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SUBMISSION TO THE NEW SOUTH WALES LAW REFORM COMMISSION ON BEHALF OF THE HOMICIDE VICTIMS' SUPPORT GROUP (AUST) INC.

SENTENCING

4 JUNE 2012

SUBMISSIONS TO THE NEW SOUTH WALES LAW REFORM COMMISSION (NSWLRC) ON BEHALF OF THE HOMICIDE VICTIMS' SUPPORT GROUP (AUST) INC.

1 BACKGROUND – HDY and The Homicide Victims' Support Group (Aust) Inc (HVSG)

Henry Davis York (**HDY**) is a commercial law firm situated in Sydney. HDY places great emphasis on their community and corporate social responsibility to provide legal services to groups and individuals who are disadvantaged and/or under-represented, as well as to address legal issues of broader community concern.

HDY has offered pro bono legal services in partnership with the Homicide Victims' Support Group (Aust) Inc (**HVSG**) since 2005. HVSG are a not-for-profit organisation dedicated to providing support, education and information to the families and loved ones of victims of homicide.

The Homicide Victims' Support Group (Aust) Inc. was founded in June 1993, at the Institute of Forensic Medicine at Glebe.

The group was established when the parents of Anita Cobby and the parents of Ebony Simpson were introduced to each other and they, with the staff at the Institute, recognised the very real need for an organisation which could offer counselling, support and information to families and friends of homicide victims throughout NSW.

The aims of HVSG are threefold

- offering support to families;
- educating the general public and professional bodies about the needs of homicide affected families; and
- reform of some laws that impact on family members.

HVSG has a working partnership agreement with the Attorney General's Department and the NSW Police Force that enables them to receive a notification form of every homicide in NSW within 48 hours of the homicide occurring. This then enables HVSG, the police and other services to put into place a comprehensive plan around supporting the surviving family members.

The majority of work conducted by HDY is for families and individuals to assist in their participation in coronial inquests and with matters such as wills, probate, civil matters and compensation. Since 2007, HDY has assisted with three to four inquest matters per year, frequently briefing counsel to appear on a pro bono basis in order to pose questions on behalf of the family.

HDY and HVSG won the 2007 Pro Bono Partnership Award through the NSW Law and Justice Foundation. The partnership that we have fostered is unique and provides services to family members of homicide that no other organisation provides.

2 SCOPE OF THESE SUBMISSIONS

HDY was asked to prepare these submissions by HVSG on behalf of their clients who are the family members and loved ones of persons who have been killed.

The scope of these submissions is limited to issues raised by HVSG and the families. They relate only to the sentencing of individuals who are found guilty of murder or manslaughter in New South Wales. These submissions are less applicable to defendants charged with minor offences and do not apply to Local Court proceedings.

3 GENERAL PURPOSES OF SENTENCING

3.1 Should there be a legislative statement on the purposes of sentencing?

Section 3A of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* (section 3A)currently provides a list of purposes for which a court may impose a sentence on an offender. These purposes reflect long standing principles developed by the common law[1]. Section 3A was introduced to provide further guidance and structure to sentencing, whilst preserving judicial discretion to ensure the criminal justice system is able to recognise and assess the facts of individual cases[2].

Other jurisdictions with legislative statements of the purposes of sentencing include the Northern Territory, Queensland, Victoria, the Australian Capital Territory, as well as the Commonwealth. With respect to the Commonwealth legislation, Gleeson CJ explained the concept and purpose of the "guidelines" in *Wong v The Queen*[3]:

> The outcome of discretionary decision-making can never be uniform, but it ought to depend as little as possible upon the identity of the judge who happens to hear the case. Like cases should be treated in like manner. The administration of criminal justice works as a system; not merely as a multiplicity of unconnected single instances. It should be systematically fair, and that involves, amongst other things, reasonable consistency.

The legislative statement on the purposes of sentencing in section 3A helps to ensure consistency in sentencing; preventing sentencing decisions based on arbitrary and inappropriate purposes and considerations. HVSG therefore submits that such a statement should be retained.

3.2 Should courts be required to take every purpose in the statutory list into account in determining an appropriate sentence?

While the purposes of sentencing may sometimes conflict and some may be pursued simultaneously[4], we submit that the ALRC was correct in asserting that judicial officers should consider and balance the various purposes of sentencing and decide which purpose or purposes can and should be pursued in any particular matter. This requires the judicial officer to consider each and every purpose before determining its relevance or prominence.

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[1] Judge John Goldring, *Facts and statistics in the sentencing process* (2009) 32 Aust Bar Rev 281
[2] *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*; NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5813 (R J Debus, Attorney General)
[3] (2001) 207 CLR 584 at [6]
[4] ALRC 105, at 4.30

However, HVSG submits that for violent crimes such as murder and manslaughter, a judicial officer should be required to treat the purpose of recognising the harm to the victim as a primary purpose in sentencing.

3.3 **Should it be possible for the court to refer to purposes that are not included in the statutory list when determining an appropriate sentence?**

The prescribed purposes in section 3A help to ensure fairness and consistency in sentencing and to protect the community from undue prominence being given to non-statutory factors. This is consistent with the current wording in section 3A.

3.4 **Should a single overarching or primary purpose of sentencing be identified? If it should, what should it be?**

HVSG submits that there should not be a single overarching or primary purpose of sentencing for all offences as the spectrum of crimes is too broad.

However, we submit that a primary purpose of recognising the harm done to the victim of the crime and the community should be identified for the offences of murder and manslaughter.

The NSW Sentencing Council and the NSW Bureau of Crime Statistics and Research released the results of a survey in 2008 which showed that 20% of people surveyed felt that the criminal justice system does not all meet the needs of victims, and 42% felt that the criminal justice system does "not very" much meet the needs of victims[5].

By implication, it is important to the community that recognising the harm done to the victim of the crime and the community be a primary purpose in sentencing for violent crimes.

3.5 **Should guidance be provided as to the court's approach to applying the purposes of sentencing in particular circumstances?**

HVSG submits that the purposes outlined in section 3A, combined with precedent and case law, are sufficient guidance for judicial officers, subject to our submission regarding the primary purposes of sentencing for murder and manslaughter offences.

