

## **‘Cooling out’ victims of crime: Managing victim participation in the sentencing process in a superior sentencing court**

### Abstract

Victim participation in the sentencing hearing by way of oral victim impact statements (VISs) is a contentious aspect of contemporary criminal justice. A particular concern is that the disjuncture between the legal goals of the sentencing hearing on the one hand and the goals of victims on the other can generate tension and conflict in the courtroom and threaten the integrity of the process. The subject of this article is the management and containment of victim participation in 18 sentencing hearings observed in the NSW Supreme Court. It is argued that various cooling out structures and processes effectively managed and contained the emotional tension in the courtroom as well as assisted victims to adjust to the legal constraints and the compromise inherent in their position in the process.

Keywords: victim impact statements, sentencing, cooling out

### Introduction

Victim participation in the sentencing process by way of victim impact statements (VISs) is a contentious aspect of contemporary criminal justice (Henderson, 1985; Ashworth, 1993; Bandes, 1996; Sarat, 1997; Hoyle et al, 1998; Erez, 2000; Sanders, et al, 2001; Edwards, 2004; Kirchengast, 2006; Author/s, 2007). More recent concerns relate to the integration of oral VISs in the sentencing hearing (Rock, 2010). Much of the controversy in this regard stems from the disjuncture between the very different goals and interests of the adversarial legal process on the one hand and those of crime victims on

the other. From a legal perspective, legal processes operate according to established principles; objective and rational decision-making is highly valued and the expression of strong emotions in this sphere is inappropriate. Many victims on the other hand want to be heard and express their feelings in relation to the crime. Changes in our society's sensibilities in the second half of the 20<sup>th</sup> century led to the recognition of the emotional dimension of legal matters as a proper concern of the law (Laster and O'Malley, 1996). In the last two decades there has been a discernible shift – through movements such as therapeutic justice and restorative justice – to the 're-emotionalisation of law and its processes' (Karstedt, 2011:3, 2006). A key feature of this emotional paradigm is the focus on victims and their emotional needs; the concomitant incorporation of VISs in the sentencing hearing is intended to provide victims with space for their emotions. That this disjuncture has the potential to produce potential for tension and conflict in the courtroom and bring the law into disrepute was recently demonstrated in a Victorian case, *Borthwick* [2010] VSC 613 (Iaria, 2010; Fogarty, 2010).<sup>i</sup>

It is only in recent times that research has started to emerge with regard victim participation in the actual sentencing hearing (Rock 2010). This article aims to contribute to this emerging body of research by exploring findings from an observation study of sentencing hearings of homicide offenders in the NSW Supreme Court.<sup>ii</sup> The subject of this article will be the containment and management of victim participation through oral VISs in the courtroom.

Since 1997, members of the deceased victim's family statutorily described as 'family victims', have been entitled by statute to submit a VIS to

the sentencing hearing in matters where the deceased victim has died as a result of the offence.<sup>iii</sup> From 2003, family victims have also had the option of reading their VISs aloud to the sentencing court.<sup>iv</sup> The study found that while the levels of emotional tension in the courtroom were raised in those matters where VISs were read aloud to the court, proceedings nonetheless remained orderly in all but one matter. Moreover to the writer's knowledge, there were no media reports of victim dissatisfaction.

Goffman's 'cooling out' process (Goffman, 1952) provides the conceptual framework for analysing these findings. It is argued that family victims were 'cooled out' by various legal structures and processes so as to manage and contain the emotional tension in the courtroom as well as assist victims to adjust to the legal constraints and the compromise inherent in their position in the process. The cooling out structures and processes demonstrated an empathic response to the situation and concerns of victims.

Part one outlines the disjuncture between the goals and interests of the adversarial sentencing process on the one hand and family victims on the other and illustrates this disjuncture through *Borthwick*. Findings from the recent UK study of VISs in the courtroom are also outlined. Part two sets out findings from the observation study which are then analysed through the 'cooling out' framework in part three.

## 1. The Disjuncture between family victims and legal process

There are three major aspects to this disjuncture: the adversarial form of legal proceedings, the narrow legal focus of the sentencing hearing and the expressive function of VISs.

### *The adversarial form of legal proceedings*

Legal proceedings take an adversarial form which means that the sentencing hearing is conducted by two opposing and partisan parties – the prosecution who prosecutes the charge on behalf of the Crown (representing the State and the community, here called ‘the Crown’) and the defendant. Only the Crown and the defendant have legal ‘standing’ to participate in the hearing by presenting and scrutinising evidence and making submissions in relation to penalty. These official parties shape the hearing, identify the contentious issues, determine the evidence and influence penalty. Family victims are not parties and excluded from this process. The proceedings are managed by an independent and impartial sentencing judge who determines the penalty (Spigelman 2004).

