Persons not abstractions

Address to the Victims Voices Conference

Office of the Commissioner for Victims of Crime

The Honourable Justice Peter Quinlan

Chief Justice of Western Australia

16 September 2022

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Thank you Ms Kraszlan, Commissioner for Victims of Crime, and your office for the invitation to address you all at today's conference.

I commence by acknowledging the Whadjuk people of the Noongar nation and pay my respects to their elders, past, present and emerging.

The subtitle of today's conference is Hearing the Voices of Victims. The subtitle, as these things often do, is intended, I think, to convey two distinct meanings.

First, 'Hearing the Voices of Victims' conveys that today's conference, this particular gathering of people, is an opportunity for those in the justice system, and beyond, to hear the voices of victims of crime and their experience of the justice system, and indeed, of their experience in our community more widely. In that sense, the conference's aims are intended to be achieved *today*; in and as part of the conference, victims' voices are intended to be heard. 'Hearing the Voices of Victims' is what this conference *is*.

Secondly, and more importantly, 'Hearing the Voices of Victims' is what today's conference is *about*. It is about an exchange of views on, and experiences with, the justice system to enable us to discern how victims' voices might better be heard by the justice system and by the community more widely. It is about identifying the ways in which those voices are *not* heard and what might be done

to change that situation. In this sense, the conference's aims will not be, and are not intended to be, achieved today. Those aims are part of the ongoing process of our justice system and community to improve justice in its broadest possible sense. And viewing justice in a broader sense than simply the *criminal justice system* may well be an integral part of better hearing the voices of victims.

If you detect a certain tentativeness in what I have said thus far, you are not mistaken. I have used words like 'might' because, as a judge working within the criminal justice system, I do not come here today suggesting that I have answers, or indeed that I bring a program of law reform. Not only would that be inconsistent with my position as a member of the judiciary, it would be presumptuous of me. I don't have all the answers and, even if I thought that I did, we should always be careful to recognise that, even now, the things that we do, sincerely and genuinely, in the interests of victims, may have (or may be perceived to have) the opposite of the effect that we intend.

Accordingly, my hope for what I will have achieved at the end of these remarks is not answers, but rather some questions that we all might think more deeply about as this work continues in the future.

To get into those questions, I will stay with our subtitle for the moment. 'Hearing the Voices of Victims', is a synonym for *communication*. To hear someone's voice is a means of communication: the means by which one person communicates with another. But it is, of course, not the only way – as we have all too painfully discovered over the past two and a half years of lockdowns, remote communication and Zoom meetings. To see a person's face is also a means of communication. To stand in a person's presence is a means of communication. To know a person's history, culture and life experience is a means of, or at least central to, communication. Dare I say, to know a person's

name is a means of communication.

Have you ever been in a conversation with a stranger, perhaps over coffee at a conference such as this, where, as the conversation deepens, one of you finally but awkwardly says, 'my name is Peter, by the way'. The 'by the way' in the remark, is usually a way of acknowledging that you have reached a point in the conversation in which, if it is to continue and deepen, you need to know the other person's name.

To the extent that we exclude any of these aspects of another person, voice, face, body language, history, culture, name, we run the risk of regarding the other person as an abstraction. And abstractions are not persons.

It should, I hope, be immediately apparent to you how this is relevant to victims of crime and their relationship with the criminal justice system. Of course, this is a point to be made in relation to victims of all kinds – victims of crime, victims of war, victims of poverty – and indeed to all persons. But as participants in the criminal justice system, in particular, it is incumbent upon us to see victims of *crime* as persons and not abstractions.

In many respects, of course, the law strives to do this. In a sentencing appeal concerning sexual offending delivered last year, for example, in agreeing with the decision of the Court, I made the following remarks:[i]

> Other than in the pages of the *Criminal Code*, sexual offences do not exist in the abstract. They are always, and in every case, a violation by one (or more than one) human being of another human being. And the impacts that such violations have on each individual victim are as many and varied as the individual experiences of victims themselves. To suggest that 'all things being equal' one form of violation is inherently more serious than the other is incoherent because, when it comes to such matters, 'all things are never equal'.

