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# Re-integrating the Victim into the Sentencing Process

## Victim Impact Statements as an Element of Offender Disposition

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### Abstract

Research into the social and psychological processes associated with offender disposition and their effects on victims of crime reveals dissatisfaction at their not being more involved in the criminal justice process. Victims feel disenfranchised and disempowered as they come to play only a secondary role. The victim impact statement (VIS) is a viable mechanism for bringing the victim back into the sentencing process. This article examines the development of the concept, its rationale and various forms, principle arguments for and against its introduction and concludes that it is an important reform in the direction of making the criminal justice system more responsive by satisfying victims' needs to be part of the process.

### Introduction

If the criminal justice system in a democratic society is to correspond with the actual feelings and demands of the community it serves, then sentencing of offenders must be such as to ensure that the community does not lose confidence in its courts and that support for them does not diminish. If this were to happen then there is a risk that people will seek their own remedies outside the law. This suggests that proper consideration should be given to the needs and concerns of the victims of crime.

A person's perception of whether or not he/she has been a victim of crime and wishes to participate in the criminal justice system is perhaps the most important decision that is made from the time the alleged offence is committed. Despite the

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importance of the victim's co-operation in the investigation and subsequent trial (if any), little, if any, attention has hitherto been given to victim satisfaction in their dealings with the criminal justice system.

## Antecedents to Victim Participation in Sentencing

In the past, victims and their families or clan initiated any action to redress their victimisation — whether it was theft, injury or other harm. Victims or their kin also carried the process of redress to completion. Some have referred to this era of private vengeance as the “Golden Age of the Victim”,<sup>1</sup> while others have questioned whether victims had any advantages pursuing justice on their own.<sup>2</sup> The decline in the penological importance of the victim paralleled the centralisation of power.<sup>3</sup> As crime became a violation of the “King's Peace” (an offence against the State rather than the individual victim), initiation of criminal proceedings and the punishment process was taken from the victim's control and transferred to the State.<sup>4</sup> This change resulted from economic factors, in that it provided an opportunity for the collection of moneys or fines for the King's treasury,<sup>5</sup> and political concerns, since it assured that punishment was not associated with undue leniency, as the offender who paid damages to the victim had escaped other types of punishment.<sup>6</sup>

This historical evolution of the penal system has resulted in a criminal justice process in which victims play only a secondary role. They report crimes to officials who decide whether to prosecute and what type of punishment to request or impose. The victim plays no formal role in the decision to charge or refuse to charge<sup>7</sup>, and the courts are reluctant to review prosecutors' charging decisions.<sup>8</sup> The victim has no power to compel prosecution nor standing to contest decisions to dismiss or reduce charges, nor to challenge the sentence imposed.<sup>9</sup> In court proceedings the victim is an observer or, at best, a witness. A fine, if imposed, is

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1 S Schafer *The Victim and His Criminal* Random House New York 1968.

2 J Greenberg 'The Victim in Historical Perspective: Some Aspects of the English Experience' (1984) 40 *Journal of Social Issues* 77.

3 CR Jefferey 'The Development of Crime in Early English Society' in J Chambliss (ed) *Crime and the Legal Process* McGraw Hill New York 1973 at 12.

4 LN Henderson 'The Wrongs of Victims's Rights' (1985) 37 *Stanford Law Review* 937. See also Schafer *supra* n.1.

5 Schafer *supra* n.1.

6 Greenberg *supra* n.2.

7 KL Wainstein 'Judicially Initiated Prosecution: A Means of Preventing Continuing Victimisation in the Case of Prosecutorial Inaction' (1988) 76 *California Law Review* 727.

8 SN Welling 'Victims in the Criminal Process: A Utilitarian Analysis of Victim Participation in the Charging Decision' (1988) 30 *Arizona Law Review* 85.

9 DJ Hall 'The Role of the Victim in the Prosecution and Disposition of the Criminal Case' (1975) 28 *Vand Law Review* 932. See also Welling *ibid*.

paid to the State. Private prosecution is non-existent, and the prosecutor has a monopoly on the criminal process.<sup>10</sup>

The victim is presumably represented by the prosecutor, who is supposed to pursue the victim's interests. However, prosecutors represent the interests of the State, first and foremost, and the presumption is contradicted by many victims' experiences. If the public interest comes into conflict with that of the victim, the former prevails. Public interest considerations often have nothing to do with the strength of the victim's case or the level of injury sustained. Such factors as the defendant's utility as a State witness in another case, correctional factors related to the offender, or the priority given to a certain type of offence may determine whether or not a defendant will be prosecuted,<sup>11</sup> and indeed, along with the degree of compliance with investigating authorities, have a bearing on the sentence.

This change in the concept of crime and administration of justice has resulted in a host of economic and psychological problems for victims, and, more importantly, in perceptions of injustice. Movements concerned with ameliorating the victims' plight and providing them with various rights have emerged.<sup>12</sup> Initially, efforts to achieve reform focussed on the economic difficulties resulting from crime. In the United Kingdom, the United States and Australia, regimes of compensation from the State<sup>13</sup> and restitution from the offender<sup>14</sup> were instituted to alleviate the financial difficulties associated with the victimisation. In the United States, psychological counselling and other services to treat the distress resulting from the crime have been provided in various jurisdictions.<sup>15</sup> As the process has continued, the battle for victims' rights has expanded into areas beyond its initial focus and has recently centred on victims' reintegration into the criminal justice process.<sup>16</sup> The current impetus is for victim integration through the use of a

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10 AS Goldstein 'Defining the Role of the Victim in Criminal Prosecution' (1982) 52 *Mississippi Law Journal* 516. See also L Sebba 'The Victim's Role in the Penal Process: A Theoretical Consideration' (1982) 30 *American Journal of Comparative Law* 217.

