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The Hon J Wood AO QC
Chairperson
New South Wales Sentencing Council
GPO Box 31
Sydney NSW 2001

Via email: sentencingcouncil@justice.nsw.gov.au

Dear The Hon J Wood AO QC

Public Submission to the New South Wales Sentencing Council- Victims' Involvement in Sentencing

Thank you for the opportunity to respond to the Consultation Paper 'Victims' Involvement in Sentencing' dated September 2017 ('Consultation Paper').

The Consultation Paper introduces the underlying framework and purpose of Victim Impact Statements ('VIS') in NSW and considers the victim's experience in the criminal justice system. Victims have diverse needs in relation to the criminal justice process including the sentencing process and sentencing outcomes. In Chapter 2, the Consultation Paper describes how information concerning VIS is provided to victims by different agencies including Police Prosecutors and the Office of the DPP. The Chapter contemplates how the content of information as well as the process of providing information could be improved. In addition, it highlights problems associated with VIS in practice including admissibility of content and presentation of VIS in court and relatedly raises the question of how victims can better be assisted when making a VIS. In Chapter 3, the Consultation Paper *inter alia* describes who can make a victim impact statement and identifies that it can sometimes be unclear whether a victim is eligible to do so. Chapter 4 is concerned in greater detail with content, admission and use of victim impact statements. A VIS from a primary victim can only be concerned with physical, psychiatric and psychological harm arising from an offence. Specific procedural matters arising in the context of VIS including issues relating to cross- and re-examination on the content of these statements are outlined in Chapter 5 together with considerations on how to respond to victims in proceedings. Lastly, Chapter 6 considers Restorative Justice approaches currently in

place in NSW which may provide victims with a way to be involved before, during and after the sentencing hearing.

The following submission addresses issues raised in the Consultation Paper by responding to a number of questions put forward by the New South Wales Sentencing Council in Chapter 2 – Victim Experience and Chapter 5-Procedural Issues with Making and Reception of a Victim Impact Statement.

I BACKGROUND

I am a lecturer in criminal law and procedure based at the University of Southern Queensland. My research interests include criminal law and procedure with a focus on the treatment of crime victims in different criminal justice systems around the globe. My PhD focused on the role of victims in criminal procedure in Germany and Australia in relation to participation in light of the 1985 *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. I am the author of several articles in Australian and international journals and chapters in edited book collections which ponder the parameters of victim participation in inquisitorial and adversarial systems.¹

I have a particular interest in victims' legal representation during proceedings and the question of what role an independent legal representative for victims could play in the Australian context. Much of my submission below relates to this notion and I hope that my ideas and comments can be useful for the New South Wales Sentencing Council in considering how to amend its law and policy in order to better protect victims and safeguard victims' rights at the sentencing stage.

II. CHAPTER 2- THE VICTIM EXPERIENCE

It has been suggested that a victim's positive experience in the criminal justice system is heavily dependent on whether they are able to participate in the criminal trial process, have access to adequate information and support and receive respectful treatment.² Traditionally, in common law systems the victims' role in criminal proceedings was confined to that of a witness for the prosecution. In the past, the victim was therefore often referred to as the 'forgotten person' in criminal procedure. The 1970s and 1980s saw the rise of the crime victims' rights movement and the adoption of international instruments relating to victims including the 1985 *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* ('Declaration'). Section 6(b) of the Declaration enshrines that victims should be allowed to present views and concerns at appropriate stages of the proceedings where their personal

¹ Kerstin Braun, 'Legal Representation for Sexual Assault Victims - Possibilities for Law Reform?' 25(3) 2014 *Current Issues in Criminal Justice* 819-837; Kerstin Braun, 'Giving Victims a Voice: On the Problems of Introducing Victim Impact Statements in German Criminal Procedure' 14(9) (2013) *German Law Journal* 1889-1908; Kerstin Braun, 'Self- or Cross-Fertilisation? Referencing ECtHR Jurisprudence to Justify Victim Participation at the ICC' in Paolo Lobba and Triestino Mariniello (eds) *Judicial Dialogue on Human Rights: The Practice of International Criminal Tribunals* (Brill, 2017) 282-299.

² New South Wales Sentencing Council, *Victims' Involvement in Sentencing*, Consultation Paper, September 2017, 14.

interests are affected. As a means to include victims further into criminal proceedings and to provide them with an avenue for participation VIS at the sentencing stage have been introduced in many common law jurisdictions including New South Wales. Even some 40 years after their first use in criminal proceedings in the United States their alleged risks and benefits continue to be controversially debated.³

Key problems associated with VIS concern victims' unawareness of the right to make such a statement, victims' unrealistic expectations as to how their VIS will be used by the judiciary and what impact it may have in court as well as the lack of support in preparing the statement.⁴ In this context, the Consultation Paper *inter alia* raises the question of how the information given to victims on VIS and sentencing could be improved (2.1) and how victims could better be assisted when making a VIS, for example, by providing victims with a specialist representative (2.5).

