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Royal Commission into Institutional Responses to Child Sexual Abuse
GPO Box 5283
Sydney NSW 2001

Dear Commissioners,

Re Consultation paper - Criminal Justice

I apologise for the further delay in reply for which after your generous extension I offer only regret. Please read below my additional submission to the Consultation Paper on Criminal Justice, which should be read in conjunction with my first submission. I have addressed issues in the sequence of the Royal Commission's paper.

Principles for initial police responses

I concur with the Royal Commission's conclusion that a victim's 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 to participate in a prosecution." I would add that given the significant role victims play as witnesses in public prosecutions, the criminal justice system would likely collapse without victims' cooperation.

Victims expect police to be 'crisis interveners' – not counsellors, such as social workers. To fulfil such, all police who may come into contact with victim-survivors of any sexual abuse should be properly trained to on the basic of providing 'psychological first aid'. All police should also be trained on victims' rights laws and practices, and police training should be ongoing. The so-called 'inoculation model', which is likened to giving police a one-off instruction, has proven inadequate for police and resulted in too many unsatisfactory responses to victims-survivors, in spite of the remarkable improvements in police responses in the past few decades.

Encouraging reporting

While I support the principles on 'encouraging reporting' in general, with respect to sexual abuse, it seems to me that victims-survivors should have options, be told their options, and where they have capacity, the opportunity to choose the option best for them.

In South Australia, for example, I support victims (16 years and older) who access the Rape and Sexual Assault Services but do not report the sexual victimization to police. The Rape and Sexual Assault Services provide medical and counselling services as well as information on the options available for victims-survivors. In some cases, victims might, for instance, choose to participate in a forensic medical examination 'just-in-case' they later want to report the sexual victimization to the police. There is an agreed procedure for the handling of just-in-case exhibits.

As an element of Operation Persist in South Australia (which addresses unsolved homicides), a dedicated telephone line has been set-up so prisoners can contact police direct without 'monitoring' by corrections staff and discretely so as to reduce the risk other prisoners will overhear conversation.

A like approach ought to be adopted for prisoners (no matter whether they be young offenders and adult offenders) seeking to report sexual abuse. Further, data on sexual assaults in institutions, such as prisons, should be collected and published. Such data is published in, for example, the USA.

Victims' rights should provide, as does the declaration in South Australia and the charter in New South Wales, for consultation with victims of serious offences 'before' charge decisions are made; however, that right should be extended to police and made a mandatory obligation on police as well as prosecutors. Moreover, there should be a record kept on the consultation, so as to show among other things that it happened before the police or prosecutor decided to alter the charge etc. It seems to me that when a victim (or the parent or guardian if a child victim) disagrees then, with their approval, other institutions such as the courts should be advised on the victim's views, especially when the victim's views differ from the police, prosecution or other.

Consistent with this victims should retain the right to withdraw at any stage in the process and to decline to proceed further with police and/or any prosecution.

Further, the imperative to engage with victims on decisions that affect them should not be sacrificed in the pursuit of improving the efficiency of Australia's criminal justice systems, such as early guilty plea laws.

In the so-called 'information age' and given the technological advances, the police should make available a range of channels to encourage reporting, including specialist telephone numbers (as per the prisoner example above), online reporting (including facility to conduct interviews via tele-communications such as Skype, Google Hangouts or other e-forum, and there should be online forms (for example, the online form to allow victims of violent crime in New South Wales to apply for financial assistance). Face-to-face communications must continue as a primary source of communication, especially as the investigation, adjudication and prosecution happen.

It is incumbent on those offering services to provide information about what to expect from each channel of reporting. It is also vital that information is provided in ways that are accessible – simply making information available is an unsatisfactory response.

To encourage reporting of allegations of institutional child sexual abuse among Aboriginal and Torres Strait Islander victims and survivors, police should take steps to develop good relationships with Aboriginal and Torres Strait Islander communities. They should also provide channels for reporting outside of the community (such as telephone numbers and online reporting forms).

To encourage prisoners and former prisoners to report allegations of institutional child sexual abuse, police should provide channels for reporting that can be used from prison and do not require a former prisoner to report at a police station. The increased use of police call-centres might facilitate reporting but ultimately there will be need for face-to-face communication if an evidentiary statement is required

Police investigations

I concur with the suggestion that identifying principles that focus on general aspects of police investigations that are of particular importance or concern to victims and survivors are helpful. The learned experience on the operation of declarations or charters on victims' rights (which in law are often written as principles governing treatment of victims rather than genuine rights) throughout Australia shows that, on the one hand, there has been remarkable improvements in police responses, on the other hand, some police still treat victims ambivalently and the implementation has been 'patchy', with often the most disadvantaged and disenfranchised not having the access to justice.

Research on police responses indicates consistently that victims and survivors who deal with specialist police units such as sex crime branches have higher levels of satisfaction with police. Many victims and survivors do not deal with police specialists; thus, it is crucial to train and educate non-specialist police if their responses are to be enhanced and outcomes for victims and survivors improved. I hasten to add that the South Australia Police Special Crimes Branch has a victim management section with trained police officers who maintain ongoing relationships with victims and survivors, and should an officer leave there is a hand-over process. Dedicated police victim contact officers are posted in the Major Crime Branch, Major Crash Branch, Internal Investigation Branch and the six metropolitan police local service areas. Unfortunately, there are no dedicated victim contact officers in regional police local service areas, although in one of these areas, the local police have a partnership with the Victim Support Service that has resulted in the Victim Support Service worker being housed at the main police station for the area.

