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**Commissioner for
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NSW Department of Justice
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Dear

A handwritten signature in black ink that reads 'Erin Gough'.

Re Consultation paper (CP) on victims' involvement in sentencing

Thank you for the invitation to make a submission on the questions put in the consultation paper on victims' involvement in sentencing. Regrettably, I was unable due to my own work commitments internationally and domestically to meet your deadline. Notwithstanding, by this letter I submit my views and answers on the questions raised in the consultation paper. Hopefully, these will help the Sentencing Council and/or the Sentencing Council's Secretariat.

The victim experience

According to the common law jurist Blackstone, whenever a crime happens there are two victims: the actual person who is harmed or suffers a loss and the state whose law is violated. Yet, since the until four decades ago the victim had become largely ignored. It was cliché to claim the victim was the forgotten person in criminal justice. Given the victim was often a prime witness for the state as investigator and as prosecutor, Young's summing the victim's standing is apt. The victim was "saddled with enforcement and prosecutorial responsibilities for a process that did not address their needs or their losses" (2001, p6). The disregard for the victim often caused him or her a 'second injury'. Such belies the victim's actual importance to criminal justice systems.

Since the 1960s greater interest has been shown in to the plight of victims of crime. Beginning in the 1960s the focus has shifted from addressing the harm suffered through state-funded compensation to establishing support services to proclaiming victims' rights. Declarations on victims' rights have emerged internationally (for example, the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power), multi-nation (for example, the Commonwealth Nations Statement of Basic Principles of Justice for Victims of Crime) and domestically (for example, the South Australia Declaration of Principles Governing Treatment of Victims). Each is intended to, among other outcomes, improve victims' access to justice. The most contentious rights have proven to be victims' procedural rights, which are intended to make victims integral players in criminal justice, rather than be outsiders.

It is theorized, and evidence supports such, that victims' expect procedural justice. Moreover, when victims' experience procedural justice they are more satisfied with the criminal justice system and the criminal justice outcome, as well as possibly better heal emotionally and psychologically.

On procedural justice there are two dominant models: the control model and the relational model. Thibaut and Walker's (1975) control model of procedural justice links people's concern with procedures to their desire to influence outcomes that affect them. Procedural fairness is commensurate on the level of input or participation that procedures allow. In this paper, this will be referred to as giving victims of crime a voice but also importantly it is asserted their voice must be heard and acknowledged. Alternatively, Lind and Tyler (1988) proposed procedural justice associates with relational concerns. Procedural justice is relational in nature, thus is dependent on factors such as status recognition, trust in the authority, and neutrality (Tyler, Degoey, & Smith, 1996). Neither exclusively describes victims' procedural justice. Some victims want the opportunity to express their views and argue their case on, for instance, key decisions that affect them, however, they are too often denied. Furthermore, even when their input does not deliver the outcome they desire, if they had voice, they can be less dissatisfied with, perhaps accepting of, an outcome contrary to that they sought. Consistent with this, a victim of sexual violence that went to trial and the jury acquitted the accused stated that she did not like the outcome; however, she did not regret her decision to report the violence because she was kept informed and involved in the process in ways she felt fair, which included being spoken with on key decisions that affected her. Much research shows victims who are not kept informed, who are not consulted or who are denied the right to make a victim impact statement are dissatisfied or most dissatisfied with the criminal justice system. Furthermore, sometimes a perceived just outcome can mitigate that dissatisfaction.

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

2.1: Information about victim impact statements How can the information given to victims on VISs and sentencing be improved?

In 2010 a South Australia Parliamentary Committee inquired on victim impact statements. The committee identified 'issues' that concerned victims and others. These included court editing of statements, having to seek the leave of the court even to have the right to deliver a statement, and the defendant not being required to be present to hear statements read out in the case of summary offences. There were also concerns expressed about the lack of information available to victims, especially about what to expect at court and the support available to them.

The committee recommended that there be better communication between the courts and victims, and that a designated person be appointed to advise victims of their rights, and guide them through the process of delivering their victim impact statement, as well as inform them of what to expect in court.

As Commissioner for Victims' Rights, I have since recommended in addition that there should be a mandatory obligation on public officials to tell victims they have a right to make impact statements.

2.2: Content of a victim impact statement How can the practice, procedure and/or law for settling the admissible content of a VIS better meet the concerns of victims?

The purposes of impact statements are not often clearly articulated in law. In South Australia, victim impact statements serve four purposes: giving the victim a 'voice', which is a central element of procedural justice; raising the offender's awareness on the harm done, which affords the offender the opportunity to acknowledge such by, for instance, reparation (such as genuine apology or restitution); providing the court with information on the harm done that might be taken into account, if relevant, in sentencing; and, providing the court with information to draw on should it elect to make a restitution order as the sentence or an element of the sentence.

The court is not bound by the rules of evidence when informing itself in the sentencing stage of criminal proceedings. With respect to the victim's voice and the offender's awareness, research findings on restorative justice practices suggest the importance of open, frank dialogue, which can be subjective and non-legalistic. With respect to sentencing, the court can only take into account the information on harm that is relevant in terms of the elements of the offence or offences for which the offender is found guilty by plea or trial. The relevancy test (for want of a better phrase) suggests this rule of evidence constrains what can be said or written in an impact statement. Thus, prosecutors and police, among others, often review victims' impact statements and edit them before they are furnished to courts. Contrary, it seems to me that victims should be permitted within the bounds of morally decency to state the harm and the court be required to state in sentencing remarks the information it has taken into account.

