

## Sentencing Council Consultation Paper on Victims' involvement in sentencing

### Office for Police and NSW Police Force response to the consultation paper

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In June 2017 the NSWPF provided preliminary submissions for consideration in the terms of reference for the review of victims' involvement in the sentencing process ("the Review").

The NSWPF provide the following submissions to the Review, based on the consultation paper produced to assist in seeking views about victims' involvement in sentencing. In addition further submissions are provided in Tab 1, which addresses the questions posed in the consultation paper.

In summary the submissions propose:

- Victims should be informed and supported on how to participate in the sentencing process, including how to make a victims impact statement, through comprehensive and easy to use information packages, training materials and support telephone lines;
- Dedication of appropriate resources to assist victims to make victim impact statements, particularly in view of the heavy workloads and fast paced environments in Local Courts which may limit the submission of victim impact statements;
- Consideration of preparing community impact statements (in addition to victim impact statements) to communicate the wider social effects of offending;

#### **Victim Impact Statements - information**

Information provided to victims on victim impact statements ("VIS") should be standardised across all NSW victim service providers identified in the *Victims Rights and Support Act 2013*. This should be through information sheets/packages and include:

- presentation of VIS in court and its place in sentencing proceedings;
- options for special arrangements (e.g. use of AVL);
- where to stand when reading a VIS and whom to address and any acknowledgement expected from the judicial officer.

All information should be developed in accessible formats and specific materials developed to support Aboriginal, culturally/linguistically diverse and vulnerable victims. This would complement the work currently undertaken by Victims Services to develop an online video about the VIS purpose, content and presentation, fact sheets, improving frontline services and working closely with the Witness Assistance Service (ODPP) to educate counsellors about VIS.

Further, a central contact service should be established for victims make enquiries.

The therapeutic value of a VIS must be understood in conjunction with the functional use of a VIS in court proceedings. Victims services providers require an increased understanding of the admissible content and editing of a VIS in order to provide victims with the correct information. The uncertainty of information provided has been shown to have a negative impact on victims involved in the process.<sup>1</sup>

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<sup>1</sup> Tait, Fiona; *Masters of Criminology by Research – JC081School of Law, University of Sydney*, 2015.



***Victim Impact Statements – various jurisdictions***

Local Courts need to be better resourced to support the use of VIS. This is due to the disparity in the number of VIS made in the Local Court compared with the District and Supreme Courts. The challenge in making a VIS in the Local Court is the time the adequacy of time to prepare and consider a VIS, which is substantially less than the higher courts.

***Community Impact Statements –***

The use of community impact statements should be encouraged to address the wider social effects of offending, by providing the community with 'a voice'.

## **Response to the Sentencing Council consultation paper on victims' involvement in sentencing.**

### **2.1 How can the information given to victims on VISs and sentencing be improved?**

The victim impact statement information package published by Victim Services could be simplified and/or accompanied with a step by step summary and FAQs with respect to the process and the questions that victims are likely to ask around the process. The FAQs and other information should also provide advice regarding realistic expectations and setting out the process at court, information around plea negotiations and the principals of sentencing. In addition, there should be more practical guidance on how to prepare a VIS including a Word and/or pdf template allowing the preparation of a structured response. There should be basic samples of what a finished VIS should look like and should not look like including practical guidance with respect of what can and cannot be included and what is likely to happen with respect to inadmissible content. Victim's Services should also provide telephone and other support points to assist victims in the preparation of victim impact statements and to guide them through the journey.

### **2.2 How can the practice, procedure and/or law for settling the admissible content of a VIS better meet the concerns of victims?**

At 2.40 in the NSW Sentencing Council report the NSW Young Lawyers Criminal Law Committee are quoted as indicating that objections to the admissibility of all or part of the VIS are often raised on the day of sentencing, and as a result "sometimes last-minute amendments to the VIS have to be made." Issues around admissibility should be resolved prior to the sentencing date so that the victim can be adequately supported and consulted and not caught off guard nor further victimised.

Better information and guidance with respect to the making of admissible VIS needs to be available through Victim Services. There should be basic examples available on line with notes to assist in explaining the ins and outs of making a VIS including examples of inadmissible content. There should also be at least telephone support if not face to face support for the preparation of VIS.

These same services should be available to assist those who make or have made VIS to understand the reasons why a VIS may be edited and other steps in the process including what a court can and cannot do with their VIS.

