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The Hon J Wood AO QC
Chairperson
New South Wales Sentencing Council
GPO Box 31
Sydney NSW 2001

Via email: sentencingcouncil@justice.nsw.gov.au

Dear The Hon J Wood AO QC

Joint Public Submission to the New South Wales Sentencing Council on Victims' Involvement in Sentencing

Thank you for the opportunity to respond to the Consultation Paper 'Victims' Involvement in Sentencing' dated September 2017 ('Consultation Paper'). This is a joint submission from Drs Tyrone Kirchengast and Kerstin Braun.

The Problem with Labels: Victim as 'Participant' or 'Party'

1. This submission addresses the identification of the victim as a 'participant' and not 'party' to proceedings. The role of the victim as a 'participant' as opposed to 'party' has gained significant recent traction as a way of understanding the limited role of the victim in the justice process.¹ It also poses a normative view that victim 'participation' ought not be that of a 'party'.

¹ The recommendations of the Victorian Law Reform Commission ('VLRC') identified the victim as a participant and not party to criminal proceedings: Victorian Law Reform Commission (2016) *Victims of Crime in the Criminal Trial Process*, Final Report, November 2016. pp. xiv-xv.; The Royal Commission into Institutional Responses to Child Sexual Abuse (the 'Royal Commission') has since endorsed this

2. Victim Impact Statements ('VIS') provide victims a mode of participation but do not ordinarily afford victims party status to proceedings. Both Kirchengast and Braun have in individual submissions to the NSW Sentencing Council identified how representation of the victim (by counsel, but also variously described as victim advocates by Kirchengast) provides an important means of formalising the role of the victim, protecting the interests of vulnerable victims in particular, and limiting or removing any anti-therapeutic consequences of VIS.
3. Reducing victims to a participatory role significantly simplifies and undermines the significant ways in which victims contribute to criminal proceedings.
4. Utilising a participant/party dichotomy diminishes the standing of victims by suggesting that victims lack the substantive capacities of a party, to make submissions and furnish evidence that may contribute to decisions made. In discrete proceedings, victims have rights and exercise powers already consistent with those of a party, and are identified as third parties to proceedings.²
5. Relegating victims to participant status encourages a simplistic understanding of a victim's involvement in proceedings. For VIS, this may imply that victims participate to provide an expressive or emotional account of the crime that is not meant to effect sentence.
6. An international literature indicates how victim participation is graduated in accordance with degrees of substantive access to justice.³ For example, victims may participate in restorative processes, including Forum and Circle Sentencing, which grants victims the power to make submissions and recommendations on sentence, giving victims a degree of standing in proceedings consistent with party status.
7. Where it may be inclined to do so, the NSW Sentencing Council is encouraged to move beyond any adoption of the simplistic and problematic dichotomy of 'participant but not party' because it reduces the status of victims by failing to acknowledge the subtle ways in which victims' access and contribute to justice.
8. Most importantly, use of the dichotomy removes the possibility of further exploring the benefits of representation, because it suggests that lacking standing, a victim is not entitled to representation.⁴

view, that victims are participants and not parties: The Royal Commission into Institutional Responses to Child Sexual Abuse (2017) *Criminal Justice Report*, August 2017, pp. 226-229.

² Braun, K. (2013) 'Legal Representation for Sexual Assault Victims-Possibilities for Law Reform?', *Current Issues in Criminal Justice*, 25, 3, 819-837; Kirchengast, T. (2013) 'Victim Lawyers, Victim Advocates and the Adversarial Criminal Trial', *New Criminal Law Review: An International and Interdisciplinary Journal*, 16, 4, 568-594; Raitt, FE. (2013) 'Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings', *Criminal Law Review*, 9, 729- 749.

³ Doak, J. (2005) 'Victims' Rights in Criminal Trials: Prospects for Participation', *Journal of Law and Society*, 32, 2, 294-216; Doak, J. (2008) *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*, Hart Publishing, Oxford, p. 243; Kirchengast, T. (2016) *Victims and the Criminal Trial*, Palgrave Macmillan, UK, pp. 8-11.

⁴ Classification of the victim as 'participant but not party' by the VLRC and Royal Commission precludes further consideration of the representational needs of victims. The VLRC notes, however, that the trial involves a 'triangulation of interests' including those of the victim. The VLRC notes that '[t]he legitimate rights of victims, properly understood, do not undermine the legitimate rights of the accused or of the community, properly understood. The true interrelationship of the three – victim,

The Need for a Broadly Phrased Inquiry on the Role of Victims in Criminal Justice

9. Kirchengast and Braun support the need for a broadly phrased inquiry into the role of victims in the NSW justice system. This would include court and related processes, in criminal law and cognate areas, including civil and administrative processes. This is supported by recent inquiries of broad and far reaching character in other jurisdictions, and because the needs of victims as important justice stakeholders can never be adequately addressed through any one process, including VIS.
10. The coherence of the multiple ways in which victims' access justice needs to be considered out of recognition of the ad hoc and improvised ways in which law and policy has developed to accommodate victims as more or less empowered stakeholders of justice. The rights framework that includes sources of law, policy, as well as the charter of rights of victims of crime, provides an array of rights that range from placatory to substantive and enforceable. This means that the modern rights framework for victims has emerged as complex, confusing and at times contradictory. The extent to which victims may be empowered by rights available to them remains obscured by virtue of the incoherent ways in which such rights cross multiple sources of law and policy. Opportunities for positive reform for all stakeholders of justice may therefore be missed due to the inaccessibility of this rights framework.
11. Victims and the community, and the justice system more generally, would benefit from an inquiry that seeks better organisation of victim rights and powers across the entirety of the NSW justice process. More clearly articulated points of connection between stages or phases of a victim's justice journey – a lengthy process that spans investigation and arrest of suspect through to sentence, appeal and parole – can only assist victims navigate what is a complex and at times confusing system. Other justice stakeholders including the legal profession and the community more generally would benefit from a clearer idea of how victims participate in justice processes, and how that participation can vary between phases, including options and choices for participation and restoration, and modes of available protection for victims.
12. Importantly, such an inquiry needs to consider how the present framework of victim rights and powers affects the rights of the accused and offender, with a view to strengthening and not weakening fair trial rights for all. The goal is to develop better processes to accommodate victims, offenders and the community for a more coherent and accessible 21st century trial process for NSW.

Yours sincerely

Dr Tyrone Kirchengast
Dr Kerstin Braun

accused and community – is mutual and complementary, not exclusory.': Victorian Law Reform Commission (2016) *Victims of Crime in the Criminal Trial Process*, Final Report, November 2016. p. xiv.