THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Crim: PWrg1407887

14 November 2017

The Hon. James Wood AO QC
Chair
New South Wales Sentencing Council
GPO Box 31
SYDNEY NSW 2001

By email: joseph.waugh@justice.nsw.gov.au

Dear Mr Wood,

Victims' involvement in sentencing

Thank you for the opportunity to comment on the consultation paper '*Victims' involvement in sentencing*', which has been considered by the Criminal Law Committee of the Law Society of NSW.

The Law Society has responded to the questions raised by the Sentencing Council in the attached submission.

The Law Society contact for this matter is Ms Rachel Geare, Senior Policy Lawyer, who can be reached on [redacted] or [redacted].

Yours sincerely,

[redacted]

Pauline Wright
President

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0333 F +61 2 9231 5809
ACN 000 000 699 ABN 98 696 304 966 www.lawsociety.com.au

Law Council
OF AUSTRALIA
CONSTITUENT BODY

2. The victim experience

2.1 Information about victim impact statements

How can the information given to victims on VISs and sentencing be improved?

It is important to provide victims with clear, accurate and timely information to manage their expectations about the Victim Impact Statement ("VIS") process, to assist with the preparation of an admissible VIS, and to improve their experience of the criminal justice system. If better quality information is provided to victims, there should be less objections to the content of VISs.

In this regard, the information package provided by Victims Services requires review by the Department of Justice. The document currently lists the following matters that appear to be outside the statutory definition of "personal harm":

- changes in your behaviour, attitudes or how you think about things
- changes in your normal coping skills
- changes in your social life or impact on relationships with others
- impact on your financial or housing situation, education or employment.

The information provided to victims refers to the possibility of cross-examination, but should also state that in practice cross-examination rarely happens. This matter should be addressed in the relevant sources of information provided to victims.

2.2 Content of a victim impact statement

How can the practice, procedure and/or law for settling the admissible content of a VIS better meet the concerns of victims?

We understand that victims have a fear of being cross-examined on the contents of the VIS (which the consultation paper acknowledges rarely occurs in practice), or having objections made and the contents of the VIS edited. To reduce the likelihood of this occurring, it is essential that the contents of the VIS are admissible.

It is preferable for defence solicitors to address matters of admissibility early. However, this can be difficult if the defence receives the VIS the night before, or the day of, sentence.

To help address these issues, the Law Society supports the introduction of a statutory requirement that the Office of the Director of Public Prosecutions (NSW) ("DPP") review the VIS before it is tendered. This would assist with issues of admissibility as DPP solicitors can anticipate objections.

We also consider that more guidance, by way of Regulation or Practice Note, in terms of service of the VIS and timeframes would be useful. If the defence were to receive the VIS seven days prior to sentence, any issues with the VIS could be resolved before court and a conversation could be had with the victim. This would reduce the potential trauma of a victim being cross-examined or having objections made to the VIS. However, this would not be possible if there is late service of a VIS.

2.3 Presenting the victim impact statement in court

What problems, if any, do victims experience when presenting their VIS in court?

If the suggestions at 2.2 are adopted, we would expect victims to experience fewer problems when presenting their VIS in court. If the DPP reviews the content of the VIS and timeframes are adhered to, there should be fewer objections to the content of the VIS.

The information provided to victims should be reviewed as detailed at 2.1.

2.4 Victim impact statements in the Local Court

(1) What factors are encouraging or discouraging the use of VISs in the Local Court?

The Law Society makes no comment.

(2) How can the use of VISs in the Local Court be improved? Can this be implemented in a way that does not compromise the efficiency of the Local Court?

The Local Court has a huge workload and is required to deal with matters very efficiently. An increased focus on using VISs may cause delay on sentence, which may have an impact on those in custody. More VISs in the Local Court will likely result in an increase in adjournments, delays and costs for justice agencies.

The Law Society prefers the status quo in relation to the use of VISs in the Local Court. As an alternative, if a matter is sufficiently serious for the DPP to appear, then a VIS could be admitted at the discretion of the Magistrate on application by the DPP.