4 SPECIFIC PURPOSES OF SENTENCING

4.1 Statement of Purposes

The evolution of theories of punishment and categories of offences has led us to a situation where we now have a plethora of conflicting and competing purposes of sentencing, which are designed to be applied to the broad range of behaviour that is currently deemed to be criminal in nature. The current state of our criminal justice system and the enormous breadth of behaviour it encapsulates means that some sentencing purposes will be appropriate for certain criminal acts, while others will not. As such any functioning criminal justice system will require an element of flexibility in order to effectively enforce society's standards of conduct and reduce the level of society's criminal behaviour.

[5] NSW Sentencing Council and NSW Bureau of Crime Statistics and Research, *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* No. 118, August 2008, page 6

HVSG supports a legislative statement setting out the purposes of sentencing. Such a statement will aid in the consistency and transparency of the sentencing process as well as facilitating a greater understanding of the process by the community, in particular those who have directly suffered as a result of any criminal acts. However, HVSG consider that a number of amendments should be made to the drafting of the list to reflect the current state of our criminal justice system.

The list set out in section 3A contains a number of potentially conflicting purposes. For example, the purpose of rehabilitation of the offender conflicts directly with recognising the harm done to the victim. In order to accommodate this and the broad range of behaviour currently the subject of criminal law, HVSG submits that any statement of purpose be drafted in a manner that reflects the varying applicability of the purposes of sentencing to the matters that may come before the courts. We submit that the current drafting of section 3A of the Act achieves this though the following drafting: "*The purposes for which a court **may** imposes a sentence are as follows: …*" [emphasis added].

4.2 Should Courts consider all sentencing purposes?

HVSG acknowledges that the courts in NSW follow the long-established common law sentencing approach and address all of the purposes of sentencing when framing a sentence.[6] HVSG submits that requiring a judge to consider all of the purposes and then decide on the most appropriate in the circumstances of the offence is the best approach as it ensures that relevant purposes cannot be overlooked.

4.3 Are there circumstances when a particular purpose should not be taken into account?

There are circumstances in which it is inappropriate to address certain sentencing purposes. For instance, promoting rehabilitation of the offender is less applicable in circumstances where the offender has committed murder than in other more minor offences. In the case of murder, an offender has caused the death of another with either reckless indifference to human life or the intent to kill or inflict grievous bodily harm. The act of murder is universally condemned; it is also so far removed from acceptable social behaviour that it has traditionally been the subject of the strictest and harshest punishments imposed by a ruling body.

The impact that an act of murder has on a victim's loved ones and the immediate community is both catastrophic and irreversible. HVSG submits that consideration of an offenders' rehabilitation as a factor in sentencing in the case of murder, is incompatible with the administration of justice as it disregards the almost universal condemnation of the act as well as the irreversible and catastrophic impact it has on the community.

4.4 A single overarching sentencing purpose to fit the crime.

As discussed above, the applicability of the various purposes of sentencing will depend entirely upon the circumstances before the court in each individual case. As such, it is inappropriate for a single overarching or primary purpose to be identified for all criminal acts.

That being said, HVSG submits that it is appropriate to identify a single overarching or primary purpose of sentencing for the offence of murder. HVSG considers that

[6] *R v Stunden* [2011] NSWCCA 8 [112]

this is appropriate on the basis that the crime of murder is unique in both its horrific nature and the irreversible consequences that follow it.

HVSG submits that, the overarching or primary purpose of sentencing for the offence of murder should be the recognition of the harm done to the victim and the community.

The identification of this as the single overarching or primary purpose of sentencing for murder would not constitute a radical departure from current sentencing laws in Australia. In South Australia, the *Criminal Law (Sentencing) Act 1998* (SA) highlights particular purposes of sentencing for particular offences.[7] In addition, the *Sentencing Act 1991* (Vic) requires that the protection of the community from the offender is to be the principal purpose for which a sentence is imposed in cases involving a recidivist serious arson, drug, sexual or violent offender. [8]

4.5 **A hierarchy of sentencing purposes to fit the crime.**

As an alternative to identifying a single overarching or primary purpose of sentencing, HVSG supports the establishment of various hierarchies of sentencing, each of which would be applied to its respective category of offences.

HVSG submits that it would be appropriate for a hierarchy of sentencing purposes to be established specifically relating to acts of murder.

The hierarchy of sentencing purposes for murder should reflect the irreversible and catastrophic impact the offence has on the victim, their friends and family and the community.

HVSG set out below a proposed hierarchy of sentencing purposes to be applied in order of importance. The hierarchy is based on the purposes set out in section 3A:

(a) Recognition of the harm done to the victim of and the community;

(b) Adequate punishment for the offence;

(c) Making the offender accountable for his or her actions;

(d) Protection of the community; and

(e) Denunciation.

HVSG submits that any of the aforementioned sentencing purposes are all valid in relation to sentencing offenders charged with murder or manslaughter.

In relation to the purpose commonly described as "offender is adequately punished for the offence", HVSG submits that this purpose should be qualified by the term "justly" as opposed to "adequately".

"Adequate" means "equal to the requirement or occasion; fully sufficient, suitable or fit."[9] The irreversible consequences of murder make it impossible to "adequately" punish an offender. There is no punishment that can be described as "fully

[7] For example, in relation to home invasions the sentencing purpose identified is the protection of the security of lawful occupants; for lighting bushfires it is bringing home the extreme gravity of the offence and reparation; and for child sex offences it is deterrence. *Criminal Law (Sentencing) Act 1988* (SA) s 10(1b)-(4).
[8] *Sentencing Act 1991* (Vic) s 6D.
[9] Macquarie Dictionary Online.

sufficient" or "equal to" the loss suffered by the community and friends and family of a murder victim.

HVSG considers that it is inappropriate to qualify this purpose of punishment with the term "adequately" as it suggests that the offender is receiving a minimum punishment as opposed to a "just" or "appropriate" punishment. As such, HVSG submits that the purpose should be qualified by the term "justly".

4.6 Promotion of an offender's rehabilitation.

HVSG does not consider that the promotion of an offender's rehabilitation is an appropriate purpose of sentencing in any case in which the offender is found guilty of murder or manslaughter.

In the case of murder, an offender has caused the death of another with either reckless indifference to human life or the intent to kill or inflict grievous bodily harm. Murder is so far removed from acceptable social behaviour that it has traditionally been the subject of the strictest and harshest punishments imposed by a judicial body. In 2008, all 41 persons charged with murder or attempted murder in NSW higher courts were sentenced to terms of imprisonment.[10] Similarly in 2009, all 48 persons charged with murder or attempted murder in NSW higher courts were also sentenced to terms of imprisonment.[11]

It is well established that public attitudes matter when formulating sentencing policy and practice[12] and that justice not only needs to be done but also needs to be seen to be done. The criminal justice system is a public institution; it's effective functioning is dependent on public confidence in the system.