2.3: Presenting the victim impact statement in court What problems, if any, do victims experience when presenting their VIS in court?

The law governing vulnerable victims should apply, so victims are protected. Victims should be allowed to make their impact statements in ways that reduce the inconvenience, cost of attendance and alleviate their worry about being in a courtroom.

Rather than a mere court orientation, victims should be prepared for giving their impact statements.

2.4: Victim impact statements in the Local Court (1) What factors are encouraging or discouraging the use of VISs in the Local Court? (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?

Victims who make impact statements are not 'witnesses', so they do not usually have access to financial assistance. Some require practical assistance such as child care.

In South Australia, if the prosecutor requests the police to arrange for the victim or in homicide and fatal road crash cases, the immediate family members be present to make their victim impact statements, the costs of their attendance is covered because they are treated as 'witnesses'. In other cases, the Commissioner for Victims' Rights will provide limited financial assistance (such as airfare and accommodation). The Commissioner makes such payments under the Attorney-General's delegation pursuant to section 31 of the Victims of Crime Act 2001. The payments are debited to the Victims of Crime Fund.

2.5: Victim assistance (1) How can victims be better assisted in making a VIS? (2) Should victims be provided with a specialist representative? If so, what should their role be?

Section 32A of the Victims of Crime Act 2001 (South Australia) authorises an 'appropriate representative', with the victim's approval, to exercise any right the victim holds, including the right to make an impact statement. An appropriate representative includes the Commissioner for Victims' Rights (in person or through legal counsel) and legal counsel.

In South Australia, the Commissioner has made impact statements for victims and the Commissioner has engaged legal counsel to help victims prepare their statements and to read them in court.

2.6: Victims requiring additional or distinct assistance (1) Are the needs of victims that require additional or distinct assistance being met by current procedures? (2) How can assistance to victims with additional or distinct needs be improved?

Victims' rights law require victims of crime be treated with respect, dignity and courtesy but also, importantly, with due regard to any special need that arises because of the victim's— age; or sex; or race or ethnicity; or cultural or linguistic background; or physical or intellectual ability; or any other reason or characteristic.

Thus, in order to meet its international and domestic obligations, the state should provide for victims' needs. If, for instance, an interpreter is required to assist a non-English speaking victim, an interpreter should be provided. If, for instance, a communication assistant is required to assist a person with disability, a communication assistant should be provided.

Who can make a victim impact statement

3.1: Primary victims (1) Is the current definition of "primary victim" appropriate? (2) How could the definition be amended? (3) What are the advantages and disadvantages of expanding the definition?

Under South Australia law, "a victim, in relation to an offence, means a person who suffers harm as a result of the commission of the offence (but does not include a person who was a party to the commission of the offence)". A victim is entitled to have any injury, loss or damage suffered as a result of the offence considered by the sentencing court before it passes sentence.

This law is augmented by sections in the Criminal Law (Sentencing) Act 1988, which do not define a victim but rather focus on the harm resulting from the criminal offence(s). Section 7 requires the prosecutor to furnish particulars of injury, loss of damage, which the prosecutor can do by asking the court to approve a person reading an 'impact statement' or the court causing such statement to be read. The prosecutor can also submit the particulars in an impact statement as per the court rules. Section 7A refers to 'a person' not the victim, so, for instance, family, friends and others in homicide cases can make impact statements.

Hon Chris Sumner as Attorney-General (1988) explained that he made a deliberate choice not to define a victim in the sentencing law and instead allow the court to determine who should be entitled to make an impact statement on a case-by-case basis.

Imagine a bank with some 30 customers inside the building when a robbery happens. During the course of the robbery, the armed robbery threatens all customers and all staff. Rarely, if ever, would the accused robbery face trial for 30 plus assaults as well as the robbery with violence. Usually, the prosecution would proceed with the robbery with violence charge and call on the customers and other staff as witnesses. Such decision under most law in Australia would deny the customers and staff who are victims of assault the right to make impact statements - not in South Australia. Charge decisions made for the expedience of the criminal justice process should not deny the victims of crime their fundamental rights.

Section 7B states that "any person may make a submission to the Commissioner for Victims' Rights for the purpose of assisting the Commissioner to compile information which may be included in a [community impact] statement".

The South Australia law is a 'good practice' example on how the law should be written. In operation the law has not impeded justice or delayed it. It has, however, allowed an array of people affected by crime (such as people living next door to a clandestine drug laboratory and people whose livelihoods have been devastated by arson causing a 'bushfire) to have a voice in sentencing.

The law should reflect the common law principle that when crime happens there are two victims: the person harmed and the community at large. The impact of crime on individuals and the community are relevant in sentencing.

3.2: Family victims (1) Is the current definition of "family victim" appropriate? (2) How could the definition be amended? (3) What are the advantages and disadvantages of expanding the definition?

See above.

3.3: Type of harm (1) Is the current definition of "personal harm" appropriate for identifying victims who may make a VIS? (2) How could the definition be amended? (3) What are the advantages and disadvantages of changing the definition?

Harm should mean injury, damage or loss; and, injury should mean physical or mental injury, and include (but not limited to) pregnancy, mental shock and nervous shock.