It is recommended that victims who are eligible to make a VIS in NSW are entitled to an independent legal representative who acts on their behalf during the sentencing phase. The legal representative offers the victim legal support in making the VIS and guides them through the sentencing phase. This includes the right to object during cross-examination on the content of the statement. The recommendation is based on the following considerations.⁵

1. Improving information available to victims

An independent legal representative can provide victims with specific information about the right to make a VIS, where and when the statement can/must be submitted and what it can entail. In addition, they can advise on how the VIS can be received (in writing and subsequently read out), the possibility for eligible victims to read the statement by CCTV or in closed court and on the possible effects of the statement in relation to the sentence. A legal representative will also be in a position to outline and explain the sentencing principles and describe the sentencing procedure in detail to their client. This allows victims to better understand the process overall and has the potential to reduce negative experiences stemming from misinformation and lack of support. Lastly, the legal representative could provide the victim

³ NSW Sentencing Council, above n 2, 9.

⁴ NSW Sentencing Council, above n 2, 16.

⁵ Legal representation for victims in the sentencing context was suggested in the preliminary submission to the NSW Sentencing Council by the NSW Office for Police and NSW Police Force, Preliminary Submission (2 August 2017) PVI12, 2. A growing number of scholars is contemplating independent legal representation for victims in adversarial systems especially in the context of victims of sexual offences. See, for example, Jennifer Temkin, *Rape and the Legal Process* (Oxford University Press, 2002) 293-305; Ivana Bacik, Catherine Maunsell and Susan Gogan, 'The Legal Process and Victims of Rape' (The Dublin Rape Crisis Centre, 1998) 17-18; Fiona E. Raitt, 'Research Report for Rape Crisis Scotland: Independent Legal Representation For Complainers In Sexual Offence Trials' (Rape Crisis Scotland, 2010); Kerstin Braun, 'Legal Representation for Sexual Assault Victims-Possibilities for Law Reform?' (2013) 25 *Current Issues in Criminal Justice* 819; Dee Smythe, 'Moving Beyond 30 Years of Anglo-American Rape Law Reforms: Legal Representation for Victims of Sexual Offences' (2005) 2 *South African Journal of Criminal Justice* 167; Margaret Garvin and Douglas E Beloof, 'Crime Victim Agency: Independent Lawyers for Sexual Assault Victims' 31(1) 2015 *Ohio State Journal of Criminal Law* 67. For discussion on the victim's right to counsel in the context of pre-trial discovery see Tyrone Kirchengast, *Victims and the Criminal Trial* (Palgrave Macmillan, 2016) 76-80.

with legal advice and apply for compensation or a restitution order as additional orders against the defendant.

Some may argue that a legal representative for victims is not necessary if more detailed manuals on how to submit a VIS and its content are produced by victim service agencies and VIS telephone helplines for victims are put in place. This, however, is not necessarily the case. Victim support agencies are not (always) staffed with lawyers and staff are therefore unable to offer victims legal advice regarding the content of their VIS. In addition, the victim and the legal representative can form a close relationship during their consultations which may allow the victim to build up trust and confidence and to be well prepared for their VIS. It does not appear that this can also be achieved through the publication of additional manuals or telephone helplines.⁶

2. Reducing Problems with the Content of Victim Impact Statements

It has been identified that some victims fail to submit a VIS due to fear of being re-traumatised in proceedings, of being cross-examined on the content or of harsh editing of their statement by the courts.⁷

In NSW, VIS are limited to description of the personal harm the victim suffers as a result of the offences for which the offender is convicted. Victims may struggle to understand or comply with these legal requirements. Their statements may therefore be subject to objections by the defence with the result of rigorous editing on the day of sentencing. This causes distress and negative feelings in some victims possibly restricting or removing any restorative effect the statement may otherwise have.⁸

The objections by the defence and respectively the editing of the VIS by the courts could be reduced where the victim receives legal advice and support through their legal representative before making a VIS. Victims may comprehend the legal requirements to a greater extent and may be better able to comply with them where they are provided with detailed and personalised information about the admissibility of material. In addition, the legal representative can advise on whether certain aspects of the specific VIS are inadmissible. A victim may be more accepting of editing their statement when they are advised by their own legal representative with whom they have established a client-lawyer relationship rather than when this occurs last minute in court without further explanations. Even where a victim chooses not to amend their statement post-advice, they are aware and understand that this part of their statement may be subject to editing in court. As a consequence, the victim may be less surprised and frustrated by the process.

