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Ms Joanna Martin
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Attorney-General's Department
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Dear Ms Martin

DRAFT SENTENCING (FIRST PRINCIPLES) BILL 2016

Victim Support Service (VSS) recognises its responsibility to advocate on the issue of sentencing in the criminal jurisdiction and welcomes the opportunity to comment on the draft Sentencing (First Principles) Bill 2016.

Victim Support Service (VSS)

VSS is a statewide not-for-profit organisation in South Australia that provides services to crime victims and advocates for victims' rights. VSS is recognised as an authoritative body which speaks on behalf of South Australian crime victims, and is invited to be a representative voice about victims' issues at many forums, including on the Parole Board and the Department for Correctional Services' (DCS) Serious Offender Committee.

Sentencing (First Principles) Bill 2016 (the Bill)

The Bill seeks to:

- replace s 10 of the *Criminal Law (Sentencing) Act 1988* (the Act);
- introduce a new general statement which makes it clear that the overriding purpose of any sentence is the protection of the community from further offending; and
- introduce the use of an offender's good character to help them commit an offence as an aggravating factor.

Purposes of sentencing (s 4 of the Bill)

We support the introduction of s 4 of the Bill which will embed sentencing theory into the Act. Sentencing of offenders may serve a range of functions. These include:

- **deterrence** – either specific or general – to prevent the offender or other potential offenders respectively from offending (s 4(1)(e) of the Bill)
- **rehabilitation** of the offender (s 4(1)(f))
- **retribution** 'to ensure offenders atone for their sins by suffering' (s 4(1)(b))
- **denunciation**, by reflecting society's disapproval of the criminal behaviour (s 4(1)(c))

- **incapacitation**, by removing the offender from society and therefore protecting the community and potentially reducing crime (s 4(1)(a); s 4(1)(g))
- **restitution**, to make reparation or pay compensation for the injury caused to the victim.

Crime victims are often viewed as a homogenous group seeking mandatory and/or punitive sentencing. In reality, victims' views on the purposes of sentencing are complex and nuanced. Many crime victims express extraordinary compassion and understanding of the offender's behaviour. Some see sentencing as an opportunity to rehabilitate the offender, while for others the motivation to incapacitate the offender is driven by their desire to protect the community from further offending. Many are strong advocates for restorative justice initiatives. Equally we have heard people, from positions of great pain and distress, express damning and retributive views about offenders.

To many of our clients, a custodial sentence may promote their personal safety, the safety of the community, a sense of justice and some level of retribution. Effective sentencing means that the offender is off the street, they have had a change in attitude and behaviour, they are rehabilitated; and the offending ceases, such that 'no-one needs to go through what I went through again'.

It should be recognised that neither punishment nor imprisonment actually help victims recover from trauma. Instead what crime victims most often seek is procedural justice: recognition, acknowledgment and meaningful participation within the criminal justice system. However, what they often have experienced is exclusion, alienation and a lack of understanding.

Victims of crime want a system which is respectful to them, facilitates just outcomes, and contributes to crime prevention. VSS believes individual sentences provide the system with the opportunity to encourage offenders to accept responsibility for their own behaviour and the harm they have caused, pay a 'fair price' through an appropriate sanction and learn not to do it again.

Principles of sentencing (s 6 of the Bill)

VSS supports clarification of the common law concepts that underpin sentencing (as referred to in s 9E(1) of the Act and now articulated in s 6(1) of the Bill.

VSS supports the replacement of s 11 of the Act with s 6(2) of the Bill, specifying that imprisonment as a sentencing option is for serious offences and/or dangerous offenders.

Sentencing factors (s 7 of the Bill)

Sentencing factors have traditionally been offender-oriented. We believe the nature of the offence, vulnerability of the victims, the harm caused, the level of true remorse and reparation offered need to be recognised in responding to victims' needs and rights.

VSS believes in sentences which:

- are balanced and take into account community protection and victims' circumstances
- incur appropriate punishment or formalised sanction for harm done'
- focus on offender rehabilitation and addressing criminogenic needs

- recognise genuine remorse and reparation of harm done.

