



Justice
Sentencing Council

Victims' involvement in sentencing

Report
March 2018



NSW Sentencing Council

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Terms of reference

The NSW Attorney General, the Hon Mark Speakman SC MP, has requested:

that the Council conduct a review of victims' involvement in the sentencing process under the *Crimes (Sentencing Procedure) Act 1999* (NSW) and consider:

1. The principles courts apply when receiving and addressing victim impact statements.
2. Who can make a victim impact statement.
3. Procedural issues with the making and reception in court of a victim impact statement, including the content of a victim impact statement, the evidential admissibility applied to a victim impact statement, and objections to the content of victim impact statements.
4. The level of support and assistance available to victims.

In undertaking this review, the Council should have regard to:

- the obligations arising under section 107 of the *Crimes (Sentencing Procedure) Act 1999* (NSW)
- the effect of the current framework on victims
- developments in other jurisdictions both in Australia and overseas
- minimising victim distress in the sentencing process.

[Received 24 May 2017]

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- Office of the Director of Public Prosecutions (NSW)
- Victims Services.

Executive summary

- 0.1 This report is a review of victims' involvement in the sentencing process under the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the Act").
- 0.2 Our focus is on the victim impact statement ("VIS"), which is one part of a broad framework designed to meet victims' needs, including the Charter of Victims Rights, the Victims Support Scheme, victims registers and restorative justice practices.
- 0.3 Statutory provisions for VISs first commenced in NSW in 1996 and have been amended on many occasions since. Subject to these provisions, VISs are available at sentencing in all NSW courts. The availability and use of VISs in the Local Court present particular challenges both now, and in light of our proposals. We recommend that the NSW Department of Justice further considers these challenges.
- 0.4 Broadly, VISs can serve instrumental and expressive functions. The chief instrumental function is to inform the sentencing court of the impact of the crime on its victims. In some cases, however, a VIS may provide evidence of circumstances of aggravation, in particular that the injury, emotional harm, loss or damage caused by the offence was substantial. The chief expressive function is to allow a victim to have their voice heard in criminal proceedings beyond the role of witness to an offence.
- 0.5 Through our recommendations, we aim to improve the system surrounding VISs so that victims' voices can be heard whenever possible. This includes:
 - minimising the trauma or harm that victims may experience when engaging with the VIS process, and
 - ensuring that the process is not procedurally or substantively unfair to offenders.

Who can make a victim impact statement (Chapter 2)

- 0.6 The process of determining who is entitled to make a VIS should be simplified, by making the "personal harm" a person suffers as the direct result of an offence the factor that chiefly determines their entitlement to make a VIS. (**Recommendation 2.1**)
- 0.7 The personal harm that a person must suffer is currently limited to physical bodily harm, and psychological or psychiatric harm. Personal harm should also include emotional suffering or distress, harm to interpersonal or social relationships, economic loss or harm arising from the other forms of personal harm, and any such harms to the victim's immediate family. (**Recommendation 2.2**)
- 0.8 By focussing on personal harm suffered as a direct result of an offence and not seeking to impose limits based on the type of offence or jurisdiction in which the offence is tried, these recommendations will expand the group of people entitled to make a VIS.
- 0.9 Anyone who suffers a relevant harm will therefore be entitled to make a VIS, including some who are currently excluded, for example:

- victims of any domestic and family violence offences that, in practice, have been excluded because the offence does not meet the violence criteria as currently expressed in the VIS provisions (such as stalking and intimidation)
 - family members of victims against whom the offence was committed (such as the partner of a person who has miscarried as a result of the offence), and
 - victims of Table 2 offences that are tried in the Local Court, that is, indictable offences that are dealt with summarily unless the prosecutor or the accused elects otherwise (including assault, assault occasioning actual bodily harm, aggravated acts of indecency and indecent assault).
- 0.10 Our recommendations are framed to ensure that the expanded eligibility does not inadvertently exclude the existing entitlement of family victims to make a VIS where a victim has died.
- 0.11 We have also recommended extending the definition of “immediate family” to include previously excluded groups such as:
- step-grandparents, step-grandchildren, aunts and uncles, nephews and nieces
 - close family members or kin of an Aboriginal person or Torres Strait Islander according to their culture, and
 - anyone whom the prosecutor is satisfied is a member of the victim’s extended family or culturally recognised family to whom they were close or with whom the victim had a close relationship analogous to family, or whom the victims considered to be family. (**Recommendation 2.3**)
- 0.12 We recommend that it should be possible to make a VIS in relation to matters listed on a Form 1 (that is, offences that are not tried but for which the offender admits guilt and which the court takes into account when sentencing the offender for a principal offence). (**Recommendation 2.4**)
- 0.13 The provisions for making a VIS should also be extended to apply in cases where the defendant has been found guilty on limited evidence after a special hearing or has been found not guilty by reason of mental illness. This recommendation accords with the recommendations of a 2013 NSW Law Reform Commission report. (**Recommendation 2.5**)

Making, delivering and receiving victim impact statements (Chapter 3)

- 0.14 We recommend providing all victims with more options around, and flexibility in, making and delivering a VIS. This should encourage victims to exercise their rights to have their voice heard.
- 0.15 We recommend an express limit of one VIS for each victim, but consider there should be no limit on the number of victims who may make a VIS in any one case. Limits on the number of victims would lead to discrimination between victims and would undermine our recommendations that expand the group of eligible victims. (**Recommendation 3.1**)
- 0.16 Other recommendations to improve procedures for victims include:

- allowing victims to adopt a VIS other than by signing, including by electronic submission to the prosecutor (**Recommendation 3.2**)
 - allowing a victim's carer or other important person in their life, to make a VIS on the victim's behalf if they are incapable of doing so themselves (**Recommendation 3.3**)
 - making special arrangements for reading a VIS in court, including: making available to all victims reading a VIS the arrangements that are available for victims of prescribed sexual assault offences; allowing a support person to be present; allowing victims to read a written VIS by pre-recorded media; and giving victims an opportunity, where practicable, to familiarise themselves with the courtroom. (**Recommendation 3.7**)
- 0.17 We also make a number of recommendations designed to reduce the possibility of last minute objections to a VIS that may prove distressing or traumatising to victims:
- providing that only the prosecution may tender a VIS (**Recommendation 3.4**), and
 - allowing the prosecution to provide copies of a VIS to the defence, subject to prohibitions on retaining, copying or disseminating any such copies. (**Recommendations 3.5 and 3.6**)

Content, admission and use of victim impact statements (Chapter 4)

- 0.18 We recommend that a VIS should be able to address any personal harm arising from an offence. The expanded definition of "personal harm" in Recommendation 2.2 should apply. We expect that the courts will continue to take a flexible approach to permitted content and not construe the terms of the definition too narrowly. (**Recommendation 4.1**)
- 0.19 In recommending an express provision that sets out what a VIS must not include, we note the support in submissions for continuing to prohibit material that is offensive, threatening, intimidating or harassing. We also concluded that there should be a clear statement that a VIS should not give the victim's views about the sentence to be imposed or the matters that the sentencing judge should take into account. This additional express provision should assist with managing victims' expectations about what a VIS can achieve. (**Recommendation 4.2**)
- 0.20 There are circumstances in which it will be almost impossible for a victim to articulate the impact of a crime without alluding to uncharged acts, for example, in circumstances of ongoing domestic violence. In such cases, we recommend that the court receive the VIS but not have regard to any content that goes beyond the charges for which the offender is being sentenced. (**Recommendation 4.3**)
- 0.21 The existing law provides that, in the case of a VIS relating to a primary victim, the court may receive and consider the VIS. However, in the case of a VIS from a family victim, the court must receive and acknowledge the VIS and may make any comment on it that the court considers appropriate. We recommend this distinction is removed and that a court is required to receive, acknowledge and consider a VIS, in appropriate form, in all cases. This would better ensure that every victim is given a voice and that those victims who prepare a VIS are not re-traumatised by a court

refusing it. Requiring courts to acknowledge a VIS helps ensure that they recognise victims in the sentencing process. (**Recommendation 4.4**)

- 0.22 We consider there is no need to amend existing provisions about how a court may use a VIS, in particular in cases where a victim has died as a result of the offence. The current application of the provision appropriately depends on the facts and circumstances of each case.
- 0.23 A particular problem arises where a VIS is used as evidence of aggravating circumstances in sentencing, usually that the "injury, emotional harm, loss or damage caused by the offence was substantial". We recommend that the prosecution be encouraged, wherever possible, to adduce evidence of aggravating circumstances outside of the VIS process. This might be done by way of expert report, witness statement or evidence already adduced at trial. Our recommendation is intended to encourage practices that ensure that a VIS can effectively provide victims with a voice in court without the VIS becoming a contested element of the sentencing process. (**Recommendation 4.5**)
- 0.24 Currently, the Act provides that "absence of a victim impact statement does not give rise to an inference that an offence had little or no impact on a victim". We recommend strengthening the current provision by changing its language to provide that the Court is prohibited from drawing "any inference" from the absence of a VIS. This wording seeks to eliminate any pressure on victims to make a statement. (**Recommendation 4.6**)
- 0.25 The prosecution and courts should adopt non-mandatory guidelines, setting out best practice for making, presenting and receiving a VIS. Our proposed timeline, that provides guidance where there are at least 10 days' notice of a sentencing hearing, aims to ensure that parties have sufficient time to review and consult on a VIS so that it is in admissible form before the sentencing hearing. Ensuring that objections to a VIS are dealt with before the sentencing hearing should help minimise trauma for the victim. (**Recommendation 4.7**)
- 0.26 We recommend that there should be limitations on when the defence can cross-examine a victim on their VIS during a sentencing hearing. (**Recommendation 4.8**)
- 0.27 We see two alternative ways to achieve this:
- by providing that the defence may cross-examine a victim about the content of their VIS *only* if the court considers it appropriate, in the interests of justice, or
 - by providing that the defence may cross examine a victim about the content of their VIS *only* if the prosecution intends to rely upon a VIS to establish circumstances of aggravation *and* if the court considers it appropriate, in the interests of justice.
- 0.28 The first option recognises that cross-examination may be appropriate in some circumstances, but may not be appropriate in cases where, for example, the victim is particularly vulnerable or the court does not intend to rely on the VIS to make findings adverse to the offender. The second option sets out an additional requirement, so that cross-examination is only possible where the prosecution intends to rely on a VIS to establish circumstances of aggravation.

- 0.29 If a court allows cross-examination, we propose that the court should make such orders about the conduct of proceedings as are necessary in the interests of the victim, including allowing special arrangements for giving evidence. In order to protect victims from potential distress, we also propose that, where the offender is unrepresented, the court must be made aware of the nature of the cross-examination proposed before it grants leave for cross-examination to occur. **(Recommendation 4.9)**

Improving victims' experience of VISs and the sentencing process (Chapter 5)

- 0.30 We received submissions that existing information about VISs and services that assist with the preparation of VISs may be inadequate and not always accessible to victims. We also received submissions that information and services given to victims about the VIS process are not adequately trauma-informed. To cater for victims who may be experiencing trauma we consider that all information and services should be trauma-informed.
- 0.31 We recommend improving information available to victims about VISs and the sentencing process, and providing for more assistance to victims. We consider that Victims Services is the best-placed agency to consult with relevant agencies to ensure that information about VISs is standardised, centralised and routinely reviewed, is brief as possible and targeted, and includes relevant information about VIS procedures and the role of VISs in sentencing. **(Recommendation 5.1)**
- 0.32 We recommend that there should be more support for victims from people trained in trauma-informed care and practice and trained in preparing a VIS. Translator services should also be made available. **(Recommendation 5.2)**
- 0.33 We also recommend improving training and education for the judiciary and legal profession about issues relevant to VISs and victims. In particular, bench books should set out how courts should deal with, and acknowledge victims when they present their VISs. **(Recommendation 5.3)**

Recommendations

1. Introduction

1.1 Victims in the Local Court

The Department of Justice should investigate ways of accommodating victims in the sentencing process in the Local Court.

2. Who can make a victim impact statement

2.1 Entitlement to make a VIS

A person (the victim) should be entitled to make a VIS, if:

- (a) they have suffered **personal harm** as a direct result of any criminal offence, and/or
- (b) they are a member of the **immediate family** of a person who has died as the result of an offence.

2.2 Type of harm

The definition of “personal harm” should include:

- (a) physical bodily harm
- (b) psychological or psychiatric harm
- (c) emotional suffering or distress
- (d) harm to interpersonal/social relationships
- (e) economic loss or harm, so long as it arises from the other forms of “personal harm”
- (f) any of the above harms to the victim’s **immediate family**
- (g) where a person has died as a result of the offence, any impact on the victim’s **immediate family**.

2.3 Members of the victim’s immediate family

The definition of “member of the victim’s immediate family” should be expanded to include:

- (a) the victim’s step-grandparent, step-grandchild, aunt, uncle, nephew, or niece
- (b) a person who is a close family member or kin of a victim who is an Aboriginal person or a Torres Strait Islander according to their culture
- (c) a person who is outside the above categories whom the prosecutor is satisfied is a person:
 - (i) who is a member of the victim’s extended family or culturally recognised family to whom they were close, or
 - (ii) with whom the victim had a close relationship analogous to family, or whom the victim considered to be family.

2.4 Matters listed on a Form 1

A victim of a Form 1 offence should be able to make a VIS about that offence in the same way as a victim of an offence where there has been a conviction.

2.5 Not guilty on the grounds of mental illness or unfit to be tried

The provisions for making a VIS should be extended to apply in cases where the defendant has been found guilty on limited evidence after a special hearing or has been found not guilty by reason of mental illness.

3. Making, delivering and receiving victim impact statements

3.1 Number of statements

A limit of one VIS should apply to each victim.

3.2 Formal requirements of a VIS

There should be provision for victims to adopt a VIS other than by signing, including by electronic submission to the prosecutor.

3.3 Making a VIS on behalf of victims

Provisions enabling people to make a VIS on behalf of victims who are incapable of providing information for a VIS because of age, impairment or otherwise, should be amended to:

- (a) enable the victim's carer and other important people in the victim's life to make a VIS on the victim's behalf, and
- (b) clarify that any person making a VIS on the victim's behalf may also make their own VIS if they are otherwise eligible to do so.

3.4 Who can tender a VIS

The *Crimes (Sentencing Procedure) Act 1999* (NSW) should provide that only the prosecution may tender a VIS.

3.5 Notice of, and access to a VIS by the defence

The *Crimes (Sentencing Procedure) Act 1999* (NSW) should expressly allow that, prior to the sentencing hearing:

- (1) the prosecution may provide a copy of a VIS to the offender's lawyer (in the case of represented offenders), and
- (2) the court may provide supervised access to a VIS to the offender (in the case of an unrepresented offenders).

3.6 Prohibition against retaining, copying or disseminating a VIS

The defence should be prohibited from retaining, copying or disseminating a VIS. Any copy of a VIS must be returned to the prosecution or the court at the conclusion of the sentencing hearing.

3.7 Special arrangements for reading a VIS

- (1) All special arrangements that are available for victims of prescribed sexual assault offences in a court should be made available, upon request and with the leave of the court, to victims reading a VIS.
- (2) All victims should be entitled to have a support person present in court and seated close to them.
- (3) It should also be possible for a victim to read out a written VIS by pre-recorded media.
- (4) Victims should be afforded an opportunity, where practicable, to familiarise themselves with the courtroom.

4. Content, admission and use of victim impact statements

4.1 Content of a VIS

A VIS may address personal harms arising from the offences.

4.2 What a VIS must not include

A VIS must not include:

- (a) material that is offensive, threatening, intimidating or harassing, or
- (b) views about the sentence to be imposed, or the matters that the sentencing judge should take into account.

4.3 Non-complying content

The court should not have regard to anything in a VIS that goes beyond a statement of the “personal harm” caused to the victim as a direct result of the relevant offence.

4.4 Court must receive and acknowledge a VIS

A court must receive, acknowledge and consider a VIS, in appropriate form, and may make any comment on it that the court considers appropriate.

4.5 Adducing evidence of aggravating circumstances

Wherever possible, evidence of aggravating circumstances should be adduced through evidence outside of the VIS process, by tendering relevant statements or expert reports.

4.6 Absence of a VIS

The court must not draw any inference about the harm suffered by a victim from the fact that a VIS is not given to the court.

4.7 Practice surrounding the making, presentation and reception of a VIS

The prosecution and courts should adopt non-mandatory guidelines, for practice and procedure surrounding the making, presentation and reception of a VIS, to the following effect:

If there is at least 10 working days notice of a sentencing hearing and the victim wishes to make a VIS, the following procedures should be followed, if possible:

- (a) The prosecutor should ensure that the victim receives appropriate advice and support about making a VIS.
- (b) The VIS should be available for review by the prosecutor at least 6 working days before the hearing.
- (c) The prosecution should review the VIS and suggest any amendments to ensure it complies with requirements as to content and form.
- (d) At least 4 working days before the hearing, the prosecution should serve a copy of the VIS on the defence (subject to restrictions on copying and distribution) and advise whether:
 - (i) it intends to use the VIS to establish an aggravating factor; and/or
 - (ii) it intends to make an application under s 28(4) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) for a family victim VIS to be considered and taken into account by the court in connection with the determination of the punishment for the offence.
- (e) At least 2 working days before the hearing, the defence should advise the prosecution of the basis of any objections to the content of the VIS and whether it intends to cross-examine the victim.
- (f) The prosecution may, if it considers it appropriate, present the VIS to the court.
- (g) The court should hear any submissions as to any unresolved objections on the content of the VIS.
- (h) If the prosecution presents a VIS, the court must receive it and hear any submissions on its use.

4.8 Cross-examining a victim on their VIS

There should be limitations on when the defence can cross-examine a victim on the content of their VIS.

4.9 Alternate arrangements and unrepresented defendants

- (1) In allowing cross-examination, the court should make such orders about the conduct of proceedings as are considered necessary in the interests of the victim. This may include making available to the victim any special arrangements for giving their evidence such as closed circuit television or the presence of a support person.
- (2) Where the offender is unrepresented, the court must be made aware of the nature of the cross-examination proposed before it grants leave for cross-examination to occur.

5. Improving victims' experience of victim impact statements and the sentencing process

5.1 Information about VISs

Victims Services, in consultation with relevant agencies, should ensure information about VISs:

- (1) is standardised, centralised and routinely reviewed
- (2) is as brief as possible and targeted, simplified, in plain language, available in different languages other than in English and in different formats, and trauma-informed
- (3) is prepared for different categories of authors of a VIS by preparing separate information for each different category of author, and
- (4) includes content addressing:
 - (a) the role of a VIS in the sentencing process
 - (b) how to make and adopt a VIS (content which should include provision of pro forma forms, samples of complying VISs, and any other relevant forms)
 - (c) who can obtain, retain, copy or disseminate a VIS, including the circumstances in which this may or may not occur
 - (d) desirable timeframes for completing a VIS
 - (e) the possibility that a VIS may be edited to comply with legal requirements, and the limited risk that the victim may be cross-examined on the VIS
 - (f) the special arrangements available to victims who wish to read their VIS in court
 - (g) how the court may use a VIS, and
 - (h) references to all other supports and resources that are available to victims in writing a VIS.

5.2 Victim assistance

- (1) There should be more support for victims from people trained in trauma-informed care and practice, and trained in preparing a VIS
- (2) A translator service should be available for those seeking to make a VIS.

5.3 Training and education for the judiciary and legal profession

- (1) The Judicial Commission, Law Society and Bar Association should offer and promote training and education for the judiciary and legal profession in issues relevant to VISs and victims
- (2) The Judicial Commission should include advice in bench books on how to receive and acknowledge VISs.

1. Introduction

In brief

In NSW, a victim's central involvement in the sentencing process is through making a victim impact statement ("VIS"). VISs inform the court of the impact of the crime on its victims, and allow victims to have their voice heard in the criminal proceedings. The recommendations in this report are designed to minimise the trauma or harm that victims may experience when engaging with the VIS process, and ensure that the process is not procedurally or substantively unfair to offenders.

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The course of this reference

Terms of reference

- 1.1 On 24 May 2017, the NSW Attorney General, the Hon Mark Speakman SC MP, requested that the Council conduct a review of victims' involvement in the sentencing process under the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the Act") and consider:
1. The principles courts apply when receiving and addressing victim impact statements.
 2. Who can make a victim impact statement.
 3. Procedural issues with the making and reception in court of a victim impact statement, including the content of a victim impact statement, the evidential admissibility applied to a victim impact statement, and objections to the content of victim impact statements.
 4. The level of support and assistance available to victims.
- 1.2 In undertaking the review, the Attorney General has requested that the Council should have regard to:

- The obligations arising under section 107 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
 - The effect of the current framework on victims.
 - Developments in other jurisdictions both in Australia and overseas.
 - Minimising victim distress in sentencing.
- 1.3 Section 107 of the Act requires the Attorney General to undertake a statutory review of the effect of amendments that were made in 2014 regarding victim impact statements ("VIS") given by family victims. This review must be completed by 1 July 2018.
- 1.4 The main focus of the terms of reference is on VISs that are part of sentencing proceedings.

