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Via email: [sentencingcouncil@justice.nsw.gov.au](mailto:sentencingcouncil@justice.nsw.gov.au)

Dear The Hon J Wood AO QC

## **Public Submission to the New South Wales Sentencing Council on Victims' Involvement in Sentencing**

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

### **Introduction**

1. Given the breadth of research which now points to the need to integrate the victim of crime across the entirety of the criminal trial process,<sup>1</sup> from arrest of suspect through to pre-trial processes including bail, to post-trial conviction, appeal and parole, this is a limited and disappointing reference from the NSW Attorney-General. However, the NSW Sentencing Council's remit covers Victim Impact Statements ('VIS') and the role of victims in sentencing more broadly, and its present inquiry is welcomed.

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<sup>1</sup> See, generally, the final report of the Victorian Law Reform Commission ('VLRC'), VLRC (2016) *Victims of Crime in the Criminal Trial Process*, Final Report, November 2016.

2. For many victims and survivors, VIS will provide a welcomed opportunity to meaningfully participate in court proceedings. Many victims will appreciate the ability to draft and deliver a VIS to the sentencing court. For many, an opportunity to explain how a crime affects their wellbeing, to fill in potential gaps in evidence by explaining trauma and harm not entered into evidence at trial, provides a meaningful opportunity to participate in the justice process. Many judicial officers also consider the delivery of a VIS to be beneficial, even if only to the victim personally. For many victims, this may be the first time a court has listened to an account of harm, in the words of the individual victim. Furthermore, the community expects that a responsive and compassionate justice system grants victims an opportunity to speak to the effects of the crime upon them.
3. Where a victim does not testify at trial, a VIS will provide the primary if not singular means of court participation in the prosecution process of NSW. However, VIS generally only ever assist victims during one phase of the criminal trial process and at best, can only provide limited voice and recognition in this final stage of the trial, which for some, comes after many years of waiting.
4. Additionally, VIS are long regarded an adjunct to sentencing proceedings, fraught with uncertainty as to their standing and use by courts. The uncertainty of VIS as an instrument of evidence and/or participation, against evidence led by the prosecution and defence upon which an offender is nominally sentenced, has resulted in victims being unproblematically identified as ambiguous participants in court processes.<sup>2</sup> Victims are relegated to a lesser standing as court participants as a result.
5. VIS, arguably, are widely expected to do things for victims and indeed the courts that they cannot, by design, achieve. This inquiry may well identify the natural limits of VIS as a tool of evidence and victim participation. This submission explores problems with VIS as a tool of evidence and as a means of victim participation by exploring problematic assumptions on the virtues of VIS and the lack of evidence in the literature that would be needed to support those assumptions, and offers possible solutions for the betterment of crime victim rights in the NSW justice system.

### **Duality of VIS**

6. To fully assess the purpose and function of VIS, such instruments should be viewed as holding a dual function, as a potential source of evidence for the sentencing court, and as means of participation for persons otherwise excluded from justice. While potentially connected, it is best to separate this dual function as both – as evidence and a means of participation – need to be assessed as leading to separate, at time incommensurate, outcomes for both victims and justice.
7. It may well be that VIS are a poor source of evidence while at the same time an effective tool of participation, or alternatively, make for poor evidence and ineffective participation, and the limited and possibly contradictory operation of such statements must be acknowledged.

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<sup>2</sup> See Edwards, I. (2004) 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making', *British Journal of Criminology*, 44, 6, 967-982.