3.4: Eligible offences (1) Is the current provision that identifies eligible offences for a VIS appropriate? (2) How should eligible offences be defined? (3) Should domestic violence offences be a separate category of eligible offences? (4) What are the advantages and disadvantages of expanding the definition?

The right to make an impact statement should not be limited by offence. All victims have a right to access to justice.

3.5: Matters listed on a Form 1 (1) In what circumstances, if any, should it be possible for a Form 1 victim to make a VIS? (2) What are the advantages and disadvantages of allowing a VIS to include content regarding Form 1 matters?

No comment.

3.6: Community impact statements (1) Should NSW adopt community impact statements? (2) What form should such community impact statements take? (3) How should sentencing

courts use them? (4) What are the advantages and disadvantages of adopting community impact statements?

Section 7B—Community impact statements of the Criminal Law (Sentencing) Act 1988 in South Australia states,

(1) Any person may make a submission to the Commissioner for Victims' Rights for the purpose of assisting the Commissioner to compile information which may be included in a statement under this section.

(2) In any proceedings to determine sentence for an offence, the prosecutor or the Commissioner for Victims' Rights may, if he or she thinks fit, furnish the sentencing court with—

(a) a written statement about the effect of the offence, or of offences of the same kind, on people living or working in the location in which the offence was committed (a neighbourhood impact statement); or

(b) a written statement about the effect of the offence, or of offences of the same kind, on the community generally or on any particular sections of the community (a social impact statement).

(3) Before determining sentence for the offence, the court will cause the statement to be read out to the court by the prosecutor, or such other person as the court thinks fit, unless the court determines that it is inappropriate or would be unduly time consuming for the statement to be so read out.

(4) The validity of a sentence is not affected by non-compliance or insufficient compliance with this section.

As Commission for Victims' Rights, I have made community impact statements either in person or through legal counsel in various cases as the following examples illustrate by quoting the sentencing justice or judge:

R v MARK HARVEY, DCCRM-13-1213 - Persistent sexual exploitation of children - His Honour Judge Boylan said, "... I must emphasise the far-reaching consequences of [your offending]. I have taken into account victim impact statements from your victims and their families and a social impact statement filed on behalf of the school. The girls and their families have suffered in different ways and I am not going to set out the contents of their statements, nor shall I repeat the contents of the social impact statement. The predominant theme of those statements is the extent to which you breached the trust placed in you by the school, by the families of students at the school, by all of the students and, of course, by those students whom you abused.

By your crimes you have sowed the seeds of mistrust. Parents find themselves no longer trusting other adults with their children. Children have become mistrustful and there has been huge mistrust at the school - to the extent of false allegations having been made there. One can only hope that your victims and their families will eventually recover. Happily, much healing has already occurred at the school."

R v MALCOLM KYM VAWSER, DCCRM-14-1255 -- Arson -- After quoting extensively the community impact statement, His Honour Judge Muscat said, "Mr Vawser, there is really nothing to mitigate the seriousness of your crime."

R v BRENDEN CLYDE STEERS, DCCRM-15-1498 – Child pornography (cited in 3 separate cases by the then Chief Judge) - His Honour the Chief Judge Muecke said, “I acknowledge the contribution by the Commissioner For Victims’ Rights, Mr Michael O’Connell, to the disposition process. In particular, I acknowledge and note Mr O’Connell’s references and comments regarding the horrendous and lasting effects that the viewing of child exploitation material has on those children who are the victims of the production of such material. I note his references to the fact that the term ‘Child pornography’ impedes our ability to understand the real harm that is experienced by young victims and the seriousness of the activities of the people who sexually exploit children in this way. He made the point that the term ‘Child pornography’ might lead to an understanding that in some way camouflages or diminishes the physical and emotional pain, the guilt, the shame and feelings of worthlessness, the interference with and difficulty in physical and emotional development, the psychological distress, the suicidal thoughts and actual suicides, the anxiety, depression and post-traumatic disorders as well as alcohol, drug, gambling, sexual and other compulsive disorders and sexual functioning problems, unwanted pregnancies, HIV infection and other sexually transmitted diseases that can result from the production of child exploitation material. Some of these effects can last the entire lifetime of some victims.

Mr O’Connell’s reference to the fact that ‘Each image or video is an image or video of a crime scene’ is worth acknowledging, highlighting, underlining and repeating over and over again.”

R v LEAH JANE LENARCZYK, DCCRM-15-1354 & 13-511 - Aggravated causing serious harm by dangerous driving - His Honour Judge Beazley said, “In a social impact statement, the Commissioner of Victim Rights detailed the concerns of the community in respect of the abuse of drugs such as methamphetamine. He also acknowledged the difficulties facing the prosecution in proving whether methamphetamine had a causative effect upon a driver in the absence of legislative change.

While it was entirely proper for him to bring to the court those concerns, it is plain that I must sentence you solely on the evidence that I heard from the expert witnesses and my findings on the law as it presently stands.

It is, however, one thing to find that I could not be satisfied beyond reasonable doubt that the methamphetamine was a causative factor in respect of the collision, it is entirely another matter for you to take the risk of driving your children to and from school without holding a licence and having consumed methamphetamine. It is not, as was suggested, okay to drive while having consumed methamphetamine.”

