Victim Impact Statements and the *Previtera* Rule: Delimiting the Voice and Representation of Family Victims in New South Wales Homicide Cases

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Abstract

A significant line of authority currently prohibits the consideration of family victim impact statements in New South Wales homicide cases. *R v Previtera* (1997) 94 A Crim R 76 makes this prohibition on the basis that family statements jeopardise a court's objectivity by according greater value to the life of the deceased than would otherwise be conferred where no statement is tendered. In such cases, an impact statement must be received by a sentencing court but must not be considered, as part of an offender's sentence. However, the relevance of *Previtera* has been questioned on the basis that the views of family members may be relevant to s 3A(g) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), concerning the broader circumstances of the offence, such as the harm done to the community. This article examines the relevance of family victims to the constitution of harm in homicide cases, and as a result, whether the rule for which *Previtera* is now authority, is in need of revision.

Introduction

Victim impact statements provide a vehicle through which a sentencing court may be informed of the consequences of a criminal offence by a victim of crime, or their immediate family. Such consequences may include the harm occasioned to a victim, and is likely to include the degree of injury caused or risked by the offensive conduct.[1] Where a statement is prepared by a family member of a deceased or primary victim, it is likely to include the impact of the death of the victim upon them, including any resultant shock or loss, in addition to an account of

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1 Andrew Von Hirsch, *Doing Justice: The Choice of Punishments* (1976), 79.

the grief and trauma sustained as a result of the offence.[2] The consideration of a victim impact statement towards the sentence of an offender is, however, discretionary on the part of a sentencing court.

In New South Wales, if it considers it appropriate to do so, a court may receive and consider a victim impact statement at any time after it convicts, but before it sentences, an offender.[3] If the primary victim has died as a direct result of the offence, a court must receive a victim impact statement provided by a family victim and acknowledge its receipt, and may make any comment on it that the court considers appropriate.[4] Thus, in cases where a family member of a deceased victim tenders a victim impact statement the court must receive it, though a significant line of authority now binds NSW sentencing courts in their limited consideration of such material.

For instance, *R v Previtera* (1997) 94 A Crim R 76 holds that where the primary victim dies, a court's discretion should be curtailed such that any victim impact statement tendered by a family member should not be taken into account in the sentence imposed. In this case, Hunt CJ reasoned that where the victim dies as a result of the offence, the harm to the victim is already known to the court. As the nature of the death of the victim is adduced into evidence at trial, the impact of the death on family members, or their opinions on the circumstances of death, become irrelevant. This is because, despite the feelings of family members to the contrary, no one life is more valuable than another according to principles of fairness and equality at law. A homicide case where victim impact statements are received and considered may thus hold the loss of the

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2 The *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 defines primary and family victim. 'Primary victim', in relation to an offence, means: (a) a person against whom the offence was committed, or (b) a person who was a witness to the act of actual or threatened violence, the death or the infliction of the physical bodily harm concerned, being a person who has suffered personal harm as a direct result of the offence. 'Family victim', in relation to an offence as a direct result of which a primary victim has died, means a person who was, at the time the offence was committed, a member of the primary victim's immediate family, and includes such a person whether or not the person has suffered personal harm as a result of the offence. 'Member of the primary victim's immediate family' means: (a) the victim's spouse, or (b) the victim's de facto spouse or same-sex partner, being a person who has cohabited with the victim for at least 2 years, or (c) a parent, guardian or step-parent of the victim, or (d) a child or step-child of the victim or some other child for whom the victim is the guardian, or (e) a brother, sister, step-brother or step-sister of the victim.

3 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(1).

4 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(3). Compare to original section (*Criminal Procedure Act 1986* (NSW) s 23C providing for the tendering of family statements as inserted by the original *Victims Rights Act 1996* (NSW) Sch 2.

victim as more valuable than another homicide case where no such statements are provided.

The sentencing court's use of and reliance on such statements should, according to *Previtera*, thus be restricted out of the primary need to objectively assess the seriousness of the offence, and the harm it has caused to both the victim and community.[5] Criticisms of victim impact statements being unsworn and not subject to the rules of evidence aside, a restricted judicial approach to the use of family statements has been said to accord with the sentencing principle that punishment be objectively proportionate to the seriousness of the offence, and culpability of the offender. Here, victim impact statements are limited in accordance with the notion that 'a man must be given the sentence appropriate to his crime and no more'.[6]

However, the recent decisions of *R v Berg* [2004] NSWCCA 300 and *R v Tzanis* [2005] NSWCCA 274 call into question the need to revisit *Previtera* on the basis that the views of family victims may indeed be admissible in homicide cases where such statements may inform and allow appropriate weight to be given to the harm done to the community.[7] This is consistent with s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), introduced in 2002, which prescribes that a court may impose a sentence on an offender to, *inter alia*, recognise the harm done to the victim of the crime and the community. The use and application of family victim impact statements in New South Wales sentencing courts, where the victim dies as a result of the offence, is thus far from settled.

Although authority currently prohibits the consideration of victim impact statements in homicide cases, criticisms of the consequences of *Previtera* abound. Such criticisms include those alluded to by Hunt CJ in *Previtera*, that the exclusion of victim impact statements may be contrary to the intent of parliament which expressly permits the tendering of such

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5 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A; *R v Geddes* (1936) 36 (NSW) SR 554; *R v Dodd* (1991) 57 A Crim R 349; *R v Veen [No 1]* (1979) 143 CLR 458; *R v Veen [No 2]* (1988) 164 CLR 465.

6 *R v Veen [No 1]* (1979) 143 CLR 458, 478 per Jacobs J.

7 *R v Berg* [2004] NSWCCA 300, [43]. Also see *Attorney General's Application Under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 2 of 2002)* [2002] NSWCCA 515, [57]-[59]. *Attorney General's Application* held that certain prior sentencing principles may need to be reviewed in light of the argument that the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g) requires a sentencing court to consider, *inter alia*, harm done to the community. As per Chief Justice Spiegelman's remarks in *Berg*, a potential expanded role of victim impact statements may include their use in characterising the community response to the offence before a sentencing court. This would mean that family statements may have a broader role that currently conceived under *Previtera*.

statements.[8] Others have argued that such statements play a broader role in judicial proceedings, by providing family victims the opportunity to put their emotional suffering and loss on record, and by allowing proper public respect to be paid to those feelings.[9] Arguments, however, critical of this agenda have been raised indicating that victims have become disillusioned with the lack of consideration given to their impact statement.[10] Alternatively, impact statements may allow the introduction of material hitherto unavailable to sentencing courts, particularly since the actual harm suffered by the victim is largely subordinated for the concept of legal harm adopted by lawyers and judges.[11]

The purpose of this article is to evaluate the need to reconsider *Previtera* by common law or statute. The reasons for limiting the judicial consideration of family victim impact statements will thus be considered, along with the views of those advocating change. The reasons why family statements are excluded, in accordance with a sentencing court's duty to formulate a sentence commensurate with the objective seriousness of an offence, will be examined. In doing so, this article will discuss why impact statements play a significant role in the dissemination of information to the sentencing court concerning the broader impacts of the offence on the victim and community. Finally, this article will consider the ongoing need for family members to have voice and representation in the judicial process leading to the sentencing of an offender,[12] and the ways in which this may be included in accordance with the principles of sentencing law, by way of statutory reform or judicial intervention.

A Brief History of Victim Impact Statements in New South Wales

Victim impact statements have a limited history at common law being, rather, an instrument of statutory creation. Before the introduction of a

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8 Pursuant to *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(3).

9 See New South Wales, *Parliamentary Debates*, NSW Legislative Assembly, 21/05/2003, 926, Hon Bob Debus, Attorney General. For a discussion of the extended therapeutic benefits of victim impact statements and the ways in which they can encourage a dialogue of restorative justice within and beyond the sentencing court, see Edna Erez, 'Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings' (2004) 40 *Criminal Law Bulletin* 5, 483, 491-498.