As Commissioner for Victims' Rights, among the prominent grievances I receive are: inconsistency with responses, often attributed to the attitude and/or behaviour of the police investigator, and lack of continuity in staffing in the police response – which is a criticism that extends to prosecutors. That said, the failure to keep victims and survivors informed – to regularly communicate in appropriate ways so as to keep them informed – is a most frequent grievance.

Contrary to victims' – survivors' needs, victims' rights declarations and charters are written in the passive; for instance, requiring victims to ask for information, yet no obligation to tell them they should ask. Victims' rights instruments should be revised and greater emphasis put on the public officials, such as police, obligations. There should be an obligation to tell victims their rights, or at least that they have rights and how to exercise them, if they choose.

Throughout Australia police have for decades been obligated to treat victims and survivors with respect, dignity and compassion. In the late 1980s, early 1990s, the Police Commissioners of Australia committed police to honouring their victims' rights obligations. I reiterate my praise for the remarkable changes made but also restate my criticism that too many victims are not afforded their rights and their needs are unmet by those who victims and survivors expect to help them.

The proposed principles to inform police investigations should be a paramount consideration. These principles should, however, augment stronger victims' rights laws. Such laws should be enforceable – for example, in South Australia I can consult individual police or the police on the treatment of victims of crime and, if in my opinion, the declaration governing treatment of victims has been violated, I can recommend the officer or the police make a written apology. Since July 2008 when this law came into operation, several heartfelt genuine apologies have been made and welcomed by victims. This process of enforcement is consistent with submissions made elsewhere to the Royal Commission on reparations and on restorative justice. I hasten to add that enforcement provisions should go further. There should be occasions when victims have access to civil and/or criminal remedies.

I support the Australian Law Reform Commission and the New South Wales Law Reform Commission recommendations on access to information being available in certain circumstances and, importantly, if certain requirements are met. Moreover, I would urge the Royal Commission to support these recommendations in the context of institutional child sexual abuse.

Investigative interviews for use as evidence in chief

The law on pre-recorded investigative interview, conducted by police or a trained forensic interviewer, as some or all of the complainant's evidence in chief should extend to all vulnerable people, not only children. Intellectually disabled and cognitively impaired people – young and old – live in institutions, for instance, and can be vulnerable as evident from reported assaults on elders in elder care / nursing facilities in South Australia.

Some of the most vulnerable people are adult residents in institutions, home care or the like, but with little or no mental capacity to defend themselves. These people rely heavily on others including strangers to care and look out for them; and, their disability makes them easy prey for sex offenders and other offenders.

I concur that the quality of the interview is crucial and agree that, in spite of the training undertaken by police in particular in recent years, there is room for improvement.

The principles suggested by the Royal Commissioner, or like principles, should be implemented to govern policing, although the history and research shows principles alone will not necessarily bring the desired compliance.

There should be no unnecessary intrusion into victims' privacy. There is not a right, however, to absolute privacy. While I concur that state and territory, and I add Commonwealth, governments should introduce legislation to remove any impediments, including in relation to privacy concerns, to the use of video recorded interviews so that the relevant police officer, his or her supervisor and any persons engaged by police in quality assurance and training can review video recorded interviews for quality assurance and training purposes. This would not be intended to require legislative authority to allow the use of video recorded interviews for general training purposes.

Victims, including for some Aboriginal and Torres Strait Islander victims, survivors and other witnesses, should have a right to an interpreter. This is an important factor in enhancing victims' access to justice.

Vulnerable victims should have a right to an Intermediaries (including a communication assistant).

Both these rights should be enshrined into state and territory declarations / charters on victims' rights; and , the rights should be incorporated in a federal charter on victims' rights, which is a necessary recommendation that to-date no federal government has been willing to implement.

Police charging decisions

I agree that the decision to charge is one of fundamental importance to victims seeking access to justice. The charge decision should be underpinned by a broad 'right to trial' for victims, which should guide decisions such as those on corroboration. Victims should not have the right to veto police or prosecutors charge decisions but they should have a right to request a review and there should be a commensurate obligation on police and prosecutors for such review independent of the person who made the initial decision.

Among the strategies to tackle court delay throughout Australia is to offer sentencing discounts (up to 40% for an accused who pleads guilty at the earliest opportunity). Under such regime it is vital that the correct charges be laid as early as possible. For this purpose victims of serious offences at least should be engaged and consulted. This should happen as a key aspect of the investigation as well as the adjudication for charge decisions.

In making decisions about whether or not to charge, police should not unnecessarily raise or dampen victims' expectations. Police should always treat the victim-complainant with respect, dignity and compassion, as well as honestly and with integrity.

If costs can be awarded against police, costs should be capped. There should be a state-funded public defender's office for accused people that is staffed and subsidized by the costs awarded against the police. Legal counsel should be accessible to accused people. I hasten to add that public funds should be available also for legal counsel to assist victims dealing with the criminal justice system, as victims should not be bystanders but rather genuine participants in the system.

