

WOMEN'S
JUSTICE
NETWORK



1 August 2017

Law Reform and Sentencing Council Secretariat
New South Wales Sentencing Council
GPO Box 31
Sydney NSW 2001

Sent via email to: sentencingcouncil@justice.nsw.gov.au

Dear Law Reform and Sentencing Council Secretariat,

Re: Preliminary Submissions for Victim Impact Statements (VISs)

We, Women's Justice Network (WJN) (formerly known as Women in Prison Advocacy Network WIPAN) are writing to provide some important considerations for the review of victims' involvement in the sentencing process.

The Woman's Justice Network (WJN) has a unique perspective as it is the only organisation in NSW focusing on specifically addressing and advocating for issues faced by marginalised women and female youth affected by the criminal justice system. Our 10-year experience in this field has allowed us to see what programs and initiatives are effective and how they can be practically implemented to provide positive and successful results. In this way, we recognise the role victim impact statements (VISs) have in our current criminal justice system as just one way for victim participation. We recommend the council to consider looking beyond the limited use and benefits of victim impact statements, to include alternative models for victim participation that are shown to significantly improve victim satisfaction, without compromising offender rights.

Role of victims in sentencing in NSW

Traditionally, victims' rights have been used to justify increasingly punitive policies and political stances, with the rights of the offender and the victim in fundamental opposition (Brown in Booth 2016: v). Rather than assume victims require vengeance for the crime committed against them, it is important to assess and create practical means that assist the victim in moving forward from the offence.

The adversarial legal model regards crime as an offence committed against the wider community or the state rather than just an individual victim and in this, it is purposefully set up to exclude the victim from proceedings and they are umbrellaed under the public interest. Thus, to maintain the integrity of legal proceedings and practice, discussion and consultation of the role of victims must be undertaken in a way that does not inhibit an offender's right to a fair hearing but validates a victim's experience.

Currently, the only participation many victims have throughout the criminal trial process is in the form of victim impact statements. A victim impact statement is voluntarily submitted to the court, following a conviction and prior to sentencing, which details the harm and impact an offence had and may continue to have, on a primary victim or family victim as a direct result of the offence. A family victim, can only submit an impact statement if the primary victim died as a direct result of the offence.

In NSW, legislation limits the submission of victim impact statements to indictable offences and of those, only offences that cause death or actual bodily harm, involves an act of actual or threatened violence or prescribed sexual offence. The consultation paper should consider the purpose of VISs and the weight given to them, when determining who can submit a statement to ensure offenders maintain entitlement to a fair hearing.

Purpose of Victim Impact Statements

The role of VISs within the criminal trial process generally considered to serve instrumental or expressive purposes. The introduction of victim impact statements was driven by victim support and advocacy groups, politicians and media who highlighted the marginalised position of victims within the criminal trial process, leading to an overall dissatisfaction with the criminal justice system. In this way, victim impact statements were introduced to provide an avenue for victim participation, enhance sentencing purposes, reduce exclusion practices and improve their overall courtroom experience, by expressing their experience and feelings to the court and offender.

Whilst this expressive function isn't explicitly stated in statutory schemes it has been cited as an essential aspect for the purpose of VISs (Erez 2004). VISs give victims a 'voice' and the opportunity to be heard and considered throughout the CJS process. According to the Interim Implementation Report by Victorian Department of Justice (2014), this is one of the most commonly cited reasons for a victim to submit and read a statement in addition to 'taking back the power' and acknowledgement of feelings (Kirchengast 2014). It is also argued that they can serve therapeutic means for the victim by having their harm acknowledged and validated.

Furthermore, VISs serve instrumental purposes, inasmuch as they are devices that can be utilised to make the court aware of the harm sustained by the victim and may potentially impact the determination of penalty (Booth 2016:35). Whilst a number of Australian jurisdictions imposed mandatory consideration of VISs by the sentencing court, NSW provisions provide a more discretionary approach to the consideration of a VIS. VISs received by primary victims may be considered, if deemed appropriate, however there is no specific association between the VIS and penalty (*Crimes (Sentencing Procedure) Act 1999 NSW s28(1)*). Whilst the discretion remains for the inclusion of family victims, it is made clear that, if appropriate, “a VIS may be taken into account by a sentencing court in the determination of penalty” (*Crimes (Sentencing Procedure) Act 1999 NSW s28(4)*).

Risks and limitations associated with Victim Impact Statements

The use and inclusion of VISs have been controversial due to the risk of impeding on the offenders’ entitlement to a fair hearing and the impact on penalty. The consultation paper should consider and discuss how these risks are mitigated.

