e-brief

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Victim impact statements by family members in homicide cases

by Lenny Roth

1. Introduction

On 23 February 2011, the NSW Coalition announced that, if elected to Government, it would legislate:

> to specifically provide that Courts in NSW may consider Victim Impact Statements by family victims in homicide cases when determining an offender's sentence.[1]

In May 2011, the NSW Department of Attorney General and Justice released a policy paper on the implementation of this proposed reform. Stakeholders could make submissions by 6 June.

The existing legislative provisions allow courts to consider Victim Impact Statements by family members of homicide victims when sentencing. However, the NSW Supreme Court has decided that it is not appropriate for courts to take such statements into account. To do so in a homicide case, the Court argues, would mean that a court could impose a higher sentence in a case where the victim has a loving and grieving family than where the victim does not (and one life would be valued as greater than another).

This e-brief outlines the legislation and case law in NSW and it provides comparisons with legislation and case law in other Australian and overseas jurisdictions. The Government's policy paper is examined, and a summary of the debate is also presented.

2. New South Wales

2.1 Legislation: In 1996, a legislative scheme was introduced for Victim Impact Statements (VISs) as part of a broader package of reforms relating to victims of crime.[2] The scheme is now in the *Crimes (Sentencing Procedure) Act 1999* (sections 26-30A).

In what cases does the scheme apply? The VIS scheme applies to certain types of offences being dealt with by the Supreme Court, District Court, Local Court and the Industrial Relations Commission. For example, it applies to an offence being dealt with on indictment by the Supreme Court or District Court if the offence "involves the death of, or actual physical bodily harm, to any person", or if the offence is "a prescribed sexual offence".

Who can make a VIS? As outlined in section 26, a VIS can be made by a "primary victim", which means a person against whom the offence was committed, or a person who witnessed the offence, but only if the person has suffered personal harm (which includes physical and psychological

harm) as a result of the offence. If a primary victim has died as a direct result of the offence, a VIS can be made by a "family victim". This means a person who was, at the time of the offence, a member of the primary victim's immediate family (whether or not the person has suffered personal harm as a result of the offence).

What is a VIS? A VIS means a written 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;
>
> (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.[3]

Receipt and consideration by court: Section 28 refers to the receipt and consideration of a VIS by the court. Section 28(1) states that:

> If it considers it appropriate to do so, a court may receive and consider a victim impact statement at any time after it convicts, but before it sentences, an offender.

Section 28(3) states:

> If a primary victim has died as a direct result of the offence, a court must receive a victim impact statement given by a family victim and acknowledge its receipt, and may make any comment on it that the court considers appropriate.

Section 28(4)(b) states that a court:

> must not consider a victim impact statement 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.

The bill that was originally introduced in 1996 allowed for the making of a VIS by a family member of a person who had died as a result of the offence. However, it did not contain the two subsections referred to above: subsections 28(3) and 28(4)(b). These provisions were inserted into the bill as a result of an amendment moved in the Legislative Council by John Tingle (Shooters Party). He said (in part):

> The amendments do not provide that a court must consider a [VIS] submitted by a family member when determining the length of sentence. The tendering, reading and acknowledging of the [VIS] in court will give the secondary victims of the offence the satisfaction of knowing that their trauma and agony has been acknowledged in public by the court and that they have received some measure of the restorative justice that I believe is involved in this type of procedure. At present the family member of a homicide victim is often required to prepare a [VIS], but it may be rejected by the court, which is not obliged to take it into account.[4]

Reading out a VIS in court: Section 30A(1) states that, if a VIS has been duly received by a court:

> a victim to whom it relates, or a person having parental responsibility for the victim, or a member of the immediate family, or other representative of the victim, is entitled to read out the whole or any part of the statement to the court.

