The Public Defenders

4 September 2012

The Hon James Wood AO QC,
NSW Law Reform Commission,
DX 1227
Sydney

Dear Chair,

Re review of the Crimes (Sentencing Procedure) Act 1999 (NSW)

I refer to the above matter, and now provide the Public Defenders' response to the Sentencing Question Papers 8 to 12.

Chapter 8: The Structure and Hierarchy of Sentencing Options

Question 8.1
Should the Crimes (Sentencing Procedure) Act 1999 (NSW) set out a hierarchy of sentences to guide the courts? What form should such a hierarchy take?

Yes. This would clarify the seriousness in which certain sentencing options, such as Intensive Corrections Orders, are to be regarded by a sentencing court.

Question 8.2
Should the structure of sentences be made more flexible by:

a. *creating a single omnibus community-based sentence with flexible components;*
b. *creating a sentencing hierarchy but with more flexibility as to components;*
c. *allowing the combination of sentences; or*
d. *adopting any other approach?*

Yes, if possible by allowing a, b and c, above. It would be appropriate to add a statement to the effect that the ultimate sentence must remain proportionate to the offence; paragraph 8.53 of the discussion paper.

Question 8.3
1. What sentence or sentence component combinations should be available?
2. Should there be limits on combinations with:
a. fines;
b. imprisonment; or
c. good behaviour requirements?

A community-based sentence in conjunction with a period of imprisonment should only be available if the total appropriate sentence of imprisonment exceeds the current maximum sentence of imprisonment that can attract a community-based sentence.

Public Defenders Chambers, 23/1 Oxford Street, Darlinghurst NSW 2010
Telephone (02) 9268 3111 Fax (02) 9268 3168 DX 11545 Sydney Downtown

www.publicdefenders.nsw.gov.au

Otherwise, the point of community-based sentences (permitting the offender to retain community ties including work-place and family support continuity) would be lost.

We support the option of a community-based sentence such as home detention in conjunction with a good behaviour bond. Again, it would be appropriate to add a statement in any legislative amendment to the effect that the overall sentence must remain proportionate to the offence.

Chapter 9: Alternative Approaches to Criminal Offending

Question 9.1
Should an early diversion program be established in NSW? If so, how should it operate?

Yes. It should operate in a similar fashion to the schemes outlined in the Discussion Paper that operate in England and Wales, New Zealand and Victoria.

Question 9.2
Is the Court Referral of Eligible Defendants into Treatment program operating effectively? Should any changes be made?

The Public Defenders do not have direct experience of whether the CREDIT scheme is working effectively, but we understand that it is widely used and has an important place in the range of services available in the Local Court.

Question 9.3
Is the Magistrates Early Referral into Treatment program operating effectively? What changes, if any, should be made?

Again, the Public Defenders do not have direct experience of whether the MERIT scheme is working effectively, but we understand that it is an important option. We are also aware of reports that there should be a version of MERIT for adolescents, and support this idea in principle.

Question 9.4
1. Is the Drug Court operating effectively? Should any changes be made?
2. Should the eligibility criteria be expanded, or refined in relation to the "violent conduct" exclusion?

The Public Defenders support the operation of the Drug Court, and the expansion of its eligibility criteria in the three ways outlined at paragraph 9.91.

Question 9.5
Is deferral of sentencing under s 11 of the Crimes (Sentencing Procedure) Act 1999 (NSW) working effectively? Should any changes be made?

The Public Defenders are satisfied with the current operation of section 11.

Question 9.6
1. Is the current scheme of prescribing specific intervention programs operating effectively? Should any changes be made?
2. Is there scope for extending or improving any of the programs specified under the scheme?
3. Are there any other programs that should be prescribed as intervention programs?

The BOCSAR recommendations in relation to the Circle Sentencing Program and Forum Sentencing should be followed. The Victorian specialist court for aboriginal offenders ("the Koori Court") should be considered (see the NSW Sentencing Council paper "The Fernando Principles; Sentencing of Indigenous Offenders in NSW").

Question 9.7
1. Should restorative justice programs be more widely used?
2. Are there any particular restorative justice programs in other jurisdictions that we should be considering?

