



**Justice**  
Sentencing Council

# Victims' involvement in sentencing

Consultation Paper  
September 2017



## **NSW Sentencing Council**

September 2017

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## Make a submission

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**Email:** [sentencingcouncil@justice.nsw.gov.au](mailto:sentencingcouncil@justice.nsw.gov.au)

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### About the NSW Sentencing Council

The Sentencing Council is an independent statutory body that provides advice to the NSW Government on sentencing in response to terms of reference given to us by the Attorney General. We undertake research, consult broadly, and report to the Attorney General with recommendations.

For more information about us, and our processes, see our website:

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## Terms of reference

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The NSW Attorney General, the Hon Mark Speakman SC MP, has requested:

that the Council conduct a review of victims' involvement in the sentencing process under the *Crimes (Sentencing Procedures) Act 1999* (NSW) and consider:

1. The principles courts apply when receiving and addressing victim impact statements.
2. Who can make a victim impact statement.
3. 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.
4. The level of support and assistance available to victims.

In undertaking this review, the Council should have regard to:

- the obligations arising under section 107 of the *Crimes (Sentencing Procedure) Act 1999* (NSW)
- the effect of the current framework on victims
- developments in other jurisdictions both in Australia and overseas
- minimising victim distress in the sentencing process.

[Received 24 May 2017]

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### Acknowledgements

We acknowledge with gratitude the assistance of:

- Victims Services.



# Questions

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## 2. The victim experience

### 2.1: Information about victim impact statements

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

### 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?

### 2.3: Presenting the victim impact statement in court

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

### 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?

### 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?

### 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?

## 3. 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?

### 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?

**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?

**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?

**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?

**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?

**4. 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?

**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?

**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?

#### **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?

#### **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?

#### **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?

#### **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?

#### **4.8: Corroborating evidence**

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

#### **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?

#### **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?

## **5. 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?

**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?

**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?

**5.4: Attaching other material**

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

**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?

**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?

**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?

**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?

**5.9: Other considerations**

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

**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?

**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?

**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?

**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?

**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?

**6. 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?

**Question 6.2 Relevant offences**

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

**Question 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?

**Question 6.4 Procedural safeguards**

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



# 1. Introduction

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## In brief

The NSW Attorney General has asked us to review victims' involvement in sentencing. The current relevant law, which focuses on victim impact statements, sits within a broader set of provisions developed since the 1980s in response to the growing victims' movement.

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## Terms of reference

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- 1.1 On 24 May 2017, the NSW Attorney General, the Hon Mark Speakman SC MP, requested that the Council conduct a review of victims' involvement in the sentencing process under the *Crimes (Sentencing Procedures) Act 1999* (NSW) and consider:
1. The principles courts apply when receiving and addressing victim impact statements.
  2. Who can make a victim impact statement.
  3. 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.
  4. The level of support and assistance available to victims.
- 1.2 In undertaking the review, the Attorney General has requested that the Council should have regard to:
- The obligations arising under section 107 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
  - The effect of the current framework on victims.
  - Developments in other jurisdictions both in Australia and overseas.
  - Minimising victim distress in sentencing.
- 1.3 Section 107 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) requires the Attorney General to undertake a statutory review of the effect of amendments that

were made in 2014 regarding victim impact statements given by family victims. This review must be completed by 1 July 2018.

### History of the victim's role in the criminal justice process

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- 1.4 Traditionally, the state has managed criminal prosecutions in common law countries. As a result, a victim's involvement in the justice system has been limited to reporting the offence and acting as a witness at the trial if required. The state prosecutes offences with the public interest in mind and, while victims' views are taken into account when decisions are made about prosecutions, their views are not determinative.<sup>1</sup>
- 1.5 In the 1970s and 1980s, people in the UK, the US, Canada, Australia and New Zealand began to talk about the failure of the criminal justice system to meet victim needs and started advocating for victims to have greater participation in the system.<sup>2</sup> Pressure from this movement achieved "victim oriented reforms" throughout these countries.<sup>3</sup>
- 1.6 In 1985, the United Nations adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.<sup>4</sup> The Declaration provides "basic standards for the treatment of victims by attempting to guarantee and strengthen their position in four respects",<sup>5</sup> including access to justice and fair treatment; restitution; compensation; and assistance.<sup>6</sup> The Declaration has influenced victim-oriented reforms throughout Australia and around the world.<sup>7</sup>

### Victims legislation in NSW

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- 1.7 In NSW, the Victims Support Scheme, which is funded partly through levies imposed on convicted offenders,<sup>8</sup> gives eligible victims access to support and assistance including:<sup>9</sup>
  - financial assistance for immediate needs
  - financial assistance for economic loss (longer term assistance)
  - recognition payments, and

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1. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [11.1]–[11.3].
2. T Booth and K Carrington, "A Comparative Analysis of the Victim Policies across the Anglo-speaking World" in S Walklate (ed) *Handbook of Victims and Victimology* (Willan, 2007) 380.
3. Victoria Law Reform Commission (VLRC), *The Role of Victims of Crime in the Criminal Trial Process, Consultation Paper* (2015) 27.
4. *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GAOR, 40th sess, 96th plen mtg, Supp No 53, UN Doc A/RES/40/34 (29 November 1985).
5. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [11.6].
6. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [11.6]. See *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GAOR, 40th sess, 96th plen mtg, Supp No 53, UN Doc A/RES/40/34 (29 November 1985) Annex art 4-17.
7. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [11.7].
8. *Victims Rights and Support Act 2013* (NSW) pt 7.
9. See *Victims Rights and Support Act 2013* (NSW), s 20–22.



- counselling by a professional trauma counsellor.<sup>10</sup>
- 1.8 In 1996, the Charter of Victims Rights was enacted. The Charter requires that victims:
- be “treated with courtesy, compassion, cultural sensitivity and respect for [their] rights and dignity”
  - are informed at the earliest practical opportunity, by relevant agencies and officials, of available services and remedies
  - have access to “available welfare, health, counselling and legal assistance responsive to the victim’s needs”
  - receive information about the prosecution of the accused, the trial process and their role in the prosecution
  - have access to information and assistance to prepare a victim impact statement (“VIS”), and
  - be provided with the opportunity to make submissions about granting parole to a serious offender.<sup>11</sup>
- 1.9 Additionally, the Charter requires that the prosecution consult with certain victims before making the decision to modify or drop charges through plea negotiation.<sup>12</sup>
- 1.10 Specified victims may elect to be on a victims register. There are three victims registers in NSW:
- the adult offenders victims register
  - the forensic patients victims register, and
  - the Juvenile Justice victims register.<sup>13</sup>
- 1.11 Registered victims are kept informed of a range of information about the offender. This information varies based on the particular register, but includes information such as impending parole or release of offenders, escape from custody, the offender’s location while in custody, and the offender’s death.<sup>14</sup>
- 1.12 We note that the definition of eligible victims for each victims register<sup>15</sup> varies from the definitions of eligible victims for the purposes of the Victims Charter,<sup>16</sup> the

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10. *Victims Rights and Support Act 2013* (NSW) s 26, s 31. A statutory compensation scheme for victims was first introduced in the *Victims Compensation Act 1987* (NSW).

11. *Victims Rights and Support Act 2013* (NSW) s 6.

12. *Victims Rights and Support Act 2013* (NSW) s 6.5. These provisions apply to victims of “serious crime that involves sexual violence or that results in actual bodily harm or psychological or psychiatric harm to the victim”.

13. All established under *Crimes (Administration of Sentences) Act 1999* (NSW) s 256.

14. NSW, Corrective Services, *Victims Register: Information Guide and Registration Form* (2016); NSW, Mental Health Review Tribunal, “Involvement of Registered Victims” <[mhrt.nsw.gov.au/forensic-patients/involvement-of-registered-victims.html](http://mhrt.nsw.gov.au/forensic-patients/involvement-of-registered-victims.html)>; NSW, Juvenile Justice, “Victims Register” <[www.juvenile.justice.nsw.gov.au/Pages/Juvenile%20Justice/aboutdjj/victimsregister.aspx](http://www.juvenile.justice.nsw.gov.au/Pages/Juvenile%20Justice/aboutdjj/victimsregister.aspx)>.

15. *Crimes (Administration of Sentences) Act 1999* (NSW) s 256(5)(a).

16. *Victims Rights and Support Act 2013* (NSW) s 5.

## CP Victims' involvement in sentencing

Victims Support Scheme,<sup>17</sup> and VISs.<sup>18</sup> This may confuse victims and raise false expectations as to eligibility for services or procedural rights.

### Victim impact statements in NSW

- 1.13 In NSW, a victim's central involvement in the sentencing process is through making a VIS.
- 1.14 The *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that the court has the discretion to receive a VIS following conviction of an offender "if it considers it appropriate to do so".<sup>19</sup> "Primary victims" and "family victims" are eligible to give a VIS.
- 1.15 "Primary victims" include the person against whom the crime was committed, as well as witnesses. Primary victims may submit a VIS detailing the particulars of any personal harm they suffered as a direct result of the offence.<sup>20</sup>
- 1.16 "Family victims" include the immediate family members of a victim that dies as a direct result of an offence.<sup>21</sup> Family victims may submit a VIS on the impact that the primary victim's death has had on them.<sup>22</sup>

### Common law

- 1.17 In addition to the statutory provisions, a sentencing court has discretion at common law to admit a VIS and consider the impact of the crime on the victim in determining the seriousness of the offence and the relevant sentence.<sup>23</sup> As a result, the court sometimes admits a VIS that does not conform to the statutory requirements.
- 1.18 The NSW Criminal Court of Appeal has said that the provisions in the *Crimes (Sentencing Procedure) Act 1999* (NSW) "do not codify and confine the circumstances in which evidence may be received by a sentencing court of the impact of crimes upon a victim".<sup>24</sup>

### History of provisions

- 1.19 The NSW statutory provisions about VISs have evolved over time. Provisions were first enacted in 1987, when the Supreme and District Courts were granted the discretion to receive and consider a VIS. Only a "victim" could submit a VIS. For these purposes, "victim" was defined as the "person against whom the offence was committed", or a "witness to the act" that "suffered injury" in the form of "bodily

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17. *Victims Rights and Support Act 2013* (NSW) pt 4 div 1.

18. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26.

19. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(1).

20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definitions of "victim impact statement" and "personal harm".

21. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definitions of "victim impact statement", "family victim" and "member of the primary victim's immediate family".

22. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of "victim impact statement".

23. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) 422.

24. *Miller v R* [2014] NSWCCA 34 [156].

- harm” including “pregnancy, mental shock and nervous shock”.<sup>25</sup> However, these provisions never commenced.
- 1.20 In 1996, the *Criminal Procedure Act 1986* (NSW) was successfully amended to allow the Supreme and District Courts discretion to consider a VIS from a victim of an indictable offence that involved “an act of actual or threatened violence (including sexual assault)”:
- prior to the sentencing of a person convicted of an indictable offence, or
  - during a sentence redetermination of an existing life sentence.<sup>26</sup>
- 1.21 The amendments also altered the definition of “victim” (as defined in the 1987 provisions) to include both “primary victims” and “family victims”.
- 1.22 A “primary victim” included people “against whom the offence was committed” and witnesses, as it does now.<sup>27</sup> “Primary victims” could submit a VIS detailing the “personal harm” that they experienced, which was limited to “actual physical bodily harm, mental illness or nervous shock”.<sup>28</sup>
- 1.23 A “family victim” included “a member of the immediate family of a primary victim of the offence who has died as a direct result of that offence”.<sup>29</sup> “Immediate family members” were limited in the legislation to the victim’s spouse or de facto spouse, parent, guardian, step-parent, child, step-child, sibling or step-sibling.<sup>30</sup> The current requirement that the content of the VIS submitted by a family victim be limited to detailing “the impact of the death of the primary victim on the members of the immediate family of the primary victim” was also introduced.<sup>31</sup>
- 1.24 These provisions emphasised that the preparation of a VIS was discretionary, and stated that the absence of a VIS did not “give rise to an inference that an offence had little or no impact on a victim”.<sup>32</sup>
- 1.25 In 1997, further amendments expanded the availability of a VIS beyond the Supreme and District Courts, allowing for a VIS to be used in the Children’s Court and Local Court in particular circumstances.<sup>33</sup> Previously, the common law had allowed for the use of a VIS in the Local Court and Children’s Court in limited circumstances.<sup>34</sup>
- 1.26 In 1999, the *Crimes (Sentencing Procedure) Act 1999* (NSW) established a statutory scheme for VISs that replaced the scheme in the *Criminal Procedure Act 1986* (NSW).<sup>35</sup>

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25. *Crimes (Sentencing) Amendment Act 1987* (NSW), to be inserted as *Crimes Act 1900* (NSW) s 447C, not commenced.

26. *Criminal Procedure Act 1986* (NSW) s 23A, s 23C.

27. *Criminal Procedure Act 1986* (NSW) s 23B, s 23A definition “primary victim”.

28. *Criminal Procedure Act 1986* (NSW) s 23A definition “personal harm”, s 23B(a).

29. *Criminal Procedure Act 1986* (NSW) s 23B, s 23A definition “family victim”.

30. *Criminal Procedure Act 1986* (NSW) s 23B, s 23A definition “member of the immediate family”.

31. *Criminal Procedure Act 1986* (NSW) s 23B(b).

32. *Criminal Procedure Act 1986* (NSW) s 23D.

33. *Crimes Legislation Further Amendment Act 1997* (NSW) sch 2, amending *Criminal Procedure Act 1986* (NSW) s 23.

34. NSW, *Parliamentary Debates*, Legislative Assembly, 29 November 1997, 2093.

35. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3 div 2.

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- 1.27 Under the *Crimes (Sentencing Procedure) Act 1999* (NSW), a VIS could be submitted by a “primary victim” or “family victim” to the Supreme Court, Industrial Relations Commission, District Court or Local Court at “any time after it convicts, but before it sentences, an offender”.<sup>36</sup>
- 1.28 Broadly, a VIS could be submitted by victims of the following offences:
- offences that result in “death of, or actual physical bodily harm to, any person”
  - an “act of actual or threatened violence”
  - a “prescribed sexual offence”
  - particular offences under the *Work Health and Safety Act 2011* and the *Rail Safety National Law (NSW)*, and
  - offences “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”.<sup>37</sup>
- 1.29 In 2003, amendments entitled victims to read their VIS out in court. Alternatively, the victim could nominate a family member or representative to read the VIS on their behalf.<sup>38</sup> This amendment sought to “enhance ... the victim’s opportunity to participate in the criminal justice process by fully informing the court about the effects of the crime upon the victim”.<sup>39</sup>
- 1.30 In 2004, the scope of offences for which victims could submit a VIS in the Local Court was expanded to include:
- offences resulting in death
  - offences for which “a higher maximum penalty may be imposed when death is occasioned”
  - offences that “result in either actual physical bodily harm to any person”
  - offences that involve “an act of actual or threatened violence”, and
  - offences that involve “an act of sexual assault”.<sup>40</sup>
- 1.31 In 2006, following a statutory review of the *Victims Support and Rehabilitation Act 1996* (NSW) and the *Victims Rights Act 1996* (NSW), the category of those eligible to make a VIS as a “family victim” was expanded. The definition of “a member of the primary victim’s immediate family” was amended to include a person engaged to the

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36. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(1), s 28(1).

37. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(2), (3).

38. *Victims Legislation Amendment Act 2003* (NSW) sch 1, amending the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A.

39. NSW, *Parliamentary Debates*, Legislative Assembly, 7 May 2003, 379.

40. NSW, *Parliamentary Debates*, Legislative Assembly, 5 December 2003, 6118-6118; Note that the Local Court’s jurisdiction to receive a VIS is limited to indictable offences being dealt with by the Local Court summarily that are included in *Criminal Procedure Act 1986* (NSW) sch 1 Table 1.

victim, a parent or grandparent, child or grandchild, and half-brother or half-sister of the victim.<sup>41</sup>

- 1.32 In 2008, the circumstances in which a Court could receive a VIS were expanded. The amendments included:
- replacing the terms “mental illness or nervous shock” in the definition of “personal harm” with the terms “psychological or psychiatric harm”
  - broadening the nature of the harm that could be documented in a VIS to include “harm that is an exacerbation of an existing psychological condition or harm that does not reach the threshold of a diagnosed mental illness or psychological disorder”<sup>42</sup>
  - broadening the scope of sexual offences for which a VIS could be made to include other sexual offences including indecent assault, persistent sexual abuse of a child, child prostitution and pornography, and child abduction,<sup>43</sup> and
  - making various procedural changes including allowing victims to include “photographs, drawings or other images”<sup>44</sup> in their VIS, and entitling victims to read out their VIS by closed circuit television in certain circumstances.<sup>45</sup>
- 1.33 In 2014, courts were given the discretion to consider the VIS of a family victim in determining the appropriate sentence, where the prosecutor supports this and the “court considers it appropriate to do so”.<sup>46</sup>
- 1.34 A Bill currently before Parliament seeks to amend the *Crimes (Sentencing Procedure) Act 1999* (NSW) further, to entitle victims of prescribed sexual offences, or a member of the victim’s immediate family, or the victim’s representative, to read the VIS “in closed court and with a support person present, unless the court otherwise directs”.<sup>47</sup> These provisions seek to:
- align the protections for sexual assault victims when a victim impact statement is read out in sentencing proceedings with protections that are currently afforded when a victim is giving evidence during trial. This will provide greater protections and support to victims of sexual violence and minimise further trauma and embarrassment.<sup>48</sup>

## Purposes of the victim impact statement

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- 1.35 A VIS can serve both an instrumental and expressive function.

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41. *Victims Support and Rehabilitation Amendment Act 2006* (NSW) sch 2.1.  
 42. NSW, *Parliamentary Debates*, Legislative Assembly, 29 August 2008, 9665 (B Collier).  
 43. *Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Act 2008* (NSW) sch 1.  
 44. *Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Act 2008* (NSW) s 9, amending the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30(2).  
 45. NSW, *Parliamentary Debates*, Legislative Assembly, 29 August 2008, 9665. See *Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Act 2008* (NSW) sch 1.  
 46. NSW, *Parliamentary Debates*, Legislative Assembly, 7 May 2014, 28360.  
 47. NSW, *Parliamentary Debates*, Legislative Assembly, 21 June 2017, 3). See also Justice Legislation Amendment Bill 2017 (NSW).  
 48. NSW, *Parliamentary Debates*, Legislative Assembly, 21 June 2017, 3.

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1.36 The instrumental function of a VIS is “to inform the court of the physical, emotional or financial harm suffered [by the victim] as the result of an offence”<sup>49</sup> to assist the court to determine “a proportionate and fit punishment.”<sup>50</sup>

1.37 In *R v P* the Federal Court of Australia said:

There is no question that increasing public concern about the position of victims of crime in the criminal justice system has been accompanied by repeated instances of judicial recognition that loss or damage suffered by a victim is a factor to be taken into account in the sentencing process...[T]hat reliable information of that nature should be presented is in the public interest, not only in the interest of the injured victim...since a proper sentence should not be based on a misconception or ignorance of salient facts.<sup>51</sup>

1.38 One commentator notes that the instrumental function of a VIS is particularly relevant where the offender pleads guilty and “little evidence relating to the offence is before the court”.<sup>52</sup>

1.39 The expressive function of the VIS is to give victims a voice in the criminal proceedings, and offenders an insight into the consequences of their actions.<sup>53</sup> By giving a victim the opportunity to present their VIS to the offender, the court and the community, a VIS can “serve therapeutic means for the victim by having their harm acknowledged and validated”.<sup>54</sup> The significance of this function was acknowledged in a number of preliminary submissions:

Victim Impact Statements ... are an important part of the sentencing process for victims of crime. [...] [V]ictims often express feelings of empowerment in being able to engage in this process and it allows victims to find personal closure and finality. This is the case regardless of whether a victim has given evidence at trial prior to conviction, or their participation is limited to providing [a] VIS on sentencing.<sup>55</sup>

...

The VIS can be an important opportunity for victims to share their experiences in an empowering way.<sup>56</sup>

...

VISs ...increase victims' level of satisfaction and therefore participation in the criminal justice system.<sup>57</sup>

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49. J Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (2008) 147-148.
50. H Robert, *Preliminary Submission PVI10*, 3 citing M Manikis, “Victim Impact Statements at Sentencing: Towards a clearer understanding of their aims” (2015) 65 *University of Toronto Law Journal* 85.
51. *R v P* (1992) 39 FCR 276, 279.
52. T Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 35. See also S Garkawe, “Victim impact statements and sentencing” (2007) 33 *Monash University Law Review* 90, 96.
53. Bravehearts, *Preliminary Submission PVI11*, 1.
54. Women's Justice Network, *Preliminary Submission PVI13*, 2.
55. NSW Young Lawyers Criminal Law Committee, *Preliminary Submission PVI15*, 2.
56. Legal Aid NSW, *Preliminary Submission PVI14*, 1.
57. B Donegan, *Preliminary Submission PVI04*, 1.

- 1.40 One preliminary submission notes that the instrumental and expressive purposes of a VIS “can be mutually supportive”:

Victims are more likely to gain a therapeutic effect when they know that their statement contributes towards the process of determining a fair sentence, and a fair sentence is more likely to be reached when the sentencing judge has had a chance to hear first-hand about the impact the crime has had on the victim(s).<sup>58</sup>

## Debate about the use of victim impact statements in sentencing

- 1.41 The purpose of the sentencing hearing is for the court to evaluate the seriousness of the offence and impose an appropriate punishment on the offender according to law. In determining the relevant punishment, the court considers the circumstances of the offending and the offender’s culpability as well as any relevant mitigating and/or aggravating factors.

- 1.42 Some commentators argue that the use of VISs can compromise the “integrity of the sentencing process”:

The emotional nature of victim input has fostered concerns that sentencing judges might be distracted from the rational, objective sentencing approach that is required by the law and fundamental sentencing principles will be undermined. How can judges avoid their own humanity and remain immune from the emotional impact of such evidence, particularly where it is presented orally to the court?<sup>59</sup>

- 1.43 Opponents of VISs argue that they are:

- Antithetical to the adversarial nature of legal proceedings;
- Irrelevant to the purposes and legal goals of sentencing;
- Detrimental to the offender’s interests and entitlements to a fair hearing;
- Detrimental to the wellbeing of victims; and
- Harmful to the integrity of the legal proceedings.<sup>60</sup>

- 1.44 Commentators that oppose VISs also frequently raise concerns about the potential for VISs to increase penalties.<sup>61</sup> However, empirical research in various places including Australia, Canada, the United States and the United Kingdom suggests that VISs have “no significant effects upon sentencing outcomes, court processes or on sentencing patterns generally”.<sup>62</sup> Research conducted in South Australia did not

58. H Robert, *Preliminary Submission PVI10*, 3.

59. T Booth and K Carrington, “A Comparative Analysis of the Victim Policies across the Anglo-speaking World” in S Walklate (ed) *Handbook of Victims and Victimology* (Willan, 2007) 395.

60. T Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 2.

61. S Garkawe, “The Effect of Victim Impact Statements on Sentencing Decisions” (Paper presented at the Sentencing: Principles, Perspectives and Possibilities Conference, Canberra, 10-11 February 2006) 3.

62. T Booth and K Carrington, “A Comparative Analysis of the Victim Policies across the Anglo-speaking World” in S Walklate (ed) *Handbook of Victims and Victimology* (Willan, 2007) 396. See also J Roberts, “Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings” (2003) 47 *Criminal Law Quarterly* 365, 381-383; E Erez, L Roeger and F Morgan *Victim Impact Statements in South Australia: An Evaluation*, Research Report (South

reveal any “significant increase” in prison sentences or sentence length after VISs were introduced there.<sup>63</sup> Additionally, research shows that rather than resulting in harsher sentences, VISs can actually “enhance proportionality in sentencing”.<sup>64</sup>

1.45 A survey by the Victorian Victim Support Agency found that VISs are “highly valued by the judiciary” and “can...contain additional information that may be of use to a sentencing court”.<sup>65</sup>

1.46 It may be simplistic to treat the interests of the victim and the offender in the criminal justice system as necessarily mutually exclusive. One commentator asserts:

Fears of a trade-off of rights tend to stem from questionable assumptions, such as the idea that victims are inherently vengeful, or that demeanour is a strong indicator of veracity. Both of these arguments have been used as a basis for minimising participating in sentencing or reducing the special measures for vulnerable witnesses, but neither is corroborated by empirical evidence.<sup>66</sup>

1.47 The Victorian Law Reform Commission, in its report on the role of victims in criminal trials, similarly found:

The legitimate rights of the accused should be protected and fulfilled. So too the rights of the community. The legitimate rights of victims, properly understood, do not undermine those of the accused or of the community. The true interrelationship of the three is complementary.<sup>67</sup>

## Overview of this consultation paper

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1.48 The remaining chapters of this consultation paper are arranged as follows:

- **Chapter 2: The victim experience** looks at victims' complex and variable needs within the criminal justice system, both in relation to sentencing procedure and outcomes. We identify particular problems surrounding the information provided to victims about sentencing and making a VIS as well as the level of support and assistance provided to them. We also consider how to encourage the use of VISs in the Local Court.
- **Chapter 3: Who can make a victim impact statement** looks at the criteria that a person must satisfy in order to make a VIS, including the type of victim, the type of harm and eligible offences. Other jurisdictions offer simpler and, in some cases, broader and more inclusive regimes. We also consider cases where an offence does not result in a conviction, but a VIS may still be desirable, as well as the possibility of community impact statements.

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Australia, Office of Crime Statistics, 1994) 71-72; E Erez, “Integrating a Victim Perspective in Criminal Justice through Victim Impact Statements” in A Crawford and J Goodey (ed) *Integrating a Victim Perspective within Criminal Justice* (Ashgate, 2000) 170-171.

63. Victoria, Victims Support Agency, *A Victim's Voice: Victim Impact Statements in Victoria: Findings of an evaluation into the effectiveness of Victim Impact Statements in Victoria* (2009) 6.

64. Victoria, Victims Support Agency, *A Victim's Voice: Victim Impact Statements in Victoria: Findings of an evaluation into the effectiveness of Victim Impact Statements in Victoria* (2009) 6.

65. Victoria, Victims Support Agency, *A Victim's Voice: Victim Impact Statements in Victoria: Findings of an evaluation into the effectiveness of Victim Impact Statements in Victoria* (2009) 7.

66. J Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (2008) 247.

67. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) 29.



- **Chapter 4: Content, admission and use of victim impact statements** looks at what a VIS may address. A primary victim's VIS may only talk about the physical, psychiatric and psychological harm arising from an offence. A family victim's VIS may only talk about the impact of a primary victim's death on the primary victim's family. Other jurisdictions have broader definitions of the harm that victims may talk about. Other related issues are how a court may use a VIS when sentencing an offender and evidential questions that arise from such use.
- **Chapter 5: Procedural issues with the making and reception of a victim impact statement.** Procedural issues can have a significant impact on victims. We look at the many issues around making and delivering a VIS, including technical requirements. We also consider special arrangements to help victims when their VIS is read out in court. The possibilities of cross-examination and publicity of a VIS can present particular problems for some victims. We also consider ways in which courts may acknowledge and respond to victims in sentencing hearings.
- **Chapter 6: Restorative justice practices in NSW** considers the restorative justice practices that may also provide victims with a way to be involved before, during and after the sentencing hearing. NSW already has some programs, however they are not widely used. We consider the existing procedures and protections as they apply to victims.



