

VCOSS submission on Proposed reforms to criminal procedure:

**Reducing trauma and delay for witnesses
and victims**

16 June 2017

About VCOSS

The Victorian Council of Social Service (VCOSS) is the peak body of the social and community sector in Victoria. VCOSS members reflect the diversity of the sector and include large charities, peak organisations, small community services, advocacy groups, and individuals interested in social policy. In addition to supporting the sector, VCOSS represents the interests of vulnerable and disadvantaged Victorians in policy debates and advocates for the development of a sustainable, fair and equitable society.

This submission was prepared for VCOSS by Ché Stockley.

Authorised by:

Emma King, Chief Executive Officer

© Copyright 2016

Victorian Council of Social Service
Level 8, 128 Exhibition Street
Melbourne, Victoria, 3000
+61 3 9235 1000

For enquiries:

Pip Lyons, Acting Policy Manager

Email: pip.lyons@vcoss.org.au

VCOSS acknowledges the traditional owners of country and pays its respects to Elders past and present.

Contents

Executive Summary	2
Recommendations	3
Support victim/survivors in the criminal justice system	4
Trauma-informed understanding of the experience of victim/survivors	4
Communication and support throughout the process	5
Ensure cases are heard quickly and appropriately to reduce stress and trauma	7
Supreme Court proposal: flexible early case management.....	7
Removal of committal hearing where the complainant of a sexual offence is a child or person with a cognitive impairment.	8
Prevent re-traumatisation in the criminal trial process	9
VLRC Recommendation 39: leave to cross-examine a victim at committal hearing.....	9
VLRC Recommendation 18: disallowance of improper questioning.....	9
VLRC Recommendation 19: victim who is a witness entitled to be present in court.....	10

Executive Summary

The Victorian Council of Social Service (VCOSS) would like to thank the Department of Justice and Regulation for the opportunity to comment on the *Proposed reforms to criminal procedure: Reducing trauma and delay for witnesses and victims* paper (Criminal Procedure Reforms Paper).

Law reform to improve the court experience for victim/survivors of family violence and sexual assault have been ongoing for more than a decade in Victoria. However, the culture within the legal system in relation these crimes has proven difficult to shift. Problems with shifting legal culture were highlighted by the Australian Institute of Family Studies (AIFS) in their research on the effectiveness and implementation of criminal law reform in all Australian states. They found entrenched practice in the justice system can undermine well-intentioned reform.¹

VCOSS welcomes the proposed reforms that are designed to reduce the experience of re-traumatisation for victim/survivors in the criminal justice system.

VCOSS members have consistently argued for reforms in the criminal justice system to be supported by clear communication with stakeholders, and aligned with other reforms designed to improve the experience of victim/survivors. In particular, caution should be exercised in relation to changing the committal powers of the Magistrates' Court without reviewing how this will impact on the special jurisdiction and expansion of the Family Violence Court Division.

The 2014 AIFS research on the victim/survivor experience indicates that implementation of legal reforms has been inhibited by the entrenched nature of the culture of the existing legal system.

VCOSS believes that ongoing information sharing for legal professionals must accompany any proposed reforms outlined in the Criminal Procedure Reforms Paper. This includes information about the intended purpose of reforms and the impact of trauma on people who have experienced violence. There are some areas that we believe there is further work to be done, which we have covered in the submission. We would welcome the opportunity to discuss these further.

¹ N Bluett-Boyd and B Filehorn, *Victim/survivor-focused justice responses and reforms to criminal court practice: Implementation, current practice and future directions*, Australian Institute of Family Studies, April 2014, p. 55.