In summary, on the specific pointers asked:

> There should be principles that augment victims' rights laws and victims' rights law should be strengthened. Both the principles and the law should govern treatment of victims; and, such governance should clearly articulate obligations.
>
> To the extent that it is reasonably practical reform should maintain the victims' right to no unnecessary intrusion on their privacy. As a general principle, a victim should be notified of what is happening with his or her information and who has access to the information (including any legal obligation to share information or any other limits to confidentiality. Moreover, releases of information should as fare as is reasonably practical and mindful of the prevailing circumstances be victim-survivor initiated and victim-survivor centred to enhance the assistance provided to the victim-survivor and releases should not be for the sole purpose of easing the burden on the provider or the programme.
>
> The Royal Commission, however, should further examine the Australian Law Reform Commission and New South Wales Law Reform Commission recommendations for reforms to the protections against disclosing the identity of mandatory reporters in the context of institutional child sexual abuse.

I cannot speak for the Government of South Australia but I offer the observation that across Australia and in several other jurisdictions that have inherited the British civil approach to policing and the adversarial criminal justice system, principles and / or guidelines to influence investigations and prosecutions have become common. It is evident that unless there is ongoing training for 'criminal justice practitioners' and others as well as monitoring of implementation, the principles and/or guidelines have little impact on improving outcomes for victims. Furthermore, judicial officers and defence counsel should be trained on both the law and principles and practices.

Police responses and institutions

There are some features of institutional child sexual abuse that may call for a different or additional police response. Institutions' staff may have vested interests and so not cooperate with police, for instance, resulting in evidence with an evidentiary value being withheld, concealed, lost and so on.

This and other factors might necessitate a different police response but that is largely an operational decision that should be informed by the prevailing circumstances.

Police communication and advice

I concur with the Royal Commission's suggestion that it "may assist if all police agencies develop procedures or protocols to guide police and institutions on the information and assistance they can provide to institutions when a (current) allegation of institutional child sexual abuse is made".

I also concur with the Royal Commission's suggestion that it "may assist if all police agencies, and/or multidisciplinary responses, develop procedures or protocols to guide police, institutions and the broader community on the information and assistance they can provide to children and parents, the broader community and the media when a (current) allegation of institutional child sexual abuse is made".

Blind reporting to police

"It is crucial to enhancing vulnerable people's safety that institutions develop and follow guidelines for reporting to police." Blind reporting might be a remedy but others are better placed than I to discuss the positives and negatives for victims, except I add that steps should be taken to make it easier for victims or the guardians to report offences. Reporting criminal offences should not be an ordeal. Furthermore, police should believe victim-complainants and tell them so – at least until the contrary is shown. Sometimes the police acknowledgment is the only sense of justice a victim can attain.

Blind reporting might also be a method of acquiring information to aid other investigations – like intelligence gathering to led police operations.

Privacy

There is no absolute right to privacy in international or domestic law. Privacy and defamation laws do create difficulties for institutions in communicating within the institution, or with children and parents, the broader community or the media; however, instruments such as the South Australia Informational Sharing Guidelines, the exemption for the South Australia Offender Management Programme, and the Family Safety Framework programme suggest that the difficulties in South Australia at least are not insurmountable. In addition I direct the Royal Commission to the principles devised by the National Victims of Crime Working Group that reports to the Attorneys-General of Australia.

As well, as protective and assistance measures to victims, the European Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, provides 'rules' to make it easier for professionals who are ordinarily bound by secrecy rules and any person who knows about or suspects sexual exploitation or sexual abuse of a child to report their concerns of suspicions. The convention also provides for the establishment of services to assist those covered by the rules to obtain advice and to make reports.

Consideration should be given to creating a civil legal remedy for breaches of privacy law; especially with respect to unnecessary intrusions on victims' privacy.

Child sexual abuse offences

The accused is entitled to a fair trial – indeed – but also the victim-survivor should be entitled to procedural justice. The adversarial criminal justice system has evolved from trial by ordeal for the accused-defendant. In order to protect the tenets of procedural justice for accused citizens, it seems to me the criminal justice system became a trial by ordeal for the victim-survivor.

The Queensland offence that focuses on the maintenance of an unlawful sexual relationship rather than particular unlawful sexual acts warrants further consideration. Likewise, I acknowledge the modification in South Australia and Tasmania law that "allows the offence in those jurisdictions to apply to unlawful sexual acts that were committed before the offence", which means "the offence can be used in historical cases".

Mindful of such law and the South Australia Supreme Court decision quoted by the Royal Commission, as well as anecdote such as informal comment by police officers and victim-advocates, I agree with the Royal Commissioners that "there needs to be an offence in each jurisdiction that will enable repeated but largely indistinguishable occasions of child sexual abuse to be charged effectively". On the question of the "form" I add only that the offence should in content and operation be consistent throughout Australia. Whether a victim – survivor has access to justice should not be constrained by geo-politico borders.

Grooming offences

While I urge consistency in law throughout Australia and a broad approach to acts and omissions that are determined to be grooming, I share the worry of some that broadening grooming offences might discourage non-offending "staff and volunteers from engaging in healthy and appropriate behaviour with children in their care". It seems to me , for instance, that innocent people might suffer; for example, a male school teacher who witnessed a child fall and injure him-/herself, stepped up, lifted the child and carried him-her to a medical room.