11 Goldstein *ibid.*

12 PS Hudson 'The Crime Victim and the Criminal Justice System: Time for a Change' (1984) 11 *Pepperdine Law Review* 23. See also BS Smith 'Trends in the Victim's Rights Movement and Implications for Future Research' (1985) 10 *Victimology* 34, R Whitrod 'Victimology: The Study of Victims in Australia' in D Chappell and P Wilson (eds) *The Australian Criminal Justice System* Butterworths 1986.

13 J Shapland 'Victims, the Criminal Justice System and Compensation' (1984) 24 *British Journal of Criminology* 13.

14 See, for example, *Queensland Criminal Code* ss663A, 663B, 685A, 685B. The former is confined to indictable offences and enables the court to order compensation for injuries. The latter sections enable the court to order restitution for victims. Section 39 *Justices Act* enables Magistrates to order restitution of property upon application.

15 S McGuire 'Victims' Rights Laws in Illinois: Two Decades of Progress' (1987) 33 *Crime and Delinquency* 532. See also Smith *supra* n.12.

16 Goldstein *supra* n.10. See also DP Kelly 'Victims' (1987) 34 *Wayne Law Review* 69, HC Rubel 'Victim Participation in Sentencing Procedures' (1986) 28 *Criminal Law Quarterly* 226, AK Posner 'Victim Impact Statements and Restitution: Making the Punishment Fit the Victim' (1984) 50 *Brooklyn Law Review* 301.

Victim Impact Statement (VIS), a statement made by the victim and addressed to the judge for consideration in sentencing. It usually includes a description of the harm done in terms of physical, social, psychological and financial consequences of the offence. In some jurisdictions, a VIS also includes a statement concerning the victim's feelings about the offence, the offender and a proposed sentence.

This demand for increased victim participation in the sentencing process has been the result of studies that have documented victims' alienation from the system. Studies of victims before the law have consistently demonstrated their frustration and disillusion with the criminal justice system. Complaints about delays, unnecessary continuances, uncomfortable waiting rooms, risk of intimidation by offenders and insensitive criminal justice practitioners are routinely associated with victims' experiences of the criminal justice system.<sup>17</sup> But the most important grievance mentioned by victims is their lack of standing and voice in the proceedings. Feelings of alienation develop as victims realise that their opinions and concerns are ignored and their requests for involvement are consistently denied. Furthermore, in many cases, victims are never informed about the status of the case or its outcome. Victims often have the misconception that being the victim in a particular case makes it "their case".<sup>18</sup> The courts view victims as witnesses, while victims perceive themselves as parties.<sup>19</sup> Indeed, it is difficult for victims to understand that they are not a party to the trial of their offenders and that they have no control over the process.<sup>20</sup> This collective experience of victims has led to a perception that the criminal law is unresponsive.<sup>21</sup>

Victims' inability to voice their feelings or concerns has been identified as a crucial matter to be addressed if victims' satisfaction with the justice system is to be increased.<sup>22</sup> Demands have been made for reintegrating victims into the criminal process or, minimally, of providing them with a mechanism for voicing their concerns and wishes concerning the crime and the disposition of the offender. These needs have been aptly expressed by the *President's Task Force on Victims of Crime*<sup>23</sup> which asserted that:

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17 R Elias 'Alienating the Victim: Compensation and Victim Attitudes' (1984) 40 *Journal of Social Issues* 103. See also DP Kelly 'Victims Perceptions of Criminal Justice' (1984) 11 *Pepperdine Law Review* 15, DP Kelly 'Delivering Legal Services to Victims: An Evaluation and Prescription' (1984) 9 *Justice Systems Journal* 62, RD Knudten, A Meade, A Knudten and W Doerner 'The Victim in the Administration of Criminal Justice: Problems and Perceptions' in WF McDonald (ed) *Criminal Justice and the Victims* Sage Beverley Hills CA 1976.

18 MA Young 'A Constitutional Amendment for Victims of Crime: The Victim's Perspective' (1987) 34 *Wayne Law Review* 51.

19 Rubel *supra* n.16.

20 Kelly *supra* n.17. See also Young *supra* n.18.

21 Goldstein *supra* n.10.

22 E Erez 'Victim Participation in Sentencing: Rhetoric and Reality' (1990) 18 *Journal of Criminal Justice* 19.

23 *Final Report* Washington DC US Government Printing Office 1982.

... victims, no less than defendants, are entitled to their day in court. Victims, no less than defendants, are entitled to have their views considered. A judge cannot evaluate the seriousness of a defendant's conduct without knowing how the crime has burdened the victim. A judge cannot reach an informed determination of the danger posed by a defendant without hearing from the person he has victimised ...<sup>24</sup>

## Developments in Victim Participation in Sentencing

At the international level, the victim is implicit in the United Nations Conventions on, for example, genocide, war crimes and crimes against peace and mankind, traffic in women and children, and slavery. However, it was not until the Seventh United Nations *Congress on the Prevention of Crime and the Treatment of Offenders*, held in Milan in 1985, that the topic of victims was dealt with as a subject in its own right. The documents prepared for consideration by the Seventh Congress included a declaration of basic principles of justice for victims of crime and abuse of power prepared by the then Attorney-General of South Australia, Chris Sumner. These principles were derived from the report of a *Committee of Inquiry* into victims of crime in 1981, the findings of which ranged across the following five major topics:

- provision of more adequate information on crime and crime victimisation;
- more effective co-ordination of victim initiatives;
- improvement and extension of services for victims;
- amendment to court procedures; and
- compensation for victims.<sup>25</sup>

After considerable debate, the declaration was adopted by the Congress and formally approved by the General Assembly of the United Nations in December, 1985.

