

8<sup>th</sup> October 2015

**Regarding the Role of VOC in Criminal Trial Proceedings**

To: The Victorian Law Reform Commission

Level 3

333 Queen Street

Melbourne Victoria 3000

From: Fiona Tait – author criminology masters thesis (2015)

**Testaments of Transformation: The Victim Impact Statement (VIS) in NSW as experienced by victims of crime (VOC) and victim service professionals (VSP).**



To whom it may concern,

**Re: The role of victims in sentencing (Chapter 9)**

Thank you for the opportunity to present a submission regarding Chapter 9 – the role of victims in sentencing.

The criminal justice process is a highly stressful and for some psychologically and emotionally challenging experience for many VOC. My study looked at factors VOC consider and negotiate when deciding whether to make a VIS, drafting a VIS, presenting a VIS and dealing with it's reception in the sentencing court.

The VIS is a highly considered document, as at every stage, VOC are forced to negotiate and evaluate multivariate complex personal and process issues. I have spoken with Megan Pearce regarding my research and hope to make my full thesis and findings available to her later this month, however as the date for submissions is closing, in the interim my thoughts on the questions posed in Chapter 9 are these:

- **Whether victims should be allowed to express in their victim impact statement (VIS) an opinion about what sentence an offender should receive**

One of the issues raised by my research is the miss-match between VOC expectations for their VIS in terms of the value of its weight in sentencing decisions, and reality. VIS information given to VOC suggests that 'the impact of the crime is taken into account when the judge imposes the sentence' but this is not routinely the case. The weight given to a VIS is dependent on particular and specific factors according to law. This is not well understood by VOC who assume from information they are provided that 'taken into account'

means that the content of their VIS will affect severity of sentence. Despite the fact that at time of my data collection, NSW courts did not consider the VIS of family victims at sentencing, 30% of family VOC stated that affecting sentence was a purpose of the VIS, with 61% expecting and 73% hoping that their VIS would do so. The quantitative results suggest that many VOC, even when categorically informed to the contrary, hold high hopes that their VIS will affect sentence. The potential damage caused to victims by such expectations not being realised has been noted as a systemic difficulty with the VIS. Interestingly, victims of SA reported the lowest expectation (17%) that their VIS would affect sentence and held no hope that it would (reasons for this are explored in the study).

Studies evaluating the affect of VIS on sentences generally conclude overall that sentencing severity or leniency is not affected by VIS. Nevertheless, judges and magistrates interviewed in a number of studies have also inferred that it is complex to isolate or assess the potency of any one item presented before them, including the VIS, when determining sentence. Affirmation by judiciary and magistracy of the functional usefulness of VIS to provide information relevant to sentencing varies across studies from 48% to 73%, despite Judges and Magistrates maintaining a fairly unequivocal line when directly questioned, that VIS information does not *affect* sentence but that consideration of VIS content may provide a more *informed* sentence. Similarly in my study, all victim service professionals (VSP) interviewed stated that the purpose of VIS was not to affect sentence, however, when considering whether VIS affected sentences, 7% reported that VIS *did* and 30% reported VIS *sometimes did* affect sentence.<sup>1</sup> As Roberts and Manikis (2011) point out, whilst research suggests that overall sentences are not harsher when a VIS is present, there is little research that looks at whether the use of VIS has affected the consistency of sentencing judgements (p33).

I feel therefore before allowing VOC to express an opinion about the sentence an offender should receive, policy/law makers should consider what they expect the court do with this information, understanding already that many VOC are disappointed by the lack of impact their VIS appears to have on sentence determinations. Will the courts actually take into account victim's wishes on sentencing, and what of consistency in similar matters where one VOC wishes a severe penalty, another wishes to forgive their offender, and a third decides not to provide a VIS at all?

I thought it (VIS) was to put our point across. For us to say how it had affected us, so they could think about that in the sentencing. To me it didn't seem like it meant anything to anybody. It was a waste of paper...it meant nothing towards the sentence.

