# *The Dead Victim, The Family Victim And Victim Impact Statements In New South Wales*

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## Introduction

The *Victims Rights Act* 1996 (NSW) (*VRA*), was proclaimed on 2nd April 1997. Section 3 of that Act provides that its object is to "recognise and promote the rights of victims of crime" through a package of support services and benefits. Together with provision for the Victims of Crime Bureau, the Victims Advisory Board and a formal declaration of a Victims' Rights Charter, the *Criminal Procedure Act* 1986 (NSW) (*CPA*) was amended to facilitate submission of victim impact statements (VIS) to the court in certain circumstances. A VIS is familiar as a mechanism for victim participation in the sentencing process whereby a victim of an offence may submit a statement to the court upon conviction of the offender, prior to sentencing. Typically, such a statement informs the court of the harm suffered by the victim as a result of the commission of the offence and/or the impact of that offence upon the victim.

The *CPA* distinguishes between victims who are either 'primary' victims of the offence or, where that person is dead as a result of the offence, 'family' victims who are members of the primary victim's family. Although the judicial trend has been to have regard to VIS from primary victims at the sentencing stage of a matter (*R v P*), consideration of victim impact statements from family victims has proved more controversial. Prior to the passage of the *CPA*, VIS from family victims had been rejected in the NSW Supreme Court (*R v De Souza*). Recent decisions of the Supreme Court indicate that despite amendments to the *CPA*, VIS from family victims will generally not be considered as a separate factor during the sentencing process (*R v Previtera*; *R v Audsley*; *R v Pham*; *R v Nguyen*; *R v Bollen*; *R v Dang*). Nor, it seems, will such statements be considered in the course of applications for redetermination of life sentences (*R v Horan*). However, this is not necessarily the position of VIS by family victims in other Australian jurisdictions or the United States. In South Australia, Western Australia and Victoria, it has been held that victim impact evidence from family victims, if admissible, will generally be regarded as a relevant factor in the sentencing process.

The aim of this paper is to examine the position of the family victim vis-a-vis the submission of VIS and the relevance of those statements to the sentencing process in New South Wales. Part one of the paper will outline the legislation framework in NSW focussing on the position of the family victim and contrast this with similar legislation in other

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Australia jurisdictions: the ACT, Victoria, South Australia and Western Australia. The link between VIS and sentencing principles will be examined in part two. Part three of the paper will explore and evaluate the response of the new Supreme Court to consideration of VIS from family victims in the sentencing process. The reasoning of the leading case, *R v Previtera*, will be examined and contrasted with the position in other jurisdictions. Part four of the paper concludes that the current law in NSW - to the effect that VIS from family victims which only deal with the impact of the death of the deceased on the family victim, will not be a relevant factor in the sentencing process - is to be preferred.

## Part One: The legislative framework

McLeod has astutely observed that implicit in the use of the terminology, 'victim impact statement', is general agreement between various jurisdictions as to the "substance, preparation and presentation" of VIS (1986:508). However, she argues that a review of the various state legislative models in the United States reveals 'minimal consensus' as to a variety of matters including: definition of the victim, contents of VIS, methods of presentation and the procedural basis for submission of VIS (1986:508, see also Hall 1991). In their work, Mcleod (1986) and Hall (1991) provide overviews of the statutory variations between the jurisdictions in the United States (US). It is notable that victim participation in those jurisdictions varies from minimal participation by a victim (a written statement of harm suffered by a victim attached to a pre-sentence report) to an oral statement from the victim to the court detailing the victim's feelings regarding the crime, the offender and the sentence.

South Australia was the first state in Australia to pass legislation providing for the submission of VIS [*Criminal Law (Sentencing) Act*, 1988]. During the following decade, Victoria (*Sentencing Act*, 1991), Western Australia (*Sentencing Act*, 1995) and the ACT (*Crimes Act* 1900) also followed suit. In New South Wales, the relevant legislative provisions concerning format and submission of VIS are located in sections 164-169 of the *CPA* and the *Criminal Procedure Regulations* 1995.

The legislation in SA, NSW and the ACT is generally based on a model of victim participation which provides for the presentation of a written VIS to the court by a victim at the sentencing stage of a criminal matter (NSW: s169, SA: s7A, ACT: s429AB). Although the language used by the Acts varies, generally the VIS provides details of the harm caused by the offence to the victim and/or the impact of that offence upon the victim. The Acts in Victoria and Western Australia contain a variation to this model whereby they incorporate provision for the victim to make an oral VIS to the court (VIC: s95A, WA: s25). In all jurisdictions submission of VIS by victims is discretionary (NSW: s168, WA: s24, VIC: s95A, ACT: s429AB) and in NSW and the ACT no inference may be drawn that the offence had little or no impact on a victim if a VIS is not submitted in a particular case (NSW: 168, ACT: s 429AB).

Although the Australian jurisdictions do not reflect the same extremes in statutory variations as the US, there is nevertheless little uniformity with regard to the definition of a victim, the contents of a VIS, the presentation of a VIS and the role of the VIS in the sentencing process.