Consultation

- 1.5 We called for preliminary submissions on the terms of reference in June 2017 and received 17 preliminary submissions, which helped identify issues for a consultation paper. The preliminary submissions are listed in Appendix A.
- 1.6 We released the consultation paper in September 2017 covering a variety of topics relating to victims' involvement in sentencing. We received 22 submissions addressing the questions raised. The submissions are listed in Appendix B.
- 1.7 We also conducted two roundtable consultations in late November 2017 with stakeholders with experience of the operation of VISs in both the District Court and the Local Court. The participants in these roundtables are listed in Appendix C.

Background

History of the victim's role in the criminal justice process

- 1.8 Traditionally, the state has managed criminal prosecutions in common law countries. As a result, a victim's involvement in the justice system has been limited to reporting the offence and acting as a witness at the trial if required. The state prosecutes offences with the public interest in mind and, while victims' views are taken into account when decisions are made about prosecutions, their views are not determinative.¹
- 1.9 In the 1970s and 1980s, people in the UK, the US, Canada, Australia and New Zealand began to talk about the failure of the criminal justice system to meet victim needs and started advocating for victims to have greater participation in the system.² Pressure from this movement achieved "victim-oriented reforms" throughout these countries.³

1. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [11.1]–[11.3].

2. T Booth and K Carrington, "A Comparative Analysis of the Victim Policies across the Anglo-speaking World" in S Walklate (ed) *Handbook of Victims and Victimology* (Routledge, 2011) 380.

3. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [2.1].

- 1.10 In 1985, the United Nations adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.⁴ The Declaration provides “basic standards for the treatment of victims by attempting to guarantee and strengthen their position in four respects”,⁵ including access to justice and fair treatment; restitution; compensation; and assistance.⁶ The Declaration has influenced victim-oriented reforms throughout Australia and around the world.⁷

Victim impact statements in NSW

- 1.11 In NSW, a victim’s central involvement in the sentencing process is through making a VIS. Under the Act, “primary victims” and “family victims” are eligible to give a VIS.
- 1.12 “Primary victims” include the person against whom the crime was committed, as well as witnesses. Primary victims may submit a VIS detailing the particulars of any personal harm they suffered as a direct result of the offence.⁸ The court may receive and consider a primary victim VIS “if it considers it appropriate to do so”.⁹
- 1.13 “Family victims” include the immediate family members of a victim that dies as a direct result of an offence.¹⁰ Family victims may submit a VIS on the impact that the primary victim’s death has had on them.¹¹ The court must receive and acknowledge a family victim VIS and may make any comment on it that the court considers appropriate.¹²

Common law

- 1.14 In addition to the statutory provisions, a sentencing court has discretion at common law to admit a VIS and consider the impact of the crime on the victim in determining the seriousness of the offence and the relevant sentence.¹³
- 1.15 The common law is expressly preserved by the statement in the Act that the VIS provisions do not limit any other law under which a court may receive and consider a VIS for any offence to which the provisions do not apply.¹⁴
- 1.16 As a result, the court sometimes admits a VIS for an offence that does not conform to the statutory requirements.¹⁵

4. *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc A/RES/40/34 (29 November 1985).

5. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [11.6].

6. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [11.6]. See *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Doc A/RES/40/34 (29 November 1985) Annex art 4-17.

7. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [11.7].

8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definitions of “primary victim”, “victim impact statement” and “personal harm”.

9. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(1).

10. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definitions of “victim impact statement”, “family victim” and “member of the primary victim’s immediate family”.

11. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of “victim impact statement”.

12. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(3).

13. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [11.38]-[11.39].

14. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(4).

15. *Miller v R* [2014] NSWCCA 34 [156]; *Porter v R* [2008] NSWCCA 145 [51].

History of provisions for VISs

- 1.17 The NSW statutory provisions about VISs have evolved over time. Provisions were first enacted in 1987, granting the Supreme and District Courts the discretion to receive and consider a VIS. Only a "victim" could submit a VIS. For these purposes, "victim" was defined as the "person against whom the offence was committed", or a "witness to the act" that "suffered injury" in the form of "bodily harm" including "pregnancy, mental shock and nervous shock".¹⁶ However, these provisions never commenced.
- 1.18 In 1996, the *Criminal Procedure Act 1986* (NSW) was successfully amended to allow the Supreme and District Courts discretion to consider a VIS from a victim of an indictable offence that involved "an act of actual or threatened violence (including sexual assault)":
- prior to the sentencing of a person convicted of an indictable offence, or
 - during a sentence redetermination of an existing life sentence.¹⁷
- 1.19 The amendments also altered the definition of "victim" (as defined in the 1987 provisions) to include both "primary victims" and "family victims".
- 1.20 A "primary victim" included people "against whom the offence was committed" and witnesses, as it does now.¹⁸ "Primary victims" could submit a VIS detailing the "personal harm" that they experienced, which was limited to "actual physical bodily harm, mental illness or nervous shock".¹⁹
- 1.21 A "family victim" included "a member of the immediate family of a primary victim of the offence who has died as a direct result of that offence".²⁰ "Immediate family members" were limited in the legislation to the victim's spouse or de facto spouse, parent, guardian, step-parent, child, step-child, sibling or step-sibling.²¹ The current requirement that the content of the VIS submitted by a family victim be limited to detailing "the impact of the death of the primary victim on the members of the immediate family of the primary victim" was also introduced.²²
- 1.22 These provisions emphasised that the preparation of a VIS was discretionary, and stated that the absence of a VIS did not "give rise to an inference that an offence had little or no impact on a victim".²³
- 1.23 In 1997, further amendments expanded the availability of a VIS beyond the Supreme and District Courts, allowing for a VIS to be used in the Children's Court and Local Court in particular circumstances.²⁴ Previously, the common law had

16. *Crimes (Sentencing) Amendment Act 1987* (NSW) sch1 cl 2, to be inserted as *Crimes Act 1900* (NSW) s 447C, not commenced.

17. *Criminal Procedure Act 1986* (NSW) s 23A, s 23C.

18. *Criminal Procedure Act 1986* (NSW) s 23B, s 23A definition "primary victim".

19. *Criminal Procedure Act 1986* (NSW) s 23A definition "personal harm", s 23B(a).

20. *Criminal Procedure Act 1986* (NSW) s 23B, s 23A definition "family victim".

21. *Criminal Procedure Act 1986* (NSW) s 23B, s 23A definition "member of the immediate family".

22. *Criminal Procedure Act 1986* (NSW) s 23B(b).

23. *Criminal Procedure Act 1986* (NSW) s 23D.

24. *Crimes Legislation Further Amendment Act 1997* (NSW) sch 2, amending *Criminal Procedure Act 1986* (NSW) s 23.

allowed for the use of a VIS in the Local Court and Children's Court in limited circumstances.²⁵

- 1.24 In 1999, the *Crimes (Sentencing Procedure) Act 1999* (NSW) established a statutory scheme for VIS that replaced the scheme in the *Criminal Procedure Act 1986* (NSW).²⁶
- 1.25 Under the Act, a VIS could be submitted by a "primary victim" or "family victim" to the Supreme Court, Industrial Relations Commission, District Court or Local Court at "any time after it convicts, but before it sentences, an offender".²⁷
- 1.26 Broadly, a VIS could be submitted by victims of the following offences:
 - offences that result in "death of, or actual physical bodily harm to, any person"
 - an "act of actual or threatened violence"
 - a "prescribed sexual offence"
 - particular offences under the *Work Health and Safety Act 2011* and the *Rail Safety National Law (NSW)*, and
 - offences "for which a higher maximum penalty may be imposed if the offence results in the death of any person than may be imposed if the offence does not have that result".²⁸

However, the Local Court could only receive VISs where the offence resulted in death.

- 1.27 In 2003, amendments entitled victims to read their VIS out in court. Alternatively, the victim could nominate a family member or representative to read the VIS on their behalf.²⁹ This amendment sought to "enhance ... the victim's opportunity to participate in the criminal justice process by fully informing the court about the effects of the crime upon the victim".³⁰
- 1.28 In 2004, the scope of offences for which victims could submit a VIS in the Local Court was expanded beyond offences resulting in death and offences for which a higher maximum penalty may be imposed when death is occasioned. Eligible offences were to include indictable offences that may be tried summarily unless the prosecutor or person charged elects otherwise and that:
 - result in actual physical bodily harm
 - involve an act of actual or threatened violence, or

25. NSW, *Parliamentary Debates*, Legislative Assembly, 29 November 1997, 2093.

26. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3 div 2.

27. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(1), s 28(1).

28. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(2), s 27(3).

29. *Victims Legislation Amendment Act 2003* (NSW) sch 1, amending the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A.

30. NSW, *Parliamentary Debates*, Legislative Assembly, 7 May 2003, 377-378.

- involve an act of sexual assault.³¹
- 1.29 In 2006, following a statutory review of the *Victims Support and Rehabilitation Act 1996* (NSW) and the *Victims Rights Act 1996* (NSW), the category of those eligible to make a VIS as a “family victim” was expanded. The definition of “a member of the primary victim’s immediate family” was amended to include a person engaged to the victim, a parent or grandparent, child or grandchild, and half-brother or half-sister of the victim.³²
- 1.30 In 2008, the circumstances in which a Court could receive a VIS were expanded. The amendments included:
- replacing the terms “mental illness or nervous shock” in the definition of “personal harm” with the terms “psychological or psychiatric harm”
 - broadening the nature of the harm that could be documented in a VIS to include “harm that is an exacerbation of an existing psychological condition or harm that does not reach the threshold of a diagnosed mental illness or psychiatric disorder”³³
 - broadening the scope of sexual offences for which a VIS could be made to include other sexual offences including indecent assault, persistent sexual abuse of a child, child prostitution and pornography, and child abduction,³⁴ and
 - making various procedural changes including allowing victims to include “photographs, drawings or other images”³⁵ in their VIS, and entitling victims to read out their VIS by closed circuit television in certain circumstances.³⁶
- 1.31 In 2014, courts were given the discretion to consider the VIS of a family victim in determining the appropriate sentence, where the prosecutor supports this and the “court considers it appropriate to do so”.³⁷
- 1.32 In 2017, an amendment was passed to entitle victims of prescribed sexual offences, or a member of the victim’s immediate family, or the victim’s representative, to read the VIS “in closed court and with a support person present, unless the court otherwise directs”.³⁸

Use of VIS in the Local Court

- 1.33 The current provisions allow victims of some eligible offences to give a VIS in Local Court sentencing proceedings.

31. *Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Act 2004* (NSW) sch 1[1].

32. *Victims Support and Rehabilitation Amendment Act 2006* (NSW) sch 2.1.

33. NSW, *Parliamentary Debates*, Legislative Assembly, 29 August 2008, 9665.

34. *Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Act 2008* (NSW) sch 1.

35. *Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Act 2008* (NSW) s 9, amending the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30(2).

36. NSW, *Parliamentary Debates*, Legislative Assembly, 29 August 2008, 9665-9666. See *Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Act 2008* (NSW) sch 1.

37. NSW, *Parliamentary Debates*, Legislative Assembly, 7 May 2014, 28360.

38. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A(3A)-(3C), inserted by *Justice Legislation Amendment Act 2017* (NSW).

- 1.34 The underuse of VISs in the Local Court has been raised as a particular issue in preliminary submissions,³⁹ submissions⁴⁰ and consultations.
- 1.35 A combination of reasons has been offered for this underuse. The reasons include:
- Victims are not receiving timely, if any, advice about their right to make a VIS, possibly through inadequate support.⁴¹ Information is also not readily available, for example, on the Victims Services website.
 - The Local Court is a high volume jurisdiction that provides speedy justice which may not accommodate VISs well, especially where there has been a guilty plea.⁴²
 - Victims may be unwilling to invest resources in attending sentencing hearings. For example, victims may have to set a whole day aside to attend court because it is not clear when a matter might actually be heard – this may depend on factors such as lawyers being on multiple matters, or inevitable delays. The cost of attendance, when courts are some distance away, may also be a factor.
 - Some people with key roles in the Local Court, such as prosecution and defence lawyers, may be unfamiliar with the use of VIS in the Local Court and the procedures surrounding them.⁴³
 - Local Court matters are generally less serious and victims do not necessarily see the benefit in making a VIS.⁴⁴
- 1.36 A similar problem of underuse has been identified in Victoria where a survey conducted by the Victims Support Agency found that there are “few opportunities” for VISs to be presented in the Magistrates’ Court “given the current mention system and high output of cases”.⁴⁵
- 1.37 We acknowledge that victims should not be prejudiced because the jurisdiction their case is heard in cannot easily accommodate them and that victims should be able to exercise the rights that legislation gives them. However, we also note that there

39. NSW, Chief Magistrate of the Local Court, *Preliminary submission PVI3*, 1; Victims and Witnesses of Crime Court Support Inc, *Preliminary submission PVI5*, 4; Victims of Crime Assistance League Inc NSW, *Preliminary submission PVI6*, 2.

40. Elizabeth Evatt Community Legal Centre, *Submission VI7*, 3; Victims of Crime Assistance League Inc NSW, *Submission VI10*, 2-3; NSW Office for Police and NSW Police Force, *Submission VI11*, 2; F Tait, *Submission VI12*, 4; Director of Public Prosecutions (NSW), *Submission VI15*, 3-4; NSW Council for Civil Liberties, *Submission VI16*, 4-5; Women’s Domestic Violence Court Advocacy Service NSW Inc, *Submission VI18*, 2, 4; NSW, Victims Services, *Submission VI21*, 2-3; Legal Aid NSW, *Submission VI22*, 5-6.

41. Victims of Crime Assistance League Inc NSW, *Submission VI10*, 4; Director of Public Prosecutions (NSW), *Submission VI15*, 3; Women’s Domestic Violence Court Advocacy Service NSW Inc, *Submission VI18*, 2; NSW, Victims Services, *Submission VI21*, 2-3.

42. Elizabeth Evatt Community Legal Centre, *Submission VI7*, 3; Victims of Crime Assistance League Inc NSW, *Submission VI10*, 3; NSW Office for Police and NSW Police Force, *Submission VI11*, 2; F Tait, *Submission VI12*, 4; Director of Public Prosecutions (NSW), *Submission VI15*, 3; NSW Council for Civil Liberties, *Submission VI16*, 4; Women’s Domestic Violence Court Advocacy Service NSW Inc, *Submission VI18*, 2.

43. Victims of Crime Assistance League Inc NSW, *Submission VI10*, 3-4; NSW Council for Civil Liberties, *Submission VI16*, 4; Women’s Domestic Violence Court Advocacy Service NSW Inc, *Submission VI18*, 2.

44. Legal Aid NSW, *Submission VI22*, 5-6.

45. Victoria, Victims Support Agency, *A Victim’s Voice: Victim Impact Statements in Victoria: Findings of an Evaluation into the Effectiveness of Victim Impact Statements in Victoria* (2009) 8.

are challenges involved in ensuring that victims can exercise their rights in the Local Court.

1.38 Given our reporting date of 1 March 2018, we are not in a position to analyse in detail the existing criminal procedures in the Local Court. Some care will be needed in implementing the recommendations in this report to avoid unintended negative consequences in the Local Court. Similar care would be required in implementing the existing provisions in the Local Court.

1.39 There is some scope to accommodate VISs in the Local Court under current conditions, for example, where cases are adjourned for a time to allow the preparation of a pre-sentence report, or to receive other information relevant to sentencing. Some submissions, however, considered that it was desirable for victims to have the opportunity to make a VIS, regardless of the impact on the efficiency of the Local Court.⁴⁶ One submission noted:

While the Local Court's current mention system and high output of cases might suggest fewer opportunities for VISs to be presented, we feel that this is no insurmountable obstacle. Matters are constantly being adjourned in order to obtain pre-sentence reports, and so the addition of a VIS would not significantly lengthen the process. In practice, VISs take only a short time to be orally presented in court. The Defence has a right to submit several character references in relation to the offender, and we would argue that allowing a victim the opportunity to submit a VIS at the same time is an essential element in the practice of justice in our judicial system.⁴⁷

1.40 There is a risk that any increased use of VISs may prove unworkable in a high volume jurisdiction under current conditions. There are real risks of impact on the Local Court by way of court delays arising from adjourning matters to allow a VIS to be prepared, and from additional time spent in tendering, reading and making submissions on VIS. We particularly note that systemic delays might also not be in the interests of some victims who would be best served by swift justice.

1.41 There is also the possibility of increased costs arising from delay and from providing new systems to support victims such as:

- a support service for victims preparing their VISs for the Local Court (not currently provided)
- systems to alert victims to upcoming sentencing proceedings, and
- providing better facilities and increased security for victims attending court to deliver a VIS (particularly in domestic violence cases).⁴⁸

1.42 These illustrate just some of the administrative, procedural and cultural challenges involved in ensuring that the voice of victims can be heard in the Local Court.

1.43 We, therefore, recommend that the Department of Justice investigate ways of accommodating victims in the sentencing process in the Local Court to ensure that they can realise their entitlement to participate in the sentencing process through a VIS. Where appropriate the Department should consult with relevant stakeholders including magistrates, lawyers (both publicly and privately employed), prosecutors

46. NSW, Victims Services, *Submission VI21*, 3; NSW Council for Civil Liberties, *Submission VI16*, 5.

47. Victims of Crime Assistance League Inc NSW, *Submission VI10*, 3.

48. See, generally, ch 3 and ch 5.

and court volunteers and supporters. Corrective Services may also have relevant experience of victims in Local Court matters from managing restorative justice programs.⁴⁹

1.1 Victims in the Local Court

The Department of Justice should investigate ways of accommodating victims in the sentencing process in the Local Court.

Other victims provisions in NSW

- 1.44 The provisions relating to VISs sit in a wider context of other provisions that relate to victims of crime in NSW. While relevant as background, these provisions have a broader application, so they will not be the subject of recommendations in this report.

Charter of Victims Rights

- 1.45 In 1996, the Charter of Victims Rights was enacted. The Charter requires that victims:
- be “treated with courtesy, compassion, cultural sensitivity and respect for [their] rights and dignity”
 - are informed at the earliest practical opportunity, by relevant agencies and officials, of available services and remedies
 - have access to “available welfare, health, counselling and legal assistance responsive to the victim’s needs”
 - receive information about the prosecution of the accused, the trial process and their role in the prosecution
 - have access to information and assistance to prepare a VIS, and
 - be provided with the opportunity to make submissions about granting parole to a serious offender.⁵⁰

- 1.46 Additionally, the Charter requires that the prosecution consult with certain victims before making the decision to modify or drop charges through plea negotiation.⁵¹

Victims Support Scheme

- 1.47 The Victims Support Scheme, which is funded partly through levies imposed on convicted offenders,⁵² gives eligible victims access to support and assistance including:⁵³

49. See [1.51]-[1.55], below.

50. *Victims Rights and Support Act 2013* (NSW) s 6.

51. *Victims Rights and Support Act 2013* (NSW) s 6.5. These provisions apply to victims of “serious crime that involves sexual violence or that results in actual bodily harm or psychological or psychiatric harm to the victim”.

52. *Victims Rights and Support Act 2013* (NSW) pt 7.

- financial assistance for immediate needs
- financial assistance for economic loss (longer term assistance)
- recognition payments, and
- counselling by a professional trauma counsellor.⁵⁴

Victims registers

- 1.48 Specified victims may elect to be on a victims register. There are three victims registers in NSW:
- the adult offenders victims register
 - the forensic patients victims register, and
 - the Juvenile Justice victims register.⁵⁵
- 1.49 Registered victims are kept informed of a range of information about the offender. This information varies based on the particular register, but includes information such as impending parole or release of offenders, escape from custody, the offender's location while in custody, and the offender's death.⁵⁶
- 1.50 We note that the definition of eligible victims for each victims register⁵⁷ varies from the definitions of eligible victims for the purposes of the Victims Charter,⁵⁸ the Victims Support Scheme,⁵⁹ and VISs.⁶⁰ These differences are, to a certain extent, inevitable given the different aims of the various schemes and the resources available to them. Recommendations in Chapter 5 seek to address any confusion and false expectations that may arise for some victims who may not qualify for some services or procedural rights.⁶¹

Restorative justice practices

- 1.51 Restorative justice has been described as "a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future".⁶² Restorative justice practices encompass a wide range of processes that focus on reparation for the victim and broader community and the reintegration of the offender into the community. The participation of victims, offenders and other stakeholders affected by an offence is

53. See *Victims Rights and Support Act 2013* (NSW) s 20–22.

54. *Victims Rights and Support Act 2013* (NSW) s 26, s 31. A statutory compensation scheme for victims was first introduced in the *Victims Compensation Act 1987* (NSW).

