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STATUS HEARINGS: An Analysis from the Victims' Perspective.

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I INTRODUCTION

The New Zealand Law Commission is currently undertaking a review of the New Zealand court structure. As part of that review, consideration will have to be given to status hearings. The object of this paper is to evaluate status hearings in the summary jurisdiction, from the perspective of victims in the New Zealand criminal justice system.

It may seem odd to some to analyse status hearings from a victims' perspective. Victims' satisfaction is however, essential to the effective functioning of the criminal justice system. A low degree of satisfaction will dissuade victims from making further complaints and reporting crime. It might also discourage others from reporting crime. The New Zealand National Survey of Crime Victims 1996 estimates that only 40 per cent of crime is reported in New Zealand.[1]

The emergence of the status hearing scheme has been controversial, with one critic declaring:[2]

> [t]hey represent an attempt by the Crown, as represented by the Judges, to extend its powers in a manner unparalleled since Charles I tried to levy ship money in 1635.

Status hearings have been the most contentious from a defendants' point of view. Measures to attain earlier guilty pleas from defendants and reduce inconveniences for witnesses, victims, prosecutors and courts alter the balance of the justice system. Some argue that these measures have infringed on the defendants right to a fair trial and breach principles of natural justice. While it is not the aim of this paper to focus on these concerns, where appropriate, defendants' rights will be considered to the extent that they bear on victims' interests.

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[1] W Young, A Morris, N Cameron, S Haslett, *New Zealand National Survey of Crime Victims 1996* (Victimisation Survey Committee, Wellington, 1997), 22.

[2] A K Grant "Out of the dark and into the blue" (issue 507, October 1998) *Lawtalk* New Zealand Law Society, 11.

The paper is organised as follows. Part II briefly discusses the needs and role of victims in the New Zealand criminal justice system. Part III evaluates the purpose and function of status hearings and part IV investigates how victims' procedural interests are incorporated into status hearings. Part V analyses certain aspects of status hearings that have been challenged by defendants and part VI considers the implication these challenges have for victims. Finally conclusions are made in part VII.

II VICTIMS NEEDS IN THE CRIMINAL JUSTICE SYSTEM

A Background

Being a victim of crime can have varying effects. These may be physical, psychological or financial depending on the nature of the crime and the individual victim.[3] For some victims the impact of the crime may be relatively low, whilst for others it may be devastating. Often feelings of loss, anger, vulnerability, frustration, confusion and anxiety are likely to wane long after the victim has recovered from the initial effects of the crime.[4]

A fundamental concept of modern commonwealth criminal justice systems is that it is the State, rather than the individual victim that assumes the responsibility for investigating and prosecuting reported crime. A criminal act is viewed as a wrong against society.[5] The traditional role of the victim has been as a witness for the prosecution. A consequence of this is that some victims are marginalised and society's wider interests subsume their interests.[6]

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[3] New Zealand Law Commission *Seeking Solutions* (NZLC PP52, Wellington, 2002), 40.
[4] Edna Erez "Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment *and* Enhancement of Justice" [1999] Criminal Law Review 545, 551.
[5] Lynne N. Henderson "The Wrongs of Victim's Rights" (1985) 37 Stanford Law Review 937, 940.
[6] New Zealand Law Commission *Criminal Prosecutions* (NZLC PP28, Wellington, 1997), 79.

Another problem is 'secondary victimisation' that results from the way the victim is treated in the criminal justice system.[7]

The needs of individual victims are as diverse as the effects an offence may have. Some victims may wish to be fully involved in the decision making of their case while others may want minimal involvement.[8] The Department of Justice has highlighted five categories of needs that victims of crime may require to enable them to get on with their lives. These are:[9]

1. Information
2. Involvement and participation
3. Protection and privacy
4. Support
5. Reparation and compensation

A victims experience in the criminal justice system can play a pivotal role in their recovery. Victims who are recognised, respected, given access to services and whose losses are acknowledged are more likely to adjust well to their experience of crime.[10]

Prior research has identified many benefits for victims who have had a chance to participate in the criminal justice process. Benefits include, reducing the power imbalance they feel with the defendant and reminding Judges of the fact that behind the crime there is a real person who is a victim.[11] It has been argued that the State has commandeered the victim's conflict with the offender and the victim needs to be re-involved in the criminal justice system to enhance

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[7] E Corns "Criminal Proceedings: An Obligation or Choice for crime Victims" (1994) 13 University of Tasmania Law Review 358.

[8] Joanna Shapland "Victims and Criminal Justice: Creating Responsible Criminal Justice Agencies" in Adam Crawford and Jo Goodey (eds) *Integrating a Victim Perspective within Criminal Justice International Debates* (Ashgate Publishing, Burlington, Vermount, USA, 2000) 147.

[9] Angela Lee and Wendy Searle *Victims' Needs: An Issues Paper* (Department of Justice, Wellington, 1993), 9-10.

[10] New Zealand Law Commission *Seeking Solutions* (NZLC PP52, Wellington, 2002), 40.

[11] Edna Erez "Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment *and* Enhancement of Justice" [1999] Criminal Law Review 545, 552.

the victims recovery.[12] There is considerable evidence that giving victims a voice, via input in the criminal justice process, may have therapeutic advantages for victims by facilitating emotional recovery and improve their mental condition and welfare.[13] While some have warned against victims being used as pawns in the service of offenders,[14] there may be a convergence of victims and defendants interests in relation to victim involvement in the criminal process. Restorative justice research has found that victim involvement may contribute to the offenders' rehabilitation.[15]

B Legislation

The first statutory recognition of the needs and interests of victims in New Zealand was the Criminal Injuries Compensation Act 1963. This was subsequently absorbed by the Accident Compensation Act 1974. The Victims of Offences Act 1987 provided the next major recognition of victims needs and interests in New Zealand. Essentially, the 1987 Act provided for victims to have access to support services, receive early information about proceedings, convey any fears they have about the alleged offender being released on bail in respect of serious charges and gave victims the opportunity to submit a Victim Impact Statement to the sentencing Judge. Many victims however, remained dissatisfied with their court experiences.[16] The Victims Rights Act 2002 replaced the Victims of Offences Act 1987. The 2002 Act was passed to "improve the provisions for the treatment and rights of victims of offences".[17]

A victim is essentially defined in section 4 of the Victims' Rights Act 2002 as a person who has an offence committed against them or a person who suffers

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[12] N Christie "Conflicts as Property" (1977) 17 British Journal of Criminology 1.
[13] See RP Wiebe, "The Mental Health Implications of Crime Victims' Rights" in D. Wexler and B Winick (eds) *Law in a Therapeutic Key* (Academic Press, Durham, NC, 1996) chapter 12.
[14] Andrew Ashworth "Victims' Rights, Defendants Rights and Criminal Procedure" in Adam Crawford and Jo Goodey (eds) *Integrating a Victim Perspective within Criminal Justice International Debates* (Ashgate Publishing, Burlington, Vermount, USA, 2000) 185.
[15] Allison Morris and Gabrielle Maxwell "The Practice of Family Group Conferences in New Zealand: Assessing the Place, Potential and Pitfalls of Restorative Justice" in Adam Crawford and Jo Goodey (eds) *Integrating a Victim Perspective within Criminal Justice International Debates* (Ashgate Publishing, Burlington, Vermount, USA, 2000) 207.
[16] New Zealand Law Commission *Seeking Solutions* (NZLC PP52, Wellington, 2002), 40.
[17] Victims' Rights Act 2002, s 3.

physical injury or loss or damage to property as a result of the offence. Included in the definition are members of the immediate family of a person who dies or is incapable as a result of the offence concerned. A person who is not a member of the victim's immediate family can be treated as a member at the discretion of the Judge. A victim can also be the parent or legal guardian of a young person who is a victim, provided they are not themselves involved with the offence. It is not necessary that anyone be arrested, charged or convicted for a victim to exercise their rights under the Victims' Rights Act 2002. A person who suffers any form of emotional harm from the offence may only be considered a victim for the purposes of sections 7 and 8 of the Victims' Rights Act 2002.[18]

While the Victims' Rights Act 2002 gives victims the opportunity to have procedural input at many stages of the criminal process, these opportunities are not legally enforceable. To this extent, the provisions in the Act are not 'rights'. Section 50(2) prohibits any person from being required to pay any money for breaches of any provision of the Act. If a victim feels that their rights have not been upheld, they are able to lodge a compliant under section 49. Complaints can be made to the person who has allegedly breached a provision of the Act, the Office of the Ombudsman (in accordance with the Ombudsmen Act 1975), the Police Compliant Authority (if the compliant involves a member of the Police) or the Privacy Commissioner (if the compliant relates to privacy). The Act does not provide anything new in this regard. Victims were able to make complaints to these agencies before the Victims' Rights Act 2002 came into effect.

