Expectations Dashed: Victim Impact Statements and the Common Law Approach to Sentencing in South Australia

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The anguish, and indeed, anger, expressed by the families of victims at the perceived leniency of sentences imposed in cases of homicide is now an all-too-familiar headline in the media in South Australia. No doubt there are countless other less newsworthy cases where similar sentiments are felt by the victim. That this dissatisfaction arises is, at first glance, surprising when one considers that in South Australia prosecutors must furnish sentencing judges with the particulars of any injury, loss or damage resulting from the offence,[1] and that the definition of 'injury', legislatively prescribed, is so broad as to include pregnancy, mental injury, shock, fear, grief, distress and embarrassment.[2] Surely a sentencing judge given such information could not but impose a sentence commensurate with the injury sustained? Without doubt, victims, when asked to assist in the compilation of a victim impact statement, which is now the accepted means by which prosecutors in South Australia fulfil their obligation to appraise the sentencing court of the consequences of the offence for the victim, have such an expectation. But it is an expectation which cannot be satisfied within the common law approach to sentencing, if indeed it is desirable that sentencing be so heavily influenced by victims' wishes.

Much debate has surrounded the introduction of victim impact statements in the sentencing process as a means of empowering the forgotten victim.[3] This has taken place both at a national and international level and has accompanied the ever-growing momentum of the victim movement and the improvement of the

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1 *Criminal Law (Sentencing) Act* 1988 (SA), s 7(1)(a).

2 Id, s 3.

3 See, for example, M McLeod, 'Victim Participation in Sentencing' (1986) *Criminal Law Bulletin* 501; LN Henderson, 'The Wrongs of Victim's Rights' (1985) 3 *Stanford Law Review* 937; E Erez, 'Victim Participation in Sentencing: Rhetoric and Reality' (1990) 18 *Journal of Criminal Justice* 19; C Corns, 'Victims and the Sentencing Process' (1988) 62 *Law Institute Journal* 528; E Fattah, 'From Crime Policy to Victim Policy: The Need for a Fundamental Policy Change' (1991) 29 *International Annals of Criminology* 43; S Garkawe, 'The Role of the Victim During Criminal Court Proceedings' (1994) 17 *UNSWLJ* 595.

plight of the victim within the criminal justice system. One particular concern with the introduction of victim impact statements that is often raised is the perceived likelihood of such statements leading to an increase in the severity of sentences imposed.[4] For example, the Victorian Sentencing Committee felt that the introduction of victim impact statements would lead sentencing judges to give 'far too much weight to the effect [of the crime] on the victim and not sufficient weight to other considerations of sentencing and in particular the rehabilitation of the offender'.[5] Thus the expectation that a victim impact statement will have a direct effect upon the penalty imposed is not one felt by the victim alone.

The concerns with the use of victim impact statements in sentencing referred to above beg the obvious questions: what do victim impact statements contribute to the sentencing process? What weight in levying sentence should be accorded to them? A recent evaluation of victim impact statements and their use in South Australia failed to provide answers to these questions. That evaluation, conducted by the Office of Crime Statistics attached to the Attorney-General's Department,[6] could not discern any alteration in sentencing patterns that could be attributed to the introduction of victim impact statements. That is not to say that victim impact statements have no influence upon sentencing. The results are equivocal. The researchers suggest that the key to unlocking the mystery lies in the method used by the courts in ultimately determining the appropriate penalty to impose. This article will concentrate upon the sentencing methodology that is prevalent in South Australia in considering what victim impact statements contribute to the sentencing process and what weight in levying sentence should be accorded to them. Whilst South Australia is not the only State to make use of victim impact statements,[7] it is the only State where they have been used for a

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4 See *Victorian Sentencing Committee Report* (Vol 2, 1988) at p 543; E Erez, L Roeger and F Morgan, *Victim Impact Statements in South Australia: An Evaluation* (Office of Crime Statistics of the South Australian Attorney General, 1994); *The Community Law Reform Committee of the ACT, Report No 6: Victims of Crime* (1993) at p 38 and pp 62-63. For a general discussion of victim impact statements, the victim movement as a whole and the changes it has generated in South Australia, see CJ Sumner, 'Victim Participation in the Criminal Justice System' (1987) 20 *Aust & NZ J of Criminology* 195.

5 *Victorian Sentencing Committee Report*, see note 4 above, at p 128.

6 Erez, Roeger and Morgan, *Victim Impact Statements in South Australia: An Evaluation*, see note 4 above.

7 New South Wales has enacted legislation permitting the use of victim impact statements in sentencing but has deferred proclamation of that legislation pending the findings of a review into the problems

sufficient length of time to permit their evaluation. Hence the focus of this article on South Australia. Before turning to consider sentencing methodology, a brief discussion of the evaluation of victim impact statements in South Australia is warranted.

