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31 July 2017

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

Re: Preliminary Submission into the review of victims' involvement in the sentencing process

Dear Chairperson,

I am writing to make a preliminary submission to the review of victim's involvement in the sentencing process, based on my research on how law responds to stillbirths caused by criminal acts,¹ and my own experiences in giving a Victim Impact Statement during a sentencing hearing in Victoria.

In 2009 I was involved in a car accident which resulted in injuries to my partner, stepdaughters, and me, and which caused the stillbirth of our daughter at 34 weeks gestation. The driver who caused the accident pleaded guilty to dangerous driving causing serious injury and failing to stop at the scene of an accident. Under section 8K of the *Sentencing Act 1991*(Vic), where a court has found someone guilty of an offence, 'a victim of the offence may make a statement to the court for the purpose of assisting the court in determining sentence'. 'Victim' is defined broadly under section 3(1) to mean:

"victim", in relation to an offence, means a person who, or body that, has suffered injury, loss or damage (including grief, distress, trauma or other significant adverse effect) as a direct result of the offence, whether or not that injury, loss or damage was reasonably foreseeable by the offender;

¹ Hannah Robert, "The bereavement gap: Grief, human dignity and legal personhood in the debate over Zoe's law" (2014) 22 *Journal of Law and Medicine* 319.

As a result, this meant that both I and my partner were able to give victim impact statements during the Sentencing Hearing. I elected to read mine out myself, and the Prosecutor read out my partner's statement.

Writing the statement and having it heard by the magistrate were immensely helpful for both of us in terms of having some public acknowledgment of our daughter and our sorrow for her, and in having the chance to communicate to the defendant and to the court the impact that the offence had on our lives. We felt that the magistrate listened and took the harms we experienced into account when determining the sentence. While the process was emotionally difficult and intense, it felt like an important opportunity to speak up for our daughter. It was the one part of the process which we had some control over.

I was surprised to discover, then, that NSW uses narrower definitions of 'primary victim' and 'family victim' which would, under current law, allow only the parent who was pregnant to give a victim impact statement where a baby was stillborn as a result of a criminal offence. This seems to be a gap which is causing significant pain to other families who have lost a child in similar circumstances.

I have responded to the terms of reference below.

1. The principles courts apply when receiving and addressing victim impact statements.

In determining the principles which should govern the courts when receiving and addressing victim impact statements, I think there needs to be some analysis of the purposes which victim impact statements are expected to serve. Making the purposes clear in the legislation would aid judges in their handling of victim impact statements, and would help give victims realistic expectations of the process. Here, I think the dual-purpose model discussed in Marie Manikis' article (in the Canadian context) might provide a useful starting point.²

² Marie Manikis, 'Victim Impact Statements at Sentencing: Towards a clearer understanding of their aims' (2015) 65 University of Toronto Law Journal 85.

Manikis suggests that Victim Impact Statements may serve expressive and/or instrumental functions. She describes the expressive function as ‘allowing victims to be heard’ and suggests that VIS regimes which support victims to express their response to the crime,

...can ensure that the “individual dignity” of the victim, who merits therapeutic healing and restoration, is recognised, and can also support the procedural justice and fairness principles that the voices of all interested individuals within proceedings should be heard.³

In contrast, Victim Impact Statements may also serve an instrumental function by providing ‘relevant evidence for assessing harm and ... assisting the judge in the determination of a proportionate and fit punishment’ (page 93). The expressive function is based on the principle of therapeutic justice; the instrumental function on the principle of proportionality, while both purposes reflect the principle of procedural justice.

Manikis discusses in detail a few ways in which the two purposes may be accommodated within the one regime. For example, she proposes having few restrictions on the content of victim impact statements, but that any content which is irrelevant to determining the harm suffered, and deciding the sentence may be read out in court (serving the expressive purpose), but would be filtered out by the sentencing judge when determining the sentence (to fulfil the instrumental purpose).

My own view is that these two purposes can be mutually supportive. Victims are more likely to gain a therapeutic effect when they know that their statement contributes towards the process of determining a fair sentence, and a fair sentence is more likely to be reached when the sentencing judge has had a chance to hear first-hand about the impact the crime has had on the victim(s). For cases where a baby has been stillborn due to an offence, enabling family to give a victim impact statement gives an opportunity for recognition within the court of the ‘individual dignity’ of their baby without the complexities of defining a fetus in utero as a legal person for the purposes of particular crimes.

2. Who can make a victim impact statement.

For families grieving a child stillborn due to a criminal act, having a chance to express that grief and have it publicly acknowledged can be an important part of processing what has

³ Ibid, 91.

happened and integrating their grief into their lives. The current categories of ‘primary victim’ and ‘family victim’ prevent the parent who wasn’t pregnant (and other grieving family, such as grandparents and siblings) from giving a victim impact statement in these situations. Given the significant grief which parents face when a child is stillborn, this restriction means that the current regime fails both the expressive and instrumental purposes of the law.

In Victoria, which has one of the broadest definition of ‘victim’, there has not been a flood of people wishing to submit victim impact statements. Indeed, a recent interim report on the Victorian VIS reforms noted that ‘VISs are still only made in a small percentage of cases (under 10% of cases where there is an identifiable victim)’.⁴ Framing the definition of ‘victim’ in broader terms would enable the court to hear from both parents where a child is stillborn, as well as others beyond the existing categories of ‘primary victim’ and ‘family victim’ whose lives have been seriously impacted by a crime.

3. Procedural issues with the making and reception in court of a victim impact statement, including the content of a victim impact statement, the evidential admissibility applied to a victim impact statement, and objections to the content of victim impact statements.

The Manikis article offers a number of procedural strategies designed to meet both the expressive and instrumental purposes of Victim Impact Statements which I think are worth considering within the review process. I think it is vital that victims be informed as to how their statement may serve these distinct purposes – for example, that only comments regarding the harm they have suffered as a result of the offence can be taken into account in the sentencing process. If victims are to be cross-examined on their statements, it should only be on those matters relevant to sentencing, and I would support victims being treated as ‘vulnerable witnesses’ so that services such as appearing via video link would be available.

4. The level of support and assistance available to victims

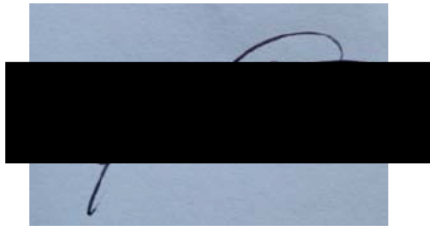
There is a real risk that victims may feel re-traumatised by the process of preparing and presenting their VIS to the court. In my experience, being able to revisit what happened and reflect on how it affected me was difficult, but in the longer term, incredibly helpful

⁴ Department of Justice, Victoria, *Victim Impact Statement Reforms in Victoria*, Interim Implementation Report (2014), at 6.4.1.

in working through the trauma and figuring out how to live with our 'new normal'. The more support available to victims, the more the process can be a therapeutic rather than a re-traumatising experience. For example, allowing victims to bring a support person to court with them on the day, or to visit the court prior to giving their statement would be helpful.

Thank you for considering my submission. If you have any further questions, please do not hesitate to contact me on the contact details above, or on my mobile phone ([REDACTED]).

Yours sincerely,



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CC: Marie Manikis, 'Victim Impact Statements at Sentencing: Towards a clearer understanding of their aims' (2015) 65 University of Toronto Law Journal 85.