## Definition of Victim

Despite little consensus as to the definition of a 'victim', family victims may submit a VIS to the sentencing court in all Australian jurisdictions. The NSW legislative model identifies and defines both a 'primary victim' of an offence and a 'family victim' who may submit a VIS to the court. A 'primary victim' is defined as a person "against whom the offence was committed" or "was a witness to the act of actual or threatened violence" and has "suffered personal harm as a direct result of the offence" (s164 *CPA*). In circumstances where the primary victim has died as a result of the offence, a 'family victim' is defined as a member of the immediate family of the dead primary victim (s164). The immediate family of the primary victim means: the victim's spouse (including de facto spouse), a parent, guardian or step-parent of the victim, a child or step-child of the victim or some other child for whom the victim is guardian, a brother or sister or step-brother or step-sister of the victim (s164).

Despite differences in terminology, the legislative models in the ACT and WA also identify and define victims other than primary victims of an offence. The ACT legislation distinguishes between 'primary victims' and 'other persons'. A 'primary victim' is defined as a person who suffers harm caused by the commission of the offence or in the course of assisting a police officer (s428Y(a)). Where the primary victim dies as a result of the commission of the offence, "any person who is financially or psychologically dependent on the primary victim immediately before his or her death" may also be defined as a 'victim' (s428Y(b)). Under the Act in WA, a 'victim' may be either a person or body that has suffered injury, loss or damage as a direct result of the offence whether or not such injury was foreseeable or where the offence results in a death, any member of the immediate family of the deceased (s13).

There are no express references in the Victorian and South Australian legislation to victims other than 'primary victims'. In SA, the legislation provides that *a person* who has suffered injury, loss or damage as a result of an indictable offence may provide the court with a written VIS giving details of that injury, loss of damage suffered by that person and the impact on his or her family (s7A). In *R v Birmingham (No 2)*, it was held that the notion of 'victim' in this provision was to be extended from the immediate victim of an offence to other victims (including family victims) where they have suffered injury, loss or damage as a result of the death of an immediate victim.

In Victoria, a victim is defined as 'a person who, or body that, has suffered injury, loss or damage as a direct result of the offence, whether or not that injury, loss or damage was reasonably foreseeable to the offender' (s3). In *R v Miller*, the Victorian Supreme Court held that the word 'victim' in this provision should not be construed too narrowly and included the relatives of a dead victim thereby giving those relatives the right to make a VIS to the court.

## Contents of a Victim Impact Statement

In NSW, the legislation limits the material that may be contained in a VIS from primary and family victims. It is the only Australian jurisdiction that distinguishes primary victims from family victims in this respect. Section 166 of the *CPA* provides that a VIS from a primary victim should contain particulars of 'personal harm' suffered by the victim as a direct result of an offence. Personal harm is defined as actual physical bodily harm, mental illness or nervous shock (s164). A VIS from a family victim should only contain particulars relating to the "impact of the death of the primary victim on the members of the immediate family of the primary victim" (s166).

Although the legislative models in the ACT and WA envisage victims other than primary victims, those models do not provide further distinction in terms of the content of VIS. In the ACT, the legislation provides that the harm that may be detailed in a VIS includes physical injury, mental injury or emotional suffering (including grief), pregnancy, economic loss and substantial impairment of rights accorded by law suffered by a victim as a result of an offence (s429AB).

The Western Australian, South Australian and Victorian models use similar terminology. In WA, a VIS is to give details of "any injury, loss or damage suffered by the victim as a direct result of the offence whether or not such injury was foreseeable" (s25(1)(a)) and "describes the effects on the victim of the commission of the offence" (s25(1)(b)). Section 25(1)(b) has been interpreted as entitling a family member to describe the effects on him or her of the commission of the homicide (*R v Mitchell*).

In SA, the Prosecutor must provide the court with details of injury, loss or damage suffered by a person as a result of the offence (s7). A VIS may be submitted by a person who has suffered injury, loss or damage resulting from an offence about the impact of that loss, injury or damage suffered by a victim on that victim and his or her family (s7A). "Injury, loss or damage" is defined to include "pregnancy, mental injury, shock, fear, grief, distress or embarrassment resulting from the offence"(s3). In *R v Birmingham (No 2)* the court found that the words "any injury, loss or damage" included not only the effects of the offence on the immediate victim but also extended to the effects of the offence on others. In that case, members of the deceased person's family were entitled to make VIS detailing their 'trauma and upset'.

Section 95B of the Victorian Act provides that a VIS is to contain particulars of any injury, loss or damage suffered by the victim as a direct result of the offence. In *R v Miller* the Supreme Court of Victoria held that the word 'injury' in this particular context included sorrow and misery caused to a dead victim's family.

## Relevance of Victim Impact Statements in the Sentencing Process

The legislation in SA, the ACT, Victoria and WA generally provides that the court is to have regard to VIS from family victims at the sentencing stage of a matter. However, the legislation in these jurisdictions does not set out the weight to be attached to the VIS and presumably this is a matter for the discretion of the sentencing judge (*R v Mitchell* at 341). In NSW, the legislation requires the court to receive VIS from family victims but it expressly preserves judicial discretion as to whether those VIS will be taken into consideration in sentencing.

Section 429AB of the *Crimes Act* 1900 (ACT) provides that a court "*shall* have regard to" a VIS tendered by a victim of an indictable offence when determining a sentence in respect of that offence. In SA, section 10 of the Act provides that the court "in determining sentence for an offence" should have regard to various matters including the personal circumstances of any victim of an offence and any injury, loss or damage which results from the offence. The prosecutor *must* "for the purpose of assisting the court to determine sentence for an offence" provide the court with details of any injury, loss or damage resulting from the offence unless a person who has suffered any such injury, loss or damage requests that the details be withheld from the court (s7). Further, on conviction of the offender, section 7A requires the court to ensure that either the author is given an opportunity to read the VIS to the court or cause that VIS to be read out to the court.

