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VOICES AFTER THE KILLING

Hearing the Stories of Family Victims in New South Wales

*Tracey Booth**

This article reports on the preliminary findings of a research project that evaluates and analyses 78 victim impact statements (VISs) from family victims submitted in 32 homicide cases in New South Wales between 2 April 1997 and 31 December 2000. Although the presentation of VISs was highly idiosyncratic and reflective of the victim authors' individual circumstances, the data reveal strong common themes: the impact of the deceased's death upon the family victims, the manner and circumstances of the death of the deceased, the personal qualities of the deceased, negative characterisation of the offender, the need for justice and frustration with regard to the processes of criminal justice.

The most compelling finding of the research is that, while the killing is the catalyst for the harm sustained by family victims, the nature of that harm reflects personal loss that is otherwise unrelated to the deceased's death. Accordingly, the New South Wales Supreme Court has found that such harm is only relevant to issues of compensation and is not relevant to the punishment of offenders for homicide offences (*R v Previtera* (1997) 94 ACrimR 76). However, even if VISs by family victims cannot be used to determine the ultimate penalty, those VISs play a crucial role in restorative justice for family victims. To this end, it is imperative that that the courts both *acknowledge* receipt of VISs from family victims and demonstrate publicly that they have *heard* the stories of the family victims by ensuring that all stakeholders are aware of the pain and trauma suffered by the family victims.

INTRODUCTION

A victim impact statement (VIS) is said to enhance the retributive aims of sentencing because it documents the objective harm suffered by the victim as a result of the offence and the sentence imposed thus reflects the harm suffered

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by the victim.[1] In the last decade, VISs from primary victims have been accepted and taken into account in the sentencing process on the basis that they serve this retributive purpose of punishment.[2] However, in the context of homicide matters, a similar basis for the consideration of VISs from the families of homicide victims (ie family victims) in the sentencing process has proved more controversial in New South Wales. Despite legislative reform in 1997 to facilitate submission and consideration of VISs from family victims, the New South Wales Supreme Court has declined to take those statements into account at the sentencing stage of a matter on the basis that such evidence is irrelevant.[3]

The purpose of this article is not to debate the merits of the legislation or the stance of the Supreme Court. Rather, this article seeks to report on the preliminary findings of a research project that evaluates and analyses 78 VISs from family victims submitted in 32 homicide cases in New South Wales between 2 April 1997 and 31 December 2000 with a view to identifying key issues to be explored in further work. The current study is part of an ongoing, larger piece of research concerned specifically with the relevance of VISs from family victims to the sentencing process and more generally with the role of family victims in the criminal justice system.

The article is divided into three parts. The first part outlines the legal position of family victims *vis-à-vis* submission of VISs at the sentencing stage of homicide matters in New South Wales.[4] The second fills in the background to the research project and describes the methodology and data collection. The preliminary findings of the research project are evaluated and analysed against a background of legislative reform and judicial concerns in the final section.

The Legal Position of the Family Victim and Victim Impact Statements in the Sentencing Process in New South Wales

Prior to legislative reform in 1997, VISs from family victims were rejected as irrelevant and inadmissible to the sentencing process in New South Wales.[5] In 1997, the *Criminal Procedure Act 1986* (NSW) was amended to facilitate the submission of VISs to the court from family victims at the sentencing stage of homicide matters.[6] These provisions have since been repealed and similar provisions are now located in the *Crimes (Sentencing Procedure) Act 1999*

1 *R v P* (1992) 111 ALR 541; New South Wales Law Reform Commission (NSWLRC) (1996).

2 *R v De Souza* (1995) 41 NSWLR 656; *R v P* (1992) 111 ALR 541.

3 *R v Previtera* (1997) 94 ACrimR 76.

4 For a more comprehensive discussion of the legal position of family victims in New South Wales, see Booth (2000).

5 *R v De Souza* (1995) 41 NSWLR 656.

6 The Shooters' Party proposed these amendments: New South Wales Legislative Council, *Parliamentary Debates (Hansard)* 51st Parliament, 2nd Session, p 6386 (21 November 1996).