Moreover, as non-parties, family victims are physically excluded from the conduct of the hearing. The adversarial form of the hearing configures the courtroom space into a series of clearly demarcated and hierarchical zones (Tait, 2001; Mulcahy, 2011). The business of the hearing - taking evidence, hearing witnesses, making submissions and imposing penalty - takes place in the body of the courtroom, here called the ‘central performance zone’. Only the judge, the parties and their legal representatives are permitted in this zone during the hearing; ‘outsiders’ enter by invitation. Family victims are not allocated space in this zone and of necessity they join members of the public in the public gallery as the ‘audience’ to the hearing. The public gallery is a zone established at the rear of the courtroom physically separated from the central performance zone by a railing or some other barrier. From this region,

the view of the hearing may be restricted and the audibility of the proceedings varies in quality.

In contrast in civil law jurisdictions, family victims are included in the proceedings as *partie civile*. Tait describes a French murder trial in which the family victims were “fully included” being located in the performance zone and able to ask questions of the defendant (Tait, 2001: 207-208).

### *The legal focus of the hearing*

The focus of the hearing is the defendant: the circumstances of the defendant’s crime, the defendant’s personal situation and the defendant’s future. Viewed from a narrow legal perspective, the sentencing hearing aims to evaluate the seriousness of the offence and determine the appropriate punishment for the offender according to law. The parties tender evidence to the court relevant to the nature of the killing and the defendant’s culpability as well as any particular mitigating and/or aggravating factors that might affect penalty. While the maximum penalty is prescribed by statute, the ultimate penalty imposed is a function of the judge’s discretion guided by the relevant legislative and common law principles such as retribution, deterrence, rehabilitation and protection of the community.<sup>v</sup>

The *Crimes (Sentencing Procedure) Act 1999* (NSW) provides family victims with a limited opportunity to participate in this process through the submission of VISs that recount the impact of the deceased’s death on his or her family.<sup>vi</sup> From a legal perspective however, it is unclear whether the purpose of such a statement is to influence the penalty imposed. Little guidance is provided in the legislation which simply directs the court to take

account of VISs from family victims in the determination of penalty only “if it considers that it is appropriate to do so.” The NSW Supreme Court has taken the view, however, that it is *not* appropriate to take account of such VISs from family victims because the resulting penalty might reflect not the culpability of the offender but instead the value and worthiness of the deceased person (*R v Previtera, R v FD; R v JD*, Author/s 2007, Kirchengast, 2005)<sup>vii</sup> (). The more valuable and worthy the deceased, the greater the impact of the death on the deceased’s family, the greater the harm caused by the offence and the greater the penalty imposed. Thus not only are family victims practically and physically excluded from the conduct of the sentencing hearing, but their VIS will not influence the penalty ultimately imposed.

#### *The expressive function of VISs*

Despite not being relevant to determining penalty in NSW, VISs do serve an expressive function that is particularly important from a victim’s perspective (Roberts and Erez, 2010, Ministry of Justice, 2008, Department of Justice, 2009). In *R v FD; R v FD; R v JD*,<sup>viii</sup> Sully J identified that expressive function as according:

[v]ictims of crime, and especially the victims of violent crime, a forum in which they can make a public statement in words of their own choosing in order to have the emotional catharsis of ensuring that their grief and loss has not been ignored altogether or expressed in what they see as an inadequate way.

Through this mechanism, enhanced if the VIS is read aloud to the court, family victims acquire a much wanted 'voice' and an opportunity to be seen and heard in the hearing. Family victims are able to describe their experiences, express their feelings about their loss, make their deceased family member visible to the court and become involved in the sentencing hearing rather than remaining the silenced bystander (Roberts and Erez, 2010). In contrast to the perceived rights of defendants, a frustrating issue for many family victims however, is that they cannot say what they want; they are constrained by law and limited to describing the impact of the deceased's death on their family (Rock, 2010, Department of Justice, 2009). Even more frustrating for many victims is the fact that they do not have control over their VISs. In the first place, VISs can be edited by the Crown before the sentencing hearing. Further once in the court, the defendant can object to the content of a VIS and, if it does not comply with the law it may be edited and parts deleted altogether in open court.

The expressive function of a VIS read aloud to the court has been regarded as problematic by many legal practitioners (Rock, 2010). In describing the grief and suffering experienced as a result of the deceased's death, the content of VISs is highly subjective, the language emotive and the oral presentation of those statements allows the expression of strong emotions in the courtroom (Author/s, 2001, Hinton, 1996). From a legal perspective, the principle of a fair hearing entitles the defendant to be heard in his or her defence and have his or her penalty determined in a neutral and objective forum. The concern is that oral VISs "laden with emotionality, potentially uncontrolled, lacking the calm, dispassionate tones of criminal

procedure” (Rock, 2008: 116-117) might detract from the neutrality and fairness of the sentencing hearing itself (Justice Strategy Unit (SA), 1999:141, Chalmers et al, 2007: 377).

