

Victims' involvement in sentencing

Legal Aid NSW submission to
Sentencing Council

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 29 Women's Domestic Violence Court Advocacy Services.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority, Drug Court and the Youth Drug and Alcohol Court.

The Criminal Indictable Section provides representation in trials, sentences and short matters listed at the Downing Centre District Court, complex committals in Local Courts throughout NSW, Supreme Court trials and sentence proceedings throughout NSW, fitness and special hearings in the District and Supreme Courts, and high risk offender matters in the Supreme Court.

The Legal Aid NSW Domestic Violence Unit (**DVU**) is a specialist unit helping

clients who have experienced domestic and family violence with both their legal and non-legal needs. The DVU is made up of specialist lawyers and social workers who connect with clients at crisis point. The DVU provides legal advice and representation in a range of areas including: apprehended domestic violence orders, family law, care and protection, housing, social security, credit/ debt problems, victims' support, financial assistance matters and criminal law.

Legal Aid NSW welcomes the opportunity to make a submission to the Sentencing Council of NSW in response to the Consultation Paper, *Victims' Involvement in Sentencing*. Should you require any further information, please contact:

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Introduction

Legal Aid NSW welcomes the opportunity to contribute to the Sentencing Council's review of victims' involvement in sentencing under the *Crimes (Sentencing Procedures) Act 1999* (the **CSPA**).

The CSPA Pt 3 Div 2 provides for victim impact statements (**VIS**) to be given in sentencing proceedings. However, Parliament did not set out the objects of these provisions. The Consultation Paper suggests that VISs have an instrumental function and an expressive, or therapeutic, function. Legal Aid NSW agrees that the instrumental function of VISs is to inform the court about the effects of the crime on the victim. This assists the court in performing its functions under section 3A of the CSPA which indicates that one of the purposes of sentencing is to acknowledge the effects of the crime on the victim.

However, we consider that the more important function of a VIS is its expressive function. The Consultation Paper notes several preliminary submissions indicated that for victims, sharing their experiences is empowering, validating, and can be therapeutic.¹ Similarly, the Victorian Law Reform Commission heard that VISs are

*an important opportunity to give expression to their suffering and to be heard by the court, the prosecution and the offender. Victims described the process of preparing and delivering a victim impact statement as therapeutic, cathartic and in other positive terms.*²

In *R v Tuala*, the Court of Criminal Appeal indicated that VISs may perform a third function; that is, they may, in certain circumstances, be relied upon as evidence of an aggravating factor, including section 21A(2)(g) of the CSPA, that 'the injury, emotional harm, loss or damage caused by the offence was substantial'.³

There is considerable tension between the expressive function of a VIS, and the third function outlined above. Victims have indicated that they prefer to make a VIS in their own words, without editing, and that they find the prospect of cross-examination on their VIS daunting.⁴ However, if a statement is to be used against a defendant to prove an aggravating feature on sentence, procedural fairness requires that its contents should be relevant to the offences for which the defendant is being sentenced, and that the maker should be available for cross-examination.

¹ Consultation Paper [1.39]

² Victorian Law Reform Commission *Victims of Crime in the Criminal Trial Process* (2016) (**VLRC Report**) [7.89]

³ *R v Tuala* [2015] NSWCCA 8 [77]-[80]

⁴ Consultation Paper Ch 2

The questions raised in the Consultation Paper regarding the victim experience, who can make a VIS, their content, admission and use of VISs, and procedural issues are closely related. We have responded to the questions raised in the Consultation Paper on the basis of the law as set out in *R v Tuala*. However, that Court also noted that ‘this Court has yet to reach a consensus on the use to which a victim impact statement may be put’.⁵ Should the law change in this regard, this would affect the Legal Aid NSW response to a range of issues raised on the Consultation Paper, including the extension of the provisions to a broader range of victims and offences, and the content of VISs.

Chapter 2: The victim experience

Information about VISs

Question 2.1

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

Legal Aid NSW considers that early and comprehensive advice to victims on the role, and limits, of the VIS in the sentencing process, will serve to minimise risk of concerns being raised as to inadmissible or objectionable material closer to, or during, the sentencing process.

Content of a victim impact statement

Question 2.2

(1) How can the practice, procedure and/or law for settling the admissible content of a VIS better meet the concerns of victims?

The Consultation Paper indicates that victims object to their VISs being edited, particularly where those requests for edits are made on the day of sentencing.

Legal Aid NSW solicitors are reluctant to object to the contents of a VIS and to seek edits, out of respect for the victim. We share the Director of Public Prosecutions (**DPP**)’s concern about excessively vigorous examination of VISs⁶ and note that this is not the practice of our solicitors. It is not common for our solicitors to object to the contents of a VIS.