South Australia immediately formulated principles, derived from the UN Declaration, which gave rights to victims at various stages of the criminal process. All relevant government departments in South Australia were instructed to ensure that their practices and procedures comply with the principles, which are included in a booklet prepared by the Attorney-General's Department<sup>26</sup> and which is given to each victim by the investigating police officer. These principles are set out in

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24 *Ibid* at 76.

25 Attorney General's Department South Australia *Report of the Committee of Inquiry on Victims of Crime* Government Printer Adelaide 1981.

26 Attorney General's Department South Australia *Information for Victims of Crime* Government Printer Adelaide 1988.

Appendix A. Whilst most of the principles have been established by administrative direction, principles 12 and 14 have received legislative sanction as follows:

- (1) *Section 10 Bail Act 1985 (SA)* which requires a bail authority, in determining whether an accused person should be released on bail to have regard to any need the victim may have, or perceive, for physical protection from that person; and
- (2) *Section 7 Criminal Law (Sentencing Act) 1988 (SA)* requires that the prosecutor must furnish the court with particulars of any injury, loss or damage suffered by any person as a result of the relevant offences.

Whilst the South Australian government has enshrined the VIS process in legislation, other States and authorities have been ambivalent on the issue. The *National Committee on Violence*<sup>27</sup> recommended that the VIS should be introduced in all jurisdictions, subject to the inclusion of safeguards against abuse by either the prosecution or the defence. The *Australian Law Reform Commission*<sup>28</sup> raised some objections to the VIS and the relevance of victim preferences concerning the disposition for sentencing decisions. The Commission asserted that information about the impact of crime on the victim is brought to the court's attention by the prosecution or the defence, and has recommended retaining this practice. The *Victorian Sentencing Committee*<sup>29</sup> has also decided against allowing victims' input via the VIS. The *New South Wales Task Force on Services for Victims of Crime* stated that "until the schemes operating can be properly evaluated the task force feels that no attempts should be made to implement such a scheme in New South Wales."<sup>30</sup> In Queensland the *Electoral and Administrative Review Commission*<sup>31</sup>, whilst discussing the notion of victims' rights generally, does not make any recommendation in relation to the use of VIS in the sentencing process. The United Kingdom has rejected their use.

In the United States, on the other hand, VIS are permitted in most States and federally. Currently, two models express the possibilities for victim involvement. The first allows the preparation of a written VIS that is introduced at the sentencing hearing, typically as an attachment to the pre-sentence report. The second expands on the first by granting the victim the right to allocution — an oral statement by the victim at the time of sentencing. The party responsible for preparing

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27 National Committee on Violence *Violence: Directions for Australia* Australian Institute of Criminology Canberra 1990.

28 Australian Law Reform Commission *Sentencing Report No. 44* AGPS Canberra 1988.

29 J Starke *Sentencing: Report of the Victorian Sentencing Committee* Government Printer Melbourne 1988.

30 New South Wales Task Force on Services for Victims of Crime *Report and Recommendations* Government Printer Sydney 1987 at 105.

31 Electoral and Administrative Review Commission *Report on the Preservation and Enhancement of Individuals' Rights* Queensland 1993.

the VIS information varies, ranging from probation departments, prosecutors' offices, victim service agencies or the police. The VIS also differs in content and form, ranging from simple checklists in some States to lengthy descriptive statements, both oral and written, in others.<sup>32</sup> As plea bargains are the most common way of disposing of cases, many States have passed laws that allow or mandate victim participation and input in plea bargaining.<sup>33</sup> New Zealand introduced legislation in 1987 allowing the use of VIS as part of the sentencing process. Canada introduced comparable legislation in 1988.<sup>34</sup>

## Rationale for Victim Participation

The arguments for bringing the victim back into the sentencing process centre on moral, penological and practical concerns rather than legal considerations. Some have suggested that because the aim of sentencing is public condemnation of the criminal act, then the sentence may be more effective if it is conveyed by the victim, who has personal involvement in the case and has suffered directly from it, whereas a non-involved entity such as "the public" will be less effective in performing this function.<sup>35</sup> Victim participation also renders the process more democratic and thus makes the sentence imposed more reflective of the community's response to crime.<sup>36</sup> Some argue that the victim is the most appropriate person to represent the community in its attempt to convey the social abhorrence of the crime. In this respect, the victim is the embodiment of the public desire to have input into the sentence,<sup>37</sup> and victim participation in sentencing may help to achieve an important goal behind the denunciation involved in punishment, namely the placation of the public.<sup>38</sup>

Some observers empathise with victims' demands for party status because the justice system to a large extent makes them feel like a party.<sup>39</sup> For instance, it gives victims the power to initiate the process and views their testimony as the most crucial, so that if it could be refuted an acquittal would result,<sup>40</sup> and the prosecutor functions as their surrogate or proceeds in their place and on their behalf.<sup>41</sup>

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32 M McLeod *The Authorisation and implementation of Victim Impact Statements* National Institute of Justice Washington DC 1988.