## **Not all VIS are Alike**

8. The Consultation Report recognises that victims have diverse needs, and this impacts the way in which victims seek to participate in sentencing, including the content and usefulness of their VIS in sentencing. Even where a VIS provides important evidence used by the judicial officer in sentencing, the veracity of that evidence will vary, as will the extent to which it is used by the court. In certain cases, it may be proper to refer to the tenure of a VIS, but note that its content is not directly material to the sentence to be arrived at.
9. VIS are better suited to the substantive needs of sentencing for certain offences over others. Likewise, VIS will most likely assist certain victims over others. Certain victims will be better placed to furnish evidence of harm and trauma and thereby gain from having participated by tendering a VIS. Sex offences victims, for instance, who may continue to develop trauma well beyond the initial offence(s), and where the trial may come many years after that offending, may provide information and evidence to the sentencing court that would not otherwise emerge during trial. In such instances, a VIS will provide invaluable assistance updating a court as to the wellness of the victim at the point of sentencing, so long as the trauma raised connects to the original course of offending. Although individual cases will vary, such benefits may be less observable for other victims, who may be less likely to develop prolonged trauma where their injuries manifest at the time of the offence only, and for which there is limited or no psychological injury beyond expected emotions. Alternatively, ongoing trauma for certain victims may be of less relevance to the sentencing court where it is not directly connected to sentencing principle, for instance, ongoing harm to family members in homicide matters may not always be directly relevant (despite the 2012 NSW reforms).
10. As such, VIS have never been an even or equal means by which justice may be achieved between individual victims. Some VIS are inherently more relevant and useful to the sentencing court than others, and this no doubt effects the sense of participatory justice felt by victims when giving a VIS in individual cases. Although the right to give a VIS should be a matter of process and thus made available on an equal basis, victims ought to be told that the use of the VIS in each case will vary, often significantly, with no guarantee that their VIS will be used in evidence nor provide them the sense of participation that they may imagine or expect. Indeed, victims may need to be warned of potential risks of secondary victimisation, including their statement being put to proof, or their participation but being received poorly by the judicial officer or counsel in court.

## **VIS as Evidence**

11. VIS have never been treated consistently as a source of evidence, despite the possibility of meeting proof BRD by examining victims in court.<sup>3</sup>
12. Courts continue to have difficulties accepting information/evidence of harm from the victim personally. Some of these difficulties reside within adversarial legal culture, with lawyers and the judiciary less inclined to seek submissions from the victim directly.

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<sup>3</sup> NSW Sentencing Council (2017) 'Victims' Involvement in Sentencing', September 2017, p. 79-81.

13. While the testing of VIS to the standard of proof BRD is possible, defence counsel generally decline such opportunities because such course of action may be tactically disadvantageous, instead distressing the victim and emphasising the harm that counsel seeks to challenge.
14. The lack of specific power for the testing of VIS in court leaves VIS with a degree of uncertainty as to its status – as evidence, an unsworn statement or a means of participation that is generally not at the level of evidence. Such confusion only derogates the significance of VIS and continues its identification as an adjunct to sentencing proceedings.
15. VIS ought to enjoy standing as evidence before the sentencing court.<sup>4</sup> Such standing is important to the overall recognition of the role to the victim, as a participant capable of providing real evidence to proceedings. It is vital that VIS are taken as capable of meeting evidential requirements. If this means potentially subjecting victims to cross-examination, despite risks to the well-being of victims in the process, then that may be necessary. Practise suggests that this only occurs where statements contain misleading, false or exaggerated facts, which ought to be put to proof out of fairness to the accused.
16. The need to ensure that VIS accord with the law of evidence before a sentencing court is connected to the important role of appropriate legal support, discussed on pp. 8-12 of this submission. Such representation also protects victims from the risks of examination of VIS in court. The ability to provide sworn statements presents as a less egregious alternative.<sup>5</sup> Cassell and Erez outline a number of further alternatives to cross-examination, including the offender's ability to make submissions and call witnesses of their own.<sup>6</sup>
17. A requirement that a VIS meets proof BRD may have consequences in terms of the scope and content of a VIS, and the ability for a sentencing court to then refer to that content more generally throughout sentencing. VIS content may be divisible into evidence that speaks to specific and general harm, or in the American literature, harm of an ancillary nature.<sup>7</sup> The further content gets away from specific harm to the primary victim, the more contentious its character, because primary harms may be directly

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<sup>4</sup> See the current practise of the Office of the Director for Public Prosecutions for NSW, which encourages drafting a VIS supported by relevant tenable evidence, '[t]he VIS must be accurate and detail the personal harm suffered (in the short or long term) as a result of the crime, including any physical injury or psychological/emotional harm. You can attach relevant medical reports that support your statement to the VIS.'. See <http://www.odpp.nsw.gov.au/victims-witnesses/victim-impact-statements>.

<sup>5</sup> Kirchengast, T. (2007) 'Victim Influence, Therapeutic Jurisprudence and Sentencing Law in the NSW Court of Criminal Appeal', *Flinders Journal of Law Reform*, 10, 1, 143-159.