However, where the VIS contains material that is inadmissible, particularly where it canvasses acts not before the court, a defence solicitor may be obliged to raise concerns to ensure their client is accorded procedural fairness in the sentencing process. The Consultation Paper notes that victims find objections to admissibility made on the day of sentencing particularly distressing as they leave victims ‘little time to process or accept changes needing to be made’.⁷ In our experience, objections at this late date are usually a result of the VIS being first made available to the defence on the day of sentencing. In

⁵ *R v Tuala* [2015] NSWCCA 8 [51]

⁶ NSW Sentencing Council, *Victims involvement in sentencing* (2017) (**Consultation Paper**) [2.41]

⁷ Consultation Paper [2.40]

response to Question 5.2 below we suggest that this situation should be avoided by requiring the prosecution to serve a VIS on the defence in advance of the hearing. This would protect procedural fairness for the defendant and provide a more predictable and less distressing process for the victim.

We further suggest that consideration be given to a recommendation of the Victorian Law Reform Commission (**VLRC**)⁸ that the DPP be required to review a VIS. While the statutory approach to the preparation and use of VISs differs in Victoria (where the victim prepares the statement and provides it to the court and the parties), we nevertheless consider that legislating a similar requirement in NSW as recommended by the VLRC would ensure greater compliance with the existing guidelines provided to victims by the ODPP as to the appropriate content of a VIS.⁹

Presenting the victim impact statement in court

Question 2.3

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

Victims are rarely cross-examined on the content of a VIS, and in fact the Legal Aid NSW solicitors involved in preparing this submission were not able to recall this ever occurring. However, as discussed at Question 4.4, as long as VISs are to be treated as a form of evidence, procedural fairness requires that cross-examination continue to be available.

We note that if the statute provided that VISs were to be used for their expressive and therapeutic function only, cross-examination would never be appropriate.

Victim impact statements in the Local Court

Question 2.4

(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?

Legal Aid NSW oversees the provision of services to victims of violence through the Women's Domestic Violence Court Advocacy Program (**WDVCAP**) and through the Domestic Violence Unit. The WDVCAP funds 29 Women's Domestic Violence Court Advocacy Services (**WDVCASs**) to provide help and information about getting protection from the court regarding domestic violence. An experienced WDVCAS manager reported to Legal Aid NSW that victims of domestic and family violence do not generally attend sentencing hearings, and if they do, it is because they are supporting the defendant. It

⁸ VLRC Report, Recommendation 27

⁹ Office of the Director of Public Prosecutions *Victim impact statements*

<http://www.odpp.nsw.gov.au/victims-witnesses/victim-impact-statements> (accessed 13 November 2017)

does not appear that victims of less serious offences see a benefit in making a VIS. It should not be assumed that giving a VIS is always empowering. As the Consultation Paper notes, it can be stressful and retraumatising.

However, Legal Aid NSW supports the provision of assistance to victims to give a VIS in the Local Court if they wish. All victims making a VIS should be offered trauma-informed support. This is vital to ensure that victims understand the process for and purpose of making a VIS, and to help with any trauma occasioned by reliving past experiences. The WDV CAP is well placed to provide that assistance to women who have experienced domestic and family violence. WDV CASs focus on incoming referrals, safety planning, pre-court, at court and post-court advocacy, limited hearing support (at two courts), information and referral for ongoing and social welfare needs. WDV CASs also host Local Coordination Points under the Safer Pathways Program, which organise Safety Action Meetings, a mechanism to deliver a coordinated response to women who have been identified as 'at serious threat' of further harm.

Should the use of VISs in Local Courts be expanded, the WDV CAP would be well-placed to provide trauma-informed support and assistance to women who have experienced domestic and family violence and are giving VISs in the Local Court, subject to adequate resourcing.

Victim assistance

Question 2.5

(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?

Victims should be able to access independent legal advice concerning, for example, their obligations in relation to victim impact statements. The Domestic Violence Unit in Legal Aid NSW frequently receives requests for legal advice from victims of crime. Legal Aid NSW also funds private lawyers on the Domestic Violence Panel to assist women and children in need of legal protection through apprehended domestic violence orders. The role of the Domestic Violence Unit or the Domestic Violence Panel could be expanded to provide legal advice to victims of crime. Consideration could also be given to the role of the Sexual Assault Communications Privilege Service within Legal Aid NSW, particularly where that Service has already been engaged by a victim in relation to sexual assault communications privilege issues.

