HOMICIDE VICTIMS SUPPORT GROUP SUBMISSION

VICTIM'S INVOLVEMENT IN SENTENCING: VICTIM IMPACT STATEMENTS

1. PREFACE

The Homicide Victim's Support Group (**HVSG**) is a charity founded in 1993 in order to provide counselling, support and information to families and friends of homicide victims throughout NSW. Currently the HVSG has approximately 4,200 family members and sadly, that number grows on average every 3 days.

The HVSG has been instrumental in changing numerous pieces of legislation over the past twenty years and it continues to advocate for the family members it supports. When its families come up against problems or inequities, HVSG works with them to change or improve things for the next victim. Although many have experienced feelings of powerlessness in the past, they stood up and demanded many of the rights outlined below, changing legislation and public perception in the process. This fight for reform was one of the founding objectives of the HVSG.

Victim Impact Statements (**VISs**) were introduced into legislation with the purpose of giving victims a voice in the criminal process. Since its introduction, VISs have gone some way to achieving this, however they have also created anxiety and further trauma for victims, during what is already a profoundly painful process.

HVSG has always operated with the belief that VISs should not be taken into account in sentencing because it maintains that all lives are equal regardless of statements made on their behalf or regardless of the impact on family victims. VISs are intended to focus on the harm that has occurred rather than have a bearing on sentencing outcomes for the offender.

However, HVSG concedes that under the *Crimes (Sentencing Procedure) Act 1999* (NSW), VIS may be taken into account for sentencing and this submission suggests reform to create clarity and consistency in their use.

This submission also suggests reform to alleviate the trauma caused by the preparation and use of VISs, and is based on HVSG's extensive experience with family members impacted by homicide. HVSG has heard their voices and requests that you hear them too.

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2. THE CURRENT LEGISLATIVE PROVISIONS

Under the current legislative provisions, a sentencing court has the discretion as to whether it will receive a VIS, apart from the circumstances where the primary victim has died as a direct result of the offence. Section 28 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the **Act**) is expressed in the following terms:

> **CRIMES (SENTENCING PROCEDURE) ACT 1999 - SECT 28**
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> When victim impact statements may be received and considered
>
> (1) If 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.
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> (2) A victim impact statement may also be received and considered by the Supreme Court when it determines an application under Schedule 1 for the determination of a term and a non-parole period for an existing life sentence referred to in that Schedule.
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> (3) If the **primary victim has died** as a direct result of the offence, a court ***must* receive a victim impact statement** given by a **family victim** and acknowledge its receipt, and ***may* make any comment** on it that the court considers appropriate.
>
> (4) A **victim impact statement given by a family victim *may***, on the application of the prosecutor and if the court considers it appropriate to do so, **be considered and taken into account by a court in connection with the determination of 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.
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> [emphasis added]

3. SUBMISSIONS FOR REFORM – AMENDMENT TO SECTION 28 OF THE ACT

These submissions focus on "family victims", which includes the immediate family members of a victim who dies as a result of an offence.[1] Family victims may submit a VIS on the impact that the primary victim's death has had on them.[2]

HVSG submits that the discretions contained in section 28 of the Act create uncertainty and anxiety in the minds of family victims.

While on the one hand, if a family victim chooses to make a VIS, the court *must* receive the VIS, but has the discretion to choose whether to take the VIS into consideration when determining the offender's sentence.

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[1] *Crimes (Sentencing Procedure) Act 1999* (NSW), s 26 definition of 'family victim' and 'member of the primary victim's immediate family'.

[2] *Crimes (Sentencing Procedure) Act 1999* (NSW), s 26 definition of 'victim impact statement'.

The court also has the discretion as to whether it will articulate reasons, or make any comments, as to how, if at all, the VIS was taken into account in sentencing.

While the HVSG acknowledges that some family victims find the process of writing and submitting a VIS cathartic and helpful in dealing with the trauma they have experienced, others can find the process highly distressing and re-traumatising.