33 DP Kelly 'Victim Participation in the Criminal Justice System' in AJ Lurigio, WA Skogan and RC Davis (eds) *Victims of Crime: Problems, Policies and Programs* Sage Newbury Park California.

34 S Skurka 'Two Scales of Justice: The Victim as Adversary' (1993) 35 *Criminal Law Quarterly* 334. See also AN Young 'Two Scales of Justice: A Reply' (1993) 35 *Criminal Law Quarterly* 355.

35 Rubel *supra* n.16. See also Young *supra* n.18.

36 Henderson *supra* n.4.

37 Rubel *supra* n.16.

38 Rubel *supra* n.16.

39 LG Forer *Criminals and Victims* WW Norton New York 1980.

40 Rubel *supra* n.16.

41 Goldstein *supra* n.10.

Bringing the victim back into the decision-making process concerning the offender's disposition is also viewed as a symbolic act on a moral level, or recognition of the "individual dignity" of the victim.<sup>42</sup>

Other issues considered in the reintegration of victims into the process are practical and include improvement of the criminal justice process, increase in victims' co-operation and better prospects for psychological healing. Some have argued that victims' dissatisfaction with and alienation from the system has made them reluctant to co-operate with the criminal justice process.<sup>43</sup> Victims who have been dissatisfied with prior system interaction will be hesitant to participate again.<sup>44</sup> Studies of the non-reporting of crime have suggested that a major deterrent to reporting crime is victims' negative expectations about their treatment by the criminal justice system.<sup>45</sup> Court decisions in the United States have also mentioned this rationale for demanding improved treatment of victims. By allowing victim participation, criminal justice system personnel hope to increase their consumers' satisfaction, encourage involvement and co-operation and thereby enhance system efficiency.<sup>46</sup>

Victim participation may also contribute to improvement of the process and to "real" justice by increasing accuracy at the sentencing stage. According victims the right to participate will result in more information provided to the decision maker.<sup>47</sup> The *President's Task Force on Victims of Crime*<sup>48</sup> mentioned this consideration in its assertion that a judge cannot reach an informed decision without hearing the person victimised. Furthermore, the sentencing stage is more relaxed and less formal than the trial and thus provides a better atmosphere for the victim to perform this fact-disclosing function. He/she does not have to contend with the pressures of cross-examination and the formality of evidentiary rules.<sup>49</sup>

The "just deserts" model of justice specifically views the concern for victims in the criminal justice process as an integral part of the "fairness" component.<sup>50</sup> It has also been argued that relying on victims to convict the offender and simultaneously ignoring their concerns, wants and needs is an unacceptable practice.<sup>51</sup> Others have argued that a sentence imposed without information from the victim

42 Henderson *supra* n.4.

43 RC Davis 'Victim/Witness Nonco-operation: A Second Look at a Persistent Phenomenon' (1983) 11 *Journal of Criminal Justice* 233. See also Goldstein *supra* n.10.

44 M McLeod 'Victim Particiaption in Sentencing' (1986) 22 *Criminal Law Bulletin* 501.

45 RF Kidd and EF Chayet 'Why Do Victims Fail to Report? The Psychology of Criminal Victimisation' (1984) 40 *Journal of Social Issues* 39. See also J Shapland, J Willmore and P Duff *Victims in the Criminal Justice System* Gower Aldershot 1985.

46 McLeod *supra* n.44.

47 Welling *supra* n.8.

48 *Supra* n.23.

49 Rubel *supra* n.16.

50 D Fogel *We Are the Living Proof* Anderson Cincinnati 1975. See also Sebba *supra* n.10.

51 Henderson *supra* n.4 at 1002.



is one sided and that "... simple fairness dictates that when the court hears, as it may, from the offender, his or her lawyer, family and friends, the person who has borne the brunt of the offender's crime should also be allowed to speak".<sup>52</sup> The victim's presence and participation in court proceedings also remind judges, juries and prosecutors that behind the State is a real person with an interest in how the case is resolved.<sup>53</sup> Participation and input may also be necessary for victims' psychological healing. Providing victims with participatory rights can reduce their perceptions of inequity relative to the offender, thereby reducing the potential for further psychological harm.

In contrast, failure to offer victims these rights results in increased feelings of inequity, with a corresponding increase in crime related psychological harm. Victimisation often produces feelings of helplessness and lack of control, which are aggravated by the criminal justice experience.<sup>54</sup> These feelings can be reduced by giving victims an opportunity to voice their feelings, concerns and wishes.<sup>55</sup> The sentencing of the offender should provide a cathartic process for the victim. If these benefits are not realised, then the psychological harm to the victim detracts from the benefit achieved by sentencing the offender.<sup>56</sup>

Finally, some have argued that victim participation in sentencing advances the various goals of sentencing, though each goal is enhanced by a different type of participation:

- Retribution is enhanced when the extent of the harm caused to the victim is disclosed so that the punishment meted out can be measured against the level of harm caused;
- Victim participation enhances deterrence because it increases prosecutorial efficiency, which in turn increases the certainty of sanction;
- Incapacitation is advanced if the victim has a special knowledge about the defendant's potential for future criminal activity; and
- Victim participation might promote rehabilitation as the offender confronts the reality of the harm caused to the victim, or if the victim is to participate in the implementation of the sentence.<sup>57</sup>

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52 CJ Sumner 'Victim Participation in the Criminal Justice System' (1987) 20 *Australian and New Zealand Journal of Criminology* 195 at 204.