A parent of another child looked on this 'caring behaviour' as inappropriate and lodged a complaint. This apparently resulted in the standing-down of the teacher while an enquiry was conducted.

Further, all jurisdictions should criminalise "the intentional proposal, through information and communication technologies, of an adult to meet a child who has not reached the legal age for sexual activities, for the purpose of subjecting him or her to sexual abuse or producing child pornography". There should be uniform law to punish those who, usually via the Internet, engage in conduct to expose children gradually to sexually explicit material, to solicit sexual activities or other like behaviour.

I also propose that there should be an offence of 'corruption of children' to cover, among other acts, the act of causing a child below the legal age for sexual activities (which varies across Australia but also should be uniform (e.g. at 16 years and above)) to witness sexual abuse of other children or adults of sexual activities (and such activities should include child torture for sexual gratification).

Position of authority offences

Whenever a person abuses his or her authority (including position of power relative to a person's vulnerability), such should be an aggravating factor.

Limitation periods on criminal prosecutions

In general, limitations of time on sex offences should be removed. If a limitation exists, however, there should be law that favours waiving the limitation and for that purpose victim-survivor access to justice should be a paramount consideration. Of course, I concede that care is necessary to avoid unduly impacting on the rights of accused people who are presumed innocent.

Furthermore, evidence of prior like offences, such as proven grooming, should be admissible as tending to confirm the accused's *mens rea*.

Third-party offences

I note that the European conventions on sexual violence against children require member-states to introduce law so that legal entities can, in certain circumstances, be held liable for offences committed on their behalf by a person in a leading position in those entities or where a person fails to supervise or check on an employee or agent of the entity, thus enabling him or her to commit an offence.

Failure to comply with reporting obligations should be prosecuted. Harm done to victims might be better dealt with in a civil 'damages' prosecution; access to which should be more readily available to victims-survivors – indeed there should be public funding for cases assessment and for prosecution of cases with merit.

That said, where it is evident that institutional staff have 'knowingly' taken steps to impede the pursuit of justice and thus failed to protect children or other vulnerable people, it seems to me appropriate to prosecute.

I add that liability need not only be criminal, but may also be civil or administrative. Whatever the liability, if a person is wronged then there should be a process for vindication and validation for that person as a victim.

Failure to report

In light of my view on third parties, I concur with the Royal Commissions proposed three broad approaches on reporting offence:

- a broad offence applying to all serious crimes and requiring all people with the relevant knowledge or belief to report to police – such as the New South Wales offence in section 316(1)
- an offence targeting child sexual abuse offences and requiring all people with the relevant knowledge or belief to report to police – such as the Victorian offence in section 327(2)
- an offence targeting institutional child sexual abuse offences and requiring those within institutions with the relevant knowledge or belief to report to police.

Silence nourishes sexual abuse and sexual exploitation of children and other vulnerable people.

Whistle-blowers

Whistle-blowers who disclose child sexual abuse should be protected.

Failure to protect

Institutions should be criminally and civilly liable for their failure to protect. The inter-relationship might be likened to liquor licensing law where the staff, the duty manager, the licensee and the directors can be prosecuted. It seems to me that the wellbeing and safety of children and other vulnerable people are more important than regulatory liquor licensing matter.

Offences by institutions

As per comment under failure to protect. Further, on a finding of guilt, the court should have authority to order restitution (that is, offender paid monetary compensation). This option should co-exist with reform of law on civil liability and a redress scheme.

See also third party offences, as above.

Issues in prosecution responses

Prosecutors and prosecution-based service providers, such as Witness Assistance Officers can (and frequently do) provide invaluable assistance to victims-survivors. They should, among other obligations:

- Provide victims' rights information and, until victims are given the right to legal counsel, ensure victims' rights are honoured during the criminal proceedings.
- Keep the victim-survivor informed and involved as a genuine participant (that is, victims should not be bystanders).
- Facilitate access to appropriate spaces in the pre-trial and court house so as to avoid unnecessary contact with the accused-defendant and defendant's family and friends.
- Provide timely and accurate information and make 'active' referrals as needed.
- Consult with the victim – survivor on the key decisions that affect him or her and notify the victim-survivor on key stages of the process.
- Assist the victim – survivor as a witness prepare for court (which includes but is not limited to familiarising him or her with the courtroom).
- Notify the victim – survivor on restitution (that is, offender paid monetary compensation) as a sentencing option or element of the sentence, and should the victim-survivor ask, advocate for restitution.
- Coordinate the inclusion of victims' impact statements into sentencing proceedings.
- Intervene to protect the victim-survivor and other witnesses who are being intimidated, harassed or subjected to unscrupulous questions by defence counsel or the accused-defendant.
- Provide victims the opportunity (including conferring an authority such as the Commissioner for Victims' Rights to attain independent legal counsel) to speak at hearings, if they request, on issues that affect them, such an accused-defendant's request for access to medical records or application to stay proceedings.
- Advocate for suppression of information that intrudes on the victim's – survivor's privacy.

