
VICTIMS' INVOLVEMENT IN SENTENCING

NSW SENTENCING COUNCIL

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1. Terms of Reference

A review of victims' involvement in the sentencing process under the Crimes (Sentencing Procedures) Act 1999 (NSW) and consider:

- The principles courts apply when receiving and addressing victim impact statements.
- Who can make a victim impact statement.
- 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.
- The level of support and assistance available to victims.

1. Initial statements

Introduction

As a general rule, I am opposed to further amendment of s 21A of the *Crimes (Sentencing Procedure) Act 1999*.

The section is useful in providing the applicable factors which should be regarded as aggravating or mitigating an offence. My central concern is that s 21A can lead to a robotic approach to the determination of a sentence. NSW case law provides that judges should engage in a holistic analysis of the various relevant factors under s 21A. s 21A impedes this process and encourages the mathematical approach to sentencing.

I am also concerned that the underlying aim of these potential amendments may be to increase penalties imposed on offenders. A healthy body of criminology and criminal justice evidence suggests this approach does not deter crime. The NSW Bureau of Crime Statistics and Research (BOCSAR) has reported as follows:

Our results suggest that the criminal justice system does exert a significant effect on crime but some elements of the criminal justice system exert much stronger effects than others. Increasing the risk of arrest or the risk of imprisonment reduces crime while increasing the length of prison sentences exerts no measurable effect at all.¹

Impact of crime on victims

The impact of crime on victims can vary greatly depending on:

- the nature of the offence(s);
- the severity of the offence(s);
- the nature of the victim; and
- the relationship between the alleged offender and the victim.

Depending on the combination of the above factors, impacts on a victim of crime can include any combination of:

¹ Wai-Yin Wan, Steve Moffat, Craig Jones and Don Weatherburn, 'Contemporary Issues in Crime and Justice' (2012) 158 *The effect of arrest and imprisonment on crime*.

- temporary or permanent physical injury;
- financial loss;
- short and long-term psychological injury;
- shame and/or guilt;
- paranoia; and
- behavioural or habitual change.

Research on the impact of crime on victims:

There is a healthy body of research which sheds light on the impacts of crime on victims, both generally and on particular types of vulnerable victims.

Generally, the research indicates that:

- a majority of victims experience some sort of emotional reaction to being victimised;²
- violent crime is more likely to cause long-term effects on victims than non-violent crime;³
- violent crime is more likely to cause higher levels of psychological stress than non-violent crime;⁴
- victims of violent crime and threats of violent crime are more likely than victims of other crime to suffer long-term social distress.⁵

In relation to particularly vulnerable individuals, the research indicates that:

- Aboriginal Australians experience compounded victimisation due to their history of victimisation by colonisation and dispossession;⁶

² Joanne Shapland and Matthew Hall, 'What Do We Know About the Effects of Crime on Victims?' (2007) 14 *International Review of Victimology* 175, 178.

³ Ibid 196.

⁴ Ibid.

⁵ Australian Bureau of Statistics, *Analysis of Crime Victimisation and Social Wellbeing, 4524.0—In Focus: Crime and Justice Statistics, July 2012* (25 July 2012).

⁶ Matthew Willis, 'Non-disclosure of Violence in Australian Indigenous Communities' (Trends and Issues in Crime and Criminal Justice No 405, Australian Institute of Criminology, 2011).

- because women are more likely than men to become homeless following victimisation, women are more likely to be further victimised after initially being victimised;⁷
- refugees are more susceptible to a greater level of victimisation due to previous experiences which compound victimisation.⁸

⁷ Commonwealth of Australia, *The Road Home: A National Approach to Reducing Homelessness* (2008) 7.

⁸ Annabelle Allimant and Beata Ostapiej-Piatkowski, 'Supporting Women from CALD backgrounds Who Are Victims/Survivors of Sexual Assault: Challenges and Opportunities for Practitioners' (ACSSA Wrap No 9, Australian Centre for the Study of Sexual Assault/Australian Institute of Family Studies, 2011) 6.

2. The legal framework

Introduction

A victim impact statement is often the only possible stage of participation for a victim during the criminal trial process. The process is independent of prosecution submissions during sentencing. The process is an important step for victims to be heard by the court, the prosecution and the offender. The process can be therapeutic for victims and their families, and gives them the opportunity to have their difficulties publicly acknowledged. This chapter addresses the first three points of the terms of reference. The final point is not addressed in this paper.

