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

SENTENCING

September 2012

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

1 BACKGROUND – Henry Davis York and The Homicide Victims' Support Group (Aust) Inc (HVSG)

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 New South Wales (**NSW**).

The aims of HVSG are threefold:

- offering support, counselling and advice to families;
- educating the general public, professional bodies and Government agencies about the needs of homicide affected families; and
- reform of various laws that impact on family members.

HVSG has a working partnership agreement with Victims Services within 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.

2 SCOPE OF THESE SUBMISSIONS

HVSG is grateful for the opportunity to provide comment to the Law Reform Commission. HVSG has prepared these submissions 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 NSW. These submissions are less applicable to defendants charged with minor offences and do not apply to Local Court proceedings.

Alternative approaches to sentencing

Adjournment under s11

Section 11 of the Crimes (Sentencing Procedures) Act 1999 (NSW) (**Crimes Sentencing Act**) provides for deferral of sentencing or adjournment (**Section 11 Adjournment**). This is the making of an order deferring an offender's sentence for the purpose of enabling an

assessment of an offender's capacity and prospects of rehabilitation to be made or to allow an offender to demonstrate that rehabilitation has taken place.[1]

Deferral of sentencing (also known as Griffiths Remand) originated as a common law concept.[2] At common law, Griffiths Remand was rarely considered appropriate if a full-time custodial sentence was ultimately to be imposed.[3] However since the codification of the Griffiths Remand into statute,[4] its application has broadened and is no longer constrained by common law limitations.[5] This has resulted in Section 11 Adjournment being applied in circumstances where full-time imprisonment remains the most likely outcome.[6]

HVSG supports the comments by Howie J in *R v Palu* (2002) 134 A Crim R 174 about the danger of the improper application of section 11:

> The section can only be utilized in a principled way and upon proper material placed before the court otherwise it becomes an instrument of injustice...by becoming the justification for the imposition of a sentence which fails to meet legitimate expectations of the community as to the punishment to be imposed upon the offender.
>
> Section 11 adjournments are thus only appropriate where the offence, considered objectively, is such that only a sentence of full time imprisonment ought to be imposed.[7]

HVSG submits that the broadening of the application has had a negative impact on the families and loved ones of victims of homicide. The use of Section 11 Adjournment in homicide cases suggest to the loved ones and families of homicide victims that the timely resolution of justice is a secondary consideration during the sentencing process. This was recognised by Buddin J in *R v ABS* [2005] NSWCCA 255:

> Whilst rehabilitation [is] properly to be regarded as an important factor in the sentencing process, it is a matter which must nonetheless take its place alongside the other purposes of sentencing which are identified in section 3A of the Crimes (Sentencing Procedure) Act 1999.

HVSG submits that Section 11 Adjournment should be amended to provide that deferral of sentencing is only available in circumstances where a sentence of full-time imprisonment is not the most likely outcome. This would reflect the common law principles upon which the sentencing option is based and would also be in line with recent judicial findings[8] on the appropriate application of section 11.

Approaches to Criminal Offending

Restorative Justice

Restorative justice is based on the concept of the offender being actively involved with the process of restoration of harm. HVSG supports restorative justice programs that are

[1] *R v ABS* [2005] NSWCCA 225 per Buddin J at [28].
[2] *Griffiths v The Queen* (1977) 137 CLR 293.
[3] *R v Trindall* (2002) 133 A Crim R 199 per Smart AJ at [64].
[4] Section 11 of the Crimes (Sentencing Procedure) Act 1999 (NSW)
[5] *R v Di Gregorio* [2004] NSWCCA 9
[6] *R v Brown* [2009] NSWCCA 6
[7] *R v Palu* (2002) 134 A Crim R 174 per Howie J (Levine and Hidden JJ agreeing) at [29].
[8] For example, *R v ABS* [2005] NSWCCA 225.

managed through the Restorative Justice Unit and the Victims Register within the Corrective Services Department.

The loved ones and family members of victims of homicide who have been involved with restorative justice programs often feel empowered by the process with a sense that their trauma and distress has been acknowledged even in some limited way.

HVSG is mindful that the concept of restoring harm caused by the offence only has very limited application in homicide cases. The harm inflicted upon the families and loved ones of victims of homicide cannot be wholly addressed or restored through any process. However, HVSG have witnessed many of their clients benefiting to some degree from participating in the restorative justice process.[9] The restorative justice process provides the loved ones and families of victims an avenue to take a moment to communicate the hurt and damage suffered. This can, in appropriate circumstances, be an empowering process for families of victims to undergo.

