THE LAW SOCIETY OF NEW SOUTH WALES
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Preliminary Submission on victims' involvement in sentencing

4 August 2017

The Sentencing Council

New South Wales Sentencing Council

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The NSW Young Lawyers Criminal Law Committee makes the following submission in response to the call for preliminary submissions on Victims' involvement in Sentencing.

NSW Young Lawyers

NSW Young Lawyers is a division of the Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Criminal Law Committee (**Committee**) is responsible for the development and support of members of NSW Young Lawyers who practice in, or are interested in, criminal law. The Committee takes a keen interest in providing comment and feedback on criminal law and the structures that support it, and consider the provision of submissions to be an important contribution to the community. The Committee is drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with criminal law.

Introduction

Victim Impact Statements (**VIS**) are an important part of the sentencing process for victims of crime. The Committee notes that victims often express feelings of empowerment in being able to engage in this process and it allows victims to find personal closure and finality. This is the case regardless of whether a victim has given evidence at trial prior to conviction, or their participation is limited to providing VIS on sentencing. This is illustrated by a comment made by one of our members:

> For some victims, the ability to do a VIS is, to them, the most important thing to them out of the process. It is their moment in court for them to explain what has happened to them and it's sometimes a moment many victims wait years (sometimes decades) for.

However, the process is not without its problems, with that same practitioner also noting that:

> On occasion, the process of objection to a VIS even where it is tendered under a statutory scheme is so vigorous that I have heard victims say that the VIS process was more violating and traumatic than days of cross examination.

Accordingly, the Committee submits that VIS procedures should be reviewed to better protect and support victims in the process.

At the same time, it is important to keep in mind that sentencing is not only concerned with addressing the harm suffered by victims. There are other important considerations that must play a role in formulating adequate and proportionate criminal sanctions. Thus, the Committee submits that the precise role of victim participation in sentencing needs to be carefully calibrated to account for these broader purposes.

Clarifying the interaction between common law and statutory VIS

The Committee submits that the interaction between the common law and statutory VIS should be clarified. The Committee's view is that codification would the best approach. Presently, neither common law nor statute expressly stipulate who can make a victim impact statement and not all victims of crime can make VIS. Section 27 of the *Crime (Sentencing Procedure) Act 1999* (NSW) (**CSP Act**) sets out the types of offences for which statutory VIS might be made. These include offences dealt with by the Supreme Court, the Industrial Relations Commission, the District Court or the Local Court, and are largely offences which result in death, are sexual in nature or involve some element of physical harm or violence. Should an offence fall within one of the relevant categories stipulated by the legislation, it triggers the application of s 26 of the CSP Act which defines a victim impact statement as being provided in one of two categories, either in respect of a primary victim or a family victim.

Offences for which VIS may be made

The Committee submits that the categories of offences for which VIS can be provided should be enlarged to include non-violent offences against identifiable victims involving serious breaches of trust or privacy for example, fraud,[1] identity theft,[2] or image based abuse.[3] Despite their non-violent nature, these offences can have a devastating impact on their victims. Moreover, such crimes commonly have multiple victims and indirect impacts.

Definition of Family Victim

The Committee submits that the definition of 'family victim', and the circumstances in which a family victim should be able to make VIS, should be widened.

[1] See e.g. *Crimes Act 1900* (NSW) Part 4AA.
[2] See e.g. *Crimes Act 1900* (NSW) Part 4AB.
[3] See e.g. *Crimes Act 1900* (NSW) Part 3 Div 15C.

A 'family victim' is currently limited to immediate family of a primary victim who has died.[4] This definition excludes close personal relationships that do not fall within the formal definition. Importantly, it does not expressly provide for indigenous kinship relationships. Furthermore, it does not take into account victims that may not have any direct family but do have close friends who are seriously impacted by the death of the victim. Accordingly, we submit that s 26 of the CSP Act be amended to introduce an inclusive definition that broadens the definition of 'family victim' to allow the court discretion to accept VIS from others close to the deceased in appropriate circumstances.

The definition also excludes families of victims who are very young children or intellectually disabled. These families, by virtue of the limited capacity of the victim that they care for, are directly and sometimes severely affected by the impact of the crime on the victim even though it does not result in the death of the victim. The victim's limited capacity also means that they are often unable to provide VIS to the court. The families of these victims often provide care for these people, and this commonly involves assisting in psychological and emotional support. While in some circumstances a parent can provide VIS on behalf of child victims, it can only extend to the impact on the child that the parent can describe.