Although the BOCSAR research suggests that current restorative justice programs are of dubious value in terms of recidivism, we are of the view that such options should be further developed with a close continuing evaluation process. It is likely that the full potential of these options has not yet been achieved.

Question 9.8
1. Should problem-solving approaches to justice be expanded?
2. Should any of the models in other jurisdictions, or any other model, be adopted?

Yes. See our answer to the previous question. We are also of the view that, as a community, we should be prepared to adopt an "experimental" approach to some sentencing options; that the fact that one non-custodial option for relatively minor offenders does not succeed in terms of recidivism rates alone, for example, should not blunt our preparedness to keep trying alternative approaches, provided it is research-driven; we need to learn from failed programs, as much as successful ones.

Question 9.9
Are there any other diversion, intervention or deferral options that should be considered in this review?

See the reference to the Victorian "Koori Court", above.

Chapter 10: Ancillary Orders

Question 10.1
Are compensation orders working effectively and should any changes be made to the current arrangements?

We are of the view that compensation orders should be considered as part of the sentence. This would be consistent with the purposes of sentencing set out in the *Crimes (Sentencing Procedure) Act 1999* (NSW), section 3A(e): "The purposes for which a court may impose a sentence on an offender are as follows: ... to make the offender accountable for his or her actions".

Question 10.2
1. What changes, if any, should be made to the provisions governing driver licence disqualification or to its operational arrangements?
2. Should driver licence disqualification be made available in relation to offences that do not arise under road transport legislation?

The Public Defenders have insufficient experience with such orders to respond to this question.

Question 10.3
1. Should non-association and place restriction orders be retained?
2. Should any changes be made to the regulation and operation of non-association and place restriction orders?

The Public Defenders oppose this legislation. Non-association and place restriction orders constitute a significant imposition on a person's fundamental human right to free association. It is important that such legislation be assessed in terms of its human rights implications and consequences, and not just in terms of whether such orders are indeed made; this is a balancing exercise.

These orders appear to be a form of revival of the offence of consorting (as is s 93X of *the Crimes Act, 1900*), that attracted widespread criticism some decades ago for its potential to be applied inappropriately by police. The recent case of Charles Foster has perhaps illustrated that this danger remains current. Particularly troubling are some reports that Mr. Foster has an intellectual disability. We also note the NSW Ombudsman's findings, as set out in the Discussion paper.

If it is to be retained, a decision to seek such an order should be subject to review by an officer of the rank of Deputy Commissioner or similar. The legislation should also continue to be subject to regular review by the NSW Ombudsman.

Chapter 11: Special Categories of Offenders

Question 11.1
1. How can the current sentencing regime be improved in order to reduce:

a. the incarceration rate of Indigenous people; and
b. the recidivism rate of Indigenous offenders?

2. Are there any forms of sentence other than those currently available that might more appropriately address the circumstances of Indigenous people?

3. Should the Fernando principles be incorporated in legislation and if so, how should this be achieved and what form should they take?

The Public Defenders adopt the recommendations in the NSW Sentencing Council paper "The Fernando Principles; Sentencing of Indigenous Offenders in NSW". We understand that literacy rates for indigenous offenders are lower than for non-indigenous offenders, and the difficulties that illiteracy creates for both employment opportunities and habilitation. We suggest that addressing illiteracy and other basic problems common to many indigenous offenders in the prison system are relatively small measures that would contribute significantly to the reduction of indigenous recidivism rates.

Question 11.2
11.2.1. Should the Crimes (Sentencing Procedure) Act 1999 (NSW) contain a more general statement directing the court's attention to the special circumstances that arise when sentencing an offender with cognitive or mental health impairments? If yes, what form should these principles take?

Generally the Public Defenders refer to those parts of their submission to the NSW Law Reform Commission ("the Commission") on cognitive impairment that addressed the issue of sentencing options. Further, we note the work done by Dr. Eileen Baldry and the Intellectual Disability Rights Service in relation to the relatively high rates of intellectual disability amongst prisoners and non-incarcerated offenders. A fundamental principle should be that, subject to proportionality to the offence at hand and any issue of dangerousness, a sentence for a person with an intellectual disability, mental illness or cognitive impairment should be weighted towards rehabilitation and address the issue of the protection of the community through that sentencing objective.