However, Legal Aid NSW does not support the appointment of legal representatives for victims in sentencing proceedings. As the Consultation Paper points out, this would not be compatible with the adversarial basis of the criminal justice system, and raises the prospect of a 'three cornered' process at the sentencing hearing, causing potential unfairness to an offender. It also potentially undermines the role of the prosecutor in representing the community. We agree with the observations of the VLRC that:

allowing victims to appear as a matter of course in sentencing or appeal proceedings goes beyond the victim's proper role in a criminal justice system, even one which recognises a triangulation of interests between the accused, the community and the victim. Rather, it elevates victims to the role of secondary prosecutor. In many cases, this would require the offender to respond to two sets of evidence and legal argument, which may be unfair in a two-party adversarial process. In addition, victims may make submissions based on their personal interests, which could conflict with the prosecution's submissions. Taking the victim's submissions into account may mean that decisions about sentencing and appeal proceedings might be determined by reference to factors which are not independent, impartial and fair.¹⁰

Chapter 3: Who can make a victim impact statement

Primary victim

Question 3.1

- (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?

Legal Aid NSW considers that the current definition of 'primary victim' is largely appropriate; that is, a person against whom the offence was committed, or who was a witness to the offence, and who has suffered personal harm as a direct result of the offence. Priority should be given to the needs of the person against whom the offence was committed.

For this reason, we would support a limited extension of the definition to include the partner of a person whose pregnancy has been terminated or resulted in a still birth as a result of the offence, and the carer of a person injured by the offence. These people have a close relationship with the victim of the offence.

We do not support the extension of the definition of 'primary victim' to first responders or neighbours of premises where a crime occurred, because their relationship with the victim of the offence is not close. As the VLRC noted, extending the VIS provisions risks reducing the appropriate focus on the primary victim and those closest to them.¹¹

Further, extensions of the definition to people who were not direct victims or witnesses of the offence could create complexity in establishing that harm suffered was in fact a direct result of the offence. For example, it would be difficult to demonstrate that post-traumatic

¹⁰ VLRC Report [7.168]

¹¹ VLRC Report [7.93]

stress experienced by an ambulance officer was attributable to attending a particular crime scene, if the ambulance officer has attended several traumatic incidents. The acknowledged distress experienced by first responders should be dealt with via occupational health and safety approaches, rather than through the criminal justice system. As the Inner City Legal Centre submitted, if less direct victims are allowed to make VISs, then greater safeguards for the defendant should be implemented.¹² The potential for cross-examination of such individuals would increase, leading to delays in resolution of the proceedings.

Family victim

Question 3.2

- (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?

Legal Aid NSW supports a broader definition of ‘family victim’ that extends to, for example, nieces, nephews, in-law relationships, and Aboriginal kinship structures. This can be particularly important when a person does not have immediate family within the jurisdiction or at all.

We do not consider that it is appropriate to describe close friends as ‘family victims’. The Consultation Paper gives an example of a victim who had no relatives but had a close relationship with a neighbour, but the neighbour was ‘not permitted to provide a VIS’.¹³ Legal Aid NSW notes that a sentencing court has discretion at common law to admit a VIS, and queries whether application should have been made to the Court to admit the neighbour’s VIS.

Legal Aid NSW would support a discretion to the court to admit a VIS from a person with a close personal relationship with the victim. This discretion should only be available if no family victim is willing and able to make a VIS.

Type of harm

Question 3.3

- (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?

The definition of ‘personal harm’ appears to be somewhat restrictive, in that it does not encompass emotional suffering and distress, and would therefore appear to exclude victims who do not suffer physical, psychological or psychiatric injury. However, we note

¹² Inner City Legal Centre, *Preliminary Submission PV12*, 2

¹³ Consultation Paper [3.26]

that it is not the practice of Legal Aid NSW practitioners to object to the admission of a VIS on the basis that the person has not suffered physical harm or psychological or psychiatric harm. It is unlikely that the definition is causing any difficulties. However, we would support an amendment that reflects the current practice of courts to admit a VIS from victims who report suffering emotional suffering and distress.

The current requirement that personal harm be suffered as a *direct result* of the offence (section 26 of the CSPA) should, in any event, be retained.

Eligible offences

Question 3.4

- (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?

Legal Aid NSW agrees that the current provisions are complex and it is sometimes unclear whether a particular offence is one that entitles a victim to make a VIS. To some extent, this lack of clarity is ameliorated by the courts' common law discretion to admit a VIS from a person who is not eligible under the CSPA. In that respect, we note the Consultation Paper's acknowledgment that statements by victims may still be considered relevant and admissible to the sentencing process even if they are not an 'eligible offence'.¹⁴

However, a WDVCS manager reported that it is difficult to inform victims of domestic violence about their eligibility to make a VIS because of this lack of clarity. Legal Aid NSW would support the inclusion of all domestic violence offences as eligible offences, though noting this may impact on current efficiencies in the Local Court in domestic violence proceedings.

