

## Submission to Victorian Law Reform Commission

# Committals.

## Rape & Domestic Violence Services Australia

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## Summary of recommendations

Recommendation 1: That the Commission consider implementing reforms such as the reforms implemented in NSW where a case management *"on the papers"* approach is now utilised.

Recommendation 2: That the Commission consider a trauma approach by including a *"protected victim"* category within any reforms to the committals system ensuring that individuals within this category are not cross-examined at the committals stage.

Recommendation 3: That if the Commission were to implement the *'DPP model'* into the committals system in Victoria that the model include provision for vicarious trauma strategies.

Recommendation 4: That the Commission in its final report recommend the Victorian Government implement the *'DPP model'* in the committals system in Victoria.

Recommendation 5: That the Commission consider including wrap-around support services for victims of crime and other vulnerable witnesses within the *'DPP model'* in the committals system in Victoria.

## 1. Background

- 1.1 Rape & Domestic Violence Services Australia welcome the opportunity to contribute to the Victorian Law Reform Commission's ('the Commission') review of the committals system in Victoria.
- 1.2 Rape & Domestic Violence Services Australia is a non-government organisation that provides a range of specialist trauma counselling services to people who have been impacted by sexual, domestic or family violence and their supporters. Our services include the NSW Rape Crisis counselling service for people in NSW whose lives have been impacted by sexual violence; Sexual Assault Counselling Australia for people accessing the Redress Scheme resulting from the Royal Commission into Institutional Responses to Child Sexual Abuse; and the Domestic and Family Violence Counselling Service for Commonwealth Bank of Australia customers and staff who are seeking to escape domestic or family violence.
- 1.3 In making this submission, we do not propose to address each Term of Reference as set out by the Commission.

## 2. Language and Terminology

- 2.1 In this submission, Rape & Domestic Violence Services Australia use the term *sexual violence* as a broad descriptor for any unwanted acts of a sexual nature perpetrated by one or more persons against another.
- 2.2 Rape & Domestic Violence Services Australia use the term *people who have experienced sexual, domestic and/or family violence* to describe individuals who have suffered this type of violence, rather than the terms survivors or victims. This language acknowledges that, although experiences of violence are often very significant in a person's life, they nevertheless do not define that person. Moreover, the process of recovery from trauma is complex, multifaceted and non-linear and will often involve experiences of survival in combination with experiences of victimisation.
- 2.3 Rape & Domestic Violence Services Australia use gendered language when discussing sexual, domestic and family violence. This reflects the fact that sexual, domestic and family violence are predominantly perpetrated by men against women. However, we acknowledge that gendered language can exclude the experiences of some people impacted by sexual, domestic and family violence. We acknowledge that:
  - 2.3.1 Women can also be perpetrators of sexual, domestic and family violence.

2.3.2 Sexual violence occurs within LGBTIQ+ relationships at a similar rate to sexual violence within heterosexual relationships.<sup>1</sup>

2.3.3 Sexual violence is perpetrated against transgender and gender-diverse people at a higher rate than against cisgender people.<sup>2</sup>

### 3. Introduction

- 3.1 Rape & Domestic Violence Services Australia are encouraged that the Commission are undertaking this committals system review. There is a need for greater efficiency within the criminal justice process throughout Australia to ensure that there is a consideration of the trauma impacts experienced by those who have experienced violence, victims of crime and other vulnerable witnesses.
- 3.2 It is imperative that any reforms to the committals system in Victoria include a trauma approach that has a clear focus on the needs of complainants and other vulnerable witnesses, as well as upholding the rights of the accused to a fair trial. It is concerning that it is common practice for Defence lawyers to give complainants and other vulnerable witnesses *“a taste of what to expect at trial,”* during cross-examination at the committals stage.
- 3.3 Rape & Domestic Violence Services Australia state that any reforms made to the committals system should include policies that support professionals working in this space with vicarious trauma management. Such policies should also include best practices for supporting those who have experienced violence, are victims of crime and other vulnerable witnesses to reduce their trauma impact.
- 3.4 Rape & Domestic Violence Services Australia highlights the reforms made to the committals system in NSW in 2018. The decision to commit the accused to trial now occurs through a case conference and charge certification *“on the papers”* process, rather than formal Court proceedings. Further details as to this process are set out below.
- 3.5 Rape & Domestic Violence Services Australia understands that there are resource concerns within the Victorian criminal justice system; however, if the current committals system is not working effectively then reform should be considered. This will inevitably mean that additional resources will need to be allocated to undertake the change, however this is unavoidable in the short term and will greatly benefit the system in the long term.