2.5 Victim assistance

(1) How can victims be better assisted in making a VIS?

Victims can be better assisted through increased funding to the DPP (and the Witness Assistance Service in particular), to ensure proper assistance with the preparation and review of a VIS.

(2) Should victims be provided with a specialist representative? If so, what should their role be?

Victims should not be provided with a separate representative in court. This would be inconsistent with the adversarial nature of the criminal justice system. It would also be unnecessary if victims are provided better assistance to prepare their VISs.

2.6 Victims requiring additional or distinct assistance

(1) Are the needs of victims that require additional or distinct assistance being met by current procedures?

We understand that Victims Services and the Witness Assistance Service provides additional assistance to victims with distinct needs.

(2) How can assistance to victims with additional or distinct needs be improved?

This could be improved, as for all victims, through increased funding to the DPP (and the Witness Assistance Service in particular), to ensure proper assistance with the preparation, review and reading of a VIS.

3. Who can make a victim impact statement

3.1 Primary victims

(1) Is the current definition of "primary victim" appropriate?

The Law Society supports the inclusion of the following categories of people who are currently excluded from the definition of "primary victim", as discussed at paragraph 3.12 of the consultation paper:

- people (including family and friends) who may endure psychological harm from providing care and support for primary victims in the aftermath of the offence, such as parents of children or people with intellectual disability who are victims of sexual abuse, and
- spouses of people whose pregnancy has been terminated or resulted in still birth as a result of the offence.

We do not support the inclusion of the other two suggestions in the consultation paper. The Court is already aware of the impact of crime on police officers and ambulance officers, and the inclusion of neighbours of premises where a violent offence has occurred is too broad, and would create delays.

(2) How could the definition be amended?

The definition could be amended by including the two categories of people who are currently omitted referred to in 3.1(1) above. The causative phrase, "direct result", should be maintained.

(3) What are the advantages and disadvantages of expanding the definition?

If amended as suggested, the definition would appropriately include categories of people who are currently omitted, without making the definition so broad as to include people who may have tenuous claims to make a VIS, which would inevitably lead to delays.

3.2 Family victims

(1) Is the current definition of "family victim" appropriate?

The definition should be amended to cover Aboriginal and Torres Strait Islander kinship structures, as well as the added discretion described below at 3.2(2).

(2) How could the definition be amended?

We support the court having the discretion to admit a VIS, where the victim has no "immediate family", and the person suffered personal harm as a direct result of the offence.

(3) What are the advantages and disadvantages of expanding the definition?

Expanding the definition, as suggested above, appropriately accommodates expanded concepts of family that exist in the community.

3.3 Type of harm

(1) Is the current definition of "personal harm" appropriate for identifying victims who may make a VIS?

We consider the current definition of "personal harm", which requires that the cause of the harm be "direct" is appropriate. The definition could be amended to include emotional suffering. We do not support the specific inclusion of economic loss or damage to property.

(2) How could the definition be amended?

See response to 3.3(1).

(3) What are the advantages and disadvantages of changing the definition?

The advantage of the suggested amendment is that it would include emotional suffering that does not amount to psychological or psychiatric harm, but would not overly broaden the definition.

3.4 Eligible offences

(1) Is the current provision that identifies eligible offences for a VIS appropriate?

We consider the current provision that identifies eligible offences for a VIS is appropriate. We suggest that if a matter is sufficiently serious for the DPP to appear, then a VIS could be admitted at the discretion of the court on application by the DPP.

(2) How should eligible offences be defined?

See response to 3.4(1).

(3) Should domestic violence offences be a separate category of eligible offences?

We support Government initiatives that have been introduced to support victims of domestic violence, and note that legislative provision specifically acknowledges that an absence of a VIS does not make the impact of an offence less serious.[1]

However, this suggestion would create a number of problems, including additional delays and costs to justice agencies, and therefore, on balance, we do not support the wholesale inclusion of domestic violence offences as eligible offences.