The statutory scheme for victim impact statements

The *Crimes (Sentencing Procedure) Act 1999* ('the Act')⁹ contains the framework under which victim impact statements are governed. Those principles are discussed in this chapter.

s 26 - Definitions

This section is most useful in ascertaining who can make a victim impact statement. s 26 clarifies who is considered a 'victim' for the purposes of the framework and is therefore eligible to provide a victim impact statement.¹⁰

Definition of 'victim'

Anyone who is considered a 'victim' may make a victim impact statement in relation to an offence. In the context of a criminal trial, 'victim' means:

- a 'primary victim'; or
- a 'family victim'.¹¹

'Victim impact statement' means:

A statement containing particulars of:

⁹ *Crimes (Sentencing Procedure) Act 1999* (NSW).

¹⁰ *Ibid* s 26.

¹¹ *Crimes (Sentencing Procedure) Act 1999* s 26.

- (a) in the case of a primary victim, any personal harm suffered by the victim as a direct result of the offence, or
- (b) in the case of a family victim, the impact of the primary victim's death on the members of the primary victim's immediate family.¹²

'Primary victim' means:

- (a) a person against whom the offence was committed, or
- (b) a person who was a witness to the act of actual or threatened violence, the sexual offence, the death or the infliction of the physical bodily harm concerned,

being a person who has suffered personal harm as a direct result of the offence.¹³

'Personal harm' means:

actual physical bodily harm or psychological or psychiatric harm.¹⁴

'Family victim' means:

in relation to an offence as a direct result of which a primary victim has died, means a person who was, at the time the offence was committed, a member of the primary victim's immediate family, and includes such a person whether or not the person has suffered personal harm as a result of the offence.¹⁵

'Member of the primary victim's immediate family' means:

- (a) the victim's spouse, or
- (b) the victim's de facto partner, or
- (b1) a person to whom the victim is engaged to be married, or
- (c) 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.

It is clearly established that a primary victim includes the target of the offence broadly, as well as bystanders who have suffered "actual bodily harm or

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

psychological or psychiatric harm”. Furthermore, family victims, although limited to family members of a primary victim who has died “as a direct result” of the offence, is broadly defined to include almost all potential members of a familial arrangement.

s 27 - Application of Division

This section outlines in what jurisdictional contexts a victim impact statement can be made.

In the Supreme or District Courts, a victim impact statement can be made where the offence being dealt with is:

- (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.¹⁶

In the Industrial Relations Commission, a victim impact statement can be made where the offence being dealt with is:

- (a) an offence against Division 5 of Part 2 of the *Work Health and Safety Act 2011* or Subdivision 3 of Division 3 of Part 3 of the *Rail Safety National Law* (NSW), and
- (b) the offence results in the death of, or actual physical bodily harm to, any person.¹⁷

In the Local Court, a victim impact statement can be made where the offence being dealt with is:

- (a) an offence that results in the death of any person, or

¹⁶ Ibid s 27(2).

¹⁷ Ibid s 27(2A).

- (b) an offence 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, or
- (c) an offence that is referred to in Table 1 of Schedule 1 to the *Criminal Procedure Act 1986* and that:
 - (i) results in actual physical bodily harm to any person, or
 - (ii) involves an act of actual or threatened violence, or
- (d) a prescribed sexual offence that is referred to in Table 1 of Schedule 1 to the *Criminal Procedure Act 1986*.¹⁸

s 27(4) expressly provides that Part 3 Div 2 of the *Crimes (Sentencing Procedure) Act 1999* does not limit the effect of any other law in providing a court with the power to hear victim impact statements.

s 28 - When victim impact statements may be received and considered

A victim impact statement may be received and considered by the court at any time after it convicts, but before it sentences, an offender.¹⁹ If the victim of the crime is deceased as a result of the offence, the court may hear a victim impact statement given by a family victim.²⁰ A court has the power to make the victim impact statement available to the prosecutor, defendant or any other relevant parties to the matter, but the offender is not permitted to retain copies of the statement.²¹ A victim impact statement may also be received when the Supreme Court determines an application for the determination of a term and a non-parole period for an existing life sentence.²²

s 29 - Victim impact statements discretionary

¹⁸ Ibid s 27(3)

¹⁹ Ibid s 28(1).

²⁰ Ibid s 28(3).

²¹ Ibid s 28(5).

²² Ibid s 28(2).