In the 2007 Survey of Social Attitudes (**Survey**), conducted by the Australian Institute of Criminology, the majority of respondents (58.4%) agreed that when sentencing criminals, judges should reflect the views of the public. Over half of those surveyed had either no confidence or "not very much confidence" in the criminal courts having regard for victims' rights.[13] The survey also reported that over 85% of respondents had either no confidence or "not very much confidence" in the capacity of the prison system to rehabilitate offenders.[14]

In light of these attitudes about prisons, the death penalty and the criminal justice system, HVSG submits that the promotion of an offender's rehabilitation should not be considered when formulating a sentence for offender's found guilty of murder or manslaughter.

5 GENERAL SENTENCING PRINCIPLES

5.1 Should the legislative and common law principle that imprisonment is a sentencing option of last resort be retained or amended in any way? If it is amended, in what way should it be amended?

[10] NSW Bureau of Crime Statistics and Research (available at: http://www.bocsar.nsw.gov.au/Lawlink/bocsar/ll_bocsar.nsf/vwFiles/hclc_penalties.xls/$file/hclc_penalties.xls)
[11] Ibid.
[12] L Roberts & D Indermaur *What Australians think about crime and justice: results from the 2007 Survey of Social Attitudes.* Research and public policy series. Canberra: Australian Institute of Criminology, page 1.
[13] L Roberts & D Indermaur *What Australians think about crime and justice: results from the 2007 Survey of Social Attitudes.* Research and public policy series. Canberra: Australian Institute of Criminology, page 18.
[14] L Roberts & D Indermaur *What Australians think about crime and justice: results from the 2007 Survey of Social Attitudes.* Research and public policy series. Canberra: Australian Institute of Criminology, page 20.

Imprisonment as a last resort in matters of unlawful killing is rarely an issue as a sentencing maxim due to the high incidence of custodial sentences currently imposed by the courts in these cases. In the period from 1994 to 2001, all persons guilty of murder were given custodial sentences. Only 11.5% of persons found guilty of manslaughter were given non-custodial sentences.[15]

However, HVSG submits an alternative proposition. In light of the statistics, for serious crimes such as unlawful killing, it is manifest that a custodial term is an appropriate response to the serious harm caused by a person's acts. Accordingly, a valid sentencing presumption would be that for serious crimes (including, but not limited to unlawful killing), a prison term is legislated as an appropriate response and only through mitigating factors can the perpetrator escape such a sentence.

5.2 **Should the common law principle of proportionality continue in its current form or be amended in any way? What would be the advantages or disadvantages of codifying the principle of proportionality?**

Proportionality has been signalled as one of the key bastions in sentencing theory. In *Veen (No 1[16])* and *Veen (No 2)* it was noted as the primary aim in sentencing in NSW. In *Hoare v The Queen* it was said:

> A basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its objective circumstances.[17]

While there is a body of case law that denotes the breadth of the principle, the fact that it remains a nebulous concept is reflected in the widely varying sentences imposed for similar crimes. As with all factors for consideration in sentencing, there is no unit of measurement by which a sentence can objectively be regarded as more or less proportionate. Proportionality, as with instinctive synthesis, requires a review of the totality of a situation. A consideration of the seriousness of the crime, and a resulting subjective assessment of how that crime should be punished, whether by harsher or less severe sentences.

There is merit in the submission that, with the body of common law backing the principle of proportionality, there is no real logic in attempting to codify the principle as the historical significance of the maxim would remain. Furthermore, there is reference to the principle in section 3A subsection (a) which states that a sentencing court must 'adequately punish' an offender.

HVSG submits that codifying the principle could only be of use if the notion that the court must not impose a sentence which exceeds the appropriate objective seriousness of the offence committed, also reflects the notion that the sentence should also reflect the gravity of an offence. The focus of cases and commentary is largely dominated by references to mitigating circumstances. HVSG submits that there should be greater weight placed on the context of the crime, with emphasis on both aggravating and mitigating factors in order that the sentence reflects the severity of the crime. In this context, the extensive impact on not only the family of the deceased, but also the community at large would be better introduced to the sentencing framework.

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[15] Ivan Potas, Judicial Commission of New South Wales, *Sentenced Homicides in New South Wales 1994-2001*.
[16] (1979) 143 CLR 458 at 467.
(1988) 164 CLR 465.
[17] (1989) 167 CLR 348 at 354.

5.3 **Should the common law principle of parity continue in its current form or be amended in any way?**

In *Lowe v The Queen*[18] the High Court found that there should be parity or proportionality between co-offenders' sentences. The area of unlawful killing can introduce issues of parity in a number of ways, for example, where more than one person is involved in committing the crime, or there is influence by a person on another to commit the crime.

HVSG supports a codification of the principle in order to provide guidance on the consideration. The notion that like should be treated alike gives greater certainty to the people who are touched by unlawful killing. Where there is disparity in the sentencing of co-offenders, the likelihood of appeals on either sentence (whether for lenience or harshness) increases, to the detriment of the family and loved ones of the victims.

5.4 **Should the common law principle of totality continue in its current form or be amended in any way? What would be the advantages and disadvantages of codifying the principle of totality?**

The totality principle requires "a sentencer who has passed a series of sentences...to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'."[19] The degree to which totality alters the sentence actually served is indicated by the extent that is served concurrently or cumulatively.

HVSG submits that the totality principle should be amended to ensure greater clarity and consistency in the sentencing process. Codification of a means to sentence perpetrators found guilty of multiple charges in a single criminal enterprise would offer many benefits for the family and loved ones of victims and the public.

The present common law principles regarding whether sentences are served concurrently or cumulatively are vague and difficult for non legal practitioners to understand. In cases of there being separate victims of violence, geographic or temporal proximity will often not be determinative factors. This is because "it may well be seen as a failure to acknowledge the harm done to those individual victims."[20] Since the decision as to accumulation or concurrent serving of sentences is wholly discretionary, Parliament should codify principles for the court to follow to minimise the risk that the harm caused by the crime would not be acknowledged.