2.2 NSW Law Reform Commission:

In the NSW Law Reform Commission's 1996 report on sentencing, it recommended that VISs should be inadmissible in death cases. The Commission stated that, in such cases, a VIS could only amount to:

- an attempt to persuade the court to impose a harsher sentence on the accused on the basis that, in some way, the death of person who was, say, young and surrounded by a loving family and friends is more serious than, say, the death of a person who was alone, unhappy or elderly; or
- the provision of a forum for the victim's family and friends to assist in their healing processes.[5]

In relation to the first of these points, the Commission noted that:

> The argument put by the Homicide Victims' Support Group...that there is, in this context, a difference between measuring the *value* of a person's life and the *impact* of the crime...is specious.[6]

The Commission stated three reasons why a VIS should not be admissible for either of the purposes noted above:

- First, it is unacceptable for the law to express, and the courts to engage in, pure retribution...
- Secondly, it is offensive to fundamental conceptions of equality and justice to value one life over another...
- Thirdly, a court applying dispassionate justice is simply an inappropriate forum for addressing the need of victims to express their grief or anger...[7]

The Commission added:

> The Commission is disappointed that submissions from those favouring VIS in death cases failed to answer, or even to address, any of these arguments. And the Commission's further attempts to find reasoned responses to our arguments in consultations were just as unsuccessful. This has reinforced our conclusion that our proposals are right in principle.[8]

2.3 Cases on VIS by family member:

The NSW Supreme Court has decided that, even though section 28(4)(b) suggests that it may be appropriate in some cases to take into account a VIS by a family member of a homicide victim when determining a sentence, it is *never* appropriate for a court to take such a VIS into account.

In *R v Previtera* (1997), the court was sentencing a person for murder and the Crown tendered a VIS from the victim's son which described his own and his sister's reactions to the murder. Justice Hunt (Chief Judge at Common Law) ruled that it would "never be appropriate" to take such a statement into account in sentencing an offender. Justice Hunt explained:

> In cases where the victim is still alive...victim impact statements will no doubt serve the useful purpose in the criminal courts of establishing the consequences of the crime upon that victim. A problem arises, however, in those cases – such as the present – where the crime involves the death of the victim. The consequences of the crime upon the victim (death) has already been proved (or admitted) by the time the offender comes to be sentenced.[9]

His Honour also stated:

> The law already recognises, without specific evidence, the value which the community places upon human life; that is why unlawful homicide is recognised by the law as a most serious crime...It is regarded by all thinking persons as offensive to fundamental concepts of equality and justice for criminal courts to value one life as greater than another. It would therefore be wholly inappropriate to impose a harsher sentence upon an offender because the value of life lost is perceived to be greater in the one case than it is in the other.[10]

Justice Hunt criticised the way in which the provisions had been drafted:

> It is unfortunate that the Legislature chose to pass [the legislation] in a form which includes a statement from members of the victim's family in a death case which deals only with the effect of the death upon them, and which could never be appropriate to be taken into account on sentencing. The Legislature is therefore responsible for having raised the expectations of the families of such victims.[11]

This decision has been followed in a number of other cases. For example, in *R v Dang* (1999), the NSW Court of Criminal Appeal found that the sentencing judge had made an error

when he referred "to the objective fact that the husband of the deceased and other relatives of the deceased had suffered grief as a result of the death of the deceased". Justice Adams explained:

> Essentially...the reason that victim impact statements in cases involving death are not taken into account in imposing sentence is that [the] law holds, as it must, that in death we are all equal and the idea that it is more serious or more culpable to kill someone who has or is surrounded by a loving and grieving family than someone who is alone is offensive to our notions of equality before the law.[12]

In *R v Berg* (2004), Chief Justice Spigelman suggested that *Previtera* might need to be reconsidered in light of a sentencing provision enacted in 2002. Section 3A(g) of the *Crimes (Sentencing Procedure) Act 1999* requires the court to "recognise the harm done to the...community": The Chief Justice 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 a victim impact statement. It may in some cases, be appropriate to consider the contents of such statements in the sentencing exercise. This was not a purpose of sentence recognised...in *Previtera*.[13]

In *R v Josefski* (2010), the NSW Court of Criminal Appeal noted that:

> In *R v Tzanis* [2005] NSWCCA 274 a specially constituted Court of five judges was convened to reconsider *Previtera* but, after hearing argument in the matter, the Court determined that it was not a suitable vehicle for that purpose. This Court has continued to apply *Previtera* and the *obiter* of the Chief Justice in *Berg* has never again been considered in that regard.[14]