Section 12 of the Victims' Rights Act 2002 entitles victims to information on the progress of Police investigations, whether charges have been laid and where charges have not been laid, why not. Victims must also be given information about any court appearances of the alleged offender, including the date and time of any hearings, bail conditions, their role as a witness and any

[18] Section 7 of the Victims' Rights Act 2002 provides that victims should be treated with courtesy, compassion, dignity and respect shall be had for their privacy. Section 8 affords victims access to services that are responsive to their needs.

penalty imposed on the offender. Sections 17 through 27 establish and regulate victim input at sentencing through Victim Impact Statements. The Victims' Rights Act 2002 however, fails to specifically recognise victims input at status hearings. The most obvious reason for this is that status hearings have not been recognised by statute either. Victims' procedural input at status hearings has developed at the discretion of the Court. Status hearings are analysed in the following part of this paper and victim input at status hearings is discussed in part IV.

III STATUS HEARINGS

In the summary jurisdiction, it is the usual practice of District Court to follow the three-stage process set out by Hammond J in *Haskett v Thames District Court.*[19] The first stage is the first opportunity a defendant has to enter a plea. If a defendant pleads 'not guilty', the case is usually adjourned to a status hearing. If a 'not guilty' plea is maintained at the status hearing, the case will proceed to a 'defended hearing' before a Judge alone.

The Police are responsible for the prosecution of most criminal cases in the summary jurisdiction. The Crown however, assumes responsibility for the prosecution of offences on behalf the Ministry of Fisheries, Work and Income New Zealand and the Inland Revenue Department and other government agencies. In the Wellington region at least, it is the policy of the Crown not to proceed to a status hearing. Instead, cases advance to the former pretrial conference. While the reason for this is not apparent, offences under these statutes do not typically involve victims *per se.*

A Purpose and Development

The status hearing pilot scheme was introduced into the Auckland District Court in October 1995. Following recommendations by the Department of the Courts National Case Flow Committee, status hearings have been adopted by

[19] *Haskett vThames District Court* (1999) 16 CRNZ 376 (HC) Hammond J.

most District Courts in New Zealand.[20] They are a form of pre-trial hearing and were developed as an alternative to the pretrial conference.

The primary purpose of status hearings is to determine whether a defended hearing is required. The aim is to identify, at an early stage, cases that do not need to proceed to a defended hearing because an inappropriate charge had been laid or a plea of 'not guilty' has been entered where there is no tenable defence whatsoever.[21] A secondary purpose is to identify undisputed facts that may be admitted under section 3(1)(k) of the Summary Proceedings Act 1957 which deems section 369 of the Crimes Act 1961 applicable to the summary jurisdiction. The admission of facts dispenses the need to prove them, thereby reducing both the time required to prepare for the case and court time required at the defended hearing.

B Procedure

Status hearings are an informal discussion between the Judge, prosecution and the defendant in an open court. One of the main advantages of the status hearing is that they are presided on by a Judge as opposed the pre-trial conference, which is usually presided on by a Registrar.[22] It is not uncommon for a Judge to question the prosecution or defendant, through counsel, or even potential witnesses if they attend. The Judge may also seek the views of victims, either directly if they are present, or through the Department of the Courts Victim Advisers if they are not.[23]

An advantage of the status hearing scheme is that the defendant has an opportunity to try and negotiate a resolution with the Police prosecution prior to the status hearing. Brooker's Criminal Procedure notes that:[24]

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[20] Status hearings were introduced into the Wellington Region in late 1998.
[21] *Haskett vThames District Court* (1999) 16 CRNZ 376, 379 (HC) Hammond J.
[22] A Judge however, will preside over a pretrial conference where the charge involves genital penetration or the charge is of a serious nature.
[23] Victim Advisers are discussed further in Part IV Victim Input at Status Hearings.
[24] John Miller (ed) *Criminal Procedure in the District Courts* (Brooker's, Wellington, 1998), chapter 3-48.

> Creative solutions seem to be the hallmark of status hearings and much can be gained by negotiating sensible outcomes with the police before the hearing.

A major change from previous pretrial conferences is the way Police Prosecutors approach a case. They are frequently willing to discuss the appropriateness of the charge laid with the defendants counsel. In the opinion of one person who has been involved with status hearings regularly since 2000, this has lead to more appropriate and generally lesser charges being laid, almost invariantly leading to earlier guilty pleas being entered by defendants. Another result of Police prosecutors and defendants discussing the case prior to the status hearing has been the early identification and withdrawal or amendment of charges that lack a sufficient factual basis to achieve a conviction.

Often a defendant charged with a more serious form of an offence will be prepared to plead guilty to a lesser charge. For instance, a person charged with "male assaults female" might be prepared to plead guilty to the lesser offence of assault. While this involves an element of "plea bargaining", there has always been an element of this in the criminal process.[25] Status hearings subject this 'bargaining' to judicial scrutiny and victims' views are taken into account the appropriate cases. A judge may refuse to endorse a resolution that is inconsistent with the victims' views or is not seen to be in the interests of justice[26].

Unlike a Registrar at the pretrial conference, a Judge has the ability to affect constructive solutions at the status hearing. Such solutions may include ordering the defendant to undertake rehabilitative programmes prior to the defendant entering a plea or being sentenced.[27] This is of benefit to defendants because it may lead to a lesser sentence being imposed. It is also beneficial to victims, especially in family violence situations. Facilitating discussion

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[25] James O'Donovan *Courtroom Procedure in New Zealand – A Practitioner's Survival Kit (2nd edition)* (CCH New Zealand Limited, Northcote, 2000), 50.
[26] James O'Donovan, above, 51.
[27] Rehabilitative programmes might include for instance, anger management or substance abuse courses.

between defendants and the prosecution enables defendants to undertake a rehabilitative programme at an earlier stage, increasing the chances that a normal relationship may resume after the ordeal.

If there has been a course of action agreed upon between the prosecutor and the defendant, the defendant will express this to the Judge at the status hearing. Where no prior discussion has occurred, the defendant might question the appropriateness of the charge at the status hearing and request an alternative (invariantly lesser) charge. The usual reason given for the request is that the lesser charge provides a better fit to the actions and intent of the defendant. Whilst this is a request to the police prosecutor, the Judge may assess whether the charge is appropriate and may recommend that the prosecutor amend the charge, frequently leading to a guilty plea being entered by the defendant at the status hearing. Alternatively, the Judge may refer to information they have been provided about the case and recommend a different course of action.

An aspect that has become an important part of status hearings is sentence indication. A defendant may ask the Judge to give an indication of the sentence that the defendant is likely to face if an early guilty plea was entered. The defendant does not have to accept the indication and the Court keeps no record of it. Sentence indication allows the defendant to gain an understanding of the penalty that might result from an early guilty plea being entered. This promotes the earlier entry of guilty pleas where cases are inappropriate to go to trial by allowing defendants to have an idea of the sentence they are likely to face before a guilty plea is entered.[28] The practice of Judges giving indicative sentences prior to the defendant entering a guilty plea or being found guilty is a contentious issue. The affects on defendants' rights and victims' interests will be discussed in parts V and IV respectively.

[28] Michael HO Beale and David J Robb "Case Management in Justice Systems: An evaluation of the Status Hearing Pilot at the Auckland District Court" (Department of Management Science and Information Systems, University of Auckland, No 149, 1997).

Early disclosure by the Police has also promoted the case management aims of status hearings.[29] A primary factor that motivates guilty pleas is the strength of the prosecutions case[30]. Full and early disclosure by the Police allows the defendant to evaluate the case against them and make an informed decision about the likelihood of a guilty verdict at the defended hearing. By having this information early in the process, a defendant can make the decision to enter a plea at an early stage in the process. This reduces the cost, wastage and inconveniences that result from the late entry of guilty pleas.

If a defendant enters a guilty plea at the status hearing, the defendant may either be sentenced immediately or remanded for sentencing at a later date. This usually occurs for one of two reasons. Firstly, this might be done to give the defendant an opportunity to participate in a rehabilitative programme before a sentence is imposed. Secondly, if the defendant is likely to face imprisonment, the case will usually be stood down so a pre-sentence report can be prepared. At status hearings, it is common for a stand-down report to be prepared, rather than a full pre-sentence report. A stand-down report is a brief report, sometimes given orally and is intended to be available on the same day as it was requested.[31] Stand-down reports are most often prepared to consider whether a sentence of community service is appropriate.[32]

If no resolution can be achieved at the status hearing and a 'not guilty' plea is maintained and the case will be adjourned to a defended hearing. Where this occurs, a time and date will be set and the expected length of the defended hearing will be established. At the discretion of the defendant, some further discussion may take place to establish common facts that can be admitted and do not need to be proved at the defended hearing pursuant to section 3(1)(k) of the Summary Proceedings Act 1957.

