VICTIM IMPACT STATEMENTS AND SENTENCING

SAM GARKAWE*

Legislation allowing for victim impact statements ('VIS') to be presented during sentencing hearings has been introduced into the criminal justice systems of most common law nations, notwithstanding many reservations from defence lawyers and civil libertarians. Despite such legislation being widespread throughout the common law world, the use of VIS remains controversial.

The main purpose of this article is to utilise basic sentencing principles in order to critically analyse the question of whether, and if so, to what extent, VIS are relevant to an offender's sentence and thus should influence sentencing decisions. It will be shown by the use of a hypothetical that there are a minority of circumstances where a VIS may appropriately be relevant to sentence. In such cases adequate procedural safeguards need to be instituted to ensure that offender's rights are not compromised. It will also be shown that despite the VIS being irrelevant to sentencing in the majority of cases, it is still justified to allow victims to submit a VIS in all cases as they serve an important therapeutic role for victims in that they provide an opportunity for victims to participate in the criminal justice system, thereby reducing their sense of powerlessness and enhancing their cooperation with the system. It will be acknowledged, however, that there are problems with allowing victims to submit VIS, knowing they should not be taken into account for sentencing purposes in the majority of cases. The article will suggest some solutions to these problems.

The writer thus generally takes a supportive view of VIS, believing that the ability of victims to prepare and present VIS can enhance their satisfaction with the criminal justice system, while a careful examination of the limits that victim impact material should have on the court's sentencing discretion will mean that they ought not impinge upon the civil liberties of offenders.

* Associate Professor, School of Law and Justice, Southern Cross University. The author wishes to thank the anonymous referee for their helpful comments.

I INTRODUCTION

Since the 1970s victim impact statements ('VIS') have been used increasingly in many common law jurisdictions. VIS are generally written reports submitted to the sentencing judge[1] following a guilty verdict or plea, and prior to the sentencing decision. They may vary in content and form, but commonly include details of the physical, financial, social and psychological harms suffered by 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, victim support personnel, a counsellor, psychologist or social worker. Depending on the jurisdiction, police, prosecutors or probation officers may also have a role in helping the victim prepare his or her statement. The degree of help victims may obtain varies between jurisdictions and the individual support a crime victim may obtain. In some situations where a victim is no longer alive or cannot otherwise 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.[2] In some jurisdictions VIS may also form part of the regular pre-sentencing report, while other jurisdictions allow the victim to read out his or her VIS.[3]

VIS are now an accepted part of the criminal justice systems of not only of each Australian criminal jurisdiction,[4] each Canadian criminal jurisdiction, New Zealand,[5] but also of every American criminal jurisdiction.[6] 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

1 The word 'judge' throughout this article is intended to also include other sentencing authorities, particularly magistrates. Although in the past VIS were not generally tended at local/magistrates courts, this has changed as the jurisdiction of local/magistrates courts has been raised over time to include more serious crimes; see Edna Erez, Leigh Roeger and Frank Morgan *Victim Impact Statements in South Australia: An Evaluation*, Office of Crime Statistics, SA Attorney-General's Department, Series C, No 6 (1994), which indicates that in the early 1990s in South Australia VIS at the magistrates court were 'rarely tendered' (at pvii) and were 'very few' (at 27). In NSW for example, the categories of offences in relation to which a local court may receive and consider a VIS was significantly increased in 2004. See the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27(3), noting that sub-section (c) that includes a much more broad range of offences than sub-sections (a) and (b), which were added by the *Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Act 2004* (NSW).

2 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30(2).

3 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A(1) and Criminal Law (Sentencing) Act 1988 (SA) s 7A(3)(a).

4 With the exception of the Federal criminal jurisdiction. For the State and Territory legislation, see *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 26-30A; *Sentencing Act 1991* (Vic) s 95; *Sentencing Act 1995* (WA) s 4; *Crimes Act 1900* (ACT) s 343; *Sentencing Act 1995* (NT) s 105; *Sentencing Act 1997* (Tas), s 81; *Criminal Offences Victims Act 1995* (Qld), s 14; and *Criminal Law (Sentencing) Act 1988* (SA) ss 7, 7A. See Michael O'Connell, 'The Law on Victim Impact Statements in Australia' (1999) 2(1) *Journal of the Australasian Society of Victimology* 88.

5 Legislation first providing for VIS was found in the *Victims of Offences Act 1987* (NZ) s 8(1). This Act has now been replaced by the *Victims' Rights Act 2002* (NZ). See ss 17-27 for the provisions relating to VIS.

6 See Sam Garkawe, 'The Legal Rights of Victims of Crime in America' (1992) 1(3) *Journal of the Australasian Society of Victimology* 1.

justice system must be 'rebalanced' in favour of the victim,[7] introduced a 'Victim Personal Statement Scheme' in October 2001.[8] This in effect provides for the introduction of a VIS type scheme, perhaps utilising slightly softer terminology. This is particularly significant because the United Kingdom had in the past opposed measures that provided for victim participation in the criminal justice system, such as VIS. For example, it was the only country to place a reservation in the early stages of the passage through the United Nations (UN) system of the unanimously approved UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* ('the Declaration').[9] 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 presence of the words 'without prejudice to the accused', this was not enough for the UK delegation to remove their initial objection to the clause, although by the time the Declaration reached the General Assembly, their objection had dissipated.

The United Kingdom 'coming into line' on the issue of VIS shows there now seems to be unanimous support for VIS, at least from 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 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.[10] The main arguments for and against VIS are briefly canvassed in Part II of this article. The aim of the article, 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 their 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 article 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 put into practice, the genuine concerns of defence lawyers can be addressed.

7 Roger Smith, 'Human Rights and Victims "Rights" and Their Impact on Criminal Justice in the United Kingdom' (Paper presented at the 'Peaceful Coexistence: Victims' Rights in a Human Rights Framework' Conference, Canberra, 16 November 2005).

