Is Three Really a Crowd? Thoughts About Victim Impact Statements and New Zealand's Revamped Sentencing Regime

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For lawyers immersed in the daily grind of New Zealand criminal justice, there is rarely time to dwell upon the foundational principles that drive the process forward. Before long, laws and practices that once might have seemed complex or peculiar simply become part of the everyday scenery. The same cannot be said for the ordinary member of the public, however. It is frequently difficult, for example, for observers to understand that justice is occasionally achieved by acquitting wrongdoers where due process requirements have been ignored by the state. Similarly, non-lawyers are often confused about the role of victims in the criminal process. Laypeople tend to sympathise with victims and any suggestion that victims lack a critical role in the prosecution of crime would be dismissed immediately as bizarre. Nonetheless, as every lawyer is acutely aware, this is exactly the position that victims of crime are actually in. Although the people directly harmed by criminal behaviour are often required in some capacity in order for a charge to move forward, they are never the central focus of the ultimate inquiry.

The reason for this stems from two closely associated features of common law criminal justice: the adversarial process and the decision to treat crime as a harm against the state rather than the individual. The adversarial process confines criminal prosecutions to a "contest[1]" between the prosecution, representing the interests of the wider public, and the defence, representing the interests of the accused, while a third party, the judge, acts as an impartial arbiter. Contrary to the expectation and belief of many, the victim is not a party to criminal proceedings, and the prosecution does not directly represent their interests. As Professor David Paciocco has bluntly noted, "[t]he victim has no place at the prosecutor's table. The lawyer who prosecutes the case, the Crown attorney, is not the victim's lawyer".[2]

This exclusion of the victim was no historical accident, but emerged through a deliberate choice to treat crime as an offence against the state rather than against a particular victim. A central feature of New Zealand justice since a formal structure for regulating criminal misconduct first emerged, this notion rests on the principle that a crime affects the entire community, and as such, it is the task of the state to condemn and punish that offence on the community's behalf.[3] While the victim may

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[1] *R v Ratten* (1974) 4 ALR 93, 99 (HC): "Under our law a criminal trial is not, and does not purport to be, an examination and assessment of all the information and evidence that exists, bearing on the question of guilt or innocence. It is a trial, not an inquisition: a trial in which the protagonists are the Crown on the one hand and the accused on the other…. The judge is to take no part in that contest…."

[2] Paciocco *Getting Away With Murder: The Canadian Criminal Justice System* (1999) 355.

[3] Law Commission *Criminal Prosecution* (2000) 5: "The State has traditionally assumed the responsibility for investigating and prosecuting all reported crime on behalf of society generally. The role of victims is limited to that of a witness and the victims are to a large extent marginalised by the process". See also: Paciocco, above note 2, at 359: "Where conduct is criminal, it poses a public danger, and it is not up to the victim either to punish or to forgive. In the interests of both public peace and public protection, that role falls to the state".

be the individual most directly and personally affected by the crime, their proximity to the events means that they are not seen as capable of objectively prosecuting the accused.[4] Were the victim allowed to participate in a meaningful way, the fear is that the delicate balance of the adversarial system would disintegrate, compromising the core interests of the system in preserving due process and arriving at a correct and dispassionate resolution of the case.[5] As Garkawe explains:[6]

> … victims may disrupt the proper determination of these issues by being too motivated by their desire for revenge and retaliation for the harm inflicted upon them…. Revenge motives were seen as too arbitrary and severe, and thus more consistency in the prosecution and punishment of offenders could only be achieved through State control. Providing the victim with consideration is thus opposed on the basis of the proper functioning of the criminal justice system, particularly in respect of the civil liberties of accused persons.

As such, the victim's role in the criminal process has traditionally been limited to the reporting of crime, and – if required by the prosecution – to giving evidence at trial. The victim's particular interests – whatever they might be – are not really a concern for the criminal law, and the response to complaints about a victim's inability to obtain their own justice in this forum has been that victims must seek redress through the law of torts.[7]

Within the public interest framework that governs common law criminal justice, this is a logical enough response, for it restricts the scope of the penal process and allows for private remedial mechanisms to accommodate private interests. From the victim's perspective however, this response has never been that satisfying. As Stuart CJ stated in the Canadian decision of *R v Bullen*,[8] "[t]o engage a victim as a witness to secure a conviction in the interests of the state and then leave the victim to pursue their injuries in another process, in another court, raises questions of fairness and practicality". Separate proceedings – while sound in theory – are unwieldy and

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[4] Other rationales for this include the possible disinterest of a victim in prosecuting the offender, the costs involved in a criminal trial, and the need to maintain consistent standards in trying and sentencing an offender. These are discussed in more detail, *infra*.

[5] See for example, Stuart "Charter Protection Against Law and Order, Victims' Rights and Equality Rhetoric" in Cameron (ed) *The Charter's Impact on the Criminal Justice System* (1996) 327, 335: "A criminal trial is about the just punishment of the accused, not about personal redress for victims…. It seems clear that a general right of representation of victims at trial, even on the determination of guilt, would hopelessly burden and confuse an already overtaxed and underresourced criminal justice system".

[6] Garkawe "The Role of the Victim During Criminal Court Proceedings" (1994) UNSW Law Journal 595, 600. See also *R v O'Connor* (1993) 22 CR (4th) 273, 282 (BCCA): " The personal 'interest' which [victims] must have in establishing the truth of their allegations involves them so closely in the merits of the case as to make it impossible to expect that they will be able to deal with the matter before the court in a detached manner".

[7] See Paciocco, above note 2, 364: "[T]he criminal trial is not the victim's day in court. It is the people's day in court. The victim's day in court occurs…when she sues the accused for damages for injuries sustained". See also *R v Coelho* (1995) 41 CR (4th) 324, 330 (BCSC), "The contest in criminal proceedings is between the state and the accused… [T]he keen personal interest of a victim must be pursued through other lawful forums, such as the civil process".