(NSW) (C(SP)A).[7] A 'family victim' is defined by the Act as a member of the primary victim's 'immediate family'. The legislation stipulates that, if submitted, the court *must* receive a VIS from a family victim and the court *must* acknowledge that VIS.[8] In addition, the court *may* make any comment on it that it considers appropriate.[9]

However, there is no provision to ensure that the court actually takes the submitted VIS into account in the sentencing process. Indeed, the legislation provides that, once received, acknowledged and perhaps commented upon, the court need *not* take account of the VIS in connection with the determination of a sentence for the offence if it considers it inappropriate to do so.[10] The absence of provisions compelling the court to take account of the submitted VIS reflects Parliament's intention expressly to preserve judicial discretion in sentencing matters. At the time of moving these amendments, Hon JS Tingle said:

> The purpose of the amendments is to ... ensure that the court will receive such statements, which it is not required to do so [sic] at present, and to read and acknowledge them ... [T]he amendments do not provide that a court must consider a VIS submitted by a family member when determining the length of sentence. The tendering, reading and acknowledging of the VISs in court will give the secondary victims of the offences the satisfaction of knowing that their trauma and agony has been acknowledged in public by the court and that they have received some measure of the restorative justice that I believe is involved in this type of procedure.[11]

The research findings reveal that, in five out of the 32 matters reviewed, the sentencing judge did not acknowledge the VIS submitted by a family victim.[12] More typically, however, sentencing judges acknowledged receipt of the VISs submitted by family victims and extended sympathy to those victims.[13] While the extent of judicial comment ranged from the very cursory

7 The *Crimes (Sentencing Procedure) Act 1999* (NSW) (C(SP)A) and the *Crimes (Administration of Sentences) Act 1999* (NSW) were passed to implement the recommendations of the NSWLRC Report (1996) on sentencing and to consolidate all existing legislation relevant to sentencing into two pieces of legislation.

8 Section 28(3).

9 Section 28(3).

10 Section 28(4)(b).

11 New South Wales Legislative Council *Parliamentary Debates (Hansard)* 51st Parliament, 2nd Session, p 6386 (21 November 1996).

12 In one matter, five VISs submitted by family victims with respect to a single deceased primary victim were not acknowledged in the judgment.

13 For instance: 'The Crown tendered a number of letters from members of [the victim's] family and the Court received them as victim impact statements under the ... Act ... It is appropriate, however, to acknowledge publicly the loss, grief and hardship which [the victim's] family have suffered, and to offer them

to several pages, ultimately all sentencing judges disregarded VISs by family victims as a factor to be taken into account in the sentencing process in New South Wales.

R v Previtera

The leading case is *R v Previtera*,[14] a decision that was handed down by the New South Wales Supreme Court shortly after the legislation came into force in April 1997. In this case, the defendant pleaded guilty to the murder of an elderly woman. At the sentencing stage of the matter, the Crown tendered a VIS authored by the deceased's son detailing the reactions of the author and his sister to the murder of their mother in terms Hunt J described as 'moderate and compassionate'.[15] Hunt J acknowledged receipt of the VIS in accordance with the Act and extended his sympathy to the family victims 'for their tragic and senseless loss'.[16] Nonetheless, he declined to consider that statement in connection with sentencing the defendant because he felt it was inappropriate to do so.

In *Previtera*, Justice Hunt distinguished between the concepts of punishment and compensation. Punishment of an offender for a homicide offence is calculated largely by reference to the objective circumstances of the offence — the *consequences of the death* of the deceased and the *manner and circumstances* in which she died.[17] According to Hunt J, information regarding the *effect* of the death on family members was irrelevant to an assessment of the objective circumstances of the offence because it had no bearing on either the deceased's death or the manner and circumstances in which she died.[18] In his view, a VIS from a family victim did not document harm that was relevant to the imposition of a penalty in a homicide matter; such victim impact evidence was only relevant to compensating the family victim for their loss sustained as a result of the death of the deceased.[19]

Aside from the problem of identifying harm suffered by family victims as relevant to the sentencing process, the court was particularly concerned that the nature of the evidence could have more sinister consequences. Hunt J said:

> It is regarded by all thinking persons as offensive to fundamental concepts of equality and justice for criminal courts to value one life as greater than another. It would therefore be wholly inappropriate to impose a harsher sentence upon an offender because the value of the life lost is perceived to be greater in one case than it is in the other.[20]

