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THE EFFECT OF VICTIM IMPACT STATEMENTS ON SENTENCING DECISIONS

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Part I: Introduction

Since the 1970s Victim Impact Statements ('VIS') have been used increasingly in many common law jurisdictions. A VIS is generally a written report submitted to the sentencing authority following a guilty verdict or plea, and prior to the sentencing decision. They may vary in content and form, but are meant to include details of the physical, financial, social and psychological effects on the victim of the crime that is the subject of the sentencing hearing. Victims may prepare the VIS themselves, or they may rely on the help of relatives, friends or victim support staff. Police, prosecutors or probation officers may also have a role in helping the victim prepare their statement, with the degree of help varying between jurisdictions and individual criminal justice professionals. In some situations where the victim is no longer alive or otherwise cannot prepare the report themselves, they may be prepared by a close family member or some other person who generally has the permission of the court to submit the VIS on behalf of the victim. In some jurisdictions they may also form part of the regular pre-sentencing report, while other jurisdictions allow the victim to read out their VIS, and/or even allow victims to provide sworn testimony during the sentencing hearing as to the effect of the crime upon them.

VIS are now an accepted part of the criminal justice systems of not only of each Australian criminal jurisdiction (O'Connell 1999), each Canadian criminal jurisdiction, New Zealand¹, but also of every American criminal jurisdiction (Garkawe 1992). Completing the picture in terms of jurisdictions that are highly influential in Australia, the United Kingdom has, in line with Tony Blair's consistent mantra that the criminal justice system must be 'rebalanced' in favour of the victim (Smith 2005), introduced a 'Victim Personal Statement Scheme' in October 2001 (Edwards 2002).² This in effect provides for the introduction of a VIS type scheme, perhaps utilising a slightly softer name. This is particularly significant because the United Kingdom has had a history of opposing measures that provide for victim participation in the criminal justice system, such as VIS. For example, it was the only country to place a reservation on its support of the otherwise unanimously approved UN *Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985) (hereafter the 'Declaration'). Specifically, it objected to article 6 (b) of the Declaration that states that the 'views and concerns of victims' should be 'presented and considered at appropriate stages of the proceedings where their personal interests are affected, *without prejudice to the accused ...*' (emphasis added). Despite the words '*without prejudice to the accused*', this was not enough for the UK delegation to remove their objection to the clause.

The United Kingdom 'coming into line' on the issue of VIS shows there seems to be unanimous support for VIS from at least the legislators in all the common law jurisdictions that have similar criminal justice systems to Australia. Yet their presentation during sentencing hearings continues to be controversial, and there still

¹ See *Victims of Offences Act 1987* (New Zealand), s8(1).

² For the Practice Direction that accompanied this scheme, see [2001] 4 All ER 640 (per Lord Woolfe CJ).

seems to be some opposition from the legal profession to VIS, not just from defence lawyers, but also from some judges and even some prosecutors (Erez 1999). The main arguments for and against VIS are briefly canvassed in Part II of this paper. The aim of the paper, however, is not to directly assess these arguments, but rather to clarify, using basic criminal law and sentencing principles, the role that VIS *should* play in the sentencing of offenders. This is because there seems to still be much uncertainty about what effect its contents should have on sentencing, with many defence lawyers remaining suspicious of their use and the potential effect they may have on the exercise of sentencing discretion. Under what circumstances might they be relevant to sentence? Is there a danger that VIS will erode the rights of offenders by being the cause of more severe penalties? Part III of the paper attempts to answer these questions. The conclusion to Part III will be that VIS may appropriately influence the sentence of an offender, but only in a minority of cases. Furthermore, provided care is taken in the implementation of VIS legislation and adequate procedural and evidentiary safeguards are implemented, the genuine concerns of defence lawyers can be addressed. Part IV of the paper will then argue that despite the writer's opinion that in the majority of cases the VIS should not affect the sentence of the offender, victims should still have the opportunity to prepare and present a VIS in all criminal cases of a reasonably serious nature. It will be shown that allowing victims to prepare and present VIS in all such cases should serve a useful therapeutic purpose for victims. It specifically may help them gain a sense of psychological satisfaction by feeling they have a role in the criminal justice system, thereby also reducing their sense of powerlessness and enhancing their cooperation with the system. It will also be shown that VIS may also have beneficial effects for other criminal justice personnel, such as judges, and even offenders. It will be acknowledged, however, that there may be problems with allowing victims to submit a VIS, knowing they will not be taken into account for sentencing purposes. The paper will suggest solutions to this potential problem of the VIS creating false expectations in victims that may leave them worse off psychologically. The overall conclusion of the paper is that VIS should generally be supported, given that the ability of victims to prepare and present VIS can enhance their satisfaction and participation in the criminal justice system. Furthermore, a careful examination of the limits that victim impact material should have on the court's sentencing discretion will mean that they should not impinge upon the civil liberties of offenders.