Codification could also assist in preventing a discretionary reduction of sentencing. The principles relating to reduction of the overall sentence imposed relate to whether the criminality of one offence can reflect the criminality of secondary or additional offences.[21] Such a reduction is not transparent and adversely impacts upon the family and loved ones of victims of such crimes. Studies demonstrate that where the criminal process fails to recognise the harm suffered by victims and is difficult to understand for them, that it appears less fair and limits the ability of victims to recover mentally.[22] Codification of the principle of totality would therefore better serve the family and loved ones of victims.

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[18] (1984) 154 CLR 606

[19] *Johnson v The Queen* [2004] HCA 15 at [18] per Gummow, Callinan and Heydon JJ, citing DA Thomas.

[20] *Regina v Wilson* [2005] NSWCCA 219 at [38] per Simpson.

[21] *Cahyadi v Regina* [2007] NSWCCA 1 at [27].

[22] Mark Umbreit, 'Victim-mediation in Canada: The impact of an emerging social work intervention' (1999) 42 *International Social Work* 215; Dena Gromet, 'Restoring the victim: Emotional reactions, justice beliefs, and support for reparation and punishment' (2012) 20(9) *Crtical Criminology Journal* 9.

The disadvantages of the codification of any law is the reduced judicial capacity to adequately operate on a case-by-case basis. It might be seen that codification may adversely impact the principle of proportionality and the key rationale for totality, that being not to impose a 'crushing sentence'.[23]

HVSG submits that appropriate codification would not unduly infringe upon the important role that proportionality and totality play in securing a just sentence. Rather, codification of the principles influencing the discretion of the sentencing court would potentially achieve:

(a) More transparent and understandable sentencing process for stakeholders; and

(b) Less arbitrary reduction of sentences where multiple serious offences have been committed in highly related circumstances.

5.5 **Should the principle that an offender is to be sentenced only for the offence proved (but still allowing the court to take into account aggravating circumstances within that limitation) be codified? What would be the advantages and disadvantages of codifying this principle?**

The principle that the offender is to be sentenced only for the offence proved is established by *De Simoni v The Queen* (1981) 147 CLR 389. It limits a sentencing court to take into account facts that may be proved but go to a more serious offence, such as grievous bodily harm in an assault where only assault was charged. A court may take into account facts that go to lesser offences, but not greater.[24]

HVSG submits that codification is warranted to prevent a serious lack of proportionality for the offence. Such a provision has been legislated in Western Australia in section 7(3) of the *Sentencing Act 1995* (WA).

HVSG agrees with the NSW Law Reform Commission that it is "totally unreasonable to put the burden on prosecutorial authorities, many poorly trained, to be able to charge with the myriad of offences that now exist. Surely where harm is proven to have been caused, justice mandates that the offender be made accountable for that harm."[25]

[23] *Postiglione v The Queen* [1997] HCA 26
[24] *Overall* (1993) 71 A Crim R 170.
[25] http://www.lawlink.nsw.gov.au/lrc.nsf/pages/DP33CHP3

6 FACTORS TO BE TAKEN INTO ACCOUNT ON SENTENCE

6.1 What would be the advantages and disadvantages of abolishing s 21A of the Crimes (Sentencing Procedure) Act 1999 (NSW)? Are there dangers that relevant factors may not be taken into account in the absence of a provision similar to s 21A of the Crimes (Sentencing Procedure) Act 1999 (NSW)? Would sentencing be less transparent in the absence of a provision similar to s 21A of the Crimes (Sentencing Procedure) Act 1999 (NSW)?

HVSG submits that section 21A of *Crimes (Sentencing Procedure) Act 1999 (NSW)* (Section 21A) should not be abolished. HVSG considers that there would be significant disadvantages to victims and their family members, as well as offenders and the general public if section 21A of the Act were abolished.

The purpose of introducing section 21A and standard non-parole periods (**SNPP**) was to promote consistency, transparency and public understanding in relation to sentencing.[26] HVSG considers that this purpose is important for all parties involved in sentencing. While HVSG acknowledges that many of the factors judges take into account on sentence have arisen through common law, we consider it important that there is a set list of factors which the public can access.

Having a list of some of the factors to be taken into account on sentence provides a clearer understanding of a judge's reasons for imposing a particular sentence. It also allows those affected by the sentence to have prior knowledge of the factors a judge may consider, instead of relying on a judge to outline the factors he or she gave weight to in determining the sentence. In this regard, section 21A can assist judges to fulfil their obligation to give reasons and identify which matters have been taken into account on sentencing[27]. It can also help to ensure that a judge considers all relevant factors and does not mistakenly overlook a factor, which is more likely to happen without an accessible list.

HVSG agrees that the list in section 21A should not prevent a judge from considering other factors relevant to a particular case and should not go so far as to provide how the factors should be weighted in each case. HVSG acknowledges the importance of a judge's discretion to weigh the factors differently depending on the circumstances of each case, but considers that it is still important to have a list of the main aggravating and mitigating factors the Court will address on sentence. In cases concerning murder or manslaughter, it may be of some comfort for family and friends of the victim to know that a judge took into account the harm or cruelty caused to the victim when imposing a sentence.

Also, if section 21A were abolished it would have significant repercussions for SNPP. Section 54B(3) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* provides that a court may only depart from a SNPP if certain factors in section 21A apply. Without having a list of factors, the legislation would have to refer to a judge's discretion which could run the risk of judges taking into account different factors in each case, thereby causing inconsistency in sentencing.

Further, while HVSG acknowledges the risk of a judge doubling up on factors, HVSG submits that this risk is not as great as the risk of a judge failing to take a relevant factor into account. Over time HVSG anticipates that claims of double

[26] NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 23 October 2002, 5813-5819 (R Debus, Attorney General).
[27] *DBW v R* [2007] NSWCCA 236 at 33.

counting will decrease and judges will be able to use section 21A as more of a guide complementing the common law and providing consistency instead of a separate aspect of their sentencing discretion. If judges used section 21A in conjunction with other sentencing requirements, instead of as the last step in the process, the risk of double counting would be greatly reduced.

6.2 **Should section 21A of the Crimes (Sentencing Procedure) Act 1999 (NSW) be retained in its current form?**

HVSG submits that section 21A should be retained in its current form. Dividing the factors to be taken into account on sentence into separate categories provides clarity as to what factors a judge will consider to be either aggravating or mitigating when determining what sentence to impose.