Essentially, the court wanted to guard against the possibility that evidence from family victims could result in a harsher penalty being imposed on the basis that an articulate family victim demonstrated that the deceased was a more valuable and worthy person than perhaps other homicide victims in otherwise similar cases. However, despite this strong expression of concern, Hunt J indicated that there might be a 'rare' case where a VIS from a family victim could provide information relevant to the sentencing process regarding the manner and circumstances of the death of the deceased. For example, a statement could include details of a slow and lingering death of the deceased as a result of the offence.[21]

Research Project

Background

The refusal by the New South Wales Supreme Court to take account of VISs from family victims at the sentencing stage of homicide matters puts it at odds with other Australian jurisdictions. In a similar manner to the C(SP)A, the relevant legislation in Victoria, South Australia and Western Australia makes provision for family victims to submit VISs to the sentencing court.[22] However, in contrast to the C(SP)A, these latter Acts do not expressly preserve judicial discretion as to whether the VISs submitted will be taken into account during sentencing. In Victoria, s 5(2) of the *Sentencing Act 1991* stipulates: 'in sentencing the offender the court *must* have regard to ... the personal circumstances of any victim of the offence'.[23] Section 10 of the South Australian *Criminal Law (Sentencing) Act 1988* provides that 'a court, in determining sentence for an offence, *should* have regard to ... the personal circumstances of any victim of the offence'.[24] In addition, s 7 specifies that 'the prosecutor *must*, for the purpose of assisting a court to determine sentence for an offence, furnish the court with particulars of ... injury loss or damage resulting from the offence'.[25] The Western Australian *Sentencing Act 1995* provides that 'a victim ... may give a VIS to a court to assist in determining the proper sentence for the offender'.[26] Both the Victorian and Western Australian Acts give the court power to rule any part of VISs submitted

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sympathy.': *R v McGregor Preuss* (NSW Supreme Court, unreported, 26 August 1997) per Barr J.

14 (1997) 94 ACrimR 76.

15 (1997) 94 ACrimR 76 at 84.

16 (1997) 94 ACrimR 76 at 84.

17 (1997) 94 ACrimR 76 at 85.

18 (1997) 94 ACrimR 76 at 87.

19 Hunt J was of the view that victims of crimes should seek compensation from the Victim Compensation Tribunal pursuant to a claim under the *Victims Compensation Act 1996* (NSW): (1997) 94 ACrimR 76 at 87.

20 (1997) 94 ACrimR 76 at 86.

21 (1997) 94 ACrimR 76 at 87.

22 *Sentencing Act 1991* (Vic) s 5(2); *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Sentencing Act 1995* (WA) s 24.

23 Author's emphasis.

24 Author's emphasis.

25 Author's emphasis.

26 Section 24.

inadmissible.[27] On the basis of these provisions, the courts in Victoria, South Australia and Western Australia have consistently taken VISs from family victims into account during sentencing.[28]

The development of inconsistent sentencing approaches across Australian criminal law jurisdictions is unfortunate. Also problematic is the contradiction between the sentencing approaches developed by the New South Wales Supreme Court (of exclusion) and the government's policy of giving family victims a 'voice' in the sentencing process.[29] The consequent sentencing outcomes and restrictions placed by the court upon the 'voice' of family victims have given rise to expressions of community concern,[30] and family victims' anger as their expectations of contributing to the sentencing process have not been fulfilled.

Other than acknowledgment and expression of condolences, the New South Wales judgments generally reveal little or no analysis of the VISs submitted in individual cases before excluding them from the sentencing process in accordance with the decision in *Previtera*. A review of empirical

27 *Sentencing Act 1995* (WA) s 26; *Sentencing Act 1991* (Vic) s 95(B). According to the court in *Mitchell & Ors* v *The Queen & Anor* [1998] WASCA 334, the court should rule inadmissible those parts of VISs which canvass matters outside the permissible content prescribed by the legislation.

28 See *Mitchell & Ors* v *The Queen & Anor* [1998] WASCA 334, *R v Deniz* [2001] VSC 36 (23 February 2001) and *R v Birmingham (No 2)* [1997] SASC 6390. These and other similar cases are reviewed in more detail in Booth (2000). The approach of the Victorian and South Australian courts to the consideration of VISs by family victims in the sentencing process is the subject of a research project currently being conducted by the author.