10 Martin Hinton, 'Expectations Dashed: Victim Impact Statements and the Common Law Approach to Sentencing in South Australia' (1995) 14 *University of Tasmania Law Review* 1, 81-99.

11 Rob White and Santina Perrone, *Crime and Social Control: An Introduction* (1997), 221.

12 Erez, above n 9.

statutory power for the handing up of victim impact statements in New South Wales in 1996,[13] impact statements were generally used in sexual assault matters where victims would be able to provide the court with a statement of information which it otherwise would not have, concerning the severity of the impact of the offence upon the victim. This was particularly the case where the victim did not testify at trial.[14]

Family victim impact statements were, however, generally excluded in homicide cases. For example, in *R v De Souza*[15] the Crown sought to tender several victim impact statements from family members of the deceased, who was murdered. Although the court ruled that the statements dealt with the impact of the deceased's death on her relatives, which included descriptions of their resulting depression, Dunford J held that the statements were inadmissible as family members had expressed feelings extraneous to the ambit of such an instrument. These included the views of family members on the defence of diminished responsibility raised at trial, their desire for revenge, and other claims not supported by authoritative documentation.[16] Booth has argued that this rejection of victim impact material led to the introduction of a statutory power for the mandatory receipt of family victim impact statements, as assented to in the 1996 legislation.[17]

The introduction of a statutory power for the tendering of victim impact statements was first outlined in 1987 by the Unsworth government. The *Crimes (Sentencing Amendment) Act 1987* (NSW) added s 447C to the *Crimes Act 1900* (NSW). Section 447C provided for the tendering of victim impact statements during sentencing.[18] However, s 447C was

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13 *Victim Rights Act 1996* (NSW) inserted Pt 6A into the *Criminal Procedure Act 1986* (NSW).

14 Sexual assault cases in which impact statements were adduced include *R v Jones* [1993] NSWSC No 60739/92 (unreported, Curruthers J, 15 December 1993) and *R v PJP* [1992] NSWSC No 60025/92 (unreported, Curruthers J, 9 July 1992).

15 *R v De Souza* [1995] NSWSC No 70105/94 (unreported, Dunford J, 10 November 1995) 4.

16 Such documentation would include statements from medical practitioners or other persons able to provide authoritative support for such claims.

17 Tracey Booth,, 'The Dead Victim, the Family Victim and Victim Impact Statements in New South Wales' (2000) 11 *Current Issues in Criminal Justice* 3, 292, 296.

18 Section 447C enabled the District or Supreme Court, if it considered it appropriate to do so, to receive and consider a victim impact statement prior to sentencing an offender for an indictable offence involving an act of actual or threatened violence. The *Sentencing Legislation (Amendment) Bill 1994* (NSW), which lapsed with the dissolution of Parliament before the State election in March 1995, proposed to amend s 447C prior to its proclamation to enable a victim impact statement to be given by or on behalf of a family representative of the victim, if the victim died or became incapacitated because of the offence.

never proclaimed, and the issue lapsed from public debate until the mid-1990s.

In 1996, however, the Carr government introduced the *Victim Rights Act 1996* (NSW) which amended the *Criminal Procedure Act 1986* (NSW) by inserting Pt 6A (ss 23A-23E).[19] Part 6A provided a statutory power for the tendering of victim impact statements in the District and Supreme Courts based on two categories of victim, as defined in the legislation. Primary and family victims were empowered under the new Act to tender a victim impact statement after conviction but before sentence.[20] The definitions of each type of victim are similar to those in force today.[21]

The current legislation providing for the tendering of victim impact statements prescribes, however, the different treatment of primary and family victims. Section 28(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that a court *may* receive and consider a victim impact statement, whilst s 28(3) provides that where the primary victim dies as a result of the offence a sentencing court *must* receive a victim impact statement, though the court may make any comment on it that it considers appropriate. Accordingly, this may include no comment, despite the fact that the court is bound to receive the statement.

In 1996, the New South Wales Law Reform Commission ('NSWLRC') declared its support for victim impact statements in its report on sentencing.[22] Recommendation 3 of the report, however, gave support to a prohibition against the consideration of family victim impact statements in homicide cases. The NSWLRC recommended that except in homicide cases, victim impact statements should be admissible at sentencing hearings, in the discretion of the court and at the victim's option, as an indication of the seriousness of the offence. Accordingly, the NSWLRC recommended that the then new provisions in the *Criminal Procedure Act*

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19 Renumbered by the *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW), transferring the victim impact statement provisions from ss 23A-23E to ss 164-169 of the *Criminal Procedure Act 1986* (NSW). This was a temporary arrangement until the enactment of the *Crimes (Sentencing Procedure) Act 1999* (NSW), as the provisions now appear under Pt 3, Div 2 of this latter Act.

20 At the time of assent a primary victim was a person against whom the offence was committed, or who was a witness to the act of actual or threatened violence, and who suffered personal harm as a direct result of the offence. A family victim was a person who was, at the time the offence was committed, a member of the immediate family of a primary victim who died as a direct result of the offence. The *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 26-27 clarify these definitions, including to whom such definitions now apply. See n 2.

21 See *Victims Rights Act 1996* (NSW) Sch 2 'Amendment of Criminal Procedure Act 1986' s 23A Definitions. Compare to the current definitions at n 2.

22 New South Wales Law Reform Commission, *Sentencing*, Report No 79, (1996).

1986 (NSW) s 23C(3) providing family victims the power to tender a victim impact statement should be repealed.

Further, victim impact statements should be limited to the person against whom the offence was committed, or a witness to the act, where they suffer personal harm as a direct result of the offence. The NSWLRC advocated that a court should have the power to exclude victim impact statements in all cases, and specifically where the contents of the statement were exaggerated, irrelevant or prejudicial.[23] The NSWLRC's preference that victim impact statements be sworn and subject to cross-examination did not gain the favour of parliament.[24]

Further amendments to victim impact statement legislation in 1997 addressed complexities regarding the types of offences for which statements could be tendered, and the courts in which this could occur. The *Crimes Legislation Further Amendment Act 1997* (NSW) extended the ambit of the scheme to include an indictment for dangerous driving occasioning death under the *Crimes Act 1900* (NSW) s 52A(1-2), and extended the operation of the existing provisions on victim impact statements to include the Local Court and Children's Court.[25]

The Primacy of an Objective Assessment of the Offence

Sentencing law and theory provides that the process of sentencing involves the balancing of overlapping and competing objectives. This may include the need to deter the offender, or potential like offenders, or to provide an opportunity to rehabilitate the offender, whilst allowing for sufficient retribution on the part of victims and the community. However, in determining this fine balance, a sentencing court must first assess the objective circumstances of the offence for which the defendant has been convicted.

After it considers the objective factors of an offence, a sentencing court will consider subjective factors particular to the offender. The subjective circumstances of an offender include their character, antecedents, age, health and mental condition. These factors may alter the severity of the original sentence depending on their mitigating or aggravating features.

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23 *Ibid*, 39-40.

24 Despite the lack of explicit statutory prescription for the cross-examination of victims tendering an impact statement, a defendant may nonetheless cross-examine a witness in relation to their statement if they suspect that their statement contains false or misleading information about the defendant or offence committed, or otherwise prejudices the defendant's right to a fair trial. See Victims of Crime Bureau (NSW), *Victim Impact Statement Information Package* (2004), 6.