The *Muldrock* decision[1] has re-affirmed the principle that general deterrence has no, or a reduced, role in the sentencing of an offender who has an intellectual disability or other cognitive impairment. Earlier NSW CCA cases, not inconsistently with *Muldrock*, have noted that a cognitive impairment may be "determinative" of the end sentence rather than one of many considerations that must be weighed against each other and that there are other bases on which a sentence may potentially be reduced where an offender has an intellectual disability. See for example *R v Hopkins* [2004] NSWCCA 105 at paragraphs [21] to [25].

11.2.2. In what circumstances, if any, should the courts be required to order a pre-sentence report when considering sentencing offenders with cognitive and mental health impairments to prison?

---

[1] *Muldrock v The Queen* (2011) 244 CLR 120.

It should only be in exception circumstances that a pre-sentence report not be ordered for such an offender, and there should be a requirement that the author consult with relevant government service agencies. This should assist in confirming that the offender has contact with these services, as well as bringing their expertise to bear on the offender's needs.

11.2.3. Should courts have the power to order that offenders with cognitive and mental health impairments be detained in facilities other than prison? If so, how should such a power be framed?

The sentencing of such offenders must always be subject to considerations of proportionality to the offence and equality with non-impaired offenders; it would be inappropriate for such offenders to be "punished" more than their non-impaired counterparts. Detention in civil facilities should only be on the basis of qualification for such detention according to the civil law.

11.2.4. Do existing sentencing options present problems for people with cognitive and mental health impairments? If so, how should this be addressed?

Imprisonment is inappropriate for many such offenders. As to how it should be addressed, see our response to question 11.2.1 above concerning an emphasis on rehabilitation. Further, special facilities in prisons need to be geared towards rehabilitation, protection and the minimising of deleterious experiences for these vulnerable prisoners.

11.2.5. Should any new sentencing options be introduced for people with cognitive and mental health impairments? If yes, what types of sentencing options should be introduced?

As noted above, there should be an emphasis on tailoring non-custodial options to such offenders, rather than new forms of sentencing options. See also generally our submission to the Commission on cognitive impairment.

Question 11.3

1. Are existing sentencing and diversionary options appropriate for female offenders?
2. If not, how can the existing options be adapted to better cater for female offenders?
3. What additional options should be developed?

We note the observations in the Discussion Paper on these issues; in particular, the increasing number of female prisoners, including indigenous female prisoners. It is important that female offenders receive the benefit of diversionary options to custodial sentences and that indigenous female prisoners receive maximum rehabilitative services in prison in order to reduce indigenous recidivism rates.

Question 11.4
Are additional sentencing options required in order to achieve the purposes of sentencing in relation to corporations? If yes, what should these options be?

This issue is outside the experience of Public Defenders.

Question 11.5
Are there any other categories of offenders that should be considered as part of this review?

Although we are unaware of any corroborating research, there is some anecdotal evidence that there is an increase in serious offences being committed by elderly offenders which, if correct, would be consistent with an ageing population living in the community more-so than in the past. It may be that such offences are occasionally linked to age-related mental conditions, such as dementia. We suggest that this group be considered separately.

Chapter 12: Procedural and Jurisdictional Aspects

Question 12.1
How can information technology be used to improve the accessibility of sentencing law while maintaining judicial independence?

The contents of the discussion paper preceding this question seem to concern the better accessibility of the public to court-room proceedings by the use of modern technology, such as live (or slightly delayed) web broadcasting. Therefore the framing of the question appears to not encapsulate the substance of this discussion. By way of response to the discussion, if not the question, we are in favour of limited broadcasting of sentencing proceedings in cases that have a high public interest.

We further suggest that steps be taken to ensure that remarks on sentence are posted to the Court website within, say, half an hour of the delivery of the remarks, so as to ensure more accurate reporting, and that internet media be encouraged to provide hyper-links to the URL for the Remarks, so that the public may easily access the actual judgement, should they wish. This should particularly be so for cases which are known to attract media interest.