### *Borthwick*<sup>ix</sup>

According to the law in Victoria, family victims are able to submit VISs but unlike NSW, those VISs are relevant to the determination of penalty.<sup>x</sup> Borthwick was convicted of the manslaughter of Mark Zimmer and at the sentencing hearing in September 2010 family victims submitted VISs wanting to read them aloud.<sup>xi</sup> The defence objected to content of the statements on the basis that it did not relate to the impact of the offence on the family as required by law. According to media reports, the court then spent some 90 minutes reviewing the objections, editing and deleting ‘inadmissible’ material in open court. Apparently no explanation was provided as to why the material was deleted other than the judge reportedly saying: “Of course victims can feel these things, but as we all know the law governs what can be in a victim impact statement” (Fogarty, 2010). Amended versions were then handed back to the family victims who appeared appalled at the outcome. It was reported that the deceased’s sister tore her VIS in two pieces and ‘stormed out of the courtroom in tears. Outside she told media: ‘My heart was on those pieces of paper and they have just destroyed them’ (Iaria, 2010) Later, the deceased’s father told ABC Radio National (2011):

we came to court today expecting to have our day in court and to be able to read our impact statements in front of the court; only to hear that the defence had objections to our statements and that the defence

wanted to edit our statements, and then we also found out that it was their right to edit our statements. We couldn't tell the court how we felt, it was up to the defence to be able to edit how we felt.

Members of the deceased's family subsequently gave media interviews about their distress and anger at their experiences in the courtroom. The case received wide media coverage and led to calls to review the way VISs are handled in the courtroom. As a result a new practice direction was implemented in May 2011 for sentencing hearings in the Victorian Supreme Court; in summary copies of VISs are to be supplied to the defence at least 10 days before the hearing and the Crown and defence are required to confer with regard to any contentious issues prior to the hearing.<sup>xii</sup>

### *UK Research*

Research regarding the integration of oral VISs in the sentencing hearings of homicide offenders has emerged from the UK in the evaluation of a pilot VIS scheme that operated in selected UK courts, 2006-2008 (Ministry of Justice, 2008).<sup>xiii</sup> Under this scheme, VISs in murder and manslaughter matters could be read aloud to the sentencing court by family victims directly, or by someone on their behalf – the Crown Prosecutor, an independent lawyer (victim's advocate) or layperson. The content of the statements was limited to the impact of the deceased's death on the family. Part of the evaluation comprised case studies of four matters - interviews with all major stakeholders (except the defendant) and observation of related court hearings (Rock, 2010). VISs were read aloud to the court in three of those matters while the fourth matter resulted in an acquittal.

It was found that many legal professionals opposed VISs being read aloud to the court by family victims on the basis that the associated rise in emotional tension could have a negative impact on the courtroom dynamics impairing “the dignity and fairness of the sentencing process” (Ministry of Justice, 2008: 33, Rock, 2010). Judges raised concerns that offenders could believe VISs were influencing penalty, that proceedings would not run smoothly, and that presentation of the evidence in that manner would be “overly confrontational”, generating not only embarrassment and discomfort but perhaps also “violence” in the courtroom (Ministry of Justice, 2008: 34).

On the other hand, families were found to generally respond positively to the opportunity to present their own VISs and many found the process therapeutic. There were however reports of a few cases where families’ distress was exacerbated because their statements were edited or their delivery curtailed in the courtroom. Overall the study found that oral VISs had a “notable impact on the dynamic of the courtroom” and inevitably raised emotional tension (Ministry of Justice, 2008: 31). The evaluators were of the view however that this was inevitable at many stages of the criminal trial and the crux of the opposition from the legal professionals was that such emotional displays were not appropriate in the legal proceedings.

When the scheme was rolled out nationally in 2008, family victims had lost the opportunity to read their VIS aloud; if the VIS is to be presented orally it is now read by legal counsel. According to the research team “additional work will be required with all stakeholders, in particular the judiciary, if oral delivery of the statements by families is to be taken forward” (Ministry of Justice, 2008: v).

## 2. The study

The observation study aimed to explore the impact of this disjuncture in the context of sentencing hearings of homicide offenders in the NSW Supreme Court. Data has been drawn from the observation of 18 sentencing hearings in the NSW Supreme Court, selected randomly from published court lists, between July 2007 and December 2008. Observations were recorded in field notes and transcribed within a few hours of the hearing. These notes were later supplemented with digital copies of the transcripts of 16 of the 18 hearings and 22 of the 30 VISs read aloud in those hearings. A grounded theory model using a constant, comparative approach was adopted as a basis for analysis (Charmaz, 2006).