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<sup>1</sup> B. Fileborn 'Accounting for space, place and identity: GLBTIQ young adults' experiences and understandings of unwanted sexual attention in clubs and pubs' (2013) 22(1) *Critical Criminology* 81.

<sup>2</sup> K. O'Halloran, 'Family Violence in an LGBTIQ context' (2015) 2 *Royal Commission In Brief*, <https://www.dvrcv.org.au/sites/default/files/Family-violence-in-an-LGBTIQ-context-Kate-OHalloran.pdf>;

## 4. Reforming the current committals system

**Term of Reference 1:** Whether Victoria should maintain, replace or reform the present committals system.

- 4.1 Rape & Domestic Violence Services Australia state that a critical feature of any reform to the current committals system must be to include a trauma approach. A trauma approach that centres on the needs of victims of crime and other vulnerable witnesses, while also upholding the right to a fair trial of the accused.
- 4.2 Rape & Domestic Violence Services Australia urge the Commission to consider the current purpose of the formal Court committals process, and whether there is a more appropriate avenue within the system to handle the committals stage. When these committals proceedings are heard by the Court, strict rules of evidence apply. There is a concern that this may be having an exacerbated adverse impact on victims of crime and other vulnerable witnesses.
- 4.3 A key concern of Rape & Domestic Violence Services Australia, (noted from the *Committals Issues Paper* at Table 2) is that an overwhelming percentage of applications for leave to cross-examine witnesses during the committals stage are granted. In the 2017-18 period, **90.5%** of these applications were granted.<sup>3</sup>
- 4.4 Ideally, a trauma approach should actively seek to meet the needs of victims of crime and other vulnerable witnesses in a way that facilitates healing and recovery. This requires a shift in institutional attitudes and practices to ensure that they are treated with respect at every stage of the process and are assisted to access the information and support that they need in order to advance their recovery.<sup>4</sup>
- 4.5 It is essential above all, that all victims of crime and other vulnerable witnesses be *“treated with compassion and respect for their dignity.”*<sup>5</sup> This is in keeping with the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.

## 5. The New South Wales Approach to the committals process

- 5.1 In 2018, legislative changes were made to the committals process in NSW. A key change as part of these reforms included Magistrates in NSW Local Courts no longer making judicial decisions as to whether the accused would be committed to stand trial, and their function became to case manage the committals process only.
- 5.2 In NSW, the function in deciding whether the accused will be committed to stand trial is now managed through a case conferencing and charge certification process; whereby a Senior Prosecutor is required to review the evidence and confirm that

<sup>3</sup> Victorian Law Reform Commission, *Committals*, Issues Paper (June 2019), Table 2 at 18.

<sup>4</sup> NSW Department of Attorney General and Justice, *Review of the Consent Provisions* (October 2013), 40-42.

<sup>5</sup> *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Adopted by the General Assembly Resolution 40/34 on 29 November 1985, Article 4.

each element for a charge can be made out. Further, the Senior Prosecutor and Defence Lawyer then meet for a case conference to discuss the charges (this case conference only occurs if the accused is represented). A key focus of this conference is to consider an early guilty plea and narrow the scope of the issues for trial.