Further, I draw the Royal Commission's attention to the provisions on prosecutors' obligations in the Commonwealth Statement of Basic Principles of Justice for Victims of Crime and the guidelines published by the Commonwealth Secretariat. These confirm my pointers and expand on such.

As Commissioner for Victims' Rights, I like the Royal Commission have received from victims and their families both positive and negative reports on their experiences with prosecutors (that is, police and public prosecutors). These reports have also extended to the Crown Solicitor's counsel in South Australia who deal with some criminal appeals and administer the state-funded victim compensation scheme.

I similarly agree that there have been many changes in how prosecution services respond to victims – survivors. Like the police, the changes in the past three decades in South Australia have been remarkable and evolutionary.

Mindful of the pointers and references above, I concur with the possible principles to inform prosecution responses as proposed in the Royal Commission's paper. The possible principles to guide prosecution charging and plea decisions are consistent with international law (such as the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985); see also the handbook), multi-national / regional law (such as the Commonwealth Nations Statement of Basic Principles of Justice for Victims of Crime; see also the Commonwealth Secretariat's Guidelines); and domestic law in New South Wales and South Australia.

Throughout Australia, in federal, state and territory victims should have a right to be consulted before key decisions, such as charge decisions, are made and there should be a reciprocal obligation on prosecutors to consult victims. Moreover, such right should be enforceable by, for instance, providing the victim with authority to apply to stay proceedings until their right has been honoured. As well, like the English courts have indicated, there should be provision to allow for certain decisions to be undone and renegotiated, even when there is an impact on the accused-defendant.

Furthermore, such right and obligation should be complimented by the proposed principle that "the benefit of securing guilty pleas, prosecution agencies should also recognise that it is important to complainants – and to the criminal justice system – that the charges for which a guilty plea is accepted reasonably reflect the true criminality of the abuse they suffered".

Given the push by governments to introduce sentencing discount laws and criminal trial process reforms to tackle court delay, it is crucial that adequate time is allowed to consult the victim – survivor and "the police in relation to any proposal to downgrade or withdraw charges or to accept a negotiated plea". The victim – survivor should also be given adequate time to deliberate on such matter and, as appropriate, to opportunity to consult legal counsel on the proposal before he or she states his or her opinion on the proposal.

Charge bargaining

In my humble view, victims' exclusion from charge bargaining is a consequence of an historical misunderstanding (to paraphrase Abraham Goldstein (1982)). Australia inherited the English criminal justice system. At about that time, the English Attorney-General was not a public prosecutor as is a public prosecutor understood today. That Attorney-General then did not historically initiate prosecutions, except in limited circumstances. The charging function was left to the victim and the police (who were considered members of the public with extraordinary authorities). The Attorney-General could by writ of *nolle prosequi* terminate prosecutions, including those initiated by the victim and/or the police. Thus, the Attorney-General had authority to review what one might today consider 'private prosecutions'. It is my view that until the relatively recent establishment of Directors of Public Prosecutions throughout Australia, that a misunderstanding of the role of the Attorney-General as a public prosecutor set in place both an inference that only a public authority can decide whether or not to initiate a prosecution and that once a public authority – now the Director of Public Prosecutions – has made such decision it is unreviewable.

The power to make charge bargains is a power that makes significance difference to victims' lives. Bringing victims into the 'limelight' of the now shrouded with 'darkness' charge bargaining would, it seems to me and others, bring a "new legitimacy" to such bargaining. It would, of course, compromise the options of prosecutors, so expectedly many will oppose it. Regaining some control over this key stage in the criminal justice system, might enhance

victims' sense of justice and confidence in the system as a justice system. With such control, however, would come obligations, such as in appropriate cases a responsibility to compromise and to display a lesser desire for vengeance. I suspect that no government is yet willing to truly empower victims in charge bargaining. Therefore, I would urge that prosecutors be obligated to confer (not merely inform) with victims and to genuinely and actively hear victims out; and that obligation should not be read as 'only to the extent reasonably practical' because that is simply unsatisfactory.

Further to above, I point to four methods of victim intervention in to prosecutorial decision-making: requesting that the decision-maker review the decision; appealing to the decision-maker's superior or to an independent authority for taking complaints; appealing to the court; or personally brining the matter to court. As Matti Jousten commented in his essay on 'Listening to the Victim' (1995), all of these methods are captured by the Council of Europe's Recommendation that states, "The victim should have the right to ask for review by a competent authority of a decision not to prosecute, or the right to institute private proceedings." Consistent with the Recommendation and the more recent European law on victims' rights, the Irish Criminal Justice (Victims of Crime) Bill 2016 proposes that victims will have the right to be informed of decisions not to proceed with an investigation or not to prosecute; and, where a decision is made not to prosecute, a victim will be entitled to seek a review of that decision. Such right of review should be law across Australia.

DPP complaints and oversight mechanisms

There should be a formalised internal victim – survivor grievance or complaints mechanism that affords victims – survivors a just and fair review of key decisions. South Australia's Declaration Governing Treatment of Victims provides for victims to be informed on an existing complaint mechanism and, to his credit the DPP works with me as Commissioner to resolve victims' grievances, although some are irreconcilable due to the conflicting interests – victim interest versus the public interest. The declaration also acknowledges that victims are entitled to ask the DPP to review a decision that has affected them, however, that 'right' is worded in a manner that suggests it is applicable to court outcomes, such as asking the DPP to review a sentence to determine if it is manifestly inadequate and whether an appeal ought to be lodged.