Section 95A of the Victorian Act provides that a victim may make a VIS to the court for the purpose of assisting the court in determining sentence. By virtue of section 5(2), the court *must* have regard to a variety of factors when sentencing an offender which include the personal circumstances of any victim of the offence and any loss, injury or damage resulting directly from the offence. However, the court may rule any part of that statement as inadmissible (s95B). Section 24 of the Western Australian Act provides that a victim may give a VIS to the court to assist the court in determining the proper sentence for the offender. The court has power to rule any part of the VIS inadmissible (s26).

In this regard, the language of the NSW Act is significantly different. The *CPA* provides that the court *may* receive and consider, if appropriate, a VIS from a primary victim after the offender has been convicted and prior to determination of sentence (s167(1)). A VIS *may* also be received and considered by the Supreme Court when it resolves applications for the redetermination of an existing life sentence referred to in section 13A of the *Sentencing Act,* 1989 (NSW) (s167(2)).[1] In contrast, the *CPA* stipulates that the court must receive a VIS from a family victim. Once received and acknowledged, the court need not consider that statement in connection with the determination of a sentence for the offence if it considers it inappropriate to do so (s167(3)).

The NSW provisions appear to be a direct response to the decision in *R v De Souza* and actively prevent the outright rejection of VIS from family victims as occurred in that case. To the extent that these provisions acknowledge the family victim and give that victim a 'voice', the legislation clearly seeks to address criticisms from victims' rights groups to the effect that the criminal justice system focuses on the offender at the expense of the victim (NSW LRC 1996). This was made clear during the second reading of the *Victims Rights Bill* when Mr. Whelan said:

> The Government has acknowledged the views expressed by some victims groups regarding the desirability of affording an opportunity for the family of a victim who has died as a result of a violent criminal act to be able to present to the sentencing court a victim impact statement which contains information about the impact on the family of the victim's death. (Parliamentary Debates 27 November 1996:6694)

Having made the policy decision to preserve judicial discretion, it is disappointing that the Government did not take the opportunity to deal with the substantive objections to VIS from family victims raised in *R v De Souza.*

## Part Two: Victim Impact Statements and Purposes of Sentencing

Although not intended to alter accepted sentencing principles, clearly a VIS is designed to influence sentencing outcomes. For instance, during the Parliamentary debates surrounding the *Victims Rights Bill,* the member for Manly, Dr. McDonald, described a case that he perceived had resulted in an unjustly lenient sentence. He said: "It is a classic case of the victim's rights being totally denied and the accused, who was finally convicted, being shown great leniency. Had a [victim impact statement] been provided to the court and had the judge taken such a statement into account in his judgement, the outcome would have been very different" (Parliamentary Debates 27 November 1996:6697). Presumably, Dr. McDonald believed that consideration of a sufficiently detailed VIS at the sentencing stage, would have led the court to impose a more severe sentence adequately reflecting the harm caused by the offence.

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1 In fact, the first VIS submitted to the New South Wales Supreme Court under this legislation by a 'family victim', the husband of the deceased was in response to an application by Kevin Garry Crump to have a redetermination of the two life sentences imposed on him in 1974.

In *Veen v The Queen (No. 2)* at 476, Mason CJ, Brennan, Dawson and Toohey JJ pointed out that "sentencing is not a purely logical exercise" because any sentence imposed must reflect the various, overlapping and often conflicting purposes of criminal punishment. These purposes included: protection of society, deterrence of the offender and others who might also be tempted to offend, retribution and reform (at 476). The principle of equality in sentencing requires similar treatment of similarly situated offenders in order to avoid disparity of outcomes (Henderson 1985:991, Talbert 1988:211). There is no convenient or precise formula setting out the weight to be accorded to any of these purposes in a particular case (Green 1996:112). However, the recent rise of retributivism as a favoured basis for punishment has been well documented (Green 1996:112).

Essentially, retributive theories of punishment try to establish a link between punishment and wrongdoing (Ten 1987:146). The offender deserves to be punished in proportion to his or her 'just desert'. This principle requires that the sentencing outcome be proportional to the objective seriousness of the offence (*Veen v The Queen* at 472; Braithwaite & Pettit 1990:5). 'Seriousness' in this context is measured according to the harm caused by the offence and the degree of culpability of the offender (von Hirsch 1976). Culpability is related to the concept of 'blameworthiness' which requires that the degree of criminal responsibility and quantum of punishment be linked to personal awareness of the consequences of one's conduct. 'Harm' is the degree of injury caused or risked by the conduct and, the more grave the harm, the more serious the offence (von Hirsch 1976: 79).

A VIS is said to enhance the retributive aims of sentencing because the statement documents the harm suffered by the victim directly injured by the offence. Together with evidence of the offender's culpability, the extent of this harm is relevant to the determination of the objective seriousness of the offence. In *R v P* the Federal Court said:

> There is no question that increasing public concern about the position of victims of crime in the criminal justice system has been accompanied by repeated instances of judicial recognition that loss or damage suffered by a victim is a factor to be taken into account in the sentencing process.....[T]hat reliable information of that nature should be presented is in the public interest, not only in the interest of the injured victim....since a proper sentence should not be based on a misconception or ignorance of salient facts (at 545).

