

Submission to the
Victorian Law Reform Commission regarding
Victoria's committal procedure

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1 Introduction

In Victoria – as in other parts of the world – our understanding of the experiences of victims of crime in adversarial models of justice, and in broader social service systems, is evolving.¹ That is reflected in the appropriately framed Terms of Reference for the current inquiry by the Victorian Law Reform Commission (VLRC) into Victoria’s committal system. Among other things, this Reference asks the VLRC to consider reforms ‘which could reduce trauma experienced by victims and witnesses’, as well as asking the VLRC to consider best practice for supporting victims as may be relevant to its recommendations.

In my view, the fundamental historical function of committal hearings is redundant. The figures set out in the VLRC’s June 2019 Issues Paper² plainly demonstrate that such a small proportion of matters are discharged by magistrates at the committal stage that this original purpose alone cannot be a valid rationale for the continuation of this procedure. Were the case for the retention of committals purely a matter of efficiency this submission might conclude here, without the need to expand on the significant trauma that the delays and unnecessary cross-examinations often associated with committals cause to victims. However, it is necessary to recognise that some of the practices which have emerged around committals can be deeply problematic for victims.

I consider the VLRC’s current Reference an opportunity to ensure that problematic aspects of pre-trial processes be eliminated as far as reasonably possible, and that case management processes can be used to develop practices that will lead us closer to a criminal justice system and culture that is ready to offer trauma-informed responses to victims (and any other court users, for that matter).

Therefore, in this submission I advocate for:

- the abolition of the test for committal
- a presumption against victims and witnesses having to give evidence twice during a criminal proceeding
- the adoption of pre-trial processes to reduce trauma to victims of crime, including case management which actively considers relevant aspects of the *Victims’ Charter Act 2006* (Victims’ Charter) and appropriate supports for victims during the proceeding,

These are key components of the model for reform proposed by Victoria’s Director for Public Prosecutions (DPP). I strongly endorse the DPP’s model.

In making this submission, I acknowledge the work already done by my predecessor in this role, Mr Greg Davies. Mr Davies advocated for the abolition of committals as we know them during his time as Victoria’s Victims of Crime Commissioner.

1.1 Scope

In addition to adverse impacts on victims, arguments in favour of the abolition of committals often include:

- inefficient use of court time – not only that of judicial officers, but of registry and support staff, and legal practitioners
- unnecessary delay to the trial process, given that very few matters are dismissed at the committals stage
- the opportunity cost of matters in the Magistrates’ Court which could have been heard in place of committals.

As the Victims of Crime Commissioner, I am not best placed to comment on the statistical significance of these inefficiencies, delays and opportunity costs – although

¹ Maarten Kunst, Lieke Popelier, Ellen Varekamp, 2015, ‘Victim satisfaction with the criminal justice system and emotional recovery: A systematic and critical review of the literature’, *Trauma, Violence & Abuse* 16(3), 336-358 at 336.

² See Victorian Law Reform Commission, 2019, *Committals: Issues Paper June 2019* at 19-20.

they certainly have negative implications for victims. Rather, this submission assumes that stakeholders appropriately placed to inform the VLRC of those arguments will do so, and it builds on those from the perspective of the impact of committals on victims of crime.

Rather, this submission takes its focus to the following key elements of the current Terms of Reference:

- whether Victoria should maintain, abolish, replace or reform the present committal system
- if, when and in what circumstances witnesses or classes of witnesses should be examined prior to trial, including consideration of ways to minimise the need for victims and other vulnerable witnesses to give evidence multiple times
- in the context of any recommendations that the Commission makes, matters relevant to best practice for supporting victims, and anything else necessary to reduce trauma experienced by victims and witnesses.

2 Committals risk unnecessary trauma for victims

Many of the procedural reforms introduced in Victoria and other jurisdictions in recent decades have been aimed at reducing secondary victimisation or ‘instances where a victim is further victimised or traumatised through negative experiences during the criminal justice process and/or by support organisations’.³ Numerous elements of the current committals process risk secondary victimisation and trauma for the victims (and witnesses) required to participate in them.