- 5.3 Consideration of this type of committals process in NSW has been debated for many years, noting that Berman in 1990 considered this concept where the committals process would become an administrative function through the Office of the Director of Public Prosecutions, however there was concern at that time as to resources.<sup>6</sup>
- 5.4 The changes to the NSW system allow the committals process to occur “*on the papers*” with minimal judicial involvement, and most importantly, would likely not require victims of crime and other vulnerable witnesses to be cross-examined at the committals stage.
- 5.5 An additional benefit to the case conference approach is that it provides a significant opportunity for early guilty pleas, which in turn could result in savings in costs and the resources of the Court, prosecution team, defence team and most importantly, victims of crime and other vulnerable witnesses not being put through the trial process. Although, Rape & Domestic Violence Services Australia notes that a major concern from the recommendations of the *Royal Commission into Institutional Responses to Child Sexual Abuse* was that when early guilty pleas occur, the accused is usually pleading to lesser offences, which can be distressing for those who have experienced violence against them;<sup>7</sup> however, the trauma impact may still be significantly reduced if victims are not exposed to the trial process.
- 5.6 Under Section 84 of the *Criminal Procedure Act 1986* (NSW), a Magistrate may only direct that a complainant or ‘*vulnerable person*’ be directed to give evidence at the committals stage if they are satisfied “*there are special reasons why*”.<sup>8</sup> The current case law in NSW indicates that this test is a high standard to meet.<sup>9</sup>
- 5.7 Rape & Domestic Violence Services Australia understand that a similar approach has been adopted in South Australia in that the Office of the Director of Public Prosecutions initially plays a more central role in determining the charges to be prosecuted. The aim of this type of process would be to achieve a more streamlined approach and provide clarity on the charges from an early stage in the proceedings. This approach would be particularly helpful to those who have experienced sexual violence. There would be more understanding and consistency

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<sup>6</sup> P. Berman, ‘The future of committal proceeding in New South Wales,’ (Paper presented at The Future of Committals,’ Conference, Australian Institute of Criminology, 1-2 May 1990), 36.

<sup>7</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Recommendations* (2017), 113.

<sup>8</sup> *Criminal Procedure Act 1986* (NSW), s 84.

<sup>9</sup> *Tez v Longley* (2004) 142 A Crim R 122.

from the start of proceedings. It would also minimise confusion or distress, during what is already a distressing and re-traumatising time for victims of crime and other vulnerable witnesses.

Recommendation 1: That the Commission consider implementing reforms such as the reforms implemented in NSW where a case management “*on the papers*” approach is now utilised.

## 6. Approaches to the committals process internationally

- 6.1 Rape & Domestic Violence Services Australia understand that New Zealand also use a case management system, where the Prosecution and Defence undertake “*case management discussions*” to assess whether the matter should proceed to trial.<sup>10</sup>
- 6.2 In England and Wales, Prosecutors are significantly involved in the early stages when charges are first considered. They provide advice in these early stages as to whether certain charges will be appropriate.<sup>11</sup>
- 6.3 Rape & Domestic Violence Services Australia urges the Commission, when considering reforms to the committals system in Victoria, to consider an early intervention case management approach such as the one used in England and Wales. This in turn may streamline the committals system more efficiently, which would result in savings in resourcing and costs. It would also reduce the distressing and re-traumatising impacts of the Court process on victims of crime and other vulnerable witnesses.

## 7. Minimising the need for those impacted by violence, victims of crime and other vulnerable witnesses to give evidence multiple times

**Term of Reference 4:** 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.

- 7.1 Rape & Domestic Violence Services Australia reiterate that any legislative reform to the committals system in Victoria should be made in keeping with a trauma approach that centres on the needs of the complainant, victims of crime and any other class of vulnerable witnesses; whilst also upholding the accused’s right to a fair trial.

<sup>10</sup> New Zealand Ministry of Justice, *Lawyers & Service Providers – Case Management Process*, 2017, <<https://www.justice.govt.nz/about/lawyers-and-service-providers/criminal-procedure-act/case-management-process/>>

<sup>11</sup> UK Ministry of Justice, *Press Release: Faster justice as unnecessary committal hearings are abolished*, 28 May 2013, <<https://www.gov.uk/government/news/faster-justice-as-unnecessary-committal-hearings-are-abolished>>