> That is why this Court has emphasised, as a matter of principle, that the seriousness of every offence of unlawful sexual penetration must be determined by its own individual circumstances. To this it may be added that the impact of every offence of unlawful sexual penetration must be determined by its own individual victim.
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> The present case provides a clear example of that principle, and, indeed, the importance of victim impact statements in the sentencing process. While the *Evidence Act 1906* (WA) prevents us from using her name, the complainant in this case has a name, and a personal history, and she provided a detailed victim impact statement as to the effect that the appellant's offending had on her. The learned sentencing judge read the entirety of that statement to the appellant in the course of her Honour's sentencing remarks.
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> The complainant's victim impact statement laid bare the profound and devastating effect that the appellant's offending had, and continues to have, on her. In the statement, the complainant describes the actual effects of the actual offending by the appellant; it leaves no room for the Court, or anyone else, to speculate as to how she might have been affected by a different hypothetical offence that did not occur. Indeed, such a hypothetical would be absurd.

You will notice, however, that even in these remarks there remains an element of abstraction. As is made clear, the *Evidence Act* prevents us from using the complainant's name.

And provisions like those in the *Evidence Act* provide us with an important illustration of the notion that I referred to earlier: that sometimes the things that we do, sincerely and genuinely, in the interests of victims may have (or may be perceived to have) the opposite of the effect of that which we intend.

The section of the *Evidence Act* referred to there is s 36C. Section 36C(1) provides:

> Subject to subsections (5) and (6) after a person is accused of a sexual offence no matter likely to lead members of the public to identify the complainant and, in the case of a complainant who is attending a school, no matter likely to lead members of the public to identify the school which the complainant attends, in relation to that accusation shall be published in a written publication available to the public or be broadcast, except by leave of the court which has or may

> have jurisdiction to try the person accused for that offence.

The legislative purpose underlying this provision is obvious. It is designed to protect the privacy and wellbeing of persons who are victims of sexual assault, including children.

The prohibition was introduced in 1976. Other than referring to 'a rape offence' rather than 'a sexual assault offence', s 36C(1) was in substantially the same terms when it was enacted. The purpose of the prohibition is clear from the Minister's Second Reading Speech when introducing the *Bill*. The Minister said, in relation to this and other reforms introduced at the time:[ii]

> The main purpose of this Bill is to provide certain measures which will reduce the level of harassment and embarrassment to which women who complain of rape may be subjected during the processes of police investigation, committal, and trial.

The Minister concluded:[iii]

> The present Bill contains three further reforms aimed at reducing the victim's trauma; namely, by restricting the evidence of her previous sexual experiences at the committal, by requiring the leave of the judge in similar matters at the trial, and by prohibiting the publication of identifying details. In addition, the Government is bringing forward other reforms which relate to criminal offences generally, including rape, in other legislation.
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> It is understood that Western Australia is the first State in the Commonwealth to actually translate its current thinking on this subject into legislative form. The Government hopes that its attempt to assist the unfortunate victims of this type of violent crime will not only meet with the approval of the House, but, in a practical way- and without taking away the accused's right to a fair trial - help to ease the situation of women who may be thus cruelly victimised.

As can be seen, the purpose of these laws was squarely directed to meeting the legitimate rights and needs of victims of sexual assault. This was to be a 'pro-victim' reform, in which Western Australia was a leader. We might, in

rhetorical terms, describe the laws as 'progressive'.

At the time that it was passed, other than the leave of the relevant court, s 36C of the *Evidence Act* admitted of no exceptions. While s 36C(5) made clear that the prohibition on identifying the complainant did not prevent the reporting of legal proceedings concerning allegations of sexual assault, there were no circumstances – absent a court order – in which a complainant could be named: before, during or after the proceedings.