Domestic violence offences cover a wide array of offences from sending a text message to gain access to children, to serious offences involving violence. The right to make a VIS for all

[1] *Crimes (Sentencing Procedure) Act 1999* section 29(3) and (4).

domestic violence offences would have significant cost ramifications for Legal Aid NSW and create significant delays in the Local Court.[2]

If a domestic violence offence is not otherwise within the category for a VIS, as in the Local Court, and is sufficiently serious for the DPP to appear, then we submit that the DPP should be able to apply to the court to permit a VIS.

(4) What are the advantages and disadvantages of expanding the definition?

See comments above.

3.5 Matters listed on a Form 1

(1) In what circumstances, if any, should it be possible for a Form 1 victim to make a VIS?

It is appropriate that the statutory scheme for VISs does not apply to Form 1 offences, since a Form 1 offence does not amount to a conviction[3].

(2) What are the advantages and disadvantages of allowing a VIS to include content regarding Form 1 matters?

As referred to in the consultation paper, allowing a VIS on a Form 1 offence may complicate charge negotiations and lead to offenders not agreeing to include matters on a Form 1.

3.6 Community impact statements

(1) Should NSW adopt community impact statements?

We do not support the adoption of community impact statements for the reasons discussed at 3.6(4) below.

(2) What form should such community impact statements take?

We do not support the adoption of community impact statements.

(3) How should sentencing courts use them?

We do not support the adoption of community impact statements.

(4) What are the advantages and disadvantages of adopting community impact statements?

We consider that the disadvantages detailed at paragraphs 3.83 and 3.84 of the consultation paper demonstrate why community impact statements should not be adopted:

- It is difficult to verify the content of community impact statements.
- The information provided in community impact statements may be too generic to be of much use to a court.

---

[2] For instance, in 2013 3,154 people were found guilty of breaching an ADVO: BOCSAR, Issues Paper No 102, *Persons convicted of breaching Apprehended Domestic Violence Orders: their characteristics and penalties*, January 2015, p1.

[3] *Crimes (Sentencing Procedure) Act 1999* section 28(1).

- Community impact statements would address matters that judges should already consider.
- A community may be using the statement as a means to vent their frustrations instead of providing useful information to the court.
- The scope of harm to the community may be interpreted too widely and include harms like lowering property prices, which would also be difficult to prove.
- Community impact statements may undermine the principle of consistent sentencing.

4. Content, admission and use of victim impact statements

4.1 Content of a primary victim's victim impact statement

What forms of harm, or other impacts or effects of an offence, should it be possible to include in a primary victim's VIS?

As above, we support the addition of emotional suffering to the definition of "personal harm". We do not consider that overly prescribing the forms of harm would be of assistance, and should be left to the common law.

4.2 Content of a family victim's victim impact statement

(1) What forms of harm, or other impacts or effects of an offence should it be possible to include in a VIS by a family victim?

Again, we do not consider that overly prescribing the forms of harm or other impacts would be of assistance, and should be left to the common law.

(2) What categories of relationship to the primary victim should the harm be in relation to?

See earlier comments at 3.2.

4.3 What a victim impact statement may not include

(1) What particular types of statement, if any, should be expressly excluded from a VIS?

The Regulation appropriately provides that a VIS must not contain anything offensive, threatening, intimidating or harassing.[4]

Any statements that are outside the definition of "personal harm", or relate to proposed penalties, and anything irrelevant such as uncharged acts, should also be expressly excluded.

(2) How should a court deal with the inclusion of any such prohibited statements?

The court should disregard any such prohibited statement.

4.4 Court's use of a primary victim's victim impact statement

(1) Are the provisions relating to a court's use of a primary victim VIS appropriate?

---

[4] *Crimes (Sentencing Procedure) Regulation 2017* (NSW), clause 11(6).

The Law Society supports the status quo. The appropriate use of a VIS will depend upon the facts and circumstances of each case.