The giving of a victim impact statement is not mandatory.²³ The court cannot receive a victim impact statement if the victim(s) objects to the statement being given to the court.²⁴ This may occur where a victim has provided a statement to the prosecutor, then subsequently decided against its submission to the court against the prosecutor's advice. Where a victim impact statement is not given, the court is not to infer that the offence had little or no impact on the victim(s).²⁵

s 30 - Formal requirements for victim impact statements

A victim impact statement must be in writing and comply with the requirements as set out by the regulations.²⁶ Clause 9 of the *Crimes (Sentencing Procedure) Regulation 2010* states that a victim impact statement:

- (a) must be legible and may be either typed or hand-written, and
- (b) must be on A4 size paper, and
- (c) must be no longer than 20 pages in length including medical reports or other annexures (except with the leave of the court).

Victims Services provides information about victim impact statements, including the suggested form of a victim impact statement, on its website at <http://www.lawlink.nsw.gov.au/vs>.

A victim impact statement may include photographs, sketches and other images.²⁷

Where a victim cannot make a victim impact statement or object to a victim impact statement which relates to the personal harm he or she has suffered, one may be made for him or her by a person having parental responsibility for the victim, a member of that person's immediate family, or any other representative of that person.²⁸

²³ Ibid s 29(1).

²⁴ Ibid s 29(2).

²⁵ Ibid ss 29(3) and 29(4).

²⁶ Ibid s 30(1).

²⁷ Ibid s 30(1A).

²⁸ Ibid s 30(2).

A court may only receive and consider a victim impact statement only if it is given in accordance with the requirements prescribed in the Act.²⁹

s 30A - Reading out victim impact statements in court

A victim is entitled to read out the whole or any part of his or her victim impact statement to the court.³⁰ If they are unable to do so, it can be read by a person having parental responsibility for the victim, a member of that person's immediate family, or other representative.³¹ A victim is entitled to read out their victim impact statement via closed-circuit television if he or she was entitled to give evidence that way during the trial.³²

Common law principles

Impact on victim as a factor in sentencing

The common law position is for the sentencing judge to take into consideration the effect of the crime on the victim.³³ In *Siganto v The Queen*, it was stated that:

The undoubted proposition that a sentencing judge is entitled to have regard to the harm done to the victim by the commission of the crime. That is the rule at common law.³⁴

The requirement to take into account the impact of the offence on the victim is therefore strongly established. It is important to remember, however, that a sentencing official cannot take into account a factor(s) that would have warranted a conviction for a more serious offence.³⁵ The relevant factors are also limited to those which were intended or could reasonably have been foreseen.³⁶

Admissibility outside the statutory framework

²⁹ Ibid s 30(3).

³⁰ Ibid s 30A(1).

³¹ Ibid.

³² Ibid ss 30A(3) and 30A(4).

³³ *Porter v R* [2008] NSWCCA 145, [54].

³⁴ *Siganto v The Queen* (1998) 194 CLR 656, [29].

³⁵ *The Queen v De Simoni* (1981) 147 CLR 383, 389.

³⁶ *Josefski v R* (2010) 217 A Crim R 183, [3]-[4], [38]-[39].

Where the statutory scheme does not allow for admission of a victim impact statement, statements made by victims may still be admissible during the sentencing process. Johnson J held in *Porter v R* that:

The fact that the statements were entitled "victim impact statements", and were prepared on forms which were not appropriate technically to the offences, does not mean that the content of the statements was inadmissible... It is not uncommon for material concerning loss and harm to victims... to be included in statements taken by police from victims, or in statements of facts used on sentence.³⁷

More recently, the court in *Miller v R* stated that evidence of harm occasioned to a victim by an offence has always been relevant and admissible whether or not given by way of victim impact statement.³⁸

Use of a victim impact statement

In *R v Tuala*, Simpson J provides a succinct list of authorities regarding victim impact statements. In doing so, her Honour observes that a consensus has yet to be reached in regards to a codified use of victim impact statements, and may never in fact be reached, requiring the use to be determined based on the facts and circumstances of the case.³⁹ Basten JA agreed with this observation in *R v Thomas* where his Honour stated that the "Act does not provide how an impact statement is to be taken into account".⁴⁰

Weight to be given

No limitation seems to exist for the weight which is to be given to a victim impact statement. The court observed in *SBF v R* that there is no statutory or other restriction on the extent to which a sentencing judge may set out the contents of victim impact statements.⁴¹

Cross-examination of victims

³⁷ *Porter v R* [2008] NSWCCA 145, [53].