*Linda (participant number 21) Daughter killed in motor accident by drug-affected driver.*

I wanted to write one because I wanted to boost the chances of him getting a

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<sup>1</sup> For this question N = 30 VSP participants who responded. Responses refer to sentencing in general. VSP did not discriminate between the sentencing of death matters as opposed to primary victim matters.

longer sentence.

*Ken (participant number 32) Victim of Physical Assault*

It is important to note that whilst some VOC make a VIS with the aim to affect severity of sentence, others are quite burdened by the notion that the sentence should fall into the realm of their responsibility.

I wouldn't want to be involved in what he gets (sentence) I was happy with the Courts to rule on the sentence.

*Jeff (participant 11) Father of murdered son.*

You need to let go of that (sentence). As a victim I have expectations and to be disappointed would be extra trauma...it's not about them. It's about me healing. If I had to be concerned about their sentence it would be too much. It would send me over the edge. I'm not hanging out for revenge.

*Olga (participant number 65) Victim of aggravated robbery/physical assault.*

Further it is important to note **who** is making VIS's. In terms of ethnicity and culture, within my VOC study sample those of white, Anglo/Australian descent were over represented, and those of non Anglo/Australian descent were under-represented as victims of crime in relation to statistics reported in current NSW victimisation studies, (ABS 2013). In NSW, Aboriginal people are three and a half times more likely to suffer a crime of sexual assault than those identifying as Anglo/Australian (ABS 2013) and 7% of physical assault victims in NSW are Aboriginal. Despite this, no participants in the study identifying as Aboriginal reported crimes of physical assault or adult sexual assault, suggesting that Aboriginal victims of crime were under-represented within the sample in these categories.

My study results suggest that there is a difference between the VIS maker demographic and the general victim of crime demographic. One of the early criticisms of VIS was that it favoured those individuals who speak the language of the dominant culture and possess a cultural confidence derived from knowledge of its procedures and norms.

As my study was interested in ethnicity, culture and language being possible barriers to making a VIS, perhaps more revealing is the comparison of the country of birth and ethnic background demographic information of VIS makers and non-VIS makers. Literature suggests VOC from minority or stigmatised groups face particular obstacles when engaging with criminal justice processes. Whilst my non-VIS maker group was small in number, over 60% of non-VIS makers were not born in Australia, or were members of racial minorities. In addition nearly 80% of VSP interviewed stated issues of literacy and comprehension of English, were barriers for VOC making a VIS in their experience, supporting findings of previous studies.

Chris Richards (1992) suggested that "class, gender and ethnic differences" would result in the "selective utilisation" of the VIS process due mainly to financial resources, literacy difficulties and cultural differences, which would "exacerbate the frustration and powerlessness" experienced by some victims (p133). My quantitative results show that when the VOC sample was broken

down into crime categories, age, gender, country of origin and consequential harms, it appears that particular barriers may affect particular victims of particular crimes at particular times. In other words, barriers already noted by previous scholars may not be necessarily universal to all victims, but may apply to certain cohorts or persons more than others. It is also to be noted that consistent with previous studies, my study showed males making fewer VIS than females (the reasons for this are explored in the study).

The study information suggests ***the opportunity to express an opinion regarding an offender's sentence*** will not be an equally accessible, or equally used measure across the VOC demographic eligible to do so, unless perhaps this opportunity is separated from the VIS.

It is also to be considered that there are potential risks for some VOC who may wish to make suggestions regarding sentence, and reasons why it is in the best interests of some VOC to protect their offender, for example those who fear retribution, isolation from community, need to protect their children, or are under pressure from within their own communal group (to include cultural, institutional, religious, ability, sexual orientation) to protect it's image/status/sanctity.

