

Joanne Monique Girvan

**“Victims Speaking Out”**

*Proposals for Victim Participation in the Criminal Justice System  
through Oral Victim Impact Statements: An Analysis of the Potential  
Problems and Alternatives.*

Submitted for the LLB(Honours) Degree at  
Victoria University of Wellington.

1 September 2000

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Joanne Monique Curran

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through Oral Victim Impact Statements: An Analysis of the Potential  
Benefits and Alternatives

WELLINGTON

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## I INTRODUCTION

The criminal justice system in New Zealand is undergoing a gradual shift towards re-incorporating the victims of crime. High levels of victim dissatisfaction with the system have led to an increased focus on victims' needs, and initiatives such as the Victim Impact Statement<sup>1</sup> have attempted to provide victims with a voice in the criminal justice system. A focus on Victims' Rights has promoted greater recognition of the psychological, physical, emotional and financial effects of crime that victims may suffer long after the courts have dealt with the offender. A new enthusiasm for victims to have the right to speak in court, in the form of an oral Victim Impact Statement<sup>2</sup>, is based on the concept that being heard is an 'important part of the healing process'<sup>3</sup>, and will have a 'closure' effect for the victim.

Currently, victim impact statements are limited to a written report given to the sentencing judge.<sup>4</sup> More recently a Victims' Rights Bill<sup>5</sup> has been proposed that would give victims the right to make these statements orally. There are already some current problems with written victim impact statements, and oral victim impact statements may raise additional matters of due process for the offender, and may also be unhelpful for victims in terms of revictimisation, an inability to express feelings, or a remaining dissatisfaction at the sentence given.

- 1) Genuinely incorporating victims may instead require a shift in thinking. Recently, victim participation at Status Hearings<sup>6</sup> has provided an example of how victims could benefit from a more flexible court process. In addition, the

<sup>1</sup> Lee, Angela; Searle, Wendy *Victims Needs: an Issues Paper* Department of Justice (Wellington, 1993), 10

<sup>2</sup> The right for victims to deliver oral victim impacts statements has been proposed in ss11 and 12 of the Victims' Rights Bill 1999 no. 331-1. The Bill underwent its second reading in October 1999 and is currently before a select committee.

<sup>3</sup> Hon Phil Goff (5 Oct 1999) 580 NZPD 19647

<sup>4</sup> Victims of Offences Act 1987 s8

<sup>5</sup> Victims' Rights Bill, above n2

<sup>6</sup> Status Hearings are a form of pre-trial conference practised at some District Courts in New Zealand. They will be discussed further in this article see: *IV STATUS HEARINGS*

development of Victims' Advisers<sup>7</sup> has provided victims with their own 'advocate', thus recognising that they are a relevant party in the process. Ultimately moves towards restorative justice may reduce the need for formal victim impact statements.

## II VICTIM IMPACT STATEMENTS

The Victims of Offences Act 1987 contributed to a growing awareness of the needs of victims of crime and their role in the criminal process.<sup>8</sup> The Act outlined the general rights of victims of crime to be treated with 'courtesy, compassion, and respect for their personal dignity'<sup>9</sup>, and provided a set of principles for those dealing with victims such as police, judges, lawyers and support groups, to follow. An important feature of the Act was the requirement for victim impact statements, outlining any physical and emotional harm, property loss or damage and any other effects suffered by a victim of crime, to be presented to the sentencing judge.<sup>10</sup>

Victim impact statements were introduced as a means of involving and recognising the victims of offences in the criminal justice system. Wallace (1989)<sup>11</sup>, in a survey of individuals involved in preparing, observing or hearing victim impact statements, found that respondents identified the purposes of victim impact statements as being:

- 1) To provide the court with a balance of information for the purpose of assisting the judge to reach an informed decision.
- 2) To help empower the victim and aid their healing process through enabling their input in the judicial process.
- 3) To aid the offender in recognising the impact of their actions.

<sup>7</sup> Victims Advisers are a court appointed role to be discussed further in this article.

See VII ALTERNATIVE FORMS OF VICTIM INVOLVEMENT: B Victims' Advisers

<sup>8</sup> *A Select Bibliography of New Zealand Research on the Needs of Victims and the services provided to victims* Department of Justice (Wellington, 1993), 4

<sup>9</sup> Victims of Offences Act 1987, s3

<sup>10</sup> Wallace, S *Victim Impact Statements: a Monograph* Department of Justice (Wellington, 1993), 3

<sup>11</sup> Wallace, above n10, 11

Victim impact statements have had mixed success in fulfilling their aims. While they are widely used, they were introduced without clear guidelines as to who should prepare them, what they should contain, and the role they should play in sentencing decisions. In response to this a standard victim impact statement form has been developed for use by the New Zealand Police<sup>12</sup>. This form separates the relevant information to be recorded into 6 sections: General victim details, Physical injuries, Property loss or damage, Financial costs, Emotional and Psychological effects, and Any other effects of the offence.<sup>13</sup>

### **III CURRENT PROBLEMS WITH VICTIM IMPACT STATEMENTS**

#### **A Preparation**

Victim impact statements may be out of date and inaccurately reflect the victims' views. They are frequently prepared by the police officer at the time of the complaint; therefore there is often a long time delay between the preparation of the statement and its presentation at sentencing<sup>14</sup>, during which the victims' views may change. The victim may at a later stage realise they have suffered greater impact or expense than first thought, or in other circumstances, having recovered from the original shock of victimisation, be calmer and realise the offender does not pose a continuing threat.

Wallace (1989)<sup>15</sup> criticised the preparation of victim impact statements at that time as often being prepared without the victim being aware. Clearly the victim impact statements fail to serve their purpose of incorporating the victim into the criminal procedure when this is the case.

#### **B Privacy**

Among the concerns of victims giving impact statements was a fear that an offender seeing the statement may retaliate, this threat causing victims to feel even more vulnerable and impeding a full disclosure of the effect of the offence. In addition, some offenders may enjoy reading about the trauma they have

<sup>12</sup> Appendix A

<sup>13</sup> Appendix A

<sup>14</sup> Wallace, above n10, 10



caused<sup>16</sup>, and victims may not want sensitive information in the statement disclosed to the offender.<sup>17</sup>

The balance of the need to protect the privacy of victims, many of whom have said that they would like access to victim impact statements restricted<sup>18</sup>, and the right of defendants to be able to check the accuracy of this information which may affect the sentence they receive, was not dealt with in the Victims of Offences Act 1987. The Act does not outline who is entitled to see the victim impact statement. However, in the High Court decision of *R v B*<sup>19</sup> Smellie J concluded that: '...there can be no question but that the person to be sentenced is entitled to see the report.'<sup>20</sup> This was based on the principle that:

...it is of the essence of a fair trial that the person charged is fully aware of the information placed before the Court which is prejudicial to him and is afforded an ample opportunity to refute.<sup>21</sup>

Nevertheless, the courts have since acknowledged that it may be appropriate in some cases to control distribution of the report by limiting the number of copies that may be made of the statement, and requiring it to be returned to the Court.<sup>22</sup> Police policy also now requires that the victim is informed that a copy of the statement will be made available to defence counsel, the probation officer, and the accused.<sup>23</sup>

The Victims' Rights Bill<sup>24</sup> also aims to address these privacy issues through clause 13(2) which would empower the Court to impose conditions on the disclosure and distribution of the Victim impact statement as 'may be necessary to protect the victim's physical safety, emotional welfare, and privacy.'<sup>25</sup> Clause

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<sup>15</sup> Wallace, above n10, 13

<sup>16</sup> Lee & Searle, above n1, 12

<sup>17</sup> Wallace, above n10, 20

<sup>18</sup> Wallace, above n10, 20

<sup>19</sup> *R v B* (14 June 1989) unreported HC s8/89 per Smellie J

<sup>20</sup> *R v B* above n19, 2

<sup>21</sup> *R v B* above n19, 2 per Smellie J

<sup>22</sup> *R v M* (2 May 1995) unreported CA 361/94

<sup>23</sup> Appendix A

<sup>24</sup> Victims' Rights Bill 1999 no. 331-1

<sup>25</sup> Victims' Rights Bill 1999 no. 331-1, cl 13(2).