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[29] Janet November (ed) *Disclosure in Criminal Cases* (Procedure Series, Butterworths, Wellington, 1999), 158.
[30] K Mark and SR Anleu "Reform of Pre-trial Criminal Procedure: Guilty Pleas" (1998) Criminal Law Journal 263.
[31] James O'Donovan *Courtroom Procedure in New Zealand – A Practitioner's Survival Kit (2nd edition)* (CCH New Zealand Limited, Northcote, 2000), 43.
[32] John Miller (ed) *Criminal Procedure in the District Courts* (Brooker's, Wellington, 1998), Chapter 7-SN33.01.

C Legality

The emergence of status hearings independent of legislation has posed some problems in summary proceedings. The legality of the status hearing was the subject of a judicial review application in *Haskett v Thames District Court.*[33] The applicant had been served with a summons on a dangerous driving charge. A 'not guilty' plea was entered and the case was adjourned to a status hearing. As part of the defence, it was alleged that the status hearing procedure was contrary to Part II of the Summary Proceedings Act 1957. Hammond J dismissed this argument stating that the District Court possesses "inherent powers to regulate its own proceedings".[34] Further, Hammond J held the three-stage process, which incorporates status hearings is a sensible measure for the Summary Proceedings Act 1957 to operate in a manner that both attains the objects of the legislation and does justice to the parties.[35] While holding that the three-stage process was lawful and sound as a process, Hammond J cautioned that unspecified features of status hearings might not be lawful.[36] Part V will consider some aspects of status hearings that have been challenged by defendants.

IV VICTIMS INPUT AT STATUS HEARINGS

A victim's perception of the criminal justice system may be strongly influenced by what takes place at status hearings. The majority of criminal cases in New Zealand are dealt with in the summary jurisdiction and many cases go through the status hearing stage. It is a stage where many cases are resolved. For cases that are not resolved, what occurs at the status hearing may shape the way the case advances through the court process.

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[33] *Haskett vThames District Court* (1999) 16 CRNZ 376 (HC) Hammond J.
[34] *Haskett vThames District Court*, above, 383.
[35] *Haskett vThames District Court,* above, 383.
[36] *Haskett vThames District Court*, above, 384.

The Victims' Rights Act 2002 entitles a victim to input at many stages of the court process. A victim may have input once the defendant enters a guilty plea by submitting a Victim Impact Statement under section 21 and a victim is entitled to information about any proceedings under section 12. If a victim feels their rights under the Act have not been meet they may make a compliant under section 49. However, no input is directly provided for at status hearings. What has developed has been independent of any statutory entitlement.

A Input Prior to the Status Hearing

As mentioned previously,[37] many cases are resolved through discussions between the Police prosecutor and the defendant prior to the status hearing. The police prosecutor has discretion to prosecute. This has two elements, whether there is sufficient evidence and whether it would be in the public interest to prosecute.[38] A victim's view can be particularly central the public interest element in the decision whether to amend and continue pursuing a charge. The police prosecutor is usually informed about the victims' views prior to the status hearing through the Victims Advisers. Generally this is done by means of a victim input memorandum. In the situations where a victim memorandum has not been prepared the Victim Adviser may talk directly with the Police. If there has been no contact with the Victim Adviser, the officer in charge of the case will usually try to attain the victim's views.

Victim Advisers are specialist staff employed by the Department of the Courts. Their services are confidential. The core roles of the Victim Adviser are to provide victims with information about the case, advise victims of their rights in the court process and help victims participate in the court process. In fulfilling this role, Victim Advisers will usually make sure the police prosecutor connected with the case is aware of any concerns the victim has. Often this includes whether the victim would be agreeable or reluctant to charges being withdrawn or amended. It is rare for a case to be continued where the victim is

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[37] See Part III B Procedure.

[38] Andrew Ashworth "The 'Public Interest' Element in Prosecutions" [1987] Criminal Law Review 595.

against the prosecution pursuing the charges. However, where other factors exist, as such the charge is of a very serious nature, the 'public interest' element may swing the discretion in favour of prosecuting. The flipside is also true. Where the victim wishes for the prosecutor to pursue the case, it is unusual for the charges to be amended or withdrawn unless there is an insufficient factual basis for the charge.

B Input at the Status Hearing

Where an agreement has occurred between the prosecution and the defendant prior to the status hearing the defendant will explain this to the Judge. In deciding if the proposed resolution is in the interests of justice the Judge may have regard to the victims' views. Victims' views may also be considered if no resolution has been agreed upon prior to the status hearing and the defendant requests that the charges be amended or withdrawn.

Victims are encouraged to attend status hearings by both Police and Victims Advisers. Victim attendance however, is relatively low. The Wellington District Court Victim Advisers report that only 13 victims attended status hearings out of a possible 75 cases that involved victims in the month of August 2003 (17 per cent).[39] There may be many reasons for such a small proportion of victims being present at the status hearing. Some victims may want to avoid the disruption of having to travel to court and being absent from work. Some may want to avoid re-confrontation with the defendant or do not wish to take part in the criminal process at all, viewing it as the Courts job to deal with the alleged offender. Other victims who have been in contact with a Victim Adviser may feel that the victim memorandum is an effective way to communicate their views to the Judge, negating the need to appear in person.[40]

The victim memorandum is prepared with the help of a Victim Adviser. Eighty nine per cent of victims whose cases were involved a status hearing in

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[39] See Appendix A.

[40] The Wellington Victim Advisers report that out of 75 cases that involved victims in August 2003, there were only 11% of victims who had had no contact with a Victim Adviser. See further Appendix A.

the Wellington District Court in August 2003 had been in contact with the Victim Advisers. Furthermore, 93 per cent of victims who had been in contact with the Wellington Victim Advisers submitted victim memorandum to the status hearing Judge in August 2003.[41]

Victim memoranda usually contain matters that go beyond what is permissible in a Victim Impact Statement.[42] Several examples of victim memoranda prepared by victims through the Wellington Victim Advisers are included in Appendix C. Information contained in the victim memorandum may include how the offence has affected the victim, any views a victim might have on how they want to see the defendant dealt with, any feelings of forgiveness or fears they hold, and occasionally any disagreements they have with the police summary of facts. The inclusion of any disagreements that the victim has with the summary of facts can be invaluable for the prosecution when considering the likelihood of a successful conviction.

Victim input memorandum are confidential and are the property of the District Court. However, copies are released to both counsel and are to be returned to the victim at the completion of the case. In the interests of the victim, copies of the memorandum are not to be given to the defendant by either counsel.[43] The examples of victim input memoranda included in Appendix C were prepared before the introduction of the Victims' Rights Act 2002. Since then, victim memorandums have contained a statement at the bottom of the page stating that:

> This report remains the property of the District Court. It is released to counsel, to be returned to the Victim Adviser at the completion of the case. A copy must not be given to the Defendant.

In the rare situation where the victim does attend the status hearing, this may be made known to the Judge through the victim memorandum. The Victim

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[41] See Appendix A.
[42] See Part V C Victim Impact Statements.
[43] Personal correspondence with Margaret McGregor, Victim Court Adviser, Department of the Courts, Wellington, 7 August 2003.

Adviser will often clarify whether the victim wishes to be identified and whether they are willing to address the court, which then noted in the victim memorandum submitted to the Judge. Where the victim is willing to address the court, the Judge may directly ask the victim about their views on matters relating to the disposal of the case. This only happened on two occasions out of the 75 cases that involved victims in the Wellington District Court in the months of August.[44] Interestingly, both occasions where victims directly addressed the Court occurred on the same day before the same Judge. Some Judges may be more willing to have victims address the Court direct than others. I recall one case where the defendant was charged with 'male assaults female'. The defendant submitted that his sister (the victim) was in attendance and wished to express her forgiveness to the Court in the hope that the charges would be withdrawn. Interestingly, the Judge asked the Victim Adviser if they had been in contact with the defendant's sister and whether they could verify that this was the victims wish, rather than asking the victim directly.

One possible reason for this might have been to alleviate concerns that the victim may have been under some pressure from the defendant to express forgiveness to the Court. Indeed, one argument against victims being involved in the Court process is that it could lead to the intimidation of victims, or retaliation by offenders or their supporters.[45] Alternatively, a reluctance to have victims speak in Court may simply be a result of judicial unease with the traditionally foreign concept of victims addressing the Court orally or otherwise.

C Sentencing

If a defendant pleads guilty at the status hearing the Judge may sentence the defendant immediately or remand the defendant for sentencing at a later date. Section 17 of the Victims' Rights Act 2002 places the prosecutor under a duty to make all reasonable efforts to ascertain information for a Victim Impact

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[44] See Appendix A
[45] Ministry of Justice http://www.justice.govt.nz/justicepubs/reports/1997/sentence_guide/chapter_9.html (last accessed 15 August 2003).

Statement from a victim, which is to be submitted to the sentencing Judge under section 21.

