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**VICTIM v OFFENDER: A NEW PARADIGM OF
CRIMINAL JUSTICE?**

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ABSTRACT

Increasingly, victims of crime are indicating their dissatisfaction with what they perceive to be a marginalised role in the criminal justice process. Although, to a limited extent, the concept of accountability to victims is acknowledged within the process, the various types of acknowledgement are the subject of diverse criticisms by victims. One common criticism is that these types of acknowledgement fail to afford victims a participatory role in the criminal justice process.

Accordingly, the paper asks, first, whether an appropriate place to offer such a role might be at sentencing, and, secondly, considers the effect of a provision of enforceable rights within the criminal justice process for victims to participate in sentencing. Evaluation of these proposals reveals that it is unlikely that a satisfactory outcome can be attained by promulgating victim participation in sentencing because the probable outcomes of such participation are likely to conflict with the sentencing aims of the criminal justice process. The paper concludes that effective participation by victims will be attained only within a restorative justice process, and proposes that a restorative justice process should replace the criminal justice process at the point of sentencing.

¹ L. Zedner "Victims" in M. Maguire, R. Morgan, R. Reiner (eds), *The Oxford Handbook of Criminology* 2nd ed (Clarendon Press, Oxford, 1997) 577.

² A. Lee, W. Beane "Victims' Needs: An Issues Paper" (Department of Justice, Wellington, 1993) 9.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately **12,650** words.

³ See SA Collins "Proposed Victim Rights Amendments to the US Constitution" (1997) 14 *Amz. J. Int'l & Comp. Law* 837, 855.

I INTRODUCTION

In recent years there has been an upsurge of support for victims of crime. As a result of an increasing interest in victims as a focus of academic research, and also as the inspiration for a growing number of national support groups, "...the victim has moved from being a 'forgotten actor' to key player in the criminal justice process."¹ Much of this interest concentrates upon the desirability of victims receiving certain services, (exemplified in New Zealand by the principles set out in the Victims of Offences Act 1987). However, there is also the question of whether victims should now assume a more active and indeed participatory role within aspects of the criminal justice process itself. Research has identified the issue of increased participation in the criminal justice process as being something which would assist in "...restoring a victim of crime's sense of self-worth and enable them to get on with their life".² Accordingly, this paper asks whether a participatory role for the victim should be promulgated within one particular area of the criminal justice process, namely the sentencing of the offender. Current practice in European legal systems³ and, to a more limited extent, in the United States,⁴ suggests that New Zealand should not dismiss this proposal. Indeed, the logical stage at which to promote victim participation within the criminal justice process is at

¹ L Zedner "Victims" in M Maguire, R Morgan, R Reiner (eds) *The Oxford Handbook of Criminology* (2 ed) (Clarendon Press, Oxford, 1997) 577.

² A Lee, W Searle *Victims' Needs: An Issues Paper* (Department of Justice, Wellington, 1993) 9.

³ See E Erez, E Bienkowska "Victim Participation in Proceedings and Satisfaction with Justice in the Continental Systems: The Case of Poland" [1993] 21 *Journal of Criminal Justice* 48.

⁴ See SA Cellini "Proposed Victim Rights Amendments to the US Constitution" (1997) 14 *Ariz. J. Int'l & Comp. Law* 837, 855.

sentencing.⁵ "It is when we know we have an offender, not just a defendant, that the victim is most strongly entitled to be heard".⁶

The Ministry of Justice has presented five arguments for the proposition that victims should be offered the opportunity to express his or her views concerning the sentencing of an offender.⁷ They are that such a move would show the wider community that the state recognises the personal involvement of the individual victim; that it would create for the victim a balance with the rights which are already accorded to the offender;⁸ that it would assist victims to come to terms with their trauma; that facing the victim might promote the rehabilitation of the offender; and that it might reduce the use of imprisonment in sentencing since victims are more likely to seek and be satisfied with a sentence of reparation, particularly if the offender shows remorse.

However, an important issue of principle arises from the proposal that victims should participate in the sentencing process. That is, whether such a proposal is reconcilable with "...the nature and goals of the criminal justice process as a legal and social institution".⁹ This issue encompasses others, such as possible conflict with the aims of sentencing within the criminal justice process, the relevance or otherwise of the individual characteristics of a particular victim to the sentencing of the offender, the requirement for

⁵ G Davies *Making Amends. Mediation and Reparation in Criminal Justice* (Routledge, London, 1992) 71. See also New Zealand Law Commission *Criminal Prosecution - Preliminary Paper No 28* (Wellington, 1997) 79.

⁶ SJ Schulhofer "The Trouble with Trials; the Trouble with Us" (1995) 105 *The Yale Law Journal* 825. See also G Davies above n 5, 27.

⁷ Ministry of Justice *Sentencing Policy and Guidance: A Discussion Paper* (Wellington, November 1997), 125.

⁸ ie rights which allow the offender to present their circumstances for consideration in pre-sentence reports, and also to call witnesses concerning their cultural background and its effect upon the offending (Criminal Justice Act 1985, s 16).

⁹ A Ashworth "Victim Impact Statements and Sentencing" [1993] *Crim. L. R.* 498.

consistency in sentencing, and also whether victims themselves would find such participation to be adequate to meet their needs.

Research shows that existing provisions which acknowledge the role of the victim, such as the ability of a victim to participate in the preparation of a victim impact statement, and to receive restitution and compensatory awards from the court, do not necessarily increase victim satisfaction with the criminal justice process. Accordingly, the provision of legally enforceable rights within the criminal justice process for the victim to participate in sentencing is considered as an option. However, there is evidence from other jurisdictions that increasing the actively participatory role of the victim in the sentencing process might not in fact increase victim satisfaction to any great extent.¹⁰ Furthermore the participation of victims, if given any real recognition by the sentencing court, is likely to result in sentencing outcomes which are very different from the aims of sentencing in the criminal justice process. The paper concludes that the suggested *offender v victim* paradigm is untenable within the existing criminal justice process. However, although the attempt to reconcile the retributive aims of the criminal justice process with the rehabilitative aims of the restorative process may be futile, a substitution of the restorative process for the criminal justice process at the stage of sentencing might succeed. Therefore, the paper proposes that increased victim participation in sentencing be achieved by a change in the existing paradigm at sentencing.

Part II of the paper outlines briefly the emergence of the criminal law as a system of "public wrongs" exemplified by a diminution in the role and status of the victim. The aims of the sentencing process have shown a similar change. The traditional ideal of compensatory redress from the offender to

¹⁰ Above n 3.

the victim has now been replaced by the view that it is the state that requires to be avenged.¹¹

However, the concept of a degree of accountability to the victim is persuasive. Conceding to pressure from the United Nations¹² and from victims' support groups, the New Zealand legislature has made some efforts to acknowledge the interest of victims in the criminal justice process. Parts III and IV of the paper review and critique, respectively, the sentencing provisions and other compensatory provisions which acknowledge accountability to the victim. It finds that although well-intentioned, in practice these provisions have failed to deliver their promised benefits to victims. Furthermore, although acknowledging accountability to the victim, the provisions tend to offer him or her a passive role within the process.

Part V reviews the theoretical and practicable arguments for allowing increased victim participation in sentencing within the criminal justice process. It concludes that by failing to acknowledge victims as having any significant role to play other than as witnesses for the prosecution, the criminal justice process itself prevents the development of a truly participatory sentencing process.

Accordingly, Part VI considers whether a means of giving victims a sense of participation might be effected by providing victims with legally enforceable rights to participate in various ways in the sentencing process. Victims would then join the state and the offender as "key players" in the criminal justice process. However, a discussion of the form that such

¹¹ See, for example, A Koskela "Victim's Rights Amendments: an Irresistible Political Force Transforms the Criminal Justice System" (1997) 34 Idaho Law Review 157, 178.

¹² United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985.

participation might take leads to the conclusion that the procedural and practical difficulties of this proposal are prohibitive. In addition, the conflict between the sentencing aims of victims and those of the criminal justice process is likely to encourage the use of judicial discretion to minimise the participatory role of the victim in the sentencing outcome.

An alternative proposal is to limit the traditional *state v offender* model of the process to "...one end of a continuum of practices by which social order is maintained".¹³ Part VII hypothesises the development of a restorative justice process to replace the criminal justice process after a guilty verdict has been obtained (or pleaded). Restorative justice views crime as a conflict between individuals. Accordingly it both acknowledges the rights of the victim and also seeks his or her active participation. The views which have been expressed by victims concerning the existing restorative justice system of family group conferences are examined briefly. Research suggests that the reason for the lack of positive impact upon victims might be that any attempt to graft restorative justice principles onto the criminal justice process is bound to fail because of the inherent conflict between society's expectations of criminal justice, and the desired outcomes of restorative justice.¹⁴ However if restorative justice were to replace the criminal justice *state v offender* paradigm entirely, rather than confining its main field of operation to the area of youth justice, society might be persuaded to accept it as a viable alternative.

¹³ L Zedner "Reparation and Retribution: Are They Reconcilable?" (1994) 57 *The Modern Law Review* 228, 250.

¹⁴ J Hudson, B Galaway (eds) *Restorative Justice: International Perspectives* (Kugler Publications, Amsterdam, 1996) 2; H Zehr *Changing Lenses: A New Focus for Crime and Justice* (Herald Press, Pennsylvania, 1990) 82. See also Submission No 73, Dunstall *Restorative Justice: The Public Submissions* (Ministry of Justice, Wellington, 1998).

The paper concludes, therefore, that a satisfactory outcome for victims might be obtained if a compromise is sought. The existing criminal justice process should continue in its present form up to the stage of sentencing, and should then (when the defendant has become an offender),¹⁵ be replaced by a restorative justice process.

II THE CRIMINAL JUSTICE PROCESS

A *The Emergence of the Criminal Justice Process*

The distinction between civil and criminal law is that criminal law is considered to be a public wrong, consisting of wrongdoing which is believed to threaten the security and well-being of society. Although any member of society may bring a criminal prosecution (whether or not they have suffered any direct harm themselves as a result of the offence), they may not discontinue it at will,¹⁶ for it is not only their concern but that of every citizen.¹⁷ More commonly, the police, as representatives of the state, will instigate prosecution. The end result of a criminal prosecution is a criminal penalty, which is intended to be punitive in nature, and more significantly, to include an element of public denunciation of the crime.¹⁸ It is this latter element which comprises the truly distinguishing feature from civil law, which consists of private wrongs. In civil proceedings the plaintiff is the person directly affected by the defendant's actions, and the end result will be an order for damages, which may include punitive or exemplary damages. However there is no element of public denunciation. Furthermore, the plaintiff may decline to enforce the order against the

¹⁵ Above n 6.