[8] (2001) 48 CR (5th) 110, (Yuk. Terr. Ct). Similarly, Garkawe argues that "…victims have specific interests in criminal court proceedings that need to be considered. Their rights outside the criminal justice system are not sufficient to satisfy these interests. Unless they are given a role in court proceedings, these interests are likely to be neglected". Garkawe, above note 6, 601.

usually ineffective, imposing excessive costs for the victim in terms of time, money, and emotional strain. Furthermore, tort remedies cannot always satisfy what the victim wants most, which is often the opportunity to have input into the sentencing of the offender. [9]

Exclusion from the criminal process has other costs as well. Recent studies confirm that the adversarial focus of criminal trials alienates many victims of crime, a marginalisation that can effectively "revictimise' an individual who is already emotionally and sometimes physically scarred.[10] Rather than empowering and assisting the victim to reach closure, the court system implicitly tells the victim that the harm they suffered and the pain they felt is not what the proceeding is about. The victim feels forgotten and betrayed by a system that punishes on the basis of the harm constituting a wrong against the state rather than against the individual who was personally affected by the offence. Whether or not this exclusion is sensible as a theoretical matter, the logical rationale provides little comfort to the people who feel the brunt of the pain caused by crime. As Paciocco notes:[11]

> Among the many mysterious notions in the criminal law, this is one of the most difficult to sell. Try convincing crime victims that the crime was against the state, not against them…. Victims are the ones whose blood has been shed, whose property has been taken, or whose dignity has been left in tatters, and the Queen is unlikely even to know about it.

The inability of victims to understand this notion means that at the end of the criminal process, they are often left bewildered and feeling as though "the system has not really 'heard' them and that offenders have not been made to 'take responsibility' for their crimes".[12] In other words, there is a "…disconnect somewhere between victims' perceptions of justice and what the courts ultimately accomplish".[13] This 'disconnect' creates great tension in the relationship between the common law criminal justice system and victims of crime. On the one hand, the classic approach demands impartiality, objectivity, and fairness to the defendant, all achieved through the intervention of an effectively disinterested state mechanism. On the other, the imposition of this neutral body creates alienation and upset amongst the people most directly affected by crime by excluding them from a meaningful role in the prosecution of offenders.

For centuries, this disquiet was tacitly accepted as an unpleasant but necessary by-product of adversarial justice, but a growing number of protest groups, politicians and academics now feel it can no longer be ignored, believing there is good reason for victims to be vindicated, healed, compensated and restored to the extent that is

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[9] For example, Roach notes that civil litigation is often an unsatisfactory forum for victims to seek redress, because "…many victims were more interested in public recognition of the wrong than in the money". Roach *Due Process and Victims' Rights* (1999) 301.

[10] The concept of revictimisation, in which the victim is violated a second time by the justice system when their interests are ignored, is a common theme in the academic literature on victims' issues. See, eg, Waller "Victims v Regina v Wrongdoer: Justice" (1985) 8 Canadian Community Law J 1, 3; Ellison "Rape and the Adversarial Culture of the Courtroom" in Childs and Ellison (eds.), *Feminist Perspectives on Evidence* 39, 40, 56.

[11] Paciocco, above note 2, 355.

[12] Ross "Victims and Criminal Justice: Exploring the Disconnect" [2002] 46 Crim LQ 483, 483.

[13] Ibid.

possible by the criminal justice system. Supporters of this line of thought contend that it is not simply a matter of being sympathetic to victims, but the recognition that ignoring these interests will have negative implications for society.[14] If victims feel marginalised or let down by the system, they are less likely to have faith in it, a sentiment which could erode the legitimacy of criminal justice in the wider community. In *R v Bullen*, Stuart CJ observed that "[v]ictims' concerns, when denied expression in the court, do not just fade away. The voices shut down in court are intensified in homes, in community gatherings and in the media".[15] In New Zealand this dissatisfaction is evident by the rise of groups like the Sensible Sentencing Trust, whose membership is extremely vocal in its criticism of the current treatment of victims by the criminal justice system.[16] Calls for the better treatment of victims ring out frequently, with vows for change being especially popular after the conclusion of a major trial in which the victim was made to suffer in one way or another.[17]

Over the past two decades, New Zealand has acknowledged the disjuncture between the traditional rationales upon which the criminal justice system is founded and modern expectations of what the system should deliver, and attempted to address it through a series of legislative enactments allowing for greater victim participation. Statutes such as the Victim of Offences Act 1987, the Victims' Rights Act 2002, and the Sentencing Act 2002, are clear indications that Parliament appreciates the importance of victim interests. Two developments – both relating to the sentencing process – stand out in particular. The first enshrined the "interests of the victim" as a mandatory consideration to be taken into account in the sentencing of an offender.[18] The second provided a mechanism by which victims can outline the physical, emotional, or other effects suffered as a result of the crime, by way of a Victim Impact Statement (VIS).[19]

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[14] For example, victim dissatisfaction may undermine the criminal justice system, by resulting in a decreased willingness of victims to report crime or co-operate with officials. Garkawe, above note 6, 601. A number of studies now suggest that victim dissatisfaction with the criminal justice system is a major deterrent to reporting crime. See for example, Erez and Tontodonato "Victim Participation in Sentencing and Satisfaction With Justice" (1992) 9 Justice Quarterly 393, 394; Kidd and Chayet "Why Do Victims Fail to Report? The Psychology of Criminal Victimization" (1984) 40 Journal of Social Issues 39; Shapland, Willmore and Duff *The Victim in the Criminal Justice System* (1985).

[15] (2001) 48 CR (5th) 110, 119 (Yuk. Terr. Ct). Sumner also emphasises this: "There is little doubt that the community demands justice for victims of crime. To the extent that the community does not see this being exhibited by police, courts and other agencies then support for a system of law enforcement is weakened". Sumner "Victim Participation in the Criminal Justice System" (1987) 20 ANZJ Crim 195, 197. See also Ellison above note 10, and the studies cited therein.

[16] See Sensible Sentencing Trust, http://www.safe-nz.org.nz. See also O'Brien *Shattered Dreams: Families of New Zealand Murder Victims Speak Out* (1996); Alexander *Justice With Both Eyes Open* (2004).