Thus, by providing information of the harm suffered by the victim directly as a result of the offence, the VIS serves to give weight to the role of retribution in the sentencing process (New South Wales Law Reform Commission 1996: 11.33).

The New South Wales Law Reform Commission has also suggested that VIS could contribute to the satisfaction of another purpose of punishment - the reformation or rehabilitation of the offender (1996:11.35, Henderson 1985:990, Talbert 1988:217). Reformation or rehabilitation is basically concerned with implementing practices that aim to change the values of the offender so that he or she will not want to commit similar or other offences in the future (Ten 1987:8). Victim impact evidence disclosed in court confronts the offender with the extent of harm suffered by the victim as a result of the offence and constructs a personalised image of the victim as a damaged human being. Consequently, the offender may be so shocked and remorseful, that he or she could be prompted to claim ultimate responsibility for the offence and seek to desist from the commission of future criminal offences.

## Part Three: Family Victims and Victim Impact Statements

### *Position before the legislation*

Historically, VIS from primary victims have been admitted and considered in the sentencing process on the basis that they serve a retributive purpose of punishment (*R v P, R v de Souza)*. However, the admissibility of VIS by family victims has proved more controversial in New South Wales. Prior to the implementation of the current legislative provisions, VIS from family victims had been rejected as irrelevant to the sentencing of the offender by the Supreme Court of New South Wales (*R v De Souza*).[2]

In *R v de Souza*, the offender was convicted of the murder of a young woman. At the sentencing stage, the Crown tendered several VIS from various members of the deceased's family that detailed the effects of the deceased's death upon them including: symptoms of depression, lack of concentration, nightmares, insomnia, alcohol and drug use and the development of serious health problems. The VIS also described the good character, life goals and reputation of the deceased as well as the authors' views on the use of steroids, the character of the defendant and the appropriate sentence to be imposed in the circumstances. The relevance of these VIS was objected to and the court addressed the issue of what significance, if any, should be attached to them.

So far as the material relating to steroid use, characterisation of the defendant and penalty was concerned, the court took the view that this was clearly irrelevant and inadmissible. The court described the family members as 'secondary victims' and found that those parts of the VIS relating to the impact of the deceased's death on them and the description of the primary victim were not relevant to an assessment of the objective seriousness of the offence. The objective seriousness of the offence (ie. homicide) is measured by the death of the primary victim and the manner and circumstances of that death. Thus, the VIS in this case were irrelevant because they provided no material relating to these issues and thus, served no useful sentencing purpose. Moreover, Dunford J warned the court of the potential prejudicial nature of such subjective evidence. "[E]ach human life has an intrinsic value. The life of one homicide victim cannot, it seems to me, be of more intrinsic value than another because he or she comes from a close family with loving relatives" (at 3).

### *R v Previtera*

As outlined in part one, the *CPA* now prevents the court from rejecting VIS from family victims. However, the legislation preserves judicial discretion and the court is not compelled to actually consider those statements in relation to the determination of a sentence unless it considers it appropriate to do so. Since the passage of the *CPA*, the NSW Supreme Court has steadily refused to consider VIS from family victims which only deal with the effect of the death of the victim on family members in the sentencing process or when redetermining life sentences.

In *R v Previtera*, the defendant pleaded guilty to the murder of an eighty-one year old woman. At the sentencing stage of the matter, the Crown tendered a VIS authored by the deceased's son which gave details of the reactions of the son and his sister to the murder of their mother in "moderate and compassionate" terms (Hunt CJ at 84). Hunt CJ acknowledged receipt of the VIS in accordance with the Act and extended his sympathy to

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2 A similar result was reached by the Victorian Supreme Court 12 months before in *The Queen v Penn* 9 May 1994, unreported, BC9401041.

the family victims "for their tragic and senseless loss" (at 84). Nevertheless, he declined to consider that statement in connection with sentencing the defendant because it was not appropriate to do so.

Mindful of sentencing purposes similar to those referred to in *Veen v The Queen (No 2)*, Hunt CJ applied a sentencing framework that took into account the objective circumstances of the offence, any matters which aggravated the offence and any matters which went to mitigation of the offence (at 85). In the case of homicide, the objective circumstances of the offence encompass the consequence of the death of the deceased and the manner and circumstances in which she died. In Hunt CJ's view, information regarding the effect of the death of the deceased on family members was not relevant to an assessment of the objective circumstances of the offence because it had no bearing on the death of the deceased or the manner and circumstances in which she died.

Admission of material that only describes the effect of that death upon family members is hazardous because it introduces subjective factors into the sentencing process that may distract the sentencing court from the objective sentencing process. Like the court in *R v De Souza*, Hunt CJ was concerned that such subjective evidence might result in an improper valuation of the life of the deceased and the surviving family members which could be reflected in the sentence imposed.

> 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 the life lost is perceived to be greater in one case than it is in the other (at 86).