Hammond J in *Sargeant v Police*[46] identified four purposes which Victim Impact Statements fulfil. Firstly, they are to assist the Court with further information. Secondly, they provide information to balance the material before the Judge. Thirdly, they give the victim an input into the administration of justice and form a method of catharsis. Fourthly, they may force the offender to recognise the effect of the offending, advancing the rehabilitative process. More recently however, Chambers J in *R v Schofield*[47] emphasised that:[48]

> But the principal purpose of a victim impact statement is not to provide an outlet to a victim's anguish but rather is to assist the sentencing judge in his or her task by providing information.

Victim Impact Statements are prepared with the Police, typically when the compliant is made and they are usually updated with the approach of court proceedings. Most commonly, it is the officer in charge of the investigation who prepares the Victim Impact Statement. In cases of a sexual nature and more serious offences, a psychologist or counsellor will sometimes prepare the Victim Impact Statement. There is no rule of thumb however. Who prepares the Statement is at the discretion of the officer in charge of the investigation. If the victim has been in contact with Victim Support, they may help prepare the Victim Impact Statement and the Victim Adviser will occasionally be asked to update the Victim Impact Statement before the case is to come before the Court. Where another agency has prepared a Victim Impact Statement, the Police may edit it to ensure that it meets the guidelines set out in section 17(1) of the Victims' Rights Act 2002.

It is suggested however, that the Victims' Rights Act 2002 now places the ultimate responsibility on the prosecutor, rather than the Police, to ensure the

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[46] *Sargeant v Police* (1998) 15 CRNZ 454, 457 (HC) Hammond J.
[47] *R v Schofield* (10 April 2001) High Court Auckland S5/01, 4 Chambers J.
[48] *R v Schofield* , above, 4.

Victim Impact Statement does not exceed what is permitted under section 17(1). Indeed, it is the prosecutor who is under a duty to make all reasonable efforts to ensure that information is ascertained from the victim and that the information has been ascertained in conformity with section 18.

It is further submitted that the prosecutor should be the person who is responsible for its preparation. Although many Victim Impact Statements are prepared at the time of the offence by the officer in charge of the case, this does not have to be the case. Statements have to subsequently be updated before the case goes through the court process. This would reduce the extra workload on front line police reported to have resulted from the responsibility Police had assumed.[49] This duty could be integrated into the prosecutors' preparation for the case and built-in to the process of informing victims on the information they are entitled to receive under section 12 of the Victims' Rights Act 2002.

A copy of the standard Victim Impact Statement form is included in Appendix B. It should be noted that the form includes guidance of what should be covered and recommends that the statement should be in narrative form. This is to help ensure that the Victim Impact Statement is factual, relevant and only includes details about the physical injuries, property damage, financial costs and any other effects of the offence as permitted by section 17(1) of the Victims' Rights Act 2002.

Most police officers do not have the professional expertise to interpret the emotional harm that has resulted from an offence. Therefore, Police will tend to repeat the victim's own words verbatim when commenting on the emotional harm suffered by the victim. This also helps promote the cathartic element of Victim Impact Statements. Allowing victims to express the effects of the offence in their own words increases the therapeutic benefits of preparing the statement.

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[49] Angela Cook and Sandra Wallace *Victim Impact Statements – Final Report* (Department of Justice, Wellington, 1989), 12.

With respect to the other parts of the Victim Impact Statement the Police will describe the physical and financial information in their own words. This information is usually accompanied by relevant documentation such as receipts and medical reports where appropriate. The victim, pursuant to section 19(3), or alternatively section 19(4) of the Victims' Rights Act 2002, must approve the Victim Impact Statement and verify that the information recorded was true to the best of the victim's knowledge and was given knowing that it was to be submitted to the Judge sentencing the offender.

In balancing the victims' right to privacy with the offenders' right to a fair trial and to protect the victim from further harassment by the offender, sections 23 to 27 of the Victims' Rights Act 2002 limit the access an offender and others have to Victim Impact Statements. Essentially, an offender must not be given a copy of the Victim Impact Statement and every person that receives a copy of the Victim Impact Statement must return it to Court staff at the end of proceedings. A Judge may withhold part of the statement from the offender to protect the physical safety or security of the victim. If a Judge exercises this right, any part of the Victim Impact Statement withheld should not be taken into account by the sentencing Judge.

Section 21 of the Victims' Rights Act 2002 requires Victim Impact Statements to be submitted in written form unless a Judge permits the prosecution or victim to read all or part of it to the Court. One of the first instances where a victim took up the opportunity to read their Victim Impact Statement orally was *R v Thompson.*[50] Hansen J made the following comment:[51]

> The Courts over the years have become used to receiving Victim Impact Statements, and although they make harrowing reading it is probably not unfair to say that they have a far different impact on the printed page than when they are actually read in Court. That right has properly been given to victims by parliament and victims are starting to avail themselves of that right.

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[50] *R v Thompson* (15 April 2003) High Court Christchurch T65/02 Hansen J.
[51] *R v Thompson* , above, 5.

If a Victim Impact Statement is read to the Court, the victim should only read the pre-written statement and cannot make any other comments. This allows the Police to vet the statement before it is read to the Court. Challenges to the content of Victim Impact Statements are considered in the part V C below.

V DEFENDANTS' RIGHTS AT STATUS HEARINGS

The advent of status hearings as a case management initiative and moves to increase victims' involvement in the criminal process both impose alternations to the balance of the criminal justice system. Certain features of status hearings are analysed in this section with respect to a defendants' right to a fair trial in terms of section 25 of the New Zealand Bill of Rights Act 1990. Implications for victims are subsequently considered in part VI.

A Sentence Indication

A controversial aspect of the status hearing is that the defendant may ask the Judge to give an indication of the sentence that the defendant may face if an early guilty plea was entered. An early guilty plea is a mitigating factor that must be taken into account[52] and is rewarded by a generous discount of sentence.[53] A truly fair justice system would find all guilty persons guilty and all innocent persons 'not guilty'. The fear is that sentence indication may provide a motive for innocent defendants to plead guilty after weighing up the costs of ending the court process at the status hearing against the cost of continuing to a defended hearing with a 'not guilty' plea. A defendant weighing up the cost of accepting the sentence indication by entering plea of guilty may not simply have regard to innocence, or lack there of. They may also consider the strength of the evidence before them, the cost of defending the allegations against them through to the defended hearing such as the financial cost and the

[52] Sentencing Act 2002, s 9(2)(b).
[53] See *R v Rameka* [1973] 2 NZLR 592.

difficulty of attending Court, the perceived stigma that a conviction holds and the discounted penalty for an early plea of guilty.

Appeal Courts have been uneasy with Judges providing sentence indications. The Court of Appeal in *R v Reece*[54] was of the opinion that, in the absence of settled guidelines, sentence indication by a Judge in an informal and unstructured status hearing provided scope for manipulation and the erosion of public confidence in the administration of justice.

In response to *R v Reece,*[55] Police, the Auckland District Law Society and the District Court judiciary agreed upon the following guidelines:[56]

1. A sentence indication will be given only if asked for by the Defendant.
2. An indication will not be given unless the Judge has the Police summary of facts and the list of previous convictions and, where appropriate, a Victim Impact Report/Statement.
3. The defence cannot be compelled to disclose anything, but can give the Judge as much material as it wishes.
4. The Judge is not bound by the indication if, after it is given, fresh evidence shows that the indication is inappropriate.
5. The indication will be limited to the *type* of sentence which the Judge thinks appropriate, that is, imprisonment, periodic detention, community service, or an essentially rehabilitative sentence such as community programme or supervision.
6. If the indication is not accepted no record of it will be kept on the file to come before the trial or sentencing judge.
7. Sentencing Judges will not be told by counsel of the Judge's indication, and if told will ignore the indication [emphasis added].

In addition to sentence indications being given at status hearings, they may also be given at the first callover in the indictable jurisdiction. Similar guidelines apply to at callover in the indictable jurisdiction as apply to status

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[54] *R v Reece* (22 May 1995) Court of Appeal CA74-78/95.
[55] *R v Reece,* above.
[56] "Sentence Indication Guidelines" (3 Dec 1999) *Northern Law News*, No 45.

hearings in the summary jurisdiction. While the case of *R v Gemmell*[57] was concerned with sentence indications being given at the first callover, the principles are relatable to sentence indications at status hearings as well. The appellant in *R v Gemmell*[58] requested a sentence indication from the Judge should he plead guilty. In contravention to guideline 5 above, the Judge gave a sentence *range* of a nine to twelve months custodial sentence. On this basis, the appellant pleaded guilty. However, after considering a pre-sentence report, a Victim Impact Statement and the submissions of counsel, the Judge imposed concurrent sentences of 2 years' imprisonment.

The Court of Appeal held a miscarriage of justice might have occurred where the guilty plea was entered based on an indicated sentence range, and a sentence considerably in excess of the indicated range was subsequently imposed without offering the appellant an opportunity to withdraw the guilty plea.[59] The Court set aside the convictions against the appellant and remitted the case to the District Court for further plea. The Court refrained from either condoning or condemning the practice of sentencing indication, restricting its judgement to the facts of the case.[60] Sentence indication therefore, continues to occur without the express authority of the Court of Appeal or Parliament.