Victim Impact Statements in South Australia: The Evaluation

As noted above, the recent evaluation of victim impact statements in South Australia revealed that the introduction of such statements has not had a significant effect upon sentencing patterns in that State.[8] In arriving at this conclusion the researchers compared the frequency of imprisonment and the length of sentences of imprisonment in the higher courts before and after the introduction of victim impact statements. A similar analysis was conducted for the specific offences of assault, rape and robbery, the results again indicating that victim impact statements had no discernible impact upon sentencing. A multivariate analysis of the factors relevant to the determination of sentence for the offence of assault occasioning actual bodily harm,

> ... identified as predictors of prison sentences [the following factors]: a previous record of imprisonment, the presence of aggravating factors, an absence of mitigating circumstances and the offender's age. However, the presence of a VIS in the court file, the judge's remarks about the VIS or whether the case was finalised before or after the introduction of VIS were not found to be related to sentencing disposition.[9]

These results were consistent with the perceptions of members of the legal profession interviewed by the researchers.[10]

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associated with victims' prolonged involvement in the criminal justice system (see *Crimes Act* 1900 (NSW), s 447C). Recently Victoria passed the *Sentencing (Victim Impact Statement) Act* 1994 permitting the use of victim impacts statements in that State. The Community Law Reform Committee of the Australian Capital Territory recommended in August 1993 in its report, *Victims of Crime*, the use of victim impact statements in that Territory. See also the Tasmanian Department of Justice, *Report of the Inter-Departmental Committee on Victims of Crime*, (Department of Justice, 1989). The issue of the use of such statements remains on the agenda in most of the other States and Territories of Australia. It should also be noted that whilst many jurisdictions do not formally make use of victim impact statements, many do so on an informal basis.

8 Erez, Roeger and Morgan, *Victim Impact Statements in South Australia: An Evaluation*, see note 4 above, Ch 4.

9 Id at p 68.

10 Id, Ch 2.

Two primary explanations are offered by the researchers for their failure to discern any change in sentencing patterns attributable to victim impact statements. First, the weight accorded the harm, loss or injury suffered by the victim is far less significant than the other factors indicative of culpability and the offender's previous criminal record. Secondly, victim impact statements have merely formalised past practice. These logical explanations trespass on territory not considered elsewhere in the evaluation - the method of determining sentence utilised in South Australia. It would appear that the researchers have operated upon the assumption that the sentencing methodology that has developed at common law in South Australia can fully embrace the victim impact statement.[11] Thus the researchers have attempted to answer the question, 'what impact on sentencing patterns has the introduction of victim impact statements had?', without considering whether or not victim impact statements can have an impact at all, and if so within what parameters. This is impliedly admitted by the researchers in that they explain the equivocal nature of their statistical results by reference to the peculiarities of sentencing practice but do not elaborate on this practice. The failure to consider the introduction of the victim impact statement against the operation of the common law approach to sentencing in South Australia renders the evaluation incomplete. It also undermines the conclusions drawn by the researchers from their interviews with the legal profession. The comments made by the profession, and in particular the judges, must be considered in the light of sentencing practice for it is against this background that they are made.

A third explanation, drawn from the experiences of the legal profession, was that victim impact statements did have an affect but it was not necessarily one which led to the increase of the penalty imposed. In some cases victim impact statements led to leniency in sentencing. Thus, it is possible to conclude that penalty levels remained unaltered as the leniency induced by a victim impact statement in one case was offset by the severity in penalty induced by another. But as the researchers themselves noted, those cases where a victim impact statement did affect sentence were the exception rather than the norm.[12]

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11 Brief reference is made to the fact that the method of sentencing adopted by the judiciary - that is, the common law approach to sentencing - may influence the judiciary's ability to make full use of victim impact statements in the introduction to the evaluation but this point is not elaborated upon: Erez, Roeger and Morgan, *Victim Impact Statements in South Australia: An Evaluation*, see note 4 above, at p 4.

12 Id at p 69.

A further aspect in which the evaluation is found wanting is its failure to identify the purpose of the South Australian Legislature in introducing victim impact statements to the sentencing process.[13] Was it envisaged that victim impact statements would alter sentencing patterns, or was the primary purpose to assist the victim as part of the healing process? In setting out the arguments in support of the introduction of victim impact statements at sentencing, the researchers do make mention of various possible objectives which may be achieved or enhanced.[14] However, none is specifically referred to by the South Australian legislative regime. Of course it is valid to assess the impact of an initiative such as victim impact statements at sentencing by reference to its consequences, but the true value of any results as an indicator of the success or failure of the initiative can only be determined against the outcome intended in implementing the initiative. To that extent the success of the victim impact statement in South Australia cannot be determined without first identifying what it was intended to achieve. In this regard the researchers' task would have been difficult as the South Australian Legislature is yet to enumerate specifically the purpose behind introducing the victim impact statement at sentencing. Without doubt the government of the day was concerned with 'improving the lot' of the victim within the criminal justice system,[15] but there was no explicit indication of an intention to alter sentencing patterns. The *Criminal Law (Sentencing) Act* 1988 (SA) is silent on the question of the weight to be accorded a victim impact statement in sentencing. In s 10 of that Act, the injury, loss or damage resulting from the offence is merely listed with numerous other factors to which the court should have regard in determining sentence. If anything, Hansard seems to indicate that the Legislature intended no more than to formalise past practice and thereby improve the common law approach to sentencing by making sure that necessary information was available to the courts. The weight to be accorded the injury suffered by the victim remained the province of the judiciary.[16]

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13 As a result, the evaluation can be looked upon as supporting both those arguments which favour and those which oppose the use of victim impact statements in sentencing. The researchers themselves arrive at this conclusion: Erez, Roeger and Morgan, *Victim Impact Statements in South Australia: An Evaluation*, see note 4 above, at p viii.