Use a court may make of VIS

There is conflicting case law regarding the use a sentencing court may make of VIS. The current legislation provides a discretion to the sentencing court by the fact that it may receive and consider VIS "if it considers it appropriate to do so."[5] In *R v Tuala*,[6] Simpson J noted that there was no definitive guidance from the courts as yet, and in *R v Thomas*,[7] Basten J noted the lack of guidance from the CSP Act itself.

Given the inherent complexity involved in sentencing, the Committee submits that some basic principles or guidance would be useful. There has been piecemeal direction from the NSW Court of Criminal Appeal (**CCA**), but that has been conservative, and the principles are often limited to particular circumstances. However, the Committee submits that legislative clarification needs to retain an appropriate level of discretion for courts, because each case turns upon its own unique factors. The following is a brief outline of areas where VIS guidance by statutory intervention may be considered.

VIS and Cross Examination

One area of concern is the fact that the evidence in VIS is generally untested.[8] There are strong policy reasons to permit a degree of procedural fairness in testing evidence that may later provide the basis for a finding unfavourable to an offender. This would probably require that the maker of the statement be available

[4] CSP Act s 26.
[5] CSP Act s 28.
[6] [2015] NSWCCA 8, at [51].
[7] [2007] NSWCCA 269.
[8] *CSP* Act s 30A, see also; *R v Wilson* [2005] NSWCCA 219 at [27]-[28].

for cross-examination should the Crown wish to press certain evidence contained within the statement. However, recalling our earlier comments about the potentially traumatic nature of the process, this would be problematic considering the overarching purposes of the VIS regime, and the charter of victims' rights.[9] This is particularly the case in matters of sexual offences, violence offences, and domestic violence offences, where subjecting a victim to cross-examination on the impact of the offending would most likely cause the victim further distress.

Accordingly, any mechanism to test VIS would need to incorporate robust protection for victims, while still affording the offender a degree of procedural fairness. The Committee submits one approach that could balance these competing considerations is that where objection has been taken, and the issue is fairly in dispute (as opposed to evidence in VIS which is established by the evidence), it would be more appropriate that the focus be on the weight that a sentencing judge could attribute to the VIS.[10]

VIS and aggravating factors

The Committee submits that statutory guidance which crystallises or clarifies the principles of the CCA regarding aggravating factors would be helpful. Courts have been understandably cautious about the circumstances in which VIS can be used to establish aggravating factors on sentence.[11] Due to the intention that the VIS be untested, the CCA has been hesitant to permit the Crown to rely upon VIS to prove, beyond reasonable doubt, factors on sentence that would aggravate and increase the sentence to the accused. It is noteworthy that the CCA has laid down some principles acknowledging (in a similar fashion as taking judicial notice), that certain evidence in VIS can be expected in specific types of offences (e.g. sexual assault). The type of evidence that is usually expected, for example for trauma to have resulted from child sexual assault, can rely upon VIS with very little exception.[12] The limit is that the Crown must still adduce further evidence, if it wishes to rely upon a type of harm that is outside the normal bounds for that type of offence and VIS should not be the sole basis for that finding.[13] The Committee submits that it would be advantageous to clarify and formalise this approach.

VIS and inconsistency with the Crown case and uncharged acts

There have been a number of appeals to the CCA arising from the tender of VIS which are inconsistent with the Crown case, or which allege uncharged acts. For the purpose of avoiding such appeals, the Committee submits that statutory guidance be introduced that directs the court not to consider any aspects of VIS which

[9] *Victims Rights and Support Act 2013* (NSW) s 6.
[10] *R v Thomas* [2007] NSWCCA 269 at [73] and *R v Tuala* at [79].
[11] *Tuala* at [77] – [80]-[81].
[12] See e.g. *DBW v R* 2007] NSWCCA 236 at [39] and *R v Gavel* [2014] NSWCCA 56 at [110].
[13] *RP v R* [2013] NSWCCA 192 at [27].

are inconsistent with the agreed facts (following sentence) or the evidence adduced (following trial). Similarly, it should indicate that a court cannot consider any uncharged act alleged in the VIS.

Procedural problems with VIS

Often objection to VIS is not taken until the day of sentence. This means the victim is left in limbo and sometimes last-minute amendments to the statement have to be made. This can be very upsetting to victims and diminish the restorative effect of giving VIS. Accordingly, the Committee submits that clearer procedural guidelines be considered – either in the legislation, the regulations or by means of practice directions in the relevant courts.