29 A careful reading of the Parliamentary debates with respect to this amendment reveals awareness on the part of Parliamentarians, including the proposer of the amendment, Hon JS Tingle, that it would certainly preserve judicial discretion as to whether or not the VIS by a family victim was taken into account during sentencing. In the course of debate, Hon JS Tingle said: 'the amendment has been worded carefully in order not to restrict or control the court in its relationship with the family of the victim or in its reaction to the impact statement'. See New South Wales Legislative Council *Parliamentary Debates (Hansard)* 51st Parliament, 2nd Session, p 6389 (21 November 1996). The point of the amendment was more concerned with ensuring that the court would accept VISs submitted by family victims and publicly acknowledge the suffering of family victims. See New South Wales Legislative Council *Parliamentary Debates (Hansard)* 51st Parliament, 2nd Session, p 6388 (21 November 1996).

30 A question was posed to the Attorney-General by Hon CJS Lynn on 23 November 1998 regarding the failure of the Supreme Court to take account of VISs by family victims in a specific case: 'What action will the Attorney General take to ensure that VISs are given more than Clayton's status so that victims of crime can be made to feel that justice has actually been done?': NSW Legislative Council *Parliamentary Debates (Hansard)* 51st Parliament, 4th Session, p 10390. ('Claytons' is a reference to a non-alcoholic drink that was marketed heavily in Australia during the 1970s as the 'drink you have when you're not having a drink'.)

research discloses a focus on the effect of VISs on the operation of the criminal justice system, on the attitudes of the legal personnel involved and on sentencing outcomes.[31] These studies usually do not distinguish between primary or family victims. Moreover, there has been little empirical research in Australia specifically on either VISs from family victims or the position of family victims in the criminal justice system. The aim of this article is to bridge the Australian analytical lacunae and to evaluate and to analyse VISs from family victims filed in homicide matters in New South Wales against the background of the legislative reform and the judicial concerns subsequently expressed in *Previtera*.[32]

Methodology and Data Collection

In June 2000, the Registrar of the Criminal Registry of the New South Wales Supreme Court granted me access to all relevant homicide files completed after 2 April 1997, subject to the condition that the names of the family victims not be revealed in any subsequent publications. Between August 2000 and January 2001, each available homicide file was examined and the VISs submitted by family victims remaining in the files were located. This latter point, in itself, is important because, although the research indicates that VISs were submitted in most homicide matters, in only some 25 per cent of those files available were the VISs retained with the court documents. In the remaining 75 per cent of matters where a VIS had apparently been submitted but was absent from the file, the court record usually indicated that it had been returned to either the DPP or the family victim. Ultimately, 78 VISs were retrieved from the court files in relation to a total of 32 matters. Multiple VISs were filed in some cases, either because the matter involved more than one deceased or because many family members submitted VISs in respect of a single deceased victim.

A striking feature of the data collection was that, despite the legislation, the supporting regulations and the existence in New South Wales of the Victims of Crime Bureau, the submission of VISs appeared to proceed very much on an *ad hoc* basis. Overall, the VISs in the study revealed an apparent lack of central agency assistance to prepare the statements resulting in different modes of presentation and a remarkable variation in the quality of the statements. However, although the presentation of the VISs was highly idiosyncratic and reflective of the victim authors' individual circumstances, the data collected revealed strong common themes.[33] A system of classification

31 Erez and Rogers (1999); Erez et al (1994); Davis and Smith (1994); Hall (1991).

32 The decision in *Previtera* has been followed in later Supreme Court cases. See for instance *R v Bollen* [1998] NSWSC 67, *R v Dang* (1999) NSW CCA 42, *R v Horan* [1998] NSWSC 46, *R v Pham*; *R v Nguyen* [1998] NSWSC 172.

33 According to Paul Rock (1998), this is not surprising. In his study of the responses of bereaved people to the aftermath of violent death, he found that the survivors (family victims) felt they were members of a unique group, 'a special minority' (p 31). The survivors reacted to the unexpected death with sensations of acute grief and chaos (p 34) and, according to Rock, 'the very incoherence and

was therefore devised as part of the research methodology, to record the data by reference to the following categories:

- the impact of the deceased's death upon the family victim;
- the manner and circumstances of the death of the deceased;
- the attributes and personal qualities of the deceased;
- the [negative] characterisation of the offender;
- references to justice, punishment and penalty; and
- references to the processes of criminal justice and, in particular, to the trial.