We do not support a general extension of the VIS provisions to victims of property offences. We agree with the observation of the NSW Law Reform Commission that for the most part, evidence will be led in cases involving property crime and fraud of the nature and extent of the loss, that can be taken into account within the factors that a court must consider in sentencing an offender including, where orders for compensation are sought by the prosecution.¹⁵ Expanding the VIS provisions in this manner will have resource implications for courts and parties: the prosecutor must spend time advising the victim about their eligibility and settling the contents of the VIS, the defence must advise and seek instructions from their client as to the content of the statement, and reading the VIS in court can take a significant amount of time. A Legal Aid NSW solicitor recently appeared in a hearing where reading the VIS (via an interpreter) took three hours.

¹⁴ See *Porter v R* [2008] NSWCCA 145 and *Miller v R* [2014] NSWCCA 34.

¹⁵ NSW Law Reform Commission *Sentencing* (2011) Report No 139 [19.23]

Matters listed on a Form 1

Question 3.5

- (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?

Legal Aid NSW would not object to the extension of the VIS provisions to the victim of an offence listed on a Form 1. We note that it would be unusual that the victim of a Form 1 is not the same person as the victim of the principal offence, but it does happen and, as Form 1 offences are taken into account for the purpose of sentencing, those victims should be entitled to have their voices heard.

Community impact statements

Question 3.6

- (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?

Legal Aid NSW does not support the adoption of community impact statements. We agree with the concerns outlined in the Consultation Paper at [3.83]. In particular, we note that:

- judicial officers are already aware of the impact of crime on communities, and
- it would be difficult to verify the content of a community impact statement, particularly if that statement sought to describe the impact of a particular crime on a community.

We consider that there would be a real risk of injustice to the defendant if he or she were held responsible for harm to a community when it could not be shown that the harm was a direct result of the defendant's actions.

Chapter 4: Content, admission and use of victim impact statements

Content of a primary victim's victim impact statement

Question 4.1

- (1) What forms of harm, or other impacts or effects of an offence, should it be possible to include in a primary victim's VIS?

The CSPA defines a VIS as a statement of 'personal harm suffered by the victim', and the definition of 'personal harm' appears to restrict the contents of a VIS to harm that amounts to physical, psychological or psychiatric injury.¹⁶ However, we note that it is not the

¹⁶ CSPA s 26

practice of Legal Aid NSW practitioners to object to the admission of a VIS that alleges injuries that fall outside this definition, and the courts do not, in our experience, refuse to admit a VIS on this basis. We are aware of many VISs that assert harm of a wide ranging nature, and the definition does not appear to be causing any difficulty.

As noted above, we would support extending the definition to emotional suffering and distress.

Content of a family victim's victim impact statement

Question 4.2

(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?

The CSPA defines a family victim VIS as a statement of 'the impact of the primary victim's death on the members of the primary victim's family'.¹⁷ We are not aware of any difficulties arising from this definition and note courts in NSW have given the concept of 'impact' a broad construction.¹⁸ Legal Aid NSW would support an extension of the definition of 'family', as discussed in response to Question 3.2 above.

What a victim impact statement may not include

Question 4.3

(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?

Legal Aid NSW considers the law in relation to prohibited content is satisfactory. The Court of Criminal Appeal (**CCA**) has indicated 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'.¹⁹ The Regulation provides that a VIS must not contain 'anything offensive, threatening, intimidating or harassing'.²⁰ The Consultation Paper notes that 'courts seem to allow a degree of latitude, at least with regard to material that may be considered offensive'. In the experience of our solicitors, this is the case. Many statements are made in VISs that are strictly inadmissible. To a large extent, this is addressed by submissions, and the court is relied upon to ignore prohibited and inadmissible material.

However, it is not possible to take this approach with regard to a VIS that contains statements about offences not charged. It is an important principle, underpinning the right of a defendant to a fair trial, that the court should only sentence with regard to offences

¹⁷ CSPA s 26

¹⁸ *R v Turnbull* (No 24) [2016] NSWSC 830 [8]

¹⁹ *R v Newman* [2004] NSWCCA 102 [82]

²⁰ *Crimes (Sentencing Procedure) Regulation 2017* (NSW) cl 11(6)

for which the defendant has been charged and convicted, and no material regarding other matters should be before the court. To avoid submissions about admissibility and edits taking place on the day of the hearing, Legal Aid NSW recommends procedural changes in response to the questions raised in Chapter 5 of the Consultation Paper.

Court's use of a primary victim's victim impact statement

Question 4.4

- (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?

The provisions regarding the courts' use of a VIS offer very little guidance to the courts or practitioners as to how a VIS may be used.