14 Id at pp 3-4. See also *The Community Law Reform Committee of the ACT, Report No 6: Victims of Crime*, note 4 above, at p 45, para 132-133.

15 South Australia, Legislative Council, *Debates* (December 1987) p 2366; House of Assembly, *Debates* (March 1988) p 3662.

16 South Australia, Legislative Council, *Debates* (February 1988) p 2625; and (March 1988) p 3342.

By contrast, the Victorian legislature, in the recently passed *Sentencing (Victim Impact Statement) Act* 1994, states specifically that the purpose of that legislation is 'to require courts in sentencing an offender to have regard to the impact of the crime upon the victim'. Taken in isolation this broad statement could also be construed as seeking to achieve no more than formalisation of past practice. However, in defining 'victim', the Victorian legislature refers to a person or body who suffers 'injury, loss or damage as a direct result of the offence, *whether or not that injury, loss or damage was reasonably foreseeable by the offender*'.[17] In the past sentences imposed in Victoria have taken into account the injury, loss or damage sustained by a victim but only to the extent that the same were reasonably foreseeable to the offender.[18] Thus, the Victorian initiative clearly intends sentencing patterns in that state to alter.

In his article, 'Victim Participation in the Criminal Justice System', published in 1987, CJ Sumner, then Attorney-General of South Australia, makes it clear that the injury sustained by the victim of crime has long been a factor relevant to sentencing and that the victim impact statement as introduced into South Australia is to operate within established sentencing principles, its purpose in this regard being to ensure that the court is fully appraised of the consequences for the victim of the crime committed.[19] The Attorney-General, as he then was, purports to be fulfilling principle 14 of the South Australian Declaration of Victims' Rights - that a victim of crime shall have the right to have the full effects of the crime upon him/her made known to the sentencing court - but makes no commitment to altering sentence patterns or sentencing principles to ensure a correlation between the victim's suffering and the penalty ultimately imposed. This has not been made clear to victims.

Victims of crime believe that their statements will be of consequence and attend sentencing only to have their hopes and expectations dashed. In the wake of the constant barrage of news items concerning disgruntled victims, it is hardly surprising that the results of a victim survey conducted as part of the South Australian evaluation tell a similar story. The researchers discovered that 71 per cent of those victims who responded to the researchers' questionnaire and who had provided the authorities with material to be used in the compilation of a victim impact statement expected such a statement to have an impact on the sentence ultimately

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17 Section 4(1)(b), emphasis added.

18 See RG Fox and A Frieberg, *Sentencing: State and Federal Law in Victoria* (Oxford University Press, 1985) pp 452-453 and pp 456-458.

19 (1987) 20 *Aust & NZ J of Criminology* 195 at 205-206.

imposed.[20] Of this group, 40 per cent believed that their statement had an impact upon sentence, whilst 34 per cent reported that their expectations as to the impact their statement would have upon sentence were not fulfilled.[21] Of those who knew the outcome of their case, the researchers found that 'satisfaction with the criminal justice system was highly correlated with the level of satisfaction with the sentence'.[22] The result is that the victim impact statement may see victims re-victimised and their discontent with the criminal justice system compounded.[23] The researchers comment:

> To prevent the possibility that raised expectations will result in a decrease in satisfaction with justice victims should be presented with a realistic range of penalties and given explanations about the considerations used by judges in sentencing.[24]

Undoubtedly this is sound advice; the question is, what are the considerations used by judges in sentencing, and how is the victim impact statement factored into these considerations? It would appear that the researchers in this regard, as with their explanations for the lack of any conclusive statistical results vis-a-vis the effect of victim impact statements upon sentencing, lead us to the same end - the common law approach to sentencing practised by the criminal courts in South Australia. Unfortunately, the researchers take us no further.

Without deconstructing the method of determining sentence which has developed at common law one cannot discern exactly how victim

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20 The researchers received 427 responses to 847 questionnaires. The questionnaires were sent to victims of offences dealt with by the Supreme and District Courts only. Thus victims of summary matters or indictable matters dealt with in the Magistrates Court were not subjects of the project.

21 Erez, Roeger and Morgan, *Victim Impact Statements in South Australia: An Evaluation*, see note 4 above, at p 53.

22 Erez, Roeger and Morgan, *Victim Impact Statements in South Australia: An Evaluation*, see note 4 above, at p 56. The researchers observed that the desire to complete a victim impact statement was highest among victims of crimes against the person, and that such people had a greater interest in proceedings and were more likely to know the outcome of their case.

23 This possibility is recognised by Erez: see E Erez, 'Victim Participation in Sentencing, Sentence Outcome and Victim's Welfare' in G Kaiser, H Kury & H-J Albrecht (eds), *Victims and Criminal Justice: Legal Protection, Restitution and Support* (Max Planck Institute, 1991). See also E Erez and P Tontodonato, 'Victim Participation in Sentencing and Satisfaction with Justice' (1992) 9 *Justice Quarterly* 394.