<sup>6</sup> Cassell, PG. and Erez, E. (2011) 'Victim Impact Statements and Ancillary Harm: The American Perspective', *Canadian Criminal Law Review*, 15, 2, 150-204.

<sup>7</sup> Roberts, JV. and Manikis, M. (2010) 'Victim Impact Statements at Sentencing: The Relevance of Ancillary Harm', *Canadian Criminal Law Review*, 15, 1, 1-29. For Roberts and Manikis, ancillary harm may also speak to harms occasioned to person connected to primary victims, who also feel the effects of the criminal offence. General harm has been discussed in the NSW context, see Booth, T. (2007) 'Penalty, Harm and the Community: What Role Now for Victim Impact Statements in Sentencing Homicide Offenders in NSW?', *University of New South Wales Law Journal*, 30, 3, 664-685; Kirchengast, T. (2011) 'The Landscape of Victim Rights in Australian Homicide Cases: Lessons from the International Experience', *Oxford Journal of Legal Studies*, 31, 1, 133-163.

provable by medical or forensic evidence. Primary harm to the victim may, however, be used as indicia of general harm to the community. VIS may thus be used more broadly where the court seeks evidence relevant to the general consequences of the crime, and may be relevant to general deterrence or denunciation.

### **VIS as Participatory Justice**

18. Access to justice is vitally important for all justice stakeholders, including victims of crime. A vast literature and recent inquiries ably acknowledged this.
19. A central contention of the importance of access to justice lays in the victim being taken seriously by other justice participants or stakeholders (lawyers, police, prosecutors and judicial officers). That respect ought not be merely cordial or placatory. It must derive from a real sense of respect of the importance of victims to proceedings, out of their relevance to the validity of the substantive decisions being made. This is best achieved by considering VIS as viable evidence, where it is carefully read as being relevant to the decision being made, being the sentence of the offender.
20. Where victim a VIS is made available to the court but is not in evidence, permitted out of granting the victim a sense of participation alone, then this does little to encourage the view that the victim is a substantive participant to be taken seriously. Rather, non-substantive participation encourages a view that the victim ought to be accommodated as extraneous to the substantive demands of justice, which in sentencing, requires that the offender be sentenced on the basis of relevant and appropriate evidence.
21. The issue therefore is the way in which access is encouraged, and the potential consequences of that participation where the individual is not taken seriously, exposed to disinterested parties, or worse, a hostile reception where victims choose to participate. In such instances, best intentions of providing victims' access to justice may indeed exacerbate harm for already vulnerable persons.
22. Lawyers, criminologists and members of the public often assume therapeutic benefits accrue from court participation. While this seems a sound contention, with the assumption based on victim's genuine requests for greater court participation, there is a paucity of research from those of appropriate authority that affirms that therapeutic benefits accrue from such participation. A paucity of psychological research deals with the concept of 'therapeutic justice' and what this may mean for the betterment of victims seeking court participation. The literature does, however, warn that court participation is particularly stressful and comes with real risks to the ongoing recovery of victims.<sup>8</sup>
23. Victim participation, aside from the tenure of evidence, provides an opportunity to put an emotional account on record and this in itself may be encouraged as a reason to submit a VIS. However, although emotions have a legitimate role to play in court

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<sup>8</sup> We must be critical of the assumption that all court participation, especially that which does not produce testimony or evidence, necessarily provide for positive outcomes. See Parsons, J. and Bergin, T. (2010) 'The Impact of Criminal Justice Involvement on Victims' Mental Health', *Journal of Traumatic Stress*, 23, 2, 182-188 and Herman, JL. (2003) 'The Mental Health of Crime Victims: Impact of Legal Intervention', *Journal of Traumatic Stress*, 16, 2, 159-166.

proceedings, the inclusion and empowerment of victims may be undermined by the poor reception of a particularly emotive VIS. Arguably, the goals for victims are both poorly articulated and ambiguous.<sup>9</sup> As Bandes states, 'the notion that the delivery of victim impact statements can help victims and survivors heal has seized the popular imagination, but is a highly problematic rationale for permitting the testimony'.<sup>10</sup>