### **2.3 What problems, if any, do victims experience when presenting their VIS in court?**

These are adequately discussed in section 2 of the consultation paper.

### **2.4 (1) What factors are encouraging or discouraging the use of VISs in the Local Court?**

In addition to those mentioned in section 2 of the consultation paper, Local Courts can deal with hundreds of matters daily and often sit beyond normal sitting hours to clear the workload. There is little time available to dedicate to victim impact statements particularly if they are either voluminous or challenged. A magistrate is more than likely to adjourn evidence and cross examination to later in the day or to an available hearing court, or another date so as to minimise the impact on the court list. Another factor is that the bulk of offences for which VISs are able to be used are matters dealt with in the District Court. Irrespective of this if VIS were used in every relevant matter they could grind the Local Court to a halt. Police Prosecutors are not resourced for this workload. To use domestic violence court lists as an example, Police Prosecutions Command does not have the resources to personally take instructions from all persons seeking the protection of ADVOs. In such circumstances Domestic Violence Liaison Officers prepare instructions on behalf of prosecutors and fill out instruction sheets to brief the prosecutor. Without such resourcing domestic violence lists would grind to a halt.

Additionally, domestic violence offences make up the highest proportion of offences in the Local Court. Victims of domestic violence are very susceptible to changing alliances and often become hostile to a prosecution. Such victims are less than likely to assist in the preparation of a VIS.

Another factor is that matters in the Local Court are likely to be dealt with to finality on either the first occasion or on the same day the plea is entered making it impractical to seek a VIS as to do so would require an adjournment further burdening future court lists already in many cases near capacity. There is a heavy emphasis in the Local Court on speedy outcomes.

### **2.4(2) How can the use of VISs in the Local Court be improved? Can this be implemented in a way that does not compromise the efficiency of the Local Court?**

Through support in preparation and greater awareness of when VIS can be used, what can be included in them and the mechanisms of the process.

There is little chance of increasing the use of VIS in the Local Court without compromising the efficiency of the court.

**2.5 (1) How can victims be better assisted in making the VIS?**

Through better and simpler resources on the internet as well as phone and face to face support, including multi-lingual resources, as required in each particular matter.

**2.5 (2) Should victims be provided with a specialist representative? If so, what should their role be?**

It would require significant resources to employ a victim representative on a daily basis in every Local Court. This would be exacerbated in multi court complexes.

Such representatives, if appointed, should not interfere unduly with the prosecutor or the workings of the court, nor should they have a dual advocacy role.

**2.6 (1) Are the current needs of victims that require additional or distinct assistance being met by the current procedures?**

Definitely not, the resources available provide an insight into the VIS process but no support with respect to the making of an admissible VIS nor the implications of including inadmissible or objectionable content.

**2.6 (2) How can assistance to victims with additional or distinct needs be improved?**

As per above.

**3.1 (1) Is the current definition of 'primary victim' appropriate?**

No, it is too narrow as argued in the paper.

**3.1 (2) How could the definition be amended?**

As suggested in the paper.

**3.1 (3) What are the advantages and disadvantages of expanding the definition?**

There will likely be an added degree of success in increasing the use of VIS in the Local Court. This might not be significant as evidenced in Victoria.

**3.2 (1) Is the current definition of “family victim” appropriate?**

No comment.

**3.2 (2) How could the definition be amended?**

No comment.

**3.2 (3) What are the advantages and disadvantages of expanding the definition?**

No comment.

**3.3 (1) Is the current definition of “personal harm” appropriate for identifying victims who may make a VIS?**

The definition is too narrow restricting the situations where a VIS is able to be used. As per paragraph 3.34 of the consultation report, four other states have much wider definitions of the types of personal harm that a victim can comment upon in their VIS.

**3.3 (2) How could the definition be amended?**

Similar to those mentioned in 3.34 of the consultation paper.

**3.3 (3) What are the advantages and disadvantages of expanding the definition?**

Greater application of VIS in the Local Court versus greater impost on the Local Court with respect to the time implications of parties negotiating the tender of VIS, arguing admission (where applicable) and the court reading and determining the weight to be attributed to the VIS.

**3.4 (1) Is the current provision that identifies eligible offences for a VIS appropriate?**

No, it is exclusive rather than inclusive. It is at times not easy to determine what an eligible offence is nor the application of the common law. Paragraph 3.40 sums it up where the authors doubt that anyone could construct an accurate and comprehensive list of eligible offences based on the current provisions.