53 Kelly *supra* n.17.

54 M Bard and D Sangrey *The Crime Victim's Book* Brunner/Mazel New York 1986. See also H Zehr and M Umbreit 'Victim Offender Reconciliation: An Incarceration Substitute' (1982) 46 *Fed Prob* 63.

55 Kelly *supra* n.16. See also DG Kilpatrick and RK Otto 'Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning' 34 *Wayne Law Review* p7. See also Young *supra* n.18.

56 Rubel *supra* n.16.

57 PA Talbert 'The Relevance of Victim Impact Statements to the Criminal Sentencing Decision' (1988) 36 *UCLA Law Review* 199.

## Objections to Victim Participation

The objections to victim participation in the sentencing process are based mostly on legal grounds and stem from the conception of crime as a public matter and of the State as representing or replacing the victim.<sup>58</sup> This conception is promoted because it contributes to de-emphasising the conflict and stabilising the public order.<sup>59</sup> Further, it has been held that allowing victims to participate in sentencing may undermine the insulation of courts from unacceptable public pressures,<sup>60</sup> or will result in substituting the victim's subjective approach for the objective one practised by the court.<sup>61</sup>

Major objections to victim input in sentencing centre on arguments concerning the appearance of justice and actual justice.<sup>62</sup> Judges and defence counsel equate sensitivity to victims' problems with lack of fairness to the defendant.<sup>63</sup> Prosecutors, who supposedly represent victims, have objected to victims' participation in the process because they fear that their control over the case would be eroded and the predictability of outcomes reduced, and defence counsel view increased victim involvement as hindering the defence.<sup>64</sup>

Concerns about delays and additional expenses if victims are brought into the process are often raised by court officials.<sup>65</sup> It has been argued that victim participation would add little that is useful to most cases and would impose irrelevant information and requests on a system that is already overburdened.<sup>66</sup> The *Victorian Sentencing Committee*<sup>67</sup> has suggested that the criminal law already takes into account the harm done to the victim in the definitions of crime and mitigating or aggravating circumstances. Moreover, they suggest that as the law requires foreseeability of the effect of the crime on the victim, only effects on the "normal" victim should be considered.

The American Bar Association, in a discussion of witness/victim legislation, concluded that victim impact statements will most likely result in higher sentences.<sup>68</sup> In this respect, major objections have been raised against one part of the VIS particularly, the victim statement of opinion (VSO), which may be the most

58 Sebbas *supra* n.10.

59 N Christie 'Conflicts As Property' (1977) 17 *British Journal of Criminology* 1.

60 Rubel *supra* n.16.

61 Starke *supra* n.29.

62 Erez *supra* n.22.

63 Kelly *supra* n.17. See also Rubel *supra* n.16.

64 RC Davis, F Kunreuther and E Connick "Expanding the Victim's Role in the Criminal Court Dispositional Process: The Results of an Experiment" (1984) 75 *Journal of Criminal Law* 491.

65 Hudson *supra* n.12. See also Australian Law Reform Commission *supra* n.28.

66 F Carrington and EE Younger 'Victims of Crime Deserve More Than Pity' (1979) 8 *Human Rights* 10. See also S Mosk 'The Mask of Reform' (1978) 10 *Southwestern University Law Review* 885.

67 Starke *supra* n.29.

68 American Bar Association *Guidelines for Fair Treatment of Victims and Witnesses in the Criminal Justice System* Victim's Committee Criminal Justice Section 1984.

inflammatory and prejudicial evidence that the victim could provide.<sup>69</sup> Other commentators have raised concerns about the possibility of an increase in sentence disparity and arbitrariness if victims are included in the sentencing process.<sup>70</sup> This concern was one of the rationales for rejecting the use of the VIS in capital cases in the United States.<sup>71</sup>

Concerns have also been raised about the effect of the VIS on victims' health and welfare. It has been suggested that one of the dangers of the VIS is to create expectations among crime victims that are not or could not be met.<sup>72</sup> Victims' "recognition" may not be realised because practical and other considerations may prevent judges from implementing victims' wishes. In fact, it has been argued that instituting formal procedures for victims' input may be counterproductive because if victims find out that their opinions are unimportant or are ignored in sentencing decisions, then they may become more embittered and resentful.<sup>73</sup> Others are concerned that allowing victim input will aggravate victims' psychological wellbeing as they relive the crime experience. Because consideration of the VIS material by the court may increase the severity of punishment, the offender must be given the right to challenge the factual basis on which the escalation of penalty occurs. This may result in victims being subjected to unpleasant cross-examination.<sup>74</sup> A related argument is that mandating the VIS may itself be traumatic for victims, and that victims may not wish the offender to be fully aware of the harm caused to them.<sup>75</sup>

Other objections to victim participation have been based on ideological grounds. Opponents of the participatory right express the concern that rights gained by the victim are rights lost to the defendant, and that bringing the victim back into the process means a reversion to the retributive, repressive and vengeful punishment of an earlier age.<sup>76</sup> These reforms would shift the primary goal of criminal justice administration from meeting the concerns of the State to meeting the concerns of the private individual, thus returning criminal prosecution to the days when it was little more than a branch of tort law.<sup>77</sup> It has also been suggested that victims' anguish has been exploited or mistranslated into support for the conservative ideology,<sup>78</sup> and has been used to produce a structure of criminal law and procedure that closely resembles the "crime control model" so antithetical to

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69 Talbert *supra* n.57.