As to the content of the VISs, the C(SP)A limits the information that may be provided by a family victim to 'the *impact* of the primary victim's death on the members of the primary victim's immediate family.'[34] The research revealed little awareness of this provision being demonstrated by a majority of family victim authors. Only 18 family victims of the 78 in the study confined their VISs to a description of the impact of the death of the deceased upon them. On the other hand, more than 50 VISs provided material relevant to issues outside the legislative criteria. Interestingly, those 50 VISs appear to have been accepted by the court in their entirety whereas two VISs submitted in separate matters had sections blacked out on the face of the document, presumably because those parts addressed issues outside the legislative parameters.

Findings

This section of the article focuses on the preliminary findings of the research project and evaluates the data as categorised above in the light of the legislative provisions and the concerns of the Supreme Court. For the purposes of this evaluation, a separate section describing the presentation of VISs generally is included. Although it is a significant finding that many family victims in the study expressed frustration and powerlessness in the context of their experiences with the legal system, such material is not directly referable to the concerns of the Supreme Court as expressed in *Previtera*. Thus the data recorded in the final category dealing with the processes of the criminal justice system will not be included in this report. However, the findings do indicate that further research is needed to determine the levels of satisfaction of family victims in the wake of legislative reform.

namelessness of the feelings constituting grief can give rise to manifest and recognizable similarities of experience' (p 56).

34 Section 26.

Presentation

The Regulations under the C(SP)A provide a standard VIS form, although use of this form by family victims is not compulsory.[35] Essentially, the form is a straightforward document that seeks details of impact of the death of the primary victim on the family victim(s). Medical or specialist reports may be attached. Although the family victim must sign the form, it is not a sworn document. In the study, with one exception, all family victims submitted separate statements that were either attached to the standard form or submitted as an independent document without the form.

Unlike other jurisdictions where it is common for a designated third party to prepare the VIS based on information supplied by the family victims,[36] 61 of the VISs in this study appeared to have been written by the family victims themselves. Of those reports obviously authored by third parties, one took the form of a police statement and was presented to the court as part of the police brief; two were written on behalf of the family victims by friends; 10 were prepared by professionals (usually psychologists); and two were submitted by grief counsellors who worked for the New South Wales Homicide Victims' Support Group. Six of the professionally authored reports were addressed to the DPP and it was noted in those reports that the family victims required interpreters. One professionally authored report was addressed to a private solicitor who appeared to be acting on behalf of the family victim, probably in connection with a compensation claim.

Because no one agency apparently undertakes responsibility for the preparation of VISs from family victims, there was little consistency in the form of the presentation of VISs. The length of VISs ranged from a few lines handwritten directly on to a standard form to several typewritten pages submitted as a separate document. Several VISs took the form of a letter to the court, the judge or the offender, while a few documents were simply titled 'VIS'. Although the Regulations provide that VISs are to be submitted on A4 paper, this requirement was apparently not enforced because VISs were submitted (and accepted) on paper of various sizes.

Moreover, the standard of presentation varied enormously. For example, in one matter the VIS was presented as a separate nine-page document: each page was displayed in a plastic sleeve and the sleeves were bound together in a plastic folder. The statement was beautifully handwritten and illustrated with large colour photographs of the deceased and his family. By way of contrast, a VIS in another matter was handwritten on small sheets of paper torn from a spiral notebook and was quite difficult to read.

Whilst most VISs in the study could be easily understood, spelling and grammar were of a variable standard and a few VISs were quite disadvantaged

35 *Crime (Sentencing Procedure) Regulations* 2000 (NSW). The form is located in the Schedule to the Regulations. Regulation 10 provides that use of the form is not compulsory but, nonetheless, the VIS must be 'legible, typed or hand-written on A4 paper and no longer than 20 pages in length'.

36 For instance, in SA the VIS is prepared by the police on the basis of information supplied by the family victim. See Erez (1994).

by their poorer standard of written expression and overall presentation. While it appeared that some family victims might well have been provided with assistance, particularly those who demonstrated knowledge of the proper content of such statements, there was no indication on the face of the court file of either the fact, or the source, of any assistance.

The Impact of the Death of the Deceased on the Family Victims

Essential to contextualising the impact of the deceased's death upon the family victims was the relationship between the family victim (and other family members) and the deceased. Most family victims were anxious to portray the deceased as a much-loved and valued family member. The VISs documented close, loving relationships between the deceased and the family victims with descriptions of the deceased such as 'a loving daughter', 'a very close loving big brother' and 'a soulmate'. In a few cases, family victims submitted lengthy and detailed narratives of the history and development of their relationship with the deceased and punctuated this narrative with several personal anecdotes and, occasionally, photographs.