25 New South Wales, *Parliamentary Debates*, NSW Legislative Council, 2/12/1997, 2952, Hon. JW Shaw, Attorney General.

However, subjective factors may not bring about a sentence beyond that which is objectively proportionate to the offence committed. A sentence must reflect the objective seriousness of the offence.[26]

As a result a court must first consider the objective circumstances of the offence. These circumstances must be constructed without undue influence from any particular, private viewpoint. This would nominally include influence exerted by such authorities as the police, the victim or their family. Thus, the primacy of the objective assessment of the seriousness of the offence is what effectively excludes victim perspectives on that offence,[27] such as that presented in a family victim impact statement. To this end, the High Court had continued to emphasise that punishment should never exceed that which is 'proportionate to the gravity of the crime considered in light of its *objective* circumstances'.[28]

As part of an objective assessment of the offence, a sentencing court is under a duty to consider the harm done to the victim.[29] This duty has now attracted statutory recognition.[30] However, the duty of the court is to inform *itself* of the harm to the victim. It is a duty reserved solely for the presiding judicial officer, in their capacity as an independent, objective, arbiter of law and fact. Thus, an objective assessment of the seriousness of the offence upon the victim, or the harm done to him or her, cannot flow from the victim personally.[31] For the sentencing court to construe its opinion of the offence and offender by following a characterisation of the victim put forward by the victim's family would be to place an offender at risk of being primarily punished out of feelings of retribution and vengeance. In the recent case of *R v Newman; R v Simpson* [2004] NSWCCA 102, Howie J states:

> It cannot be that the attitude of complainants can govern the duty of a court when proceeding to sentence. As has been pointed out elsewhere, the

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26 *R v Dodd* (1991) 57 A Crim R 349, 349.

27 *R v Previtera* (1997) 94 A Crim R 76, 86 held that the personal perspective of the primary victim is indeed relevant where the victim survives the offence. This is because the outcome of the offence on the victim is not necessarily known to the court, nor is the level of harm occasioned. Thus, a victim impact statement produced by a primary victim is expressly permitted where relevant as it plays a functional role informing the court of the harm occasioned where not adduced into evidence at trial.

28 *Hoare v The Queen* (1989) 167 CLR 348, 354. Original emphasis.

29 *Siganto v The Queen* (1998) 194 CLR 656. Such an assessment does not include harm occasioned by giving evidence as a matter of aggravation where the defendant pleads not guilty.

30 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g); s 21A(2)(a, h, k, l, m).

31 *R v RKB* [1992] NSWSC (unreported, Badgery-Parker J, 30 June 1992). Also see *R v Slack* [2004] NSWCCA 128, [61]; *R v Newman; R v Simpson* [2004] NSWCCA 102, [80]-[85]; *R v Wilson* [2005] NSWCCA 219.

> adoption of such a practice or philosophy would involve taking into account the desires of unforgiving complainants for vengeance or salutary penalty.[32]

It is this perspective, on the primacy of the need to objectively assess an offence without influence from the victim personally, which has led to the nominal exclusion of victim impact evidence as principally informing the harm done to the victim in sentencing courts.[33]

Where the primary victim dies, however, the need to objectively assess an offence is exacerbated. It is increased, as indicated earlier, because death is seen as the ultimate harm. At law, no individual life should be regarded as more valuable than another. Thus, where family victims seek to influence a sentence outcome in homicide cases, the sentencing court has generally been left with little choice but to exclude the impact statement as prejudicial. This is certainly consistent with the principle that 'forgiveness should be no more persuasive towards leniency than a desire for vengeance by a victim should be towards severity'.[34] Indeed, sentencing courts have well noted that harsher penalties should be avoided simply because the victim was loved by many.[35] The need to maintain this objective focus, and thereby limit the applicability of family victim impact statements, has therefore gained favour in New South Wales courts and the academy.[36]

Against the trend in Victoria, South Australia and Western Australia, where family victim impact statements are able to be considered in homicide cases,[37] Booth argues that the nature of the harm to the victim is not able to be characterised by their family. Statements with such a focus are therefore of little relevance and should be excluded as impacting on the final sentence imposed.[38] Booth recognises an important point elaborated upon in judicial discourse, that a family victim's characterisation of harm may be tainted by purely personal perspectives not relevant to the constitution of the personal harm of the victim. A victim can suffer no fate worse than death. Family statements have thus

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32 *R v Newman; R v Simpson* [2004] NSWCCA 102, [85].

33 See *Payne v Tennessee* (1991) 115 L Ed 2d 720, overruling the general prohibition against victim impact evidence at capital sentencing hearings in the US, as held in *South Carolina v Gathers* (1989) 104 L Ed 2d 876 and *Booth v Maryland* (1987) 96 L Ed 2d 440.

34 Ivan Potas, *Sentencing Manual* (2001) 275-276.

35 *R v Miller* [1995] 2 VR 348, 354.

36 Tracey Booth, 'Homicide, Family Victims and Sentencing: Continuing the Debate about Victim Impact Statements' (2004) 15 *Contemporary Issues in Criminal Justice* 3, 253.

37 For a discussion of the consideration of family victim impact statements in other jurisdictions, see below.

38 Booth, above, n 17, 304.

been deemed prejudicial to the administration of justice for the fair and consistent protection of the community.

This is a point of some history in the New South WalesCourt of Criminal Appeal (NSWCCA). For example, *R v Slack* [2004] NSWCCA 128 emphasises the NSWCCA's attitude towards an untrammeled objective assessment of the harm of the offence on the victim. Here, the court ruled that on the charge of sexual assault, where the primary victim tenders a victim impact statement personally, that the court must be satisfied of circumstances of aggravation beyond reasonable doubt, according to the law of evidence. This was also affirmed in *R v Wickham* [2004] NSWCCA 193, where the injury, harm, and damage caused by the offence was limited by the rule partly endorsed in *Previtera*, that the effect of the death of the victim upon others is not an aggravating feature of an offence such as murder. Thus, *Slack* maintains the view that 'substantial weight cannot be given to an account of harm in an unsworn statement', where such an account is not an impartial view of the effect of the offence on the victim.[39]

The inclusion of sentimental statements towards the family of the victim in the remarks of the sentencing judge, particularly if informed by a victim impact statement excludable under *Previtera*, may thus leave the decision susceptible to correction before the NSWCCA. In *R v Bollen* (1998) 99 A Crim R 510, for example, Hunt CJ upheld his Honour's earlier decision in *Previtera* by finding that the sentencing judge took irrelevant material into account by having regard to the particular effects of the death upon the victim's family. *Previtera* can thus be understood, in the broader context of sentencing law, as responding to the need to primarily assess the harm of the offence in the context of its factual circumstances.

The role of the court where a victim impact statement is provided is to thus eschew the statement to ensure that the final sentence is devoid of any personal reflection validating the victimised status of the deceased as either unique, extreme or somehow warranting a greater or lesser punishment than other homicide cases would necessarily demand. Death is thus the ultimate harm, requiring no further elaboration or explanation, particularly from persons intimately connected with the offence or primary victim.