⁶ On legal representation for victims during the sentencing phase see also Paulette Benton-Greig, 'The Needs of Victims in Sexual Offence Trials' (17) 2011 *Canterbury Law Review* 88, 92 and Michael O'Connell, South Australian Commissioner for Victims' Rights quoted in Sean Fewster and Ben Hyde, 'SA Victims' Rights Commissioner Says Victims Should Be Represented by Lawyers During Criminal Sentencing Hearings' *The Advertiser* (online) (3 June 2014) <http://www.adelaidenow.com.au/news/south-australia/sa-victims-rights-commissioner-says-victims-should-be-represented-by-lawyers-during-criminal-sentencing-hearings/story-fni6uo1m-1226940821137>.

⁷ NSW Sentencing Council, above n 2, 20.

⁸ NSW Sentencing Council, above n 2, 21.

3. Reducing Problems with Presenting VIS in Court

Studies suggest that victims' satisfaction with VIS is greatly dependent on the victim's treatment by criminal justice authorities during the process.⁹ Particularly the possibility of being cross-examined on the content of their VIS causes some victims such great distress that they forego their right to make a statement. Although some point out that cross-examination occurs infrequently in practice in NSW it cannot be denied that the defence has the right to cross-examine the content of a VIS where it presents evidence relevant to the sentencing process and may elect to do so in the particular case at hand. Amending victim information manuals to reflect that cross-examination on the content of VIS only happens occasionally to stop victims from being discouraged may therefore not offer a comprehensive solution.¹⁰ What role a legal representative could play in preparing victims for possible cross-examination and how this could reduce potential problems is examined further below under 'III. Procedural Issues' where the specific questions about cross-examination are addressed.

Research on jurisdictions which have introduced legal representation for victims suggests that by simply having a legal representative present at trial victims experience less animosity from criminal justice authorities,¹¹ and are overall taken more seriously.¹² Affording victims the right to legal representation during the sentencing stage therefore has the potential to ensure respectful treatment and to increase victim satisfaction with the VIS process.

4. Assistance Available to Victims

Apart from practical assistance in making a VIS, victims may require emotional support in preparing their statement as it can contain highly sensitive material. In addition to advising on the content and on how to prepare a VIS, a legal representative can provide victims with tailor-made assistance in relation to the benefits and risks of submitting a VIS as well as on the decision to read out the VIS in court.

5. Compatibility with the Adversarial Criminal Justice System

Some suggest that legal representation for victims cannot be accommodated in adversarial criminal justice systems as they differ structurally to a great extent from inquisitorial systems where such representation is frequently possible.¹³ This overlooks, however, that legal representation can be tailored to fit within existing adversarial parameters as it does not have to take the same shape as some existing broad forms of victim participation in inquisitorial systems. A narrowly tailored role in which the legal representative merely safeguards the victims' existing rights, such as the right to make a VIS and to read it out, and provides

⁹ NSW Sentencing Council, above n 2, 22.

¹⁰ NSW Sentencing Council, above n 2, 23.

¹¹ Temkin, above n 5, 293.

¹² Raitt, above n 5, 70.

¹³ Discussed in NSW Sentencing Council, above n 2, 26. See also discussion in the British context in Laura Hoyano, 'Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants' (2015) *Criminal Law Review* 107, 115, 117.

information and support to the victim during the sentencing phase arguably does not violate the adversarial structure or defendants' due process rights.¹⁴

That legal representation can be accommodated in adversarial systems is further evidenced by the fact that an increasing number of common law jurisdictions have afforded victims legal representation during specific stages of the proceedings. For example, in Ireland sexual assault victims have the right to legal representation regards the defence's application to introduce evidence on the victim's past sexual history.¹⁵ Due to enacted crime victims' rights acts in most US States victims have the right to be defended by their own attorney. Especially in relation to VIS victims in the US have the right to an attorney to assist them in drafting and subsequently presenting the statement.¹⁶ For example, US federal law for federal cases, the *Crime Victims' Rights Act*, 18 USC 3771, provides that

The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a).¹⁷

Since 2011, New South Wales has introduced a state funded legal representation scheme for sexual assault victims when addressing the court in relation to the prevention or restriction of disclosure of protected sexual assault counselling notes (*Criminal Procedure Act 1986* (NSW) s 299A). In South Australia, victims can apply to the Victims of Crime Commissioner to be legally represented in cases that involve 'consultation with prosecution, in criminal and civil proceedings and coronial inquests, as well as initiated legal matters that affect victims in general'.¹⁸

The introduction of legal representatives for victims in different instances in a number of jurisdictions shows that legal representation is not *per se* incompatible with the parameters of the adversarial criminal justice system. In addition, it should not be overlooked that the recommended legal representation occurs at the sentencing stage where the guilt of the defendant has already been determined. Arguments presented regarding the incompatibility of

¹⁴ Similar argument concerning legal representation for victims of sexual offences at the trial stage in Fiona Raitt, 'Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings' (2013) *Criminal Law Review* 729, 742.