8 See Ian Edwards, 'The Place of Victims' Preferences in the Sentencing of "Their" Offenders', [2002] *Criminal Law Review* 689. For the Practice Direction that accompanied this scheme, see *Practice Direction (Criminal Proceedings: Victim Personal Statements)* [2001] 4 All ER 640 (Lord Woolfe CJ).

9 GA Res 34, Annex, 40 UN GAOR Supp (No 53), 96th plen mtg, 214, UN Doc A/Res/40/53 (1985) ('the Declaration').

10 See Edna Erez, 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice' [1999] *Criminal Law Review* 545.

Part IV of the article 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 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 article will suggest solutions to the potential problem of the VIS creating false expectations in victims that may leave them worse off psychologically. It will also be shown in this Part that VIS may also have beneficial effects for others involved in the criminal justice system, such as judges, and even offenders. The overall conclusion of the article is that VIS should generally be supported, the most important reason being 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.

The final part of the article will include a broad discussion of the potential implications for our adversarial system of criminal justice that an increased attention to the concerns and position of crime victims that initiatives such as VIS provide. It will be shown that the involvement and empowerment of crime victims is one of the features of other systems of justice, such as restorative justice and inquisitorial systems. It will be argued that only by very carefully introducing such measures into our adversarial system can we integrate some of the desirable aspects of these other systems of justice without upsetting the fundamentals of our criminal justice system that has been part of the cultural legacy of common law legal systems for many centuries.

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.[11] 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

11 Law Book Company, *Laws of Australia*, vol 12 (at 11 July 2007) 12 Criminal Sentencing, 'Consequences and Impact on Victim' [12.2.50]. As further evidence of this statement, 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).

effect on victims, and thus VIS were unnecessary.[12] 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 has thus described this use of VIS as 'victims in the service of severity'.[13] 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 therefore social control, thereby adding to the conservative 'law and order' agenda.[14] 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.[15]

Most victim support groups, on the other hand, were supportive of VIS for a number of reasons. They argued that VIS increase the recognition of victims in the criminal justice system, thereby increasing their satisfaction levels, reducing

12 See, eg, Andrew Sanders et al, 'Victim Impact Statements: Don't Work, Can't Work' [2001] *Criminal Law Review* 447, 454:

> 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.

13 See Andrew Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure' (Paper presented at the International Conference on Integrating Victim Perspectives in Criminal Justice, York, 17-18 July 1998).

14 See, eg, Robert Elias, *Victims Still: The Political Manipulation of Crime Victims* (1993).

15 For a small sample of critical perspectives on the use of VIS utilising some or all of the above arguments, see Lynne Henderson, 'The Wrongs of Victims Rights' (1985) 37 Stanford Law Review 937; Andrew Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice: International Debates* (2000) 185; Andrew Ashworth, 'Victim Impact Statements and Sentencing' [1993] *Criminal Law Review* 498; Martin Hinton, 'Guarding Against Victim-authored Victim Impact Statements' (1996) 20(6) *Criminal Law Journal* 310; Martin Hinton, 'Expectations Dashed: Victim Impact Statements and the Common Law Approach to Sentencing in South Australia' (1995) 14(1) *University of Tasmania Law Review* 81; Geoff Hall, 'Victim Impact Statements: Sentencing on Thin Ice?' (1992) *New Zealand Universities Review* 143; Therese McCarthy, 'Victim Impact Statements – A Problematic Remedy' (1994) 3 *Australian Feminist Law Journal* 175; Chris Richards, 'Victim impact statements: Victims' rights wronged' (1992) 17(3) *Alternative Law Journal* 131; Sanders et al, above n 12.

'secondary victimisation'[16] and thus ultimately their co-operation with the system. Such cooperation is vital for the proper functioning of the criminal justice system. 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 criminal justice system; 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 judges are able to discern what evidence is purely 'emotional' and thus irrelevant, in contrast to what evidence is relevant to their discretion. Another important argument that will be explained in greater detail below in Part III is that VIS can help judges to be aware of the harm that specific crimes may engender, particularly in circumstances where the judge, who for perhaps valid reasons, may not be fully aware of such harm.[17]

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, which might be reflected in a VIS, is relevant at all to the offender's sentence? It may well be argued by many that the seriousness of a crime can be derived by judges from the facts, documents and testimony that are presented by the parties during the criminal trial, and thus it is not necessary and perhaps not even relevant for the actual impact of a crime, in the form of a VIS, to be provided to the judge. There are two clear retorts to this line of reasoning. First, the impact of a crime may not be obvious to judges from the evidence presented

16 This term is commonly used in the literature concerning crime victims and refers to the all too frequent occurrence of victims' suffering further victimisation (in a sense being re-victimised) due to insensitive and uncaring treatment by criminal justice professionals and others in the aftermath of the crime. See, eg, Andrew Paterson, 'Preventing Re-Victimisation: The South Australian Experience', in Christopher Sumner et al (eds), *International Victimology: Selected Papers from the 8th International Symposium of the World Society of Victimology*, Australian Institute of Criminology Conference Proceedings No 27, 1996, 227-231.

17 For a small sample of articles supportive of VIS utilising some or all of these arguments, see Christopher Corns, 'The Sentencing (Victim Impact Statement) Act 1994' (1994) 68 *Law Institute Journal* 1054; Christopher Corns, 'Victims and the sentencing process' (1988) 62(6) *Law Institute Journal* 529; Sam Garkawe, 'The Role of the Victim during Criminal Court Proceedings' (1994) 17(2) *University of New South Wales Law Journal* 595; Christopher Sumner, 'Victims of Crime & Criminal Justice' (1999) 2(1) *Journal of the Australasian Society of Victimology* 31; Christopher Sumner, 'Victim Participation in the Criminal Justice System' (1987) 20 *Australia and New Zealand Journal of Criminology* 195; Edna Erez, 'Integrating a Victim Perspective in Criminal Justice Through Victim Impact Statements' in Crawford and Goodey, above n 15; Erez, above n 10.

by the parties at the trial, or the evidence simply may not be adequate. This would be particularly the case where, as in the majority of criminal cases, there has been a guilty plea and thus only a limited amount of evidence may have been presented to the court. In such circumstances, the VIS may provide the judge with greater knowledge concerning the seriousness of the crime, although this does raise the issues (discussed below) of to what extent does the judge have to accept the contents of the VIS, and under what circumstances are these contents relevant to the offender's sentence? Secondly, even in cases where sufficient evidence of the seriousness of the crime is available to the judge, there may be a difference between the *expected* or *assumed* harm resulting from the evidence presented concerning the crime and the *actual* harm as revealed in the VIS. Again, the issues this raises; namely, whether the actual impact of a crime, where different from the expected harm resulting from a crime, is relevant to sentencing, and if it is, how and to what extent, are issues that will be discussed below.