Question 12.2
Could publicity orders and databases be a useful tool in corporate or other sentencing cases?

Yes.

Question 12.3
What procedural changes should be made to make sentencing more efficient?

We agree with all of the proposals set out at paragraph 12.40, although we note that some may require more human resources for them to be achievable.

Question 12.4
How can the process of obtaining pre-sentence reports covering all sentencing options be made more efficient?

In view of the Discussion Paper background to this question, it may be a worthwhile exercise to encourage a pilot scheme in NSW along the lines of the South Australian scheme.

Question 12.5
Should oral sentencing remarks be encouraged by legislation with appropriate legislative protections to limit the scope of appeals?

The Public Defenders are in favour of more sentences being handed down with oral Remarks. Clearly there are some cases that are not amenable to oral remarks in the context of the complexity of modern sentencing law, and others where the sentence to be imposed is close to the upper or lower limit of the range, so that more care is required in explaining the reasons for that particular sentence. However, these circumstances aside, oral Remarks are to be encouraged. We are cautious about the notion of legislative "protection", which probably would constitute the exclusion of certain grounds of appeal in such circumstances. Careful thought would need to be given to any such excluded categories, so as not to unduly reduce the appeal rights of the parties.

Question 12.6
1. Should any change be made in sentence appeals to the test for appellate intervention (from either the Local Court or a higher court)?
2. Should greater emphasis be given to the existing provision in s 43 of the Crimes (Sentencing Procedure) Act 1999 (NSW), which allows sentencing courts to correct errors on their own motion or at the request of one of the parties without the need for an appeal?
3. Should appellate courts be able to determine appeals 'on the papers' if the parties agree?

We note the reference to double jeopardy at paragraph 12.53 of the Discussion Paper needs to be corrected in light of s.68A of the Crimes (Appeal and Review) Act 2001, which commenced in September 2009. See also *Green v The Queen* [2011] HCA 49 at [26].

We are in favour of greater use being made of s 43. We have used it to approach a sentencing court to correct calculations in the Remarks of the commencement and conclusion dates of sentences and are of the view that it has potential to be used for a wider range of non-controversial issues that otherwise might be the subject of appeals to the CCA. It would be helpful if its use is clarified by legislative amendment, if required, to facilitate certain issues being brought back before the sentencing court; for example, in

such a way that post-*Muldrock* applications for the correction of sentences imposed where *R v Way* had been relied upon in a material way in the original sentence. It would then be a matter for the court to adjust the sentence, if required, in light of *Muldrock.*

We are not in agreement with the idea that appeals be decided "on the papers". It happens on occasion that the advocacy of a party persuades the CCA to the opposite view than that which it appeared to hold in unison at the hearing's outset. This is a reasonable indication that, had it not been for the opportunity to be heard, the court would have arrived at the opposite decision to that which they considered appropriate after the hearing. Often this change in tack is because the Court takes the view that it had underestimated the relevance of one or more factors.

Although the proposal is that there be a hearing on the papers only if both parties agree, it is difficult to imagine a circumstance where defence counsel would advise their client to adopt that course. Even if both parties are in agreement as to the orders sought (which is a rare occurrence), it is likely that such a case would occupy little hearing time, with minimal cost.

Question 12.7
What bottlenecks exist that prevent committal for sentence proceeding as swiftly as possible and how can they be addressed?

We agree with the observations made in the Discussion Paper at paragraphs 12.65-12.67 concerning the need to have the ultimate prosecutor at trial briefed at an early stage to facilitate discussion between the parties; a solicitor or barrister/prosecutor having charge of the matter as an intermediate lawyer, rather than as part of the final prosecution team, mitigates against meaningful discussions between the parties, in our experience over many years.

The major "bottleneck" with charges of serious offences is the size of the police brief, the time taken to serve it and consequent time by the defence to obtain instructions. In some serious crime cases, such as multiple murder or large-scale drug importation cases involving alleged international organised crime networks, the briefs are more than 10,000 pages in length. Often there is a need for the defence to obtain expert reports at this early stage to facilitate advice to the client, with a view to entering into final negotiations for a plea, at this early stage. This may require a delay in the committal process, but the prospect of significant savings of time and resources in the higher court. It is difficult to see how this delay might be reduced.