13 would give the Court wide discretion "without limitation" to restrict the copying and/or distribution of the victim impact statement at its own initiative or at the prosecution's application.

### *C Unsubstantiated Information/ Challenges*

Of particular concern for defence lawyers, is the possibility that victim impact statements may be overly emotive, or contain unsubstantiated allegations, relating to the current charge or other matters not being prosecuted.

While the defence may challenge a victim impact statement if it is believed to contain unsubstantiated allegations, or information relating to other incidents for which charges have not been laid, it is often unadvisable to do so. The court may view challenges as subjecting the victim to revictimisation, and this may impact negatively at sentencing<sup>26</sup>. An offender who disputes facts, and thus causes the complainant to be required to give evidence, may forfeit the advantage gained from a guilty plea, if those facts are found against him or her.<sup>27</sup> There is no indication on the police victim impact standard form that statements must relate only to the offence charged, and in some cases courts have been faced with statements have gone beyond this criteria.

This situation was examined in the High Court in *R v F*<sup>28</sup>. In that case the defendant had pleaded guilty to seven charges of incest spanning a period of 13 months. The victim impact statement introduced at sentencing meanwhile, suggested the abuse had taken place over a period of 8 years, and also alleged that the acts of incest were accompanied by physical violence and threats.<sup>29</sup> Tipping J directed that the offending sections be removed from the victim impact statement. In doing so it was held that section 8 of the Victims of Offences Act 1987:

<sup>26</sup> Miller, John *Brooker's Criminal Procedure in the District Court* (Brooker's Wellington, 1998), 7-SN32.05

<sup>27</sup> *Curtis v Police* (1993) 10 CRNZ 28, 34 per Thomas J

<sup>28</sup> *R v F* (1989) 4 CRNZ 365

<sup>29</sup> *R v F* above n28, 366

...gives no foundation for allowing the author of a victim impact statement to introduce substantial circumstances of aggravation which have not been referred hitherto and specifically have not been referred to in the police statement of facts.<sup>30</sup>

It was also observed that:

Care must be taken...to avoid the risk of trial by victim impact statement. Such statements must fully serve their statutory purpose but should not be allowed to trespass outside the reasonable ambit of that purpose.<sup>31</sup>

In the later case of *R v Hopkirk*<sup>32</sup> an overly emotive victim impact report was found to be in 'clear breach of the language and spirit of the Victims of Offences Act 1987...'<sup>33</sup> In that case it appears the victim had included an emotive appeal to the sentencer as to the correct approach a court should take when sentencing in cases of sexual offending.<sup>34</sup> Thus it is clear that courts are reluctant to admit victim impact statements that go beyond their prescribed mandate. However it is equally clear that it is not an infrequent occurrence for such statements to be prepared.

On this point, Smellie J commented in *R v B*<sup>35</sup> that it was the 'duty of counsel appearing for the Crown not only to see that the Victim Impact Report is available but also to ensure that its contents are appropriate.'<sup>36</sup> In the Summary Jurisdiction of the District Court this responsibility would fall upon the Senior Police Officer prosecuting the case.<sup>37</sup>

Preparation of victim impact statements is now also a role of Victims' Advisers,<sup>38</sup> thus the responsibility of filtering out unsubstantiated information may now require considerable communication between Police prosecutors and Victims' Advisers.

<sup>30</sup> *R v F* above n28, 367 per Tipping J

<sup>31</sup> *R v F* above n28, 368 per Tipping J

<sup>32</sup> *R v Hopkirk* (1994) 12 CRNZ 216

<sup>33</sup> *R v Hopkirk* above n32, 219 per Thorp J

<sup>34</sup> *R v Hopkirk* above n33

<sup>35</sup> *R v B* above n19

<sup>36</sup> *R v B* above n19, 3 per Smellie J

<sup>37</sup> *R v B* above n19, 3 per Smellie J

<sup>38</sup> Court Victims' Advisers, above n7

The potential for unsubstantiated allegations or overly emotive language to feature in victim impact statements would be enhanced if the victim presented these statements orally, as proposed in the Victims' Rights Bill.<sup>39</sup> Victims will be much less concerned of the need to limit the statement to the offence described in the police statement of facts, and unless the statement is pre-prepared, prosecutors will be unable to prevent extra information from being either deliberately or inadvertently included by the victim in their oral statement. In addition, victims may wrongly conclude that their opinion as to sentence is relevant, when the court is only interested in the impact the offence has had on them.

#### **IV STATUS HEARINGS**

The development of the status hearings procedure in some District Courts in New Zealand has also had some benefits for victims, as will be discussed further in this article.<sup>40</sup> However their emergence also poses some problems as they have been developed independently of legislative authority.

Status hearings are a procedure that have replaced pre trial conferences in some District Courts. Their aim is to identify inappropriate pleas, and avoid unnecessary adjournments at an early stage, thus reducing the number of defended hearings that do not go ahead<sup>41</sup>.

The validity of status hearings as a procedure was questioned in *Haskett v Thames District Court*.<sup>42</sup> It was alleged that they were contrary to Section 67 of the Summary Proceedings Act 1957, which contains no express authorisation for such a three-stage process. However Hammond J ruled that 'the Act has had to be operated in a sensible manner, which meets the present day needs of

<sup>39</sup> Victims' Rights Bill 1999 no. 331-1 clauses 11, 12

<sup>40</sup> Discussed further see *VII ALTERNATIVE FORMS OF VICTIM INVOLVEMENT: D Victim Influence at Sentencing in New Zealand and the USA*

<sup>41</sup> Miller, above n26, 3-PT5.03

<sup>42</sup> *Haskett v Thames District Court* (1999) 16 CRNZ 376

citizens.<sup>43</sup> The Court had an inherent power to regulate its own proceedings<sup>44</sup>, although it was noted that 'such a process must in fact operate "fairly".<sup>45</sup>

In *Pickering v Police*<sup>46</sup> the issue arose as to whether the same judge who had presided over a status hearing, could later preside over the defended hearing of that offence. Hammond J concluded that no absolute rule should apply, but that the onus would shift to the prosecution to demonstrate that there had been no actual or perceived impropriety, in such cases.<sup>47</sup>

At the status hearing a District Court judge will usually give an indication of the strengths and weaknesses of the case, and may give an indication of a likely sentence if a guilty plea was made. Complainants are invited to attend the court, may address the court, and in conjunction with the Court Victims Adviser<sup>48</sup> may be able to provide input into the negotiations.<sup>49</sup> Status hearings are a particularly useful way of incorporating the victim into the criminal justice process, as solutions mooted do not have to be binding, discussions which take place cannot influence a later trial, and they are likely to encourage flexibility between the parties participating. The victim may benefit directly from providing input, particularly where a reparation sentence is possible, and they are able to inform the court of the extent of loss or damage they have suffered. In addition, Status Hearings may result in an earlier guilty plea, thus preventing some victims from having to testify as witnesses.

However although the procedure may offer benefits for some victims, there is currently a lack of legislative authority to allow victims to speak at these hearings, and the input of Victims Advisers in presenting Victim Impact Statements is not provided for by the Victims of Offences Act 1987. Thus it is clear that Victim Impact Statement legislation needs to be updated to concord with innovations taking place in the Courts.