Part II: The main arguments for and against VIS being submitted during an offender's sentencing hearing

The introduction of VIS was particularly controversial at the time. It is clear that the extent and seriousness of the crime, of which the harm to the victim is an important and relevant element, is a major factor in evaluating a convicted person's sentence (Warner 1996, [49]).³ Those opposed to the introduction of VIS, however, argued they were superfluous to this assessment because the very nature and circumstances of the crime was enough to assess the relevant seriousness of the crime and its likely effect on

³ Note that Rule 145 (1) (c) of the *Rules of Procedure and Evidence* of the International Criminal Court states that the Court in sentencing shall have regard: 'to the extent of the damage caused, in particular *the harm caused to the victims and their families ...*' (emphasis added).

victims, and thus VIS were unnecessary.⁴ Some opponents assumed that the effect of VIS would be to increase penalties because it was thought that crime victims would necessarily be vindictive, and thus either exaggerate the effects of the crime upon them or make unfounded allegations against the offender. Well-known English academic Andrew Ashworth (1998) thus described this use of VIS as ‘victims in the service of severity’. Criminologists and other criminal justice professionals argued that the victim’s anguish as revealed in the VIS will be exploited as a back door means to increase penalties and thus social control, thereby adding to the conservative ‘law and order’ agenda (Elias 1993). Defence lawyers and civil libertarians argued that VIS engendered a subjective approach to assessing appropriate penalties, thus undermining the objectivity of the court on such an important issue as a person’s liberty. They asserted that similar cases would be disposed of differently depending on the education, awareness, resiliency, and vindictiveness or forgiveness of individual victims. VIS would thus increase the unpredictability of the outcome, detracting from the proper functioning and purpose of the criminal justice system, which is to decide on the guilt or innocence of the accused and, if he or she is guilty, an appropriate penalty. Such decisions must be made with objective fairness so that there is a degree of consistency in the prosecution and punishment of offenders. For a small sample of critical perspectives on the use of VIS utilising some or all of the above arguments, see Henderson (1985); Ashworth (2000; 1993); Hinton (1996; 1995); Hall (1992); McCarthy (1994); Richards (1992) and Sanders *et al* (2001).

Victim advocates, on the other hand, were supportive of VIS for a number of reasons. They argued that VIS increase the recognition of victims in the CJS, thereby increasing their satisfaction levels, and thus ultimately their co-operation with the system. Such cooperation is vital for the proper functioning of the CJS. Some argued that it is a matter of basic fairness—the courts hear from almost everybody else during sentencing. Other arguments were that VIS reflects the community’s input into the CJS; they remind authorities that behind the ‘State’ is a real person who has been harmed; and if they are not allowed this will confirm the victim’s feelings of helplessness and powerlessness, adding to their psychological trauma. Legal arguments in favour were that, in contradiction to the claim that they undermine the objectivity of the court and enhance the unpredictability of the outcome, VIS in fact increased the accuracy of the information that the sentencing authority has at their disposal. Even though the contents of the VIS may inject some ‘emotionalism’ into proceedings, there is nothing wrong with some emotionalism in the court, and it is a false assumption that this undermines the objectivity of the court. It is argued that legally trained sentencing authorities are able to discern what evidence is purely ‘emotional’ and thus irrelevant, in contrast to what evidence is relevant to their discretion. For a small sample of articles supportive of VIS utilising some or all of these arguments see Corns (1994; 1988); Garkawe (1994); Sumner (1999; 1987) and Erez (2000; 1999).

⁴ For example, Sanders *et al* (2001, 454) states: ‘Most cases are typical cases: that is, the impact of the crime on the victim is as one would expect given the nature and seriousness of the crime. ... significant harm ... is usually recorded in the form of witness statements taken for evidential purposes from doctors and other professionals ... most VIS add little relevant information to prosecution files that is not already available.’

Part III: Under what circumstances (if any) is the *actual* impact of the crime on the victim, as reflected in a VIS, relevant to sentencing?