- **Whether additional measures are needed to restrict the publication of VIS or restrict disclosures to the offender**

My research found that some VOC fashion their VIS with media exposure in mind, seeing their VIS as a way to inform public opinion, change policy and societal prejudices and in death matters to keep alive the memory of those loved ones deceased. In other words some VOC wish their VIS to become a public document, actively engage the media in the production of their VIS's, and are disappointed when contents of their VIS are not reported by the press. Other VOC do not wish any details of their VIS to be reported in the media and will chose not to make a VIS or affect or minimise it's contents for fear of media use. In such instances, VOC fearing media exposure should be allowed to request that the court be closed to the media should they wish to read out their VIS, and media be denied access to the VIS, whether read out or tendered.

Some primary and family VOC participants suggested they did not want the offender to see the VIS. Reasons were mainly that they did not want the offender to know how deeply the crime had affected them, and did not want to empower or satisfy the offender in this regard. Victims of domestic violence and sexual assault were least likely to want the offender to see the contents of their VIS.

It was just that they would read it in Court in front of the defendant and I didn't want him to know. I didn't want him to know what impact it had on me. I just felt I didn't want him to know...I was pretty sad when I knew he was going to hear it.

*Hua (participant number 46) Victim of Sexual Assault – Non-VIS Maker*

The statement said 'you made me feel scared and helpless' which was their aim, so you are telling them that they've done a good job.

*Belinda (participant 40) Victim of Domestic Violence*

I didn't want to read it out. I didn't even want it read. I didn't want to give them the satisfaction...I felt they'd get pleasure from it, like reading about their success...they would in common parlance have a wank over the thing.

*Michael (participant number 34) Victim of Aggravated Physical Assault*

I knew what I would pay if I humiliated him. I didn't feel the system kept me safe. The consequence would have been a retaliation.

*Dee (participant number 42) Victim of Domestic Violence – Non VIS maker*

To restrict the access of the contents of a VIS to an offender is problematic, however as the VIS is presented post conviction, and has already been vetted for inadmissible material by victim support agencies, WAS, Prosecution services, Defence and finally Judiciary, it appears to me personally that if the VOC does not wish the offender to see/hear the VIS, their wish should be allowed and upheld. If this were possible, many more victims of domestic violence, fearing for their safety and indeed their lives, may be prepared to present VIS.

- **Whether victims should be allowed to make submissions at sentencing hearings**

VOC study participants often referred to what they saw as an imbalance in sentencing proceedings, in that the offender could make submissions, and the VIS was their only counter. However many victims wanted to add contextual information to explain a pattern of offending behaviour that lead up to the crime being sentenced. Usually this information was edited out of their VIS, as it did not refer to the matters charged. What form VOC submissions should take and the type of information that can be presented in a way that could be untested would require some handling. Any potential for submissions from VOC to be challenged or received negatively by the court or the public gallery would be highly traumatising and psychologically damaging for some victims. Whilst many victims would wish to make submissions, they often lack insight into the personal risks and personal negative consequences of their perception of truth and fairness being challenged (this is explored within the study).

- **Should victims be represented by a lawyer during sentencing hearings, who could also assist with the preparation of their VIS**

Many VOC participants wished they had representation during sentencing hearings not only as a support but to explain what was happening. VOC supported by WAS or by experienced court support staff reported better understandings of sentencing procedures. Lack of information provided to them about the progression of their matters, and lack of understanding of court processes to include sentencing proceedings was a theme of VOC responses, with many dissatisfied by the experience of the criminal justice

process as a result. In terms of the preparation of the VIS, assistance was often sought, with VSP reporting that 47% of VOC needed assistance to understand the purpose of the VIS and what it can or cannot contain. Further assistance was needed in terms of formatting, nature of content, transcription and, at times, translation.