- 7.2 Rape & Domestic Violence Services Australia urges the Commission to recommend in its final report that there be no opportunity for victims of crime and other vulnerable witnesses to be cross-examined during the committals stage.
- 7.3 From the two reform models proposed in the *Committals Issues Paper*, Rape & Domestic Violence Services Australia state that the Commission should consider the ‘DPP model’ more closely, as this model would “abolish the culture of cross-examining witnesses twice during a criminal proceeding.”<sup>12</sup>
- 7.4 Rape & Domestic Violence Services Australia does have concerns that the current provisions in Section 198A of the *Criminal Procedure Act 2009* (Vic) allow for the accused to make an application to cross-examine any witness (other than the complainant) at any time. Although, it is acknowledged that this section specifically excludes the cross-examination of a witness in a sexual offence case involving a complainant who is either under the age of 18 or has a cognitive impairment.<sup>13</sup> It is the position of Rape & Domestic Violence Services Australia that this legislation does not go far enough in protecting victims of crime and other vulnerable witnesses from being cross-examined during the committals stage.
- 7.5 In 2002, Western Australia abolished the ability of the accused to obtain leave to cross-examine witnesses during a committals hearing, and Rape & Domestic Violence Services Australia encourages the Commission to consider a provision such as this when reforming the committals system in Victoria.<sup>14</sup>
- 7.6 If the Commission are not minded to abolish the ability of the accused to cross-examine witnesses during the committals stage, then Rape & Domestic Violence Services Australia urges the Commission to consider adopting a high standard such as the “special reasons” test used in the NSW as a way forward. There needs to be recognition that victims of crime and other vulnerable witnesses, regardless of their age, intellectual capacity or other factors have already faced a significant level of scrutiny and re-traumatisation through a police investigation prior to Court proceedings commencing. The law should not further burden these individuals with additional possibilities of cross-examination, which in our view are unnecessary prior to a trial.
- 7.7 Rape & Domestic Violence Services Australia are supportive of the recommendations made in the 2016 Victorian Law Reform Commission’s report ‘*Victims of Crime in the Criminal Trial Process*’ of the introduction of a “protected victim” category for those who are likely to suffer trauma or be so distressed when giving evidence.

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<sup>12</sup> Victorian Law Reform Commission, *Committals*, Issues Paper (June 2019), 68.

<sup>13</sup> *Criminal Procedure Act 2009* (Vic), s 123.

<sup>14</sup> Australian Law Reform Commission, Australian Government, *Family Violence – A National Legal Response*, 26. *Reporting, Prosecution and Pre-trial Processes*, ALRC Report 114, 2010, <<https://www.alrc.gov.au/publications/26.%20Reporting%2C%20Prosecution%20and%20Pre-trial%20Processes/giving-evidence-committals>>

- 7.8 While, the Victorian Law Reform Commission recommended in the 2016 report that the eligibility as to whether an individual fits into this category could be assessed on a case-by-case basis,<sup>15</sup> Rape & Domestic Violence Services Australia state that the nature of the offence should automatically place the complainant or other vulnerable witness into the “*protected victim*” category. This category of persons would then be excluded from cross-examination at the committals stage entirely.

Recommendation 2: That the Commission consider a trauma approach by including a “*protected victim*” category within any reforms to the committals system ensuring that individuals within this category are not cross-examined at the committals stage.

## 8. The impact of our recommended changes to the criminal justice system

Term of Reference 6: The impacts of any recommended changes on all parts of the criminal justice system, and what will be needed to ensure the successful implementation and operation of those changes, including resource implications.

### Additional funding for the ‘DPP model’

- 8.1 There will be a need for additional funding, resources and training if, for example, the ‘DPP model’ as set out in the *Committals Issues Paper* is implemented.<sup>16</sup> The additional funding in our view, would be necessary to reform the current committals system.
- 8.2 The additional funding and resources will initially be required within the Office of the Director of Public Prosecutions as there will be a need for Senior staff to be trained on effective case management of the committals stage.
- 8.3 Within this additional funding structure, Rape & Domestic Violence Services Australia would recommend a vicarious trauma management strategy, as an increased workload in case management of the committals stage may increase the risk of vicarious trauma for professionals working within this structure.<sup>17</sup>
- 8.4 Vicarious trauma describes the negative psychological impacts experienced by people not directly affected by traumatic events but nevertheless exposed to them in some way.<sup>18</sup>

<sup>15</sup> Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process*, Report, August 2016, <<https://www.lawreform.vic.gov.au/all-projects/victims-crime-criminal-trial-process>>, 203.

