



15 August 2019

Bruce Gardner PSM
Acting Chair
Victorian Law Reform Commission
Level 3, 333 Queen Street
Melbourne Vic 3000

Re: VLRC review of Victoria's committal system

Dear Mr Gardner,

The Office of the Public Advocate (OPA) welcomes the opportunity to contribute to the Victorian Law Reform Commission's review of Victoria's committal system.

OPA is a statutory office, independent of government and government services, that works to protect and promote the rights, interests and dignity of people with disability in Victoria.

OPA provides a number of services through which we work towards these goals, including the provision of advocacy, investigation and guardianship services to people with cognitive impairments or mental illness. OPA also coordinates five volunteer programs, the largest being the Community Visitors Program which visits a variety of supported accommodation settings for people with disability or mental illness to provide independent oversight of the conditions therein.

Most relevant to this review are OPA's experiences coordinating the Independent Third Person volunteer program. This program runs 24 hours a day, seven days a week and supports alleged offenders, victims and witnesses with a cognitive impairment or mental illness.

Independent Third Persons (ITPs) attend police interviews for adults and young people with a cognitive impairment or mental illness to ensure that they are not disadvantaged during the interview process. ITPs are trained to support and assist the person with disability through the police interview process: including by facilitating communication between the person and police and by ensuring that the individual understands the caution and rights sufficiently to participate in the interview process. In addition, ITPs help the person being interviewed contact a friend, relative or lawyer if requested.

While the ITP's role is limited to the police interview setting and, as such, they do not have direct experience of the committals process, their work supporting vulnerable people during these processes, including the audiovisual recording of evidence in chief, can influence the reliability of evidence disclosed at the committal. The more successful the ITP is in facilitating communication between the witness and the police, the more completely the statement or audiovisual recording will satisfy a key purpose of the committal: to fully disclose the prosecution's case. This would also likely reduce the need for witnesses (to whom special protections are not already available) to be cross examined at the committal and potentially retraumatised.

The ITP program has a memorandum of understanding with Victoria's Intermediaries Pilot Program, which has been in operation since 1 July 2018. The pilot supports vulnerable victims and witnesses of sexual assault and homicide matters in six locations. We understand that the intermediaries are paid professionals (psychologists, social workers and allied health workers) with a range of special skills and experiences that enable them to assess the communication support

needs of vulnerable witnesses and promote access to justice in police interviews and, most importantly, in court.

We understand that children and people with cognitive impairment who are victims of sexual assault are already protected from being retraumatised by the committals process (section 123 of the *Criminal Procedure Act 2009*(Vic)). The intermediaries may still be required to provide support in committal hearings to vulnerable witnesses in homicide matters, or in other offence categories if the program is expanded.

OPA looks forward to the evaluation of the pilot and to a state-wide roll-out.

OPA makes the following recommendations in relation to the ITP and Intermediaries Pilot Program to better protect and promote the rights, interests and dignity of people with a cognitive impairment or mental illness in Victoria's committal system.

Expansion of the ITP and Intermediaries Pilot Programs

Intermediaries, like ITPs, can promote one of the purposes of the committals hearing – of full disclosure of the prosecution case – and reduce the need for cross-examination of witnesses, by better enabling people to tell their stories (either at the police interview or at a special hearing). To this end, OPA recommends the program be expanded to support people with cognitive impairment in a broader range of offence categories than is currently offered.

On occasion, ITPs have been asked to continue their involvement with the person they supported in the police interview context by going to court with them. The ITP program is aware that DHHS has made such requests in the past, knowing the person had no one to support them once they reached court. Unfortunately, the ITP program is not funded to provide this support.

The Intermediaries Pilot Program may pick up some of these people if it is expanded to support more people with complex communication support needs accessing the criminal justice system. Alternatively, the ITP program could be funded to support many of the people they already work with in police interviews who also require support in court settings and have no one else to provide this support.

Legislate to enshrine the role of ITPs and authorise access to audio visual recordings

The ITP role is not legislated. Given the importance of this role to the effectiveness of the court process, it should be enshrined in legislation and properly resourced. The ITP Program is administered by paid staff, but police interviews are conducted by volunteers, so it is very cost effective. There is a similar role for a person under the age of 18 – the Independent Person – that is legislated for in the *Crimes Act 1958* (Vic) (see ss464B, 464E, 464K, 464M, 464Y, 464Z, 464ZA, 464ZGB). OPA would like to see the same assurance of rights protection that Independent Persons currently provide for children in police interviews legislated for people with cognitive impairment or mental illness.

In addition, to enhance the performance of OPA's ITPs, the ITP program requires access to audiovisual recordings of interviews attended by ITPs for training purposes. Ideally the program would have access to one recording (after the suspect and victim have been deidentified) for each ITP annually so that program staff can review the recording with them to improve their practice and further enhance the skills of individual ITPs.

If this level of access is not possible, OPA nevertheless believes that access to deidentified recordings would improve OPA's ITP training outcomes, as this would enable the program to identify the development needs of ITPs more broadly.

OPA recognises that this would require amendment to the *Crimes Act 1958* (Vic), which prohibits all but authorised persons from possessing or playing such audio or audiovisual recordings. OPA notes that the Act provides for recordings to be used for training and teaching purposes, for example for training police, with certain conditions (section 464JD). OPA invites the Commission to consider whether amendments to the Act could likewise support the development of ITPs by allowing access to audiovisual recordings of ITP supported police interviews.


OPA believes that the potential for cross-examinations in committal hearings to retraumatise victims and witnesses is high and, as such, cross-examination should be avoided wherever possible. OPA references the VLRC's past work in relation to vulnerable victims and supports the recommendations numbers 37 to 40 made in the *Victims of Crime in the Criminal Trial Process: Report* (2016).

In particular, OPA supports the concept of a case by case assessment of whether a person is determined to be a 'protected victim' – one 'who is likely to suffer severe emotional trauma or be so intimidated or distressed as to be unable to give evidence or give evidence fairly' – and who would receive special protections on that basis. As that report was focused on victims, OPA asks the Commission to consider whether their previous recommendations may be valuably extended to encompass witnesses.

OPA seeks to ensure that people with cognitive impairment are protected from further trauma, but that they are also supported to give evidence in less stressful circumstances than a court setting may engender. This goal, which stands alongside the right of the accused to a fair trial, may or may not be best served by discontinuing committal hearings. OPA looks forward to the VLRC's careful consideration of this issue and hopes that, where committals continue, that special protections are further enhanced for victims and witnesses with communication support needs.

I welcome the opportunity to discuss the matters raised in this letter further, should you wish to discuss.

Yours sincerely



Colleen Pearce
Public Advocate