55. All established under *Crimes (Administration of Sentences) Act 1999* (NSW) s 256.

56. NSW, Corrective Services, *Victims Register: Information Guide and Registration Form* (2016); NSW, Mental Health Review Tribunal, "Involvement of Registered Victims" (13 February 2018) <mhrt.nsw.gov.au/forensic-patients/involvement-of-registered-victims.html>; NSW, Juvenile Justice, "Victims Register" (5 July 2016) <www.juvenile.justice.nsw.gov.au/Pages/Juvenile%20Justice/aboutdjj/victimsregister.aspx>.

57. *Crimes (Administration of Sentences) Act 1999* (NSW) s 256(5)(a).

58. *Victims Rights and Support Act 2013* (NSW) s 5.

59. *Victims Rights and Support Act 2013* (NSW) pt 4 div 1.

60. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26.

61. See [5.12]–[5.16].

62. T F Marshall, *Restorative Justice: An Overview* (HMSO, 1999) 5.

an important part of the restorative justice approach.⁶³ For example, restorative justice can involve victims and community members talking face to face with an offender about the impact of their crime. The potential value of a restorative justice approach is to meet victim needs that are not otherwise met by the criminal justice system, including VIS. They can take place at various stages of the criminal process, including before sentencing, and may even be employed in circumstances where a conviction does not result.

1.52 Restorative justice practices are available on a limited basis in NSW. Particular forms of restorative justice practices that are currently available before sentencing, and which give a voice to victims, include:

- **Circle sentencing** is an option available to eligible Aboriginal offenders. A magistrate presides over the circle sentencing group, which may consist of the offender and the legal representative, the prosecutor, at least three Aboriginal people from the relevant Aboriginal community, and the victim. The group determines an intervention plan for the offender, which may include treatment or rehabilitation and may also make a recommendation as to the appropriate sentence for the offender.⁶⁴
- **Youth justice conference** – a conference that involves a child accused of an offence whose matter has been diverted from the Children’s Court before sentence. The participants, which may include a victim or their representative and the victim’s support person, draft an outcome plan, which may, for example, include an apology or reparation to the victim. If possible, the conference participants should agree to the outcome plan by consensus. An agreed outcome plan is referred to the court, which may either approve the plan or recommence proceedings.⁶⁵

1.53 NSW also provides for post-sentencing restorative justice practices that supplement the criminal justice process. Since 1999, Corrective Services NSW’s Restorative Justice Unit has provided post-sentencing conferences in which both the victim and offender participate to “address unmet needs and legislated rights of victims of crime”.⁶⁶ These victim offender conferences most commonly relate to situations where there has been “significant harm, very high-level trauma and often chronic post-traumatic stress certainly for the victim and sometimes for the offender also”.⁶⁷ Victim offender conferences can only occur where both parties consent to the conference, and the offender admits responsibility for the offence. The Restorative Justice Unit undertakes a “robust assessment process” to determine the parties’ suitability for conference, taking account of safety issues and the need to prevent further harm to the victim.⁶⁸ Victim offender conferences can be a positive experience for victims. Corrective Services NSW notes:

63. J Doak, *Victims’ Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart, 2008) 255.

64. *Criminal Procedure Regulation 2017* (NSW) pt 7.

65. *Young Offenders Act 1997* (NSW) pt 5.

66. Corrective Services NSW, “Victim Support” (16 August 2017) <www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/support-families-community/victims.aspx>.

67. J Bolitho, “Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice” (2015) 3 *Restorative Justice: An International Journal* 256, 261-262.

68. J Bolitho, “Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice” (2015) 3 *Restorative Justice: An International Journal* 256, 262-263.

Participating in a process focussed on their needs, people who are victims of crime can empower themselves and move forward: having a voice, asking questions, expressing how they have been affected, holding the offender accountable and having a say on how the harm can be repaired.⁶⁹

- 1.54 An empirical study on the outcomes of victim offender conferences facilitated by Corrective Services NSW between 1999-2013 found that 95% of participants considered their experiences “positive”, meaning the participant “was comfortable with their decision to take part, was satisfied with the process, would recommend it to others in akin situations, and had their expectations met (or exceeded)”.⁷⁰
- 1.55 We will not be making recommendations about the role of victims in restorative justice processes for a number of reasons, including, that the restorative justice practices outlined above:
- may apply at different stages of the criminal justice process, not just at sentencing
 - are subject to complex offence exclusions that may not be appropriate in all circumstances, and
 - have wider aims that involve not only giving the victim an opportunity to express the harm caused by the offence, but also repairing some of the harm caused.

Purposes of a VIS

- 1.56 The Act does not expressly state the purposes of a VIS.
- 1.57 Broadly, a VIS can serve instrumental and expressive functions. However, many subcategories fall within these functions.
- 1.58 The chief instrumental function is to inform the court of the impact of the crime on its victims, when it is deciding what penalties to impose on an offender. The purpose of the sentencing hearing is for the court to evaluate the seriousness of the offence and impose an appropriate punishment on the offender according to law. In determining the relevant punishment, the court considers the circumstances of the offending and the offender’s culpability as well as any relevant mitigating and/or aggravating factors.
- 1.59 The content of a VIS can be said, therefore, to relate to the sentencing process under the Act by informing the court when it is:
- giving effect to one of the purposes of sentencing, that is, recognising the “harm done to the victim of the crime and the community”,⁷¹ and
 - taking into account the aggravating factor that the “injury, emotional harm, loss or damage caused by the offence was substantial”.⁷²

69. Corrective Services NSW, “Victim Support” (16 August 2017) <www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/support-families-community/victims.aspx>.

70. J Bolitho, “Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice” (2015) 3 *Restorative Justice: An International Journal* 256, 270.

71. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g). See also *R v Halloun* [2014] NSWSC 1705 [46].

- 1.60 This instrumental function of a VIS may take on a particular relevance where there is insufficient evidence about the offence before the court, for example, in cases where the offender pleads guilty.⁷³ A survey by the Victorian Victim Support Agency found that VISs are “highly valued by the judiciary” and “can...contain additional information that may be of use to a sentencing court”.⁷⁴
- 1.61 The chief expressive function of the VIS is to allow victims to have their voice heard in the criminal proceedings, a voice that was traditionally excluded beyond the victim’s role as witness. By giving a victim the opportunity to explain the impact of the crime, a VIS can “serve therapeutic means for the victim by having their harm acknowledged and validated”.⁷⁵ The significance of this function was acknowledged in a number of preliminary submissions:
- Victim Impact Statements ... are an important part of the sentencing process for victims of crime. [...] [V]ictims often express feelings of empowerment in being able to engage in this process and it allows victims to find personal closure and finality. This is the case regardless of whether a victim has given evidence at trial prior to conviction, or their participation is limited to providing [a] VIS on sentencing.⁷⁶
- ...
- The VIS can be an important opportunity for victims to share their experiences in an empowering way.⁷⁷
- ...
- VISs ...increase victims’ level of satisfaction and therefore participation in the criminal justice system.⁷⁸
- 1.62 While the therapeutic effect that underlies the expressive function is important for some victims, it must be acknowledged that there are sometimes real risks of further harm/trauma from the various stages of the experience, including simply writing the VIS itself, having it subjected to editing and objection, reading the VIS in court and, in rare cases, being cross-examined on its contents. Several submissions noted the possibility that participation in the VIS process may cause further harm to a victim.⁷⁹ Some submissions observed that sometimes victims fail to submit a VIS because they fear being further traumatised by the process.⁸⁰

72. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(g).

73. T Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 35. See also S Garkawe, “Victim impact statements and sentencing” (2007) 33 *Monash University Law Review* 90, 96.

74. Victoria, Victims Support Agency, *A Victim’s Voice: Victim Impact Statements in Victoria: Findings of an evaluation into the effectiveness of Victim Impact Statements in Victoria* (2009) 7.

75. Women’s Justice Network, *Preliminary Submission PVI13*, 2.

76. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PVI15*, 2.

77. Legal Aid NSW, *Preliminary Submission PVI14*, 1.

78. B Donegan, *Preliminary Submission PVI4*, 1.

79. T Kirchengast, *Submission VI5* [25], [28]; Victims of Crime Assistance League Inc NSW, *Submission VI10*, 4; NSW Office for Police and NSW Police Force, *Submission VI11*, 11; F Tait, *Submission VI12*, 3, 6; Police Association of NSW, *Submission VI13*, 2, 4, 5; Director of Public Prosecutions (NSW), *Submission VI15*, 2, 13, 19, 21; Homicide Victims Support Group, *Submission VI20*, 1, 4; NSW, Victims Services, *Submission VI21*, 2; Legal Aid NSW, *Submission VI22*, 7.

80. K Braun, *Submission VI4*, 4; Elizabeth Evatt Community Legal Centre, *Submission VI7*, 1.

1.63 Making the victim's voice heard can have impacts beyond those outlined above. The impacts include:

- the rehabilitative potential from giving offenders and their family and supporters an insight into the consequences of their offending, and
- increasing general knowledge about the impact of offending on victims for the community generally, as well as the courts and lawyers; this aspect has been particularly important for evolving attitudes to sexual offences.

1.64 One preliminary submission notes that the instrumental and expressive purposes of a VIS "can be mutually supportive":

Victims are more likely to gain a therapeutic effect when they know that their statement contributes towards the process of determining a fair sentence, and a fair sentence is more likely to be reached when the sentencing judge has had a chance to hear first-hand about the impact the crime has had on the victim(s).⁸¹

Our approach in this report

1.65 Despite advances over the past 25 years, much still needs to be done to support victims in the sentencing process.

1.66 One aim of this report is to improve the system surrounding VISs so that victims can have their voices heard whenever possible. In framing recommendations to achieve this, we must:

- seek to minimise the trauma or harm that victims may experience when participating in the system, and
- not be procedurally or substantively unfair to offenders.

1.67 These two aims are not necessarily mutually exclusive. The Victorian Law Reform Commission, in its report on the role of victims in criminal trials, found:

The legitimate rights of the accused should be protected and fulfilled. So too the rights of the community. The legitimate rights of victims, properly understood, do not undermine those of the accused or of the community. The true interrelationship of the three is complementary.⁸²

1.68 One submission observed that:

Victims' participatory rights are one way to enhance procedural justice for victims of crime without unduly encroaching on procedural justice for accused and convicted persons.⁸³

81. H Robert, *Preliminary Submission PVI10*, 3.

82. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) 29.

83. SA, Commissioner for Victims' Rights, *Submission VI23*, 2.

2. Who can make a victim impact statement

In brief

We recommend that the chief factor in determining who can make a victim impact statement (“VIS”) should be the personal harm that a person suffers as a direct result of an offence. The types of harm covered by “personal harm” should be expanded and the definition of “immediate family member” should be broadened. VISs should be available for matters listed on a Form 1 and where a defendant is found not guilty on the grounds of mental illness or is unfit to be tried. We do not recommend introducing community impact statements.

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Entitlement to make a VIS

2.1 Entitlement to make a VIS

A person (the victim) should be entitled to make a VIS, if:

- (a) they have suffered **personal harm** as a direct result of any criminal offence, and/or
- (b) they are a member of the **immediate family** of a person who has died as the result of an offence.

- 2.1 This recommendation ensures that the “personal harm” a person suffers as the direct result of an offence chiefly determines their entitlement to make a victim impact statement (“VIS”). We deal with the definition of “personal harm” later in this chapter.
- 2.2 This recommendation simplifies the process of determining who is entitled to make a VIS. It removes the other determinants that are contained in the existing provisions, including the type of offence committed, the court in which the offence is tried, and direct involvement in the offence (as the person against whom the offence is committed or a witness).
- 2.3 Given the expanded definition of personal harm, a family member of a person who has died will qualify as a victim under Recommendation 2.1(a) in most cases. In those rare cases where such a family member has not suffered a relevant personal

harm, Recommendation 2.1(b) preserves their entitlement to make a VIS in any event.

The current law

- 2.4 The existing law effectively limits the availability of VISs to mostly indictable offences.¹ The offences in the Supreme Court and District Court are:
- (a) an offence that results in the death of, or actual physical bodily harm to, any person, or
 - (b) an offence that involves an act of actual or threatened violence, or
 - (c) an offence for which a higher maximum penalty may be imposed if the offence results in the death of, or actual physical bodily harm to, any person than may be imposed if the offence does not have that result, or
 - (d) a prescribed sexual offence.²
- 2.5 In the Local Court, eligible offences are limited to “Table 1 offences” (indictable offences that are dealt with summarily unless the prosecutor or the accused elects otherwise).³ This omits from the list of eligible offences “Table 2 offences” (indictable offences that are dealt with summarily unless the prosecutor elects otherwise).⁴ Table 2 offences include a number of offences against the person including assault, assault occasioning actual bodily harm, aggravated act of indecency, and indecent assault. The offences of stalking or intimidation under s 13 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) are also in Table 2.
- 2.6 A victim of a breach of duty of health and safety may also make a VIS, even though it is a summary offence.⁵
- 2.7 The current approach limits the victim, in the case of a primary victim, to a person who has suffered personal harm as a direct result of the offence and is either:
- the person against whom the offence was committed or
 - a witness to the act constituting the offence.⁶
- 2.8 These current provisions are complex and, in some cases, unclear. Sometimes, it is not immediately clear whether a particular offence is one that entitles a victim to make a VIS. This sort of uncertainty is undesirable if it prevents victims who want to make a VIS, or who have written a VIS, from submitting it, especially if the rejection occurs late in the proceedings.

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27.

2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(2), s 27(3).

3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(3).

4. See *Criminal Procedure Act 1986* (NSW) sch 1 Table 2.

5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(2A).

6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of “primary victim”.

Expanding the group of people entitled to make a VIS

- 2.9 Submissions generally supported broadening the group of people who can be identified as victims.⁷ Some, however, preferred to limit an expanded group, for example, to family and carers directly affected and the father of a still-born child.⁸ Others sought to exclude first responders and neighbours.⁹ We saw difficulties with this latter approach, which would have the effect of diluting the voice of directly involved victims and raising complex issues of causation.
- 2.10 Some proposed that there should be no restrictions on the offences for which a victims may submit a VIS.¹⁰ Others supported adding specific offences or categories of offences to the list of eligible offences – for example, economic offences,¹¹ offences punishable by a maximum term of imprisonment greater than a specified period,¹² or domestic and family violence offences.¹³
- 2.11 We prefer to use an expanded category of victim that is wide enough to cover the above categories of victim, rather than specifying particular categories of offences and having to amend the list when omissions later become apparent.
- 2.12 Our recommendation will remove what is effectively a physical proximity requirement in the current law that requires an eligible victim to be the person against whom the offence was committed or a witness to that offence. We do, however, propose retaining the requirement that the personal harm suffered must be the “direct result” of the offence. This would exclude personal harms that are indirectly or remotely caused by the offence. Several jurisdictions also require that the causation of the harm be “direct”.¹⁴
- 2.13 In some jurisdictions that do not require “direct” causation, the courts have imported that concept, for example, by discussing whether the harm was caused by the offence or is too remote to be included in a VIS. The NT Supreme Court has ruled that the stress of staff, caused by cleaning up the residual blood left by a trespasser, was not admissible in a VIS, because, in the absence of any intention to injure them, it was not reasonably foreseeable that they would suffer harm in the circumstances.¹⁵ The ACT Supreme Court applied the criminal law test of causation

7. See, eg, Senior Public Defender, *Submission VI3*, 2; Victims of Crime Assistance League Inc NSW, *Submission VI10*, 5; Police Association of NSW, *Submission VI13*, 3; Women's Domestic Violence Court Advocacy Service NSW Inc, *Submission VI18*, 3; NSW, Victims Services, *Submission VI21*, 4.

8. Director of Public Prosecutions (NSW), *Submission VI15*, 5-6; Law Society of NSW, *Submission VI17*, 4; Legal Aid NSW, *Submission VI22*, 7.

9. Law Society of NSW, *Submission VI17*, 4; Legal Aid NSW, *Submission VI22*, 7.

10. Elizabeth Evatt Community Legal Centre, *Submission VI7*, 5; Victims of Crime Assistance League Inc NSW, *Submission VI10*, 6; Police Association of NSW, *Submission VI13*, 3; NSW Council for Civil Liberties, *Submission VI16*, 8; SA, Commissioner for Victims' Rights, *Submission VI23*, 5.

11. S Pour, *Submission VI2*, 17-18.

12. NSW Office for Police and NSW Police Force, *Submission VI11*, 5. See also NSW, Victims Services, *Submission VI21*, 5.

13. Elizabeth Evatt Community Legal Centre, *Submission VI7*, 5; Victims of Crime Assistance League Inc NSW, *Submission VI10*, 6; Director of Public Prosecutions (NSW), *Submission VI15*, 8; Women's Domestic Violence Court Advocacy Service NSW Inc, *Submission VI18*, 4; NSW, Victims Services, *Submission VI21*, 5; Legal Aid NSW, *Submission VI22*, 9.

14. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26; *Sentencing Act 1995* (WA) s 13(a), s 23A definition of “victim impact statement”; *Sentencing Act 1997* (Tas) s 81A(1) definition of “victim”.

15. *Gumbinyarra v Teague* [2003] NTSC 25, 12 NTLR 226 [5]-[7].

to find that the harm suffered during cross-examination is not admissible.¹⁶ However, it has also ruled that the harm caused by the stressful nature of a fraud investigation was admissible as an “almost inevitable” outcome of the offence.¹⁷

2.14 We would expect that the courts in NSW would draw similar conclusions, if any such matters were to come before them. Given that the prosecution is the only party that may submit a VIS to the court, we anticipate that the prosecution can manage the unusual cases where anyone whose harm is too remote from the offence wishes to make a VIS.

2.15 This recommendation means, for example, that, subject to the “personal harm” suffered and the requirement that the harm is a “direct result” of the offence, the following may be eligible victims:

- victims of any domestic and family violence offences (“DV offences”), and not just those offences that are indictable or meet the violence criteria as currently expressed in the VIS provisions (removing the need to refer to extensive definitions of DV offences, as is the case in Tasmania and Queensland)¹⁸
- first responders to the scene of an offence, such as first aid providers, police officers and ambulance officers¹⁹
- victims of fraud, arson, theft or other property crime (because of the removal of the “violence” requirement)
- family members of a victim against whom the offence was committed, for example, a spouse whose partner has miscarried as the result of an offence,²⁰ a family member who must assist in a victim's day to day care as well as psychological and emotional support,²¹ or a family member who suffers emotional harm because an accessory has concealed a murder,²² or
- victims of Table 2 offences tried in the Local Court.

2.16 This new approach is generally consistent with the approach in some other Australian jurisdictions,²³ and overseas.²⁴ While some have pointed to the significant delays and costs that may arise from expanding the categories of those eligible to make a VIS,²⁵ the experience in other jurisdictions suggests that the

16. *R v Iacuone (No 2)* [2014] ACTSC 149, 242 A Crim R 391 [23]-[24].

17. *R v Reid* [2016] ACTSC 24 [33].

18. *Sentencing Act 1997* (Tas) s 4 definition of “family violence offence”; *Family Violence Act 2004* (Tas) s 4 definition of “family violence offence”, s 7; *Victims of Crime Assistance Act 2009* (Qld) s 5(3); *Domestic and Family Violence Protection Act 2012* (Qld) s 8(1)-(2).

19. See, eg, *R v Freeman* [2011] VSC 139 [21].

20. B Donegan, *Preliminary submission PVI4*; H Robert, *Preliminary submission PVI10*.

21. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PVI15*, 4.

22. See, eg, *R v Kirk* [2015] QSC 336.

23. *Sentencing Act 1995* (WA) s 24(1); *Sentencing Act* (NT) s 106A, s 106B; *Sentencing Act 1991* (Vic) s 8K. See NSW Sentencing Council, *Victims' Involvement in Sentencing*, Consultation Paper (2017) [3.15]-[3.16], [3.34].

24. England and Wales, Ministry of Justice, *Code of Practice for Victims of Crime* (2015) [4]; *Victims' Rights Act 2002* (NZ) s 4 definitions of “offence” and “victim”; *Criminal Code 1985* (Canada) s 722(1); *Criminal Justice (Scotland) Act 2003* (Scot) s 14; *Justice Act (Northern Ireland) 2015* (NI) s 29.