<sup>16</sup> Victorian Law Reform Commission, *Committals*, Issues Paper (June 2019), 68.

<sup>17</sup> NSW Attorney General’s Department, *Responding to sexual assault: The way forward* (December 2005), 170.

<sup>18</sup> R&DVSA’s understanding of vicarious trauma is influenced by the work of Charles Figley, Laurie Pearlman and Zoe Morrison among others. See for example, C. R. Figley, ‘Compassion fatigue as secondary traumatic stress disorder: An overview’ in C.R. Figley (Ed.) *Compassion fatigue: Coping with secondary traumatic stress disorder in those who treat the traumatized* (New York, NY: Brunner/Mazel, 1995); L. A. Pearlman, ‘Self-care for trauma therapists: Ameliorating vicarious traumatization’ in B. H. Stamm (Ed.), *Secondary traumatic stress: Self-care issues for clinicians, researcher, and educators* (2nd ed., Lutherville, MD: Sidran Press, 1995); Z. Morrison, ‘Feeling heavy: Vicarious trauma and other issues facing those who work in the sexual assault field’, *Australian Centre for the Study of Sexual Assault Wrap* (Melbourne: Australian Institute of Family Studies, 2007), 4.

- 8.5 Rape & Domestic Violence Services Australia holds the view that the most reliable predictor of whether or not a person will experience vicarious trauma is their exposure to traumatic material.<sup>19</sup> Given that any work within a case management model will inevitably involve significant contact with traumatic material, vicarious trauma should be understood as a work, health and safety risk within this environment.
- 8.6 Although the risk of vicarious trauma cannot be altogether eliminated, research suggests that vicarious trauma effects may be ameliorated if proactively addressed at an organisational level.<sup>20</sup> This requires a comprehensive program of strategies aimed to provide support at both an individual and organisational level.

Recommendation 3: That if the Commission were to implement the 'DPP model' into the committals system in Victoria that the model include provision for vicarious trauma strategies.

### Less resources required from the Court if the 'DPP model' is implemented

- 8.7 A key impact in utilising the 'DPP model' will be that there are less requirements of the Court in determining whether an accused be committed to stand trial. This impact is important to highlight, noting that at Table 12 of the *Committals Issues Paper* there is indication of a significant backlog of cases at all tiers of the Court system in Victoria. This table indicates 25% of cases in the Supreme Court are taking greater than 12 months to finalise, with the percentage in the County Court at 19.5%.<sup>21</sup> This model may assist in reducing the current delays being experienced.
- 8.8 The 'DPP model' may provide the opportunity to reduce the delay and complexity of legal processes within the criminal justice system. The Commission is therefore strongly urged to consider this approach to ensure that victims of crime and other vulnerable witnesses are not re-traumatised by the Court process.
- 8.9 Victims of crime and other vulnerable witnesses should not be subjected to long delays and complex processes such as applications being made to cross-examine

<sup>19</sup> Some literature suggests that individual differences can predict whether a person will experience vicarious trauma symptoms, such as a person's previous trauma history, age, gender, social support, education, and coping styles. However, there is a significant body of research which shows that exposure to traumatic material is the only variable that reliably and significantly predicts vicarious trauma. See, for example: N. Kassam-Adams, 'The risks of treating sexual trauma: Stress and secondary trauma in psychotherapists' in B. H. Stamm (Ed.), *Secondary traumatic stress: Self-care issues for clinicians, researchers, and educators* (2nd ed., Lutherville, MD: The Sidran Press, 1995); M. D. Salston and C. R. Figley, 'Secondary traumatic stress effects of working with survivors of criminal victimisation' (2003) 16(2) *Journal of Traumatic Stress* 167; L. J. Schauben, and P. A. Frazier 'Vicarious trauma: The effects on female counsellors of working with sexual abuse survivors' (1995) 19 *Psychology of Women Quarterly* 49.