Hunt CJ did not rule that VIS from family victims would always be irrelevant to the sentencing process. Indeed, he indicated that there might be a 'rare case' where a VIS from a family victim could provide material relevant to the sentencing process (at 87). For instance, such a case might involve details of the slow and lingering death of the deceased as a result of the offence and as such would bear on the manner and circumstances of the death of the deceased (at 87). Otherwise, where the evidence from family victims only describes the effect of the deceased's death upon family members, it will usually only be relevant to victim compensation and outside the purview of the sentencing court (at 87).

The reasoning in *R v Previtera* is based on the assumption that victim impact evidence from family victims is subjective because it focuses on the personal attributes of the deceased and the emotional impact of the death of the deceased upon family members. The basis for refusing to take VIS s from family victims into account at sentencing is twofold (Hall 1991, Henderson 1985, Hinton 1996, Finn De-Luca 1999, Mitchell 1996). First, the harm documented by the VIS from a family victim is irrelevant to retribution in sentencing because it does not relate to the harm component of the objective seriousness of the offence. In homicide, that harm component relates to the death of the deceased and the manner and circumstances in which he or she died. Second, admission of VIS from family victims could be unduly prejudicial to the sentencing process. The very nature of such evidence requires a subjective analysis of the emotional impact of the deceased's death and the personal qualities of the deceased. The subjective quality of the evidence, particularly relating to victim worthiness and the quality of the VIS, could distract the sentencing court from the sentencing principles of equality and proportionality and result in sentence disparity for similarly situated offenders. As a result, the court in *R v Previtera* views such victim impact evidence as relevant to compensation and outside the criminal justice system. These arguments will be discussed in turn.

### *Retribution*

Unlawful homicide offences are regarded seriously by the legislature and carry severe penalties precisely because of the harm which is the gist of the offence – the death of a human being, the primary victim. The objective seriousness of the offence is established by the occurrence of that central harm and the manner and circumstances of the homicide (*De Souza* at 4). In addition, there may also be particular aggravating circumstances associated with the homicide which are relevant (*R v Previtera* at 84).

The United States Supreme Court has taken a different view. In *Payne v Tennessee* 111 S.Ct. 2597 (1991), Payne was convicted of two counts of first degree murder of a 28 year old woman and her 2 year old daughter and of assault with intent to commit murder of the deceased's 3 year old son. The jury sentenced him to death for each murder. He was sentenced to 30 years in prison for the assault. During the sentencing stage of the matter, the State called evidence from Mary Zvolanek, mother and grandmother to the deceased victims. Ms Zvolanek testified as to the surviving 3 year old child's reaction to the crime and the loss of his mother and sister.

> He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie [the deceased 2 year old]. He comes to me many times during the week and asks me, Grandma, do you miss my Lacie? And I tell him yes. I'm worried about my Lacie (at 2603).

The court held that victim impact evidence from family victims which relates to the emotional impact of the death of the deceased on those victims and evidence relating to the personal characteristics of the deceased is admissible in capital sentencing cases. The majority took the view that victim impact evidence which detailed the emotional impact of the crime on family members was portraying the actual or specific harm caused by the offence and therefore relevant to the defendant's moral culpability and blameworthiness (at 2608).

Finn De-Luca challenges this reasoning on the basis that it is derived from a social retribution model of sentencing which focuses on personal responsibility for outcomes more than the actual intent (1999:372). Under this model, evidence of the deceased victim's character and the emotional impact on the family of the death of the deceased will be relevant to outcome. However, she argues that this result poses the risk of improperly crossing the line between social retribution and vengeance and conflicts with the fundamental principles of proportionality and equality in sentencing (1999:372). In *R v Previtera* Hunt CJ also expressed caution at equating vengeance with justice and he emphasised that retribution was only one sentencing purpose (p 86).

The sentencing of an offender is an objective process and the gravity of an offence must be determined from an objective standpoint (*De Souza* at 4, von Hirsch 1976: 79). It is contended that the nature of victim impact evidence from family victims involves the court in a subjective analysis which is antithetical to the objective process of sentencing. According to Hall, the subjective nature of such evidence becomes apparent when examining the questions generally addressed by VIS from family victims such as: "How has this crime affected your psychological or emotional well being?" "Has this crime affected your relationship with family members or friends?" "How much have you grieved?" (1991:256) Hall argues that "only in the most indirect way do answers to these questions reflect any legitimate measure of victim harm" (1991:256). On the reasoning in *Previtera*, such subjective material could never be a legitimate measure of harm and the objective circumstances of the offence. Clearly, consideration of such subjective evidence inevitably detracts from the objective sentencing process because it does not relate to the objective circumstances of the offence and can, therefore, serve no useful sentencing purpose.

### *Victim worthiness*

The judgments in *R v De Souza* and *R v Previtera* reflect the concern that the more loved or worthy the dead victim as perceived by the family victim or the court, the more severe the punishment that could be imposed on the offender. If victim impact evidence from a family victim is considered, sentencing outcomes may reflect not only the intrinsic harm of the offence, the death of an already valued human being, but also the comparative worthiness or lovable nature of the victim relative to other dead victims. Potentially, the more worthy or loved the victim, according to the family and the court, the greater could be the sentence imposed on the offender.