[17] The most recent example comes from Parliament's Justice and Electoral Committee that has launched an inquiry to examine "the place of, and outcomes for, victims of crime and their families in the criminal justice system", an inquiry that was launched in the wake of a highly publicized rape case. See: http://www.clerk.parliament.govt.nz/Programme/Committees/PressReleases/05may06.htm.

[18] Section 8(f) of the Sentencing Act 2002.

[19] Sections 17-21 of the Victims' Rights Act 2002. Prior to 2002, victims had the ability to give victim impact statements under the Victim of Offences Act 1987, but judges did not have to consider the statements. The language of the prior legislation was purely permissive in nature, a matter that was rectified by the Victims Rights Act 2002, which makes judicial consideration of victim impact statements mandatory.

Both of these changes – which we shall discuss in greater detail – represent significant steps away from the classic model of adversarial criminal justice, as they seek to invigorate the ability of victims to have a meaningful role in the process of sentencing offenders who caused them harm. Or at least that *seems* to be their purpose. Notwithstanding Parliament's intentions, these new mechanisms still have to be implemented in the traditional hall of criminal justice – the courts – where old habits die hard, and where the two-party model and the strong desire to retain proportionality in sentencing inhibit the use of VIS. The process of incorporating victim interests into the system remains very much a work in progress, and not surprisingly, the integration has caused difficulties. For the most part, the judges and lawyers who run the system have reacted by subverting VIS, forcing them to comply with traditional justice goals, muting the impact of this new tool and reducing the benefits it was intended to provide.

Given Parliament's desire to incorporate victim interests into the sentencing process, the question is no longer *whether* victims should be allowed to participate, but rather, what the nature and scope of their role should be. In order to provide insight regarding this question, this article will first examine the underlying purposes of the criminal justice system, including the historical justifications for excluding victims. We will then take a deeper look at the legislative changes, with particular focus upon the underlying aims that Parliament sought to achieve through these enactments. Following this we will take a critical look at how victim rights legislation has been implemented, and examine the two competing models that have emerged. The first, labelled the 'information' model, limits the use of VIS to traditional criminal justice goals. The second, the 'victim satisfaction' model, has an entirely different focus, allowing the use of VIS to achieve ends that previously had no place in the process. In our view, the rise of two distinct approaches stem from divergent views about what VIS were designed to achieve, and more importantly, from disagreement about what types of victim participation can be tolerated without sacrificing traditional justice aims. It is our contention that restricting the participation of the victim as the information model has done may well be unnecessary, as it risks undermining the purposes for which the new legislation was enacted and limiting the benefits it intended to achieve. Moreover, while there are certainly risks to a system that focuses *exclusively* on the restorative goals emphasized by the use of VIS, it is not clear that advancing victim satisfaction as a secondary purpose necessarily inhibits the established aims of the sentencing process.

Two's Company: How the Traditional Goals of the Criminal Justice System Led to Exclusion of Victims

It is not at all surprising that victims who have pressed for greater recognition of their interests within the criminal justice system have encountered tremendous resistance as the practice of marginalising them is deeply rooted. In order to understand how this came to be, it is necessary to look briefly at the historical role that victims played in the criminal process, and the reasons why they were first considered a danger to the developing criminal justice system.

In ancient times – and at least until the end of the 11th Century, victims were critical players in the criminal trial process.[20] Since there was no centralised state prosecution apparatus in these early times[21], local communities undertook the responsibility for regulating crime prevention and the enforcement of sanctions.[22] If property was damaged, it was the community that ensured that the victim was adequately compensated, and in the event of more serious offences, it was the community that declared the wrongdoer to be an "outlaw", thereby stripping them of their membership within the community, and its associated protection.[23] This system was clearly focused on the victim's interest in achieving satisfaction for the harm they had suffered, and the victim had an essentially unregulated power to determine the adequacy of the punishment.[24]

While such 'eye for an eye' retribution may have been satisfying for a victim's family, it had significant drawbacks for the wider community. The system allowed the victim or their family to take the law into their own hands, but rather than leading to a resolution of the situation, it was liable to result in larger vendettas or blood feuds between clans or families.[25] It also left the choice of whether to seek retribution entirely in the hands of the victim, with the consequence that prosecution would depend upon whether such a victim had the means to pursue it.[26] Needless to say, a system of retribution that created such disorder inhibited the capacity of the governing monarch to effectively rule and eventually came to be viewed as undesirable. To rectify the problem, the King gradually began to intervene in the criminal process on a larger scale, not to avenge any particular harm suffered by the victim, but to protect his own peace.[27] Initially, the King's role was restricted to regulating these potentially disruptive feuds and providing some sort of mechanism to ensure proportionality in punishing an offender, but gradually, the victim's role in the proceeding was superseded by the Crown entirely.

Unsurprisingly, the goals and purposes of the criminal system likewise adapted to satisfy the interests of the state as opposed to those of the victim. Whereas the old system focused on the wrong committed against the individual victim, the new system viewed criminal behaviour as an offence against the state, and the offender was punished in order to protect society from future harm and as 'payment' for the disruption to the peace. Victims were not only deemed irrelevant to the core aims of the system, but it was feared that they could actually endanger the system itself, by disrupting public order, jeopardising due process and fairness to the accused, and skewing the focus of the criminal justice system. As Hagan has observed, one explanation for the development of the public form of criminal justice is the notion that:

> [V]ictims in particular represent a potential source of substantive irrationality in the legal process. The personal, often emotional, involvement of individual victims in

[20] Tobolowsky *Crime Victim Rights and Remedies* (2001) 5. See also Hagan *Victims Before the Law* (1983) 9.
[21] Strang *Repair or Revenge: Victims and Restorative Justice* (2002) 3.
[22] See Hagan, above note 20, 8.
[23] A.K.R Kiralfy *Potter's Historical Introduction to English Law and Its Institutions* (1958) 347.
[24] Paciocco, above note 2, 356; Hagan, above note 20, 8.
[25] Paciocco, above note 2, 356.
[26] Ibid, 352.
[27] Ibid, 358; Kiralfy, above note 23, 351.