Recommendations

- Train all actors in the criminal justice system on the impact of trauma on victim/survivors of family violence and sexual assault.
- Improve communication and support for victim/survivors.
- Ensure the proposed reforms don't adversely impact on other reforms, in particular, the specialist jurisdiction of the Family Violence Court Division.
- Consider the lessons from the fast tracking pilot that is underway in the Dandenong Magistrates' Court.
- Review this amendment after 12 months to ensure:
 - a. There are no adverse consequences from removing "vulnerable witness" from the legislation and
 - b. the expansion of the definition to apply to "any" witness is not being used to the detriment of vulnerable witnesses.

Support victim/survivors in the criminal justice system

VCOSS believes that ensuring victim/survivors' needs are met throughout the criminal justice process, specifically the need for "information provision, support, recognition of the harm they've experienced, reparation for harm and effective protection"² is critical.

VCOSS members strongly support reforms to strengthen protections for victim/survivors, and measures to ensure victim/survivors are empowered to make informed choices, where possible, about their involvement in the process.

Trauma-informed understanding of the experience of victim/survivors

Recommendation

- Train all actors in the criminal justice system on the impact of trauma on victim/survivors of family violence and sexual assault.

VCOSS welcomes the focus on the impact of trauma in the Criminal Procedure Reform Paper, specifically addressing how to reduce the experience of trauma for witnesses and victim/survivors. We strongly support the focus on law reform in criminal procedure relating to sexual assault that aims to minimise or avoid, "re-traumatisation" for victim/survivors in the trial process. Acknowledgement within the legal system that the court experience re-traumatizes victim/survivors, leading to a reluctance to give evidence, has already led to significant reforms in the legal processes. For example, changes in criminal procedure in recent years have:

- introduced alternative mechanisms to support victim/survivors giving evidence in court
- provided the ability for victim/survivors to have support people present throughout the process and
- placed restrictions on the types of questions defence lawyers can ask that may negatively impact on victim/survivors giving evidence in court.

These changes are supported by research undertaken in Victoria regarding the needs of victim/survivors in the criminal court process, which highlighted the need for: "comprehensive and

² *ibid.*, p.17.

ongoing education that provides information on recent reform to legal actors, and education of a range of professionals as to the social context of sexual assault and psychological aspects of victimisation.”³

VCOSS members noted some victim/survivors, for example Aboriginal women, have additional needs which need to be addressed to minimise re-traumatisation. For example, coupled with a lack of understanding of trauma, some court personnel display a lack of cultural competence and Aboriginal women experience indirect and direct discrimination.

VCOSS members report the need for ongoing training for all actors in the criminal justice system is required to support both the understanding and implementation of law reform in Victoria. Changes to criminal procedure to help minimise re-traumatisation of victim/survivors must be coupled with targeted education on the impact of trauma following the experience of sexual assault, how trauma based behaviours manifest and the particular impact on particular groups of victim/survivors.

Communication and support throughout the process

Recommendation

- Improve communication and support for victim/survivors.

VCOSS members noted victim/survivors of sexual assault report little or no change in their negative experiences with the legal system, in spite of more than a decade of reforms intended to improve this. In particular, VCOSS members report ongoing poor communication with victim/survivors about the criminal justice process itself.

VCOSS members told us that victim/survivors need to assistance to understand the whole legal process, in order to make informed choices. Victim/survivors have requested support throughout proceedings by a consistent support person who is knowledgeable about the legal system and skilled in therapeutic care of people who have experienced trauma. As well as improvements to the committal processes and giving evidence, VCOSS recommends there is a need for a coordinating person to assist victim/survivors through the process. A model for consideration is a navigation role, as described by the Royal Commission into Family Violence, which is a person who has specialised skills and is knowledgeable about the service system.⁴ In a criminal trial process, navigation and advocacy is needed to support communication with victim/survivors about the progress of their case, and provide information about what to expect next. Ideally, this support would be provided by an Aboriginal Controlled Community Agency when the victim/survivor is Aboriginal.

³ *ibid.*, p. xii.

⁴ State of Victoria, *Royal Commission into Family Violence: Report and recommendations, Vol II*, Parl Paper No 132 (2014-16), p. 268.