R v ANTON PASQUALE GERARDIS, DCCRM-15-1821 - Trafficking in a large commercial quantity of controlled drug and of manufacturing a large commercial quantity of methylamphetamine - His Honour Judge Soulio said, “In considering sentence I have taken into account a community impact statement in which the author spoke of the dangers posed by the manufacture of illicit drugs. That statement refers to the obvious harm to the people who use such drugs, and to the lesser known harm of clandestine drug laboratories to the environment should illicit drugs and precursor chemicals be

disposed of inappropriately to avoid detection, including the risk of contamination to the surrounding area, groundwater and river catchments, as well as hazardous toxic fume inhalation, chemical burns and explosions. The statement also referred to the impact upon the owners of the property, upon discovery that the property had been used for a criminal purpose. They understandably felt betrayed by you and considered your actions to be selfish and dangerous. They have experienced the stigma associated with their property having been used for such serious drug offending.

R v MICHAEL SUVE MCDONALD, SCCRM-14-69 -- Murder -- Honourable Justice Stanley said, "Domestic violence results in the death of, on average, one woman per week in Australia. It leaves many women and children terrorised. ... It is an insidious and pervasive crime that is unacceptable in all of its various forms." He referred to the 'social impact statement' in the context of a Western Australia case (*Munda v Western Australia* [2013] HCA 38) then stated that domestic violence must be taken as an offence against human dignity.

R v MARSHALL [2014] SASC 92 - Application for release on licence (declared dangerous sex offender) - Honourable Justice Kelly said, "Although the Commissioner for Victims' Rights sought to file a Social Impact Statement pursuant to s 7B of the Act, in the end I received that document as submissions under the provisions of s 25 of the Act. Later in written submissions provided, the Solicitor-General took issue with the reception of the submissions made on behalf of the Commissioner for Victims' Rights pursuant to that section, however in light of the subsequent developments it has become unnecessary to resolve that particular collateral issue in the context of this application. I add however, and wish to record, that I was greatly assisted by submissions made by all parties in respect of this application, but particularly by the submissions made by the Solicitor-General, counsel appearing for the Commissioner for Victims' Rights and counsel for the Director of Public Prosecutions."

R v NICHOLAS LOWE SCCRM-13-310 - Attempted murder - Honourable Justice Blue said, "The Commissioner for Victims Rights prepared a community impact statement that was read in court. Members of the community described the sense of sorrow, shock and disbelief felt by the community upon hearing of the attack on Nanette Clarke. They described the loss of innocence and ongoing anguish, fear, anxiety and vulnerability felt by members of the community as a result. They described the sense of guilt and regret felt by immediate neighbours who did not investigate what they heard or saw on that evening. They also described their admiration for the strength, courage and resilience displayed by Nanette Clarke in the aftermath of the attack and since then."

R v LEAN [2017] SASFC 101 – Fraud – Honourable Justice Hinton, quoting the sentencing judgement on appeal said, "The Commissioner for Victim's Rights provided a community victim impact statement pursuant to s 7B(2) of the Sentencing Act. That statement describes the significant impact upon those members of the Aboriginal Health Service; those who worked directly with you; the Aboriginal community as a whole, as well as the broader community."

R v MARSHALL [2017] SASC 157 - Application for release on licence (declared dangerous sex offender) - Honourable Justice Vanstone said, "I have also had regard to a carefully compiled and helpful "Social Impact Statement" which I received from Mr Allen on behalf of the Commissioner for the Victims' Rights. The statement referred to the letter to AB. It was submitted that it demonstrates a "breathtaking lack of insight on the part of the Applicant and has the effect of re-victimising [AB] and her family"."

Community impact statements have practical advantages. For example, the impact or effects of crime on a large group of people can be consolidated thus, reducing the number of individual impact statements presented to a sentencing court (for instance, a school affected by a series of sex offences perpetrated on students). They allow a collective of victims, such as neighbours of a clandestine drug laboratory operated by organised crime members, to make impact statements with a sense of anonymity.

Community impact statements complement individual impact statements. They present the sentencing court with information about the ripple effect of crime, such as the socio-economic ramification of domestic violence, or to highlight broad concerns, such as the dangers of drug driving in the context of road safety.

Content, admission and use of victim impact statements

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

The victimisation process begins when the offender and the victim first interact, which is often an unpredictable and unexpected event. The nature and circumstances of the crime can influence how crime affects victims. Variations can also happen because each individual is a unique combination of physical, cognitive, social, emotional and behavioural characteristics. In general, the impact of crime can be immediate, short-term or long-term. However, most victims show some significant adjustment or recovery between one and three months after the crime (O'Connor 2004, p. 1). The immediate impact may include physical injury, as well as physiological reactions, cognitive difficulties and emotional responses (see Table 4.1). While victims of violent crimes usually suffer external effects, all victims may suffer similar internal effects. All also have similar needs for information and practical assistance. Victims of property crime incur loss of property and money, but all victims may endure financial effects such as loss of earnings while recovering from the crime, transport costs and loss of income while attending court.