That changed in Western Australia in 2000 when s 36C(6) was introduced. That provision enabled a publication or broadcast to identify a complainant with the written authorisation of the complainant so long as he or she was at least 18 years of age and did not have a mental impairment that meant that they were incapable of making reasonable judgments in respect of the publication or broadcasting of such matters.

Again, Western Australia made this change relatively early when compared with other jurisdictions; although it is still worth noting that the complete prohibition as it was originally enacted remained in place for 24 years.

Similar exceptions to the prohibition were made in other States, including, most notably in Tasmania in 2020 following the #LetHerSpeak campaign created by journalist and sexual assault survivor advocate Nina Funnell, together with Grace Tame, who was, of course, named as Australian of the Year in 2021 for her advocacy surrounding the issue.

The #LetHerSpeak campaign was launched in 2018. The laws such as s 36C (as originally enacted) were described as 'victim gag-laws'. As the campaign recognised, while the provisions were originally intended to prevent exploitation

of victims (and were part of a law reform intended to be 'progressive'), they were now understood to be 'clearly regressive'. The effects of the law are described by the campaign as including the following:[iv]

- silencing individual survivors who wish to speak out publicly, thereby increasing their sense of isolation, powerlessness and voicelessness;
- exacerbating existing trauma, through the further removal of control and denial of personal agency;
- maintaining and increasing social stigma around sexual violence by keeping taboos intact;
- enabling and protecting offenders of these crimes by ‘muzzling’ the victims even after convictions are in place;
- disempowering sexual assault survivors in the community more broadly, by erasing from view public survivor role models;
- restricting survivor-led advocacy and education by placing conditions on how survivors can participate and be heard in public debates – including those debates which directly affect them.

The #LetHerSpeak campaign has been immensely successful, not only in terms of law reform advocacy (although its work in this area is not over yet) but also in its effect on raising public awareness and understanding of the causes, impacts and consequences of sexual violence on persons within our community and on our community as a whole.

In its essence it is a campaign, I would like to suggest, which emphasises persons, rather than abstractions, when addressing issues of sexual violence. It also emphasises, with the continuation of a general prohibition on publication subject to an exception based on the *consent* of the victim, the importance of personal autonomy as a hallmark of 'victim focussed' law reform. Whether all of the provisions in Australia adequately incorporate the notion of informed consent in

this context is another question, perhaps for another day.

There are three observations which, I submit, we might also make about this process of change in the law over that period of 46 years.

The first is to recognise how much has changed in cultural and social attitudes over that time, as they concern sexual violence. No doubt part of the impetus for the reformers of the 1970s was, in addition to concerns of privacy, notions of shame that so often accompany the experience of sexual violence, including child sexual abuse. The significant emphasis on survivors of sexual violence reclaiming their voices, and their names, marks an important cultural shift from shame being attached to victims, to shame being attached to offenders. For those survivors who choose to be identified (and there will always be those who will not) their story is often one of moving beyond shame – or at least placing it squarely where it belongs: on those responsible for abuse and sexual violence. The stories of the survivor participants in the #LetHerSpeak campaign make this clear: 'It wasn't my fault, I'm not to blame, I have no shame here'.[v] This is not just an example of legislative reform; it is a profound cultural change.

The second observation is related to the first. In addressing the ongoing task of reform in this, and so many other, areas we should approach the efforts of our forebears with a little humility. The fact that we can see things more clearly than they can is not due to any moral or intellectual superiority on our part. It is just that we can see from a different vantage point than they could. There can be little doubt, for example, that the architects of s 36C of the *Evidence Act* as it was initially enacted, were sure that what they were doing was in the better interests of victims of sexual violence. That those laws had 'unintended consequences' (as the #LetHerSpeak campaign properly calls them), should not be a basis for impugning the motives, or the genuine reforms achieved, by those who came

before us.

And, most importantly, from both of these observations, we should ask ourselves: what are we doing right now, sincerely and genuinely, in the interests of victims of crime, that may be having the opposite of the effect that we intend? What will people attending a conference such as this in 20 or 40 years' time look back on and say: 'How could they have done that? How could they have thought that was in the interest of victims of crime?'