Improved information to prepare vulnerable witnesses for court was also a recommendation from the Family Violence Royal Commission. The Commission found a lack of information about the legal process can negatively impact on how the victim/survivor feels about it, and can heighten the anxiety they experience. This, in turn, can impact on the victim/survivor's demeanour and presentation in court, which may unfairly influence court outcomes.⁵

A lack of communication about the process for victim/survivors also has other unintended negative impacts. For example, it can lead to confusion for victim/survivors about the meaning of different sentences handed down to perpetrators. One member described supporting a victim/survivor who was distraught at the thought the perpetrator had "got off" when he received a suspended sentence. Similarly, when an accused person is acquitted, victim/survivors can be left feeling devastated at this outcome. Despite many days of giving evidence they may feel that they failed, that the jury thought they were lying and/or that the legal system failed them, when in fact, due to the complexity of the law in this area, there may be many different factors that may result in an acquittal.

⁵ State of Victoria, *Royal Commission into Family Violence: Report and recommendations, Vol III*, Parl Paper No 132 (2014-16), p. 129.

Ensure cases are heard quickly and appropriately to reduce stress and trauma

Recommendations

- Ensure the proposed reforms don't adversely impact on other reforms, in particular, the specialist jurisdiction of the Family Violence Court Division
- Consider the lessons from the fast tracking pilot that is underway in the Dandenong Magistrates' Court.

Supreme Court proposal: flexible early case management

VCOSS supports any initiatives designed to reduce delays between committal and trial. In 2014, AIFS found that the time lag between committal and trial in Victoria can be up to two years, and during that period some victim/survivors disengaged from the process.⁶ Mechanisms such as that proposed by the Supreme Court in the Criminal Procedure Reforms Paper, which would reduce this delay, are an important measure to ensuring victim/survivors are given every opportunity to seek justice.

VCOSS also notes caution with these proposed changes, to ensure that they do not inadvertently impact on the changes recommended by the Family Violence Royal Commission in relation to the operations of the Family Violence Court Division.

VCOSS members noted that the Family Violence Court Division is empowered by section 41 of the *Magistrates' Court Act 1989*, to hear committal proceedings for indictable offences in family violence cases. As the Supreme Court proposal is to remove committal proceedings from Magistrates' Courts, our members expressed concern about removing some committal proceedings from the Family Violence Court Division. VCOSS notes that this would only apply in the most extreme cases, but also notes the importance of not losing the information about history of family violence that the Family Violence Court Division may have, that the Supreme Court may not have.

⁶ Bluett-Boyd and Filehorn, op cit., p. 46.

VCOSS encourages the current review to ensure it is in accord with other justice reform approaches and doesn't inadvertently come into conflict with other positive reform mechanisms.

The Family Violence Royal Commission recommended that the Family Violence Court Division be expanded to all headquarter courts in Victoria. The Commission also recommended legislative amendments to ensure all family violence matters are heard in this court.⁷

The expansion of the Family Violence Court Division is intended to utilise the "capacity of specialist courts to hear related aspects of a case - criminal, civil, family law, compensation and other matters".⁸ For victims of family violence this will reduce the traumatic impact of having to retell their circumstances and give evidence in different jurisdictions. As such, VCOSS notes that the proposal to remove committal hearings from the Magistrates' Court and place them into the Supreme Court may undermine the expansion of the Family Violence Court Division and the consolidation of civil and criminal family violence matters.

Acknowledging the potential for delay in family violence matters, the Family Violence Royal Commission recommended fast tracking criminal family violence matters, as is occurring in the current pilot in the Dandenong Magistrates' Court.⁹ Alongside the Supreme Court's proposal, VCOSS submits that you also consider the results of this pilot and the potential to adopt this approach more broadly across the state.

Removal of committal hearing where the complainant of a sexual offence is a child or person with a cognitive impairment.

