



Victims Of Crime Assistance League Inc NSW



**Submission to NSW Department of Justice
Sentencing Council:**

Victims' involvement in sentencing

10 November 2017



Victims of Crime Assistance League Inc. NSW (VOCAL) is writing in response to the NSW Sentencing Council's invitation for submissions regarding victims involvement in sentencing and the use of Victim Impact Statements (VIS)

Improving information given to victims on VISs and sentencing

The NSW Sentencing Council's 2017 Consultation Paper on victims' involvement in sentencing outlines how no single group or entity has designated responsibility for sharing information with victims regarding a VIS. This leads to the generally acknowledged problem of absent or inconsistent information-reaching victims. We feel that it is important that information about VISs be available through a variety of methods, for example, websites, fliers in all courts, the Victims Access Line, face-to-face support through NGOs, and Victims Services Approved Counsellors.

Unfortunately, NSW Police, Victims Services and the ODPP all provide information on their websites that only partly addresses this issue. Given that notification about writing a VIS is provided to a victim involved in a District or Supreme Court matter after a conviction and in the wake of a trial, individuals are often emotionally heightened and cognitively unable to absorb all relevant, structural and legal requirements of preparing a statement. While every person reacts differently, the majority of VOCAL's clients are seeking face-to-face or individualised support as they find it "extremely difficult" facing the "daunting task" of writing down their personal experience. Frequently, the only information they have accessed at that stage is Victims Services' information booklet provided by a WAS or ODPP.

As mentioned in VOCAL's preliminary submission, we believe the Victims Services' *Victim Impact Statement Information Package* could be simplified and updated. Improvements should include better promoting options for support, more trauma-informed content, and providing an example or template for a VIS.

Following from this, VOCAL's Victim Support Unit is often asked questions by victims who have received inconsistent written information. One example are the discrepancies that exist between Victims Services' two publications, *Sentencing Information Package* and *Victim Impact Statement Information Package*. The wording is contradictory regarding the jurisdiction within which a VIS can be received. Specifically, the VIS Information Package states:

"Legislation allows a victim impact statement to be received and considered in certain cases in the Supreme Court, the District Court, the Local Court and the Children's Court. A victim impact statement may be received by the court in relation to an offence that involves:

- Actual or threatened violence (including sexual assault)
- The death of, or any actual physical bodily harm, to any person.

In contrast, Sentencing Information Package states:

"Legislation allows a victim impact statement to be received and considered in certain cases in the Supreme Court, the District Court, the Local Court and the Children's Court. *In the Supreme Court and District Court* [emphasis added], a victim impact statement may be received by the court in relation to an offence that involves:

- Actual or threatened violence (including some sexual offences); or
- The death of, or any actual physical bodily harm, to any person.

Additionally, VOCAL's Victim Support Unit finds it challenging to provide consistent information about VIS's given the inconsistency in their application by the courts. Responses from the legal profession vary, with victim support specialists being told VIS's are "hardly ever used in Local Court", or are "not required"

because “the impact is part of the prosecutor’s submission”. One Magistrate recently told a family he would make “a special allowance” for them to submit their VIS regarding negligent driving occasioning death.

We would argue that written and verbal information given to victims on VISs be as consistent as possible. Victims with Local Court matters argue that they have sustained actual physical bodily harm. The interpretation of actual physical bodily harm may vary from victim to victim, and with it left to the Prosecutor’s discretion to adjudicate whether a VIS is permitted, this often results in a perceived injustice to some victims.

Presenting a VIS in court

Regarding Supreme Court and District Court matters, our clients have generally been treated with the upmost respect from court staff and members of the judiciary when presenting their VIS. It is in the Local Court that issues regarding VISs arise.

From our point of view, the biggest reason why less VISs are presented in the Local Court is the possible impact it would have on an already overloaded court system. Given that the Local Court deals with a wide variety of matters, defining specific offences where a victim is eligible to submit a statement would be operationally beneficial, and also provide clearer and more consistent information to victims.