<sup>43</sup> *Haskett v Thames District Court*, above n42, 383 per Hammond J

<sup>44</sup> *Haskett v Thames District Court*, above n42, 383 per Hammond J

<sup>45</sup> *Haskett v Thames District Court*, above n42, 384 per Hammond J

<sup>46</sup> *Pickering v Police* (1999) 16 CRNZ 386

<sup>47</sup> *Pickering v Police* above n46, 388 per Hammond J

<sup>48</sup> Court Victims Adviser's, above n7

<sup>49</sup> Miller, above n26, 3-SH4.06

## V RESTORATIVE JUSTICE

Another innovation, which will have an impact on the need for victim impact statements, is the development of forms of restorative justice. A pilot restorative justice scheme<sup>50</sup> is now being trialed in New Zealand based on the Family Group Conference model<sup>51</sup> developed for youth offenders. Central to the idea of restorative justice is encouraging the offender to take responsibility for the offence and its consequences.<sup>52</sup> An important part of the process, therefore, is the personal input of the victim. A victim may use their own words and emotions to convey the impact of the offence on them. The 'sentence' reached is based on a 'plan' devised by the parties. This is in contrast to the 'dispassionate'<sup>53</sup> style of the current system described below:

In criminal courts the expression of strong emotion is closely managed. The opportunities for emotional displays are limited by the protocols of representation through counsel and the presentation of written reports and statements to describe the emotional, physical and financial effects of the offence on the victim.<sup>54</sup>

A move towards restorative justice may remove the need for formal victim impact statements, and would allow for more emotive participation from the victim. Formal victim impact statements could then be confined to situations where restorative justice may be inappropriate, for example in cases of serious violence and rape. When considering an individual offender's eligibility for a restorative justice program, an initial acknowledgement of their responsibility for the offence would be essential. This would ensure that a victim would not be expressing anger and emotion to an unsympathetic and unco-operative offender.

In cases where restorative justice is inappropriate, a written victim impact statement is still likely to be the best way of incorporating victim information

<sup>50</sup> MacLeod, Scott "Criminals to face victims in \$4.8m plan" 12 June 2000 New Zealand Herald

<sup>51</sup> Family Group Conferences discussed further see:

VII ALTERNATIVE FORMS OF VICTIM INVOLVEMENT: A *Family Group Conferences*

<sup>52</sup> *Restorative Justice* Ministry of Justice (Wellington, 1995), 17

<sup>53</sup> *Restorative Justice*, above n52, 17

<sup>54</sup> *Restorative Justice*, above n52, 17

into a traditional court setting, as an oral statement may also be inappropriate for reasons already discussed. Where reconciliation between the parties is unlikely, the defence will also be particularly wary of the content of oral victim input, as the prime concern for defence will be to present the offender favourably in sentencing submissions. Additionally, if an offender is seeking mitigation at sentencing, they are unlikely to accept a level of responsibility for the offence that would be satisfactory to the victim. Thus victims could easily feel that their emotional oral statement was falling on deaf ears.

## **VI VICTIMS MAKING ORAL SUBMISSIONS**

### **A Current Law**

The Victims of Offences Act 1987 allows the victim impact statement to be presented in written form or orally by the prosecutor, but did not provide for the victim to present the statement orally themselves.<sup>55</sup> Overwhelmingly, prosecution has opted for a written report reflecting the argument made by police, victims and victims support groups of the need to protect victims' confidentiality. There has been opposition from victims and support groups to the victim impact statement being read out in court, being referred to in the submissions of counsel or judges sentencing comments, and possibly being reported in the press.<sup>56</sup>

Not all victims have had these concerns. Some accounts have described victims who were quite happy with the reporting of the victim impact statement in the local press.<sup>57</sup> Certain other victims are quite prepared to appear and present their views in court, though currently must rely on the discretion of the court to do so. This cautious approach of the courts to such participation was exemplified in *R v Edmonds*.<sup>58</sup> In this case the prosecution had dropped a manslaughter charge, following the defendant's guilty plea to lesser charges of causing death whilst under the influence of alcohol, causing bodily injury whilst under the influence

<sup>55</sup> Victims of Offences Act 1987 s8

<sup>56</sup> Wallace, above n10, 20

<sup>57</sup> Wallace, above n10, 21

<sup>58</sup> *R v Edmonds* (1997) 15 CRNZ 340

of alcohol, and causing injury while driving under the influence of alcohol.<sup>59</sup> A request was made on behalf of the victims to address the court on two bases: the first being that the family had not been consulted or informed of the lesser charge, the second was a request to supplement the victim impact statement. Hammond J noted that there was no specific provision in the Victims of Offences Act 1987 for victims themselves to address the court at a sentencing hearing, but that this did not rule out the possibility of the court giving discretion for the victim to do so.<sup>60</sup> The principal reason given by Hammond J in denying the request in this case was that the real purpose of the application was to publicly attack the prosecution decision not to pursue the manslaughter charge.

More generally Hammond J suggested that such discretion would be 'very sparingly exercised and the circumstances would be most unusual before any leave would be granted.'<sup>61</sup> Not only does this illustrate the frustration that victims may experience in being excluded from prosecution decisions, but is also indicative of a general reluctance of courts to entertain the idea of oral victim participation.

Allowing victims to make oral statements would avoid some of the current features of written victim impact statements that make them an ineffective way of making the victim feel involved in the court process, such as their preparation without the victims knowledge and being out of date. However oral statements may increase the other problems of overly emotive language and unsubstantiated allegations.

### ***B Proposals Under the Victims' Rights Bill***

In 1999 the National party Minister of Justice<sup>62</sup> proposed a Victims' Rights Bill stating: "The government is introducing this legislation to give victims new and

<sup>59</sup> *R v Edmonds* above n58. These charges were laid under ss55 (2)(a) of the Transport Act 1962.

<sup>60</sup> *R v Edmonds* above n58, 349 per Hammond J

<sup>61</sup> *R v Edmonds* above n58, 349 per Hammond J

<sup>62</sup> Hon. Tony Ryall (NZ National)



undeniable rights to have their voices heard by the courts and the Parole Board.”<sup>63</sup>

The current Minister of Justice<sup>64</sup> criticised the Bill at its introduction for wording that is: “...permissive only and does not create guaranteed rights for victims.”<sup>65</sup> However he agreed that: “...victims should have the right to address the court on what the cost to them has been of offenders’ actions.”<sup>66</sup>

The Bill is before a select committee, and the current Justice Minister has expressed a desire to make the existing rights in the Bill legally enforceable, and expand the Bill to ensure that victims are consulted on name suppression issues.<sup>67</sup>

The Victims’ Rights Bill proposed in 1999 states that: ‘currently, victims must rely on administrative practice and judicial discretion to make oral victim impact statements at sentencing and oral submissions on parole and final releases. This has neither ensured a consistent approach nor given victims sufficient choices as to how they participate.’<sup>68</sup>

To rectify this fault the proposed new provision enables the victim to give statements orally, as set out in the following sections of the Bill:

**11. Victim impact statements** (1) Appropriate administrative arrangements should be made to ensure that a sentencing Judge is given information about-

(a) Any physical or emotional harm suffered by the victim through or by any means of the offence; and

<sup>63</sup> (5 Oct 1999) 580 NZPD 19645

<sup>64</sup> Hon. Phil Goff (NZ Labour)

<sup>65</sup> (5 Oct 1999) 580 NZPD 19647

<sup>66</sup> (5 Oct 1999) 580 NZPD 19647

<sup>67</sup> “Victims to get a say on name suppression” New Zealand Herald, 26 May 2000 Justice Minister Phil Goff stated “One [weakness] that stood out was in the issue of name suppression- nowhere in the law did it say the victim should be consulted over whether or not that is appropriate.”

<sup>68</sup> Explanatory note to the Victims’ Rights Bill, no. 331-1

- (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
- (2) That information should be given to the judge either-
- (a) By the prosecutor, either orally or by means of a written statement about the victim; or
  - (b) *By the victim orally.* (emphasis added)

- 12. Sentencing Judge may require victim impact statement-** (1) Without limiting section 11, a sentencing Judge may direct the prosecutor to ensure that the Judge is given the information referred to in section 11 (1) in relation to any victim.
- (2) That information must be given to the Judge either-
- (a) By the prosecutor, either orally or by means of a written statement about the victim; or
  - (b) *By the victim orally.* (emphasis added)

These sections are directly comparable to section 8 of the Victims of Offences Act 1987, the only new inclusion in the Bill being the provision for victims to present their statement orally.