This is in part due to the uncertainty around how their VIS will be dealt with by the court. One way of reducing this unnecessary distress to family members is to ensure that all VISs from family victims in circumstances of homicide be mandatorily taken into account in sentencing the offender, and that reasons are provided as to how the VIS was taken into account.

Such reform also provides for a consistent approach by the courts to sentencing, which will serve to enhance public confidence and transparency in the sentencing process for serious crimes such as homicide.

In order to minimize the ongoing trauma and distress to family victims, the HVSG submits that it would be preferable that section 28 be amended such that:

(a) where the primary victim has died as a direct result of the offence, and a VIS has been received by the court, it should be mandatory that the court take that VIS into consideration in sentencing under section 28(4); and

(b) it be mandatory for a court to provide reasons as to how the VIS was taken into account in sentencing under section 28(3).

4. SUBMISSIONS FOR REFORM – FURTHER GUIDANCE REQUIRED

HVSG's research and experience has indicated that there appears to be a lack of guidance and information provided in relation to a number of key issues concerning VISs and their effect on sentencing. In particular, it is unclear:

(i) what principles the judge takes into account when considering a VIS and, specifically, whether a particular judge's individual emotional response impacts the result;

(ii) what impact *not* providing a VIS has on the sentencing of the offender;

(iii) whether the existence of a VIS, and the consideration of the VIS by the court, can constitute a ground for appeal, and in what circumstances this would be the case;

(iv) whether a VIS will be considered in the same way at a re-determination hearing, particular if heard by a different judge; and

(v) what consideration is given to a VIS, and what impact the VIS has, in circumstances where an offender is found not guilty on the grounds of mental illness.

The uncertainty surrounding these issues often contributes increased stress and anxiety for family victims. Accordingly, HVSG submits that:

(a) family victims should always have the opportunity to submit a VIS, and have it considered by the court, even in circumstances where the offender is found not guilty on grounds of mental illness; and

(b) clear guidance and information be provided, both to judges and family victims, to clarify the issues in paragraph 4.1 and ensure that a consistent approach is adopted.

TERM OF REFERENCE 2: WHO CAN MAKE A VICTIM IMPACT STATEMENT

This section of our submission focuses on who can make a VIS. HVSG contends that the purpose of the VIS is to focus on the harm that has occurred rather than have a bearing on sentencing outcomes for the offender.

It must be noted that unwillingness or inability to give a VIS does not reflect an absence of harm or grief. HVSG finds that victims often struggle to provide a VIS, due to the tremendous burden of grief. It can also occur because families may come from lower socio economic backgrounds, face language barriers, have little or no education and simply refuse to provide VIS out of sheer fear. This fear is often exacerbated by being in a vulnerable position because of their tragic circumstances.

6. THE CURRENT LEGISLATIVE PROVISIONS – FAMILY VICTIMS

In New South Wales a VIS can be made by a by a "primary victim", who is the person the offence was committed against, or by a "family victim", if the primary victim has died as result of the offence.[3] HVSG is solely concerned with the latter category as it advocates for victims of homicide.

Family victims include those who are a member of the immediate family of a primary victim who has died. Immediate family members may be the victim's spouse; the victim's de-facto spouse or same sex partner; a person to whom the victim is engaged to be married; a parent, grandparent, guardian or step-parent of the victim; a child, grandchild, or step-child of the victim or some other child for whom the victim is the guardian; or a brother, sister, half-brother, half-sister, step-brother or step-sister of the victim.[4]

7. SUBMISSIONS FOR REFORM OF SECTION 26 OF THE ACT

The Definition

The current definition of family victim does not recognise victims which did not have, or were not in contact with, immediate family members, but may nevertheless have had close friends or service workers at the time of their death. These circumstances can often arise in context of homelessness and family violence.

HVSG submits that where no immediate family member is available to provide a VIS, the definition of family victim should be expanded (or a new sub category should be created) to include extended family members, close friends, service providers (for example homeless shelter workers, social workers, doctors and teachers), and witnesses.