Interestingly, courts in other Australian jurisdictions have not shared these concerns to the same extent. In *R v Birmingham (No. 2)*, the defendant pleaded guilty to a charge of causing death by dangerous driving. At the sentencing stage of the matter, Perry J considered the issue of whether the court could take into account written VIS from the parents of the deceased. The VIS described the emotional impact of the deceased's death upon them. The defence argued that, on the basis of the views of Hunt CJ in *Previtera,* the VIS were inadmissible. While Perry J agreed that, in this context, the court should not "put a greater value on one human life as opposed to another" in his view the court was free to consider the 'trauma and upset' suffered by the family victims (at 6393). According to Perry J, 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" (at 6393). He did not see his stance as offending any 'basic tenet of sentencing principles' because, "after all, offenders must take victims as they find them" (at 6393). In the case of homicide, "injury, loss or damage" to others flowing from the death of one human being may be much more severe in one case than in another" (at 6394).

Implicit in this judgment seems to be the inescapable conclusion that the severity of injury, loss or damage will depend on the personal qualities of the dead victim and the family victim and the emotional impact of the death of the deceased upon family members. The extent of injury, loss or damage so calculated will be reflected in the sentence imposed on the offender. This is precisely the sentencing outcome that the court in *R v Previtera* was so anxious to avoid because of the improper impact of subjective factors irrelevant to the sentencing process and the unduly prejudicial nature of such evidence.

In *R v Miller* the court considered that "it was 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" (at 354). Nonetheless, without discussion of the implications of the victim worthiness issue, the court held that the Victorian legislation (outlined in part one) allowed evidence of 'sorrow and misery to a particular victim's family' to be taken into account in the sentencing process. However, the court did caution that a sentencing judge must avoid allowing sympathy for the victim to loom so large that the sentencing discretion is miscarried.

In *R v Mitchell,* the defendant was sentenced to 25 years imprisonment for the murder of a 33 year-old mother. He appealed against the severity of this sentence on various grounds including that the trial judge gave too much consideration to VIS submitted by family victims. According to the appeal court the statements demonstrated that "the victim was a much loved person, and her death had a severe and far-reaching impact on the lives of many who cared for her deeply. Several of the persons so affected wrote statements which in an articulate and eloquent manner emphasised the tragic loss to them, and other individuals,

and to the community as a whole, as a result of [the victim's] death" (at 340). The applicant submitted that the emotional content of the VIS, meant that the trial judge was unduly swayed by the VIS to an improper extent.

*R v Previtera* was distinguished by the court on the basis that the NSW legislative provisions preserving judicial discretion were 'fundamentally different' to the legislation in WA which allowed any member of the dead victim's family to give a VIS to the court. The use that a sentencing judge makes of a VIS is still a matter within his or her discretion (Ipp J at 341). Given that a sentencing judge must not be unduly swayed by the contents of a VIS, it is striking that the court did not analyse the substance of Hunt CJ's arguments relating to the 'loved victim' and the value of the victim being reflected in the sentence imposed. In this case the court simply found that the trial judge's comments concerning the VIS did not reveal that he had been unduly swayed by the contents of those statements.

In *Payne v Tennessee,* the US Supreme Court considered this issue and concluded that victim impact evidence from family victims is not offered to encourage comparisons of worthy or loved victims (Rehnquist J at 2607). Instead, evidence of this type is a demonstration of each individual victim's uniqueness and it is required to transform the dead victim into a living person.[3] However, with respect, unlawful homicide is criminalised and graded as a serious offence precisely because the fundamental principle of the sanctity of life recognises the unique nature of each human life and the fact that each life is intrinsically equal. It is because of the uniqueness of each human being and the high value accorded each human life that it is illegal to kill another person, whomever they may be, without lawful excuse. Given then that the uniqueness of any particular victim is already inherent in the sanctity of life doctrine and relevant criminal offences, further evidence seems superfluous. The more likely outcome is that a VIS from a family victim will apply the uniqueness of that particular victim to emphasise the degree of worthiness between that victim and others. Such a comparison could invite harsher sentences where a particular victim is judged more worthy or lovable.

It is contended that it would be an abuse of justice to suggest that a sentence should or could be influenced by whether there are loved ones of the deceased who are bereaved and/ or the magnitude of worthiness enjoyed by the deceased. It would be particularly 'grotesque' to parade such victim impact evidence in a manner which would inevitably foster comparison of different victims and result in some form of sentence correlation with the constructed value of the victim. Surely an offender can have little control over the personal attributes of his or her victim or the regard in which his or her family holds that victim or indeed even whether the primary victim has a family. The prospect of such discriminatory and unfettered subjective assessments and their effect upon consistency in sentencing are matters for concern. Ultimately, sentences could operate to assign different values to the lives of various homicide victims assessed according to that victim's worth to family, friends, work colleagues and the community (New South Wales Law Reform Commission 1996:11.51). The objective seriousness of the offence is established by the death of the primary victim and the manner and circumstances in which they died; the worthiness of or the extent to which that victim is loved and admired by family members is not and must not be considered relevant to the sentencing process.