While there are issues with some of the factors, particularly mitigating factors, also being addressed under separate sections of legislation, if judges and lawyers are careful to read the sections in conjunction with each other, there should not be a significant issue preventing the factors also being included in section 21A. In many ways, HVSG considers it better to have all issues regarding sentencing contained within the one section, which is discussed further below.

Alternatively, NSW could adopt a similar approach to the Northern Territory and list aggravating factors, but have other factors listed in unclassified, neutral terms.[28] One of the issues with section 21A is that it is not clear that if an aggravating factor does not apply, the reverse of that factor does not equate to a mitigating factor. Listing only aggravating factors could reduce the risk that factors that were never intended to be mitigating would be considered as such by the Court. It would also allow the Court to take into account important discounting factors, such as duress, separately first before considering the impact of aggravating factors on sentence.

6.3 **Should section 21A of the Crimes (Sentencing Procedure) Act 1999 (NSW) be amended by the addition and/or deletion of any factors?**

HVSG submits that:

(a) section 21A(2)(g) should be amended to provide more clarity about the fact that it does not just apply to loss caused to the victim; and

(b) the factors listed at sections 21A(3)(a), 21A(3)(b) and 21A(3)(i) should be removed as mitigating factors.

Aggravating factors

HVSG considers that it may be appropriate to include as a factor the likely impact of the offence upon the victim. While section 21A(2)(g) (loss is substantial) is likely to apply in cases involving murder or manslaughter, the impact of the offence on the victim is separate and different to requiring the injury, emotional harm and loss to be substantial.[29] While the Courts can take this factor into account under section 21A(1)(c) as an objective or subjective factor, it would be useful to have this listed as its own factor to be applied in relevant cases.

[28] Sentencing Act (NT) s 6A.

[29] See *R v Jammeh* [2004] NSWCCA 327 at 23, where the Court takes into account the effect of the offence on the victim.

Also, in respect of section 21A(2)(g), HVSG considers that it could be made clearer that this subclause is not limited to injury, emotional harm, loss or damage to the victim, but potentially extends to the emotional harm and loss suffered by the victim's spouses and dependents.[30] Again, while the Court is entitled to consider this factor despite not being set out clearly in section 21A, HVSG submits that it would be beneficial to have this set out as an extension of section 21A(2)(g) to ensure that judges are made aware of this consideration in relevant cases.

Mitigating factors

HVSG submits that the fact the injury, emotional harm, loss or damage caused was not substantial should not be a mitigating factor, and neither should the fact that the offence was not part of a planned or organised criminal activity. These factors are the converse of the aggravating factors at section 21A(2)(g) and section 21A(2)(n) respectively, but HVSG considers that this is not a strong enough reason to make them mitigating factors. Individuals who commit serious crimes, should not be able to receive any form of benefit from the fact that they were not part of an organised criminal activity at the time of the offence.

Also, in respect of section 21A(3)(a), the fact the offence, for whatever reason, has not caused substantial loss should not be of benefit to the offender. While murder and manslaughter always cause substantial harm, HVSG is concerned that since this factor is listed in section 21A a judge may mistakenly have regard to it and impose a lesser sentence. In any event, the fact that the loss caused is not as great as it could otherwise have been does not diminish the offender's criminality and it should not, therefore, be a mitigating factor.

HVSG also submits that the remorse shown by the offender should not be a mitigating factor, or at least should not be given much weight in cases involving serious offences. HVSG considers that remorse is best demonstrated in an offender's plea of guilty and/or the degree to which the offender cooperates with the court in making pre-trial disclosures. Since these are already mitigating factors, it does not seem necessary to also include remorse as a mitigating factor. Further, the extent of true remorse is very difficult to measure and, in any event, does not change the offender's intention at the time of committing the offence, or the loss and harm caused to the family and loved ones of the victim by the offence.

While there are other mitigating factors listed which HVSG considers should not have a strong mitigating affect in respect of murder or manslaughter, HVSG acknowledges that they may play a role in determining the sentence for a different offence and should therefore be retained in s 21A. In this respect, HVSG appreciates that judges have other common law considerations that they take into account, which can mean, for example, that when determining a sentence for murder or manslaughter, the court will not give much consideration to the offender's good character, because the weight given to that factor depends on the seriousness of the offence committed.[31]

6.4 **Which considerations to be taken into account on sentence should be included in legislation and how should such legislative provisions be worded? Should the purposes of sentencing contained in section 3A, the provisions of the Act relating to pleas of guilty, assistance to authorities and disclosure and section 21A of the Crimes (Sentencing Procedure) Act 1999**

[30] *Aslett v R* [2006] NSWCCA 360 at [37].
[31] *Ryan v The Queen* (2001) 206 CLR 267 at [143]; *R v Kennedy* [2000] NSWCCA 527 at [21]-[22].

(NSW) be consolidated into a provision similar to section 16A of the Crimes Act 1914 (Cth)?

HVSG submits that the purposes of sentencing contained in section 3A, the provisions of the Act relating to pleas of guilty, assistance to authorities and disclosure and section 21A of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* should be consolidated into a provision similar to section 16A of the *Crimes Act 1914 (Cth)*. Having all aspects that need to be considered on sentence contained in one place will provide greater clarity for everyone affected by the sentence.

There are risks associated with combining aspects of legislation, such as inadvertently leaving out important points of the individual sections when they are combined, and it will take time for the courts to adapt to the changes. However, in the long term HVSG considers that consolidated legislation will provide more clarity and actually speed up the process of sentencing for all involved. It is in the interests of everyone affected by the offence for sentences to be imposed as soon as possible after conviction in order to decrease the amount of emotional distress caused to all involved.

Consolidating the separate provisions may also help to avoid double counting of certain mitigating factors, such as guilty pleas. Currently guilty pleas and other discounting factors are dealt with in sections 22 to 23 of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*, as well as also being considered under section 21A. Having these provisions consolidated into one place would avoid the need for judges to have regard to both sections, which may speed up the process of sentencing as well as reduce the risk of judges considering these mitigating factors twice and potentially imposing a lesser sentence than appropriate in the circumstances.

6.5 **Should section 21A of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* be reframed as an unclassified, neutral and non-exhaustive list of sentencing factors? If so:**
(a) should the factors be expressed in broad terms; or
(b) should the same level of detail as appears in the current section 21A be reproduced in a new provision, but without listing the relevant factors as 'aggravating' or 'mitigating'?