This is appropriately demonstrated in *R v Dang* [1999] NSWCCA 42. *Dang* indicates how, under authority of *Previtera*, any reference to the suffering of family victims may jeopardise the tenor of a sentencing

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[39] *R v Slack* [2004] NSWCCA 128, [62].

decision. In this case, the sentencing judge clearly states that an objective assessment of the seriousness of the offence was made pursuant to the information tendered in the victim impact statement. However, as Abadee J holds, the fact that the sentencing judge made an *objective* assessment of the harm contained in the impact statement does not distract from the fact that, as Adams J makes clear, 'in death we are all equal'. Abadee J rules:

> his Honour did fall into appealable error when he referred to the objective fact that the husband of the deceased and other relatives of the deceased had suffered grief as a result of the death of the deceased. In my opinion, what his Honour did transgressed the appropriate principles that had been laid down by this court in such decisions as *Regina v Bollen* (1998) 99 A Crim R 510 and *Regina v Previtera* (1997) 94 A Crim R 76.[40]

Justice Adams goes on to explain the logic of the court's decision against the sentencing judge's 'objective' assessment of the victim impact statement:

> The reason why a victim's impact statement cannot be taken into account where a person dies may easily be demonstrated. Assume the deceased was friendless; assume the deceased had no family. It would be monstrous to suggest that that meant for some reason killing her should attract a lesser sentence than would be the case if, as is the situation here, she had a loving family and grieving relatives. Essentially, then, the reason that victim impact statements in cases involving death are not taken into account in imposing sentence is that law holds, as it must, that in death we are all equal and the idea that it is more serious or more culpable to kill someone who has or is surrounded by a loving and grieving family than someone who is alone is offensive to our notions of equality before the law.[41]

Dang proposes that an inference drawn from a family impact statement goes against the rule that a sentence must reflect the objective seriousness of the offence. Even where care is taken to ensure that the statement is interpreted objectively, where the words of the victim are measured against general community opinion and accepted or rejected on that basis, sentencing error will be found if a sentencing judge makes reference to the material contained in the statement. Under NSW authority, the proper role of a family victim impact statement in homicide cases is to thus accompany the case file, never to be read as influencing the final sentence to be imposed.

However, one problem with this situation, as Hunt CJ indicates is that it raises the expectation of family victims into believing that a sentencing court will take their statements into account. This is evidenced in the

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40 *R v Dang* [1999] NSWCCA 42, [15].

41 *Ibid*, [25].

sentencing appeal of *R v Penisini* [2004] NSWCCA 339 in which Spigelman CJ quotes from the sentencing judge:

> I confirm that I have given careful consideration, for the limited purposes permitted by law, to the victim impact statements which were read in Court by Robert McEnallay, the father of Senior Constable McEnallay, and by Amanda Mahon, who had been that officer's partner and intended wife.[42]

This case, in which the NSWCCA considered whether the deliberate killing of a police officer during the course of duty warranted a life sentence, demonstrates the limited applicability of victim impact evidence as provided by family members. Further, it demonstrates how the need to receive a victim impact statement pursuant to s 28(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and to objectively assess harm pursuant to *Previtera*, may deceive family members into believing that the court is somehow interested in their personal opinions and perspectives of the offence, even where victims are made aware that the court will determine seriousness from a dispassionate assessment of the facts.

A reasonable lay attitude may thus include the notion that where family victims are informed of the *Previtera* rule, such victims will continue to believe that their statement will be taken into account. This is due to a victim's lack of knowledge of the workings of judicial discretion, and the ways in which judges readily exclude information and knowledge, even where they have been formerly exposed to it. Apart from the words 'for the limited purpose permitted by law' pursuant to *Penisini*, for example, a lay victim may have little idea that their statement as tendered is not only excluded as irrelevant to an objective assessment of sentence, but explicitly excluded as prejudicial to the ends of justice.[43] This defies the spirit of the legislation providing for the tendering of family victim impact statements in the first instance, a point well acknowledged by Hunt CJ's in *Previtera*.[44]

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42 *R v Penisini* [2004] NSWCCA 339, [37].

43 Booth talks of the therapeutic value of victim impact statements even where they cannot be considered by a sentencing court. Booth argues that even where victim impact statements are not considered as relevant to sentencing outcome, they continue to be relevant to sentencing process in a restorative capacity. However, this defies the purpose of a victim impact statement, which was never intended to be tendered as token to the sentencing process, but as impacting on the actual sentence that the offender is to eventually serve. See Tracey Booth, 'Homicide, Family Victims and Sentencing: Continuing the Debate about Victim Impact Statements' (2004) 15 *Contemporary Issues in Criminal Justice* 3, 253, 255.

44 In *R v Previtera* (1997) 94 A Crim R 76, 87 Hunt CJ notes the consequences of the current provisions: 'It is unfortunate that the Legislature chose to pass s 23C(3) in a form which includes a statement from members of the victim's family in a homicide

With ample opportunity to amend the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(3), which contain provisions similar to those commented on by Hunt CJ in *Previtera*,[45] NSW parliament has provided a strong indication that the power to tender a family victim impact statement in homicide cases stands. Thus, a need presents itself to consider the admissibility of victim impact evidence if not out of fairness to family victims acting under the assumption that their perspective is significant to the sentencing court, then for the reasons cited by Spigelman CJ in *Berg*, being:

> The reasons given in *Previtera* may need to be reconsidered in an appropriate case, by reason of the conclusion of the statement of the purposes of sentencing in s 3A of the *Sentencing Procedure Act* 1999. I refer particularly to the reference in s 3A(g) 'To recognise the harm done to ... the community.' (See *Re Attorney General's Application under s 32 of the Crimes (Sentencing Procedure) Act 1999 (No 2 of 2002)* (2002) 136 A Crim R 196 at [57]-[59].)
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> It appears to me strongly arguable that the recognition of this purpose of sentencing would encompass the kind of matters which are incorporated in a victim impact statement. It may in some cases, be appropriate to consider the contents of such statements in the sentencing exercise. This was not a purpose of sentence recognised by Hunt CJ in *Previtera,* see at 86.[46]

In terms of the ongoing problems surrounding the limitation of family perspectives in homicide cases, a clear need exists to revisit the fairness of the prohibition emerging out of *Previtera*.[47] This need goes towards whether family members should inform the harm occasioned in homicide cases as members of the community, and whether room exists for such a perspective alongside the primacy of an objective assessment of culpability as emphasised by *Previtera* and the principle of proportionality in sentencing.

The Views of Family Victims as Members of the Community

In *Berg*, Spigelman CJ refers to the possibility that *Previtera* may need to be revisited on the basis that s 3A(g) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides for the assessment harm in sentencing from the context of the victim and, specifically, the community. In *Bollen*, similarly, Hunt CJ clearly indicates that the content of family victim impact statements may inform the loss of the

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case which deals only with the effect of the death upon them, and which could never be appropriate to be taken into account on sentencing'.

45 See above, n 4.

46 *R v Berg* [2004] NSWCCA 300, [43]-44].

47 Also see *R v Tzanis* [2005] NSWCCA 274, [15].

victim from the perspective of the community, in aid of an objective assessment of the harm occasioned by the offence. The NSWCCA in *Bollen* allowed the appeal on sentence because, as indicated earlier,[48] the sentencing judge took explicit account of the victim impact statements in forming his opinion as to the harm occasioned by the victim. Hunt CJ states:

> When referring to the Victim Impact Statements, the judge said that the consequence of the crime committed by the Appellant was that the community had lost one of its number and the Groves family had lost a loving member - one who was a husband, father, son and brother. I see nothing wrong with that statement. It does no more than recognise the value which the community places upon human life. However, the judge then said that he had 'borne in mind' the seven statements filed, the material which they contained about the deceased and the reaction of the respective authors of those statements to his death.[49]

A significant aspect of the sentencing process involves the weighing up of the harm occasioned to the victim against the seriousness of the offence as adjudged by contemporary community standards. This is reflected in the principle of proportionality, that the sentence imposed must be commensurate with the gravity of the offence. This is to ensure that offenders receive the appropriate level of punishment for the correction and rehabilitation of their aberrant conduct, and to thus restrain arbitrary or capricious punishment.

The problem with family statements clearly flows from the intimacy of their substantive basis. Accordingly, sentences informed by the personal perspective of family members are likely to be more severe than that which is necessary to realise the aims of sentencing, as the victim will be more likely to adopt harsher views towards the offender due to their personal loss and subjectification. This is particularly the case where a victim (or their family) calls for a sentence on the basis of retribution or vengeance. So fundamental is the principle of proportionality that it even precludes the imposition of a greater sentence for the protection of the community alone.[50] Thus, even the need to protect the community against dangerous offenders needs to be proportional to the other objects of sentencing, including prospects of rehabilitation. The head sentence will thus depend on *all* the circumstances of the offence.