> the crime experience can generate very particularlised interests in the outcome of cases; and these individual interests may have little to do with the public interest.[28]

Victims were perceived as embodying characteristics that were diametrically opposed to those valued by the system – they had the potential to be subjective, emotional and vengeful rather than objective, disinterested and fair.

It is easy to see why a modern day practitioner would be wary of victim participation using the historic victim-oriented system as a reference point. Under this system, modern core values of our criminal justice system such as due process and fairness to the accused were not relevant. Once an accused was found guilty, the rights that the system afforded were one-sided. The victim had the right to seek retribution, but the wrongdoer had no protection, and there was no real means of regulating the severity of the punishment dispensed. By denying offenders any measure of due process, the criminal justice system was highly unregulated and skewed in favour of the victim's interests. In this sort of system, it is hardly unreasonable to suggest that the victim's physical and emotional proximity to the harm – combined with the enormous power they possessed to punish – posed serious risks for wrongdoers.

Despite the significant evolution of the criminal process over the past few centuries, the idea of a victim playing a role in punishing the offender is still perceived as threatening the effective functioning of the system. The fear is that without a disinterested and impartial party taking responsibility for the prosecution of offenders, retribution would be meted out by vigilante victims motivated by vengeance and blood lust.[29] Not only is this prospect disturbing from a public interest perspective, but also from a due process standpoint. If justice is to be done, an accused person must be treated fairly. Even where found guilty of an offence, the offender is still entitled to certain rights and protections and to be punished in a manner that reflects the societal nature of the process, reflected in the core aim of achieving proportionality in sentencing – that any punishment handed down to an offender must be proportionate to the wrong committed.[30] As Woodhouse P held in *R v Puru*,[31] "[the] judicial obligation is to ensure that the punishment [the Courts] impose in the name of the community is itself a civilised reaction, determined not on impulse or emotion but in terms of justice and deliberation".[32]

Further, with the historical focus purely on the wrong suffered by the victim, the moral culpability of the offender was irrelevant. It was sufficient to show that the victim had suffered harm, that the accused caused it, and that the victim needed to be compensated. In other words, this system focused exclusively on the actus reus of an offence, without having regard to the mens rea – the intention of the offender, a necessary component in determining moral fault for a crime. In our criminal justice system, the moral denunciation of criminal behaviour is critical – "[s]ociety is entitled

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[28] Hagan, above note 20, 3.
[29] Paciocco, above note 2, 371; Gardner "Crime: in Proportion and in Perspective" in Ashworth and Wasik (eds) *Fundamentals of Sentencing Theory* (1998) 31. Paciocco also notes that another possible motivation for preventing victims from taking the law into their own hands is to shield them from potential guilt associated with taking responsibility for the punishment of offenders.
[30] Sentencing Act 2002, s8.
[31] [1984] 1 NZLR 248 (CA).
[32] Ibid at 249.

to exact a severe penalty from the offender so as to mark its condemnation of his conduct".[33] Paciocco argues that this concept of moral fault "…allows us to distinguish the clumsy from the evil, the insane from the sane, the acts of children from those of adults, manslaughter from murder".[34] Such distinctions are not important if the system is completely orientated around compensating the victim, but if the focus is more on punishing socially unacceptable behaviour, the moral culpability of an accused person is central to the inquiry.

These fears provide legitimate reasons to be cautious when involving victims in the criminal process. It is true that fairness and due process to the accused must not be compromised, and that the interests of an individual victim should not be allowed to override the wider public good. A system in which the victim had complete control over prosecution or sentencing would indeed raise major concerns as to whether "justice" was being served. But these aims of the criminal justice system do not necessarily provide a compelling justification for the total exclusion of victims from the system. The fears outlined above embody a worst-case scenario in which victims are the sole or main participants in the system and are motivated by an overwhelming desire to avenge their suffering by causing maximum harm to the offender. Most people would agree that victims should not be the sole or primary participant in the criminal process, but this does not preclude them from having a role, or indeed a meaningful role, in the system. It does not have to be a zero sum game in which either the system is dominated by the defence and the state, or by the victim – there is room to accommodate the interests of the victim as well as the interests of the offender and the wider public.

Nonetheless, the criminal justice system reacted to the fears of victim participation by marginalising them entirely. A two-party system was created in which the prosecution focused not on the suffering of the victim, but on the adequacy of evidence, compliance with procedure, the nature of the wrong committed, and its impact on the wider public. The prosecutor is the only party permitted to address the wrong committed by the offender, and he or she must remain dispassionate and essentially impartial. It is well known that a prosecutor "should not act or think in terms of winning or losing"[35], and must be committed most of all to defending the 'public' interest, ensuring that "justice is done as between the subject and the State".[36]

As a consequence, at common law the criminal justice system is entitled to regard the victim as a complete outsider. As Lesage ACJO bluntly noted in *R v Bernardo*[37], "there is no foundation, in statute or at common law, for the proposition that a victim or the families of a victim must be granted intervenor status in the criminal trial". Even once guilt is established, "a victim is not directly represented and has no more right to be heard in the sentencing process [than he or she does] in

[33] *R v Puru* [1984] 1 NZLR 248, 254 (CA) per Woodhouse P.
[34] Paciocco, above note 2, 361.
[35] *R v Hodges*, CA 435/02, 19 August 2003, para. 21.
[36] *R v Lucas* [1973] VR 693, 705 (Sup Ct). In terms of sentencing, see *R v Tkachuk* (2001) 159 CCC (3d) 434, 441 (Alta CA): "Society's interest in the imposition of a fit sentence… must override the compassionate or vengeful views of the victim. A sentencing regime cannot administer justice or maintain public confidence if it allows itself to be guided by the wishes of a victim to impose either a harsh or a lenient sentence".
[37] (1995) 38 CR (4th) 229, 236 (Ont Gen Div).

the trial".[38] For victims, the result was that their interests would only be represented when they happened to coincide with the interests that the system gave priority to – those of the defendant or the State.