The key question this part attempts to answer is whether the *actual* impact of a crime on the victim, beyond the likely or foreseeable impact that can be derived from the facts surrounding the crime, is relevant at all to the offender's sentence? The first point that needs to be made is that the law already defines offences according to the *actual* harm to the victim. As a simple example, if a person is physically assaulted, the charge to be brought against the offender will depend on the actual effect of the crime on the victim. If the victim dies, the offender may be charged with manslaughter or murder. If the victim is injured, the offender is likely to be charged with some form of assault. If the victim is hardly injured at all, the victim will all probably not bother with reporting the crime, and if they do or the police find out about the incident, they might be unlikely to take the matter any further.

Within the parameters of the same charge being brought against the offender, the question remains as to whether it should matter in terms of the offender's penalty what the actual effect of the crime was on the victim. For most crimes maximum and minimum penalties are set out in legislation, but there is normally a large range of possible penalties in between that a court can order. This will still be the case even where the legislature sets out a more prescriptive penalty regime, or where a higher criminal court has issued guidelines judgments. While either of these may curtail some sentencing discretion, the fact remains that judges generally retain considerable discretion.

A hypothetical example

Turning to the question of the relevance of VIS to sentencing, a hypothetical example will be discussed which will be useful in order to more clearly illustrate the dilemmas and principles involved. In this hypothetical, five different victims (V1, V2, V3, V4 and V5) are struck from behind on the head by the same offender using exactly the same amount of force and in the same manner each time. This means that the two primary sentencing determinants, namely the seriousness of the crime and the circumstances of the offender, seem to be more or less the same in each case. What is different are the circumstances of each victim that makes the impact of the crime vary in each case (with the exception of V2 and V5). The question is if and how should these differences effect the offender's sentence?

Say that V1 is a particularly strong victim, both physically and psychologically, and he/she thus only suffers only minor bruising. On the other hand, V2 is hospitalised and needs considerable medical attention, thus misses two weeks of work and suffers some emotional and psychological trauma. This level of harm falls clearly within the range of physical and psychological outcomes that would be expected from a crime of this nature. In other words, V2 suffers 'typical' harm that one would expect from the nature of this type of crime. Like V2, V3 also is hospitalised and needs considerable medical attention, and misses about two weeks of work. However, V3 does not just suffer *some* emotional and psychological trauma, he/she happens to be an exceptionally psychologically fragile person and as a result of the crime suffers *significant*

psychological trauma. For example, he or she refuses to ever go out again and ends all his/her relationships. Like V2 and V3, V4 also is hospitalised and needs considerable medical attention, and misses about two weeks of work. Unlike V2 and V3, however, V4 runs a small business, and V4 loses a very lucrative contract worth one million dollars because he/she is unable to attend to their business during the particularly crucial two weeks it would have taken to seal the deal. Finally, V5 is injured and suffers harm to the same extent as V2, but for his/her own personal reasons (eg. he/she comes from a strong religious background where forgiveness is emphasised regardless of the circumstances) decides to completely forgive the offender.

These examples illustrate that exactly the same crime can have different physical, psychological, social and financial effects on individual victims. In this hypothetical some victims (V1) have suffered less harm than what would be expected, other victims (V3 and V4) have suffered greater harm than expected, or that was beyond the likely or foreseeable impact that can be derived from the facts surrounding the crime. Only V2 and V5 have suffered the likely or foreseeable harm that would be the consequence of a crime of the nature described. The question is whether the penalty of the offender for each of the above crimes should be different. The case of V5 perhaps brings up the separate, but perhaps related, issue of whether the *opinion* of a victim as regards to sentence (in this case, wanting no sentence at all) should have any bearing in the court's sentencing decision. The writer will presently leave this issue to the side, and it will be returned to much later in this Part (see below).

The question of principle—should the penalty differ?

Confining this discussion to the situation of the first four victims, there are strong arguments on either side of the issue. The main argument *for* the penalty being exactly the same in each case is that the offender in each instance has committed an identical act—why should it matter what the actual effect of the crime was on the victim? Objectively, the offender has committed the same crime, involving the same amount of force. The amount of penalty should therefore only be based upon the 'normal' or 'expected' effects of the crime of that nature that was committed (as with V2). If there are any unexpected or unusual effects of the crime on the victim, either lessening the effects (as with V1), or increasing the effects (as with V3 and V4), this should not matter as far as the offender's responsibility is concerned. On the assumption that these impacts were not foreseeable to the offender, it would be unfair to punish the offender more or less as a result. On this reasoning, the offender's sentence should be same for the crimes against V1, V2, V3 and V4. Furthermore, another argument against providing for differing penalties is that by focusing on the actual harm to the victim one is emphasising retaliation or revenge as the basis for the amount of the penalty, and this would not be in conformity with the basic sentencing principle of proportionality.

