New South Wales
Council for Civil Liberties

NSWCCL SUBMISSION

NSW SENTENCING COUNCIL

VICTIMS' INVOLVEMENT IN SENTENCING

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NSW COUNCIL FOR CIVIL LIBERTIES SUBMISSION TO NSW SENTENCING COUNCIL

VICTIMS' INVOLVEMENT IN SENTENCING.

The NSW Council for Civil Liberties (CCL) welcomes the opportunity to respond to the Consultation Paper by the NSW Sentencing Council: **Victims' involvement in sentencing**. (September 2017) (The Paper).

The Paper provides a useful summary of the range of issues around victims' involvement in sentencing. CCL has focussed on responding briefly to questions relevant to the issues we regard as important from a civil liberties perspective. We have focussed on answers rather than reworking the arguments for various possible responses – as these are reasonably familiar and are well covered in the Paper.

We have not responded at this time to the questions relating to restorative justice but hope there may be a later opportunity to provide some input as to our views on this very important dimension.

2.1 Information about victim impact statements

Question 2.1: How can the information given to victims on VISs and sentencing be improved?

Clear, comprehensive and timely information and guidance needs to be given.

It should be available in writing, electronically (via website) and supported by oral explication by police, prosecutors and Victims Services in terms that are sympathetic and readily understandable.

Sentencing principles and procedure need to be explained. The role and content of a VIS need to be explained.

Documents presently available from relevant agencies need to be kept current and preferably standardised, so that inconsistent messages are not put out. A degree of coordination is necessary.

2.2 Content of a victim impact statement

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

The difficulty has always been and remains balancing the concerns of victims with the principles of sentencing. That balance needs to be controlled and maintained. Some victims have unrealistic expectations about the impact and therefore the content of a VIS, while many do not.

The principles of sentencing are clear from legislation and common law. A VIS must not infringe those principles but there is room for them still to serve a useful purpose.

First the law about the admissible content of a VIS needs to be settled and that is a policy issue. By prescribing in legislation the limits of content and the form it may take (oral, written, electronic, graphic), victims are guided to provide information that may meet their concerns and be able to be considered by a court.

It is important that victims not have false expectations and clear information in advance is the most effective way of preventing that.

Victims may often need assistance to meet those legislated parameters and that should be provided in advance of any hearing through Victims Services and the prosecution.

Every effort should be made, in advance, to avoid objection and possible exclusion.

The defence should not have a role in that, but should still be entitled to object to content and have that adjudicated; but defence representatives should be aware (through professional development programs or otherwise) of the possible impact of any editing of a VIS.

2.3: Presenting the victim impact statement in court

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

All persons engaged in the process – police, prosecutors, judges, magistrates, associates, clerks, Sheriff's officers, court staff, etc – should have specific training on the process and implications that may arise.

Cross-examination on a VIS should not be allowed in any circumstances. If the ancillary conduct of the matter has met the necessary standards, it should not be needed in any event.

2.4: Victim impact statements in the Local Court

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

Police prosecutors are the barrier. They are not as professionally competent or sensitive as ODPP prosecutors, they have excessive workloads and therefore not the time to devote to victims and they lack expertise and confidence to competently guide victims through the process.

They should all be replaced by adequately resourced ODPP prosecutors.

The Local Court also operates with case volumes and timing that discourages the use of VISs.

The categories of offence in which a VIS may be presented should be the same in all courts – the criteria prescribed should not differentiate between jurisdictions, especially where increasingly serious offences are being dealt with in the Local Court.

Question 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?

If by "efficiency" is meant "low cost", then increased use of VISs must impact upon ("compromise") it. Cases would take longer to hear and the preparation involved may interfere with the smooth running of the courts at times.

This is a reasonable price to pay to better meet the concerns of victims and necessary resources should be made available for it.

2.5: Victim assistance

Question 2.5 (1) How can victims be better assisted in making a VIS?

Through the measures described above : 2.4(1) 2.4(2)

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

Ideally yes. The idea of a victim's advocate as described in paragraph 2.57 (and apparently used in the USA) has some attractions. The corps of officers would need to be specially and uniformly trained to a high standard. Perhaps their deployment could be managed through the courts.

2.6: Victims requiring additional or distinct assistance

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

Not adequately. There are victims with special needs, such as persons with physical and/or intellectual impairment, Indigenous persons, children and young people, victims of abuse of various kinds and so on. They need additional support tailored to their situations.

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

This is an issue of resources, training, specialisation and accessibility.

3.1: Primary victims

Question 3.1 (1) Is the current definition of "primary victim" appropriate?