Table 4.2 summarises the common effects of violent crimes. The impact of sexually violent crimes can differ, however, from that resulting from non-sexually violent ones (Markesteyn 1992). Victims of sexual assault tend to have more persistent social and psychological effects compared to victims of assault. Rape victims are more likely than other types of victims to attempt suicide, and suffer depression (Devilly 2005) and post-traumatic stress disorder (Bartol & Bartol 2004). Child sexual assault can hamper the child's cognitive and social development. The psychological harm can last for decades (van Loon & Kralik 2005).

Table 4.1 Immediate effects of crime on victims

PHYSIOLOGICAL REACTIONS	COGNITIVE DIFFICULTIES	EMOTIONAL RESPONSES
Shock	Disorientation	Fear/anxiety
Dizziness	Confusion	Anger
Headaches	Difficult problem solving	Depression
Rapid breathing	Memory problems	Grief
Body/muscle aches	Poor attention spans	Guilt
Profuse sweating	Disturbed thinking	Feeling helpless
Feeling unwell	Blaming someone	Feeling isolated
Rapid/irregular heartbeat	Reliving the event	Desire to withdraw/hide
Sleep disturbances	Distressing dreams	

Robbery and assault also evoke psychological and social effects, as well as behavioural responses and lifestyle changes, including avoidance, resignation from work and moving home. Homicide can stimulate secondary victims' self-destructive behaviours such as alcoholism, drug addiction and suicidal tendencies. It can cause cognitive learning difficulties among surviving children. The grief can be overwhelming as adults and children struggle to cope with their daily lives. They may also feel let down by the criminal justice system that was meant to protect their loved ones.

Table 4.2 Effects of violent crimes

EFFECT	EXAMPLES OF HARM SUFFERED
Physical	Bruises, wounds or physical disabilities
Emotional	Fear, sleeplessness, anger, anxiety, suspicion, a desire to move
Economic	Property loss, property damage, loss of income, medical expenses
Dysfunction in support group	Residual effects on normal family contacts, effects on spouse/children/greater family, associated marital impact, fear, suspicion, financial loss
Inconvenience	Awaiting restoration, repair or replacement of property, meeting the requirements of the criminal justice system, seeking compensation
<i>Source: Adapted from Waller (1982), p. 7.</i>	

Mindful of the research cited and other, the law and procedure on victim impact statements should provide for the inclusion of information on the physical and physiological, emotional and psychological, economic (including financial loss), dysfunction in support, and inconvenience resulting from the offender's crime.

In charge bargain cases, the victim might disagree with the 'statement of agreed facts'. The victim should in these cases be permitted at least to state whether they agreed or not with the 'facts'. The victim, in terms of the public record, has to live with the 'facts', which might differ from the reality or truth as the victim perceives it.

4.2: Content of a family victim's victim impact statement (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? (2) What categories of relationship to the primary victim should the harm be in relation to?

See above.

4.3: What a victim impact statement may not include (1) What particular types of statement, if any, should be expressly excluded from a VIS? (2) How should a court deal with the inclusion of any such prohibited statements?

Offenders are entitled to be treated, no matter how abhorrent their crime, with dignity. Abusive, offensive and other inappropriate language and content should be excluded.

In a case in South Australia several years ago, a victim described the offender as a 'dick-head' but also drew a picture of the offender as a cartoon penis. While I hold that the victim was entitled to express their view, I caution against allowing victims and others unfettered to verbally attack and demean the offender.

The focus should be on the purposes of impact statements and the potential restorative justice element of the practice.

Rules of court should be used to deal with the 'exclusion' of information, so adjustments can be made without recourse to legislative reform through parliament.

As Commissioner for Victims' Rights, experience teaches me that victims who are properly assisted in the preparation of their impact statements adopt a responsible and mature approach and the content reflects such.

4.4: Court's use of a primary victim's victim impact statement (1) Are the provisions relating to a court's use of a primary victim VIS appropriate? (2) How should a court be able to use a primary victim VIS?

The effects of crime and the personal circumstances of the victim should be prime factors in sentencing. Courts play a central role in vindication and validation for the victim. Courts can also be a source of secondary victimisation.

Justice, judges and magistrates should acknowledge receipt of victims' impact statements, point to the relevant matter taken into account in sentencing, and acknowledge the effects in their remarks on sentence.

Sentencing is not exclusively about the offender's circumstances etc. but rather also about procedural justice for victims.

4.5: Court's use of a family victim's victim impact statement (1) Are the provisions relating to a court's use of a family victim VIS appropriate? (2) How should a court be able to use a family victim VIS?

No comment

4.6: Absence of a victim impact statement 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 be empowered to ask the prosecutor whether the victim was given the opportunity to make an impact statement

4.7: Proving mitigating circumstances (1) Should it be possible to use material in a VIS to establish a mitigating factor at sentence? (2) If so, in what circumstances?

There are several cases in South Australia where the victims have stated their preference for leniency and/or as Honourable Justice Vanstone observed, “[the victim’s] family in my view, showed great maturity in their response to the plan and in finding, as a fall-back position, some common ground.” R v BOWEN [2014] SASC 81

Section 7C of the Criminal Law (Sentencing) Act 1988 prohibits the exclusion of an impact statement simply because the victim expresses a view on sentence.

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

In South Australia it is very exceptional for a victim or other to be challenged on the content of their victim impact statement (see for example, O’Connell 2009, as appended). This is partly because of pointers I have made, such as the preparedness of victims to be mature and responsible in their approach and the support given to victims and families of the most serious offences.