HVSG note that restorative justice should have very limited influence on the actual sentencing of homicide offenders. While restorative justice can benefit some victims, the adequate and lengthy incarceration of homicide offenders should remain the main priority in sentencing for the offence of homicide.

HVSG generally supports the role of restorative justice used as a corollary to the sentencing process. However, HVSG acknowledges two important issues:

1. Restorative justice will not be appropriate in all circumstances and for all loved ones of victims of homicide, and

2. Restorative justice should have very limited influence on the actual sentencing of homicide offenders. The adequate and lengthy incarceration of homicide offenders should remain the main priority in sentencing for the offence of homicide.

Problem-Solving approaches to Justice.

Problem-solving justice is a developing concept in our legal system, having its origins in the USA. HVSG submits that its application to homicide offences be cautiously considered. HVSG considers that it would be advisable for more empirical data to emerge on its effectiveness in reducing recidivism and, *more importantly*, satisfaction from victims of crime before we can propose its involvement in homicide crimes.

Recent findings show there is no significant difference in the rate of recidivism amongst offenders who are exposed to problem-solving approaches to justice and offenders who are not.[10] Furthermore, there is no difference in the frequency of re-offending or the seriousness of the offences committed.[11] These findings highlight the need for more research as to the effect of problem-solving as an approach to justice before applying this approach to cases of homicide.

One aspect of the problem-solving approach to justice is the use of 'special courts'. The purpose of the 'special courts' is to alleviate disadvantage of offenders by entering them into rehabilitative programs (for example, a drug rehabilitation course). These programs are

[9] There is also independent empricial evidence as to the benefits of restorative justice processes on victims. See Peni Moore, 'Lessons learned on the road: Teaching restorative justice to marginalised individuals and communities in Fiji' (2007) 18 *Australasian Dispute Resolution Journal* 110.
[10] Smith and Weatherburn, *Youth Justice Conference versus Children's Court: A Comparison of Re-offending*, Crime and Justice Bulletin 160 (NSW Bureau of Crime Statistics and Research, 2012).
[11] Ibid.

not appropriate for homicide offenders. Protection of the community and deterrence should take priority over the prospects for rehabilitation for homicide offenders. Specifically, any rehabilitation programs offered for homicide should take place during detainment.

The values associated with the problem-solving approach to justice are not compatible with offences involving homicide. Problem-solving justice caters for offences at the opposite end of the spectrum to homicide and values efficiency, reduced costs and the needs of offenders. The community-based approach to problem-solving justice found in jurisdictions across the world is suited for low-level offences.

Offenders with cognitive and mental health impairments

Sentencing mentally impaired offenders

HVSG note that under Section 21A(3)(j) of the Crimes Sentencing Act the Courts attention is directed to the special circumstances of the offender. This encompasses circumstances where the "offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability".[12]

HVSG acknowledge that the application of Section 21A(3)(i) in homicide cases can result in lowering the degree of moral culpability for cognitively and mentally impaired offenders. HVSG do not take issue with reduction in moral culpability in appropriate cases. However, HVSG are concerned that when the culpability of offenders is lowered the issues of adequate retribution and specific deterrence are often not adequately addressed.[13]

HVSG's concerns would be allayed if the judiciary were empowered to sentence cognitively or mentally impaired offenders to appropriate treatment facilities. The significant and unique rehabilitation needs of mentally impaired offenders require specific medical intervention and ongoing and long term assessment in an appropriate medical facility. Detaining these offenders in appropriate treatment facilities for significant periods of time would ensure that issues of retribution, specific deterrence and medical intervention were adequately addressed. Not permitting a court to order such detainment has been described by Adams J in *R v Fisher* [2009] NSWSC 348 as an "appalling situation" and needed in the interests of both the offender and the public.[14]

HVSG submits that statutory guidance is important in these difficult sentencing matters to help direct the judiciary to ensure that consistent and adequate attention is given to the following issues:

1. the level of the offender's moral culpability as a result of their serious mental impairment;

2. the fact that mentally impaired offenders are often not appropriate guides for community deterrence;

3. the fact that prison is not an appropriate place for rehabilitation for mentally impaired offenders;

[12] *Crimes (Sentencing Procedure) Act 1999* (NSW).
[13] *R v Fisher* [2009] NSWSC 348, [19-20];
[14] Ibid, [19].

4. the level of danger that the mentally impaired offender presents to the community;[15] and

5. the need to acknowledge the harm caused to victims and the community.