### *The hearings*

The structure and conduct of the sentencing hearings reflected the adversarial model described above. Unlike the well-documented crowded court lists of lower courts (Carlen, 1976), the sentencing hearings were the only substantive matters in the list for the session and 15 of the 18 matters were concluded within two-three hours. Each hearing followed a similar sequence. First, the Crown presented its case through a tender of documents including a statement of facts, the defendant's criminal and custodial histories, VISs, additional materials or documents such as photographs or medical reports and penalty submissions. Only in two cases did the defence object to the VISs (see below) and no family victims were cross examined in relation to their statements. Once accepted by the court VISs could then be read aloud. In

turn, the defence presented its case, tendering evidence in mitigation such as medical reports and penalty submissions.

A total of 38 VISs were received by the court in the hearings observed and 30 of those were read aloud in 13 matters: 22 by family victims, six by a support person from the Homicide Victims Support Group (HVSG), one by the Crown and the other by the judge. In six matters, eight VISs submitted to the court were not read aloud. The content of these written VISs was not disclosed to the court and the family victims were not otherwise acknowledged. Conversely, oral VISs were a prominent component of the hearings observed. Family victims were formally invited into the central performance zone from the public gallery to read their statements. In 11 cases, the family victims were seated in either the witness box or the jury box from which they could easily access water and tissues and read their statement with a degree of comfort. In two matters however, the victims stood beside the bar table with no support for their statements nor access to other comforts. In the sombre, silent courtrooms, family victims were in close physical proximity to the defendants and the bar table crowded with bewigged and gowned lawyers. Unsurprisingly in these surroundings, most family victims showed signs of nervousness such as shaking hands, trembling voices.

The presentation of oral VISs differed significantly from other oral testimony. Because family victims were not regarded as witnesses they were not sworn or affirmed before reading their statements. Moreover, the content of the VISs was not extracted in a traditional question-answer format; instead, the statements were read aloud in narrative form without interruption. The

emotional pitch or tone of the oral VISs was also very different to the tone of other material presented in the courtroom. For instance when lawyers presented material such as submissions on penalty, they spoke in measured tones, with neutral affect; their language was technical, complex and functional. Family victims however were not reading legal documents or talking about technical legal matters; their statements were not read in measured tones and the language was emotive rather than functional. Most family victims expressed distress and frustration and shed tears; all VISs told stories of a loved family member, heartbreak, suffering and loss. By way of example, one deceased's mother told the court:

I can go for a day without crying for him... *but it doesn't last*. It is always there waiting to knock you down...*it is the enormous wave of grief that suddenly engulfs you and it's as if you can't breathe*. You are so overwhelmed by the blackness of it that you feel you are going to drown in it...the pain of losing [my son] is something that I will never get over. My whole life is lived with this terrible burden of sadness...I think about him all day everyday and I will until the day I die.<sup>xiv</sup>

There was no indication that victims spoke of matters outside their approved VISs. It was striking however that much of the approved content of the VISs heard was outside legislative guidelines, referring to a range of inadmissible material such as the killing, the defendant, the penalty and the criminal justice system. Expressions of anger and frustration about a lack of information, legal constraints and/or the defendant were common. A frequent complaint related to the editing of VISs. For instance, in one matter, the mother of the deceased victim said:

I am so angry that I can't even express what I really want to say in this... statement. It had to be edited to make it "ACCEPTABLE". What [defendant] did was not acceptable, but I have to be careful what I say...This is so unjust.<sup>xv</sup>

Some family victims made references to the killing. One talked of "the terrible way" her son had died, attacked by three men and "chased like an animal". Another reminded the court that her son had died as a result of "21 stab wounds, not 1 or 2". Various descriptions of the crime were also put to the court: "a senseless, despicable act", "an execution", "cowardly" and "unforgivable". And many victims talked about penalty: "I want this monster to pay for his crimes"; "I hope the court does the right thing by me and my family".

VISs varied considerably in length, ranging from five to 25 minutes and the total victim impact evidence in each matter usually did not exceed 40 minutes although in one unusual case five VISs took 90 minutes to complete. Even though several VISs were lengthy, or presentation of the evidence was delayed by the victim's distress, no family victim was hurried. When they finished reading their VISs, they either returned to their seat in the public gallery or on two occasions, left the courtroom. In most cases, there was little response from defendants who remained largely "remote, inscrutable, passive" (Rock, 2010: 219) while the VISs were presented. Only in one matter did the defendant shed tears while the VISs were read to the court.

#### *The exceptional case*

In this matter five VISs were read aloud to the court by the deceased's brothers and her mother's representative. The brothers' VISs were handed to the court on the morning of the sentencing hearing and two were handwritten. During the course of the hearing, the proceedings were interrupted by the emotional outpourings of the deceased's brothers who at various stages cried, shouted and threatened the defendant.