Recognising the Plight of Victims - Victim Rights Legislation

Although the common law position rested on a cogent philosophical foundation, its blunt tendency to consistently force victims' interests to the sideline – angering victims in the process – made reform somewhat inevitable. As one commentator has noted, "the victims' cause was so just, and their condition so palpably unfair that it now appears extraordinary that their neglect could have continued for so long".[39]

Nonetheless, it was not until the latter half of the 20th Century that the plight of crime victims began to receive serious attention. Early interest focussed on the financial effects of crime on victims and the failure of the state to adequately develop schemes to compensate victims for their losses,[40] something that prompted many countries, including New Zealand, to implement schemes designed to compensate crime victims.[41] Still, important as these schemes were, they tended to incorporate victims' interests into the welfare system, and it was not until the last few decades of the 20th Century that attention focused more directly on the role of victims in the criminal process.[42]

The emergence of a cohesive movement focused on victims' rights first occurred in the late 1970s, but as Strang notes, "[i]t is difficult to disentangle the elements that resulted in the move over the past twenty-five years towards greater recognition of the importance of victims in the justice system".[43] Indeed, a number of somewhat unrelated causes all prompted greater concern for victims. The women's movement, for example, was a major impetus, with supporters lobbying for greater support for victims of rape and domestic violence.[44]

Surging crime rates from the 1960s onwards also played an important part in the developing victims' movement, as this trend helped to place issues of law and order firmly on the political agenda.[45] As a result, many governments around the world conducted crime surveys[46] that highlighted the incidence of victimization, and also looked at victims' experiences with, and attitudes toward the criminal justice system.[47] Strang notes that these surveys "…gave insight into the low regard for the

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[38] *R v P* (1992) 111 ALR 541, 545 (Fed Ct). See also *Re Regina and Antler* (1982) 69 CCC (2d) 480 (BCSC).
[39] Strang, above note 21, 7.
[40] Fry *Arms of Law* (1951).
[41] New Zealand led the world in implementing such a scheme with the Criminal Injuries Compensation Act 1963, followed by similar legislation in Australia and the United Kingdom. Sumner "Victim Participation in the Criminal Justice System" (1987) 20 ANZJ Crim. 195 at 197.
[42] Strang, above note 21, 16.
[43] Ibid, 7.
[44] Strang, above note 21, 27.
[45] Ibid.
[46] Block "A Comparison of National Crime Surveys" in Fattah (ed) *The Plight of Crime Victims in Modern Society* (1989) 3.
[47] Ibid, 4.

justice system felt by crime victims, many of whom turned out to be reluctant to report even quite serious crime and extremely unwilling to act as prosecution witnesses".[48] For example, a 1977 report to the United States Department of Justice stated that victims were "[o]ften forgotten in the criminal justice system… [and] frequently express negative attitudes to the existing criminal justice system".[49]

Similarly, a 1985 British study found that "[v]ictims felt that they should be considered as having a proper role in the system and interest in the case, a feeling fuelled by the perceived inequity in the amount of help they gave the system, compared to what the system gave them".[50] Victims' feelings of dissatisfaction with their lack of a meaningful role in the criminal justice system were reflected in the continuing growth of the victims' rights movement, which by the 1980s, had become both widespread and mainstream.[51]

The United Nations also played a key role in highlighting the needs of victims in the criminal justice system. In 1985, the General Assembly issued a declaration outlining the basic principles that governments should implement to accommodate the interests of victims into the criminal system.[52] The General Assembly noted that "…millions of people throughout the world suffer harm as a result of crime… and that the rights of victims have not been adequately recognized".[53] The declaration also stated that victims are "…entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered".[54] In essence, what was being called for was a restructuring of criminal justice priorities, and a recognition that victims must be allowed some form of participation in the criminal justice system. In particular, this participation should be facilitated by:

> [a]llowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.[55]

Without doubt, the United Nations Declaration was an "…important statement of principles agreed to by the international community for incorporation in domestic law and practice", [56] one which spurred legislatures around the world to provide greater recognition for the needs of victims in the criminal system.[57] New Zealand

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[48] Strang, above note 21, 28.
[49] Knudten et al *Victims and Witnesses: Their Experiences with Crime and the Criminal Justice System* (1977) cited in Shapland et al *Victims in the Criminal Justice System* (1985) 3.
[50] Shapland, above note 14, 95.
[51] Strang, above note 21, 28.
[52] United Nations *Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985).
[53] Ibid.
[54] Ibid.
[55] Ibid, Principle 6(b).
[56] Sumner, above note 15, 200.
[57] See, eg. Declaration of Rights for Victims of Crime 1985 (South Australia), and in particular principle 14, which gave the victim a right to make known to a sentencing court the full effects of the crime upon him or her. Canada similarly amended its Criminal Code in 1988 (Bill C-89) to provide for better treatment of victims in the sentencing process, and gave statutory recognition for the use of VIS. See Roberts "Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings" [2003] 47 Crim LQ 363.

acted as well. Although Parliament had made a few earlier moves designed to respond to some victim critiques of the criminal justice system, most notably by giving criminal courts a specific power to provide reparation to victims,[58] the U.N. declaration inspired more sweeping initiatives.

The first of these was a relatively tepid piece of legislation entitled the Victims of Offence Act 1987.[59] While revolutionary compared to what existed previously, the Act offered victims little of concrete substance, and most importantly, it provided no enforceable rights.[60] Instead, the Act simply outlined a number of principles designed to guide practitioners of the criminal system in their treatment of victims. Reflective of the United Nations Declaration, the Act provided that persons dealing with victims should treat them with courtesy and compassion,[61] that victims should be entitled to access to services,[62] and that they should be informed about the progress of the proceedings against the offender.[63]

The most significant aspect of the new legislation was Parliament's decision to give victims a limited input into the sentencing process through a VIS.[64] Section 8 of the Act provided that arrangements "should" be made so that the Judge could be informed of the physical and emotional harm, property damage or loss, and any other effects suffered by the victim as a result of the offence.[65] It provided that this information should be given either by way of an oral statement from the Prosecutor, or by a written statement from the victim.[66]

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[58] Criminal Justice Act 1985, s11. Enactment of this legislation did little to change the status quo, however. While the judge had the power to make the order, the discretion to prepare an emotional harm or property damage report rested with the probation service, and in many cases, a report was not requested and therefore reparation was not awarded. The victim was not permitted to simply request reparation as a matter of sentence: Poole *Victims of Crime: Reform in the 1980s* (1989) 26-37.