HVSG submits that section 21A should not be reframed as an unclassified, neutral and non-exhaustive list of sentencing factors. HVSG considers that the factors to be taken into account on sentence should not be expressed in broad terms and should not be grouped into a neutral list. It is important to provide clarity and consistency on sentencing and HVSG submits that having detailed factors in categories of aggravating and mitigating is more effective in achieving this aim than having a neutral list of broad factors.

In the neutral lists contained in section 16A of the *Crimes Act 1914 (Cth)* and the former section 21A of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*, a number of factors to be taken into account on sentence are actually purposes of sentencing, e.g. making sure the offender is adequately punished and the deterrent effect of the sentence. If these factors are removed and included at the top of the section as purposes of sentencing, the balance of the factors can generally be classified as either aggravating or mitigating.

HVSG submits that a detailed list of factors works best when they are split into the categories or aggravating or mitigating, because there is a real risk that when

considering a neutral list of detailed factors, a judge may decide to take a factor into account as either mitigating or aggravating when that factor is not intended to act in that way. For example, acting under duress would only be considered a mitigating factor; it would be unusual for a judge to consider the fact that an offender did not act under duress as an aggravating factor on sentencing. Also, while the use of a weapon may be an aggravating factor, the absence of a weapon is not a matter of mitigation.[32]

HVSG acknowledges that there is still a risk under the current section 21A that judges will consider the opposite of an aggravating factor a mitigating factor, and vice versa, but HVSG submits that there would be a lower risk of this occurring if the factors remain distinct as opposed to being grouped together. Also, HVSG submits that it could be beneficial to insert a clause in section 21A to clarify that where an aggravating factor is not relevant (e.g. the offence was not committed in the presence of a child), the fact of its irrelevance should not then be considered as a mitigating factor.

While there are benefits to having broad categories, such as the list will not need to be amended as frequently, HVSG considers that broad categories would not eradicate some of the issues of a specific list, such as the possibility of double counting factors. HVSG submits that overall the need to have greater clarity and consistency across sentencing is best met by separating the factors to be taken into account into categories or aggravating and mitigating.

7 SENTENCING OF YOUNG PEOPLE

7.1 Serious indictable children's offences

HVSG recognises that, in many cases, the principles set out in section 6 of the Children (Crininal Proceedings) Act (CCPA) CCPA are relevant in sentencing young offenders. However, HVSG does not consider that these principles ought to be given paramount consideration when it comes to sentencing in respect of "serious indictable children's offences" (as defined in the CCPA) (**SCIOs**), including murder and manslaughter.

Under the CCPA, sentencing for SCIOs is carried out at law.[33] This recognises that different principles ought to apply when sentencing young offenders for the most serious crimes such as homicide. Many of the principles in the CCPA are not relevant to sentencing in homicide cases (for example, those containing a bias against custodial sentences). Rather, HVSG views the principles set out in section 3A of the *Crime (Sentencing Procedure) Act*, including general deterrence, protection of the community, denunciation and recognition of the harm done to the victim of the crime and community, as more appropriate. This is also reflected in the case law, where it has been held that the emphasis placed on rehabilitation when sentencing young offenders:[34]

> is subject to the qualification that, where a youth conducts himself in the way an adult might conduct himself and commits a crime of considerable gravity, the function of the courts to protect the community requires deterrence and retribution to remain significant elements in sentencing him.

[32] *Versluys v R* [2008] NSWCCA 76 at [37].
[33] sections 16 and 17 CCPA, and section 28 CCPA.
[34] *R v Bus* (Court of Criminal Appeal, 3 November 1995, unreported).

The sentencing judge has the opportunity to take into account the youth of the offender as a mitigating factor in determining sentence (for example where the offender has good prospects of rehabilitation or where the offender was not fully aware of the consequences of his or her action).[35]

7.2 Life sentences

HVSG is concerned that, due to the emphasis placed on rehabilitation when sentencing young offenders, life sentences are not perceived as being available for young offenders who are convicted of murder. However, HVSG submits that the option of imposing a life sentence should be available to the court when sentencing any offender for murder in the worst cases, regardless of age.

Under the *Crimes Act 1900*, a person who commits the crime of murder is liable to imprisonment for life, and they are to serve that sentence for the term of their natural life.[36] This is tempered by a provision contained in the *Crime (Sentencing Procedure) Act*, allowing the court to pass a lesser sentence.[37] A life sentence is mandatory in the most extreme cases, in accordance with section 61(1) of the *Crime (Sentencing Procedure) Act*. This section states that a court is to impose a sentence of imprisonment for life on a person who is convicted of murder if the court is satisfied that:

> the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.

However, the mandatory life sentence provision does not apply to a person who was under the age of 18 years at the date of the commission of the offence.[38]

HVSG is concerned that this has been interpreted as meaning that life sentences *cannot* be given to offenders under the age of 18 who are convicted of murder. Section 61(6), however, supports the interpretation that the court is not obliged to impose a sentence of imprisonment for life on a person who was under the age of 18 years. It ought to be clear that the court has the option to impose such a sentence in extreme cases, regardless of the age of the offender, in order to meet the community's need for protection and recognition of the seriousness of the offence.

7.3 Provisional sentencing

A 2009 report[39] prepared for the NSW Sentencing Council advocated the implementation of a provisional sentencing scheme for sentencing of offenders aged between 10 and 14 years at the time of the offence who are convicted of murder. Provisional sentencing would be available where the court is unable to make a proper assessment in relation to the "presence or likely development in the offender of a serious personality and psychiatric disorder, and as a consequence an assessment as to their potential for future dangerousness or rehabilitation."[40] The Provisional Sentencing Report recommended that provisional sentencing be considered on a case-by-case basis, and that the court would have the discretion to

[35] subsections 21A(3)(h) and (j) CSPA.
[36] sections 19A(1) and (2) *Crimes Act 1900*.
[37] section 21(1) CSPA.
[38] section 61(6) CCPA.
[39] *Provisional Sentencing for Children*, a report by Sophia Beckett, Lester Fernandez and Katherine McFarlane for the NSW Sentencing Council, September 2009 (**Provisional Sentencing Report**).
[40] Provisional Sentencing Report, pp 10 and 50.

sentence pursuant to ordinary sentencing principles or to the provisional sentencing provisions.[41]

The purpose of provisional sentencing would be to:[42]

> allow for a notional sentence to be imposed at an initial sentencing procedure, with an ability to later vary or adjust that sentence during the course of the sentence, according to a variety of factors that might include assessments as to the offender's capacity to rehabilitate, and as to future dangerousness, and take into account a better understanding of any mental health conditions that may have emerged or become apparent as the child matures.