## 2. The victim experience

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### In brief

Victims have complex and variable needs within the criminal justice system, both in relation to sentencing procedure and outcomes. There are particular problems surrounding the information provided to victims about sentencing and making a victim impact statement (“VIS”) as well as the level of support and assistance provided to them. We also consider how to encourage the use of VISs in the Local Court.

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### What are the needs of victims in the criminal justice system?

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- 2.1 When it comes to the criminal justice system, victims have “complex and variable”<sup>1</sup> needs. The harm they suffer as a result of criminal offences committed against them or their family members, can be wide-ranging, and might include physical, psychological and other forms of harm.<sup>2</sup> Ideally, the criminal justice process should give victims a chance to obtain “justice, healing, offender accountability [and] public acknowledgment”<sup>3</sup> of this harm.
- 2.2 From the perspective of the victim, whether the process achieves this will depend on whether it delivers the forms of justice we call “procedural justice” and “distributive justice”.
- 2.3 Procedural justice is concerned with the quality of the victim’s experience of the justice process including whether they have been:

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1. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [3.2].

2. I Freckelton, *Criminal Injuries Compensation: Law, Practice and Policy* (LBC, 2001) [3.10]; Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [3.20].

3. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [3.23].

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- able to participate in the criminal trial process (if they choose to)
  - able to access adequate “information and support”, and
  - treated with respect.<sup>4</sup>
- 2.4 Distributive justice is concerned with the victim’s perception of justice arising from outcomes including:
- the punishment and deterrence of the offender
  - the protection of community safety, and
  - the victim’s restoration.<sup>5</sup>
- 2.5 As one commentator notes, “for victims the critical issue is to feel included—to be informed, consulted, and heard—thereby acquiring a sense of fairness and control over the way their victimization is processed and disposed”.<sup>6</sup>
- 2.6 Preliminary submissions support this view. Bravehearts Foundation Ltd states that victims need to feel that they “are more than a name on a piece of paper or a ‘witness’ to the crime perpetrated against them”.<sup>7</sup> Bravehearts also says that victims want to have “an opportunity to be involved and a strong voice to tell their story”.<sup>8</sup>
- 2.7 While some victims are satisfied with the criminal justice system, we know that many experience “profound dismay”.<sup>9</sup> The Tasmanian Sentencing Advisory Council in its recent review of driving offences that result in death or injury acknowledged that “there are limits in the capacity of the conventional criminal justice system to respond to [victims]”.<sup>10</sup> Notably, the Council drew attention to the “‘expectation’ gap in relation to what the law can appropriately do by way of penalty (which may not be viewed as being enough by family members) and the offender’s culpability”.<sup>11</sup> The Council concluded that “sentencing reforms cannot close that expectation gap but other responses may be able to assist in closing the ‘healing gap’ for some families and victims”.<sup>12</sup>
- 2.8 Criminal sentencing procedures have adapted with the aim of improving victims’ experiences in terms of procedural and distributive justice.<sup>13</sup> The most notable of

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4. Tasmania, Sentencing Advisory Council, *Sentencing of Driving Offences that Result in Death or Injury*, Final Report 8 (2017) 113-114.

5. Tasmania, Sentencing Advisory Council, *Sentencing of Driving Offences that Result in Death or Injury*, Final Report 8 (2017) 114.

6. E Erez, *Submission to the Victorian Law Reform Commission’s Review of the Role of Victims of Crime in the Criminal Trial Process* (2015) 1.

7. Bravehearts Foundation Ltd, *Preliminary submission PVI11*, 2.

8. Bravehearts Foundation Ltd, *Preliminary submission PVI11*, 1.

9. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [3.2].

10. Tasmania, Sentencing Advisory Council, *Sentencing of Driving Offences that Result in Death or Injury*, Final Report 8 (2017) 119.

11. Tasmania, Sentencing Advisory Council, *Sentencing of Driving Offences that Result in Death or Injury*, Final Report 8 (2017) 114.

12. Tasmania, Sentencing Advisory Council, *Sentencing of Driving Offences that Result in Death or Injury*, Final Report 8 (2017) 114.

13. Tasmania, Sentencing Advisory Council, *Sentencing of Driving Offences that Result in Death or Injury*, Final Report 8 (2017) 114.

these reforms, in NSW, is the use of the victim impact statement (“VIS”) in sentencing.

## Victims’ experience with victim impact statements

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2.9 Victims are motivated to make VISs for various reasons, including:

- “to have a voice in proceedings”
- “to have the nature of their harm acknowledged, validated and vindicated by the court”
- “to have the opportunity to experience therapeutic effects, such as catharsis and empowerment.”<sup>14</sup>

For family victims, VISs can be “important devices through which to make the deceased visible to the court”.<sup>15</sup>

2.10 The Victorian Law Reform Commission (“VLRC”) in its report on the role of victims in criminal trials, found that victims experience the process of making a VIS in diverse ways, with some describing it as “therapeutic [and] cathartic” others as “difficult”, “emotionally challenging”, “frustrat[ing]” and “disappoint[ing]”.<sup>16</sup>

2.11 Preliminary submissions reflect this range of victims’ experiences. Some highlight the manner in which the “VIS can be distressing and re-traumatising for victims”:<sup>17</sup>

As a victim, I found it incredibly difficult, traumatic and emotionally draining to write my statement. I had to relive the trauma. I had to relive the pain ... I felt extremely intimidated to have to read my statement in court from the bench. I was, however, determined for the judge and the offender to hear the statement in my words.<sup>18</sup>

2.12 However, some also agree that preparing a VIS can be empowering and therapeutic for victims:

Even though writing and delivering a VIS is an emotional, difficult and traumatic process, it IS cathartic, it IS empowering and I did feel a weight lifted after reading my statement to the court. I am grateful I had the opportunity to speak. I felt it was the only input or influence I had in the process and I wanted the offender (the driver who hit me) and the judge to understand how much the accident had changed mine and my family’s life ...<sup>19</sup>

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14. F Tait, *Testaments of Transformation: The Victim Impact Statement Process in NSW as Experienced by Victims of Crime and Victim Service Professionals* (Masters of Criminology, University of Sydney, 2015) 101. See also M Giannini, “Equal Rights for Equal Rites? Victim Allocation, Defendant Allocation, and the Crime Victims’ Rights Act” (2008) 26 *Yale Law and Policy Review* 431, 444.

15. T Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 64.

16. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.89].

17. Legal Aid NSW, *Preliminary submission PVI14*, 1.

18. B Donegan, *Preliminary submission PVI4*, 2. See also Victims of Crime Assistance League Inc NSW, *Preliminary Submission PVI6*, 3.

19. B Donegan, *Preliminary submission PVI4*, 2-3. See also H Robert, *Preliminary submission PVI10*, 2; Victims of Crime Assistance League Inc NSW, *Preliminary Submission PVI6*, 1.

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- 2.13 A recent study has found that most victims describe the VIS process as “therapeutic”.<sup>20</sup> In particular, preparing a VIS allows victims “the opportunity to reconstruct the traumatic story from their perspective, to assess their harms, ... make meaning of their suffering” and have it validated by having their story heard in public.<sup>21</sup> The study found that the “positive experience of writing the VIS appeared not to be coloured by the sentencing experience”,<sup>22</sup> and that the intrinsic therapeutic benefit of making a VIS remains notwithstanding “any disappointment with sentencing proceedings and sentencing term”.<sup>23</sup>
- 2.14 In a survey conducted by the Victorian Victims Support Agency (“VSA”), stakeholders acknowledged the “important and valuable” role that VISs play in the sentencing process.<sup>24</sup> However, the VSA says:
- there are a number of factors which can affect [victims'] levels of satisfaction with the process of making a VIS. These include: the extent to which they are aware of their right to make a VIS; their understanding and expectations of the VIS process (in particular how their VIS will be used); whether they receive adequate information and support to prepare their VIS; and how their VIS is presented to, and judicially acknowledged by, the court.<sup>25</sup>
- 2.15 The following sections of this chapter will examine the information and support provided to victims, as well as problems with the VIS process that arise in practice.

### Information provided to victims about victim impact statements

- 2.16 The VLRC notes that providing clear, comprehensive and timely information and guidance to victims about the VIS and sentencing process can improve victims’ “experience of the court process, their perceptions of fairness and ultimately their confidence in the legal system”.<sup>26</sup>

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20. F Tait, *Testaments of Transformation: The Victim Impact Statement Process in NSW as Experienced by Victims of Crime and Victim Service Professionals* (Masters of Criminology, University of Sydney, 2015) 98, 192. See also Victoria, Victims Support Agency, *A Victim's Voice: Victim Impact Statements in Victoria: Findings of an Evaluation into the Effectiveness of Victim Impact Statements in Victoria* (2009) 12.

21. F Tait, *Testaments of Transformation: The Victim Impact Statement Process in NSW as Experienced by Victims of Crime and Victim Service Professionals* (Masters of Criminology, University of Sydney, 2015) 192.

22. F Tait, *Testaments of Transformation: The Victim Impact Statement Process in NSW as Experienced by Victims of Crime and Victim Service Professionals* (Masters of Criminology, University of Sydney, 2015) 76.

23. F Tait, *Testaments of Transformation: The Victim Impact Statement Process in NSW as Experienced by Victims of Crime and Victim Service Professionals* (Masters of Criminology, University of Sydney, 2015) 76, 194.

24. Victoria, Victims Support Agency, *A Victim's Voice: Victim Impact Statements in Victoria: Findings of an Evaluation into the Effectiveness of Victim Impact Statements in Victoria* (2009) 11.

25. Victoria, Victims Support Agency, *A Victim's Voice: Victim Impact Statements in Victoria: Findings of an Evaluation into the Effectiveness of Victim Impact Statements in Victoria* (2009) 8.

26. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [6.17].

- 2.17 Giving victims adequate information on sentencing procedure and the role of the VIS, is also critical to managing victims' expectations of their role and the impact of the VIS on sentencing.<sup>27</sup>
- 2.18 Research has found that victim satisfaction with the VIS process correlates with "victims' expectations of the purpose of these statements and the use to which they will be put".<sup>28</sup> In this respect, "raising unrealistic expectations may result in lower, not higher levels of victim satisfaction", particularly where victims expect their VIS to have an impact on sentencing.<sup>29</sup>

### NSW Police Force

- 2.19 When a crime is reported, the Officer in Charge ("OIC") of the investigation informs the victim of the range of services available through Victims Services (discussed below),<sup>30</sup> and provides the victim with the contact details for Victims Services and the Victims Access Line (discussed below).<sup>31</sup>
- 2.20 While it is unclear whether there is a practice of OICs informing a victim of their right to make a VIS, the NSW Police Force website provides information for victims, including information on submitting a VIS.<sup>32</sup> However, the police do not assist victims to prepare the VIS, nor suggest what content should be included.<sup>33</sup>

### Victims Services

- 2.21 Victims Services is part of the NSW Department of Justice and provides support services to victims including counselling and financial support.
- 2.22 Victims Services provides a VIS information package<sup>34</sup> on its website, which gives a detailed overview of the VIS process, including information on who can prepare a VIS and guidelines on how to write the VIS. The pack also provides victims with contact details for agencies that might assist the victim to prepare a VIS.<sup>35</sup>

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27. Victoria, Victims Support Agency, *A Victim's Voice: Victim Impact Statements in Victoria: Findings of an Evaluation into the Effectiveness of Victim Impact Statements in Victoria* (2009) 59. See also S Garkawe, "The Effect of Victim Impact Statements on Sentencing Decisions" (Paper presented at the Sentencing: Principles, Perspectives and Possibilities Conference, Canberra, 10-11 February 2006) 12-13.

28. JV Roberts and M Manikis, *Victim Personal Statements, A Review of Empirical Research*, Report for the Commissioner for Victims and Witnesses in England and Wales (University of Oxford, 2011) 27.

29. JV Roberts and M Manikis, *Victim Personal Statements, A Review of Empirical Research*, Report for the Commissioner for Victims and Witnesses in England and Wales (University of Oxford, 2011) 27.

30. [2.21]-[2.23].

31. [2.24]-[2.25].

32. NSW Police Force, "Are You a Victim of Crime?" <[www.police.nsw.gov.au/crime/are\\_you\\_a\\_victim\\_of\\_crime](http://www.police.nsw.gov.au/crime/are_you_a_victim_of_crime)> (retrieved 7 September 2017).

33. NSW Police Force, *NSW Police Handbook* (2016) 99, 483-485..

34. NSW, Department of Justice, Victims Services, *Victim Impact Statement: Information Package* (2017).

35. NSW, Department of Justice, Victims Services, *Victim Impact Statement: Information Package* (2017) 9.

## CP Victims' involvement in sentencing

- 2.23 Victims Services also provides a Code of Practice for the Charter of Victims Rights.<sup>36</sup> As noted in Chapter 1,<sup>37</sup> the Charter provides that victims should have “access to information and assistance” for preparing their VIS.<sup>38</sup> The Code states that it is the responsibility of the Office of the Director of Public Prosecutions, NSW Police Force, NSW Health, Victims Services, and nominated non-government service providers to ensure that victims are:
- advised if they may be eligible to make a VIS
  - referred to the appropriate agency for assistance with the preparing a VIS, and
  - “advised about the purpose and process” of the VIS.<sup>39</sup>

### Victims Access Line

- 2.24 The Victims Access Line is a service run by Victims Services. It is the “entry point” to Victims Services<sup>40</sup> and provides victims with information about available support services and referrals to relevant support agencies.
- 2.25 Victims Services will assist a victim to prepare a VIS, if requested. However, the Victims Access Line does not advise victims of their right to make a VIS, nor does it provide victims with information on preparing a VIS, unless specifically requested.

### Police Prosecutors

- 2.26 Police Prosecutors rarely meet with victims before the court hearing, and do not as a matter of policy advise the victim of their right to make a VIS. However, where the victim tells the Police Prosecutor that they wish to submit a VIS, the Police Prosecutor must ensure the VIS is admissible by removing content that is not permitted.

### Office of the Director of Public Prosecutions

- 2.27 The Office of the Director of Public Prosecutions (“ODPP”) has a Witness Assistance Service (“WAS”) to support victims.
- 2.28 The ODPP website provides victims with information on sentencing procedure and preparing the VIS. It also encourages victims to contact the ODPP Solicitor instructing in the matter or WAS if they want help writing their VIS.<sup>41</sup>

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36. NSW, Department of Justice, Victims Services, *NSW Code of Practice: Charter of Victims Rights* (2015).

37. [1.18].

38. NSW, Department of Justice, Victims Services, *NSW Code of Practice: Charter of Victims Rights* (2015) 28; *Victims Rights and Support Act 2013* (NSW) s 6(14).

39. NSW, Department of Justice, Victims Services, *NSW Code of Practice: Charter of Victims Rights* (2015) 28.

40. NSW, Department of Justice, Victims Services, *Contact Us* <[www.victimsservices.justice.nsw.gov.au/Pages/vss/VS\\_contactus.aspx](http://www.victimsservices.justice.nsw.gov.au/Pages/vss/VS_contactus.aspx)> (retrieved 7 September 2017).

41. NSW, Office of the Director of Public Prosecutions, “Writing Your Victim Impact Statement” (2008) <http://www.odpp.nsw.gov.au/victims-witnesses/victim-impact-statements> (retrieved 7 September 2017).



- 2.29 The ODPP requires the victim to tell the prosecutor if they want to make a VIS. It is also ODPP practice to emphasise to victims that the decision to submit the VIS is at the prosecutor's discretion.

### Improving information available to victims

- 2.30 Preliminary submissions note that the information routinely provided to victims in NSW is insufficient and could be improved. In preliminary submissions, the Victim Services' VIS information package was described as "intimidating" and "sterile",<sup>42</sup> and "overly complicated and not reflective of [victims'] in-court experience, particularly with reference as to how a VIS will be used in court".<sup>43</sup> One family victim stated:

I received the information booklet and found the idea of writing a VIS very daunting and became apprehensive about submitting one. I struggled with piecing together my experiences and the impact the assault had on me.<sup>44</sup>

- 2.31 Preliminary submissions also note that victims need more comprehensive information on sentencing principles and procedure so that the victim can "follow the procedure and results more fully".<sup>45</sup>

- 2.32 One preliminary submission suggests that plea negotiations are "often misunderstood by victims/families". This submission also suggests that information be provided to victims to help them understand the "discount on sentence that will be applied as a result of taking a guilty plea instead of going to trial".<sup>46</sup>

- 2.33 The VLRC has also acknowledged the importance of ensuring that victims have sufficient information regarding the sentencing process, concluding that victims need to know:

- the purposes of, and factors relevant to, sentencing and how these relate to the offender's circumstances and defence submissions;
- the duties of the prosecutor at a sentencing hearing;
- the purposes and use of maximum sentences, cumulative sentencing and concurrent sentencing;
- the role of victim impact statements, what content is permitted and alternative arrangements for reading out a statement;
- the option of applying for compensation or restitution as an additional order against the offender.<sup>47</sup>

- 2.34 Guidelines, principles or templates may help victims to draft a VIS. Bravehearts suggests that a template with "core questions" to be addressed may help. However,

42. Victims of Crime Assistance League Inc NSW, *Preliminary submission PVI6*, 2.

43. NSW, Director of Public Prosecutions, *Preliminary submission PVI6*, 4.

44. Victims of Crime Assistance League Inc NSW, *Preliminary submission PVI6*, 2.

45. Victims and Witnesses of Crime Court Support Inc, *Preliminary submission PVI5*, 3; H Robert, *Preliminary submission PVI10*, 4.

46. Victims and Witnesses of Crime Court Support Inc, *Preliminary submission PVI5*, 3.

47. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [6.40].

Bravehearts notes "questions should not be closed or leading and should not inhibit the victim from providing further information about the effects of the crime".<sup>48</sup>

- 2.35 One suggestion is to standardise the information that victim support agencies provide about VISs.<sup>49</sup> Another is for the government to establish a dedicated phone line with trained personnel, and have explanatory web videos and information sheets in Local Courts to assist victims.<sup>50</sup>
- 2.36 The NSW Commissioner of Victims Rights is developing an online video that aims to make it easier, simpler and faster for victims to fill out a VIS.<sup>51</sup> In addition, Victims Services is producing fact sheets, improving frontline services and working closely with the WAS to educate counsellors about VISs.<sup>52</sup> The answers to Question 2.1 will be available to guide Victim Services in the development of these resources.

### Question 2.1: Information about victim impact statements

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

## Problems with the victim impact statement process in practice

- 2.37 Preliminary submissions highlighted that victims may be dissuaded from tendering a VIS because they fear being re-traumatised, or cross-examined on its content or because their VIS has been edited to comply with court requirements.<sup>53</sup> Some victims may also fear media coverage of their VIS, which is currently highlighted as a possibility in *A Guide to Media for Victims of Crime* produced by Victims Services.<sup>54</sup>

## Content of a victim impact statement

- 2.38 As discussed in Chapter 4,<sup>55</sup> the admissible content of a VIS is limited to the personal harm the victim suffers as a result of the offence(s) for which the offender is convicted.

48. Bravehearts Foundation Ltd, *Preliminary submission PVI11*, 3.

49. F Tait, *Testaments of Transformation: The Victim Impact Statement Process in NSW as Experienced by Victims of Crime and Victim Service Professionals* (Masters of Criminology, University of Sydney, 2015) 245.

50. F Tait, *Testaments of Transformation: The Victim Impact Statement Process in NSW as Experienced by Victims of Crime and Victim Service Professionals* (Masters of Criminology, University of Sydney, 2015) 244.

51. University of Sydney, *Victim Impact Statements Need Reform* (2 December 2015) <[sydney.edu.au/news-opinion/news/2015/12/02/victim-impact-statements-need-reform.html](http://sydney.edu.au/news-opinion/news/2015/12/02/victim-impact-statements-need-reform.html)>.

52. University of Sydney, *Victim Impact Statements Need Reform* (2 December 2015) <[sydney.edu.au/news-opinion/news/2015/12/02/victim-impact-statements-need-reform.html](http://sydney.edu.au/news-opinion/news/2015/12/02/victim-impact-statements-need-reform.html)>.

53. NSW, Director of Public Prosecutions, *Preliminary submission PVI16*, 3-4; NSW Young Lawyers Criminal Law Committee, *Preliminary submission PVI15*, 4-5; Women's Justice Network, *Preliminary submission PVI13*. See also T Kirchengast, *Participation of Victims of Crime in New South Wales Court Processes* (2014) 205, 211, 216; T Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 128-129

54. NSW, Department of Justice, Victims Services, *A Guide to the Media for Victims of Crime* (2016) 20.

55. [4.44]-[4.46].

- 2.39 Victims can find it difficult to confine their statement to the offences before the court, particularly when offenders have a history of violent behaviour, or charges have been dropped or reduced through plea negotiations.<sup>56</sup> As one commentator notes:

it is neither uncommon nor surprising for victims to...write in their VISs from their own perspective about their own experience of victimisation rather than from the 'legal' picture of the offending that has been constructed for the court.<sup>57</sup>

- 2.40 The VLRC notes that the admissibility of VISs is contentious.<sup>58</sup> Objections to the admissibility of all or part of a VIS are often raised on the day of sentencing, and as a result, "sometimes last-minute amendments to the VIS have to be made".<sup>59</sup> One commentator notes:

Most [victims] stated they objected to their VIS being edited and felt strongly that VIS editing should not occur...While many [victims] were aware of the parameters of admissible content in the VIS, they believed it inappropriate that the expression of their suffering could be tempered or limited by the offender or the court.<sup>60</sup>

...

Editing of the VIS by defence was generally viewed as giving the offender the right to decide which part of the victim's suffering was admissible. The idea that offenders were permitted to undermine and challenge personal assessments of a crime's impact was deeply offensive and distressing to some [victims]. Judicial editing tended to occur on the day of VIS presentation, leaving [victims] little time to process or accept changes needing to be made, especially if unexplained.<sup>61</sup>

- 2.41 Preliminary submissions suggest that objections to the admissibility of a VIS can be "enormously detrimental" to victims<sup>62</sup> and "diminish the restorative effect of giving a VIS".<sup>63</sup> Victims have described the process as "so vigorous" that it is "more violating and traumatic than days of cross examination".<sup>64</sup> The NSW Director of Public Prosecutions provides examples of the process and its effect on victims:

These cases involve Defence, in open court, objecting to minute detail, line by line, or strictly applying rules of evidence and seeking that parts of the VIS be ruled inadmissible.

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56. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) 150; T Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 139.
57. T Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 117. See also Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) 150-151.
58. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) 149.
59. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PVI15*, 6.
60. F Tait, *Testaments of Transformation: The Victim Impact Statement Process in NSW as Experienced by Victims of Crime and Victim Service Professionals* (Masters of Criminology, University of Sydney, 2015) 69.
61. F Tait, *Testaments of Transformation: The Victim Impact Statement Process in NSW as Experienced by Victims of Crime and Victim Service Professionals* (Masters of Criminology, University of Sydney, 2015) 173.
62. NSW, Director of Public Prosecutions, *Preliminary submission PVI16*, 3.
63. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PVI15*, 6.
64. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PVI15*, 3.

Examples of this behaviour include Defence objecting to a Victim referring in his VIS to the shame he and his family felt the offence had brought on them - the objection was that "there was no evidence of shame".

Where such objections are ruled on by the sentencing Judge and an amendment is then required to the VIS, this leads to the victim believing that they are not being heard and that their feelings in relation to the harm the offence has caused them are not valid. They are then required to, in effect, read a document that is no longer theirs.

On [one] occasion...a victim refused to read her VIS after significant challenges were made to it during the sentencing proceedings that resulted in significant amendment to the document. As a result, the VIS was tendered but not read.<sup>65</sup>

- 2.42 One commentator suggests that a review of the guidelines for dealing with VISs would be timely, in particular, to avoid family victims "being further traumatised by overzealous editing".<sup>66</sup>

### Question 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?

## Victims' experience presenting victim impact statements in court

- 2.43 In 2009, Victoria's Victims Support Agency ("VSA") ran a survey about victims' experiences in court. The survey found that victims' level of satisfaction with the VIS process was significantly affected by the way they are treated by counsel, the judge and other court staff and the way they can present their VIS.<sup>67</sup> In particular, the VSA found "a strong link between judicial recognition of a victim's VIS and victims' satisfaction with the process of making a VIS overall".<sup>68</sup> This was echoed by Victims and Witnesses of Crime Court Support who note that the judiciary's actions can have a significant impact on a victim's "healing journey".<sup>69</sup> Questions about procedural reform and best practice are raised in Chapter 5.
- 2.44 Although studies suggest that victims are rarely cross-examined on the content of their VIS,<sup>70</sup> various preliminary submissions were concerned about the potential for cross-examination to traumatise victims<sup>71</sup> or cause them "further distress".<sup>72</sup> The potential threat of cross-examination is enough to make some victims decide

65. NSW, Director of Public Prosecutions, *Preliminary submission PVI16*, 3.

66. F Tait, *Testaments of Transformation: The Victim Impact Statement Process in NSW as Experienced by Victims of Crime and Victim Service Professionals* (Masters of Criminology, University of Sydney, 2015) 207.

67. Victoria, Victims Support Agency, *A Victim's Voice: Victim Impact Statements in Victoria: Findings of an evaluation into the effectiveness of Victim Impact statements in Victoria* (2009) 11-12.

68. Victoria, Victims Support Agency, *A Victim's Voice: Victim Impact Statements in Victoria: Findings of an evaluation into the effectiveness of Victim Impact statements in Victoria* (2009) 12.

69. Victims and Witnesses of Crime Court Support Inc, *Preliminary submission PVI5*, 2.

70. See F Tait, *Testaments of Transformation: The Victim Impact Statement Process in NSW as Experienced by Victims of Crime and Victim Service Professionals* (Masters of Criminology, University of Sydney, 2015) 201-202.

71. Inner City Legal Centre, *Preliminary submission PVI2*, 2.

72. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PVI15*, 4-5.

against making a VIS.<sup>73</sup> Information provided to victims warns that they may be subject to cross-examination about their VIS.<sup>74</sup> However, this information often fails to say that cross-examination rarely happens. Information provided to victims may, thus, unnecessarily discourage victims from making a VIS. We ask specific questions about cross-examination in Chapter 5.<sup>75</sup>

### Question 2.3: Presenting the victim impact statement in court

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

## Use of victim impact statements in the Local Court

- 2.45 The Chief Magistrate of the Local Court is concerned about the low use of VISs in the Local Court, noting:

Despite substantial overlap in the Local Court's criminal jurisdiction with that of the District Court and commonality in the offences ...victim impact statements are rarely received in the Local Court. It is not immediately clear why this is the case.<sup>76</sup>

- 2.46 Other preliminary submissions also highlight the low use of VISs in the Local Court, and the lack of professional support available for victims wishing to make a VIS there.<sup>77</sup> While the Local Court can accept a VIS for a range of specified offences that involve serious harm or threatened violence,<sup>78</sup> the Victims of Crime Assistance League ("VOCAL") notes that, in its experience, the Local Court in the Hunter Region only accepts a VIS for driving offences resulting in death. In cases where its clients have wanted to submit a VIS about matters involving actual or threatened violence, the prosecutor has denied the victim's request.<sup>79</sup> This practice may prevent a large number of victims of assault and domestic violence from submitting a VIS.