From the outset, little attention was paid to the comfort and well being of the family victims. They read their statements standing beside the bar table and when distressed, were forced to lean against the table for support. Furthermore, the defence barrister demonstrated a marked lack of respect and sensitivity for the family victims; at one stage when her mobile phone rang audibly, she left the courtroom and remained outside for approximately two minutes.

During the course of reading their VISs, two of the brothers shouted threats at the defendant such as: "Wayne you need to suffer the way you have made us suffer".<sup>xvi</sup> After the VISs were completed and the offender was giving oral evidence about his mental illness and alcoholism, the proceedings became somewhat disorderly. The defendant spoke quietly and the deceased's brothers were swearing at him loudly telling him to speak up. After a couple of minutes the police asked two of the brothers who were shouting to leave the courtroom. The judge did not look at the brothers as they shouted and nor did he exhibit surprise at this ruckus as he continued to focus on the defendant giving evidence. This case was the exception. Despite the disjuncture outlined in part one and potential for tension and conflict as demonstrated in *Borthwick*, while the content and presentation of oral VISs

certainly raised the emotional tension in the hearings, these emotions did not 'flood out' causing disorder in the courtroom in the 12 of the 13 cases.

### 3. Discussion

It is argued that these findings are in large part a function of cooling out structures and processes that managed and contained victim participation in the courtroom.

#### *Goffman's cooling out process*

Goffman developed the concept of cooling out in the context of a confidence game where cooling out is the final stage of the scam (Goffman, 1952). To avoid the 'mark', the person duped by the scam, complaining to the police or otherwise generating bad publicity for the scammer's business, the scammer works to cool out – pacify, console and re-orient – the mark. Cooling out is necessary to defuse the mark's anger at his or her financial loss and loss of face; the goal is to "define the situation for the mark in a way that makes it easy for him to accept the inevitable and quietly go home" (Goffman, 1952: 451)

The cooling out process has since been shown to operate in many social settings including American higher education (Clark, 1960). A college education was a recognised pre-requisite for better employment prospects and "moving upward in status" (Clark, 1960:570). An 'open-door' admission policy operated in publicly supported American colleges; unlimited entry was thought to provide equal opportunity for all citizens to acquire such an education (Clark, 1960:570). There was a disjuncture however between

students of poor academic ability entering college with expectations of advancement but destined to fail because they were unable to meet the performance standards (Clark, 1960: 571). The higher education sector was required to 'handle' these disappointed students in a manner that preserved their motivation but deflected their resentment at their loss of status and prospects (Clark, 1960: 571). Clark examined cooling out processes of specialised junior colleges that assisted low achieving students to realistically evaluate their own abilities and vocational choices and strive for achievable goals.

Given the disjuncture between the legal process and family victims, the sentencing hearing is a setting in which cooling out processes and structures can defuse or reduce victims' anger and/or resentment, help family victims adjust to prevailing constraints imposed by law, and induce them to proceed acquiescently within the legal framework. If victims are not successfully cooled out, negative emotions associated with their grief, disappointment and resentment could 'flood out', disrupt the legal proceedings, threaten the fairness of the hearing and undermine public confidence in the administration of criminal justice. In recent years, the role of the court is "being increasingly judged in terms of service quality and its responsiveness to the views and expectations of those involved in the proceedings as well as the wider community" (Jeffries, 2002:9-10). It is important that court processes in this environment, now more than ever in the public eye, be seen as reflective of community standards and expectations. Reports of angry, distressed victims who perceive unfair treatment and re-victimisation by the law and its agents in the courtroom are the stuff of political nightmare. Unlike the shadowy, private

world of the “con mob”, the court is a critical public institution dispensing justice and as such it “cannot take it on the lam; it must pacify its marks” (Goffman, 1952: 455).

Empathy is a significant component of cooling out structures and processes. According to Henderson empathy is both a “way of knowing” and a “catalyst for action” (1987: 1576). As a way of knowing, it is the quality of understanding the experience or situation of another (Henderson, 1987:1576). This involves reading both verbal and non-verbal cues and being sensitive to the affective state of the situation (Eisenberg and Strayer, 1987: 5-6). As a catalyst for action, empathy generates empathic responses to situations such as providing information, communicating a sense of caring or responding to the situation in a ‘helping and non-judgmental manner’ (Eisenberg and Strayer, 1987: 5-6). In the sentencing hearing, cooling out structures and processes demonstrate both awareness of and response to the impact of laws and legal procedures on crime victims.

The cooling out processes and structures involved in the sentencing hearing will be examined in two phases: the ‘consultation phase’ and the ‘courtroom phase’.

### *The Consultation Phase*

The consultation phase is that period before the sentencing hearing where the Crown consults with family victims in relation to the preparation and presentation of VISs.<sup>xvii</sup> Certain components of this phase perform a significant cooling out function to assist family victims to understand and comply with the rules of the sentencing hearing and adjust to legal constraints on their voice.