³⁸ *Miller v R* [2014] NSWCCA 34.

³⁹ *R v Tuala* [2015] NSWCCA 8, [52]-[76].

⁴⁰ *R v Thomas* [2007] NSWCCA 269, [36].

⁴¹ *SBF v R* (2009) 198 A Crim R 219, [88].

The statutory framework does not seem to envisage a victim being cross-examined on the basis of his or her impact statement.⁴² A statement may be cross-examined if it is written by an expert acting as a 'qualified person' under cl 8 of the *Regulation*, giving an opinion concerning the harm suffered by the victim.⁴³

The *De Simoni* Principle

A victim impact statement may only be considered in the context of the offence before the court. Details of the offence or the offender contained in a victim impact statement which would give rise to a more serious offence cannot be taken into account by a sentencing judge, even where the statement is received without objection, as this would breach the principle espoused in *R v De Simoni*.⁴⁴

This principle was exemplified in *R v Bakewell*⁴⁵ and affirmed in *FV v R*.⁴⁶ In *FV v R*, a victim impact statement (which was admitted without objection) was inconsistent with the agreed statement of facts.

Offences not charged

A victim impact statement may only refer to the impact of charged offences.⁴⁷

Relevance of victim's attitude

In *R v Palu*, Howie J stated that:

The attitude of the victim cannot be allowed to interfere with a proper exercise of the sentencing discretion. This is so whether the attitude expressed is one of vengeance or of forgiveness: *R v Glen* (NSWCCA, unreported, 19 December 1994). Sentencing proceedings are not a private matter between the victim and the offender, not even to the extent that the determination of the appropriate punishment may involve meting out retribution for the wrong suffered by the victim. A serious crime is a wrong committed against the community at large and the community is itself entitled to retribution... Matters of general public importance are at the heart of the policies and principles that direct the

⁴² *R v Wilson* [2005] NSWCCA 219, [27]-[28].

⁴³ *Muggleton v R* [2015] NSWCCA 62, [44].

⁴⁴ *R v De Simoni* [1981] HCA 35.

⁴⁵ *R v Bakewell* (unreported, 27 June 1996, NSWCCA).

⁴⁶ *FV v R* [2006] NSWCCA 237.

⁴⁷ *PWB v R* [2011] NSWCCA 84, [52]-[54].

proper assessment of punishment, the purpose of which is to protect the public, not to mollify the victim.

Relevance of forgiveness

Forgiveness of the offender should not be taken into account as a factor in determining a sentence.⁴⁸ The victim's attitude (even in forgiveness) cannot overrule the need for general deterrence in a case involving serious objective circumstances.⁴⁹

⁴⁸ *R v Begbie* (2001) 124 A Crim R 300, [57]-[59].

⁴⁹ *Ibid* [43].

3. Questions

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

Guidelines provided to victims should include a list of examples, if present, that should be included in the VIS. An example list is provided at Appendix 1.

Information should also be provided to outline the extent to which the court may use the information provided in a VIS. This would temper the expectation a victim may place on the sentencing outcome at the outset, and reduce the likelihood that he/she may be disappointed in the outcome.

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

A VIS template should be designed and provided to victims at their request. Having a template available would thoroughly reduce the difficulty in drafting a VIS, particularly during a stressful time.

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

Please see questions 2.1 and 2.2.

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

As the Department of Justice will be well aware, the Children's Champions scheme has been strongly praised in the community; similarly, the use of therapy dogs in some Local Courts in NSW.

I recommend the use of similar specialist intermediary schemes in general criminal matters in NSW. Given the successful implementation and management of the Children's Champions scheme, there is little doubt that the NSW Department of

Justice can successfully and professionally introduce similar program for other categories of victims.⁵⁰

3.1 - Is the current definition of "primary victim" appropriate?

The current definition of "primary victim" appropriately captures the intention of parliament to restrict the making of a VIS to those who have been directly victimised and witnesses to the victimisation.

3.2 - Is the current definition of "family victim" appropriate?

The current definition allows the grandparent, grandchild, and some other child for whom the victim is the guardian to make a VIS. Accordingly, it is recommended that the following are added to the definition:

- step-grandparent
- step-grandchild
- adoptive grandparent
- adoptive grandchild

Given the increase in life expectancy, the frequency of grandparent-grandchildren supervision has increased in Australia and abroad. As such, it is necessary to recognise the additional familial relationships that arise.

3.3 - Is the current definition of "personal harm" appropriate for identifying victims who may make a VIS?