So what might be the relevance of the *actual* harm of a crime, as might be reflected in a VIS, to sentencing? 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's injury is insignificant, the victim will probably not bother with reporting the crime, and if they do or the police find out about the incident, they would be unlikely to take the matter any further although technically the offender still might be guilty of an assault.

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 the maximum and to a lesser extent the minimum penalty is set out in legislation, but there is normally a large range of possible penalties in between that the sentencing judge may order. This will still be the case even where the legislature sets out a more prescriptive penalty regime,[18] or where a higher criminal court has issued guidelines judgments.[19] While either of these may curtail some sentencing discretion, the fact remains that judges generally retain considerable discretion.[20]

18 For example, where the legislature lists the purposes of sentencing and/or provides a list of aggravating and mitigating factors, or even provides for forms of mandatory sentencing such as the *Criminal Code* (WA), ss 400 & 401.

19 See, eg, *R v Jurisic* (1998) 45 NSWLR 209.

20 'Although recent developments appear to herald a new era, discretion is likely to prove resilient in the sentencing process notwithstanding reforms aimed at contracting, streamlining, guiding or, indeed eliminating its exercise.' George Zdenkowski, 'Limiting Sentencing Discretion: Has There Been A Paradigm Shift?' (2000) 12 (1) *Current Issues in Criminal Justice* 58, 72.

The primary principle that governs sentencing is 'that the sentence be proportionate to the gravity of the crime'.[21] While the impact of the crime on the victim is clearly relevant to the question of how serious the crime was, it needs to be stressed at this early stage that victim impact is only one of many sentencing factors. Its role in sentencing thus should not be exaggerated, and in many instances, if it plays a role at all, will only be a relatively small one when looked at from the perspective of the offender's overall sentence.

A *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. The circumstances of each victim are different, making 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 or 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 or she happens to be an exceptionally psychologically fragile person and as a result of the crime suffers *significant* and life changing psychological trauma. For example, he or she refuses to ever go out again and ends all his or 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 or 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 or her own personal reasons, for example, he or she comes from a strong religious background where forgiveness is emphasised regardless of the circumstances, decides to completely pardon the offender.

21 Richard Fox and Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), 196. A brief discussion of the content and statutory recognition of the proportionality principle is found at 220-222. See also Richard Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19 *Melbourne University Law Review* 489. The main High Court authority on this issue is *Veen v R* (No 2) (1988) 164 CLR 465.

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 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. We will leave this issue to the side for the moment, and return to it later.

B *The Question of Principle – Should the Penalty Differ?*

Confining our 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. This argument also seems to be in conformity with the basic sentencing principle of proportionality.[22] This is because providing for differing penalties would focus on the actual harm to the victim, and as this would emphasise retaliation or revenge as the basis for the amount of the penalty, it would violate the proportionality principle.

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 he or she has inflicted. By committing the crime, the offender should 'take the victim as he or she finds them'[23] and thus bear the full responsibility for all the harm that flows as a result of the criminal act. 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

22 See above n 21.

23 This is a common expression used in the law of torts – see below.

offender should be punished for unusual or unexpected consequences to the victim that flow from the offence.

So which of the above two opposing views is more compelling to the assessment of criminal penalties? The writer would argue that the above two views are too simplistic 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 being based upon the consequences of the offender's conduct whether or not the harm actually sustained was intended or contemplated.[24]

This quote suggests that it is the '*knowledge and intention* possessed by an offender' (emphasis added) that should be crucial to the assessment of both criminal responsibility and the amount of criminal penalty of offenders. This seemingly simple formulation indicates a predominant subjective approach to both issues of criminal liability and criminal penalty, although it will be shown below that this is not necessary reflective of both the law and of the views of commentators. With respect to the issue of criminal responsibility, while a detailed discussion is beyond the scope of this article, it is clear that there is tendency in Australia,[25] like the United Kingdom,[26] for the common law to move towards the position of upholding the general principle that criminal liability should only be based upon an accused's subjective intent. It is acknowledged, however, that not everyone agrees with this,[27] the law does not always reflect this,[28] and there are some valid arguments for not always applying a subjective test to criminal liability.[29]

24 *R v Mallinder* (1986) 23 A Crim R 179, 187-188.

25 Current 'common law' favours the subjective approach to criminal responsibility'. Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (3rd ed, 2005), Oxford University Press at 15. See also Model Criminal Code Officers Committee, *General Principles of Criminal Responsibility* (1992), 25.

26 See, eg, *DPP v Morgan* [1976] AC 182, and more recently R v G [2003] UKHL 50.

27 For example, some academics and commentators strongly disagreed with the majority of the House of Lords in Morgan (eg, James Faulkner, '*Mens Rea* in Rape: *Morgan* and the Inadequacy of Subjectivism' (1991) 18 *Melbourne University Law Review* 60), and as a result a number of jurisdictions in Australia have reformed the law relating to rape/sexual assault. See *Crimes Act 1958* (Vic), s 37(1).