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3 However, the uniqueness of each dead victim is confined to the merits of that person rather than his or her vices. (Finn De-Luca 1999:372)

### *Presentation and Quality of VIS*

Selective presentation of VIS and the variable quality of VIS also pose potential hazards to the integrity of the sentencing process. The submission of a VIS in an applicable criminal matter is not mandatory in New South Wales and inevitably, there will be matters where family victims elect not to submit a statement. In the event that the court agreed to consider a VIS from a family victim, selective presentation of such evidence might mean that the information before the court for the purposes of sentencing similarly situated offenders could vary significantly in each case. Studies of similar legislation in other jurisdictions have demonstrated that the right to submit a VIS is utilised by victims far less than may be expected (Mitchell 1996:168; Hall 1991:241). Whether or not a victim will submit a VIS depends upon particular characteristics of the victim. Relevant variables include: class, gender, cultural background, level of literacy, costs of reports and the assistance that is made available for this purpose (Richards 1992:133). Of particular concern are findings that typically, only those primary or family victims who are white and middle/upper class will submit a VIS (Hall 1991:233). This empirical evidence suggests the possibility that disparate sentence outcomes may stem from the racial and/or socio-economic status of the victim and the victim's family.

The drafting of VIS is of crucial importance and it is logical to anticipate that family victims will express themselves with varying levels of eloquence and expertise. Clearly, the quality of a VIS will vary according to levels of education and motivation of its author. Indeed, in a recent evaluation of VIS in South Australia, it was found that the quality of the information supplied in a VIS was highly variable and often not adequately followed up or updated (Erez et al 1994:8). The problem is that the more articulate and expert the VIS, the more a sentencing judge may be improperly influenced by its contents and distracted from the objective sentencing process. In his dissenting judgment in *Booth v Maryland*, White J of the US Supreme Court, described this as a "makeweight consideration". In his view, because "no two prosecutors have exactly the same ability to present their arguments to the jury [and] no two witnesses have exactly the same ability to communicate the facts....there is no requirement in capital cases that the evidence and the argument be reduced to the lowest common denominator" (at 518). In response, Hall argues that lack of evenness in presentation and quality of VIS detracts from the goal of sentencing parity for similarly situated offenders. In his view, "our justice system must strive to minimise and mute as many disparity-inducing factors as possible. It cannot be disputed that inviting victim input pushes us further away from the idea of even-handed sentencing." (1991:258).

Hinton (1996) contends that a significant problem with victim-authored VIS is the use of 'intemperate and emotive' language to express the victim's feelings about the impact of the crime on them or other family members and the personal qualities of the dead victim. As a result, the judge may be diverted from the sentencing task in hand. His concern is that VIS which utilise emotional language may "permeate the shroud of impartiality surrounding the judge" despite that judge's efforts to remain objective (1996:317). This is not to say that judges are easily distracted from the sentencing process. But to deny the potential for this result is to deny judges their humanity (Hinton 1996: 317).

A judge should not presume that he is immune from the prejudice that a victim impact statement injects into the sentencing process. Rather a judge should be careful to exclude any evidence that might divert his attention from the defendant. (Talbert 1988:230)

The obvious solution is to minimise emotional distractions to assist the sentencing judge to focus on the relevant objective factors in the sentencing process. Hinton argues that VIS prepared by an independent government body following strict guidelines as to content may

achieve this result. According to the *Charter of Victims Rights* set out in the *VRA,* "a relevant victim should have access to information and assistance for the preparation of any victim impact statement... to ensure that the full effect of the crime is placed before the court." Presumably in NSW, the Victims of Crime Bureau will provide assistance to family victims for this purpose and it may be that problems of inappropriate language, content and varying quality of VIS will be alleviated.[4] However, whether the Bureau will have adequate resources so that it may discharge its functions effectively and remove the dangers of selective presentation and quality differentiation, remains to be evaluated. In any event, assistance will not necessarily force those family victims whom, for whatever personal reason, choose not to prepare and submit a statement.

### *The Criminal Justice System*

The court in *R v Previtera* viewed VIS from family victims as more relevant to issues of victim compensation than to issues of punishment in the criminal justice system. However, in *Payne v Tennessee,* not only was victim impact evidence from a family victim admitted because it was relevant to retributive principles of sentencing but also because admission of the evidence would be fair to the victim. In that case the court was of the view that the effect of the defendant leading considerable evidence in mitigation was to turn the dead victim into a 'faceless stranger' and deprived the jury of the moral force of the prosecution's case against the defendant. The basis of this argument is that victim impact evidence from family victims allows those victims to participate in the criminal justice process and goes some distance to redressing the balance between the offender and the victim in an offender-oriented criminal justice system.

Prominent victims' rights groups maintain that the criminal justice system focuses on the offender at the expense of the victim. As a consequence of its preoccupation with the offender, the criminal justice system is not enough concerned with the plight of the victim. Thus, victim participation in sentencing increases the visibility of the victim in the criminal justice system at the sentencing stage and provides more substantive justice to the victim.

However, the notion of distributing justice more equally between the family victim and the offender in this way distorts the nature of the criminal justice system. Historically, criminal justice was regarded as substantially a private matter for which the victim could seek redress from the offender according to custom (Henderson 1985). In contrast, the modern criminal justice system regards crime as an offence committed by the offender against the wider community rather than specifically against the immediate victim. Because the criminal justice system assumes that the crime committed transcends interests of individuals and is an affront to the community, the model of criminal justice focuses on the offender being tried by the State (Henderson 1985; Ashworth 1993). The principal parties in a criminal matter are the offenders and the State and each are separately represented. The role of the victim is limited to that of witness in any criminal proceedings that follow.