Question 12.8
Should specialisation be introduced to the criminal justice system in any of the following ways:
a. having specialist criminal law judicial officers who are only allocated to criminal matters;
b. establishing a Criminal Division of the District Court;
c. establishing a single specialist Criminal Court incorporating both the District Court and Supreme Court's criminal jurisdictions, modelled on the Crown Court;
d. amending the selection criteria for the appointment of judicial officers;

e. in any other way?

The Public Defenders are of the view that the degree of specialised knowledge of the criminal law that is required by a trial or appellate judge and the experience of its application that is advantageous to those positions has reached the point where it makes sense to have a specialised criminal jurisdiction; a Criminal Division of the District and Supreme Courts, and ultimately one vertically-integrated jurisdiction.

Subject to an important proviso, our proposal is that judges would only sit in the Criminal Division of their respective Court if they had a significant practice in criminal law before their appointment to the Bench.

There are likely to be a number of advantages with a specialised criminal jurisdiction:

a) It would ensure that the trial or sentencing judge is able to draw upon a high level of knowledge and expertise in criminal law, thereby substantially reducing or eliminating the need for appeals from simple errors.

b) It is likely that there would be a higher degree of consistency in the sentences handed down by different judges within a specialised criminal jurisdiction, because of the sentencing judge's greater familiarity with the appropriate sentencing range for particular offences and the manner in which mitigatory or exacerbatory features should be taken into account. While a specialised criminal jurisdiction would still produce a range of sentences, there would be fewer unjustifiable sentences that fell outside the accepted range, thereby reducing the volume of sentencing appeals.

c) It is likely that criminal proceedings would be shorter, for the same reason; a Judge who is familiar with procedural and substantive law, all else being equal, requires less time for deliberation and is more likely to hand down a correct decision or judgement. Such a judge is also likely to be more able to deliver *ex tempore* judgements, thereby saving time and resources across the criminal justice system.

d) At present, it is commonplace to have three-judge Benches of the Court of Criminal Appeal where none of the three Justices had a criminal law practice as counsel or as a trial judge before their appointment to the Supreme Court. The Bench of an appellate court in a specialised criminal jurisdiction would be able to draw upon a high level of first-hand experience in trials as counsel, and ideally as a trial judge in both the District and Supreme Courts. This experience would particularly inform deliberations that involve issues concerning the practicalities of the trial process and the representation of accused persons.

The proviso is that the specialised criminal jurisdiction include judges who do not have the requisite knowledge or experience, but nevertheless clearly have the aptitude to develop their expertise to a point where an appointment is warranted. Some of our finest judges presiding over criminal cases currently and in the last three decades, including Chief Judges at Common Law, had non-criminal practices prior to their appointment. It is of critical importance that there be sufficient flexibility in the specialised criminal

jurisdiction to enable such appointments to continue, and for some judges to sit in more than one Division. This ensures that there is a flow of experience and awareness of practices in other Divisions that may benefit the development of the jurisprudence of the Criminal Divisions.

An example of a mechanism that would provide that flexibility is that the Chief Judge of the District Court and Chief Justice be able to direct that a judge of their court who is not of the Criminal Division may sit for periods as an Acting Judge of that Division and in due course, if appropriate, be appointed (or directed to be) a judge of that specialised Division.

Possible concerns with a specialised criminal jurisdiction include whether there would be any additional cost. One can imagine various models, but at its most basic there need be no change in infrastructure or any other significant change requiring expenditure. Further, District Court sittings in country and regional areas are dedicated criminal or civil sittings, so it would seem unlikely that there would be costs incurred by having to change judges in the same sitting.