<sup>20</sup> M. S. Cerny, 'Treating the "heroic treaters"' in C. R. Figley (Ed.), *Compassion Fatigue* (New York: Brunner/Mazel 1995); B. S. Sansbury, K. Graves, and W. Scott 'Managing traumatic stress responses among clinicians: Individual and organizational tools for self-care' (2015) 17(2) *Trauma* 114; L. Sexton 'Vicarious traumatisation of counsellors and effects on their workplace' (1999) 27(3) *British Journal of Guidance and Counselling* 393.

<sup>21</sup> Victorian Law Reform Commission, *Committals, Issues Paper* (June 2019), 29.

them during the committals stage. This is not a trauma-informed approach to legal proceedings nor is it supportive of recovery and healing.

Recommendation 4: That the Commission in its final report recommend the Victorian Government implement the 'DPP model' in the committals system in Victoria.

## 9. Best practices for supporting victims through the criminal justice process

Additional Terms of Reference 1: The Commission should also consider best practice for supporting victims.

- 9.1 As Judith Herman describes, "[t]he wishes and needs of victims are often diametrically opposed to the requirements of legal proceedings".<sup>22</sup>

*Victims need social acknowledgement and support; the court requires them to endure a public challenge to their credibility. Victims need to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and bureaucratic procedures that they may not understand and over which they have no control. Victims need an opportunity to tell their stories in their own way, in a setting of their choice; the court requires them to respond to a set of yes-or-no questions that break down any personal attempt to construct a coherent and meaningful narrative ... Indeed, if one sets out intentionally to design a system for proving symptoms of traumatic stress, it might look very much like a court of law.*<sup>23</sup>

- 9.2 At a minimum, a trauma approach should aim to ensure that the requirements of participation in the criminal justice system do not actively exacerbate trauma by again compromising a victim's autonomy, privacy and sense of security.<sup>24</sup> Re-traumatisation should not be accepted as the 'price' of seeking legal redress.<sup>25</sup> It is acknowledge that the risk of re-traumatisation cannot be altogether eliminated. However, every effort should be made to reduce this risk as much as possible.
- 9.3 It is widely recognised that excessive delay in criminal justice processes can have a significant impact on access to justice. This principle is recognised in the legal maxim, 'Justice delayed is justice denied.'
- 9.4 Rape & Domestic Violence Services Australia also urge the Commission to consider implementing wrap-around support services for victims of crime and other vulnerable witnesses, if not from the commencement of proceedings, but certainly from the committals stage. Effective support is a necessary precondition for those who have experienced violence to access the criminal justice system. This may

<sup>22</sup> J. L. Herman 'Justice from the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571, 574.

<sup>23</sup> *Ibid.*

<sup>24</sup> W. Larcombe, 'Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law' (2011) 19 *Feminist Legal Studies* 27, 34.

<sup>25</sup> *Ibid.*, 35.

include practical, therapeutic, medical and legal support, received both directly after the act of violence and on an ongoing basis.<sup>26</sup>

Recommendation 5: That the Commission consider including wrap-around support services for victims of crime and other vulnerable witnesses within the '*DPP model*' in the committals system in Victoria.

## 10. Conclusion

- 10.1 In conclusion, Rape & Domestic Violence Services Australia supports the '*DPP model*' proposed in the *Committals Issues Paper* which would include no provision for victims of crime and other vulnerable witnesses to be cross-examined at the committals stage.
- 10.2 Rape & Domestic Violence Services Australia believes it is imperative that the negative effects of the criminal justice system on victims of crime and other vulnerable witnesses should always be limited where possible. If the Commission was to recommend the '*DPP model*' in its final report, this would create a presumption that victims of crime and other vulnerable witnesses should not be cross-examined at the committals stage. This would send a strong message to the community that the needs of victims of crime and other vulnerable witnesses should always be considered within the criminal justice system.

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<sup>26</sup> New Zealand Law Commission, '*The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*', NZLC R136 (December 2015), 7.