On the other hand, there are also strong arguments *against* the penalty being exactly the same in each case. It can be argued that the offender should bear the full consequences of his or her actions, and this means being punished according to the actual harm they have inflicted. By committing the crime, the offender should 'take their victim as they find them'. A strict interpretation of this view would imply that if the victim suffers less harm than expected, such as V1, this is the offender's good fortune. If the offender

suffers more harm than expected, such as V3 and V4, this is the offender's bad luck. This viewpoint implies that the offender should be punished for unusual or unexpected consequences to the victim that flow from the offence.

It might be useful at this point to examine what the law of torts in the common law says about such situations. Where a tortious wrong is committed, the amount of damage that can be recovered by the victim of that wrong in compensation is not just dependent on the wrong committed, but also depends upon the actual harm to the victim. The generally accepted historical motto from the law of torts is that 'you take the victim as you find him/her'.⁵ However, modern torts law is not that simple, as it specifies that the *type* of harm must be 'reasonably foreseeable'⁶, and if a victim suffers a *different type* of harm from that which is foreseeable, the offender will not be responsible for injuries that arise from that *type* of harm.⁷ In the above hypothetical, however, as the type of harm that V3 has suffered (psychological) is clearly foreseeable (V2 has also suffered some psychological harm), then under the law of torts the offender (or the defendant in the torts claim) will be liable for all the psychological injury V3 has suffered. Similarly, as the type of harm that V4 has suffered (financial) is clearly foreseeable (V2 has also suffered some financial harm), then under the law of torts the defendant will be liable for all the financial injury V3 has suffered.

However, what the law of torts says about penalty does not necessarily translate to answer the question as to what the criminal law should say about penalty. This is because the amount of criminal penalty clearly should not be assessed on the same basis as the amount of monetary damages the injured party may receive in the law of torts. There are very different consequences at stake for offenders in a criminal trial (their liberty) than for people defending a torts claim against them (an amount of money). Clearly the law must be much more careful in its assessment of criminal penalty than its assessment of tortious liability, and the fact that there are very different standards of proof required in these situations is an indication of this.

So which of the above two opposing views is more compelling to the assessment of criminal penalties? As 'the common law in relation to [the issue whether an offender should be liable for] unforeseeable consequences is unclear' (Warner 1996, [50]), this issue needs to be analysed utilising basic sentencing principles. The writer would argue that neither view is adequate because they both ignore the crucial issue of the mental state of the offender. Vincent J of the Victorian Supreme Court makes some important comments in this context:

The extent to which the law has been concerned with the consequences of criminal behaviour has altered substantially during the last century. There has been a significant shift towards the attribution of criminal responsibility both in terms of both conviction and the assessment of the appropriate penalty, on the basis of the knowledge and intention possessed by an offender, and away from such attribution

⁵ See *Re Polemis and Furness Withy & Co Ltd* [1921] 3 KB 560.

⁶ See *Overseas Tankship (UK) Ltd v Mort's Dock and Engineering Co Ltd (The Wagon Mound (No 1))* [1961] AC 388.

⁷ See *Commonwealth v McLean* (1996) 41 NSWLR 389.

being based upon the consequences of the offender's conduct whether or not the harm actually sustained was intended or contemplated.

Whilst the consequences to and interests of the victim of criminal behaviour must be seriously taken into account, care must be taken to ensure that the law does not respond on the basis of a principle of retribution based essentially upon consideration of the consequences of such conduct, which had perhaps more justification in earlier times than it does at this stage of our social development. There can be no doubt that an element of retribution may be incorporated within a sentencing disposition, however it appears to me that such an element is significantly more appropriate in a situation where the harm suffered was deliberately caused or recklessly disregarded by a perpetrator.⁸

This quote suggests that it is the '*knowledge and intention* possessed by an offender' (emphasis added) that should be crucial to the assessment of the amount of criminal penalty. This is not necessarily the case in the assessment of the amount of tortious penalty. This means that the writer's opinion is that non-foreseeable events and/or consequences should *not* be taken into account in the assessment of an offender's penalty. This contrasts with the views expressed by some prominent victimologists such as Sumner (1999), who take the view that offenders should bear the full consequences of his or her actions, and this means being punished according to the *actual* harm they have inflicted, generally regardless of whether it was foreseeable or not. The writer would disagree, however, arguing that only being able to take into account foreseeable harms is essential to ensuring the justice, fairness and proportionality of criminal sentences. This view places the focus of the penalty on the offender's actual culpability, and avoids allowing chance factors intruding into this decision.

