OUR REFERENCE **DIRECTOR'S CHAMBERS**

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YOUR REFERENCE

ODPP
New South Wales

DATE 8 August, 2017

The Hon James Wood AO QC
Chairperson
NSW Sentencing Council
GPO Box 31
Sydney NSW 2001

By email: sentencingcouncil@justsice.nsw.gov.au (Attn: Joseph Waugh)

Dear Mr Wood

Sentencing Council Review of victims' involvement in the sentencing process: Preliminary submission

Thank you for the opportunity to make a preliminary submission in relation to the above enquiry. As this is a preliminary submission, I will direct my comments to some of the areas where I consider reform is warranted and to specified Terms of Reference.

2. Who can make a victim impact statement.

There are, in relation to who can make a victim impact statement (VIS), a number of areas where I would like to see reform so that the VIS scheme more appropriately reflects modern living practices and modern notions of family. I would also like to see reform that takes into consideration the damage done to families as a whole by specific types of offending and an extension of the regime to more offences. These areas and offences are:

- "Family victim" is defined in Section 26, the Definitions section of the *Crimes (Sentencing Procedure) Act* 1999, to mean a member of the (deceased) primary victim's "immediate family". Immediate family is further defined to include, essentially, persons related by blood, marriage or de facto status.
  There are many people in today's society whose "family" is not constituted by such traditional ties. Close friendships, for example, now constitute "family" for many people, and extended family and/or kinship relationships may be a person's only family. To exclude a person who was, to all intents, a primary victim's family on the basis that they do not fit the section 26 definition, is to deny a voice to those people and, therefore, to the deceased victim.
  In two recent matters prosecuted by this Office, the people closest to the victims and most affected by their deaths were unable to tell the court what effect the death had had on them and what the deceased had meant to them, because they did not fit the definition of "family victim".
  In one matter, the victim lived alone and had no immediate family as defined in the *Act*. She did, though, have a close parental relationship with a teenager who lived in the flat above hers. The teenager had no parents and he too, lived alone. The victim was murdered in her home. The teenager heard her being murdered. The matter went to trial many years

after the event and the teenager, now an adult, gave evidence. The murder of his "mother" had had a huge impact on his life and he knew the victim better than anyone, but he was not permitted to provide a VIS. As no-one came within the definition of a "family victim", no VIS was submitted.

In the second matter, the person who was perhaps the closest to the victim, his cousin, also did not fit the definition and could not give a VIS. The victim was an only child with a mother overseas and out of contact, an absent father, and no children of his own. Again, no VIS was submitted.

I would like to see reform so that where a victim has no "immediate family", there is discretion to admit a VIS by a member of their extended or kinship family to whom they were close or by someone with whom they had a close family type relationship or whom they considered to be their family.

- Consideration also needs to be given to reform in relation to the number of family victim statements that can be accepted in relation to the one victim (I refer to clause 11 of the *Crimes (Sentencing Procedure) Regulation* 2010). Many families operate at a level of dysfunction or non-contact that makes the submission of a single VIS unrealistic. There are also times where the offender is a family member and persons from the offender's side of the family, for example, grandparents where the victim was their grandchild, would like to contribute to a family VIS but are unable to do so. In these cases, consideration should be given to the receipt of more than one family victim VIS.

- Another circumstance where reform is needed is where the family victim has prepared a VIS but dies before the matter proceeds to sentence. If a VIS was prepared before their death – perhaps in relation to a co-offender, perhaps in anticipation of a sentence date that did not proceed – the legislation should allow for the VIS to be read at sentence, rather than reliance placed on the defence to voluntarily consent.

- VISs by family victims are presently confined to matters where the primary victim died as a direct result of the offending. I would like to see family VISs available in Child Sexual Assault matters, as children are often not in a position – whether by age, development capacity, or due to trauma – to articulate the harm done to them. (Alternately, section 30(2) of the *Crimes (Sentencing Procedure) Act* 1999 could be amended so that it is clear that child sexual assault victims are covered by the section, whether they fit the "incapable" requirement or not). And secondly, the family unit can also be a "victim" in these matters, particularly if a parent is the offender. In these cases, there is a further loss and an ongoing impact on the family, which should be put before the court.

- There are also classes of victims who are unable to prepare VISs, as the relevant offence falls outside the VIS scheme.

  For example, in a recent matter a plea was obtained to a section 192E *Crimes Act* 1900 offence, where the offender caused a $1,540,000 financial disadvantage to his elderly parents by the fraudulent mortgage of their home, two investment properties and a taxi licence. The investment properties were quickly sold to limit the accrual of interest. Another son sold his home and moved his young family in with his parents to ensure they had somewhere to live and a daughter took out a $200,000 loan to release the taxi licence. The consequences of the fraud on the elderly couple, and their other children, were devastating and life-changing.