It has been recognised, however, that if an offender knows that a homicide will cause substantial harm to family members then that is a relevant factor in sentencing. In *R v Lewis* (2001), a convicted murderer appealed against his sentence on the ground that the sentencing judge took into account as an aggravating feature the fact that the victim's death would deprive her five children of the care and comfort of a mother. Justice Hodgson (with the other members of the Court of Criminal Appeal agreeing) stated:

> I accept that *Previtera* is authority for the proposition that the effect of a death upon the victim's family, of itself, is not relevant to the culpability of the offender. However, that is not to say that the degree of harm which the offender knows will be caused by the offence is likewise not relevant: on the contrary, in my opinion the degree of harm which the offender knows will be caused by the offence is highly relevant to the culpability of the offender. In this case, quite plainly the applicant knew that the death of Ms. Pang would deprive five children of their mother, and prima facie that is serious harm, in addition to the death of Ms. Pang, which the applicant knew would be caused by his offence. This is not to say that the crime is more serious because Ms. Pang was in some way more worthy than other possible victims, merely to recognise the harm caused to children by the loss of their mother; and to recognise that where the offender knows that this harm will be caused, that can be relevant to the offender's culpability.[15]

3. Other Australian jurisdictions

3.1 Legislation: All other States and Territories have enacted laws that provide for the making of a VIS.[16] In most other States and the Territories, the legislation expressly provides for the making of VIS by a family member of a homicide victim. In Victoria and South Australia, the laws do not expressly provide for the making of a VIS by a family member of a homicide victim but the provisions are wide enough to allow for this.[17] As outlined

below, there are some differences across the jurisdictions in what the laws say or do not say about the role of a VIS and the matters that a court should have regard to in sentencing.

In the ACT and the Northern Territory, the laws expressly require the court to consider a VIS before determining the sentence to be imposed in relation to the offence.[18] In some States (Victoria, Western Australia and Queensland) the laws expressly refer to the purpose of making a VIS to the court.[19] For example, in Victoria, the laws refer to the making of a VIS to the court "for the purpose of assisting the court in determining sentence". Further, in some States (Victoria, South Australia and Queensland), the laws require the court, when determining sentence, to have regard to "any injury, loss or damage resulting from the offence".[20]

3.2 Cases on VIS by family member:
In a number of other States, courts have been willing to allow a VIS by family members of a homicide victim to be taken into account in sentencing.

Victoria: In *R v Miller* (1995), a convicted murderer appealed against his sentence on the basis of the sentencing judge's statement that the victim's "loved ones will be afflicted forever by her loss". It was argued for the offender that the decision in *R v Penn* (decided before the VIS provisions were enacted) prevented the sentencing judge from taking this consideration into account. The Court of Criminal Appeal rejected this ground of appeal. The Court stated:

> ...the passing of the 1994 Act necessarily leads to the conclusion that evidence of "sorrow and misery to a particular victim's family" which was held to be inadmissible in *Penn* would now be admissible by way of a victim impact statement. It follows also, we think, that even in the absence of a victim impact statement, a sentencing judge is entitled to draw reasonable inferences from the evidence before him of any injury, loss or damage suffered by victims and their immediate families. However, it is still good law that a sentencing judge "should not be required to impose a harsher penalty upon an offender who causes the death of a person who is widely loved than upon one who causes the death of an unloved victim".[21]

In *R v Beckett* (1998), when sentencing a murderer, Justice Vincent referred to VISs made by family members of the victim and commented on the significance of VISs:

> The introduction of such statements was not, as I see it, intended to effect any change in the sentencing principles which govern the exercise of discretion by a sentencing judge. What such statements do is introduce in a more specific way factors which a court would ordinarily have considered in a broader context. They constitute a reminder of what might be described as 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.[22]

In *R v Gemmill* (2004), the Supreme Court was sentencing a person who had murdered his wife. Justice Osborn stated that the VISs "spell out the consequential suffering which you have caused to your wife's sister and to your sons". Then, after referring to what Justice Vincent had said in *R v Beckett,* Justice Osborn stated:

> It is clear that Robyn's death has caused great emotional pain to her sister and to your sons. It is also clear that your sons have not only lost their mother, but, in effect, have lost the father they respected and relied upon. The victim impact statements are most moving and impressive documents which amplify the personal suffering you have inflicted.[23]

South Australia: In *R v Birmingham (No 2)* (1997), the offender was being sentenced for causing death by dangerous driving and the sentencing judge took into account VISs provided by family members of the victim. The relevant legislation required the judge to consider "any injury, loss or damage resulting from the offence" and it required the prosecutor to furnish the court with particulars of this for the purpose of assisting the court in determining sentence for the offence.

After referring to decisions in other States (including the NSW decision of *Previtera*) Justice Perry stated:

> ...it is unquestionably right, not only as a philosophical proposition but for the purposes of the law, that courts should not put a greater value on one human life as opposed to another...
>
> But...it appears to me that there is no breach of that basic principle, to make allowance for the trauma and upset suffered by surviving members of the victim of a homicide in the context of the *Criminal Law (Sentencing) Act.* In my opinion, the words in that Act, "any injury, loss or damage resulting from the offence", are apt to describe not only the effects of the offence upon the immediate victim, but also the effects...on others.
>
> In that context, it is not a matter of valuing one life more than another. Rather it is a question of having regard to the totality of the "injury, loss or damage", which may include injury, loss or damage suffered by others apart from the immediate victim.[24]

Justice Perry concluded by stating:

> I must say that given the youth of the deceased and the circumstances of his death, the grief and outrage felt by the surviving parents is very much what I might have expected, even if I had not had the benefit of the victim impact statements in question. It follows that even without the benefit of those statements, I doubt that I would have imposed a less severe sentence.[25]

Western Australia: In *R v Mitchell* (1998) a convicted murderer appealed against his sentence. One ground of appeal was that the sentencing judge was swayed to an improper extent by VISs submitted by the family members of the victim. The sentencing judge had made comments including, "the family will be forever contemplating the horror through which she went". The Court of Criminal Appeal rejected this ground of appeal, declining to follow the NSW decision of *Previtera* on the basis that the VIS provisions in NSW were "fundamentally different" to the provisions in Western Australia.[26] However, the court's reasons for this conclusion appear to be based on an incorrect reading of the NSW laws.

3.3 Comment on cases: Tracey Booth, a senior law lecturer at the University of Technology, has referred to two main approaches taken by the courts outside NSW.[27] The *specific impact approach* involves "the sentencing court taking account of the specific harm sustained by individual family victims detailed in VISs". In contrast, *under the generalised impact approach* VISs from family victims:

> are taken into account in sentencing as representative of the generalised impact of the killing on the community rather than as evidence of the specific harm sustained by the family victim.

According to Booth, the specific impact approach seems to be the approach applied by courts in South Australia and Western Australia, whereas courts in Victoria and Tasmania appear to have taken the generalised impact approach. However, the Victorian decisions referred to above suggest that the Victorian courts have actually adopted the specific impact approach.

3.4 Reforms in South Australia: In 2009, the South Australian Parliament

enacted major changes to its VIS scheme.[28] The new provisions allow a VIS to contain "recommendations relating to the sentence to be determined by the court" (and this also applies to a VIS made by the family member of a homicide victim).[29] In addition, the new provisions allow the Commissioner for Victims' Rights or the prosecutor to provide the court with a Community Impact Statement.[30]

3.5 Australian Law Reform Commission report: In its 2006 report on sentencing federal offenders, the Australian Law Reform Commission recommended that federal sentencing laws should make comprehensive provision for the use of VISs. It also recommended that the definition of victim should include, in cases where the primary victim has died, "the victim's immediate family members and other defined classes of individuals". [31] The Commission did not explain its reasons for this but it noted that some other jurisdictions had a similar definition, and that a number of stakeholders supported this.[32]

4. Selected overseas jurisdictions

4.1 United Kingdom: Victim Impact Statements (known as Victim Personal Statements, or VPS) were introduced in 2001. VPSs, which were taken from the victim by the police, could be made by primary victims as well as by the relatives of homicide victims.