I responded to the Royal Commission's query on whether there should be provision for external judicial review of key prosecutorial decisions, "particularly those to do with not commencing or discontinuing a prosecution". In spite of the opposition, I still maintain that no person or authority should be 'above the law' and judicial review is an essential ingredient of victim-oriented procedural justice. I concur with the Royal Commission's observation that "there would seem to be 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 policies, and the affected victim is left with no opportunity to seek judicial review".

A formal internal grievance or complaint process would not undo such injustice. I am mindful also that police make prosecutorial decisions that ought to be reviewable. I point to a case – conceding that one case is not necessarily adequate to inform good policy-making but it is illustrative of the problem – where the DPP referred a matter to police for prosecution, and the victim and the police investigator agreed on consultation that the matter should be prosecuted. Yet, a police prosecutor determined not to prosecute the matter and on that prosecutor's recommendation (contrary to the DPP solicitor's view, the victim's view and the

investigator's view) not to prosecute, no evidence was tendered. The accused-defendant then commenced a civil prosecution against the victim on the basis that the police prosecutor's decision confirmed his 'innocence' and the victim's allegations were malicious. I paid to defend the victim in the civil prosecution, then assisted the victim in mounting a complaint against the police prosecutor. A conciliation between the police and the victim failed. I have now engaged a lawyer to act on the victim's instructions to seek a remedy. The victim has been denied procedural justice.

As mentioned above, the victim in such cases should have a right to apply to a criminal court for a stay of proceedings while a review of a prosecutor's decision happens. The English case law serves as a persuasive argument but it does not stand alone as there is similar case law in Hong Kong under the existing adversarial criminal justice system (which incidentally on consulting a senior DPP staff and a prosecutor I am told is an accepted means of holding them accountable as they are not immune to error).

Delays in prosecutions

On delays in the criminal prosecution – criminal proceedings, I observe:

- Court delays cause unnecessary hardship for victims and their families. However, speeding up the justice process by rewarding accused people with significant discounts, while attractive to some victims, is not perceived as fair and just by others.
- Court delays also undermine public confidence in the system's ability to deliver timely justice - thus the common expression, justice delay is justice denied. People might be reluctant to report crime and be witnesses at trials if they assume the delay (hence the personal toll) will be too great.
- Court delays in addition suggest to some offenders, wrongly in my view, that their delaying tactics are acceptable, when they are not.
- Often lost in the debate on court delays is the impact on those who work in the criminal justice system, including judges and magistrates. They want to see justice done but their hands are often tied by their number and the availability of court-rooms.
- Victims (I reiterate) should be kept informed and consulted on key decisions that affect them. These rights should enforceable, and courts ought to enquire of prosecutors whether victims have been consulted and what their views are for the 'public record'. It seems to me that victims who are engaged, such as attending pre-trial conferences, feel more positive toward the courts, even when there is delay. Victims should not be bystanders in the criminal justice system.
- The uncertainty created by late plea changes (which some are trying to overcome by offering sentencing discounts for early pleas) and late withdrawal of proceedings can have significant adverse effects on victims. Further, delays have significant implications for all involved in the trial process.
- Much of the law reform and practice change to cope with delay in our state has focused on encouraging early guilty pleas, managing court time, case management and prioritising certain cases. Notably, to-date there has been lesser attention paid to

the impact of speedy trial laws, not specifically in terms of resolving court cases quicker but rather the consequences for victims and defendants.

- Court delay confirms the importance of audio-visual recording initial interviews with child victims and witnesses as well as other vulnerable people wherever possible; and, given the impact of court delay, confirms also the significance of allowing such recordings as evidence in criminal proceedings.

Specialist courts and prosecution units etc. that have been introduced to address sexual offences in some Australian jurisdictions assist some victims but can give rise to problems, such as prosecutors' and judges' well-being.

Early allocation of prosecutors, coupled with consistency in such allocation, would likely achieve some of the outcomes the Royal Commission flags, such as "enable the prosecutors to make sure the charges are correct early in the proceedings" and "allow early identification and narrowing of the issues". To which I add, that the attitude and behaviour of prosecutors dealing with victim-complainants is a critical factor in determining victims' satisfaction and sense of (in)justice. I concur also that a lack of resources for the key participants, particularly courts and prosecution agencies, will (not may) make it difficult to implement reforms.

The Royal Commission's observation on the differences between jurisdictions that are experiencing unacceptable delays is valid. A report on reducing court delay in the European Union illustrates the same experience across nations rather than solely within a nation. Notwithstanding, there is no escaping the importance of reducing delay and that steps must be taken towards this desired end for the sake of all, not just victim-complainants. That said, victims' rights should not be set aside or ignored to achieve expedience

Evidence of victims and survivors

In spite of the victim-oriented reforms over the past three decades, too many victims still speak of their 'trial by ordeal' and how daunting and overly legalistic they found the criminal justice system. Giving evidence – that is fulfilling one's role and responsibilities as a witness – should not be an ordeal. Some defence counsel have much to answer for in terms of their deplorable cross-examination, which can be humiliating, offensive and destructive. Too often giving evidence is a source of 'second injury' – that is, it as secondary victimisation it re-traumatises.

