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# **VICTIMS' INVOLVEMENT IN SENTENCING**

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**NSW SENTENCING COUNCIL**

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**Seppy Pour**

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# ***1. Terms of Reference***

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

- The principles courts apply when receiving and addressing victim impact statements.
- Who can make a victim impact statement.
- Procedural issues with the making and reception in court of a victim impact statement, including the content of a victim impact statement, the evidential admissibility applied to a victim impact statement, and objections to the content of victim impact statements.
- The level of support and assistance available to victims.

# 1. Initial statements

## Introduction

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

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

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

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

## Impact of crime on victims

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

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

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

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

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

### **Research on the impact of crime on victims:**

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

Generally, the research indicates that:

- a majority of victims experience some sort of emotional reaction to being victimised;<sup>2</sup>
- violent crime is more likely to cause long-term effects on victims than non-violent crime;<sup>3</sup>

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

- violent crime is more likely to cause higher levels of psychological stress than non-violent crime;<sup>4</sup>
- victims of violent crime and threats of violent crime are more likely than victims of other crime to suffer long-term social distress.<sup>5</sup>

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

- Aboriginal Australians experience compounded victimisation due to their history of victimisation by colonisation and dispossession;<sup>6</sup>
- because women are more likely than men to become homeless following victimisation, women are more likely to be further victimised after initially being victimised;<sup>7</sup>
- refugees are more susceptible to a greater level of victimisation due to previous experiences which compound victimisation.<sup>8</sup>

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<sup>3</sup> Ibid 196.

<sup>4</sup> Ibid.

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

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

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

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

## 2. The legal framework

### Introduction

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

### The statutory scheme for victim impact statements

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

### s 26 – Definitions

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

#### Definition of 'victim'

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<sup>9</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW).

<sup>10</sup> *Ibid* s 26.

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

- a 'primary victim'; or
- a 'family victim'.<sup>11</sup>

'Victim impact statement' means:

A statement containing particulars of:

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

'Primary victim' means:

- (a) a person against whom the offence was committed, or
  - (b) a person who was a witness to the act of actual or threatened violence, the sexual offence, the death or the infliction of the physical bodily harm concerned,
- being a person who has suffered personal harm as a direct result of the offence.<sup>13</sup>

'Personal harm' means:

actual physical bodily harm or psychological or psychiatric harm.<sup>14</sup>

'Family victim' means:

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<sup>11</sup> *Crimes (Sentencing Procedure) Act 1999* s 26.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*



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>15</sup>

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

- (a) the victim's spouse, or
- (b) the victim's de facto partner, or
- (b1) a person to whom the victim is engaged to be married, or
- (c) parent, grandparent, guardian or step-parent of the victim, or
- (d) a child, grandchild or step-child of the victim or some other child for whom the victim is the guardian, or
- (e) a brother, sister, half-brother, half-sister, step-brother or step-sister of the victim.

It is clearly established that a primary victim includes the target of the offence broadly, as well as bystanders who have suffered "actual bodily harm or psychological or psychiatric harm". Furthermore, family victims, although limited to family members of a primary victim who has died "as a direct result" of the offence, is broadly defined to include almost all potential members of a familial arrangement.

## **s 27 – Application of Division**

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

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<sup>15</sup> Ibid.

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

- (a) an offence that results in the death of, or actual physical bodily harm to, any person, or
- (b) an offence that involves an act of actual or threatened violence, or
- (c) an offence for which a higher maximum penalty may be imposed if the offence results in the death of, or actual physical bodily harm to, any person than may be imposed if the offence does not have that result, or
- (d) a prescribed sexual offence.<sup>16</sup>

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

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

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

- (a) an offence that results in the death of any person, or
- (b) an offence for which a higher maximum penalty may be imposed if the offence results in the death of any person than may be imposed if the offence does not have that result, or

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<sup>16</sup> Ibid s 27(2).

<sup>17</sup> Ibid s 27(2A).