In Local Court matters, some clients have been met with attitudes of impatience. Judiciary state it is “unusual” for a VIS to be read out, with one Magistrate stating they made “a special allowance” for a family to submit their VIS regarding negligent driving occasioning death. This points to a procedural inconsistency in the practice of VIS submissions – victims are legally permitted to submit but it still remains at the Prosecutor’s discretion. VOCAL is of the view that procedures surrounding the practice of submitting and receiving VIS’s should be standardised.

From our perspective, there are limited resources available for victims who require support in Local Court matters and this is likely to be influencing their lack of knowledge about a VIS and court processes. We repeatedly have victims phone our Victim Support Unit seeking information about the outcome of their matter, and we understand that NSW Police are overstretched in their capacity to provide follow up victim care. Giving NSW Police and Police Prosecutors local referral pathways for victim support is essential. While the Victims Card promotes Victims Services, we see it as essential that all staff on the Victims Access Line staff are informed and educated on VIS information as well as the Victims Rights and Support Act 2013

VIS in Local Courts

We would argue in favour of increasing the number of Local Court matters in which a VIS is received. While the Local Court’s current mention system and high output of cases might suggest fewer opportunities for VISs to be presented, we feel that this is no insurmountable obstacle. Matters are constantly being adjourned in order to obtain pre-sentence reports, and so the addition of a VIS would not significantly lengthen the process. In practice, VISs take only a short time to be orally presented in court. The Defense has a right to submit several character references in relation to the offender, and we would argue that allowing a victim the opportunity to submit a VIS at the same time is an essential element in the practice of justice in our judicial system.

In the past, VOCAL’s victim support specialists have participated in forum sentencing both in a victim support capacity and as the victim’s representative. We observed that allowing the victim to speak directly to the offender about the impact of the crime was extremely empowering and had a positive impact on the victim’s recovery. It is noted that in most of our Forum Sentencing matters, the victim was not concerned about retaliation or retribution from the offender, which led to a willingness to write about their personal impact.

Information on VISs in the Local Court could also be improved by expanding the scope of WDVCS's Police Prosecutors clinics to include VIS information specific to Local Court matters. In addition, there would be huge benefit from simply increasing the resources of organizations such as VOCAL or VWCCS to provide information sessions for victims and support agencies on VIS preparation. This would take pressure of NSW police and prosecutors who may find themselves assisting victims in VIS preparations.

Victim Assistance

All victims should have the opportunity to access one-on-one support in the preparation of a VIS. As discussed in Section 5 of the Consultation Paper, a "qualified person" who can assist in preparing a VIS is listed to include a counsellor approved under the Victims Rights and Support Act 2013. We regularly take referrals from such counsellors to specifically assist a victim in writing a VIS. Victims Services counsellors have stated to us, "it's not my role to write it" or "I am not familiar with the court procedures" or "I don't have enough time in a session to write it". While we understand fully the time restraints placed on counsellors, providing them with VIS information, education and referral pathways would be most beneficial to victims throughout NSW.

VOCAL's Victim Support Specialists are trained in preparing a VIS, have knowledge of how it can be used, are familiar with (in)admissible content, and possess expertise in managing the effects of trauma likely to arise in the reliving of traumatic events. In our view, it is crucial that this support is personal and individualized, rather than generic. In line with Bravehearts' suggestion in its preliminary submission, we use a template guide that can be worked through with the client either face-to-face, over the phone or via email. Given the potential for re-traumatisation, we find it essential to break this down into manageable stages and work from a trauma informed perspective. The process of preparing a VIS often takes several appointments to complete.

We believe that a better understanding of the preparation process would be beneficial for ODPP, Victims Services staff and NSW Police (Detectives), in order that they provide effective information if a victim makes contact for assistance. It is noted that the Charter of Victims' Rights states "A relevant victim will have access to information and assistance for the preparation of any VIS...". One client in Western NSW reports she was mailed the information booklet and felt "left on her own" to prepare her VIS. While our experience is that victims are being provided with the *Victim Impact Statement Information Package*, there is very little assistance offered to them after this. As outlined in our preliminary submission, we would welcome an updated Information Package that is more user friendly, consistent and clearly detailing support agencies who can assist.