In relation to witnesses, HVSG notes that NSW legislation currently requires witnesses to have suffered "personal harm" to make a VIS (as this in turn makes them a primary victim) – a requirement not imposed on family victims. HVSG submits that the requirement of personal harm

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[3] *Crimes (Sentencing Procedure) Act 1999 (NSW)*, s 26.

[4] Ibid.

be removed as it creates an unnecessary burden on witnesses in requiring them to show that "actual physical bodily harm or psychological or psychiatric harm" has occurred in order to make a VIS.[5]

HVSG cannot envisage any disadvantage in expanding the definition of family victim. Other jurisdictions such as Victoria currently already allow close friends to make VIS (albeit in limited circumstances).[6] HVSG submits that, if the definition were expanded in this way, the VIS should be given the same weight as if it were presented by an immediate family member.

Community impact statements

HVSG considers that the harm of homicide expands far beyond the families of individuals who have died as a result of crime. Community impact statements are one way to address such harm.

South Australia is the only jurisdiction in Australia to introduce community impact statements. Since 2010, the South Australian Commissioner for Victims' Rights may provide a sentencing court with a community impact statement, which can take the form of either a "neighbourhood impact statement" or a "social impact statement".[7]

A neighbourhood impact statement provides information on the effect of the offence on people living or working in the area in which the offending occurred. A social impact statement provides information on the effect of a particular type of offence on the community more generally.

Unlike a VIS written by a family victim, community impact statements are not necessarily written by a person who knew the individual who has died, and any person may make a submission to the Commissioner for Victims' Rights for information to be included in the community impact statement.[8] This is beneficial for grieving victims who do not feel comfortable making a VIS (particularly in light of the fact that they may be cross examined), but may wish to provide a submission to the Commissioner.

Community impact statements were considered (though ultimately rejected) in NSW after the king hit death of Thomas Kelly in 2014. John Robertson MP introduced the *Crimes (Sentencing Procedure) Amendment (Victim Impact Statements—Mandatory Consideration) Bill 2014*, stating:

> there is no such thing in our society as a friendless victim. We believe that every human being, especially every victim, is entitled to dignity and the fundamental principle of equality before the law. That is why this bill adopts provisions in place in South Australia that allow

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[5] Personal harm is defined under section 26 of the Act.

[6] The inclusion of friends is stipulated on the Victorian Government's information page on Victim Impact statement, writing "Family members, and sometimes friends can also be considered victims of the crime and can make [a victim impact statement]". Victims of Crime, "Victim Impact Statements", accessed 14 November 2017, <https://www.victimsofcrime.vic.gov.au/going-to-court/victim-impact-statements>.

[7] *Criminal Law (Sentencing) Act 1988* (SA), s 7B.

[8] Ibid, s 7B(1).

> the Victims Commissioner in that State to make community impact statements on behalf of victims.[9]

This statement is consistent with HVSG's view that it is "offensive to fundamental concepts of equality and justice for criminal courts to value one life as greater than another".[10] Community impact statements address this issue as they provide an avenue for the harm to be expressed where there may be no family victim available to give a VIS.

Furthermore, community impact statements are unlikely to replace the role of VISs. Since the introduction of community impact statements in South Australia, only one has been tendered in court, which occurred in the 2013 case of Lana Towers who was beaten to death by her former partner. South Australia's Victims of Crime Commissioner, Michael O'Connell, presented a social impact statement to the Supreme Court on the impact of domestic violence on the community. Outside court, Mr O'Connell said:[11]

> This case was important for two reasons, one is the nature of the crime perpetrated against Ms Towers... The second is that my statement was not going to affect the ultimate sentence and that meant that I could focus on the harm that had been done and the costs that the community were going to incur.

Again, this observation reiterates HVSG's view that the purpose of the VIS or community impact statements is to focus on the harm that has occurred rather than have a bearing on sentencing outcomes for the offender.

Finally, the introduction of community impact statements is consistent with pre-existing provisions in the Act. Section 3A of the Act prescribes that a court may impose a sentence on an offender to recognise the harm done to the victim of the crime and the community. VISs currently assist with the former, and community impact statements would assist with the latter.