This belief, however, in contrast to the views of many defence lawyers and civil libertarians, does not mean VIS are necessarily irrelevant. Clearly offenders should be responsible for what are the 'usual' effects of the type of crime they committed, including what was 'reasonable foreseeable' to the ordinary person. In such situations the writer agrees that the VIS that specifies the actual impact of the crime will largely be irrelevant as it would be unlikely to add to the court's information. However, if the harm to the victim goes beyond the 'usual' effects of the type of crime committed; in other words, it is not usual, or only eventuates because of the special vulnerability of the victim, then there still may be circumstances where the offender might still be responsible for the full extent or actual harm to the victim. Vincent J's dicta suggests that in such a situation only if the offender *knew* of the victim's special vulnerability or circumstances should all the harm then be attributable to the offender. It should also be noted that under basic criminal liability principles, the concept of 'knowledge' also includes the probability or possibility⁹ of reckless disregard¹⁰ for the victim's special vulnerability or circumstances. The key is whether the offender was able to foresee the

⁸ *R v Mallinder* (1986) 23 *Australian Criminal Reports* 179, at 187–188.

⁹ Whether the correct test for 'recklessness' in this context is the *probability* of awareness or the *possibility* of awareness is a complex issue and beyond the scope of this unit. The answer seems to be unclear from the case law anyway.

¹⁰ Of course the criminal law distinguishes the concept of 'recklessness' from that of mere 'negligence'; and such a distinction is crucial.

victims' special vulnerability or circumstances. It is only in such situations that the VIS becomes relevant and is of use in assessing the appropriate penalty for the offender.

The writer will now attempt to apply these principals to the above hypothetical. The first question for the sentencing authority is whether the actual harm to the victim went beyond what is 'normal' or 'reasonably foreseeable' in an objective sense for the kind of offence that was committed. If the answer is 'no', as it is with respect to V2, then the actual impact of the crime is irrelevant; and the offender will be sentenced according to the level of harm normally expected for the crime they committed. In such situations the VIS should not impact on penalty. Generally speaking also there should thus be no difference in penalty in respect of the crimes committed against V1 and V2 in our above example. There may be perhaps one exception—the rare situation where the offender can show he or she was aware of the fact that the victim was particularly strong and thus the victim would suffer little harm. A good example here may be an offender injuring someone by some action that is outside the rules of the sport, but in the context of a sporting contest where the offender is aware that the other competitors will be particularly fit and strong individuals..

On the other hand, if the harm went beyond what is 'normal' or 'reasonably foreseeable' in an objective sense for the kind of offence committed, then a further question needs to be asked. Did the offender actually *know* of the victims' special vulnerability or circumstances, and thus that this level of harm would occur or be foreseeable, or alternatively did he or she recklessly disregard the possibility or probability of this occurring? If the answer to either of these questions is 'yes', it is in these circumstances that the full extent of the actual harm should be attributed to the offender, and the VIS is thus relevant. Such circumstances it is admitted might be in the minority, but nevertheless, they are possible. If the answer is 'no' to both questions, then it would be unfair to attribute the actual harm to the offender and once again the VIS would largely be irrelevant. The critical point is that the focus of the judge or other sentencing authority should be on the knowledge and awareness of the *offender*, and not on the victim or the victim's opinion. In the cases of the crimes committed against V3 and V4, the actual harm to these victims would be attributable to the offender only if the offender *knew* or recklessly disregarded the victim's special vulnerability or circumstances. In the case of V3, the issue for the sentencing authority would be whether the offender knew, or was reckless to V3 being particularly vulnerable socially. In the case of V4 it would be whether the offender knew, or was reckless to V4 being a person who would suffer extraordinary financial loss if they are unable to attend to their business.

There is another very significant point that the above principles seem to imply. Where the offender and victims are strangers, and thus the offender has no knowledge of the victims' circumstances, the actual impact of the crime should not matter to the sentence, and the VIS would generally be irrelevant to sentence. However, where an offender has previous knowledge of the victim, they may well know or be reckless to their special vulnerability or circumstances, and thus the actual impact of the crime (and thus the VIS) may matter according to the above principles.

The need for adequate procedural and evidentiary safeguards in the use of VIS

In the minority of situations where the VIS may impact on the offender's sentence, it is vitally important that adequate procedural and evidentiary safeguards in relation to the VIS be implemented. This is because an individual victim may be driven by a desire for revenge or retribution that may result in him or her producing a VIS that either exaggerates the harm done to the victim and/or makes unfounded allegations against the offender. Individual offenders thus might receive an unfair higher penalty unless adequate safeguards are put in place. The first safeguard would for any VIS legislation to spell out clearly what the aims of the VIS should be. These should not be to increase penalties or to allow victims to indicate their desire for revenge, but rather to provide the court with factually correct information about the full effects of the crime upon the victim.¹¹ This conforms with the views of Edwards (2002) that victims in adversarial systems of justice may have a role as information-providers, but not as decision-makers. This is a critical distinction. It also means, as discussed below, that VIS should not generally include victims' opinions as to what the convicted offender's sentence should be.