The Court in *R v Gemmell*[61] noted that giving of a sentence indication prior to conviction without the assistance of pre-sentence reports or Victim Impact Statements must be so qualified that they provide no real basis on which to pleas.[62] The value of sentence indications however, is thought of as essential to achieve earlier guilty pleas at the status hearing stage.[63] Sentence indication is a controversial practice and there is a fine line between providing sentence indications that allow the accused to be more informed when entering a plea and

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[57] *R v Gemmell* (2000) 17 CRNZ 608 (CA) Gault, Keith, Tipping JJ.
[58] *R v Gemmell*, above.
[59] *R v Gemmell*, above, 610 per Gault, Keith, Tipping JJ.
[60] *R v Gemmell*, above, 612 per Gault, Keith, Tipping JJ.
[61] *R v Gemmell*, above.
[62] *R v Gemmell*, above, 611 per Gault, Keith, Tipping JJ.
[63] National Case Management Committee *Status Hearing Pilot Scheme – Interim Report* (Department of the Courts, Auckland, 1996).

ensuring that their rights are not compromised. Implications for victims are discussed in part VI B below.

B Confidentiality

It is essential for the effective operation of status hearings that the information offered by a defendant is confidential and not raised at the defended hearing. There is no obligation on the defendant to disclose the details of the defence. This results from the fundamental right to remain silent. However, a defendant may be prepared to "trade" his right to silence in the hope that the prosecutor may withdraw or amend charges and possibly to allow the Judge to give a fairer indication of the possible penalty should the defendant wish to plead guilty at that stage. Defendants will be less willing to enter into discussion about the case and disclose information to the prosecution if the prosecution can use the information to the defendant's detriment. Without voluntary defence disclosure, the case management objectives of the status hearing would be difficult to achieve.[64]

1 The case of Police v Southey

Police v Southey[65] was a case concerned with the use that a prosecutor may make of information disclosed by the defence during a status hearing. The defendant was charged with driving with excess blood alcohol. The defendants lawyer had had discussions with the Police prosecutor both prior to and at the status hearing, in which defects in the breath testing procedure where disclosed in the attempt to persuade the Police prosecutor to withdraw the charges. These attempts were unsuccessful and the case was remanded to a defended hearing. At the defended hearing it appeared that all the defects in the Police evidence had been fixed. In cross-examination the sole Police witness (the police constable who administered the test) admitted that after the status hearing the prosecutor had discussed the defects in the evidence with him. Judge Damler,

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[64] Janet November (ed) *Disclosure in Criminal Cases* (Procedure Series, Butterworths, Wellington, 1999), 158.
[65] *Police v Southey* [1999] DCR 1141 Judge Damler.

in a reserved decision, held that procedural unfairness had occurred as a result of confidential material gained from defence disclosure at the status hearing being used against the defence and dismissed the information.[66]

2 *The case of* Police v Creswell

The later case of *Police v Creswell*[67] restricted the confidentiality protection that the law provides for status hearings. The issue was whether the police prosecutor could make use of information received in the course of discussions with counsel prior to the status hearing. The day before the status hearing the officer in charge of the case contacted defence counsel. In the course of the discussion that followed, the defence disclosed that there was a lack evidence to prove the element of supply in a charge being laid under the Films, Videos and Publications Act 1993 of supplying objectionable material. Consequently, the Police prosecutor decided to lay a charge of possession instead of supply. The defendant applied for a stay of proceedings or for the information to be dismissed on the grounds of abuse of process.

Judge Walker dismissed the application, distinguishing the case from *Police v Southey*.[68] It was held that discussions prior to a status hearing were not automatically confidential, as opposed to discussion at the status hearing that were deemed impliedly confidential. Therefore, the police prosecutor may use information disclosed by the defence prior to the status hearing, unless an undertaking of confidentiality had been agreed upon prior to the discussion. Judge Walker further indicated however, that even where there is a request to "talk off the record", the seriousness of the charge might preclude a police prosecutor from accepting such an undertaking.[69]

From a practical perspective, *Police v Creswell*[70] may see defence counsel limiting the extent of any flaws in the prosecutions case that they disclose in

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[66] *Police v Southey* [1999] DCR 1141, 1158 Judge Damler.
[67] *Police v Creswell* [2002] DCR 43 Judge Walker.
[68] *Police v Southey*, above.
[69] *Police v Creswell*, above, 55.
[70] *Police v Creswell*, above.

pre-status hearing discussions. While partially negating the case-flow aims of status hearings, this measure will protect defendants from providing information in an attempt to achieve a lighter outcome, only to have it used against them at a later stage. Others however, may see a better strategy as "keeping your powder dry" by not alluding to deficiencies in the prosecutions case until the defended hearing in the hope that a finding of 'not guilty' may result. This type of strategy would undermine the case management aims of status hearings and reduce the opportunity for the victim to be involved with the disposal of the case.

Underlying the cases of *Police v Southey*[71] and *Police v Creswell*[72] is the tension that exists between the case management objectives of status hearings and the defendants' right to a fair trial. Some implications for victims that result from this tension will be the subject of further consideration in part VI.

C *Victim Impact Statements*

As mentioned previously,[73] Victim Impact Statements are usually prepared in conjunction with the Police. Police assume the responsibility of filtering out inappropriate content in Victim Impact Statements.[74] A further check on what information has been included in the Victim Impact Statement is through challenges by defendants.

Section 17(1) provides that a Victim Impact Statement should contain the following matters:

(a) any physical injury or emotional harm suffered by the victim through, or by means of, the offence; and
(b) any loss of, or damage to, property suffered by the victim through, or by means of, the offence; and
(c) any other effects of the offence on the victim.

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[71] *Police v Southey*, above.
[72] *Police v Creswell*, above.
[73] See Part VI C Sentencing.
[74] *R v Haddon* (1990) 6 CRNZ 508, 511 (CA) Somers, Hardie Boys, Jeffries JJ.

The content permitted by the section 17(1) of the Victims' Rights Act 2002 is identical to what was previously permitted under section 8 of the Victims of Offences Act 1987.

It is important to keep in mind that a plea of guilty is not an admission of matters contained in the police summary of facts, but only to the essential legal elements of the offence charged.[75] A sentencing Judge may take into account an aggravating factor that would be an element of a more serious offence other than the one charged, provided that it does not result in a sentence disproportionate to the nature of the offence charged.[76] For example, in *H v Police*[77] the facts established at sentencing were sufficient to sustain a charge of sexual violation, however the offender had been found convicted of indecent assault, a lesser charge. The Court emphasised the need to impose a sentence that was appropriate to the offence that the offender was found guilty of. If the Court takes into account facts outside those essential to satisfy the alleged offence, the defence should be afforded the opportunity to dispute them.[78] It is on these principles that Victim Impact Statements should not be used as a 'Trojan horse' to put debatable material before the sentencing Judge.[79]

One of the earliest challenges to information contained in a Victim Impact Statement was the case of *R v Haddon*.[80] The offender objected to unsubstantiated information about the effects to the victims that were not related to the offences that the offender was convicted of. The Court of Appeal held that:[81]

> [t]hey [Victim Impact Statements] must be factual and relevant. Otherwise, they are likely to hinder rather than help the sentencing Judge in his task.

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[75] See *R v Bryant* [1980] 1 NZLR 264 (CA) Richmond P, Woodhouse, McMullin JJ.
[76] G Hall "Victim Impact Statements: Sentencing on Thin Ice?" 15 NZULR 143, 150.
[77] *H v Police* (22 March 1989) High Court Dunedin AP 21/89 Tipping J.
[78] *R v F* (1989) 4 CRNZ 365, 368 (HC) Tipping J.
[79] *R v F* (1989), above.
[80] *R v Haddon* (1990) 6 CRNZ 508, (CA) Somers, Hardie Boys, Jeffries JJ.
[81] *R v Haddon*, above, 511 per Somers, Hardie Boys, Jeffries JJ.

In the later case of *R v Hopkirk*[82] the Court of Appeal held that Victim Impact Statements were to inform the sentencing Judge about the impact of the offending on the victim, not to allege offences other than those charged, and not to advise the Judge in emotive language as to the correct attitude of the Court in sentencing.[83]

More recently, Chambers J in *R v Burns(No 1)*[84] held expressions of opinion as to the character of the offender, feelings of wanting to harm the offender, opinions as to penalty and unsubstantiated claims of other offences allegedly committed by the offender should be ignored by sentencing Judges and actively prohibited by police who prepare the Victim Impact Statement.

VI IMPLICATIONS FOR VICTIMS

This part analyses some of the implications for victims of crime and their input at status hearings that result from defendants' rights being upheld.