24. The anti-therapeutic consequences of VIS have been studied, and include a lack of recognition and being believed.<sup>11</sup> Where a VIS does not meet evidential requirements but where a victim is nonetheless encouraged to present a VIS in court, the risk of lack of respect and being believed increases, as does the risk of cross-examination, which also contributes to anti-therapeutic outcomes.
25. Access to VIS as providing a means of participatory justice that leads to beneficial outcomes for victims must be critically assessed in light of proper evidence that supports such benefits for victims. We ought not assume, that where VIS provide little useful evidence to the court, that they are nonetheless justified out of the sense of participation they otherwise afford victims because that participation may indeed exacerbate harm or trauma in the form of secondary victimisation.
26. The suggestion that VIS are primarily a tool that allows a victim to vent their trauma to the court dangerously undermines the actual role the victim may play in sentencing, and encourages a typecast response that sees victims as the emotional, even 'hysterical other', easily dismissed as not contributing material of evidential quality and thus not to be taken seriously against the primary role of the court – to consider evidence of a substantive legal character. Arguably, such assumptions as to the virtues of VIS may encourage secondary victimisation and further harm, as judges accommodate the victim giving their VIS, precisely because their VIS is emotional and not evidential. Although all sentencing judges should act compassionately toward the victim, judges are not counsellors. In sentencing, their role is to consider the law and to determine facts on a forensic basis to arrive at a proportionate sentence.
27. If all VIS were evidential then courts would be obliged to listen to or read the content of the statement with a view that the information, which is tendered as evidence, be considered in sentencing. It may not be used in sentencing, but it will be listened to or read as potentially material, as occurs for all other evidence before a sentencing court.
28. However, if VIS are not readily evidential we must be careful to advocate their use as facilitating participatory justice, especially where participation is justified or encouraged on supposed therapeutic benefits. We must be particularly critical of the assumption that VIS are particularly justified because they afford the victim a chance to vent their harm or trauma, and that a judicial officer may indeed assist in this, which benefits the

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<sup>9</sup> Bandes, SA. (2016) 'Share Your Grief but Not Your Anger: Victims and the Expression of Emotion in Criminal Justice', in Abell, C. and Smith, J. (eds.) *The Expression of Emotion: Philosophical, Psychological and Legal Perspectives*, Cambridge University Press, UK, pp. 263-286.

<sup>10</sup> Ibid, Bandes, p. 274.

<sup>11</sup> Wemmers, J-A. (2011) 'Victims in the Criminal Justice System and Therapeutic Jurisprudence: A Canadian Perspective' in Erez, E., Kilchling, M., and Wemmers, J-A. (eds.) (2011) *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives*, Carolina Academic Press, North Carolina, pp. 67-87.

victim in their recovery from the crime. While the ability to orate harm and trauma to a court convened to consider the offence and offender may well assist some victims, there is a real risk that such participation which may further aggravate harm, isolate the victim, or generally typecast victims as emotional persons not capable of meeting proof. We must be particularly critical of the assumption that the proper role of the judge is to assist a victim's access to such court-based therapy, to allow victims to express feelings as a primary reason for the tendering of a VIS.

29. Despite court-based services designed to minimise secondary harm to victims and witnesses, including support provided by the Witness Assistance Service ('WAS') or voluntary organisations, risks of participation remain. Although participation is no doubt very difficult for some victims, and judicial officers and counsel take a vested interest in ensuring that testimony is delivered in a way not to distress the witness, the expressive function of VIS may require that judicial officers and counsel are expected to cater for an emotional response to fulfil the therapeutic aspects of VIS. Encouraging VIS as expressive tools of court participation carries the risk of undermining the work of sentencing courts by expecting all court participants to support a course of participatory therapy for victims, the outcomes of which are, as identified above, ambiguous and ill-defined. Indeed, poor experiences before certain judges has meant that some victims come away worse for having participated.<sup>12</sup>
30. It is therefore best for the victim and the court that VIS be construed as an instrument that sets out relevant evidence before the court. However, appropriate professional support can assist victims in the preparation and tenure of a VIS that meets the evidential needs of the court while allowing for a meaningful, supported and potentially better received, statement. Professional support – legal or alternative – can guide and protect victims and defend against the anti-therapeutic risks that expose victims to poor outcomes and secondary victimisation.