25. See, eg, Law Society of NSW, *Submission VI17*, 4.

potential expansion of the offences for which a VIS may be made is unlikely to lead to a flood of VISs that were not previously possible.²⁶

- 2.17 Procedural complexity does not appear to have arisen in places with an expanded eligibility to make a VIS based on harm suffered. The SA Commissioner for Victims' Rights has observed of the law in South Australia:

In operation the law has not impeded justice or delayed it. It has, however, allowed an array of people affected by crime (such as people living next door to a clandestine drug laboratory and people whose livelihoods have been devastated by arson causing a bushfire) to have a voice in sentencing.²⁷

- 2.18 Our new approach is also consistent with a judge's discretion to admit statements under common law from those who fall outside the definition of primary victim, as they have done, for example, by receiving statements from both child victims of abuse and members of their family.²⁸

Type of harm

2.2 Type of harm

The definition of "personal harm" should include:

- (a) physical bodily harm
- (b) psychological or psychiatric harm
- (c) emotional suffering or distress
- (d) harm to interpersonal/social relationships
- (e) economic loss or harm, so long as it arises from the other forms of "personal harm"
- (f) any of the above harms to the victim's **immediate family**
- (g) where a person has died as a result of the offence, any impact on the victim's **immediate family**.

- 2.19 Under current law, for a primary victim to be able to make a VIS, they must have suffered a particular form of harm as a result of the offence. That harm must be "personal harm" which is defined as "actual physical bodily harm or psychological or psychiatric harm".²⁹
- 2.20 This recommendation expands the current definition of "personal harm" to include:
- emotional suffering or distress
 - harm to interpersonal/social relationships, and
 - economic harm so long as it arises from one of the other harms.

26. See generally Victoria, Department of Justice, *Victim Impact Statement Reforms in Victoria*, Interim Implementation Report (2014).

27. SA, Commissioner for Victims' Rights, *Submission VI23*, 5.

28. *AG v R* [2016] NSWCCA 102 [16]-[19]; *RL v R* [2015] NSWCCA 106 [49]-[57].

29. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definitions of "primary victim" and "personal harm".

- 2.21 This definition is intended to be inclusive (not exhaustive). Our recommendation does not go as far as those States that simply allow a VIS to include details of any "injury, loss or damage" without guidance as to what forms the harms may take.³⁰
- 2.22 Some submissions supported extending the definition of personal harm.³¹ Some noted the confusion caused by existing advice to victims to include emotional, financial and social harm in their VISs.³² One submission stated that the type of harm should be expanded to encompass better the "types of harm frequently suffered by domestic and family violence victims".³³
- 2.23 **Emotional suffering or distress** (that is, mental harm other than psychiatric or psychological harm) could cover situations where a victim has become pregnant as the result of an offence, or fears that they have contracted a sexually transmissible medical condition without the need to expressly itemise these outcomes, as is the case, for example, in the Northern Territory.³⁴ Some submissions specifically supported including emotional suffering or distress.³⁵
- 2.24 The inclusion of harm to **interpersonal/social relationships** is intended to cover a range of harms that may not fit under the other forms of harm, for example, where a related child sex offender effectively splits a family; or where a person who reports a sexual offence against another community member is ostracised from their community. This could also extend to people who can no longer form close relationships, although this might count as psychological or emotional harm.
- 2.25 The inclusion of **economic loss or harm** arising from the other harms is designed to cover, for example, loss of income from injuries, homelessness, and medical expenses.
- 2.26 Property damage or loss without any relevant personal harm would not be included in this definition as a form of harm. Some submissions expressly supported including economic loss within the definition of personal harm,³⁶ while others rejected the specific inclusion of economic loss or damage to property.³⁷
- 2.27 However, in cases of pure property damage or loss arising from a property or fraud offence, we would expect that the fact of the loss or damage and the value would already be before the court – either as evidence or in an agreed statement of facts.
- 2.28 Maintaining a broad category of eligible offences that includes property or fraud offences, while limiting economic harm to that arising from the other forms of personal harm, is the simplest and clearest way of both ensuring that victims of

30. *Sentencing Act 1995* (WA) s 13(a), s 23A definitions of "personal harm" and "victim impact statement"; *Sentencing Act 1991* (Vic) s 8L(1); *Victims of Crime Act 2001* (SA) s 4(1) definition of "harm", s 10(1); *Sentencing Act 1997* (Tas) s 81A(1) definition of "victim", s 81A(2)(b).

31. S Pour, *Submission VI2*, 17; Victims of Crime Assistance League Inc NSW, *Submission VI10*, 6; NSW Office for Police and NSW Police Force, *Submission VI11*, 4; Police Association of NSW, *Submission VI13*, 3; Director of Public Prosecutions (NSW), *Submission VI15*, 6-7; NSW Council for Civil Liberties, *Submission VI16*, 7; SA, Commissioner for Victims' Rights, *Submission VI23*, 5.

32. F Tait, *Submission VI12*, 5.

33. Women's Domestic Violence Court Advocacy Service NSW Inc, *Submission VI18*, 3.

34. *Sentencing Act* (NT) s 106A definition of "harm" (ba).

35. Victims of Crime Assistance League Inc NSW, *Submission VI10*, 6; Law Society of NSW, *Submission VI17*, 5; Legal Aid NSW, *Submission VI22*, 8-9.

36. S Pour, *Submission VI2*, 17; Director of Public Prosecutions (NSW), *Submission VI15*, 6-7.

37. Law Society of NSW, *Submission VI17*, 5.

property and fraud offences can talk about the personal harms they have suffered and that victims of offences of violence can talk about the economic harms they have suffered as a result of those offences.

- 2.29 Including “any of the above **harms to the victim’s immediate family**” is intended to recognise that victims will often talk about the harms endured by their immediate family as part of their own VIS.
- 2.30 The current definition of “family victim” makes it clear that a person can be a family victim “whether or not the person has suffered personal harm as a result of the offence”.³⁸ The *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that a family victim’s VIS is about “the impact of the primary victim’s death on members of the primary victim’s immediate family”.³⁹
- 2.31 We have reduced the distinction between primary and family victims as much as possible. However, rather than run the risk of removing an existing entitlement that may have a broader reach than our proposed expansion of “personal harm”, we have decided to include reference to the “impact on” immediate family in cases where the victim of the offence has died.

Members of the victim’s immediate family

2.3 Members of the victim’s immediate family

The definition of “member of the victim’s immediate family” should be expanded to include:

- (a) the victim’s step-grandparent, step-grandchild, aunt, uncle, nephew, or niece
- (b) a person who is a close family member or kin of a victim who is an Aboriginal person or a Torres Strait Islander according to their culture
- (c) a person who is outside the above categories whom the prosecutor is satisfied is a person:
 - (i) who is a member of the victim’s extended family or culturally recognised family to whom they were close, or
 - (ii) with whom the victim had a close relationship analogous to family, or whom the victim considered to be family.

- 2.32 This recommendation provides a definition of members of the victim’s immediate family for the purposes of Recommendation 2.1(b) and Recommendation 2.2(f) and 2.2(g), above. It, therefore, applies in two situations – where an immediate family member is making a statement about the impact of an offence on the family of a deceased victim, and where a victim is describing harm to their immediate family as an aspect of personal harm.
- 2.33 It expands the existing definition which defines “member of the primary victim’s immediate family” as meaning:
- (a) the victim’s spouse, or

38. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of “family victim”.

39. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of “victim impact statement” (b).

- (b) the victim's de facto partner, or
 - (b1) a person to whom the victim is engaged to be married, or
 - (c) a parent, grandparent, guardian or step-parent of the victim, or
 - (d) a child, grandchild or step-child of the victim or some other child for whom the victim is the guardian, or
 - (e) a brother, sister, half-brother, half-sister, step-brother or step-sister of the victim.⁴⁰
- 2.34 While we are expanding the definition of immediate family, we have decided not to remove all limits on such a definition, as is the case in some other jurisdictions. In our view, a limited definition of immediate family is still required to ensure that the category of people who can make a VIS where a victim has died as a result of the offence does not address broader community impact. This would go beyond the original intention of the family victim provisions of addressing the impact on the victim's family.
- 2.35 The relationships covered by Recommendation 2.3(a) have been added as reasonable extensions of existing categories in the current definition of "immediate family".
- 2.36 Several submissions expressly support the recognition of Aboriginal and Torres Strait Islander kinship structures.⁴¹
- 2.37 Recommendation 2.3(c) responds to concerns that the definition of "immediate family" does not accommodate diverse family and family-like arrangements within the community. Several submissions supported some accommodation of people who are considered family or in a family-like arrangement, at least in cases where a victim who has died has no available family members who fall within the current definition.⁴²
- 2.38 We have given the discretion as to who is included within Recommendation 2.3(c) to the relevant prosecutor, who we expect will be in the best position to identify such people. Leaving the ultimate discretion to the court to identify those who lie outside traditional family may be too late and may negatively impact on close non-family members whose VIS may be rejected or perceived as being open to rejection.

40. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of "member of the primary victim's immediate family".

41. Senior Public Defender, *Submission VI3*, 2; Elizabeth Evatt Community Legal Centre, *Submission VI7*, 4-5; Victims of Crime Assistance League Inc NSW, *Submission VI10*, 5; Director of Public Prosecutions (NSW), *Submission VI15*, 6; Law Society of NSW, *Submission VI17*, 4.

42. Elizabeth Evatt Community Legal Centre, *Submission VI7*, 5; Victims of Crime Assistance League Inc NSW, *Submission VI10*, 5; Police Association of NSW, *Submission VI13*, 3; Director of Public Prosecutions (NSW), *Submission VI15*, 6; Law Society of NSW, *Submission VI17*, 4-5; Homicide Victims Support Group, *Submission VI20*, 6-7; NSW, Victims Services, *Submission VI21*, 4.

Matters listed on a Form 1

2.4 Matters listed on a Form 1

A victim of a Form 1 offence should be able to make a VIS about that offence in the same way as a victim of an offence where there has been a conviction.

- 2.39 This recommendation allows a victim of a “Form 1” offence to make a VIS about the impact of that offence in the same way as a victim of an offence where there has been a conviction.
- 2.40 A “Form 1” lists offences other than the “principal offence” that the court may take into account when determining the sentence for the principal offence (“Form 1 offence”).⁴³ Form 1 offences are offences for which the offender admits guilt and are generally of similar or lesser seriousness compared to the principal offence.⁴⁴ Form 1 offences must be agreed to by the parties,⁴⁵ and are usually agreed to during charge negotiations. It would seem that a victim of a Form 1 offence may not be entitled to make a VIS,⁴⁶ since Form 1 offences do not amount to a conviction and the VIS process only activates after a person is convicted of an offence.⁴⁷
- 2.41 Submissions generally agreed that victims should be able to refer to the harm caused by a Form 1 offence in their VIS.⁴⁸
- 2.42 We intend this recommendation to extend both to victims of a Form 1 offence who are also victims of a convicted offence and to victims who are victims of a Form 1 offence alone.
- 2.43 In rare cases, a Form 1 victim is not the same person as the victim of the principal offence.⁴⁹ Where a Form 1 victim suffers serious harm as a result of an offence, it would be unfair that their voice could not be heard through a VIS. Some submissions agreed with this position.⁵⁰
- 2.44 In the case of victims who are also victims of a convicted offence, it is not currently clear whether they can include in their VIS any harm arising from the Form 1 offences. It is unrealistic to require victims not to address the impact of Form 1 offences when making a VIS for convicted offences.⁵¹

43. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33(2)(b). See also NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) guideline 20.

44. *Abbas v R* [2013] NSWCCA 115, 231 A Crim R 413.

45. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 32, s 33.

46. A matter listed on a Form 1 would also not meet the requirement that matters in the Supreme Court and District Court be dealt with on indictment: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(2).

47. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(1).

48. Director of Public Prosecutions (NSW), *Submission VI15*, 8; NSW Council for Civil Liberties, *Submission VI16*, 8.

49. *R v Wratten* [2007] NSWDC 279; *R v A Young Offender* [2007] NSWDC 336, where it would appear that a victim of a matter listed on a Form 1 in fact made a VIS. Note the NSW Court of Criminal Appeal has strongly criticised having Form 1 matters that involve a different victim, see *PB v R* [2016] NSWCCA 258 [55]; *SGJ v R* [2008] NSWCCA 258 [24]-[29].

50. Director of Public Prosecutions (NSW), *Submission VI15*, 8; Legal Aid NSW, *Submission VI22*, 10.

51. Director of Public Prosecutions (NSW), *Submission VI15*, 8.

- 2.45 One submission opposes allowing victims to include the harm caused by a Form 1 offence in their VISs on the grounds that it may complicate charge negotiations and lead to offenders not agreeing to include matters on a Form 1.⁵² The Director of Public Prosecutions ("DPP"), however, is of the view that such an outcome is unlikely and noted that it is likely that VISs that deal with Form 1 offences are already being admitted without objection.⁵³

Not guilty on the grounds of mental illness or unfit to be tried

2.5 Not guilty on the grounds of mental illness or unfit to be tried

The provisions for making a VIS should be extended to apply in cases where the defendant has been found guilty on limited evidence after a special hearing or has been found not guilty by reason of mental illness.

- 2.46 This recommendation adopts the recommendations of a 2013 NSW Law Reform Commission ("LRC") report on people with cognitive and mental health impairments in the criminal justice system. The report recommended that a victim should be able to make a VIS in cases where the accused:
- has been found guilty on limited evidence after a special hearing or
 - has been found not guilty by reason of mental illness.⁵⁴

There is currently no provision for a victim in either of these circumstances to submit a VIS.

- 2.47 Where the Supreme Court or District Court finds that a person who has been charged with an offence is unfit to stand trial, they are referred to the Mental Health Review Tribunal ("MHRT") to determine whether they will become fit within 12 months. If the MHRT finds the person is unfit to stand trial and will not or has not become fit within 12 months, the matter is then referred to the DPP who must decide whether proceedings against that person are to continue. If the DPP decides to proceed, the court conducts a "special hearing" that is to be as close to a normal trial as is practicable. Among other outcomes, the court can find that, on the limited evidence available, the person committed the offences charged.
- 2.48 After such a finding, if the court, in an ordinary trial, would have imposed a custodial sentence, the court can nominate a limiting term. The limiting term is the maximum period for which the person can be a forensic patient and is based on the court's best estimate of the sentence the court would have imposed if the person had been found guilty of the offence at an ordinary trial. A person who is subject to a limiting term becomes a forensic patient and is referred to the MHRT which periodically determines questions of care, treatment and possible release.⁵⁵

52. Law Society of NSW, *Submission VI17*, 6.

53. Director of Public Prosecutions (NSW), *Submission VI15*, 8.

54. NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report 138 (2013) rec 8.4.

55. *Mental Health (Forensic Provisions) Act 1990* (NSW) pt 2. See also NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report 138 (2013) ch 6.

- 2.49 After a trial, or a special hearing, a person may be found not guilty on the grounds of mental illness.⁵⁶ The consequence of such a finding is that the person becomes a forensic patient. The MHRT reviews forensic patients every six months and may release them only if satisfied, on the balance of probabilities, that the release will not seriously endanger the safety of the person or any member of the public.⁵⁷
- 2.50 The first opportunity that a victim has to make a statement is in subsequent MHRT proceedings which are focussed on the forensic patient's care and treatment. The MHRT observes that in this context it is inappropriate, and may be traumatic for a victim, to seek to acknowledge the victim's distress, or to involve them in the MHRT review process unless they are seeking a non-association condition or a place restriction condition or have relevant information to offer.⁵⁸
- 2.51 We understand that the government is considering the LRC's recommendation for implementation in 2018 and, accordingly did not specifically ask questions about it in the Consultation Paper. A number of submissions, however, specifically supported implementing the LRC's recommendations.⁵⁹

Community impact statements

- 2.52 A community impact statement ("CIS") is a statement made by or on behalf of a community in response to a crime. A CIS could, potentially, inform the purpose of sentencing – "to recognise the harm done to the victim of the crime and the community".⁶⁰

Examples of community impact statements

- 2.53 CISs may vary considerably in terms of the harms addressed, who may write them and present them, and which communities or groups of victims they may be about. Forms of CIS have been implemented under legislation in South Australia,⁶¹ Canada,⁶² and England and Wales.⁶³ A form of CIS was also proposed in a private member's bill in NSW in 2014.⁶⁴
- 2.54 For example, in South Australia, CISs are divided into two categories:
- **neighbourhood impact statements** which deal with the harm done by a specific offence to people living or working in the area where the offence was committed, and

56. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 38.

57. *Mental Health (Forensic Provisions) Act 1990* (NSW) pt 4, s 42, s 43(a).

58. NSW, Mental Health Review Tribunal, *Preliminary submission PVI17*, 1-2.

59. Victims of Crime Assistance League Inc NSW, *Submission VI10*, 6; F Tait, *Submission VI12*, 4; NSW, Victims Services, *Submission VI21*, 5-6; Director of Public Prosecutions (NSW), *Submission VI15*, 7; Homicide Victims Support Group, *Submission VI20*, 4-5.

60. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g).

61. *Criminal Law (Sentencing) Act 1988* (SA) s 7B.

62. *Criminal Code 1985* (Canada) s 722.2.

63. *Criminal Practice Directions 2015* [2015] EWCA Crim 1567, CPDVII Sentencing H: Community Impact Statements; *Criminal Justice Act 1967* (UK) s 9.

64. Crimes (Sentencing Procedure) Amendment (Victim Impact Statements – Mandatory Consideration) Bill 2014 (NSW) defeated 15 May 2014.

- **social impact statements** which deal with the effect of an offence or offences of the same kind on the community generally.⁶⁵
- 2.55 The South Australian Commissioner for Victims' Rights collects neighbourhood impact statements from individuals, and social impact statements from experts. The South Australian government envisaged that the Commissioner would eventually collect a series of generic social impact statements for various offences.⁶⁶
- 2.56 In Canada, on the other hand, an individual may make a CIS on behalf of the community. The statements must be specific to the offence and offenders before the court.⁶⁷ A statement must create a nexus between the offender's actions and the impact on the community.⁶⁸
- 2.57 In England and Wales, CISs are made under a general provision which deals with proof by written statement.⁶⁹ There are two types of CIS:
- a generic statement that relates to a range of offences or anti-social behaviours affecting a community, and
 - a specific statement that covers the impact of a specific offence or anti-social behaviour incident that the community has identified as a concern.⁷⁰
- 2.58 A "community" can be based on geography, identity (for example, ethnic groups, people with disability) and interest (for example, sport clubs, support groups). The local police authority may collect statements for a community, and present them to the court before sentencing.⁷¹ As part of this process, the authority is expected to validate the information objectively and ensure it is admissible before a court.⁷²
- 2.59 A private member's bill was introduced in NSW in 2014, but did not pass. It would have imposed a mandatory requirement on courts to consider a VIS and would have allowed the Commissioner of Victims Rights to make CIS to provide courts with statements in cases where a VIS was not submitted.⁷³

Merits of community impact statements

- 2.60 We note that there is some merit in having CISs available in, at least, some cases and that two submissions expressly supported their introduction.⁷⁴

65. *Criminal Law (Sentencing) Act 1988* (SA) s 7B(2).

66. South Australia, *Parliamentary Debates*, House of Assembly, 4 February 2009, 1393.

67. *Criminal Code 1985* (Canada) s 722.2; *R v Ali* [2015] BCSC 2539 [19]–[30].

68. *R v Ali* [2015] BCSC 2539 [29]–[30]. See also *R v Denny* [2016] NSSC 76 [120]–[122].

69. *Criminal Justice Act 1967* (UK) s 9; *Criminal Practice Directions 2015* [2015] EWCA Crim 1567, CPD VII Sentencing H: Community Impact Statements H.2.

70. England and Wales, Crown Prosecution Service, "Community Impact Statements – Adult" <www.cps.gov.uk/legal/a_to_c/community_impact_statement_-_adult>.

71. *Criminal Practice Directions 2015* [2015] EWCA Crim 1567, CPD VII Sentencing H: Community Impact Statements H.1.

72. England and Wales, Crown Prosecution Service, "Community Impact Statements – Adult" <www.cps.gov.uk/legal/a_to_c/community_impact_statement_-_adult>.

73. Crimes (Sentencing Procedure) Amendment (Victim Impact Statements – Mandatory Consideration) Bill 2014 (NSW) defeated 15 May 2014.

74. SA, Commissioner for Victims' Rights, *Submission VI23*, 6-9; Homicide Victims Support Group, *Submission VI20*, 7-8.

- 2.61 Examples of cases that may warrant CISs include cases of child sexual assault which have a broader community impact (for example, trust in institutions) and cases affecting certain groups within the community such as Aboriginal and Torres Strait Islander people who may experience particular exclusion from justice processes.
- 2.62 There may also be an incidental benefit for the offender arising from being able to listen to, consider and reflect on the impact of their crime, which often adversely affects the community to which that person belongs.