28 This is shown by the fact that many crimes are defined in terms of either not requiring the prosecution to prove any mens rea or have a negligence standard where there is no requirement for the prosecution to prove the defendant averted to the consequences of their conduct. The negligence standard applies even to very serious crimes such as manslaughter. See the High Court's decision in *R v Wilson* (1992) 174 CLR 313. Furthermore, as further evidence that subjectivity is not universally accepted in Australia, note that most crimes under the criminal codes of Queensland, Western Australia and Tasmania also do not require a subjective standard.

29 Those who disagree that a pure subjective standard should apply critique the principle of individual autonomy that such an approach seems to be derived from. Such critics prefer a community welfare approach that tends to favour more of an objective test approach.

The issue that is more pertinent to this article is the relevance of the *actual* harm to the victim to the assessment of the amount of the offender's penalty. The above formulation by Vincent J that the amount of criminal penalty should depend on the '*knowledge and intention*' possessed by an offender implies a subjectivist approach. However, subsequent cases and commentary indicates that the law appears far from settled in this area. There are three key questions that need to be resolved:

1) Do the words 'knowledge and intention' in Vincent J's formulation also include the concept of recklessness? In other words, if the offender did not know or did not intend that the victim would suffer the extent of harm that the victim actually suffered, but instead was reckless to this (ie he or she foresaw or adverted their mind to the possibility that the victim would suffer this amount of harm), should the offender still be liable for the full extent of the actual victim's harm?

2) What is the situation where not only the offender did not intend, know or foresee the extent of the harm that the victim has actually suffered, but also such harm was also not reasonably foreseeable to an objective person (such as the judge)?

3) What about the situation where, again, the offender did not intend, know or foresee the extent of the harm that the victim has suffered, but in this case such harm was reasonably foreseeable to an objective person (such as the judge)?

The first question is perhaps the simplest to answer out of the three. Vincent J's dicta suggests that in a situation where the offender had knowledge of the victim's special vulnerability or circumstances that resulted in a greater amount of harm than might normally be expected, then all that harm should then be attributable to the offender. As under basic criminal liability principles in Australia, the concept of 'knowledge' generally also includes 'recklessness' which constitutes awareness of the probability or possibility[30] of the injury occurring. It would thus seem acceptable that offenders who were aware of and did foresee that a victim's special vulnerability or circumstances could lead to the victim suffering greater harm or loss than other victims should be held accountable for the full extent of the victims' harm in such situations, even though they did not intend for the victim to suffer this amount of harm. In such situations, however, it useful to be reminded of a point that was made above – that victim impact is only one of many sentencing factors and its role in sentencing should not be exaggerated.

The answer to the second question is not as clear even though it seems obvious that if one takes the subjective approach to the assessment of criminal penalty implicit in Vincent J's judgment, then the offender should not in such circumstances be

30 Under Australian criminal law, it is generally considered that the test for 'recklessness' in the context of a fatal offence is awareness of the *probability of death occurring* (see *R v Crabbe* (1990) 156 CLR 464), and the test in the context of a non-fatal offence is awareness of the *possibility* of the prescribed injury occurring (see *R v Coleman* (1990) 19 NSWLR 467). It is beyond the scope of this article to determine what the appropriate test should be in the context of the assessment of criminal penalty.

liable for any harm to the victim that was not foreseeable. The writer agrees with the subjective approach in these circumstances as taking into account unforeseeable victim harms for the purposes of sentencing seems to be unjust and unfair, and does not conform to the most basic principal of sentencing – the requirement of proportionality.[31] This view places the focus of the appropriate penalty on the offender's *actual* culpability, and avoids allowing chance factors relating to victims' special vulnerability and/or circumstances intruding into this decision.

This is not a universally held view, however, as there is some questioning of the purely subjective approach by writers, courts, and in the law of torts. Starting first with the law of torts, it provides that where a tortious wrong is committed, the amount of damage that can be recovered by the victim for 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'.[32] This does seem to support an objective, rather than a subjective approach, to the assessment of penalty. However, modern torts law is not that simple, as it specifies that the *type* of harm must be 'reasonably foreseeable',[33] 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.[34] On the other hand, if the victim suffers from a type of harm that was foreseeable, then the offender will be responsible for the full extent of that harm, even though that amount of harm was not foreseeable. In our above hypothetical, for example, this would mean that 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 again under the law of torts the defendant will be liable for all the financial injury V4 has suffered. This overview of the law of torts seems to suggest a combination of objective and subjective approaches to the question of the assessment of damages.

However, there is a compelling and obvious reason why one should not utilise the law of torts to support the proposition that non-foreseeable harms should still be taken into account in the assessment of an offender's criminal penalty. What the law of torts says about penalty should not necessarily translate to answer the question as to what the criminal law should say about penalty. One cannot compare the very different consequences at stake for offenders in a criminal trial (potentially their liberty) to the consequences for defendants in a tort claim (generally an award of monetary damages). Clearly the law must be much more careful in its assessment of criminal penalty than its assessment of tortious liability, and the

31 See above, n 21.

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

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

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

fact that criminal liability carries with it a much higher standard of proof for the prosecution is an indication of this reality.

Support for more of an objective approach to the assessment of an offender's penalty also comes from some prominent victimologists such as Sumner,[35] who after a detailed examination of relevant case law and legislation on VIS, and stating that while 'it is not possible to take an absolute approach to this question',[36] basically comes to the conclusion that offenders should generally bear the full consequences of their actions and be punished according to the *actual* harm they have inflicted. There is also support for Sumner's more objective approach by Underwood J in the Tasmanian case of *Inkson*,[37] and in road traffic cases where issues arise when a similar act of incompetent or careless driving may well lead to very different consequences that might involve chance factors that are unforeseeable to the offender. According to Fox and Freiberg:

> Although a purely subjectivist approach would require the courts to focus solely upon an offender's mental state, the courts at sentencing are far more pragmatic, seeking to strike a balance between subjective and objective elements in assessing the gravity of the crime[38]