¹⁵ See section 34 *Sexual Offences Act 2001* (Ireland).

¹⁶ For in-depth analysis on victims' legal representation in the US context see: Tyrone Kirchengast, 'Victim Lawyers, Victim Advocates and the Adversarial Trial', 16(4) 2013 *New Criminal Law Review: An International and Interdisciplinary Journal* 568, 577-583. For comparative analysis on the issue see Tyrone Kirchengast, *Victimology and Victim Rights: International Comparative Perspectives* (Routledge, 2016) 159-200.

¹⁷ Subsection a) includes the right to make a VIS.

¹⁸ Michael O'Connell, 'Victims' Rights: Integrating Victims in Criminal Proceedings' Commissioner for Victims' Rights, Government of South Australia, 7 http://www.voc.sa.gov.au/sites/default/files/OConnell_Integrating%20Victims.pdf. On 27 October 2017 it was announced that from 1 December 2017 in Queensland, comparable to the situation in New South Wales, victims of sexual assault will have the opportunity to receive legal assistance when seeking to prevent the disclosure of protected private counselling communications as evidence at trial, see: Queensland Government, 'Media Statement: Attorney-General and Minister for Justice and Minister for Training and Skills The Honourable Yvette D'Ath: Law Change to Help Victims of Sexual Assault' (27 October 2017) http://statements.qld.gov.au/Statement/2017/10/27/law-change-to-help-victims-of-sexual-assault?utm_source=MailingList&utm_medium=email&utm_campaign=20171030_QLU.

legal representation and adversarial systems at the trial stage, especially in relation to equality of arms, do not appear to translate to the sentencing stage.

6. Cost Implications

The introduction of the right to a legal representative does not come without cost implications.¹⁹ Although it is difficult to predict the financial implications for the future, two arguments of why state funding of a legal representative could be worthwhile financially are discussed below.

Firstly, although the scheme needs to be financed, savings may occur elsewhere in the public sector if public servants responsible for dealing with victims or accompanying victims to court or providing help with VIS are not required anymore in cases where a legal representative for the victim exists. Secondly, the immediate costs for a legal representative have to be considered in relation to the costs that may arise for the public health sector long-term for the physical and psychological treatment of victims traumatised by their experience in the criminal justice system.

III CHAPTER 5-PROCEDURAL ISSUES WITH THE MAKING AND RECEPTION OF A VICTIM IMPACT STATEMENT

1. Reading the Statement in Court

In NSW, the victim or their representative has the right to read the VIS after the conviction but prior to the sentencing.²⁰ The reading may occur via CCTV in certain cases including sexual offence proceedings as well as in case of child victims and victims with cognitive impairment.

Question 5.8 of the Consultation Paper asks what special arrangements should be available to victims who read their VIS in court and whether these arrangements should in any way be limited. In relation to reading out a VIS, a legal representative can provide explanations to the victim about the court room layout and court procedures prior to their appearance because a court may be an unfamiliar setting and attending a daunting experience for many victims. The representative should be equipped with the right to support the victim by being present and by sitting close to them when they read out their statement in court. Such support should be made available to all victims approved by the court to read out their VIS and should not be limited to certain victims, for example, victims of sexual offences. In addition, the legal representative should be able to make an application to court on behalf of an eligible victim to read their VIS by CCTV or in closed court.

A legal representative would also be able to address the court as to the evidential quality of the VIS. Should the victim be subject to cross-examination (question 5.12 of the Consultation Paper), although this does not appear to occur frequently in practice in NSW, a legal representative should have standing to represent the interests of the victim and to object to inadmissible, disrespectful, compromising or suggestive questions. The fact that the legal representative will be able to explain the cross-examination procedure to the victim beforehand

¹⁹ Raised in NSW Sentencing Council, above n 2, 26.

²⁰ NSW Sentencing Council, above n 2, 75.

and the knowledge that their representative is present and can object to certain questions may already be enough to take away some of the victim's anxiety.

IV. FINAL REMARKS

The current inquiry aims to examine whether victims can have a stronger voice or be given more support. Unfortunately, its scope is limited to the sentencing phase. There is a need for a more broadly phrased inquiry into the role of victims in the criminal justice system, including the pre-trial, trial and post-sentencing phase, in order to holistically assess whether and how victims' voices can be increased in criminal proceedings in New South Wales.²¹

I hope my submission and recommendation is useful and will inform the Sentencing Council on how to advance and safeguard victims' interests at the sentencing stage in New South Wales in the future.

Sincerely

Dr Kerstin Braun

²¹ A broad inquiry into the role of victims, for example, was carried out in Victoria and published in 2016, see: Victorian Law Reform Commission, *Victims of Crime in the Criminal Trial Process*, Final Report, November 2016.