Therefore, in the mix of sentencing principles, with the need to objectively assess the seriousness of the offence and harm occasioned,

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[48] See discussion under section 'The Primacy of an Objective Assessment of the Offence'.

[49] *R v Bollen* (1998) 99 A Crim R 510, 529-530.

[50] *Veen v The Queen [No 2]* (1988) 164 CLR 465, 472.

significant weight may go to the harm occasioned from the perspective of the community. This, however, is not the only perspective informing objective proportionality. Other considerations, such as those outlined by Fox,[51] may well extend or limit the sentence imposed. Fox indicates that these factors, some of which flow from the actualisation of the status of the victim, are as follows:

> Harm is obviously an objective circumstance, but the problem is to weigh the harmfulness of criminal behaviour that invades different interests, for example physical integrity, personal privacy, proprietary rights, public order, moral standards, administration of justice and government, etc. Harm must include both advantages gained by the offender and losses caused to the victim.[52]

With the reminder that a sentence cannot be disproportionate to the circumstances of the offence, as provided by *Veen [No 1]* and affirmed in *Veen [No 2]*, room is made for an assessment of the seriousness of the offence from a variety of sources. The reality is that a court must consider several, at times competing, factors when determining a proportionate sentence. Thus, in *Veen [No 2]* the court states that whilst a sentence may not be extended to merely protect the community, the protection of society, amongst other factors, continues to be material.[53] *Veen [No 2]* holds that various factors, specifically an offender's continued threat to society, or implicitly the perspective of the victim or their family towards the offence, are relevant factors to be considered in order to bring about a sentence proportionate to seriousness and culpability. The need to assess objectively is not simply a reflection of broad community standards and expectations – it may well incorporate the needs and views of others, such as victims, including family victims, in homicide cases.

There is therefore room, in the objective assessment expected of all sentencing courts, to consider the consequences of the offence on the victim and their family in order to bring the head sentence within a scope acceptable to a variety of interested parties. Put another way, there is justification under current sentencing principles to include the views of family victims as tendered in a victim impact statement. These justifications would see family victim impact statements being used to inform a sentencing court on such things as the potential impacts of the offence on the community, likelihood of recidivism, or the extent to which the offence breached current community standards. What is

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51 Richard G Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19 *Melbourne University Law Review* 489.

52 *Ibid*, 499.

53 *Veen v The Queen [No 2]* (1988) 164 CLR 465, 473.

required is the balancing of these perspectives by the sentencing court such that the social or protective aspects of the objective assessment are not downplayed for the more personal views of family victims. Clearly, care would need to be taken to avoid the valuing of the life of the deceased as above that of another.

However, as *Veen [No 2]* states authoritatively, proportionality requires that a number of factors be weighed into a sentence. It is permissible that this includes the perspective of those persons familiar to the primary victim. As the attempts to reform, standardise and consolidate the principles and practices of sentencing have reminded us, discretion on the part of the sentencing court is key.[54] This is a point acknowledged by Booth and others.[55] The reality is that if family victim impact statements were allowed in New South Wales, some statements would still need to be excluded as irrelevant, whilst others may be quite useful, informing the court of factors relevant to the broader assessment of the offence as necessitated by *Veen [No 2]*. The content of the statement as a representative viewpoint of the community, as a fair statement relevant to an objective assessment of the seriousness of the offence, would be crucial to its utility. The utility of a statement would thus largely depend on the substance, accuracy and reliability of the comments in the statement, as related to the sentencing factors deemed relevant by the sentencing court. Where a direct link exists between the content of an impact statement, and a sentencing factor required to be considered under *Veen [No 2]*, the statement would be extremely useful.

The general criticisms leveled against the reform of the current NSW law that excludes family victim impact statements needs to be revised in the context of the proper exercise of judicial discretion. Booth, however, despite acknowledging the validity of impact statements from family victims, questions the utility of any change to NSW law that would ultimately allow for the consideration of such statements.[56] Many of these questions go toward the ways in which the judiciary would guard against the inappropriate use of family victim impact statements, particularly in

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54 The primacy of discretion is a point raised within the debate over the utility of guideline judgements in New South Wales. Guideline judgements seek to promote consistency in sentencing outcomes by providing standard ranges for given offences. This movement has, however, been heavily criticised: Donna Spears, 'Structuring Discretion: Sentencing and the *Jurisic* Age' (1999) 5 *University of New South Wales Law Journal Forum*, 18; Kate Warner, 'The Role of Guideline Judgements in the Law and Order Debate in Australia' (2003) 27 *Criminal Law Journal* 8, 8.

55 Booth, above, n 36, 255.

56 Booth, above, n 36, 254. Also see Tracy Booth, 'Victims of Crime, Vulnerable Citizens, and the Criminal Justice Paradigm', *Sentencing: Principles, Perspectives and Possibilities*, Conference Proceedings, 10-12 February 2006, Canberra, 9-10.

terms of their conceptualisation of the harm occasioned by the victim, and the typification of a victim self to which others may then be compared. However, judges are familiar with the consideration of such information. As has been widely acknowledged,[57] judges already consider the harm done to the victim and with this may consider perspectives on the nature of the victimisation put forward by counsel or as otherwise put before the court.

This potential has been highlighted by literature assessing the use of impact statements by the bench. Hinton, for example, argues that courts, in their need to assess the seriousness of an offence in light of its objective circumstances, already exclude material that construes the injury sustained by the victim in a subjective light.[58] Injuries charged at a particular level of seriousness, such as assaults, or even homicides, generally receive comparable sentences by virtue of the courts' sensitivity to the general nature, or circumstances, of such offences. The doctrine of parity between offences, and offenders, is dependent upon it. Furthermore, courts exclude 'from the sentencing process those consequences of the injury perpetrated that are not objectively discernable'.[59] Accordingly, an impact statement that contains significant subjective content, at odds with community sentiment as to the seriousness of the offence upon the victim, will be excluded unless it contains at least some information that can be discerned objectively. Even then, only that information which the court deems as reliable would stand the change of impacting upon sentence. Clearly, however, those statements orientated towards a more objective evaluation of the impacts of crime upon the victim will be of greatest utility. Moreover, those statements concerned with actual harms occasioned as a result of the offence, harms that may go toward informing the needs of specific or general deterrence, denunciation, potential recidivism, or rehabilitation, will be of greatest utility. A focus on injury over emotion, impact over anger, will assist the court's reception of such information as objective, and thus tenable, in the first instance. Booth's research on the nature of family impact statements supports the view that the content of such statements is variable.[60] Some will be useful, others not. Statements

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57 *R v Henry & Ors* (1999) 46 NSWLR 346; *R v Hall* [1995] NSWSC No 60326/92 (unreported, Gleeson CJ, Grove and Abadee JJ, 28 September 1995); *R v Previtera* (1997) 94 A Crim R 76, 86-87; *R v Slack* [2004] NSWCCA 128, [58]; *R v Willis* [2000] VSC 297, [16].

58 Hinton, above, n 10, 97-98.

59 *Ibid*, 98.

60 Tracey Booth,, 'Voices after the Killing: Hearing the Stories of Family Victims in New South Wales' (2001) 10 *Griffith Law Review*, 1, 25–41.

indicative of community sentiment would significantly accord with current requirements on the assessment of an offence, that the sentence must be proportionate to the seriousness of the offence as construed objectively.