2.1 Cross-examination of victims and witnesses at the committal stage

Cross-examination at committals can be more traumatic for victims than at other times

Cross-examination is often a traumatic experience for victims. Currently, when committal hearings are conducted in Victoria, all victims apart from children and cognitively impaired victims in sexual assault cases, can be required to be cross-examined leave is granted for that to occur.⁴ Present practice demonstrates that leave to cross-examine at the committal stage is granted in the vast majority of cases.⁵ According to the DPP, the ‘culture’ of cross-examining witnesses twice during a criminal proceeding is unique to Victoria.⁶

Many victims and witnesses whose cases progress to trial will be required to tell their story at least twice in the course of one legal proceeding: the first being a formal written statement and the second being at trial. However, the telling of a story in the context of cross-examination can be a particularly traumatic, and when it occurs at the committal stage it often means that victims and witnesses do not only need to tell their story twice, but rather be cross-examined twice. (Further, victim survivors of family violence are often subjected to cross-examination in a number of different jurisdictions, including the Family Court or Federal Circuit Court, in intervention order proceedings and child protection matters.)

As the VLRC heard in the course of consultation to inform its report on *The Role of Victims in the Criminal Trial Process* (2016 VLRC Report), cross-examination at the committal stage can be even worse than at the trial for the following reasons:

- ‘Victims cannot tell their story through evidence-in-chief. Rather, their statement is tendered to the magistrate and they are subject only to cross-examination.

³Australian Institute of Criminology, ‘Studying victims of crime’, *The database of victimisation experiences*, accessed from <https://aic.gov.au/publications/tbp/tbp060/studying-victims-crime>

⁴*Criminal Procedure Act 2009* ss 123 and 124.

⁵See Victorian Law Reform Commission, 2019, *Committals: Issues Paper June 2019* at 17-8.

⁶Director of Public Prosecutions Victoria, 1 October 2018, *Policy paper: Proposed reforms to reduce further trauma to victims and witnesses*.

- The manner of questioning by the defence is not constrained by the presence of a jury. As a result it may be more oppressive or intimidating.⁷

Cross-examination at committals can be abused by defence practitioners

Some would argue that identifying prior inconsistent statements is a key function for the defence; a 'central strategy in discrediting a witness. Skilful cross-examination often involves tripping up a witness on inconsistencies between different earlier tellings of their story...or between one or more earlier tellings on the one hand, and answers about the story in cross-examination on the other.'⁸ However, some judicial officers and support workers have suggested to the VLRC that defence practitioners might exploit cross-examination of victims at the committal stage to 'generate inconsistencies' in witnesses' evidence.⁹

Proponents of cross-examination of victims and witnesses at the committal stage suggest it is in the interests of justice to identify inconsistencies. However, this needs to be balanced with other realities of those giving evidence:

- sociolinguistic research suggests that variations in storytelling are common (even 'inevitable'), and that stories told through the common question-and-answer style format of the courtroom can lead to sometimes artificial co-construction, 'with the interviewer actively contributing to the telling of the witness's story'.¹⁰ Despite this, the legal system tends to ignore the 'social and perceptual dimensions of inconsistency'.¹¹ This problem can be compounded for Aboriginal witnesses, who may be culturally unfamiliar with such approaches¹²
- for sexual assault victims, the retelling of their story and can cause flashbacks, confusion, panic attacks and nausea, as well as difficulty remembering,¹³ which can affect the quality of the victim's evidence and lead to inadvertent inconsistencies
- 'the stress experienced by victims who are cross-examined at committal can limit their ability or willingness to give evidence at trial'.¹⁴

Further restrictions on cross-examination of victims and witnesses at the pre-trial stage

I support the abolition of the test for committal. In doing so, I recognise that there might occasionally be a legitimate need to test the evidence of victims and witnesses prior to trial. To that end, I consider that the DPP's model of an 'Issues hearing', alongside a presumption against the cross-examination of witnesses twice in the one criminal proceeding, would strike an appropriate balance in reducing unnecessary trauma to victims and witnesses. I also endorse the DPP's proposed prohibition on cross-examination of complainants in sexual or family violence offences at committal.