### **Witness Assistance Service**

31. The WAS offered by the Office of the Director of Public Prosecutions for NSW provides professional support to assists victims by familiarising them with the trial process.<sup>13</sup> WAS Officers provide a range of support services, including information on the VIS and the sentencing process. WAS Officers facilitate communication with the prosecutor to ensure that they are aware of the needs of the victim.
32. WAS Officers can assist victims by providing information about drafting a VIS, as well as support victims through the trial and sentencing phase of their justice journey.<sup>14</sup> A WAS Officer will be able to offer support should a victim seek to tender and read their statement to the court.
33. WAS Officers are able to advise victims on the difficulties they may encounter, including likely reception of their statement, the need for breaks, becoming emotional

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<sup>12</sup> Ibid, Bades, pp. 264-270.

<sup>13</sup> See <http://www.odpp.nsw.gov.au/witness-assistance-service/about-the-was>.

<sup>14</sup> See Victims Services (NSW) (2016) *Justice Journey: Information for Victims of Crime in NSW*, Department of Justice, NSW.

upon delivery of a statement orally, and moving on from any interruption to successfully deliver the content of their statement. WAS Officers are not available to all victims and are not available in the Local Court.

### **Drafting Assistance**

34. A VIS must be in the words of the victim themselves, although assistance with drafting may be given by a friend, relative, counsellor, or person volunteering or employed by a victim support agency or non-government organisation ('NGO').
35. Stretched resources may mean that levels of support will vary, including the availability and experience of any support person. Support is often determined by the type offence and the identification of the victim by the support service at some earlier point in the trial.<sup>15</sup> Assistance also varies by region. A support person may assist in conjunction with a WAS officer, but will generally be unable to advocate the interests of the victim to other trial participants, including counsel or before the court itself.

### **Role of Legal Counsel**

36. The identified risks of the dual function of VIS as a means of evidence and participation can be reduced by granting the victims access to counsel apprised of the law of evidence and the nature of complex court processes. Risks to the victim may be reduced by the provision of personal legal counsel, ethically and legally bound to the interests of the victim and court, to assist in the drafting, submission and possible oration of the VIS to the court.<sup>16</sup> The international courts and civil European jurisdictions provide publicly funded legal counsel, but privately funded legal counsel may also be retained in criminal proceedings in the United States and elsewhere.<sup>17</sup> Counsel may be an important way of professionally supporting and thereby limiting the anti-therapeutic risks and consequences of VIS.

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<sup>15</sup> See, for instance, the support offered to homicide victims by the Homicide Victim's Support Group ('HVSG') (NSW), see <http://hvsg.com.au/>. The Victims of Crime Assistance League ('VOCAL') provides support across a range of offences but is limited to the Hunter region of NSW, see <http://vocal.org.au/victim-support-unit/court-preparation-support/>.

<sup>16</sup> The Royal Commission into Institutional Responses to Child Sexual Abuse (2017) *Criminal Justice Report*, August 2017, recommended that there was no need for system wide reforms to the adversarial trial beyond discrete reforms designed to make existing processes more effective. Accordingly, there was no recommendation to reform the representation of victims in the criminal justice system, despite a significant international literature which now advocates the assistance of counsel for sex offences victims. The report did support the VLRC position that victims are participants and not parties to proceedings. The report considered the need for representation through a series of submissions but did not assess the need for reform beyond these submissions (see pp. 198-226). The work and recommendations of the VLRC was substantially relied upon, despite a specialised literature recognising the need to separately consider the importance of representation for sex offences victims as vulnerable witnesses. Justice Coate further confirmed at a plenary at the *National Victims of Crime Conference*, Brisbane, Queensland, 6-7 September 2017, that modification of the adversarial nature of the criminal trial was seen to be beyond the remit of the Royal Commission (see p. 227).

<sup>17</sup> See Kirchengast, T. (2016) *Victimology and Victim Rights: International Comparative Perspectives*, Oxon, UK: Routledge, pp. 170-174.