Are lawyers however the best people to assist VOC in the preparation of their VIS? The VIS is a subjective document. Analysis of the first hand experiences of VOC themselves confirms the novel finding that the core therapeutic value of VIS is that it provides VOC the opportunity to reframe their experience. By giving VOC the autonomy to choose how their experience is to be understood by a wider audience, VIS is a vehicle through which the power, at least in the consequences of the victim's management of their experience, is returned to them. The VIS requires VOC to purposely challenge themselves to consider their crime experience and evaluate its impact, moving VOC beyond early stages of anger and denial, towards stages of bargaining, depression and acceptance (further explained in the study). VOC themselves fashion their understanding not only of what has happened to them, but what that means to them in the present through the perspective of their past and how they will make sense of it into their future. This process of making their own meaning of the injustices of their suffering is both therapeutic and transformative, allowing them to psychologically travel from victimisation to self-determination, isolation to reconnection, and disempowerment to empowerment facilitated through the mechanism of the VIS. This intrinsic therapeutic benefit stands alone, disassociated from any disappointment with sentencing proceedings and sentence term. My study results show that this outcome is robust and lasting. Considering making a VIS is in itself a *therapeutic process*. VSP suggested that legal advice given during the drafting of the VIS sometimes 'leached emotion' out of VIS content, giving it a different tone, changing the nature and content of the 'victim's voice'. Therefore if legal advice/advocacy was provided to VOC in sentencing proceedings it may be useful to also engage a secondary support in order that the victim's voice is not tempered by legal objectivity of appropriateness, in order that it's potential therapeutic benefit for the VOC is maximised.

Editing of VIS was reported at high levels; with 50% of VOC participants interviewed stating that their VIS had been edited. The VIS's of participant victims of domestic violence were most highly edited, amended at each process stage - by WAS, the Prosecution, and the Defence, and at times the Judge. Often VIS editing is necessary due to changes to the statement of agreed facts when charges are negotiated. However of further concern, findings suggest much editing is idiosyncratic, arbitrary or based on a second-guessing by those supporting VOC or prosecuting matters of what might be deemed admissible within the law (which is somewhat vague), by the defence or judiciary. Whether legal advisors would add a further editing tier to this eclectic process is a moot point. My findings show that VIS information and support provided to VOC can be inconsistent, and the high level of editing reported and qualitative responses regarding the nature of editing suggests a general confusion regarding the intended aims and expected effects of the 'victim's voice' within sentencing proceedings. As other studies suggest, the

VIS embodies an uneasy dissonance between the legal goals of the sentencing hearing and the needs of VOC.

For these reasons, consideration should be given to the rationale for providing VOC with a lawyer and whether the intention of legal provision is to support the VOC, or best manage the VOC for the purposes of the court, during sentencing proceedings.

- **Whether community impact statements should be introduced in Victoria**
- **Whether restorative justice processes should be available as part of, or alternative to the sentencing process**

I did not research these areas. My feeling however is both measures are dependent on the nature of the crime and the characteristics and needs of the victim, and/or victimised community.

I have included some of the recommendations from my study regarding the VIS in NSW, which may be of use to this debate:

#### **To improve VIS process**

1. Central information line for VOC to call regarding VIS questions.
2. VIS information sheet available at Local Courts.
3. Standard protocols for the presentation of oral VIS in Supreme, District and Local Court.
4. Standard protocol for judges and magistrates to orally acknowledge an oral or tendered VIS in summation prior to sentencing.
5. Facility to present oral or tendered primary or family VIS in matters where offender is found not guilty due to mental illness/diminished responsibility. Currently VIS are not permitted to be presented in these matters, where although it has been proved the offender committed the crime, a not guilty verdict has been made due to the offenders responsibility for the crime being diminished due to mental illness.
6. Education regarding presentation of VIS at the Local Court for police/police prosecutors/defence/magistrates.
7. Education regarding the complexities and emotional challenges VOC endure to make a VIS for those prosecuting, defending and judging matters.
8. Ability to apply for financial aid for VOC wishing to attend sentencing to make a VIS who are financially prohibited from doing so.

9. Standardised protocols regarding information given by victim support agencies to VOC regarding VIS.

I am hopeful that the enclosed will be of use.

Yours sincerely,

Fiona Tait

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[Redacted contact information]