One of the purposes of sentencing (section 3A (g) of the Crimes (Sentencing Procedure) Act 1999 [CSP] is: *"to recognise the harm done to the victim of the crime and the community."*

There may be speculation about who is included in the description of "victim of the crime". If it is put that it means, in the terms of the Victims Rights and Support Act 2013 [VRS], only a primary victim, then the addition of "and the community" would gather up everyone else in the relevant community ambit.

So it is probably unnecessary to define "primary victim" and "family victim" separately if the input made by victims is to contribute to the purposes of sentencing.

This is one of the enduring conundrums of VISs – do they contribute to the identification of the harm done to a victim and the community or do they not?

If, on the other hand, definitions are included in the VRS in order to limit the classes of persons who may make VISs, then attention needs to be given to those definitions.

The matters included at paragraph 3.12 of the Consultation Paper would need to be included.

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

Not necessary.

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

Not relevant.

3.2: Family victims

Question 3.2 (1) Is the current definition of "family victim" appropriate?

"Family victim" is not defined in section 3 or 5 of the VRS, but is defined in section 22 for the purposes of Part 4. Section 5 provides that "a member of the person's [the victim's] immediate family" is also a victim of crime. Assistance in the interpretation of that description may be obtained from section 22.

This drafting certainly needs to be addressed to make it clear what provisions may apply to VISs.

Section 22(3) is not framed broadly enough to include all categories of persons who may be as significantly harmed by an offence as a close partner or a parent might be (for example).

"Family victim" is defined in section 26 of the CSP in similar terms with the addition of a person engaged to be married to the primary victim – (b1) in section 26.

The VRS needs to be amended for consistency.

If the intention is to gather into the field of people who may make a VIS all those whose harm suffered may impact upon the sentence recognising the harm done to the victim and to the community, then no limit should be imposed. Different offences against different primary victims may have very different impacts, in kind and extent, upon different classes of persons.

If, on the other hand, the intention is to restrict the field, then policy will dictate where those restrictions will be set.

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

That depends upon the policy being applied.

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

There are advantages in encompassing all persons who have suffered to the extent that they wish to be heard. It better enables a court to assess the harm done to the victim and to the community.

There are practical disadvantages in multiplying the number of persons who may contribute and managing those contributions – and in adding to the complexity of the sentencer's task.

3.3: Type of harm

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

Personal harm is not defined in the VRS. In the CSP it is defined to mean: "actual physical bodily harm or psychological or psychiatric harm".

There is no requirement that a family victim has suffered personal harm, so the question may be misconstrued.

Question (2) How could the definition be amended?

The matters in paragraph 3.33 of the Consultation Paper should be taken into account.

Question 3.3 (3) What are the advantages and disadvantages of changing the definition?

The advantage is recognition of the range of ways in which a criminal offence may cause harm to a victim. There are no disadvantages.

3.4: Eligible offences

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

Paragraph 3.41 of the Consultation Paper points to the need to harmonise the legislation and the common law in this area.

If the purpose of sentencing in section 3A(g) of the CSP is to be given proper effect, there is no reason why a VIS should only be able to be given in cases involving personal harm and death (and some sexual offences).

In order for a court to properly apply section 3A(g), a VIS should be able to be given in the case of any offence.

Question 3.4 (2) How should eligible offences be defined?

There should not be such a category.

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

No.

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

In order to better enable a court to observe and apply the purpose of sentencing in section 3A(g) of the CSP and give it proper meaning.

3.5: Matters listed on a Form 1

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

In exactly the same circumstances as a victim of an offence on the indictment.

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

The advantage is to enable the purposes of sentencing to be properly applied in relation to all relevant offences.

3.6: Community impact statements

Question 3.6 (1) Should NSW adopt community impact statements?

It might be argued that community impact statements of the two forms described are a natural progression from individual statements to assist in applying section 3A(g) of the CSP.

However, CCL considers better approaches to the issue would be either:

- to amend section 3A(g) to circumscribe its operation
- or to draw a line between the harm done to individuals and the harm done more ephemerally to "the community" of which they are members.

Section 3A(g) describes a factor to be taken into account in the sentence imposed and while describable individual harm may affect the sentence imposed, it would be unreasonable and impracticable to sheet home to an individual offender all consequences for the offence occurring to a geographical area or the psyche of a society.

If that view is taken, no change is required and community impact statements should not be adopted.

Questions 3.6 (2)(3)(4)

Not relevant.

4.1 Content of a primary victim's victim impact statement

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

All harm, direct and indirect, caused by the commission of the offence that would not otherwise have been suffered.

4.2: Content of a family victim's victim impact statement

Question 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?

