BACKGROUND POLICY PAPER

FAMILY VICTIM IMPACT STATEMENTS AND SENTENCING IN HOMICIDE CASES

NSW DEPARTMENT OF ATTORNEY GENERAL AND JUSTICE

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The proposal

The Government proposes to legislate to specifically provide that courts in New South Wales may consider victim impact statements (**VIS**) by family victims when determining an offender's sentence in homicide cases.

This policy paper sets out the current law in New South Wales in relation to the use of VIS in sentencing, including in homicide cases. It considers developments in other jurisdictions and policy issues affecting the implementation of the proposal in New South Wales. Comments are sought on the key issues that should be addressed in implementing the proposal.

Purposes of VIS

VIS presently serve a number of purposes. They have an informative function in explaining to the court the extent of the impact of the crime on the primary victim's life. In cases not involving death this can contribute to the court's assessment of the seriousness of the offence and play a role in determining the appropriate sentence.

VIS also have a therapeutic function in enabling victims to communicate the impact of the crime to the court. Where a family member has died as the result of an act of violence, VIS provide an opportunity for the family to express their grief and loss, and allow proper public respect to be paid to these feelings.[1] Consultation undertaken by the Victorian Victims Support Agency revealed that:

> rather than impact directly on sentence, mostly victims wanted the court or the offender to hear about the impact of the crime. For family members of deceased victims, the purpose of the VIS was generally to give the deceased victim a presence or "voice" in the courtroom."[2]

Current sentencing law in NSW

The fundamental principle of sentencing in Australia is that a sentence must be objectively proportionate to the purposes of sentencing. That is, the final sentence must reflect the objective seriousness of the offence and offender.[3] In determining the sentence, the court must take into account the following factors:

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[1] The Department of Justice's 2009 review into VIS in Victoria undertook extensive consultations with victims groups. Those consultations revealed that victims identified the primary purpose of VIS as therapeutic, specifically, by allowing victims to communicate the impact of the crime to the court and "tell their story".

[2] *A Victim's Voice, Victim Impact Statements in Victoria*; Victims Support Agency, Department of Justice (Victoria); October 2009, p 9.

[3] *Veen v The Queen (No 1)* (1979) 143 CLR 458 and *Veen v The Queen (No 2)* (1988) 164 CLR 465.

- the facts of the offence;
- the circumstances of the offence;
- subjective factors about the offender; and
- relevant sentencing law.

In New South Wales, courts must determine sentences in accordance with the purposes of sentencing set out in section 3A of the *Crimes (Sentencing Procedure) Act 1999* (**CSPA**), which include:

- to protect the community from the offender;
- to ensure that the offender is adequately punished for the offence;
- to prevent crime by preventing the offender and other people from committing similar offences (deterrence);
- to promote the rehabilitation of the offender;
- to make the offender responsible (accountable) for his/her actions;
- to condemn the conduct of the offender;
- to recognise the harm done to the victim of the crime and the community.

On its face, the CSPA gives courts a discretion to consider VIS when sentencing in all cases, including homicide cases. Division 2 of Part 3 of the CSPA provides:

- a VIS is a statement containing particulars of:
    a) in the case of a primary victim, any personal harm suffered by the victim as a direct result of the offence; or
    b) in the case of a family victim, the impact of the primary victim's death on the members of the primary victim's immediate family (s 26);
- if it considers it appropriate to do so, a court may receive and consider a VIS after it convicts but before it sentences an offender (s 28(1));
- if the primary victim has died as a direct result of the offence, a court must receive a VIS given by a family victim and acknowledge its receipt, and may make any comment on it that the court considers appropriate (s 28(3);
- despite the above, a court must not consider a VIS given by a family victim in connection with the determination of the punishment for the offence unless it considers that it is appropriate to do so (s 28(4)(b)).

Considering VIS in the sentencing of homicide cases would also, prima facie, appear to be consistent with section 3A(g) CSPA, which provides that one purpose for which a court may impose a sentence in NSW is "to recognise the harm done to the victim of the crime and the community."

However, the NSW Court of Criminal Appeal has consistently held that it is not appropriate to take a family VIS (which deals only with the effect of the death on the

family) into account when sentencing for a homicide offence (*Previtera* (1997) 94 A Crim R 76).[4] The court's reasoning in *Previtera* was that:

- a sentence must be proportionate to the objective seriousness of an offence;
- the sentence will already take into account the value of a human life;
- it is "offensive to fundamental concepts of equality and justice for criminal courts to value one life as greater than another"; and
- it is "inappropriate to impose a harsher sentence upon an offender because the value of the life lost is perceived to be greater in the one case than in the other".

