Victims of Crime in the Criminal Trial Process: Consultation Paper Submission

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To the Victorian Law Reform Commission:

By way of background, for some years I have researched and published in the area of victim impact statements (VISs). In 2012 I completed my PhD which was a small ethnographic study of victim participation and the presentation of victim impact statements (VISs) in the sentencing of homicide offenders in the NSW Supreme Court. The victims in this study were members of the deceased's family ('family victims' in NSW). Researching this particular group of victims provided a valuable opportunity to generate rich insights. First, while crime victims are clearly not homogeneous, significant commonalities in victims' experiences of victimisation and the conduct of sentencing hearings in a single court is likely in the context of this discrete group of victims. Second, research shows that VISs are more likely to be submitted in serious cases of violence, sexual assault and homicide. Data was gathered through observation of 18 sentencing hearings of homicide offenders in the NSW Supreme Court, semi-structured interviews with 14 family victims and a narrative analysis of 24 VISs read aloud to the court in the hearings observed. The study is not intended to be representative of victim participation in the sentencing of homicide offenders; rather it is a case study designed to illuminate the nature and dynamics of participation of family victims in a particular court. The findings from this group of victims highlight issues that are relevant to victim participation in common law jurisdictions more generally.

My submission as follows, seeks to respond to questions and issues raised by chapter nine of the consultation paper. I aim to answer some of the specific questions raised by the Commission as well as share the findings of my research in relation to broader issues addressed in this chapter. A list of references is provided at the end of this submission that includes my relevant publications (analysis of findings from my VIS study) together with other relevant research not referred to in the consultation paper that you might find useful.

Yours sincerely,

Tracey Booth (by email)

Specific Questions

35 Should the victim have a greater role in sentencing? If so, what should that role be?

Unless the victim is a formal witness in the sentencing hearing, the role of the victim is limited to that of submitting a VIS. If the victim submits a written VIS and does not read the statement aloud, the victim's role is that of a member of the public. If the victim attends the sentencing hearing, they will be seated in the public gallery outside the business of the hearing. Whether or not the victim attends the hearing, in my study the victim-author of a written VIS was not otherwise acknowledged by the court.

The victim will have a more visible and physical role in the hearing if they read their VIS aloud to the court. In that case, the victim is generally called to the front of the courtroom and then – perhaps seated in the witness box or jury box, or perhaps standing in the body of the court beside the bar table – reads their statement aloud. In this role, victims have the opportunity to communicate to the judge, the offender and the wider community.

The role of the VIS is said to be both instrumental and expressive. From an instrumental perspective, the VIS provides the court with information about the harm caused by the offending. Information regarding harm is relevant to an assessment of the seriousness of the offence as well as to purposes of general deterrence and perhaps also rehabilitation of the offender. From an expressive perspective, a VIS provides victims with a voice, a platform from which to tell the court, the offender, the wider community about the personal impact of the offending.

In the context of the current adversarial process, I don't think that the victim should be given a greater role in sentencing per se (here I am thinking a greater role might be as a party to the proceedings or a greater say in the penalty imposed). However - given media reports of angry, distressed victims who perceive unfair treatment and re-victimisation by the law and its agents in the courtroom such as occurred in the Victorian case of *Borthwick* [2010] VSC 613 (Booth, 2011) - I think a more important question to ask is: How might this role be enhanced for victims?

Through the submission of a VIS, a victim acquires an interest in the proceedings that could be 'substantially affected' by the handling of their statements in the courtroom. Contemporary standards of fairness require sentencing judges to be responsive to the interests of victims without jeopardising the offender's entitlement to a fair hearing. Procedural justice is the key – it is the quality, the fairness of the process that is significant. Fairness to victims in this context is more than the entitlement to submit a VIS. Fairness involves meeting a range of procedural conditions whereby victims are: treated with dignity

and respect; kept informed and consulted where appropriate; and engaged as a participant with due recognition by the court.