Prosecutorial guidelines published by the NSW Office of the Director of Public Prosecutions (ODPP)<sup>xviii</sup> require the Crown lawyers to obtain and review draft VISs from family victims to ensure that the VISs deal only with the impact of the deceased's death on the family and contain no offensive, threatening and/or harassing material. In this process a VIS, a highly personal document that has often taken months to prepare, can be changed or rejected during consultation if it contains inadmissible material. Even though the Crown 'consults' with family victims about any editing of VISs, the law is not negotiable; family victims learn that they do not have an unfettered 'voice' in the sentencing hearing and, further, that that voice might be lost through non-compliance.

If VISs were not reviewed, there is a risk that successful objections could result in the statements being deleted in part or entirely. Such outcomes are potentially humiliating and frustrating for the victim and a source of tension and conflict as occurred in *Borthwick*. Thus the review process serves an important cooling out function by both assisting family victims to prepare an admissible VIS that can be read to the court and also in reducing the likelihood of conflict disrupting the hearing.

Once the VISs go through this 'filtering' process, copies are forwarded to the defence.<sup>xix</sup> This seemed to be the practice in all but the exceptional case where the court was told that the parties had received VISs from the deceased's brothers that morning. By this process, the Crown received notice of any contentious issues and can prepare the family victims for what might happen at the hearing. In contrast to the situation in *Borthwick*, the lack of

surprise on the part of the family victims whose VISs were subject to objections suggested that they had come to court prepared.

Another important cooling out component during this phase is that family victims have room to 'vent' at their lack of control and compromise (Goffman, 1952: 457). And it is preferable that victims express their anger and disappointment in the relative privacy of an office under appropriate guidance rather than under the public gaze in the courtroom where such venting could disrupt the hearing and threaten public confidence. A consultation period provides victims with time for reflection and adjustment to the legal framework. Of course the family victims were still angry or disappointed as was noted in part two but they nonetheless came into the courtroom informed and complied with the restrictions.

Consultation before the hearing reduces the likelihood of these scenarios arising in the courtroom. In this light, consultation can also be viewed as prevention strategy which aims to ensure that the victim does not require cooling out in the courtroom - a difficult and risky course.

### *The courtroom phase*

Cooling out processes in the courtroom operate to defuse the expression of victim distress and/or anger and lessen the strains of the ordeal presenting VISs. The object is to maintain orderly proceedings conducive to achieving the desired legal goals. . The courtroom phase is divided into two main stages: the reception of VISs in the courtroom and oral presentation.

## The reception of VISs in the courtroom

This stage comprises the tender and scrutiny of VISs, handling objections and amending the statements if necessary. While formal objections were made in two cases (see below) a conspicuous feature of the remaining hearings was the marked lack of debate regarding the content VISs despite the inadmissible material described in part two.

The following exchange took place in one case after VISs were submitted. When later read aloud the VISs contained angry comments regarding punishment, the killing, the criminal justice system.

D: There may be some material there that is irregular in terms of content, but I don't want to make anything of that your Honour.

J: They will be marked as Exhibit B on sentence, and received on the usual basis.

C: I can indicate there are some sections in there, as my friend suggests, that are probably not appropriate for an impact statement, and we do not rely on them.

This and similar exchanges in other cases revealed that family victims were 'cut some slack' in relation to what they could say in their VISs in court. It was a collaborative effort on the part of the legal professionals; in downplaying the inadmissible material the lawyers' remarks indicated their trust that the sentencing judge would deal with the VISs appropriately and the inadmissible material would have no impact on sentence (Erez and Laster, 1999). Similarly the judge's comment that he received the VISs 'on the usual

basis' conveyed that that trust was well placed and the VISs would be handled according to NSW law i.e. the content disregarded for the purpose of formulating penalty. This process of neutralising the legal impact of the VISs however was most likely not evident to the family victims (all non-lawyers). From their perspective, the VISs were accepted and they could then read them aloud to the court. While it might have been incidental to legal process and the legal professionals were not acting to preserve the feelings of the family victims, the effect was that family victims were not frustrated or angered by public interference in their VISs in the courtroom; they were able to present their statements in accordance with expectations fostered during the consultation phase.

Further, it is unlikely that the significance of the words "on the usual basis" would have been apparent to the family victims. Although family victims in NSW are supposed to be told that their VISs will not influence penalty, it is unclear what expectations may nonetheless be harboured. The law is certainly not made plain in the sentencing information package where family victims are told that the court will only "consider the VIS in connection with the determination of the sentencing to be imposed if it considers that it is appropriate to do so".<sup>xx</sup> These words are lifted directly from the legislation and the context suggests that it could be appropriate in some circumstances to consider VISs which is misleading given the current law. It would not be surprising if many family victims harbour misguided hopes or expectations that their VISs could influence the penalty imposed. Indeed, this would be consistent with Rock's findings that while the family victims in his study had been told that their VISs could not influence penalty, they nonetheless held

hopes that their VISs would lead to the imposition of a harsher penalty (Rock, 2010: 211). Again, while it may not have been the subjective intention of the legal professionals to respond sensitively to the needs of the victims the effect was that there was no public statement that the VISs were irrelevant to sentencing which might well have humiliated and angered victims in the courtroom.

