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New South Wales Sentencing Council
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SUBMISSION ON REVIEW OF VICTIMS' INVOLVEMENT IN SENTENCING

Thank you for the opportunity to make a submission to the Sentencing Council's review of victims' involvement in sentencing in NSW.

Elizabeth Evatt Community Legal Centre (EECLC) is a non-government organisation that provides free legal advice and limited representation to disadvantaged members of the community living in the Blue Mountains, Greater Lithgow, Bathurst, Oberon and Orange regions of NSW. EECLC also provides community legal education and engages in law reform activities in areas of significance to the community.

Due to the large proportion of clients represented by EECLC that are either primary or family survivors of violence, particularly domestic and family violence and sexual assault, we have a significant interest in how victims of violent crime are involved and treated within the criminal justice system.

In addition to their experiences of violence our clients are also often experiencing increased vulnerability due to homelessness, lower literacy skills, lack of English, poverty, disability, social exclusion, drug and alcohol use and the on-going experience of further acts of violence.

EECLC acknowledges the many barriers that victims of violence face in reporting violence to Police and engaging with criminal justice processes, including: fear of retribution from the offender; fear of not being believed; concern that the violence they have experienced is not 'serious' enough to warrant Police intervention; social stigma associated with being a victim of violence; previous poor experience with Police or the criminal justice system; concern for the safety of the offender; fear that their children may be removed as a result of reporting the violence; fear of re-traumatisation through engaging with the criminal justice system; an inability to take time off work to engage with the process and distrust in Police and the criminal justice system.

Section 3A(g) of Crimes (Sentencing Procedure) Act 1999 (NSW) recognises ‘the harm done to victims of crime and the community’ as one of the purposes for which a court may impose sentence on an offender. EECLC supports the right of victims to participate in the criminal process, including sentencing.

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

Consideration could be given to amending the Victim Impact Statement (VIS) Information Package published by Victims Services NSW to include the website of Community Legal Centres NSW¹ for the purpose of giving victims easy access to a directory of free, local legal advice providers.

We also submit that access to a universal template or pro forma for the preparation of VISs would be helpful for victims, especially those struggling with additional vulnerabilities like lower literacy skills or lack of English.

EECLC also supports the preliminary submission of *Victims and Witness of Crime Court Support* that a small leaflet with information on the elements and factors involved in the sentencing procedure, including VISs should be readily available and provided to victims before the sentencing date.² This smaller resource could complement the 20-page sentencing currently booklet provided by Victims Services that some victims may find difficult to engage with, particularly after an experience of trauma.

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

Research indicates that there is some confusion regarding when oral VIS should be heard in sentencing proceedings.³

We support the view that there should be standard procedural protocols for dealing with orally presented VIS in the court and that these procedures should include a mandatory acknowledgement of the victim and their VIS by the court regardless of whether it is presented orally or tendered.

We also support the preliminary submission of *Braveheart Foundation Ltd*, in that the impact of the crime on victims who choose *not* to submit a victim impact statement should also be noted as part of the sentencing process.⁴

2.4: Victim impact statements in the Local Court

¹ Community Legal Centres NSW, Community Legal Centre Directory available at: http://www.clcnsw.org.au/clc_directory.php

² *Victims and Witness of Crime Court Support*, PVI5 5 to Sentencing Council of NSW, *Preliminary Submission into Victims involvement in sentencing*, 31 July 2017

³ Fiona Tait, *The Victim Impact Statement Process in NSW as Experienced by Victims of Crime and Victims Service Professionals* (Master Thesis, University of Sydney, 2015) <https://ses.library.usyd.edu.au/bitstream/2123/14033/1/tait_fm_thesis.pdf>

⁴ Bravehearts Foundation Ltd, PVI11 to Sentencing Council of NSW, *Preliminary Submission into Victims involvement in sentencing*, 1 August 2017 <<http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Current-projects/Victims/PVI11.pdf>>

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

It has been the experience of the EECLC that victims with matters being heard in the Local Court (frequently domestic violence matters) are often unaware they can submit a VIS prior to the sentencing of an offender.

We have also observed that the high-caseloads and mention system operating within the Local Court make it difficult for victims to use VISs.⁵

Some victims, particularly victims of domestic violence, at times may wish to seek leniency for the offender due to a whole range of complex reasons. We submit that police prosecutors may be hesitant to encourage the use of VIS where a victim's interests or wishes are perceived to be odds with the desired sentencing outcome.

Likewise, police may be reluctant to encourage the use of VISs in domestic violence matters, as it could appear to negate the benefits of other police practices, like Domestic Violence Evidence-in-Chief (DVEC) reforms aimed toward 'reducing trauma to victims in telling their story in front of offenders'.⁶

We note that victims who are provided information about VISs and encouraged by police prosecutors to use them, may struggle to engage with the process within the strict timeframes and lower level of support provided to many victims dealing with the Local Court.

Conversely, as VISs can only relate to the crime to which the offender has been convicted, and in cases of domestic violence, victims may be deterred by the requirement to restrict their experiences to a single offence, particularly where the offence charged has been determined to be on the lower end of criminal offending.

We submit that it is also possible that the more casual security arrangements often seen at Local Courts (particularly those in regional and remote communities that the EECLC service) may make it less likely that a victim feels safe presenting a VIS, particularly for victims of domestic violence who may be fearful of the offender.