Victim impact statements combine with reparation and emotional harm reports as ways of providing the court with relevant information about the victim. Section 22 of the Criminal Justice Act 1985 provides that a court may make a reparation order where a person is convicted of an offence in which another person suffered emotional harm<sup>69</sup> or loss of property. Under this section a court may be adjourned in order for the probation officer to prepare such a report. Section 11 of the Criminal Justice Act 1985 established a presumption in favour of reparation.<sup>70</sup>

<sup>69</sup> Reparation for 'emotional harm' became possible under a 1987 amendment to the Act.

<sup>70</sup> Speir, Phillip *Conviction and Sentencing of offenders in New Zealand 1989 to 1998* Ministry of Justice (Wellington, December 1999), 99

This combination marks a shift from the exclusion of the victim in the criminal justice system to increasing their inclusion, however the provision of oral victim's statements raises questions as to whether victims should be included in this manner in the criminal justice process, and whether the provision to make oral statements could pose more problems than it attempts to fix. These issues will now be considered.

Some justify the exclusion of victims from participation on the basis that offences are a crime against the State, and that State prosecution prevents vigilantism and ensures efficiency and consistency in the justice system<sup>71</sup>. Not all justice systems see the need to exclude victims in this manner however, in many European jurisdictions victim participation has varied from the right to initiate a private criminal prosecution for minor crimes where there is no public interest in prosecution<sup>72</sup>, the right to be a subsidiary prosecutor by submitting evidence and being heard in court<sup>73</sup>, and the full right to bring a private prosecution<sup>74</sup>. In New Zealand members of the public can bring private prosecutions for most crimes.<sup>75</sup>

Victim impact statements have appeared in various forms in New Zealand, Australia, England and Wales, Canada, and the United States. Their development was largely as a result of the United Nations General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuses of Power adopted in 1985. This declaration encouraged presenting and considering the views and concerns of victims, at appropriate stages of proceedings.<sup>76</sup> It was motivated by a victims' rights movement, which voiced the concerns of victims who were unsatisfied with their exclusion from the justice system. However the right to participate orally has not been a feature of Commonwealth systems.

<sup>71</sup> Ashworth, Andrew "Restorative Justice and Victim's Rights" [2000] NZLJ, 85

<sup>72</sup> (Austria, Denmark, Germany, Hungary, Norway, Poland, Russia, Scotland and Yugoslavia) Tobolowskyz, Peggy M "Victim Participation in the Criminal Justice Process: Fifteen Years after the Presidents Task Force on Victims of Crime" 25 N.E.J on Crim.& Civ.Con.21, 24

<sup>73</sup> (Austria, Germany, Norway, Poland, Sweden, and Yugoslavia) Tobolowskyz, Peggy M above n72, 2

<sup>74</sup> (Finland) Tobolowskyz, Peggy M, 24

<sup>75</sup> Summary Proceedings Act 1957 ss13, 146a, 186, however note that the Attorney General's consent is required for the initiation of criminal proceedings in respect of some crimes.

<sup>76</sup> Tobolowskyz, Peggy M, above n72, 24

One system where oral participation has been allowed is the United States. Here, in addition to victim impact statements being authorised in 48 states, 29 of these states allow victims a 'right of allocution'<sup>77</sup>, that is, a victim is allowed to make an oral statement at the time of sentencing<sup>78</sup>. This 'right of allocution' is also often referred to as a 'Victim Opinion Statement' which may include information not only about harm suffered by the victim, but also the victims views about the offender and appropriate sentencing<sup>79</sup>.

The proposed Victim' Rights Bill does not go as far as to allow a victim to make comments about the offender. The Bill is, however, drafted broadly to include 'any other effects' on the victim as relevant, and statements detailing the victims fear of, or previous encounters with the offender might be included. However, it is interesting to note that the Victims of Offences Act 1987 also included such a provision, yet the Courts have been reluctant to allow inclusion of effects not relating to the specific offence charged.

### *C Oral Statements- Problems for Victims*

The delivery of oral victim impact statements also allows the victim the opportunity to directly confront the offender and the court with their suffering.

There has been a range of views as to whether such participation is likely to be helpful to the victim. It has been suggested that victims have the right to contribute as a party in the prosecution, as they play an essential role in the justice system through reporting crime and acting as witnesses, and thus are already drawn into the process<sup>80</sup>. It is often difficult for victims to understand why they do not have 'party' status as they view the crime as being committed against them primarily, not the state, thus in a sense having 'ownership' of the crime<sup>81</sup>. Furthermore, it is argued that victim participation assists the function of

<sup>77</sup> 'Allocution' is defined as 'a formal or hortatory speech or manner of address' Thompson, Della (ed) *Concise Oxford Dictionary (9<sup>th</sup> ed)* (Oxford University Press Inc, New York, 1995)

<sup>78</sup> Ashworth, n71 above, 87

<sup>79</sup> Raineri, Aldo "Re-integrating the Victim into the Sentencing Process: Victim Impact Statements as an Element of Offender Disposition" 11 *QLD Uni. Tech Law Jnl* 79, 84

<sup>80</sup> Kelley, D P "Victim Participation in the Criminal Justice System" in Lurigo, A J; Skogan, W A; and Davis, R C (eds) *Victims of Crime: Problems, Policies and Programs* (Sage, Newbury Park California, 1990) 172

<sup>81</sup> Raineri, above n79, 82

the justice system by increasing victim satisfaction<sup>82</sup>, making victims more willing to cooperate in the proceedings<sup>83</sup>.

The Victims Task Force in New Zealand (1989)<sup>84</sup> reported that Victim Impact statements had a strong symbolic role as the most prominent method of putting the victims experience before the court. It is unclear how victims in New Zealand would value the opportunity to express their views orally in court. In a recent report on public attitudes to restorative justice<sup>85</sup>, members of the public expressed enthusiasm at the idea of being able to confront the offender and express their feelings. However the situation proposed to these respondents did not involve making a public appearance in court.

The Privacy Commissioner<sup>86</sup> has expressed some concerns at the possibility of victim impact statements being made orally. In a report<sup>87</sup> on the proposed legislation the Privacy Commissioner noted that the provision of the option for victims to make an oral statement has its dangers in that the victims words will be heard in open court; will become known to all those in the courtroom; and may be reported in the media. The report notes that the decision to make an oral statement should not be taken lightly, and that the victim must be fully informed about the implications of making an oral statement, in that the statement will not automatically be protected from distribution, the discretion here lying with the judge in the individual case.<sup>88</sup>

The Commissioner places importance on making victims aware of any intimate information about themselves that is already before the judge, so they do not think that they have to detail it in open court. To overcome the Commissioner's

<sup>82</sup> Victim satisfaction may result from victims' *perception* that they are influencing the system, rather than by victims having an *actual* influence. Kelley, above n80, 175

<sup>83</sup> Kelley, above n80, 175

<sup>84</sup> Ballin, *Ann Report on the progress of the Victims Task Force*. The Task Force (Wellington, 1989), 4

<sup>85</sup> *Public Attitudes Towards Restorative Justice*/[Researched and Prepared by the MRL Research Group; for the Criminal Justice Development Group of the Department of Justice.] Department of Justice (Wellington, 1995) [Public Attitudes Towards Restorative Justice]

<sup>86</sup> *Report by the Privacy Commissioner to the Minister of Justice in Relation to the Victims' Rights Bill* 10 December 1999 [www.privacy.org.nz/people/vicright.html](http://www.privacy.org.nz/people/vicright.html) (last accessed 8 May 2000) [Privacy Commissioner's Report]

<sup>87</sup> Privacy Commissioner's Report, above n86

<sup>88</sup> Privacy Commissioner's Report, above n86

concern, one suggestion is that the Bill should contain a provision to allow a part written and part oral statement to be given, making it clear which information the victim regards as confidential and would like protected.<sup>89</sup>

In addition to privacy concerns, public concerns have been expressed that meeting the offender may be perceived as dangerous or threatening, and that the victim may not actually want the offender to be made aware of the full extent of harm suffered by them<sup>90</sup>. Though these comments were in relation to a restorative justice setting, they would be equally applicable to a court setting. There is the potential for revictimisation to occur if the presentation of the statement causes the victim to relive the offence, break down in court, or in a state of heightened emotions express feelings that in retrospect they would have preferred to keep quiet. Trauma may also result if victims' statements are challenged by the defence, forcing victims to testify in their own defence.