The current definition of "personal harm" only includes actual physical bodily harm, psychological harm, or psychiatric harm. In the post global financial crisis world, economic loss even in the short term can cause significant detriment to a victim. Economic loss can also lead to an inability to afford treatment for physical bodily harm, psychological harm, and psychiatric harm.

3.4 - Is the current provision that identifies eligible offences for a VIS appropriate?

⁵⁰ <http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2017/praise-for-childrens-champions-scheme.aspx>

On the same basis as the response to question 3.3, economic offences should be added to the scope of eligible offences for a VIS.

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

The current Form 1 regime under the *Crimes (Sentencing Procedure) Act 1999* allows the court to take a further offence into account in dealing with an offender for a principal offence if, inter alia, in all the circumstances, the court considers it appropriate to do so.⁵¹

It is recommended that the making of a VIS in relation to a Form 1 offence should be allowed if, in all of the circumstances, the court considers it appropriate to do so.

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?

Please see questions 3.3 and 3.4.

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?

See questions 3.3 and 3.4. Economic loss would inherently affect dependants of the primary victim, if not other family's victims as well (e.g. where an adult sibling provides financial assistance as a result of economic loss).

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

There should be no limitation on the eligibility of family members who wish to make a VIS. In theory, any member of a primary victim's family may be a family victim, even in the case of economic loss.

4.3 - What particular types of statement, if any, should be expressly excluded from a VIS?

⁵¹ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33(2)(b).

Attached at Appendix 2 is a fact sheet which is designed to be added to a VIS template which discusses what should not be included in a VIS.

4.4 - Are the provisions relating to a court's use of a primary victim VIS appropriate?

In light of the common law surrounding the use of VISs by the judiciary, the provisions are adequate.

4.5 - Are the provisions relating to a court's use of a family victim VIS appropriate?

Please see question 4.4.

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 provision should be made to the effect that a court must not draw an adverse inference against the offender from the absence of a VIS. This concept is well established, for example in the case of a defendant opting not to give testimony during a trial. The absence of a VIS may occur for a number of reasons, and as such should not be the basis for any adverse inference.

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

The court should be able to see corroborating evidence of statements made in a VIS if, in all of the circumstances, the court considers it appropriate 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?

The VIS should still be received to achieve the therapeutic effect of making a VIS for the victim. However, the consideration of the admissibility of the contents of that VIS should still be made based on the *De Simoni* principle, as discussed in question 4.9 (2).

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

Technically speaking, the *De Simoni* principle would prevent the court from taking into account a factor at sentencing (even if it is adduced by way of VIS) which, if accepted by the sentencing officer, would give rise to a more serious offence.⁵²

However, to avoid the possibility of an appeal should this question ever arise (which appellate courts would no doubt dismiss), a provision should be made to this effect.

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

While it is important to allow for the objection of questionable content in a VIS, care must be taken to avoid further traumatising a victim and/or reducing the rehabilitative process of drafting a VIS. One approach to achieving these two competing interests may be to allow for the offender's lawyer to draft a list of objections to content in the VIS out of court and submit it to the court. The sentencing officer can then rule out any inadmissible content or give lesser weighting to it.

Furthermore, please see question 5.2.

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

Given the documented benefits of drafting a VIS for a victim, it is recommended that a victim be encouraged to draft a VIS (or something similar) prior to conviction. Care should be taken in advising them that a conviction is yet to be secured and may not be at the end of the trial.

Furthermore, please see question 5.2.

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?

To avoid the victim having to endure the contention or cross-examination of their VIS on the day of sentencing, it is recommended that a provision be introduced that

⁵² *R v De Simoni* [1981] HCA 31.

allows for the offender to hear (not keep a copy) the contents of any VISs made prior to sentencing. This way, defence submissions to the court as discussed in question 4.1 can be made.

Updates to a VIS beyond this point should be relayed to the offender or their legal representative in a reasonable time after the update has been made.

5.3 - What limits, if any, should there be on the number of victims who can make a VIS, or the number of VISs that any victim may tender?

There should be no blanket limit on the number of victims who can make a VIS. There is no theoretical limit of how many victims to which a crime may give rise.

A victim should be limited to one VIS. There is no reason why a victim cannot simply update their VIS to include new material, particularly if VISs are made prior to conviction. However, a court may allow for additional VISs to be made if, in all of the circumstances, the court considers it appropriate to do so.