VOCAL's Victim Support Unit has established memorandums of understanding with key stakeholders in the Hunter Region, giving victim support specialists permission to contact a victim who is in a heightened emotional state, experiencing anxiety and/or stress related to a trauma or situational crisis. For people experiencing trauma, it can be overwhelming to 'cold call' an organization that they have previously had nothing to do with. While some victims have consistent contact with our victim support specialists, others contact us only when a specific need arises (for example, being subpoenaed to attend court is a key catalyst). In this way, VOCAL provides a model for how a specialist victims' representative might act, and we would argue that outcomes are best when victims have access to such support.

If such a representative were to be more widely provided to victims for VIS assistance, VOCAL is of the view that such a role should be informed primarily by skills of social work or counselling, working with trauma, and possessing additional comprehensive knowledge of the legal system.

Victims requiring additional or distinct assistance

In our experience, the needs of victims that require additional or distinct assistance are not being met by current procedures. Of those victims *not* residing in the Hunter region who contact our Victim Support Unit, most find us via our website after an internet search on 'how to write a Victim Impact Statement'. All who contact the Victim Support Unit have stated they have been given the Information Booklet, but "don't know how to start writing their statement". As mentioned above, explaining the process is best broken

down into stages, and many prefer to email us with questions about admissibility of content.

VOCAL notes that there are a proportion of victims who do not (a) have ready internet access; (b) have suitable literacy; and (c) have the wherewithal to proactively seek, process and action information regarding a VIS in the wake of a traumatic incident. In addition, victims for whom English is not their primary language face considerable disadvantage, as costs for translation services are high and information does not exist in a broad variety of languages.

Given that the ODPP and NSW Police (Detectives) are likely to have the most contact with a victim during the court process, we would like to see an increased awareness in these bodies (as well as Victims Access Line staff) on the process involved in preparing a victim impact statement. This awareness may also include the emotional impact this process has on a victim of crime. Not all Victims Services approved counsellors are willing to assist in VIS preparation, which leaves victims having most contact with ODPP staff and/or Police. Creating and effectively promoting a specialized referral system for VIS support is essential. We think this is also essential for assisting CALD and ATSI victims.

Additionally, child witnesses must be better supported to prepare a VIS that best reflects their experience, which may include drawings, poems or artwork. In addition, parent(s) of a child should be encouraged to provide a statement, highlighting to the court the psychological, physical and financial impact they face while supporting a child victim of assault. Specific referrals to trauma informed supporting agencies is essential.

Who can make a victim impact statement?

VOCAL notes the confusion arising from the differing definitions of 'victim' between the various victims' registers, the Victims Charter, and the Victims Support Scheme. On account of this, we believe that streamlining definitions is of utmost importance.

A general expansion of the definition is useful simply in the interests of inclusion rather than exclusion. Crime and trauma affects individuals differently, and the impact is often life changing for direct victims, secondary victims and witnesses alike. We also see advantages to abandoning the arbitrary separation of primary and family victims, and the Victorian example is illustrative in this regard.

VOCAL notes with interest the finding that broader definitions in other jurisdictions have not led to any significant take up of VIS by related victims. We would suggest that this relates more to lack of awareness and availability of information and support, rather than indicating a lack of interest in the VIS process.

Family victim definition

VOCAL is of the view that the current definition of 'family victim' does not adequately capture family structures within ATSI and CALD communities and recommends consideration be given to a broader range of family members where victims are from ATSI or CALD backgrounds. As outlined in our preliminary submission, extended family networks and kinship ties have significance in many communities and the current family victim definition is not inclusive of this.

The definition would also benefit from expansion in cases where family members currently reside overseas, or when relationships within the immediate family are not longer functional. For example, in one matter regarding a murder, the victim had not been in contact with either of her parents for more than 20 years. The victim's mother in law requested to write a VIS, but was denied by the ODPP. It is noted that 3.11 of the consultation paper states that judges retain discretion to admit statements from individuals who fall outside the definition of 'primary/secondary' victim. It remains unclear however as to whether it is the ODPP or the Judge who decides whether an individual outside of the primary victim/family member can submit a VIS.

Another issue relates to the number of family VISs able to be submitted, with prosecutors currently exercising discretion on this. VOCAL observes that there are times when only one collective VIS has been permitted, whereas in other instances multiple statements from family members have been allowed. We would welcome reform in this area to improve consistency.