VCOSS supports the proposal to remove the committal hearing where the complainant of a sexual offence is a child or person with a cognitive impairment, noting again the specialist jurisdiction of the Family Violence Court Division.

As noted above, reforms in criminal procedure related to sexual assault must align with reforms in relation to family violence, especially in relation to the committal jurisdiction of the Family Violence Court Division.

⁷ State of Victoria, Vol III, op cit., p. 160-161. See Recommendations 60 and 61.

⁸ *ibid.*, p. 160.

⁹ *ibid.*, p. 158.

Prevent re-traumatisation in the criminal trial process

VLRC Recommendation 39: leave to cross-examine a victim at committal hearing

VCOSS supports minimising the number of times that a victim/survivor needs to give evidence, and acknowledges that the committal process can be especially hard for victim/survivors in this respect. VCOSS supports the proposal that cross-examination in a committal hearing should be limited. This may limit the re-traumatisation of victim/survivors, and prevent the attrition that occurs at the committal stage.

VLRC Recommendation 18: disallowance of improper questioning

Recommendations

- Review this amendment after 12 months to ensure:
 - c. There are no adverse consequences from removing “vulnerable witness” from the legislation and
 - d. the expansion of the definition to apply to “any” witness is not being used to the detriment of vulnerable witnesses.

VCOSS supports proposed reforms that are designed to ensure judges intervene to disallow improper questions of witnesses. Our members pointed out that in their experience of supporting victim/survivors, some defence lawyers question witnesses in ways that are deliberately misleading and confusing. There are reasons that they choose to cross-examine in this way, irrespective of any harm it may cause to the witnesses. Members emphasised the need for ongoing education of judges and legal practitioners to ensure that they fully understand and uphold their obligations under the *Evidence Act 2008* (Vic), as well as the proposed changes.

VCOSS also supports this reform as it will bring practice in Victoria in line with other states.

VCOSS argues that these amendments should apply to any witness, not just victim/survivors.

VCOSS cautions against any changes that may inadvertently remove any protections for vulnerable witnesses or allow for defence lawyers to abuse process, if this is expanded to any witness (including the defendant).

VLRC Recommendation 19: victim who is a witness entitled to be present in court

As acknowledged in the reforms paper, victim/survivors have a unique view on their experience of being present at court. VCOSS members told us that some victim/survivors report feeling intimidated and overwhelmed by being in a courtroom and giving evidence on the stand as a witness.

Similarly, witnesses that have given evidence outside of the courtroom - for example via a video-link - also report finding the experience daunting and unnerving. For example, some clients have reported feeling dismayed that their image would be “on the big screen” in the courtroom. Some victim/survivors, including vulnerable witnesses with cognitive impairment and other disabilities have found the video-link room can be a strange and clinical environment in which to give evidence. Coupled with technology problems, which are apparently not uncommon, the experience of giving evidence away from the courtroom can actually have a disempowering effect for some witnesses.

Defence practitioners rarely object to the use of alternative provisions for giving evidence. This may be due to the fact that, as the available data shows, it may work in their client’s favour to have the victim/survivor outside of the courtroom as it places distance between the victim/survivor and the jury, which means they might feel less empathy towards them.¹⁰

For these reasons, VCOSS agrees with the recommendations that a victim/survivor should not automatically be excluded from the courtroom at any stage of proceedings. Decisions about whether to be present in court should be based on the victim/survivors’ views and informed choice. Giving victim/survivors decision making power about aspects of the court experience is more likely to reduce the associated trauma¹¹ and improve their engagement with the whole legal process.

¹⁰ Bluett-Boyd and Filehorn, *op cit.*, p. 37.

¹¹ *Ibid.*, p. 37.

Victorian Council of Social Service

Level 8, 128 Exhibition Street,
Melbourne, Victoria, 3000

e vcoss@vcoss.org.au

t 03 9235 1000

www.vcoss.org.au