In 2006, following the release of a consultation paper, the Government established a pilot Victims' Advocate Scheme, which, in five court areas, enabled the relatives of homicide victims to present a Family Impact Statement to the court (personally or through a Victim's Advocate) before sentencing. In 2007, this scheme was replaced by a national Victim Focus Scheme, which is run by the Crown Prosecution Service. Under this scheme, the prosecution can tender a Family Impact Statement (FIS) to the court in homicide cases.

The Consolidated Criminal Practice Direction contains the following statement about the way in which courts should take account of VPSs and FISs in sentencing:

> The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender, taking into account, so far as the court considers it appropriate, the impact on the victim.[33]

There are court decisions in the UK that suggest that an impact statement by a family member of a homicide victim can be taken into account in determining a sentence. However, it is not clear how such statements are to be taken into account in all cases.

In *R v Akbar* (2004), the High Court was asked to determine the minimum term to be served by a convicted murderer. Justice Openshaw stated:

> I have read the Victim Personal Statement made by Katie O'Neil, who now cares for [the victim's] mother. That she needs a carer is not surprising. On hearing of his son's murder, his father...had a heart attack from shock; within a few days he had another heart attack from which he died. [The victim's] girlfriend was so shocked that she miscarried. Some time later, his brother Stephen, grieving at the murder of his brother and the death of his father, committed suicide. If the effect of crimes upon victims are to have any effect on sentencers - and indeed on sentences -it is obvious to my mind that they are a highly relevant factor in this case.[34]

In *R v Wright* (2009), the England and Wales Court of Appeal dealt with an appeal against sentence from a person

who had murdered his mother for financial gain. The Court stated:

> ...it is, in our judgment, plainly an aggravating circumstance that the victim was his own mother, since this has greatly increased the anguish of the other members of the family. It is clear from their victim personal statements that they now must bear the knowledge not only that their mother has been brutally murdered but that the deed has been done by their own brother.[35]

In *R v Bennett* (2009), the England and Wales Court of Appeal dealt with an appeal against sentence by a person convicted of causing death by dangerous driving. The Court stated:

> ...cases such as this present judges with very difficult problems in sentencing. It is clear from the moving victim personal statements that we have read that [the victim's] family has suffered a devastating loss as a result of the appellant's offence. No sentence imposed by a judge can compensate them for that loss. It is not the purpose of the sentencing exercise to do so. Its purpose is to assess the extent of the offender's culpability and to pass a sentence appropriate to that culpability and in accordance with the relevant sentencing guidance.[36]

4.2 Canada: Section 722 of the Criminal Code provides that:

> For the purpose of determining the sentence to be imposed on an offender…in respect of any offence, the court shall consider any statement that may have been prepared in accordance with subsection (2) of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence.

In cases where the primary victim of the offence has died, the term "victim" is defined to include the spouse of that person or any relative of that person.

An article by Tyrone Kirchengast, a senior law lecturer at the University of New South Wales, refers to relevant decisions by a number of Canadian provincial courts and comments:

> Cases abound as to the application of s 722 of the Canadian Criminal Code although it is clear that the courts grapple with the extent to which the harms occasioned to family members are directly relevant to sentence. Predominantly, the Canadian courts consider the harm to family victims in the context of the general harm occasioned to the community and state.[37]

5. NSW Government's policy paper

As noted in the introduction, in May 2011, the NSW Department of Attorney General published a policy paper on the Government's proposed reform. The policy paper states:

> 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 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 sentencing courts, but the courts must have the discretion to decide what parts of a VIS are useful or not.[38]

The paper suggests that the proposed reform should be consistent with these principles. In terms of implementing the reform, the paper notes that:

> One possible option would be to amend section 28(4)(b) of the [Act] to emphasise when a court may consider a VIS...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 [Act].[39]

The paper identifies two potential negative impacts of the proposed reform on family victims. First, it could cause family victims "to have false expectations that the sentence imposed will reflect the harm that they perceive they have suffered". Second, family victims "may feel increased pressure to make a VIS when they might otherwise choose not to".