24 Erez, Roeger and Morgan, *Victim Impact Statements in South Australia: An Evaluation*, see note 4 above, at p 57.

impact statements influence sentencing. The conduct of such an exercise and its explanation to victims is extremely important to the success of the victim impact statement as a step toward making the the criminal justice system more amenable to victims. Deconstructing the common law approach to sentencing permits the victim to understand the sentence imposed, deflates unrealistic expectations, prepares the victim for the sentence, and thereby can only increase the likelihood that the victim will be satisfied with the sentence imposed and the criminal justice system as a whole. At the same time it may allay any residual fears of the legal profession that victim impact statements may distort the sentencing process. The remainder of this article is devoted to such an exercise.

The Victim within the Common Law Approach to Sentencing

The Common Law Approach to Sentencing

The objectives to which a judge is to give effect in sentencing an offender have been best expressed by Wells J in the case of *R v Kear*:[25]

> In the span of centuries during which judges have been sentencing, the possible purposes that have, again and again, presented themselves to judicial minds, and that jostle one another in their endeavours to gain paramountcy are (1) to deter; (2) to prevent; (3) to reform, or, in modern parlance, to rehabilitate; (4) to exact retribution.
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> It is not possible in any one case to give full rein to any one of these purposes. To adopt one to the exclusion of the rest is likely to produce results that are absurd, unjust, and ineffectual.
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> [T]he visiting of retribution - wreaking the community's revenge - on an offender can be important, but if it was allowed to become the sole aim of punishment, the community would be relegated to a primitive condition where the determination of the law to exact an eye for an eye and a tooth for a tooth would cause immeasurable and intolerable cruelty in the name of even-handed justice. Nevertheless, the need to consider retribution can never be allowed to disappear from the judicial mind...
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> Where, then, do we stand? The sentencing judge is presented with a choice of purposes, a range of powers, and the duty to exercise discretions reposed in him in a fair, impartial, and judicial manner. He must not act arbitrarily, or in accordance with aims and precepts not countenanced by law.
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> He must first obtain a good grasp of the facts of the crime and such details relating to the prisoner's history, character, and mentality as

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25 (1977) 75 LSJS 311 at 315.

> appear relevant and helpful. He must consider, where pertinent, pre-sentence, police, medical, psychiatric, and all other, reports tendered to him by defence or Crown. He must keep prominently before him the victim, the harm and pain suffered, the loss incurred. He must remember those affected by the victim's experience. He must have regard to other potential victims and other potential criminals. He must weigh every relevant circumstance... He must, in short, protect the community by and through the orders he makes, as far as may be with justice to all and, where it can be extended, mercy...
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> In sentencing, therefore, judges exercise the powers given to them in order to maintain, as far as practicable, and within the limits of those powers, the Queen's Peace within this realm, and thus protect the community against the attacks on it from within which take the form of crimes. The judicial act of sentencing consists in the responsible, imaginative, and fearless use of those powers to devise in all the circumstances of the case under consideration, the order that will best serve those ends.

Earlier in his judgment, Wells J commented that:

> [J]udges ... are constrained in some measure to be pragmatic. We must, of course, abide by the law. But within the limits and discretions laid down for us by law, we must use such wisdom, judicial and otherwise, as we have acquired in life, generally, and in the law, in particular, and derive such assistance as we can from the work, the judgments, and the remarks, of other judges, from conferences and conference papers, and from published works of authority and learning.

What Wells J does not tell us is the method used by judges to arrive at a particular sentence. He does comment on the constraints placed upon judges in sentencing, and refers to the assistance that is to be had by reference to the judgments and remarks of other judges, and to scholarly works. But there is no indication of how a judge measures an offender's blameworthiness and translates that into the penalty imposed.

In Australia it would appear that at common law there are two basic methods to determining the appropriate sentence to be imposed: the 'tariff approach', as best propounded by Dr D A Thomas in his book *Principles of Sentencing*,[26] and the instinctive synthesis approach, as championed in Victoria in particular. Without doubt it is the former method that is utilised in South Australia.[27]

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26 2nd ed, Heineman, 1979.

27 *R v Fermaner* (Unreported, SA CCA, 21st March 1994); *R v Prendergast* (1988) 147 LSJS 486; *R v Dube: R v Knowles* (1987) 46 SASR 118 at 123; *R v Halse* (1985) 38 SASR 594; *R v James* (1981) 27 SASR 348; *R v Mackay* (1988) 119 LSJS 192; *R v Town* (1987) 139 LSJS 348; *R v Young and Dowden* (Unreported, SA CCA, 26th May 1989); *Skrjanc* (1993) 71

The tariff approach recognises that the majority of offences that come before the criminal courts are capable of classification according to particular uniform elements. Over time the sentences imposed against offenders who have committed a particular offence that possesses uniform elements give rise to a range of sentences. That range is termed the tariff, and the task for future sentencers is to determine, by reference to the gravity of the offence, where on the tariff an offender falls before considering aggravating and mitigating factors. In South Australia the Court of Criminal Appeal has, on occasions, gone so far as to specifically stipulate the tariff for a particular offence.[28] For the vast majority of offences, however, the tariff is identified by reference to past sentences imposed. It is often the practice therefore, that counsel refers the sentencing court to a sample of cases wherein sentences have been imposed for the same offence as that before the court. This sample purports to demonstrate the tariff. By comparing the circumstances of the offence at hand with those of other instances of its commission, the court is able to accord the offence at hand a ranking indicative of its gravity, and, by reference to the sentences handed down in those other instances, identifies a provisional penalty. That penalty then constitutes a starting point from which the court proceeds to determine the actual sentence having regard to those subjective factors personal to the defendant which operate in mitigation and/or aggravation of the offence. Thus, the ultimate sentence arrived at reflects the blameworthiness of the individual offender.