- 2.47 The survey conducted by VSA found that in Victoria there are "few opportunities" for VISs to be presented in the Magistrates' Court "given the current mention system and high output of cases".<sup>80</sup> The VSA noted:

there may be cultural, educational and resource issues in relation to the use of VISs in the Magistrates' Court that may not exist in higher courts where estimates of VISs being made in more serious cases are between 80-90%.<sup>81</sup>

73. F Tait, *Testaments of Transformation: The Victim Impact Statement Process in NSW as Experienced by Victims of Crime and Victim Service Professionals* (Masters of Criminology, University of Sydney, 2015) 201-202.

74. For example, see NSW Police Force, "Are You a Victim of Crime?" <[www.police.nsw.gov.au/crime/are\\_you\\_a\\_victim\\_of\\_crime](http://www.police.nsw.gov.au/crime/are_you_a_victim_of_crime)> (retrieved 7 September 2017).

75. [5.68]-[5.79].

76. NSW, Chief Magistrate of the Local Court, *Preliminary submission PVI3*, 1.

77. Victims and Witnesses of Crime Court Support Inc, *Preliminary submission PVI5*, 4.

78. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(3).

79. Victims of Crime Assistance League Inc NSW, *Preliminary submission PVI6*, 2.

80. Victoria, Victims Support Agency, *A Victim's Voice: Victim Impact Statements in Victoria: Findings of an evaluation into the effectiveness of Victim Impact statements in Victoria* (2009) 8.

81. Victoria, Victims Support Agency, *A Victim's Voice: Victim Impact Statements in Victoria: Findings of an evaluation into the effectiveness of Victim Impact statements in Victoria* (2009) 8.

However, the VSA found that three quarters of surveyed Magistrates were in favour of using VISs and wanted them to be made more often.<sup>82</sup>

- 2.48 Currently the NSW Local Court's jurisdiction to receive a VIS is limited to certain indictable offences that may be tried in the Local Court. However, a number of indictable offences that may be tried in the Local Court are excluded, for example, assault occasioning actual bodily harm, indecent assault, acts of indecency, assault, harassment, staking or intimidating school children attending school, stalking and intimidation, publishing of child pornography, and recording and distributing intimate images without consent.<sup>83</sup> The omission of these offences from eligible VIS offences before the Local Court are discussed further in Chapter 3.<sup>84</sup>
- 2.49 The Chief Magistrate is open to increasing the number of Local Court matters in which a VIS is received.<sup>85</sup> It is worth noting though that increasing the number of VISs being admitted in Local Court matters could impact on the Local Court's workload and potentially delay some cases.
- 2.50 While victim participation in sentencing through submitting a VIS is low in the Local Court, the Local Court allows victim participation through alternative sentencing practices such as Forum Sentencing and circle sentencing. These are discussed in Chapter 6.

### Question 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?

## Assistance available for victims

- 2.51 Victims making a VIS require not only practical assistance but emotional support in preparing a VIS.<sup>86</sup> VOCAL notes that:

Some trauma reactions can be felt for years after an event, and may have considerable impact on an individual's functioning. As such, it is extremely difficult for someone experiencing these physical, psychological, and behavioural traumatic reactions to prepare a VIS without support. Repeated feedback from VOCAL clients is that professional support is essential: "*The advantage of having a professional to speak to, to have an explanation of what*

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82. Victoria, Victims Support Agency, *A Victim's Voice: Victim Impact Statements in Victoria: Findings of an evaluation into the effectiveness of Victim Impact statements in Victoria* (2009) 43; Victoria, Department of Justice, Social Research Centre, "Victim Impact Statement Research Amongst Judiciary and Magistracy" in Victoria, *A Victim's Voice: Victim Impact Statements in Victoria: Findings of an evaluation into the effectiveness of Victim Impact statements in Victoria* (2009) Appendix B.

83. *Criminal Procedure Act 1986* (NSW) sch 1, Table 2.

84. [3.45].

85. Chief Magistrate, *Preliminary submission PVI3*, 1.

86. Victoria, Victims Support Agency, *A Victim's Voice: Victim Impact Statements in Victoria: Findings of an evaluation into the effectiveness of Victim Impact statements in Victoria* (2009) 67-68. See also Bravehearts Foundation Ltd, *Preliminary submission PVI11*, 2.

*a VIS is, how to begin writing it, and what not to include is something I would recommend to anyone unfortunate enough to have experience writing a VIS*.<sup>87</sup>

- 2.52 Regarding practical support, victims require:
- help deciding whether or not to submit a VIS
  - help in preparing the VIS
  - help in deciding whether or not to read their written statement aloud in court
  - assistance understanding court procedures and sentencing processes
  - information about available assistance and support at court, and
  - assistance preparing for cross-examination on their VIS.<sup>88</sup>
- 2.53 Ensuring victims receive suitable assistance to prepare a VIS reduces the risk that inadmissible material is included in their VIS and reduces the need for cross-examination at the sentencing hearing.<sup>89</sup> The VLRC notes that assistance is of particular importance for “individuals who have limited literacy skills or communication difficulties”.<sup>90</sup>
- 2.54 A contentious point is what service providers should help victims. One preliminary submission suggests that a victim liaison officer (a legally trained professional employee by the Department of Justice) be assigned as a contact to provide information on possible entitlements, assistance and direction to appropriate support agencies. The liaison officer could also explain court processes, procedures and offer support during the writing of the VIS. The same preliminary submission suggests that NSW follow the approach of Queensland’s Local Victim Coordination Program, which is run by the Queensland government’s Victim Assist Queensland.<sup>91</sup> Victim Coordination Officers in Queensland provide victims with information about court processes, referrals to specialist agencies that can help the victim write a VIS, and “give extra support” to victims “experiencing difficult circumstances or [that] have complex needs”.<sup>92</sup>
- 2.55 The NSW Mental Health Review Tribunal suggests the need for a specialist Victim Support Unit for victims of offenders found not guilty because of mental impairment,<sup>93</sup> given the difficult, lengthy and uncertain nature of these proceedings. Such a unit could ensure “accurate information for victims”<sup>94</sup> in order to support victims in their recovery.

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87. Victims of Crime Assistance League Inc NSW, *Preliminary submission PVI6*, 2. See also H Robert, *Preliminary submission PVI10*, 4-5.

88. S Garkawe, *The effect of victim impact statements on sentencing decisions* (2006) 12.

89. Bravehearts Foundation Ltd, *Preliminary submission PVI11*, 3; Inner City Legal Centre, *Preliminary submission PVI2*, 2.

90. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) 155.

91. B Donegan, *Preliminary submission PVI4*, 2.

92. Queensland Government, “Victim Coordination Program” <[www.qld.gov.au/law/court/victim-coordination-program](http://www.qld.gov.au/law/court/victim-coordination-program)> (retrieved 11 September 2017).

93. The proposed model would be based on the Queensland Health Victims Support Service.

94. NSW Mental Health Review Tribunal, *Preliminary submission PVI17*, 2.

- 2.56 One preliminary submission raises the possibility of an appointed victim's advocate or legal representative. In Japan, lawyers for victims act as co-prosecutors, and in some parts of the United States counsel is appointed to ensure the rights of victims are represented in sentencing.<sup>95</sup> However, legal representatives for victims may be incompatible with the adversarial basis of the criminal justice system, and the provision of publicly-funded counsel raises questions of costs.<sup>96</sup> Legal representatives for victims may be engaged more appropriately outside of the sentencing process, for instance, if a victim needs help responding to a subpoena for discovery.<sup>97</sup>
- 2.57 In the United States, victims may appoint a victim's advocate whose role is to help a victim at any stage of the criminal justice process. Victims' advocates are not always legally trained, but often have skills in social work, case management, counselling or witness support. Victim advocates may be able to "better connect victims with justice officials" (for example, police, ODPP solicitors, and government departments) and help steer victims through the "complex and fragmented set of processes for victims".<sup>98</sup>
- 2.58 All people who have experienced trauma should be treated with respect, and should feel safe and supported. A position paper by the Mental Health Coordinating Council notes that "[t]rauma survivors often experience services as unsafe, disempowering and/or invalidating" and that trauma informed care can minimise re-victimisation.<sup>99</sup> Trauma informed care and practice is described as:
- a strengths-based framework that is responsive to the impact of trauma, emphasising physical, psychological, and emotional safety for both service providers and survivors, and creates opportunities for survivors to rebuild a sense of control and empowerment. It is grounded in and directed by a thorough understanding of the neurological, biological, psychological and social effects of trauma and interpersonal violence and the prevalence of these experiences in persons who receive mental health services.<sup>100</sup>
- 2.59 Legal Aid NSW suggests that we should consider the extent to which support for victims is "trauma informed; that is, grounded in an understanding of the impact of trauma, and emphasising emotional and psychological safety for victims".<sup>101</sup>

### Question 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?

95. NSW Office for Police and NSW Police Force, *Preliminary submission PVI12*, 2.

96. T Kirchengast, *Participation of Victims of Crime in New South Wales Court Processes: A Study Commissioned by Victims Services*, NSW (2014) 85, 139.

97. T Kirchengast, *Participation of Victims of Crime in New South Wales Court Processes: A Study Commissioned by Victims Services*, NSW (2014) 140.

98. T Kirchengast, *Participation of Victims of Crime in New South Wales Court Processes: A Study Commissioned by Victims Services*, NSW (2014) 84, 138, 143.

99. Mental Health Coordinating Council, *Trauma Informed Care and Practice: Towards a cultural shift in policy reform across mental health and human services in Australia* (2013) 5, 27.

100. Mental Health Coordinating Council, *Trauma Informed Care and Practice: Towards a cultural shift in policy reform across mental health and human services in Australia* (2013) 9.

101. Legal Aid NSW, *Preliminary submission PVI14*, 1.



## Victims requiring additional or distinct assistance

- 2.60 Certain victims may face obstacles in submitting a VIS due to factors such as disability, residence in regional areas, age and language, among others.
- 2.61 A “culturally sensitive approach”<sup>102</sup> should be adopted when supporting certain groups such as Aboriginal and Torres Strait Islander people, and people from culturally and linguistically diverse backgrounds.
- 2.62 WAS has Aboriginal Witness Assistance Officers that can assist Aboriginal witnesses and victims. Victims Services also has an Aboriginal Contact Line. Other non-government community legal services can also support Aboriginal victims.<sup>103</sup>
- 2.63 Where victims do not speak English, they may require interpreting services. While the Victims Services’ VIS information package notes that interpreter services may be arranged to assist with preparing or reading a VIS, victims are referred to the Australian Government Telephone Interpreting Service (TIS), which may involve charges.<sup>104</sup>
- 2.64 Victims with disabilities may require assistance in preparing or reading their VIS to the court. The VIS information package notes that Victims Services can assist in arranging this support.<sup>105</sup>
- 2.65 Where the victim is a child, a parent or another representative may prepare and read aloud to the Court a VIS on their behalf. If the child elects to read their own VIS, the child may be eligible to read it through closed-circuit television.<sup>106</sup>
- 2.66 The Royal Commission into Institutional Responses to Child Sexual Abuse has recommended that State and territory governments work to “improve the information provided to victims and survivors of child sexual abuse offences” in order to:
- (a) give them a better understanding of the role of the victim impact statement in the sentencing process
  - (b) better prepare them for making a victim impact statement, including in relation to understanding the sort of content that may result in objection being taken to the statement or parts of it.<sup>107</sup>
- 2.67 The Royal Commission also recommended that state and territory governments “ensure that, as far as reasonably practicable, special measures to assist victims of

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102. Aboriginal Legal Service (NSW/ACT) Ltd, *Preliminary submission PVI9*, 2. See also Royal Commission into Aboriginal Deaths in Custody, *National Report*, vol 1 (1991) [1.10].

103. For example, the Aboriginal Legal Service, Indigenous Women’s Legal Line and Warringa Baiya Legal Centre.

104. NSW, Department of Justice, Victims Services, *Victim Impact Statement: Information Package* (2017) 8. See also Australian Department of Immigration and Border Protection, “Translating and Interpreting Service” <[www.tisnational.gov.au](http://www.tisnational.gov.au)> (retrieved 11 September 2017).

105. NSW, Department of Justice, Victims Services, *Victim Impact Statement: Information Package* (2017) 8.

106. *Crimes Sentencing Procedure Act 1999* (NSW), s 30(1), s 30A(3).

107. Royal Commission into Institutional responses to Child Sexual Abuse, *Criminal Justice Report* (2017) 325, rec 77.

child sexual abuse offences to give evidence in prosecutions are available for victims when they give a victim impact statement, if they wish to use them".<sup>108</sup>

- 2.68 NSW is currently piloting the use of witness intermediaries for child victims of sexual offences.<sup>109</sup> The scheme applies at any stage of relevant proceedings<sup>110</sup> and could, conceivably apply to sentencing proceedings. The witness intermediary or "children's champion" has the role of facilitating communication between the victim and anyone asking questions as well as explaining the questions and answers to the respective parties.<sup>111</sup> A witness intermediary must have a tertiary qualification in psychology, social work, speech pathology, teaching or occupational therapy or such other qualifications, training, experience or skills as may be prescribed by the regulations (or both).<sup>112</sup>

### Question 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?

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108. Royal Commission into Institutional responses to Child Sexual Abuse, *Criminal Justice Report* (2017) 325, rec 78.

109. *Criminal Procedure Act 1986* (NSW) sch 2 pt 29 div 3.

110. *Criminal Procedure Act 1986* (NSW) sch 2 cl 83(2).

111. *Criminal Procedure Act 1986* (NSW) sch 2 cl 88(1).

112. *Criminal Procedure Act 1986* (NSW) sch 2 cl 89(2).

### 3. Who can make a victim impact statement

#### In brief

In order to determine who may make a victim impact statement (“VIS”), the law in NSW requires a person to meet criteria around the type of victim, the type of harm and eligible offences. Other jurisdictions offer simpler and, in some cases, broader and more inclusive regimes. We also consider cases where an offence does not result in a conviction, but a VIS may still be desirable, as well as the possibility of community impact statements.

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- 3.1 Under the current provisions, the question of who can make a victim impact statement (“VIS”) depends on whether the person meets the definition of victim and has suffered the relevant harm as the result of a relevant offence.
- 3.2 In considering these inter-related issues, we need to consider the impact that any changes to the current provisions may have on the number of people who may seek to make a VIS in future.

- 3.3 This chapter also considers certain cases where proceedings do not result in a conviction, but a VIS could still be desirable, as well as the possibility of community impact statements.

### Type of victim

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- 3.4 There are two main types of victim under the *Crimes (Sentencing Procedure) Act 1999* (NSW):
- primary victims – who may, subject to other requirements in the Act, make a VIS about the personal harm they have suffered as the result of a relevant offence, and
  - family victims – who may, subject to other requirements in the Act, make a VIS about the impact of a primary victim's death on the members of the primary victim's immediate family.
- 3.5 We deal with the related issue of people who can make a VIS on behalf of a primary victim who is incapable of making their own VIS in Chapter 5.<sup>1</sup>
- 3.6 In considering these categories of victim, a general question arises as to whether there is a need to limit “indirect” victims who may have tenuous claims to make a VIS. One preliminary submission raises the question whether it is “necessary or desirable” for victims of crime other than those directly involved in the offence to be able to make a VIS, adding that “[i]f less direct victims are allowed to make a VIS, then greater safeguards for the offender should be implemented to ensure fairness in the proceedings”.<sup>2</sup> However, there are also views that some genuinely impacted people are excluded from making a VIS.
- 3.7 As noted in Chapter 1,<sup>3</sup> the definitions of eligible victims for the purpose of making a VIS differ from the definitions of victim for the various victims registers,<sup>4</sup> the Victims Charter,<sup>5</sup> and the Victims Support Scheme.<sup>6</sup> This may confuse victims and raise false expectations as to eligibility for services or procedural rights.

### Primary victims

- 3.8 For the purposes of this discussion we have identified two broad categories of “primary victims”:
- a person against whom the relevant offence was committed, and
  - a person against whom the relevant offence was not committed but who has been harmed as a result of the offence (a “related victim”).

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1. [5.61]-[5.67].

2. Inner City Legal Centre, *Preliminary submission PVI2*, 2.

3. [1.10]-[1.12].

4. *Crimes (Administration of Sentences) Act 1999* (NSW) s 256(5)(a).

5. *Victims Rights and Support Act 2013* (NSW) s 5.

6. *Victims Rights and Support Act 2013* (NSW) pt 4 div 1.

- 3.9 In NSW, related victims are limited to 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”.<sup>7</sup>
- 3.10 The primary victims in each category must have “suffered personal harm as a direct result of the offence”.<sup>8</sup> This is in addition to meeting the requirements about eligible offences and type of harm outlined later in this chapter.
- 3.11 Despite the statutory definition, it has been held that the NSW provisions “do not codify and confine the circumstances in which evidence may be received by a sentencing court of the impact of crimes upon a victim”.<sup>9</sup> Judges therefore retain the discretion to admit statements under common law from those who fall outside the definition, as they have done, for example, by receiving statements from both child victims of abuse and members of their family.<sup>10</sup>

#### *Omissions from the current law*

- 3.12 The current definition of “primary victim” in NSW omits a number of people who can be directly harmed by an offence even though the offence itself has not been committed against them. These include:
- people who have not witnessed the offence but may have to deal with the immediate aftermath of an offence such as first aid providers, police officers and ambulance officers<sup>11</sup>
  - people (including family and friends) who may endure psychological harm from providing care and support for primary victims in the aftermath of the offence, such as parents of children or people with intellectual disability who are victims of sexual abuse<sup>12</sup>
  - spouses of people whose pregnancy has been terminated or resulted in still birth as a result of the offence, and
  - neighbours of premises where a violent offence has occurred.<sup>13</sup>
- 3.13 While, in some cases, a family member or carer can provide a VIS on behalf of a victim, the VIS can only deal with the impact of the offence on the primary victim. Families and carers in such cases are directly and sometimes severely affected by the crime even though it does not result in the victim's death. This can commonly involve assisting in the victim's day to day care as well as psychological and

7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of “primary victim”.

8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of “primary victim”.

9. *Miller v R* [2014] NSWCCA 34 [156]. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(4) which states that “[n]othing in this Division limits any other law by or under which a court may receive and consider a victim impact statement in relation to any offence to which this Division does not apply”.

10. *AG v R* [2016] NSWCCA 102 [16]-[19]; *RL v R* [2015] NSWCCA 106 [50]-[57].

11. See Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.92]; *R v Freeman* [2011] VSC 139 [21].

12. See, eg, *R v Liddy* [2002] SASC 306, 84 SASR 231 [59].

13. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.92].

emotional support.<sup>14</sup> One preliminary submission emphasises that the family unit can be a victim in cases of child sexual offences.<sup>15</sup>

- 3.14 A particular issue arises about the existing coverage of family members where an offence results in the termination of a pregnancy or the stillbirth of a child. In NSW, only the mother is entitled to make a VIS when her pregnancy is terminated as the result of an offence. The father and other affected family members cannot make a VIS. Several preliminary submissions raised this omission as being inconsistent with arrangements in other Australian jurisdictions that recognise that the person has suffered some form of harm as the result of the offence.<sup>16</sup>

### *Possible approaches*

- 3.15 Some other Australian jurisdictions delimit who is a victim by reference to the harm suffered, rather than their proximity to the offence. For example, in Victoria a victim is “a person who, or body that, has suffered injury, loss or damage (including grief, distress, trauma or other significant adverse effect) as a direct result of the offence, whether or not that injury, loss or damage was reasonably foreseeable by the offender”.<sup>17</sup>
- 3.16 Some jurisdictions make direct reference to people who come within the category of related victims. For example, in Queensland, a victim may be a person who has suffered harm because they are a family member or a dependant of a person who has died or suffered harm because a crime was committed against that person (and they did not commit that crime).<sup>18</sup> In Queensland, the statutory definition of victim also includes those who suffer harm “as a direct result of intervening to help a person who has died or suffered harm”.<sup>19</sup>
- 3.17 New Zealand defines victims as:
- a person against whom an offence is committed
  - a person who “through, or by means of, an offence committed by another person, suffers physical injury, or loss of, or damage to, property”, and
  - a parent or legal guardian of a child or young person who falls into either of these categories.<sup>20</sup>
- 3.18 In addition to this wide definition, which explicitly includes damage to property, prosecutors are granted the discretion to treat anyone “who was disadvantaged by the offence” as a victim for the purposes of making a VIS.<sup>21</sup> This provision has allowed a director of a War Museum from which medals were stolen to make a VIS

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14. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PVI15*, 4.

15. NSW, Director of Public Prosecutions, *Preliminary submission PVI16*, 2.

16. B Donegan, *Preliminary submission PVI4*; H Robert, *Preliminary submission PVI10*.

17. *Sentencing Act 1991* (Vic) s 3(1) definition of “victim”.

18. *Penalties and Sentences Act 1992* (Qld) s 179I; *Victims of Crime Assistance Act 2009* (Qld) s 5(1)(b), s 5(2).

19. *Victims of Crime Assistance Act 2009* (Qld) s 5(1)(c).

20. *Victims Rights Act 2002* (NZ) s 4 definition of “victim”.

21. *Victims Rights Act 2002* (NZ) s 20.

detailing “the effect of the burglary on the staff of the Museum and ... the response of people from overseas and within New Zealand to the theft”.<sup>22</sup>

- 3.19 Canada recently broadened its definition of a victim from the “direct victim of the crime”<sup>23</sup> to include those who suffer “physical or emotional harm, property damage or economic loss as the result of the commission of an offence against any other person”.<sup>24</sup>
- 3.20 In England and Wales, primary victims are defined in terms of harm as “a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence”.<sup>25</sup> However, both Scotland and Northern Ireland define a victim as a natural person against whom an offence is committed.<sup>26</sup>
- 3.21 The broader provisions in other jurisdictions, like Victoria, have not led to any significant take up of VIS by related victims.<sup>27</sup>

### Question 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?

## Family victims

- 3.22 “Family victims” may make a VIS in cases where the primary victim dies as the direct result of an offence.
- 3.23 The relevant definition states that a family victim:
- 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.<sup>28</sup>
- 3.24 “Member of the primary victim’s immediate family” means:
- (a) the victim’s spouse, or
  - (b) the victim’s de facto partner, or

22. *Van Wakeren v R* [2011] NZCA 503 [48].

23. *R v Gabriel* (1999) 137 CCC (3d) 1, 18.

24. *Criminal Code 1985* (Canada) s 2 definition of “victim”. There were concerns that the definition was already too wide, with cases such as *R v Holub* [2002] OJ 579, 163 CCC (3d) 166 [10] involving “hundreds of [VISs] that were submitted”. See A Smith, “Victim Impact Statements: Redefining ‘Victim’” (2011) 57 *Criminal Law Quarterly* 346.

25. England and Wales, Ministry of Justice, *Code of Practice for Victims of Crime* (2015) cl 4.

26. *Criminal Justice (Scotland) Act 2003* (Scot) s 14(2); *Justice Act (Northern Ireland) 2015* (NI) s 33(1).

27. Victoria, Department of Justice, *Victim Impact Statement Reforms in Victoria: Interim Implementation Report* (2014) [6.4.1], [8.5].

28. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of “family victim”.

- (b1) a person to whom the victim is engaged to be married, or
- (c) a 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.<sup>29</sup>

### *Omissions from the current law*

3.25 The current provision can be criticised on the grounds that the definition of “immediate family” does not accommodate diverse family arrangements within the community. One preliminary submission points out:

Close friendships, for example, now constitute “family” for many people, and extended family and/or kinship relationships may be a person’s only family. To exclude a person who was, to all intents, a primary victim’s family on the basis that they do not fit the ... definition, is to deny a voice to those people and, therefore, to the deceased victim.<sup>30</sup>

3.26 Some particular issues surrounding the definition of “immediate family” include:

- **Family members outside a victim’s “immediate family”.** The Supreme Court has allowed statements to be read by, for example, nieces and a sister-in-law of a deceased victim, even though they are not covered by the definition of immediate family.<sup>31</sup> In some cases the family members who fit the definition may all live overseas and the only relatives in NSW may not fit the definition.<sup>32</sup>
- **Aboriginal and Torres Strait Islander kinship.** The current provisions do not recognise expanded concepts of family that exist in Aboriginal and Torres Strait Islander communities. The Supreme Court has received statements from aunts and uncles of a deceased victim “in view of the evident concern of this wider group of relatives, demonstrated by their attendance at court during both the trial and the sentencing proceedings”.<sup>33</sup> Preliminary submissions support expanding the coverage to kinship structures within Indigenous communities.<sup>34</sup> In the NT, “relative” includes “a relative according to Aboriginal tradition or contemporary social practice, a spouse and a de facto partner”.<sup>35</sup> In NZ, a victim’s “immediate family” means “a member of the victim’s family, whanau, or other culturally recognised family group, who is in a close relationship with the victim at the time of the offence”.<sup>36</sup>

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29. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of “member of the primary victim’s immediate family”.

30. NSW, Director of Public Prosecutions, *Preliminary submission PVI16*, 1.

31. *R v AX* [2015] NSWSC 317 [74]-[75].

32. Victims of Crime Assistance League Inc NSW, *Preliminary submission PVI6*, 2.

33. *R v Biles (No 2)* [2017] NSWSC 525 [66].

34. Victims of Crime Assistance League Inc NSW, *Preliminary submission PVI6*, 2; NSW Young Lawyers Criminal Law Committee, *Preliminary submission PVI15*, 4.

35. *Sentencing Act* (NT) s 106A definition of “relative”.

36. *Victims’ Rights Act 2002* (NZ) s 4 definition of “immediate family”.



- **Culturally and linguistically diverse communities.** One preliminary submission has noted that the definition may not give complete coverage to family structures within culturally and linguistically diverse communities.<sup>37</sup>
- **Other relationships.** One preliminary submission raised the issue of coverage of other people who are currently excluded, such as friends, dependants, and people in close or intimate personal relationships, especially for people who do not have any direct family or family relationships.<sup>38</sup>

#### Example 1

The victim who was murdered lived alone and had no immediate family as defined in the Act. She did, though, have a close parental relationship with a teenager who lived in the flat above hers. The teenager had no parents and he too, lived alone. The victim was murdered in her home. The teenager heard her being murdered. The matter went to trial many years after the event and the teenager, now an adult, gave evidence. The murder of his “mother” had a huge impact on his life and he knew the victim better than anyone, but he was not permitted to provide a VIS. As no-one came within the definition of a “family victim”, no VIS was submitted.<sup>39</sup>

#### Example 2

In a murder case, the person who was perhaps the closest to the victim, his cousin, did not fit the definition and could not give a VIS. The victim was an only child with a mother overseas and out of contact, an absent father, and no children of his own. No VIS was submitted.<sup>40</sup>

### Possible approaches

3.27 While Tasmania has broadly similar provisions to those in NSW,<sup>41</sup> other parts of Australia offer significant variations in the definition of a victim where the primary victim has died because of an offence. For example:

- a “relative” or a person “who was financially or psychologically dependent on” the deceased victim<sup>42</sup>
- a person who was “financially or psychologically dependent” on the deceased victim<sup>43</sup>
- a “family member or dependant” of a deceased victim,<sup>44</sup> and

37. Victims of Crime Assistance League Inc NSW, *Preliminary submission PVI6*, 2.

38. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PVI15*, 4.