(2) How should a court be able to use a primary victim VIS?

The current use of a primary victim VIS is appropriate.

We would oppose any proposal to allow the use of a VIS to prove an aggravating factor on sentence. Such a proposal would lead to far more instances of cross-examination, and would also substantially lengthen proceedings.

4.5 Court's use of a family victim's victim impact statement

(1) Are the provisions relating to a court's use of a family victim VIS appropriate?

Our response to 4.4(1) also applies in this context.

(2) How should a court be able to use a family victim VIS?

Our response to 4.4(2) also applies in this context.

4.6 Absence of a victim impact statement

What provision, if any, should be made for what a court may or may not conclude from the absence of a VIS?

Section 29(3) and (4) of the *Crimes (Sentencing Procedure) Act 1999* appropriately provide that the absence of a VIS does not give rise to the inference that the offence had little or no impact on the victim.

4.7 Proving mitigating circumstances

(1) Should it be possible to use material in a VIS to establish a mitigating factor at sentence?

We support the status quo.

(2) If so, in what circumstances?

The Law Society makes no comment.

4.8 Corroborating evidence

What provision, if any, should be made for adducing evidence to corroborate material contained in a VIS?

As discussed at 4.4(2), we do not consider that a VIS should be used to establish aggravating circumstances. A VIS should be separate to the adversarial process. The prosecution should rely on professional opinions in the form of separate reports to establish aggravating factors, and not rely on a VIS.

If the law is changed so that a VIS can be used to establish an aggravating factor, then provision must be made for adducing evidence to corroborate material contained in a VIS.

We note that if a VIS can establish an aggravating factor, procedural fairness would require that an accused have the opportunity to adduce evidence in reply, which will impact upon the efficiency of the court to dispose of sentence matters.

4.9 Where a victim impact statement is not consistent with charges proved

(1) What procedure should be followed in situations where a VIS is not consistent with the charges for which the offender has been convicted?

If our suggestion that DPP solicitors review VISs is adopted, then VISs should only contain statements that are consistent with the charges for which the offender has been convicted, and should not breach the De Simoni principle[5].

If a VIS contains statements that are not consistent with the charges for which the offender has been convicted, those portions of the statement should not be put before the court and should not be taken into account by the court on sentence.

(2) What provision, if any, should be made for such cases?

No provision should be made for such cases.

4.10 Objecting to the content of a victim impact statement

What provision, if any, should be made for objections to the content of a VIS?

If there is proper DPP review of the VIS, and more guidance by way of Regulation or Practice Note as to service of the VIS and timeframes, objections should be much less frequent (see discussion at 2.2). However, the defence must be allowed to object, because if unchallenged the court may use the material to establish aggravating circumstances:

> Where no objection was taken to the victim impact statement, no question raised as to the weight to be attributed to it, and no attempt made to limit its use, the case for its acceptance as evidence of substantial harm has been considered to be strengthened.[6]

5. Procedural issues with the making and reception of a victim impact statement

5.1 Time of making a victim impact statement

(1) What arrangements, if any, should be made to allow a person to prepare a VIS before conviction of the offender?

A person should not be allowed to prepare a VIS before conviction of the offender. This concept is inconsistent with the presumption of innocence. We agree with the current DPP practice of not asking for a VIS before an offender is convicted.

(2) What are the benefits and disadvantages of allowing a person to prepare a VIS before conviction?

The offender may be found not guilty and the ability to prepare a VIS prior to conviction

---

[5] *The Queen v De Simoni* (1981) 147 CLR 383.
[6] R v Tuala [2015] NSWCCA 8, 248 A Crim R 502 [78].

could raise the expectations of the victim. Charge negotiations may change the offence originally charged requiring a re-redraft of the VIS, which may be distressing for the victim.

5.2 Notifying the offender

What provision, if any, should be made to inform an offender about the contents of a proposed VIS, before the statement is tendered in court?