Judicial reference to the harm occasioned by the victim, as evidence of the way in which a sentencing court will necessarily inform itself of the harm occasioned to the victim as part of the constitution of the objective seriousness of an offence, emerges in *R v Lewis* [2001] NSWCCA 448. *Lewis*, in which a victim impact statement was not tendered, suggests that the plight of the victims of crime, particularly if known or foreseeable to the offender at the time of the offence, is best characterised as an aggravating factor to be included in sentence. In this case, the offender arranged for the contract killing of his wife, leaving their five children without a mother. Hodgson JA was careful to comply with the tenor of *Previtera,* ruling that the primary victim was in no way more worthy than the other family victims, but that the culpability of the offence must incorporate the fact that the death of the primary victim would 'deprive five children of their mother'.[61] Accordingly, Hodgson JA ruled that 'in my opinion the degree of harm which the offender knew would be caused by the offence is highly relevant to the culpability of the offender'.[62] *Lewis* demonstrates how the NSWCCA, and more broadly sentencing courts in New South Wales, may include reference to the particular and personal harm of the homicide victim, especially where that harm can be rationalised as an objective matter of fact.

Problems as to objective proportionality, or the tainting of that proportionality by unacceptable private or emotive views, can thus be dispelled by reference to the current regime of sentencing practices, apart from those prescribed under the victim impact legislation. Problems referred to in *Previtera* are therefore already being dealt with in New South Wales sentencing courts, as suggested by *Lewis*. Nor have such problems emerged in the other states of Australia in which courts can receive family victim impact statements.

The cases emerging under the statutory provisions of Victoria, South Australia and Western Australia where family victim impact statements can be adduced and considered on sentencing support the inclusive interpretation of objective proportionality adopted herein.[63] The Victorian

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61 *R v Lewis* [2001] NSWCCA 448, [67].

62 *Ibid.*

63 The provisions for victim impact statements in these states include: *Sentencing Act 1991* (Vic) Pt6, Div 1A; *Criminal Law (Sentencing) Act 1998* (SA) s 7A; *Sentencing Act 1995* (WA) s 24. Note that in Victoria, victim impact statements must be made by statutory declaration or given orally under oath: (*Sentencing Act 1991* (Vic) s 52(2)).

case of *R v Willis* [2000] VSC 297 provides authoritative comment on the relevance of family viewpoints toward an objective assessment of the offence. Vincent J remarks:

> The introduction of such statements was not intended to effect any change in the sentencing principles which govern the exercise of discretion by a sentencing judge. What they do is to introduce in a more specific way, factors to which a court would ordinarily have regard in a broader context. They constitute a reminder of what might be described as the human aspect of crime and draw to the attention of the judge who would of necessity have to consider the possible and probable consequences of criminal behaviour, not only its significance to society in general but the actual effect of a specific crime upon those who have been intimately affected by it. Victim impact statements provide an opportunity for those whose lives are often tragically altered by criminal behaviour to draw to the Court's attention the damage and senseless anguish which has been created and which can often be of very long duration.[64]

Justice Vincent outlines that the 'human aspect of crime', in so far as it characterises an objective assessment, requires a sentencing court to consider the offence not only from the perspective of society, but from the more focused or specific perspective of those who have been directly affected by the offence. Thus, his Honour advocates the inclusive approach provided for under s 52 of the *Sentencing Act 1991* (Vic) and as alluded to in New South Wales in *Berg*. This approach does not seek to make a distinction between the objective assessment of the offence from the perspectives of family victims, instead utilising such opinions to gain a more informed and comprehensive understanding of the nature and impacts of the offence.

By eschewing the assumption that a private perspective will somehow taint the objectivity of an assessment of harm, Vincent J advocates the utility of the victim in sentencing proceedings. Here, family victims gain more than an entitlement to restorative discourse, a secondary therapeutic effect flowing from their ability to tender a victim impact statement. They gain the position of stakeholder, as actually relevant to the sentencing process, whose views are appropriate to the outcome which is to be determined. Under this approach, it is for the sentencing court to opine that the statement as tendered is relevant or not, and the extent to which it will thus be considered in the determination of a proportionate sentence.

Victorian sentencing law further emphasises how Chief Justice Spigelman's reference to the community in *Berg* may be contextualised

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64 *R v Willis* [2000] VSC 297, [16].

by reference to a family impact statement. *R v Penn*,[65] a Victorian homicide case involving culpable driving, held that where evidence indicating the loss or trauma felt by family members mirrors or complements community sentiment towards the offence, such evidence may indeed be relevant to the constitution of an objectively proportionate sentence. The court rules:

> The question is whether the effect of the offender's criminal conduct upon others than the 'direct' victim [of] the offence may be taken into account when the assessment of a proper penalty is being made. In *Brannon*, an unreported decision of this court, 3rd February 1982, McInerney J, speaking for the Court, remarked that: 'In the exercise of the sentencing discretion the learned trial judge had to consider what was the appropriate punishment to award the respondent for the crime he committed. He had to take into account the community's revulsion at that crime, the sorrow and distress which the death of the deceased had caused to his widow and family, and the distress which the death of the deceased, in the circumstances, leaving a widow and children who presumably were dependent upon him would excite in the mind of the community.'
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> For the applicant it was maintained that this passage must be read in the context of the judgment as a whole. It can then be seen, so it was said, that the judge was referring to the community's attitude generally to the crime of culpable driving. One of the reasons for community revulsion is a general recognition of the needless waste of human life together with sorrow and distress that is usually the concomitant of this particular offence. It was submitted that the theory of moral responsibility upon which punishment under the criminal law exists focuses upon the potential harm criminal conduct could cause to any person, rather than upon the consequences actually resulting, at least indirectly, to particular persons.

Where the consequences of an offence resonate alarm, or to the extreme, feelings of revulsion, within the community, family victim impact evidence may be of use to the sentencing court. If community sentiment is therefore echoed or encapsulated in a family victim impact statement such a statement, under *Penn*, may help inform a sentencing court of the seriousness of harm caused by the offence. Clearly, where community sentiment and the content of a family victim impact statement are at odds, a court must proceed with extreme caution. Specifically, a court must not consider the harm occasioned as more serious just because the victim's family are keen to state that they dearly grieve the loss of the deceased. However, where useful information as to offender culpability or offence seriousness can be gleaned from an impact statement reflective of community sentiment, then such statements should not be excluded by

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[65] *R v Penn* [1994] VCCA339/93 (Unreported, Crockett, Southwell, Vincent JJ, 9 May 1994), 5.

virtue of some blanket rule grouping all family statements as unreliable and prejudicial.

However, in *Penn's* case, the court ruled that despite authority suggesting that the inclusion of victim perspectives was permissible as a reflection of community sentiment, that reference to such sentiment must be limited. It was ruled that victim evidence, particularly from the family of the deceased in homicide cases, is limited in accordance with the principles of law empowering the sentencing judge in the first instance. In *Penn*, as in most culpable or dangerous driving offences, the court ruled that there is a significant need to deter other motorists from engaging in like behaviour. As such, the sentencing judge's remarks of the trauma of family members was permitted as it went towards justifying a sentence significantly rationalised under the principle of general deterrence. Facts in issue thus necessitated a consideration of the broader impacts of driving offences, particularly those occasioning death, as a threat to the community. The sentencing judge drew from evidence of the family's trauma to justify a sentence that would dissuade others from participating in like conduct. However, despite the trauma of family members being taken as representative of community sentiment, the court rules that:

> The reference to the widow and children is made in the abstract. That is to say, as an example of the importance of general deterrence. The matters which the sentencing judge can give weight are those to which he can take judicial notice. Beyond that he should not go.[66]

Penn thus rationalises the inclusion of victim perspectives on the basis that such material goes towards justifying a proportionate sentence in accordance with well recognised sentencing principles. The need for general deterrence, particularly significant in almost all homicide offences, allows for the inclusion of material specific to the suffering of family victims on the basis that such material is to inform the sentence to be ultimately handed down in order to deter others from acting similarly. In this sense, victim evidence is included as informing the community's attitude to the offence, a perspective central to the constituting of objective seriousness of the offence in the first instance. However, despite being of potential relevance to sentence, any consideration of victim perspectives from the subjective viewpoint of family members, say with regard to the need for vengeance, or revenge, will stand outside the admitted principles of sentencing law.[67] As the court indicates, beyond a

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[66] *Ibid*, [6].