The report recommended a provisional sentencing scheme in which a provisional sentence is set (equivalent to the non-parole period) along with a balance of term. Together, the provisional sentence and balance of term constitute the head sentence. While in custody, the offender would be subject to an ongoing process of judicial review. A final determination of the provisional sentence would take place before the expiry of that sentence. The offender could be released at the end of the provisional sentence, or the provisional sentence could be extended into the balance of term. There is also the possibility that the offender could be released before the end of the provisional sentence. The length of the sentence cannot be increased.[43]

HVSG have two main concerns with the proposal for the introduction of a provisional sentencing scheme. The first relates to the uncertainty and lack of closure afforded to the families of murder victims by a scheme that can allow a reduction in the sentence of the perpetrator. HVSG's second concern relates to the process of continual review.

7.4 Uncertainty of sentence

The proposed provisional sentencing scheme would allow for the provisional sentence and head sentence to be reduced, should the offender show positive progress while in custody. This results in uncertainty and anxiety to the families of murder victims. The knowledge that an offender convicted of murder is to be kept in custody for a certain length of time provides the families with a sense that justice has been done for the victim, the perpetrator is being punished appropriately, and is being held accountable for their actions. A sentence also provides an element of closure to families after the death of a loved one. Given the seriousness of the crime of murder, and that the perpetrator of murder is sentenced at law rather than under the CCPA regime, the HVSG feels that provisional sentencing process risks placing an over-emphasis on the rehabilitation of the offender. This comes at the expense of the remaining purposes of sentencing, which ought not to be lost sight of.

7.5 Continual review process

HVSG also has concerns with the continual review process in the proposed provisional sentencing regime. It is suggested in the Provisional Sentencing Report that this process be based on the continuous review scheme contained in the *Mental Health Act 1990* (NSW), under which defendants are reviewed by the

[41] Provisional Sentencing Report, p 51.
[42] Provisional Sentencing Report, p 9.
[43] Provisional Sentencing Report, pp 50 - 54.

Mental Health Review Tribunal (**MHRT**) on a six month basis.[44] HVSG recognises that the purpose of continual review is to allow for flexibility of response according to changes in the maturity and development of the offender. However, such reviews cause great stress for the family members of victims of homicide, who are regularly faced with memories of the death and confronted by the person who committed the fatal act. The review scheme proposed essentially means their grieving process is re-opened every six months, and is exacerbated by the anxiety that the offender may receive more liberties at each review.[45]

A provisional sentencing procedure as set out in the Provisional Sentencing Report is likely to cause the families of murder victims additional anxiety and distress, due to the uncertainty in sentence and the continual review process. HVSG urge that its concerns be taken into account should the introduction of a provisional sentencing regime in NSW be considered. If introduced, provisional sentencing ought to be reserved only for the most extreme cases. The families of victims ought be permitted to have legal representation in the continual review process in order to ensure that their voices are not removed from the process. This would assist in alleviating some of the pressure and concern connected to frequent reviews.

8 NON-PAROLE PERIODS

8.1 Life sentences

The legislation in New South Wales currently provides that the level of culpability required of a convicted murderer, to impose a life sentence, is that the offence be so extreme that the community interest in retribution, punishment, community protection and deterrence, can only be met through imposition of that sentence[46]. While the availability of such a sentence is an acknowledgment of the most heinous of crimes, there is little, if any, guidance for the judges responsible for dealing with any act of murder that falls within this category.

In the past, a life sentence had been described as being both symbolically harsh but practically flexible[47]. The term was misleading as it rarely resulted in a person convicted of murder being held in custody for the rest of their natural life. Rather, it was seen as exceptional that the individual provided with such a sentence would serve more than 15 years[48]. With the introduction of section 61(1) of the *Crimes (Sentencing Procedure) Act* there was a purposive move away from the symbolism to 'truth in sentencing'. Recently, Dr Don Weatherburn, the director of the Bureau of Statistics, said that, "if you get a life sentence in NSW these days, you never get out of prison" [49]. HVSG supports the move away from the symbolic penal servitude for life that a life sentence once held.

While the symbolism has been removed, there appears to still be a hesitation from the judiciary in imposing a life sentence on convicted murderers. In 2009, four people received life sentences for murder. This number was reduced to zero in 2010[50]. These figures demonstrate the cautiousness from the judiciary in the use of

[44] Provisional Sentencing Report, p 57.
[45] See p 57 of the Provisional Sentencing Report: "One of the benefits of the ongoing review of the child is that there could be a gradual process of leave allocation and reduced security classification to facilitate transfer of the young offender into community rehabilitation schemes."
[46] Section 61(1) of the Crimes (Sentencing Procedure) Act
[47] John Landerson, *"Indefinite, Inhumane, Inequitable' - The Principle of Equal Application of the Law and the Natural Life Sentence for Murder: A Reform Agenda"* [2006] UNSW LawJl 41; (2006) 29(3) University of New South Wales Law Journal 139.
[48] See note 3.
[49] NSW Bureau of Crime Statistics and Research. Media Releases. "*Sentencing for homicide and related offences*", dated 4 April 2012.
[50] See note 4.

a life sentence. This conservative approach may occur due to the lack of guidelines available to the judges imposing this type of sentence. HVSG submits that further guidance is required for the judiciary so they can fully understand what circumstances should lead them to impose a life sentence on an individual who has been convicted of murder.

Legislation also provides that the court may impose a sentence of imprisonment for a specified time when an offender is made liable for life imprisonment[51]. While HVSG acknowledges that the judiciary and parts of the community encourage reform of serious offenders, we submit that strict guidelines be created and applied when considering any reduction in the sentence of an offender who has had a life sentence imposed. Such offenders have been found guilty of the most heinous of crimes and should not, except for exceptional circumstances, be eligible for parole or release.

8.2 Murder v manslaughter non- parole periods

There is a vast difference in the approach taken by legislation in regards to sentencing and non-parole periods for murder and manslaughter. In their current form, both are problematic and require amendment.

For murder, there are 2 standard non-parole periods: 20 and 25 years. It is an attempt by the legislature to distinguish between the circumstances surrounding the murder. The higher standard applies to situations where the victim is a public figure exercising public or community functions and the offence has arisen because of the victim's occupation[52]. HVSG submits that an offence of murder should not differentiate between public officials and the public at large. The 25 year period of non-parole should be applied to all offenders convicted of murder, as the right to life, and the loss that occurs when a life is extinguished by the act of murder, is no different based on the occupation of the victim.