As to which aggravating and mitigating factors may be taken into account, there exists a body of principles contained in the case law that serves to guide the sentencing court and constrain it in the weight it attaches to each. The result is:

> ... a framework by reference to which the sentencer can determine what factors in a particular case are relevant to his decision and what weight should be attached to them. Properly used, they offer a basis for maintaining consistency of sentencing different offenders, while observing relevant distinctions, making

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A Crim R 347. In these cases the Court of Criminal Appeal openly refers to the tariff applicable to the offence concerned (or to the absence of any suitable tariff due to the offence being generic in nature and insufficiently specific; eg arson). By contrast, see *R v* Willscroft [1975] VR 292 and *R v Young, Dickenson and West* (Unreported, VIC CCA, 1 March 1990).

28 See *R v Halse* (1985) 38 SASR 594; *R v Fermaner* (Unreported, SA CCA, 21st March 1994); *R v Young and Dowden* (Unreported, SA CCA, 26th May 1989).

> appropriate allowances for individual factors and preserving adequate scope for the exercise of judicial discretion.[29]

Thomas states that this approach applies only where the aim to be achieved in sentencing is that of either retribution or deterrence. If the aim is rehabilitation or incapacitation then the sentencing process is at all times individualised. In the South Australian context, however, this is not strictly true. The Legislature in South Australia has not provided the judiciary with a positive rehabilitative penalty and purely incapacitative sentences are contrary to the common law.[30] Scope for rehabilitation within sentencing practises in South Australia exists only where the offender is capable of reforming him or herself. In such circumstances a sentence of imprisonment may be suspended or the penalty structured so as to give the offender the opportunity to reform. In the former instance, the court will have first gone through the sentencing process particular to the tariff approach before deciding to suspend the penalty ultimately arrived at. In the latter circumstance, the penalty structured so as to permit the offender the opportunity to reform him or herself will itself be commensurate to the gravity of the offence once regard is had to those factors personal to the offender. Thus it will comply with the tariff. Should it be otherwise the penalty would be appealable.

Thus the method of determining sentence invoked by judges in South Australia is essentially a two-stage process. First, having regard to the gravity of the offence and other objective factors, the sentencer determines where on the tariff the particular offender falls - that is, a starting point proportionate to the gravity of the offence is determined. Secondly, the actual sentence imposed is determined after having regard to subjective mitigating factors.[31]

There are four elements inherent in this method of sentencing that serve to militate against the contents of a victim impact statement being pivotal in the ultimate determination of penalty. First, victim input in the form of an impact statement does not further the aims of sentencing as referred to by Wells J. Secondly, in sentencing it is the public interest that is accorded paramountcy and not the views of the individual victim. Thirdly, the tariff is determined by reference to other decisions and factors objectively determined, so to an extent the system assumes homogeneity of victimisation. Fourthly, the

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29 DA Thomas, *Principles of Sentencing*, (2nd ed, Heineman, 1979) at p 29. See also the observations of the ALRC in *Sentencing Research Paper No 7* (1979) at p 78.

30 *Veen v The Queen (No 2)* (1988) 164 CLR 465; *Hoare v The Queen* (1989) 167 CLR 348; *R v Johnston* (1985) 38 SASR 583 per King CJ at 585-586.

31 Aggravating factors most often fall into the objective category and are thus taken into account as part of the first stage.

starting point identified at the conclusion of the first stage is restricted by the concept of proportionality, and what is proportionate is also objectively determined. Each of these points shall now be examined in turn.

Victim Input and the Aims of Sentencing

The time-honoured aims of sentencing that jostle one another in an effort to be accorded paramountcy in any sentencing decision are retribution, deterrence, rehabilitation and incapacitation. In his article, 'The Relevance of Victim Impact Statements to the Criminal Sentencing Decision', Phillip Talbert considers the contribution to the aims of sentencing that victim input may make.[32] With respect to retribution, Talbert refers to two models underpinning retributive penalties imposed by the State. The first is designated 'moral retribution', wherein punishment is levied against an offender due to their moral blameworthiness. Under this model the sentencing court contrasts the offender's blameworthiness with the morality of the victim represented in an impact statement. The victim's morality replaces that of the wider community. The result is that the focus of the sentencing hearing shifts from the offender to the victim as the victim's individual morality and moral worth come under scrutiny. The end result could be that fault is found with the victim and a more lenient sentence imposed. This, and the fact that the victim would be open to cross-examination and thereby the possibility of re-victimisation, serve to undermine the purpose of victim participation and to divert the sentencing court from its true purpose.[33] Talbert terms the second model of retribution 'social retribution'. Here the sentencing court concerns itself with punishing the offender in order to address the imbalance in the relationship between the offender and society caused by the offender's offence against society. Punishment correlates to the harm caused to the victim and thus may offend the concept of proportionality. Further, the victim's characteristics are irrelevant to the sentencing decision because the degree of harm is objectively assessed. This may offend the principle that offenders take their victims as they find them.[34]

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32 36 *UCLA L R* 199 (1988).