39. NSW, Director of Public Prosecutions, *Preliminary submission PVI16*, 1-2.

40. NSW, Director of Public Prosecutions, *Preliminary submission PVI16*, 2.

41. See, eg, *Sentencing Act 1997* (Tas) s 81A(1) definition of “victim”.

42. *Sentencing Act* (NT) s 106A definition of “victim”.

43. *Crimes (Sentencing) Act 2005* (ACT) s 47 definition of “victim”.

44. *Victims of Crime Assistance Act 2009* (Qld) s 5(1)(b).

## CP Victims' involvement in sentencing

- “any member of the immediate family of the deceased”.<sup>45</sup>
- 3.28 Some jurisdictions do not have a separate concept of “family” or secondary victims. Victoria, for example, simply defines a victim as one who has “suffered injury, loss or damage (including grief, distress, trauma or other significant adverse effect) as a direct result of the offence”.<sup>46</sup>
- 3.29 One preliminary submission suggests that, where there is no “immediate family” the court should have discretion to admit a VIS by a member of the victim’s extended or kinship family or “someone with whom they had a close family type relationship or whom they considered to be their family”.<sup>47</sup>
- 3.30 On the other hand, the Supreme Court of Victoria submitted to the VLRC review that allowing people other than immediate family to read out a VIS had the potential to re-traumatise a victim’s immediate family and extend the sentencing hearing by days.<sup>48</sup>

### Question 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?

## Type of harm

- 3.31 For a primary victim to be able to make a VIS, they must have suffered a particular form of harm as a result of the offence. That harm must be “personal harm” which is defined as “actual physical bodily harm or psychological or psychiatric harm”.<sup>49</sup>
- 3.32 This personal harm is relevant only to primary victims. The definition of family victim makes it clear that a person can be a family victim “whether or not the person has suffered personal harm as a result of the offence”.<sup>50</sup> The Act provides that a family victim’s VIS is about “the impact of the primary victim’s death on members of the primary victim’s immediate family”.<sup>51</sup> Personal harm is therefore not relevant to a family victim.

## Omissions from the current law

- 3.33 The definition of “personal harm” seemingly excludes emotional suffering or distress that does not amount to psychological or psychiatric harm. It also excludes impacts on social life, economic loss, and damage to property.

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45. *Sentencing Act 1995* (WA) s 13(b).

46. *Sentencing Act 1991* (Vic) s 3(1) definition of “victim”.

47. NSW, Director of Public Prosecutions, *Preliminary submission PVI16*, 2.

48. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.93].

49. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definitions of “primary victim” and “personal harm”.

50. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of “family victim”.

51. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of “victim impact statement” (b).

## Other approaches

- 3.34 Four states allow a VIS to include details of any “injury, loss or damage” without limiting these forms of harm to physical, psychological, or psychiatric harm.<sup>52</sup> In Victoria, “injury, loss or damage” clearly extends beyond bodily and mental harm, since a victim can be a person or a “body”.<sup>53</sup> These states also allow a VIS to detail the “impact” or “effects” on the victim of the offence.
- 3.35 The two territories have lists of types of harm that explicitly include economic harm and pregnancy.<sup>54</sup> In the Northern Territory, for example, the offences of unlawful possession of property and unlawful entry of a dwelling have been admitted.<sup>55</sup> The NT also includes a relevant harm as “contraction or fear of contraction of a sexually transmissible medical condition”.<sup>56</sup> Western Australian courts have allowed VISs in offences such as criminal damage by fire.<sup>57</sup> Victorian courts have accepted VISs in cases of arson,<sup>58</sup> theft,<sup>59</sup> burglary,<sup>60</sup> and fraud.<sup>61</sup>
- 3.36 On the question of causation, several jurisdictions, like NSW, require that the causation of the harm be “direct”.<sup>62</sup>
- 3.37 The courts in some jurisdictions that do not require “direct” causation have discussed whether the harm was caused by the offence or is too remote to be included in a VIS. The NT Supreme Court has ruled that the stress of staff, caused by cleaning up the residual blood left by a trespasser, was not admissible in a VIS, because, in the absence of any intention to injure them, it was not reasonably foreseeable that they would suffer harm in the circumstances.<sup>63</sup> The ACT Supreme Court applied the criminal law test of causation to find that the harm suffered during cross-examination is not admissible.<sup>64</sup> However, it has also ruled that the harm caused by the stressful nature of a fraud investigation was admissible as an “almost inevitable” outcome of the offence.<sup>65</sup>

### Question 3.3: Type of harm

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

52. *Sentencing Act 1995* (WA) s 13(a), s 25(1)(b); *Sentencing Act 1991* (Vic) s 8L(1); *Victims of Crime Act 2001* (SA) s 4(1) definition of “victim”, s 10(1); *Sentencing Act 1997* (Tas) s 81A(1) definition of “victim”, s 81A(2)(b).
53. *Sentencing Act 1991* (Vic) s 3(1) definition of “victim”.
54. *Sentencing Act* (NT) s 106A definition of “harm”; *Crimes (Sentencing) Act 2005* (ACT) s 47 definition of “harm”.
55. *Sultan v Guerin* [2016] NTSC 33 [24].
56. *Sentencing Act* (NT) s 106A definition of “harm” (ba).
57. *Rimington v State of Western Australia* [2015] WASCA 102 [19].
58. *Tannous v R* [2017] VSCA 91 [27]; *Luciano v R* [2015] VSCA 69 [9]; *Luciano v R* [2015] VSCA 173 [3]; *R v Campbell* [2015] VSC 181 [26]-[27].
59. *R v Munt* [2015] VSC 132 [27].
60. *R v Bult* [2008] VSCA 227 [19].
61. *R v Munt* [2015] VSC 132 [27]; *R v Swift* [2007] VSCA 52, 15 VR 497; *Maddocks v R* [2011] VSCA 20; *Thorpe v R* [2016] VSCA 158 [38].
62. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26; *Sentencing Act 1995* (WA) s 13(a), s 25(1)(a); *Victims of Crime Act 2001* (SA) s 4(1); *Sentencing Act 1997* (Tas) s 81A(1).
63. *Gumbinyarra v Teague* [2003] NTSC 25, 12 NTLR 226 [5]-[7].
64. *R v Iacune (No 2)* [2014] ACTSC 149, 242 A Crim R 391 [23]-[24].
65. *R v Reid* [2016] ACTSC 24 [33].

- (2) How could the definition be amended?
- (3) What are the advantages and disadvantages of changing the definition?

### Eligible offences

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- 3.38 A victim will only be eligible to make a VIS under the *Crimes (Sentencing Procedure) Act 1999* (NSW) if they are the victim of a specified offence.<sup>66</sup> This is effectively restricted to certain indictable offences in any court. The offence must also be:
- (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.<sup>67</sup>
- 3.39 A victim of a breach of duty of health and safety will also be eligible to make a VIS, even though it is a summary offence.<sup>68</sup>
- 3.40 We doubt that anyone could construct an accurate and comprehensive list of eligible offences based on the current provisions.

### Effect of common law

- 3.41 At common law, it has been established that loss or damage suffered by a victim is a relevant factor in sentencing.<sup>69</sup> Consequently, the courts have accepted VISs in cases involving offences that technically fall out of the statutory definition of harm. VISs have been submitted on this rationale for dishonesty offences,<sup>70</sup> breaking and entering and criminal damage by fire.<sup>71</sup>
- 3.42 Courts in Tasmania have exercised a similar type of discretion. In one instance, the court found that, although an assault did not fall within the legislative definition of offence,<sup>72</sup> the effect of an offence on a victim is always a relevant consideration in sentencing.<sup>73</sup> Consequently, the prosecutor was entitled to state those effects in a statement written by the victim.<sup>74</sup>

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66. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27.

67. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(2), s 27(3).

68. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(2A).

69. *Siganto v R* [1998] HCA 74, 194 CLR 656 [29]; *Porter v R* [2008] NSWCCA 145 [51]; *Miller v R* [2014] NSWCCA 34 [155]-[156].

70. *Miller v R* [2014] NSWCCA 34 [154]-[156].

71. *Porter v R* [2008] NSWCCA 145 [52]-[56].

72. *Sentencing Act 1997* (Tas) s 81A.

73. *Belbin v Bennett* [2011] TASSC 23, 218 A Crim R 42 [29]-[30].

74. *Belbin v Bennett* [2011] TASSC 23, 218 A Crim R 42 [31].

- 3.43 In South Australia, the effect of the common law is preserved so that victims of offences that fall out of the prescribed statutory definition are still eligible to make a VIS, unless the court finds it inappropriate to do so.<sup>75</sup>

## Problems with the current law

### *Complexity and uncertainty*

- 3.44 The current provisions are complex and, in some cases, unclear. Sometimes, it is not immediately clear whether a particular offence is one that entitles a victim to make a VIS. This sort of uncertainty is undesirable if it leads to victims who want to make a VIS, or who have written a VIS, being prevented from submitting it at a late stage of proceedings.

### *Offences not currently covered*

- 3.45 There are a number of offences not included by the current formulation. For example, indictable offences that are to be dealt with summarily unless the prosecutor elects otherwise<sup>76</sup> (“Table 2 offences”) are not eligible offences for a victim seeking to make a VIS in the Local Court.<sup>77</sup> These offences include a number of offences against the person including assault, assault occasioning actual bodily harm, aggravated act of indecency, and indecent assault.<sup>78</sup> The offences of stalking or intimidation under s 13 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) are also in Table 2, although they may be excluded more generally since these offences may not be seen as involving “violence”.<sup>79</sup>
- 3.46 Other offences which are also excluded under the current definition of personal harm include offences of fraud, theft and arson. For example, one preliminary submission suggests that eligible offences should:
- include non-violent offences against identifiable victims involving serious breaches of trust or privacy for example, fraud, identity theft, or image based abuse. Despite their non-violent nature, these offences can have a devastating impact on their victims. Moreover, such crimes commonly have multiple victims and indirect impacts.<sup>80</sup>
- 3.47 Another preliminary submission suggests including frauds, “particularly where the victims are elderly, the personal loss is substantial and the damage significantly detrimental”.<sup>81</sup>
- 3.48 The Chief Magistrate of the Local Court supports considering extending the number of offences that are triable summarily in which VIS may be received.<sup>82</sup>

75. *Criminal Law (Sentencing) Act 1988* (SA) s 7(2a).

76. *Criminal Procedure Act 1986* (NSW) sch 1 Table 2.

77. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(3).

78. NSW, Director of Public Prosecutions, *Preliminary submission PVI16*, 3.

79. NSW, Director of Public Prosecutions, *Preliminary submission PVI16*, 3.

80. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PVI15*, 3.

81. NSW, Director of Public Prosecutions, *Preliminary submission PVI16*, 2-3.

82. NSW, Chief Magistrate of the Local Court, *Preliminary submission PVI3*.

### Example 3

The offender caused a \$1,540,000 financial disadvantage to his elderly parents by the fraudulent mortgage of their home, two investment properties and a taxi licence. The investment properties were quickly sold to limit the accrual of interest. Another son sold his home and moved his young family in with his parents to ensure they had somewhere to live and a daughter took out a \$200,000 loan to release the taxi licence. The consequences of the fraud on the elderly couple, and their other children, were devastating and life changing.<sup>83</sup>

### *Accessory after the fact*

- 3.49 NSW courts have rejected VISs when sentencing an offender for being an accessory after the fact to murder.<sup>84</sup> This is because in NSW the offence must result in the death of the victim.<sup>85</sup>
- 3.50 A VIS was accepted in one NSW case where the offender was an accessory after the fact to murder. However, the VIS did not deal with loss arising from the assistance to the principal offender; instead, it explained the loss that was caused by the murder.<sup>86</sup> There was no discussion as to why the VIS should be included consequently it is likely this is an anomaly.
- 3.51 In Queensland, unlike NSW, the legislation does not require the offence to cause the death of the victim; however, the harm must still arise from the offence. Accordingly, in one Queensland case, the judge found that accessory to murder after the fact might be an eligible offence. The court held it could accept a VIS that outlined the harm suffered by family members, arising from the offender's role in concealing the murder.<sup>87</sup> However, in this particular case the VIS was not admissible because it outlined harm arising from the murder.

### Possible approaches

- 3.52 There are a number of possible approaches to identifying eligible offences. The following options are based on the provisions in other jurisdictions – all of them less complex than NSW in terms of eligible offences. In each case, victims of eligible offences would still need to meet the requirements surrounding the definition of victim and type of harm in order to be able to make a VIS.

#### *Option 1 – Any offence*

- 3.53 One option is to make an eligible offence any offence (that is, an indictable or summary offence).

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83. NSW, Director of Public Prosecutions, *Preliminary submission PVI16*, 2.

84. *R v Scowen* [2007] NSWSC 792 [3]-[5]; *R v Urriola* [2010] NSWSC 367 [24]; *R v Burns* [2013] NSWSC 1851 [8]; *R v El-Chami* [2016] NSWSC 445.

85. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(2)(a); *R v Scowen* [2007] NSWSC 792 [3]-[4]; *R v Urriola* [2010] NSWSC 367 [24]; *R v Burns* [2013] NSWSC 1851 [8]; *R v El-Chami* [2016] NSWSC 445 [88]-[90].

86. *R v Stanford* [2016] NSWSC 1174 [42].

87. *R v Kirk* [2015] QSC 336.

- 3.54 There are provisions along these lines in Western Australia, the Northern Territory and Victoria. In these jurisdictions, the legislation does not define “offence” and instead relies on the definitions of “victim” and “harm” to limit the availability of a VIS.<sup>88</sup> Queensland also has a broad definition of “prescribed offence”, only limiting it to an offence committed against a person.<sup>89</sup>
- 3.55 Overseas, in the United Kingdom, an eligible offence is defined broadly as a “criminal offence” committed or subject to criminal proceedings.<sup>90</sup> New Zealand requires the offence to be one that is committed against the victim, or through which the victim has suffered harm.<sup>91</sup> Canada, Scotland and Northern Ireland do not define offence.<sup>92</sup>

*Option 2 – Offences punishable by a maximum term of imprisonment greater than a specified period*

- 3.56 Eligible offences could be limited to offences attracting maximum terms of imprisonment that are greater than a specified period.
- 3.57 For example, in the ACT a VIS can be submitted where the offence is punishable by imprisonment for longer than a year or where prescribed by regulation.<sup>93</sup> As a result, this has included offences such as obtaining property by deception (fraud).<sup>94</sup> Regulations have included negligent driving causing grievous bodily harm<sup>95</sup> and a failure to comply with a health and safety duty<sup>96</sup> if a person dies, is seriously injured or develops an illness as a result of exposure to risk.<sup>97</sup>
- 3.58 If this model were adopted in NSW it would capture most offences that can be dealt with on indictment as well as many summary offences. Again, the ability of a person to make a VIS would depend on the definition of victim, including the requisite harm suffered.

*Option 3 – Offences that can be heard on indictment and some summary offences*

- 3.59 Eligible offences could include all offences that can be heard on indictment and specified summary offences, for example, summary offences that cause death or serious harm or injury. Tasmania and South Australia have implemented such schemes.

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88. *Sentencing Act 1995* (WA) s 24(1); *Sentencing Act* (NT) s 106B; *Sentencing Act 1991* (Vic) s 8K. See [3.15]-[3.16], [3.34].

89. *Victims of Crime Assistance Act 2009* (Qld) s 25A(3)(a).

90. England and Wales, Ministry of Justice, *Code of Practice for Victims of Crime* (2015) [4].

91. *Victims’ Rights Act 2002* (NZ) s 4 definition of “offence” (a)(i), (ii).

92. *Criminal Code 1985* (Canada) s 722; *Criminal Justice (Scotland) Act 2003* (Scot) s 14; *Justice Act (Northern Ireland) 2015* (NI) s 29.

93. *Crimes (Sentencing) Act 2005* (ACT) s 48.

94. *R v Reid* [2016] ACTSC 24; *R v Ghoubriel* [2015] ACTSC 399.

95. *Road Transport (Safety and Traffic Management) Act 1999* (ACT) s 6(1)(b).

96. Under the *Work Health and Safety Act 2011* (ACT).

97. *Crimes (Sentencing) Regulation 2006* (ACT) cl 1A.

## CP Victims' involvement in sentencing

- 3.60 In Tasmania, a victim can submit a VIS for any offence punishable on indictment, even if it is dealt with summarily, as well as summary offences that result in the death of, or serious harm to, any person.<sup>98</sup>
- 3.61 South Australia has equivalent provisions but limits summary offences to those that cause “serious harm” rather than “serious injury”. Serious harm includes harm that endangers a person’s life; or harm that consists of “loss of, or serious protracted impairment of, a part of the body or a physical or mental function; or harm that consists of serious disfigurement”.<sup>99</sup>

### *Option 4 – Offences that can be heard on indictment*

- 3.62 Eligible offences could simply include all offences that can be heard on indictment.
- 3.63 However, this would exclude some summary offences including those which fall under other regulatory legislation. For example, this would exclude breach of health and safety duties,<sup>100</sup> which is currently covered. Similarly, this would not cover summary offences that involve violence.

### *Additional provision: domestic violence offence*

- 3.64 Another possibility, in addition to the options outlined above, could be to allow all victims of offences involving domestic violence (“DV”) to submit a VIS. Tasmania and Queensland both have provisions that allow for a VIS in domestic violence matters.
- 3.65 Tasmania explicitly provides for a VIS in “family violence offences”. A “family violence offence” includes the following offences against the offender’s partner or spouse: assault, including sexual assault; threats, coercion, intimidation or verbal abuse; abduction; stalking; economic abuse; emotional abuse or intimidation; contravening an external family violence order and damage to property owned by the spouse, the offender and spouse jointly or by an affected child.<sup>101</sup>
- 3.66 Queensland has also very recently expanded the definition of an eligible “offence” to include DV offences.<sup>102</sup> This includes offences such as contravention of a DV order or police protection order. It also includes offences that are associated with DV. DV is defined as behaviour towards a person with whom the offender has a relevant relationship that:

- (a) is physically or sexually abusive; or
- (b) is emotionally or psychologically abusive; or
- (c) is economically abusive; or
- (d) is threatening; or
- (e) is coercive; or

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98. *Sentencing Act 1997* (Tas) s 81A.

99. *Criminal Law (Sentencing) Act 1988* (SA) s 7A(5).

100. *Work Health Safety Act 2011* (NSW) s 32-33.

101. *Sentencing Act 1997* (Tas) s 4 definition of “family violence offence”; *Family Violence Act 2004* (Tas) s 4 definition of “family violence offence”, s 7.

102. *Victims of Crime Assistance Act 2009* (Qld) s 5(3).



- (f) in any other way controls or dominates the second person and causes the second person to fear for the second person's safety or wellbeing or that of someone else.<sup>103</sup>

3.67 A DV offence is already defined in NSW legislation.<sup>104</sup> A DV offence is an offence committed against a victim with whom the offender had a domestic relationship. A domestic relationship is defined broadly to include intimate relationships and relatives, among other things.<sup>105</sup> The offence must be a personal violence offence ("PVO"), an offence that occurs in similar circumstances to a PVO or an offence that is intended to coerce, control or cause fear in the victim.<sup>106</sup> A PVO covers a wide range offences including:

- the various offences (and attempts to commit the offences) of murder and manslaughter
- sending or causing delivery of documents containing threats
- causing injury (including assault, wounding, and actual or grievous bodily harm)
- sexual assault, indecent assault, acts of indecency, sexual intercourse with children, and causing sexual servitude
- kidnapping and child abduction
- destroying or damaging property
- causing danger with a firearm or spear gun, and firing at a building
- stalking and intimidation
- various offences of break and enter with the intention of committing any of the other listed offences, and
- contravening an apprehended violence order.<sup>107</sup>

#### Question 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?

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103. *Domestic and Family Violence Protection Act 2012* (Qld) s 8(1).

104. *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

105. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5.

106. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 11.

107. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 4.

## Matters that do not result in a conviction

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- 3.68 There are a number of cases where victims cannot make a VIS under the current VIS provisions because their matter has not resulted in a conviction, even though the offence has been proved (in a limited sense) or admitted. These are where an offender is found not guilty by reason of mental illness, where an offender who is unfit to be tried is found guilty on limited evidence after a “special hearing”, and where the relevant offences have been admitted and taken into account “on a Form 1” in sentencing for another offence.

### Not guilty on the grounds of mental illness or unfit to be tried

- 3.69 Where the Supreme Court or District Court finds that a person who has been charged with an offence is unfit to stand trial, they are referred to the Mental Health Review Tribunal (“MHRT”) to determine whether they will become fit within 12 months. If the MHRT finds the person is unfit to stand trial and will not or has not become fit within 12 months, the matter is then referred to the Director of Public Prosecutions (“DPP”) who must decide whether proceedings against that person are to continue. If the DPP decides to proceed, the court conducts a “special hearing” that is to be as close to a normal trial as is practicable. Among other outcomes, the court can find that, on the limited evidence available, the person committed the offences charged.
- 3.70 After such a finding, if the court, in an ordinary trial, would have imposed a custodial sentence, the court can nominate a limiting term. The limiting term is the maximum period for which the person can be a forensic patient and is based on the court’s best estimate of the sentence the court would have imposed if the person had been found guilty of the offence at an ordinary trial. A person who is subject to a limiting term becomes a forensic patient and is referred to the MHRT which periodically determines questions of care, treatment and possible release.<sup>108</sup>
- 3.71 After a trial, or a special hearing, a person may be found not guilty on the grounds of mental illness.<sup>109</sup> The consequence of such a finding is that the person becomes a forensic patient. The MHRT reviews forensic patients every six months and may release them only if satisfied, on the balance of probabilities, that the release will not seriously endanger the safety of the person or any member of the public.<sup>110</sup>
- 3.72 There is no provision for a victim in either of these circumstances to submit a VIS. The first opportunity that a victim has to make a statement is in subsequent MHRT proceedings which are focussed on the forensic patient’s care and treatment. The MHRT observes that in this context it is inappropriate, and may be traumatic for a victim, to seek to acknowledge the victim’s distress, or to involve them in the MHRT review process unless they are seeking a non-association condition or a place restriction condition or have relevant information to offer.<sup>111</sup>
- 3.73 A NSW Law Reform Commission report on people with cognitive and mental health impairments in the criminal justice system has recommended that the provisions for

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108. *Mental Health (Forensic Provisions) Act 1990* (NSW) pt 2. See also NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences* (Report 138, 2013) ch 6.

109. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 38.

110. *Mental Health (Forensic Provisions) Act 1990* (NSW) pt 4, s 42, s 43.

111. NSW, Mental Health Review Tribunal, *Preliminary submission PVI17*, 1-2.

making a VIS should be extended to apply in cases where the defendant has been found guilty on limited evidence after a special hearing or has been found not guilty by reason of mental illness.<sup>112</sup> The NSW Government is considering the Commission's recommendation.

### Matters listed on a Form 1

- 3.74 Another question is whether a VIS can be made by the victim of an offence which is taken into account at sentencing on a Form 1. A "Form 1" lists offences other than the "principal offence" that the court may take into account when determining the sentence for the principal offence ("Form 1 offence"). The court can refuse to take a Form 1 offence into account (and it must then be dealt with separately) if, in its opinion, it is not appropriate to deal with it in this way.<sup>113</sup>
- 3.75 Form 1 offences are offences for which the offender admits guilt and are generally of similar or lesser seriousness compared to the principal offence.<sup>114</sup> Form 1 offences must be agreed to by the parties,<sup>115</sup> and are usually agreed to during charge negotiations.
- 3.76 The prosecution must consult with the victim and with the Officer in Charge of the case before placing an offence on a Form 1, or give reasons why such consultation has not taken place.<sup>116</sup> Despite these requirements, it appears victims are not always consulted, or may not fully understand the consequences of putting a matter on a Form 1 (at least with regard to their future ability to make a VIS).
- 3.77 The VIS process applies after a person is convicted of an offence.<sup>117</sup> Since Form 1 offences do not amount to a conviction, it would seem that a victim of a Form 1 offence may not be entitled to make a VIS.<sup>118</sup> However, we are not aware of any cases where a Form 1 victim was not permitted to make a VIS.
- 3.78 Although not generally the case, situations do arise where the Form 1 victim is not the same person as the victim of the principal offence.<sup>119</sup> In situations where the Form 1 victim suffers serious harm as a result of an offence, it would appear unfair that only the victim of the principal offence may submit a VIS to the court. However, there is a risk that allowing victims to make a VIS in relation to Form 1 matters and actively advising them of that right may complicate charge negotiations and lead to offenders not agreeing to include matters on a Form 1.

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112. NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report 138 (2013) rec 8.4.

113. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33(2)(b). See also NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines*, Guideline 20.

114. *Abbas v R* [2013] NSWCCA 115.

115. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 32, s 33.

116. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 35A. See also NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines*, Guideline 20.

117. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(1).

118. A matter listed on a Form 1 would also not meet the requirement that matters in the Supreme Court and District Court be dealt with on indictment: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(2).

119. *R v Wratten* [2007] NSWDC 279; *R v A Young Offender* [2007] NSWDC 336, where it would appear that a victim of a matter listed on a Form 1 in fact made a VIS. Note the CCA has strongly criticised having Form 1 matters that involve a different victim, see *PB v R* [2016] NSWCCA 258 [55]; *SGJ v R* [2008] NSWCCA 258 [24]-[29].

**Question 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?

## Community impact statements

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3.79 Community impact statements are statements made by or on behalf of a community in response to a crime. They have been implemented in legislation in South Australia,<sup>120</sup> Canada,<sup>121</sup> and England and Wales.<sup>122</sup> They were also proposed in a private member's bill in NSW in 2014.<sup>123</sup>

### *South Australia*

3.80 In South Australia, community impact statements can be divided into two categories:

- **neighbourhood impact statements** which deal with the harm done by a specific offence to people living or working in the area where the offence was committed, and
- **social impact statements** which deal with the effect of an offence or offences of the same kind on the community generally.<sup>124</sup>

3.81 The Commissioner for Victims' Rights collects neighbourhood impact statements from individuals, and social impact statements from experts. The South Australian government envisaged that the Commissioner would eventually collect a series of generic social impact statements for various offences.<sup>125</sup>

3.82 Before sentencing, the prosecutor, or some other person the court deems fit, reads aloud the statement, unless the court determines it to be inappropriate or unduly time-consuming.<sup>126</sup>

3.83 A number of concerns were raised about this provision. It was suggested that such statements would not assist judges since they would cover matters that judges should already recognise such as the impact of offences, like drug offences or domestic violence, on members of the community.<sup>127</sup> Other criticisms include:

- It is difficult to verify the content of community impact statements.

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120. *Criminal Law (Sentencing) Act 1988* (SA) s 7B.

121. *Criminal Code 1985* (Canada) s 722.2.