¹⁶ *Wood* (1832) 3 B & Ad 657.

¹⁷ JC Smith *Smith & Hogan: Criminal Law* (8 ed) (Reed Elsevier (UK) Ltd, London, 1996) 17.

¹⁸ Above n 7, 22.

defendant. In contrast, the victim of a criminal offence is not able to pardon the offender.

Historically, however, little distinction was made between public and private wrongs. After analysis of early Roman, Hebrew and Greek legal systems, and biblical doctrine, Bianchi¹⁹ asserts that the present punitive criminal system is based on a "historical misunderstanding generated by religious anachronism". The earlier forms of conflict resolution in Europe, following the ancient legal traditions, comprised a civil system of repair, compensation and dispute settlement.²⁰ Both victim and offender were key figures in these early legal systems, with the victim initiating proceedings in both civil and criminal matters. The court official performed a mediatory role and might order restitution, retributive punishment, or both.²¹ By the sixteenth century, however, state control over punishment had usurped the role of the victim, probably, it is thought "...to gain access to a source of revenue", and although the victim's role in initiating prosecutions remained in place, the rights of victims came to be regarded as independent of criminal law.²² Early criminal law was based on the common law of felony, which comprised offences of violence and of property.²³ Felonies were deliberate acts (the *mens rea* of criminal law) and were therefore considered to be morally reprehensible. The early medieval *ordeal* placed

¹⁹ H Bianchi *Justice as Sanctuary: Toward a New System of Crime Control* (Indiana University Press, Bloomington and Indianapolis, 1994) 31.

²⁰ Above n 19, 16. See also G Davies above n 5; J Jamieson *Crime, Victims and Justice* (Strategic Leadership Network, Wellington, 1994) 3; and H Zehr "Rethinking Criminal Justice: Restorative Justice" in McElrea (ed) *Re-Thinking Criminal Justice: Justice in the Community* Vol I (Legal Research Foundation, Auckland, 1995) 11.

²¹ G Davies above n 5, 2.

²² Above n 19, 66.

²³ CB Herrup *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England* (Cambridge University Press, Cambridge, 1987) 2.

the felonious offender in the hands of God, although His influence was subsequently replaced by the trial by jury. However.²⁴

Because criminal acts threatened the peace of society, criminal justice could not simply be the concern of victims or their families.The injury in crime transcended the loss of any single individual. It was the king who stood as symbolic victim, and who had to be revenged.

It is from this model that the criminal justice process developed, with its view of crime as an offence against society. The punishment for that offence is sought by the state as symbolic plaintiff, while the true plaintiff, the victim of the offence, is thereby ignored or at least marginalised in the ensuing court proceedings.²⁵

However, the emergence of victims' movements in the past twenty years has led to arguments for a return to the ancient legal traditions according to which crime should be seen not only as a wrong against society but also as a dispute between offender and victim requiring resolution.²⁶ The following sections of this paper will consider whether a logical stage for the returning of victims to "their" conflict²⁷ is at the stage of sentencing and whether this proposal is practicable within the criminal justice process.

B Sentencing Policies in the Criminal Justice Process

Before addressing the question of whether victims should be involved in sentencing, it is necessary to examine the principles which underlie sentencing policies within the criminal justice process. For, according to Ashworth, it is the "...nature and goals of the criminal justice process as a legal and social institution" and not the wishes of victims, which should

²⁴ Above n 23, 3.

²⁵ G Davies above n 5, 6. See also E Erez "Victim Participation in Sentencing: Rhetoric and Reality" (1990) 18 *Journal of Criminal Justice* 19.

²⁶ See text at n 21.

²⁷ N Christie "Conflicts as Property" (1977) 17 *British Journal of Criminology* 1.

dictate whether victims should have a right to be consulted or to participate in the criminal justice process.²⁸

The various goals of the state when sentencing offenders have been summarised as: "just deserts" (retribution and denunciation), deterrence, incapacitation, rehabilitation, and restitution.²⁹ Any one or more of these goals may be discerned in a particular sentencing decision. However, the goals themselves have evolved from three very different principles which underlie sentencing policies.

One principle of sentencing, which aligns itself firmly with the *state v offender* criminal justice process, perceives sentencing as a means both for the assertion of state authority and also for deterrence. This principle underlies the retribution goal, in which the focus is on the offence itself. Because a criminal offence is regarded by the courts as a moral wrong, sentencing should involve the imposition by the state of some form of punishment on the offender. The same principle also underlies, to some extent, the deterrence goal, according to which public denunciation of the offender is considered to be part of the punishment. Under this principle, proportionality of sentencing, related to the offence itself, is targeted. In other words, the severity of the offence should dictate the level of punishment, and like offences should attract like sentences.³⁰ Proportionality of sentencing is seen as both inspiring public confidence and achieving fairness amongst defendants.³¹ No attempt is made to prevent recidivism or to compensate the victim, because it is believed that neither of these goals relate to the underlying principle.

²⁸ Above n 9, 499.

²⁹ Above n 7, 37.

³⁰ Above n 7, 40.

³¹ D Miers "The Responsibility and Rights of Victims of Crime" (1992) 55 *The Modern Law Review* 482, cited in Ashworth, above n 9, 503.

A second principle of sentencing perceives it as being a means for the achievement of a greater social good by the reduction of crime. This utilitarian principle underlies the deterrence, incapacitation, and rehabilitation goals of sentencing.³² The aim of this principle is to deter future offending and to protect society from future offending. To a limited extent, therefore, this principle considers and protects potential victims.³³ However, because the focus remains upon the state and the offender, this principle is not entirely incompatible with the *state v offender* criminal justice process. Nevertheless, because it necessarily permits a consideration of past offending to be used as a predictor of likely future behaviour, and also because the rehabilitative requirements of any offender require a subjective judgment, the proportionality of sentencing which is considered essential to the *state v offender* criminal justice process is supplanted by a wide disparity in sentencing under this principle.

A third principle sees sentencing as being a means of making redress to the victim. This principle underlies the use of restitution as a sentencing goal and is recognised in the sentence of reparation which is provided for by the Criminal Justice Act 1985. There is a fundamental difference between restitution and the other sentencing goal, because restitution is focused mainly on the victim rather than the offender.³⁴ A logical extension of this principle of sentencing is that the wishes of the victim should be influential, so that if the victim wishes to forgive the offender then no sentencing order should be made.³⁵

It is apparent that only the first of these sentencing principles sits comfortably with the *state v offender* criminal justice process. The latter two

³² Above n 7, 37.

³³ Above n 7, 57.

³⁴ Above n 7, 78.

³⁵ Above n 9, 503.

principles conflict with the process to a greater or lesser degree. One of the reasons for this conflict might be that these two principles of sentencing require an acknowledgement of the victim as a participant in the sentencing process, whereas the victim is not acknowledged as a participant in the criminal justice process itself.

Despite the lack of theoretical foundation for acknowledging the victim Yet victims' rights groups now demand this acknowledgement. The importance of sentencing to victims is discussed by Cretney et al³⁶ who explain that "[t]he sentence imposed is ... regarded by victims as a yardstick of their own worth in the eyes of the court". The authors note the dismay felt by victims faced with supposedly inadequate sentences and emphasise that sentencers are pursuing "primarily 'public' purposes". Thus any "justification" put forward by a judge for a particular sentence will generally be addressed to the public and not to the victim of the offence. However, the authors question the popular view that more compensatory sentencing will necessarily reduce the role of the state in the criminal justice process. They warn that the sentencing process might still retain its essentially public character and, also, that compensatory sentencing might not necessarily satisfy the many victims who have non-pecuniary motives for reporting offences to the police.³⁷ With these comments in mind, the following two sections of the paper consider and critique existing specific policies in New Zealand which purport to acknowledge the wrong which has been done to a victim of crime.

A The Victim Impact Statement

Section 8 of the Victims of Offences Act 1997 provides for victim impact

³⁶ A Cretney, G Davis, C Clarkson, J Shepherd "Criminalizing Assault: The Failure of the 'Offence Against Society' Model" [1994] 34 British Journal of Criminology 15, 24.

³⁷ Above n 36. For example the United Nations Declaration of Basic Principles of Justice for Victims and Abuse of Power (November 1985) is binding on New Zealand

III ACCOUNTABILITY TO VICTIMS OF CRIME

Despite the lack of theoretical foundation for acknowledging the victim within the criminal justice process, the concept of the victim of a crime as being one to whom certain responsibilities are owed by the state and the offender is becoming more apparent.³⁸ To this end, legislative provision has been made for the views of victims of crime to be taken into account by a sentencing judge, and also for victims of crime to receive certain forms of compensation. The provisions are as follows:

- The Victims of Offences Act 1987, which provides for victim impact statements;
- The Criminal Justice Act 1985, which provides for reparation, compensation and restitution for victims, and allows the court to take account of an offer made by the offender to make amends; and
- The Accident Rehabilitation and Compensation Act 1992, which provides for compensation for victims of violent crimes.

There is also the possibility, which has always existed, of a victim bringing proceedings in civil law for tortious damages from the offender.

A *The Victim Impact Statement*

Section 8 of the Victims of Offences Act 1987 provides for victim impact statements. In accordance with the persuasive (as opposed to legally enforceable) nature of the Act, the section states as follows:

³⁸ For example the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (November 1985) is binding on New Zealand

(1) Appropriate administrative arrangements should be made to ensure that a sentencing Judge is informed about any physical or emotional harm, or any loss of or damage to property, suffered by the victim through or by means of the offence, and any other effects of the offence on the victim.

(2) Any such information should be conveyed to the Judge either by the prosecutor orally or by means of a written statement about the victim...

Two further subsections were inserted in July 1994. These provide, in effect, that the sentencing Judge may direct a prosecutor to provide the information mentioned above in relation to any victim.