2.5 Assistance for victims

We note the 2016 report from the Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* recommends victims should be aware of and able to assert their substantive legal rights in connection with a criminal process independently of the prosecution.⁷ We support this conclusion and submit

⁵ Department of Justice Victoria, Victim Impact Statement Reforms, Interim Implementation Report, 2011,

<https://www.victimsofcrime.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2017/07/1d/69d2d809f/victim-impact-statement-reforms-in-victoria-interim-implementation-report.pdf>

⁶ NSW Police, *Domestic Violence Evidence in Chief (DVEC)* Booklet, 2016

<http://www.police.nsw.gov.au/__data/assets/pdf_file/0004/439420/DVEC_Brochure.pdf>

⁷ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, August 2017 <http://www.lawreform.vic.gov.au/sites/default/files/VLRC_Victims%20of%20Crime-Report-W_0.pdf>

that independent legal advice for victims of crime is essential, as the legal interests and wishes of a victim and the public interest of prosecuting crime can be at odds.

Resolution of criminal matters may limit a victim's capacity to pursue a civil action or to make a Victims Services claim; all victims should be encouraged to pursue legal advice to ensure they understand the consequences of a proposed resolution or discontinuance of a prosecution.

We submit that all victims, particularly those who face additional barriers in accessing the justice system, should have access to free independent legal advice and, if needed, ongoing legal assistance to assert rights connected with their involvement in the criminal process.

We note the preliminary submission from NSW Police Force asks the Sentencing Council to explore the introduction of independent legal representation of victims at sentencing hearings "moving victims towards equality with the prosecution and defence."⁸

Although currently under resourced, we believe CLCs are well placed to play an increasing role in this area due to our visibility and accessibility within communities as well as our access to and knowledge of local networks and services, often needed by victims.

2.6: Victims requiring additional or distinct assistance

EECLC supports the preliminary submission of *Victims and Witness of Crime Court Support* that victims should have the option of either pre-recording their VIS to be played in court or using a CCTV room to read their VIS.⁹

We hold the view that victims should be empowered with greater flexibility as to how they choose to engage with the justice system and these options may be particularly useful for smaller, regional courts with less rigid security arrangements.

3.2: Family victims

Section 26 of the *Crimes (Sentencing Procedure) Act 1999* defines 'family member' primarily as people related by blood, marriage or within de facto relationship.

We submit that patterns of parenting, marriage, kin relationships and responsibilities that can equate to 'family' vary significantly across cultures within Australia and as such, the definition of family victim should be broadened to better encompass how people define their own families.

We suggest that this could be achieved by bringing the definition of 'family member' in the *Crimes (Sentencing Procedure) Act* into closer alignment with definitions of 'relative' and 'domestic relationship' provided in the *Crimes (Domestic and*

⁸ NSW Office for Police and NSW Police Force, PVI12 to Sentencing Council of NSW, *Preliminary Submission into Victims involvement in sentencing*, 2 August 2017

<<http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Current-projects/Victims/PVI12.pdf>>

⁹ Victims and Witness of Crime Court Support, PVI5 to Sentencing Council of NSW, *Preliminary Submission into Victims involvement in sentencing*, 31 July 2017 <

<http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Current-projects/Victims/PVI06.pdf>>

Personal Violence) Act. For example, to include in the case of an Aboriginal or Torres Strait Islander person, the extended family or kin according to the Indigenous kinship system of the person's culture.

We also note that many marginalised victims, particularly those affected by homelessness may have no 'family' members that fall within the current definition to provide a VIS or may not consider those people related by 'blood' or 'marriage' as 'family'. We also support the submission of the *Office of Director of Public Prosecutions* that were a deceased victim has no "immediate family" there is discretion to admit the VIS of someone who was considered 'family' or someone who was in a family type relationship with the deceased to present a VISs.¹⁰

3.4: Eligible offences

We support the proposed 'Option 1' in the Consultation Paper so that *any* victim meeting the statutory definition of a 'victim' or 'family victim' having suffered harm from a crime could be eligible to use a VIS regardless of the offence type. We believe this option is both the simplest to understand and provides the greatest flexibility for victims' involvement in the sentencing process.

We also support the inclusion of domestic violence as a separate offence type specifically within the legislation and would favour the approach taken by Tasmania¹¹ that includes: sexual assault; threats, coercion, intimidation or verbal abuse; abduction; stalking; economic abuse; emotional abuse or intimidation; contravening an apprehended domestic violence order and/or damage to property.

We suggest that in domestic violence matters the court has discretion to allow wider scope for the content of VISs, noting that for many victims the impacts of non-physical abuse can be far more significant than the impacts of a specific physical injury.¹² We believe that the significant and pervasive consequences of domestic violence on a victim are often lost in an incident-focused criminal process.

The use of VISs aimed specifically toward domestic violence offences may assist the court to understand of the multi-faceted effects of violence that is likely to have occurred in a variety of forms over a long period of time.

Thank you for the opportunity to comment on this consultation paper. If you need any further information please contact Arlia Fleming, Managing Principal Solicitor on (02) 47040203 or by email arlia@eeclc.org.au.

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¹⁰ Director of Public Prosecutions (NSW), PVI6 to Sentencing Council of NSW, *Preliminary Submission into Victims involvement in sentencing*, 9 August 2017, <<http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Current-projects/Victims/PVI16.pdf>>

¹¹ Sentencing Act 1997 (Tas) s4 definition of "family violence offence"; Family Violence Act 2004 (Tas) s 4 definition of "family violence offence", s 7.

¹² Australian Institute of Criminology, *Key Issues in Domestic Violence*, December 2007 <<http://www.aic.gov.au/publications/current%20series/rip/1-10/07.html>>