NEW SOUTH WALES
BAR ASSOCIATION

Our Ref: 17/14-4

17 November 2017

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

By Email: sentencingcouncil@justice.nsw.gov.au

Dear Mr Wood,

Victim's involvement in sentencing

Thank you for providing the New South Wales Bar Association (Association) with the opportunity to respond to the NSW Department of Justice Sentencing Council discussion paper, "Victims' Involvement in Sentencing" dated September 2017 (the Discussion Paper).

The Discussion Paper poses 74 questions across 6 chapters dealing with a wide range of issues concerning the experience of victims in the sentencing process, with a particular focus upon victim impact statements. It is noted that the Association has not provided responses to all chapters, nor to every question within each chapter. The Association has responded to a number of the questions within Chapter 4 (*Content, admission and use of victim impact statements*) and Chapter 5 (*Procedural issues with the making and reception of a VIS*). The Association would be pleased to provide further submissions responding to particular legislative reform proposals that may arise as a result of this review.

As a general submission, the Association acknowledges the importance of ensuring the appropriate and beneficial participation of victims in the sentencing process, and the importance of the VIS in the Court's recognition of the harm done to the victim and the community. The Association also notes that there can be a therapeutic benefit to the offender in hearing directly from the victim the details of the harm caused by the offending conduct as part of the sentencing process, and in providing the opportunity for the offender to acknowledge that harm. It is in the interests of all participants in the sentencing process that the purposes of, limitations upon and procedures involved in the use of victim impact statements are fair, clear and well communicated to victims of crime, as well as those legal practitioners involved in the sentencing process. From the perspective of members practising in the criminal jurisdiction, the most significant problems arise when a VIS is prepared and tendered (or sought to be tendered) which does not comply with the applicable law. Practitioners cite difficulties with late service of such reports,

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inclusion of material going beyond the agreed facts and, on occasion, the inclusion of offensive content. As the Discussion Paper sets out (at [2.38]-[2.42]), the process of having a VIS edited, whether before the sentencing proceedings or as a result of objections argued in court, can fundamentally undermine the potential therapeutic benefit of preparing and presenting a VIS and can cause delay and related expense during the sentencing process.

The Association has not provided comments upon individual questions contained in Chapter 2 of the Discussion Paper (*The victim experience*) as they are primarily matters for the policy and resourcing of the DPP, courts and related justice agencies. However, the Association supports any measures which will improve the information and assistance provided to victims directed towards ensuring that a VIS is prepared which complies with the law and is appropriate for the individual offence/s and sentencing exercise to which that VIS relates.

Chapter 4 Content, admission and use of victim impact statements

Question 4.3 (1) What particular types of statement, if any, should be expressly excluded from a VIS?

The legislation and the common law as described in the Discussion Paper (at [4.18]-[4.19] provide suitable limitations and they should continue to apply. However, in addition to the current limitations, the Regulations should expressly state that a VIS must not include the victim's views about the appropriate sentence.

Question 4.3 (2) How should a court deal with the inclusion of any such prohibited statements?

This will be a matter for the discretion of the court. However, where a statement is expressly excluded by the applicable Regulations, then deletion from the statement before it is tendered is the preferable course.

Question 4.4 (and 4.5) Courts use of a primary victim's/family victim's VIS: (1) are the provisions relating to a court's use of a primary victim/family victim VIS appropriate? (2) How should a court be able to use a primary victim/family victim VIS?

As noted in the Consultation Paper at Cl 4.30, the Act lacks guidance as to the use to which a VIS may be put in proving an aggravating factor generally or specifically as to the assessment as to whether "the injury, emotional harm, loss or damage caused by the offence" was substantial, per s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999*. Only in respect of deaths does the Act, at s 28(4), specifically allow for the VIS of a family victim to be "considered and taken into account by a court in connection with the determination of the punishment for the offence". This provision was introduced in the 2014 amendments to the Act to overcome the effect of *R v Previtera* (1997) 94 A Crim R 76. The uncertain position as to the use to which a VIS may be put on determining sentence

in the remaining matters has been noted by the CCA,[1] and remains an area of ongoing concern.[2]

The Association supports clarification of how a VIS may be used in those remaining matters excluding deaths. The Association submits that the VIS ought not be able to be used as a means by which the Crown establishes an aggravating feature of an offence on sentence, but rather should focus on fulfilling the role of recognising the harm done to the victim or the family victim by the offender's crime; and by extension, the harm to the community. The current position is that the defence is required to object to evidence of aggravating features given in this form and cross-examine the victim or family member if they do not accept the evidence given. The use of the VIS therefore to introduce potentially contentious evidence before the court to establish an aggravating factor, leaves the maker of the statement open to potentially distressing cross-examination, thereby undermining the therapeutic aim of the VIS reforms.