As previously stated, VISs serve an instrumental function and enhance sentencing purposes of retribution, general deterrence and rehabilitation as it documents the harm sustained from the offending (Booth 2016:38). VISs however can be considered irrelevant for instrumental purposes as the harm is already made aware to the court due to the consequence of an offence is an essential component or has been presented as evidence (NSWLRC 1996:11.19; Sanders et al 2001: 454; Booth 2016: 38). As VISs are in most cases not sworn documents or, if given orally, not presented under oath and are not ‘tested’ by the defence according to the rules of evidence, it is essential that the consultation paper discusses how the court consider VISs and how much weight they are given in determining penalty.

In addition, the highly emotional content of VISs may elicit emotions that can affect the level of punitiveness an offender receives, through influencing the sentencing court to place increased weight on VISs rather than mitigating factors. (Bandes and Salrino 2014).

Furthermore, there are limitations and barriers that dissuade a victim from tendering a VIS including:

- Secondary victimisation
- Facing the offender/offender’s family in court
- Re-traumatisation
- Fear of cross-examination
- Cultural shame attached to victims of crime
- Editing of submission (Kirchengast 2014; Booth 2016)

In this way, discussion must include the limitations victims are confronted by when making a VISs.

Furthermore, the actual therapeutic, expressive or restorative benefits of making a VIS need to be examined. According to a longitudinal study in the Netherlands (Lens et al. in Booth 2016) generally had no direct therapeutic benefits leading to a decrease in fear or anger, however they did find that they were more likely to experience higher levels of procedural justice. In this way, exploration of the purpose, benefits and limitations must be made in conjunction with consideration of other models for victim participation that may increase levels of victim satisfaction.

Alternative Models for Victim Participation

Whilst we acknowledge the current importance and usefulness of including VIS in the criminal justice process, it is significant to understand the heterogeneity of victims, their needs and alternative models that can lead to higher levels of satisfaction and overall trust of the criminal justice system. In this way, a flexible approach is needed to ensure the civil liberties of offenders is maintained, victims are more satisfied and ultimately produce a more effective criminal justice process.

Forum sentencing

We would like the consultation paper to include discussion of the use of forum sentencing, as a method of increasing victim participation and satisfaction. The overall goal of contemporary restorative justice “is to create a process for reconciliation between defendants who accept responsibility for their wrongdoing, their victims, their community, family and friends who are affected by their crimes” (Zehr in Wormer & Walker 2013). It is in this way that for a comprehensive and meaningful discussion on victim participation in sentencing, discussion must be made concerning the improvement of the current practice in Forum Sentencing and like programs.

According to a survey by Kichengast (2014) 0% of the victims, who’s cases went to court, participated in forum sentencing/youth justice conferencing/circle sentencing. Furthermore, only 16% of participants with cases pending had heard of forum sentencing and youth justice sentencing, with less (12%) having heard about circle sentencing. For an adequate assessment of victims in sentencing a review of the communication processes between victims and court processes should be undertaken.

There is strong evidence that supports victim satisfaction objectives, including numerous studies that report higher levels of victim satisfaction and longer lasting satisfaction, in those who participated in Forum Sentencing and restorative justice programs (Shapland et al. 2007; People & Trimboli 2007; Triggs 2005; Sherman & Strang 2010). Furthermore, interviews with victims from the United Kingdom and Australia demonstrated that levels of fear and anger towards the offender were substantially reduced and instead victims were substantially sympathetic towards the offender (Strang et al. 2006).

Restorative justice initiatives are underpinned by voluntariness. A significant limitation of restorative justice, particularly concerning adult offenders, is the reluctance of victims and offenders to participate. Furthermore, lack of understanding or awareness of restorative process by victims or offenders, limits participation levels (Bowen 2004).

In New Zealand, restorative justice programs are now an important component of their legal system and have produce positive results insofar as increasing satisfaction and promoting a sense of responsibility in offenders (Bowen et al. in Bolitho et al. 2012:136). Research concerning recidivism rates vary across jurisdictions (United Kingdom, Canada, New Zealand and Australia) due to the difficulty in capturing all variables that may account for reoffending. Whilst the current program for Forum Sentencing in NSW has been so far ineffective at reducing recidivism, it must be made clear that this is only one of six objectives of the program (Poyton 2013). An average reduction in recidivism rate amongst several studies was however found to be 7% (Bowen et al. in Bolitho et al. 2012:136).

If victim satisfaction is however consistently significantly higher through programs such as forum sentencing, and offender recidivism rates are not increasing, then they are an important investment and need to be considered within the discussion paper. It is with total despair that we at WJN have just learnt that the forum sentencing program/s will be closing or are closed. If this is the case, the NSW Government are seriously moving backwards, not forwards in the area of support and closure opportunities for victims of crime in this state, let alone trying to ensure the offender can make a significant contribution in being made to understand and change their offending behavior/s.

We thank you for your consideration on these issues and if you have any questions or matters to discuss in further, please do not hesitate to contact us at the details below.

Kindest regards,

Kate Finch and Kat Armstrong

For and on Behalf of the;

Women's Justice Network

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