Provision should be made via Practice Note or Regulation to require a VIS to be served seven days before the sentence hearing unless leave is given. The Practice Note or Regulation should make provision for the ability to consent to a shorter timeframe, for instance where the accused is in custody, to avoid delay.

5.3 Number of statements

What limits, if any, should there be on:

(a) the number of victims who can make a VIS, or

(b) the number of VISs that any victim may tender?

The current Regulation permits the tendering of one VIS in respect of each primary victim, and where the primary victim has died as a result of the offence a VIS for each family victim, which is appropriate.

5.4 Attaching other material

What provision should be made for attaching other material to a VIS?

The current provision permitting photographs, drawings of other images is appropriate as it permits material to be presented in an objective way. We do not support the inclusion of videos similar to a eulogy video at a funeral as is permitted in Victoria. A video eulogy would be too emotive and unfairly prejudicial to the accused, and is also likely to contain material which is outside what is permitted to be included in a VIS.

5.5 Medical and other expert evidence

How should medical and other expert evidence relating to the impact of an offence on a victim be dealt with at sentencing?

Medical and other expert evidence should be tendered as a separate document and should not be attached to a VIS. This provides the defence with the opportunity to arrange its own reports and to cross-examine the expert witness.

5.6 Other formal requirements

(1) What should be the formal requirements for a VIS to be received and considered by a court?

The current formal requirements are appropriate.

(2) What should be the consequences of failure to comply with the formal requirements?

So long as the VIS substantially complies with the formal requirements and the defence does not take issue with the failure to comply, then it should be possible to tender by consent. We note that the content of the VIS is more important than the formal requirements.

5.7 Tendering a victim impact statement

(1) Who should be able to tender a VIS?

The Law Society supports the current position that only a prosecutor may tender a VIS. In the current adversarial system, the crime committed is a crime against the state and the state is represented by the prosecutor. A victim does not have standing, however, we submit the victim, as a member of the community, has appropriate representation through the DPP and can be greatly assisted by the DPP reviewing and tendering their VIS. If victims were to have standing and there were multiple VISs tendered by family victims, the accused could face numerous parties, which would be undesirable.

As noted by the VLRC, permitting victims to make a VIS to the sentencing court independently of the prosecution, is "at odds with the need to minimise the victim's contact with the offender".[7] The VLRC recommended that the prosecutor tender any VIS with the court and that it be served on the offender or the offender's lawyer.[8]

(2) If prosecutors alone are permitted to tender a VIS, what guidance should be provided for the exercise of their discretion?

We would not be opposed to prosecutors being provided with guidance for the exercise of the discretion to tender the VIS. Further resourcing for the DPP would assist with this process.

5.8 Special arrangements for reading a victim impact statement

(1) What special arrangements should be available to victims who read their VIS in court?

We would support the availability of support persons for all victims, and for victims to be given the opportunity to familiarise themselves with the courtroom prior to reading their VIS.

(2) Should the availability of these arrangements be limited in any way?

If pre-recording of a VIS is introduced, the defence must be given the opportunity to view the video before sentence to allow for editing, and a transcript should be provided to the defence. The victim would need to be available when the recording is played in court if required for cross-examination.

5.9 Other considerations

(1) Should any considerations prevent a victim from reading their VIS in court?

The Court should consider whether the effect on the offender needs to be taken into account e.g. if the offender is a person with a mental illness or a child.

---

[7] Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016), p 156.
[8] Ibid., p157.

(2) What alternative arrangements could be made?

In relation to children, the Law Society strongly supports the increased use of youth justice conferences. A referral to a youth justice conference is a more age-appropriate way of ensuring victims' involvement.

Youth justice conferences deal with young people in a way that enables a community based negotiated response to offences involving all the affected parties, emphasises restitution by the offender and the acceptance of responsibility by the offender for his or her behaviour, and meets the needs of victims and offenders.[9]

5.10 Oral statements

(1) Should it be possible for a victim to deliver an oral VIS, without tendering one in writing?