A further concern for victims in presenting an oral statement is that they may not be able to adequately express their views. The Victims' Task Force noted about written victim impact statements that the form of victim impact statement should not be such as to disadvantage victims due to educational, language or socio-economic differences<sup>91</sup>. The same must apply to oral victim impact statements, meaning that in some cases it may be desirable to have a victims' advocate present the statement on the victims' behalf. It is the right of a defendant in any case not to speak on his or her own behalf, and this right should equally apply to a victim.

One risk is that having gone to the trouble, embarrassment, and possible trauma of delivering a victim impact statement in court; victims may still feel unheard. The provision may create expectations among crime victims that their statement will result in harsher or more lenient penalties for the offender at their request. In reality courts are often limited in the sentences they can impose for certain offences. If victims discover that their views are uninfluential at sentencing,

<sup>89</sup> Privacy Commissioner's Report, above n86

<sup>90</sup> *Public Attitudes Towards Restorative Justice*, above n85

<sup>91</sup> Ballin, Ann, above n84, 4

they may regret having been involved at all, and become resentful towards the criminal justice system<sup>92</sup>.

Some of these concerns may be dismissed as taking an overly protectionist attitude towards the victim<sup>93</sup>. The impersonal style of the justice system may have had the benefit of protecting the victim from the offender by the state bringing prosecutions. However where a victim *wishes* to confront the offender, this approach may be seen as one of the failings of a system that arguably does not recognise that the needs of victims may vary considerably.

In reality, it is likely that victims in New Zealand courts will be limited in what they are able to say. If victim impact statements are to be a pure statement of fact, unaffected by emotion, as recommended by the Victims Task Force<sup>94</sup>, it is likely that judges will have to require a written copy of the proposed statement to be presented before delivery. This would be necessary to ensure that it is not overly emotive, or likely to become the subject of defence challenges for containing unsubstantiated information. It is questionable whether reading a prepared (and filtered) victim impact statement would really fulfil a victims wish to be heard.

#### ***D Victim Influence at Sentencing in New Zealand and the USA***

There is considerable difficulty in grafting victims' rights onto existing systems of criminal procedure<sup>95</sup> while maintaining the offender's right to due process. There is concern that victim impact statements introduce emotional, rather than objective considerations into sentencing, and the possibility of unsubstantiated allegations or attacks on the offender being made by the victim via the victim impact statements. As noted earlier, the defence is limited in what it can do to prevent such information, as they will be reluctant to be accused of 'revictimising' the victim.

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<sup>92</sup> Raineri above n79, 89

<sup>93</sup> *Public Attitudes Towards Restorative Justice*, above n85

<sup>94</sup> Ballin, Ann, above n84, 4

<sup>95</sup> Kelley, above n80, 184

There is a contrast of views on whether victim impact information should have relevance at sentencing. Under retributive sentencing policies it is proposed that an offender has the right to receive a response to their offending that is 'decided by reference to publicly debated and democratically determined policies that show respect for the human rights of victims and defendants', not a sentence at the preference of the particular victim.<sup>96</sup>

It is unclear to what extent victim impact statements do influence sentencing, and whether this influence is likely to be enhanced by the provision for oral statements. One study found that the presence of a victim impact statement in the court file increased the likelihood of a prison sentence.<sup>97</sup> But this was not because of the victim's specific retributive request, but rather the availability of details of the crime and its impact on the victim (viewed as a relevant sentencing consideration).<sup>98</sup> It is here that oral statements have the advantage of providing the court with up to date information about the impact of the crime on the victim, and in this way may serve the interests of justice.

In a study of 36 states in the United States, judges indicated that they found victim impact information regarding the financial, physical, and psychological impact of crimes to be useful at sentencing, but did not find the victims opinions expressed through victim allocution, to be useful.<sup>99</sup> In addition an Ohio study of 500 felony cases indicated that written victim impact statements increased the likelihood of incarceration, however oral allocution requesting incarceration did not.<sup>100</sup> These studies suggest that judges may have difficulty in reconciling oral victim input with objective sentencing policies, and thus may feel inclined to discount the oral victim statements when making sentencing decisions. Raineri<sup>101</sup> has called these allocution rights only a symbolic aspect of victim integration, as victims' emotional appeals to the court cannot carry more weight than facts and criteria.

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<sup>96</sup> Ashworth, above n71

<sup>97</sup> Raineri, above n79, 92

<sup>98</sup> Raineri, above n79, 92

<sup>99</sup> Tobolowskyz, Peggy M, above n72, 86

<sup>100</sup> Tobolowskyz, Peggy M, above n72, 89



In New Zealand, victims' opinions about sentencing are not considered to be decisive in sentencing decisions. In *R v R*<sup>102</sup>, where the victim obtained a psychiatric report on the offender and requested a lenient sentence, it was noted by the court that the victim's views were not to dominate the sentence given. This was an unusual case in which the complainant requested a non-custodial sentence for the offender, who was her former partner and father of her children, and had pleaded guilty to sexual violation by rape and kidnapping. The complainant took the initiative in consulting a psychiatrist to validate her opinion that a non-custodial sentence would be appropriate in the circumstances. While the prison sentence was reduced from eight to seven years, the Court noted that only limited weight could be given to the victim's views, and instead looked to cases of a similar nature and severity to determine an appropriate sentence.

In *Lowe v Police*<sup>103</sup> where in a victim impact statement the victims' family said they would be distraught if they saw the offender driving again, it was held that courts should not be swayed by the views of individual victims and that the Victims of Offences Act 1987 was not intended to enable courts to surrender their responsibility to impose an appropriate sentence. In *Rowe v Police*<sup>104</sup> it was noted that victims views on sentencing are relevant but not decisive, and that the public interest in a prison sentence may prevail over a victims desire for a non-custodial sentence.

However even without judges deliberately considering the victim's views and demands about sentencing, there is potential that the presence in court of the victim and delivery of an emotional statement may be hard for judges to ignore. An articulately presented oral victim impact statement may have a greater impact on the judge than a written, or less articulately presented one, despite the effect on the victim having perhaps been similar in both cases. Emotional oral statements may also be hard to ignore. This problem was identified in the

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<sup>101</sup> Raineri, above n79, 93

<sup>102</sup> *R v R* (15 June 1999) unreported CA CA59/99 Blanchard, Heron & Goddard JJ

<sup>103</sup> *Lowe v Police* (1988) 3 CRNZ 199

<sup>104</sup> *Rowe v Police* unreported HC Christchurch, Tipping J AP292/92

United States in the *Booth*<sup>105</sup> case, where unusually articulate and emotional expressions of the grief and trauma the victim's children had experienced after their parents were killed, were introduced.<sup>106</sup> Courts in the United States have also been criticised by commentators for allowing such statements as: "I think someone could probably have cut off my arm, and I would not have missed it as much as I have my daughter." And the testimony that a father: "often has chest pains as if a bullet pierces through his right lung ... where [the victim] was hit at close range with a gun shot."<sup>107</sup>