A Confidentiality

There is a fundamental tension between the efficiency objectives of status hearings, the public's interest in the successful prosecution of offenders and the defendants right to a fair trial. The cases of *Police v Southey*[85] and *Police v Creswell*[86] provide an illustration of this. For the case management objectives of status hearings to be advanced, voluntary defence disclosure needs to be encouraged. The wider public have an interest in seeing that offenders are successfully prosecuted and any information that the prosecution has should be put to this purpose. If however, the prosecution may use information gained in the course of the status hearing, defendants will be discouraged from disclosing information that may be used to against them at the defended hearing. How this

[82] *R v Hopkirk* (1994) 12 CRNZ 216 (CA) Eichelbaum CJ, Casey, Thorp JJ.
[83] *R v Hopkirk*, above, 219 per Eichelbaum CJ, Casey, Thorp JJ.
[84] *R v Burns(No 1)* (2000) 18 CRNZ 212 (HC) Chambers J.
[85] *Police v Southey* [1999] DCR 1141 Judge Damler.
[86] *Police v Creswell* [2002] DCR 43 Judge Walker.

tension is balanced also has implications for victims' involvement in the status hearing.

1 *The case of* Police v Southey

The case of *Police v Southey*[87] resulted in the information being dismissed on the grounds of procedural unfairness that resulted from confidential information being disclosed to the witness who 'patched up' the evidence before the defended hearing. Section 12 of the Victims' Rights Act 2002 entitles victims to a wide range of information about the proceedings against the alleged offender. Such information includes the time and date of status hearings, the victims role as a witness and whether or not charges have been laid and, if not why not, and all changes made to the charges laid.

It must be kept in mind that a victim of a crime may also be a witness for the prosecution. This is most common in cases of assault. There is the potential for police, inadvertently or otherwise, to disclose to a victim deficiencies in the evidence of the case that arose at the status hearing when they are informing the victim about the events at a status hearing under section 12 of the Victims' Rights Act 2002. A victim may then become conscious of deficiencies in their evidence and amend their evidence at the defended hearing to take this into account. It is submitted that this situation would lead to the same infringement against the defendants' rights as in *Police v Southey.*[88] It involves information gained in the confidential arena of the status hearing being disclosed to the witness in much the same manner as occurred in *Police v Southey.*[89] It must be recognised however, that this situation would be uncommon. As in *Police v Southey*,[90] issues of this nature will more commonly lie with more technical evidence, or procedural failings on behalf of the prosecution. Moreover, if the evidence provided by a victim is not sufficient to satisfy the charge laid, the prosecution will typically discover this on his or her own accord in preparation for the defended hearing and ascertain the necessary facts prior to the hearing.

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[87] *Police v Southey*, above.
[88] *Police v Southey*, above.
[89] *Police v Southey*, above.
[90] *Police v Southey*, above.

Notwithstanding the low likelihood of this situation occurring, section 13 of the Victims' Rights Act 2002 allows any persons giving information under section 12 to withhold such information if it would be likely to prejudice the maintenance of the law, including the right to a fair trial. Thus, police need to be aware of this possibility when informing victims under section 12 and withhold information learnt at the status hearing in the small number of cases where the disclosure of the information could cause a victim to revise their evidence at the defended hearing.

2 *The case of* Police v Creswell

The case of *Police v Creswell*[91] may also have implications for victims of crime. Judge Walker held that the prosecution could take advantage of information voluntarily disclosed prior to the status hearing where there had not been an express undertaking that the information disclosed was 'without prejudice'. Even where there has been an undertaking of confidentiality by the prosecution, Judge Walker held that the nature of the information may justify the prosecutor breaching the undertaken[92].

By allowing the prosecution to take advantage of information voluntarily disclosed prior to the status hearing, defendants may be less willing to negotiate a resolution to the case for fear that the information may be used to their disadvantage. A victim's participation at the status hearing depends greatly on the willingness of the defendant to seek an outcome to the case that is acceptable to all the parties involved. While Judge Walker's decision may consequently see a reduction in the opportunities victims might have to participate at status hearings.

A further implication for victims that may result from the decision in *Police v Creswell*[93] derives from the impact it may have on the case management

[91] *Police v Creswell* [2002] DCR 43 Judge Walker.
[92] *Police v Creswell*, above, 55.
[93] *Police v Creswell*, above.

objectives of status hearings. The primary rationale of status hearings is to achieve the earlier identification of cases that are inappropriate to go to a defended hearing. Discouraging co-operation by defendants prior to the status hearing could have the effect of reducing the number of cases that are resolved at the status hearing. Therefore, more cases may advance past the status hearing, only to have charges withdrawn or a guilty plea entered at the last minute. This may result in more victims organising and taking time off work and going through the trauma of a looming defended hearing, only to find out it was unnecessary.

B Sentence Indication

While *R v Gemmell*[94] was concerned with a miscarriage of justice prejudicing the defendant, implications can arise for victims who attend status hearings. A victim will have commonly prepared a Victim Impact Statement in conjunction with police to be submitted to the sentencing Judge. Strictly speaking, the Victim Impact Statement is to be submitted to the sentencing Judge after the defendant has been found guilty, or entered a guilty plea. This is recorded on at the top of the standard form Victim Impact Statement which states:[95]

> The victim must be informed that … [t]he information in this statement will be put before the Judge after the accused is found guilty and before sentencing, as one of the matters which will help in deciding on the suitable sentence for the offender.

This is also consistent with the important principle of the presumption of innocence[96] and the purpose of Victim Impact Statements as reaffirmed most recently by Chambers J in *R v Schofield*[97]. At one status hearing I attended in the Wellington District Court, the Judge strongly declined a persistent request

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[94] *R v Gemmell* (2000) 17 CRNZ 608 (CA) Gault, Keith, Tipping JJ.
[95] See Appendix B.
[96] See also Victims Rights' Act 2002, ss 17(1), 18(a)(ii) and 19(3)(a).
[97] *R v Schofield* (10 April 2001) High Court Auckland S5/01, 4 Chambers J: Also see quote above Part IV C Victim Impact Statements.

by one undefended defendant to give an indication of a sentence *range*, stating that it was not possible to do so without the defendant first entering a guilty plea so the Judge could refer to the Victim Impact Statement and receive a pre-sentence report.

There is however, anecdotal evidence to suggest that some Judges have developed a practice of referring to Victim Impact Statements at status hearings prior to a guilty plea being entered. Indeed, clause 2 of the sentence indication guidelines agreed upon by the Auckland District Law Society, Police and the District Court Judiciary states:[98]

> 2. An indication will not be given unless the Judge has the Police summary of facts and the list of previous convictions and, where appropriate, a Victim Impact Report/Statement.

The Police include the Victim Impact Statement on the Police file that is submitted to the Court for the purpose of the status hearing. It seems that some Judges will have regard to the Victim Impact Statement when giving an indication of the likely sentence and some will not refer to the Statement until the defendant has entered a guilty plea or has been convicted.

A victim who prepares a Victim Impact Statement may have the expectation that the Judge will have regard to their Statement. A victim who attends a status hearing and sees the Judge take no notice of the Victim Impact Statement when giving a sentence indication may feel a greater sense of frustration than if the victim had not prepared a Victim Impact Statement at all.[99] The problem of heightened victim expectation can be easily resolved by explaining to victims that the indication is merely an indication that does not bind the Court and that the Victim Impact Statement may only be put before the Judge once the defendant either pleads guilty or convicted of the offence. Furthermore, a

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[98] See Part V A Sentence Indication.

[99] See Andrew Ashworth "Victim Impact Statements and Sentencing" [1993] Criminal Law Review 498.

victim who sees a Judge have regard to their Victim Impact Statement whilst considering a sentence indication may feel a greater sense of importance.

In any case, where the victim has been in contact with a Victim Adviser and has prepared a victim memorandum, the Judge will more often than not have regard to this when giving a sentence indication. Victim memoranda regularly include more information than what is permitted in the Victim Impact Statement.[100] Not all victims have contact with the Victim Advisers or prepare a victim memorandum.[101] It would appear that Victim Impact Statements should be referred by the status hearing judge whilst giving a sentence indication. This would increase victims' sense of importance, help to alleviate feelings of marginalisation in the criminal justice system and provide a fairer sentence indication for defendants who request that one be given.

C Victim Memorandum

As previously mentioned,[102] a victim may prepare a victim memorandum to be submitted to the Judge at the status hearing.[103] The Judge will often have regard to the memorandum, creating a sense of worth for the victim in the criminal justice process. Victim memoranda may include information that is much wider than is permitted under the Victim Impact Statement[104]. For example, any views they have on how they want to see the alleged offender dealt with and any disagreements they have with the police summary of facts. In this regard victim memorandum should provide a greater form of catharsis than Victim Impact Statements, which are confined to the effects of the offence on the victim.