70 Hall *supra* n.9. See also DR Ranish and D Shichor 'The Victim's Role in the Penal Process: Recent Developments in California' (1985) 49 *Fed Prob* 50 and PN Grabosky 'Victims' in G Zdenkowski et al (eds) *The Criminal Injustice System* Pluto Press Sydney 1987.

71 Booth v Maryland (1987) 107 S. Ct. 2529.

72 EH Fattah (ed) *From Crime Policy to Victim Policy* Macmillan London 1986.

73 Henderson *supra* n.4.

74 Starke *supra* n.29.

75 Australian Law Reform Commission *supra* n.28.

76 Sebba *supra* n.10.

77 SS Abrahamson 'Redefining Roles: The Victim's Rights Movement' (1985) *Utah Law Review* 517.

78 Henderson *supra* n.4.

liberal thought.<sup>79</sup> Opponents of victim integration in the criminal justice process often portray the victim as a vindictive individual whose main objective in providing input will be to ensure severe punishment to the offender. One empirical examination of victim activism provided some support for the punitive model of the victims' rights movement; however, the authors did state that it is not clear whether victimisation caused the retributive attitudes or the victimisation was used as an excuse for retributive ideology.<sup>80</sup>

## Research Findings on Victim Participation in Sentencing

Research has questioned many of the assumptions underlying the arguments against the use of the VIS, and has not confirmed the fears expressed by those who object to allowing victims input into the sentencing decisions.

### 1. Punitiveness of Victims

The message from studies in several countries is that first-hand experience of crime as a victim does not, in general, fuel a desire for heavy sentences.<sup>81</sup> Furthermore, victims have not been found to be more punitive than the general public. Recent studies abroad<sup>82</sup> as well as in Australia<sup>83</sup> suggest that public attitudes tend to be more punitive than the actual sentencing practices of the courts. Victims do not view themselves as vengeful.<sup>84</sup> Less than 10% of victims report a crime in order to see an offender punished.<sup>85</sup> Studies that examine the content of the VIS in various jurisdictions in the United States confirm that only a fraction of victims in felony cases request that the offender be incarcerated or punished severely.<sup>86</sup>

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79 Henderson *ibid.* See also E Viano 'Victim's Rights and the Constitution: Reflections on a Bicentennial' (1987) 33 *Crime and Delinquency* 430.

80 BS Smith and CR Huff *From Victim to Political Activist: An Empirical Examination of the Victims' Rights Movement* Paper presented at the Annual Meeting of the Academy of Criminal Justice Sciences Washington DC 1989.

81 N Walker and M Hough *Public Attitudes to Sentencing* Gower Aldershot 1987.

82 S Zimmerman, D Alostyne and C Dunn 'The National Punishment Survey and Public Policy Consequences' (1988) 25 *Journal of Research in Crime and Delinquency* 120.

83 D Indermaur *Perceptions of Crime Seriousness and Sentencing: A Comparison of Court Practice and the Perceptions of a Sample of the Public and Judges* Report to the Criminology Research Council Canberra 1990.

84 J Gardner *Victims and Criminal Justice* Office of Crime Statistics Attorney-General's Department South Australia 1990.

85 US Department of Justice *Report to the Nation on Crime and Justice* US Government Printing Office Washington DC 1988.

86 E Erez and P Tontodonato 'The Effect of Victim Participation in Sentencing on Sentence Outcome' (1990) 24(3) *Criminology* 451. See also A Walsh 'Placebo Justice: Victim Recommendations and Offender Sentences in Sexual Assault Cases' (1986) 77 *Journal of Criminal Law and Criminology* 1126.

Quite often victims merely want restitution or compensation<sup>87</sup> or help and counselling rather than punishment for the offender, even in cases where the offender was a stranger.<sup>88</sup>

The retributive element in some victims' preferences about sentencing may reflect a lack of knowledge about alternative dispositions. Often victims who recommend imprisonment do so because they are not aware of any other options, such as community service, treatment disposition or even restitution. Victims also tend to receive recommendations for disposition made by the prosecution or even the defence.<sup>89</sup> Fears that victim participation in sentencing would result in harsher pleas in cases of plea bargaining in the United States have also not been realised.<sup>90</sup>

## 2. Problems for the Criminal Justice System

Research in jurisdictions that allow victim participation indicates that including victims in the criminal justice process does not cause delays or additional expenses,<sup>91</sup> and very few court officials believe that victims' input creates or exacerbates problems.<sup>92</sup> A recent survey of a busy New York jurisdiction indicates that both judges and prosecutors see the practice as positive.<sup>93</sup> And when the information for the VIS is collected and updated by a person who can reasonably verify its credibility, and is given to the defence on a routine basis, challenges from the defence are likely to be minimal, if at all.<sup>94</sup> Most of the judges and prosecutors in another study thought that victims' input in the form of a VIS improved the quality of justice by influencing restitution awards and sentence type and length.<sup>95</sup>

This is in line with research in England that suggests that a key variable in making a compensation order was whether it was mentioned in court proceedings. This could have occurred in the course of the prosecution making its case, as a result of an application by the victim or simply as a reminder to the court of

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87 Shapland et al *supra* n.45. See also Gardner *supra* n.84.

88 LC Kosaki 'The "Known" Criminal: Non-Stranger Crime in the Criminal Court' Unpublished Dissertation, Ann Arbor Michigan in E Erez *Victim Impact Statements* 33 Trends and Issues in Criminal Justice Australian Institute of Criminology 1984.