The authors refer to the judgment of Lee J in the case of *Wilkins*,[39] where he said that it would be 'extraordinary' and 'an affront to reason and common sense' to mete out the same penalty to a person convicted of culpable driving whether one person or fifty died.[40]

The writer would respectively disagree with these perspectives. Once again, he would stress that in order to satisfy the basic requirements of fairness and proportionality the amount of criminal penalty should only depend upon the offender's *actual* culpability, and it seems to the writer that a consequence or harm to a victim that was not foreseen by the offender and would not have been foreseen by a reasonable person should not be taken into account in assessing penalty, regardless if many people happened to die as a result of the offender's conduct, and no matter what the public view of the situation. There is also considerable authority to support this view. Even Fox and Freiberg later appear to contradict their earlier views when they seem to state categorically:

> Where the consequences of an offender's conduct are exceptional and extraordinary and neither intended, foreseen, or reasonably foreseeable, the person will not be held to account in punishment for the full extent of the harm.[41]

35 Sumner 1999, above n 17.

36 Ibid, 66.

37 *Inkson v R* (1996) 6 *Tas R* 1. Underwood J, after an examination of previous case law comes the conclusion that: ' ... in Tasmania at least, it has long been held that the consequences of a criminal act are relevant in the sentencing process regardless of whether they were foreseen or ought to have been foreseen' (at 13). However, see below, n 46, and the accompanying text.

38 Fox & Freiberg, above n 21, 244.

39 *R v Wilkins* (1988) 38 A Crim R 445.

40 Ibid, 449-500.

41 Fox & Freiberg, above n 21, 246.

They cite a number of cases in support of this proposition – *Boyd*,[42], *Feldman v Samuels*,[43] *Economedes*[44] and *Boxtel*.[45] Furthermore, two out of the three judges in the Tasmanian case of *Inkson* do not support Underwood J's objective approach.[46] It is thus submitted that both as a matter of principle and from the weight of authority that the answer to question two is that harms that are not foreseeable to the offender or reasonably foreseeable should not be taken into account in assessing the offender's penalty.

The third question combines objective and subjective elements towards the issue of the assessment of criminal penalty. There is a lack of subjective awareness by the offender as he or she was not aware or reckless concerning the possible extent of damage the victim might suffer, but the reasonable person would have foreseen the extent of the harm of the offender's conduct. In a sense this means that the offender was negligent towards this possibility. The weight of authority does seem to support the view that in such circumstances the actual impact of the crime will be relevant to the offender's penalty.[47] From the point of view of the above principles it would seem that the offender, although not aware or reckless towards the full extent of the harm that the victim might suffer, is culpable to some extent as he or she *should* have realised that their conduct might result in the increased level of harm that the victim actually suffered. It would thus not offend the principles of fairness and proportionality for the offender to be liable in such circumstances for the full effect of the victim's harm. This does deviate from a pure subjective approach, but the writer would place two important caveats on this conclusion. The first is a more obvious one – again stressing that victim impact is only one of many sentencing factors and its role in sentencing should not be exaggerated, it is also the case that victim impact should have an even lesser effect on penalty in the situation of offenders in the third question than that of the first question. Clearly, there should be lesser culpability where the offender is not aware or is not reckless to the full extent of the victim's harm, but a reasonable person would have been, compared to the situation in first question where the offender does at least have awareness of the victim's circumstances or special vulnerability that caused the victim to suffer their level of actual harm. It clearly is fairer and more proportional that an offender's liability in the third question will be less that an offender's liability in the situation of the first question.

42 *R v Boyd* [1975] VR 168.

43 [1956] SASR 55.

44 *R v Economedes* (1990) 58 A Crim R 466.

45 *R v Boxtel* (1993) 70 A Crim R 400.

46 The other two judges came to different inferences from the case law than Underwood J's conclusions. Whereas Crawford J stated that ' ... there is no satisfactory line of authority on the point in question' (at 24), Zeeman J states that 'I am not persuaded that there is any Tasmanian authority for the proposition that the consequences of a criminal act which were neither foreseen or reasonably foreseeable are relevant sentencing considerations' (at 33).

47 Fox & Freiberg, above n 21, state that 'Consequences that are neither intended nor foreseen by the offender, but are regarded by the sentencer as having been reasonably foreseeable, will be taken into account in sentence' (at 247). They cite the following authority: *R v Amituanai* (1995) 78 A Crim R 588 and *R v Sheppard* (1995) 77 A Crim R 139.

The second caveat is perhaps a little more complex. This is that judges must be very careful in coming to the conclusion that although the offender was not aware or reckless to the special circumstances or vulnerability of the victim, that offender ought to have been so aware and that the actual harm suffered by the victim was thus reasonably foreseeable. This is because there are various reasons why an offender 'may not foresee the consequences of his or her actions ... immaturity, intoxication, intellectual disability, mental illness, or behavioural disorder'.[48] It is in the case of the last three reasons for the offender's lack of foreseeability where a court is most likely to find that the offender ought to have been aware of the victim's special circumstances or vulnerability. The objective test implied in the above formulation of the law needs to be tempered by an acknowledgement that offender's level of awareness cannot be judged by the same standards in each case. Judges need to take some of the personal characteristics of the offender (particularly matters such as intellectual disability, mental illness, or behavioural disorder) in assessing whether the offender ought to have foreseen the full extent of the victim's harm.