If not immediately, then over time, there would ideally be an integration of the two Criminal Divisions into the one Criminal Division spanning the District and Supreme Courts, which is drawn upon for the constitution of the Court of Criminal Appeal; a localised version of the Crown Court. It is ironic that, at the time of their appointments to the District Court Bench, many (if not most) criminal barristers have practices almost exclusively involving Supreme Court trials and appeals to the Court of Criminal Appeal, but few have the opportunity to follow that practice to its logical conclusion by a further appointment from the District to the Supreme Court Bench. Conversely, some counsel with no criminal practice at all who are appointed to the Supreme Court may be presiding over a murder trial or sitting in the Court of Criminal Appeal very quickly and regularly thereafter. One wonders if this is the best use of the precious resource of our Judicial Officers.

A single vertically-integrated Criminal Division would also facilitate Benches of the Court of Criminal Appeal being able to draw upon the trial-judge experience of a wide range of criminal offences, not only the select few crimes within the Supreme Court's trial jurisdiction. It would also facilitate a broader pool of expertise from which Court of Criminal Appeal Benches could be constituted, to meet the needs of particular cases.

The introduction of a specialised criminal jurisdiction could be achieved in various ways that perhaps do not need to be explored in our response to this question. If the District and Supreme Courts are to initially retain their respective separate jurisdictions, one minimalist way, for example, would be that all judges at the time of the commencement of the relevant legislation be automatically included in the respective Criminal Division of their Court so that only fresh appointments would be to one or other of the Divisions.

Question 12.9

1. Should the comprehensive guideline judgment system in England and Wales be adopted in NSW?

2. Should the current guideline judgment system be expanded by:

a. allowing specialist research bodies such as the NSW Sentencing Council to have a greater role to play in the formulation of guideline judgments, and if so, how should they be involved?
b. allowing parties other than the Attorney General to make an application for a guideline judgment, and if so, which parties, and on what basis should they be able to apply for a guideline judgment?
3. Should the Chief Magistrate have the power to issue guideline judgments for the Local Court? If so, what procedures should apply?

The Public Defenders are not in favour of the introduction into NSW of the England and Wales guideline model system. However, we support the proposition that section 42 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) be amended to enable the CCA when entertaining an application for a guideline judgement to receive into evidence, where the Court thinks it appropriate, a wide range of material, including Reports and other publications of the Law Reform Commission, the Sentencing Council and academic peer-reviewed journal articles and other publications.

We are not in favour of the proposition that parties other than the Attorney General be permitted to seek a guideline judgement, but if the Commission determines to recommend this proposal, we are of the view that the only additional offices that may seek a guideline judgement should be the Senior Public Defender and the Director of Public Prosecutions. It is likely to be rarely sought by either office, and it is unnecessary to legislatively confine the circumstances in which they may seek a guideline judgement.

We are not in favour of the Chief Magistrate having the power to issues guideline judgements.

Question 12.10
1. Should a sentence indication scheme be reintroduced in NSW?
2. If so, should it apply in all criminal courts or should it be limited to the Local Court or the higher courts?
3. Should a guideline judgment be sought from the Court of Criminal Appeal to guide the operation of the scheme?
4. How could the problems identified with the previous sentence indication pilot scheme in NSW in the 1990s, including overly lenient sentence indications and 'judge shopping', be overcome?

The Public Defenders are not in favour of the re-introduction of the sentence indication scheme. It was introduced in the early 1990's as a pragmatic, somewhat cynical, measure to deal with a lengthy backlog in the District Court trial list that seemed at the time to be incapable of being resolved by other than drastic means. That particular circumstance does not apply now, nor does any other circumstance that would warrant such a step; it is not needed.

Further, it sends a troubling message to the community, and the victim, about the criminal justice system that hardly engenders confidence in its philosophical integrity.

Question 12.11
1. Should a court be permitted to give weight to the contents of a family victim impact statement when fixing the sentence for an offence in which the victim was killed?
2. Should any changes be made to the types of offences for which a victim impact statement can be tendered?
3. Are there any other ways in which victims should be able to take part in the sentencing process which are presently unavailable?

The Public Defenders are not in favour of a sentencing court giving weight to the contents of a victim impact statement in the determination of the offender's sentence. The prosecution can, and routinely does, tender evidence of the consequences of the offence on the victim; for example in a serious assault the Crown may tender expert medical evidence of any lengthy or permanent loss of capacity or other lasting injury or other relevant consequence of the assault. This evidence is relevantly taken into account by the Court in fixing the sentence.