As noted at the outset, Legal Aid NSW considers that the most important function of the VIS is the expressive function. It gives victims a voice in proceedings, which can have a restorative and therapeutic effect. VISs also have the instrumental function of assisting courts with their task of sentencing, as they are required to give effect to section 3A of the CSPA, which provides that one of the purposes of sentencing is to 'recognise harm done to the victim and the community'.

Legal Aid NSW does not consider that a VIS is an appropriate vehicle for evidence about an aggravating factor, including section 21A(2)(g), that 'the injury, emotional harm, loss or damage caused by the offence was substantial'. Proof of an aggravating factor such as substantial harm can lead to a significant increase in penalty. Aggravating factors must be proved beyond reasonable doubt.²¹ Legal Aid NSW considers that an unsworn statement, where the maker is not available for cross-examination, is not an appropriate basis for a finding beyond reasonable doubt. We note the absence of any provision in the CSPA requiring service of a VIS on the defendant, and the fact that section 28(5) of the CSPA means that making a VIS available to the offender is discretionary. This suggests that VISs are not to be relied upon for evidence of facts in issue.

We agree there is a need for caution in this respect, as observed by the court in *R v Berg*,

However, I would sound a note of caution in relation to the proper approach to fact-finding concerning the impact of a crime upon other members of the community or, upon the victim. If that is to be achieved by way of victim impact statements, then an injustice may occur in relation to a person standing for sentence, in so far as the maker of the statement would not normally be available for cross-examination.

I add that caution in support of the general proposition that extreme care needs to be taken by those who prosecute and defend these cases, and

²¹ *The Queen v Olbrich* (1999) 199 CLR 270 [27]–[28] where the High Court adopted the approach taken in *R v Storey* [1998] 1 VR 359, 369

*also by trial judges in always ensuring that there is a proper evidentiary basis for any findings of fact which go towards aggravating or mitigating a sentence.*²²

The CCA in *R v Tuala* held that a VIS should not, on its own, be the basis of a finding of substantial harm unless no objection is taken to the VIS, no question raised as to the weight to be attributed to it, and no attempt made to limit its use.²³

Legal Aid NSW considers that there would be advantages to a more definitive legislative statement that VISs, as unsworn statements not subject to cross-examination, are not an appropriate basis for a finding of substantial harm.

The position taken in *Tuala* means that if the presence of substantial harm is in dispute, legal representatives of the defendant are obliged to make to objections to VISs, to seek edits and amendments, and to make submissions regarding the weight to be given to VISs. This undermines the expressive purpose of a VIS, where a victim tells the court about the impact of the offence in their own words. It also conflicts with the expectations of victims, who have indicated that they object to the editing of statements to ensure that they contain admissible material only, and who object to being cross-examined.²⁴

Legal Aid NSW solicitors are sympathetic to these concerns and attempt to respect them as far as possible. However the state of the law, as set out in *Tuala*, means that the defence may be obliged to take objections, seek edits, and make submissions as to weight should the prosecution seek to rely on the VIS to prove an aggravating factor.

Court's use of a family victim's victim impact statement

Question 4.5

- (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?

Section 28(4) of the CSPA provides that a VIS given by a family victim may be taken into account in determining sentence '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'.²⁵ Legal Aid NSW has no concerns with this provision, and we agree with the approach taken by McCallum J that the evidence of family victims gives 'texture to the undoubted proposition that every unlawful taking of a human life harms the community in some way'.²⁶

²² *R v Berg* [2004] NSWCCA 300 [48]-[49], Wood CJ at CL

²³ *R v Tuala* [2015] NSWCCA 8 [77]-[80]

²⁴ Consultation Paper Ch 2

²⁵ However section 28(4) of the CSPA does not affect the application of the law of evidence in proceedings relating to sentencing: CSPA s 28(4A)

²⁶ *R v Halloun* [2014] NSWSC 531 [65]

Absence of a victim impact statement

Question 4.6

(1) What provision, if any, should be made for what a court may or may not conclude from the absence of a VIS?

Legal Aid NSW has no concerns about the provisions in section 29.

Proving mitigating circumstances

Question 4.7

(1) Should it be possible to use material in a VIS to establish a mitigating factor at sentence?
(2) If so, in what circumstances?

The court's decision in *R v Tuala*, which relates to aggravating factors, suggests that a VIS could also establish a mitigating factor if there is nothing to contradict it and no objections made. As noted in response to 4.4, Legal Aid NSW considers that a VIS is not an appropriate vehicle for establishing a fact in issue.