89 J Henderson and GT Gitchoff 'Using Experts and Victims in the Sentencing Process' (1981) 17 *Criminal Law Bulletin* 226.

90 Kelly *supra* n.33.

91 AM Heinz and WG Kerstetter 'Pre-Trial Settlement Conference; Evaluation of Reform Plea Bargaining' (1979) 13 *Law and Society Review* 349.

92 SW Hillenbrand and BE Smith *Victims Rights Legislation: An Assessment of Its Impact on Criminal Justice Practitioners and Victims* Report of the American Bar Association to the National Institute for Justice 1989.

93 M Henley, RC Davis and BE Smith 'The Reactions of Prosecutors and Judges to Victim Impact Statements' (1993) *International Review of Victimology*

94 Henley et al *ibid.* See also CJ Sumner and AC Sutton 'Implementing Victims' Rights — An Australian Perspective' (1990) 1(2) *Journal of the Australian Society of Victimology* 4.

95 Hillenbrand and Smith *supra* n.92.

its power.<sup>96</sup> As prosecutors may not be aware of victims' preferences, or for various reasons fail to convey them to the court, allowing victims to express their wishes in a VIS may guarantee that the sentencing authority becomes aware of these requests.

### 3. Impact on Sentence Outcome

Research on the impact of victims' input on sentence outcome suggests that it has only a limited effect. A study of victims' requests in VIS submitted in sexual assault cases found that the court was most likely to recognise the desires of the victim when they were consistent with the court's own view of an appropriate sentence. Furthermore, the court was also likely to ignore the victim's desire for a probation sentence over imprisonment.<sup>97</sup>

Another study which examined all types of felony offences<sup>98</sup> found that victim retributiveness or requests for incarceration do not influence the court's choice of sentence when all relevant factors are taken into consideration. The decision whether to grant probation or impose a prison sentence is explained primarily by legal considerations such as the severity of the offence or prior convictions of the accused. This study, however, found that the presence of the VIS in the court file does increase the likelihood of a prison sentence. Thus, it is the availability of the details of the crime and its impact on the victim, rather than the victim's specific retributive request, that influences the disposition. Once the prison sentence is imposed, the VIS does not significantly affect the length of the sentence.

A recent survey of judges in the United States concerning the effects of the VIS confirms that judges consider objective information (eg: the physical and financial impact of the crime) to be more useful in sentencing decisions than subjective types of information (eg, social effects), particularly the victim statement of opinion.<sup>99</sup>

Lastly, the victim's presence in the court rather than the use of the allocution right has some effect on the length of sentence. Typically, the victims who come to the sentencing tend to be involved in many phases of the trial process, thus providing a constant reminder to the judge that the victim is a person who has suffered substantially.<sup>100</sup> The finding of no effect of the allocution right is not surprising:

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96 Shapland et al *supra* n.45.

97 Walsh *supra* n.86.

98 Erez and Tontodonato *supra* n.86.

99 Hillenbrand and Smith *supra* n.92.

100 Erez and Tontodonato *supra* n.86.

By the time the victim comes to the court, a well prepared probation report having been received by a well prepared judge leaves little reason for modification of an intended decision. A victim's emotional appeal to the court cannot carry more weight in place of facts and criteria.<sup>101</sup>

The sentencing stage is more ritualistic in nature and input at this juncture is not likely to be considered, as the decision has already been made. In this sense, the allocution right only constitutes a symbolic aspect of victim integration, whereas the opportunity for a written VIS is a more realistic and efficient approach to enable a victim's input to influence the sentencing decision.<sup>102</sup>

The conclusion that emerges from these combined findings is that judges use their discretion and judgement in considering victims' input and requests. The VIS and the information it contains is only an additional, though relevant, item used by the judge in meting out a sentence. It by no means results in substituting the subjective approach of the victim for the objective one required by the law and practised by the court.

#### 4. Victim Satisfaction with Justice

Research in this regard indicates that filing a VIS is associated with increased satisfaction with the outcome. However, for a small proportion of victims, filing a VIS may heighten their expectations to influence the outcome, and when they feel that their input had no effect on the sentence, their satisfaction with the sentence is decreased.<sup>103</sup> This problem may be prevented by describing a realistic range of sentences and explaining to victims the considerations used by the courts in sentencing.<sup>104</sup>

Better understanding of the criminal justice system often contributes to victims' satisfaction with justice.<sup>105</sup> Studies of victims who participated as subsidiary prosecutors or who acted as private prosecutors (as several continental justice systems allow) reveal that their satisfaction with justice is higher than those who did not actively participate in the proceedings.<sup>106</sup>

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101 E Villmoare and VV Neto *Victim Appearances at Sentencing Hearings under the California Victims' Bill of Rights* US Department of Justice Washington DC 1987.

102 Erez and Tontodonato *supra* n.86.

103 Erez and Tontodonato *supra* n.86.

104 Gardner *supra* n.84.

105 J Hagan 'Victims Before the Law: A Study of Victims' Involvement in the Criminal Justice Process' (1982) 73 *Journal of Criminal Law and Criminology* 317.

106 E Bienkowska and E Erez 'Victims' Rights and Victims' Reality: The Case of Poland' (1993) 21 *Journal of Criminal Justice* 47.