37. In NSW, private counsel may be presently retained where the victim seeks to challenge the issuing of a subpoena or a protected confidence or counselling communication in sexual assault trials.<sup>18</sup> Assistance, including legal assistance, may be available from LegalAid NSW in such instances.<sup>19</sup> Victims may also retain counsel for coronial inquests.<sup>20</sup> Where there is a relevant public interest, Legal Aid NSW may also provide legal assistance for such proceedings.<sup>21</sup>
38. Ireland has introduced reforms to support vulnerable and at-risk victims and witnesses in sexual assault trials. Scotland allows representation where an accused seeks discovery of confidential medical records.<sup>22</sup> Ireland has introduced legal representation for victims where their sexual history or character is questioned in court.<sup>23</sup>
39. In Scotland and Ireland, as well as NSW, private counsel are not equal to the prosecution and defence, but represent the victim during discrete applications in which the victim is particularly vulnerable and where victim participation is especially justified.
40. The greatest hurdle for the provision of legal counsel in criminal matters is overcoming the widely held assumption that a third party to proceedings is inherently incompatible with adversarial proceedings.
41. The main benefit derived from legal representation for victims tendering and/or reading a VIS is in the protection of the interests of the victim, advice as to how to phrase statements and present information in accordance with the law of evidence, which in turn will minimise problems of the identification of the VIS as merely expressive.
42. Other benefits also accrue, for instance, access to a lawyer facilitates professional communication with other justice stakeholders and trial participants, in particular, the prosecutor, defence counsel and judicial officer, and would ensure that the victim is treated with the respect and courtesy that counsel can demand of such participants. Furthermore, a victim could be confident that their lawyer would maintain their personal

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<sup>18</sup> *Criminal Procedure Act 1986* (NSW) ss 295-306. See Braun, K. (2013) 'Legal Representation for Sexual Assault Victims-Possibilities for Law Reform?', *Current Issues in Criminal Justice*, 25, 3, 819-837.

<sup>19</sup> LegalAid NSW hosts the Sexual Assault Communications Privilege Service ('SACPS'), which provides assistance and advice including representation in court, where a victim or other protected confider seeks to challenge the issuing of a subpoena for access to otherwise protected or confidential records, see <https://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service>.

<sup>20</sup> *Coroners Act 2009* (NSW) s 57. Coronial inquests are classed as a civil process.

<sup>21</sup> See <https://www.legalaid.nsw.gov.au/what-we-do/civil-law/coronial-inquest-matters>.

<sup>22</sup> *Sexual Offences (Procedure and Evidence) (Scotland) Act 2002* (Scotland); *Vulnerable Witnesses (Scotland) Act 2004* (Scotland). Scotland allows representation under Article 8 of the European Convention of Human Rights, per *WF for judicial review of a decision of the Scottish Ministers to refuse to make a determination for legal aid under section 4(2)(C) of the Legal Aid (Scotland) Act 1986* [2016] CSOH 27. See Munro, M. (2016) 'Victims' Policy in Scotland: A Review' in Croall, H., Mooney, G. and Munro, M. (eds.) *Crime, Justice and Society in Scotland*, Routledge: Oxon, pp. 151-164. For a summary see, Kirchengast, T. (2016) *Victims and the Criminal Trial*, Palgrave Macmillan, UK, pp. 78-79. Also see Doak, J. (2008) *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*, Hart Publishing, Oxford, p.143.

<sup>23</sup> *Sexual Offences Act 2001* s 34 (Ireland). See Raitt, FE. (2013) 'Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings', *Criminal Law Review*, 9, 729-749.

interest and integrity in the process, which would ordinarily include protecting the victim from adversative processes and outcomes that may lead to secondary victimisation, such as poor treatment by other trial participants, release of personal information including that sealed by the court, or cross-examination without a full hearing as to the need to expose the victim to such examination.