All but two of the VISs in the files described the impact of the deceased's death upon family members. Typically, the VISs focused on how a particular person *felt*, how that person *grieved*, how that person *suffered* and the *implications* of the death of the deceased for that person or other family members. The 'impact' of the death of the deceased upon family victims encompassed an extremely broad range of harms including: grief, loss, sadness, suffering, distress, pain, anger, bitterness (particularly towards the offender), shock, suicidal thoughts, guilt, shame, failure, loss of innocence (usually referring to children), loss of control over life, adverse effect on work, relocation, loss of contact with other family members such as grandchildren or nieces or nephews, negative effects on existing relationships,[37] physical and/or mental illness, fear, financial insecurity, concern for other members of the family and ongoing treatment from doctors, psychologists or counsellors.

While such harms documented by family victims describe the 'impact' of the deceased's death upon them in terms of the personal loss suffered by those victims, this loss does not pertain directly to either the event of the deceased's death or the manner and circumstances of that death. Despite the Legislature's raising of expectations, the Supreme Court has held that it will not have regard to such personal losses documented by family victims in the sentencing process. Harms sustained by family victims are connected only indirectly to the homicide event insofar as the deceased's death is the catalyst for the personal loss suffered.

Manner and Circumstances of the Death of the Deceased

Almost a third of the family victims in the study described and/or characterised the manner and circumstances of the death of the deceased. Although this material is not within legislative parameters, the Supreme Court in *Previtera*

37 For example, many family victims documented separation due to the high levels of stress following the death of the deceased.

considered such information relevant to the objective circumstances of the offence. Common adjectives used by family victims to describe the homicide included 'cowardly', 'savage', 'brutal', 'gruesome' or 'horrific'. In one case, the family victims described the killing as an 'execution': 'My son was executed. He was murdered in cold blood, shot in the back of the head. This to me is such a cowardly thing to do.'

A few family victim authors devoted much of their VISs to graphic descriptions of the circumstances of the deceased's death and to their viewing the body of the deceased:

> When I think of what happened to my brother, the way in which he died. Minding his own business, driving along the highway in the middle of the night and from out of the darkness to have a rock come smashing through the windscreen. My eyes fill with tears, I want to scream and I feel sick to my stomach.

In another case:

> The family viewed [the victim's] body the day before he was buried. It was very evident that [the victim] had been savagely and brutally beaten by these people for no reason. I find it very hard not to continually think of [the victim's] last 15–20 minutes in the carpark.

The court in *Previtera* viewed the manner and circumstances of the deceased's death as relevant to sentencing and a basis on which to compare individual cases for the purposes of consistency and parity in penalty. However, in none of the matters in the study was the VIS, or the parts of the VIS dealing with this aspect, taken into account at sentencing; nor did the sentencing judge refer to this material in a relevant case, although the judge frequently characterised the manner and circumstances of the deceased's death in a similar fashion to that of the family victims.

Such omissions on the part of sentencing judges raise interesting issues. Various commentators have suggested that, in taking account of this material in the VISs, there may be a danger of legitimising the 'intemperate' and 'emotional' views of the family victims.[38] Inherent in consideration of the emotional and subjective nature of the views of the family victims is the risk that admission of such evidence may distract the judge from the objective and dispassionate process of sentencing. Implicit is the premise that only those VISs from family victims that exercise and demonstrate restraint may be acceptable to the objective process of sentencing.

The research reveals that the very nature of victim impact evidence means that it must necessarily be highly subjective and it is contended that it is neither possible nor desirable for a family victim to downplay effectively the emotional temper of their response. Victim impact evidence describes intensely personal and emotional reactions to a family tragedy and, in this

38 Hinton (1996), p 313. See also Hall (1991).

study, most of the VISs used highly emotional language to convey the effect of that tragedy in their lives. For instance:

> Nothing will ever replace the hole in our lives losing [the victim] has created. The anger and sadness we feel each and every day is unbearable. Although through this we have had to remain strong and go on with life as best can it will never change the love we felt for [the victim] and still feel, he remains in our hearts constantly and always will.

The 14-year-old daughter of a deceased victim said:

> I miss my Dad so much, my love for him will never stop. My mind has so many good memories of my father. But as time passes by, it gets harder and harder to remember these memories. I wish my Dad could be brought back so that he could be part of my life again. I would do anything to have him back.

