MONASH University

NSW Sentencing Council
GPO Box 31
Sydney
NSW 2001

November 1, 2017

Dear NSW Sentencing Council

Submission regarding Victims' involvement in sentencing, Consultation Paper

This letter is in response to the Consultation Paper of September 2017 calling for submissions on Victims' involvement in sentencing. The focus of our submission, will be on the specific questions outlined below.

1. Background

The opportunity to address this important issue concerning victims' engagement within such a crucial part of the criminal justice process is to be welcomed. Victims of crime often suffer a substantial burden associated with the commission of a crime. While we live within a democratic society that affords the rule of law and a significant amount of protections to those accused of a crime, the current criminal justice institutions and processes largely engage with and use victims for the primary purpose as witnesses in securing a prosecution. Notwithstanding the changes increase victim participation to date, there is a greater need to victims of crime, that they have the right to be treated with equality and dignity and that the state and community takes seriously the impact of crime on them. It is particularly important, as the positioning of victims' rights to a remedy and to be part of the process to achieve justice (if existent), is often placed beneath that of the accused.

We write in the capacity of an academic and researcher within Monash University. Dr James Roffee has held positions in law and criminology with research interests in victims and sentencing, and Hayley Lynch having undertaken a nine-month Honours research project on Victim Impact Statements (VIS) in Victoria, which was successfully completed in October 2017. The following submission draws upon that research and elite interviews with those working within the criminal justice system. Victoria and NSW have, incrementally, sought to improve their approach to victims. The Attorney-General has afforded the opportunity of this review, through which NSW can adopt measures to excel in their approach to victim involvement. We implore the Council to avoid using this opportunity to tinker with the provisions in this space, and instead be bold in responding to victims and their need for involvement in the criminal process.

2. Response to specific questions

Questions **3.1: Primary victims**

The definition of primary victim in NSW is unduly narrow. Recognising that a VIS has both an instrumental function to provide the court with information on the impact of a crime and to provide an expressive function to those proximately affected by a crime, the decision to continue to adopt a restrictive approach appears regressive. Victoria currently adopts a more inclusive approach to who is a victim without experiencing issues concerning the volume of impact statements tendered to the court. The submission paper at para 3.21 is in

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accord with our findings in relation to the negligible impact on the number of VIS following a broadening of the definition. The broader definition provides the opportunity for more information to be provided to the court and for more victims to have the opportunity to express a crimes' impact. We therefore support a widening of the definition of who is classed as a victim of a crime and thus afforded the opportunity to make a VIS.

Questions **4.1: Content of a primary victim's impact statement**

Primary victims in NSW are restricted to speaking to the personal harms from the crime. Victorian legislation provides flexibility for victims to speak on a wider set of impacts, including the emotional, psychological, and financial impact, that the crime has had on the victims' life. These are important facets of the crime that directly impact the victim and victims should be afforded the symbolic opportunity to present these to a court.

Nonetheless, we emphasise the importance of allowing and empowering a victim to have the opportunity to present their statement uncensored by rules of evidence in particular in relation to only the crime for which a plea is negotiated or a charge laid (see below). Preventing victims from discussing the full extent of the harm suffered, acts to sterilise the VIS and create a narrative about such harms, that is divergent from the victim's experience. The state should be vigilant in attempting to create or replicate a structure of VIS that reduces the content of the VIS to that which is at odds with a true experience of the victims. There is space for the Judge to allow the provision of a statement but indicate that which will be considered during sentencing and that which will be excluded. There is an option to make the statement purely expressive in function. We do not prima facie support this.

We do not believe that the victim should be required to include suggestions as to an appropriate sentence. We equally do not believe that they should be prohibited from making suggestions. The decision on an appropriate sentence is for the court, however, there may be circumstances where the victims' suggestions are useful for a court when applying principles of sentencing and in seeking to impose a proportionate sentence.

Question **4.3 (1): Express exclusions**

Victims' statements should not be limited, beyond the inclusion of a provision preventing them from making anything offensive, threatening, intimidating or harassing within their statement. They are currently unable to make statements within their VIS against the offender which are not relating to personal harm or the impact of the crime (see above 4.1). The narrow scope to which victims may make statements limits the autonomy of victims in describing the harms and impact that the committed crime has had. For some victims, the cathartic nature of providing their narrative on the crime is lost when statements are reconstructed by the judge or magistrate to ensure its admissibility.