33 These concerns are often raised in argument against the introduction of victim impact statements. See, for example, *Victorian Sentencing Committee Report*, see note 4 above, at p 543. See also M Hinton, *Valuing the Victim*, a paper given at the Eighth World Symposium on Victimology (1994, Adelaide).

34 *R v Blaue* [1975] 3 All ER 446; *Mamote Kulang of Tamagot v R* (1963-64) 111 CLR 62.

Of deterrence, Talbert notes that the individual is 'deterred in direct proportion to the severity of sanction and the certainty of sanction'.[35] Provided that victim participation at sentencing assists the court in assessing these variables it is of relevance. He concludes that victim participation can enhance the certainty of sanction by making the trial process more efficient. Whilst there is much research that questions the deterrent effect of punishment as opposed to the certainty of detection, courts still operate on the basis that the appropriate penalty will deter.[36] Nevertheless, the influence victim participation may have is limited by the notion that severity of sentence imposed need be the minimum required to deter.[37] Furthermore, where general deterrence is uppermost in the court's mind the intention is to deter the future offender from committing an offence sharing common factors to the one before the court. That is, the penalty correlates to factors that are objectively ascertainable as it looks beyond the individual victim to the safety of the community at large. Consider, by way of example, the comments of Bray CJ in *R v Harstorff*,[38] a case involving a sentence of four months imprisonment imposed upon a charge of causing death by dangerous driving:

> I realise to the full that the appellant is a man of good character and worthy of respect, that he is not, in the ordinary sense of the word, a criminal, that he had no intention of harming anyone, and that imprisonment will be to him a great hardship and a great indignity. He does not stand in need of reformation or rehabilitation. But, as I have said in other contexts recently on more than one occasion, there are offences where the deterrent principle must take priority and where sentences of imprisonment may properly be imposed, even on offenders of good character, to mark the disapproval by the law of the conduct in question and in the hope that other people will be deterred from like behaviour.[39]

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35 See note 32 above at 215.

36 *R v Dube; R v Knowles* (1987) 46 SASR 118.

37 J Bentham, *An Introduction to the Principles of Morals and Legislation* (1789), Ch 14. See also: *R v Stewart* [1984] 35 SASR 477; *R v Fyfe* [1985] 40 SASR 120 per Bollen J at 129; *Webb v O'Sullivan* [1952] SASR 56 per Napier CJ at 66.

38 (1975) 11 SASR 217.

39 Id at 222. See also the comments of King CJ in *R v Morrison* (1985) 119 LSJS 403 at 405: 'It is important that proper standards of punishment be maintained and that the community sense of justice and due proportion between the gravity of the crime and the punishment inflicted be respected. Moreover, it is important that others, whether by reason of personality, or temperamental defects, or for any other reason are tempted to engage in violence, be deterred by understanding that to give way to those inclinations, to the extent of committing a serious assault, must result in severe punishment.'

To this extent victim participation can only be of limited assistance and is, perhaps, unnecessary in light of the fact that the objective information will be apparent from the circumstances surrounding the commission of the offence.

The purpose of an incapacitative sentence is to remove from the community an offender who poses an unacceptable risk of future offending. Here the sentencing court is occupied with assessing the future dangerousness of the offender which depends upon factors personal to the offender. The victim, Talbert comments, can have little input save where he or she has prior knowledge of the offender which may be of assistance in assessing dangerousness.

As to rehabilitation, Talbert says that victim participation may be of assistance in constructing a rehabilitative penalty 'if the defendant would profit from confronting the reality of the harm caused to the victim'.[40] In the writer's view, whether repentance is induced by a victim impact statement or otherwise is a peripheral issue at best. If a court is inclined to impose a rehabilitative sentence upon an offender, its primary concern will be with the likelihood that that offender will respond to such penalty. Factors surrounding the offence are important to the consideration of a rehabilitative penalty, and therein the harm caused the victim, but the focus at sentencing is firmly set upon the offender and his social background.

> Rehabilitation as an object of sentencing is aimed at the renunciation by the offender of his wrongdoing and his establishment or re-establishment as an honourable law-abiding citizen ... The object of the courts is to fashion sentencing measures designed to reclaim such individuals wherever such measures are consistent with the primary object of the criminal law which is the protection of the community.

To this end, the victim and any victim impact statement will be of little significance.

In conclusion, Talbert states that victim participation does advance the aims of sentencing where such participation is fashioned to the particular aim under consideration. In order for this to occur within the South Australian context, or for that matter, in any jurisdiction in Australia, the court would first have to give some sort of indication as to which of the aims, or combination of aims, of sentencing it proposed to give priority in a particular sentence - a most unlikely step to be added to the current sentencing process. To some extent the aims that a sentencing court is likely to give priority to will be evident in the relevant tariff discernible from past cases. However, as is implicit from the findings of the evaluation conducted by the Office of Crime Statistics, victims are far from aware of the tariff and

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40 See note 32 above at 219.

the object of sentencing in any given case. In any event, fashioning victim impact statements so as to address the aims likely to be pursued by a court in imposing sentence may defeat the victims' purpose in compiling the statement and reduce the role such a statement plays in the healing process. Once again, victims would be deprived of the power to influence the system, their alienation would be perpetuated and victim impact statements made self-defeating.