Problems with community impact statements

- 2.63 Some submissions did not support the introduction of CISs.⁷⁵
- 2.64 Reasons for not recommending CISs include:
- It is difficult to prove the information in such a statement.⁷⁶ The scope of harm to the community may be interpreted too widely and include harms like lowering property prices, which would also be difficult to prove.⁷⁷ Contested statements could lead to delays and consequent detriment to individual victims.⁷⁸
 - The information may be too generic. It is potentially unfair to place responsibility for the general impact of such offences on a particular individual's offending,⁷⁹ and very difficult to separate out an individual's impact, especially with prevalent offending.
 - Community harm is implied in the fact that parliament as the representative of the community has enacted the activity as a criminal offence.
 - A CIS, although potentially addressing a different type of harm to that covered by a VIS, may dominate the process and dilute the voice of victims who are directly affected by the crime.⁸⁰
 - With some groups the CIS may become political and it may be difficult to identify leaders of the relevant community.
- 2.65 More generally, it has been suggested that CISs may undermine the principle of consistent sentencing.⁸¹

Our conclusion

- 2.66 We do not recommend adopting any form of CIS in this report.

75. Director of Public Prosecutions (NSW), *Submission VI15*, 8-9; NSW Council for Civil Liberties, *Submission VI16*, 8-9; Law Society of NSW, *Submission VI17*, 6-7; NSW, Victims Services, *Submission VI21*, 6; Legal Aid NSW, *Submission VI22*, 10.

76. Director of Public Prosecutions (NSW), *Submission VI15*, 9.

77. A Webster, "Expanding the Role of Victims and the Community in Sentencing" (2011) 35 *Criminal Law Journal* 21, 23-26.

78. NSW, Victims Services, *Submission VI21*, 6.

79. NSW Council for Civil Liberties, *Submission VI16*, 8-9; Legal Aid NSW, *Submission VI22*, 10.

80. Director of Public Prosecutions (NSW), *Submission VI15*, 9.

81. K Long, "Community Input at Sentencing: Victim's Right or Victim's Revenge?" (1995) 75 *Boston University Law Review* 187, 225.

2.67 The courts currently recognise harm to the community caused by, for example, the following offences:

- supply of prohibited drugs: pointing, for example, to direct and indirect costs such as health costs and criminal damage and criminal behaviour⁸²
- domestic violence offences: recognising, for example, the impact on other family members and supporters of the victim and that such offending contributes to the subordination of women⁸³
- child sex offences: acknowledging, for example, the change in community attitudes and the long term impact of such offences,⁸⁴ and
- possession of child abuse material, as contributing to the general problem in the community arising from creating and distributing child pornography.⁸⁵

2.68 When the victim is part of an identifiable, vulnerable community, for example a victim of a gay hate crime, racially-motivated attack, or a victim of a school shooting, the court will usually have sufficient material from which to discern the impact on the community. The prosecutor can address these harms in submissions on sentence. An example of a court taking account of the impact on vulnerable communities without the need for a CIS addressing the issue may be found in a Supreme Court sentencing of an offender who murdered an elderly woman in her own home:

Finally, speaking of the community, and the harm the offender has caused to it, it is true that no victim impact statements from any members of the family of the deceased were placed before me. But it cannot be controversial that this offence has inflicted substantial harm on the community, above and beyond the fatal harm inflicted upon the deceased herself.

Quite apart from family and friends who loved the deceased and lost her in harrowing circumstances, it must surely be the case that people who lived near the deceased were unsettled and upset when they heard that an elderly woman had been strangled and suffocated to death in her own home. More broadly, I think that older members of the community who heard of the murder, even those living well away from Villawood, must have been frightened at the thought of what had occurred. And speaking even more generally, it must surely be seen as inflicting great harm upon the community when one of its members decides to murder another, plans and prepares for it, and thereafter does exactly that.⁸⁶

2.69 While there is value in acknowledging the wider community impacts of a crime, further consideration is required about how to inform the court about wider harm to the community. It is not appropriate to consider this question in a review of victims' involvement in the sentencing process, because it potentially goes beyond individual victims (however many) to considerations of wider community harm. This is fundamentally different to the purposes of a VIS which is intended to provide a forum for individual voices.

82. *Vu v R* [2006] NSWCCA 188 [129]; *R v Poon* [2003] NSWCCA 42, 56 NSWLR 284 [16]. See also *Zuffo v R* [2017] NSWCCA 187 [87]; *Taysavang v R* [2017] NSWCCA 146 [45]-[53].

83. *R v Hamid* [2006] NSWCCA 302, 164 A Crim R 179 [77].

84. *R v MJR* [2002] NSWCCA 129, 54 NSWLR 368 [57].

85. *RLS v R* [2012] NSWCCA 236 [134].

86. *R v Biljuh (No 7)* [2015] NSWSC 1917 [69]-[70].

3. Making, delivering and receiving victim impact statements

In brief

Victims should have more options around, and flexibility in, making and delivering a victim impact statement (“VIS”). In addition to recommendations to improve procedures, we recommend provisions designed to reduce the possibility of last minute objections to a VIS that may prove distressing or traumatising to victims.

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- 3.1 Procedures around making, delivering and receiving a victim impact statement (“VIS”) can have a significant impact on victims. Some may unnecessarily hinder victims from making a VIS and insufficient procedures may inadvertently re-traumatise the victim through the VIS process. Existing procedures support some victims more than others and create an arbitrary hierarchy among victims.
- 3.2 We considered ways to improve upon these procedures to better support all victims who wish to make a VIS. In this Chapter, we recommend providing all victims with more options around, and flexibility in, making and delivering a VIS. This would encourage victims to exercise their rights to have their voice heard in open court, thereby upholding the aims of victim-oriented reforms.

Making a VIS

Number of statements

3.1 Number of statements

A limit of one VIS should apply to each victim.

- 3.3 The *Crimes (Sentencing Procedure) Regulation 2017* (NSW) (“the Regulation”) currently provides that only one VIS may be tendered in respect of each primary victim and, where the primary victim has died as a result of the offence, each family victim.¹ There is otherwise no express limit on the number of victims who may make a VIS. We consider it is reasonable that there is a limit of one VIS to each victim but

1. *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 12(2).

no limit on the number of victims who may make a VIS in any one case. Submissions broadly support preserving the current position.²

- 3.4 We considered providing some limits on the number of victims who may make a VIS in any one case. However, imposing such limits would result in discriminating between, and creating an arbitrary hierarchy among victims, which would contradict the purpose of our recommendation to expand the definition of "victim" to enable victims who were previously unable to make a VIS to do so.³ Imposing such limits would also frustrate some victims' expectations and undermine the aim of providing all victims with a greater voice in court proceedings.
- 3.5 Our recommendation to expand the category of people who can make a VIS without limiting the number of victims who can make a VIS may increase the number of VISs made in any one case. However, we consider large numbers of VISs would only be submitted in unusual and serious cases and courts would be able to manage such an increase. For example, the Victorian Supreme Court recently sentenced an offender for the manslaughter of a victim whose death reportedly had a profound effect on a very large number of people in the area in which he and his family lived, and where he was educated and played football. In that case, the Court considered 93 VISs tendered from the family, friends and associates of the victim, including some very young people.⁴

Formal requirements of a VIS

3.2 Formal requirements of a VIS

There should be provision for victims to adopt a VIS other than by signing, including by electronic submission to the prosecutor.

- 3.6 We consider that existing formal requirements to be met before a VIS will be received or considered by the court are appropriate, but should be amended to allow victims to submit a VIS without signing it.
- 3.7 Existing formal requirements are that the VIS:⁵
- be in writing
 - be legibly typed or hand-written
 - be on A4 paper
 - be no longer than 20 pages (including annexures) unless the court gives leave for it to be longer

2. In support of limiting one VIS to each victim: Victims of Crime Assistance League Inc NSW, *Submission VI10*, 5; Law Society of NSW, *Submission VI17*, 10. In support of limiting one VIS to each victim and providing no limit on the number of victims: S Pour, *Submission VI2*, 26; NSW Council for Civil Liberties, *Submission VI16*, 12; Director of Public Prosecutions (NSW), *Submission VI15*, 15; NSW Bar Association, *Submission VI19*, 5.

3. Recommendation 2.1.

4. *R v Lee* [2017] VSC 678 [28].

5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30; *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 10-11.

- includes the full name of the person who made the statement and is signed and dated by that person, and
 - in the case of a family victim, identifies the primary victim and (“unless a relative by blood or marriage”) the nature and duration of the relationship with the primary victim (that is, most likely, a de facto partner or a foster child).
- 3.8 In practice, courts admit a VIS that fails to comply with these formal requirements (“non-complying VIS”) where it is tendered by consent or where the requirements are not pressed.⁶ For example, the Supreme Court recently admitted a non-complying VIS, which the deceased person’s father had not signed in circumstances where the defence did not object to its tender.⁷ Non-compliance with formal requirements should not prevent victims from having a voice in court proceedings in appropriate circumstances, and we support retaining this practice.
- 3.9 The requirement to sign a VIS is an unnecessary formal barrier for victims who are unable to sign documents or who live in remote areas and have trouble signing documents for delivery to court. A VIS is not a sworn document and formal requirements for a VIS should provide measures for regularity without creating barriers that compromise the aim to provide victims with a voice in court proceedings. Submissions broadly support this approach.⁸
- 3.10 We also considered allowing victims to make an oral VIS only. However, we do not support this option, chiefly because allowing victims to make an oral VIS that is not also in writing subverts procedures designed to ensure a VIS contains admissible content so that a victim is less likely to be cross-examined on their VIS at the sentencing hearing.⁹ An additional concern with an oral VIS is that it is less accessible than a written VIS and can only be accessed through contemporaneous notes or by obtaining a transcript of the sentencing proceeding. Submissions agree with these concerns and prefer maintaining existing requirements for writing.¹⁰

Making a VIS on behalf of victims

3.3 Making a VIS on behalf of victims

Provisions enabling people to make a VIS on behalf of victims who are incapable of providing information for a VIS because of age, impairment or otherwise, should be amended to:

- (a) enable the victim’s carer and other important people in the victim’s life to make a VIS on the victim’s behalf, and

6. See, eg, *R v Barlow* [2015] NSWDC 422 [75].

7. *R v Hadchiti* [2017] NSWSC 292 [41].

8. NSW Office for Police and NSW Police Force, *Submission VI11*, 10-11; NSW Council for Civil Liberties, *Submission VI16*, 14; Law Society of NSW, *Submission VI17*, 10-11; Legal Aid NSW, *Submission VI22*, 19; NSW Bar Association, *Submission VI19*, 5-6; and specifically in support of enabling electronic submission of a VIS: Director of Public Prosecutions (NSW), *Submission VI15*, 16; NSW, Victims Services, *Submission VI21*, 12.

9. See [4.26]-[4.36].

10. S Pour, *Submission VI2*, 21; NSW Office for Police and NSW Police Force, *Submission VI11*, 12; Director of Public Prosecutions (NSW), *Submission VI15*, 18; NSW Council for Civil Liberties, *Submission VI16*, 14; Law Society of NSW, *Submission VI17*, 12; NSW Bar Association, *Submission VI19*, 6; Legal Aid NSW, *Submission VI22*, 19.

- (b) clarify that any person making a VIS on the victim's behalf may also make their own VIS if they are otherwise eligible to do so.

- 3.11 Currently, the following people may make a VIS on behalf of victims who cannot provide information for a VIS because of "age, impairment or otherwise":
- a person with parental responsibility for the victim
 - a member of the victim's immediate family
 - any other representative, subject to the regulations.¹¹
- 3.12 We do not intend to recommend any substantial changes to the existing provision. Many submissions broadly support preserving the current position,¹² or do not raise concerns with it. However, in response to some concerns, we recommend amending the existing provision to better support victims, by:
- expanding the category of people who may make a VIS on the victim's behalf to include the victim's carer and other important people in the victim's life,¹³ and
 - for the avoidance of any doubt, clarifying any person making a VIS on the victim's behalf may also make their own VIS if they are eligible to do so.

Procedures on tendering, providing and receiving a VIS

- 3.13 Some current procedures concerning the tender, provision and receipt of a VIS in court contain anomalies, or are not prescribed in legislation and lack transparency. For example:
- Section 28(5) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the Act") provides that a court may make a VIS available to the prosecutor, offender or any other person. This appears to contemplate someone other than the prosecutor tendering a VIS to the court. However, this creates an anomalous situation, as it is accepted practice and prescribed in the Regulation that only the prosecution may tender a VIS to the court.¹⁴
 - Although a court may make a VIS available to the offender,¹⁵ there is no legislative requirement to give notice of a VIS to the defence prior to tendering it in court.
 - Although a court may make a VIS available to the offender subject to any conditions it considers appropriate,¹⁶ there is no legislative requirement governing the broader retention, use or dissemination of a VIS by the defence (except for a mandatory condition preventing the offender from retaining copies of a VIS).

11. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30(2).

12. Law Society of NSW, *Submission VI17*, 12; Legal Aid NSW, *Submission VI22*, 19-20.

13. NSW Office for Police and NSW Police Force, *Submission VI11*, 12; Director of Public Prosecutions (NSW), *Submission VI15*, 18-19; Legal Aid NSW, *Submission VI22*, 19-20.

14. *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 12(1).

15. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(5).

16. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(5).

Who can tender a VIS

3.4 Who can tender a VIS

The *Crimes (Sentencing Procedure) Act 1999* (NSW) should provide that only the prosecution may tender a VIS.

- 3.14 We recommend maintaining the current practice that only the prosecution may tender a VIS.¹⁷ The Act should be amended to prescribe this, and consequential amendments should be made to s 28(5) of the Act and cl 12(1) of the Regulation.¹⁸ Submissions support this approach.¹⁹
- 3.15 We considered providing victims or a victims' representative an independent role in tendering a VIS. However, it is appropriate that the prosecution alone can tender a VIS for the following reasons:
- The prosecution, as the representative of the community in criminal proceedings, has a unique role in obtaining victim details, establishing and maintaining relationships with victims, and ensuring the content of a VIS complies with formal requirements and is in an admissible form.²⁰
 - Allowing only the prosecution to tender a VIS will help to manage and prevent any possibility of re-traumatising the victim through the VIS process.
 - Limiting a victim's direct contact with the offender complies with the Charter of Victims Rights, which upholds victims' rights to be protected from contact with the accused.²¹

Notice of, and access to a VIS by the defence

3.5 Notice of, and access to a VIS by the defence

The *Crimes (Sentencing Procedure) Act 1999* (NSW) should expressly allow that, prior to the sentencing hearing:

- (1) the prosecution may provide a copy of a VIS to the offender's lawyer (in the case of represented offenders), and
- (2) the court may provide supervised access to a VIS to the offender (in the case of an unrepresented offenders).

- 3.16 In practice, many DPP solicitors and Crown Prosecutors will serve VISs on the offender's lawyer before the sentencing hearing to allow them time to consider any objections to its content. This practice upholds principles of due process and

17. *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 12(1).

18. See [3.13] above.

19. Chief Justice of NSW, *Submission VI1*, 1; NSW Office for Police and NSW Police Force, *Submission VI11*, 11; NSW Council for Civil Liberties, *Submission VI16*, 13; Director of Public Prosecutions (NSW), *Submission VI15*, 16; Law Society of NSW, *Submission VI17*, 11; NSW Bar Association, *Submission VI19*, 6; NSW, Victims Services, *Submission VI21*, 12; Legal Aid NSW, *Submission VI22*, 18.

20. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) Guideline 19.

21. *Victims Rights and Support Act 2013* (NSW) s 6.11.

minimises the possibility of further trauma upon the victim by being cross-examined on their VIS at the sentencing hearing.

- 3.17 We recommend the Act should expressly allow for notice of a VIS to be given to the defence. A number of submissions support improving upon, or legislating, this practice.²² This recommendation is supported by our recommendation for guidelines to be developed detailing the desirable timeframes for notice of the content of a VIS.²³ We recommend the following two separate notice arrangements:
- In the case of represented offenders, the prosecution may provide a copy of a VIS to the offender's lawyers.²⁴
 - In the case of unrepresented offenders, the court should provide supervised access to a VIS.²⁵ We note in these cases it may not be possible to adhere to the desirable timeframes outlined in Recommendation 4.7.
- 3.18 The *Criminal Procedure Act 1986* (NSW) provides an example of a provision allowing an accused restricted access to sensitive evidence.²⁶ These provisions allow the prosecution to specify the conditions under which the sensitive information may be made available and to supervise the access. However, as we consider it undesirable for the prosecution to supervise an unrepresented offender in such circumstances, we have proposed that, in the case of unrepresented offenders, the court should be responsible for managing supervised access to a VIS.

Prohibiting the defence from retaining, copying or disseminating a VIS

3.6 Prohibition against retaining, copying or disseminating a VIS

The defence should be prohibited from retaining, copying or disseminating a VIS. Any copy of a VIS must be returned to the prosecution or the court at the conclusion of the sentencing hearing.

- 3.19 Currently, the court may make a VIS available to the offender with conditions, as it considers appropriate, including a mandatory condition preventing the offender from retaining copies of a VIS.²⁷ There is otherwise no legislation governing the broader retention, use or dissemination of a VIS by the defence.
- 3.20 A VIS can contain highly personal information. Some offenders may retain VISs as "trophies" or disseminate a VIS with the intention of further harming the victim. We therefore recommend the defence be prohibited from retaining, copying or disseminating a VIS, and be required to return all copies to the prosecution or the

22. S Pour, *Submission VI2*, 20-21; Senior Public Defender, *Submission VI3*, 1, 2; Director of Public Prosecutions (NSW), *Submission VI15*, 14-15; NSW Council for Civil Liberties, *Submission VI16*, 12; NSW Bar Association, *Submission VI19*, 4-5; NSW, Victims Services, *Submission VI21*, 10; Legal Aid NSW, *Submission VI22*, 17.

23. Recommendation 4.7.

24. NSW Office for Police and NSW Police Force, *Submission VI11*, 10.

25. Director of Public Prosecutions (NSW), *Submission VI15*, 14-15.

26. *Criminal Procedure Act 1986* (NSW) ch 6 pt 2A.

27. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(5).

court once the sentencing hearing has finished. Submissions broadly support such a requirement.²⁸

Special arrangements for reading a VIS

3.7 Special arrangements for reading a VIS

- (1) All special arrangements that are available for victims of prescribed sexual assault offences in a court should be made available, upon request and with the leave of the court, to victims reading a VIS.
- (2) All victims should be entitled to have a support person present in court and seated close to them.
- (3) It should also be possible for a victim to read out a written VIS by pre-recorded media.
- (4) Victims should be afforded an opportunity, where practicable, to familiarise themselves with the courtroom.

3.21 Once a court receives a VIS, the victim or a victim's representative may read it aloud before the offender is sentenced.²⁹ Only victims of particular offences have access to special arrangements to read a VIS aloud in court. For example:

- A victim may read a VIS by closed-circuit television (CCTV) in proceedings relating to: a prescribed sexual offence; an apprehended violence order, if the defendant is charged with a prescribed sexual offence and the protected person who wishes to make the VIS is the alleged victim of that offence; or, in certain circumstances, a child or a person with cognitive impairment.³⁰
- A VIS must be read in closed court unless the court directs otherwise in proceedings for a prescribed sexual offence.³¹
- A victim, in prescribed sexual offence proceedings, is entitled to have a support person of their choosing to be "present near the victim, and within the victim's sight". The person may include "a parent, guardian, relative, friend or support person of the victim or a person assisting the victim in a professional capacity".³²

3.22 There is no reason to provide special arrangements for reading a VIS to some victims but not others. All VISs are likely to contain highly personal information, and by making and reading a VIS, a victim may open themselves to embarrassment and further trauma and distress. Delivering a VIS in the offender's presence in a foreign and intimidating courtroom presents additional pressures for the victim.

3.23 We therefore recommend that existing special arrangements available to victims of prescribed sexual assault offences are made available to all victims for reading out a VIS. This would provide all victims with the greatest level of special arrangements

28. NSW Office for Police and NSW Police Force, *Submission VI11*, 12; Director of Public Prosecutions (NSW), *Submission VI15*, 15; NSW Bar Association, *Submission VI19*, 5.

29. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A(1)-(2).

30. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A(3), s 30A(4); *Criminal Procedure Act 1986* (NSW) s 294B, s 306M definition of "vulnerable person", ch 6 pt 6 div 4.

31. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A(3A).

32. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A(3C).

available, for example, being able to read a VIS by CCTV and in closed court, and having a support person present in court and seated close to them. However, because many of these arrangements (excluding the use of a support person) may not benefit all victims but will impact the court's resources, those arrangements should only be available at the victim's request and with the court's leave. Submissions broadly support this approach.³³

3.24 We also recommend providing for the following additional special arrangements:

- Enabling a VIS to be read by pre-recorded media. The prosecution and defence should review the VIS before making a pre-recording to ensure the contents of the pre-recording will not be subject to objection and amendment, which could cause technical difficulties and delay. South Australia has a similar provision, which enables the use of prerecording and replaying evidence.³⁴ Submissions broadly support this approach.³⁵
- Providing victims with an opportunity to familiarise themselves with the courtroom before the hearing. This arrangement should only be available where practicable, as in some cases, practical considerations may hinder or obstruct court access (for example, inadequate security and staffing). Submissions broadly support this approach.³⁶

3.25 We do not propose to restrict a victim's existing entitlement to read their VIS in court to address concerns raised about its potential harm on vulnerable offenders (for example, children or people who are mentally ill).³⁷ Courts are sufficiently equipped at common law to manage those vulnerabilities through their inherent or implied power to control proceedings brought in their jurisdiction to avoid abuse of process or injustice.³⁸ For example, if a situation arose where a vulnerable offender is clearly becoming significantly distressed when a VIS is being read, the court may attempt to resolve the situation in consultation and agreement with parties.