Whilst cognisant that making VISs too widely available may undermine the intent of the legislation and perhaps minimise their impact, I believe consideration should be given to including frauds, particularly where the victims are elderly, the personal loss is substantial and the damage significantly detrimental.

- I also note that the list of offences for which a VIS can be prepared is narrower for the Local Court than it is for the District Court. As more matters move to the Local Court for resolution, I believe it is time to reconsider the application of the VIS regime in the Local Court. The policy of excluding some offences when dealt with in the Local Court now appears hard to justify. By way of example, there is no right to present a VIS in relation to an assault or assault occasioning actual bodily harm in the Local Court, as they are Table 2 offences. Likewise, in relation to any prescribed sexual offence from Table 2, such as a section 61O aggravated act of indecency or 61L indecent assault, or Stalking or Intimidation pursuant to section 13 of the *Crimes (Domestic and Personal Violence) Act* 2007 - as this offence rarely involves "violence", it is an excluded offence in both the Local and District courts.

- Another class of victim unable to make a VIS are those where no finding of guilt is made or conviction recorded but the judicial process comes to a conclusion as to the offender's culpability. These matters are dealt with, in the Local Court, under section 32 of the *Mental Health (Forensic Provisions) Act* 1990 and in the higher courts are those matters where an offender is found not guilty by reason of mental illness, a section 38 Special Verdict. I would like the VIS regime extended to these type of matters.

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.

A number of examples have been brought to my attention where objections raised and submissions made by Defence counsel in relation to the admissibility of a VIS have had an enormously detrimental effect on the victim, causing more trauma, distress and humiliation.

- These cases involve Defence, in open court, objecting to minute detail, line by line, or strictly applying rules of evidence and seeking that parts of the VIS be ruled inadmissible. This occurs even where the Crown does not seek to have the VIS taken into consideration as an aggravating feature under section 21A(2)(g) of the Crimes (*Sentencing Procedure) Act* 1999.

  Examples of this behaviour include Defence objecting to a Victim referring in his VIS to the shame he and his family felt the offence had brought on them – the objection was that "there was no evidence of shame".

  Where such objections are ruled on by the sentencing Judge and an amendment is then required to the VIS, this leads to the victim believing that they are not being heard and that their feelings in relation to the harm the offence has caused them are not valid. They are then required to, in effect, read a document that is no longer theirs.

  On another occasion brought to my attention, a victim refused to read her VIS after significant challenges were made to it during the sentencing proceedings that resulted in significant amendment to the document. As a result, the VIS was tendered but not read.

Taking such objections in such a manner may not be legally improper, but it is certainly, I would suggest, against the spirit and objectives of the legislation.
Consideration should be given to reform that either prevents these type of challenges or governs the way they can be raised, so that victims can be put on notice, given a chance to, if required, rewrite their VIS in a calm and considered setting, and efforts made to prevent them being re-traumatised by the process.

- Another matter recently brought to my attention was a Childrens Court matter in which a young victim was denied the chance to read her VIS in court, as the young person offender refused to enter the court to be sentenced if the victim was present. Whilst acknowledging the invidious position the magistrate was placed in, closing the court to prevent the [devastated] victim (and her mother) from being present during the sentencing proceedings and not allowing the victim to read her VIS, was not, in my opinion, the correct resolution of the matter.

4. The level of support and assistance available to victims.

In relation to this Term of Reference, there are two reforms which I believe are warranted.

- The first is to ensure that, if an offender is being sentenced in relation to a prescribed sexual offence, the supports available when a VIS is being read in court are the same as those that were available at the trial stage. At present, CCTV is available for the reading of a VIS (clause 30A(3) of the *Crimes (Sentencing Procedure) Regulation* 2010) but not the option to close the court or to have a support person present. I would like to see these protections extended to the reading of a VIS by these most vulnerable of victims (or their representatives) in these most distressing of offences.

- The second is that I would like to see VISs specifically included in the Sensitive Evidence provisions of the *Criminal Procedure Act* 1986 (Chapter 6, Part 2A). VISs are very personal documents and all that can be done to prevent re-victimisation of the victim and the misuse of their VIS should be done. If a VIS is served on the Defence prior to the sentencing proceedings, protections should be in place to govern how the VIS is dealt with by the Defence and to whom access is given.

On another note, unrelated to the Terms of Reference, my Office has received feedback from victims that they find the publically available information, Justice's Victim impact statement Information Sheet, to be overly complicated and not reflective of their in-court experience, particularly with reference to how a VIS will be used in court.

Thank you for the opportunity to make these preliminary comments and I look forward to making further comments when the Victim Consultation paper is released.

Yours faithfully

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Lloyd Babb SC
Director of Public Prosecutions