Victim impact statements, whether by the victim him or herself or the victim's family, "humanise" the proceedings. The statement involves the victim directly even if they have not been a witness and confronts the offender with an often moving account of the consequences of their actions. These aspects may ultimately contribute towards the offender's rehabilitation as well as to a sense of participation and closure for the victim.

However, to take the statement into account in formulating the sentence is another matter. By implication the absence of a victim impact statement may lead to a different sentence than otherwise would have been handed down. This will apply pressure to the victim or their family to produce a statement (many presently prefer not to do so) and to treat the content of their statement differently than they presently do.

We further rely on our submission dated 11 June 2011 in response to the *Family Victim Impact statements and Sentencing in Homicide Cases* Discussion Paper, which is annexed to our response.

Question 12.12
Should any other options be considered for the possible reform of the sentencing system?

No.

We are happy to provide further assistance with this reference if required.

Yours faithfully,

Mark Ierace SC
Senior Public Defender

1 June 2011

The Honourable Greg Smith SC MP,
The Attorney General and Minister for Justice,
Level 31, Governor Macquarie Tower,
1 Farrer Place,
SYDNEY NSW 2000

Dear Attorney General,

Family Victim Impact Statements in Homicide Cases

Thank you for your letter dated 10 May last in which you invited a response to the issues raised in the background policy paper titled *Family Victim Impact statements and Sentencing in Homicide Cases* ("the Background Paper").

At the outset may I note that in my view the advent of victim impact statements has been a positive development in criminal procedure. There is clearly a considerable personal and community benefit in the victim, or the immediate family members of a deceased victim, publicly expressing their loss and grief. In my experience, where the offender has acknowledged his or her guilt, there is often a valuable benefit to the offender's rehabilitation, by their exposure to the raw impact of the consequences to the victim and their loved ones of their criminal act. This resonates to some extent with the notion that victims' impact statements tend towards a restorative justice model, integrating the interests of the state, offender and victim.

However, I am opposed to the proposed changes, regarding them as a significant step too far. Although the government is committed to introducing legislation that will permit courts to consider such statements in the determination of an offender's sentence in homicide cases, I would respectfully urge the government to re-consider, for the following reasons.

The Background Paper proposes two amendments to the Crimes (Sentencing Procedure) Act 1999 ("the CSPA"), firstly providing guidance to a sentencing court as to when a victim impact statement by a family victim may be considered on the determination of the sentence, and secondly, setting a suitable evidentiary standard: "such as those that apply in Victoria".[1]

[1] Background Paper, page 7.5.

Carl Shannon Chambers, 13/175 Liverpool St, Sydney NSW 2000
Telephone (02) 9268 3111 Facsimile (02) 9268 3168 DX 11545 Sydney Downtown
Web http://www.lawlink.nsw.gov.au/publicdefenders

In relation to the first issue, it is suggested that the amendment could provide that such a statement would be admissible where it was in conformity with section 3A(g) of the CSPA, which provides:

> **3A The Purposes of Sentencing**
> The purposes for which a court may impose a sentence on an offender are as follows:
> (g) to recognise the harm done to the victim of the crime and the community.

I suggest that this would be of little assistance. According to that standard it can only be relevant to "the community" since the victim is deceased, and therefore the harm done to the victim's immediate family would artificially be determined only in the context of the family being part of the community. There would be a temptation to amend section 3A to include the immediate family, as well as the victim and community.

Whether such an amendment to 3A is made or not, but particularly if it is, one wonders in what circumstances a court could reject such a statement for the purpose of determining sentence, without slighting the family. It is trite to observe that the occasion of a sentencing court receiving a victim impact statement from a family victim, that is, where the victim was killed as a consequence of the crime, is as emotionally powerful and delicate a moment as ever occurs in a criminal matter. If the family victim is anxious for his or her statement to be so considered, a rejection of the statement for that purpose (even though it would be permitted for the usual purpose) would inevitably be interpreted by that person as a public rejection of the statement as necessary to determine the harm done, which could be quite hurtful. This would be especially so in manslaughter cases, where a family victim whose statement is excluded for sentencing purposes is later appalled by a sentence which they regard as quite unduly lenient.