#### **3.4 (2) How should eligible offence be identified?**

It should be simplified. Option 2 appears to be the best outcome.

#### **3.4 (3) Should domestic violence offences be a separate category of eligible offences?**

Yes, unless option 1 is adopted.

#### **3.4 (4) What are the advantages and disadvantages of expanding the definition?**

The advantages include expanding the use of VIS in the Local Court and providing greater clarity with respect to what offences a VIS can be used for. Additionally, the impact of domestic violence on victims would have a more prominent place in the court. The disadvantages include the increased workload and impact on the Local Court and an increase in hostile domestic violence victims.

#### **3.5 (1) In what circumstances, if any, should it be possible for a Form 1 victim to make a VIS?**

In all circumstances given the purpose of a Form 1 in sentencing.

#### **3.5 (2) What are the advantages and disadvantages of allowing a VIS to include content regarding Form 1 matters?**

The advantages include the recognition of the impact of the Form 1 offences on the victim. It allows the victim/s an extra degree of restorative justice. The disadvantages include the additional time taken to negotiate, tender, argue and take into account the VIS in the court.

#### **3.6 (1) Should NSW adopt community impact statements?**

No comment.

**3.6 (2) What form should such community impact statements take?**

No comment.

**3.6 (3) How should sentencing courts use them?**

No comment.

**3.6 (4) What are the advantages and disadvantages of adopting community impact statements?**

No comment.

**4.1 What forms of harm, or other impacts or effects of an offence, should it be possible to include a primary victim's VIS?**

VISs should include details of injury, loss and damage occasioned upon the victim and family victims. They have a right to express this. The court can put this into perspective when sentencing.

**4.2 (1) What forms of harm, or other impacts or effects of an offence, should it be possible to include in a VIS by a family victim?**

There should be consistency with other jurisdictions eg same as the primary victim.

**4.2 (2) What categories of relationship to the primary victim should the harm be in relation to?**

The scope of family should be expanded. The consultation paper outlines several examples of inequity with respect to the current legislation.

**4.3 (1) What particular types of statement, if any, should be expressly excluded from a VIS?**



The nature of the sentence the court should give.

**4.3 (2) How should a court deal with the inclusion of any such prohibited statements?**

By discounting them.

**4.4 (1) Are the provisions relating to the court's use of a primary victim VIS appropriate?**

There is little guidance to the court with respect to how a court can take a VIS into account. More guidance is required.

**4.4 (2) How should a court be able to use a primary victim VIS?**

The court should rely on the VIS in determining the appropriate sentence including to prove an aggravating factor.

**4.5 (1) Are the provisions relating to the court's use of a family victim VIS appropriate?**

No. The consultation paper adequately outlines reasons for this.

**4.5 (2) How should a court be able to use a family victim VIS?**

To inform itself on the particular harm caused in order to determine sentencing outcomes.

**4.6 What provision, if any, should be made for what a court may or may not conclude from the absence of a VIS?**

As currently provided by the legislation.

**4.7 (1) Should it be possible to use material in a VIS to establish a mitigating factor at sentence?**

Yes.

#### **4.7 (2) If so, in what circumstances?**

When a mitigating factor is established.

#### **4.8 What provision, if any, should be made for adducing evidence to corroborate material contained in a VIS?**

The provision to adduce evidence to corroborate content of the VIS either by way of expert report or statement by the calling of witness/es to do so.

#### **4.9 (1) What procedure should be followed in situations where a VIS is not consistent with the charges for which the offender has been convicted?**

Some allowances should be made perhaps consistent with the Enough is Enough submission to allow the victim to articulate the impact.

#### **4.9 (2) What provision, if any, should be made for such cases?**

The court should act consistently with paragraph 4.58

4.58 The VIS provisions should direct the court not to consider:

- any aspects of VIS which are inconsistent with the agreed facts (following a plea of guilty)
- any aspects of the VIS which are inconsistent with the evidence adduced (following trial), or
- any uncharged act alleged in the VIS.

#### **4.10 What provision, if any, should be made for objections to the content of a VIS?**

Where possible the parties should resolve issues before the VIS is tendered as set out in the *R v Evans* [2011] QCA 135 in the Queensland Court of Appeal as cited in paragraph 4.67. Where unresolved the defence should raise their concerns with the presiding judge or magistrate. There is also merit in the preliminary submission from the Director for Public Prosecutions, NSW which suggested that consideration be given to preventing challenges or controlling the way challenges may be raised so as to put victims on notice and given the opportunity, if required, to rewrite their VIS in a

calm and considered setting. The process of admission of the VIS should not result in the re-traumatisation of the victim.