The "lack of specificity"³⁹ of the legislation has led to the formulation of judicial principles concerning victim impact statements (V.I.S.). In *Sargeant v Police*,⁴⁰ Hammond J advised that a V.I.S. should serve at least four purposes. The V.I.S.:⁴¹

- i assists the court with further information.
- ii provides the Court with information about the effect of a crime on a victim and helps to balance the information in the pre-sentence report on the offender.
- iii affords the victim input into the administration of justice.
- iv forces the offender to recognise what he or she has done, which may advance the rehabilitative process and prevent further offending.

³⁹ G Hall "Victim Impact Statements: Sentencing on Thin Ice?" (1992) 15 NZ Universities Law Review 143.

⁴⁰ (1997) 15 CRNZ 454.

⁴¹ Above n 40, 456.

Section 8(2) of the Victims of Offences Act provides for an oral or written V.I.S. to be conveyed to the judge by the prosecutor. The Act does not specifically permit the victim himself to make an oral statement, possibly because a written statement is perceived as less overtly influential upon the court than an oral statement by the victim.⁴² The V.I.S. therefore offers a relatively low key means of satisfying the popular demand to include victims within the criminal justice process, while, at the same time, preserving tradition, which requires unfettered judicial discretion in the sentencing process. That this approach need not automatically be discredited has been confirmed by studies which conclude that a *sense* of participation (whether this participation has *actually* influenced the sentencing process, or not), is important to victims.⁴³

B Reparation

The sentence of reparation is compensatory in nature, but is of broader scope than compensation per se. Thus, as well as the compensatory aim, the other main aims of reparation are "...to increase opportunities for the development of offender awareness of the consequences of their offences, and to reduce imprisonment for property offending".⁴⁴ Reparation requires an offender to make amends for the wrong caused to the victim.

Although reparation was originally believed to be a suitable sentence only for property related offences, it is now, in theory at least, much more widely available. Indeed, since 1993 the Criminal Justice Act 1985 has provided for reparation to be considered in all cases. Section 11 states as follows:

The Court shall consider imposing a sentence of reparation in every case, and, subject to section 22 of this Act shall impose such a

⁴² Davis RC, Smith BE "Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise?" [1994] 22 Journal of Criminal Justice 1, 11.

⁴³ Above n 42, 2.

⁴⁴ Policy and Research Division, Dept of Justice "The Impact on Sentencing of the Criminal Justice Act 1985" (Dept of Justice, Wellington, Sept 1988) 150.

harm, or a sentence unless it is satisfied that it would be clearly inappropriate to do so.⁴⁵

Although the Act does not state when it would be "clearly inappropriate" to make a reparation order, one ground would be that such an order would be clearly beyond the foreseeable means of the offender.⁴⁶

Section 22 of the Criminal Justice Act provides that an offender may be sentenced to make reparation whenever the court is satisfied that any other person suffered either emotional harm, or any loss of or damage to property, through or by means of the offence. However, there must be a causal connection between the offence and the loss, damage or emotional harm suffered by the victim. The issue is whether a reasonable person could have foreseen the kind of damage which occurred as a result of the offence.⁴⁷

Section 22 requires the sentencing court to give the prosecution and defence an opportunity to be heard on the specific question of reparation, as well as hearing the general submissions on sentencing. Unless the amount of reparation will clearly not exceed the sum of \$500, a probation officer may be ordered to prepare a report on the financial means and existing financial obligations of the offender, the value of the loss or damage, and the frequency and magnitude of payments which should be made by the offender.⁴⁸ The probation officer is required to attempt to seek agreement between the offender and the person who suffered emotional

⁴⁵ Criminal Justice Act 1985, s 11 (as substituted by the Criminal Amendment Act 1993, s 4).

⁴⁶ *Adams on Criminal Law* (Brooker's Limited, Wellington, 1998) Ch 3.5.13 .

⁴⁷ See *Wilson v Police* Unreported, 13 February 1995, High Court, Napier Registry, AP 60/94, cited in *Adams on Criminal Law* above n 46, Ch3.3.02 para (1).

⁴⁸ Criminal Justice Act 1985, s 22.

harm, or any loss of or damage to property, on the amount the offender should be required to pay by way of reparation.⁴⁹

Amendments made in 1993 to the Criminal Justice Act require the court to direct that reparation ordered under the provisions of s 22(1) be made in part, or by means of periodic payments, where the offender has insufficient means to make reparation in full,⁵⁰ and to sentence the offender to reparation in preference to a fine, where the offender has insufficient means to pay both.⁵¹ Where a sentence of a fine has been imposed in addition to a sentence of reparation, any payment received from the offender must first be applied in satisfaction of the amount due under the sentence of reparation.⁵² Reparation may be imposed concurrently with a fine, and either a community based sentence or a custodial sentence. However, a 1997 study concluded that the 1993 amendments to the Criminal Justice Act 1985 have had little effect on the use of the sentence of reparation, "...probably because the amendments mainly confirmed actions which were already being taken."⁵³

C Compensation

Section 28 requires the court to consider whether any part of a fine ordered to be paid by an offender should be ordered to be paid to a victim by way of

⁴⁹ Criminal Justice Act 1985, s 23. However the section provides further that the person who suffered either emotional harm, or any loss of or damage to property, shall not be obliged to meet the offender.

⁵⁰ Criminal Justice Act 1985, s 22(6) (as inserted by the Criminal Amendment Act 1993, s 8(2)).

⁵¹ Criminal Justice Act 1985, s 22(7) (as inserted by the Criminal Amendment Act 1993, s 8(2)).

⁵² Criminal Justice Act 1985, s 22(8) (as inserted by the Criminal Amendment Act 1993, s 8(2)), and see *Bowman v Police* (1993) 10 CRNZ 558.

⁵³ P Spier *Conviction and Sentencing of Offenders in New Zealand* (Ministry of Justice, Wellington, Nov. 1997) 157.

compensation, where that victim has suffered physical or emotional harm as a result of the offence. The court must first determine whether a fine is appropriate by reference to the offence itself, since s 28 may not be used to provide compensation to a victim of an offence for which a fine is not justified. Thus, the operation of s 28 is effectively excluded for the victim of a serious offence which merits a sentence of imprisonment. Furthermore, the level of fine and therefore the level of compensation will be dictated by the offender's means. Any such compensatory award must be deducted from any damages recovered by the victim as a result of a civil action. However an award of compensation under s 28 of the Criminal Justice Act does not affect the victim's right to receive compensation under the Accident Rehabilitation and Compensation Act 1992.

D Restitution

Restitution involves the return of property which is in the wrongful possession of an offender to its rightful owner. Section 404 of the Criminal Justice Act 1985 provides for a restitution order to be made by the court in such circumstances. An order for restitution may be made when discharging an offender, whereas an order for reparation may be made only following a conviction.⁵⁴

E An Offer to make Amends

Section 12 of the Criminal Justice Act 1985 provides that the court may take into account any offer of compensation made by or on behalf of the offender to the victim, and may adjourn sentencing pending the payment of compensation. In deciding whether and to what extent an offer of compensation should be taken into account under this provision, the court may have regard to whether or not the offer has been accepted by the

⁵⁴ Criminal Justice Act 1985, ss 19(3), 20 and *Adams on Criminal Law* above n 46, CA 347.07.

victim as expiating or mitigating the wrong. The provision is restorative in nature and might be expected to receive strong approval from victims. However, at the time of writing, the precise effect of the victim's attitude to the offer of amends has not been considered in any reported case.⁵⁵

F Compensation under the Accident Rehabilitation and Compensation Act 1992

The Accident Rehabilitation and Compensation Act 1992 provides a "no-fault" compensation scheme for compensation for personal injury by accident. A victim of crime who suffers physical injury (and mental injury if it is consequent upon that physical injury) is entitled to various forms of compensation from the scheme. Victims of certain sexual crimes are entitled to claim for mental consequences alone. Victims of other crimes, who suffer severe psychological damage but who do not incur physical damage, receive nothing under the scheme.⁵⁶

State funded compensation is justified on several grounds. In particular, that it reflects the existence of a "contract" between the state and its citizens, whereby in consideration of individual citizens relinquishing their "rights" in any criminal dispute, the state promises to compensate them for any injury suffered, that the state has failed in its duty to prevent the crime and so has a moral obligation to compensate the victim, that welfare principles and the appeasement of community outrage merit compensation to those who have suffered hardship occasioned by criminal violence.⁵⁷

⁵⁵ Above n 46, Ch3.5.14.

⁵⁶ For further discussion see R Tobin "Compensation for Victims of Crime Here and Overseas" in Seminar Proceedings *The Victim and the Criminal Justice System: Past Progress and Future Plans* (Victims Task Force, Wellington, 1992) 106.

⁵⁷ Community Law Reform Committee of the Australian Capital Territory *Criminal Injuries Compensation*(<http://actag.canberra.edu.au/actag.Reports/CLRC/R6/Report6c5.html>).

G Civil Proceedings

Both the Criminal Justice Act 1985 and the Crimes Act 1961 preserve the right to pursue a civil remedy for exemplary damages arising from the same conduct for which an offender has been convicted in criminal proceedings.⁵⁸ However, a 1995 survey of judges concerning the issue of reparation, found that judges frequently considered civil remedies to be a viable option for victims of offences against the person and when a fine rather than reparation might be imposed.⁵⁹ The judges viewed the right for a victim to bring civil proceedings as offering a preferable alternative to receiving reparation from the criminal court, since the existence of a reparation order was considered to present an impediment to a civil action for damages.

IV ACCOUNTABILITY PROVISIONS: A VICTIM'S CRITIQUE

A The Victim Impact Statement

1 Lack of participation

Research has suggested that, for those victims who wish to be involved in the criminal justice process, an actively participatory role is sought.⁶⁰ The submission of a written V.I.S. to the sentencing judge does not fulfil this role. Indeed, research carried out in the United States concluded that the

⁵⁸ See the Criminal Justice Act 1985, ss 24(f), 28(4) and the Crimes Act 1961, ss 10(4), 405. See also *O v U* (1996) 14 CRNZ 76 which affirmed that the right to bring civil proceedings is not invalidated by the New Zealand Bill of Rights Act 1990, s 26(2).

⁵⁹ Above n 44, 152.