Additional measures to reduce trauma during pre-trial cross-examination

Recommendation 37 of the 2016 VLRC Report called for the creation of a definition for 'protected victims', to include victims who are 'likely to suffer severe emotional trauma or be so intimidated or distressed as to be unable to give evidence or give evidence fairly',¹⁵ with a view to expanding eligibility for protective procedures to protected victims. Critically, the VLRC's recommendation for considering whether a victim should be considered a 'protected victim' has regard to the victim's views. This approach

⁷ Victorian Law Reform Commission, 2016, *The role of victims of crime in the criminal trial process* at 207. (Note: footnotes have been removed from the original text.)

⁸ Diana Eades, 2008, 'Telling and retelling your story in court: Questions assumptions and intercultural implications', *Current Issues in Criminal Justice* 20(2), 209-230 at 215.

⁹ Victorian Law Reform Commission, 2016, *The role of victims of crime in the criminal trial process* at 211.

¹⁰ Diana Eades, 2008, 'Telling and retelling your story in court: Questions assumptions and intercultural implications', *Current Issues in Criminal Justice* 20(2), 209-230 at 213-4.

¹¹ Diana Eades, 2012, 'The social consequences of language ideologies in courtroom cross-examination', *Language in Society* 41(4), 471-497 at 476.

¹² Diana Eades, 2008, 'Telling and retelling your story in court: Questions assumptions and intercultural implications', *Current Issues in Criminal Justice* 20(2), 209-230.

¹³ Victorian Law Reform Commission, 2016, *The role of victims of crime in the criminal trial process* at 201.

¹⁴ Victorian Law Reform Commission, 2016, *The role of victims of crime in the criminal trial process* at 207.

¹⁵ Victorian Law Reform Commission, 2016, *The role of victims of crime in the criminal trial process*, recommendation 37.

recognises the role for victims as participants in the criminal proceeding and marks an important departure from the trend of procedural reforms in various jurisdictions which have failed to acknowledge that the one measure might not be universally appropriate for all victims of crime.¹⁶

Recommendation 37 is an important step in the evolution towards a criminal justice system that is capable of trauma-informed responses to all its users, including victims of crime. I therefore advocate for its implementation, and for a prohibition on the cross-examination of protected victims at the pre-trial stage (that is, an extension to the DPP's proposal for complainants in sexual or family violence offences).

It is important to acknowledge that adequate resourcing of these reforms should extend to the education of judicial officers, court staff and the legal profession about the impacts of trauma and cross-examination. In this respect, the publication recently launched by the Judicial College of Victoria, *Victims of crime in the courtroom: A guide for judicial officers* (JCV Guide) offers an excellent starting place, but the experience of victims will only improve when the steps outlined in it become a meaningful practice.

2.2 Early resolution of at the pre-trial stage

The nexus between committals and disclosure

While I appreciate that some perceive that a practice has emerged in Victoria linking the prosecution's disclosure obligations to the committal stage, I consider that the same objectives could be achieved through effective pre-trial case management. An example of this is outlined in the DPP's proposed model.

Implications of disclosure for early guilty pleas and plea negotiations

The disclosure of the prosecution's case can lead to early guilty pleas by the accused, and in some cases, the process of assessing evidence can see plea negotiations commence. Early guilty pleas mean that victims are not exposed to the trauma of a criminal trial and that the State does not unnecessarily commit resources in a costly, time consuming exercise. Plea negotiations can potentially have the same effect. Each of these can be achieved through effective disclosure (without the need for committal), and, if necessary, through the issues hearing and case management approach in the DPP's proposed model.