122. *Criminal Practice Directions 2015* [2015] EWCA Crim 1567, CPDVII Sentencing H: Community Impact Statements; *Criminal Justice Act 1967* (UK) s 9.

123. Crimes (Sentencing Procedure) Amendment (Victim Impact Statements – Mandatory Consideration) Bill 2014 (NSW) defeated 15 May 2014.

124. *Criminal Law (Sentencing) Act 1988* (SA) s 7B(2).

125. South Australia, *Parliamentary Debates*, House of Assembly, 4 February 2009, 1393.

126. *Criminal Law (Sentencing) Act 1988* (SA) s 7B(3).

127. South Australia, *Parliamentary Debates*, House of Assembly, 4 February 2009, 1393.

- The information provided in community impact statements may be too generic to be of much use to a court.
  - A community may be using the statement as a means to vent their frustrations instead of providing useful information to the court.
  - The phrase ‘offences of the same kind’ may be interpreted too broadly and result in even more generic information than intended.
  - Placing too much weight on community impact statements can result in inconsistent sentencing because some communities may be more forgiving than others, or more eloquent in their submissions than others.
  - The scope of harm to the community may be interpreted too widely and include harms like lowering property prices, which would also be difficult to prove.<sup>128</sup>
- 3.84 More generally, it has been suggested that community impact statements may undermine the principle of consistent sentencing.<sup>129</sup>

### Canada

- 3.85 In Canada, an individual may make a community impact statement on behalf of the community. The statements must be specific to the offence and offenders before the court.<sup>130</sup> A statement must create a nexus between the offender’s actions and the impact on the community.<sup>131</sup>
- 3.86 Statements must also be made in a prescribed form.<sup>132</sup> If the individual who made the statement so wishes, they can present the statement before the court. They are not permitted to present it outside of the courtroom unless CCTV arrangements have been made. A copy of the statement must be provided to the offender or counsel for the offender and the prosecutor upon the finding of guilt.<sup>133</sup>
- 3.87 The legislation does not provide a definition of “community”.

### England and Wales

- 3.88 In England and Wales, community impact statements are made under a general provision which deals with proof by written statement.<sup>134</sup>
- 3.89 Like South Australia, England and Wales distinguishes between two types of community impact statement. A generic statement relates to a range of offences or anti-social behaviours affecting a community. A specific statement covers the

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128. A Webster, “Expanding the Role of Victims and the Community in Sentencing” (2011) 35 *Criminal Law Journal* 21, 23-26.

129. K Long, “Community Input at Sentencing: Victim’s Right or Victim’s Revenge?” (1995) 75 *Boston University Law Review* 187, 225.

130. *Criminal Code 1985* (Canada) s 722.2; *R v Ali* [2015] BCSC 2539 [19]–[30].

131. *R v Ali* [2015] BCSC 2539 [29]–[30]. See also *R v Denny* [2016] NSSC 76 [120]–[122].

132. *Criminal Code 1985* (Canada) s 722.2(2).

133. *Criminal Code 1985* (Canada) s 722.2(4)–(5).

134. *Criminal Justice Act 1967* (UK) s 9; *Criminal Practice Directions 2015* [2015] EWCA Crim 1567, CPDVII Sentencing H: Community Impact Statements H.2.

impact of a specific offence or anti-social behaviour incident that the community has identified as a concern.<sup>135</sup>

- 3.90 The local police authority may collect statements for a community, and present them to the court before sentencing.<sup>136</sup> As part of this process, the authority is expected to:
- validate the information objectively
  - ensure it is admissible before a court
  - explain to the community what the statement is, why it is being used, and what impact it may have on the court, and
  - ensure the community understands that the statement may not be the judge's primary consideration.<sup>137</sup>
- 3.91 A "community" can be based on geography, identity (for example, ethnic groups, people with disability) and interest (for example, sport clubs, support groups).
- 3.92 The court may only consider the effect of the offence on the community, not any sentencing recommendations.<sup>138</sup>

### *NSW Bill*

- 3.93 A private member's bill was introduced in 2014 that would impose a mandatory requirement on courts to consider a VIS and would allow the Commissioner of Victims Rights to make community impact statements to provide courts with statements in cases where a VIS was not submitted.<sup>139</sup> It was argued that the availability of community impact statements in such cases would help ensure consistent sentencing even when no VIS is made.<sup>140</sup>
- 3.94 The proposal was criticised on the grounds that a community impact statement could never be considered equal to a family victim's VIS<sup>141</sup> and that it could result in inconsistent sentencing outcomes because it would have less impact than a family victim's VIS.<sup>142</sup>

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135. England and Wales, Crown Prosecution Service, "Community Impact Statements – Adult" <[www.cps.gov.uk/legal/a\\_to\\_c/community\\_impact\\_statement\\_-\\_adult](http://www.cps.gov.uk/legal/a_to_c/community_impact_statement_-_adult)>.

136. *Criminal Practice Directions 2015* [2015] EWCA Crim 1567, CPDVII Sentencing H: Community Impact Statements H.1.

137. England and Wales, Crown Prosecution Service, "Community Impact Statements – Adult" <[www.cps.gov.uk/legal/a\\_to\\_c/community\\_impact\\_statement\\_-\\_adult](http://www.cps.gov.uk/legal/a_to_c/community_impact_statement_-_adult)>.

138. *Criminal Practice Directions 2015* [2015] EWCA Crim 1567, CPDVII Sentencing H: Community Impact Statements H.3.

139. Crimes (Sentencing Procedure) Amendment (Victim Impact Statements – Mandatory Consideration) Bill 2014 (NSW).

140. Parliament of NSW, *Parliamentary Debates*, Legislative Assembly, 20 March 2014, 27602–27603.

141. Parliament of NSW, *Parliamentary Debates*, Legislative Assembly, 15 May 2014, 28921, 28923.

142. Parliament of NSW, *Parliamentary Debates*, Legislative Assembly, 15 May 2014, 28922–28923; Parliament of NSW, Legislation Review Committee, *Legislation Review Digest*, No 53/55 (25 March 2014) [16].

**Question 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?





## 4. Content, admission and use of victim impact statements

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### In brief

A primary victim's victim impact statement ("VIS") may only talk about the physical, psychiatric and psychological harm arising from an offence. A family victim's VIS may only talk about the impact of a primary victim's death on the primary victim's family. Other jurisdictions have broader definitions of the harm that victims may address. Other related issues are how a court may use a VIS when sentencing an offender and evidential questions that arise from such use.

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- 4.1 This chapter deals broadly with the closely related questions of what a victim impact statement ("VIS") may contain, the admissibility of a VIS, how a court may use a VIS and objections to the content of a VIS.

### The content of a victim impact statement

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- 4.2 The question of what a VIS may contain is different for primary victims and family victims. Primary victims may provide details of "personal harm" and family victims may provide details of "impact" on the victim's immediate family.
- 4.3 Narrowly confining statements to the direct impacts of the crime on the victim may be justified on the grounds that a court may consider them in setting the penalty.<sup>1</sup> However, victims often may not understand what they can include, or that they cannot include particular material about, for example, uncharged offences, prior history, and facts not agreed when there has been a negotiated guilty plea.

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1. Inner City Legal Centre, *Preliminary submission PVI2*, 2.

### Primary victims: personal harm

- 4.4 The current provisions restrict the content of a primary victim's VIS to "any personal harm suffered by the victim as a direct result of the offence".<sup>2</sup> "Personal harm" is defined as "actual physical bodily harm or psychological or psychiatric harm".<sup>3</sup> As already noted in Chapter 2 in relation to the harm required for a person to be an eligible victim,<sup>4</sup> this appears to exclude emotional suffering or distress that does not amount to psychological or psychiatric harm. It also excludes impacts on social life, economic loss, and damage to property.
- 4.5 This does not align with other parts of sentencing law when it comes to considering harm to a victim. For example, one purpose of sentencing is to "recognise the harm done to the victim of the crime and the community".<sup>5</sup> This purpose does not limit the definition of harm to "personal harm" as defined for the purposes of a VIS. Likewise, the potential aggravating factor that "the injury, emotional harm, loss or damage caused by the offence was substantial"<sup>6</sup> refers to a broader range of harms than physical, psychological and psychiatric harm.
- 4.6 The NSW Court of Criminal Appeal ("CCA") has stated that wherever possible the limitations set by the current definition of personal harm "should be respected".<sup>7</sup> It has also recently held that a VIS that does not disclose personal harm (as it is defined), or that denies harm, or refers to harm arising from the criminal prosecution of the offender, cannot be admitted under the existing provisions.<sup>8</sup>
- 4.7 Despite this, there are instances of VISs being tendered and received which go outside "actual physical bodily harm or psychological or psychiatric harm" to the victim themselves. This has included statements by victims detailing economic or financial harm,<sup>9</sup> the effects on their relationship with their children,<sup>10</sup> and the stress caused to their wife from learning they were in danger.<sup>11</sup> In the few cases where parts of a VIS have been ruled inadmissible for straying outside "personal harm" to the victim, this has occurred because the statement included the victim's ill-feelings towards the offender or personal abuse.<sup>12</sup>
- 4.8 The *Victim Impact Statement Information Package* provided by Victims Services suggests that the impacts of the crime that victims may wish to tell the court about could include:
- physical injuries, impact on health, medical treatment
  - emotional impact and wellbeing
  - psychological or mental health impact

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2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of "victim impact statement" (a).

3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of "personal harm".

4. [3.33].

5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g).

6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(g).

7. *AG v R* [2016] NSWCCA 102 [19].

8. *AC v R* [2016] NSWCCA 107 [43]-[45].

9. *Bajouri v R* [2016] NSWCCA 20 [36]; *Miller v R* [2014] NSWCCA 34 [156].

10. *R v Natuba* [2012] NSWSC 1569 [154].

11. *R v Stocco* [2017] NSWSC 304 [91].

12. *R v Shaba* [2010] NSWDC 34 [44]-[46]; *R v Qin (No 2)* [2008] NSWDC 169.

- changes in your behaviour, attitudes or how you think about things
  - changes in your normal coping skills
  - changes in your social life or impact on relationships with others
  - impact on your financial or housing situation, education or employment.<sup>13</sup>
- 4.9 The final four points seem to sit outside the statutory definition of “personal harm”. This list also appears in the Office of the Director of Public Prosecutions’ (“ODPP”) “Writing Your Victim Impact Statement Guide” which further states that “you can only write about what has changed in your life as a result of the offences”.<sup>14</sup>
- 4.10 In all other Australian jurisdictions, the harm caused by the offence that a VIS may refer to is more broadly defined than NSW’s “actual physical bodily harm or psychological or psychiatric harm”. For example, some use broader expressions, such as “injury, loss or damage”<sup>15</sup> and may also refer to the “impact” or the “effect” of the offence on the victim.<sup>16</sup> Some expressly include one or more particular forms of harm, such as:
- emotional suffering or harm and grief
  - contraction and fear of contracting a sexually transmissible medical condition
  - pregnancy
  - economic loss, and/or
  - substantial impairment of legal rights.<sup>17</sup>
- 4.11 Queensland is the least expansive of the other jurisdictions, defining harm for the purposes of a VIS only as “physical, mental or emotional harm”.<sup>18</sup>
- 4.12 Questions about the definition of “personal harm” are also considered in Chapter 3.<sup>19</sup>

**Question 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?

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13. NSW, Department of Justice, Victims Services, *Victim impact statements information package* (2017) 7.

14. NSW, Office of the Director of Public Prosecutions, “Writing Your Victim Impact Statement Guide” (2008).

15. *Criminal Law (Sentencing) Act 1988* (SA) s 7A(1); *Sentencing Act 1997* (Tas) s 81A(2); *Sentencing Act 1991* (Vic) s 8L(1); *Sentencing Act 1995* (WA) s 25(1)(a).

16. *Sentencing Act 1991* (Vic) s 8L(1); *Sentencing Act 1995* (WA) s 25(1)(b).

17. *Crimes (Sentencing) Act 2005* (NSW) s 47 definition of “harm”; *Sentencing Act* (NT) s 106A definition of “harm”.

18. *Penalties and Sentences Act 1992* (Qld) s 179I definition of “harm”.

19. [3.31]-[3.37].

### Family victims: Impact of the death

4.13 For family victims a VIS contains particulars of “the impact of the primary victim’s death on the members of the primary victim’s immediate family”.<sup>20</sup>

4.14 The “impact” on the primary victim’s immediate family conceives of a different and broader range of harms than the “personal harm” that may be referred to in a primary victim’s statement. In one case, Justice Johnson considered an application by the defence that parts of a VIS did not fall within the definition of VIS when given by a family victim. He observed that the term “impact”:

should not be construed narrowly. The impact of the death of a person on the members of that person's immediate family extends to the influence or effect of the death. It is not confined to the immediate impact. It is not confined to immediate issues of grief, but to the devastation that can be caused to the family of a murder victim. It can extend, in my view, to the thought processes of the victims which, at times, may involve strong feelings with respect to the perpetrator, and what (in their view) may have motivated the perpetrator. To exclude matters of that sort, in my view, would narrowly and artificially confine the very process by which victim impact statements are made.<sup>21</sup>

4.15 In another case, however, the primary victim’s daughter provided a VIS through her offender mother’s lawyers. The VIS dealt with the daughter’s distress at hearing that her father was engaged in another relationship and detailing emotional abuse that she and her mother had endured at her father’s hands. Justice Latham doubted that the statement qualified as a VIS by a family victim, noting that:

the statement is almost wholly concerned with events that predated the victim's death. It fails to express any impact upon [the daughter] arising out of the death of her father.<sup>22</sup>

4.16 The requirement that the impact be the impact on the “members of the primary victim’s immediate family” raises problems of the sort discussed in Chapter 3 where we consider the narrow scope of “family”.<sup>23</sup>

4.17 NSW would appear to be the only jurisdiction that uses a different formulation of harm for the purposes of a VIS by a family victim. For all other Australian jurisdictions, the harm that the secondary victim suffers is not defined or identified separately from the harm that a primary victim would suffer.<sup>24</sup> In all cases, this includes emotional harm and in many cases can extend to financial, economic and social harm.

#### Question 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?

20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of “victim impact statement” (b).

21. *R v Turnbull (No 24)* [2016] NSWSC 830 [8].

22. *R v Ryan* [2011] NSWSC 1249 [25]-[26].

23. Para [3.25]-[3.26].

24. *Crimes (Sentencing) Act 2005* (ACT) s 47; *Sentencing Act* (NT) s 106A; *Penalties and Sentences Act 1992* (Qld) s 179I; *Criminal Law (Sentencing) Act 1988* (SA) s 7A(1); *Sentencing Act 1997* (Tas) s 81A(2); *Sentencing Act 1991* (Vic) s 8L(1); *Sentencing Act 1995* (WA) s 25(1).

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

### What a victim impact statement may not include

- 4.18 In NSW generally a VIS may not include anything that does not come within the definition of personal harm (in the case of primary victims) or impact (in the case of family victims). The CCA has held that victims “are not entitled to express their views as to the appropriate sentence to be imposed, the matters to be taken into account by the sentencing judge, or, their personal opinions of the offender”.<sup>25</sup>
- 4.19 The Regulation further controls the content of a VIS, by requiring that it not contain anything offensive, threatening, intimidating or harassing.<sup>26</sup>

#### *Offensive material*

- 4.20 Courts seem to allow a degree of latitude, at least with regard to material that may be considered offensive. For example, the Supreme Court recently rejected an objection to a VIS in a murder case on the basis that it went beyond the impact of the death and included offensive material. As quoted above, the Court observed that strong feelings can be involved and to exclude these from a VIS may be undesirable.<sup>27</sup>
- 4.21 The Supreme Court in 2015 received a VIS from the grandparents of the deceased and these were read out in court. They contained some “powerful and brutally honest statements”. The Court commented:

I feel the need in this case to comment, however, that a victim impact statement should not be used as the occasion to refer to the offender or any co-accused in offensive or pejorative terms in the way that was adopted in one of the victim impact statements read aloud before me. The maintenance of dignity in the face of grief says more to me about a victim and his or her suffering than a gratuitous explosion of distasteful remarks and venomous adjectives.<sup>28</sup>

The VIS was, however, admitted in this case.

- 4.22 Of the other Australian jurisdictions, only the ACT expressly states that a VIS must not contain anything that is offensive, threatening, intimidating or harassing.<sup>29</sup> The words used are generally only applied in the law of evidence in relation to improper questions which may be “unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive”.<sup>30</sup>
- 4.23 Other jurisdictions make no provision, but presumably, there is an underlying assumption that the courts may exercise their discretion to exclude material that

25. *R v Newman* [2004] NSWCCA 102, 145 A Crim R 361 [82].

26. *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 11(6).

27. *R v Turnbull (No 24)* [2016] NSWSC 830 [8].

28. *R v KJ* [2015] NSWSC 767 [63].

29. *Crimes (Sentencing) Act 2005* (ACT) s 51(7).

30. *Evidence Act 1995* (NSW) s 41(1)(b).

falls within this category. In Victoria, there is an express provision that “the court may rule as inadmissible the whole or any part of a victim impact statement”.<sup>31</sup>

### *Proposed penalty*

4.24 Even though expressions of opinion as to penalty do not come within the permitted content of a VIS, the Courts have received VISs that state such views. In one case, the Supreme Court stated that it would set such views aside and observed:

In truth, no sentence this Court could impose, not even life imprisonment, can make good the loss of a loved one to that person's family and friends, or alleviate their pain.<sup>32</sup>

4.25 Some jurisdictions expressly allow a VIS to contain the victim's views about the sentence the court should impose.<sup>33</sup> None of these jurisdictions has a provision requiring the court to have regard to such opinions. However, in WA, a VIS is not to address the way in which or the extent to which the offender ought to be sentenced.<sup>34</sup>

4.26 One preliminary submission specifically opposes any move to allow victims to include suggestions as to penalty in their VIS because the decision about the appropriate sentence rests with the court, which must apply all of the principles of sentencing and other relevant considerations.<sup>35</sup>

#### **Question 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?

## Court's use of victim impact statements

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4.27 The *Crimes (Sentencing Procedure) Act 1999* (NSW) states what a court may do with a VIS:

- in the case of a VIS relating to a primary victim, the court may receive and consider the VIS<sup>36</sup>
- in the case of a family victim's VIS, the court must receive and acknowledge and may make any comment on the VIS.<sup>37</sup>

4.28 In addition, in relation to a family member's VIS, the prosecutor may apply for the court to consider and take it into account, “if the court considers it appropriate to do

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31. *Sentencing Act 1991* (Vic) s 8L(3).

32. *R v Patel (No 2)* [2015] NSWSC 1381 [109].

33. *Sentencing Act* (NT) s 106B(5A); *Criminal Law (Sentencing) Act 1988* (SA) s 7C(2).

34. *Sentencing Act 1995* (WA) s 25(2).

35. S Pour, *Preliminary submission PVI1*, 18-19.

36. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(1).

37. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(3).

so”, in determining the punishment for the offence “on the basis that the harmful impact of the primary victim’s death on the members of the primary victim’s immediate family is an aspect of harm done to the community”.<sup>38</sup> This new provision was introduced in 2014.<sup>39</sup>

- 4.29 Such statements have been described by the CCA as “a particular species of evidence available to a sentencing judge”.<sup>40</sup>

### Primary victims

- 4.30 The provisions about a primary victim’s VIS do not say how the VIS is to be taken into account. The CCA has observed:

Although the question has been raised on a number of occasions, this Court has yet to reach a consensus on the use to which a victim impact statement may be put. It may be that it is not possible to reach such a consensus, and that each case will depend upon its own facts and circumstances.<sup>41</sup>

The lack of guidance provided in the Act has been described as “unfortunate”.<sup>42</sup>

- 4.31 The CCA has observed that it can be inferred that a VIS can be “material upon which the sentencing judge can rely in determining the appropriate sentence”.<sup>43</sup> This raises the question of the extent to which a VIS can be used to prove an aggravating factor (as discussed below). For example, it could provide evidence for the aggravating factor that “the injury, emotional harm, loss or damage caused by the offence was substantial”.<sup>44</sup> This can also link to the purpose of sentencing to “recognise the harm done to the victim of the crime and the community”.<sup>45</sup>

#### Question 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?

### Family victims

- 4.32 Previously, a VIS by a family victim did not provide evidence that the sentencing court could take into account in sentencing an offender.<sup>46</sup> The practice generally became for the court to acknowledge the grief and loss expressed, extend the

38. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(4).

39. *Crimes (Sentencing Procedure) Amendment (Family Member Victim Impact Statement) Act 2014* (NSW) sch 1.

40. *R v Wilson* [2005] NSWCCA 219 [25].

41. *R v Tuala* [2015] NSWCCA 8, 248 A Crim R 502 [51]. See also *R v Thomas* [2007] NSWCCA 269 [36].

42. *R v Thomas* [2007] NSW CCA 269 [37].

43. *R v Thomas* [2007] NSW CCA 269 [36]. See also *R v Slack* [2004] NSWCCA 128 [60]-[61]; *R v MJB* [2014] NSWCCA 195 [52]-[53].

44. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(g).

45. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g).

46. *Bollen v R* (1998) 99 A Crim R 510, 529 (Hunt CJ at CL) referring to *R v Previtera* (1997) 94 A Crim R 76.

sympathy of the court to the family and to note that the VIS would be dealt with according to well settled practice.<sup>47</sup>

- 4.33 The provision introduced in 2014 allows the sentencing court, where it considers it appropriate to do so, to consider and take into account a family member's VIS on the basis that the harmful impact described is an aspect of harm done to the community.<sup>48</sup> Recognising the harm done to the community is one of the purposes of sentencing identified in the *Crimes (Sentencing Procedure) Act 1999* (NSW).<sup>49</sup>
- 4.34 There have been a variety of judicial responses to the new provision. The new provision has been applied in numerous cases often without much discussion or elaboration.<sup>50</sup>
- 4.35 Some have noted that the provision does not explain how a judge is to determine when it is "appropriate" to take the offence's harmful impact on the victim's immediate family into account in determining punishment.<sup>51</sup>
- 4.36 Some judges have applied the provision and emphasised that they treat VISs in such situations as giving specific support to the proposition that every unlawful taking of life harms the community in some way.<sup>52</sup> For example, in one Supreme Court case, the sentencing judge observed:

It seems unthinkable that the amendment reflects an acceptance by the legislature that some lives are more valuable to the community than others. I would construe the new provision as an important mechanism for ensuring that the evidence of family victims is placed before the court to give texture to the undoubted proposition that every unlawful taking of a human life harms the community in some way. In that way, the provision serves the purposes of sentencing ... one of which is to recognise the harm done to the victim of the crime and the community.<sup>53</sup>

- 4.37 One judge has expressly raised the question of the effect of the new provisions by observing that it is "far from clear what practical difference has been made by the amendment".<sup>54</sup>
- 4.38 There have been a number of cases where the prosecution has not applied for the court to consider a VIS under the new provision.<sup>55</sup>

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47. See, eg, *R v Barton* [2007] NSWSC 651 [71] citing *R v Previtara* (1997) 94 A Crim R 76; *R v FD* [2006] NSWCCA 31, 160 A Crim R 392; *MAH v R* [2006] NSWCCA 226.

48. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(4).

49. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g).

50. *Sumpton v R* [2016] NSWCCA 162 [153]-[155]; *Safe Work NSW v Essential Energy Pty Ltd* [2016] NSWDC 219 [66]; *R v Fang (No 4)* [2017] NSWSC 323 [64]; *R v Haines (No 3)* [2016] NSWSC 1812 [88]; *R v Towney (No 2)* [2016] NSWSC 97 [57]; *R v Haines* [2015] NSWSC 390 [37]; *R v Lane (No 3)* [2015] NSWSC 118 [39]; *R v Matthews* [2015] NSWSC 49 [45]; *R v Johnson* [2015] NSWSC 31 [56]; *R v Briggs (No 9)* [2014] NSWSC 1805 [55]; *R v Jones (No 3)* [2014] NSWSC 1511 [121]; *R v Hunter (No 15)* [2014] NSWSC 1456 [70]. But see *R v Wang* [2016] NSWSC 222 [25]-[26].

51. *R v Halloun* [2014] NSWSC 1705 [46]; *R v Hines (No 3)* [2014] NSWSC 1273 [78].

52. *R v Turnbull (No 26)* [2016] NSWSC 847 [159]-[161]; *R v Crickitt (No 2)* [2017] NSWSC 542 [40]; *R v Abdallah* [2015] NSWSC 531 [65]; *R v Hines (No 3)* [2014] NSWSC 1273 [75]-[76], [78]-[85]; *R v Do (No 4)* [2015] NSWSC 512 [50]; *R v Pluis* [2015] NSWSC 320 [103].

53. *R v Halloun* [2014] NSWSC 1705 [46], citing *R v Hines (No 3)* [2014] NSWSC 1273 [75], [78]. See also *R v Johnson* [2015] NSWSC 31 [56].

54. *R v Do (No 4)* [2015] NSWSC 512 [50].



- 4.39 There have also been cases where the court has rejected prosecution applications.<sup>56</sup> In one case, the sentencing judge accepted the emotional harm to the deceased's family as an aggravating factor (that the injury, emotional harm, loss or damage caused by the offence was substantial).<sup>57</sup> He rejected the prosecution application because he considered there was an "unacceptable risk of double counting" if he were also to take the emotional harm into account in the determination of punishment.<sup>58</sup> In another case, the judge preferred to rest the assessment of the consequences of the offence "upon the proposition that this is an example of a murder, and all killing is offensive to an ordered society".<sup>59</sup>
- 4.40 In another case, where family VISs were submitted, the defence argued that the loss to the victim's young children was mitigated by being surrounded by a loving family. The judge considered that the new provisions did not "raise a basis for a sentencing court to find that the harm caused by a crime such as this is either aggravated or mitigated by the extent of the loss occasioned by the death of the victim". In the circumstances, the judge did not take the VIS as worsening the offender's crime, but rather, in accordance with existing authority, as being "demonstrative of the harm that is inherent in an offence of manslaughter".<sup>60</sup>

**Question 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?

**Absence of a victim impact statement**

- 4.41 The *Crimes (Sentencing Procedure) Act 1999* (NSW) expressly provides that absence of a VIS does not give rise to the inference that the offence had little or no impact on the victim.<sup>61</sup>
- 4.42 Some other jurisdictions make similar express provisions:
- In the ACT, a court "must not draw any inference about the harm suffered by a victim from the fact that a victim impact statement is not given to the court".<sup>62</sup>
  - In the NT, a court "must not draw an inference in favour of an offender or against a victim because a victim impact statement or victim report is not presented to the court".<sup>63</sup>

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55. *R v Thompson* [2017] NSWSC 628 [51]; *R v Hadchiti* [2017] NSWSC 292 [44]; *R v Perkins* [2016] NSWSC 1080 [62]; *R v Beattie (No 4)* [2015] NSWSC 961 [70]; *R v Lambaditis* [2015] NSWSC 746 [104]; *R v Silva* [2015] NSWSC 148 [45]; *R v JH* [2014] NSWSC 1878 [138].

56. *R v Aller (No 2)* [2015] NSWSC 402 [13]; *R v Mahon* [2015] NSWSC 25 [92]; *R v Anderson* [2016] NSWSC 399 [105].

57. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(g).

58. *R v Anderson* [2016] NSWSC 399 [105].

59. *R v Mahon* [2015] NSWSC 25 [92].

60. *R v Merrick (No 5)* [2016] NSWSC 661 [65]-[67].

61. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 29(3)-(4).

62. *Crimes (Sentencing) Act 2005* (ACT) s 53(1)(b).

63. *Sentencing Act* (NT) s 106B(6).

- In Queensland, “[t]he fact that details of the harm caused to a victim by the offence are absent at the sentencing does not, of itself, give rise to an inference that the offence caused little or no harm to the victim”.<sup>64</sup> Queensland further provides that “[t]o remove any doubt, it is declared that it is not mandatory for a victim to give the prosecutor details of the harm caused to the victim by the offence”.<sup>65</sup>

### Question 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?

## Proving mitigating circumstances

- 4.43 A related question is the extent to which a VIS may be used to establish a matter that mitigates a sentence.
- 4.44 The CCA has acknowledged the possibility that a VIS (whether complying or not) could be used to establish a mitigating factor such as that “the injury, emotional harm, loss or damage caused by the offence was not substantial”.<sup>66</sup>
- 4.45 One preliminary submission raised questions of whether and how a VIS could be used to elicit remorse from the offender and how that remorse should be assessed or dealt with.<sup>67</sup>

### Question 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?

## Evidential issues

- 4.46 The evidential issues raised in the following paragraphs are closely related to the use that a court may make of a VIS. Particular issues arise surrounding the use of a VIS to prove aggravating circumstances. There is also the question of the use of a VIS where it is not consistent with the charges for which the offender has been convicted either because the harm arises from uncharged offences or because the conviction is the result of negotiated charges.
- 4.47 There are risks that a sentence may be successfully appealed on the grounds that a court has impermissibly taken into account material that should not have been

64. *Penalties and Sentences Act 1992* (Qld) s 179K(5).

65. *Penalties and Sentences Act 1992* (Qld) s 179K(6).

66. *AC v R* [2016] NSWCCA 107 [47]-[49]. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(a).

67. Inner City Legal Centre, *Preliminary submission PVI2*, 1.

included in a VIS.<sup>68</sup> It is also in such circumstances that the question of objecting to the content of a VIS becomes important.<sup>69</sup>

### Proving aggravating circumstances

- 4.48 The main question is what happens when the VIS goes beyond the type of harm that would be expected for the particular offence and the court is asked to use it as evidence of an aggravating factor without the support of corroborating evidence - either already adduced at trial or adduced separately in the sentencing hearing. The courts have observed that considerable caution must be exercised before the VIS can be used to establish an aggravating factor to the requisite standard.<sup>70</sup> For example, Justice Simpson has observed that issues about the use of a VIS will arise where “the harm which the statement asserts goes well beyond that which might ordinarily be expected of that particular offence”, or where “the content of the victim impact statement is the only evidence of harm”.<sup>71</sup> Conversely:

Where no objection was taken to the victim impact statement, no question raised as to the weight to be attributed to it, and no attempt made to limit its use, the case for its acceptance as evidence of substantial harm has been considered to be strengthened. ... Further, where the statement tends to be confirmatory of other evidence (either in a trial, or in the sentencing proceedings) or where it attests to harm of the kind that might be expected of the offence in question, there is little difficulty with acceptance of its contents.<sup>72</sup>

### Corroboration

- 4.49 Corroboration of material contained in a VIS can become important. Evidence admitted in the trial can corroborate material in a VIS. For example, in one case, the CCA acknowledged the need to exercise considerable caution before a VIS is used to establish an aggravating factor if it is the only evidence of the harm claimed and observed:

That is not this case. The agreed facts constitute detailed and extensive evidence of physical harm. Other types of harm – emotional and economic – would inescapably be found, as a matter of inference.<sup>73</sup>

- 4.50 However, it is not always the case that such corroborating evidence is available:

The impact on this officer of these offences are indeed considerable, but there is no evidence from which I could make a finding the injury, emotional harm, loss or damage caused by the offences was substantial. ... But of course, the situation of the victim in any sentencing process is only one factor to be taken into account and where there is no actual evidence presented in relation to the impact on this victim of these offences, the extent to which that situation can be examined is limited.<sup>74</sup>

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68. As was the case, eg, with *RL v R* [2015] NSWCCA 106 [57].

69. See below, [4.59]-[4.71].

70. See, eg, *RP v R* [2013] NSWCCA 192, 234 A Crim R 272 [28]; *R v Singh* [2006] QCA 71, 6-7.

71. *R v Tuala* [2015] NSWCCA 8, 248 A Crim R 502 [80].

72. *R v Tuala* [2015] NSWCCA 8, 248 A Crim R 502 [77]-[78].

73. *Bajouri v R* [2016] NSWCCA 20 [41].

74. *R v Beckett* [2015] NSWDC 416 [60].

## CP Victims' involvement in sentencing

- 4.51 In such cases it may be necessary to bring in corroborating evidence in the sentencing proceedings. For example, in cases where a VIS refers to psychological or psychiatric harm but does not include relevant reports to support the claim.
- 4.52 One preliminary submission suggests that there is a need to “clarify and formalise” the approach where the prosecution adduces further evidence “if it wishes to rely upon a type of harm that is outside the normal bounds for that type of offence”, adding that “VIS should not be the sole basis for that finding”.<sup>75</sup>
- 4.53 In Victoria, a victim, or a person who has made a VIS, may call a witness to give evidence in support of any matter contained in a VIS or in a medical report. Such a witness may be subject to cross-examination and re-examination.<sup>76</sup>

### Question 4.8: Corroborating evidence

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

## Where a victim impact statement is not consistent with charges proved

- 4.54 There is also the question of the use of a VIS where it is not consistent with the charges for which the offender has been convicted either because the harm arises from uncharged offences or because the conviction is the result of negotiated charges.<sup>77</sup> This is a problem because of the principle that, when sentencing an offender, a court may not take into account any aggravating circumstances which would have warranted a conviction for a more serious offence.<sup>78</sup>
- 4.55 In some cases, the courts have exercised discretion not to consider a VIS where the injuries go beyond what is set out in the agreed statement of facts or the consequences described arise from offending other than that charged.<sup>79</sup>
- 4.56 Chief Justice Gleeson has highlighted some of the problems that arise when a VIS refers to offending other than that involved in the offences that have been proved:
- [I]t will often be impossible to separate consideration of the impact upon the victim of the events, as he or she describes them, from consideration of what the impact might have been, absent the aggravating features of the case. Indeed, in many cases, as in the present, any attempt to do that would be hopelessly artificial.<sup>80</sup>
- 4.57 One preliminary submission considers that some allowances should be made to victims in these cases to enable them to articulate fully the impact of the crime.<sup>81</sup>

75. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PVI15*, 5.

76. *Sentencing Act 1991* (Vic) s 8P.

77. See, eg, *PWB v R* [2011] NSWCCA 84, 216 A Crim R 305 [53]. T Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) [6.2.1].

78. *R v De Simoni* (1981) 147 CLR 383, 389 (Gibbs CJ).

79. See, eg *Inspector Cook v State of New South Wales (NSW Police Force)* [2013] NSWIRComm 114 [88]-[93].

80. *R v Bakewell* (Unreported, NSWCCA, 27 June 1996) 9 (Gleeson CJ). See also *FV v R* [2006] NSWCCA 237 [41].

81. Enough is Enough Anti Violence Movement Inc, *Preliminary submission PVI8*.

- 4.58 One preliminary submission suggests that the VIS provisions should direct the sentencing court not to consider:
- any aspects of VIS which are inconsistent with the agreed facts (following a plea of guilty)
  - any aspects of VIS which are inconsistent with the evidence adduced (following trial), or
  - any uncharged act alleged in the VIS.<sup>82</sup>

**Question 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?

### Objecting to the content of a victim impact statement

- 4.59 Courts and offenders have sometimes taken issue with content that goes beyond the limits permitted by the definitions of victim and the harm caused by the offence.<sup>83</sup> The need to object arises principally because, if unchallenged, the court may use the material to establish aggravating circumstances.
- 4.60 We understand that there is increasing pressure to control the content of VISs, particularly because media reports of non-complying VISs are raising victims' expectations about what they can say.
- 4.61 In some cases, objection to content is leading to editing of the VIS that a victim wishes to read out in court. The Prosecution Guidelines of the NSW ODPP state that ODPP lawyers and Crown Prosecutors:
- should ensure that a victim impact statement complies with the legislation - especially that it does not contain material that is offensive, threatening or harassing. Such material and other inadmissible material (eg. allegations of further criminal conduct not charged) is to be deleted before a statement is tendered. Victims should be consulted as to changes that may be required to be made to their victim impact statements and be informed of the reasons for these changes.<sup>84</sup>
- 4.62 In this context, there is concern about distress to victims caused by objections to VISs, particularly when this occurs close to the day of the sentencing hearing or at the hearing itself. This is discussed in Chapter 2.<sup>85</sup> The DPP observes that, while taking such objections may not be "legally improper", it is "certainly ... against the spirit and objectives of the legislation".<sup>86</sup>

82. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PVI15*, 5-6.

83. *RL v R* [2015] NSWCCA 106 [50]-[57]. See also *R v Beckett* [2015] NSWDC 416 [54]-[60].

84. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) guideline 19.

85. [2.40]-[2.41].

86. NSW, Director of Public Prosecutions, *Preliminary submission PVI16*, 3-4.

- 4.63 Objecting to the content of a VIS presents certain dilemmas for offenders who may wish to avoid being seen to re-victimise the victim. Some of the dilemmas were highlighted in a recent CCA case:

This was one of those cases (hopefully rare) where the prosecutor tendered a statement which went beyond the limits of legitimate content. Counsel for the applicant suggested that objection may not have been taken because that might have appeared inconsistent with the fully remorseful position of the applicant. There is no evidence that counsel below took such a position, nor, one would hope, would such an approach be thought necessary. Genuine remorse does not require submission to inadmissible material.<sup>87</sup>

- 4.64 However, it would seem that the issue is largely uncontroversial and the use to which a VIS can be put can be dealt with by submissions from the bar table. The general approach appears to be that sentencing courts agree not to give such evidence inappropriate weight.

- 4.65 The practice in other jurisdictions would also appear to accord with the approach of dealing with objectionable content by way of submissions from the bar table about its use. For example, Justice Nettle of the Victorian Court of Appeal observed that counsel in sentencing hearings:

have tended not to say a great deal about the admissibility of the contents of victim impact statements. In effect, they have left it to sentencing judges to work out which parts of a statement are admissible and may be relied upon. Such an approach is to some extent contrary to mainstream criminal practice, where the taking of objections tends to be punctilious. But it has considerable advantages, in the context of a plea, which are likely to appeal to both sides. It also accords with the observations ... that it would be destructive of the purpose of victim impact statements if their reception in evidence were surrounded and confined by the sorts of procedural rules which are applicable to the treatment of witness statements in commercial cases.

Of course, it remains incumbent on counsel for a prisoner on a plea to take objection to those parts of material known to be before the judge which counsel wishes to have treated as inadmissible against the prisoner. Otherwise ... if it does not appear that a sentencing judge has necessarily relied upon material to which objection might successfully have been taken, counsel cannot hope to succeed in a submission on appeal that the judge in fact relied upon inadmissible material. Furthermore, if objection is taken on a matter of substance to any part of a victim impact statement which is inadmissible, the judge should either rule it inadmissible or make it clear during the plea or in his sentencing reasons that no reliance would be or was being placed on that part of the statement. But, under the existing practice, there is no reason why a judge should not make full use of relevant material in a victim impact statement, including material which goes beyond the [permitted] ambit ... so long as the judge first makes plain to counsel that he or she intends to adopt that course and counsel does not object.<sup>88</sup>

- 4.66 The Queensland Court of Appeal (“QCA”) has proposed the following approach:

Sentencing judges should be very careful before acting on assertions of fact made in victim impact statements. The purpose of those statements is primarily therapeutic. For that reason victims should be permitted, and even encouraged, to read their statements to the court. However, if they contain material damaging to the accused which is neither self-evidently correct nor known by the accused

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87. *RL v R* [2015] NSWCCA 106 [54].

88. *R v Swift* [2007] VSCA 52, 15 VR 497 [7]-[8].

to be correct (and this includes lay diagnoses of medical and psychiatric conditions) they should not be acted on. The prosecution should call the appropriate supporting evidence. It is unfair to present the accused with the dilemma of challenging a statement of dubious probative value, thereby risking a finding that genuine remorse is lacking, or accepting that statement to his or her detriment.<sup>89</sup>

4.67 The QCA has further elaborated on the approach that the defence should take:

In the absence of an application for an adjournment, the court will assume that counsel on both sides are properly prepared for and ready to proceed with sentencing. That implies that they have made themselves aware of the facts which their opponents will assert and have made a judgment about how to deal with each fact. If defence counsel believes his client is exposed to unfairness ... it behoves him or her to speak to the prosecutor before the day of hearing and request that the Crown provide appropriate supporting evidence ... If that is not done the sentencing judge should be made aware of any dilemma which the prosecution's approach poses to the defence.<sup>90</sup>

4.68 By contrast, in Tasmania, the *Criminal Rules 2006* (Tas) expressly allows the sentencing judge to control the content of a VIS that is read out in court:

If the presiding judge so directs, a victim is not to read to the court any part of his or her victim impact statement that the presiding judge considers to be irrelevant to the proceedings.<sup>91</sup>

4.69 Some preliminary submissions propose changes to avoid some potentially undesirable outcomes in the existing system. One preliminary submission suggests that consideration be given to preventing challenges, or at least controlling the way they can be raised so that victims are put on notice and given a chance, if required, to rewrite their VIS in a "calm and considered setting" and "efforts made to prevent them being re-traumatised by the process".<sup>92</sup>

4.70 Another preliminary submission asserts that "clearer procedural guidelines" are needed on the admissibility of the VIS, and when and how objections can be made, in order to minimise victim distress. The submission suggests that this could be achieved by amending legislation or regulations, or introducing practice directions in the courts.<sup>93</sup> The submission proposes a process whereby the defence must be served with a copy of the VIS and,

- if the defence does not object, then the VIS is tendered automatically, or
- if the defence does object, the objection must be dealt with prior to the sentencing hearing.<sup>94</sup>

This submission also suggests that it would be more appropriate that the focus be on the weight that a sentencing judge could attribute to the VIS.<sup>95</sup>

89. *R v Singh* [2006] QCA 71, 6-7. See also *R v Evans* [2011] QCA 135, [2011] 2 Qd R 571 [31]-[32].

90. *R v Evans* [2011] QCA 135, [2011] 2 Qd R 571 [31].

91. *Criminal Rules 2006* (Tas) r 10.

92. NSW, Director of Public Prosecutions, *Preliminary submission PVI16*, 4.

93. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PVI15*, 6.

94. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PVI15*, 6.

95. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PVI15*, 5.

- 4.71 The Victorian Law Reform Commission (“VLRC”) has recently considered whether objections to admissibility and editing of the content of VISs could be resolved by granting the judge greater discretion to determine the admissibility and weight to be given to the VIS.<sup>96</sup> The VLRC asserted that such an approach could remove limits on victims’ “autonomy and voice” and “allow victims to convey the impact of the offending more authentically.”<sup>97</sup> However, the VLRC also acknowledged the “risks associated with relying on the sentencing judge to determine admissibility” including that it may “undermine [the] transparency” of the sentencing process and “create the false impression [for victims] that their entire statement will be taken into account”.<sup>98</sup> The VLRC determined that “on balance, the sentencing judge should not have primary responsibility for determining the admissibility” of VISs. Rather, the VLRC concluded that the issue could be resolved by assisting victims to prepare VISs “to ensure their statements principally contain admissible material”.<sup>99</sup>

### **Question 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?

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96. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.124]-[7.127].
97. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.126]. See also T Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) [5.3].
98. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.125].
99. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.127].



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

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### In brief

Procedural issues can have a significant impact on victims. There are many issues around making and delivering a victim impact statement (“VIS”), including many technical requirements. We also consider special arrangements to help victims when their VIS is read out in court. The possibilities of cross-examination and publicity of a VIS can present particular problems for some victims. We also consider ways in which courts may acknowledge and respond to victims in sentencing hearings.

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### Making and delivering a victim impact statement

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- 5.1 This section looks at the processes of making, tendering and otherwise presenting a victim impact statement (“VIS”). Aspects of these processes can have a significant impact on victims, both in terms of their recovery from the crime and in terms of their participation in the sentencing process.

#### Time of making a victim impact statement

- 5.2 Currently “[i]f it considers it appropriate to do so, a court may receive and consider a victim impact statement at any time after it convicts, but before it sentences, an offender”.<sup>1</sup> While this provision deals with the timing of tendering a VIS, there is no provision that deals with the problems that can arise if a VIS is prepared by the victim before the offender is convicted.

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1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(1).

## CP Victims' involvement in sentencing

- 5.3 If a person prepares a VIS before the offender is convicted, it may have to be served on the parties to the trial. The Director of Public Prosecutions (“DPP”) therefore has a practice of not asking for a VIS before an offender is convicted. This has implications, for example, in the Local Court where sentencing may take place immediately or within a short time of the finding or admission of guilt.
- 5.4 Another reason to delay preparing a VIS, at least in the higher courts, is that charge negotiations or cascading offences may change the offence originally charged. However, a particular problem arose in the UK where police were taking statements at the time of reporting and victims were being cross-examined on the content of those statements.
- 5.5 The Victorian Law Reform Commission (“VLRC”) has proposed that it should be possible to prepare a VIS before a finding of guilt or a plea of guilty, but that it should be admissible only after guilt has been determined.<sup>2</sup> The reasons for this position were:
- Making statements admissible before guilt is determined would undermine proposals for a scheme to help victims prepare primarily admissible VISs and review them.
  - Victims who seek legal assistance in preparing a VIS would be protected by legal professional privilege while those who used non-legal support would not be so protected.
  - Requiring victims to wait for a determination of guilt “limits their capacity to exercise a substantive legal entitlement to participate”.<sup>3</sup>
- 5.6 Potential delay to proceedings caused by the need to prepare a VIS has been addressed in Queensland by giving the prosecutor the ability to deny a victim the opportunity to make a VIS:

The prosecutor may continue with the sentencing proceeding without having permitted the victim to give details of the harm if it is reasonable to do so in the circumstances, having regard to ... whether permitting the details of the harm to be given would unreasonably delay the sentencing of the offender.<sup>4</sup>

### Question 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?

## Notifying the offender of the contents of a victim impact statement

- 5.7 In NSW, only the prosecutor may tender a VIS to the court and currently “[a] court may make a victim impact statement available to ... the offender ... (which must

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2. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) rec 29.

3. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.143].

4. *Penalties and Sentences Act 1992* (Qld) s 179K(2)(b).

include conditions preventing the offender from retaining copies of the statement) as it considers appropriate”.<sup>5</sup> The prosecutor does not appear to be required to advise the offender or the offender’s lawyers of the content of a VIS before tendering it. In practice many Office of the DPP solicitors and Crown Prosecutors will serve VISs on the offender’s lawyers before the sentencing hearing in order to allow them time to consider if they have any objections to the content.

- 5.8 Not having a formal requirement to notify the offender may have implications if the contents of a VIS can be subject to objection and amendment before the court admits it. This may lead to editing and negotiation over the content of an already tendered VIS. Such a practice is undesirable from the point of view of the victim.<sup>6</sup>
- 5.9 Some jurisdictions expressly require that the offender be notified of the contents of a VIS.
- 5.10 For example, in Tasmania, “[t]he court must ensure that the offender has knowledge of, and the opportunity to challenge, the information received by the court”.<sup>7</sup> The *Criminal Rules* also require a victim to provide copies of any intended VIS to the Director or authorised counsel for distribution to the prosecutor and defendant’s counsel.<sup>8</sup>
- 5.11 In Victoria, a victim who prepares a VIS must, “a reasonable time before sentencing is to take place ... provide a copy to ... the offender or the legal practitioner representing the offender”.<sup>9</sup>
- 5.12 In the ACT, a VIS may not be given in writing to the court unless a copy of the VIS has been given to the defence.<sup>10</sup> Similar provisions apply in the NT.<sup>11</sup>

### Question 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?

### Number of statements

- 5.13 The Regulation currently provides that only one VIS may be tendered in respect of each primary victim and, where the primary victim has died as a result of the offence, each family victim.<sup>12</sup> There is otherwise no express limit on the number of victims who may make a VIS.
- 5.14 The express reference to each family victim was included in the 2017 remake of the Regulation to deal with situations where there is more than one person who meets the definition of family victim. The wording of the previous provision<sup>13</sup> had resulted

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5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(5).

6. [2.40]-[2.42].

7. *Sentencing Act 1997* (Tas) s 81(2).

8. *Criminal Rules 2006* (Tas) r 4(1).

9. *Sentencing Act 1991* (Vic) s 8N(b)(i).

10. *Crimes (Sentencing) Act 2005* (ACT) s 53(2)(b).

11. *Sentencing Act* (NT) s 106B(8).

12. *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 12(2).

13. *Crimes (Sentencing Procedure) Regulation 2010* (NSW) cl 11(2).

in some family victims being advised to submit a collective family statement whereas in other cases each family victim was invited to submit a VIS.<sup>14</sup> One preliminary submission, written before the Regulation was remade, supported allowing the courts to receive more than one family VIS, noting:

Many families operate at a level of dysfunction or non-contact that makes the submission of a single VIS unrealistic. There are also times where the offender is a family member and persons from the offender's side of the family, for example, grandparents where the victim was their grandchild, would like to contribute to a family VIS but are unable to do so.<sup>15</sup>

- 5.15 If changes were to be made to the law to allow other people directly affected by an offence to be classed as primary victims, as discussed in Chapter 3,<sup>16</sup> the new provision might need to be redrafted to refer to each primary victim rather than “the” primary victim. The new provision may not adequately cover cases where there is more than one primary victim under the current definition, for example, one person against whom the offence was committed and one person who witnessed the offence.
- 5.16 However, one preliminary submission considers that there needs to be a limit on the number of VISs in any one case.<sup>17</sup> Such a limit could be justified, especially where there are large number of people who meet the definition of primary victim or family victim, and where there are likely to be multiple or competing viewpoints.
- 5.17 Some other jurisdictions expressly provide for more than one victim to make a VIS in all cases. For example, in the ACT there is an express statement that nothing prevents a VIS being made “by or for more than 1 victim”.<sup>18</sup>

### Question 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?

## Written statements

- 5.18 In NSW, a VIS must be in writing.<sup>19</sup>

### *Attaching other material*

- 5.19 In NSW, a VIS may include photographs, drawings or other images.<sup>20</sup>
- 5.20 Queensland and the ACT similarly define a VIS so that it may have attached to it “photographs, drawings or other images”.<sup>21</sup>

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14. Victims of Crime Assistance League Inc NSW, *Preliminary submission PVI6*, 2.

15. NSW, Director of Public Prosecutions, *Preliminary submission PVI16*, 2.

16. Para [3.15]-[3.21].

17. Enough is Enough Anti Violence Movement Inc, *Preliminary submission PVI8*, 1.

18. *Crimes (Sentencing) Act 2005* (ACT) s 51(8).

19. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30(1).

20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30(1A).

- 5.21 In Victoria, “[a] victim impact statement may include photographs, drawings or poems and other material that relates to the impact of the offence on the victim or to any injury, loss or damage suffered by the victim as a direct result of the offence”.<sup>22</sup>
- 5.22 The “other material” in Victoria has, in some cases involving the death of the primary victim, included videos, often involving a montage of images of the primary victim.<sup>23</sup> These videos are sometimes similar to eulogy videos that are used at funerals and memorial services. The use of such videos has been particularly controversial in the United States where they have been challenged as being unfairly prejudicial to the offender.<sup>24</sup>

#### Question 5.4: Attaching other material

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

#### *Attaching expert reports*

- 5.23 While specific provision is made for the attachment of images, there is no such specific provision for attaching expert reports, including medical reports, to a VIS.
- 5.24 The only direct mention of medical reports or other annexures is a provision in the regulation that limits the length of a VIS to no more than 20 A4 pages “including medical reports or other annexures”.<sup>25</sup>
- 5.25 The definition of a VIS as “a statement containing particulars of” the relevant harm<sup>26</sup> may be sufficient to incorporate the attachment of a report prepared by an expert. However, it is not clear how such material is to be treated by the court (and also whether its author could be subject to cross examination).
- 5.26 Currently, there are provisions relating to a “qualified person” who may make a VIS. The qualified person may be designated by the victim, a victim’s representative or the prosecutor. The “qualified person” must be either a counsellor approved under the *Victims Rights and Support Act 2013* (NSW) or “any other person who is qualified by training, study or experience to provide the particulars required for inclusion in a victim impact statement”.<sup>27</sup> These could conceivably extend to medical experts, however, these provisions appear to treat the qualified person as the author of a separate VIS, not the author of an attachment to a primary victim’s VIS.
- 5.27 Other jurisdictions make express reference to the attachment of supporting documents:

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21. *Penalties and Sentences Act 1992* (Qld) s 179I definition of “victim impact statement” (c)(ii); *Crimes (Sentencing) Act 2005* (ACT) s 51(6).

22. *Sentencing Act 1991* (Vic) s 8L(2).

23. Victoria, Department of Justice, *Victim Impact Statement Reforms in Victoria: Interim Implementation Report* (2014) 45.

24. T Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press, 2016) 122-123.

25. *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 10(c).

26. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 definition of “victim impact statement”.

27. *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 9.

- In Queensland, a VIS is defined as a written statement that “may have attached to it ... documents supporting the particulars, including, for example, medical reports”.<sup>28</sup>
- Victoria has specific provisions relating to a “written statement on medical matters concerning the victim” made by a medical expert.<sup>29</sup> There is also an express provision about cross-examining and re-examining medical experts whose reports are attached to VISs.<sup>30</sup>
- In WA, a VIS “may be accompanied by a report by any person who has treated the victim in connection with the effects on the victim of the commission of the offence”.<sup>31</sup>

### Question 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?

#### *Other requirements for written statements*

5.28 In addition to being in writing, a VIS in NSW must comply with the following requirements:

- it must be legibly typed or hand-written
- it must be on A4 paper
- it must be no longer than 20 pages (including annexures) unless the court gives leave for it to be longer
- it must include the full name of the person who made the statement and must be signed and dated by that person, and
- in the case of a family victim, it must identify the primary victim and (“unless a relative by blood or marriage”) the nature and duration of the relationship with the primary victim (that is, most likely, a defacto partner or a foster child).<sup>32</sup>

5.29 In NSW, a VIS must comply with these requirements in order to be received or considered.<sup>33</sup> But some of these requirements are not pressed or VISs have been tendered by consent and the courts have admitted in non-complying statements.<sup>34</sup> For example, in a recent Supreme Court case, the offender's counsel did not object to the tender of an unsigned VIS from the father of the deceased.<sup>35</sup>

5.30 Apart from general questions about the desirability of each of the above requirements, a number of specific questions arise:

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28. *Penalties and Sentences Act 1992* (Qld) s 179I definition of “victim impact statement” (c)(i).