Although these statements describe the psychological impact of the crime on the victim, which is information allowed in victim impact statements, they do so in a highly emotive manner. Judges are meant to consider sentencing based on an objective view of the impact of the crime both on society and on the victim<sup>108</sup>, however emotive victim impact testimony may be 'too powerful for a human sentencer to ignore',<sup>109</sup> even for judges who are used to ignoring impermissible evidence. This also raises a practical difficulty in that where such statements are made in sentencing; a sentence is likely to be appealed. For appeal purposes oral victim impact statements would have to be recorded or prepared in advance.<sup>110</sup> In *Lelei v Police* this problem was identified in an occasion where the District Court Judge allowed the victims to make verbal submissions that were not under oath. The appellant objected both to these oral statements and to the inclusion of emotive victim impact statements, and successfully appealed the sentence.<sup>111</sup>

In the United States the right of victim allocution may have neither matched the highest expectations of its advocates, nor realised the worst fears of its critics.<sup>112</sup>

A survey of 33 states found that only nine to thirteen percent of victims chose to

<sup>105</sup> *Booth v Maryland* 479 U.S. 882 (1986)

<sup>106</sup> Perkins, Marshall N "Beyond the Roar of the Crowd: Victim Impact Testimony Collides with Due Process" 27 U.Balt.L.F.31, 32

<sup>107</sup> Perkins, above n106, 41

<sup>108</sup> Perkins above n106, 41

<sup>109</sup> Perkins above n106, 41

<sup>110</sup> Wallace above n10, 19

<sup>111</sup> *Lelei v Police* 29 March 1995 unreported HC Auckland AP34/95, Barker J

<sup>112</sup> Tobolowskyz, Peggy M, above n72, 81

make an oral allocution at sentencing<sup>113</sup>, and in one Californian study of victim allocution, researchers found that only 3% of victims who knew of their right to appear, chose to exercise it. Others chose not to appear either because they were satisfied with the criminal justice system's response; thought that their appearance would make no difference; were too upset, fearful of retaliation, confused or discouraged to appear; or could not afford the financial expense involved in appearing<sup>114</sup>.

Fears of calls for overly punitive sentences where statements are made at sentencing have not been realised<sup>115</sup>, but victim satisfaction with the criminal justice system has not necessarily been enhanced either. Often victims are merely seeking restitution or compensation, or help and counselling, rather than punishment for the offender, even in cases where the offender was a stranger<sup>116</sup>. In a New Zealand study of victims of property offences, victims appeared more interested in receiving reparation than having property offenders imprisoned with no reparation imposed.<sup>117</sup>

Fattah<sup>118</sup> has argued that increased victim participation in punishment-based systems does not satisfy victims needs, and instead advocates increased victim involvement as part of a shift towards restorative justice concepts of mediation, reconciliation, restitution, and compensation. Ashworth<sup>119</sup> also suggests that where restitution is a possibility, the victim has a direct interest in the sentence, and thus there may be strong arguments for allowing the victim to submit a statement to the court relating to the harm and damage caused by the offence. However he notes that where sentencing is based on 'public interest' principles, and victim restitution is not a possibility, the victim's individual views about sentencing are not relevant.

<sup>113</sup> Tobolowskyz, Peggy M, above n72, 82

<sup>114</sup> Tobolowskyz, Peggy M, above n72, 83

<sup>115</sup> Kelley, above n80, 177

<sup>116</sup> Raineri above n79, 91

<sup>117</sup> Galaway, B; Spier, Phillip *Sentencing to Reparation: Implementation of the Criminal Justice Act 1985* Department of Justice (Wellington, Sept 1992)

<sup>118</sup> Fattah, Ezzat A *From Crime Policy to Victim Policy: Reorienting the Justice System* (The Macmillan Press, London, 1986)

<sup>119</sup> Ashworth above n71, 87

A move towards restorative justice concepts has been mooted in New Zealand and other jurisdictions as part of a growing dissatisfaction with retributive systems that have resulted in over-burdened prison systems, low victim satisfaction and low public satisfaction. While traditional courtrooms in New Zealand have been reluctant to allow victims to participate orally, two examples where victims have been able to do so are through family group conferences and at status hearings. In addition, the provision of Victims' Advisers has assisted victims' in being 'heard' by the court.

## VII ALTERNATIVE FORMS OF VICTIM INVOLVEMENT

### A Family Group Conferences

Family Group Conferences are a development to deal with young offenders (under the age of 17) who commit moderately serious or multiple offences, and more serious offences by referral from the Youth Court. The offender, the offender's family and/or representatives, the victim and/or their representative, the police, and a social worker are present at these conferences. The aim is for the offender's family to come up with a 'plan' to deal with the offending.<sup>120</sup>

In a study by Morris and Maxwell<sup>121</sup> it was found that less than half of victims attended family group conferences, although the major reasons for this were not lack of interest, but insufficient notice, or inability to attend at the chosen time. For the majority of victims the conference was a positive experience, particularly where the young offender apologised and offered to pay reparation or do work for the victim. Often victims found that attending the conference made them better able to understand why the offence had occurred. However about a quarter of victims who attended these conferences felt worse afterwards. Reasons for this were victims fearing reprisals, being unable to express their emotions during the conference, and feeling that the offender was treated leniently and did not show remorse.

<sup>120</sup> *Restorative Justice* above n52, 26

<sup>121</sup> Morris, A; Maxwell, G; Robertson, J.P "Giving Victims a Voice: a New Zealand Experiment" (1993) 32 *Howard J.C.J.* 304

The experience of Family Group Conferences suggests that oral participation in court is unlikely to result in positive feelings for the victim, unless the statement results in compensation or remorse by the offender. In traditional adversarial court settings, where defence lawyers may be advocating a reduction in sentence based on an 'offender centred views of sentencing', an expression of remorse even less likely than in a family group conference setting.

Incorporating victims into the traditional court setting requires effective administration to guarantee that victims are not just paid lip service, but become a significant party in the process. The provision of Court Victims Advisers has assisted in this, as has an increasing flexibility in the courtroom as is demonstrated by the development of status hearings in the District Court.

### ***B Victims' Advisers***

Court Victim's Advisers originated from a pilot scheme on Victims' Court Assistance in 1993.<sup>122</sup> Court Victims Advisers are now instrumental in implementing the purposes of the Victims of Offences Act 1987 specifying the right of victims of crime to be kept informed throughout the court process.

The role is not to be confused with that of victim's support agencies that provide emotional and practical support to not only victims of crime but also in a range of other circumstances. Court Victims Advisers are employed by the Court. Their main function is not providing counselling or emotional support; advisers will sometimes refer victims to these agencies for such support. Instead their role is in keeping victims involved and informed, to the extent that each victim chooses, in the criminal justice system. Preventing the alienation that victims of crime have previously felt, and assisting the court process in providing relevant and up to date victim information is a major objective. In doing so Victims Advisers may facilitate the healing process for some victims. While for others, who may not have felt substantial emotional harm but are still concerned to

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<sup>122</sup> Church, A; Lang, K; Leigh, J; Young, P; Gray, A; Edgar, N *Victims' Court Assistance: Evaluation of the Pilot Scheme on Victim's Court Assistance in 1993*. Department of Justice (Wellington, 1995) [Victims' Court Assistance]

know the outcome of the case, the process may make the victim feel acknowledged by the system as a relevant party.

Court Victim's Advisers contact victims of crime throughout the court process informing them of court dates and outcomes, so that victims may attend court if they desire, and if they choose not to, will still be able to receive information about the progress of the case. Advisers also facilitate in the preparation of victim impact statements, ensuring these statements are updated as required. These victim impact statements are prepared in the victim's own words, and may occasionally include a memo as to the victims views on sentencing. Victims may prepare these statements themselves, and advisers give advice as to what kind of information to include, thus acting as a vetting system against inappropriate victim impact statements, while still allowing the victims statement to be expressed in their own words. Advisers may attend court with the victim, may address the court on their behalf, or may indicate to the judge that they victim would like to speak if possible.

Another feature of the Florida study was that victims might have been aware Judges look to victims advisers to bring relevant information before the court, in a similar way to that of lawyers and police prosecutors, particularly at sentencing. Where relevant information is not in front of the court, a Judge may even adjourn the case so that the Victim's Adviser may contact the victim.