It is submitted that a VIS should be focused on putting the evidence of harm to the victim before the court in a manner that is therapeutically supportive of the victim. Should the Crown wish to adduce evidence of harm over and above that which might be reasonably expected to be suffered by a victim of the relevant offence, such evidence ought be adduced as part of the sentence process by either calling evidence from that witness outside the VIS format and/or by supporting the extent of the harm by other evidence.

Question 4.7 (1) Should it be possible to use material in a VIS to establish a mitigating factor at sentence? (2) If so, in what circumstances?

It should not be possible to use material in a VIS to establish a mitigating factor at sentence for the same reasons as are articulated at 4.4 and 4.5 above. Evidence going to matters of mitigation and aggravation should be proved in the usual way in which facts are established on sentence outside the VIS format in accordance with sentencing principles.

Question 4.9 (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 a VIS expressly addresses the harm caused to a victim as a result of a criminal offence for which the offender has not been convicted, or makes statements about specific harm which extends beyond the relevant criminal offence, then those aspects of the VIS are not admissible. It is legally correct in those circumstances to edit or exclude the non-admissible parts of the VIS where they can be delineated and this can be achieved. In most cases this should be able to be achieved by consultation between the Crown and the offender's lawyers.

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[1] *R v Thomas* [2007] NSWCCA 269 at [36]-[37]; *R v Tuala* [2015] NSWCCA 8 at [51].

[2] *Muggleton v R* [2015] NSWCCA 62 found that a judge did not err in the use made of VIS where there was no objection to its admission and it was supported by the report of an expert.

The objection process and the editing of a VIS has the disadvantages for the victim that have been referred to earlier. However, it is of vital importance to the offender that he or she only be sentenced for the offence/s of which he or she has been convicted. If no objection is taken, then the offender may be sentenced on the basis of harm for which the offender is not criminally liable. For this reason, the ideal procedure is that the victim has been assisted to prepare a complying VIS at the outset.

Question 4.10 What provision, if any, should be made for objections to the content of a VIS?

A party should be able to take objection to any part of a VIS which is considered not to be admissible, and the objection be adjudicated by the court if agreement cannot be reached (see also question 5.2 below). The victim should not have a right to be heard on objections, because the victim is not a party to the sentence proceedings.

Chapter 5 Procedural Issues with the making and reception of a victim impact statement

Question 5.1 (1) What arrangements, if any, should be made to allow a person to prepare a VIS before conviction of the offender? 5.1 (2) What are the benefits and disadvantages of allowing a person to prepare a VIS before conviction?

The arrangements for the preparation of a VIS are a matter for the prosecuting authorities who will be responsible for the tender of the VIS. However, the current practice of the DPP not to have a VIS prepared before conviction is a sound one. The appropriate occasion for preparation of a VIS is when there is a plea or a finding of guilt and the matter is to be prepared for sentence.

There are a number of practical disadvantages to the preparation of a VIS before conviction. Where the victim is the 'primary victim' it is very likely that person will be required to give evidence in any trial. It would seem to undermine the therapeutic aims of the VIS process for a victim to prepare a VIS before conviction, as this would then need to be served upon the defence representative as part of the prosecution duty of disclosure. The victim could be cross-examined about material included in the VIS at any trial. Further, even if there is no trial, it is likely in a significant number of cases that any VIS prepared at the time of making a statement about the alleged offence will require amendment in order for it to be appropriate and admissible at the sentencing proceedings due to charge negotiation or the content of the evidence that has been agreed and admitted.

Question 5.2 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?