### Objections to VISs

It is evident that objections to VISs have the potential to place great stress on the hearing and the family victims involved and cooling out strategies are essential in the handling of objections in the courtroom.

In this study, objections were made in two matters. The defence objected to the tender of VISs in the first case on the basis that the authors of the statements did not qualify as family victims. According to the legislation, a family victim can only submit a VIS where the deceased has died “as a direct result of the offence”<sup>xxi</sup> and in this case the defendant had been convicted of being an accessory after the fact to murder. The judge upheld the objection but said that he would explain the law because the deceased’s family were in court. His Honour said that he wanted to ensure the family members understood that they were prevented from submitting their VISs because of the law and not because of anything that they had written.

Such an outright rejection of VISs could have generated tension and conflict but did not. The family victims sat silently in the public gallery while the objection was being ruled upon and, as already noted, they did not appear surprised or shocked. More importantly, the judge’s remarks recognised their

interest and status as victims in the matter by acknowledging their disappointment and taking the time to explain the legal position to them.

The second case involved objections to the content of two VISs tendered. Defence counsel indicated that the objectionable parts were 'highlighted' in the copies of the statements handed to the judge but gave no further explanation. Again the family victims appeared prepared for the course of events. The judge read both VISs and agreed with the defence in relation to the first VIS and in part with respect to the second. The judge then told the family victims that they could only read aloud those parts of their statements that were not marked. This was a high profile case and the very small court room was crowded with friends and supporters of the defendant as well as journalists. There was certainly potential for the family victims to have been humiliated and angered at the public rejection and editing of their personal statements and these emotions could have flooded out disrupting the proceedings as had occurred in *Borthwick*. Like the first case however, the judge explained the law clearly and at length to the court and emphasised that the decision to delete sections of the VISs was neither personal nor a reflection on the victims. The judge told the first victim "It's not a subjective criticism of you Ms [X] but it's a matter we must do according to the law".

Before the first family victim commenced reading her statement, the judge reassured her that the opportunity to read her VIS "was not wasted" because being unable to read the highlighted sections "wouldn't matter very much to the impact of what you say." The family victims then in turn sat in the witness box and read their VISs aloud to the courtroom as directed and the proceedings continued in an orderly fashion.

Empathic responses to the plight of the family victims were fundamental to the cooling out processes in both cases.

### The ordeal of presenting VISs

When it comes to reading their VISs aloud to the court, not surprisingly for many victims such a public expression of private grief, especially in an alien, intimidating courtroom before the defendant is an ordeal (Rock, 2010; Department of Justice, 2009). Cooling out family victims as they present their VISs so that they might remain calm and compliant is primarily a challenge for sentencing judges; judges are required to deal directly with unrepresented, bereaved victims, the expression of their emotions and the emotions generated by the VISs in the courtroom. The sentencing judge's task is to both provide a space for the victim's voice in accordance with the legislation and maintain an orderly court so vital to the conduct of a fair hearing. It is important that the expressions of emotion by family victims are kept within socially approved limits rather than flooding out, that the family victims defer to the authority of the judge and conform to the behavioural norms of the sentencing hearing and that the proceedings are seen to run smoothly overall.

While the sentencing judges maintained the 'affective neutrality' required of their role, most also demonstrated a variety of empathic responses conveying respect, compassion and sensitivity to the family victims' ordeal reading their VIS aloud in the courtroom. Speaking clearly and often addressing family victims by name, most judges took actions such as providing glasses of water and tissues and/or encouraging them to relax and take their time. Often as victims shed tears, they would be unable to speak or

would stop speaking so as to take a sip of water or wipe their faces. On two occasions judges dealt with episodes of acute distress by adjourning the matter for a brief time so as to give the victim an opportunity to regain his or her composure. Although many VISs were quite lengthy, no victim was hurried to finish.

Many judges demonstrated active listening by appearing attentive and/or actively engaging with the victim and their VIS. Attentiveness was conveyed through a variety of means including: watching the reader of the VIS and in some cases, moving furnishings or physically changing position on the bench to better see the victim as he or she read. Some judges also responded directly to the family victim as he or she presented their VIS. For instance, on one occasion the family victim was speaking very quickly as she read. The judge asked her to speak more slowly, and said “if you read it that fast people can’t appreciate what you are saying”. On other occasions the judge responded directly to the content of the VIS. For example in one matter after listening to the VISs, the judge asked counsel whether he should take account of the effect of the criminal conduct in depriving the deceased’s daughters of being able to say goodbye to their father because this was a “very significant part of their loss” and “it just affected me when I heard his daughters say that – it is a big part of grieving”. These comments indicated that not only had he been listening but he engaged with what had been said.