On the one hand, such information is helpful in the construction of a resolution by the court that all parties are content with. Information concerning any disagreement that the victim has with the police summary of facts can be

[100] See Part V C Victim Impact Statements.
[101] See Part IV B Input at the Status Hearing.
[102] See Part IV B Input at the Status Hearing.
[103] Examples of victim memoranda prepared for status hearings are included in Appendix C.
[104] See Part V C Victim Impact Statements; contrast Victims' Rights Act 2002, s 17(1).

invaluable when the parties are contemplating the chances of the case being successful at the defended hearing or considering whether the victim will be agreeable to a purposed 'deal' or resolution between the prosecution and the defendant.

On the other hand, there is the fear that the Judge may be unduly affected by the inclusion of hearsay evidence in the victim memorandum when sentencing the offender. With respect to Victim Impact Statements, the Court of Appeal in *R v Haddon*[105] held that Victim Impact Statements must be factual otherwise they were deemed to hinder rather than help to sentencing Judge. Furthermore, the Court was concerned that an inappropriate Victim Impact Statement:[106]

> [m]ay give rise to real concern that even unconsciously the Judge may be affected by the error or irrelevancy.

This same concern is central when victim memoranda include aggravating facts that have not been substantiated. Occasionally, the offender is remanded for sentencing at a later date. As opposed to sentencing in criminal trials however, the offender is usually sentenced immediately after entering a guilty plea. A defendant who pleads guilty does not automatically admit the facts that were not essential to establish the elements of the offence.[107] It is for the Judge therefore, to establish which facts are to be considered for the purposes of sentencing.

In the course of the status hearing, the defendant will usually have made any disagreements that exist with the police summary of facts clear. Any disagreement with facts alleged information in the Victim Impact Statement could be challenged on the basis that they are outside what is permissible under section 17(1) of the Victims' Rights Act 2002. There is however, no statutory provision that dictates what should be permitted in the victim memorandum. A defendant who is concerned that disputed facts alleged in the victim memorandum by the victim may influence the Judge in sentencing should

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[105] *R v Haddon* (1990) 6 CRNZ 508 (CA) Somers, Hardie Boys, Jeffries JJ.
[106] *R v Haddon*, above, 511 per Somers, Hardie Boys, Jeffries JJ.
[107] *R v Bryant* [1980] 1 NZLR 264 (CA) Richmond P, Woodhouse, McMullin JJ: Also see Sentencing Act 2002, s 24(2).

inform the Court and request to disregard them. This raises two distinct but related problems for victims.

The first problem relates to the 'plea bargaining' aspect of status hearings. It is often the case with status hearings that a defendant will defend a serious charge, but be willing to plead guilty to a lesser charge. For instance, a defendant who has been charged of 'assault with the intent to injure'[108] may be willing to plead guilty the lesser offence of 'common assault'.[109] Judges have adopted a policy of only approving such a resolution where the victim is agreeable to the proposed amendment. A victim may be agreeable to the reduction of the charge if it means the defendant admits their guilt and does not require victims to give evidence at the defended hearing. However, a victim will often wish for an element of the more serious offence to be considered at sentencing. If the prosecution do not wish to advance the facts that constitute this element, the victim may feel 'short-changed' having agreed to the lesser charge.

The second problem relates to disputed aggravating facts. It is unclear what level of proof would be required for such facts when they are included in the victim memorandum. Section 24(2)(c) of the Sentencing Act 2002 requires disputed facts to be proved beyond reasonable doubt by the prosecution. If the prosecution wishes to advance the disputed facts that might significantly affect the sentence to be imposed, the case may have to be adjourned for sentencing at a later date. In this case the victim may be required to give evidence or the subject of cross-examination. Thomas J in *Curtis v Police*[110] however, held that Victim Impact Statements were a special case and that it is for the Judge to assess the objection and determine the weight to be given to the disputed facts contained within them.

It is submitted that disputed facts contained in victim memorandum should be treated in an equivalent manner to Victim Impact Statements. Following the

[108] Crimes Act 1961, s192.
[109] Crimes Act 1961, s196.
[110] *Curtis v Police* (1993) 10 CRNZ 28 (HC) Thomas J.

approach of *Curtis v Police*[111], the victim would not be required to be subjected to the trauma of giving evidence and being cross examined. Untested evidence contained in the pre-sentence report is often considered and weighed by the Judge at sentencing. Furthermore, the defendant could still be sentenced immediately after the status hearing, alleviating the need for the case to be adjourned to a later date, benefiting all the parties involved.

VII CONCLUSIONS

As part of the current review of the New Zealand court structure, the New Zealand Law Commission will have to consider the operation of status hearings. While status hearings have emerged independently of legislative authority, they provide an effective forum for victims' views to be involved with the resolution of the case.

Although it is rare for victims to attend status hearings, many victims participate through victim memoranda prepared in conjunction with the Department of the Courts Victim Advisers. Victim memoranda allow victims concerns to be submitted to the Judge, avoiding any re-confrontation with the alleged offender. Having regard to victim's views when there is an attempt to resolve the case can reduce feelings of marginalisation and helplessness that victims often experience as a result of having an offence committed against them.

The inclusion of disputed aggravating facts in the victim memorandum beyond those essential to satisfy the charge has the potential to create problems. While their inclusion can be invaluable for the prosecution in considering what a victim may be willing to testify at the defended hearing, it may lead to victims having to give evidence and be cross-examined when establishing the facts which are to be taken account of at sentencing. It is submitted that this need not be so. Following the approach taken in *Curtis v Police*[112] with respect to Victim Impact Statements, it would be for the Judge to weigh the alleged facts included

[111] *Curtis v Police* (1993) 10 CRNZ 28 (HC) Thomas J.
[112] *Curtis v Police* (1993) 10 CRNZ 28 (HC) Thomas J.

in the victim memorandum on the one hand, against the objection on the other, when sentencing the offender. This would be beneficial to both victims and defendants.

APPENDIX A

This table summarises victim involvement in status hearings at the Wellington District Court in the month of August 2003. Figures are estimates recorded by the Wellington District Court Victim Advisers. The figures cover 75 cases that involved victims over four status hearing dates.

5 August 2003

Number of victims that the Victim Advisers had no contact with	2
Number of victims contacted, but did not prepare a victim memorandum	2
Number of victims attending the status hearing	2
Number of victims who orally addressed the Court	0
Number of cases involving victims	23

12 August 2003

Number of victims that the Victim Advisers had no contact with	2
Number of victims contacted, but did not prepare a victim memorandum	0
Number of victims attending the status hearing	4
Number of victims who orally addressed the Court	0
Number of cases involving victims	18

19 August 2003

Number of victims that the Victim Advisers had no contact with	2
Number of victims contacted, but did not prepare a victim memorandum	0
Number of victims attending the status hearing	4
Number of victims who orally addressed the Court	2
Number of cases involving victims	15

26 August 2003

Number of victims that the Victim Advisers had no contact with	4
Number of victims contacted, but did not prepare a victim memorandum	3
Number of victims attending the status hearing	3
Number of victims who orally addressed the Court	0
Number of Total cases involving victims	19

Totals for the month of August 2003

Total number of victims that the Victim Advisers had no contact with	**8**
Total victims contacted, but did not prepare a victim memorandum	**5**
Total number of victims attending the status hearing	**13**
Total number of victims who orally addressed the Court	**2**
Total cases involving victims	**75**

APPENDIX B

NEW ZEALAND POLICE

POL 392
02/98

VICTIM IMPACT STATEMENT

Name: _____

[The victim must be informed that:
The information in this statement will be put before the Judge after the accused is found guilty and before sentencing, as one of the matters which will help in deciding on a suitable sentence for the offender. The information given will need to be true and correct. A copy of this statement will be available to other people such as defence counsel, the probation officer and the accused.]

Statement to take narrative form and to cover following:

- **Victim Details** if appropriate e.g.: age, occupation, gender, living arrangements/ marital status, relationship to offender (if any), ethnic origin
- **Physical Injuries** include type and extent of injuries, long/short term effects, whether treatment/ absence from work/ hospitalisation reqd. medical/dental reports.
- **Property damage or loss** provide full description of property damaged/stolen
- **Financial Costs** include costs of treatment, replacement/repair costs, loss of wages/income, incidental costs.
- **Emotional/Psychological Effects** include changes in behaviour/ lifestyle/personal reaction. Include details of treatment/ counselling as appropriate. Attach psychological/other relevant reports.
- **Any other effects of the offence** on the victim/victim's lifestyle.

Prepared by:

Designation:

Date:

Sources of information:

[Continue on next page if necessary]

APPENDIX C

DEPARTMENT FOR COURTS
TE TARI KOOTI

STATUS HEARING MEMO

To: The Presiding Judge

From: Margaret McGregor
Victims Adviser
Court Services for Victims

Date: [redacted]

Defendant: [redacted]

Subject: Victim's Input to Status Hearing on [redacted]

I have spoken to the complainant, [redacted]s. He will not be attending the status hearing, but would like his views known by the Court.