Even in professional reports that otherwise tend to enumerate the psychological consequences to a family victim in a clinical manner, the language of the professional could at times, be highly emotional: 'I was especially struck by the air of frail vulnerability of the couple ... they appeared utterly desolate.' In a subsequent report for the same family victim, the same psychologist wrote:

> Indeed, despite my long professional association with bereavement, I was shocked, moved and deeply concerned at how little relief the passing of time has brought to the parents. Their grief appears unchanged and absorbing nearly all of their energies — intense, continual and hardly bearable.

In the absence of comment from the judges, one can only speculate as to the basis on which such strong emotive evidence from family victims has been read and disregarded in the sentencing process. However, there are indications in some judgments suggesting that judges may have taken the view that such information is already apparent from the evidence adduced at the trial and therefore, any further description is superfluous.[39]

The Attributes and Personal Qualities of the Deceased

As indicated earlier, a major concern of the New South Wales Supreme Court is that VISs from family victims could lead to the imposition of a penalty in proportion to the loved status or worthiness of the deceased victim. Implicit in

[39] For example in *R v Adam* [1999] NSWSC 144 at 28, Wood J said that the VISs from family victims 'underline in strong terms what would otherwise have been apparent from the evidence, namely that a decent and dedicated young police officer lost his life for no good reason whatsoever in a few moments of violence that was both inexcusable and wholly unnecessary'.

many of the judgments is the assumption that VISs from family victims aim to showcase the attributes of the deceased with a view to influencing the final sentencing outcome. Despite descriptions of the personal attributes and achievements of the deceased not being a legislative criterion, 21 family victims in the study nonetheless provided this information in some detail. For instance, the deceased's wife said:

> he was friendly, kind, thoughtful and he had the greatest sense of humour. [The victim] was a calm, pacifist who would never hurt anyone.

The deceased's sister:

> [the victim] was so kind-hearted, he loved music, sports and nature ... Thanks to [the victim] our home was always filled with animals, birds and fish. Our garden was always filled with fresh flowers and fish ponds which he had taken the time to build.

The deceased's mother:

> My son [the victim] was a great sportsman and loved any sport ... he played football in the white team and in the black team ... he was an outgoing young fellow and had lots of friends ... he used to love the bush, camping and hunting and collecting emu eggs ... he had two sides, the Aborigine and the white culture ... he was able to share ... he was not a cheeky boy, he was honest and faithful. He was not violent and had never been involved in fights ... he was not a drinker.

Many of the descriptions of the deceased were such tributes as to be in the nature of eulogies. In fact, two VISs included copies of the eulogies distributed at the funeral of the deceased together with photographs of the deceased. In another case, the VIS was a lengthy document containing many photographs of the deceased with a plea from the deceased's mother: 'So please look at the enclosed photos and endeavour to understand what our life is like without our [the victim].'

Negative Characterisation of the Offender

Fourteen family victims in the study negatively characterised the offender and two VISs were specifically addressed to the offender. The negative characterisation was frequently used to reinforce the value and worthiness of the deceased. The references to the offender tended to commonly focus on:

- the allegedly false testimony of the offender at the trial;
- the offender's contempt of court proceedings;
- the offender's lack of humanitarian feelings;
- the offender's lack of remorse; and
- the fear with which the family victims regarded the offender.

For example:

> People dump rubbish not bodies, and that is the hardest part of all this, the fact that you just dumped him, and did not show any humanitarian feelings for his family at all ... You at least could have shown a bit of remorse, your tears [in court] were only for yourself and not for [the victim] and with his family sitting in front of you, you could have at least said sorry for what you have done. But you didn't which just proves to us that you are not sorry in the slightest.

In another case:

> We believe these so-called men to be totally lacking in remorse. We believe them to be callous and brutal and without conscience. We also believe them to be cowards, typical of those who hunt in packs or are part of a mob.

On the other hand, the descriptions of the deceased tended to be quite idealised, with only favourable (and no negative) attributes referred to. It was rare to find any negative images of the deceased, particularly when contrasted with negative descriptions of the offender. Inclusion of this material in the VISs sheds light on the cathartic value that the need to vent their resentment of, and bitterness towards, the offender has for many family victims. Nonetheless, it was also apparent that most family victims expected that their input would result in the imposition of a harsher penalty for the killing, due to their description of the value and worthiness of the deceased, relative to the negative characterisation of the offender.