Obviously, I don't know the answer to this question. And I may never know.

But it is, I want to suggest, vitally important that we ask the question – again and again. Because, as has happened in the last 46 years, our culture will continue to change and what we now see as best practice, may not be in the future and may indeed be regarded as regressive.

Let me make one, very tentative suggestion, for us to think about. When I commenced working in the courts almost 30 years ago, when a complainant in a sexual assault trial gave evidence, he or she routinely did so, in the courtroom – in the presence of the judge or jury. Measures such as screens were put in place, so that the complainant did not have to see the accused. Nevertheless the complainant was present in the same place, and at the same time, as the decision maker. He or she was present *to* the decision maker.

Following this practice, it became commonplace, as it still is, for complainants to give their evidence remotely – by closed circuit television – from a room outside the courtroom. The complainant can be seen and heard by the decision maker, at the *time* that he or she was giving evidence, but was in a different *place*. He or she was literally *displaced*.

A final change, resulting in our current practice, is that we now, routinely, pre-record the complainant's evidence at an earlier court sitting, prior to the commencement of an accused's trial. The use of technology in this way was first introduced in Western Australia by amendments to the *Evidence Act* in 1992. In such a case, the evidence of the complainant is adduced at trial by replaying the audio-visual recording of the complainant's earlier evidence. Later amendments were made to the law to permit the use of recording made at a *previous* trial where closed circuit television was used and it is necessary that there be a subsequent trial or a retrial.[vi] Again, the complainant can be seen and heard by the decision maker giving his or her evidence; but is in a different *place* and at a different *time*. He or she is displaced in both place and time.

I am not suggesting in any way that these changes in practice are not a good thing, or are not necessary, in many (if not most) circumstances. Quite the contrary. They are clearly intended, and clearly designed, to lessen the trauma associated with giving evidence in court. While I have tried to eschew predictions of the future in this address, I think it likely that there will always be a role, and a significant role, for the use of such measures, especially in cases involving children.

But that doesn't excuse us from asking the question: what might we have lost, as a community and as a justice system, by the routine use of such procedures?

Since becoming a judge, I have heard evidence of sexual assault where the evidence has been given in person, in my presence; I have heard such evidence from a remote location (removed in place but not time); and I have heard such evidence by way of a pre-recording (displaced in both place and time). Speaking from my own experience, and I can only do that, whatever else one might say of

the capacity to assess a witness' evidence and other technical matters of that kind, there is no doubt that, for me, the human experience is different. Communication with the *person* is different. There is, at least in my experience, a sense in which, as witnesses are displaced in place or in time, they become less present, and more abstract.

Are we asking victims the same questions? To what extent do our well-intended practices and measures, designed to reduce trauma, have the effect of making victims feel displaced or unconnected with proceedings that are intimately concerned with them, and with their experiences? To what extent are we, prosecutors, defence counsel and judges, making decisions about the use of such procedures on behalf of complainants, rather than complainants making those decisions themselves? How good are we at taking into account the real and informed wishes of complainants in relation to these matters? How might we do it better?

I don't know the answers to these questions. But we should ask then. And we should not just ask the questions of ourselves. We should ask the victims. We should hear their voices.

Thank you for your attention.

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[i] ***Musgrave v The State of Western Australia*** [2021] WASCA 67 [7] – [10].
[ii] Western Australia, *Hansard*, Legislative Assembly, 3 November 1976, 3603 (Mr O'Neill).
[iii] Western Australia, *Hansard*, Legislative Assembly, 3 November 1976, 3605 (Mr O'Neill).
[iv] Nina Funnell, 'About the Gag Laws', *#LetHerSpeak* (Web Page) <https://www.letusspeak.com.au/about-the-gag-laws/>.
[v] 'Meet the Survivor Participants', *#LetHerSpeak* (Web Page) <https://www.letusspeak.com.au/survivor-participants/>.
[vi] Incidentally, this amendment to the Evidence Act was made at the same time as the introduction of s 36C(6).