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[9] Parliament of New South Wales, "Crimes (Sentencing Procedure) Amendment (Victim Impact Statements-Mandatory Consideration) Bill 2014", accessed 14 November 2017, <https://www.parliament.nsw.gov.au/bills/DBAssets/bills/SecondReadSpeechLA/2840/2R%20Victims%20Impact.pdf>.

[10] *R v Previtera* (1997) 94 A Crim R 76 at paragraphs [86]-[87].

[11] ABC News (online), "Lana Towers murder: Impact of domestic violence extends into community, court told", accessed 14 November 2017, < http://www.abc.net.au/news/2014-11-07/victims-of-crime-commissioner-social-impact-statement/5874916 >.

TERM OF REFERENCE 3: PROCEDURAL ISSUES ASSOCIATED WITH THE MAKING AND RECEPTION OF A VICTIM IMPACT STATEMENT

8. THE FAMILY MEMBER SHOULD BE PERMITTED TO DIRECTLY ADDRESS THE OFFENDER IN THEIR VIS

At present, a VIS cannot be addressed to the offender, it may only address the court.[12] This requirement may prevent the family victim from properly describing their emotions, which in many cases are directed at the offender.

HVSG submits that family victims should have the opportunity to, if they wish, address the offender directly. The ability to directly address the offender would be limited by the requirement that the VIS does not offend (as in offensive language), threaten, intimidate, or harass the offender.[13]

9. REMOVAL OF FORMAL REQUIREMENTS

HVSG submits that section 30 of the Act should be amended to remove prescriptions on the form a VIS must take. At present, a VIS must be in writing; drawings, photographs, and medical reports may be attached, but only as annexures.[14]

The restriction on acceptable forms for a VIS affects the ability of the family victim to accurately and appropriately express themselves and their experience, which may be best conveyed in an alternate form. Alternate forms may include a painting, a piece of music, a poem, or a religious offering. In some cases, such as with Indigenous members of the community, cultural performances would be beneficial.

In a recent Supreme Court matter, the Crown Prosecutor directed family victims to remove all words written completely in capital letters from their VIS. The family victims were told that the use of capital letters would "intimidate the offender". While HVSG agrees that restrictions that remove offensive, threatening, intimidating, or harassing material are reasonable, these restrictions should be limited to the content, and not the form, of the VIS.[15] In the above case, the family victims did not have adequate control over the way in which their experience was conveyed to the court.

In order to maximise the potential of a VIS to be truly reflective a of a family victim's experience, HVSG submits that:

(a) a family victim should be allowed to present a VIS in whichever form they wish;

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[12] *Victim Impact Statement- information package*, NSW Justice Victims Service, page 7; *Crimes (Sentencing Procedure) Regulation 2017* [NSW], r 10.

[13] *Victim Impact Statement- information package*, NSW Justice Victims Service, page 3; *Crimes (Sentencing Procedure) Regulation 2017* [NSW], r 11(6); *Crimes Act 1914* (Cth), s 16AB(5)(b).

[14] *Crimes (Sentencing Procedure) Act 1999 (NSW)*, s 30.

[15] *Victim Impact Statement- information package*, NSW Justice Victims Service, page 3; *Crimes (Sentencing Procedure) Regulation 2017* [NSW], r 11(6); *Crimes Act 1914* (Cth), s 16AB(5)(b).

(b) family victims should be allowed to submit, as a VIS, statements that may not be authored by them, such as a poem, song, or artwork; and

(c) restrictions on that which might be offensive threatening, intimidating or harassing to the offender should be limited to the content, and not the form, of the VIS.

10. THE VIS SHOULD NOT BE AMENDED ONCE IT HAS BEEN APPROVED BY THE CROWN PROSECUTOR

A VIS may undergo numerous changes after it has been approved by the Crown Prosecutor. These changes may be because some aspects of the VIS do not comply with the rules of evidence, are prejudicial, or may require further substantiation. When a VIS is amended by the defence or judge, it is done without consultation with the family victim.