29. *Sentencing Act 1991* (Vic) s 8M.

30. *Sentencing Act 1991* (Vic) s 8O.

31. *Sentencing Act 1995* (WA) s 25(3).

32. *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 10, cl 11.

33. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30(3).

34. See, eg, *R v Barlow* [2015] NSWDC 422 [75].

35. *R v Hadchiti* [2017] NSWSC 292 [41].

- Whether alternatives to signing should be provided for, for example, where a victim is unable to sign, or submits the VIS electronically. In Queensland, a VIS that is given to a prosecutor electronically is taken to have been signed by the person who gives it.<sup>36</sup>
- Whether the requirements surrounding other representatives of a victim should encompass, for example, the representative's occupation (where the person has been designated because of qualifications rather than relationship).

**Question 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?

*Tendering a VIS*

- 5.31 In NSW, only the prosecution may tender a VIS to the court.<sup>37</sup> The provisions, however, do not refer to the prosecution's discretion whether or not to tender a particular VIS. The advice to victims contained in the *Victim Impact Statement Information Package* suggests that the prosecution has the final say about whether to submit a VIS:

The final decision about whether to submit the victim impact statement or parts of the victim impact statement to the court, is made by the prosecutor.<sup>38</sup>

- 5.32 The Charter of rights of victims of crime states:

A relevant victim will have access to information and assistance for the preparation of any victim impact statement authorised by law to ensure that the full effect of the crime on the victim is placed before the court.<sup>39</sup>

- 5.33 The Prosecution Guidelines of the NSW Office of the Director of Public Prosecutions refer only to ensuring that non-compliant material is deleted before tendering a VIS.<sup>40</sup>

- 5.34 One question that arises is whether there should be more guidance for prosecutors about their discretion to tender a VIS. Queensland, for example, expressly gives the prosecutor an active role in determining whether to present a VIS during the sentencing hearing. For example, the prosecutor may first deny a victim permission to give details of the harm caused by the offence if "it is reasonable to do so in the circumstances, having regard to the following matters":

- (a) the interests of justice;
- (b) whether permitting the details of the harm to be given would unreasonably delay the sentencing of the offender;

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36. *Penalties and Sentences Act 1992* (Qld) s 179L(2).

37. *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 12(1).

38. NSW, Department of Justice, Victims Services, *Victim Impact Statement Information Package* (2016) 4.

39. *Victims Rights and Support Act 2013* (NSW) s 6.14.

40. NSW, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) guideline 19.

- (c) anything else that may adversely affect the reasonableness or practicality of permitting details of the harm to be given.<sup>41</sup>

5.35 The prosecutor must then determine (having regard to the victim's wishes) what details, if any, are appropriate to be given to the sentencing court and whether the appropriate details should be given in the form of a VIS.<sup>42</sup> The Explanatory Note to the Queensland provisions noted:

This is to ensure justice is conducted efficiently, that flexibility within the sentencing system is maintained and to preserve the prosecutor's role in the sentence proceeding. This is particularly necessary given the extension of the principles to all offences against the person, the large proportion of offenders who plead guilty and the time consuming processes associated with such proceedings on any given day in the lower and higher courts throughout the State.<sup>43</sup>

5.36 Another question that arises is whether someone other than the prosecutor should be able to tender a VIS, such as a victim or a victim's representative.

5.37 In the Northern Territory, for example, "a person other than the prosecutor" may present a VIS, with the permission of the court.<sup>44</sup>

5.38 In Victoria, victims have the right to make a VIS to the sentencing court independently of the prosecution.<sup>45</sup> If a victim prepares a VIS, the victim must file a copy (and any attachments) with the court and provide a copy to the offender or the offender's legal practitioner and the prosecutor.<sup>46</sup> The VLRC has observed that this conflicts with Supreme Court and County Court practice notes.<sup>47</sup> These practice notes require the prosecution to file the VIS with the court and provide a copy to the offender at least 5 or 10 days before the sentencing hearing.<sup>48</sup> The VLRC has also suggested that the current requirement is "at odds with the need to minimise the victim's contact with the offender" and recommended that it be amended to require the prosecutor to file any VIS with the court and serve it on the offender or the offender's lawyer.<sup>49</sup>

### Question 5.7: Tendering a victim impact statement

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

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41. *Penalties and Sentences Act 1992* (Qld) s 179K(2). A similar version of this provision was previously contained in the *Victims of Crime Assistance Act 2009* (Qld) s 15. A much shorter provision allowing the prosecutor to inform the sentencing court of "appropriate details of the harm caused to a victim by the crime" was previously contained in *Criminal Offence Victims Act 1995* (Qld) s 14.
42. *Penalties and Sentences Act 1992* (Qld) s 179K(3).
43. Explanatory note, *Victims of Crime Assistance Bill 2009* (Qld) cl 26.
44. *Sentencing Act* (NT) s 106B(3).
45. *Victims' Charter Act 2006* (Vic) s 13.
46. *Sentencing Act 1991* (Vic) s 8N.
47. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.139].
48. Victoria, County Court, *County Court Criminal Division Practice Note*, PNCr 1–2015, (1 July 2017) [7.5]; Supreme Court of Victoria, *Practice Note No 11 of 2015—Sentencing Hearings*, (1 March 2015) [10].
49. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.139], rec 28.



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

### Reading a written statement in court

- 5.39 In NSW, a VIS that is received by the court may be read aloud by the victim or the victim's representative.<sup>50</sup> The VIS may be read after the conviction, but prior to the sentencing of the offender.<sup>51</sup>
- 5.40 One potential gap arises where a victim dies between making a VIS and the sentencing hearing. One preliminary submission suggests that specific provision should be made for such a VIS to be read at the hearing.<sup>52</sup>
- 5.41 In Victoria, a VIS in addition to being made in writing by statutory declaration, may be made orally by sworn evidence.<sup>53</sup> If the VIS is read out, the Court must ensure that only the admissible parts are read.<sup>54</sup>
- 5.42 In Queensland the relevant provision declares that “[t]o remove any doubt ... the purpose of the reading aloud of the victim impact statement before the court is to provide a therapeutic benefit to the victim” and adds that “it is not necessary for a person, reading aloud the victim impact statement before the court under this section, to read the statement under oath or affirmation”.<sup>55</sup>

### Special arrangements for reading a VIS

- 5.43 In NSW, the victim may read the VIS by closed-circuit television arrangements (CCTV), where the proceedings relate to a prescribed sexual offence, an apprehended violence order in a domestic violence complaint or, in certain circumstances, a child or a person with cognitive impairment.<sup>56</sup>
- 5.44 In proceedings for a prescribed sexual offence, the statement must be read in closed court unless the court directs otherwise.<sup>57</sup> The victim is also entitled to have a person of their choosing to be “present near the victim, and within the victim’s sight”. The person may include “a parent, guardian, relative, friend or support person of the victim or a person assisting the victim in a professional capacity”.<sup>58</sup>
- 5.45 The current provisions have a number of limitations. They provide only a small number of options – delivery by CCTV, closing the court and having a support person. The options also do not apply to all victims. The support person provisions, in particular, only apply to proceedings for prescribed sexual offences.

50. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A(1).

51. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A(2).

52. NSW, Director of Public Prosecutions, *Preliminary submission PVI16*, 2.

53. *Sentencing Act 1991* (Vic) s 8K(2).

54. *Sentencing Act 1991* (Vic) s 8Q(3), s 8L(3).

55. *Penalties and Sentences Act 1992* (Qld) s 179M(4).

56. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A(3), s 30A(4); *Criminal Procedure Act 1986* (NSW) s 294B, s 306M definition of “vulnerable person”, ch 6 pt 6 div 4.

57. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A(3A).

58. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A(3C).

## CP Victims' involvement in sentencing

- 5.46 The Royal Commission into Institutional Responses to Child Sexual Abuse in its Criminal Justice Report recommended that state and territory governments “ensure that, as far as reasonably practicable, special measures to assist victims of child sexual abuse offences to give evidence in prosecutions are available for victims when they give a victim impact statement, if they wish to use them.”<sup>59</sup>
- 5.47 Some preliminary submissions support the victim being able to read the VIS by CCTV<sup>60</sup> or pre-recorded video<sup>61</sup> and for having the option to close the court.<sup>62</sup>
- 5.48 One preliminary submission emphasises the feelings of intimidation and trauma that victims experience when reading their statements in court and proposes that victims should be able to choose a person to sit with and support them if they require it.<sup>63</sup>
- 5.49 One preliminary submission also proposes giving victims an opportunity to familiarise themselves with the courtroom before the hearing,<sup>64</sup> noting that “[f]or most [victims] it will be the first time they are in a court room, and it is hugely intimidating.”<sup>65</sup>
- 5.50 Other jurisdictions take a broader approach to the availability and variety of special arrangements and accommodations for victims.
- 5.51 Queensland, for example, allows a person approved by the court to be present while the victim is reading the VIS “to provide emotional support”.<sup>66</sup> Queensland also has provisions for CCTV and screens and permits the court to be closed for the reading of a VIS. These arrangements appear to be available for all victims, subject to the court finding, on its own initiative or on the application of the prosecutor, that the arrangements are appropriate “having regard to all relevant circumstances”.<sup>67</sup>
- 5.52 In SA, the court, if it considers there is good reason to do so, in order to assist a person who wishes to read out a VIS to the court, may “exercise any other powers that it has with regard to a vulnerable witness”.<sup>68</sup> The South Australian provisions allow for special arrangements to be made for vulnerable witnesses where the facilities are available and practicable and can be made without prejudice to any party to the proceedings.<sup>69</sup> The special arrangements can include:
- giving evidence by CCTV
  - prerecording and replaying the evidence
  - the use of screens or one way glass

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59. Royal Commission into Institutional responses to Child Sexual Abuse, *Criminal Justice Report* (2017) 325, rec 78.

60. H Robert, *Preliminary submission PVI10*, 4.

61. Victims and Witnesses of Crime Court Support Inc, *Preliminary submission PVI5*, 3.

62. NSW, Director of Public Prosecutions, *Preliminary submission PVI16*, 4.

63. B Donegan, *Preliminary submission PVI4*, 2. See also Inner City Legal Centre, *Preliminary submission PVI2*, 2.

64. B Donegan, *Preliminary submission PVI4*, 2.

65. B Donegan, *Preliminary submission PVI4*, 2.

66. *Penalties and Sentences Act 1992* (Qld) s 179N(2)(c), s 179N(3).

67. *Penalties and Sentences Act 1992* (Qld) s 179N.

68. *Criminal Law (Sentencing) Act 1988* (SA) s 7A(3a)(b).

69. *Evidence Act 1929* (SA) s 13A(1).

- excluding the defendant from the place where the evidence is given or otherwise preventing the defendant from directly seeing or hearing the vulnerable witness, and/or
- measures to facilitate the giving of evidence including:
  - having a relative, friend or other person to provide emotional support or,
  - where the witness has a physical disability or cognitive impairment, engaging ways of giving evidence that will minimise the witness's embarrassment or distress
  - making extra allowances for breaks and for time to be allocated, and/or
  - having judges and barristers not wear a wig or gown (or both).<sup>70</sup>

5.53 Victoria makes similar provision, but without the pre-recording option.<sup>71</sup>

**Question 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?

*Other considerations*

- 5.54 There may be some limited circumstances where the effect on the offender of reading a VIS in court may need to be taken into account – for example, where the offender is a person with mental illness or a child.
- 5.55 One preliminary submission raises the concern about the potential harm that a victim reading their VIS in court may have on offenders with mental illness.<sup>72</sup>
- 5.56 Another preliminary submission suggests the VIS scheme be amended to account for special considerations for juvenile offenders while still allowing for appropriate victim involvement in sentencing.<sup>73</sup> One case was brought to our attention of a young victim and her mother being excluded from the court during the sentencing and the victim not being allowed to read her VIS in court.<sup>74</sup>
- 5.57 In Queensland, if a person makes a request to read out all or part of a VIS, the court must allow this to occur unless it considers that “having regard to all relevant circumstances, it is inappropriate to do so”.<sup>75</sup> In SA there are provisions to ensure that the offender is present in court or, if this is inappropriate, for the offender to be present by audio/visual link.<sup>76</sup>

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70. *Evidence Act 1929* (SA) s 13A(2).

71. *Sentencing Act 1991* (Vic) s 8R.

72. R Wade, *Preliminary submission PVI7*, 1-2.

73. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PVI15*, 6.

74. NSW, Director of Public Prosecutions, *Preliminary submission PVI16*, 4.

75. *Penalties and Sentences Act 1992* (Qld) s 179M(3).

76. *Criminal Law (Sentencing) Act 1988* (SA) s 7A(3c).

**Question 5.9: Other considerations**

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

**Oral statements**

- 5.58 In NSW, while it is possible for a victim to read out a written VIS in court, a victim or other person may not deliver an oral VIS.
- 5.59 Other jurisdictions allow for oral submission. For example, in Western Australia, a VIS is defined as a “written or oral statement”.<sup>77</sup> In the ACT, a VIS may be made or given “orally in court”.<sup>78</sup>
- 5.60 These jurisdictions do not appear to make provision for the content of a proposed oral VIS to be communicated to the defence. By contrast, in the Northern Territory, when a VIS is delivered orally, a “written or oral summary of the contents of the statement” must be provided to the offender.<sup>79</sup>

**Question 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?

**Making a victim impact statement on behalf of a victim**

- 5.61 In NSW, if a primary victim is incapable of providing information for a VIS, by reason of “age, impairment or otherwise”, one of the following may act on behalf of the victim:
- a person with parental responsibility for the victim
  - a member of the victim’s immediate family, or
  - any other representative, subject to the regulations.<sup>80</sup>

No provision would appear to be made for a family victim who is “incapable of providing information”.

- 5.62 The statement must indicate the name of the representative and the “nature and (unless a relative by blood or marriage) the duration of that person’s relationship to the primary victim”.<sup>81</sup>

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77. *Sentencing Act 1995* (WA) s 25(1).

78. *Crimes (Sentencing) Act 2005* (ACT) s 50(b), s 52(1)(b).

79. *Sentencing Act* (NT) s 106B(8)(b).

80. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30(2).

81. *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 11(5).

- 5.63 One preliminary submission requests clarification that child victims of sexual assault are covered by this provision, whether they meet the “incapable” requirement or not.<sup>82</sup>
- 5.64 Other jurisdictions allow a broader range of people to make a VIS in a broader range of circumstances, not limited to cases where the victim is incapable of providing information.
- 5.65 For example, the ACT allows that the following people may make a VIS (detailing the harm to the victim of the offence):
- (a) a victim of the offence;
  - (b) a person who has parental responsibility for a victim of the offence;
  - (c) a close family member of a victim of the offence;
  - (d) a carer for a victim of the offence; and
  - (e) a person with an intimate personal relationship with a victim of the offence.<sup>83</sup>
- 5.66 Victoria, on the other hand, does not specify who may make a VIS on behalf of a victim but specifies the victims on behalf of whom such a statement may be made:
- A victim impact statement may be made by another person on behalf of a victim—
- (a) who is under the age of 18 years; or
  - (b) who the court is satisfied is incapable of making the statement because of mental illness or for any other reason; or
  - (c) that is not an individual.<sup>84</sup>
- 5.67 In WA, if a victim is “personally incapable” of giving a VIS, another person may give the VIS on the victim's behalf, but only if the court is satisfied that it is appropriate to do so.<sup>85</sup>

**Question 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?

## Cross-examination and re-examination

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- 5.68 There is no express provision about cross-examination or re-examination of a person who has made a VIS. Insofar as a VIS provides evidence that is relevant to the sentencing process, cross-examination and re-examination of the author of a

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82. NSW, Director of Public Prosecutions, *Preliminary submission PVI16*, 2.

83. *Crimes (Sentencing) Act 2005* (ACT) s 49.

84. *Sentencing Act 1991* (Vic) s 8K(3).

85. *Sentencing Act 1995* (WA) s 24(2).

VIS would appear to be a theoretical possibility. This possibility may be preserved at least with respect to a family victim VIS by a provision that states that the use of a family victim VIS to determine punishment “does not affect the application of the law of evidence in proceedings relating to sentencing”.<sup>86</sup> However, we understand that cross-examination is not happening in practice. Indeed, it would appear that even if the question of cross-examination is raised, defence counsel have declined the opportunity.<sup>87</sup>

- 5.69 The CCA has observed on a number of occasions that the scheme does not envisage cross-examination of victims on the contents of their VISs.<sup>88</sup> The situation may, however, be different if an “expert” rather than the victim were to author a VIS.<sup>89</sup>
- 5.70 Cross-examination is a particular concern, because it may undermine the therapeutic aims of allowing victims to make VISs, and may cause further significant distress and trauma to victims, particularly in cases involving sexual offences, violent offences and domestic violence. Preliminary submissions took a variety of approaches to these concerns.
- 5.71 One preliminary submission calls for “robust protection for victims, while still affording the offender a degree of procedural fairness”. It suggests that the rights of the offender to a fair trial can be adequately balanced against victims’ needs by limiting the scope of objections to submissions about the weight to be attributed to a VIS, therefore preventing the need to cross-examine the author of the VIS.<sup>90</sup>
- 5.72 Another option is to exclude the possibility of cross-examination altogether.<sup>91</sup> One submission observed:
- Given that the victim impact statement is about the victim’s experience and their perceptions of how the crime affected them, it would seem redundant and potentially unnecessarily traumatising for victims to be cross-examined on their statements. In sentencing the Courts are well aware of what is and what is not relevant.<sup>92</sup>
- 5.73 It may also be necessary to ensure that the restrictions on a sexual offender cross-examining the victim<sup>93</sup> apply in the sentencing proceedings.
- 5.74 Other jurisdictions have a variety of different express provisions relating to the examination of those who have made a VIS.
- 5.75 The Northern Territory allows a legal practitioner to cross-examine a person who signed a VIS or who presented a VIS orally in court, but only allows the offender to do so with the leave of the court.<sup>94</sup>

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86. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(4A).

87. See, eg, *Wilmot v R* [2007] NSWCCA 30, 169 A Crim R 280 [29].

88. See, eg, *Muggleton v R* [2015] NSWCCA 62, 250 A Crim R 180 [44]; *R v MJB* [2014] NSWCCA 195 [50].

89. *Muggleton v R* [2015] NSWCCA 62, 250 A Crim R 180 [44].

90. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PVI15*, 4-5.

91. Inner City Legal Centre, *Preliminary submission PVI2*, 2.

92. Bravehearts Foundation Ltd, *Preliminary submission PVI11*, 3.

93. *Criminal Procedure Act 1986* (NSW) s 294B.

94. *Sentencing Act* (NT) s 106B(9).

- 5.76 The ACT allows the defence to cross-examine the person who makes a VIS. However, if the offender is not legally represented, cross-examination is only possible if the offender “has indicated to the court the nature of the proposed cross-examination” and the court gives the offender leave.<sup>95</sup>
- 5.77 In Victoria, the court may, if the offender or prosecutor requests it, call a person who has made a VIS to give evidence and that person may be cross-examined and re-examined.<sup>96</sup> However, a Victim Support Agency survey of judges and magistrates in that jurisdiction found that 98% of judges and magistrates said that such cross-examination “almost never or never happened and that when it did, it was usually because irrelevant or inflammatory material had been included in the VIS”.<sup>97</sup>
- 5.78 Victoria makes special provision for the court to direct that alternative arrangements be put in place if a person who has made a VIS is to be cross-examined. These include allowing the use of CCTV, screens, supporters, and closed courts, as well as requiring legal practitioners to sit or not to wear robes while cross-examining the person.<sup>98</sup>
- 5.79 In Tasmania, if the offender challenges the truth of any information received by the court before sentencing, the court may require that information be proved as though it had been received at a trial.<sup>99</sup> This presumably extends to cross examination of the content of a VIS.

**Question 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?

## Use of victim impact statements outside of a sentencing hearing

- 5.80 A court may decide to make a VIS available to the prosecutor, the offender, or anyone on conditions “as it considers appropriate”. However, one of the conditions must be a condition that prevents the offender from retaining copies of the VIS.<sup>100</sup>
- 5.81 However, generally, the contents of a VIS are made public when victims read them in open court or when the judge refers to them in remarks on sentencing. The VIS is also retained on the court file and may, subject to conditions, be accessed there. There is a warning to this effect in the *Victim Impact Statement Information Package*:

The media may gain access to the victim impact statement through the court registry and may report on the contents of the victim impact statement that is read out or referred to in court.<sup>101</sup>

95. *Crimes (Sentencing) Act 2005* (ACT) s 53(3)-(4).

96. *Sentencing Act 1991* (Vic) s 8O.

97. Victoria, Department of Justice, Victims Support Agency, *A Victim's Voice: Victim Impact Statements in Victoria* (2009) 73.

98. *Sentencing Act 1991* (Vic) s 8S.

99. *Sentencing Act 1997* (Tas) s 81(4).

100. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(5).

## CP Victims' involvement in sentencing

- 5.82 A VIS may also be available to Corrective Services case managers as relevant information. A VIS may also be used in immigration and family law proceedings.
- 5.83 These avenues for publication and distribution of information contained in a VIS give rise to privacy concerns, for example, for victims of sexual offences, especially child victims and adults who were victims of sexual offences when they were children.
- 5.84 The DPP proposes that a VIS should be treated as sensitive evidence in accordance with the *Criminal Procedure Act 1986* (NSW).<sup>102</sup> This would prevent the offender from receiving a copy of a VIS from the prosecution, but would allow the offender to request access to the VIS, subject to conditions to prevent reproduction or circulation. The relevant provisions also include an offence of improper copying or circulation of sensitive evidence.<sup>103</sup>
- 5.85 In support of this proposal, the DPP observes:
- VISs are very personal documents and all that can be done to prevent re-victimisation of the victim and the misuse of their VIS should be done. If a VIS is served on the Defence prior to the sentencing proceedings, protections should be in place to govern how the VIS is dealt with by the Defence and to whom access is given.<sup>104</sup>
- 5.86 The VLRC considered the question of the dissemination of the contents of a VIS beyond the sentencing hearing, but recommended no change to the existing arrangements in Victoria on the basis that the “current mechanisms for ensuring non-disclosure are adequate”.<sup>105</sup> The VLRC noted that victims who did not want parts of their VIS to be referred to by the judge could convey this request to the court, but provided no evidence of the operation of such a practice.<sup>106</sup>

### Question 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?

## Responding to victims in proceedings

- 5.87 Victims and Witnesses of Crime Court Support (VWCCS) states that “sentencing procedure should attempt to return power and respect back to the victim” through, for instance, “the Bench confirming the integrity, courage and dignity shown by the victim throughout the trial and/or during their evidence and cross-examination and in presenting their Victim Impact Statement (VIS) to the court”. In particular, VWCCS

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101. NSW, Department of Justice, Victims Services, *Victim Impact Statement Information Package* (2017) 6.

102. NSW, Director of Public Prosecutions, *Preliminary submission PVI16*, 4.

103. *Criminal Procedure Act 1986* (NSW) ch 6 pt 2A.

104. NSW, Director of Public Prosecutions, *Preliminary submission PVI16*, 4.

105. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [8.166].

106. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [8.164].



stresses the impact the judiciary's actions can have on a victim's "healing journey".<sup>107</sup>

5.88 VWCCS suggests that best practices for the judiciary in dealing with victims in sentencing should be developed to better meet victims' needs, including that the Court:

- acknowledges the victim's presence in the court;<sup>108</sup>
- thanks both victims and witnesses for their participation in court, acknowledging "the important role they have played in the process of justice," as well as that the court "appreciates the difficulties involved in coming forward in the justice system, giving evidence/information about an offence, and providing details of the impact of these offences".<sup>109</sup>

5.89 The VLRC similarly supported the provision of guidance material to the judiciary "to ensure that victims' interactions with judicial officers and lawyers in the courtroom are respectful."<sup>110</sup> The VLRC asserts that such guidance material should include:

- How to refer appropriately to victims who have been killed as a result of a crime, and specifically, avoiding the practice of referring to them as "the deceased".
- Acknowledging the victim's presence in the courtroom.
- Explicitly ensuring victims are aware of what is happening in the proceedings.
- Using sensitive and compassionate language.
- Allowing victims to express emotions in the courtroom (where doing so does not prejudice the jury against the accused).
- In the context of sentencing proceedings, confirming that victims understand the full circumstances of the offending and taking the time to clarify the principles of sentencing.<sup>111</sup>

#### Question 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?

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107. Victims and Witnesses of Crime Court Support Inc, *Preliminary submission PVI5*, 2.

108. Victims and Witnesses of Crime Court Support Inc, *Preliminary submission PVI5*, 2.

109. Victims and Witnesses of Crime Court Support Inc, *Preliminary submission PVI5*, 2.

110. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [5.33] (references omitted).

111. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) Preface, 92, citing Submission 9 (Associate Professor Tracey Booth); Consultation 35 (Parent of a victim).



## 6. Restorative justice practices in NSW

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### In brief

Restorative justice practices may also provide victims with a way to be involved before, during and after the sentencing hearing. NSW already has some programs, however they are not widely used. We consider the existing procedures and protections as they apply to victims.

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- 6.1 In addition to victim impact statements, “restorative justice” practices are sometimes used as a way of involving victims in the criminal justice process.
- 6.2 Restorative justice has been described as “a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future”.<sup>1</sup> Restorative justice practices encompass a wide range of processes that focus on reparation for the victim and broader community and the reintegration of the offender into the community. The participation of victims, offenders and other stakeholders affected by an offence is an important part of the restorative justice approach.<sup>2</sup> For example, restorative justice can involve victims and community members talking face to face with an offender about the impact of their crime.
- 6.3 The potential value of a restorative justice approach is to meet victim needs that are not otherwise met by the criminal justice system. The Tasmanian Sentencing Advisory Council in its report on sentencing driving offences that result in death or injury recently noted:

there are limits in the capacity of the conventional criminal justice system to respond to those who have suffered serious injury or to those whose relative has died in a motor vehicle crash. There are unmet needs of victims, particularly in the relation to cases heard in the Magistrates Court and the Council’s view is

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1. TE Marshall, *Restorative Justice: An Overview* (HMSO, 1999) 5.  
2. J Doak, *Victims’ Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart, 2008) 255.

that restorative justice practices may be able to assist in closing the “healing gap” for some families and victims.<sup>3</sup>

6.4 The NSW Law Reform Commission (“NSWLRC”) notes that restorative justice practices may theoretically occur at three stages in the criminal justice system:

- before trial, often as part of a police cautioning power, as a diversion scheme or alternative to prosecution;
- as part of the sentencing process, as an assistance to the court in determining an appropriate sentence; and
- after sentencing, on occasions when victims and offenders desire reconciliation, compensation or some form of future contact.<sup>4</sup>

6.5 We describe specific forms of restorative justice used in NSW below.<sup>5</sup>

### Benefits of restorative justice models for victims

6.6 Restorative justice practices may offer victims a “more meaningful and inclusive way” to participate in the criminal justice process, including “more effective means of conveying their story and the impact of the offending”.<sup>6</sup>

6.7 Victims can participate more substantially in restorative justice practices than they can in a criminal trial, and can be empowered by “the opportunity ... to confront offenders with their account of the impact of the crime”.<sup>7</sup>

6.8 The Centre for Innovative Justice has identified the following benefits associated with restorative justice conferencing:<sup>8</sup>

Benefits for the Victim	Benefits for the Offender
Opportunity to be directly involved in the justice process.	Opportunity to take responsibility for the offending by understanding the full effect that the offending had on the victim.
Opportunity to tell the offender directly the impact the offending has had.	Opportunity to apologise.
Opportunity to receive answers in relation to unresolved questions about the offending.	Opportunity to repair relationships, where appropriate, with the victim, family and broader community
Opportunity to resolve relationships with the offender, family	Opportunity to engage in treatment and rehabilitation and

3. Tasmania, Sentencing Advisory Council, *Sentencing of Driving Offences that Result in Death or Injury*, Final Report 8 (2017) 119.

4. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [12.2].

5. [6.11]-[6.21].

6. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.237]. See also H Strang, *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press, 2002) 50-52; T Van Camp and J Wemmers, “Victim Satisfaction with Restorative Justice: More Than Simply Procedural Justice” (2013) 19 *International Review of Victimology* 117,124-125, 136.

7. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [12.6].

8. Tasmania, Sentencing Advisory Council, *Sentencing of Driving Offences that Result in Death or Injury*, Final Report 8 (2017) 115, citing RMIT University, Centre for Innovative Justice, *Restorative Justice Conferencing Pilot Program*, Background Paper (2016) 2–3.

or the broader community, where appropriate.	to avoid future offending.
Opportunity to have input into the outcome, including an opportunity to request compensation without needing to go through a formal court process	Opportunity to make amends by agreeing to the outcomes sought by the victim.

- 6.9 Preliminary submissions to this review also highlight the positive role of existing restorative justice practices in NSW,<sup>9</sup> noting that such practices:
- increase “victim participation and satisfaction”<sup>10</sup>
  - reduce victims’ “levels of fear and anger towards the offender”,<sup>11</sup> and
  - “give offenders an opportunity to understand and address their behaviour”.<sup>12</sup>
- 6.10 However, one preliminary submission also notes that, in practice, victims and offenders are often reluctant to participate in restorative justice practices, particularly in cases where the offender is an adult.<sup>13</sup>

## Restorative justice practices in NSW

- 6.11 In NSW, any Court (except the Children’s Court) may order a person accused or convicted of an offence to participate in an intervention program after a conviction of guilt but before sentencing, or as a condition of sentencing or a good behaviour bond.<sup>14</sup>
- 6.12 While courts may theoretically order restorative justice practices at any stage, NSW has statutory provisions in the Local Court and the Children’s Court that specifically enable a court to use restorative justice practices before sentencing in order to inform sentencing, or after sentencing as a supplementary process.

## Pre-sentence restorative justice provisions

### *Forum Sentencing*

- 6.13 Forum Sentencing is a conference that the offender, victim(s) and their support persons and representatives attend.<sup>15</sup> A Forum Sentencing conference can only be held in relation to “eligible” offenders,<sup>16</sup> and at least one victim must have agreed to participate.<sup>17</sup>

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9. Legal Aid NSW, *Preliminary submission PVI1*, 2; Women’s Justice Network, *Preliminary submission PVI13*, 4-5; Enough is Enough Anti Violence Movement Inc, *Preliminary submission PVI8*, 1.

10. Women’s Justice Network, *Preliminary submission PVI13*, 4.

11. Women’s Justice Network, *Preliminary submission PVI13*, 4.

12. Enough is Enough Anti Violence Movement Inc, *Preliminary submission PVI8*, 1.

13. Women’s Justice Network, *Preliminary submission PVI13*, 5.

14. *Criminal Procedure Act 1986* (NSW) pt 4.

15. *Criminal Procedure Regulation 2017* (NSW) cl 77, cl 78.

16. *Criminal Procedure Regulation 2017* (NSW) cl 70. See also [6.31]-[6.40].

17. *Criminal Procedure Regulation 2017* (NSW) cl 70(e). See also [6.44]-[6.46].

## CP Victims' involvement in sentencing

- 6.14 A facilitator leads discussion,<sup>18</sup> and, participants are encouraged to agree to appropriate recommendations about the offender and draft an “intervention plan” based on those recommendations.<sup>19</sup> The plan may require, for example, that the offender apologise and make some form of reparation to the victim, such as a monetary payment or a commitment to undertake voluntary work for the victim or community.<sup>20</sup> The plan should reflect the consensus of the participants, if possible.<sup>21</sup> A victim who is invited to attend the conference but is unable or declines to do so may inform the facilitator of their views. The forum facilitator must make these views available to the participants.<sup>22</sup> Both the offender and any victims that attend the conference have a right of veto with respect to the whole of a draft intervention plan, or to any proposed recommendation.<sup>23</sup> The court may then approve the draft intervention plan and make it an “intervention plan order”.<sup>24</sup> If the court approves the draft intervention plan, the court may adjourn sentencing proceedings to allow the offender to complete it. The court may then take into account, the successful completion of the plan when sentencing the offender.<sup>25</sup> Alternatively, if the court approves the plan, it may proceed directly to impose a good behaviour bond, dismiss charges, discharge the offender on conditions or impose a suspended sentence.<sup>26</sup>
- 6.15 If the offender fails to complete a plan satisfactorily, the offender may be required to go back to court for the court to sentence the offender.<sup>27</sup>

### Circle sentencing

- 6.16 Circle sentencing is a restorative justice process available to eligible Aboriginal people who plead guilty or are found guilty of an offence and who have significant ties to their community.<sup>28</sup> Rather than a facilitator, a magistrate presides over the circle sentencing group<sup>29</sup>, which may consist of the offender and the legal representative, the prosecutor, at least three Aboriginal people from the Aboriginal community that the offender has a close association or kinship with, and the victim. The group determines an intervention plan for the offender, which may include treatment or rehabilitation.<sup>30</sup> The offender must comply with the intervention plan determined by the circle sentencing group.<sup>31</sup>

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18. *Criminal Procedure Regulation 2017* (NSW) cl 81.

19. *Criminal Procedure Regulation 2017* (NSW) cl 62(1)(i).

20. *Criminal Procedure Regulation 2017* (NSW) cl 84(2)(a)-(b). See also NSW Department of Justice, *Forum Sentencing for Victims – The Conference* <[http://www.forumsentencing.justice.nsw.gov.au/Pages/forumsentencing/forum-sentencing-victims/victims\\_conference.aspx](http://www.forumsentencing.justice.nsw.gov.au/Pages/forumsentencing/forum-sentencing-victims/victims_conference.aspx)> (retrieved 11 September 2017).

21. *Criminal Procedure Regulation 2017* (NSW) cl 84(4).

22. *Criminal Procedure Regulation 2017* (NSW) cl 80.

23. *Criminal Procedure Regulation 2017* (NSW) cl 84(5)-(6).

24. *Criminal Procedure Regulation 2017* (NSW) cl 62(1)(j).

25. Local Court Practice Note Crim 1, *Case management of criminal proceedings in the local court* (2017) 21. See also *Crimes Sentencing Procedure Act 1999* (NSW) s 11(1)(b2).

26. Local Court Practice Note Crim 1, *Case management of criminal proceedings in the local court* (2017) 21. See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9, s 10, s 12, s 95A.

27. *Criminal Procedure Regulation 2017* (NSW) cl 62(1)(l).

28. *Criminal Procedure Regulation 2017* (NSW) cl 40.

29. *Criminal Procedure Regulation 2017* (NSW) cl 34(1)(f).

30. *Criminal Procedure Regulation 2017* (NSW) cl 41(c)(i).

31. *Criminal Procedure Regulation 2017* (NSW) cl 34(1)(f)-(g).

- 6.17 The circle sentencing group may also make a recommendation as to the appropriate sentence for the offender.<sup>32</sup> The court may impose the sentence recommended by the circle sentencing group, if it agrees with the consensus of the group. If an offender fails to participate in circle sentencing or to comply with an intervention plan, the offender may be returned to the court for sentencing.<sup>33</sup>

### *Youth Justice Conferences*

- 6.18 In the Children’s Court, a child accused of an offence may have their matter diverted before sentence to a “Youth Justice Conference” by either the Director of Public Prosecutions (“DPP”) or the court. This can happen where the child admits the offence, consents to the conference, and is entitled to have their matter diverted to a conference.<sup>34</sup>
- 6.19 The conference operates in a broadly similar way to forum sentencing and circle sentencing conferences, however, in addition to the court, the DPP also has the power to refer a young person to Youth Justice Conference.<sup>35</sup> The participants draft an outcome plan, which may similarly include an apology or reparation to the victim.<sup>36</sup> It might also require, for example, that the young person participates in a counselling, rehabilitation or educative program.<sup>37</sup> If possible, the conference participants should agree to the outcome plan by consensus.<sup>38</sup> An agreed outcome plan is referred to the court, which may either approve the plan or recommence proceedings.<sup>39</sup>
- 6.20 Alternatively, a matter in the Children’s Court may be diverted altogether from the criminal trial process through the use of a warning or caution.<sup>40</sup>
- 6.21 These practices in the Children’s Court aim to “divert young people away from formal court processes and to encourage them to take responsibility for their offending, while meeting the needs of victims and emphasising restitution by the offender and the offender accepting responsibility for their behaviour”.<sup>41</sup>

### *Concerns about pre-sentence restorative justice practices*

- 6.22 Some commentators have expressed concern about the use of restorative justice practices as part of the sentencing process. These concerns include “that procedural safeguards and rights which are available under the traditional criminal justice system may not be available under the alternative schemes, which may also be less open to scrutiny, accountability and review”.<sup>42</sup> Additionally, where

32. *Criminal Procedure Regulation 2017* (NSW) cl 44(b), cl 41(v)(ii).

33. *Criminal Procedure Regulation 2017* (NSW) cl 34(1)(g).

34. *Young Offenders Act 1997* (NSW) s 36, s 40. The child’s entitlement to have their matter deferred to a conference is determined in accordance with factors in s 37. A conference can only be held where the young person commits a relevant offence, discussed below at [6.33].

35. *Young Offenders Act 1997* (NSW) s 40.

36. *Young Offenders Act 1997* (NSW) s 52(5)(a)-(b).

37. *Young Offenders Act 1997* (NSW) s 52(5A).

38. *Young Offenders Act 1997* (NSW) s 52(1), s 52(3).

39. *Young Offenders Act 1997* (NSW) s 54.

40. *Young Offenders Act 1997* (NSW) pt 3, pt 4.

41. The Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) 429; *Young Offenders Act 1997* (NSW) s 3.

42. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [12.7].

restorative justice practices are used prior to sentencing, the offender “may participate for disingenuous reasons, such as to have their sentence reduced”.<sup>43</sup>

- 6.23 Concerns have also been raised about the effectiveness of restorative justice practices.
- 6.24 A study published in 2013 found “no evidence that offenders who are referred to the NSW Forum Sentencing program are less likely to re-offend than similar offenders who are dealt with through the normal sentencing process”.<sup>44</sup>
- 6.25 An earlier study on the rate of reoffending for those that participated in Youth Justice Conferences, found this scheme to be more effective, finding that only 58% of young people participating in Youth Justice Conferences reoffended within five years, as compared to a study that found 68% of young people reappeared at least once in a criminal court within a period of eight years, “prior to the availability of diversionary options”.<sup>45</sup>

### Post-sentence restorative justice practices

- 6.26 NSW also provides for post-sentencing restorative justice practices that supplement the criminal justice process.
- 6.27 Since 1999, Corrective Services NSW's Restorative Justice Unit has provided post-sentencing victim offender conferences to “address unmet needs and legislated rights of victims of crime”.<sup>46</sup> The Restorative Justice Unit can facilitate various restorative practices, but specialises in the victim offender conference: a practice where the victim and the offender “talk about what happened, how people have been affected and what can be done to make things better”.<sup>47</sup> Victim offender conferences can only be arranged for adult offenders, but can include offenders who have been convicted of a broad range of offences. Conferences most commonly relate to situations where there has been “significant harm, very high-level trauma and often chronic post-traumatic stress certainly for the victim and sometimes for the offender also”.<sup>48</sup>
- 6.28 Victim offender conferences are initiated by a referral from the victim, offender, or parties acting on their behalf, such as victim support groups, counsellors, and prison psychologists.<sup>49</sup> However, victim offender conferences can only occur where both

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43. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.296].

44. S Poynton, *Rates of recidivism among offenders referred to Forum Sentencing*, Crime and Justice Bulletin No 172 (NSW Bureau of Crime Statistics and Research, 2013) 21.

45. S Vignaendra and J Fitzgerald, *Reoffending among young people cautioned by police or who participated in youth justice conference*, Crime and Justice Bulletin No 103 (NSW Bureau of Crime Statistics and Research, 2006) 1; S Chen and others, *The transition from juvenile to adult criminal careers*, Crime and Justice Bulletin No 86 (NSW Bureau of Crime Statistics and Research, 2005).

46. Corrective Services NSW, *Victim Support*, <http://www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/support-families-community/victims.aspx> (retrieved 6 September 2017).

47. Corrective Services NSW, *Victim Support*, [www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/support-families-community/victims.aspx](http://www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/support-families-community/victims.aspx) (retrieved 6 September 2017).

48. J Bolitho, “Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice” (2015) 3 *Restorative Justice* 256, 261-262.

49. J Bolitho, “Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice” (2015) 3 *Restorative Justice* 256, 261.



parties consent to the conference, and the offender admits responsibility for the offence. Additionally, the Restorative Justice Unit undertakes a “robust assessment process” to determine the parties’ suitability for conference, taking account of safety issues and the need to prevent further harm to the victim.<sup>50</sup>

- 6.29 Victim offender conferences can be a positive experience for victims. Corrective Services NSW notes:

Participating in a process focussed on their needs, people who are victims of crime can empower themselves and move forward: having a voice, asking questions, expressing how they have been affected, holding the offender accountable and having a say on how the harm can be repaired.<sup>51</sup>

- 6.30 An empirical study on the outcomes of victim offender conferences facilitated by Corrective Services NSW between 1999-2013 found that 95% of participants considered their experiences “positive”, meaning the participant “was comfortable with their decision to take part, was satisfied with the process, would recommend it to others in akin situations, and had their expectations met (or exceeded)”.<sup>52</sup>

#### 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?

### Relevant offences

- 6.31 In NSW, restorative justice practices in all courts (except the Children’s Court) may only be ordered for summary offences and indictable offences that may be dealt with summarily.<sup>53</sup> The provisions expressly exclude the use of restorative justice practices for specified offences involving reckless grievous bodily harm or wounding, rape, sexual assault, child prostitution, child pornography, stalking or intimidation, offences involving firearms, the supply of prohibited drugs, and indictable offences remitted to the Children’s Court to be tried summarily.<sup>54</sup>
- 6.32 In addition to the excluded offences listed above, Forum Sentencing in the Local Court may not be ordered for offenders convicted of murder, manslaughter, a serious weapons offence, or for specified offences relating to domestic violence, personal violence, assault of police officers, riot, prohibited drugs and traffic offences.<sup>55</sup>

50. J Bolitho, “Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice” (2015) 3 *Restorative Justice* 256, 262-263.

51. Corrective Services NSW, *Victim Support*, <http://www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/support-families-community/victims.aspx> (retrieved 6 September 2017).

52. J Bolitho, “Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice” (2015) 3 *Restorative Justice* 256, 270.

53. *Criminal Procedure Act 1986* (NSW) s 348(1).

54. *Criminal Procedure Act 1986* (NSW) s 348(2), s 349.

55. *Criminal Procedure Regulation 2017* (NSW) cl 59(2), cl 70(2).

- 6.33 The Children's Court or the DPP may refer a child accused of either a summary offence, or an indictable offence being dealt with summarily, to a Youth Justice Conference. However, the provisions expressly exclude offences that result in the death of a person, specified domestic and personal violence offences, specified drug offences, specified traffic offences, specified offences of indecency and assault, and specified sexual offences.<sup>56</sup> A small number of summary sexual offences are eligible for Youth Justice Conferences.<sup>57</sup>
- 6.34 The Royal Commission into Institutional Responses to Child Sexual Abuse in its *Criminal Justice Report* notes that:
- It seems clear that some children who may have committed child sexual abuse offences should be diverted from the criminal justice system...
- At present, we have no evidence to suggest that one approach is better than the other. We also have no evidence to suggest that children who have committed child sexual abuse offences are being prosecuted through the criminal justice system in circumstances where they should be diverted from it.
- ... we do not recommend any reforms in relation to these issues.<sup>58</sup>
- 6.35 Last year the Victorian Law Reform Commission ("VLRC") recommended that the Victorian Government establish a statutory scheme allowing the court to refer indictable offences to restorative justice conferences, as a supplement to the criminal trial process.<sup>59</sup> The VLRC in its report noted that restorative justice would be most appropriate for use in serious indictable offences:
- where a decision is made by the DPP to discontinue a prosecution
  - after a guilty plea and before sentencing in the Supreme or County Court, [and]
  - after a guilty plea and in connection with an application for compensation or restitution orders by a victim in the Supreme or County Court (which may occur after sentencing).<sup>60</sup>
- 6.36 The VLRC recommended that this model be initially restricted to "offences that do not involve sexual violence and family violence and be extended to sexual violence and family violence offences at a later stage".<sup>61</sup> While the VLRC acknowledged concerns regarding "the use of restorative justice to respond to serious violent offending, particularly sexual and family violence", it decided that some of these

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56. *Young Offenders Act 1997* (NSW) s 8, s 35. See Australia, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) 428. See also T Kirchengast, *Victims and the Criminal Trial* (Palgrave, 2016) 96.

57. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) 428.

58. Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) 443.

59. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.251], rec 32-36.

60. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.279].

61. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) rec 34.

concerns could be ameliorated “if restorative justice is understood as having a supplementary role in cases of serious offending, not a diversionary role”.<sup>62</sup>

- 6.37 In the ACT, legislation provides for the use of restorative justice for:
- “serious offences” committed by either an adult or young offender where the offender either pleads guilty or is found guilty.<sup>63</sup> A “serious offence” includes offences punishable by imprisonment for longer than 14 years (for offences relating to money or other property) or 10 years (for all other cases), and
  - “less serious offences” committed by either an adult or young offender,<sup>64</sup> which include all offences that are not serious offences.
- 6.38 The ACT also allows the use of restorative justice for the following offences, from a day declared by the Minister:<sup>65</sup>
- a “less serious” family violence or sexual offences committed by either an adult or young offender,<sup>66</sup> and
  - a “serious family violence offence or a serious sexual offence committed by a young offender or an adult ... if the offender pleads guilty ... or ... is found guilty of the offence”.<sup>67</sup>
- 6.39 The Tasmanian Sentencing Advisory Council in its report on driving offences that result in death or injury, recommended further exploration of “the development of a pilot restorative justice program for the offences of negligent driving causing death and negligent driving causing grievous bodily harm”.<sup>68</sup> Similarly to the VLRC, the Sentencing Advisory Council concluded that restorative justice practices should only supplement the criminal justice system, rather than be a diversion from it.<sup>69</sup>
- 6.40 As discussed above, an empirical study on the outcomes of victim offender conferences facilitated by Corrective Services NSW between 1999-2013 concluded:
- it is possible to safely and usefully practice a victim-oriented [restorative justice] process for adult offenders convicted of crimes including murder, manslaughter, driving offences leading to death, and sexual offences ... [There] is strong empirical evidence that it is possible to consistently offer a safe restorative encounter in the form of [victim offender conference] after serious crime, and that this encounter consistently provides victims, offenders and their loved ones, with a different and deeper sense of justice.<sup>70</sup>

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62. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.249]-[7.250].

63. *Crimes (Restorative Justice) Act 2004* (ACT) s 15(1).

64. *Crimes (Restorative Justice) Act 2004* (ACT) s 12 definition of “serious offence”, definition of “less serious offence”, s 14(1).

65. *Crimes (Restorative Justice) Act 2004* (ACT) s 16(4)-(5).

66. *Crimes (Restorative Justice) Act 2004* (ACT) s 16(1)-(2).

67. *Crimes (Restorative Justice) Act 2004* (ACT) s 16(3).

68. Tasmania, Sentencing Advisory Council, *Sentencing of Driving Offences that Result in Death or Injury*, Final Report 8 (2017) rec 2, 119-120.

69. Tasmania, Sentencing Advisory Council, *Sentencing of Driving Offences that Result in Death or Injury*, Final Report 8 (2017) 120.

70. J Bolitho, “Putting Justice Needs First: A Case Study of Best Practice in Restorative Justice” (2015) 3 *Restorative Justice* 256, 274.

**Question 6.2 Relevant offences**

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

**Attendance and participation**

- 6.41 Forum Sentencing conferences in NSW may be attended by the offender, any victim that consents to participation or their representative, the forum facilitator, the offender's legal representative, supporters for the offender and the victim,<sup>71</sup> and others as invited by the facilitator.<sup>72</sup>
- 6.42 A circle sentencing group is comprised of the magistrate, the offender and their legal representatives, the prosecutor and at least three members of the Aboriginal community of which the offender claims to be part or with which the offender claims to have a close association or kinship. The circle sentencing group may also include the victim, and supporters for the both the victim and the offender.<sup>73</sup>
- 6.43 Youth Justice Conferences may be attended by the child that is the subject of the conference and their legal representative, the conference convener, the person responsible for the child, members of the child's family, an adult chosen by the child, the investigating official, a specialist youth officer, the victim or their representative and a support person for the victim.<sup>74</sup>

**Victim involvement**

- 6.44 All statutory restorative justice models in NSW allow a victim to participate actively. For example, Forum Sentencing cannot proceed without at least one victim's agreement to participate.<sup>75</sup>
- 6.45 Where victims agree to participate in circle sentencing, they are given an opportunity "in their own voice and their own time" to express their views about the offender and the nature of the offence and give views on sentencing and punishment.<sup>76</sup>
- 6.46 A victim's involvement in Youth Justice Conferences is similarly significant. One commentator notes:

[The conference] will often centre on the harm occasioned the victim, whether or not they are in attendance. The victim may seek to explain the harm caused to them from their perspective, as an elaboration of the agreed facts. The consequences of the offence for the victim, ongoing harm and trauma, will also be put to the conference. Often the victim will seek a further explanation as to why the offender committed the offence and why they were chosen as the victim

71. *Criminal Procedure Regulation 2017* (NSW) cl 77(1).

72. *Criminal Procedure Regulation 2017* (NSW) cl 77(2), 77(3). The Regulation requires the facilitator consult with or obtain the consent of the victim and the offender.

73. *Criminal Procedure Regulation 2017* (NSW) cl 43(1)-(2).

74. *Young Offenders Act 1997* (NSW) s 47(1).

75. *Criminal Procedure Regulation 2017* (NSW) cl 62(1)(d)-(e).

76. *Criminal Procedure Regulation 2017* (NSW) cl 47; T Booth and K Carrington, "A Comparative Analysis of the Victim Policies across the Anglo-speaking World" in S Walklate (ed) *Handbook of Victims and Victimology* (Willan, 2007) 407.

of the offence. Victims may also value the conference because it is an opportunity to actually see the offender in a more personable context, to hear what the offender has to say about their offending, and the context of the offending in the life of the offender. ....

The opportunity to meet the victim and allow the victim to speak informally about the harm that has occurred to them is an important aspect of the conference and allows the offender to see the real consequences of their offending in a way that is generally removed or hidden by the formality of court appearances, and the need to act through counsel. The development of an outcome plan through agreement between conference participants is also an important outcome that allows harm to be repaired through consensus.<sup>77</sup>

### Question 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?

## Procedural Safeguards

- 6.47 In 2002, the UN adopted the *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*.<sup>78</sup> These Principles highlight the need for several procedural safeguards in the use of restorative justice conferences, including:
- the “free and voluntary consent” of all parties, being “fully informed of their rights, the nature of the process and the possible consequences of their decision”
  - the right of the parties to “consult with legal counsel concerning the restorative process”
  - the right for children to have parental assistance, and
  - that communications in restorative processes are confidential and not disclosed unless the parties agree.<sup>79</sup>
- 6.48 The VLRC has recommended that free and informed consent be a statutory prerequisite for participation in restorative justice processes for serious indictable offences. The VLRC also emphasised the need for “robust procedures” to assess whether each case is suitable “in view of the unique circumstances and individuals”.<sup>80</sup>

77. T Kirchengast, *Victims and the Criminal Trial* (Palgrave, 2016) 100-101.

78. *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ESC Res 2002/12, 37th plen mtg, (24 July 2002).

79. *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ESC Res 2002/12, 37th plen mtg, (24 July 2002) art 7, art 13(a), art 13(b), art 14.

80. Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process*, Report (2016) [7.311]-[7.313].

## CP Victims' involvement in sentencing

- 6.49 The NSW provisions for Forum Sentencing and circle sentencing allow for the consent of the parties and a suitability assessment.<sup>81</sup> While the provisions include an express right to legal representation for the offender, the victim is limited to a “representative” or “support person”.<sup>82</sup>
- 6.50 Both Forum Sentencing and circle sentencing protect the confidentiality of the proceedings and prevent statements made during the proceedings from being admissible in subsequent civil or criminal proceedings.<sup>83</sup> Further, there is no requirement that offenders and victims be fully informed of their rights, the nature of the process and the possible consequences of their decision prior to giving consent to participation.<sup>84</sup>

### Question 6.4 Procedural safeguards

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

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81. *Criminal Procedure Regulation 2017* (NSW) cl 34(1)(a)-(c), cl 34(1)(e), cl 36, cl 40(d), cl 41(a), cl 62(1), cl 64, cl 65, cl 67, cl 71(a).

82. *Criminal Procedure Regulation 2017* (NSW) cl 43, cl 77.

83. *Criminal Procedure Regulation 2017* (NSW) cl 57, cl 58, cl 94, cl 95.

84. *Criminal Procedure Regulation 2017* (NSW) cl 34(e), cl 41(a), cl 62(1), cl 71(a), cl 76(3).

## Appendix A: Preliminary submissions

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- PVI01 Seppy Pour, 14 June 2017
- PVI02 Inner City Legal Centre, 19 June 2017
- PVI03 Chief Magistrate of the Local Court (NSW), 6 July 2017
- PVI04 Brodie Donegan, 30 July 2017
- PVI05 Victims and Witnesses of Crime Court Support Inc, 31 July 2017
- PVI06 Victims of Crime Assistance League Inc NSW, 31 July 2017
- PVI07 Robert Wade, 31 July 2017
- PVI08 Enough is Enough Anti Violence Movement Inc, 31 July 2017
- PVI09 Aboriginal Legal Service (NSW/ACT) Ltd, 31 July 2017
- PVI10 Hannah Robert, 1 August 2017
- PVI11 Bravehearts Foundation Ltd, 1 August 2017
- PVI12 NSW Office for Police and NSW Police Force, 2 August 2017
- PVI13 Women's Justice Network, 2 August 2017
- PVI14 Legal Aid NSW, 3 August 2017
- PVI15 NSW Young Lawyers Criminal Law Committee, 4 August 2017
- PVI16 Director of Public Prosecutions (NSW), 9 August 2017
- PVI17 NSW Mental Health Review Tribunal, 10 August 2017