## Conclusion

The disjuncture between the different interests and goals of the legal process on the one hand and family victims on the other is inevitable in the prevailing

adversarial framework. From a narrow legal viewpoint, the sentencing hearing aims to impose an appropriate penalty on the individual defendant in proceedings that are conducted in a neutral, rational and de-personalised manner and the expression of strong emotion is eschewed. Family victims are thrust into legal proceedings to find that they lack status, control, and input. VISs, particularly oral VISs, present the only opportunity they have to express their feelings about their loss in the proceedings (Rock, 2010). In *Borthwick* the disjunction led to outright conflict in and out of the courtroom bringing the law into disrepute. In the UK concerns that such conflict could eventuate led to the withdrawal of family victims' entitlement to read their own VIS aloud to the court (Ministry of Justice, 2008, Rock, 2010).

This study found that oral VISs did raise the emotional tension in the hearings but that any potential adverse impact was managed and contained through various cooling out processes and structures. The findings of this study point to the importance of empathic responses of legal actors and institutions and remaining sensitive to the predicament of family victims in the sentencing process.

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<sup>i</sup> *Borthwick* [2010] VSC 613.

<sup>ii</sup> For the purposes of this project, ‘homicide offenders’ are those offenders convicted of either murder or manslaughter under the *Crimes Act 1900* (NSW).

<sup>iii</sup> Part 3 Division 2 *Crimes (Sentencing Procedure) Act 1999* (NSW). Section 26 of this Act defines a family victim as a member of the deceased primary victim’s immediate family which means: spouse, de facto partner, fiancé, parent, grandparent, guardian or step-parent, child, grandchild or step-child, brother, sister, half-brother, half-sister, step-brother or stepsister of the victim.

<sup>iv</sup> Section 30A *Crimes (Sentencing Procedure) Act 1999* (NSW).

<sup>v</sup> *Veen No. 2* (1988) 164 CLR 465, 476.

<sup>vi</sup> Part 3 Division 2 *Crimes (Sentencing Procedure) Act 1999* (NSW).

<sup>vii</sup> (1997) 94 A Crim R 76, (2006) 160 A Crim R 392.

<sup>viii</sup> (2006) 106 A Crim R 392, 414.

<sup>ix</sup> *R v Borthwick* [2010] VSC 613. Information regarding the events in the courtroom in this case has been obtained through media reports, (Iaria, 2010, Fogarty, 2010, Lowe 2010) and a three-part documentary in relation to the case broadcast by ABC Radio National, 25/1/11, 1/2/11, 8/2/11.

<sup>x</sup> Section 95A(1) *Sentencing Act 1991* (Vic), *R v Miller* [1995] 2 VR 348, *DPP v DJK* [2003] VSCA 109.

<sup>xi</sup> At that time it was a matter for the court’s discretion as to whether the family victims could read their statements aloud. Sections 95F(1) and (1A) have since been inserted into the Act entitling family victims to read their VISs (so far as they are admissible) to the court.

<sup>xii</sup> Practice Note No 3 of 2011: Sentencing Hearings.

<sup>xiii</sup> President of the Queen’s Bench Division, *A Protocol Issued By The President Of The Queen’s Bench Division Setting Out The Procedure To Be Followed In The Victims’ Advocate Pilot Areas* (President, Queens Bench Division, High Court of Justice, UK 2006). In the scheme VISs were referred to as ‘family impact statements’.

<sup>xiv</sup> The words in italics were italicised in the copy of the original VIS received from the court.

<sup>xv</sup> The word in capitals was capitalised in the copy of the original VIS received from the court.

<sup>xvi</sup> For ethical reasons, ‘Wayne’ is not the defendant’s real name.

<sup>xvii</sup> Although not directly observed, inferences have been drawn from documents such as Prosecution Guidelines and the Information package supplied to crime victims from NSW Victims Services, and the observation fieldwork.

<sup>xviii</sup> Prosecution guidelines are published by the NSW Office of the Director of Public Prosecutions and regulate the conduct of public prosecutors. The guidelines are available from

<http://www.odpp.nsw.gov.au/guidelines/FullGuidelines.pdf>

<sup>xix</sup> Prosecution Guidelines 18.

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[http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll\\_vs.nsf/vwFiles/BK03\\_VIS.pdf/\\$file/BK03\\_VI\\_S.pdf](http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll_vs.nsf/vwFiles/BK03_VIS.pdf/$file/BK03_VI_S.pdf), 4 (accessed 29/1/11).

<sup>xxi</sup> Section 28(3) *Crimes (Sentencing Procedure) Act 1999* (NSW).

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