As discussed in paragraph 4.70 there need to be clearer procedural guidelines that not only explain these processes but are designed to minimise the possibility of further victim trauma. The proposal by the Young Lawyers that the defence is served a copy of the VIS has some merit. If the defence does not object, the VIS should be tendered automatically and if they do the objection should be dealt with prior to the sentence hearing. The current law around VIS prevents the service of the VIS on the defence is no doubt designed to protect misuse of the VIS by defendants. Perhaps legislation similar to that enacted around Domestic Violence Evidence in Chief (DVEC) should be written to prevent direct service of the VIS upon the defendant and require the defence practitioner to not only prevent the document from being given to the defendant or copied and require its return to the prosecution upon conclusion of the matter.

#### **5.1 (1) What arrangements, if any, should be made to allow a person to prepare a VIS before conviction of the offender?**

The Local Court is the engine house of the court system. Most criminal prosecutions are dealt with to finality there. Many Local Courts deal with more than 100 listed matters per day and as swiftly as possible. Many matters are dealt with as a plea of guilty on the first occasion or soon thereafter upon a subsequent occasion after the defendant has received an adjournment for legal advice. Again many of these matters result in sentencing on the first occasion. The current process for VIS serves to extend the process as an adjournment is necessary to allow the victim to prepare their VIS which must be done without police assistance. If the objective of this review is to increase the use of VIS in the Local Court this will not occur without detriment to the swift workings of the Local Court. Additional adjournments will be required for several weeks in order to provide victims with the time to seek advice or review guidelines and review practical examples etc will delay resolution of potentially thousands of matters in the Local Court. If the VIS was prepared prior to the first occasion and served as discussed in the response to the previous question there is greater potential for not only critical issues to be resolved but for the court to deal with the matter on the first occasion. This process would also be assisted if Victim Services was properly resourced to provide better telephone and internet based advice to victims in the preparation of VIS as discussed early in these questions.

#### **5.1 (2) What are the benefits and disadvantages of allowing a person to prepare a VIS before conviction?**

The benefit of allowing the preparation of a VIS before conviction is that the matter could be finalised more quickly without unnecessary delay minimising delays in the Local Court. Disadvantages include the increased possibility of the victim having to prepare a revised VIS because a plea is accepted on a revised basis or certain charges are withdrawn on the basis of pleas in another.

**5.2 What provision, if any, should be made to inform an offender about the contents of a proposed VIS, before the statement is tendered in court?**

As indicated above perhaps the VIS could be served upon the defendant's legal representative with strict legislation preventing the document or any copy thereof of falling into the hands of the defendant. Such legislation could make it an offence to breach strict protocols and require the return of the VIS after sentencing.

**5.3 What limits, if any, should there be on:**

- (a) the number of victims who can make a VIS, or**
- (b) the number of VISs that any victim may tender?**

These questions should be left to the discretion of the court.

**5.4 What provision should be made for attaching other material to a VIS?**

Other jurisdictions have permitted the tender of other material including video and photo montages. Within reason these should be able to be tendered in company with a VIS.

**5.5 How should medical and other expert evidence relating to the impact of an offence be dealt with at sentencing?**

Such evidence should be tendered as an adjunct to the VIS. Currently there is a 20 page limit provided by the regulations with respect to the length of a VIS. Medical and other expert reports can at times exceed individually or collectively the 20 page limit. This could heavily impact on a VIS particularly when there is associated medical and support material with respect to physical, psychological and other impacts a crime/s have on the victim.

**5.6 (1) What should be the formal requirements for a VIS to be received and considered by a court?**

As per the current situation with the discretion to admit an unsigned VIS.

**5.6 (2) What should be the consequences of failure to comply with the formal requirements?**

The adjournment of the matter to allow the preparation of a VIS that does comply with formal requirements, where such an adjournment is necessary.

**5.7 (1) Who should be able to tender a VIS?**

A VIS should only be tenderable by the prosecutor otherwise it could result in unreasonable delay to the finalisation of matters.

Additionally, the prosecutor who has carriage of a matter could lose control of what is tendered and how it is tendered.

**5.7 (2) If prosecutors alone are permitted to tender a VIS, what guidance should be provided for the exercise of their discretion?**

There should be plenty of guidance within SOPs or a practice note to enable a prosecutor to appropriately exercise his or her discretion.