We do not support a victim delivering an oral VIS without requiring one in writing. It is in the interests of all parties for the VIS to be in written form to ensure the content is appropriate, and that it can be provided to the defence in advance.

(2) What procedures would need to be put in place if oral VISs were to be permitted?

We do not support the introduction of oral VISs without requiring one in writing.

5.11 Making a victim impact statement on behalf of a victim

What provision should be made for someone to make a VIS on a victim's behalf?

The Law Society supports the status quo in relation to primary victims, and recognises the possible need for a provision for a family victim who is incapable of providing information for a VIS.

5.12 Cross examination and re-examination

Under what circumstances should it be possible to cross-examine or re-examine a person who has made a VIS?

If, as we have suggested, the DPP is required to review and sign off on a VIS, and provide it to the defence seven days before sentence, then the need for cross-examination should be minimised. However, the availability of cross-examination should remain.

As discussed in the consultation paper, cross-examination happens rarely, and defence lawyers are reluctant to cross-examine as it is likely to reflect poorly on their client. However, cross-examination does occur when inadmissible material that should have been led as evidence has been introduced by way of a VIS. We again reiterate that a VIS should not be used in the evidentiary sense. There is a risk that a VIS could be used to back-end aggravating material that could not be challenged if cross-examination was abolished.

One option would be for the defence to formally notify the DPP in advance about what content will be cross-examined on if it is not removed. This would give the victim the choice to avoid cross-examination.

---

[9] *Young Offenders Act 1997*, section 3.

5.13 Use of victim impact statements outside of a sentencing hearing

To what extent and under what conditions should a VIS be available outside of the sentencing proceedings to which it relates?

A VIS should not be available to be used in proceedings outside of the sentencing proceedings to which it relates.

5.14 Other procedural changes

What other changes to practice and procedure could be made to improve a victim's experience of the sentencing process?

The Law Society supports the suggestions of the Victorian Law Reform Commission that guidance material to the judiciary should include:

- How to refer appropriately to victims who have been killed as a result of a crime, and specifically, avoiding the practice of referring to them as "the deceased".
- Acknowledging the victim's presence in the courtroom.
- Explicitly ensuring victims are aware of what is happening in the proceedings.
- Using sensitive and compassionate language.
- Allowing victims to express emotions in the courtroom (where doing so does not prejudice the jury against the accused).
- In the context of sentencing proceedings, confirming that victims understand the full circumstances of the offending and taking the time to clarify the principles of sentencing.[10]

6. Restorative justice practices in NSW Question

6.1 When restorative justice practices should be used

(1) When should restorative justice practices be available?

The Law Society is supportive of a broader approach to restorative justice practices. We consider that restorative justice practices should be available at any stage of the criminal trial process – before sentence, as part of the sentencing process, or after sentencing (subject to appropriate safeguards as referred to in 6.4).

Restorative justice practices should be available where the victim expresses a wish to participate and the matter is evaluated as suitable. The availability of restorative justice practices should not be limited by offence; the ultimate discretion in relation to suitability should lie with the court (or Corrective Services NSW post-sentence).

(2) What are the advantages or disadvantages of having restorative justice practices available as part of the sentencing process?

---

[10] Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016), p 92. We also note that the Judicial Commission of NSWs *Equality before the Law* Bench Book provides substantial guidance about community and individual differences and practical examples of how to take appropriate account of these differences.

As discussed in the consultation paper, the role of the victim in the criminal justice system is limited. Restorative justice practices provide opportunity and scope for victim involvement beyond what is available in the conventional criminal justice system. As noted by the Bureau of Crime Statistics and Research:

> "There is good evidence that victims who participate in RJ programs are satisfied or very satisfied with the process, are generally more satisfied than victims whose matter [sic] are dealt with through the normal sentencing process and that these high levels of satisfaction can be sustained months after participation in the RJ process."[11]

As discussed at pages 86-87 of the consultation paper, the benefits associated with restorative justice conferences for the victim include the opportunity to:

- tell the offender directly the impact the offending has had;
- receive answers in relation to unresolved questions about the offending;
- resolve relationships with the offender, family or the broader community, where appropriate, and
- have input into the outcome, including an opportunity to request compensation without needing to go through a formal court process.