3.26 We also do not propose to restrict the use of a VIS outside of a sentencing hearing. We consider existing non-publication and suppression rules³⁹ sufficiently balance the use of sensitive material against the principle of open justice.

33. K Braun, *Submission VI4*, 7-8; Victims of Crime Assistance League Inc NSW, *Submission VI10*, 7; NSW Office for Police and NSW Police Force, *Submission VI11*, 11; F Tait, *Submission VI12*, 7; Police Association of NSW, *Submission VI13*, 5; Director of Public Prosecutions (NSW), *Submission VI15*, 17; Law Society of NSW, *Submission VI17*, 11; Women's Domestic Violence Court Advocacy Service NSW Inc, *Submission VI18*, 5; NSW, Victims Services, *Submission VI21*, 2, 12-13; Legal Aid NSW, *Submission VI22*, 18-19; SA, Commissioner for Victims' Rights, *Submission VI23*, 14.

34. *Evidence Act 1929* (SA) s 13A(2).

35. Victims of Crime Assistance League Inc NSW, *Submission VI10*, 7; NSW Office for Police and NSW Police Force, *Submission VI11*, 11; F Tait, *Submission VI12*, 7; Police Association of NSW, *Submission VI13*, 5; Director of Public Prosecutions (NSW), *Submission VI15*, 17; NSW, Victims Services, *Submission VI21*, 12-13; Legal Aid NSW, *Submission VI22*, 19; SA, Commissioner for Victims' Rights, *Submission VI23*, 14; Elizabeth Evatt Community Legal Centre, *Submission VI7*, 4.

36. F Tait, *Submission VI12*, 7; Director of Public Prosecutions (NSW), *Submission VI15*, 17; Law Society of NSW, *Submission VI17*, 11.

37. R Wade, *Preliminary submission PV17*, 1-2.

38. *Assistant Commissioner Condon v Pompano Pty Ltd* [2013] HCA 7, 252 CLR 38 [40]-[41]; *Grassby v R* (1989) 168 CLR 1, 16.

39. *Court Suppression and Non-publication Orders Act 2010* (NSW).

4. Content, admission and use of victim impact statements

In brief

In this chapter we address what should be included in a victim impact statement (“VIS”) and what should be prohibited. We make recommendations about the use that the court and the prosecution can make of a VIS. We also recommend placing limits on when the defence can cross-examine a victim on their VIS.

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Content of a VIS

4.1 Content of a VIS

A VIS may address personal harms arising from the offences.

- 4.1 This recommendation concerns the type of harm which a victim may describe in their victim impact statement (“VIS”). Currently, the type of harm which a VIS may address depends on whether its author is a primary or a family victim. A VIS from a primary victim may address “any personal harm suffered by the victim as a direct result of the offence” and a VIS from a family victim may address “the impact of the primary victim’s death on the members of the primary victim’s immediate family”.¹
- 4.2 “Personal harm” is currently limited to “actual physical bodily harm or psychological or psychiatric harm”.² In Chapter 2 we recommended a new definition of “personal harm” which includes economic harm arising from personal harms (for example, loss of income due to physical injury), and in cases where a victim has died, the impact of the victim’s death on his or her immediate family. Submissions were largely in favour of expanding the definition of personal harm to broaden the

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of “victim impact statement”.
2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of “personal harm”.

admissible content of a VIS.³ Victims Services submitted that the “current limitations imposed by the legislative provisions are a barrier to the full and honest participation of the victim in the criminal justice process”.⁴

- 4.3 In light of our broader definition of “personal harm,” we recommend that the legislation prescribe that a VIS may address the various personal harms suffered by a victim. Our recommendation aligns the law in NSW with other Australian jurisdictions.⁵ Under our recommendation, both primary and family victims may include details of personal harms in their respective statements. A VIS may include particulars of how the victim’s interaction with the criminal justice system has caused personal harm, for example psychological harm from re-traumatisation or emotional suffering from the uncertainty of the trial process.
- 4.4 While we have expanded the definition of personal harm, we anticipate that the courts will continue to take a flexible approach to its interpretation, assisted by submissions from the bar table. Recently, the Supreme Court of NSW concluded that the term “impact”, in “victim impact statement”, “should not be construed narrowly” and might extend to “the thought processes of the victims which, at times, may involve strong feelings with respect to the perpetrator, and what (in their view) may have motivated the perpetrator”.⁶ We support this approach as there should be some allowance for a victim to express his or her story without the overly prescriptive editing of their statement. We see this as consistent with the function of sentencing to “recognise the harm done to the victim of the crime and the community”.⁷

What a VIS must not include

4.2 What a VIS must not include

A VIS must not include:

- (a) material that is offensive, threatening, intimidating or harassing, or
- (b) views about the sentence to be imposed, or the matters that the sentencing judge should take into account.

- 4.5 Currently, the *Crimes (Sentencing Procedure) Regulation 2017* (NSW) prohibits the inclusion of any offensive, threatening, intimidating or harassing material in a VIS.⁸ There was broad support in submissions for retaining this prohibition,⁹ although

3. Police Association of NSW, *Submission VI13*, 3; J A Roffee and H Lynch, *Submission VI14*, 2; Director of Public Prosecutions (NSW), *Submission VI15*, 6-7, 9; NSW Council for Civil Liberties, *Submission VI16*, 7, 9; Law Society of NSW, *Submission VI17*, 5, 7; NSW, Victims Services, *Submission VI21*, 6-7; Legal Aid NSW, *Submission VI22*, 10-11.

4. NSW, Victims Services, *Submission VI21*, 7.

5. *Crimes (Sentencing) Act 2005* (ACT) s 47 definition of “harm”; *Sentencing Act* (NT) s 106A definition of “harm”; *Penalties and Sentences Act 1992* (Qld) s 179I definition of “harm”; *Criminal Law (Sentencing) Act 1988* (SA) s 7A(1); *Sentencing Act 1997* (Tas) s 81A(2); *Sentencing Act 1991* (Vic) s 8L(1); *Sentencing Act 1995* (WA) s 23A definition of “personal harm”.

6. *R v Turnbull (No 24)* [2016] NSWSC 830 [8].

7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g).

8. *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 11(6).

9. Senior Public Defender, *Submission VI3*, 2; J A Roffee and H Lynch, *Submission VI14*, 2; Director of Public Prosecutions (NSW), *Submission VI15*, 9-10; NSW Council for Civil Liberties, *Submission VI16*, 9; Law Society of NSW, *Submission VI17*, 7; NSW Bar Association,

some noted that courts have exercised a degree of latitude in its interpretation.¹⁰ Chief Justice Bathurst expressed the view that there should not be any legislative restraint on the sentencing judge's discretion to remove any material from a VIS which is "irrelevant, inflammatory or insulting".¹¹

- 4.6 Some submissions supported a provision prohibiting comment on the appropriate penalty for an offender.¹² In Western Australia, a VIS is "not to address the way in which or the extent to which the offender ought to be sentenced".¹³ We have included a recommendation to similar effect to make this clear to victims and to assist with managing expectations about what a VIS can achieve.

Non-complying content

4.3 Non-complying content

The court should not have regard to anything in a VIS that goes beyond a statement of the "personal harm" caused to the victim as a direct result of the relevant offence.

- 4.7 There may be circumstances in which a VIS is not consistent with the charges for which the offender has been convicted either because the harm arises from uncharged offences or because the conviction is the result of negotiated charges.¹⁴ This is a problem because of the principle that, when sentencing an offender, a court may not take into account any aggravating circumstances which would have warranted a conviction for a more serious offence.¹⁵ Chief Justice Gleeson has highlighted some of the problems that arise when a VIS refers to offending other than that involved in the offences that have been proved:

[I]t will often be impossible to separate consideration of the impact upon the victim of the events, as he or she describes them, from consideration of what the impact might have been, absent the aggravating features of the case. Indeed, in many cases, as in the present, any attempt to do that would be hopelessly artificial.¹⁶

- 4.8 In some cases, the courts have exercised discretion not to consider a VIS where the injuries go beyond what is set out in the agreed statement of facts or the

Submission VI19, 2; NSW, Victims Services, *Submission VI21*, 7; Legal Aid NSW, *Submission VI22*, 11; SA, Commissioner for Victims' Rights, *Submission VI23*, 11.

10. See F Tait, *Submission VI12*, 5; Legal Aid NSW, *Submission VI22*, 11; NSW, Victims Services, *Submission VI21*, 7.
11. Chief Justice of NSW, *Submission VI1*, 1.
12. NSW Office for Police and NSW Police Force, *Submission VI11*, 6 – 7; NSW Council for Civil Liberties, *Submission VI16*, 9; Law Society of NSW, *Submission VI17*, 7; NSW Bar Association, *Submission VI19*, 2.
13. *Sentencing Act 1995* (WA) s 25(2).
14. See, eg, *PWB v R* [2011] NSWCCA 84, 216 A Crim R 305 [53]. T Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) [6.1.2].
15. *R v De Simoni* (1981) 147 CLR 383, 389-390 (Gibbs CJ).
16. *R v Bakewell* (Unreported, NSWCCA, 27 June 1996) 9 (Gleeson CJ). See also *FV v R* [2006] NSWCCA 237 [41].

consequences described arise from offending other than that charged.¹⁷ However, this can prevent victims from telling their story.

- 4.9 Our recommendations seek to encourage the timely preparation of a VIS to reduce the possibility of its including material which does not relate to “personal harm”, is not relevant to the offender’s convictions, nor is offensive. As the Director of Public Prosecutions (“DPP”) notes, informing victims about the outcome of plea negotiations, for example if certain charges have been dropped, and that uncharged acts cannot be a factor in sentencing, can assist with ensuring a victim prepares a compliant VIS.¹⁸ Additionally, adequate consultation between prosecution and defence counsel prior to sentencing should ensure that a VIS is in admissible form. We have recommended that notice of, and access to, a VIS be given to the defence prior to the sentencing hearing, by the prosecution or the court, as applicable.¹⁹
- 4.10 We recognise that there are circumstances in which it will be almost impossible for a victim to articulate the impact of a crime without alluding to uncharged acts, for example, in circumstances of ongoing domestic violence. In those cases, we recommend that the court receive the VIS but not have regard to any content which goes beyond the charges on which the offender is being sentenced. We expect that judicial discretion in such circumstances will be effective in ensuring fairness to the offender and appropriate outcomes for the victim.

Court’s use of a VIS

4.4 Court must receive and acknowledge a VIS

A court must receive, acknowledge and consider a VIS, in appropriate form, and may make any comment on it that the court considers appropriate.

- 4.11 Currently, the *Crimes (Sentencing Procedure) Act 1999* (NSW) (“the Act”) sets out what a court may do with a VIS:
- in the case of a VIS relating to a primary victim, the court may receive and consider the VIS,²⁰ and
 - in the case of a VIS from a family victim, the court must receive and acknowledge the VIS and may make any comment on it, that the court considers appropriate.²¹
- 4.12 The legislation requires the court to receive and acknowledge a VIS from a family victim while the court can exercise its discretion to receive a VIS from a primary victim. This distinction exists to ensure that the family of a person who has died as the result of a crime has their grief publicly acknowledged and is guaranteed the opportunity to tell the court about the impact of the crime.²²

17. See, eg *Inspector Cook v State of New South Wales (NSW Police Force)* [2013] NSWIRComm 114 [88]-[93].

18. Director of Public Prosecutions (NSW), *Submission VI15*, 2.

19. Recommendation 3.5.

20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(1).

21. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(3).

22. See NSW, *Parliamentary Debates*, Legislative Council, 21 November 1996, 6386.

- 4.13 However, we recommend this distinction is removed and that a court is required to receive, acknowledge and consider an admissible VIS, in appropriate form, in all cases. This would better ensure that all victims are given a voice and that those victims who prepare a VIS are not re-traumatised by having it refused by the court. Requiring courts to acknowledge a VIS ensures that judges recognise victims and the family of any deceased, in the sentencing process.

Managing victim expectations

- 4.14 Many of the criticisms raised about the VIS process relate to victim misunderstanding about a VIS's potential to affect sentencing outcomes.²³ Informing victims that a VIS is one of many factors that a court must consider in reaching a sentencing decision might assist with managing victim expectations. We suggest implementing procedures to ensure that victims are aware of how the court will deal with a VIS, the impact a VIS can have on sentence, and the consequences of using a VIS to prove aggravating circumstances (for example, cross-examination and re-traumatisation). We discuss this further in Chapter 5.

Where a victim has died

- 4.15 In 2014, a provision was introduced into the Act to allow the sentencing court, where it considers it appropriate to do so, to consider and take into account a family member's VIS on the basis that the harmful impact described is an aspect of harm done to the community.²⁴ The DPP described this provision as codifying "an existing practice whereby it was taken as fact that the community was harmed by an unlawful death".²⁵ Recognising the harm done to the community is one of the purposes of sentencing identified in the Act.²⁶
- 4.16 There has been a variety of judicial responses to this provision. For example, some judges have applied the provision, emphasising that a VIS can give specific support to the proposition that every unlawful taking of life harms the community in some way.²⁷ Other judges have rejected prosecution applications to use the provision on the basis that it amounts to "double counting" of the factors going to sentence.²⁸ Nonetheless, the application of the provision by the courts, when considered appropriate, suggests that the objectives of the amendment are being achieved in so far as making it possible for VISs to impact sentencing where a victim has died.
- 4.17 Submissions identified a lack of consistency in the application of the provision and pointed to the absence of guidance on what amounts to "appropriate" use of a

23. People with Disability Australia, *Submission VI9*, 4; Law Society of NSW, *Submission VI17*, 2; Women's Domestic Violence Court Advocacy Service NSW Inc, *Submission VI18*, 2 – 3; Homicide Victims Support Group, *Submission VI20*, 11; NSW, Victims Services, *Submission VI21*, 1; Legal Aid NSW, *Submission VI22*, 4.

24. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(4).

25. Director of Public Prosecutions (NSW), *Submission VI15*, 11.

26. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g).

27. *R v Turnbull* (No 26) [2016] NSWSC 847 [159]–[161]; *R v Crickitt* (No 2) [2017] NSWSC 542 [40]; *R v Hines* (No 3) [2014] NSWSC 1273 [75]–[76], [78]–[85]; *R v Do* (No 4) [2015] NSWSC 512 [50]; *R v Pluis* [2015] NSWSC 320 [103].

28. *R v Anderson* [2016] NSWSC 399 [105]. See also NSW Sentencing Council, *Victims' Involvement in Sentencing*, Consultation Paper (2017) [4.32]–[4.40] for a discussion of the different approaches taken in relation to this provision.

family victim VIS.²⁹ The Law Society of NSW noted that “appropriate” use will depend on the facts and circumstances of each case.³⁰ The approach currently taken by the courts reflects this interpretation which we see as satisfactory. There was limited comment in submissions regarding this provision³¹ and we do not recommend any changes.

Judicial discretion in sentencing

- 4.18 The legislation does not provide any further guidance on how a court should use or apply a VIS once it is received, nor has the common law arrived at a consensus.³² The NSW Court of Criminal Appeal has observed that a VIS can be “material upon which the sentencing judge can rely in determining the appropriate sentence”.³³ However, the Court has also cautioned against allowing a VIS to interfere with the “proper exercise of the sentencing discretion” noting that a crime is a wrong committed against the community rather than a private matter.³⁴
- 4.19 We recognise the importance of judicial discretion in sentencing, particularly a court’s ability to take into account the individual circumstances of each case. In light of this, we prefer allowing the common law to develop guidance in terms of how a court may use a VIS rather than constrain the court through legislative mandate.
- 4.20 However, the court’s use of a VIS can become particularly contentious when the prosecution seeks to tender it as evidence of aggravating circumstances in sentencing.³⁵ The NSW Court of Criminal Appeal has accepted a VIS as evidence going to the assessment of the gravity of an offence in circumstances where it is supported by other admissible evidence.³⁶ We have considered this issue in further detail below.

Adducing evidence of aggravating circumstances

4.5 Adducing evidence of aggravating circumstances

Wherever possible, evidence of aggravating circumstances should be adduced through evidence outside of the VIS process, by tendering relevant statements or expert reports.

- 4.21 Section 21A(2) of the Act sets out a list of aggravating factors which may be taken into account by the court in determining the appropriate sentence for an offence. This includes that the “the injury, emotional harm, loss or damage caused by the

29. Director of Public Prosecutions (NSW), *Submission VI15*, 11; NSW Council for Civil Liberties, *Submission VI16*, 10; NSW, Victims Services, *Submission VI21*, 8.

30. Law Society of NSW, *Submission VI17*, 8.

31. See Homicide Victims Support Group, *Submission VI20*, 4; NSW Council for Civil Liberties, *Submission VI16*, 10.

32. See *R v Tuala* [2015] NSWCCA 8, 248 A Crim R 502 [51]. See also *R v Thomas* [2007] NSWCCA 269 [36].

33. *R v Thomas* [2007] NSWCCA 269 [36]. See also *R v Slack* [2004] NSWCCA 128 [60]-[61]; *R v MJB* [2014] NSWCCA 195 [52]-[53].

34. *R v Palu* [2002] NSWCCA 381, 134 A Crim R 174 [37].

35. *Consultation VIC1*.

36. *R v Wilson* [2005] NSWCCA 219 [29]; *R v MJB* [2014] NSWCCA 195 [53]. See also *Muggleton v R* [2015] NSWCCA 62, 250 A Crim R 180; *Bajouri v R* [2016] NSWCCA 20.

offence was substantial”.³⁷ Usually, evidence of aggravating circumstances is found in the evidence adduced at trial, in witness statements and/or in expert reports. However, there may be circumstances in which the VIS may be the only available evidence of an aggravating factor, for example, that the emotional harm caused by the offence was substantial. The DPP notes that this sort of evidence may be difficult to corroborate or express in a different form.³⁸ The courts have observed that considerable caution must be exercised before a VIS can be used to establish an aggravating factor to the requisite standard.³⁹

- 4.22 Justice Simpson has observed that issues about the use of a VIS will arise where “the harm which the statement asserts goes well beyond that which might ordinarily be expected of that particular offence”, or where the content of the VIS “is the only evidence of harm”.⁴⁰ Similarly, Justice Hoeben has said that where a VIS describes consequences going “beyond that which would normally be expected”, more than “an uncritical acceptance” of the VIS is required.⁴¹
- 4.23 To ensure clarity and align the statutory requirements with the common law, we recommend that the prosecution be encouraged, wherever possible, to adduce evidence of aggravating circumstances outside of the VIS process. This might be done by way of expert report, witness statement or evidence already adduced at trial. Our recommendation is intended to encourage practices that ensure that a VIS can effectively provide victims with a voice in court without the VIS becoming a contested element of the sentencing process.
- 4.24 We note that this recommendation is limited to those situations where a VIS refers to some substantial harm that the prosecution seeks to advance as an aggravating factor in sentencing. We recognise that it would be detrimental to victims to require that all harm referred to in a VIS be corroborated outside of the VIS process.⁴² We anticipate that, if the DPP adopts the practice of adducing evidence of aggravating circumstances by other means, where possible, it will encourage victims to focus their VISs on the specific types of harm which they have encountered as a result of the offence. We anticipate that this will arise in only limited cases such that it might be dealt with through judicial discretion.

Absence of a VIS

4.6 Absence of a VIS

The court must not draw any inference about the harm suffered by a victim from the fact that a VIS is not given to the court.

- 4.25 Currently, the Act provides that “absence of a victim impact statement does not give rise to an inference that an offence had little or no impact on a victim”.⁴³ We recommend strengthening the current provision by changing its language to provide

37. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(g).

38. Director of Public Prosecutions (NSW), *Submission V115*, 12.

39. See, eg, *R v Tuala* [2015] NSWCCA 8, 248 A Crim R 502; *RP v R* [2013] NSWCCA 192, 234 A Crim R 272 [28]; *R v Singh* [2006] QCA 71, 8.

40. *R v Tuala* [2015] NSWCCA 8, 248 A Crim R 502 [80].

41. *EG v R* [2015] NSWCCA 21 [36]; see also *R v Slack* [2004] NSWCCA 128 [62].