Thus the conclusion drawn from the above discussion is that that only foreseeable harms, including harm that ought to have been foreseen by a reasonable person (subject to the above caveats), should be taken into account for the purposes of sentencing. This does not mean, however, that VIS are necessarily irrelevant, as many defence lawyers and civil libertarians might believe. Clearly, offenders should be responsible for what are the 'usual' effects of the type of crime they committed, including what they actually foresaw or what was 'reasonable foreseeable' to an objective, reasonable 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 anything to the court's information. Having said this, however, as mentioned in the introduction, in such circumstances it is still possible for the VIS to still be useful where a judge might not be aware of the harm that the specific crimes may engender. An example here might be a male judge who is not in a position to ever experience what it is like to be a female rape victim. Such a judge may not be aware of the particular harms that such a crime causes, and thus the VIS may be very useful in ensuring that he is aware of the types of harms the crime of rape involves. Clearly proper judicial education would make the need for a VIS redundant in such circumstances, but in some cases they clearly would be of some benefit, and would possibly avoid a sentence having to be corrected on appeal. Outside the need for a VIS to clarify the normal harms expected of specific offences, another way the VIS might be of benefit is where a judge reinforces their sentencing decision by paraphrasing or quoting directly from a VIS. This provides direct validation and acknowledgment of the harm caused to the victim, and thus can be therapeutically beneficial for him or her, as well as helping to place a more human emphasis within sentencing decisions.

The other situation is where 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. In such circumstances there may

48 Ibid, 244.

be circumstances where the offender might be responsible for the full extent or actual harm to the victim. Under the principles discussed above, the key question is whether the offender knew, or was reckless, or ought to have known of the victim's circumstances or special vulnerability, so as to be aware (expressly or impliedly) of the risk of the increased level of harm occurring. If the answer to this question is 'yes', then in such situations the VIS becomes relevant and is of use in assessing the appropriate penalty for the offender. Here the VIS is relevant to sentencing not because of any lack of awareness of judges, but rather because it provides factual information on the harm suffered by the victim that, because of the offender's knowledge or recklessness is directly relevant to the sentencing decision.

C *Applying These Principles*

Let us now attempt to apply the above principles to our 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, although as stated above it may still be useful to remind/ensure that the court is aware of the types of normal harms that result from the specific crime. Generally speaking also there should thus be no difference in penalty in respect of the crimes committed against V1 and V2 in the above hypothetical. 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 reasonably believes[49] that the victim would suffer little harm. A good example here may be an offender that commits a criminal offence during a sporting contest by injuring someone due to conduct that is outside the rules of the sport. In such circumstances it may be argued that the offender was aware that the other competitors will be particularly fit and strong individuals and thus would not be as likely to suffer much harm as other members of the community.

On the other hand, if the victim's harm went beyond what is 'normal' or 'reasonably foreseeable' in an objective sense for the kind of offence committed, then further questions 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 was he or she reckless to the possibility or probability of this level of harm occurring, or *should* the offender have known

49 The qualification that the offender's belief must be reasonable has been added to cover situations such as that found in the controversial case of *R v Hakopian* (unrep, 8/8/1991, SC Vic Jones J), where the judge gave the offender a lesser penalty on the problematic basis that the judge was of the opinion that the offender thought that the rape of a prostitute would have a less serious psychological effect on the victim than the rape of other woman. It is submitted that any belief by an offender that the victim is particularly strong, fit or resilient must be based on an objective reasonable belief (which the writer believes Hakopian did not have) if a lesser penalty is to be justified. See also *Laws of Australia*, above n 11, [53].

about the victims' special vulnerability or circumstances? If the answer to any 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. It is admitted that such circumstances might not occur often, but nevertheless, they are possible. If the answer is 'no' to all three questions, then for the reasons asserted above it would be unfair to attribute the actual harm to the offender and once again the VIS would largely be irrelevant.[50] The critical point is that the focus of the judge should be on the knowledge, awareness and situation 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*, should have known, 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, should have known, or was reckless to V3 being particularly vulnerable socially. In the case of V4 it would be whether the offender knew, should have known, or was reckless to V4 being a person who would suffer extraordinary financial loss if they are unable to attend to their business. Only where the answer to these questions is 'yes' should the offender be considered to be responsible for the full extent of the harm to V3 and V4.

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 or vulnerability, the actual impact of the crime should not matter to the sentence, and the VIS would generally be irrelevant to sentence.[51] However, where an offender has previous knowledge of the victim, they may well know or should know or be reckless to their special vulnerability or circumstances, and thus the actual impact of the crime (and thus the VIS) may be relevant according to the above principles.

D *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.[52] 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 main aims of the VIS

50 Although again, as stated above, the VIS may still be useful to remind/ensure that the judge is aware of the types of normal harms that result from the specific crime.

51 But see above n 50.

52 It should be noted that the arguments here also apply to the opposite situation – where one has a particularly forgiving victim, such as V5 in the hypothetical, who de-emphasises their harm and may even praise the offender.

should be. These should be to provide the court with factually correct information about the full effects of the crime upon the victim and to involve victims more in the criminal justice system, but not to allow victims to indicate their desire for revenge and thus unjustly increase penalties for the offender.[53] This conforms with the views of Ian Edwards[54] that victims in adversarial systems of justice may have a role as *information-providers*, but not as *decision-makers*. It is submitted that this is a critical distinction.

Another 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 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.[55] 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, this should be made under oath and the victim needs to be made aware that their VIS will at all times be subject to cross examination by the defence. These safeguards would overcome objections to VIS that have been made in NSW, such as in *R v Slack*[56] 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.

E *Empirical Research on the Effect of VIS on Sentences*

The above principles also accord with what the empirical research indicates concerning the effect of VIS on sentencing decisions. Edna Erez[57] points to overseas statistics that shows that in the vast majority of cases the use of VIS had no effect on the final result.[58] 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 additional information to assist the court.[59] Alternatively, the impact of the crime as revealed by the VIS will fall

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

54 See Edwards, above n 8.

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

56 [2004] NSWCCA 128.

57 Erez, above n 10, 548.

58 Note that empirical work on VIS has also been carried out in some Australian jurisdictions, such as South Australia (see Erez et al, above n 1), Western Australia (see Adrienne Mansell & David Indermaur, (1997) 'Evaluation of the Introduction of Victim Impact Statements in Western Australia' (Paper presented at the 9th International Symposium on Victimology, Amsterdam, 25-29 August 1997)) and in Victoria (see Dianne Mitchell, 'Victim Impact Statements: A Brief Examination of their Implementation in Victoria' (1996) 8(2) *Current Issues in Criminal Justice* 163).