Another possible safeguard that attempts to ensure that the VIS does not turn out to be an instrument for revenge or retaliation would be to allow, or even require, prosecutors and/or victim support personnel to check the VIS before submission to the sentencing authority. If the VIS does contain inflammatory material or non-verifiable material, prosecutors and/or victim support personnel should advise the victim to take out this material and explain the reasons for this.¹² Ensuring the VIS is as 'objective' as possible can be further aided by requiring the VIS, if in written form, to be attested to by the victim. This written VIS should be provided to the defence before the sentencing hearing so they have a chance to read it beforehand and possibly contest its contents. Where an oral VIS is allowed, the victim should be made aware that the VIS will be sworn testimony, and is thus at all times subject to the cross examination by the defence. These safeguards would overcome objections to VIS that have been made in NSW, such as in *R v Slack*¹³ where the NSW Court of Criminal Appeal ruled that little weight would be attached to the harm evidenced by a VIS unless its contents are established beyond a reasonable doubt.

Empirical research on VIS

The above principles also accord with what the empirical research shows concerning the effect of VIS on sentencing decisions. Edna Erez (1999, 548) points to statistics that shows that in the vast majority of cases the use of VIS had no effect on the final result.¹⁴ This seems perfectly understandable to the writer because in most cases the court will be aware of the effects of the crime on the victim, and thus the VIS will not provide any

¹¹ Note that some other possible aims of VIS are also discussed in Part IV below.

¹² A possible stronger safeguard here would be to provide the prosecutor and/or victim support personnel with the right to change the VIS without the victim's permission. A discussion of this issue is beyond the scope of this paper.

¹³ [2004] NSWCCA 128.

¹⁴ Note that empirical work on VIS has also been carried out in South Australia (Erez et al, 1994), Western Australia (Mansell & Indermaur, 1997), and in Victoria (Mitchell 1996).

additional information to assist the court.¹⁵ Alternatively, the impact of the crime as revealed by the VIS will fall within the likely range of effects and thus the VIS will be of little use, apart from perhaps confirming and reminding the court of the type and amount of harm that would be expected to result from the crime. In cases where the VIS indicates effects on the victim that are not known to the court, or that are not anticipated by the type of crime, then the above discussion indicates that there may be other valid reasons why the VIS might still not make a difference to the sentence. Such situations include where the extent of the harm to the victim was unforeseeable to the offender, and thus, in the sentencing authority's opinion (which the writer agrees with) such harms should be ignored for the purpose of assessing the sentence. In the small minority of cases where the VIS seemed to have an effect: 'the data revealed that the sentence was as likely to be more lenient as it was to be more severe than initially thought' (Erez 1999, 548). This seems logical to the writer, as it appears that there may be an equal chance that crime victims may be motivated by a desire for revenge and/or retribution, as they are by a desire to forgive and forget. With respect to the latter, some victims may express a desire for no sentence or a small sentence regardless of the seriousness of the crime. Perhaps they might be motivated by a wish to effect a reconciliation, or to allow the offender a chance to seek employment, thus giving them a better chance of receiving some form of compensation or restitution. Alternatively, other victims might be guided by their own particular personal, cultural or religious perspectives (such as V5 in our hypothetical).

The issue of victims' opinions

How should sentencing authorities treat victims' opinions on sentence? Although many American criminal jurisdictions allow for a victim to also provide a sentencing authority with a statement of opinion as to sentence, this does not appear to be a practice that occurs outside the USA, and a number of UK commentators have rejected such statements as being irrelevant (Ashworth 2000; Edwards 2002). The Practice Direction accompanying the introduction of the UK Victim Personal Statement Scheme seems to support this view:

The opinions of the victim or the victim's close relatives as to what the sentence should be are ... not relevant, unlike the consequences of the offence upon them. Victims should be advised of this. If despite the advice, opinions as to sentence are included in a statement, the court should pay no attention to them.¹⁶

The case law in fact does seem to suggest that where victims express a desire for a high penalty this should not be taken into account in the sentencing decision.¹⁷ However, in situations like that of V5, where the victim expresses a desire for either no penalty or a lighter penalty, the law seems to be a little more equivocal despite the apparently clear Practice Direction. Edwards (2002) provides a detailed description of some English case law that does seem to allow a court to take the victims' views into account in such

¹⁵ Refer to note 4 above.