All harm, direct and indirect, caused by the commission of the offence that would not otherwise have been suffered. All aspects of the effect of the death on the family victim – and family – should be included.

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

This question is not clear.

4.3: What a victim impact statement may not include

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

The Regulation and common law provide suitable limitations and they should continue to apply. CCL considers an amendment to the Regulations expressly excluding a statement of the victim's views about the appropriate sentence is desirable.

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

By having them deleted from the VIS, on application of a party or of the court's own motion.

4.4: Court's use of a primary victim's victim impact statement

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

This is where legislative guidance is required. The situation is presently too uncertain. A policy decision needs to be made: is a VIS able to affect the sentence imposed, or is it not? The question has been avoided for long enough.

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

The CCL does not support the use of the VIS by the Crown to establish an aggravating feature of an offence on sentence. This practice generates objections from defence and may lead to cross-examination of the victim. This is recognised as potentially undermining of the therapeutic intent of the VIS.

The courts use of the VIS should focus on supporting the victim by recognising the harm done to the victim.

4.5: Court's use of a family victim's victim impact statement

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

This is where legislative guidance is required. The situation is presently too uncertain. A policy decision needs to be made: is a VIS able to affect the sentence imposed, or is it not? The question has been avoided for long enough

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

Consistent with 4.4 (2) above.

4.6: Absence of a victim impact statement

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

A court should not be able to draw any conclusion from the absence of a VIS.

4.7: Proving mitigating circumstances

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

Consistent with our on-balance views in 4.4(2) - no.

Question 4.7 (2) If so, in what circumstances?

Not relevant.

4.8: Corroborating evidence

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

There should be no such provision. A VIS is to be assessed at face value.

4.9: Where a victim impact statement is not consistent with charges proved

Question 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?

The inconsistent parts of the VIS should not be admissible.

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

Legislative guidance would be helpful.

4.10: Objecting to the content of a victim impact statement

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

Objection should be able to be made by a party and adjudicated by the court if agreement cannot be reached. The victim should not have a right to be heard on such an application.

5.1: Time of making a victim impact statement

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

A VIS arises on sentence, not before conviction. No formal arrangements should be made

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

Not relevant.

5.2: Notifying the offender

Question 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?

A copy of the VIS should be provided to the defence in advance of any sentencing hearing. It is desirable that any objections or concerns are resolved prior to sentencing procedures.

5.3: Number of statements

Question 5.3 (a) What limits, if any, should there be on the number of victims who can make a VIS,

No limit should be imposed.

Question 5.3 (b) What limits, if any, should there be on the number of VISs that any victim may tender?

One VIS per victim.

5.4: Attaching other material

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

The current NSW provision re content of any attached or referenced material sets out appropriate requirements for a VIS. No amendments to extend or further restrict are needed.

5.5: Medical and other expert evidence

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

Such material should not be admissible. It is impossible to set fair limits on it or to describe the permissible scope of such material.

5.6: Other formal requirements

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

Reasonable requirements that effectively and efficiently enable the intended audience to understand the VIS. A level of discretion should be left to the court to deal with such matters – being too prescriptive only leads to being bogged down in details.

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

The VIS is not able to be used. The current requirements are appropriate.

5.7: Tendering a victim impact statement

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

The prosecution should provide a VIS to the court.

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

That is an internal prosecutorial matter.

5.8: Special arrangements for reading a victim impact statement

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

The arrangements presently provided in NSW are appropriate.

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

See 5.8(1) above.

5.9: Other considerations

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

This should be left to the discretion of the court.

Question 5.9 (2) What alternative arrangements could be made?

See 5.9(1) above.

5.10: Oral statements

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

Yes. But generally it is preferable that a victim first provides a written VIS before it is delivered orally to the Court. A victim who is unable to read or write can have a VIS prepared and have it read to the court – as currently permitted

Question5.10 (2) What procedures would need to be put in place if oral VISs were to be permitted?

The parties and the court should have the power to interrupt if impermissible material is advanced

5.11: Making a victim impact statement on behalf of a victim

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

This will depend on the individual circumstances.

5.12: Cross examination and re-examination

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

In no circumstances.

But to ensure procedural fairness to the offender this requires clarifying legislation to prohibit a VIS being used to establish aggravating features for sentencing purposes.

5.13: Use of victim impact statements outside of a sentencing hearing

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

Not at all.

5.14: Other procedural changes

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

None suggested.

Concluding comments

The NSW Council for Civil Liberties hopes these brief responses to many of the questions posed by the Consultation paper will be of assistance to the Sentencing Council in its review of victims' involvement in the sentencing process. We are available to discuss any aspects of this response further.

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