There are some indications that the NSW Supreme Court may be willing to re-consider the approach in *Previtera* in light of the introduction of sub-section 3A(g) in the CSPA in 2002. In *R v Berg* [2004] NSWCCA 300, Chief Justice Spigelman stated that the *Previtera* rule might need to be reconsidered in order to recognise that material from a family VIS could go towards demonstrating the harm done to the community by the offence, under section 3A(g) of the CSPA. He stated:

> It appears to me strongly arguable that the recognition of this purpose of sentencing would encompass the kind of matters which are incorporated in victim impact statements. It may in some cases, be appropriate to consider the contents of such statements in the sentencing exercise. This was not a purpose recognised by Hunt CJ at CL in *Previtera*, (at p86).

The NSW Court of Criminal Appeal, however, appears reluctant to consider the issue unless it is absolutely necessary. In *R v Tzanis* [2005] NSWCCA 274, Chief Justice Spigelman stated:

> It appears that no suitable vehicle has emerged for the grant of special leave by the High Court to resolve these differences. This court has sat a Bench of five in order to reconsider *Previtera* and *Bollen* if necessary. Nevertheless it is not appropriate to do so unless the issue squarely arises. In my opinion it does not arise.

In the most recent relevant decision, *R v FD; R v FD; R v JD* [2006], Justice Sully stated:

> My own view about the case now put by the Crown upon the vexed question of victim impact statements is that the present appeal is not an appropriate vehicle for determining current differences of opinion unless such a course cannot properly be avoided. This would require changes to the *Crimes (Sentencing Procedure) Act 1999*.

Justice Sully described the difficulty in allowing VIS to be taken into account when determining sentence for a homicide case in the following terms:

- offenders should not be sentenced under a "lynch mentality";
- the offender should not be sentenced in a manner that is dictated by the victim;
- victims still deserve a forum in which they can make a public statement to allow for the "emotional catharsis" of putting their grief and loss on record; and

[4] See also *R v Bollen* (1998) 99 A Crim R 510; *R v Dang* [1999] NSWCCA 42; *R v Newman; R v Simpson* [2004] NSWCCA 102; *R v King* (2004) 150 A Crim R 409.

- VIS provide a means of implementing a political imperative originating from the perceived lack of trust voters have in the sentencing process. It is not easy to deal with this issue in a way that "does not lay waste to the accumulated wisdom of the common law of crime and punishment".

For a recent reiteration of the position see the discussion in *Josefski, Shane Stewart v R* [2010] NSWCCA 41 (8 March 2010).

The evidentiary status of VIS in NSW

A VIS is not required to be a sworn statement and the CSPA does not require that a victim who makes a VIS should be available for cross-examination. In practice there is no cross-examination of the content of a VIS in New South Wales.

The unsworn and untested nature of the evidence in VIS may be a further reason for the NSW Court of Criminal Appeal's reluctance to consider VIS in determining sentence in homicide cases. In *Previtera* Chief Justice Hunt stated:

> It is a fundamental principle of the criminal law that the onus of establishing disputed matters put forward in aggravation …. must be shown beyond reasonable doubt that they are true …It would therefore appear to remain inappropriate to take [victim impact statements] into account unless its author were called as a witness in the sentencing proceedings.

The Court of Criminal Appeal repeated these concerns in *Berg* and *R v Slack [2004]* NSWCCA 128. In *Berg*, Justice Wood emphasised the importance of a proper evidentiary basis for any findings of fact going towards aggravating or mitigating a sentence, particularly where these are contained in VIS "in so far as the maker of the statement would not normally be available for cross-examination."

In *Slack*, Justice Sperling cautioned against giving substantial weight to the unsworn and untested evidence contained in the VIS, particularly as the VIS in that case was "in the nature of things, far from being an objective and impartial account of the effect of the offence on the victim".

Concerns regarding the use of VIS in sentencing

In summary, the concerns raised by the NSW Court of Criminal Appeal regarding the consideration of VIS in sentencing are as follows:

- VIS are, by their nature, subjective. If VIS made by family members are required to be considered in sentencing, this may undermine the fundamental principle that sentencing be objective and proportionate and may lead to inconsistent penalties;
- VIS over-emphasise the principle of denunciation, to the detriment of other important sentencing purposes;
- If VIS are used as evidence of aggravation, the matters they refer to should be subject to the normal evidentiary rules.

Other jurisdictions

There are indications that *Previtera* may now be out of step with the common law approach in other states and other common law jurisdictions, which accept a wider notion of the relevance of family VIS in sentencing. Indeed, New South Wales is the only jurisdiction to automatically exclude family statements as relevant to sentence in homicide cases.[5]

The courts in Victoria and South Australia have shown a willingness to consider family VIS as a relevant factor in sentencing to the extent that VIS reflect the "general" impact of the offence on the community. In the Victorian case of *R v Willis* [2000] VSC 297, Justice Vincent stated that the views of family members may be taken as a specific representation of the community's response to the offence. In *R v Kellisar* [1999] VSC 357, Justice Vincent affirmed that statements made in VIS were not intended to effect any change in the sentencing principles which govern the exercise of discretion by a sentencing judge. Instead, he emphasised that family VIS remind the court of the human impacts of crime:

> What such statements do is introduce, in a more specific way, factors which a court would ordinarily have been considered in a broader context. They constitute a reminder of … the human impact of crime. They draw to the attention of the judge who would of necessity have to consider the possible and probable consequences of criminal behaviour, not only its significance to society in general, but the actual effect of a specific crime upon those who have been intimately affected by it.