A VIS from a family victim that intends to manipulate the focus of the sentencing process and requires the sentencing court to take account of and consider the personal loss of that victim, departs from this model of criminal justice. The loss and injury sustained by a family victim is only indirectly connected to the offence and irrelevant to the objective seriousness of the offence. Evidence of such loss or injury can only be relevant to civil issues of compensation and not punishment of the offender. It is not the function of the criminal justice system to vindicate the rights of family victims as individuals or to secure their civil rights; civil rights are outside the criminal law (Law Reform Commission of Ireland 1993:336). The more appropriate forum in which family victims should pursue their civil rights is the Victim Compensation Tribunal (*R v Previtera*).

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4 See the broad functions of the Victims of Crime Bureau set out in Part 3 of the *VRA.*

Another argument might be that submission of VIS by family victims may render the sentencing process more democratic because victim participation ensures that the sentence reflects the community's response to the crimes (Henderson 1985:1003). However, community interests are necessarily wider than those immediate personal interests of the family victim. The wider community interest takes into account public safety, harm to the victim, crime prevention, crime reduction, consistency and fairness in sentencing and just treatment of the offender. On the other hand, the family victim is likely to be more concerned with his or her personal response to the crime and seek recognition of his or her loss, retaliation and, perhaps, vengeance. Moreover, because sentence determinations reflect the multifarious purposes of the criminal law, particular sentencing outcomes frequently do not satisfy the family victim or others affected by the crime (*R v Previtera* at 10). Realistically, no amount of punishment can ever compensate these victims for their loss and victim satisfaction should not and cannot be the overriding criteria for any particular sentence outcome (*R v Previtera* at 10).

Many commentators argue that, in any event, the aim of victim participation is not so much 'fairness' to the victim but a desire to further 'law and order' policies so popular with governments during the last 10 years (Henderson 1985, Elias 1993, Lee 1996). The key feature of law and order policies is the desire to be 'harder' on crime and criminals perceived to be threatening the community. In this respect, violent offences, in particular homicide, have received the most attention (Lee 1996:152). Henderson argues that the real reason for victim participation in sentencing is the desire for harsher sentences and thus, the victim becomes the instrument of conservative criminal policy (1985:1002).

According to law and order advocates, offenders have been given rights in the criminal justice system and these rights have been given precedence over those rights of the victim (Elias 1993:44). The VIS is perceived as giving rights to victims, which are deserved, over those of the offender. The voice of certain victims' rights movements has become louder and more popular within the community and the law and order politicians have warmly supported the victims' rights movement.[5] From the point of view of the government, the VIS is a cheap, visible and politically astute method of supporting the victim of crime. However, as Henderson points out, if the government was really concerned with implementing measures to foster fairness to the victim, it would not restrict its reforms to measures that only assisted victims at the end of the criminal trial (1985:1002).

## Conclusion

Devastated by their loss of a loved one, frustrated by their lack of voice and recognition in the trial process, family victims are particularly vulnerable and frequently express disenchantment with the criminal justice system (NSW LRC 1996). The legislative reforms reflect the concern of the legislature for that dissatisfaction and clearly are intended to placate vocal victims' rights groups by giving family victims a voice in the sentencing process. However, legislative intentions have been largely thwarted by the Supreme Court which has generally regarded it as inappropriate to the sentencing process to take victim impact evidence from family victims into account.

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5 In Australia, the victims' rights group which has been loudest and attracted the most public support is called *Enough is Enough*, headed by Ken Marslew. It has been primarily concerned with the position of family victims in the case of homicide. It is important to note that not all victims' rights groups attract such public support. For instance, little is heard in the popular press of groups which seek to stop gay bashing and gay murders.

In *R v Previtera* (at 11-12), Hunt J acknowledged that his refusal to consider victim impact evidence from family victims in the sentencing process was "no doubt disappointing and unsatisfactory to them". However, he continued: "[T]he Legislature is...responsible for having raised the expectations of the families of the victims and for the disappointment and dissatisfaction resulting from non-fulfilment of those expectations."

A VIS from a family victim adds a dimension to the sentencing process that relates to purely personal circumstances introduced by the family victim and far removed from the objective circumstances of the offence. As has been argued, these subjective constraints have the potential to impact in a discriminatory and unjust manner upon sentence outcomes. Thus, if a VIS from a family victim is a factor to be included in the sentencing equation, the sentencing process may, however unintentionally or inadvertently, reflect an unacceptable valuation of human lives and result in inconsistent sentence outcomes for similarly situated offenders. Even given that victim impact evidence from family victims might assist in the reformative purpose of punishment, the overall irrelevance of that evidence to other purposes of sentencing and the inherent dangers of taking account of such evidence more than outweigh any perceived benefit of reform.

It is impossible not to be sympathetic with the premise that family victims deserve to be acknowledged and respected. However, a political ploy aimed at sentencing is not the solution. Family victims complain about the lack of respect with which they are accorded, the lack of information they receive and their overall treatment in the criminal justice system. These are problems that have not been alleviated by the legislative reforms. Even if considered relevant, a VIS would not cure these problems because it only applies to one aspect of the criminal justice process, sentencing. Procedural inequities inherent in the criminal justice system prior to sentencing should be targeted. The Government would do better to direct its energies and resources to an overhaul of the major components of the criminal justice system, in particular, policing, support services and the trial, with a view to better accommodating the family victim. If a family victim believes that he or she will be respected, that he or she will be heard, that victim is more likely to be satisfied with the criminal justice system.

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