VSS has found that the overwhelming concern expressed by victims of crime is about the process of sentencing rather than concerns with an increase in penalties. Typically, victims of crime show no desire to actually make sentencing recommendations or decisions. Their major concern is that they want to participate in a process that takes into account the harm done to them. Victims of crime tell us that their major issue stems from being disengaged during the sentencing process. This occurs due to the following factors:

- The apparent lack of weight often placed on Victim Impact Statements in the sentencing process. This is in part expressed in an AGD report *Victims of Crime Review* (1999).
- As a consequence of not having victims concerns adequately reflected in the sentencing process, victims can become affronted and angry if a sentence appears manifestly inadequate or if, for example, is suspended. They express this as a sense of injustice whereby they are left with a 'life sentence' compared to the temporary interruption in the life of the offender.
- Victims express anger and frustration at what they see as their exclusion from the plea bargaining process. They wish to be consulted about this issue, and the 'need' to downgrade charges.

VSS supports the redrafting of the original s 10 of the Act to include reference to the vulnerability of any victim (s 7(10)(b) of the Bill), the extent of emotional harm or any significant risk or danger created by the offence (s 7(10)(c)) and the defendant's *prospects of rehabilitation* (s 7(10)(g)).

We note that the Bill refers to the 'extent of the defendant's remorse' (s7(1)(f)). We believe it is wishful thinking to believe that an offender who expresses remorse is less likely to re-offend. Research shows that there is no empirical support that links a high degree of offender empathy and remorse with a reduction in the seriousness or frequency of future offending.¹

Victims believe that too much weight is given to mitigating circumstances of the offender relative to the impact on victims and that effective sentencing should balance both perspectives. For example, victims have expressed concerns to VSS that a court too easily finds an offender is 'remorseful' if he/she sends a letter to them expressing that sentiment. The victim's concern is that a letter alone does not adequately demonstrate genuine remorse and that remorse may be better reflected by additional actions such as a face-to-face apology, a willingness to undertake treatment programs and community service, or participate in victim-offender meetings.

¹ Horne, A.S. 1999, Reflections on remorse in forensic psychotherapy, in *Remorse and Reparation*, edited by M. Cox. London: Jessica Kingsley Publishing, 21-31.

VSS also supports the introduction of 7(4)(b) which states:

if a court is satisfied that the defendant's previous alleged good character, general background or offending history was of assistance in or otherwise connected to the commission of the offence—the court may have regard to those factors (but only as aggravating and not as mitigating factors).

Much of our work, particularly as a support agency of the Royal Commission into Institutional Responses to Child Sexual Abuse, involves supporting people who have been sexually abused by offenders where there has been a significant power imbalance in the relationship (e.g. priests, carers). These offenders often rely on positive character references to undermine the veracity of the victim's claims. We encourage the court's use of this evidence as an aggravating factor when sentencing, as the character references and offender's previous high standing in the community often illustrate the heinous breach of trust that victims and their families experience.

The role of punishment in sentencing

VSS acknowledges that while the imposition of a penalty is important in terms of denunciation it will not reduce crime. We know that punishment is a poor deterrent and alone rarely results in rehabilitation – especially in traditional criminal justice and correctional settings which cannot apply swift and certain sanctions that are consistent, timely, specific to the behaviour and shame the behaviour (rather than the person).

Often offenders are remanded in custody for extended periods of time before conviction and sentencing. During this time they are not engaged in intervention programs or services to address their criminogenic needs and assist their rehabilitation. We believe this is a lost opportunity to get people back on the right track.

Additional considerations

We ask that this submission be read in conjunction with our submission in response to the Transforming Criminal Justice *Better Sentencing Options: Creating the Best Outcomes for the Community Discussion Paper* in June 2015. In that submission, we highlighted:

- the need to prioritise victims of crime as key stakeholders in the Government's approach to justice reform
- the barriers to victim participation in the criminal justice system, particularly during the sentencing process and
- strategies to promote victim participation in sentencing, such as the use of Victim Impact Statements as an opportunity to explain restorative justice to the victim and record their interest in participation.

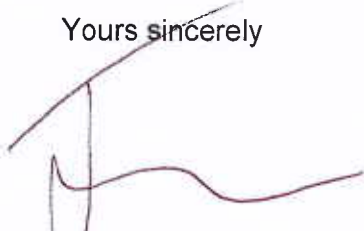
I enclose a copy of our submission in response to the Discussion Paper.

In Summary

VSS supports sentencing principles that will lead to swift and certain sentences, where decisions are linked to evidence-based strategies that reduce recidivism rates, and where sentences are delivered through a justice system that offers procedural fairness to victims of crime, and provides parallel levels of investment in the rehabilitation of victim and offender.

I would be pleased to answer any questions you have in relation to these comments.

Yours sincerely



Julian Roffe
Chief Executive
Victim Support Service

Encl.