Having their VIS amended without consultation can be very distressing to a family victim. The family victim may consider that, after amendment, the VIS that is ultimately presented to the court is no longer a true reflection of their experience. Instead, the VIS becomes the product of the judge and the defence counsel.

In contrast, when all necessary amendments are made by the Crown Prosecutor, they are done in consultation with the family victim. This is less confusing and distressing for the family victim.

HVSG submits that:

(a) witness impact statements should not undergo any amendments after it is approved by the Crown Prosecutor; and

(b) the Crown Prosecutor should be solely responsible for ensuring that the contents and form of the VIS are acceptable for the Court.

11. CROSS-EXAMINATION OF A FAMILY VICTIM SHOULD NOT BE PERMITTED

Family victims who provide a VIS may be cross-examined by the defence on their statement. Some family victims may find this process confronting and difficult, and it may dissuade them from providing a VIS at all.

In particular, it is unclear whether, and to what extent, a victim's past criminal history, if any, will be a focus of cross-examination. If a family victim who provides a VIS is subject to cross-examination focusing on the victim's past criminal history, and uses this to undermine the credibility of the VIS, this adds a significant amount of stress to an already extremely painful process. This is particularly the case where the family victim is not prepared for, or warned of, such cross-examination.

HVSG understands that there are some protections against the cross-examination of a vulnerable person.[16] However, HVSG considers that cross-examination is not be necessary where all necessary amendments have been made by the Crown Prosecutor.

HVSG submits that:

(a) family victims should not be cross-examined on the contents of their VIS after it has been amended and approved by the Crown Prosecutor; or

(b) in the alternative, if cross-examination of a family victim is permitted, new guidelines should be developed which ensure that a focus on the past criminal history of victims is:

(i) either prohibited or significantly limited;

(ii) consistent across all cases; and

(iii) only carried out following sufficient information and warning being provided to family victims.

12. THERE SHOULD BE NEW JUDICIAL GUIDELINES ISSUED IN RELATION TO VICTIM IMPACT STATEMENTS

HVSG's research and experience has indicated numerous concerning practices in relation to the way in which VIS are treated by the court.

(i) *Consistency*

Judges vary considerably in what they will accept in a VIS. This creates confusion and disappointment in family victims, who may have their statements amended in a way that would not have been required in another trial before a different judge.

(ii) Confusion about how the VIS affected the sentence

Often family victims are not clear on the impact their VIS had on the eventual sentence of the offender. This leaves family victims anxious and confused about the part they played in the sentence.

(iii) Etiquette in the court room when an oral VIS is given

There has been a concerning trend of judicial officers and people in the courtroom not giving an oral VIS their full attention. There is sometimes chattering in the courtroom, and defence counsel and judges have been known to shuffle their papers and engage in other distracting behaviour. These behaviours are disrespectful to the family victim who is in the process of sharing very traumatic and personal experiences.

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[16] *Crimes Act 1914* (Cth), Part IAD.

To reduce uncertainty and disappointment in family victims, HVSG submits that judges be provided with new guidelines which:

(a) ensure that decisions to allow or disallow content of a VIS are made consistently;

(b) require judges to explain to family victims the way in which their VIS was considered, and why aspects of their VIS may have been discounted in sentencing; and

(c) require appropriate etiquette is used at all times during an oral VIS.

13. THERE SHOULD BE INFORMATION ABOUT HOW USING A SERVICE PROVIDER FOR AN ORAL VIS MIGHT AFFECT SENTENCING

Family victims sometimes choose to have a counsellor or service provider read their VIS in court.[17] This may be for a number of reasons: it might be because English is not their first language, they may be elderly or too young, or they may be particularly vulnerable. The fact that another person is reading their VIS is a source of concern for family victims, who worry that this could change the impact their VIS would otherwise have had on the sentence.

HVSG submit that more information should be provided to family victims who do not intend to personally read their VIS to the court. This information should be provided in languages that family victims can understand. Most importantly, it should inform family victims about how this option might affect sentencing, if at all.