## 5. Victim Distress

Although victims' distress levels are not directly influenced by aspects of procedural justice such as the VIS, input in this form is nonetheless important for victims' distress as it influences the type of sentence<sup>107</sup> which, in turn, influences the perception of equity by the victim. Few studies thus far have systematically examined the effect of participation in the criminal justice system on victims' distress. Further, these studies were mostly limited to rape victims and their results are inconclusive.<sup>108</sup> No research has specifically examined the effect of filling out a VIS on victims' distress.

Indirect evidence, however, suggests that victims may be interested in providing input for the purpose of "justice", even at the supposed cost of reliving the crime. A study in Australia found that victims, particularly of serious crime, expressed interest in receiving information concerning the case at all stages of the process, even at the expense of being reminded of the crime and its impact.<sup>109</sup> Most victims also expressed the feeling that, for the purpose of sentencing, the court should have information on the impact of the crime on their emotional state, family and lifestyle, and their concerns for safety, in addition to the medical and financial consequences.<sup>110</sup>

## Conclusion

The VIS as a mechanism for victims' input into sentencing decisions is an important reform in the direction of making the criminal justice system more victim oriented.<sup>111</sup> It is a benign way of providing victims with the right for input and satisfying their need to be part of the process, without jeopardising the basic principles of the adversary system or compromising the rights of the accused. The VIS contributes to procedural and substantive justice. It provides victims with an important component of procedural justice, namely "the opportunity to present their case to the authorities before a decision is made."<sup>112</sup> Because the effect of the crime on the victim is a legally relevant consideration in sentencing practices,<sup>113</sup> providing a VIS to the sentencing authority also enhances substantive justice in that it ascertains proportionality in sentencing. The implementation of the VIS

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107 Erez and Tontodonato *supra* n.86.

108 AJ Lurigio and PA Resick 'Healing the Psychological Wounds of Criminal Victimization: Predicting Post-Crime Distress and Recovery' in AJ Lurigio and PA Resick (eds) *Victims of Crime: Problems, Policies and Programs* Sage Newbury California 1990 at 50.

109 Gardner *supra* n.84.

110 Gardner *ibid*.

111 Sumner *supra* n.52.

112 TR Tyler 'What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 *Law and Society Review* 103.

113 Sumner and Sutton *supra* n.94.



does not transform sentencing into a three way contest — the input is only one additional factor to consider in a sentencing disposition.

However, despite an enthusiastic endorsement of the victim's right for input, in practice this right is not fully implemented. Several studies in different jurisdictions in the United States have found that little is done to inform victims of their right to provide input, or to elicit this information.<sup>114</sup> In addition, the laws requiring submission of the VIS (and section 7 of the South Australia *Criminal Law (Sentencing) Act 1988* is a typical example) often explicitly state that the validity of a sentence is not affected by noncompliance or insufficient compliance concerning the VIS. This reality has led some to comment that victims' rights are only privileges that operate at the mercy of the police, prosecutor or the judge and that there is a need to reform the reforms.<sup>115</sup> As Kilpatrick and Otto put it:

Promising victims rights that are not delivered may involve a certain danger: providing rights without remedies would result in the worst of consequences, such as feelings of helplessness, lack of control and further victimisation ...

Ultimately, with the victims' best interests in mind, it is better to confer no rights than rights without remedies.<sup>116</sup>

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114 Villmoare and Neto *supra* n.101. See also Henly et al *supra* n.93, Hillenbrand and Smith *supra* n.92 and Erez and Tontodonato *supra* n.86.

115 Kelly *supra* n.33.

116 *Supra* n.16 at 27.

**Appendix A**  
**Declaration of Victims' Rights**  
**(South Australia)**

Victims of crime are entitled to:

1. Be dealt with at all times in a sympathetic, constructive and reassuring manner and with due regard to the victim's personal situation, rights and dignity.
2. Be informed about the progress of investigations being conducted by the police (except where such disclosure might jeopardise the investigation).
3. Be advised of the charges laid against the accused and of any modification to the charges in question.
4. Have a comprehensive statement taken at the time of the initial investigation which shall include information regarding the harm done and losses incurred in consequence of the commission of the offence. The information in this statement shall be updated before the accused is sentenced.
5. Be advised of justifications for accepting a plea of guilty to a lesser charge or for accepting a guilty plea in return for recommended leniency in sentencing.
6. Be advised of justification for entering a nolle prosequi when a decision is taken not to proceed with charges. Decisions which might prove discomfoting to victims should be explained with sensitivity and tact.
7. Have property held by the Crown for purposes of investigation or evidence returned as promptly as possible. Inconvenience to victims should be minimised wherever possible.
8. Be informed about the trial process and the rights and responsibilities of victims.
9. Be protected from unnecessary contact with the accused and defence counsel during the course of the trial.
10. Not have his or her residential address disclosed unless deemed material to the defence or prosecution.
11. Not be required to appear at preliminary hearings or committal proceedings unless deemed material to the defence or prosecution.
12. Be entitled to have his or her perceived need for physical protection put by the prosecutor before a bail authority which is determining an application for bail by the accused person.
13. Be advised of the outcome of bail applications and be informed of any conditions of bail which are designed to protect the victim from the accused.
14. Be entitled to have the full effects of the crime on him or her made known to the sentencing court either by the prosecutor or by information contained in a pre-sentence report; including any financial, social or physical harm done to or suffered by the victim. Any other information that may aid the court in sentencing, including the restitution or compensation needs of the victim should also be put before the court by the prosecutor.
15. Be advised of the outcome of criminal proceedings and fully appraised of the sentence, when imposed, and its implications.
16. Be advised of the outcome of parole proceedings.
17. Be notified of an offender's impending release from custody.