42. See Director of Public Prosecutions (NSW), *Submission V115*, 12.

43. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 29(3).

that the Court is prohibited from drawing “any inference” from the absence of a VIS. This wording is based on provisions in the relevant ACT and Northern Territory legislation⁴⁴ and seeks to eliminate any pressure on victims to make a statement. We note that it is open to the Court to make conclusions about the harm experienced by a victim through other evidence.

Practice notes and guidelines

4.7 Practice surrounding the making, presentation and reception of a VIS

The prosecution and courts should adopt non-mandatory guidelines, for practice and procedure surrounding the making, presentation and reception of a VIS, to the following effect:

If there is at least 10 working days' notice of a sentencing hearing and the victim wishes to make a VIS, the following procedures should be followed, if possible:

- (a) The prosecutor should ensure that the victim receives appropriate advice and support about making a VIS.
- (b) The VIS should be available for review by the prosecutor at least 6 working days before the hearing.
- (c) The prosecution should review the VIS and suggest any amendments to ensure it complies with requirements as to content and form.
- (d) At least 4 working days before the hearing, the prosecution should serve a copy of the VIS on the defence (subject to restrictions on copying and distribution) and advise whether:
 - (i) it intends to use the VIS to establish an aggravating factor; and/or
 - (ii) it intends to make an application under s 28(4) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) for a family victim VIS to be considered and taken into account by the court in connection with the determination of the punishment for the offence.
- (e) At least 2 working days before the hearing, the defence should advise the prosecution of the basis of any objections to the content of the VIS and whether it intends to cross-examine the victim.
- (f) The prosecution may, if it considers it appropriate, present the VIS to the court.
- (g) The court should hear any submissions as to any unresolved objections on the content of the VIS.
- (h) If the prosecution presents a VIS, the court must receive it and hear any submissions on its use.

- 4.26 We recommend that the courts, through consultation with the DPP, establish a set of guidelines relating to the process of making and receiving a VIS. There was support for this in submissions and during consultation.⁴⁵ The guidelines should be non-mandatory and used as a model of best practice. In some Australian

44. *Crimes (Sentencing) Act 2005* (ACT) s 53(1)(b); *Sentencing Act* (NT) s 106B(6).

45. See NSW Office for Police and NSW Police Force, *Submission VI11*, 8-9; Law Society of NSW, *Submission VI17*, 2; *Consultation VIC1*.

jurisdictions, the VIS process has been formalised through practice notes⁴⁶ or court rules.⁴⁷ We note that similar approaches in NSW could improve the accessibility and consistency of the VIS process.

- 4.27 We heard during consultation that some victims cannot comply with strict time frames for providing a VIS because they may have difficulty writing the VIS or lack access to technology.⁴⁸ For this reason, we recommend that a timeline for production of a VIS is used as a guide only and not as a barrier to victim participation in proceedings. In circumstances where there is non-compliance with the guidelines, the VIS process should not serve to re-traumatise the victim. Nor should the offender be prejudiced by an inadequate opportunity to review a VIS or make submissions regarding its content. The court and the parties will need to strike a balance between these interests.
- 4.28 We see guidelines such as the above as having the potential to improve the VIS process even where they are not mandatory. If the majority of matters can follow the guidelines, this will relieve pressure on courts and parties to deal with any problematic VISs at the last minute. A best practice model may also promote consistency and effective use of resources including by encouraging parties to seek an adjournment if an admissible VIS will not be available in time for the sentencing hearing. At the very least, we expect that the implementation of guidelines will set expectations for practice and procedure around the VIS process.⁴⁹
- 4.29 The timeline, which we have included in our recommendation, aims to ensure that parties have sufficient time to review and consult on a VIS so that it is in admissible form prior to the sentencing hearing. Victims and parties should be encouraged, where possible, to meet the timeline earlier than specified.
- 4.30 However, we expect that the time frames specified in our recommended guidelines will not be feasible where there is a fast turnover of cases, for example, in many Local Court matters or in some District Court matters where there has been a guilty plea. In such cases it might also be impractical to engage in a process of consultation and notification about the VIS prior to sentencing. Additionally we anticipate that implementing the guidelines might cause delays or reduce the efficiency with which courts can discharge cases. While all courts should be encouraged to adhere to the guidelines, we acknowledge that it might not be possible in all circumstances.
- 4.31 We note there is some debate about who should be responsible for drawing the attention of victims to information about their entitlements in the VIS process.⁵⁰ We see prosecutors as being best placed to perform this role because of their access to victims and oversight of case conduct. While this primarily concerns police prosecutors and the DPP, we note in certain cases it might include other prosecuting authorities such as SafeWork NSW.
- 4.32 We also considered whether a victim should be invited to prepare a VIS before the accused being convicted in order to accommodate situations where a victim may

46. See for example Supreme Court of Victoria, *Practice Note SC CR 4 – Sentencing Hearings* (2017) [4.6]-[4.9].

47. See for example *Supreme Court Criminal Rules 2014* (SA) r 90-91.

48. *Consultation VIC1*.

49. This was suggested during *Consultation VIC1*.

50. *Consultation VIC1*.

receive insufficient notice of the sentencing hearing. However, we see this approach as problematic for two main reasons:

- The impact of the crime on the victim may change over time, especially if there are delays in reaching trial, so it is likely a victim will need to revise their VIS before sentencing.
- There may be changes to the charges against the accused, the accused might enter a plea, and/or the accused might be found not guilty. This would result in the VIS being obsolete or not required at all.

Objecting to the content of a VIS

- 4.33 Submissions widely acknowledged that objections to a VIS in court can further traumatise a victim.⁵¹ We heard at consultation that, in light of this, defence counsel are generally reluctant to raise objections.⁵² However, sometimes, it is necessary for the defence to raise objections to a VIS in order to protect their client's interests. Justice Simpson has highlighted the risks of an unchallenged VIS:

Where no objection was taken to the victim impact statement, no question raised as to the weight to be attributed to it, and no attempt made to limit its use, the case for its acceptance as evidence of substantial harm has been considered to be strengthened. ... Further, where the statement tends to be confirmatory of other evidence (either in a trial, or in the sentencing proceedings) or where it attests to harm of the kind that might be expected of the offence in question, there is little difficulty with acceptance of its contents.⁵³

- 4.34 We recommend that, where possible, objections to a VIS are dealt with prior to the sentencing hearing to minimise trauma for the victim.⁵⁴ The defence should inform the prosecution in advance of the basis of any objections to a VIS. On receipt of the objections, we anticipate some consultation will occur between the defence and prosecution to settle the VIS. This might also provide an opportunity for the victim to reconsider and rewrite parts of the VIS before the hearing date.⁵⁵ Should the defence maintain an objection to the VIS, this will need to be the subject of submissions to the court at sentencing.
- 4.35 We anticipate that prosecutors will continue to consult with victims on possible changes to their VIS. However, we expect that by the time of the sentencing hearing victims will be on notice of any objections to their VIS which might cause difficulties. We anticipate this will provide an opportunity for victims to manage any distress and will lessen the trauma they might experience.

Unrepresented offenders

- 4.36 We acknowledge that the guidelines above are not suitable where the offender is unrepresented. We have recommended in Chapter 3 that, prior to a sentencing

51. S Pour, *Submission VI2*, 20; NSW Office for Police and NSW Police Force, *Submission VI11*, 8-9; Director of Public Prosecutions (NSW), *Submission VI15*, 13; Homicide Victims Support Group, *Submission VI20*, 10.

52. *Consultation VIC1*.

53. *R v Tuala* [2015] NSWCCA 8, 248 A Crim R 502 [78]-[79].

54. See Director of Public Prosecutions (NSW), *Submission VI15*, 13; NSW Office for Police and NSW Police Force, *Submission VI11*, 8-9.

55. NSW Office for Police and NSW Police Force, *Submission VI11*, 8-9, submitted that victim should be able to rewrite a VIS in a calm and considered way.

hearing, an unrepresented offender be given the opportunity to read a VIS under court supervision.⁵⁶ The prosecutor should ensure that the VIS is in admissible form by this stage. Given the potential practical challenges of communicating with an unrepresented offender, particularly if on remand, it may be impractical to expect parties to discuss objections to the VIS prior to the hearing date. We anticipate that, in these circumstances, any objections and arguments about use of the VIS will be heard on the day of sentencing.

Cross-examining a victim on their VIS

Limiting cross-examination

4.8 Cross-examining a victim on their VIS

There should be limitations on when the defence can cross-examine a victim on the content of their VIS.

- 4.37 Notwithstanding our procedural recommendations to reduce the need to cross-examine a victim about their VIS, there are cases where it may need to happen. Currently, the Act does not contain any express provision about cross-examination or re-examination of a person who has made a VIS. We see this as unsatisfactory because:
- it fails to provide sufficient certainty to victims about the circumstances in which they might face cross-examination in a way that helps them to decide what to include in a VIS; and
 - it fails to offer sufficient guidance to prosecutors, defence and other parties involved in the sentencing process who might be responsible for informing victims about what to expect in the VIS process.
- 4.38 Submissions broadly acknowledge that cross-examination on a VIS can be a distressing experience for a victim who may feel humiliated or be further traumatised.⁵⁷ We agree that cross-examination about a VIS can be damaging for a victim and that it should be minimised. A number of submissions sought to prohibit cross-examination of a victim on their VIS.⁵⁸ However, it is unfair to deny an offender the opportunity to cross-examine a victim on the contents of a VIS which may have an adverse impact on their sentence. This problem has been dealt with in other Australian jurisdictions in various ways, for example:

56. Recommendation 3.5(2).

57. K Braun, *Submission VI4*, 4-5; Victims of Crime Assistance League Inc NSW, *Submission VI10*, 7; F Tait, *Submission VI12*, 7; J A Roffee and H Lynch, *Submission VI14*, 3; Director of Public Prosecutions (NSW), *Submission VI15*, 19; Women's Domestic Violence Court Advocacy Service NSW Inc, *Submission VI18*, 4-5; NSW Bar Association, *Submission VI19*, 3; Homicide Victims Support Group, *Submission VI20*, 10.

58. People with Disability Australia, *Submission VI9*, 4-5; Victims of Crime Assistance League Inc NSW, *Submission VI10*, 7; F Tait, *Submission VI12*, 7; J A Roffee and H Lynch, *Submission VI14*, 3, 4.

- In Victoria, it is open to the defence to cross-examine a victim on their VIS, however, the court may direct alternate arrangements such as closed circuit television, to be used.⁵⁹
 - In the ACT, the court must consider any VIS as part of its sentencing exercise.⁶⁰ While the defence may cross-examine the author of the VIS, if the offender is unrepresented, the court must be made aware of what the offender wants to ask the victim and grant leave for cross-examination.⁶¹
 - In the Northern Territory, the court must consider any VIS before determining the offender's sentence.⁶² Defence counsel may cross-examine the author of the VIS on its contents, but an unrepresented offender must have the leave of the court to do so.⁶³
- 4.39 In practice, it is uncommon to cross-examine a victim about his or her VIS⁶⁴ and, as we have recommended, the prosecution should, wherever possible, seek to prove aggravation by means other than a VIS.⁶⁵ In most cases, cross-examination of a victim on their VIS is also undesirable for the defence from a strategic perspective.⁶⁶ However, it is a possibility because a VIS may provide evidence which is relevant to the sentencing process and may be detrimental to the offender.
- 4.40 In light of the harm that cross-examination might cause to victims, we recommend limiting the circumstances in which cross-examination is allowed. We are unable to agree on how to achieve this outcome. We set out two possible ways in which this could be achieved:
- by providing that the defence may cross-examine a victim about the content of their VIS *only* if the court considers it appropriate, in the interests of justice.
 - by providing that the defence may cross examine a victim about the content of their VIS *only* if the prosecution intends to rely upon a VIS to establish circumstances of aggravation *and* if the court considers it appropriate, in the interests of justice.
- 4.41 If the first option were taken, the court would exercise its discretion, having regard to the individual circumstances of each case, to determine whether cross-examination is appropriate. This option recognises that cross-examination may be appropriate in circumstances:
- where the prosecution seeks to rely on the VIS to establish an aggravating factor,
 - where the prosecution has made an application under s 28(4) of the Act for the VIS to be taken into account in determining punishment, or

59. *Sentencing Act 1991* (Vic) s 8P, s 8S.

60. *Crimes Sentencing Act 2005* (ACT) s 53(1).

61. *Crimes Sentencing Act 2005* (ACT) s 53(3)-(4). See also, Explanatory Statement, Crimes Sentencing Bill 2005 (ACT) 23.

62. *Sentencing Act* (NT) s 106B(4).

63. *Sentencing Act* (NT) s 106B(9).

64. *Consultation VIC1*.

65. Recommendation 4.5.

66. *Consultation VIC1*.

- where the court intends to rely on the VIS as the sole source for adverse findings against the offender.
- 4.42 However, this option also recognises that cross-examination might not be appropriate in all such cases, for example, where a victim is particularly vulnerable, or where the court has formed the view that it will not be relying on the VIS to make findings that are adverse to the offender. It seeks to balance the interests of the defence to a fair sentencing hearing while protecting the victim from potentially distressing cross-examination. Under this option, prosecutors can provide some certainty to victims, by advising that cross-examination rarely, if ever happens, and that the court will have discretion to disallow cross-examination in certain cases.
- 4.43 The second option includes an additional requirement that must be met before a victim can be cross-examined about their VIS - namely, that the prosecution is seeking to rely on the VIS to prove circumstances of aggravation. While our recommendations are designed to encourage the prosecution to prove circumstances of aggravation by means other than a VIS, we acknowledge that this is not always possible. We envisage that, in most cases, the circumstance of aggravation will be that “the injury, emotional harm, loss or damage caused by the offence was substantial”.⁶⁷
- 4.44 When compared with the first option, this condition further limits the circumstances in which the defence may cross-examine a victim on their VIS. For example, the defence would not be able to cross-examine a victim on the basis that the VIS could give rise to an adverse finding against the offender. Under this option, if the prosecution is not using the VIS to prove circumstances of aggravation, there will be no opportunity for the defence to cross-examine the victim. In this way, the prosecution effectively acts as a gatekeeper regarding whether cross-examination takes place at all.
- 4.45 In comparison to the first option, this option would further restrict the situations in which cross-examination is available and would therefore provide greater certainty to victims about when they might face cross-examination on their VIS. This would, however, be at the expense of rights that offenders currently have to cross examine victims. This option recognises that currently victims might be worried or stressed about the prospect of cross-examination and that this might lead them to decide against making a VIS or providing a detailed VIS. This option aims to reduce uncertainty when compared with the first option. This is because the prosecution would decide whether to use the VIS to prove circumstances of aggravation and, thereby, open the VIS to the rare possibility of cross-examination. This will allow prosecutors and support staff to provide clearer directions to a victim and set expectations around the VIS process. It would also give certainty to the defence about when a VIS will be used to prove aggravating circumstances and whether to apply for cross-examination.
- 4.46 One potential criticism of this option is that it may not appropriately accommodate situations where there are agreed facts for sentence as the result of a guilty plea, and the VIS contradicts those facts. On the other hand, it could be argued that such matters may be better dealt with by submissions from the bar table, supported by our recommendation that the court should not have regard to anything in a VIS that

67. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(g).

goes beyond a statement of the "personal harm" caused to the victim as a direct result of the relevant offence.⁶⁸

Alternate arrangements and unrepresented defendants

4.9 Alternate arrangements and unrepresented defendants

- (1) In allowing cross-examination, the court should make such orders about the conduct of proceedings as are considered necessary in the interests of the victim. This may include making available to the victim any special arrangements for giving their evidence such as closed circuit television or the presence of a support person.
- (2) Where the offender is unrepresented, the court must be made aware of the nature of the cross-examination proposed before it grants leave for cross-examination to occur.

- 4.47 When an unrepresented offender seeks to cross-examine a victim on their VIS, we recommend an additional requirement that the court be made aware of what the offender seeks to ask the victim in cross-examination. This is based on the provisions in the ACT legislation⁶⁹ and is similar to limitations on cross-examination of complainants by unrepresented accused in sexual offence proceedings.⁷⁰ We see this recommendation as protecting victims from possible distress. We expect that the court will exercise its discretion on whether to allow cross-examination in these cases and the conditions of the cross-examination. In all cases, we anticipate that the Court will ensure cross-examination is not used as a way of repeating objections or testing admissibility.
- 4.48 We also recommend that special arrangements such as the use of closed circuit television, a closed court room or the presence of a support person, are made available for all victims who are cross-examined on their VIS. This is with a view to minimising the adverse effects which cross-examination might have on a victim. We have expanded on alternative arrangements in Chapter 3.⁷¹

68. Recommendation 4.3.

69. *Crimes Sentencing Act 2005* (ACT) s 53(3)-(4).

70. *Criminal Procedure Act 1986* (NSW) s 294A.

71. [3.21]-[3.26].

5. Improving victims' experience of victim impact statements and the sentencing process

In brief

We have identified various ways to improve victims' experience of victim impact statements ("VIS") and the broader sentencing process, by:

- improving information available to victims about VISs
- providing for greater victim assistance, and
- improving training and education for the judiciary and legal profession about issues relevant to VISs and victims.

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Information and assistance about VISs

An outline of existing information and assistance

5.1 The Commissioner of Victims Rights has a number of statutory responsibilities and functions to support victims. These include:¹

- General functions:
 - to provide information to victims about available support services and assistance, and to assist them in exercising their rights.
- Oversight and compliance functions:
 - to co-ordinate and encourage the effective and efficient delivery of support services for victims
 - to promote and oversee the implementation of the Charter of Victims Rights (including publishing codes, guidelines and other practical guidance)
 - to receive complaints from victims about alleged breaches of the Charter and make best efforts to resolve them, and
 - to make recommendations to help agencies improve their compliance with the Charter (including conducting training and recommending changes to policies and procedures).

1. *Victims Rights and Support Act 2013* (NSW) s 9-11.

- Educative functions:
 - to conduct, promote and monitor training, public awareness activities and research on victims.
- Review functions:
 - to conduct reviews and inquiries on issues relating to victims at the Attorney General's request.

5.2 Victims Services is an agency within the NSW Department of Justice, which supports the Commissioner of Victims Rights in fulfilling those statutory responsibilities and functions. Victims Services has a key role in providing victims with information, support and assistance about victim impact statements ("VIS"), such as:

- support services to victims including counselling and financial support
- the Victims Access Line, which provides victims with information about available support services and referrals to relevant support agencies, and provides assistance in preparing a VIS if requested
- a VIS information package accessible online, which contains a detailed overview of the VIS process, information on who can prepare a VIS, guidelines on how to write the VIS, and contact details for agencies that might assist the victim to prepare a VIS², and
- a Code of Practice for the Charter of Victims Rights, which aims to help victims understand how to access their rights, to set minimum standards of service provision and support to victims of crime and to clarify how service providers meet their obligations under the Charter.

5.3 Other key agencies that provide victims with information, support and assistance about VISs are:

- The Office of the Director of Public Prosecutions ("ODPP"), which provides:
 - instructing solicitors who are responsible for assisting victims in writing a VIS and, where a VIS is made, ensuring the VIS complies with legislation and for tendering and disclosing the VIS
 - a Witness Assistance Service to support victims, and
 - information on sentencing procedure³ and how to prepare a VIS⁴ on its website, and a guide to writing a VIS.⁵
- Police Prosecutors within NSW Police Force, who are responsible for tendering VISs in the Local Court where a VIS is made.⁶

2. NSW Department of Justice, Victims Services, *Victim Impact Statement: Information Package* (2017).

3. NSW Office of the Director of Public Prosecutions, *The Sentencing Process: Information for Victims of Crime* (2012).

4. NSW Office of the Director of Public Prosecutions, *About Victim Impact Statements: Brief Overview* (2008).

5. NSW Office of the Director of Public Prosecutions, *Writing Your Victim Impact Statement* (2008).

- The NSW Police Force, which:
 - through the Officer in Charge, provides victims with a contact number and ensures all material contained in a VIS complies with legislation, and
 - provides victims with general information on their website, including advice on what a VIS should contain and the circumstances in which a VIS may be made.⁷

While a police officer may provide victims with information on preparing a VIS, they cannot suggest what to include in the VIS and are instructed not to assist victims with preparing a VIS.⁸

5.4 Relevantly, the Victims Services' Code of Practice states that the ODPP and the NSW Police Force are among the number of agencies responsible for:

- ensuring victims are advised of their eligibility to make a VIS
- referring victims to an appropriate agency for assistance with the preparation of a VIS, and
- providing victims with general assistance and information about a VIS.⁹

Concerns about existing information and services

5.5 We received submissions that existing information and services about VISs may be inadequate and not always accessible to victims.¹⁰ This is problematic because victims may be traumatised from experiencing a crime and/or may be from a vulnerable or disadvantaged socio-economic background.

5.6 In particular, we heard that the information given to victims about the VIS process should help manage victims' expectations of the process and role of a VIS.¹¹ Research has found victim satisfaction with the VIS process correlates with their expectations of the purpose and use of VISs.¹² Unrealistic expectations may

6. *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 12(1).