[59] One other development is worthy of mention. In 1986, a private member's Bill entitled the Victim Rights Bill was introduced into Parliament. The Bill's author, Hon. J.K. McLay, declared that in the past, "…much more attention has been focused on the offender than on the victim of the crime… [and] in the process the victim has become the forgotten part of the criminal offending equation": 475 NZPD 5123 (22 October 1986). The Bill recommended measures that were quite radical at the time, including a clause mandating that the court ascertain information not only about the effects of the crime, but also the views of the victim regarding the offender and the appropriate sentence to be imposed: 475 NZPD 5125 (22 October 1986). The Bill was supplanted by the government's Victim of Offences Act described, *infra*.

[60] For the most part it is unsurprising that the Act was so vague in its wording giving the unprecedented nature of what Parliament was proposing. Although New Zealand society was waking up to the inequities suffered by victims in the criminal justice process, the fact that victims had been pushed to the fringes of the criminal justice system for so long, and the rationales demanding their exclusion were so well entrenched, meant that change would have to be gradual. While Parliament was becoming increasingly concerned about the marginalization of victims, the vague and hesitant wording of the Victims of Offences Act 1987 demonstrates that it was uncertain about how to deal with the problem, and there was concern about sailing off into uncharted waters without some measure of restraint. As Parliamentarian Phil Goff noted years later, "the Victims of Offences Act was a revolutionary piece of legislation, but it deliberately created discretionary rights until agencies and officials were sufficiently familiar with their obligations that they could be relied upon to carry them out": 580 NZPD 19646 (5 October 1999).

[61] Section 3 of the Victims of Offences Act 1987.

[62] Section 4 of the Victims of Offences Act 1987.

[63] Sections 5 and 6 of the Victims of Offences Act 1987.

[64] Section 8 of the Victims of Offences Act 1987.

[65] Section 8(1) of the Victims of Offences Act 1987.

[66] Section 8(2) of the Victims of Offences Act 1987.

While revolutionary in one sense, the Victims of Offences Act 1987 did little to alter the criminal justice landscape for victims. The major limitation was the fact that the Act was permissive rather than declaratory in nature. It failed to impose any responsibilities on prosecutors to actually gather a VIS, and did not mandate judges to accept them. Without any strong impetus to change, most courts simply refused to use the statements at all. In 1993, a report prepared for the Minister of Justice indicated that impact statements were have little effect in improving the experience for victims in the criminal justice process. The main reason was their infrequent use. A survey by a specially constituted Victims Task Force indicated that in the District Court – where the vast majority of criminal charges are tried – statements were prepared in a scant 6% of cases.[67]

Sensing the public's desire for greater change[68], Parliament went back to work, and in 2002 enacted two statutes designed to provide a more comprehensive adjustment to the criminal justice system. First came the Victims Rights Act 2002, legislation that transformed most of the principles contained in the Victims of Offences Act into enforceable rights, and went even further in many respects, specifically granting a number of rights to the victim in the sentencing process. Section 17 imposed a mandatory obligation upon the prosecution to take all reasonable efforts to obtain information from the victim about the effects suffered as a result of the offence, and the legislation provided detailed instructions about how a statement could be prepared. Most notably, the Act also granted victims the right to present statements in their own words, and even to present their VIS orally to the court if they desired.[69]

The Victims Rights Act was supplemented by a powerful piece of legislation – the Sentencing Act 2002 – that radically revamped New Zealand's sentencing procedures and also sought to improve the role of victims in the process. While the Criminal Justice Act 1985 had created a presumption in favour of reparation for victims of crime,[70] the Sentencing Act 2002 imposed an even stronger presumption in favour of reparation for any loss or damage, whether emotional, physical harm or relating to the loss of, or damage to, property.[71] More importantly, the Sentencing Act went so far as to recognise the interests of the victim as one of the four main

[67] Victims Task Force, *Towards Equality in Criminal Justice* (1993), 68. Compliance was more significant in the High Court, where reports were prepared in 49% of cases.

[68] In 1999, a Citizen's Initiated Referendum asked voters whether there should be a reform of the justice system placing greater emphasis on the needs of victims. The results were overwhelmingly in favour of reform, with 91.8 percent of voters answering that change was required. In a study looking at the various components of the referendum question, Gendall et al determined that voters most supported the component asking about greater emphasis on victims, with about 93% of those surveyed indicating their support for this. See Gendall et al "Respondent Understanding of the 1999 Referendum Question on a Reform of the New Zealand Justice System" (2002) 37 Australian Journal of Political Science 303, 307-8. The vague question posed by the referendum, and the usefulness of the response has been strongly criticized: see Roberts "Sentencing Reform in New Zealand", (2003) 36 Australia and New Zealand Journal of Criminology 249.

[69] Section 21(1) and (2)(b) of the Victims Rights Act 2002. Neither right is absolute. Oral presentation requires leave of the trial judge, and the prosecutor retains the ability to request that the information be presented in an alternative manner, where appropriate.

[70] Section 12 of the Criminal Justice Act 1985.

[71] Section 32 of the Sentencing Act 2002.

purposes of sentencing,[72] and stated that the court must take into account any information provided to the court concerning the effect of the offending on the victim.[73]

The history behind these enactments demonstrate that they were initiated as part of an attempt to revamp New Zealand criminal justice and make it more accommodating to the needs of victims. Indeed, the Victims Rights Act 2002 expressly states that its sole purpose is to "improve provisions for the treatment and rights of victims".[74] This short statement of purpose does not stand alone, however. Every legislative body that proposed, researched, campaigned for, or initiated the amendments made it clear that they were instituted with one major purpose in mind: to change the two-dimensional focus of the adversarial system by making the needs of victims a major concern for criminal justice.