⁶⁰ Above n 2.

fact that a V.I.S. has been completed has no significant effect on victim satisfaction.⁶¹

An earlier study had suggested that one possible reason for the lack of victim satisfaction might be the lack of ceremony attached to V.I.S. interviews - often the victims were not aware that one of the purposes, or indeed the only purpose, of an interview was to produce a V.I.S. In order to negate this possible effect in the 1994 research, every effort was made to ensure that the victims who were to be the subjects of the study were aware of the purpose of the V.I.S. interview. The researchers were able to select the court staff who would carry out the interviews, and train them to conduct the interviews in an empathic fashion and to emphasise to the victims the reasons why the questions were being asked. The victims, who were victims of serious offences of robbery, felonious assault, attempted homicide, or burglary, were assigned randomly to one of three groups.

Within the first group of victims, each victim was interviewed, a V.I.S. was written and distributed, and the victims were told that the judge would have the V.I.S. available at sentencing. The victims were also told that a person from Victim Services Agency would contact them one month after the court hearing to ask them what coming to court had been like and to update the information in their V.I.S. if necessary. When the victims' cases ended the researchers would contact them to find out what they felt about the case outcome.

A second group of victims was interviewed but no written V.I.S. was produced. This was to establish whether the victim impact interview alone had a therapeutic influence upon victim satisfaction. These victims were told that the Victim Services Agency and the researchers were interested in

⁶¹ Above n 43, 10.

learning about the experiences of crime victims and the effect of the crime upon their lives. The victims were also told that a person from Victim Services Agency would contact them one month after the court hearing to ask them what coming to court had been like. When the victims' cases ended the researchers would contact them to find out what they felt about the case outcome.

Finally, a control group of victims was simply informed that Victim Services Agency was interested in learning about the experiences of crime victims and that someone from the Agency would contact them one month after the court hearing to ask them what coming to court was like, and again to enquire what they felt about the case outcome.

Analysis of responses obtained from the three groups of victims during the first interview (one month after the hearing), and the second interview (after the disposition of the case), led the researchers to conclude that not only did the production of a V.I.S. *not* increase victim satisfaction with the criminal justice system, but also that about half of the victims who received the experimental treatment did not remember it. Yet as the authors point out:⁶²

...the treatment we designed and implemented in the present study was more distinct and meaningful to victims than most impact statement procedures currently in use in courts across the United States.

This research has implications for New Zealand. Hall observes that the victim of an offence will often not be asked directly how the offending has affected him or her and indeed might not be aware that the V.I.S. is being prepared from the statements made to the police officer at the time of the offence.⁶³

⁶² Above n 43, 11.

⁶³ Above n 39, 153. The position is similar in Australia, see E Erez, L Roeger, F Morgan "Victim Impact Statements in South Australia: An Evaluation" (Office of

2 Lack of skilled preparation

Although there are reports of some victims being advised to complete the V.I.S. themselves,⁶⁴ more commonly the V.I.S. will be prepared by the police officer who attends the scene of the offence. The role of the police in preparing the V.I.S. has been criticised on the basis that the police do not have the time to spend with the victim, that they do not have the necessary skills, and that the statements they prepare are often too brief and limited.⁶⁵

3 Lack of real influence

Certain states in the United States have legislated for the V.I.S. to contain an expression of opinion on sentence.⁶⁶ However, the V.I.S. in New Zealand serves only to inform the judge of the effect of the offence upon the victim. Although, the V.I.S. is not intended to be used as a means of suggesting a sentence to the sentencing judge which the victim might consider to be appropriate for the offender,⁶⁷ nevertheless, a 1989 survey established that a majority of judges thought that the V.I.S. should have some effect on sentencing.⁶⁸ However, since the V.I.S. is not intended to be directed towards a reparatory sentence as such, the concept of "an effect on sentencing" is somewhat nebulous and therefore unsatisfactory from a victim's point of view. For instance, it is not possible for a victim to assess with any certainty whether or not the V.I.S. actually had any effect upon the sentence eventually imposed on the offender.

Crime Statistics, South Australian Attorney-General's Department, Adelaide, 1994) 20.

⁶⁴ Above n 2, 16. See also *R v J* Unreported, 22 November 1994, High Court, Rotorua Registry, T 35/94. Noted 18 TCL 5/6.

⁶⁵ Above n 2, 11. These criticisms have also been made by the judiciary, see B Galaway, P Spier *Sentencing to Reparation: Implementation of the Criminal Justice Act 1985* (Policy and Research Division, Dept of Justice, Wellington, 1992) 109.

⁶⁶ Above n 9, 504.

⁶⁷ See *Lowe v Police* (1988) 3 CRNZ 199, and *R v Hopkirk* (1994) 12 CRNZ 216.

⁶⁸ B Galaway, P Spier, above n 65.

Hall concludes that the V.I.S. is simply one factor among many to be taken into account by the court “..when exercising its discretion and weighing matters that may be seen to aggravate or mitigate sentence.”⁶⁹ The decision in *Lowe v Police*⁷⁰ affirms this view. In *Lowe* the offender’s appeal was successful on the grounds that too much emphasis had been placed by the sentencing Court on the V.I.S., to the exclusion of other relevant factors. The offender in *Lowe* had been convicted of causing death by dangerous driving and disqualified from driving for two years. He had requested the Judge in the District Court to grant him a limited driving licence in order that he might continue his paid employment, but this was refused because a V.I.S. had stated that the family of the deceased would be distraught if they saw him driving. In the High Court, Holland J allowed the appeal, affirming that sentencing must remain the responsibility of the Court, which must take into account all the circumstances of the offence and the offender. Although the damage and harm caused by the offence upon the victim is one such circumstance, the Victims of Offences Act 1987 was not intended by Parliament to enable the Courts to surrender their responsibility to impose an appropriate sentence.⁷¹

The use of emotive language in a V.I.S. to describe the particular characteristics of the victim has also been criticised, although in *Payne v Tennessee*⁷² the Supreme Court of the United States observed the injustice of permitting the defendant to introduce evidence in mitigation relating to previous good character at the sentencing hearing and noted

⁶⁹ Above n 39, 157.

⁷⁰ (1988) 3 CRNZ 199.

⁷¹ Above n 70, 202.

⁷² *Payne v Tennessee* 112 L Ed 2d 1032, 111 S Ct 1407 (1991), discussed in E A Meek “Victim Impact Evidence and Capital Sentencing: A Casenote on *Payne v Tennessee*” (1992) 52 Louisiana Law Review 1299. See also *State v Gentry* 88 P 2d 1105 (Wash. 1995) and *State v Muhammad* 678 A 2d 164 (N.J. 1996).

that the surviving victim should similarly be permitted to introduce evidence as to the character of the deceased victim.

Similar judicial disapproval has been indicated towards any perceived over-emphasis being placed by a sentencing judge upon the contents of a V.I.S. In *Sargeant*⁷³ the sentencing judge had utilised lengthy passages of the victim impact reports verbatim in her sentencing remarks. Hammond J commented that although "...to bring home to the offender what he had done" was a proper objective, "the extensive reading of the victim impact reports gave this sentencing a quite unbalanced aspect".

Ashworth's views concur. He believes that the V.I.S. "...might be expected to enhance the compensatory elements [of sentencing], by making prosecutors and courts more aware of the need for compensation and by giving information about the harm and losses suffered..", but is less convinced about questions such as whether the V.I.S. should be permitted to contain a recommendation as to the sentence itself.⁷⁴

B *Reparation and Compensation*

1 *Pragmatic considerations*

Research carried out during 1996 showed that reparation sentences were most frequently imposed when a victim had suffered property damage.⁷⁵

This was the situation before the amendment of s 11 of the Criminal Justice Act. However, of the total number of property related offences during 1996 which resulted in a conviction, only 20% resulted in a sentence

⁷³ Above n 40.

⁷⁴ Above n 9, 504.

⁷⁵ Above n 7, 73.

of reparation. Violent offences were the next highest category, although the corresponding percentage of convictions resulting in a sentence of reparation was only 3%.⁷⁶ These findings encouraged further investigation in order to address the specific question of the reasons for the non-use of reparation for property offences.⁷⁷ Four District Courts were selected for survey and seven judges from those courts were interviewed. The main reason given by the judges for not imposing a sentence of reparation upon an offender convicted of a property-related offence was that the loss to the victim had already been made good. The other main reason was the inability of the offender to pay reparation. One judge commented that to make an award of partial reparation, where the award would be so low as to amount to a token reparation would be meaningless.⁷⁸ Another factor mentioned by some judges was that if the police did not raise the question of reparation then it would not be addressed by the sentencing court.

2 *Evaluation of emotional effects*

A 1989 survey of district probation offices found that reparation reports concerning emotional harm were less likely to be prepared than reparation reports concerning property loss and damage. The main reasons given for this were that emotional harm reparation reports were perceived by probation officers to be different entities from property loss and damage reports. In particular, the preparation of an emotional harm reparation report is considered to be complex and time-consuming and requires a victim/offender meeting. Furthermore, the judge usually does not specify an emotional harm report when requesting a reparation report. The

⁷⁶ Above n 53, 136.

⁷⁷ Above n 53, 141.

⁷⁸ Above n 53, 151.

difficulty of quantifying emotional loss was also mentioned as a discouraging factor.⁷⁹ viewed by the offender as one more punitive sanction, rather than as a logical attempt to right a wrong and fulfil an obligation to another person.⁸⁰ Research in 1992 for the Ministry of Justice concluded Reparation for emotional harm was considered in *Sargeant v Police*,⁸⁰ in which the victims were the family members of a person killed in a motor accident. Hammond J affirmed that the actual "loss" suffered by such a victim may be difficult to quantify, although "...it has long been recognised that full compensation or reparation is not affordable, whether by society at large or individuals".⁸¹ His Honour's view is supported by research which has shown that financial compensation is seen by the victim as moral vindication and symbolic; that it is evidence that the state acknowledges the victim's suffering and loss. If this is indeed the case, then precise quantification of the loss may not be relevant.⁸²

3 *Offender's lack of accountability*

All too often an order which was made against the defendant for reparation or a fine will, on default, be remitted or resented by a judge without consultation with the victim.⁸³

Many victims mention difficulties with reparation payments being slow or not made at all.⁸⁴ "Once the heat of sentencing is over, the offender tends to lose his or her urgency to pay and the victims are left once again in a

⁷⁹ The ration was 74: 735 for the first three months of 1989. See B Galaway, P Spier above n 65, 94-98.

⁸⁰ Above n 40.

⁸¹ Above n 40, 458.