The paper then states that "procedural safeguards may ameliorate some of the risks of the reform". For example, the paper suggests that "prosecutors and/or victims support staff could be required to provide victims with information and support about all aspects of making of a VIS".

Another issue raised in the paper is whether stricter evidentiary standards should apply to the making of a VIS. The paper notes that the NSW laws do not require a VIS to be a sworn statement and nor do they require the person who made the VIS to be available for cross-examination. In contrast, the provisions in Victoria require a VIS to be made by statutory declaration (and orally, by sworn evidence) and a person who makes a VIS may be cross-examined.

The paper suggests that the stricter requirements in Victoria "may be one reason for the greater willingness of the Victorian courts to consider family VIS in homicide cases". However, this is not evident from a reading of the decisions in Victoria.

The policy paper also outlines the arguments for and against stricter evidentiary standards:

> Homicide offences are offences that may result in the harshest punishment under the law. Fairness to the offender 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 distressing for the victim. This may well undermine the 'therapeutic functions of making a VIS...[40]

6. Summary of the debate

The NSW Supreme Court has expressed the argument against taking into account VISs by family members in homicide cases. The court has argued that to do so would offend the fundamental concepts of equality and justice as it would lead to the courts valuing a homicide victim's life as greater in one case than in another.

Courts in other jurisdictions have not had the same objection. Perhaps the best case for taking into account a family VIS has been made by Justice Perry in the South Australian case of *R v Birmingham (No 2).* His Honour took the view that there is a difference between taking into account the total harm caused by an offence (which is legitimate, particularly having regard to the provisions that exist in South Australia) and valuing one life over another (which is not legitimate).

In some jurisdictions (e.g. South Australia and, arguably, Victoria), the courts have taken the *specific impact approach* to a family VIS. In other jurisdictions (e.g. Canada) the courts have mainly taken the *generalised impact approach*. The proposal in NSW Government's policy paper seems to be more closely aligned with the latter approach: i.e. a family VIS

would help inform the court of the community's response to an offence.

An article by Tyrone Kirchengast seems to support this approach:

> Family statements on the impact of the offence would be significantly useful when determining the basis and extent to which the victim and community condemn the offence, in an objective and fair way. The statement would thus need to be read in the broader context of the evidence adduced at trial, material put forward in mitigation or aggravation of sentence, and the sentencing judge's own reflection of the community's response to the offence in a general way.[41]

On the other hand, Mark Walters notes that community "is an elusive concept", and he argues that criminal courts should only "view the community as a symbolic presence". Therefore, he suggests that it would be inappropriate for the courts to have regard to a family VIS when determining the harm done to the community (or, it follows, when determining the community's response to an offence).[42]

Tracey Booth argues that the ruling in *Previtera* is compelling and that it is inappropriate to take a family VIS into account using the *specific impact approach*.[43] Booth also argues that it would also be inappropriate to take a family VIS into account using the *generalised impact approach*. In part, this is because families may develop false expectations that the sentence imposed will reflect the harm that they perceive they have suffered.

Another issue in the debate is whether the Government's proposed reform is likely to impact on the sentences imposed by NSW courts in homicide cases? The evidence that exists about the impact of VISs on sentencing (which does not necessarily answer the question posed) was noted in the NSW Government's policy paper:

> Empirical research in various jurisdictions including Australia, Canada and the United Kingdom suggests that VIS do not have significant effects on sentencing outcomes.[44]

As was the case when the VIS scheme was introduced in NSW 15 years ago, the proposed reform raises important and difficult issues in relation to sentencing. The precise nature of any proposed legislation that results from the recent consultation process remains to be seen.

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1 Greg Smith MP, 'Families of Homicide Victims Given a Voice, *Media Release*, 23 February 2011

2 For background to this legislation, see R Johns, *Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services*, Briefing Paper 10/02.

3 *Crimes (Sentencing Procedure) Act 1999*, section 26.

4 John Tingle, *Hansard (LC),* 21 November 1996, p6386.

5 NSW Law Reform Commission, *Sentencing,* 1996, para 2.22

6 NSWLRC, n5, para 2.22 (footnote 51)

7 NSWLRC, n5, para 2.23

8 NSWLRC, n5, para 2.24.

9 *R v Previtera* (1997) 94 A Crim R 76 at p86

10 *R v Previtera,* n9, p86-87

11 *R v Previtera,* n9, p87.