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

A provision should be made that allows for any material to be attached to a VIS, as admissible according to the rules of evidence. This includes any financial documents, medical records, doctor's letters, and psychological evaluation reports.

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

Please see question 5.4.

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

Ideally, a VIS is tendered in writing or tendering in writing and read. If one is not given in writing, then the pre-sentencing procedure allowing the defence to submit objections as recommended would not be possible.

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

A victim should be able to have their VIS read by a representative if the victim is unable to do so due to a lack of capacity or inability to attend. However, the victim should be informed that they can simply tender the VIS if they are unable to attend.

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

Please see question 5.2.

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

Given that a VIS forms part of the hearing, it should be able to be used as any other trial materials are used outside sentencing proceedings.

4. Conclusion

Reforms have been made in recent years to ensure that victims can participate in the sentencing process, particularly through the provision of victim impact statements. I do not see a need for further changes to be made to this process.

I wholeheartedly suggest against the push toward victims being permitted to make suggestions as to the type or length of sentence which should be imposed. This is for several reasons, with the basis of all of those reasons being that a victim is not qualified to be making any such determination. By way of example, a victim is not legally qualified: they are unfamiliar with, *inter alia*, the rules of evidence, the common law, sentencing guidelines, the purposes of sentencing, and the research on incarceration and recidivism. Furthermore, it is unlikely that they are coming to their determination with an impartial mind.

Ultimately, I submit that there should be no greater role conferred to victims in sentencing other than those already provided for under current sentencing practices. Sentencing is a very specific balancing process to ensure all purposes of sentencing⁵³ are reflected in the determination. The court already must have regard to the impact of a crime upon a victim when sentencing, which can be clarified by the reception of a victim impact statement. Beyond that, a judge's decision on what sentence is to be imposed should not be interfered with.

Accepted and carefully considered sentencing principles have been well defined in the statutory framework and common law which expressly includes the impact of the offence on a victim. It is the exclusive duty of a sentencing officer to determine the appropriate sentence for an offender; a sentencing officer who is familiar with the law, experienced in sentencing, and uninhibited by a sense of anger or vengeance.

⁵³ *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 3A, 21A.

Appendix 1

A victim impact statement should include relevant information on:

- any physical injury or emotional harm you have suffered as a result of the offence
- any loss of, or damage to, property as a result of the offence
- any other effects of the offence on you
- any other information that is consistent with the purpose of a victim impact statement.

This list is not exhaustive. It simply gives examples of content that would fall within the purpose of a victim impact statement.

Examples of the information to include are:

Physical injury

- injuries you received as a result of the offence
- an illness you have developed that relates to the offence
- the type and extent of your injuries, including any long-term effects
- any medical treatment you have received
- the impact of the injuries or illness on your lifestyle, e.g. sport or hobbies.

Emotional effects

- changes in your attitudes or feelings (e.g. how you feel about yourself and others,
- whether your outlook on life has changed as a result of the offence)
- changes in your behaviour (e.g. change of lifestyle, ways of coping, sleep patterns,
- eating and drinking habits, sexual behaviour)
- changes in your relationships with spouse, family, friends or work associates
- short and long term mental health trauma (e.g. post traumatic stress disorder, depression and anxiety)
- any counselling you have sought or received.

Financial effects

- the value and description of any property that has been damaged, lost, or destroyed
- any costs not covered by your insurance
- financial loss from time off work
- medical, therapy and/or counselling expenses
- lost educational or work opportunities
- consequential loss (i.e. the difference between the compensation your insurer pays you and your total costs)

The judge can take these costs into account when considering whether the offender should pay reparation.

The court will not necessarily require the offender to pay you reparation. The offender's financial situation will influence whether any fines or reparation can be imposed.

If the victim has died

If a victim has died as a result of the offence, their family may wish to talk about them and the life they led, as well as the impact on those left behind.

Other information

You may include information on the impact of the crime on your family, if they agree. A victim impact statement can include information contained in the 'summary of facts' of the case. However, this should be kept brief because the court already knows what has happened. The victim impact statement should focus on the harm you have suffered.

Appendix 2

A victim impact statement must not include information that is inconsistent with the purpose of a victim impact statement.

For example, a victim impact statement must not include content that:

- you know is false,
- makes threats against the offender or their family,
- is abusive,
- is irrelevant,
- is confidential,
- refers to other offences you think the offender committed, or
- makes comments about the judge, prosecution, defence, jury or witnesses.

This list is not exhaustive.