⁸² R L Mawby "Victims' Needs or Victims Rights" in M Maguire and J Pointing (eds) *Victims of Crime: a New Deal* (Open University Press, Milton Keynes, 1988).

⁸³ C Henwood "A Judicial View of the Victim of Crime" in Seminar Proceedings *The Victim and the Criminal Justice System: Past Progress and Future Plans* (Victims Task Force, Wellington, 1992), 40. See also B Galaway, P Spier above n 65, 111.

⁸⁴ Above n 2, 16.

powerless situation...".⁸⁵ Zehr contends that the reason for this might be that the sentence is viewed by the offender as one more punitive sanction, rather than as a logical attempt to right a wrong and fulfil an obligation to another person.⁸⁶ Research in 1992 for the Ministry of Justice concluded that reparation is not being administered in a manner that would accomplish objectives relating to offender accountability or provide opportunities for victim participation.⁸⁷

One of the justifications for truly restorative sentencing is accountability to the victim. However, the *state v offender* criminal justice process provides the state with the leading role in evaluating the extent of this accountability. Although accountability involves being given an opportunity to face up to the human consequences of one's behaviour and taking responsibility for the results of that behaviour,⁸⁸ in practice the offender's role is usually limited to providing details of his or her financial means to pay. Furthermore, the final decision as to the extent of a reparation sentence rests with the judge. A judge may request reparation reports and then not sentence an offender to reparation, even in situations where a victim and offender agreement is achieved.⁸⁹

C *The Accident Rehabilitation and Compensation Act 1992*

Issues raised by victims relating to the Accident Compensation Scheme include the inadequacy of the payments, particularly since the 1992 Act's

⁸⁵ C Henwood above n 83.

⁸⁶ H Zehr *Changing Lenses* (Herald Press, Pennsylvania, 1990) 42.

⁸⁷ Above n 65, 33.

⁸⁸ Above n 86.

⁸⁹ B Galaway, P Spier above n 65, 103.

replacement of the ability to receive a lump sum payments with an "independence allowance", the practical difficulties experienced in receiving an allowance under the Act, and the failure of the Act to provide compensation for victims without physical injury who suffer from stress or emotional harm other than that caused by sexual offences,⁹⁰ or for families of victims and secondary victims.⁹¹

Furthermore, the decision-making process under the Accident Compensation Scheme is one-way. The Scheme itself prescribes who is eligible and what compensation is payable. The actual harm suffered by individual victims and their needs is addressed only insofar as they meet the criteria laid down within the Scheme.⁹²

D Civil Proceedings

The main deterrents to victims bringing civil proceedings against the offender are the expense, the additional stress and the time involved. The victim will be required to recount details of the offence for a second time in formal court proceedings, and the psychological trauma caused by their participation in further adversarial legal proceedings might outweigh any benefits from the formal recognition of their plight by the court and the payment of damages.⁹³ Furthermore, this is likely to cause delay in the ability of the victim to "put the offence behind them" and is considered by some writers to be a form of re-victimization.

⁹⁰ Above n 2, 18. See also A Hayden "There is Light at the End of the Tunnel": Initiatives for Victims of Crime at a Local, National and Statutory Level (Report to the Winston Churchill Memorial Trust Board, Wellington, 1996) 56.

⁹¹ Above n 2, 19.

⁹² J Shapland "Victim Assistance and the Criminal Justice System" in EA Fattah (ed) *From Crime Policy to Victim Policy: Reorienting the Justice System* (The Macmillan Press, Hampshire, 1986) 224.

⁹³ Above n 57, 3.

One of the justifications for introducing the sentence of compensation in the United Kingdom was that it was unreasonable to expect most crime victims to pursue claims for damages through the civil courts.⁹⁴ However, although the awards of reparation and compensation might be considered, logically, to supersede any requirement for victims to expend time and resources upon pursuing a civil action, in practice this is not the case. In particular, an order for compensation must be deducted from any damages awarded in the civil courts, while an order for reparation "may make it more difficult to obtain damages in civil proceedings".⁹⁵ Furthermore, the compensation order is not available for more serious offences.

E Summary

The foregoing collation of criticisms made by victims and victims' organisations concerning the "accountability provisions" fails to reveal a single common thread. However, in brief:

- a victim impact statement apprises the judge of the emotional and physical damage, and any material loss suffered by a victim, but fails to offer the victim any participatory role;
- sentences of reparation, restitution and compensation, and also compensation payable under the Accident Rehabilitation and Compensation Act 1992, address directly the material loss of the victim, but rarely address emotional damage, and also fail to offer a participatory role to the victim;

⁹⁴ Advisory Council on the Penal System *Reparation by the Offender* (Widgery Report, HMSO, 1970) and Lord Dunpark *Reparation by the Offender to the Victim in Scotland* (Edinburgh, HMSO 1977) Cmnd 6802, cited in Zedner above n 13, 239.

⁹⁵ Above n 53, 152.

- civil proceedings offer, indeed demand participation by the victim, but the need to bring additional court proceedings involves additional expense, time and stress for the victim.

The question must be asked whether a more actively participatory role for victims in the sentencing process would in fact address these diverse criticisms with any degree of effectiveness. Furthermore, would the end result of such participation be compatible with the principle underlying the sentencing policy of the *state v offender* criminal justice process?⁹⁶

V ENHANCED VICTIM PARTICIPATION IN SENTENCING WITHIN THE CRIMINAL JUSTICE PROCESS

The premise common to most researchers in the area of victim involvement in the criminal justice system is that, presently, victims feel excluded from the process and that, accordingly, an opportunity to increase victim participation will increase victim satisfaction.⁹⁷ It is thought that an overriding motivation for many victims "...is the desire to tell one's story and through doing this, to secure vindication...".⁹⁸ However, there is judicial opposition to any suggestion that a victim of an offence be asked to suggest or propose a punishment for the offender.⁹⁹

Nevertheless, in its 1997 discussion paper on sentencing, the Ministry of Justice sees as "most significant" the issue whether victim's needs would be better addressed by allowing them to address the court on sentencing,

⁹⁶ Discussed above part II B.

⁹⁷ Above n 42.

⁹⁸ Above n 42, 17. See also E Erez and L Roeger above n 63, 48.

⁹⁹ See, for example, *R v B* Unreported, 14 June 1989, High Court, Dunedin Registry, S8/89 and *R v Hopkirk* (1994) 12 CRNZ 216.

or to give an opinion on appropriate sentencing within the victim impact statement.¹⁰⁰ However, the Ministry itself notes several objections to the issue.¹⁰¹ These include such matters as the probable inconsistencies of sentencing which would follow,¹⁰² the possibility of intimidation of, or retaliation against victims by offenders, and, finally and perhaps most persuasively to traditionalists, the fact that the victim would thereby be usurping the role of the state within the criminal justice process.

English research affirms that the "hanging, drawing and quartering" victim is a myth. Victims have been found not to be particularly punitive either in

Similarly, Ashworth is less confident about the relevance of a victim impact statement to aspects of sentencing other than compensatory sentencing,¹⁰³ for the reasons, respectively, that this would involve sentencing for unforeseen results (thus introducing subjectivity into sentencing, depending upon the particular susceptibilities of the victim), that the defendant's rights might be infringed (the V.I.S. might permit unfounded allegations to be made about the offender), and finally that the ability to influence sentencing might raise expectations for victims which might subsequently not be met.

Each of the foregoing arguments will be examined in turn.

A Retaliatory Sentencing

The proposition that a victim should be offered the opportunity to express his or her views concerning the sentencing of an offender inevitably raises the issue of retribution or retaliatory sentencing, due to the victim's

¹⁰⁰ Above n 7, 129.

¹⁰¹ Above n 7, 125.

¹⁰² See also E Crowther "The Impact of Impact Statements" [1998] NLJ 70.

¹⁰³ Above n 9, 505 - 508.

subjective viewpoint.¹⁰⁴ However, this belief is not supported by research.¹⁰⁵ Dr Howard Zehr writes:¹⁰⁶

Victims badly need what might be called somewhat ambiguously "an experience of justice". This has many dimensions. Often it is assumed that vengeance is part of this need but various studies suggest that this is not necessarily so, that the need for vengeance often may be the result of justice denied.

English research affirms that the "hanging, drawing and quartering" victim is a myth. Victims have been found not to be particularly punitive either in voicing their opinions about a sentence they would wish the offender to receive, or in their reactions to the sentences that those offenders who were convicted eventually received.¹⁰⁷

B Unforeseen Consequences

The introduction into the sentencing process of subjective matters such as the particular characteristics of a victim is considered to be wrong in that it will lead to arbitrariness, which is contrary to the requirement of the criminal justice process for proportionality in sentencing.

However, the whole question of the unforeseeability of the consequences of a criminal act upon a victim needs to be examined objectively. Where the victim is known to the offender this argument collapses, unless the defendant has some mental or physical impairment which would prevent him or her from appreciating the particular characteristics of the victim. Where the victim is not known to the offender, it is suggested that the

¹⁰⁴ Above n 11, 179.

¹⁰⁵ Above n 7, 130.

¹⁰⁶ H Zehr "Rethinking Criminal Justice: Restorative Justice" in McElrea (ed) above n 20, 4.

¹⁰⁷ J Shapland "Victims and the Criminal Justice System" in E A Fattah (ed) above n 92, 214.

nature of the crime itself will often raise a presumption of foreseeability of its consequences for the victim. Furthermore, the victim will often plead his or her special circumstances at the time of the offence.¹⁰⁸

in addition, there seems to be no reason why the "egg-shell skull" principle should not be permitted to apply after the offence as well as during the commission of the offence. In other words, the maxim that the offender must "take his victim as he finds him" should apply throughout the prosecution and sentencing stages.¹⁰⁹

C *Inconsistencies in Sentencing*

In its 1997 paper, the Ministry of Justice rebuts its own argument regarding inconsistencies of sentencing.¹¹⁰ It explains that, although some guidance as to sentencing in New Zealand is provided by legislation and judicial rulings, a lack of specificity and the retention of judicial discretion mean that in practice a wide disparity in sentencing decisions is evident. A similar situation was observed in Canada by the Ontario Sentencing Project which carried out extensive research into the sentencing process in Ontario district courts.¹¹¹ The research led the Director of the Centre of Criminology at the University of Toronto to conclude that the sentencing process is fundamentally "...a value judgement", in that "...such dispositions are accounted for more adequately by the beliefs and goals of the decision maker than by the objective facets of the individual case".¹¹² These findings support the view that to allow the victim to participate in the sentencing process will not be disturbing a rigid or consistent regime. On the contrary,

¹⁰⁸ H Fenwick "Procedural 'Rights' of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?" (1997) 60 *The Modern Law Review* 317, 330.