43. Access to a lawyer to assist in the drafting stage may also allow the victim to take advice as to the content of their VIS. A lawyer will be able to guide a victim to present VIS content in a way that more likely accords with standards of evidence and proof. Private counsel will also be positioned to deliver potentially difficult to take advice, or that certain content be modified or omitted, to bring the statement to proof. At the least, legal advice as to presentation of VIS content will no doubt assist a victim present information in a more factual way.
44. Data published in the 2014 report for Victims Services, NSW, '*Participation of Victims of Crime in NSW Court Processes*' does not support the general contention that private counsel for victims of crime are incompatible with the interests of adversarial criminal justice. Rather, interviews with judges indicated that there was limited support for such reform. This finding is of little surprise given that few judges participating in the study identified that counsel are already available for sex offences victims where counselling communications are objectionably subpoenaed. The study revealed that most judges identified counsel for victims as a third party that are incompatible with adversarial criminal proceedings. However, the report recommended that judicial officers would likely benefit from continued legal education as to developments in victim rights. Specifically, judges may not be aware of the different ways in which private counsel may assist victims and indeed the court as found across other like adversarial jurisdictions, internationally.<sup>24</sup> Although more conventional elsewhere, including England and Wales, judicial education may have a role to play maintaining the currency of knowledge of legal and policy developments in areas such as victim rights.
45. As the international research and law reforms indicate, discrete need for private counsel is key. Private counsel should only be made available where their role will enhance existing proceedings. This means supporting victims in a way that better integrates them into existing court processes, furnishing evidence from victims relevant to the substantive issues under consideration by the court. Where counsel is an appropriate option, an expectation of relevant training and continuing legal education on the needs of victims and justice would not be unreasonable.
46. The suggestion that private counsel for victims of crime is incompatible with adversarial justice is widely but uncritically accepted by many common lawyers. However, evidence mounts, in NSW and internationally, that this is not the case. The Sentencing Council is encouraged to move beyond assumptions as to the non-compatibility of private counsel and adversarial trial processes to engage with the international research on the role of private counsel as potentially enhancing the adversarial process. Indeed, such research indicates how private counsel can participate as a third party, and how such representation can benefit the work of the court.

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<sup>24</sup> For a summary see, Kirchengast, T. (2016) *Victims and the Criminal Trial*, Palgrave Macmillan, UK, pp. 76-80.

## Alternatives to Legal Counsel

47. Failing the general availability of private legal counsel, a victim's advocate (a non-lawyer, used widely in the United States, but increasingly elsewhere) may be appropriate. A victim's advocate can assist the victim throughout all phases of the trial (arrest of suspect through to parole). This includes helping the victim with their VIS to the requisite standard. The advocate can also deliver the statement to the court.<sup>25</sup>
48. One of the issues raised by the 2014 report for Victims Services, NSW, '*Participation of Victims of Crime in NSW Court Processes*', included the need for a consistent point of contact to assist victims with their justice journey. The present situation requires victims to communicate with a range of justice stakeholders from start to end. Many victims identified the police as fulfilling this role, as a trusted person and confidant whom they could contact for advice or support, even though the police are not there to personally assist victims through their justice journey. For many victims, this journey may last several years, and possibly longer for more complex matters.
49. Many states in the United States use victim advocates' as an alternative to personal legal counsel. Indeed, victim advocates assist the victim well beyond traditional legal proceedings by providing information, directing victims to available resources, assisting victims to make a complaint to the police or an appropriate authority, assist with compensation or restitution claims, provide support during court appearances, ensure that the victim's charter rights are maintained, may provide or direct victims to relevant counselling or social services, help the victim consult with relevant stakeholders (police, prosecutors, court staff, potentially judicial officers), identify the victim as vulnerable or at-risk and liaise with prosecutors accordingly, draft and/or deliver the VIS, inform the victim of post-conviction proceedings, assist with restorative interventions pre or post-conviction, and support victims throughout the entire process.
50. Utah, for instance, provides for a professional body of victim advocates that may be legally trained but are not necessarily admitted or practising lawyers.<sup>26</sup> Such advocates will usually have a background in social work or psychology, and will have some formal training in the functioning of the criminal justice system at the state and federal levels. Unlike legal counsel, victim advocates would lack standing before a court but would be able to address a court on behalf of a victim with the leave of the court or by discrete statutory amendment (for instance, to deliver a VIS orally in sentencing).
51. Victim advocates may be generalist or targeted to particular types of victimisation, such as domestic, family or sexual violence.<sup>27</sup> In the United Kingdom for example,

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<sup>25</sup> Kolb, KH. (2012) 'Victim Advocates' Perceptions of Legal Work', *Violence Against Women*, 17, 12, 1559-1575.

<sup>26</sup> Utah is comparable to NSW in that victim rights flow from a state declaration of rights for victims, with associated services that seek to maintain those rights across the justice journey. See <https://attorneygeneral.utah.gov/victim-advocacy> and <http://www.utahvictimsclinic.org/>. Victim rights clinics are an important complement and facilitate victim advocacy and victim's access to justice. The United States has a developed federal framework, see *Crime Victims' Rights Act*, 18 USC § 3771.