[67] The Canadian cases, referred to below, stand as case in point on the exclusion of purely subjective viewpoints.

general consideration of family trauma according to the principle of general deterrence the sentencing judge 'should not go'.

The issue of the relevance of victim trauma particularly from the family of homicide victims was revisited, however, in the Victorian case of *R v Miller* [1995] 2 VR 348. This case involved the unprovoked murder of a 20 year old female shop attendant by a male person suffering from Klinefelter's syndrome, a chromosomal disorder, causing limited intellectual development and various developmental disabilities. While the attack on the young woman was not determined to be a result of Klinefelter's syndrome, the effects *inter alia* of deinstitutionalisation and the non-availability of appropriate community care did go towards informing the objective seriousness of the offence. Added to this assessment were the sentencing judge's remarks on the plight of the murdered victim, her youth, innocence and potential for growth. The court, comprised of Southwell, Ormiston and McDonald JJ, ultimately determined that:

> In the present case, there was evidence of the fear that had been felt by residents of Bendigo at the time following the murder; there was evidence in the depositions from the mother of the deceased, which touched upon their loss. We are not persuaded that the judge misdirected himself by referring to, and taking into account of, the effect on the Bendigo community of this crime, or the anguish of her family. Commonsense would allow inferences to be drawn in respect of these matters, in the absence of direct evidence.[68]

Particular to this case was the introduction into Victorian Parliament of the Sentencing (Victim Impact Statement) Bill 1994. This Bill, which was later passed into law to commence on 31 May 1994, sought to overcome the potential limitations provided by *Penn*. *Penn* limited the availability of victim evidence to that which accorded with community sentiment so far as it was relevant to a determination of sentence under known principles of sentencing, specifically general deterrence. The 1994 Act sought to change Victorian sentencing law to a position where a victim, by way of victim impact statement, could inform the court of any 'injury, loss or damage' that occurred as a direct result of the offence. The 1994 Act also sought to amend the *Sentencing Act 1991* (Vic) s 5(2) by drawing specific reference to the personal circumstances of the victim of the offence and any injury, loss or damage that resulted directly from the offence. For the court in *Miller*, the 1994 Act sought to clarify the status of victim impact evidence, evidence which may already be before the court even if not provided by impact statement. The court determined that

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68 *R v Miller* [1995] 2 VR 348, [354].

victim experience, whilst now being able to be adduced as a matter of law, was always relevant to sentence as a sentencing court is entitled to draw inferences from any evidence which points towards the harm, loss or suffering experience by a victim. Most importantly, the court ruled that this is the case for both the actual victim of homicide, and 'their immediate families'.[69] As emphasised in *Penn*, a sentencing judge must hand down a sentence that is objectively proportionate to the seriousness of the offence. Clearly, this will not come about through a single focus on the personal loss of the victim, or the suffering of their family. However, where victim sentiment is relevant to the broader exploration of the community's reaction to the offence, then impact evidence, either before the court in evidence or via a victim impact statement, may inform a variety of sentencing principles. In *Miller's* case, this included specific deterrence, albeit due to the nature of the chromosomal disease and other afflictions suffered by the accused, this was not an appropriate case for general deterrence. At the very least, *Miller* emphasises that a 'sentencing judge has never been prohibited from saying something about the circumstances of the victim of crime'.[70] In *Miller*, the court ruled that the sentencing judge is 'thereby not to be regarded as having allowed sympathy for the victim to loom so large that the sentencing discretion miscarried'.[71]

Rather than accepting a family victim impact statement under the guise of its consideration, Victorian law provides the basis for the modification of New South Wales law to a more informed and inclusive position in which the victim is not just tolerated as an unnecessary adjunct to sentencing law and practice, but is utilised as a valuable source of information for the purpose of a comprehensive assessment of the seriousness of an offence and the culpability of the offender. This culminates in a more inclusive and representative basis upon which the offender is sentenced, whilst minimising the grounds upon which a sentencing decision can be subject to appeal by removing from the law artificial distinctions which carry few benefits other than to remind the sentencing court of the need to construe the sentence of the offender in an objective, impartial way.

This position is further emphasised with reference to the Canadian experience. The Canadian *Criminal Code* s 722 allows for the introduction of a victim impact statement in all criminal cases, including homicides. The *Criminal Code* defines victim pursuant to s 722(4):

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69 *Ibid*, 354.

70 *Ibid*, 354-355.

71 *Ibid*, 355.

> s 722(4) For the purposes of this section and section 722.2, 'victim', in relation to an offence,
>
> (a) means a person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence; and
>
> (b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement referred to in subsection (1), includes the spouse or common-law partner or any relative of that person, anyone who has in law or fact the custody of that person or is responsible for the care or support of that person or any dependant of that person.

Section 722 thus expressly permits the introduction of victim impact evidence into sentencing proceedings where the victim has died as a result of the offence. The issues before the Canadian courts have tended to focus on the types of persons able to introduce victim impact statements pursuant to s 722(4)(b).[72] However, issues as to the extent to which family victims are able to impact on the sentence to be handed down in homicide cases has also been of issue. In the leading case of *R v Gabriel* (1999) 137 CCC (3d) 1,[73] Hill J of the Ontario Superior Court of Justice provides guidance on the point:

> Without, in any fashion, diminishing the significant contribution of victim impact statements to providing victims a voice in the criminal process, it must be remembered that a criminal trial, including the sentencing phase, is not a tripartite proceeding. A convicted offender has committed a crime - an act against society as a whole. It is the public interest, not a private interest, which is to be served in sentencing.[74]

His Honour goes on to examine the limitations of victim impact material and the issues upon which victims should not submit. His Honour indicates that these issues include, *inter alia*:

> Impact statements should describe 'the harm done to, or loss suffered by, the victim arising from the commission of the offence'. The statements

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[72] See, for example, see the comments of Strong J in *R. v Duffus* (2000) OJ 4850 (Ontario SCJ), where his Honour discusses the impacts of the 1999 amendment to s 722 of the *Criminal Code*, thus: 'In changing the definition of 'victim' in section 722(4)(a) from 'the person' to whom harm was done, to 'a person' to whom harm was done. Parliament changed the limiting nature of the definition to a more inclusive definition, from a narrow delineation to a wider more expansive definition. Parliament expanded victimization to include not only the direct victim, that is, the victim-recipient of the harm done but also the victim or victims directly affected by the commission of the offence'.

[73] The facts of the case are these. The defendant Gabriel was sentenced to 2 years less 1 day, pleading guilty to criminal negligence causing death. At sentencing, some 30-victim impact statements were received. Many of the statements contained submissions on the facts of the case, the character of the accused, and the punishment he deserved. The court held that only the contents of the victim impact statements that described the harm done to, or loss suffered by, the identifiable victims was admissible.

[74] *R v Gabriel* (1999) 137 CCC (3d) 1, 12.