12 *R v Dang* [1999] NSWCCA 42, para 25.

13 *R v Berg* [2004] NSWCCA 300, para 44

14 *Josefski v R* [2010] NSWCCA 41, para 37.

15 *R v Lewis* [2001] NSWCCA 448, para 67.

16 *Sentencing Act 1991* (VIC), s 95A; *Victims of Crime Assistance Act 2009* (QLD), s 15; *Criminal Law (Sentencing) Act 1988* (SA), s 7A; *Sentencing Act 1995* (WA), s 24; *Sentencing Act 1997,* s 81A; *Sentencing Act 1995* (NT), s 106B; *Crimes (Sentencing) Act 2005* (ACT), s49.

17 See *Sentencing Act 1991* (VIC), s 3 (definition of victim); and *Criminal Law (Sentencing) Act 1988* (SA), s 7A.

18 *Sentencing Act 1995* (NT), s 106B(4); and *Crimes (Sentencing) Act 2005* (ACT), s 33(1), 53(1).

[19] *Sentencing Act 1991* (VIC), s 95A; *Sentencing Act 1995* (WA), s24(1); *Victims of Crime Assistance Act 2009* (QLD), s 15(1)
[20] *Sentencing Act 1991* (VIC), s 5(2)(db); *Criminal Law (Sentencing) Act 1988* (SA), s 10(1); *Penalties and Sentences Act 1992* (QLD), s 9(2).
[21] *R v Miller* [1995] 2 VR 348 at 354
[22] *R v Beckett* [1998] VSC 219, para 79
[23] *R v Gemmill* [2004] VSC 30, para 56
[24] *R v Birmingham (No 2)* (1997) 96 A Crim R 545 at 548-549
[25] *R v Birmingham (No 2),* n24, 549
[26] *R v Mitchell* (1998) 104 A Crim R 523 at 533 (Ipp J, with whom Kennedy J and Steytler J agreed). See also the remarks by Kennedy J at 526.
[27] T Booth, 'Penalty, harm and the community: What role now for Victim Impact Statements in sentencing homicide offenders in NSW' (2007) 30(3) *University of New South Wales Law Journal* 664, p674-679.
[28] *Statutes Amendment (Victims of Crime) Act 2009* (SA). For a commentary, see A Webster, 'Expanding the role of victims and the community in sentencing', (2011) 35 *Criminal Law Journal* 21.
[29] *Criminal Law (Sentencing) Act 1988* (SA), Section 7C(2)
[30] *Criminal Law (Sentencing) Act 1988* (SA), Section 7B
[31] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offences,* Recommendation 14-1.
[32] ALRC, n31, para 14.15-14.17, 14.36.
[33] Consolidated Criminal Practice Direction III.28 (Victim Personal Statements)
[34] *R v Akbar* [2004] EWHC 1819, para 5.
[35] *R v Wright* [2009] EWCA Crim 976, para 12
[36] *R v Bennett* [2009] EWCA Crim 591, para 10
[37] T Kirchengast, 'The Landscape of Victim Rights in Australian Homicide Cases – Lessons from the International Experience', (2010) 31(1) *Oxford Journal of Legal Studies* 133, p146. See also T Booth, n27, p678-679.
[38] NSW Department of Attorney General and Justice, *Family Victim Impact Statements and Sentencing in Homicide Cases: Background Policy Paper,* May 2011, p6-7.
[39] Policy paper, n38, p7.
[40] Policy paper, n38, p8-9.
[41] Kirchengast, n37, p160.
[42] M Walters, 'Victim Impact Statements in homicide cases: Should "recognising the harm done…to the community" signify a new direction?' (2006) 2(2) *International Journal of Punishment and Sentencing* 53.
[43] T Booth, n27, p679-685.
[44] Policy paper, n38, p8. See also Department of Justice (Victoria), *A Victim's Voice: Victim Impact Statements in Victoria*, October 2009, p34ff.