¹⁰⁹ Above n 108.

¹¹⁰ Above n 7, 35.

¹¹¹ See *Report of Proceedings: National Conference on the Disposition of Offenders in Canada* (Centre of Criminology, University of Toronto, May 14-17, 1972) 11.

¹¹² Above n 111, 21.

the "beliefs and goals" of the victim might simply be regarded as constituting another viewpoint (indeed the viewpoint of the person arguably most affected by the offence), and may contribute to "real" justice by increasing accuracy at the sentencing stage.¹¹³

D Offender Retaliation

The possibility of victim intimidation or retaliation by offenders is more persuasive, especially where the offender and victim were already known to one another at the time of the offence. One possibility is that the views of the victim could be given to the sentencing judge as written submissions. However, this is likely to lead to similar criticisms from victims as are made concerning the submission of a written V.I.S.

Nevertheless, it is not suggested that existing sentencing principles and guidelines be abolished. The victim's views would be influential only within the principles and guidelines already established for the particular category of offence. One writer suggests that there be a single maximum quantum for an offence; if the victim demanded less for private reparation, more would be owed to the community in the order for public reparation.¹¹⁴ By thus removing any direct responsibility for the sentence from the victim, this might also overcome any perceptions that victim sentencing might lead to offender retaliation.

E Conflict with the State v Offender Paradigm

It is the argument concerning the usurpation of the role of the state which may be more compelling. Nevertheless, at certain stages within the criminal justice process, a divergence from the *state v offender* paradigm is

¹¹³ See E Erez above n 25, 23.

¹¹⁴ M Wright "Can Mediation be an Alternative to Criminal Justice?" in J Hudson, B Galaway (eds) above n 14, 236.

already apparent. A 1994 University of Bristol study of the police response to assault concluded that the "offence against society" model is not followed during the first stage of the criminal justice process.¹¹⁵ The authors noted that the police regularly choose not to proceed with a complaint from a victim of an assault if that victim does not demonstrate a firm commitment to the prosecution process. They inferred that the early stage of the criminal justice process follows a "complaint-orientated model", in which the interests of the state and society are subordinated to the interests and attitude of the victim in determining whether or not a complaint will proceed to prosecution.¹¹⁶ Only rarely were the police prepared to bring charges against an alleged assailant without first ensuring the co-operation of the victim. The authors noted that in these "atypical" cases the police appeared to have been influenced by pragmatic considerations such as "...the horrific nature of the injuries sustained, by the high profile which was afforded to these assaults in the local press, and by their wish to 'nail' powerful local villains".¹¹⁷ Patently, these were cases which would result in successful prosecution without necessarily requiring the co-operation of the victim.

A further inconsistency with the *state v offender* paradigm becomes evident if the matter proceeds to prosecution and the defendant disputes the charge:¹¹⁸

If the defendant pleads guilty they [the victim] are, in effect rendered redundant. If, on the other hand, the alleged assailant contests the charge, the victim may be subjected to a gruelling examination of his or her own behaviour, all in the interests of a process which has largely public, or symbolic, purposes.

These views are affirmed by research which analyses the framework within which the criminal justice system operates in the United Kingdom.¹¹⁹ This

¹¹⁵ Above n 36.

¹¹⁶ Above n 36, 16.

¹¹⁷ Above n 36, 21.

¹¹⁸ Above n 36, 15.

concluded that the ostensible, formal requirements of the criminal law model are indeed addressed in the criminal justice system "...with the rhetoric of these principles.." However the research observes the significant gap between rhetoric and reality which exists in practice and which is exemplified by such human variables as coercive police practice, the decision to prosecute a particular offence, and the broad judicial discretion, and hence subjectivity, in sentencing decisions.¹²⁰

It is concluded that at certain points the criminal justice process already diverges significantly from the *state v offender* paradigm. A logical point for further divergence from the paradigm might be at the commencement of the sentencing process.

F **Unfairness**

Another argument against victim participation in sentencing is the inherent unfairness of purely restitutive sentencing (which research indicates most victims will seek),¹²¹ in that a wealthier offender will generally suffer less hardship when required to compensate their victim than the poorer offender. The argument is refuted by noting that the financial means of an offender has of necessity always been one factor considered by the court when imposing a sentence. A pragmatic view suggests that restitutive sentencing be looked at in a wider sense than purely financial. Thus, the impecunious offender might compensate his or her victim by offering services.

¹¹⁹ C M King *The Framework of Criminal Justice* (Croom Helm Ltd, London, 1981). See also J Shapland above n 107, 215.

¹²⁰ CM King above n 119, 149.

¹²¹ J Shapland, J Willmore, P Duff *Victims in the Criminal Justice System* (Gower Publishing, Great Britain, 1985) 135.

VI LEGISLATIVE PROVISION FOR VICTIMS' RIGHTS

G WITHIN SECTION 75 *Subjective Arguments*

Other researchers suggest that by making the victim of a crime responsible for the imposition of a punishment, the victim's capacity to "walk away from" the crime may be negatively affected,¹²² and point out that if the sentencing judge (who, it is presumed, will retain a discretion) after listening to the offender's plea in mitigation, does not follow the victim's wishes concerning sentencing, the victim might well feel more let down than if their views had not been sought in the first place. These arguments are rather more subjective. No doubt some victims will be so affected, others will not. In any event "[t]he victim's presence and participation in court proceedings....remind judges, juries and prosecutors that behind the "state" is a real person with an interest in how the case is resolved".¹²³

The Criminal Justice Act 1985 which allow the offender to present their circumstances

The foregoing analysis suggests that there are persuasive arguments for permitting victims to assume a more actively participatory role in the sentencing process. The specific nature of that participation and whether it would result in outcomes which meet the requirements of the sentencing policies of the *state v offender* criminal justice paradigm¹²⁴ have yet to be considered. Accordingly, the following part of this paper considers these questions and suggests affording victims enforceable rights in the criminal justice process in order that they may participate in the sentencing process.

¹²² Appx n 4, 864

¹²³ Criminal Justice Act 1985, s 75.

¹²⁴ Victims of Offences Act 1987, ss 4, 10.

¹²² Halleck SL "Vengeance and Victimisation" (1980) *Victimology* v 5.

¹²³ See E Erez above n 25, 23.

¹²⁴ Discussed above part II B.

VI LEGISLATIVE PROVISION FOR VICTIMS' RIGHTS WITHIN SENTENCING

A *Rights for Victims*

Cellini observes that "...nothing short of a constitutional amendment delineating victims' rights and giving them standing to assert these rights in criminal proceedings would be sufficient to ensure victims a role in the criminal justice system".¹²⁵

The criminal justice process itself focuses upon two protagonists, the state and the offender. Legally enforceable rights are not provided for peripheral participants in the process such as victims. There is, for example, no equivalent for the victim of the procedural rights contained in the Criminal Justice Act 1985 which allow the offender to present their circumstances for consideration in pre-sentence reports, and also to call witnesses concerning their cultural background and its effect upon the offending.¹²⁶ The Victims of Offences Act consists mainly of principles concerning services which victims should be entitled to receive, and also recommends that the views on bail of victims of sexual or assault offences be conveyed to the judge.¹²⁷ The provisions concerning victim impact statements are also recommendatory in form.¹²⁸ Thus, for example although a victim impact statement should be taken into account by the judge at sentencing, it would clearly be difficult for a victim to be sure that it had been. The Act

¹²⁵ Above n 4, 864.

¹²⁶ Criminal Justice Act 1985, s 16.

¹²⁷ Victims of Offences Act 1987, ss 8, 10.

¹²⁸ The Act was passed in order to comply with New Zealand's international obligations, for example, the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (November 1985) which is binding on New Zealand.

contains no sanctions for a failure to observe any of its declared principles, although the Law Commission has recently recommended that victims' interests within the Act be elevated to the level of rights.¹²⁹ The non-legal status of the Victims Charter in England has drawn similar criticism, because "...the persuasive grace and favour nature of this approach may eventually become unsustainable especially if the political climate grows more hostile to victims rights".¹³⁰

Furthermore, although many of the responsibilities owed by the criminal justice system to the person charged with an offence have been elevated to the status of rights within the New Zealand Bill of Rights Act 1990,¹³¹ no such equivalent legislation exists to affirm the "rights" of the victim of a crime. Admittedly, certain of these rights such as the right of a person charged with an offence to be tried without undue delay¹³² are beneficial to both the accused and the victim. Conversely, however, in bail applications a balancing exercise is required between the responsibilities owed to the victim and those owed to the person charged with the offence.¹³³ In any event, there is no legislation which would permit a victim to enforce those putative "rights".

A similar situation exists in the United States. The rights of a person charged with an offence are constitutionally guaranteed in the Bill of Rights,¹³⁴ while the victim is not mentioned. Cellini¹³⁵ explains this anomaly

¹²⁹ New Zealand Law Commission above n 5, 127.

¹³⁰ Above n 108, 324.

¹³¹ See ss 21 - 27.

¹³² New Zealand Bill of Rights Act 1990, s 25(b). See also *Martin v District Court at Tauranga* [1995] 1 NZLR 491, and New Zealand Law Commission above n 5, 80.

¹³³ See for example the New Zealand Bill of Rights Act 1990, s 24(b) which requires that the accused be released on bail unless there is just cause for continued detention. The necessary 'balancing exercise' was discussed by Eichelbaum CJ in *Whitair v Attorney-General* [1996] 2 NZLR 45.

¹³⁴ US Constitution amend. IV, V.

as reflecting the historical situation at the time of drafting of the Bill of Rights. The accused was often "mistreated and abused under the authority of the Crown". On the other hand, a victim was, at that time, able to bring a private criminal prosecution and damages were a principal goal of the criminal proceeding. Therefore, "the Founding Fathers would not have felt a need to delineate a victim's right to attend and participate in a criminal proceeding when the victim could have almost complete charge of the prosecution of one accused of causing him injury".