> should not contain criticisms of the offender, assertions as to the facts of the offence, or recommendations as to the severity of punishment.
>
> Criticism of the offender tilts the adversary system and risks the appearance of revenge motivation...
>
> The Attorney General represents the public interest in the prosecution of crime.[75]

However, the issue of the extent to which a family impact statement can inform the court of harm, loss or trauma as considerations relevant to an objectively proportionate sentence mirror those considered in the New South Walesand Victoria cases, as above. Justice Hill indicates:

> In a case of a crime resulting in death, human experience, logic and common sense surely go some distance to presuming the existence of profound grief, loss and despair. It has been observed that 'the criminal law does not value one life over another' and that '[a] consideration of the measure of loss of a human life is not only a demeaning process but also leads to a potentially egregious weighing of the worth of an individual's life.'[76]

Despite this restricted approach, specifically the use of family statements in homicide cases as evidence relevant to sentence, the approach taken by the Canadian courts accords with that of Victoria under *Penn* and *Miller*, and more recently *Willis*. Justice Hill further suggests:

> A significant concern of the sentencing hearing is finding a disposition tailored to the individual offender in an effort to ensure long range protection of the public. As a consequence, much becomes known about the accused as a person. In this process, there is a danger of the victim being reduced to obscurity - an intolerable departure from respect for the personal integrity of the victim. The victim was a special and unique person as well - information revealing the individuality of the victim and the impact of the crime on the victim's survivors achieves a measure of balance in understanding the consequences of the crime in the context of the victim's personal circumstances, or those of survivors.
>
> The victim impact statement is not, however, the exclusive answer to the civilized treatment of victims within the criminal process. [77]

What has emerged in the more recent cases in Canada is a trend to view more restrictively the information put forward by family victims. Any needless criticism of the offender, or suggestion as to the appropriate sentence the offender ought to receive, will be excluded. Likewise, where numerous statements are adduced, caution will be taken so as not to tend towards a more favourable view of the deceased than ought otherwise be

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75 *Ibid*, 15.

76 *Ibid*, 19.

77 *Ibid*, 11-12.

taken. In a recent case in the Ontario Superior Court of Justice, *R v McDonough and McClatchey* [2006] CanLII 18369, some 19 victim impact statements were adduced at sentencing. In this matter, Dunro J ruled that little could be gained by paying regard to numerous statements that provide a multiplicity of perspectives on the victim, giving the impression that the deceased was widely valued, or will be sorely missed. His Honour further states:

> [I]t would be wrong to conclude that the sentence in this case should be more severe than another second degree murder case, where there are 4 or 5 statements filed and here there are 19. Indeed, the Court of Appeal has held that Victim Impact Statements do not justify double punishment - once for the crime against society, and again to counterbalance the harm done to the victims.[78]

The need to hand down a sentence which is proportionate to the seriousness of the offence thus seeks to include, albeit in a limited way, family perspectives on the loss suffered as a result of the death of the victim. In accordance with the arguments put forward for the modification of New South Wales law, in particular the modification of the *Previtera* rule limiting family evidence as prejudicial to a determination of objective seriousness, Canadian law provides further evidence that a sound legal basis exists to include family perspectives in homicide cases. As emphasised by the Canadian approach, there is need to adhere to the principles of proportionality in order to construe a sentence objectively. While sentencing is not a tripartite process expressly inclusive of the victim, or more specifically their subjective desires, it is a process manifestly concerned with the consideration of various issues in order to bring about a sentence that represents a balance of, at times, competing objectives and interests. Family perspectives are relevant in homicide cases in so far as they reflect or affirm community sentiment. Such evidence is particularly relevant where facts in issue call for the application of principles in which the attitude of the community must be ascertained in order to bring about a fair, proportionate sentence. Such is the need with general deterrence. It is here where family impact evidence will be most useful. Otherwise, a court should be free to inform itself of the harm occasioned by the offence so long as it does not encroach upon the principle that one life is more valued than another. This is the issue with s 3A(g) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) as indicated in *Berg*.

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78 *R v McDonough and McClatchey* [2006] CanLII 18369, [19].

New South Wales: A Need for Legislative Change?

Strong support exists for the retention of the law under *Previtera*. Following the recommendations of the NSWLRC, *Previtera* endorses the view that the statutory scheme for the tendering of victim impact statements under the then *Criminal Procedure Act 1986* (NSW) s 23C(3) should be repealed, favouring a more restricted approach whereby such statements are only available for primary victims or witnesses of a violent offence. However, *Previtera* does not seek to place an absolute bar against reference to victim impact statements in homicide cases. *Previtera* only seeks to prohibit victim impact statements which speak of the harm occasioned to the family of the victim personally, due to their specific loss. It only precludes comments which seek to demonstrate how awful the loss of the victim has actually been for individual family members. It is this which Hunt CJ objects to, emphasising the need to maintain an objective standard. Various members of the judiciary support such a stance on the use of victim impact statements in homicide cases.

However, the expanded reasons for precluding such considerations on sentence as provided by recommendation 3 of the NSWLRC's report on sentencing limit the potential relevance of victim impact statements in homicide cases to the following:

> In homicide cases, victim impact statements could only amount to:
>
> 1) an attempt to persuade the court to impose a harsher sentence on the accused on the basis that, in some way, the death of a person who was, say, young and surrounded by a loving family and friends is more serious than, say, the death of a person who was alone, unhappy or elderly;
> 2) or the provision of a forum for the victim's family and friends to assist in their healing processes.[79]

However, this article has demonstrated, through an assessment of the principle which has been readily cited as justifying the prohibition, that room exists for the consideration of the views of family members in aid of informing the community standard held as a key factor of the principle of objective proportionality in sentencing. To argue against the inclusion of the views of family members is a nearsighted view of the discretion which a sentencing court must properly exercise. This article fully endorses the need to objectively assess an offence and the culpability of an offender in order to reach a fair and just sentence. However, to expect that by mere reference to the views of family members a sentencing decision will become tainted with unacceptable private views, validating the life lost as somehow greater or more valuable than another, removes

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[79] New South Wales Law Reform Commission, above, n 22, [2.22]. Footnotes omitted.

from the sentencing process a key discretion to which all victims are entitled.

This entitlement includes the fact that all victims, family or otherwise, form an important part of the social fabric culminating in community standards. Any victim impact statement which contains 'exaggerated, irrelevant or simply prejudicial' statements which may unfairly influence a sentencing outcome would continue to be excludable pursuant to the court's discretion under the current provisions.[80] It is through the exercise of a court's discretion that competing interests, including principles of sentencing and those of the victim and community, may be brought into balance.

The criticisms of s 28(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) generally go toward maintaining the objective standard of sentencing as a reflection of the competing demands of sentencing discretion. As argued, the limitations placed on s 28(3) are only significantly prohibitive when the principle of objective proportionality is interpreted exclusively within a public-private dichotomy. The objectifying of victim evidence has been criticised on this basis as it normalises victim harm, removing from the victim's version of events their characterisation of harm in favour of a clinical retelling of the offence which typifies its impacts.[81] Thus, by realising that private views, such as those of family victims, may be able to better inform or exist along side those views prevalent in society, a sentencing court may be able to overcome the bar placed on victim impact statements by the *Previtera* rule. This, however, would require recognition from the NSWCCA, in a reconsideration of the leading authorities on victim impact statements identified herein.

Overall, it is strongly arguable that there is no specific need to reconsider s 28(3) on the basis of the criticism of it by Hunt CJ in *Previtera*. What is required is a review of the terms of reference in *Previtera* so that a balance can be drawn between s 3A(g) and s 28(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), enabling the consideration of family views in line with the limitations placed on objective proportionality in *Veen [No 2]*. Chief Justice Spigelman proposes such a review although whether this occurs will depend on the connection made between the pressing needs of family victims and the degree to which the NSWCCA views those needs as informing the seriousness of the offence

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80 New South Wales Law Reform Commission, above, n 22, [2.26].

81 Edna Erez and Linda Rogers, 'Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals' (1999) 39 *British Journal of Criminology* 2, 228, 234.

and the culpability of the offender from the perspective of the community. Specifically, the court will need to locate the needs of family victims as relevant to a broader objective analysis of the offence, rather than restricting such views to the constitution of personal harm, which as *Previtera* makes clear, is largely already known to the court in homicide cases.