THE LAW SOCIETY
OF NEW SOUTH WALES

6 June 2011

The Hon. Greg Smith SC MP
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 inviting the Law Society to comment on the issues raised in the background policy paper '*Family Victim Impact Statements and Sentencing in Homicide Cases*'.

The Law Society's Criminal Law Committee (Committee) does not support the proposal to legislate to provide that courts in New South Wales may consider a victim impact statement (VIS) made by family members when determining an offender's sentence in homicide cases.

There are a number of concerning features of the proposal (some of which are canvassed in the background policy paper) including misstating the sentencing task of judges. The VIS is likely to cover factors judges take into account in sentencing in any case, of which the effect on the victim and community is one, but only one. In addition, the criminal law and criminal justice process proceeds on the basis of the equal value of lives of all individuals, something which is invoked in the broad categories of wrongfulness in homicide (murder and manslaughter). More broadly, perhaps the key distinguishing feature of criminal law is the idea that a charge is brought on behalf of the public, on the basis that a wrong has been committed against the public. Enhancing the role of the VIS in the ways suggested in the background policy paper moves too far away from this core feature of criminal justice.

As the Honourable Justice Levine said in his keynote address at the May 2011 '*Meeting the Needs of Victims of Crime*' conference:

> "To permit further intrusion in the sentencing process, by either or both the jury or the victims, could be seen to amount to the privatisation of the quintessential act of the State on behalf of the whole community, that is, the imposition of punishment. It also could be seen to amount to the validation of vengeance and vendetta which hitherto the whole of the rule of law and the administration of criminal justice has been at pains to prevent."

The Committee agrees with the position of the NSW Court of Criminal Appeal in *R v Previtera* (1997) 94 A Crim R 76, that it is not appropriate to take a VIS into account when sentencing for a homicide case for the following reasons:

- a sentence must be proportionate to the objective seriousness of an offence;

- the sentence will already take into account the value of a human life;
- it is "offensive to fundamental concepts of equality and justice for criminal courts to value one life as greater than another"; and
- it is "inappropriate to impose a harsher sentence upon an offender because the value of the life lost is perceived to be greater in the one case than in the other".

In *R v FD; R v FD; R v JD* (2006) 160 A Crim R 392, Justice Scully raised the following problems with allowing a VIS to be taken into account when determining the sentence for a homicide case:

- offenders should not be sentenced under a "lynch mentality";
- the offender should not be sentenced in a manner that is dictated by the victim;
- victims still deserve a forum in which they can make a public statement to allow for the "emotional catharsis" of putting their grief and loss on record; and
- VIS provide a means of implementing a political imperative originating from the perceived lack of trust voters have in the sentencing process. It is not easy to deal with this issue in a way that "does not lay waste to the accumulated wisdom of the common law of crime and punishment".

Significant difficulties would arise in NSW if a VIS were to be treated as material affecting the sentence otherwise properly imposed. There would need to be considerable extra time and trouble taken to settle the VIS by the prosecution, ensuring that any factual assertions were capable of proof if necessary, and that assertions of psychological or medical impact, for example, could be supported by expert evidence. Sentencing proceedings would become longer and more complex than they already are.

As a matter of principle, where there are facts in dispute on sentence, the fact in issue must be determined beyond reasonable doubt during a sentencing hearing. If a court is to adjust a sentence because of the content of a VIS, then the laws of evidence should apply to that content since it would affect the sentence and would therefore be a matter relevant to sentencing. This may require cross-examination of the author of the VIS. It would be extremely difficult for the defence to cross-examine a family victim on their emotions, feelings and grief.

Your correspondence explains that the proposal is part of the Government's commitment to restoring faith in the fairness of the criminal justice system and that the reform will allow the voices of family victims to be heard in the sentencing process. However, the background policy paper identifies real risks that the proposal may impact negatively on victims in the following ways:

- cross-examination could be traumatic for a family victim and may undermine the therapeutic value of making a VIS;
- consideration of a VIS in homicide cases could cause family victims to have false expectations that the sentence imposed will reflect the harm that they perceive they have suffered. If a court is perceived not to have given sufficient weight to a VIS, the therapeutic benefits of making the VIS

will be limited and indeed, may aggravate the harm caused to family victims and damage the public's confidence in the justice system; and

- some victims choose not to make a VIS because they feel that the trial process is already traumatic enough. There is a risk that if a VIS is accepted in sentencing for homicides, family victims will feel increased pressure to make a VIS when they might otherwise choose not to.

These risks appear to outweigh any perceived benefit to the victim of having the VIS considered by the court when determining an offender's sentence in homicide cases.

A VIS should remain primarily as a therapeutic, cathartic process for victims, and should not be taken into account when determining an offender's sentence in homicide cases.

Officials may find it convenient to direct any queries on this submission to the policy lawyer with responsibility for this matter, Rachel Geare, on 9926-0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

pur Stuart Westgarth
**President**