After lecturing on the plight of children as victims at a conference for legal aid and other lawyers, a lawyer in the audience challenged some pointers I made. In reply, I offered to review, possibly retract, those the questioner considered most inappropriate if a lawyer in the audience was willing to step forward and state they would not only encourage their young child as a victim of a sex offence to report such to the police but also, importantly, allow their child to be subject to cross-examination by some of the most, from a defence perspective, applauded barristers. Not a single person stepped up and the questioner did not pursue their challenge.

I do hasten to add that I have seen some defence counsel conduct themselves with much respect for the victim-complainant; and, I have found that exposure to victims' views and experiences by acting for them in criminal proceedings has been a wonderful educator for solicitors and barristers who are mostly defence counsel.

Vulnerable witnesses' laws and law prohibiting unscrupulous and inappropriate questioning are essential ingredients. Various aids have been implemented through legislation to assist them in giving their evidence at trial. Special measures must include: the use of a pre-recorded investigative interview as some or all of the victim-complainant's evidence in chief; pre-recording all of the victim-complainant's / other vulnerable witness' evidence, including cross-examination and re-examination, so that the evidence is taken in the absence of the jury and the complainant need not participate in the trial itself; and, should a victim-complainant / other vulnerable witness give evidence in-person (whether in court or via CCTV), the recording of that evidence, so should the accused-defendant successfully appeal and a retrial be ordered, the victim-complaint's / witness' recorded evidence can be used rather than require that person to give evidence a second, third and some on time.

Restrictions on the scope of questions that can be asked in cross-examination; requiring the court to disallow improper questions in cross-examination; allowing third parties to give evidence of the disclosure of abuse as evidence that the abuse occurred; allowing expert evidence to be given about child development and child behaviour, including about the impact of sexual abuse on children – are all important and necessary measures that should be uniform throughout Australia.

Judges and magistrates should be obligated to use their judicial authority to protect victims and witnesses from harassment, threats, intimidation and harm.

Tendency and coincidence evidence and joint trials

I concede that there are a complex and technical issues, which have troubled the courts for decades. As the Royal Commission proposes, the law needs to change so that it facilitates more cross-admissibility of evidence and more joint trials in child sexual abuse matters. I note the Jury Reasoning Research that revealed no evidence of unfair prejudice to the accused-defendant in the joint trials or where tendency evidence was admitted in a separate trial. Of particular relevance are the findings that the credibility of the victim-complainants was enhanced by evidence from independent witnesses and that jurors are capable of reasoning separately about each count, even where the counts related to the same victim-complainant.

Regarding child victim-complainants, I add that I have encountered difficulty explaining to a child and/or his or her parent / guardian the obligation to truthfully tell the court what they saw, heard etc. but thereafter should the child be both a corroborating witness in one trial and a victim-complainant in another, trying to distinguish telling the whole truth and telling the admissible legal truth. One child, for instance, was forbidden from mentioning he or she was sexually assaulted while present when another child was sexually assault because the two alleged sexually assaults on different victims but the same accused-defendant were held separately – and, so much fuss is made about children's capacity to tell the truth, yet the rules of evidence not only discourage truth telling they can 'require' the truth be hidden. It is little wonder that some claim, truth discovery in an adversarial criminal justice system is too often by accident.

I concur with the Commissioners that the current law needs to change to facilitate more cross-admissibility of evidence and more joint trials in child sexual abuse matters.

Jury directions

Codification should be explored for the purposes stated in the discussion paper.

Regarding juries, the Royal Commission should be cognizant of the findings of research on jurors' decision-making, and such evidence should be the basis of any recommended reforms.

Training and continuing legal education

Training and education to protect children and other vulnerable people should target five differential axes: prevention, detection, intervention, sensitivity and needs and legal interests of victims of crime. Sensitivity training on victim related issues should be an essential element of criminal justice, legal studies and law courses in tertiary colleges and universities. Suitable training and ongoing education on victims' rights, for example, should be provided for all those working in the criminal justice system.

Verdicts

Not guilty verdicts are not proclamations of innocence; rather, they are determinations that the evidence presented by the prosecutor was not adequate to secure a conviction. Victims can be stigmatised as a consequence of misunderstanding and misrepresentation of the verdict. In international law (see the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)) a person is a victim no matter whether the suspect is identified or prosecuted, or whether the accused is found guilty or acquitted. This international law should be enshrined in all declarations or charters on victims' rights.

Sentencing

Excluding good character as a mitigating factor - particularly so in matters of institutional child sexual abuse.

There should be no presumption in favour of cumulative, rather than concurrent sentencing.

Consideration should be given to the law in England and Wales that "[w]hile the statutory maximum penalty that applied at the time of the offence continues to apply, they otherwise sentence in accordance with the sentencing standards that apply at the time of sentencing".

The harm done should be a factor taken into account in sentencing.

Victims, via their victim impact statement should (as happens in South Australia) be allowed to comment on sentence.

On victim impact statements, consideration should be given to the South Australia law on community impact statements (neighbourhood and social) being provided for throughout Australia. Neighbourhood impact statements have proven to be a practical way to encapsulate the harm done on multiple victims, while social impact statements have been a practical way to put a collective (and informed) view on the broad social and other ramifications of the offender's crime.