Manslaughter, unlike murder, does not have a standard non-parole period specifically provided for in legislation. While this offence covers a broad range of conduct and culpability, HVSG submits that mandatory minimum non-parole periods should be applied to each offence of manslaughter. HVSG acknowledges that there is a difference between the mental element required in an offence of murder compared to that of manslaughter, but the outcome of both acts are the same. A life has been lost and a family is left to grieve. The sentence imposed on an offender is to the victim's family an acknowledgment and recognition of the life that has been lost.

The Bureau of Statistics recently released a series of reports that describe current sentencing practice for various offences. It found that the average aggregate sentence for manslaughter is seven years (with an average minimum of 4.5 years)[53]. HVSG submits that the sentences currently imposed for manslaughter are extremely low. By fixing a standard non-parole period for such an offence, offenders would consistently serve more time and justice would be seen to be served.

9 VICTIM IMPACT STATEMENTS

Victims of homicide in New South Wales have the least involvement in the criminal justice system than in any other state in Australia. HVSG submits that it is in the interests of victims, the community at large and the criminal justice system to encourage greater use of victim impact statements in homicide sentencing in New South Wales.

[51] Section 21 of the Crimes (Sentencing Procedure) Act.
[52] See the Table in Part 4, Division 1A of the Crimes (Sentencing Procedure) Act
[53] See note 4.

The key evidence in support of this is that greater understanding and involvement in the process generally results in greater levels of victim satisfaction with criminal justice and impressions of fairness. This is significant in assisting victims to recover from the crime.

9.1 Current use of victim impact statements in NSW

Victim impact statements may currently be admitted to the court after a conviction for certain serious offences and prior to sentencing.[54] The statement may be taken into account by the court in determining the sentence and may be relevant to gauge the aggravating factor that 'the injury, emotional harm, loss or damage caused by the offence was substantial'.[55]

There are concerns raised in the authorities as to how these statements may be used by the sentencing judge, particularly in regards to the limited weight that might be given to what is often untested evidence.[56]

However, victim impact statements given by the family of homicide victims are not relevant to the quantum of the sentence.[57] This is despite section 28(4) *Crimes (Sentencing Procedure) Act 1999* (NSW) permitting courts to consider a victim impact statement given by family in determination of the punishment of an offence if it considers it appropriate to do so. This is because "the idea that it is more serious or more culpable to kill someone who has or is surrounded by a loving and grieving family than someone who is alone is offensive to our notions of equality before the law."[58] *MAH v R* [2006] NSWCCA 226 is binding authority that the correct course for a sentencing court is to receive the statement and acknowledge that it is not relevant as a consideration to aggravate the offence. Failure to acknowledge that the statement was not a relevant consideration in sentencing is an error of law and grounds for appeal of the sentence.[59]

9.2 Other jurisdictions

All states except NSW allow victim impact statements of the family to be considered during sentencing.[60] The most common means of accepting such statements is where they express sentiment consistent with that of the community then they are relevant to the harm caused to that community.[61] This approach is based on the proposition that the seriousness of the offence and the culpability of the offender can continue to be construed objectively despite views of the family.

HVSG submits that NSW should take steps to ensure that at the very least this practice is adopted so that victim impact statements are accepted and voiced in the court room. Where a judge feels that the statement should not influence sentencing, the statement should at least be read out for the purposes of acknowledging the harm done to the victim. This process is followed in South Australia.

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[54] Crimes (Sentencing Procedure) Act 1999 (NSW) s 28(1)
[55] Ibid s 21A(2)(g); *R v Thomas* [2007] NSWCCA 269.
[56] *R v Slack* [2004] NSWCCA 128 at [61]-[62].
[57] *R v Previtera* (1997) 94 A Crim R 76.
[58] *R v Dang* [1999] NSWCCA 42 per Adams J at [25]-[26].
[59] *R v Dawes* [2004] NSWCCA 363 at [30]; *R v Dang* [1999] NSWCCA 42 at [15].
[60] T Kirchengast, 'Expressing a justiciable role for family victims in NSW homicide cases' (2008) 15 *E Law* 159
[61] *R v Miller* [1995] 2 VR 348.

9.3 Effects of participation for the family and loved ones of victims

Victims (and their families and loved ones) tend to show greater degree of satisfaction where they have the opportunity to be involved in the process of criminal justice.[62] Studies of restorative justice practices such as victim offender mediation in Canada, USA and South Australia demonstrate that a sense of involvement contributed significantly to assisting the victim to understand the process.[63] As a result of this understanding and involvement, victims tend to feel less isolated and a greater sense of fairness with the entire process. These sentiments have two major categories of benefits.

Firstly, the family and loved ones of victims are greatly assisted in being able to recover and move on from the crime. Involvement through victim impact statements would thus be a far more cost-effective and efficient way of achieving a meaningful outcome for victims than the current bureaucratic form of victim compensation. Victim compensation and services cannot offer the potential emotional outcome for victims willing to provide statements to be used in the trial process.

Secondly, the justice system itself stands to gain considerably greater degree of legitimacy. Criticism at the sentencing process is regularly seized by the media and tends to focus on lack of transparency with the process. Such opinions no doubt stem from the lack of understanding of the process and sense of isolation that victims feel as a result of their lack of input in the process. Clarification of their role and an avenue to voice their sentiments in the court room is something of considerable value that ought to be taken into account in and of itself in the trial process.

10 SUMMATION

This completes the submission prepared on behalf of the HVSG.

On behalf of the families, the HVSG would like to thank you for the opportunity to contribute to this inquiry.

Should you have any further questions, please contact Mirella Fisicaro of HDY on the number below.

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[62] http://download.audit.vic.gov.au/files/20110209-VoC.pdf; Ben Bradford Criminology and Criminal Justice 2011 11, 345.

[63] Andrew Cannon, 'Sorting out conflict and repairing harm: Using Victim offnder conferences in court processes to deal with adult crime' (2008) 18 *Journal of Judicial Administration* 85; Patrick Gerkin, 'Participation in Victim-Offender Mediation: Lessons learned from observations' (2009) 34(2) *Criminal Justice Review* 226; Mark Umbreit, 'Victim-mediation in Canada: The impact of an emerging social work intervention' (1999) 42 *International Social Work* 215; .