In recommending the new legislation, for example, the Victims Task Force concluded that:

> [T]he Victim of Offences Act introduces radical change into the criminal justice system. It looks back over a thousand years to re-introduce the victim of a crime as a person with a special interest in the pursuit of justice, and deserving special acknowledgement for the experience they have had forced upon them.[75]

Politicians similarly trumpeted the philosophy upon which the legislation was premised, making clear that the new provisions were not merely cosmetic alterations. Tim Barnett, the Chair of the Justice and Electoral Committee for the Labour Party government which brought in the Victims Rights Act 2002, stated in his comments supporting the final revisions to the legislation that:

> By the time the committee finished considering the Bill, we recognized that it was, in the truest sense, a radical piece of law, that it went to the very roots of our justice system, and that it started to recognize in a proper way the role and the needs of victims.[76]

The legislation was so popular that it had the unanimous backing of every party in the House of Representatives. Nick Smith speaking for the opposition National Party made clear that:

> It is our view that [victims] have a right to a proper voice within the justice system – a voice at the time of sentencing and at the time of parole… Members of the Opposition are keen to ensure that we have victims' rights legislation in this country

[72] Section 3(d) of the Sentencing Act 2002 states that one of the purposes of the Act is to take into account the interests of victims of crime. This is emphasised further in Section 7, which states that the purposes for which a court may sentence an offender include "to hold the offender accountable for harm done to the victim and the community by the offending" (Section 7(1)(a)), "to provide for the interests of the victim of the offence" (Section(1)(c)) and to "provide reparation for harm done by the offending" (Section 7(1)(d)).
[73] Section 8(f) of the Sentencing Act 2002.
[74] Section 3 of the Victims Rights Act 2002.
[75] Victims Task Force Report, above note 67, 75.
[76] 603 NZPD 1318 (8 October 2002).

> that makes sure that all persons adversely affected by crime get a clearer and louder voice within our justice system.[77]

Marc Alexander, a United Future MP that was part of the governing coalition, also noted that:

> For much too long victims in our nation have been denied their rightful place – at the very heart of the criminal justice system. They have been deprived of the right to be heard and they have been starved of a legislative voice… Although no single bill can have the capacity to right the wrongs done to victims, this bill forms a solid basis for shifting the focus back to the hitherto under-represented interests of the victim… It is landmark legislation that rightly enshrines the focus so long denied to our most vulnerable… Victims will now be the focus of our judicial system, and at long last they will have a voice that must be heard.[78]

What these and other similar statements share in common is the desire to create legislation granting victims a real "voice". The 2002 changes to the New Zealand legal landscape make a number of conclusions inescapable. First, victim legislation was intended to cause a major shift in focus for criminal justice, ending the notion that only two interests need to be represented at the sentencing phase of a trial. Consequently, the interests of victims are a valid factor to be considered in sentencing, and it is impermissible to simply dismiss the victim's needs on the basis that criminal justice is something exclusively between the State and the accused. Finally, the legislation represents the importance of courts listening to victims, the recognition that their voice should be heard for its own sake as a way of acknowledging the harm caused to them, and the importance of alleviating that harm through the court process if at all possible.

The Bumpy Path: Integrating Victim Interests into Criminal Justice

As the preceding section demonstrates, the enactment of legislation providing for the interests of victims was designed to enhance the role of the victim in the court process as a means of increasing the potential for victims of crime to be satisfied with criminal justice outcomes. Nonetheless, creating a mechanism by which these goals can be advanced is only the first part of the solution. Enhancing victim satisfaction is only possible with the cooperation of judges and courtroom participants, a group of people steeped in the ideology of criminal justice being solely a matter between the State and the accused. In its final report to the Minister of Justice, the Victims Taskforce, sagely observed that the Victims of Offences Act 1987:

> [S]eeks to introduce changes into the criminal justice system. This, with the possible exception of the military culture, is the most rigid, entrenched and complex in our society. The criminal justice system is invested with enormous significance, moral weight, social authority and power over individuals. It is intrinsically conservative as it functions to preserve whatever is presently regarded as acceptable behaviour.[79]

It is difficult to dispute this statement. For centuries, the criminal justice system has operated on an adversarial model that treats criminality exclusively as a public wrong

[77] 603 NZPD 1317 (8 October 2002)..
[78] 603 NZPD 1320 (8 October 2002).
[79] Victims Task Force Report, above note 67, 75.

against the state, and that focuses upon proportionality as the primary focus of sentencing. Victim legislation attempts to partially reverse this approach by making the personal harm suffered by the victim a relevant aspect of the equation, and more significantly, asks the courts to recognize a new goal in sentencing: satisfying the victim's interests to the extent this is possible.

Implementation of this objective was complicated by the fact that early victim legislation, while notionally enacted to enhance the victim experience and allow victims to participate in the sentencing process, was silent on critical details, such as the purpose for which VIS should be prepared, when or by whom it was to be prepared, the form of the VIS, the role the victim should play in its preparation, or the impact it should have on sentencing.[80] Commentators were sceptical about this attempt to alter established procedure. Professor Geoff Hall, described the Victim of Offences Act 1987 as "…hasty and ill-considered legislation",[81] and was highly critical of the decision to rashly enact a measure with the potential to cause such a radical alteration to criminal justice, pointing out that the legislation was "…lacking in specificity… in the basic mechanics as to the implementation of the concept of victim participation in the sentencing process".[82]

Hall's comments were not unfamiliar, and reflected an understandable tension in the criminal justice community about the use of VIS in the sentencing process. The procedure was unprecedented and represented a philosophical shift that was simultaneously admired as a valiant step forward by victims' advocates and decried by defenders of a traditional style of criminal justice. The titles of two academic articles published at the height of the debate over the use of VIS internationally sum up the divide brilliantly. In her article "Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice"[83], Professor Edna Erez discussed how VIS could bring meaningful change to criminal justice, and usefully integrate victims into the process. In response, a quartet of authors condemned the procedure, with a candid headline expressing their displeasure with the tool: "Victim Impact Statements: Don't Work, Can't Work".[84]

The latter title aptly characterized – and still characterizes – the view of a large portion of the legal establishment. To these critics, VIS are primarily a political tool designed to appease a law and order climate and premised on a misunderstanding of what criminal justice is supposed to achieve.[85] The statements themselves tend to be generally irrelevant and can include prejudicial information.[86] They distract the