4.9: Where a victim impact statement is not consistent with charges proved (1) What procedure should be followed in situations where a VIS is not consistent with the charges for which the offender has been convicted? (2) What provision, if any, should be made for such cases?

See comments above.

4.10: Objecting to the content of a victim impact statement What provision, if any, should be made for objections to the content of a VIS?

No comment.

Procedural issues with the making and reception of a victim impact statement

5.1: Time of making a victim impact statement (1) What arrangements, if any, should be made to allow a person to prepare a VIS before conviction of the offender? (2) What are the benefits and disadvantages of allowing a person to prepare a VIS before conviction?

Victims should not be rushed into making an impact statement.

5.2: Notifying the offender 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?

Offenders are alerted on the victim’s intent to make an impact statement and are permitted to read such before it is read or tendered in court. If there is disagreement on content these can be addressed pre-sentencing rather than in ‘open court’.

5.3: Number of statements 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?

None but consideration should be given to the practical benefits of introducing community impact statements. See above.

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

This should be left to the court's discretion. Criminal courts in South Australia are not bound by the rules of evidence, so judicial officers have discretion on how they inform themselves on matter as well as what they find to be relevant later for the purpose of fashioning the sentence.

In South Australia, impact statements have been presented as poems; photographs have been attached to personalise the deceased victim; and, children have drawn pictures to express their feelings. For many victims, the making of their impact statement is their day in court and truly for most given the number guilty pleas the only occasion to personalise the victimisation.

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

No comment

5.6: Other formal requirements (1) What should be the formal requirements for a VIS to be received and considered by a court? (2) What should be the consequences of failure to comply with the formal requirements?

Unfortunately, the law on victim impact statements tends to impose no legal obligation on the court to hold prosecutors, police or other account for their failure to provide such statements. Among the most frequent victim complaint I receive as Commissioner for Victims' Rights are: that the victim was not invited to make an impact statement; and, that the impact statement was not presented in court. From prosecutors, especially in the Magistrates Court not so common complaint but nonetheless relevant is that magistrates refuse to adjourn matters to allow prosecutors time to attain impact statements. Reasons for the unwillingness of to adjourn include the impact of sentencing discount legislation, which has led to accused defendant's pleading guilty at the earliest opportunity then seeking to be sentenced. On one occasion, the victim of a serious assault was still in intensive care in hospital when the accused defendant at the first court hearing, after their over weekend arrest, plead guilty to an assault. The magistrate took submissions and sentenced the assailant. The victim was extremely disappointed, even aggrieved, on hearing that not only did the charge not adequately represent the harm done but also that they were denied the opportunity to tell the court about the harm done.

As said above, courts should be empowered to query prosecutors so as to call them to account on whether victims were extended the right to make an impact statement.

5.7: Tendering a victim impact statement (1) Who should be able to tender a VIS? (2) If prosecutors alone are permitted to tender a VIS, what guidance should be provided for the exercise of their discretion?

Consideration should be given to introducing in New South Wales a modelled on section 32A of the South Australia Victims of Crime Act 2001, so an appropriate representative person, including the Commissioner for Victims Rights and legal

counsel, can exercise the victim's rights, such as the right to present an impact statement to a court.

5.8: Special arrangements for reading a victim impact statement (1) What special arrangements should be available to victims who read their VIS in court? (2) Should the availability of these arrangements be limited in any way?

All vulnerable witness provisions should apply. As well, victims should be able to produce an audio or audio-visual recording of their impact statement. In the matter of R v Dudley Davey (murder), sentencing submissions, including the reading of impact statements, happened over several days with an adjournment in between. As I was unable to attend in-person to read the community impact statement, the Honourable Justice permitted an audio-visual recording of me reading the statement to be played in court in the presence of the defendant.

One of the victims in R v Heinz who resided overseas, made their impact statement via audio-recording that was played in open court in the presence of the defendant.

A 'white-collar' professional as a victim of crime who resided and worked in another state of Australia made their impact statement via audio-visual link, so as, among other factors, not to cause them further inconvenience of interstate travel.

5.9: Other considerations (1) Should any considerations prevent a victim from reading their VIS in court? (2) What alternative arrangements could be made?

Victims' rights are important. All arrangements pertaining to impact statements should accord with victims' rights, such as the right to be treated with respect and having due regard for their personal circumstances and characteristics (such as disability). Furthermore, their physical safety and mental well-being are paramount.

5.10: Oral statements (1) Should it be possible for a victim to deliver an oral VIS, without tendering one in writing? (2) What procedures would need to be put in place if oral VISs were to be permitted?

In South Australia, text on victims reading of impact statements in court is omitted from the transcript and instead the written version, as read, is tendered before it is read. This is respectful of the victim's right to privacy. It also has the practical benefit that courts' time can be allocated in accordance with the expected time to be taken to read the number of impact statements in each case. Later should the media want a copy of the impact statement, their application comes under the law on sensitive material - the media cannot simply attain access to the court transcript.

5.11: Making a victim impact statement on behalf of a victim What provision should be made for someone to make a VIS on a victim's behalf?

See comments above on my suggestion that New South Wales law be amended to include a provision like section 32A of the South Australia Victims of Crime Act 2001.

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

This rarely, if ever, happens - see O'Connell 2009, as appended. If victims want to influence sentence then they should be prepared to be called to account for what they say in their impact statements.