The benefits for the offender include the opportunity to:

- take responsibility for the offending by understanding the full effect that the offending had on the victim;
- apologise;
- repair relationships, where appropriate, with the victim, family and broader community;
- engage in treatment and rehabilitation and to avoid future offending, and
- make amends by agreeing to the outcomes sought by the victim.

(3) What are the advantages or disadvantages of having restorative justice practices available after sentencing?

Post-sentence restorative justice practices provide a further opportunity for victims and offenders to experience the benefits of a restorative justice conference.

The disadvantage of having a restorative justice practice after sentence is that participation is not taken into account on sentence to demonstrate the offender's remorse or rehabilitation, greater community protection etc.

6.2 Relevant offences

(1) What offences should be eligible for restorative justice practices?

Restorative justice practices should be available for all offences where the victim expresses a wish to participate and the matter is evaluated as suitable. There is no need to limit eligibility by offence; the ultimate discretion should lie with the court (or Corrective Services NSW post-sentence). We agree with the VLRC that:

---

[11] BOCSAR, *Rates of recidivism among offenders referred to Forum Sentencing*, July 2013, p12.

> "...each case should be rigorously assessed for suitability based on the circumstances and individuals involved, rather than having a blanket inclusion or exclusion of certain offences, offenders or victims".[12]

As noted by the VLRC, concerns about the use of restorative justice practices for serious offences can be alleviated if they are understood as having a supplementary role not a diversionary role.[13] The VLRC refers to a body of research that shows that restorative justice can have a positive impact on victims of serious and violent crimes, and that it is these victims who often expect the most from the criminal justice system.[14] A blanket exclusion of certain offences removes an option to certain victims that is open to others.

Corrective Services NSW's Restorative Justice Unit has also reported victim satisfaction with its post-sentence victim offender conferences. The consultation paper refers to research which found that 95% of victim participants found their experience "positive", and this included victims of serious crimes, including murder, manslaughter, culpable driving and sexual offences.[15] However, we note that only a limited number of cases referred to the program are deemed suitable for a conference.[16]

(2) What offences should be excluded from restorative justice practices?

See response to 6.2(1) above.

6.3 Attendance and participation

(1) Who should be able to attend restorative justice proceedings?

The existing attendees and participants at restorative justice practices in NSW are appropriate.

Legal practitioners should be present in serious matters, or otherwise if requested, to observe and offer advice if any issues arise in relation to the plea or self-incrimination.

We also consider that support persons for both offender and victim should be able to attend if requested.

(2) Should certain participants be excluded?

If someone is assessed as a risk to other participants.

(3) What can be done to encourage victim involvement in restorative justice practices in appropriate cases?

Victims should be provided with resources that properly explain the process, and emphasise the benefits victims might experience as a result of participating in restorative justice conferences.

---

[12] Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016), p 188.
[13] Ibid., p177.
[14] Ibid., p178.
[15] NSW Sentencing Council, *Victims' involvement in sentencing*, 2017, p91.
[16] Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report, Part I, p185.

Restorative justice practices should be made more widely available e.g. expanding forum sentencing to other NSW Local Court locations and to the District Court for appropriate matters. The availability of forum sentence officers at court would encourage referrals and allow for assessments on the day, which would reduce adjournments.

6.4 Procedural safeguards

What procedural safeguards, if any, should be required in restorative justice practices in NSW?

The current safeguards in the *Criminal Procedure Regulation 2017* referred to in the consultation paper and the procedural safeguards contained in the in the United Nations *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*,[17] are appropriate.

[17] *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ESC Res 2002/12, 37th plen mtg, (24 July 2002) https://www.un.org/ecosoc/sites/www.un.org.ecosoc/files/documents/2002/resolution-2002-12.pdf