59 Above n 12.

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 to a reasonable person, and thus, in the writer's opinion, 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'.[60] 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 increasing their chances 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).

F *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.[61] 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.[62]

The UK 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.[63] However, in situations like that of V5, where the victim expresses a desire for either no penalty or a light penalty, the law seems to be a little more equivocal despite the apparently clear Practice Direction. Edwards provides a detailed description

60 Erez, above n 10, 548.

61 See Ashworth, above n 15, and Edwards, above n 8.

62 [2001] 4 All ER 640 (per Lord Woolfe CJ).

63 See Edwards, above n 8, who discusses the case of *R v Perks* [2000] *Crim L R* 606.

of some UK case law that does appear to allow a court to take the victims' views into account in such situations.[64] His critical analysis of the logic behind these decisions, however, shows a number of flaws in the courts' reasoning.[65] 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.[66]

Allowing victims' opinions to have an influence on sentencing provides them with a status of decision-makers, and this would conflict with Edward's and the writer's view that this is not appropriate in an adversarial system of justice. As referred to above, the amount of a criminal penalty should primarily 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. 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 principal 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.

IV WHY VICTIMS SHOULD BE ALLOWED TO PRESENT VIS DURING SENTENCING HEARINGS IN ALL (SERIOUS) CRIMINAL CASES

Part III of this article showed that VIS may be relevant to sentencing decisions in perhaps only a small number of cases. It was argued that in these cases the VIS provides judges 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 judge is

64 Edwards, above n 8, refers to cases such as *R v Darvill* (1987) 9 Cr App R (S) 225; *Attorney-General's Reference* (No 18 of 1993) (1994) 15 Cr App Rep (S) 800; *R v Hutchinson* (1993) 15 Cr App Rep (S) 134; and *R v Mills* (1998) 2 Cr App R (S) 252.

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

66 Edwards, above n 8, 702.

almost certain to not take them 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 from a practical point of view perhaps there are strong economic and/or administrative reasons for not allowing them.

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 judge hears from almost everybody else; and they counter-act the victim's feelings of helplessness and powerlessness and the possibility of 'secondary victimisation'. 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.[67]

On the possible negative side of the ledger for victims is the very valid and genuine 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, while minimising their 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.[68] 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

67 See Erez, above n 10, 552. See also Julian Roberts & Edna Erez, 'Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements' (2004) 10 (3) *International Review of Victimology* 223.

68 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW), s 29.

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,[69] 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 in 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 Victims of Crime Bureau and the Criminal Law Review Division of the NSW Attorney-General's Department together with the NSW Sentencing Council[70] contains information on these issues – this is precisely what each victim needs to be provided with in every (serious) criminal case.

The other reason why VIS should be presented in all (serious) cases is that they may also be advantageous for the others involved in the criminal justice system. For example, the presentation of the VIS may be beneficial for judges. 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 as their legal training should mean that they are best placed to determine which aspects (if any) of the VIS are legally relevant to their sentencing discretion. They should be able to eliminate 'emotional' and other non-factual victim impact evidence, as well as unforeseeable harms, from their consideration of the appropriate penalty, and thus the VIS should contribute positively to their decision-making processes. On the other hand, it must be remembered that judges are also human. No matter how learned they are, it is natural to see other people's experiences through one's own mindset and one's own knowledge and experiences. Without being disrespectful, it is likely for someone who has not been a victim of a crime or a victim of a particular crime not to fully comprehend the consequences of the crime. For example, as referred to above, a male judge can probably never fully appreciate what it is like for a woman to be raped. 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 judges.

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, bestowing on them with more understanding for the victims, thus giving them a greater feeling of responsibility and ultimately a better chance of

69 See Erez et al, above n 1, 10.

70 Victims of Crime Bureau & Criminal Law Review Division of the NSW Attorney-General's Department, *Sentencing Information Package*, 2007.

rehabilitation. On examining the therapeutic literature, Erez states that: 'hearing victim voices through written or oral statements may also contribute to *offenders'* rehabilitation, as a victim perspective is likely to create empathy in defendants'.[71] This accords with one of the main aims of restorative justice initiatives – to help offenders by increasing their accountability that ultimately contributes to their rehabilitation. Clearly, this is another area that also 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. This Part has also shown that VIS may also be beneficial for judges and even offenders.[72]

V CONCLUSION

The first Australian jurisdiction to introduce legislation providing for VIS to be utilised at sentencing hearings was South Australia.[73] The then Attorney-General, Chris Sumner, 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.[74] For this reason, in his opinion, the opposition to the legislation from the legal profession was muted. His view confirms once again the crucial point made by Edwards that victims' should be information providers, not decision makers. It is submitted that provided this is kept in mind and the necessary limits and safeguards on VIS as suggested throughout this article are implemented, there is little danger for offenders in their use during sentencing hearings.

In conclusion, it is worthwhile reflecting on a broader level at the potential implications for our adversarial system of criminal justice that an increased attention to the concerns and position of crime victims that initiatives such as VIS provide.[75] There are, not surprisingly, two sides to this issue. On one hand, civil libertarians are concerned that any involvement of victims detracts from and goes against the very nature of the adversarial system of justice that they regard as an essential barrier against the power of the State. They assert that having a third party become more involved in criminal justice proceedings, particularly

71 See Erez, above n 10, 552 at fn 45.

72 One might also speculate on the possible effect of VIS on prosecutors.

73 See *Criminal Law (Sentencing) Act 1988* (SA), s 7A.

74 Christopher Sumner (Speech delivered at the conference 'Peaceful Coexistence: Victims' Rights in a Human Rights Framework', Canberra, 16 November 2005).