It is important to recognise that regardless of the committal step in the criminal justice process, not all victims feel the same way about the early resolution of proceedings – especially plea negotiations. Some victims are relieved if a lesser charge means that their matter won't go to trial, they don't need to give evidence, and the offender admits their guilt — other victims can feel completely let down or cheated. Regardless of a particular victim's response, the risk of their secondary victimisation is likely to be reduced if prosecuting agencies ensure that they comply with the relevant Victims' Charter principles; if victims are given information about the process, are kept informed of the progress of their case and have the opportunity to have their views heard — even if the outcome doesn't result in a conviction or a lengthy sentence.

2.3 Best practice for supporting victims in pre-trial processes

The JCV Guide appropriately recognises that 'victim participation in adversarial systems is a developing area and no single approach will cater to all'.¹⁷ It encourages judicial officers to ask themselves whether the victim has 'specific needs that can be met to maximise their participation and engagement with the court process'.¹⁸ I recommend taking that consideration further, such that it becomes a standard matter for discussion at any pre-trial case management hearings. If well handled, this step could lead to

¹⁶ Maarten Kunst, Lieke Popelier, Ellen Varekamp, 2015, 'Victim satisfaction with the criminal justice system and emotional recovery: A systematic and critical review of the literature', *Trauma, Violence & Abuse* 16(3), 336-358 at 337.

¹⁷ Judicial College of Victoria, 2019, *Victims of crime in the courtroom: A guide for judicial officers* at 2, accessed from: http://www.judicialcollege.vic.edu.au/eManuals/Victims/Victims%20of%20Crime%20in%20the%20Courtroom_WholeDoc.pdf

¹⁸ Judicial College of Victoria, 2019, *Victims of crime in the courtroom: A guide for judicial officers* at 7.

opportunities for greater integration and consistency between Victorian jurisdictions if victim supports can remain in place even if the proceeding is tried in a higher court.

Earlier this year, the Independent Victims' Commissioner for London, Claire Waxman, delivered a Review of Compliance with the Victims' Code of Practice¹⁹ (similar to Victoria's Victims' Charter). Ms Waxman's Review was the first of its kind in London and involved exhaustive consultation, including with victims themselves.

Unsurprisingly, Waxman's Review found that 'victims put a real premium on emotionally intelligent service and clear information on what is happening with their case' – at every stage of the process.²⁰ Themes like this emerged through the 2016 VLRC Report.

I consider many of Ms Waxman's recommendations in respect of victim support 'before trial' to be highly relevant in the Victorian context, and I commend them to the VLRC. In particular, it would be appropriate to consider the following supports for victims in any pre-trial processes:

- The availability of victim support workers to attend court with victims, particularly if a victim is to be cross-examined
- Where necessary, the development of safety plans from the time that a victim enters a court building to the point of exit, to minimise contact with the accused and the accused's family (and if this is not possible, informing the victim of that fact)
- Facilitating opportunities for victims to orientate themselves with court rooms – either virtually or in physically on site. (While this is relevant regardless of whether a victim will be giving evidence at a particular listing, but it is especially important when they will be).

3 Conclusion

The VLRC's current Reference presents an important opportunity to move Victoria towards a contemporary criminal justice process – one that could be capable of offering trauma informed responses to victims of crime. The essence of the committals process has no role in such a system, but reforms to related aspects of the pre-trial process present a chance to better establish the role of victims of crime as participants in the process, and adopt meaningful practices to support that.

To that end, I strongly endorse the model proposed by the DPP. I further advocate for the implementation of the Recommendation 37 from the 2016 VLRC Report to establish a definition for 'protected victims' to whom protective procedures should be available, including the same prohibition on pre-trial cross-examination of complainants in sexual and family violence offences.

Last, but far from least, this Reference is a chance for courts, judicial officers, legal practitioners and victim support services to actively consider supports that would assist a victim's participation throughout the proceeding at the pre-trial stage.



Fiona McCormack

Victims of Crime Commissioner.

¹⁹ Independent Victims' Commissioner for London, March 2019, *Review of compliance with the Victims' Code of Practice*, accessed from: https://www.london.gov.uk/sites/default/files/vcop_final_pages.pdf

²⁰ Independent Victims' Commissioner for London, March 2019, *Review of compliance with the Victims' Code of Practice* at 18.