The Victorian cases do suggest however, that there should be limits on the use of VIS in sentencing. In *R v Penn* (1994) 19 MVR 367, the Victorian court showed a reluctance to consider the impact of an offence on family members. The Court noted that the information in the VIS must be relevant to one of the accepted rationales of sentencing.[6]

The difference in approach between the New South Wales and Victorian courts is thus, not related to a substantive difference between the general principles that govern sentencing decisions in each state. These are substantially the same (with the exception that the *Sentencing Act 1991* (Vic) contains no equivalent to section 3A(g) of the CSPA in NSW).

There is, however, a significant difference between the jurisdictions, which is that the Victorian legislation imposes strict evidentiary requirements on the making of VIS. The Victorian legislation provides that:

- VIS can be used to assist the court in determining a sentence;
- The definition of "victim" is wide enough to encompass family members of homicide victims;
- VIS may be made by statutory declaration if in writing, and by statutory declaration and sworn evidence if it is read out;

[5] Kirchengast, Tyrone; *Sentencing Law and the 'Emotional Catharsis' of Victim's Rights in NSW Homicide Cases*; (2008) 30 Sydney L. Rev. 615-637 at 636.

[6] *R v Penn* was a case concerning culpable driving occasioning death. The court considered that the content of the family VIS could have been relevant to the object of general deterrence.

- A court may rule as inadmissible the whole or any part of a VIS;
- The victim or a person who has given a VIS on behalf of a victim may be called by the offender or prosecutor to give evidence and may be cross-examined and re-examined;
- A witness who gives evidence to support any matter included in a VIS or an attached medical report may also be cross-examined;
- The victim, a person nominated by the victim or the prosecutor may read out those parts of a VIS that are appropriate and relevant to sentencing.[7]

The strict evidentiary requirements on the making of VIS may be one reason for the greater willingness of the Victorian courts to consider family VIS in homicide cases.

The international perspective

International jurisprudence also tends to support the integration of a family victim perspective in sentencing in homicide matters, in appropriate circumstances. Cases in New Zealand, Canada, the United States and the United Kingdom show some courts' willingness to incorporate family perspectives in an objective assessment of the offence, although there is no clear consensus on the issue. Ian Edwards suggests that the English cases of *R v Perks* [2001] 1 Cr App R (S) 19, *R v Nunn* [1996] 2 Cr App (S) 136 and *R v Mills* [1998] 2 Cr App R (S) 252 show that the Court of Appeal is attempting to define victim interests as part of the broader public interest.[8] However the use of VIS in sentencing continues to be controversial in the United Kingdom.[9]

A principled basis for considering VIS in sentencing?

An analysis of the jurisprudence and literature shows two common themes to the role of family VIS in sentencing:

- Family VIS can inform a court of the community's response to an offence. As such, family VIS can be one of the numerous factors that the sentencing judge can consider when establishing the seriousness of an offence and can thus, consistent with general sentencing principles, be relevant to a court's objective assessment of the seriousness of an offence.
- The court should retain its central role in determining when a family VIS will be relevant and to what extent. Family victims may have a legitimate role in providing information that is potentially useful to the objective analysis of

[7] Division 1A of Part 6 of the *Sentencing Act 1991* (Vic).
[8] Cited by Kirchengast, Tyrone; note 5 at 630. Indeed, *Perks* and *Nunn* illustrate that taking into account family views in sentencing may sometimes lead to a lesser sentence. In *Perks*, Garland J of the Court of Appeal stated that two circumstances where a sentence may be decreased will be, firstly, where a lengthy sentence might in fact aggravate the victim's distress (for instance, where there is a relationship of dependence between the victim or the victim's family, and the offender), and secondly, where the victim's forgiveness or unwillingness to press charges provide evidence that the harm caused to the victim must be much less than would normally be the case.
[9] Garkawe, Sam; *Victim Impact Statements and Sentencing*; (2007) 33(1) Monash University Law Review; 91-114 at 92.

sentencing courts, but the courts must have the discretion to decide what parts of a VIS are useful or not.[10]

Seen in this way, consideration of family VIS in sentencing forms part of an expanded doctrine of proportionality where the court makes an objective assessment of the offence, balancing at times competing interests, including a family's perspective of the impact of the crime on the community.