Word limitations prevent a detailed investigation within this paper of the background to the criminal procedure provisions of the New Zealand Bill of Rights Act 1990. However, the New Zealand Bill of Rights Act was drawn heavily from the Canadian Charter of Rights and Freedoms which does not mention rights for victims, yet affirms rights for a person charged with a criminal offence. It is conceivable, therefore, that in a parallel with the postulated development of the United States' Bill of Rights, the position of the victim was simply overlooked by the drafters of the New Zealand legislation, rather than representing a deliberate policy decision.

Fenwick discusses the concept of victims' rights as being one side of a bargain between the state and victims. As the burden of offence avoidance or crime prevention is taken on more and more by private citizens (who finance or volunteer for entities such as security guards or Neighbourhood Watch schemes), who are also potential victims of crime, so actual victims of crime should have the right to ensure that punishment of the offender occurs if offence avoidance fails.¹³⁵ However, her objection to this concept is that, logically, the victim who has not accepted responsibility for offence avoidance (such as the car owner who has left her car unlocked, or the

¹³⁵ Above n 4, 846.

¹³⁶ Above n 108, 320.

rape victim who has walked along a dark street late at night), would then not be entitled to the right to participate in sentencing.¹³⁷

Alternatively, Fenwick sees the provision of victims' rights as being necessary to prevent secondary victimisation.¹³⁸ This view accords more with the concept of victims assuming a participatory role in the criminal justice process.

B Are Rights for Victims Compatible with the Criminal Justice Process?

Nevertheless, if victims are given a legally enforceable right to participate in sentencing, various procedural and practicable difficulties become apparent. For instance, would an offender have a right to appeal a sentence on the grounds that his victim had chosen not to make representation? Statements made by a victim in person at the sentencing hearing would be cross-examinable by prosecuting counsel. This would cause additional stress for victims and could lead to objections of re-victimisation, in the same way as already occurs when victims bring civil proceedings for exemplary damages.

Furthermore, it is debatable whether such legislation would supply the "sense of participation" which is extremely important to victims. The formal procedures and adversarial approach of the criminal justice process are designed to minimise the emotional elements of criminal justice. It is unlikely, within such a setting, that the offender would feel able to express his or her remorse with any sincerity, and similarly, the victim might feel constrained from revealing the full extent of his or her reaction to the

¹³⁷ Above n 108, 320.

¹³⁸ Above n 108, 320.

offending. Certainly, the current attitude of the judiciary to any suggestion of emotive language within a written V.I.S. does not encourage optimism concerning possible emotional outbursts from the victim in the sentencing court.¹³⁹

Perhaps the main objection is that participation by victims within that process is likely to result in sentencing decisions which are not consistent with the sentencing principles of the criminal justice process. Thus although victims seek active participation within the process,¹⁴⁰ it appears that from that participation they hope to achieve results such as reparation, the redress of the wrong, emotional healing, reassurance concerning safety from the offender and the rehabilitation of the offender.¹⁴¹ These aims diverge considerably from the aims of the sentencing policies within the criminal justice process.

It is concluded, therefore, that if victims' rights of participation are to be permitted have a real impact upon sentencing, then the criminal justice process itself will require to be re-shaped in a fundamental sense. The sentencing policies which underpin the present *state v offender* model will no longer be applicable. Alternatively, victims rights of participation will be illusory. The sentencing judge will pay lip-service to the views of victims, but will, in the end, sentence the offender in accordance with the retributive, deterrent and proportionality aims of sentencing which are the foundation of sentencing in the criminal justice process.

¹³⁹ See *R v Hopkirk*, above n 67.

¹⁴⁰ Above n 2, 33.

¹⁴¹ Above n 2, 45.

The New Zealand Law Commission supports increased participation by victims in the criminal justice process, including the sentencing process.¹⁴² Conversely, however, Victim Support opposes the imposition upon victims of a "... burden regarding decisions about the offender".¹⁴³ In order to assess the reality and the extent of victims' wishes so far as participation in sentencing is concerned, specific opportunities for such participation which are already provided for victims in other jurisdictions are examined briefly. Such opportunities have in many instances not been taken advantage of by victims to the extent that would be expected. Furthermore, it appears that victims' level of satisfaction with the criminal justice service may not have been improved to a significant extent by affording them such opportunities.¹⁴⁴

C *A Victim's Right of Allocution*

In some American states, rights of allocution are provided for victims. This right permits the victim to present a victim impact statement (V.I.S.) orally to the sentencing court.¹⁴⁵ However, this does not lead inevitably to victim participation in sentence, since in theory the victim's statement could be disregarded.¹⁴⁶ Although the Kansas Court of Appeals in *State v Heath*¹⁴⁷ approved a victim's explicit sentencing request which did not follow state sentencing guidelines for the particular offence, the degree of influence of a V.I.S. upon sentencing differs from state to state.¹⁴⁸

¹⁴² See Law Commission above n 5, 85.

¹⁴³ Hayden, above n 90.

¹⁴⁴ Above n 108, 321.

¹⁴⁵ Above n 11, 161.

¹⁴⁶ Above n 108, 329.

¹⁴⁷ 901 P 2d 29 (Kan Ct App 1996).

¹⁴⁸ *Payne v Tennessee* 112 L Ed 2d 1032, 111 S Ct 1407 (1991), discussed in E A Meek "Victim Impact Evidence and Capital Sentencing: A Casenote on *Payne v Tennessee*" (1992) 52 Louisiana Law Review 1299; *South Carolina v Gathers* 104

Judges in the United States formerly possessed the discretionary power to exclude victims who would be likely to testify at a subsequent hearing from the substantive trial of the accused. This discretionary power was thought to be a necessary safeguard to prevent prejudice and prejudgment of the issues. However this discretion has now been expressly excluded by the United States Victim Allocation Clarification Act 1997. The legislation provides that "...a United States district court shall not order any victim of an offense excluded from the trial of a defendant accused of that offense because such victim may, during the sentencing hearing, testify as to the effect of the offense on the victim and the victim's family".

Despite the foregoing judicial and legislative encouragements, there remains some doubt concerning whether or not victims in fact wish to take advantage of a right of allocution. The research of Davis and Smith¹⁴⁹ which established that the V.I.S. procedure did not enhance victim satisfaction with the criminal justice process, led them to question whether allowing victims to make oral statements to the court at sentencing "...might offer a more effective way to promote victim satisfaction through participation".¹⁵⁰ However, they note that a study carried out into the effects of a Californian allocution statute revealed that although victims who spoke in court were positive about the experience, they were no more satisfied with the criminal justice process than were those victims who chose not to speak. The researchers conclude that the premise that victims desire participation within the criminal justice process may be flawed. They recommend the instigation of further research in order to ascertain, first,

L Ed 2d 876 , 109 S Ct 2207, (1989), and *Booth v Maryland* 96 L Ed 2d 440, 107 S Ct 2529 (1987), overruled. See also Ministry of Justice above n 7, 127.

¹⁴⁹ RC Davis, BE Smith "Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise?" [1994] 22 Journal of Criminal Justice 1.

¹⁵⁰ Above n 149, 11.

the proportion of victims who want to participate more fully in the criminal justice process and, second, to determine who these victims are. Although the answers to these questions "...might not be compatible with the aims of the justice system and the rights of the accused,.....until we understand what victims want, we cannot debate their role in the justice process intelligently."¹⁵¹

One explanation for the apparent lack of enthusiasm on the part of victims observed by Davis and Smith,¹⁵² might be that allocution is not truly participatory. For victims to participate with any degree of satisfaction in the sentencing process they might also require to be given the legally enforceable right to question the offender and any witnesses, to compel prosecution and to challenge the sentence imposed on the offender.

Police prosecutors in Australia observe that in general the circumstances of the offender are examined in more detail by the sentencing judge than the circumstances of the victim. The reasons suggested for this are because either there is a solicitor representing the defendant, or there exists a pre-sentence report "that goes into great detail about how the sentence will affect the offender".¹⁵³ Although the V.I.S. is intended to countermand this effect to some extent, another possibility might be that the victim be represented by legal counsel. Section 4 of the Victims of Offences Act 1987 states that "Victims...should have access to.....legal assistance responsive to their needs." While expressing support for the concept, the Victims' Task Force has also noted the resource implications of making this provision mandatory rather than recommendatory. However it has been noted that legal aid is available for the legal representation of impecunious

¹⁵¹ A Hayden above n 90, 97.

¹⁵² See text at p 72.

¹⁵¹ Above n 149, 12.

¹⁵² Above n 149, 129.

¹⁵³ Above n 63, 9.

offenders and should therefore also be made available for impecunious victims.¹⁵⁴

Although the provision of legal counsel for victims at sentencing might increase victims' sense of participation in the criminal justice process, the difficulty of reconciling the sentencing aims of victims with those of the *state v offender* criminal justice paradigm remains. In order to address the wishes of victims effectively, it may be necessary to minimise the role of the state in the criminal justice process and return the conflict to the individuals concerned.¹⁵⁵ A *victim v offender* restorative justice paradigm, which would come into operation after a finding or plea of guilty, offers the opportunity "...for victims and offenders to reach agreements as to the appropriate response to the offending, sometimes under the umbrella of court processes, and sometimes in an independent process".¹⁵⁶

VII PARTICIPATION WITHIN A NEW PARADIGM OF CRIMINAL JUSTICE?

In supporting the claims of victims for a voice in the criminal justice process, Jamieson¹⁵⁷ proposes "a major paradigm shift to a fully restorative justice system". This view is supported by Shapland¹⁵⁸ who observes that the adoption of a more victim-centered system within the criminal justice process may produce "a system more rounded in its concerns but no less adversarial than at present". She postulates the emergence of a different model, one closer to a "mediated consensus model of dispute resolution".

¹⁵⁴ A Hayden above n 90, 87.

¹⁵⁵ See text at n 36.

¹⁵⁶ Above n 7, 128.

¹⁵⁷ Above n 20, 7.

¹⁵⁸ Above n 107, 216.