(c) an offence that is referred to in Table 1 of Schedule 1 to the *Criminal Procedure Act 1986* and that:

- (i) results in actual physical bodily harm to any person, or
- (ii) involves an act of actual or threatened violence, or

(d) a prescribed sexual offence that is referred to in Table 1 of Schedule 1 to the *Criminal Procedure Act 1986*.<sup>18</sup>

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

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

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

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<sup>18</sup> Ibid s 27(3)

<sup>19</sup> Ibid s 28(1).

<sup>20</sup> Ibid s 28(3).

<sup>21</sup> Ibid s 28(5).

for the determination of a term and a non-parole period for an existing life sentence.<sup>22</sup>

### **s 29 – Victim impact statements discretionary**

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

### **s 30 – Formal requirements for victim impact statements**

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

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

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<sup>22</sup> Ibid s 28(2).

<sup>23</sup> Ibid s 29(1).

<sup>24</sup> Ibid s 29(2).

<sup>25</sup> Ibid ss 29(3) and 29(4).

<sup>26</sup> Ibid s 30(1).

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

A victim impact statement may include photographs, sketches and other images.<sup>27</sup>

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

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

### **s 30A – Reading out victim impact statements in court**

A victim is entitled to read out the whole or any part of his or her victim impact statement to the court.<sup>30</sup> If they are unable to do so, it can be read by a person having parental responsibility for the victim, a member of that person's immediate family, or other representative.<sup>31</sup> A victim is entitled to read out their victim impact

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<sup>27</sup> Ibid s 30(1A).

<sup>28</sup> Ibid s 30(2).

<sup>29</sup> Ibid s 30(3).

<sup>30</sup> Ibid s 30A(1).

<sup>31</sup> Ibid.

statement via closed-circuit television if he or she was entitled to give evidence that way during the trial.<sup>32</sup>

## **Common law principles**

### Impact on victim as a factor in sentencing

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

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

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

### Admissibility outside the statutory framework

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

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<sup>32</sup> Ibid ss 30A(3) and 30A(4).

<sup>33</sup> *Porter v R* [2008] NSWCCA 145, [54].

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

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

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

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

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

#### Use of a victim impact statement

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

#### Weight to be given

No limitation seems to exist for the weight which is to be given to a victim impact statement. The court observed in *SBF v R* that there is no statutory or other

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<sup>37</sup> *Porter v R* [2008] NSWCCA 145, [53].

<sup>38</sup> *Miller v R* [2014] NSWCCA 34.

<sup>39</sup> *R v Tuala* [2015] NSWCCA 8, [52]-[76].

<sup>40</sup> *R v Thomas* [2007] NSWCCA 269, [36].

restriction on the extent to which a sentencing judge may set out the contents of victim impact statements.<sup>41</sup>

### Cross-examination of victims

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

### The De Simoni Principle

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

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

### Offences not charged

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

<sup>42</sup> *R v Wilson* [2005] NSWCCA 219, [27]-[28].

<sup>43</sup> *Muggleton v R* [2015] NSWCCA 62, [44].

<sup>44</sup> *The Queen v De Simoni* (1981) 147 CLR 383.

<sup>45</sup> *R v Bakewell* (unreported, 27 June 1996, NSWCCA).

<sup>46</sup> *FV v R* [2006] NSWCCA 237.



A victim impact statement may only refer to the impact of charged offences.<sup>47</sup>

### Relevance of victim's attitude

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

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

### Relevance of forgiveness

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

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<sup>47</sup> *PWB v R* [2011] NSWCCA 84, [52]-[54].

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

<sup>49</sup> *Ibid* [43].

## 4. Conclusion

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

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

Ultimately, I submit that there should be no greater role conferred to victims in sentencing other than those already provided for under current sentencing practices. Sentencing is a very specific balancing process to ensure all purposes of sentencing<sup>50</sup> are reflected in the determination. The court already must have regard to the impact of a crime upon a victim when sentencing, which can be clarified by the reception of a victim impact statement. Beyond that, a judge's decision on what sentence is to be imposed should not be interfered with.

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<sup>50</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 3A, 21A.

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