It is essential that the offender's representatives have an opportunity to see a VIS well before the statement is tendered in the proceedings. It is preferable from the perspective of the offender, the prosecution, and the victim if any objections or concerns about aspects of the VIS are able to be resolved prior to the sentencing proceedings. If sufficient time is available for the defence representatives to discuss the matter

with the prosecutor, resolution may be reached between the parties obviating the need for amendments to the VIS, or alternatively resulting in appropriate editing prior to the sentence, allowing the VIS to be read on the day without objection or the need for cross-examination on its contents. Even if agreement is not able to be reached, it is preferable that the prosecutor is in a position to advise the victim in advance that there may be some dispute about aspects of the VIS. The Bar Association supports an express provision requiring service of the VIS in advance of the sentence hearing, such as a period of 7 days prior to the date listed for hearing. Restrictions on copying and distribution could be incorporated to accommodate victim privacy concerns.

Question 5.3 What limits, if any, should there be on:

(a) *The number of victims who can make a VIS:*

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

It is difficult to see how a numerical limit could be placed upon the number of (qualifying) victims who can make a VIS. However, only one VIS should be received per victim.

Question 5.4 What provision should be made for attaching other material to a VIS?

It is noted that the current NSW provision already allows for a VIS to include photographs, drawings or other images. The Association opposes any amendment to the current NSW provision which would permit the attachment of videos [or photographic montages] similar to eulogy material in the case of family victims. Such material has the potential to be unfairly prejudicial. Such material arguably extends beyond and outside the requirement that the VIS speak to the impact of the crime upon the family victims. It has the potential to lead to a perception that some lives are more important or valuable than others in sentencing for homicide cases.

Question 5.5 How should medical and other expert evidence relating to the impact of an offence on a victim be dealt with at sentencing?

Medical and expert evidence relied upon by the prosecution as evidence of 'substantial harm' or harm which in some way aggravates the seriousness of the offence should be dealt with in the same way as any other evidence relied upon for such purpose. That is to say, it must be subject to objection, cross-examination and challenge and the prosecution is required to prove it beyond reasonable doubt. The Bar Association would oppose any proposal which would lower admissibility or onus of proof standards, by treating such material differently if it were attached to a VIS.

Question 5.6 (1) What should be the formal requirements for a VIS to be received and considered by a court? (2) What should be the consequences of failure to comply with the formal requirements?

The current requirements seem appropriate. The Bar Association would not oppose an amendment to provide for alternatives to a conventional signature where there is a good reason why the victim is unable to sign the VIS.

Question 5.7 (1) Who should be able to tender a VIS?
(2) If prosecutors alone are permitted to tender a VIS, what guidance should be provided for the exercise of their discretion?

Only prosecutors should be able to tender a VIS. Guidance for the exercise of prosecutors' discretion is contained in the Uniform Barristers' Rules and the DPP Guidelines.

Question 5.10 (1) Should it be possible for a victim to deliver an oral VIS without tendering one in writing?
(2) What procedures would need to be put in place if oral VISs were to be permitted?

It should not be possible for a victim to deliver an oral VIS without first providing it in writing. This is not intended to exclude a victim who is unable to read or write from having a VIS prepared and having it read to the Court (as provision is already made for this). The concern is that neither the prosecutor nor the defence representatives will have notice of precisely what the victim proposes to say. This has a number of risks associated with it, chiefly the prospect of highly prejudicial material being impermissibly placed before the court and defence counsel being required to object to the VIS while it is being given. This is likely to be devastating to the victim personally in terms of the therapeutic benefits of giving a VIS. It also presents difficulties for defence counsel who may not wish to object for good reasons, but who may need to do so, as failure to object has been considered to constitute a concession with respect to the evidence.

Question 5.12 Under what circumstances should it be possible to cross-examine or re-examine a person who has made a VIS?

As identified by the Discussion Paper, this is a difficult issue. Where a VIS includes assertions of harm which go beyond the evidence already led by the prosecution and may be considered by the sentencing court to constitute an aggravating feature of the offence, procedural fairness to the offender would dictate that these assertions be able to be tested by cross-examination. However, cross-examination of a victim who has provided a VIS is highly undesirable for all the reasons identified above. As stated above in response to Questions 4.4 and 4.5, this is an area where clarification of the law is desirable. If the legislation clearly provided that a VIS could not be used to establish an aggravating feature then cross examination would not be required which would better align with the therapeutic aims of the scheme. Further, as submitted above in response to Question 5.2, a requirement that a VIS be served 7 days in advance of the hearing would provide the opportunity to resolve matters of concern in advance of the hearing, allowing the process to proceed without objection or other challenge.

If you have the Council has any questions please contact the Association's Executive Director, Mr Greg Tolhurst on [redacted]

Yours sincerely,

[redacted]

Arthur Moses SC
President