

14 June 2017

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

Dear Law Reform and Sentencing Council Secretariat,

Re: Preliminary Submissions for Victim Impact Statements (VISs)

We are writing to outline some preliminary considerations for the consultation paper on VISs.

Principles courts apply when receiving and addressing VISs

VISs give victims a chance to tell the offender and the court how the crime affected their life.

One of the reasons given for this in the literature is to elicit remorse from the offender. Remorse is also a mitigating factor for sentencing in s 21A of the *Crimes (Sentencing Procedure Act) 1999* (NSW) (the 'Act'). Booth (2013) makes the distinction between 'offender focused remorse' and 'victim focused remorse.' The former refers to remorse expressed by the offender with the purpose of lessening their sentence, whilst the latter refers to remorse genuinely felt for committing the crime and the impact it has had on the victim (Booth, 2013). If VISs are used for the purpose of testing the authenticity of remorse expressed for the offender, then the consultation paper should explore principles that the judge can utilise to make a determination on the level of remorse expressed by the offender. There should also be some discussion on whether a judge should be able to invite an immediate response from the offender following the presentation of a VIS. Currently, there is very little guidance for judges receiving VISs in court (Basten JA in *R v Thomas* [2007] NSWCCA 269 stated at [36], Latham J agreeing). Booth (2013) suggests some ways to assess remorse from offenders, such as the use of the word 'sorry', words spoken by the offender personally (i.e. not through counsel) and whether the words were spoken contemporaneously with the VIS being read out or at a later stage.

However, we acknowledge that the courtroom environment is intimidating for offenders. It is highly structured and not conducive to 'meaningful apologies and expressions of remorse' (Booth, 2013). Therefore, even those who are truly remorseful may not appear as such. Further, victim focused remorse may not even be something that is actually sought by victims and their families (Booth, 2013). There are also limits on the victim's ability to see the offender's apologies in a positive light, whether the offender is acting authentically or not (Booth, 2013). Nevertheless, the consultation paper should include a discussion on the idea of remorse and

expressions of apologies and its place in sentencing, including whether the Act should have any specific guidance about ways to assess remorse.

Who can make a VIS

Allowing victims of crime the opportunity to be heard in the process is to uphold perceived fairness in sentencing. Section 26 of the Act governs who can give VIS; either a primary victim or a family victim if the primary victim has died as a result of the offence. Discussion in the consultation paper on who is allowed to make a VIS is closely tied with the purpose and utility of a VIS and whether the maker of the statement can be cross-examined (discussed below). The paper should consider whether it is necessary or desirable for victims of crime other than those directly involved in the offence to be allowed to make a VIS in court. If less direct victims are allowed to make a VIS, then greater safeguards for the offender should be implemented to ensure fairness in the proceedings.

Procedural issues with VISs

Under s 28(1) of the Act, the court can receive a VIS any time after it convicts and before it sentences an offender. If the purpose of receiving a VIS in court is to have an actual effect on the offender's sentence, then it is appropriate that the weight attributed to the contents of the statement rests with the judge (*R v Thomas* [2007] NSWCCA 269 at [37], per Basten JA, Latham J agreeing). However, the consultation paper should discuss how the Act could include greater guidance as to the specific elements of a VIS that the court should take into account (*R v Thomas* [2007] NSWCCA 269 at [36], per Basten JA, Latham J agreeing). At present, the use of VISs is dependent on the facts and circumstances of each case (*R v Tuala* [2015] NSWCCA 8 at [52]-[76]).


Even though making a VIS is a decision that rests with the victim, the giving of a VIS in court has potential to re-traumatise. In the interests of protecting the victim, it is appropriate that the court does not allow the cross-examination of the victim on the contents of their statement. If greater guidance were given in the Act as to how the judge can utilize the statement, then this should address any potential effect on sentencing of parts of the VIS that cannot be tested by cross-examination. For example, perhaps the VIS could be made for the sole purpose of giving the victim a chance to be involved in the proceedings, without any impact on aggravating or mitigating the sentence. On the other hand, if the VIS is to be used for the purpose of affecting the sentence, then the contents of the statement should be narrowly confined to the direct impacts the crime has had on the victim after the offence. Discussion on the purpose and contents of VISs should be included in the consultation paper. This discussion should also have regard to the weight attributed to a VIS.

Support and assistance available to victims

Giving a VIS is a discretionary process. However, support and assistance should be available for those who want to make a VIS, but are worried about reading the statement alone in court. In addition to the option to give the statement via closed-circuit television arrangements (s 30A of the Act), the consultation paper should discuss other ways in which victims can be supported through the process. Examples include allowing the victim a support person, having someone else read their statement for them (besides a prosecutor) or submitting a written version for the offender to read. Further, since r 9(c) of the Regulation provides that the VIS can be up to 20 pages including medical reports and other annexures, the consultation paper should discuss whether it is necessary to provide support for victims in preparing their statements. If guidelines regarding the contents are set out in the Act, then this support person could assist in ensuring the statement stays within the guidelines and is able to be read fully in court.

If you have any questions, please do not hesitate to contact our office on (02) 9332 1966.

Yours sincerely,




Hilary Kincaid
Principal Solicitor

References:

Booth, Tracey, "Victim Impact Statements and the Nature and Incidence of Offender Remorse: Findings from an Observation Study in a Superior Sentencing Court" (2013) 22(2) *Griffith Law Review* 430.