References to Justice, Punishment and Penalty

The VISs in the study contained many references to justice and penalty. Although recommendations as to the appropriate imposition of penalty or any discussion of punishment are *outside* the legislative parameters, whatever the understanding or expectations of family victims, almost a third of the family victims referred to these issues in their VISs. For instance:

> I hope that the court deals with this person who has caused all this heartache and pain to the fullest ... in my opinion he should be shown no mercy.

In two cases the authors overtly called for harsh or the harshest penalties: 'Please relieve a mother's aching heart and those of my grandchildren and family and bring down the MAXIMUM sentence. [signed yours in trust].' From the second of these two cases:

> I wish not to sway your sentencing in any way but to remind you that so many beautiful people have been irreversibly effected by [the victim's] death, not just his death but the brutal way in which he died ... we would like, and I think it would help a lot of people, not only our family, to have a sentence that will surfice [sic]. I would like you to think about [the victim] for a moment before you pass sentence and then ask yourself, 'if [the victim] was my son; would this sentence be adequate?' I'm sure if you do this you won't be disappointed — neither will we.

These instances aside, it was common for family victims to utilise more subtle forms of pressure such as calling for 'justice' ('we really hope that justice will be done', 'all we pray for is justice for our [name of victim]') or asking for 'examples to be set' and trusting the court not to be 'too lenient'.

Conclusion

The most compelling finding is that the nature of the 'harm' suffered by family victims reflects a myriad of losses that can be categorised as 'personal loss'. Although the killing is the catalyst for the harm sustained by family victims, that harm is otherwise unrelated to the deceased's death. Thus the crucial question is: are the various types of harm sustained by family victims of such a nature as to be relevant to the punishment of offenders for homicide offences? According to the New South Wales Supreme Court, the answer is 'no' — such harms are relevant to compensation, not punishment. However, as outlined earlier, this is not the position in Victoria, South Australia and Western Australia where VISs submitted by family victims are taken into account for the purposes of determining sentence. Whether or not consideration of this harm serves the retributive purposes of sentencing is a critical issue that needs to be explored further.

Another striking finding from the research conducted is that the range of harms sustained by family victims is so incredibly diverse that an objective assessment of those harms must be problematic. Even if the 'harm' suffered by family victims is regarded as relevant to sentencing, how is each 'harm' or 'loss' suffered to be measured and quantified 'objectively'? What weight is to be attached to each individual reaction in the sentencing process? Will there be reactions of family victims that will be considered more 'acceptable' than others and therefore of more influence in the sentencing process?

It may be that the character and relevance of harm suffered by family victims is ultimately irrelevant because of other, overriding concerns. The nature of victim impact evidence from family victims is such that it is put to the court with the obvious intention of promoting the personal qualities and attributes of the deceased victim with the aim of increasing penalties imposed on the convicted killer. The research findings demonstrate that the VISs revolve around common themes of strong family links, the value and worthiness of the deceased, the negative qualities of the offender and the requirements of justice. If the interests of justice and equality are to be served, how can VISs from family victims ever be a proper factor to be taken into account during sentencing if the direct and necessary result is likely to be that

an improper valuation of the deceased's life may influence the penalty imposed?[40]

Finally, in all of this analysis, there is a danger of forgetting that what has happened to these family victims is a tragedy. It is essential that family victims have a voice in the criminal justice process. Even if the VISs by family victims cannot be used to determine the ultimate penalty, their voice should still be heard and respected by the court, the offender and the community so, at the very least, we can all be reminded of our humanity. Therefore, not only is it essential for the courts to receive all VISs by family victims, but it must also be apparent that the court is both listening to those family victims and hearing them, even if it cannot regard the VISs as a factor in sentencing. To this end, it is crucial that the court must comment publicly upon VISs submitted by family victims in each and every case and acknowledge the suffering of those victims and their grief as a result of the death of the deceased. Moreover, the court should take particular care to ensure that the offender is also made aware of the extent of pain and trauma suffered by the family victims. If VISs from family victims cannot serve retributive purposes in the determination of sentences, those VISs play a crucial role in restorative justice for family victims.

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[40] The author has received a research grant to investigate this question in the context of the Victorian and South Australian decisions that take account of VISs by family victims for the purposes of sentencing.

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