



Victorian Aboriginal Legal Service Co-operative Ltd.

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Ms Catherine Tobin
Department of Justice
55 St Andrews Place
Melbourne VIC 3002

Dear Ms Tobin,

Re: Victim Related Amendments to the Sentencing Act 1991

Thank you for the opportunity to respond to the proposed legislative changes that give victims of crime greater recognition in the sentencing process. Arguably, the reforms have the potential to have a disproportionate impact on Indigenous Australians given their over-representation in the criminal justice system and high victimization rate.

VALS has the following comments on the proposals.

Arguments That Apply To Each Proposal

- The proposals will do little for victims and do little for the promotion of sensible sentencing.
- It is difficult to understand how the proposals will contribute anything positive to the difficult issue of balancing the rights of victims and the rights of offenders. The proposal appears to be an attempt to increase the emphasis on the impact of a crime on a victim which has the likely effect of prejudicing the interests of the offender.
- The Government gives the impression it wants to move in the direction of making sentences more responsive to the victim and less responsive to other relevant factors, such as intent or criminal record of the offender. In the absence of any greater clarity about how an emphasis on the impact of a crime on a victim is to be balanced against other factors such as intent, proportionality and rehabilitation etc it is unclear how it will benefit victims.
- The lack of clarity about how consideration of the impact of a crime on a victim is to be balanced against other relevant factors will create unrealistic expectations of what the proposal will achieve by some victims groups. This will lead to further calls for shifting of the balance of sentencing towards the wishes of victims. The proposal may be giving victims a false sense of hope as it is questionable whether

the proposal will result in much change in reality. This will result in victims continuing to be frustrated about their inclusion in the trial process.

- The proposals overlook the fact that a ‘tough on crime approach’ is not necessarily a ‘smart on crime approach’. According to Professor Arie Frieberg punitive approaches do not have a deterrent effect. A tough on crime approach has the effect of criminalizing disadvantage. A tough on crime approach gives the appearance that justice is being done, but it is questionable whether this is the case. Together with more punitive sentencing policies introduced over the last decade the proposal and its emphasis on the impact of a crime on victims is likely to continue to lift imprisonment numbers. Hence we believe that these proposals will do little for the promotion of sensible sentencing.
- Rather than create more space for victims in the sentencing process, there should be more recognition of the need to support victims in other ways. For instance, the needs of victims can be met through counselling and compensation. VALS has argued in previous submissions that the present situation where a victim of crime who has a criminal record receives less compensation than a victim who has a clean criminal record is inadequate and discriminatory.
- The Government should not take any further steps towards an Old Testament style eye for an eye sentencing policy. Instead the Government should actively promote recognition of the principles of sentencing and their rationale.
- VALS is concerned whether the legal system will be unable to uphold the value of consistency of sentencing and proportionate sentencing if the impact of the crime on the victim is taken into account to a greater extent than it is presently. VALS notes that the Sentencing Act 1991 includes the principle of restitution, not retribution (section1).
- By orienting sentencing more to victims the proposal reflects a move towards retribution and away from rehabilitation. The charges that police choose to lay are already influenced by the impact on the victim. Adding another encouragement to consider the impact on the specific victim is simply giving implicit support to people who are unhappy with the severity of present sentencing laws. Given the demonstrable failure of more punitive sentencing policies and the incapacity of any sentence to remedy the pain and suffering of the victim it is not helpful to pass legislation which adds further fuel to the idea that the satisfaction of a victim with a sentence (satisfaction index) should guide sentencing.
- An emphasis on the impact of a crime on a victim may lead the Court to overlook the fact that some offenders are victims themselves. Many Indigenous Australian offenders suffer from extreme disadvantage and are victim to factors such as the following: effects of colonization, discrimination and poverty etc.

Specific Proposals

Proposal 1 : Require Judges and Magistrates to have regard to the impact of a crime on the victim when determining an appropriate sentence for an offender. Currently section 5(2)(d)(a) of the Sentencing Act requires a sentencing Court to have regard to the “personal circumstances of any victim of the offence” and any section 5(2)(d)(b) “injury, loss or damage resulting directly for the offence” but s5(2) does not specifically mention the “impact of a crime on the victim”.

VALS is concerned that the effect of the proposal will be that the sentencing process will be hijacked by the outcome of a crime in terms of the impact on the victim. The proposal appears to reflect a shift away from considering relevant factors, such as intent of a crime or criminal record etc and this will have a prejudicial impact on the offender.

Proposal 2: Provide that where victims so desire, the Prosecutor or Judge is required to read aloud appropriate and admissible parts of a victim impact statement during sentencing proceedings.

VALS is concerned about the purpose of reading out a victim impact statement (VIS) as the Magistrate/Judge already has a copy of the VIS. VALS is concerned that whilst the proposal may benefit the victim (ie cathartic exercise), such benefit will come at the expense of the offender. The likely effect of reading the VIS out is: prejudice against the offender and media beat up.

VALS is concerned that racist attitudes towards Indigenous Australians will be aired in the Court room if the impact of a crime on a victim is read aloud. If racist attitudes are verbalized publicly and the media print them in the media then racist attitudes may be perpetuated rather than eradicated.

The proposal will not be in the interests of victims. VALS criminal law solicitors defending the offender will feel more compelled to cross-examine the witness on the victim impact statement and take an adversarial approach than they currently do if the VIS is read out. The act of reading out the VIS will give the VIS more credence and so the defendant's solicitor will attempt to downplay the VIS through cross-examination.

Proposal 3: Ensure that a victim who wants to observe proceedings is not automatically excluded when the court makes an order for witnesses to leave the Court.

VALS is concerned that proposal three could undermine the fairness of a trial. The creation of an exception for victims that removes their standing as a witness reflects the unraveling of a central core of the justice system. It is unfair for a victim to hear evidence of other witnesses and subsequently give evidence as the victim may be influenced by the evidence of previous witnesses.

VALS agrees that if the proposal goes ahead that it is essential that the Court retains the discretion to exclude the victim/witness where it is satisfied that it is appropriate to do so in the interests of fairness.

Thank you for considering this submission and please contact Greta Jubb (Research Officer) if you have any queries.

Yours Sincerely

Victorian Aboriginal Legal Service

Frank E. Guivarra
Chief Executive Officer