7. NSW Police Force, "Are you a Victim of Crime? Victim Impact Statements" <www.police.nsw.gov.au/crime/are_you_a_victim_of_crime>.

8. NSW Police Force, *Victims of Crime: Guidelines for the NSW Police Force Response to Victims of Crime* (2012) 10; NSW Police Force, *NSW Police Force Handbook* (2016) 99.

9. NSW Department of Justice, Victims Services, *NSW Code of Practice: Charter of Victims Rights* (2015) 28.

10. Homicide Victims Support Group, *Submission VI20*, 4; Women's Domestic Violence Court Advocacy Service NSW Inc, *Submission VI18*, 5; Law Society of NSW, *Submission VI17*, 2; Director of Public Prosecutions (NSW), *Submission VI15*, 1; F Tait, *Submission VI12*, 2; Victims of Crime Assistance League Inc NSW, *Submission VI10*, 2.

11. NSW, Victims Services, *Submission VI21*, 1; SA, Commissioner for Victims' Rights, *Submission VI23*, 17; Women's Domestic Violence Court Advocacy Service NSW Inc, *Submission VI18*, 6; Law Society of NSW, *Submission VI17*, 2; NSW Council for Civil Liberties, *Submission VI16*, 4; F Tait, *Submission VI12*, 7; NSW Office for Police and NSW Police Force, *Submission VI11*, 3; S Pour, *Submission VI2*, 16.

12. J V Roberts and M Manikis, *Victim Personal Statements: A Review of Empirical Research*, Report for the Commissioner for Victims and Witnesses in England and Wales (University of Oxford, 2011) 27.

therefore result in lower satisfaction levels, particularly where victims expect their VIS will affect sentencing outcomes.¹³

- 5.7 We also received submissions that information and services given to victims about the VIS process should be trauma-informed.¹⁴ Trauma-informed care and practice means:

a strengths-based framework that is responsive to the impact of trauma, emphasising physical, psychological, and emotional safety for both service providers and survivors, and creates opportunities for survivors to rebuild a sense of control and empowerment.¹⁵

- 5.8 A position paper by the Mental Health Coordinating Council notes that “[t]rauma survivors often experience services as unsafe, disempowering and/or invalidating” and that trauma-informed care can minimise re-victimisation.¹⁶
- 5.9 We are also aware that some existing information is misleading and may discourage victims from making a VIS. For example, some information gives victims a false impression that if they make a VIS, it is likely that they will be cross-examined on their VIS, or that their VIS will be disseminated to the public.¹⁷

Improving the victim experience

- 5.10 To improve victims' experience of the court and sentencing process, in this Chapter we recommend improving information available to victims about VISs and the sentencing process, and providing for more assistance to victims. We also recommend improving training and education for the judiciary and legal profession about issues relevant to VISs and victims. To cater for victims who may be experiencing trauma as a result of the offence, all information and services should be trauma-informed.
- 5.11 These recommendations will help address broader problems concerning the underuse of VISs in the Local Court outlined in Chapter 1;¹⁸ for example, by:

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13. J V Roberts and M Manikis, *Victim Personal Statements: A Review of Empirical Research*, Report for the Commissioner for Victims and Witnesses in England and Wales (University of Oxford, 2011) 27.
14. Legal Aid NSW, *Submission VI22*, 6; NSW, Victims Services, *Submission VI21*, 3; Women's Domestic Violence Court Advocacy Service NSW Inc, *Submission VI18*, 6; Director of Public Prosecutions (NSW), *Submission VI15*, 4; F Tait, *Submission VI12*, 3; NSW Office for Police and NSW Police Force, *Submission VI11*, 9; Victims of Crime Assistance League Inc NSW, *Submission VI10*, 2; People with Disability Australia, *Submission VI9*, 17; Elizabeth Evatt Community Legal Centre, *Submission VI7*, 2.
15. Mental Health Coordinating Council, *Trauma Informed Care and Practice: Towards a Cultural Shift in Policy Reform across Mental Health and Human Services in Australia: A National Strategic Direction*, Position Paper and Recommendations (2013) 9.
16. Mental Health Coordinating Council, *Trauma Informed Care and Practice: Towards a Cultural Shift in Policy Reform across Mental Health and Human Services in Australia: A National Strategic Direction*, Position Paper and Recommendations (2013) 5, 27.
17. See, eg, NSW Police Force, “Are You a Victim of Crime?” <www.police.nsw.gov.au/crime/are_you_a_victim_of_crime> (retrieved 7 September 2017); NSW, Department of Justice, Victims Services, *A Guide to the Media for Victims of Crime* (2016) 20.
18. See [1.33]-[1.43].

- enabling victims to obtain timely advice of their eligibility to make a VIS, and providing them with accessible information to help them decide if they should make a VIS, what that may involve, and what a VIS will achieve
- providing victims with more accessible and specialised support services (which are also potentially more comparable to the level of services currently offered in the District Court and superior courts through the ODPP's Witness Assistance Service), and
- improving the general awareness and communication strategies of people who hold key roles in the Local Court (for example, police prosecutors and defence lawyers) concerning VISs and related procedures.

Information about VISs

5.1 Information about VISs

Victims Services, in consultation with relevant agencies, should ensure information about VISs:

- (1) is standardised, centralised and routinely reviewed
- (2) is as brief as possible and targeted, simplified, in plain language, available in different languages other than in English and in different formats, and trauma-informed
- (3) is prepared for different categories of authors of a VIS by preparing separate information for each different category of author, and
- (4) includes content addressing:
 - (a) the role of a VIS in the sentencing process
 - (b) how to make and adopt a VIS (content which should include provision of pro forma forms, samples of complying VISs, and any other relevant forms)
 - (c) who can obtain, retain, copy or disseminate a VIS, including the circumstances in which this may or may not occur
 - (d) desirable timeframes for completing a VIS
 - (e) the possibility that a VIS may be edited to comply with legal requirements, and the limited risk that the victim may be cross-examined on the VIS
 - (f) the special arrangements available to victims who wish to read their VIS in court
 - (g) how the court may use a VIS, and
 - (h) references to all other supports and resources that are available to victims in writing a VIS.

5.12 We agree with concerns that existing information about VISs is inconsistent, sometimes out-dated, inaccessible and limited.¹⁹ We consider that Victims Services is the appropriate agency to deliver improvements to such information, since it falls

19. NSW Council for Civil Liberties, *Submission VI16*, 3; F Tait, *Submission VI12*, 2, 5; Victims of Crime Assistance League Inc NSW, *Submission VI10*, 2; Women's Domestic Violence Court Advocacy Service NSW Inc, *Submission VI18*, 6.

within its existing functions²⁰ and, in particular, its responsibility to help the Commissioner of Victims Rights:

- to provide victims with information about available support services and assistance, and assist them in exercising their rights, and
- to co-ordinate and encourage the effective and efficient delivery of support services to victims.

5.13 We therefore recommend Victims Services, in consultation with relevant agencies such as the ODPP, NSW Police Force and Corrective Services NSW, should ensure information and material about VISs addresses concerns that:

- information should be standardised²¹ to ensure consistency across different sources; centralised²² to ensure all available resources are accessible from a central source (i.e. from Victims Services); and its content routinely reviewed to ensure and maintain currency and accuracy²³
- content should be as brief as possible and targeted (excluding any irrelevant information); simplified (for example, providing a step-by-step summary of the VIS and overall sentencing process, and including FAQs);²⁴ accessible to a diverse audience (including using plain language, translating into languages other than English, and adopting different mediums and formats such as electronic, print, audio, video and braille);²⁵ and trauma-informed,²⁶ and
- material should be separately prepared for different authors of a VIS (for example, primary victims, family victims and people preparing a VIS on a victim's behalf) to avoid potentially confusing these authors with information that is irrelevant to them.

5.14 We have suggested consulting with Corrective Services as it may be able to provide expert advice on the victim experience from managing restorative justice programs and maintaining victim registers.²⁷

5.15 We also agree that victims should be better informed and their expectations better managed with regard to their role in the sentencing process and the use that can be made of a VIS. We therefore also recommend Victims Services improve the content of information available by ensuring it addresses the following matters:

- the role of a VIS in the sentencing process;²⁸ significantly, the fact that a VIS does not necessarily impact a sentencing outcome

20. NSW, Victims Services, *Submission VI21*, 1. See [5.1]-[5.2], above.

21. Senior Public Defender, *Submission VI3*, 2; F Tait, *Submission VI12*, 3; NSW Council for Civil Liberties, *Submission VI16*, 3; NSW, Victims Services, *Submission VI21*, 1; Victims of Crime Assistance League Inc NSW, *Submission VI10*, 2, 3.

22. F Tait, *Submission VI12*, 3.

23. Law Society of NSW, *Submission VI17*, 2; NSW, Victims Services, *Submission VI21*, 1.

24. NSW Office for Police and NSW Police Force, *Submission VI11*, 3.

25. People with Disability Australia, *Submission VI9*, 3-4; Victims of Crime Assistance League Inc NSW, *Submission VI10*, 2; Women's Domestic Violence Court Advocacy Service NSW Inc, *Submission VI18*, 6; NSW, Victims Services, *Submission VI21*, 1, 3-4; NSW Council for Civil Liberties, *Submission VI16*, 3; Homicide Victims Support Group, *Submission VI20*, 12, 14.

26. F Tait, *Submission VI12*, 3; NSW, Victims Services, *Submission VI21*, 3; Victims of Crime Assistance League Inc NSW, *Submission VI10*, 2.

27. See [1.48]-[1.55].

- how to make and adopt a VIS, including examples of what a VIS may or may not contain, and pro forma forms and samples of complying VISs²⁹
- the possibility that a VIS may be edited to comply with legal requirements, and the limited risk that the victim may be cross-examined on the VIS, including the circumstances in which this may occur,³⁰ and
- an outline of all other supports and resources available to victims who wish to make a VIS, including links to those supports and resources (for example, directories to free legal advice providers such as community legal centres).³¹

5.16 Other content that should be addressed includes:

- the processes around obtaining, retaining, copying or disseminating a VIS, including the circumstances in which this may or may not occur
- desirable timeframes for completing a VIS
- the special arrangements available to victims who wish to read their VIS in court, and
- how the court may use a VIS, including that the court may not draw any inference from the absence of a VIS.³²

Victim assistance

5.2 Victim assistance

- (1) There should be more support for victims from people trained in trauma-informed care and practice, and trained in preparing a VIS.
- (2) A translator service should be available for those seeking to make a VIS.

5.17 We agree with concerns that there should be greater assistance available to victims through a variety of means, including in-person support officers, advice lines and online services. We also agree service providers should be trained in VIS requirements (to the extent necessary to provide assistance in writing a complying VIS), as well as trauma-informed support and practice.

5.18 Victims of Crime Assistance League notes that:

it is extremely difficult for someone experiencing these physical, psychological, and behavioural traumatic reactions to prepare a VIS without support ...

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28. NSW Office for Police and NSW Police Force, *Submission VI11*, 1; NSW Council for Civil Liberties, *Submission VI16*, 3; Women's Domestic Violence Court Advocacy Service NSW Inc, *Submission VI18*, 2-3; NSW, Victims Services, *Submission VI21*, 1, 3; Legal Aid NSW, *Submission VI22*, 4.
 29. Elizabeth Evatt Community Legal Centre, *Submission VI7*, 2; NSW Office for Police and NSW Police Force, *Submission VI11*, 1; Women's Domestic Violence Court Advocacy Service NSW Inc, *Submission VI18*, 4-5.
 30. NSW Office for Police and NSW Police Force, *Submission VI11*, 1; Law Society of NSW, *Submission VI17*, 2; NSW, Victims Services, *Submission VI21*, 2.
 31. Elizabeth Evatt Community Legal Centre, *Submission VI7*, 2; NSW, Victims Services, *Submission VI21*, 1.
 32. J A Roffee and H Lynch, *Submission VI14*, 3.

professional support is essential: "*The advantage of having a professional to speak to, to have an explanation of what a VIS is, how to begin writing it, and what not to include is something I would recommend to anyone unfortunate enough to have experience writing a VIS*".³³

- 5.19 We recommend expanding existing support services and developing additional support services where possible, subject to funding. Existing support services include the ODPP's Witness Assistance Service, Victims and Witnesses of Crime Court Support, the Women's Domestic Violence Court Advocacy Services, and approved professional trauma counsellors under the *Victims Rights and Support Act 2013* (NSW). Victims Services should also develop a new victim liaison role within Victims Services, which would inform victims about VISs at the earliest practicable opportunity including referring victims to approved counsellors at the outset. All support services should be trained in VIS requirements and trauma-informed support and practice.³⁴ We also recommend providing for translation support services for people who wish to make a VIS but are of a non-English speaking background.³⁵
- 5.20 Some submissions suggest providing victims with a legal representative or advocate who would provide them with direct assistance and protect their interests throughout the criminal justice process.³⁶ However, apart from being beyond the scope of this reference, we consider such a service may have a detrimental impact on the efficient disposal of criminal cases and may not provide the most appropriate support to victims in the sentencing process. Other submissions do not support the suggested change and recognise these challenges.³⁷

Training and education for the judiciary and legal profession

5.3 Training and education for the judiciary and legal profession

- (1) The Judicial Commission, Law Society and Bar Association should offer and promote training and education for the judiciary and legal profession in issues relevant to VISs and victims.
- (2) The Judicial Commission should include advice in bench books on how to receive and acknowledge VISs.

- 5.21 We have received some submissions about less than satisfactory interactions between victims and courts, and victims and lawyers, in relation to issues relevant to VISs and victims.³⁸ A study analysing data from interviews conducted across a

33. Victims of Crime Assistance League Inc NSW, *Preliminary submission PVI6*, 2. See also H Robert, *Preliminary submission PVI10*, 4-5.

34. Victims of Crime Assistance League Inc NSW, *Submission VI10*, 3; Legal Aid NSW, *Submission VI22*, 6.

35. Homicide Victims Support Group, *Submission VI20*, 14.

36. S Pour, *Submission VI2*, 16-17; People with Disability Australia, *Submission VI9*, 4; SA, Commissioner for Victims' Rights, *Submission VI23*, 2, 4; NSW Council for Civil Liberties, *Submission VI16*, 5; Elizabeth Evatt Community Legal Centre, *Submission VI7*, 3-4; T Kirchengast, *Submission VI5*, 8-12; T Kirchengast and K Braun, *Submission VI6*, 2; Victims of Crime Assistance League Inc NSW, *Submission VI10*, 4.

37. Director of Public Prosecutions (NSW), *Submission VI15*, 4; Law Society of NSW, *Submission VI17*, 2; Legal Aid NSW, *Submission VI22*, 6-7.

38. See, eg, Homicide Victims Support Group, *Submission VI20*, 9, 11; Director of Public Prosecutions (NSW), *Submission VI15*, 2-3, 17-18; Victims of Crime Assistance League Inc NSW, *Submission VI10*, 3.

broad cross-section of victims of various serious crimes in NSW, cites victims reporting on their experience of the VIS process as follows:

I was not aware I was able to make a VIS. I read the information on the Victims Services website, that's where I read about it ... I didn't have any support from the DPP. It was at the Local Court in Campbelltown ... I had tried to contact the police to discuss VIS but I had huge problems trying to get hold of the police to get information.

More needs to happen than being handed an envelope. I remember the police giving me a [VIS] pack too, but I was so traumatised. You need people to go through it and point out what is important. It's like giving a drowning person an envelope and saying, "When you have time, read this. See you!" Just so they cover themselves by tossing you an envelope.

Because I did not read [the VIS] out, it was not acknowledged, so I didn't know if he [the judge] had read it. There was nothing mentioned about it at all. I would have liked some acknowledgement that he had read it.³⁹

- 5.22 Many courts and lawyers are exemplary in their interactions with victims. However, the judiciary and legal profession have very limited training and education in matters relevant to VISs and victims that is also trauma-informed. Currently, such existing training and education is limited to advice and information about legal issues surrounding the operation and effect of VIS provisions in the Judicial Commission's *Sentencing Bench Book*. This does not address matters of practice, such as how courts should deal with, and acknowledge victims when they present VISs to the court.
- 5.23 We therefore recommend the Judicial Commission, and legal professional bodies such as the Law Society and Bar Association develop training and education on issues relevant to victims and VISs. For example:
- how the judiciary should receive and acknowledge victims and VISs, including appropriate language to use (for example, how to refer to deceased primary victims), and
 - how prosecutors should manage the production of an admissible VIS, and navigate their responsibilities under the Code of Practice for the Charter of Victims Rights.
- 5.24 The development of training and education should also be trauma-informed for the reasons outlined above.⁴⁰ Submissions broadly support this approach.⁴¹

39. F Tait, *Submission VI12*, 3, 4, 8.

40. [5.7]-[5.8].

41. Victims of Crime Assistance League Inc NSW, *Submission VI10*, 4; Women's Domestic Violence Court Advocacy Service NSW Inc, *Submission VI18*, 3, 5-6; Homicide Victims Support Group, *Submission VI20*, 11-12.

Appendix A: Preliminary submissions

PVI01 Seppy Pour, 14 June 2017

PVI02 Inner City Legal Centre, 19 June 2017

PVI03 Chief Magistrate of the Local Court (NSW), 6 July 2017

PVI04 Brodie Donegan, 30 July 2017

PVI05 Victims and Witnesses of Crime Court Support Inc, 31 July 2017

PVI06 Victims of Crime Assistance League Inc NSW, 31 July 2017

PVI07 Robert Wade, 31 July 2017

PVI08 Enough is Enough Anti Violence Movement Inc, 31 July 2017

PVI09 Aboriginal Legal Service (NSW/ACT) Ltd, 31 July 2017

PVI10 Hannah Robert, 1 August 2017

PVI11 Bravehearts Foundation Ltd, 1 August 2017

PVI12 NSW Office for Police and NSW Police Force, 2 August 2017

PVI13 Women's Justice Network, 2 August 2017

PVI14 Legal Aid NSW, 3 August 2017

PVI15 NSW Young Lawyers Criminal Law Committee, 4 August 2017

PVI16 Director of Public Prosecutions (NSW), 9 August 2017

PVI17 NSW Mental Health Review Tribunal, 10 August 2017

Appendix B: Submissions

- VI01 Hon Justice T F Bathurst AC, Chief Justice of NSW, 6 October 2017
- VI02 Seppy Pour, 1 November 2017
- VI03 Mark Ierace SC, Senior Public Defender, 8 November 2017
- VI04 Dr Kerstin Braun, 9 November 2017
- VI05 Dr Tyrone Kirchengast, 9 November 2017
- VI06 Dr Tyrone Kirchengast and Dr Kerstin Braun, 9 November 2017
- VI07 Elizabeth Evatt Community Legal Centre, 9 November 2017
- VI08 Care Leavers Australasia Network, 9 November 2017
- VI09 People with Disability Australia, 9 November 2017
- VI10 Victims of Crime Assistance League Inc NSW, 10 November 2017
- VI11 NSW Office for Police and NSW Police Force, 10 November 2017
- VI12 Fiona Tait, 10 November 2017
- VI13 Police Association of NSW, 10 November 2017
- VI14 Dr James A Roffee and Hayley Lynch, 10 November 2017
- VI15 Lloyd Babb SC, Director of Public Prosecutions, 15 November 2017
- VI16 NSW Council for Civil Liberties, 15 November 2017
- VI17 Law Society of NSW, 16 November 2017
- VI18 Women's Domestic Violence Court Advocacy Service NSW Inc,
17 November 2017
- VI19 NSW Bar Association, 20 November 2017
- VI20 Homicide Victims Support Group, 22 November 2017
- VI21 NSW, Victims Services, 23 November 2017
- VI22 Legal Aid NSW, 24 November 2017
- VI23 Michael O'Connell AM APM, South Australia, Commissioner for Victims'
Rights, 5 January 2018

Appendix C: Consultations

Roundtable (VIC1)

27 November 2017

K Renata Field (Women's Domestic Violence Court Advocacy Service)
David Turner (NSW Young Lawyers)
Liam Cavell (NSW Young Lawyers)
Kartini Saddington (NSW Young Lawyers)
Michael King (Public Defenders)
Marianne Carey (Office of the Director of Public Prosecutions)
Sophia Beckett (NSW Bar Association)
Helen Roberts (NSW Bar Association)
Penny Musgrave (Law Society of NSW)

Local Court roundtable (VIC2)

29 November 2017

Harriet Ketley (Legal Aid NSW)
Pieta Thornton (Victims and Witnesses of Crime Court Support)
Stephanie McCoy (Victims and Witnesses of Crime Court Support)
His Honour Magistrate Les Mabbutt (NSW Local Court)
Johanna Pheils (Office of the Director of Public Prosecutions)
Chief Superintendent Tony Trichter (Police Prosecutions)