¹⁶ Refer to note 2 above.

¹⁷ See Edwards (2002), discussing the case of *Perks* (2000) that is summarised in [2000] *Criminal Law Review* 606.

situations.¹⁸ His critical analysis of the reasoning behind these decisions, however, shows a number of flaws in the court's reasoning.¹⁹ His overall conclusion is that:

Forgiveness has no place in an independent and impartial legal system; offenders should be judged on the basis of the crime they have committed by reference to predetermined legal standards, and not have their fate left to the chance factor of the particular feelings of their victims. (Edwards 2002, 702)

This view accords with those expressed by the writer throughout this paper. The amount of a criminal penalty should be dependent on the knowledge and awareness of the offender, and the victims' views are not really relevant to this assessment. To allow them to be, whether their views are punitive or evidence forgiveness, takes the focus of the sentencing decision away from the offenders' knowledge and awareness, and firmly places it on the victim. This is clearly not in accordance with the principles of sentencing discussed above. Because different victims may have very different views on sentence, this will unfairly impinge on the consistency of the sentencing decisions and detract from the principle of proportionality. It is thus submitted that the penalty for the crime against V5 in our hypothetical should be exactly the same as that for V2.

Part IV: why victims should be allowed to present VIS during sentencing hearings in all (serious) criminal cases

Part III of this paper showed that VIS are relevant to sentencing decisions in a small number of cases. It was argued that in these cases the VIS provides sentencing authorities with relevant information that may enhance their decisions. In such cases VIS are justified because it allows the court to know the full extent of the physical, financial, psychological and social effects of the crime on the victim in order to fairly determine the sentence of the offender. This information may not be available to the court in the absence of a VIS, particularly where there has been a guilty plea.

But what about the majority of cases where the VIS may not be relevant to sentencing, as explained in the previous Part? Should victims still be able to prepare and then present their VIS to the sentencing authority? While most commentators might see little problem in allowing the victim to *prepare* a VIS, many argue that they should not be presented to the court in circumstances where the sentencing authority thinks they should not be taken into account for the purposes of sentencing. This will lead, so it is argued, to a danger of false expectations as victims may think that their VIS will be taken into account during sentencing. This would leave them psychologically worse off. The writer disagrees with these arguments, believing that VIS should be allowed to be presented to a court *regardless* of whether the VIS will be relevant to sentencing or not. This probably does not mean in all criminal cases, because in more minor cases perhaps there are strong economic and/or administrative reasons for not allowing them.

¹⁸ Edwards (2002) refers to cases such as *Darvill* (1987) 9 Cr App R (S) 225; *Attorney-General's Reference* (No 18 of 1993) (1994) 15 Cr App Rep (S) 800; *Hutchinson* (1993) 15 Cr App Rep (S) 134; and *Mills* (1998) 2 Cr App R (S) 252.

¹⁹ He particularly concentrates upon the problematic equating of expressions of forgiveness with evidence of limited suffering.

The reason for the writer's opinion is that the benefits of allowing the VIS to be presented to the court outweigh the potential problems. The primary benefit for victims is mainly that it supplies them with a sense of psychological satisfaction, in that they are able to express how the crime affected them. It is submitted that this is likely to have a positive, therapeutic effect on victims for a variety of reasons—they increase the recognition of victims in the CJS, thereby increasing their satisfaction levels; they satisfy their demand for basic fairness because victims are often aware that the sentencing authority hears from almost everybody else; and they counter-act the victim's feelings of helplessness and powerlessness. The field of therapeutic jurisprudence also confirms these conclusions:

The literature in the growing field of therapeutic jurisprudence provides support to the proposition that having a voice may improve victims' mental condition and welfare. Scholars in this area have discussed [at] length the therapeutic advantages of having a voice, and the harmful effects that feeling silenced and external to the process may have on victims. (Erez 1999, 552)