Some commentators also argue that the movement towards consideration of VIS in sentencing for homicide matters constitutes a movement to a restorative justice model of sentencing. Proponents of the approach argue that the restorative model integrates the interests of the state, offender and victim in a more balanced way.

Implementation of the proposed reform in NSW

The Government has committed to ensuring that courts are empowered to consider family VIS in sentencing homicide offences. Consistent with the approach in other jurisdictions, courts should, however, remain subject to the general sentencing principles that govern all sentencing decisions. Courts should also retain their discretion as to when and how consideration of family VIS will be appropriate to determination of sentences in homicide cases. This raises two significant issues as to the implementation of the proposal:

- how the legislation can be amended to clarify that family VIS **may** be considered in determining sentence for homicide offences, and
- whether evidentiary standards, such as those that apply in Victoria, should be introduced into the making of VIS in New South Wales.

In relation to the first issue, it will be important to ensure that the legislation strikes a careful balance between, on the one hand, encouraging the courts to consider family VIS in a way that is consistent with sentencing principles, and on the other hand, leaving the courts with the discretion to determine the appropriate circumstances in which to do so.

One possible option would be to amend section 28(4)(b) of the CSPA to emphasise when a court may consider a VIS (rather than when it must not) and to give guidance as to when a VIS could be relevant to homicide cases, for example, where a family VIS is relevant to section 3A(g) of the CSPA.

In relation to the second issue, there may be both advantages and disadvantages in the introduction of evidentiary standards for making VIS.

Homicide offences are offences that may result in the harshest punishment under the law. Fairness to offenders requires that evidence, including a VIS, that is taken into account in determining sentence, should be subject to the usual evidentiary standards. This may also enhance the objectivity of the sentencing process.

However, the experience in Victoria has been that while cross-examination of a victim about a VIS occurs only infrequently, when it does happen, it is very

[10] Ibid.

distressing for the victim. This may well undermine the 'therapeutic' functions of making VIS. Some victims have also expressed frustration and disheartenment that VIS are subject to rules of evidence and editing.[11]

There are also some other potential risks for the proposal to impact negatively on victims. These include:

- Consideration of family VIS in homicide cases could cause family victims to have false expectations that the sentence imposed will reflect the harm that they perceive they have suffered. Empirical research in various jurisdictions including Australia, Canada and the United Kingdom suggests that VIS do not have significant effects on sentencing outcomes.[12] Members of the public are unlikely to be aware of the different purposes that a court must balance in determining a sentence. If a court is perceived not to have given sufficient weight to a VIS, the therapeutic benefits of the making VIS will be limited and indeed, may aggravate the harm caused to family victims and damage the public's confidence in the justice system.[13]
- VIS are not mandatory in New South Wales. Some victims choose not to make a VIS because they feel that the trial process is already traumatic enough and do not wish to relive the trauma. There is a risk that if VIS are accepted in sentencing for homicides, family victims will feel increased pressure to make VIS when they might otherwise choose not to.

Procedural safeguards

Procedural safeguards for the making of VIS may ameliorate some of risks of the reform identified above. For example:

- Procedural rules concerning VIS could clarify that it is a victim's choice whether to present a VIS;
- The legislation could specify that no inference is to be drawn if a victim decides not to present a VIS;
- Prosecutors and/or victims support staff could be required to provide victims with information and support about all aspects of VIS, including advice as to the possibilities of cross-examination and of exclusion of irrelevant or prejudicial parts of VIS. Prosecutors and/or victims support staff could also be required to provide assistance in preparing a VIS;
- If the prosecution or defence requires cross-examination on the contents of a VIS, the victim should be assisted to prepare for cross-examination;

[11] Victims Support Agency, Department of Justice (Victoria); above note 2 at p 73.
[12] Erez, Edna et al, *Victim Impact Statements in South Australia: an Evaluation* (1994); Erez, Edna, "Integrating a Victim Perspective in Criminal Justice through Victim Impact Statements" in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice* (2000); Roberts, Julian, "Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings" (2003) 47 *Criminal Law Quarterly* 365.
[13] Booth, Tracey; *Penalty, Harm and the Community: What role now for victim impact statements in sentencing homicide offenders in NSW?*, (2007) 30(3) UNSW Law Journal, 664 – 685 at 683; Garkawe, Sam, above note 9 at 110.

- Information should be provided to the victim about the sentencing process, including as to the factors that courts are required to take into account when determining a sentence.[14]

In New South Wales, victims already have a right to have access to information and assistance for the preparation of a VIS under the Charter of Victims Rights,[15] so the focus of the suggested procedural changes could possibly be incorporated into existing requirements.

[14] Garkawe, Sam; above note 9 at 110.
[15] Section 6.14 of the *Victims Rights Act 1996*.