### ***C Victims' Involvement at Status Hearings in New Zealand, and Pre-Trial Conferences in Florida, USA***

Victim involvement at status hearings in New Zealand may be compared to a similar process trialed in Florida, USA, in which crime victims were included in pre-trial plea negotiations. The defendant and defence counsel, prosecutor and police officer, judge, and the victim attended these conferences. During the informal conference, attorneys discussed the proposed disposition of the case with the judge, who in turn questioned the victims regarding the losses or

<sup>124</sup> Kennard, *Keep The Victim's Voice: A Way to Increase Victim Impact on Criminal Cases Dispositions* 1989 77 Calif. L. Rev. 417, 424.

<sup>125</sup> Kennard, above n123, 433.

<sup>126</sup> Kennard, above n123, 433.

<sup>127</sup> Kennard, above n123, 433.

<sup>128</sup> Kennard, above n123, 433.

injuries they had sustained and inquired whether they were satisfied with the proposed disposition.<sup>123</sup>

It is argued that where the victim is present, there is increased accountability on the prosecution to explain the reasoning behind a particular proposed disposition decision, thus enabling the victim to better understand the process.<sup>124</sup> Victims in the Florida research did not respond to the opportunity to provide input by demanding harsh sentences, in fact there was a shift towards more lenient sentences and a reduction in the use of incarceration.<sup>125</sup> The researchers were concerned in this situation that the victims might have felt intimidated into agreeing with the proposed sentence, being reluctant to disturb an apparent concurrence of professional opinion.<sup>126</sup> The appearance of Victims' Court Advisers may go some way to preventing such a response in status hearings in New Zealand, where the victim has their own professional advocate to ensure that their real views are put forward.

Another feature of the Florida study was that victims might have been aware that they had no real power to influence the final decision; that is there was no power to veto the decision.<sup>127</sup> The same difficulty arises in status hearings, the court is not obliged to satisfy the victim; the prosecution, defence and judge may reach a decision as to the appropriate way of dealing with the case which is unsatisfactory, for instance if the prosecutors agree to drop contentious charges if there is a guilty plea for the other charges. The real solution for victims may not be in appearing in court, confronting the offender and expressing outrage; instead victims might benefit from greater involvement in the prosecution of the case, with the right to question why the prosecution are not pursuing some matters that the victim would like addressed.

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<sup>123</sup> Kennard, Karen *The Victim's Veto: A way to Increase Victim Impact on Criminal Cases Dispositions* 1989 77 Calif. L. Rev. 417, 434

<sup>124</sup> Kennard, above n123, 435

<sup>125</sup> Kennard, above n123, 435

<sup>126</sup> Kennard, above n123, 435

<sup>127</sup> Kennard, above n123, 435

Victims who participated in the Florida conferences were 'somewhat' more satisfied with the criminal justice process than non-participating victims, although the difference was not statistically significant.<sup>128</sup>

The flexibility of status hearings in New Zealand may have advantages for both victim and offender. In some matters, where a defendant pleads guilty to the charge, sentencing may be adjourned to a later status hearing date in order for the offender to address the cause of their offending by completing a relevant course such as anger management or violence prevention, or drug or alcohol counselling. A judge may allow such an adjournment with no sentence indication or guarantees. Successful completion of such a programme is an indication to both the court and the complainant that the offender has accepted responsibility for the offence and has sought to do something about it. At this stage an updated victim statement is particularly relevant, as a complainant may feel more satisfied that the offending is being addressed, and happy to let the court proceed with sentencing. In cases where the complainant and offender know each other, for instance domestic violence cases, the complainant may have witnessed changes in the offender that will affect their views as to sentencing. Keeping the victim informed and involved throughout developments like these may give victims a more realistic view of the type of input they may have, without creating unreasonable expectations as to sentencing.

An adjournment may also take place for the offender to make reparation and/or an apology to the victim. Delaying sentencing until this has occurred ensures an offender is more likely to comply with the suggestion. A positive feature of this for the victim is that they may receive some compensation, and the offender may also benefit, as judges are permitted to take into account offers of reparation made by offenders in sentencing.<sup>129</sup>

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<sup>128</sup> Kennard, above n123, 436

<sup>129</sup> Criminal Justice Act 1985 s12 allows the sentencing judge to take account of any offer of compensation to the victim made by or on behalf of the offender. When determining the weight to be given to such an offer, the judge may consider the extent to which the offer is accepted by the victim as "expiating or mitigating the wrong".



A 1992 study of reparation in New Zealand showed that reparation sentences at that time were largely reliant on police requests for reparation as a sentence.<sup>130</sup> While this study showed that police requested reparation in 71% of cases where there was a known loss and 70% of these resulted in a reparation sentence, where police did not recommend the sentence, reparation resulted only 36% of the time.<sup>131</sup> A victims' adviser may now ensure the complainants views on reparation are put to the court. In addition they may provide a liaison for probation officers when an appropriate reparation plan is being developed. This would be productive as the 1992 study suggested one barrier to victims' input in reparation plans was a perception by probation officers that victims would not wish to meet with the offender to develop a plan, resulting in victim/offender meetings in only 10% of reports.<sup>132</sup>

Compliance with reparation orders was another major problem identified in the 1992 study, with only 38% of offenders ordered to pay lump sum reparation in compliance, and 62% of offenders making part payments in compliance. The Court Victims Adviser can provide a contact point for victims if reparation payments are not being made, or are being made only sporadically, and the Victims Adviser may bring this to the attention of the court.<sup>133</sup>

Approximate figures obtained from the Wellington District Court Victims Adviser's<sup>134</sup> suggest that victim input in status hearings is high, and takes a variety of forms. In a review of 29 status-hearing dates from the 25<sup>th</sup> of January to the 8<sup>th</sup> of August 2000, Victim's Advisers were involved in approximately 412 cases. The major form of contribution from victims was through victim impact memos of which 263 were prepared. Victims' advisers noted whether a previously prepared memo remained relevant (approximately 32% of cases), a new memo had been prepared (approximately 58% of cases), or an existing memo was updated (approximately 10% of cases). Victims attended court in 14% of cases, and while figures for the number of times victims spoke were

<sup>130</sup> Galaway & Speir, above n117, 164

<sup>131</sup> Galaway & Speir, above n117, 164

<sup>132</sup> Galaway & Speir, above n117, 164

<sup>133</sup> Victims' Court Assistance, above n121

unavailable, it is clear that at least 11 victims spoke at status hearings during this time.<sup>135</sup>

In some situations judges were reluctant to proceed with sentencing plans proposed by defence counsel where an up to date report on the victims views was unavailable. Furthermore, when victims do attend in court, judges occasionally asked the victim if they had anything to add to the report that was before the judge. Lack of attendance does not prevent consideration of the victims interest however, as often the judge will instead direct inquiries to the victims court adviser.

It is clear from these figures that Victims Advisers provide a practical way of ensuring Victim Impact reports are up to date, written in the victims own words, but do not exceed their guidelines. Where the flexibility of the courtroom allows, advisers may go even further to make victims' views about sentencing available to the court. Clearly this is appropriate where reparation sentences are a possibility, or where victims' views about the offender may have changed as a result of positive steps taken by the offender regarding the cause of the offending. The appropriateness of victim input is likely to be determined by the nature of the offence.

Victim participation is likely to be most rewarding where the victim is able to gain something out of the situation such as reparation or an expression of remorse from the offender. Allowing victims the right to make oral victim impact statements is only really valuable if those statements are able to fulfil the victims desire of either expressing emotions such as anger and distress to the offender and the court, and being involved in the ultimate sentencing decision. Giving victims a wide 'right' to make oral victim impact statements at sentencing may not be the most effective way of giving recognition to their needs.