Drawing on my research I have made the following recommendations in order to enhance the role of victims and their VIS in the sentencing hearing (Booth, 2015):

- Upon the receipt of a written VIS, the judge should acknowledge the victim if they are in the courtroom.
- The designation of a comfortable space in the courtroom from which victims can read their VIS to the court. Victims should be consulted as to whether they prefer to be seated (preferably the witness box) or stand – being forced to stand while they read makes an arduous task unnecessarily more difficult.
- A victim should not be hurried to complete the reading of their VIS.
- If a victim becomes particularly distressed while they read their VIS or they are unable to go on, the court should consider a short adjournment to enable the victim to regain their composure.
- When the victim has finished reading their VIS the judge should not resume the business of the hearing until the victim has resumed their seat in the public gallery or left the courtroom.
- In the event of ruling on objections to the content of VISs the judge should not conduct the proceedings as if the victims are not present. Although the judge does not have to consult with the victim as to outcome, nonetheless the judge should anticipate victims' likely grief, disappointment and resentment by explaining to the court (so that the victims will hear and be informed) the:
    - Nature of the objections;
    - The reason for the court's ruling; and
    - The ways in which the VISs have been amended (if at all).

<u>36 Should the purposes of sentencing explicitly include the needs and interests of victims?</u>
Yes though not in restorative terms as set out in 9.7 – "the restoration of and reparations to the victim of offending". What does it mean to impose a penalty that furthers the 'restoration of the victim'? What does 'restoration of the victim' look like when it is achieved? Is it the same for every victim? If not, should the sentencing hearing focus on the individuality of the victim as it does on the individuality of the offender? How would the court do this? The concept of restoration in this context is too ambiguous to be operationalised by a sentencing court; the introduction of restorative justice in sentencing in this manner requires extensive discussion and clarification (though I do think that restorative principles and/or values can inform legal proceedings – see below).

Nonetheless I think that the purposes of sentencing should extend to recognition of the interests of victims: that by imposing penalty for the offending the court is recognising and acknowledging the harm caused by the crime. I think such a provision should be worded

along similar lines to s3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW): "to recognise the harm done to the victim of crime and the community" (see also Canadian legislation).

Arguably this provision reflects contemporary community sensibilities and expectations whereby victims should be included and acknowledged in the sentencing hearing. I don't think this sentencing purpose would encourage the imposition of disproportionate penalties because it is also consistent with sentencing principles that provide that the harm sustained by the victim and the community is relevant to the determination of the seriousness of the offence and therefore the penalty imposed.

I would also argue that such a provision provides a context for judges to acknowledge and recognise victims in the course of sentencing. In particular, this could be achieved through judicial reference to VISs submitted. It is important that judges acknowledge the harm caused by offending – and the VIS illustrates such harm.

<u>40 Should victims be permitted to make submissions in relation to sentencing?</u>
In most cases, no – [the exception might be in cases of traditional customary punishments involving indigenous victims and offenders – this might account for the law in the Northern Territory].

The nature and quantum of the penalty that is imposed is a function of the application of sentencing laws and principles to the facts (as found or agreed by the parties) of the offending. In most cases, victims will not have sufficient knowledge of the law and the penalty options available, nor the training or wherewithal to consciously avoid being 'unduly swayed' by subjective concerns. It is not fair to ask or suggest that they provide an opinion.

In my view it is 'tokenistic' to offer victims the chance to express their opinion as to the punishment to be imposed when that opinion cannot change the law that has to be applied by the judge. Such a situation would inevitably lead to expectations that their opinion will carry weight and research suggests that a great many victims would be likely to seek the imposition of a heavy penalty on the basis of the harm they have suffered.