On the possible negative side of the ledger for victims is the very valid false expectations argument mentioned above. It should first be noted that there will be some victims who will always feel their expectations have not been fulfilled, regardless of whether they were able to submit a VIS or not, and regardless of the penalty—this is the nature of criminal victimisation. For other victims, however, it is important to have some strategies in place so as to avoid this problem of unmet expectations. These may also be considered to be in the nature of procedural safeguards for the use of VIS, this time in favour of the victim. These are essential in order for victims to receive the maximum benefits from the submission of VIS, but also in order to minimise possible negative aspects. First, the procedural rules concerning VIS need to make it clear that it is the victim's choice as to whether they decide to present the VIS, and that no inferences will be drawn if a victim decides not to submit a VIS. Secondly, victims need much information and support from prosecutors and/or victim support personnel in all aspects of the VIS. This should include help with the initial decision to write a VIS in the first place, and if the victim decides in favour, then help in its preparation. Victims then need to be assisted with the decision as to whether to also submit the VIS to the court, and in what manner, assuming there is a choice. This will involve an explanation of court procedures, information concerning the availability of assistance and support at court, and an understanding of the possibility of cross-examination on their VIS. Although not common (Erez et al 1997), if cross-examination does eventuate, victims will clearly need assistance in preparing for cross-examination on the contents of their VIS. Most importantly, however, they need to have as much information as possible on the procedure and laws of sentencing, including how sentencing works and the many factors that courts need to take into account under relevant legislation or guidelines. Such information should go some way to explaining to victims why their VIS is only one of many matters judges have to take into account when sentencing, and thus often will either not be relevant or only of minor importance compared to the myriad of other factors sentencing authorities must take into account. In this respect, the Sentencing Information Package prepared by the NSW Victims of Crime Bureau and the NSW Attorney-General's Criminal Law Review Division (2003) contains information on

these issues—this is precisely what each victim should be provided with in every (serious) criminal case.

The VIS may also be advantageous for the other major professionals working in the criminal justice system. For example, the presentation of the VIS may be beneficial for the judge or other sentencing authority. Their role is obviously crucial for the proper functioning of VIS, and it is entirely appropriate that they that will determine the relevancy of the VIS, hopefully based on the principles provided in this paper. The VIS may well contribute positively to their decision-making processes. While their legal training should mean that they will know to eliminate ‘emotional’ and other non-factual victim impact evidence from their consideration of the appropriate penalty, it still must be remembered that they are human. No matter how learned they are, they naturally see other people’s experiences through their own mindset and their own knowledge and experiences. Without being disrespectful, it is natural for someone who has not been a victim of a crime or a victim of a particular crime (eg. a male judge can never know what it is like for a woman to be raped) not to fully comprehend the consequences of the crime. Listening to VIS thus may aid judges in more fairly and better understanding the effects of particular crimes against specific types of victims that perhaps the judge cannot really appreciate. Clearly, this raises complex issues and much more research and work needs to be done on the impact of VIS on sentencing authorities.

One issue that is even less explored is the question of what might be the benefits for *offenders* in having VIS evidence presented to the court during a sentencing hearing. This process may provide them with greater awareness of the effects of their crime, endowing them with more empathy for the victims, thus giving them a greater feeling of responsibility and ultimately a better chance of rehabilitation. This is obviously related to restorative justice initiatives in many other areas, and is another question that requires a lot more research.

In summary, it is submitted that all victims of (serious) crimes should be able to prepare and then submit a VIS whenever they choose to do so. The therapeutic value of this process for victims outweighs the potential problem of false expectations, especially if the procedural safeguards mentioned in this part are implemented. The VIS may also be beneficial for sentencing authorities and offenders themselves, and while a lot more research needs to be done on these issues, the potential advantages to the writer are obvious.

Part V: Conclusion

The first Australian jurisdiction to introduce legislation providing for VIS to be used at sentencing hearings was South Australia.²⁰ The then Attorney-General, Chris Sumner (2005), when receiving the first inaugural award for services to crime victims in November 2005 in Canberra, stated that the introduction of VIS was not aimed at increasing penalties, but rather to assist the court receive accurate information concerning the crime. For this reason, in his opinion, the opposition to the legislation

²⁰ See *Criminal Law (Sentencing) Act 1988 (SA)*, s7A.

from the legal profession was muted. His view confirms the crucial point made by Edwards (2002) that victims should be information providers, not decision makers.

Once we recognise that VIS are thus only relevant to sentencing in a limited number of cases, and we implement the required procedural and evidentiary safeguards for their introduction, we can then see that there is little danger for offenders in their use during sentencing hearings. The potential benefits for victims themselves, sentencing authorities, offenders and perhaps other criminal justice personal potentially makes their use a very positive development towards a more just criminal justice system. While much more research needs to be carried out with respect to many aspects of VIS, it is clear they are here to stay and will continue to spark comment, debate, new ideas and controversy.²¹

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²¹ For example, the issue of whether family VIS in homicide cases has been particularly controversial (see Booth 2000), and is beyond the scope of this paper.

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