Question **4.3 (2): Responding to prohibited material**

Our research conducted in 2017 indicated that victims should be given the opportunity to voice their harms without restrictions beyond those above in 4.3(1), before the judge considers whether the statements fall within the scope of admissibility to determine the validity of their influence in sentencing. Victims should be given the opportunity to read their statement without intervention regarding the admissibility of their statements. If expressly excluded material is tendered, the judge should remind the victim of the exclusion, and note the lack of impact of the excluded material on the sentence.

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Question **4.6: Absence of a victim impact statement**

We propose that NSW follow the ACT and NT, and provide an express provision that a court "shall not draw any inference as to the harm, including type or extent, from the fact that a victim impact statement is not given to the court". This is required to prevent victims feeling that they must provide a VIS and may help to respond to the issues raised in para 1.43 by those opposed to VIS, concerning the making of a statement being detrimental to victims.

Question **5.1: Timing of making a victim impact statement**

Our research in Victoria indicates that victims are currently encouraged to delay composing their statement until a determination of guilt has been made to protect victims' statements from inclusion into the criminal trial and possible cross-examination. By doing so, victims may have insufficient time to compose their statement. It can thus undermine cathartic benefits of the VIS as a tool for victims to express the harms of crime. In addition, victims face a shorter time-frame between the determination of guilt and sentencing in which they are required to articulate their thoughts and feelings into a written statement - this may lead to it being rushed and not given requisite thought, hence a reduction in its utility.
For this reason, two arrangements should be considered:

- Victims should be allowed to compose, and tender VIS to the prosecution at any point after a charge is laid, as is outlined in para 5.5. The statement should not be tendered to the defence or scrutinised by the court and therefore not be discussed or contents challenged in criminal proceedings; and
- If a statement is tendered to the prosecution before a finding of guilt is returned, there should be the introduction of a time-frame following the determination of guilt (and, after a statement has been tendered) but before sentencing proceedings begin, to allow victims the opportunity to re-evaluate and amend their statements to ensure they accurately address the harm from the crimes the offender has been found guilty of committing.

Question **5.12**: **Cross-examination and re-examination**

Whilst acknowledging this is a rare practice in Victoria, the defence can cross-examine victims when their VIS is tendered to the court before the end of criminal proceedings. We propose that this right should be expressly denied to the defence and we do not suggest that NSW should follow Victoria in allowing this practice.

The VIS should not be exposed to cross-examination, as doing so calls into question the victims' perspective on the harms they experienced as a result of the offenders' actions. The symbolic act of allowing the interrogation of their statement and questioning the legitimacy or veracity of the contents should be avoided. A VIS is not tended to address the facts of the crime for the determination of guilt, but to address the questions surrounding the very personal and subjective impact that crime has had on the lives of the victim. Therefore, no evidence should need to be provided to substantiate its contents.

The statement, whether provided in written form or orally, should be accompanied by a statutory declaration or under oath or affirmation as to the truth of the content. The requirement that this be accompanied by such a requirement signals to the victims the importance of providing a true statement. Judges should be encouraged to use their discretion to note the parts of the statement that they consider during the sentencing phase.

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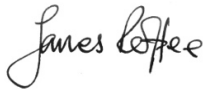
3. Conclusion

Having carefully considered the proposed consultation paper, we recommend the following:

a. Consideration should be given to expanding the definition of primary victim.
b. Consideration should be given to taking an inclusive approach to the content of a primary victim impact statement.
c. Consideration should be given to limiting the expressly excluded content to statements that are offensive, threatening, intimidating or harassing.
d. Judicial discretion should be promoted to allow for comment on the use (or lack thereof) to which expressly excluded and extraneous material is given.
e. Consideration should be given to providing a provision noting that no inference shall be drawn as to the harm or impact of a crime from the fact a statement is not provided.
f. Victims should be encouraged to compose a VIS and tender it to the prosecution when they are able to do so. If this is before a finding of guilt is returned, victims should be afforded a time-frame in which to amend and update their statement.
g. A victim should not be cross-examined on the contents of their statement.

We are happy to expand on the above comments and to assist the Council further, should it so wish.

Yours sincerely,



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