep understanding of the case. Indeed, we would say that continuity of prosecution personnel is important for all personal offences with high impact on victims.

**Laying correct charges early:** We concur with the importance of laying the correct charges early. However, we are cautious of making too rigid requirements because of the possible emergence of other evidence as well as the unfolding of views and concerns from the victim. At the same time, we are deeply aware that charge negotiation is a flash point in relations between prosecutors and victims. Prosecutors need to be very cognisant not only of victim views but also their reasons for those views.

**Keeping victims and families informed:** Surveys of victims conducted internationally and within Australia consistently show that victims rank the provision of information as their most important requirement of criminal justice agencies. It is insufficient that information is only of a general nature. People need to know the specifics that apply to their case. The criminal justice process is recognised as a source of secondary victimisation and most victims have little or no knowledge or experience of it. Victims who are kept informed about what is happening in their case and what to expect from the trial process are better able to cope with the process and to give their best evidence. In our view a key problem is that information systems are not robust in the routine provision of information. Unfortunately it can be 'hit and miss' and can be responsive to those who shout loudest or who have a strong advocate. It is our submission that our recommended independent victim advocate organisation have particular responsibility not only to ensure criminal justice agencies deliver case information in a timely and meaningful way, but also then to be the follow up organisation to discuss with the victim that they understand the nature of that information, what it may mean to their particular circumstance, and how they might constructively engage with it.

**Importance of internal Witness Assistance Services:** The role of DPP Witness Assistance Services (WAS) in providing information and facilitating communication with the prosecution



system they have said that they “*would not have got through*” or “*would not have survived*” the prosecution and court process without the support of WAS. In general, WAS social workers adopt a trauma-informed, non-judgemental approach to supporting victims and their families and are pivotal in ensuring that they are kept informed about the prosecution case. They maintain direct communication with the victim and importantly, also facilitate conferences and debriefings with the prosecution team. Legal practitioners often struggle to communicate with victims and one of the roles that WAS perform is to assist prosecutors to communicate more effectively with victims. We therefore welcome the Royal Commission's recommendation that WAS services should be adequately staffed and funded to ensure they can perform these roles. In most States, and certainly Victoria, WAS does not have the necessary resources to support all victims involved in prosecutions conducted by the DPP.

On this point, however, we strongly submit that the resourcing of WAS is no substitute at all for independent victim-focused advocacy and representation. The primary purpose of the WAS is to support the prosecution. The primary purpose of an independent statutory victim advocacy office is to assist and support the victim.

**Charging and Plea Decisions:** We support the recommendations to promote more timely plea negotiations which include adequate time to discuss with, advise and consult the victim. However, we reiterate our caution that too early acceptance not exclude emergent evidence, not take place as a convenience for prosecution or the court process, and be much more transparent. It is on this issue that victims feel most excluded and betrayed by the criminal justice process. We welcome the Royal Commission's consideration of measures that may improve transparency of and accountability for plea negotiations. The system which operates in NSW where plea negotiations must be registered with the court may be one option to explore. Certainly assisting victims to be involved with and understand charging and plea considerations would be a core function of our recommendation for an independent statutory victim advocacy organisation.

We also welcome the Commission's recommendation that the charges resulting from plea negotiations should reflect the true criminality of the act/s. This is not only important to keep faith with the victim and the community and to ensure that offenders are held accountable for the totality of their criminal behaviours, but also to enable the victim to tell the court about the impact of the crime on their lives through a Victim Impact Statement (VIS). There are significant other implications to victims if the full extent of the criminal conduct is not adequately reflected in the charges.

**Victim impact statements (VIS)** are one area in which these consequences are experienced. If the charges are downgraded and the offender is convicted only on those, then a VIS can usually

**Victim impact statements (VIS)** are one area in which these consequences are experienced. If the charges are downgraded and the offender is convicted only on those, then a VIS can usually only comment in relation to that conduct. Victims feel re-traumatised because they are, in effect, censored in reflecting on the totality of the conduct and the full consequences. Interviews with victims who have been through the VIS process consistently highlight the importance of having an unfettered voice and, equally importantly, having the harm acknowledged by the court at sentencing. Indeed, there may be scope for the Royal Commission to consider the possibility of victims making comment on the sentence itself.<sup>9</sup> However, we acknowledge that the inclusion of sentencing preference may give yet another reason for legal practitioners within criminal justice to resist VIS. Further, victims may also expect the sentencing judicial officer to take account of their views and preferences and would be grievously let down to learn that these are irrelevant to the sentencing decision. At the same time, VIS creates another area where skilled and experienced victim advocates work with victims to discuss their multiple goals for justice and their reasons for seeing these goals.

**Independent victim advocacy and representation:** We end our submission by urging once again that the Royal Commission consider and see the enormous value in a single independent statutory victim advocacy authority. Criminal justice institutions have specific interests in bringing alleged offenders to account, upholding the rule of law, and acting in the public interest. While victims also have an interest in these objectives, it is wrong to assume that their interests are one and the same as these institutions. Our submission is that the Royal Commission acknowledges the power of state-sanctioned intrusiveness in the lives of people as victims through these state institutions. This power can be constructive and beneficial as it can be interfering and oppressive. Just as the accused person as a member of the public requires independent representation to protect her interests and rights in relation to this power of the state, so too should this be available to the victimised person as a member of the public.

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<sup>9</sup> Whether or not victims should be able to make comments on the sentence and how is controversial. Indeed, in drafting this submission Dr Holder and Ms Whiting shared concerns and issues that showed differences in our positions. We note that scope for victims influencing, indeed negotiating, an outcome agreement in restorative justice processes appears to be relatively uncontroversial. This is intriguing as both opportunities take place after a decision, whether a conviction by the criminal court or a pre-trial admission to another justice authority.

## ABOUT THE AUTHORS

Dr Robyn Holder was an independent statutory officer appointed pursuant to the *Victims of Crime Act 1994* (ACT) from 1996 to 2011. Her role was to promote and protect the rights and interests of victims of crime in the administration of justice, and to investigate allegations of breaches of the Act. She is now a Research Fellow at Griffith University where her research focuses on victims, law and justice.

Ms Suzanne Whiting was a senior manager responsible for victims' policy and research in the Victorian Department of Justice for fifteen years. Her views are based on her work and experience with victims of crime during that time. The views expressed in the submission are her own and do not represent the views or policies of the Department of Justice in Victoria.

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