Pre-sentence Reports

HVSG note the importance of pre-sentencing reports to assist the court in weighing up the competing interests of the offender's rehabilitation and community expectations. The reports provide an opportunity for issues such as the prospects of rehabilitation of the offender and risks to the community to be adequately addressed before sentencing.

Pre-sentencing reports in cases of homicide involving offenders with mental impairment assist the judge to make two key determinations:

1. whether the offender is mentally impaired to an extent that warrants special treatment; and

2. what appropriate sentence might address both the need to detain the offender and address their mental impairment.

Procedural and jurisdictional possibilities

The role of victims in sentencing proceedings

Under the current law in NSW, the contents of a victim impact statement (**VIS**) cannot be taken into account when fixing the penalty for an offence involving the victim's death.[16]

The justifications for this position were set out by Hunt CJ in *R v Previtera* (1997) 94 A Crim R 76 as "offensive to the fundamental concepts of equality and justice for criminal courts to value one life as greater than another". As a result it is "wholly inappropriate to impose a harsher sentence upon an offender because the value of the life lost is perceived to be greater in one case than in the other".[17]

HVSG respectfully submits that this position is out of step internationally and with other Australian jurisdictions. The courts in Victoria and South Australia consider family VIS "as a relevant factor in sentencing to the extent that it reflects the "general" impact of the offence on the community."[18] In New Zealand, a prosecutor is required to make all reasonable efforts to ensure that relevant information on any physical injury or emotional harm suffered by the victim is put before the court.[19] VIS are used in New Zealand courts as particular examples of community sentiment towards the offence.[20] In England and Wales, VIS can be used to influence the actual sentencing option in certain circumstances.

HVSG expressed the following view to the NSW Law Reform Commission earlier in the year in relation to the use of VIS in sentencing:

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[15] (a) - (d) represent the common law as enunciated in *R v Hemsley* [2004] NSWCCA 228 [33]-[36] (Sperling J).
[16] *R v Previtera* (1997) 94 A Crim R 76.
[17] Ibid at 86-87.
[18] NSW Department of Attorney General and Justice, *Family Victim Impact Statements and Sentencing in Homicide Cases*, Background Policy Paper (2011) 5.
[19] *Victims' Rights Act 2002* (NZ), ss 4 and 17. Note: "Victim" is defined as including a member of the immediate family of a person who, as a result of an offence committed by another person, dies or is incapable.
[20] *The Queen v Carlos Namana* [2000] NZCA 348

> 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.[21]

HVSG reiterates this position and supports the "Generalised Impact Approach" used in sentencing courts in Victoria, Tasmania and Canada.[22] The "Generalised Impact Approach" has best been described by Vincent J in *R v Beckett:*

> The introduction of such [victim impact] statements was not, as I see it, intended to effect any change in the sentencing principles which govern the exercise of discretion by a sentencing judge. What such statements do is introduce in a more specific way factors which a court would ordinarily have considered in a broader context. They constitute a reminder of what might be described as the human impact of crime.[23]

HVSG considers that the Generalised Impact Approach would allow New South Wales courts to consider VIS when determining a sentence in homicide cases in a way that appeases their concerns and does not offend the principle that "in death we are all equal".[24]

The courts of other jurisdictions have endorsed the principle of not placing greater value of one life over another whilst acknowledging that taking account of VIS from the families of victims does not breach this principle.[25] This is because VIS are significant to a court having regard to the totality of loss, injury or damage. Furthermore, the purpose of a criminal sentence in effecting retribution is so closely linked to the impact on the victim, as a member of the community, that it ought not to be ignored.

The concern expressed in *Previtera* that VIS may result in unfair distinctions based upon the worthiness of victims does not warrant their exclusion. Differential sentencing occurs every time a court gives a sentence, in line with fundamental principles of the common law. More specifically, an aggravating factor of sentence includes the status of the victim as a police officer, emergency services worker, teacher, health worker, correctional officer, community worker or judicial officer.[26]

In addition, courts retain discretion to include family perspectives and to what extent they are considered. This discretion is an important safeguard protecting the court from considering unreliable and biased evidence. This is important in maintaining the court's control of proceedings and ensuring that while victims are afforded a legitimate role, ultimately the judge ensures that information in the VIS is only used objectively. However, discretionary use of VIS can cause issues for the families involved. HVSG have counselled a number of clients that have felt let down when their VIS was altered or only partially considered. Altering a VIS can make family members feel less in control of the only moment they have in the proceedings to express their loss and the impact that loss has had on their lives.[27] HVSG suggest that any amendments to the VIS are made known to and approved by the author.