The second proposed amendment would introduce evidentiary standards, and I note that in your letter you particularly invited comment in relation to this aspect. As noted above, the Background Paper suggests that the Victorian legislation could be a model. It provides that the Court may, at the request of the offender or the prosecutor, require the maker of a statement (and witnesses giving evidence in support) to give evidence, in which case they may be cross-examined and re-examined.[2]

It is conceivable that, in contrast to the current situation, defence counsel will be obliged in some cases to cross-examine the makers of such statements, because of a possible nexus between what is said and the sentence to be imposed. It is difficult to imagine a more unpleasant task to befall counsel for the defence, or a more appalling public spectacle. It would be an experience that would not reflect well on the criminal justice system that permitted it. It is noted in the Background Paper that:

> ... the experience in Victoria has been that while cross-examination of a victim about a victim impact statement occurs only infrequently, when it does happen, it is very distressing for the victim.[3]

---

[2] Sentencing Act, 1991 (Vic) sections 95 D and 95E.
[3] Page 7.10.

However, I am unable to think of an acceptable alternative to the evidence being tested in the usual way, if the content of the statement is to be a part of the material in light of which the sentencing judge fashions the sentence.

This is more than a technical dilemma. It goes to the heart of why there are limits to the extent to which a criminal proceeding can be utilised for other non-criminal purposes, no matter how compelling that other purpose may be. Ultimately, if material before the court which unquestionably serves a valuable purpose in the expression, and public acknowledgement, of the full consequences of the particular offence is to be used as well for a punitive purpose, it must be filtered through the rules of evidence; it is unavoidable.

I have an additional concern with the proposal. At the moment, there is no pressure on family victims to make a victim impact statement, since it is unrelated to the sentence imposed. The families of some victims do, and others don't. In the recent sentence of *R v Reynolds & Small* [2010] NSWSC 691, following Reynolds' conviction on six counts of manslaughter and Small on six counts of dangerous navigation causing death (following a boat collision off Bradley's Head in Sydney Harbour), the families of three of the deceased victims made victim impact statements, and the other three did not. Grove J observed:

> 92 Before turning to the imposition of sentences I should acknowledge receipt of victim impact statements on behalf of the families of three of the deceased. That no representative of the families of the other three victims has chosen to make such a public statement does not imply to my mind that the losses of those families are any less keenly felt. The statements which were made reveal deeply felt grief and sense of loss and such comfort as I can offer is limited to making this public acknowledgement.
>
> 93 Obviously nothing can alter the situation of death and loss but it is important that it be understood that I am not in any sense evaluating the lives of the respective deceased. Every life has a value beyond description in mere words. Nor is it my task in some way to avenge the deaths which have occurred and the memory of each of them can never be gauged against any penalty which is ultimately imposed.

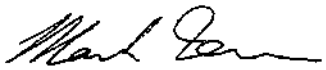
If legislative changes permit a sentencing judge to consider such statements in the determination of the sentence, and the victim's family understand as much, in particular that in some circumstances a victim impact statement may cause a longer sentence to be imposed, family members may feel obliged to make a statement from a sense of responsibility to the deceased, where otherwise they would not have done so, for whatever reason.

They may also feel an obligation to shape their statement in a manner that they feel is more likely to lead to a longer sentence being imposed on the offender. I am not being critical of victims in a general sense in making this observation, nor am I suggesting that a victim would necessarily be untruthful in order to secure a longer sentence; rather, that once the writer understands that the statement may be available for this purpose, it will naturally be drafted accordingly.

In short, the change in consequences may impact on the therapeutic benefit of victim impact statements in homicide cases, leading to a more adversarial aspect, directly drawing the victim's family into the sentencing exercise.

If I can be of any further assistance, please do not hesitate to contact me.

Yours faithfully,



Mark Ierace SC
Senior Public Defender