Corroborating evidence

Question 4.8

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

No special provisions are necessary. If the prosecution and the defence cannot agree on the facts upon which the court will sentence, a contested hearing on the facts can be held. As the High Court said in *GAS v The Queen*,

In the case of a plea of guilty, any facts beyond what is necessarily involved as an element of the offence must be proved by evidence, or admitted formally (as in an agreed statement of facts), or informally (as occurred in the present case by a statement of facts from the bar table which was not contradicted).²⁷

Similarly, the CCA said in *O'Neill-Shaw*, a sentencing judge must

impose the appropriate sentence, based on the evidence properly before the court. As explained by Howie J in Palu, the factual basis should be identified with particularity and disputed facts resolved by the accusatorial process upon the evidence before the court.²⁸

²⁷ *GAS v The Queen* (2004) 217 CLR 198 [30]

²⁸ *O'Neill-Shaw v R* [2010] NSWCCA 42 [26]

Where a victim impact statement is not consistent with charges proved

Question 4.9

- (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?

The prosecution should not tender a VIS that includes reference to offences for which the defendant is not being sentenced. According to the Prosecution Guidelines of the Office of the Director of Public Prosecutions:

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.²⁹

Similarly, the Office of the Director of Public Prosecutions' information for victims states:

If the VIS refers to the effect resulting from other offences for which the offender was not convicted by the court, then those parts will not be included in the statement accepted by the court.³⁰

If these Guidelines are followed, there should be no instances where a VIS is tendered that is inconsistent with the charges for which the defendant has been convicted. As noted above, a statutory requirement that the DPP review the VIS before it is tendered, and early provision of the VIS to the defence, would assist in this regard.

Objecting to the content of a victim impact statement

Question 4.10

- (1) What provision, if any, should be made for objections to the content of a VIS?

The preferred approach is for the prosecutor to ensure the inadmissible material is removed from a VIS prior to tendering the statement. We refer to our suggestions in response to Question 4.9 as to how this may be facilitated. However, if this has not occurred, objections can be made on the day of the hearing. In egregious cases, this should lead to the editing of the statement. In other cases, submissions can be made regarding material that should be ignored for the purpose of sentencing.

²⁹ Office of the Director of Public Prosecutions *Prosecution Guidelines* (2007) 35

³⁰ Office of the Director of Public Prosecutions *Victim impact statements*

<http://www.odpp.nsw.gov.au/victims-witnesses/victim-impact-statements> (accessed 13 November 2017)

We note that this section of the Consultation Paper quotes extensively from Justice Nettle of the Victorian Court of Appeal. However, in Victoria, VISs are statutory declarations or sworn oral evidence,³¹ and in our view, this gives them a significantly different evidentiary status to VISs in the NSW courts. We consider that Queensland provisions are more analogous to those in NSW,³² and prefer the approach taken by the Queensland Court of Appeal:

*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 to be correct (and this includes lay diagnoses of medical and psychiatric conditions) they should not be acted on.*³³

Chapter 5: Procedural issues with the making and reception of a victim impact statement

Legal Aid NSW considers that clearer procedures could improve the experience of giving a VIS for victims as well as safeguard fairness for defendants. If victims are advised early as to the appropriate content for a VIS, and if prosecutors carefully review those statements and provide them to their defence ahead of the hearing, the need for hasty edits to the VIS on the day of the hearing can be avoided.

Time of making a victim impact statement

Question 5.1

- (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?

Earlier preparation of a VIS would have benefits for both victim and offender because there would be more time to settle the contents of the VIS and ensure that it does not contain inadmissible or inappropriate material. However, if the VIS contained information inconsistent with the witness' previous evidence, it would have to be served on the

³¹ *Sentencing Act 1991* (Vic) s 8K(2)

³² *Penalties and Sentences Act 1992* (Qld) ss 179K-179N. The Queensland statute provides for the victim to give the prosecutor a VIS. The prosecutor has discretion to decide what, if any, details are appropriate to be given to the sentencing court. The VIS may be read aloud by the person who prepared the statement or by the prosecutor. The statement is not read under oath or affirmation. The Queensland statute provides that 'the purpose of the reading aloud of the victim impact statement before the court is to provide a therapeutic benefit to the victim': s 179M(4)(a).

³³ *R v Singh* [2006] QCA 71, 6-7 cited in Consultation Paper at 4.66

defence.³⁴ If a plea negotiation took place after the preparation of a VIS, further edits to the VIS might be needed.

Legal Aid NSW does not support the VLRC proposal to provide that only victim impact statements that have been ‘declared’ are admissible in criminal proceedings to which the victim impact statement relates.³⁵ The general rule is that relevant evidence is admissible. An inconsistent statement by the victim is highly relevant in criminal proceedings and should be admissible.

Notifying the offender

Question 5.2

(1) 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?