The leading criminologist, Nils Christie, claims that the takeover of the crime conflict by the state and its professionals is theft of important public property.¹⁵⁹ The victim, the offender, and the community must regain "their" conflict from the state. In order to achieve this ideal, society's expectations of the criminal justice process need to be addressed. The modern concept of retribution as the focus of justice should be replaced by the traditional restorative concepts of accepting responsibility, and restitution.¹⁶⁰ Nevertheless, it will generally be appropriate for the criminal justice process to operate until a guilty verdict is obtained (or pleaded).¹⁶¹ This disposes of the objection that the possibility of an early diversion out of the system might induce some defendants to plead guilty in order to avoid a public trial.¹⁶²

The need for "redress of the wrong" is already acknowledged to a limited extent within the criminal justice process. Reparative sentencing is available under the Criminal Justice Act 1985¹⁶³ and the Children, Young Persons and their Families Act 1989 has replaced court proceedings in the area of youth justice with family conferences.¹⁶⁴ There are also a few adult restorative justice schemes such as "Te Oritenga" and "Justice Alternatives" in Auckland, and the pilot project run by Timaru District Court.¹⁶⁵ However, these initiatives have been less successful than

¹⁵⁹ Above n 27.

¹⁶⁰ H Zehr "Models of Justice - Retribution vs Restoration" (1994) 420 *Lawtalk* 18.

¹⁶¹ See Submission No 32, New Zealand Council of Victim Support Groups *Restorative Justice: The Public Submissions* (Ministry of Justice, Wellington, 1998).

¹⁶² G Davis above n 5, 139.

¹⁶³ Criminal Justice Act 1985, ss 11,12, 14, 16, 22- 25, 28 - 45.

¹⁶⁴ Children, Young Persons and their Families Act 1989, s 279.

¹⁶⁵ "Perfect Justice or Easy Way Out?" *Sunday Star-Times*, Auckland, New Zealand, 19 April 1998, C6.

envisaged.¹⁶⁶ It is suggested that this might be because of the inherent difference between the restorative justice paradigm, which views crime as a conflict between individuals, resulting in harm to victims, communities, and offenders, and the criminal justice process which views crime as a conflict between the offender and the state,¹⁶⁷ with the true victim treated as no more than another witness to assist the prosecution.

A restorative justice scheme is one which possesses the following characteristics and objectives: the rehabilitation of offenders, the active participation of victims, the redress of the wrong, the affirmation of community and cultural values, and the restoration of community relationships through "reintegrative shaming" of the offender.¹⁶⁸ In brief, restorative justice recognises that the conflict is between individuals and encourages dialogue and healing.¹⁶⁹

Zedner maintains that restorative aims in sentencing appear to conflict with the *state v offender* criminal justice process, for three reasons.¹⁷⁰ First, restorative justice¹⁷¹ has no intrinsic penal character and thus ignores the

¹⁶⁶ Ministry of Justice *Restorative Justice: A Discussion Paper* (Ministry of Justice, Wellington, 1995) 34.

¹⁶⁷ J Hudson, B Galaway above n 14, 2; H Zehr above n 14, 82. See also Submission No 73, Dunstall *Restorative Justice: The Public Submissions* (Ministry of Justice, Wellington, 1998).

¹⁶⁸ The principle of reintegrative shaming is that although the offender may be stigmatized for the offence he or she is provided with ways to overcome that stigmatization. See J Braithwaite *Crime Shame and Reintegration* (Cambridge University Press, Cambridge, 1989).

¹⁶⁹ Above n 159.

¹⁷⁰ Above n 13, 239.

¹⁷¹ Note that Zedner's chosen terminology is the converse of that selected by the Department of Justice, above n 7, 70. In other words, Zedner uses the term "reparative justice" to include compensation as well as wider elements such as acknowledgement of the harm done, expressions of remorse and agreement to undergo rehabilitative treatment. This form of justice is described as "restorative justice" by the Department of Justice, while the concept of reparation is used to mean financial compensation.

distinction between criminal law and civil law.¹⁷² Second, restorative justice fails to recognise that a crime is not simply an offence against the victim, but also an offence against society. Because restorative justice proceedings are not generally open to either the public, or the media, the element of public denunciation of the offender is missing. Third, restorative justice focuses upon the harm caused by the offence and ignores the mens rea element of the crime. The effect of the crime upon the particular victim is considered, but the degree of culpability of the offender is not.

Although the decision in *Clotworthy* appears to focus upon an irreconcilable conflict between the interests of the wider community and the interests of the offender and victim, these arguments are refutable to an extent. First, there is no inherent reason why restorative outcomes should not contain a punitive element, (although research indicates that victims are not inclined to be overly punitive).¹⁷³ Second, outcomes such as community service orders are intended to acknowledge the interest of the wider community in the outcome of a criminal prosecution. Third, the outcome of a restorative justice process is one which will have been negotiated and agreed between the offender and victim themselves. It is unlikely that the matter of the offender's intent will not have been discussed and taken into account when reaching agreement.

However, the recent decision by the Court of Appeal in *R v Clotworthy*¹⁷⁴ has highlighted the resistance evidenced by, not only the public¹⁷⁵ but also the judiciary in accepting restorative justice sentencing agreements as being "legitimate" outcomes of the criminal justice process. In *Clotworthy* the final recommendation of a restorative justice conference, endorsed by both offender and victim, was appealed by the solicitor-general's office as being inappropriate for a case of serious offending. The victim was

¹⁷² Discussed above part II.

¹⁷³ Discussed above part V A.

¹⁷⁴ Unreported, 29 June 1998, Court of Appeal, CA 114/98.

¹⁷⁵ See F Haden *Sunday Star -Times* New Zealand, 5 July 1998, C4.

permitted to speak at the appeal hearing and reiterated his agreement with the original restorative sentence and also his view that a prison sentence would achieve nothing either for the offender or himself.¹⁷⁶ Nevertheless, observing that the need to deter others for public safety reasons was too important to justify the imposition of a suspended prison sentence, the Court of Appeal overturned the earlier ruling and imposed a prison sentence of three years upon the offender.

Although the decision in *Clotworthy* appears to focus upon an irreconcilable conflict between the interests of the state and the interests of the victim, this is not necessarily the case. One of the outcomes of restorative justice must be the assurance of the safety and security of the wider community. Therefore depending upon the nature of the offending, incarceration of the offender may be a legitimate sentencing aim which, if improperly overlooked by the parties at a restorative justice conference, may be examined by the court. Nevertheless, the wishes of the victim should be influential,¹⁷⁷ and it is only if the offender poses a threat in reality that the court should be permitted to intervene. Contrary to the situation in the criminal justice process, there is no place within restorative justice for taking a symbolic view of the interests of the state.¹⁷⁸

Restorative justice in New Zealand operates principally in the area of youth justice where it has, in effect, replaced the criminal justice process. The family group conference (FGC) system is a compulsory restorative justice scheme which operates in the youth justice area for all offences except murder and manslaughter.¹⁷⁹ One of the principles of the scheme is that the interests of victims of youth offending should be given due regard when

¹⁷⁶ Above n 174, 12.

¹⁷⁷ See text at n 35.

¹⁷⁸ G Davis above n 5, 217.

¹⁷⁹ The family group conference system was established by the Children, Young Persons and their Families Act 1979.

dealing with that offending. Victims are invited to attend and to participate in the FGC and offenders are encouraged to accept responsibility for the wrong done to the victim and to make amends. Victims are generally positive about the experience of meeting the offender, and being enabled to "release" negative feelings about the offending, although some mention intimidation by the offender and an inability to express their true feelings concerning the offence for various reasons.¹⁸⁰ However, research indicates a significant level of victim dissatisfaction with the system, mostly centered upon the perceived inadequacy of penalties or reparation, and dissatisfaction with the rehabilitative proposals made within the FGC for the offender.¹⁸¹ Morris suggests that the underlying reason for victim dissatisfaction might be that "[t]ension has been created by expecting very different interests to be met in a single forum without one or the other being compromised".¹⁸² However, she does not condemn the principles which underlie restorative justice. Rather, she suggests practical improvements to the process such as providing victims with support and information before meeting offenders and proposes that victim attendance should remain optional.¹⁸³

VIII CONCLUSION

The influence of the victims' movement with its demands for a leading role in the criminal justice system is a relatively recent phenomenon, but its rapid increase both nationally and internationally indicate that it will not be

¹⁸⁰ However recent amendments to the Children, Young Persons and their Families Act 1979 are intended to place a further "emphasis upon the victim" and are intended to reduce complaints of such intimidation. These relate to the new duty of the Youth Justice Co-ordinator to consult with the victim concerning the date and time of the FGC (s 250(2)); and also to s 251(2) which allows a victim to be accompanied by support persons when attending an FGC.

¹⁸¹ See above n 2 and see also D Swain "Family Group Conferences in Child Care and Protection and in Youth Justice in Aotearoa/New Zealand" *International Journal of Law and the Family* 9 (August 1995) 155-207.

¹⁸² A Morris "Giving Victims a Voice: A New Zealand Experiment" [1993] *Criminology Aotearoa/New Zealand* 12.

¹⁸³ Above n 182, 13.

short-lived. Given the twin pressures of international opinion and political expediency, it seems inevitable that New Zealand's criminal justice system will be compelled to make provision for victims of crime to participate actively in the criminal process.

This paper has examined the various ways in which the criminal justice process recognises the concept of accountability to victims in the sentencing process and has concluded that they are generally ineffectual in meeting the real needs of victims. Consideration of the provision of legally enforceable victims' rights which would enable a victim to make some form of "actively participatory" contribution reveals that viable victim participation in sentencing within the criminal justice paradigm remains illusory. The reason for this is that there is a fundamental conflict between the retributive, deterrent and proportionality aims of sentencing of the criminal justice process and the restorative and rehabilitative aims of victims. Although research indicates that restorative justice outcomes offer an increased level of victim satisfaction, these outcomes are inconsistent with the criminal justice process and therefore lack the capability to reach their full potential.¹⁸⁴

One possible solution is to allow the criminal justice paradigm to proceed so far as the stage of sentencing, or to a plea of guilty. The punitive aims of sentencing under the criminal justice process¹⁸⁵ would then be replaced by restorative aims, so far as is practicable and reconcilable with public safety issues. Accordingly, for more serious crimes, sentencing will take place under the criminal justice system, and restorative justice programmes will be offered subsequently. The aims of the restorative justice programmes in such cases will be the promotion of emotional healing and the rehabilitation of the offender, (although this would not preclude incarceration where this

¹⁸⁴ G Davis above n 5, 20-21.

¹⁸⁵ Above n 7, 40.

is deemed necessary for the protection of society). For other crimes, when "the defendant" has become "the offender", the restorative justice paradigm will replace criminal justice. In this way both the victim and the offender will "regain their conflict".¹⁸⁶

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