Public Interest Versus the Interests of the Victim

In his article, 'Victim Impact Statements and Sentencing', Ashworth notes:

> The approach [to sentencing] that became conventional in the mid-twentieth century is that criminal offences are offences against the state, that they should be prosecuted to the extent that the public interest requires it, and that the sentence should be passed in the public interest. The victim's interest is part of the public's interest, but only part. This gives primacy to the state's interest in controlling the response to crime; those who violate the Queen's peace should be dealt with on that basis, and not according to the desires of the individual whether they be forgiving or vengeful. It aims for consistency of treatment, which may both inspire public confidence and achieve fairness among defendants.[41]

Ashworth's observations are consistent with the duty of the sentencing judge in approaching his or her task as espoused by Wells J above. Ashworth proceeds to contrast the 'conventional' approach to sentencing with a model that would champion restitution as its primary aim. Under such model the interests of the victim would be the primary consideration in sentencing, the court being concerned with restoring the victim to that standard of living which he or she enjoyed prior to suffering the offence. Whilst there is power in South Australia to make a restitution or compensation order part of any penalty imposed, it can hardly be said that restitution as an aim of sentencing is pursued to the extent that the wider public interest in sentencing is excluded or rendered insignificant.[42] It remains very much the case in South Australia that the public interest is the paramount consideration in sentencing and that the interests of the victim are one of the many factors taken into consideration in structuring a penalty that will serve that interest.[43]

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41 A Ashworth, 'Victim Impact Statements and Sentencing' [1993] *Crim LR* 498 at 503.

42 See ss 52 and 53 of the *Criminal Law (Sentencing) Act* 1988 (SA). See also s 13: a pecuniary penalty should not be imposed unless the offender can comply with such order.

43 See, for example, the comments of Matheson J in *R v Fermaner* (Unreported, SA CCA, 21st March 1994), regarding the court's

> [T]he function of our criminal justice system is to ensure that the interests of the whole community as affected by crime are met. To achieve this, the state interposes itself between the offender and the victim, and takes on the role of representing the legitimate interests of the victim. The policies of the criminal law have developed in such a way as to strike what is seen as an appropriate balance between the interests of the victim of the crime and the broader social and political interests of the community. To regress to a situation where a criminal trial becomes a one-on-one conflict between a victim and an offender would result in a downgrading of other important principles forming part of the criminal justice system, including the need to prevent future crime through an effective system.[44]

Homogeneity of Victimisation

The impact of a crime upon the victim is most often taken into account in the very charge that is laid and the penalty prescribed for that charge.[45] For example, the different categories of assault (common assault, assault occasioning actual bodily harm, and unlawful wounding) vary according to the injury sustained by the victim.[46] The variation in impact upon the victim is commensurate to the variation in the maximum penalty that may be imposed - common assault is punishable by a term of imprisonment of up to two years, assault occasioning actual bodily by up to five years, and wounding with intent to cause grievous bodily harm, by life imprisonment.[47] As the maximum penalty is a factor considered in determining the ultimate penalty imposed, that ultimate penalty will likewise account for the harm caused the victim and reflect the aggravation in consequences that demarks different charges. Thus the injury or harm suffered by the victim is already accounted for in sentencing. To this extent, therefore, the tariff approach to sentencing assumes homogeneity of victimisation. By that it is meant that the individual sentencer is significantly constrained in the

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responsibility to protect the public from armed robbers to the extent that its sentencing practices permit it to do so. See also: the comments of Bollen J in *R v Fyfe* [1985] 40 SASR 121 at 129, regarding the duty to impose the least penalty that will satisfy the *community conscience;* Bollen J in *C v Kennedy* (1992) 164 LSJS 187 at 189, regarding the weight that may be given the wishes of a victim in sentencing; King CJ in *Vartzokas v Zanker* (1989) 51 SASR 277 at 279, where he states that rehabilitative sentences must be consistent with the primary purpose of the criminal law: the protection of the community.

44 *Victorian Sentencing Committee Report*, see note 4 above, at p 543.

45 Id at pp 536-539.

46 See ss 21, 39 and 40 of the *Criminal Law Consolidation Act* 1935 (SA).

47 Ibid.

weighting he or she may give the injury sustained by the victim in determining the gravity of the offence committed. In every case where a particular offence is committed, provided it is an ordinary example of that offence[48] (one, therefore, falling within the ambit of the tariff), the weight to be given the impact of the injury upon the victim may only marginally influence the starting point nominated by the sentencer. Impact of injury, therefore, cannot be looked to in explanation of disparity. This is because the tariff carries with it the qualitative assumption that the impact of a particular offence upon victims in different cases is the same. Thus, the penalty does not vary in reflection of the impact of the injury upon the victim as subjectively portrayed in a victim impact statement, but in reflection of the degree of injury objectively discernible and the manner in which it was inflicted. The contents of a victim impact statement, therefore, should not alter the weighting ascribed to the impact of an offence upon the victim. This is borne out by the case law - if the consequences were not foreseen by the defendant but would have been foreseeable to the reasonable person, then such consequences will be grouped with the many other factors that determine the gravity of the crime committed.[49] If the injurious consequences were foreseen by the offender then they may constitute a factor aggravating the crime and may justify the starting point exceeding the ceiling set by the general tariff.[50]