Legal Aid NSW considers that there should be a formal requirement that the defendant has notice of, and an opportunity to challenge, the contents of a VIS. This requirement should be in rules of the court or the CSPA or its regulations.

Number of statements

Question 5.3

(1) 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?

A court has discretion as to whether it receives and considers a VIS³⁶ but if it has received a statement, the maker of the statement is entitled to read the whole VIS in court.³⁷ We consider that, in the unusual case where many or lengthy VISs are tendered (for example, where a deceased victim has a large family), the court should have discretion to order that only certain VISs, or only parts of the VIS, are read aloud, in order to avoid excessively lengthy proceedings.

Attaching other material

Question 5.4

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

The Consultation Paper refers to the occasional practice of attaching to a VIS a montage of images of a victim who died, similar to eulogy videos. We are concerned that such

³⁴ Office of the Director of Public Prosecutions for NSW *Prosecution Guidelines* (2007) 31

³⁵ VLRC Report Rec 29

³⁶ CSPA s 28(1)

³⁷ CSPA s 30A(1)

material may be unfairly prejudicial to an accused and for that reason do not support amendment to section 30(1A) of the CPSA.

Medical and other expert evidence

Question 5.5

(1) How should medical and other expert evidence relating to the impact of an offence on a victim be dealt with at sentencing?

If medical or expert evidence is to be relied upon to prove a fact in issue, such as substantial harm, then those documents should be tendered in the usual way and the maker of the statement made available for cross-examination. They should not be attached to a VIS.

Other formal requirements

Question 5.6

(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?

Legal Aid NSW has no concerns about the current arrangements.

Tendering a victim impact statement

Question 5.7

(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?

Only the prosecutor should be permitted to tender a VIS. This preserves the prosecutor's role in the sentencing proceedings, and ensures that the VIS does not contain inappropriate material.

Special arrangements for reading a victim impact statement

Question 5.8

(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?

We note that since release of the Consultation Paper, the *Justice Legislation Amendment Act 2017* (NSW) has made further provision for reading a VIS in court. For proceedings for prescribed sexual offences, there is a presumption that the court will be closed when the VIS is read out.³⁸ The victim is also entitled to choose a person or persons to be

³⁸ CSPA s 30A(3A)(b)

present near them and within their sight when the statement is read out.³⁹ Legal Aid NSW would not object to support persons and use of remote witness facilities being available to all victims, if this could be done without introducing inefficiencies. We would also be open to the use of pre-recorded video to present a VIS to the court, as long as that video was served on the defence ahead of time and inadmissible material excluded.

We note that in South Australia, the court can make an order that a defendant be excluded from the place where the VIS is given.⁴⁰ We would object to any such provision in NSW.

Other considerations

Question 5.9

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

Where the offender is vulnerable, for example, has a mental illness or is a child, particular care should be taken to ensure that the VIS contains only admissible material and does not contain anything that is offensive, threatening, intimidating or harassing.

Oral statements

Question 5.10

- (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?

It should not be possible for a victim to deliver an oral VIS without tendering one in writing. There would be no possibility of the prosecution or the defence ensuring that inadmissible and prejudicial material is not placed before the court. Currently, there are concerns about victims who make oral statements that are not consistent with their written statements.

Making a victim impact statement on behalf of a victim

Question 5.11

- (1) What provisions should be made for someone to make a VIS on a victim's behalf?

Legal Aid NSW would not object to an extension of the provisions allowing representatives to make a VIS to all child victims (not only those 'incapable of providing information'), including family victims. We consider that representatives should be a person with parental

³⁹ CSPA s 30A(3C)

⁴⁰ *Evidence Act 1929 (SA)* s 13A

responsibility, a close family member, a carer or a person with an intimate personal relationship with the victim, as is provided in the ACT legislation.⁴¹

Cross-examination and re-examination

Question 5.12

(1) Under what circumstances should it be possible to cross-examine or re-examine a person who has made a VIS?

As noted earlier, Legal Aid NSW solicitors do not usually cross-examine a person who has made a VIS, and we are not aware of any matters undertaken by Legal Aid NSW solicitors where this has happened. However, as discussed at 4.4, the courts have left open the possibility of a VIS being relied upon as evidence of an aggravating factor; that is, substantial harm. If the court is proposing to rely on a VIS as evidence of an aggravating factor, and that fact is in issue, it may be the duty of the defendant's representative to cross-examine the maker of a VIS. We would have significant concerns were the defence prohibited from cross-examining the maker of a VIS. This would be contrary to procedural fairness and natural justice principles. A more balanced approach to this issue, if not addressed through the suggestions we have made about (1) a clearer statement in the legislation as to the therapeutic (as opposed to evidential) objectives of the VIS, (2) formalising the role of the DPP in reviewing the VIS and (3) early provision of the VIS to the defence, would be legislating safeguards to prevent direct cross-examination of victim by an unrepresented defendant.