Type of harm

Defining ‘psychological or psychiatric’ harm is fraught. Some victims are surprisingly resilient in the face of psychological stresses while others suffer greatly. Contrary to that suggested in the consultation paper, emotional suffering or distress might be ideally included this category.

We would also suggest that while a strict definition of ‘personal harm’ ostensibly excludes impacts on social life, economic loss, and damage to property etc, these impacts can be captured in a VIS through the lens of psychological or psychiatric harm, emotional suffering and distress. Ultimately however, we feel that the definition of personal harm should be extended beyond bodily and mental harm, as is already the case in other states such as Victoria, Northern Territory and Western Australia.

Eligible offences

We cannot see any reason to limit eligibility for a VIS to a prescribed list of indictable offences. To expand eligible offences to any offence – while still ensuring that victims meet the requirements surrounding the definition of victim and type of harm – would allow more victims the opportunity to participate in the sentencing process.

We support the notion that victims of offences involving family and domestic violence be allowed to submit a VIS. Literature in the social work and community services sector speaks of ‘family and domestic violence’ as a whole and nuanced category.

Matters that do not result in a conviction

We concur with recommendations made by the NSW Law Reform Commission’s 2013 report to allow submission of a VIS in cases where the defendant has been found guilty on limited evidence after a social hearing or has been found not guilty by reason of mental illness.

Procedural issues

VOCAL believes that limiting a victim to tendering only one VIS is a reasonable and realistic approach. Under the Victims Rights and Support Act (2013), the primary victim is defined as a person against whom the offence was committed while a secondary victim includes witnesses who have been psychologically harmed. An option would be to permit a primary victim to submit one only VIS and allow secondary victims to submit a VIS if they desire. A limit would need to be set as to how many secondary victims can submit.

Procedural issues surrounding who is listed as a “qualified person” under the Victims Right and Support Act 2013 (NSW) has been addressed earlier in this submission. We stress that people assisting victims in preparing a VIS be both trauma informed and aware of the specific VIS requirements.

Tendering a VIS

It is unsettling to read throughout the consultation paper that the tendering of a VIS is ultimately at the discretion of the prosecutor and that in QLD, for example, the prosecutor has an active role in determining whether to present a VIS during the sentencing hearing. VOCAL would hope that in NSW the issue of “unreasonably delaying the sentencing of the offender” would not be at the detriment to allowing a victim to be heard as part of the sentencing process.

It is our experience in the Hunter Region that Judges always allow a victim support specialist from our organization to be seated next to the victim reading the VIS, if the victim has indicated they would like the support. This is regardless of the nature of the offence. We are unsure as to whether this is standard practice throughout NSW. If it is not, we strongly recommend the victim be allowed to have a friend, family member or support person beside them when reading their VIS. On many occasions, we have seen victims cry, vomit, run out of court or become frozen with fear as they start to read their statement. Passing over their statement to be read by a support person ensures the victims has still had a voice in the sentencing process. A pre-recorded option would assist people who do not meet the requirements of CCTV rooms, but are not comfortable with facing the offender in court.


Cross examination and re-examination

VOCAL is against the notion of cross-examining a victim with regards to their victim impact statement. Almost on every occasion that our Victim Support Unit has been involved with preparation and delivery of a VIS, the victim has written they have been diagnosed with PTSD, anxiety or depression as a result of the crime against them. Largely, in our experience, this disclosure of information goes unchallenged in sentencing. Recently however, there was a lengthy discussion between the Defence and Judge as to whether the victim "really" had a medical diagnosis or was it something she "made up". For the victim to listen to whether her mental health diagnosis was factual was insulting to her and caused additional anxiety on the day. In the same matter, her VIS stated she was forced to lodge bankruptcy, yet Defence did not question the validity of this.

Subjecting a victim to cross-examination on the content of a VIS, especially after its contents has been approved by both Prosecution and Defence, exposes the victim to unnecessary stress and trauma.

Victims of Crime Assistance Leave Inc NSW is grateful for the work of the NSW Sentencing Council and would like to thank you for the opportunity to contribute to this discussion.


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