<sup>27</sup> Bennett Cattaneo, L. and Goodman LA. (2010) 'Through the lens of Therapeutic Jurisprudence: The Relationship between Empowerment in the Court System and Well-being for Intimate Partner Violence Victims', *Journal of Interpersonal Violence*, 25, 3, 481-502.

independent domestic violence advocates<sup>28</sup> provide a range of court and non-court based assistance.<sup>29</sup>

52. Victim advocacy largely brings together state services, some of which may already be funded, and seeks to recover costs by removing duplication of services that are already provided by state agencies or state funded NGO's.
53. Most importantly, victim advocates provide a consistent and familiar point of contact and support throughout the justice journey. Professionally trained in victim support, a victim advocate provides for the participatory needs of victims without the victim standing as a third party to proceedings (save where standing is specifically granted by statute).

## **Recommendations**

54. **VIS should be regarded as evidence and qualified advice provided to victims to bring VIS the requisite standard prior to attendance at court.** This would provide the best outcomes for victims - their statement is taken seriously like all evidence before a court. The consequence would be that if the VIS is taken seriously, so would its author. Risks of anti-therapeutic consequences would be minimised. The primary justification must be evidential and not therapeutic, given the problems that therapeutic participation can be dismissed, the victim accommodated as a venting emotional subject, and the associated problem of then typecasting all victims as unduly emotional participants. This may mean stricter guidance for victims drafting such statements. Redacting VIS at the last minute should be avoided.
55. **The benefits of legal counsel or, alternatively, a dedicated victim's advocate, should be genuinely explored and piloted.** Representation is key to raising the standing of VIS to evidence before the court. Any consideration of representation, however, should not occur as an isolated experiment in sentencing, given that victims may benefit from the assistance of counsel across the other phases of the criminal trial process as indicated in the international literature. Recourse to legal counsel or an alternative form of personal advocacy is warranted out the need to raise the evidential quality and minimise the anti-therapeutic consequences of VIS.
56. **The justification of VIS as a therapeutic tool for victim participation can only be supported where anti-therapeutic consequences are minimised and controlled.** Should VIS be primarily justified as a tool of therapeutic justice then, rather than being assumed to provide such benefits, therapeutic outcomes must be identified and found in evidence. Where it is agreed that VIS do lead to anti-therapeutic outcomes, support

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<sup>28</sup> See Independent Domestic Violence Advocates, Refuge Inc, <http://www.refuge.org.uk/what-we-do/our-services/independent-domestic-violence-advocacy/>; cf. the court based Women's Domestic Violence Court Advocacy Program by LegalAid NSW, which extends advocacy beyond the nominal remit of that provided by legal counsel, <https://www.legalaid.nsw.gov.au/what-we-do/community-partnerships/womens-domestic-violence-court-advocacy-program>.

<sup>29</sup> See the summary of functions of the domestic violence advocate extracted by the Royal Commission into Family Violence (Vic) (2016) *Royal Commission into Family Violence Volume II: Report and Recommendations*, March 2016, p. 22.

must be made available and specific measures investigated to minimise those consequences.

57. **VIS will always be a limited tool of victim participation.** Often and certainly for more serious and complex matters, VIS come at the end of years of waiting for sentencing. Where matters result in withdrawal, discontinuation or acquittal, victims are generally afforded no role. The assumption that VIS provide the balance for years of exclusion and often poor treatment by justice officials must be reconsidered and discarded. Several legal limitations have been overcome which now allow for the more comprehensive substantive use of VIS across proceedings, but courts still receive these statements poorly and with ambiguity.
58. **VIS is not a single solution to victim's access to justice.** Rather, at best, VIS ought to be recognised as one of the many opportunities for participation across the lengthy trial process that spans pre-trial processes through to conviction, appeal and parole. VIS are already admissible across a range of proceedings, but despite this, victims continue to seek opportunities for participation from the commencement of their justice journey. This warrants further assessment.
59. **NSW would benefit from a broadly framed review on the role of victims in the criminal trial process.** Similar to that conducted by the Victorian Law Reform Commission from 2014-2016, such a review would separately consider the needs and rights of victims as they stand across the entire justice process of NSW. The need for such a review is more urgent in light of associated inquiries, including the reluctance of the Royal Commission into Institutional Responses to Child Sexual Abuse to conduct a detailed review of the need to consider representation for victims of crime in light of their inability to recommend systemic change.

Yours sincerely

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