Use of victim impact statements outside of a sentencing hearing

Question 5.13

(1) To what extent and under what conditions should a VIS be available outside of the sentencing proceedings to which it relates?

Legal Aid NSW has concerns about the publicity given to VISs when they are read out in court or placed on the court file, as these statements may sometimes contain material about offences for which the defendant was not charged or convicted, and abusive comments about the defendant. However, we consider on balance that the principle of open justice requires that these statements should continue to be made publicly.

We have concerns about the DPP proposal that a VIS be treated as sensitive evidence in accordance with the *Criminal Procedure Act 1986* (NSW). If a VIS is, potentially, to be relied upon to establish a fact in issue at a sentencing hearing, the defendant needs proper access to the document in order to give instructions to his or her legal representative. The defendant frequently will be in custody while the VIS is being prepared, and treating the VIS as sensitive evidence means that his or her access to it will be significantly limited.

⁴¹ *Crimes (Sentencing) Act 2005* (ACT) s 49

Chapter 6: Restorative justice practices in NSW

When restorative justice practices should be used

Question 6.1

- (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?

Legal Aid NSW supports the use of restorative justice practices. We provide legal services to people participating in Forum Sentencing, Circle Court and Youth Justice Conferences, if the person satisfies the means test and Legal Aid NSW is satisfied that it is appropriate that the person has legal representation. We would support expansion of pre-sentencing restorative justice practices in New South Wales, including expanding forum sentencing to other NSW Local Court locations and in appropriate cases to the District Court.

The Consultation Paper raises concerns about the effectiveness of restorative justice practices, noting that 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 dealt with through the normal sentencing process.⁴² However, in 2014 the Australian Institute of Criminology (**AIC**) comprehensively reviewed evaluations of restorative justice practices. The AIC report indicates that while not all programs have reduced reoffending, there have been significant successes:

- ‘A meta-analysis of 22 studies examining the effectiveness of 35 individual restorative justice programs found that restorative justice was more effective than traditional criminal justice approaches, leading to reduced reoffending’.⁴³
- A review of research comparing outcomes of restorative justice practices with those from conventional processes found ‘substantial reductions in repeat offending for both violence and property crime’.⁴⁴
- An ACT experiment where violent offenders were randomly assigned to either conference or the courts found significantly lower reoffending.⁴⁵
- Across seven randomised controlled trials conducted by the Justice Research Consortium in the United Kingdom, offenders assigned to restorative justice practices committed significantly fewer offences in the following two years.⁴⁶

⁴² Consultation Paper [6.24]

⁴³ Jacqueline Joudo Larsen *Restorative justice in the Australian Criminal justice system* Australian Institute of Criminology (2014) (**AIC**) 23

⁴⁴ AIC 24

⁴⁵ AIC 25

⁴⁶ AIC 25

The AIC concluded that 'while the evidence is not overwhelming at present, there is a growing body of evidence that supports the assertion that restorative justice can reduce reoffending ...'.⁴⁷

The AIC also found that victims involved in restorative justice practices consistently reported higher rates of satisfaction and feelings of safety and security.⁴⁸ Finally, the AIC reported that, while cost-effectiveness requires further research, youth justice conferences cost less than processing young offenders through the Children's Court.⁴⁹ Evaluations of the trials in the UK took into account the cost of crime prevented and found that this benefit was greater than the running costs of the programs.⁵⁰

Legal Aid NSW considers that NSW should continue to implement, improve, expand and evaluate restorative justice practices, because of its potential to reduce reoffending, improve victim satisfaction and reduce costs to the justice system.

Procedural safeguards

Question 6.4

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

Legal Aid NSW considers that the UN *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*⁵¹ should be the basis of the procedural safeguards for restorative justice practices in NSW. In particular,

- There should be free and informed consent from all parties (art 7)
- There needs to be acknowledgement by all parties of the basic facts of the case (art 8)
- All parties should have the right to legal advice (art 12)
- Children should have the right to parental support (art 12)
- Matters disclosed in restorative processes should be confidential (art 13)

Facilitators should provide a safe environment and be appropriately trained (arts 19, 20). Discussions should be held with all those proposing to participate in the process to ensure that all participants understand that the purpose of the process is reparation for the victim and reintegration for the offender.

Where the restorative process results in a sentence, as in the case of circle sentencing, judicial officers should ensure that the sentence imposed is appropriate and not more severe than would have been arrived at through traditional processes.

⁴⁷ AIC 26

⁴⁸ AIC 27

⁴⁹ AIC 28

⁵⁰ AIC 28

⁵¹ ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000).