75 Other such initiatives that have recently been advocated are greater use of long standing provisions found in sentencing legislation that enables a judge to make a compensation order in favour of the victim as part of the offender's sentence (such as s 85B of the *Sentencing Act 1991* (Vic)), and rights for crime victims at other significant stages of the criminal justice system (such as bail applications, charge bargaining and parole hearings). In relation to the latter, see for example Part 2 of the recently enacted *Victims' Charter Act 2006* (Vic).

one that is likely to take the side of the State rather than the defence, may erode the protections that this system of justice offers accused and convicted persons. It is true that if we are to preserve our adversarial system of justice we do have to be very cautious when introducing reforms that may erode the hard fought protections for accused persons.[76] This is why this article has emphasised throughout the limits and restraints on the use of VIS – that it is only relevant to sentencing in a limited number of cases, and that in these and in all other cases necessary procedural and evidentiary safeguards for both offenders and victims need to be ensured.

On the other hand, some victim advocates and commentators see the adversarial system as the real problem because its very nature limits the rights and role of victims, produces 'secondary victimisation',[77] and ultimately makes genuine support and assistance for victims problematic. It is no doubt true that greater involvement and empowerment of crime victims is one of the features of other systems of justice, such as systems based upon restorative justice[78] and inquisitorial criminal justice systems commonly found in Continental Europe.[79] Some prominent victim advocates thus argue that the only way crime victims can be treated properly and achieve justice is if the adversarial system is replaced by either of these systems, or by substituting a civil justice system,[80] or by radical changes to the adversarial system, such as allowing victims to have their own legal representation.[81] The reality is, however, that whatever one's views are of the adversarial system, it has

76 This is particularly the case in Australia where the Federal Constitution does not include comprehensive criminal procedural guarantees (like in the USA, Canada and other nations) that might afford some protection for accused persons against governments willing to introduce populist legislation that may erode the rights of accused persons.

77 See above n 16.

78 A good example of the greater power of victims under restorative justice mechanisms is conferencing for young offenders now provided for by legislation in many jurisdictions in Australia. Conferencing is commonly accepted by commentators as an example of restorative justice. Section 52 (4) of the *Young Offenders Act 1997* (NSW) provides that: '[t]he child, *and any victim of the offence who personally attends the conference, each have a right of veto* with respect to the whole of an outcome plan, or with respect to any decision proposed to be contained in an outcome plan, regardless of the views of any other participant in the conference'. (emphasis added). It should be noted, however, that restorative justice initiatives should not be accepted uncritically as necessarily being beneficial for crime victims. See Sam Garkawe, 'Restorative justice from the Perspective of Crime Victims' (1999) 15 Queensland University of Technology Law Journal 40.

79 See Matti Joutsen, 'Listening to the Victim: The Victim's Role in European Criminal Justice Systems' (1987) 34 (1) *Wayne Law Review* 95.

80 For example, prominent victimologist, Ezzat Fattah, in predicting future trends for crime victims says that: '... the arbitrary distinction between crimes and civil torts will disappear and that the artificial boundaries that have been erected over the years between criminal courts and civil courts will be removed. All harmful actions will generate an obligation to redress coupled with endeavours to prevent future occurrence. This will be the era of restorative justice'. (Ezzat Fattah, 'Victimology: Past, Present and Future' (2000) 33 (1) *Criminologie* 5, 42).

81 For example, a Committee headed by Mr Justice Malimath appointed in India to suggest reforms to the Indian criminal justice system recommended that the victim should have party status 'in every criminal proceeding where the charge is punishable with 7 years imprisonment or more', and otherwise 'has a right to be represented by an advocate of his (sic) choice; provided that an advocate shall be provided at the cost of the State if the victim is not in a position to afford a lawyer'. (Recommendation 14(i) and (iii) of the Ministry of Home Affairs, Government of India, *Committee on Reforms of Criminal Justice System, Report,* March 2003, available at: <http://mha.nic.in/criminal_justice_system.pdf> at 10 November 2007. Note that this recommendation, like most of the others in the Report, remains unimplemented.

been part of the cultural legacy of common law legal systems for many centuries,[82] and this is likely to remain the case for the foreseeable future. This does not mean, however, that ideas from other systems of justice cannot be imported or 'borrowed' if they can be shown to be beneficial and do not disturb the foundations of the present system. This article has shown that reforms such as the introduction of VIS, if carefully implemented, can take some of the desirable elements of other justice systems from a victim perspective[83] (such as giving victims more recognition and more of a voice) without necessarily upsetting the fundamentals of our adversarial criminal justice system. This may not satisfy those victim advocates who demand more deep-seated changes,[84] but there is a pressing need that crime victims proceeding through the present criminal justice system should be empowered to better cope with the system and thereby avoid or at least reduce any secondary victimisation. Initiatives such as VIS can help achieve these aims and thus can constitute a very positive development towards a better, fairer and more humane 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 they will continue to spark comment, debate, new ideas and controversy.[85]

82 One should note, however, that it was only around the middle of the nineteenth century that the State replaced the victim as the 'other' party to proceedings. Prior to the state taking over the functions of investigation, initiation of criminal proceedings, prosecution and punishment, the criminal justice system was still adversarial in nature, but consisted primarily of private prosecutions by victims of defendants. The right of private prosecution is still a possibility even today, but is used sparingly and is only feasible in very limited circumstances.

83 This article has also shown that there are potential benefits of VIS for not only victims, but also for offenders, and perhaps criminal justice personal, including judges. With careful planning, there is no reason why other initiatives borrowed from restorative justice principles or other types of criminal justice systems cannot be integrated within the adversarial system to the benefit of offenders, victims and the community.

84 One should not, however, discount the possibility that the cumulative effect of smaller changes to the adversarial system can, over time, have a better chance of one day sparking a complete rethink of the whole system and thus achieving the type of radical reforms to the system that some victim advocates desire.

85 For example, the issue of whether family VIS in homicide cases should be relevant to sentencing has been particularly controversial, and while it is beyond the scope of this article, the writer would argue that similar principles as discussed in this article could apply. See Tracey Booth, 'The Dead Victim, the Family Victim and Victim Impact Statements in NSW' (2000) 11(3) *Current Issues in Criminal Justice* 292.