Proportionality

The concept of proportionality limits the degree to which punishment may be imposed upon an offender.[51] That is, sentencers are not required to impose penalties proportionate to the gravity of the offence,[52] they are merely constrained in the degree to which they may punish by the concept of proportionality.[53] Nevertheless,

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48 See *R v Turner* (1975) 61 Cr App R 67 at 92, for a definition of what amounts to an ordinary example of an offence as opposed to an extraordinary example.

49 *Wise v R* [1965] Tas SR 196 per Crisp J; *R v Boyd* [1975] VR 168; *Feldman v Samuels* [1956] SASR 55; *R v McCormack & Ors* [1981] VR 104.

50 *R v Teremoane* (1990) 54 SASR 30; *R v Mayne* (1987) 137 LSJS 100; *Feldman v Samuels* [1956] SASR 55; *R v McCormack & Ors* [1981] VR 104; *R v Thompson* (1975) 11 SASR 217.

51 *Veen v The Queen (No 2)* (1988) 164 CLR 465; *Hoare v R* (1989) 167 CLR 348; *R v Stewart*[1984] 35 SASR 477.

52 By contrast, see the relevant provisions of the United Kingdom *Criminal Justice Act* 1991.

53 *Veen v R (No 2)* (1988) 164 CLR 465, per Deane J at 491. See also R Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19 *MULR* 489.

the fact that a court may impose a penalty proportionate to the gravity of the offence indicates, prima facie, that full vent in sentence may be given to the impact of an offence upon the victim. However, what is proportionate is determined objectively:

> [A] basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime in the light of its *objective* circumstances.[54]

The emphasis upon the word 'objective' is to be found in the original judgment of the High Court. As Fox explains in his article, 'The Meaning of Proportionality in Sentencing', the use of the word 'objective' by the High Court does not exclude all elements of the offender's involvement which might be regarded as subjective, such as the offender's state of mind at the time of the commission of the offence.[55] But what it does exclude is a subjective appraisal of the degree of injury sustained by the victim. That is, it excludes from the sentencing process those consequences of the injury perpetrated that are not objectively discernible, that are not reasonably foreseeable. The effect is that full vent may not be given to the impact of the offence as felt by the victim and contained in a victim impact statement, where the contents of that statement contain material that is not discernible from an objective standpoint. The victim's hope that the court will understand his or her suffering and sentence in that knowledge cannot be fulfilled. Again this is borne out by the case law regarding the weight that may be given to the injury sustained by the victim as referred to above.[56]

Conclusion: What Do Victim Impact Statements Add to Sentencing?

This article has attempted to demonstrate that the methodology adhered to in the common law approach to sentencing in South Australia excludes consideration from a subjective stand point the injury sustained by a victim as a result of the commission of a criminal offence. As a result, sentencing patterns in South Australia have not altered with the introduction of victim impact statements to the sentencing process. Thus, the results returned by the evaluation of victim impact statements in South Australia, as conducted by the Office of Crime Statistics, are explained. They are consistent with the common law as it applies to sentencing and is applied. The problem that arises is that victims are not informed of the fact that their

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54 *Hoare v R* (1989) 167 CLR 348, per Mason CJ, Brennan, Dawson and Toohey JJ at 485-486. See also *Channon v R* (1978) 33 FLR 433.

55 (1994) 19 *MULR* 489 at 498.

56 See notes 49 and 50 above.

statements are of little consequence to the ultimate penalty imposed. They attend court expecting satisfaction as the judge has been fully informed of the consequences of the offence for them. Unfortunately the entire consequences of the offence *for them* cannot be factored into the sentence imposed unless those same consequences are objectively discernible. This can lead to the victim being further alienated from the criminal justice system, thereby defeating one of the very purposes underpinning the introduction of the victim impact statement.

What then do victim impact statements contribute to the sentencing process? Undoubtedly where there is a plea of guilty, the victim impact statement appraises the court of information it would normally glean from the evidence given in the course of a trial. Further, the quality of the information in a victim impact statement may render more accurate a court's objective consideration of the injuries caused by an offender which will assist in the determination of penalty. But save these circumstances, the victim impact statement contributes little to the determination of the ultimate penalty imposed. Of course there is the contribution to the healing process that the compilation of a victim impact statement may make, but this may well be jeopardised where the victim is not informed as to the use that may be made of his or her statement. This could all be changed were South Australia to legislate as the Victorian Parliament has done, resulting in the courts being in a position to impose sentences commensurate to the injury sustained by the victim whether or not such injury was reasonably foreseeable.[57] The merits of such a fundamental change to sentencing practice is beyond the scope of this article. In the South Australian context, the constraints upon sentencing with respect to the impact of the offence upon the victim that are imposed by the common law must be formally recognised, and against that background the victim impact statement regime moulded so as to have the effect desired.

57 *Sentencing (Victim Impact Statement) Act* 1994 (Vic).