One approach may be the introduction of a scheme similar to the tender of expert certificates. The *Evidence Act 1995* (NSW) s 177 provides that if an expert certificate is served within a particular time along with a notice indicating intention to tender it, then unless the other party advises that they require the expert for cross-examination the party is entitled to tender the expert certificate. This could be adopted for VIS and would provide more certainty. The process would have to be amended so that a copy of the statement is available to the defence to view because offenders are not to retain a copy, but otherwise it could be much the same. That way, if the defence has not indicated they object then VIS are tendered automatically. Or, if there is any objection it must be indicated and be dealt with *prior* to sentence.

Victim involvement in sentencing juvenile offenders

The Committee submits that juvenile offenders ought to be treated differently with respect to VIS. Presently, the *Children (Criminal Proceedings) Act 1987,* s 33C(2) provides that the division of the CSP Act which relates to VIS applies to any offence dealt with by the Children's Court that is an offence to which that Division would apply if it were being dealt with by the Local Court." The Committee submits that that aspect of the VIS scheme be amended to account for the special considerations for juvenile offenders while still allowing for appropriate victim involvement in sentencing.

The level of support and assistance available to victims

It is the Committee's view that there is considerable scope to provide more support and assistance to victims. In this respect, it is noted that the report of the 2016 review of the operation the *Victims Rights and Support Act 2013* (NSW) has not yet been tabled. The Committee reiterates aspects of its submission[14] in response to that review, which raised the following issues relevant to the level of support and assistance available to victims:

[14] NSW Young Lawyers, Submission to NSW Department of Justice. *Statutory review of the Victims Rights and Support Act 2013* (NSW), 28 July 2016 (available at http://www.justice.nsw.gov.au/justicepolicy/Documents/Review%20-%20Victims%20Rights%20and%20Support%20Act%202013%20Submissions/Law%20Society%20of%20NSW%20Young%20Lawyers%20Criminal%20Law%20Committee.pdf).

- the quantum of recognition payments,
- the definition of indigenous family victims,
- the lack of recognition payments for certain victims,
- reporting time limits on certain claims,
- the requirements for documentary evidence, and
- procedural assistance for claims.

In addition to these issues, the Committee is of the view that current arrangements for victims of crime do not currently provide sufficient support as they progress through the process. Accordingly, the Committee submits that the Witness Assistance Scheme should be broadened.

Restorative justice mechanisms

Restorative justice schemes such as Youth Justice Conferencing and Circle Sentencing have the potential to greatly improve outcomes for offenders, in terms of improving rehabilitation and reducing recidivism, and more importantly for the purposes of this review, for the victims. The Committee notes that the data is ambivalent[15] about the efficacy of these programs in their current forms. Accordingly, the Committee submits that the review should investigate whether these schemes can be strengthened or re-structured so as improve the experience of victims' interactions with the criminal justice system.

Concluding Comments

The criminal justice process can be highly problematic for victims of crime. For this reason, the Committee submits that there needs to be far greater support to assist victims in understanding and navigating the system. Furthermore, the role of the criminal law includes recognising the harm caused to victims[16] and so playing a role in sentencing is an important and necessary means of achieving this recognition. However, this harm is not the sole consideration for a sentencing court, but is considered along with other equally important principles which focus attention on the broader social implications of criminal behaviour. The Committee is of the view that while victims should have a central role in sentencing, this needs to be clearly defined and carefully calibrated. Failure to do so risks undermining parity for sentences for crimes of similar culpability and ignoring or sidelining other important considerations for sentencing offenders.

[15] Jacqueline Fitzgerald, "Does circle sentencing reduce Aboriginal offending?" (2008) 115 *BOCSAR Contemporary Issues in Crime and Justice* 1*;* Nadine Smith and Don Weatherburn*,* "Youth Justice Conferences versus Children's Court: A comparison of re-offending" (2012)) 160 *BOCSAR Contemporary Issues in Crime and Justice* 1.

[16] *Munda v Western Australia* (2013) 249 CLR 600 at [54].

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NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned.

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13 November 2017

By email

Dear Mr Waugh

Victims involvement in sentencing: NSW Young Lawyers Submission

NSW Young Lawyers is pleased to accept your invitation to attend the Sentencing Council's Roundtable on 27 November 2017. I will be attending with the Chair of the NSW Young Lawyers Criminal Law Committee, Liam Cavell, and another member of that Committee whose details will provided in due course.

Owing to the impending due date for submissions in response to the Sentencing Council's Consultation Paper (although acknowledging that an extension was granted to 17 November 2017), we have decided to put forward our views at the Roundtable in lieu of a written submission. However, we would be pleased to summarise our views in writing following the Roundtable, if this would be of assistance to the Sentencing Council.

Please do not hesitate to contact the undersigned if you have any questions or would like to discuss any of the above.

Yours sincerely,

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