There is a VIS available which outlines the injuries [redacted]uffered and the effect on his life. As an update, he reports that he is making a good recovery and has just started back at work this week. He is walking now with the assistance of a cane. He is still having physiotherapy. He says his costs have been covered by ACC.

[redacted]says that the SOF is a fantastic summary of what happened and he comments that the officer in charge had done the situation proud in terms of recording it. He says that the conversation with the defendant did get heated in the sense of voices being raised, but not violently so. He says he knows how much he had had to drink, reporting that he had not been drinking excessively and that he was in full control of his faculties. His feeling was that what the defendant did was not personal to him, rather that he happened to be the closest person. To him it was fairly obvious that if anyone was pushed in that situation, they would be hurt by their fall, but he thinks the defendant would not have been intending that he break a leg. To his mind it was a stupid thing to do, but maybe not as mean as a punch.

The important thing to [redacted]is that the defendant acknowledges what he did. He says that if he pleads guilty and it was simply a one-off mistake by a person having a bad night, then he would be satisfied with a letter of apology. However, if the defendant has a record for other violence, then he would feel differently. He is happy to leave that kind of decision to the Police and the Court as they have more information than he does. He hopes that the matter can be resolved at this stage rather than drag on, but will give evidence should that be necessary.

Margaret McGregor

District Court
43-49 Ballance Street, Private Box 5094, Lambton Quay, DX SX 11166, Wellington, New Zealand
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Disputes Tribunal: 0-4 918 8029 Fax: 0-4 918 8241 Case Processing: 0-4 918 8405 Fax: 0-4 918 8241

DEPARTMENT FOR COURTS
TE TARI KOOTI

Def ✓
Prosec ✓
Cl file ✓

STATUS HEARING MEMO

To: The Presiding Judge

From: Margaret McGregor
Victims Adviser
Court Services for Victims

Date: [redacted]

Defendant: [redacted]

Subject: Victim's Input to Status Hearing on [redacted]

I have spoken to the complainant, [redacted] will attend the status hearing and is prepared to speak if necessary. She would like her views recorded in advance.

Read her the SOF and [redacted] comments that the story is greater than is conveyed in the summary and it is hard to describe how awful it was on that night. She reports that he said a lot of things and she can't remember them all, but it included his threatening to burn her house down. She says he was yelling and screaming at her and calling her things such as being a slut. She says she felt threatened in a very personal sense of violation. The defendant has been trespassed from her property, but she feels that the potential is still there for more serious harassment. Her view is that he is an unstable person.

[redacted] says what she wants most is to be able to resume her life without feeling intimidated by this man. She reports that she has not been able to work since the incident and she finds it difficult to go out and do things like mowing her lawns. She acknowledges that she has suffered trauma in the past, which this invasion and abuse has brought up again, so the effects on her have had extra significance.

[redacted] thinks that the defendant definitely deserves to be convicted for what he has done and she hopes that that will deter him such behaviour in the future. She also expects that he will have to pay reparation for the damaged telephone.

There was another person on the house at the time who was also a witness to what happened. [redacted] will give evidence willingly if there is no change of plea, but would much prefer the matter to be finalised at the status hearing.

Margaret McGregor.

District Court
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DEPARTMENT FOR COURTS
TE TARI KOOTI

STATUS HEARING MEMO

To: The Presiding Judge

From: Margaret McGregor
Victims Adviser
Court Services for Victims

Date: [redacted]

Defendant: [redacted]

Subject: Victim's Input to Status Hearing on [redacted]

I have spoken to the complainant, [redacted]. She will not be attending the status hearing, but would like the Court to know her views.

[redacted] says that they had both been drinking that evening, had an argument over a misunderstanding and things got out of hand. She says that he did slap her and as a result she had a cut lip. She reports that she ran out of the house and neighbours called the Police. She did not think the matter would go this far.

[redacted] comments that there has only been one other time when the defendant hit her and she does not think that he is a violent man. She thinks it might be useful for him to do some counselling. She wants the Court to give him a strong warning and some counselling because she does not want to be beaten again. She says that if the same thing ever happened again she would leave the relationship and she has told him that.

Margaret McGregor

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DEPARTMENT FOR COURTS
TE TARI KOOTI

STATUS HEARING MEMO

To: The Presiding Judge

From: Margaret McGregor
Victims Adviser
Court Services for Victims

Date: [redacted]

Defendant: [redacted]

Subject: Victim's Input to Status Hearing on [redacted]

I have spoken to the complainant, [redacted]. She will attend the status hearing and is willing to speak if that is needed and appropriate.

[redacted] says that she feels reasonably philosophical about what happened, knowing that it could happen to anyone if they were not paying enough attention. At the same time she thinks that drivers should be conscious of people crossing the road, with the lights, on a pedestrian crossing, as she was. At the end of the day, she states, she did get hit and injured.

[redacted] reports that she has concentrated on getting well, rather than on what happened. In update to the VIS, she reports that she is still not officially back at work, but is currently working three hours three days a week. She is still covered by ACC and this effort to ease herself back into work is being seen as part of her rehabilitation. It is being monitored carefully by Capital Health. She will be under their rehab programme for some time, probably until March next year, a year after the accident. She saw a speech therapist for quite some time, has seen a neuro-psychologist and is still seeing the occupational therapist once a week. She reports that with head injuries it is hard to give a definite prognosis because it is difficult to be sure what will heal. She states that she hopes at least to develop strategies to cope. She still suffers from fatigue and that is the main worry. There were lots of things she used to be able to do that she no longer can manage e.g. going to the gym and dragon boat racing.

[redacted] states that she holds no malice towards the driver. Her costs have been covered by ACC and she is not seeking recompense for her pain and suffering, but neither would not refuse it if it were offered. She is happy to leave the appropriate consequences to the Court and let the justice system work.

Margaret McGregor

District Court
43-49 Ballance Street, Private Box 5094, Lambton Quay, DX SX 11166, Wellington, New Zealand
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DEPARTMENT FOR COURTS
TE TARI KOOTI

STATUS HEARING MEMO

To: The Presiding Judge

From: Margaret McGregor
Victims Adviser
Court Services for Victims

Date: [redacted]

Defendant: [redacted]

Subject: Victim's Input to Status Hearing on [redacted]

I have spoken to the complainant, [redacted] He will attend the status hearing, but does not want to be identified.

I have read [redacted] the SOF. He was astounded at the allegation by the defendant that he hit him, stating that he found the idea humorous, in the sense of being ludicrous. He says he did nothing to provoke the situation. He says that he did notice the guys as he went into the shop because they were talking very loudly and abusively. He thinks from the beginning the defendant appeared to be a trouble maker and he seemed to know what he was doing. When he came out and they intervened they ruined his whole night. He says he went straight back to work and rang the Police.

He reports that he was really upset about what happened to him and gutted that someone could do that to anyone. He says there were a lot of people around and no-one did anything, except one guy. He says he used to feel safe, but now he hates walking in the area and always feels he has to watch his back. This is very stressful.

[redacted] says that the charge seems the right one to him because the intent to injure him was how he sees what happened as he was lying on the ground with his knees up trying to protect and guard himself from the punches and kicks. For this reason he would like the charge left as is.

[redacted] would like the defendant to have to pay his costs, which he outlines as $80 for his torn shirt and $10 medical expenses. He also reports that he missed one night's work and had a lot of pain in his hip, which affected him at work for the next week and a half.

If the defendant is prepared to get help for a possible drug or alcohol problem and for learning to live without violence, he would support that kind of response from the Court.

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DEPARTMENT FOR COURTS
TE TARI KOOTI

STATUS HEARING MEMO

To: The Presiding Judge

From: Margaret McGregor
Victims Adviser
Court Services for Victims

Date: [redacted]

Defendant: [redacted]

Subject: Complainant's Input to Status Hearing on [redacted]

I have spoken to the complainant [redacted] with the assistance of an interpreter. She will not be attending the status hearing, but would like her views known by the Court.

[redacted] confirms the SOF and states that when she asked the defendant to leave, he categorically refused. She says that he was drunk and told her that he would not leave until she called the Police. She says that basically he is a good person and it is OK when he is not drunk, but it is not safe when he has been drinking. She says that he has helped her in the past and has been good to the children. She has not invited him back since, although he has come a few times. She says he has not entered on the property, but she does get afraid because she cannot be sure what he will do next.

[redacted] states that what she wants is to feel safe. For instance, she wants to be sure that if she opens the window, she will still be safe. At the moment she feels she has to keep them closed, even when she is smoking. She comments that she feels ashamed to have to ring Police and she worries that she will be expelled by WCC because of damage he has done. She says that would be really regrettable because she likes the place she has.

[redacted] says she does not want to make things worse for him and aggravate his situation. She hopes that he will calm down of his own accord and accept that she does not want to have anything to do with him. She would like the case to be settled at this stage, but will give evidence if that becomes necessary.

Margaret McGregor

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