Victim-offender post-conviction / pre-sentence conferences are an alternative way to provide victim impact information to be presented first unfettered to the defendant and second by way of an outcome report (somewhat similar to a pre-sentence report) to alert the court on effects relevant to its sentencing task.

A pilot programme on victim-offender conferences ran in the Magistrates Court several years ago. The adult pilot was based in general terms upon the South Australian young offender family conferencing model, which is often called a restorative justice practice, however, it was not introduced as such. Halsey and others report that "Without prompting, the majority of offenders were quick to apologise to their victim(s). Such an apology was usually given during the course of the offender's opening remarks where they were asked by the facilitator to give an account of their life to date, and how they came to be involved in crime ... The most sincere expressions of regret – as interpreted by the victim(s) – included the qualifier that the offender was not expressing regret regarding arrest (i.e. that they had been caught), but that they acknowledged, took personal responsibility for and regretted the harm caused to the victim(s) as a result of their offending behaviour ..."

"Some victims found the conference process allowed them to develop a measure of empathy for the offender. One victim of a housebreak said that for her, the greatest benefit of the conference was that it provided 'a reminder that people's life circumstances can lead them in all sorts of directions, and maybe if I were in that position, then maybe the same would happen to me or maybe even worse'."

"Consistent with other evaluations, material reparation played no significant part in nearly all conferences observed. Instead, victims tended to be content with some kind of 'symbolic reparation' ..."

Notably given pointers I have made above on the content of victim impact statements and the process, Halsey and others state, "A number of victims spoke of conferences as allowing them to 'put a face' to the person who had victimised them. For such persons, there was for an explicit benefit in being able to 'speak our mind' regarding how the crime had affected them. Some admitted to feeling angry about the crime at the beginning of the conference, but generally, victims admitted to feeling better by conference end."

5.13: Use of victim impact statements outside of a sentencing hearing To what extent and under what conditions should a VIS be available outside of the sentencing proceedings to which it relates?

The South Australia Parole Board has access to victim impact statements as do I as Commissioner for Victims' Rights for the purpose of making submissions to that board.

Victim impact statements can also be drawn from to buttress victims' applications for state-funded victim compensation, although this can be an inhibitor when victims harm as stated in their impact statement is inconsistent with the harm proven by medical and other evidence tender with the application for compensation.

Sometimes Correctional Services staff (not offenders) will be permitted to read impact statements to ascertain information to assist in tailoring rehabilitation programmes.

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

Restorative justice practices in NSW Question

6.1: When restorative justice practices should be used (1) When should restorative justice practices be available? (2) What are the advantages or disadvantages of having restorative justice practices available as part of the sentencing process? (3) What are the advantages or disadvantages of having restorative justice practices available after sentencing?

In addition to the comment on the adult victim-offender conferencing pilot in the Magistrates Court, I draw attention to the Aboriginal Conferencing, which is the only restorative justice activity available to adults in South Australia. It is governed by section 9C of the Criminal Law (Sentencing) Act 1988, and will continue under the new Sentencing Act 2016. Before sentencing an Aboriginal defendant, the court may, with the defendant's consent and with the assistance of an Aboriginal Justice Officer, convene a sentencing conference so as to take into consideration the views expressed at the conference.

The conference will include the defendant, their legal representative, the prosecutor, the victim, should they choose to be present, and the victim's parent or guardian if they are a child. Other persons included in the conference may be an Aboriginal elder, a member of the defendant's family or any other person (and I have appeared to represent the victim on one occasion).

Regarding the specific questions under 6.1, please note:

Whereas the early 'drivers' for restorative justice were, says Dignan (2007: 105) 'profoundly ambivalent towards victims', Hoyle (2012) claims restorative justice is becoming more 'victim-centric'. Some restorative values, such as respect and compassion, are shared. Similarly, there are shared perceptions on procedural fairness. Nevertheless as Bowen and Boyack (2003: 129) recognised over a decade ago, "restorative process are not uniform, or uniformly good, nor are they always successful". Furthermore, they concluded that "a poor restorative process, despite the best of intentions, can re-victimise victims." (p127). In spite of the research findings and lessons learnt since then there still are, says Rossner (2017: 419), "some hurdles and challenges that need to be overcome to maximize benefits for victims".

Restorative justice theory and practice must recognize the legitimate interests of victims. It must provide a means for the expression of for their emotions. It must create a forum in which the harm caused by crime can be repaired to the satisfaction of those who have directly experienced the harm. It must view and respond to crime with victims as utterly central and integral to the process.

Victims should be treated more fairly than they traditionally have in the criminal justice systems throughout the world; and, this can be achieved without unduly harming offenders' rights or the public interest.

Crucially,

- Victim participation should be a personal decision that each victim must make for him- or her- self.
- No pressure should be placed on the victim to participate; rather his or her participation must be voluntary.

- The victim should be able to withdraw consent at any time during the process.
- The victim's needs should be a paramount consideration.
- The process must be sensitive to the victim's rights, especially the right to be treated with respect, dignity and compassion.
- The victim should be granted a choice in the timing, location and structure of the process.
- The victim should have the right to end the process at any stage.
- The victim's safety must be prioritised.

Furthermore, to be eligible, and to continue, to participate in a restorative justice process the offender must accept responsibility for his or her offending behaviour.