Restitution (including offender paid monetary compensation) should be a sentencing option, and where it exists, it should be paid greater attention as the sentence or condition (or element) of the sentence. Where appropriate, offenders should make fair restitution to victims.

Appeals

There is no finality in criminal proceedings as once construed. Parliaments have enacted laws to allow for appeals on grounds of 'fresh and compelling evidence' years, even decades, after the matter was considered finalised.

Appeals play an important role in the criminal justice system, albeit that the common perception is that appeals favour accused-defendants.

The Director of Public Prosecutions in each jurisdiction should have adequate rights of interlocutory appeal to reduce the possibility of error in the trial.

The law and practice on 'inconsistent verdict' appeals should be codified and, in the main, not be considered a ground for appeal.

I reiterate my view on the importance of recording victim-complainants' (and vulnerable witness') evidence. There should be no barrier to reusing the recording or to using a recording of the evidence given in any retrial.

Given the impact on victim-complainants of the decision whether or not to proceed with a retrial, it would be beneficial for prosecution guidelines to explicitly address this issue and to require the prosecutor to confer with the victim-complainant and the relevant police officer before the Director of Public Prosecution decides whether or not to retry a matter after a conviction has been overturned. There should also be a right of review on both whether there was genuine conferring and on the decision.

Like me as Commissioner for Victims' Rights in South Australia, there should be an authority tasked with monitoring the effect of court practices and decisions on victims to ensure that the reforms are working as intended.

Post-sentencing issues

In accord with the United Nations handbook on Justice for Victims of Crime and Abuse of Power, the roles and responsibilities of correctional services in relation to victims should include but not limited to:

- Extracting relevant victim information (including, where applicable, victim impact statements and protection orders) from court documentation for inclusion in the offender's file;
- Protecting the confidentiality of victim information through protected automated databases or "flags" on paper files that indicate that this information is not available to inmates or their counsel;
- Protecting victims and witnesses from intimidation or harassment by the inmate during their period of incarceration;

- Notifying victims on their rights then upon request, notifying victims of an offender's status, including but not limited to the offender's current location, classification, potential release date, escape or death.

Victims have a legitimate interest in seeking to ensure not only that offenders are brought to justice, but also that they do not present a danger to victims and others after release. If a prisoner is to be released (under any circumstances), some victims want to be notified in advance and this should be their right. Victims may have been threatened during or after the offence, so they fear the offender and his or her release. Offenders may view victims or witnesses as being responsible for their punishment, which causes some victims to have a real fear of retaliation by offenders.

Victims should therefore have the right to make submissions (written and oral) to a parole authority considering whether to release a prisoner on parole and, if so, on what conditions. Parole authorities should be obligated to take into account victims' safety concerns and to put conditions on prisoners that address the safety concerns. Victims or witnesses should also be given the opportunity to take physical precautions and to prepare themselves mentally for the release of offenders.

Like the proposed Irish law reform, victims of crime might be given the power to request that alleged offenders be kept in custody and invited to provide information on which they base their request.

Consideration should be given to augmenting the sentencing process by providing for 'victim-offender conferencing'. If such is introduced, I add that authorities must endeavour, where appropriate, to establish or enhance systems of restorative practice that seek to represent victims' interests as a priority. Further, that authority must in law and practice emphasize the need for acceptance by the offender of his or her responsibility for the offence and the acknowledgement of the adverse consequences of the offence for the victim. The Parliament and or other authority shall also ensure that victims have the opportunity to choose or to not choose such conferencing or other forums, and if they do decide to choose such conference or forum, these must accord with victims' dignity, compassion and other rights as paramount.

Media

Although journalists, reporters and other media workers are covered by codes of ethics, there should be specific 'standards' or 'principles' governing coverage of crime and victimisation. For example, the media should be obliged to: present details of a crime in a fair, objective and balanced manner, avoiding over-dramatised news; respect the privacy of individual victims or victims' families who choose to refrain from dealing with the media; never report rumours or innuendoes about the victim or the crime (even the offender) unless such information is verified by reliable sources; and, never, without the victim's consent, identify him or her and never publish, broadcast or in other ways the victim's home address. The media should never approach the coverage of crime and/or victimisation in a manner that is "lurid, sensational or intrusive to the victim or his or her family".

Concluding comment

The overarching objective of reform in law, procedure and practice should be to ensure that all victims have access to justice as well as to support throughout the justice processes; and

that the criminal justice system in particular is transformed so as to minimise the obstacles that victims currently face in seeking justice.

Furthermore, the overarching justification for victim participation – thus accepting victims as genuine participants in the criminal justice system as recommended by the Victoria Law Reform Commission – is that fundamental fairness demands it. As George Fletcher wrote (1995), “A just legal system must stand by its victims … By seeking to punish the guilty, we do not abandon the innocent who suffer. We do not become complicitous in the crimes against them.”

Despite all the reforms and remarkable changes in criminal justice agencies and the courts, we have much distance yet to travel before finding that perfect balance that will serve the interests of victims and especially protect children and other vulnerable people.

Yours faithfully,

Michael O’Connell | Commissioner for Victims’ Rights, South Australia