[17] *Victim Impact Statement- information package*, NSW Justice Victims Service, page 5.

TERM OF REFERENCE 4: THE LEVEL OF SUPPORT AND ASSISTANCE AVAILABLE TO VICTIMS

14. SUPPORT AND ASSISTANCE AVAILABLE TO FAMILY MEMBERS OF HOMICIDE VICTIMS

In NSW, a number of services offer support and assistance to families of homicide victims, including:

(i) the Office of the DPP Witness Assistance Service (the **DPP**);

(ii) victim support groups, such as HVSG; and

(iii) the NSW Government Victims Services unit (**Victims Services**).

HVSG considers that, in most circumstances, these services provide sufficient support and assistance to family victims.

15. CIRCUMSTANCES WHERE SUPPORT AND ASSISTANCE IS NOT SUFFICIENT

HVSG submits that the support and assistance available to family victims is not sufficient where family victims:

(a) live in rural NSW; or

(b) do not speak English as their first language.

The additional emotional distress caused by the lack of support and assistance in these circumstances can cause family victims to become disengaged and dissatisfied with the sentencing process.

Rurally located family victims

It is much more difficult for individuals in rural NSW, as opposed to those in metropolitan NSW, to engage with the sentencing process.

Almost all support services are located in metropolitan NSW. For family victims in rural areas, accessing these services, and presenting in court, requires a significant time commitment and financial expense. Financial expenses may include transport, accommodation and parking. Further, family victims are often given very little notice of the hearing date.

Consequently, it is often not possible for family victims in rural areas to obtain face to face support or to attend the court hearing to read their VIS. Instead, individuals are left to prepare their VISs on their own and rely on third parties (eg counsellors) to read their VISs in court on their behalf.

This inability to properly engage with the sentencing process, combined with the perception that their VIS is critical to the sentencing outcome, creates significant emotional stress

for family victims. Further, not being able to read their VIS in court, or at least be present in court, limits the potential for any therapeutic benefit being gained from the process.

Non-English speaking family victims

The sentencing process is far more difficult to engage with for family victims who do not speak English as their first language.

These family victims generally require interpreter services to assist both with preparing their VIS and reading their VIS in court. However, very little support is provided.

In a recent case, a family victim required an interpreter to translate his VIS because he did not speak English as a first language. Assisted by HVSG, the family victim contacted both the DPP and Victims Services to seek assistance. Both entities denied that this was their responsibility.

Eventually, the DPP did arrange and pay for a translator service, however the family victim found the service to be highly unsatisfactory. The translator spoke a different dialect to the family victim and had a lack of understanding about VISs and the criminal justice process, which made translating the VIS considerably more difficult.

The shortcomings of the service provided, in addition to the stress of initially being denied by both the DPP and Victims Services and of not having someone immediately available to translate his VIS, added an additional layer of distress to family victim's already traumatic circumstances.

16. SUBMISSIONS FOR REFORM

HVSG submits the level of support and assistance available should be equal for all family victims, regardless of their circumstances.

HVSG submits that insufficient assistance and support is provided to family victims who are located in rural NSW or who do not speak English as a first language.

HVSG submits that the following reforms should be made to improve the support and assistance provided in these circumstances:

(a) financial assistance, including transport and accommodation, access to audio visual link up should be made available to those located in rural NSW, to assist them in receiving support to write a VIS and to attend court;

(b) bespoke, free of charge, interpreter and translator services should be arranged for family victims who require them, both to assist with writing/translating a VIS as well as reading the VIS in court;

(c) it should be made clear which entity, either the DPP or Victims Services, has responsibility for the above; and

(d) if a family victim chooses to make a VIS, they should receive the same treatment by the DPP as if they were a primary witness.

17. CONCLUSION

HVSG supports some of the justice system's most vulnerable people. It has worked with family members impacted by homicide for almost three decades and recognises the enormous importance of VISs. HVSG welcomes the opportunity to engage with the Committee on the reform of VISs, ensuring that family victims are given support, respect and ultimately a voice in the criminal justice system.