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[21] Homicide Victims' Support Group (Aust) Inc & Henry Davis York, *Submission to the New South Wales Law Reform Commission on behalf of the Homicide Victims' Support Group (Aust) Inc. - Sentencing,* 4 June 2012, 20.
[22] Tracey Booth, 'Penalty, Harm and the Community: What role now for Victim Impact Statements in Sentencing Homicide Offenders in NSW?' (2007) 30(3) *UNSW Law Journal* 676.
[23] *R v Beckett* [1998] VSC 219, 79.
[24] *R v Dang* [1999] NSWCCA 42
[25] *R v Birmingham (No 2)* (1997) 69 SASR 502, 548.
[26] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(a).
[27] *R v Owens* [2008] NSWSC 1375; *R v Jones* [2010] NSWSC 432.

HVSG also submit that VIS's should not become a mandatory part of the sentencing process. HVSG note that not all homicide victims are survived by family members or loved ones who are willing or able to provide VIS.

Currently in New South Wales VIS cannot be presented in court unless there is a conviction. This requirement means that the family members and loved ones of victims in matters involving an accused found not to be guilty by way of mental illness are unable to provide VIS. HVSG are concerned that these family members who have suffered the same devastating impact of a homicide are not afforded the opportunity to express their story through a VIS. HVSG submit that family members who are involved in matters where no conviction has been entered as the accused is not guilty by way of mental illness should be able to provide a VIS.

HVSG would like to take the opportunity to acknowledge the importance of VIS for the loved ones and family members of victims. The loved ones and families of victims use the opportunity of VIS to express their stories and the impact of the crime on their lives. It has long be recognised that they play an essential role for families involvement in the judicial system, this we believe should be available for all family members whether a conviction has been recorded or not.

HVSG note the judicial acknowledgment of VIS's in *R v Melehan [201] NSWSC 201*[28] and *R v Southon [2002] NSWSC 255.*[29] In both cases the accused was found not guilty by mental illness and VIS were prepared by the family of the deceased. In *Southon*, Kirby J acknowledgement the impact of the crime and expressed his "heartfelt sorrow and condolences." He also acknowledged the victim as a "decent and gentle" man[30]. Also in *Melehan*[31] the VIS was put before the court without objection[32] and acknowledged by Schmidt J as follows:

> ...I note the information concerning Mr Vaughan received from his family was put before the Court by the Crown, without objection. This material showed that Mr Vaughan had dealt bravely with his serious misfortune which life had brought him before his death. It also dealt with the impact which his death has had. This material had not gone without notice. I extend my deepest sympathy to Mr Vaughan's family for the undoubtable consequences of his tragic death.

The opportunity to express their trauma and its subsequent recognition by the sentencing judge was appreciated by the family and brought to them a sense that their story and ongoing distress was recognised and valued by the judiciary.

It is well understood that family members of victims tend to show greater degree of satisfaction where they have the opportunity to be involved in the process of criminal justice. 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.[33] 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 primary benefits:

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[28]]2010] NSWSC 210.
[29] [2002] NSWSC 255.
[30] Ibid, [46].
[31]]2010] NSWSC 210.
[32] Ibid at [42].
[33] Andrew Cannon, 'Sorting out conflict and repairing harm: Using Victim offender conferences in court processes to deal with adult crime' (2008) 18 *Journal of Judicial Administration* 85; Gordon Bazemore and Mark Umbreit, *A Comparison of four restorative conferencing models* (US Department of Justice and Delinquency Prevention, 2001); Patrick Gerkin, 'Participation in Victim-Offender Mediation: Lessons learned from observations' (2009) 34(2) *Criminal Justice Review* 226 at 227.

1. The families of victims are greatly assisted in being able to recover and move on from the crime. Involvement through victim impact statements is a far more cost-effective and efficient way of achieving a meaningful outcome for victims than the current bureaucratic form of victim's compensation. Victim's compensation and services cannot offer the potential emotional outcome for victims willing to provide statements to be used in the trial process.

2. The justice system itself stands to gain a 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.[34] 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.

SUMMATION

This completes the submission prepared on behalf of the HVSG.

HVSG would like to thank you for the opportunity to contribute to this inquiry.

Henry Davis York (**HDY**) have prepared these submissions on behalf of HVSG and the family members and loved ones of persons who have been victims of homicide. HDY is very proud of this unique and longstanding pro bono partnership and is very grateful for the opportunity to provide pro bono legal services to HVSG.

Should you have any further questions, please contact Martha Jabour or Jillian Mitford-Burgess on the numbers below.

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[34] New South Wales Law Reform Commission, *Sentencing and Juries*, Issue Paper 27 (2006), 2.