**5.8 (1) What special arrangements should be available to victims who read their VIS in court?**

Options should be available including AVL, closed court rooms, screens, support persons and pre-recorded evidence in chief.

**5.8 (2) Should the availability of these arrangements be limited in any way?**

The court should allow victims access to these alternatives unless it considers that having regard to all of the relevant circumstances, it is inappropriate to do so.

**5.9 (1) Should any considerations prevent a victim from reading their VIS in court?**

The Queensland model appears reasonable. The court must allow a victim to read their VIS unless it considers that having regard to all of the relevant circumstances, it is inappropriate to do so.

#### **5.9 (2) What alternative arrangements could be made?**

Perhaps in limited circumstances another person could read the VIS or it be tendered instead.

#### **5.10 (1) Should it be possible for a victim to deliver an oral VIS, without tendering one in writing?**

NSWPF should oppose an oral VIS in lieu of a documented VIS. In such circumstances the court has limited ability to preview what will be said or control the witness with respect to ensuring they comply with the rules of admissibility. Potentially this could lead also to a constant stream of objections and a further damaging experience for the victim. It could be possible however, to tender a pre-recorded VIS instead of a written one. There is already precedent with the respect to pre-recorded statements for Domestic Violence Evidence in Chief (DVEC).

The downside of recorded or verbal only VIS, is that the court is required to focus on note taking at a time when attention should be focussed upon the victim and the creation of a supportive and welcoming environment. If the judicial officer's attention is diverted the victim may feel that their VIS is not important or that they are getting no non-verbal acceptance or understanding from the court.

#### **5.10 (2) What procedures would need to be put in place if oral VISs were to be permitted?**

No comment.

#### **5.11 What provision should be made for someone to make a VIS on a victim's behalf?**

As applies in the ACT, a wider range of persons should be able to make a VIS on behalf of a victim of crime including persons who are in an intimate personal relationship with the victim similar to the definition under the *Crimes (Domestic and Personal Violence) Act 2007* and other friendships.

**5.12 Under what circumstances should it be possible to cross-examine or re-examine a person who made a VIS?**

Any disputes with respect to a VIS should be resolved wherever possible before the date upon which the VIS is to be read or tendered. In some cases the defence could raise a general objection and the prosecution agree that the relevant portion of the statement have limited weight. Cross examination should only occur in limited circumstances.

**5.13 To what extent and under what conditions should a VIS be available outside of the sentencing proceedings to which it relates?**

No more than is currently allowed.

**5.14 What other changes to practice and procedure could be made to improve a victim's experience of the sentencing process?**

As outlined in paragraphs 5.88 to 5.60 judicial officers should acknowledge the presence of victims in court and thank them for their participation. They should also use sensitive and compassionate language and understand the process and the principles of sentencing.

**6.1 (1) When should restorative justice practices be available?**

Restorative justice practices to a limited extent currently exist with respect to circle sentencing, youth justice conferencing and forum sentencing. These processes when used allow victims to buy in and give them greater involvement in sentencing and alternate process. These should continue with greater victim involvement where merited and other opportunities to use restorative justice explored.

**6.1 (2) What are the advantages and disadvantages of having restorative justice practices available as part of the sentencing process?**

Restorative justice provides victims with buy in to the process and greater involvement in the outcome of matters. Victims of crime are regularly disenfranchised by their perception of weak sentencing particularly when bonds and fines are in no way reflective or recognition of their experience. It is arguable that restorative justice when combined with such sentencing can make the outcome more palatable to victims particularly when they have been heard and they have an apology from the defendant.

**6.1 (3) What are the advantages or disadvantages of having restorative justice practices available after sentencing?**

No comment.

**6.2 (1) What offences should be eligible for restorative justice practices?**

No comment.

**6.2 (2) What offences should be excluded from restorative justice practices?**

No comment.

**6.3 (1) Who should be able to attend restorative justice proceedings?**

As current including victims of crime.

**6.3 (2) Should certain participants be excluded?**

No comment.

**6.3 (3) What can be done to encourage victim involvement in restorative justice practices in appropriate cases?**

There needs to be greater information and support to victims from Victim's Services who should be resourced accordingly. Services and resources should be advertised through a variety of media including the internet.

**6.4 What procedural safeguards, if any, should be required in restorative justice practices in NSW?**

The safeguard cited in paragraph 6.47 and following.