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<sup>134</sup> Figures obtained from Wellington District Court Victims' Adviser Margaret McGregor are approximates as recorded in the diaries of victims' advisers. See Appendix B

<sup>135</sup> Appendix B

The proposed Victims Rights Bill attempts to grant victims a greater choice in how they are involved in the criminal justice system. However the danger in pronouncing a victims right to make an oral statement in court is that under the current system the court is likely to place considerable restrictions on what may and may not be said, thus some victims may feel they are not being granted rights at all, merely privileges at the discretion of the judge. Currently victim impact statements are prepared as an objective account of the victim's suffering and it is unlikely that victims would gain much satisfaction out of reading such a statement aloud. However if these limitations are not applied to oral victim impact statements, issues of fair process will arise for the defendant, and the delivery of victim impact statements might actually cause greater distress to the victim. There is also a danger in allowing these statements without giving a clear indication as to how they are to be used by the court, without such guidelines victims may end up feeling even less satisfaction with the process when they find that their statements do not influence decisions. The fulfilment of victims' wishes to express anger and emotion may be better suited to restorative justice situations where their emotions are less likely to be challenged, and a cooperative response from the offender is expected.

Allowing victims the right to make oral victim impact statements in traditional court room settings may not be the most constructive way of increasing victim input in the criminal justice system as it is unlikely to increase victim's understanding or satisfaction with the way sentencing operates. Instead there should be increased flexibility to allow victim consultation at sentencing, and an assurance that victims needs and opinions will be represented in court. Victims' Advisers would appear to be a particularly useful way of ensuring the victim becomes involved, while avoiding the problems that would arise with oral victim impact statements. Defendants are entitled to have a professional advocate to ensure their rights are observed, and if victims' rights are to become a feature of the criminal justice system it seems appropriate that they too should be entitled to an advocate.

The Victims of Offences Act 1987 has been successful in giving victims a greater role in the criminal justice system and in encouraging respect for victims rights, even it has taken long time for some of these rights to be successfully implemented. Before granting additional rights, however, it must be guaranteed that they can be integrated successfully into new or existing systems. Otherwise the declaration of such rights is meaningless and problematic to implement. Granting victims the right to make oral victim impact statements may be inconsistent with the current design of the criminal justice process. The needs of victims might be better served through ensuring that their current rights are legally enforceable, through greater flexibility in courtrooms, or through the development of forms of restorative justice.

## APPENDIX A VICTIM IMPACT STATEMENT FORM

NEW ZEALAND POLICE

Pol. 392  
12/95

### 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 B VICTIM INVOLVEMENT AT STATUS HEARINGS

This table outlines victim involvement at status hearings in a review of 29 status hearing dates from 25 January 2000 to 8 August 2000. Figures are approximate records only as kept by Wellington District Court Victims' Advisers.

| Date         | Cases       | Def's       | Victims    | Prev      | Memo       | Update    | Blank     | Attend    | Other     | No input | Spoke     | No contact |
|--------------|-------------|-------------|------------|-----------|------------|-----------|-----------|-----------|-----------|----------|-----------|------------|
| 1            | 48          | 37          | 22         | 4         | 10         | 3         | 3         | 6         | 0         | 0        | 0         | 3          |
| 2            | 45          | 44          | 16         | 3         | 7          | 2         | 0         | 0         | 0         | 0        | 0         | 1          |
| 3            | 49          | 46          | 19         | 3         | 12         | 3         | 1         | 2         | 0         | 0        | 1         | 0          |
| 4            | 49          | 40          | 25         | 4         | 16         | 2         | 1         | 3         | 0         | 0        | 2         | 1          |
| 5            | 40          | 40          | 18         | 6         | 5          | 0         | 1         | 2         | 0         | 1        | 0         | 1          |
| 6            | 43          | 40          | 15         | 6         | 6          | 1         | 2         | 0         | 0         | 1        | 0         | 0          |
| 7            | 50          | 42          | 15         | 4         | 6          | 3         | 0         | 2         | 2         | 0        | 0         | 1          |
| 8            | 48          | 37          | 7          | 5         | 9          | 0         | 0         | 3         | 0         | 0        | 0         | 0          |
| 9            | 38          | 33          | 8          | 4         | 5          | 0         | 5         | 3         | 0         | 0        | 0         | 0          |
| 10           | 37          | 36          | 11         | 5         | 3          | 0         | 1         | 2         | 1         | 0        | 0         | 0          |
| 11           | 39          | 36          | 14         | 1         | 8          | 3         | 1         | 2         | 1         | 0        | 0         | 1          |
| 12           | 38          | 38          | 17         | 3         | 5          | 0         | 0         | 3         | 0         | 0        | 0         | 1          |
| 13           | 34          | 34          | 7          | 4         | 0          | 0         | 3         | 0         | 1         | 0        | 0         | 0          |
| 14           | 41          | 41          | 13         | 6         | 2          | 0         | 5         | 2         | 1         | 0        | 0         | 0          |
| 15           | 50          | 42          | 21         | 1         | 7          | 1         | 0         | 1         | 0         | 0        | 1         | 4          |
| 16           | 28          | 24          | 7          | 0         | 2          | 0         | 7         | 1         | 1         | 0        | 0         | 0          |
| 17           | 28          | 26          | 9          | 1         | 2          | 0         | 7         | 1         | 8         | 0        | 0         | 0          |
| 18           | 49          | 44          | 18         | 1         | 2          | 0         | 7         | 1         | 8         | 0        | 0         | 0          |
| 19           | 31          | 31          | 13         | 1         | 3          | 1         | 0         | 3         | 0         | 0        | 2         | 0          |
| 20           | 45          | 39          | 12         | 2         | 6          | 1         | 0         | 4         | 0         | 0        | 2         | 0          |
| 21           | 43          | 43          | 16         | 4         | 5          | 0         | 3         | 0         | 1         | 0        | 0         | 0          |
| 22           | 45          | 44          | 9          | 1         | 5          | 1         | 2         | 1         | 1         | 0        | 0         | 0          |
| 23           | 64          | 59          | 15         | 1         | 4          | 0         | 1         | 0         | 0         | 0        | 0         | 0          |
| 24           | 51          | 46          | 21         | 1         | 7          | 0         | 1         | 0         | 0         | 0        | 0         | 0          |
| 25           | 56          | 45          | 9          | 0         | 5          | 0         | 0         | 2         | 0         | 0        | 0         | 0          |
| 26           | 59          | 48          | 20         | 1         | 6          | 3         | 3         | 1         | 5         | 1        | 0         | 0          |
| 27           | 59          | 52          | 17         | 3         | 4          | 1         | 1         | 1         | 3         | 0        | 0         | 4          |
| 28           | 52          | 44          | 23         | 4         | 5          | 2         | 7         | 8         | 0         | 0        | 3         | 0          |
| 29           | 47          | 45          | 10         | 5         | 0          | 0         | 3         | 4         | 0         | 0        | 0         | 0          |
| <b>Total</b> | <b>1242</b> | <b>1117</b> | <b>412</b> | <b>83</b> | <b>153</b> | <b>27</b> | <b>64</b> | <b>58</b> | <b>33</b> | <b>3</b> | <b>11</b> | <b>17</b>  |

### KEY

**Cases:** Total no. of cases set down for status hearing on that date.

**Def's:** Total no. of defendants to appear on that date. (NB: these differ as often a defendant appears on more than one charge.)

**Victims:** Total no. of cases involving victims.

**Prev:** Indicates cases where a victim impact memo had been previously prepared and remained relevant at the time of the status hearing.

**Memo:** Indicates cases where a victim impact memo was prepared.

**Update:** Indicates cases where a victim impact memo was updated for the status hearing.

**Blank:** Details of victim involvement not recorded.

**Attend:** Indicates cases in which the victim attended Court

**Other:** In these cases victims chose another course, such as sending a victim impact statement to the court.

**No Input:** In these cases victims chose to have no input.

**Spoke\*:** In these cases victims attended and spoke.

**No Contact:** The victim was unable to be contacted in these cases.

\* Note that figures for the no. of victims who spoke were estimates only.



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