The victim and the offender in addition should both should be thoroughly prepared by being provided with the information and support they require to make an informed choice about participation, to understand the process and possible outcomes and establish realistic expectations of what can be achieved. Secondary victimisation should be prevented.

Restorative processes and restorative values should be culturally competent for Indigenous peoples as well as culturally and linguistically diverse people.

Suitability of a matter for a restorative justice process in practice should be assessed on a case by case basis and should be informed by the crucial 'elements' above. Restorative justice processes is not appropriate in all cases.

When it is appropriate, restorative justice processes in practice should be available and accessible, as well as able to be applied at any stage of the criminal justice process. However, I hold that these process in practice, if respectful of victims' rights, should be implemented as useful additions or augmentations to criminal justice interventions. The argumentative clash between retributive justice and restorative justice is no longer useful.

The outcome (for example, an agreement with terms and conditions) resulting from a restorative justice process should be enforceable; and, for such purpose overseen by an appropriate authority. The police, the prosecutor, the court or the correctional service, depending on where the restorative process has happened in the criminal justice system should be empowered to take appropriate action in response to any non-compliance with the outcome. This is important because it seems to me that some offenders engage in a restorative process to avoid punishment. Alternatively, it is legitimate for the court to take into consideration the outcomes from a restorative justice process in sentencing, although the weight given to this should be left for judicial discretion.

Given crime is a legal wrong, there should be legislation underpinning restorative justice processes whether in practice it be a diversion from or an augmentation within existing criminal justice systems.

In practice, ensuring adequate resources are allocated for the significant preparation needed is vital. Restorative justice is more likely to benefit victims if victim assistance (such as therapeutic services for victims of violent crime) is given a high priority. Likewise, assistance (including treatment services) for offenders should be a priority.

Such assistance should be available to help victims and offenders prepare for the decision whether to participate or not, as well as pre-participation and post-participation. Regarding reducing recidivism, post-participation rehabilitation informed by desistance theory is vital if the preventive potential is to be realised.

Restorative justice practitioners and criminal justice personnel should be appropriately trained and facilitators should be impartial.

Furthermore, restorative justice processes must be properly resourced in all facets, so it is imperative, if these processes are established or expanded, that adequate budget allocations are made.

The research findings although positive are inconclusive; thus, adequate resources should also be dedicated to the collection and analysis of data on the use and outcomes of restorative justice processes, including the impact on victims and offenders. Furthermore, that evaluation of new and existing restorative justice processes is required to inform the future use of these processes, otherwise the risk of doing more harm is too high.

I close on this point - there is a substantial body of knowledge suggesting that victims perceive restorative justice as fairer, more satisfying and more inclusive than conventional 'court-based' criminal justice systems (Strang 2002, 2009; Daly 2004; Shapland et al. 2007; Umbreit et al 2007; Tyler et al. 2007; see also Rossner 2017). However, would that comparison be as stark if what we have learnt informed reform of our conventional criminal justice systems? Most of the 'successful' restorative justice programmes are linked to criminal justice systems, rather than be distinct alternatives. It is evident that many victims still want a criminal justice response - they should be entitled to a better justice as well.

6.2 Relevant offences (1) What offences should be eligible for restorative justice practices?
(2) What offences should be excluded from restorative justice practices?

If restorative justice is an adjunct to rather than a diversion from the adult criminal justice system, it might not be necessary to exclude offences; instead, the focus should be on the victim. To quote article 9 of the model draft convention on principles of justice for victims of crime and abuse of power,

“States parties shall endeavour where appropriate to establish or enhance systems of restorative justice that seek to represent victims’ interests as a priority. States shall emphasise the need for acceptance by the offender of his or her responsibility for the offence and the acknowledgment of the adverse consequences of the offence for the victim.”

Article 9 (2) continues,

“States parties shall ensure that victims shall have the opportunity to choose or to not choose restorative justice forums under domestic laws, and if they do decide to choose such forums, these mechanisms must accord with victims’ dignity, compassion and similar rights and services to those described in this convention.”

These rights and services are consistent with the rights proclaimed and services (including assistance) described in the existing United Nations Declaration of Basic

Principles of Justice for Victims of Crime and Abuse of Power (1985), which has influenced the evolution of victims' rights and victim assistance throughout Australia.

6.3 Attendance and participation (1) Who should be able to attend restorative justice proceedings? (2) Should certain participants be excluded? (3) What can be done to encourage victim involvement in restorative justice practices in appropriate cases?

Victims should no longer be treated as outsiders in the criminal justice system. They should have a 'voice' on decisions that affect them and those charged with listening, among other tasks, must do so with respect, dignity and courtesy but also respond in ways that validate and vindicate the victim's experience and harm done.

Victims must not be forced into a restorative justice programme - it is not the 'right path' for all victims or all offenders. As Commissioner I have dealt with victims' anger on the unfulfilled undertakings and commitments given by offenders during a 'conference'. These victims feel a strong sense of betrayal.

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

See above, especially my comments under 6.1. Also please see the two United Nations papers attached, which result from my work as an 'expert' with the United Nations Office of Drugs and Crime.

Should you wish to discuss my submission or have any query, please do not hesitate to contact me.

Yours faithfully,




Michael O'Connell AM APM
Commissioner for Victims' Rights
South Australia