Most victims don't understand that a level of harm is intrinsic to the nature of each offence. This means that the sentencing judge 'expects' that certain harm (the nature and extent of harm) will be caused by the particular crime. Thus, in the ordinary course, a VIS will not provide additional information and by itself will not increase the penalty that would be otherwise proportionate and appropriate to the offending. From a policy perspective, it is likely that victims' expectations would be 'dashed' resulting in disappointed, perhaps angry and bitter victims perceiving themselves as victimised by the law as well as by the crime (I agree with the comments in 9.96).

It would also add an unnecessary layer of complexity for sentencing judges who would have to address the victims' opinion in the course of their judgment and explain how it is regarded by the court and whether or not it is appropriate.

41 What should be the role of the prosecutor in preparing victim impact statements?

I think the prosecutor should have a similar role to that of a prosecutor in NSW. In NSW Prosecutorial guidelines require victims to submit their draft VIS to the Prosecution before the hearing. The Crown must ensure that VISs deal only with the impact of the crime on the victim and contain no offensive, threatening and/or harassing material. Once the VISs are so vetted, NSW Prosecution Guidelines require that copies are forwarded to the defence. The defence can let the Crown know if there are any contentious issues and the Crown can prepare the family victims for what might occur at the hearing if it cannot be resolved.

On the one hand such vetting or 'filtering' of the VIS detracts from victim autonomy and can cause resentment (Booth, 2012). However, on the other hand as I have argued (Booth 2012), such vetting most likely reduces the number of objections or challenges to the admissibility of VISs. Furthermore, it provides a space for victims to privately vent their anger and disappointment at the restrictions placed on them rather than publicly in the courtroom.

42 Should restorative justice procedures be available as either an alternative or supplementary part of the sentencing process? If not, why not? If so, in what circumstances?

I don't want to comment on the introduction of RJ practices (such as conferencing or mediation) in the context of sentencing hearings but I do think it would be beneficial for victims if the legal proceedings better reflected RJ values. RJ values include: fairness, healing, inclusivity, collaboration, respect, dignity, support, safety, democracy, empowerment, accountability and responsibility. These principles inform the recommendations I have made in relation to improving legal processes that apply to the submission of VISs (see above). Other features of legal processes that better integrate RJ values include:

- Expression of emotion by victims would be regarded as natural rather than suppressed and disparaged. As noted above, sentencing courts would give victims time and space to deal with their feelings.
- Judges would ensure that victims are kept informed during the hearing. As suggested above this might be in the case of challenges to VISs. However, in my study I also found that some judges engaged in more indirect communicative strategies (Booth, 2014) with victims such as: having the Crown read the statement of facts to the court when it appeared from the VISs that the family victims did not know the full

circumstances of the deceased's death or taking the time to clarify the sentencing law for the benefit of victims in the public gallery.

- Perhaps more controversially, subject to advice from their legal representatives, offenders might be encouraged to express remorse directly to the victim, perhaps also apologising for the harm caused by the offending (Booth, 2014)

General Comments

- The statement of law in paragraph 9.35 is incorrect. In NSW, by statute family victims have been permitted to make a VIS since 1997; they have been able to read their VIS aloud to the court since 2003. Prior to the 2014 amendments, the legislation provided that the sentencing court was required to receive that statement but did not have to take it into account unless it considered it *appropriate* to do so. *R v Previtera* was authority for the principle that it was not appropriate for the sentencing court to give weight to a VIS from a family victim in the determination of penalty. The new provision expressly links the role of a VIS to the sentencing purpose (see above) though it is still a matter for the court to consider whether it is appropriate to give weight to the VIS.
- As to form and presentation of VISs (9.15) it appears from the cases that a VIS can also take the form of a video or DVD in Victoria – see *The Queen v Vlahos* [2013] VSC 171, *The Queen v Ball* [2014] VSC 669. VIDs are particularly controversial and the use of VISs in this form have been the subject of appeal in the US and also Canada.
- As to paragraph 9.85, you might consider the important research by Lens et al (2013, 2015, set out in the references below).

List of References

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