[80] Ibid.
[81] Ibid at 162.
[82] Hall "Victim Impact Statements: Sentencing on Thin Ice?" (1992) 15 New Zealand Universities Law Review 143 at 144. Hall's comment has considerable merit considering the paucity of commentary or discussion of the Act's provisions relating to victims in the House prior to enactment. See 480 NZPD 8633-8652 (30 April 1987); 482 NZPD 10239-10248 (7 July 1987); 10315-10342 (8 July 1987); 10413-10419 (14 July 1987) for discussion of the Bill. Most of the discussion deals with the first part of the Bill, rather than the section dealing with victims.
[83] [1999] Crim LR 545.
[84] Sanders, Hoyle, Morgan, Cape "Victim Impact Statements: Don't Work, Can't Work" [2001] Crim LR 447.
[85] Ashworth "Victim's Rights, Defendant's Rights and Criminal Procedure" in Crawford and Goodey (eds) *Integrating Victim Perspectives in Criminal Justice* (2000).
[86] Sanders et al., above note 84, 454-455.

sentencing court with information that does not bear on the public interest at stake, and they do not even make the victims feel better.[87] Moreover, by introducing a new interest into the sentencing process, they risk imposing sentences that are disproportionate to the seriousness of the offence.

One suspects that most of the New Zealand judiciary shared this perspective. Still, the new legislation posed a dilemma. Parliament had imposed victim participation on the courts, and judges had little choice but to accept it. Nonetheless, given the vague nature of the governing legislation, the courts did retain a great deal of leeway in *how* they accepted this new procedure, and their method of doing so was hardly enthusiastic. Although it seemed clear from the thrust of the legislation and Parliamentarians' many statements that the purpose of creating VIS was an attempt to integrate victim interests into sentence proceedings and an attempt to increase victim satisfaction by victims being "healed" through the process of speaking freely about their experience was anathema to judges. Instead of adopting such a radical approach, judges gravitated to a secondary purpose of VIS, one with which they were much more familiar: the need to provide better information regarding the harm caused by the offence. On this reasoning, VIS were tendered not to advance the cause of a third party to the proceedings, but rather, were provided for the benefits of the courts, constituting nothing more than a mechanism for transmitting useful information about victims to the judge, a process that serves existing sentencing goals. It has long been accepted that assessment of the harm caused by a crime is a relevant inquiry in sentencing, as evidence of specific impact relates to an assessment of moral culpability and blameworthiness.[88]

The decision to latch on to this information "model" of VIS, in which the process is designed to serve traditional sentence objectives, is visible from the very first New Zealand judgments involving VIS. Clearly uncomfortable with the notion of letting victims put their uncensored and emotional thoughts before the courts, judges emphasized that VIS could only be utilized to serve an existing purpose of sentencing. In *R v Haddon*[89], the Court of Appeal emphasized that VIS had a narrow scope. In order to be admitted, they:

> [M]ust be factual and relevant. Otherwise they are likely to hinder rather than help the sentencing judge in his task. And they may give rise to real concern that even unconsciously the judge may be affected by the error or irrelevancy.

In the subsequent decision of *R v Hopkirk*[90], the Court of Appeal took the opportunity to offer trenchant criticism of a VIS that made the mistake of alleging facts other than those for which the offender had been convicted, and "tendering advice to the sentencer in emotive language as to the correct attitude of the Court to the imposition of penalties for sexual offending". According to the Court of Appeal:

> That document was in clear breach of the language and spirit of the Victim of Offences Act 1987… The purpose of such a report is to inform the sentencer of the impact of the particular offence or offences for which sentence must be imposed on

[87] Ibid at 450-451.
[88] *Payne v Tennessee*, 501 US 808 (1991)
[89] (1990) 6 CRNZ 508 (CA). For similar commentary, see *R v F* (1989) 4 CRNZ 365 (HC).
[90] (1994) 12 CRNZ 216, 219 (CA).

> the particular victim, and it is important that the nature of the reporter's role be recognized.[91]

Haddon and *Hopkirk* – which have both been cited repeatedly by New Zealand courts - had a dramatic and immediate impact on the use of VIS in the sentencing process. Both decisions emphasized quite sternly that the primary purpose of VIS is to gather information that courts can use in sentencing offenders. Providing victims with a voice or trying to mitigate their sense of dissatisfaction that arose from being ostracized from the process – the purposes most often noted by proponents of the new law and by the legislation itself – became matters of secondary concern, at best.

It should be noted that there is nothing inherently wrong with VIS being utilized to provide useful information to judges in sentencing. Although questions still exist about the effectiveness of VIS in providing information of which judges are unaware on a widespread basis[92], many observers feel they can be useful. As Williams J remarked in *R v Piovia*,[93] the advent of VIS's "…shows what a major gap there was in the sentencing process in our criminal justice system before we had such reports. Judges sentenced people then without having the opportunity to see just how seriously the offending had affected the victims".[94] In some cases, VIS will also alert judges to consequential harm of which they would not otherwise have been aware. A good example of this occurred in *R v Barrett*[95], where a victim of sexual abuse at the hands of a family member told her family about the assault and was disbelieved. She was cast out of her home, and the VIS brought home the psychological harm she had suffered from this rejection, a harm that would not have come out at trial[96], and of a type that no trial judge would have instinctively been aware.

Still, the decision to latch on to "information" as the primary raison-d'être of VIS has led to a number of unpleasant consequences. To begin with, the rationale is somewhat at odds with the purpose of providing victims with their own voice in sentencing as a means of enhancing their satisfaction with the process. The courts are quite used to the idea of receiving information, but as the case excerpts above make clear, they do so under a limited adversarial paradigm. Information to be used in sentencing must be proven, and in that regard, it must be both relevant and reliable to ensure that the accused is not unfairly treated. Furthermore, it must serve the public interest in obtaining a just sentence.

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[91] See similarly *R v Barrett* [1999] 1 NZLR 146, 153 (CA): "Parliament passed [the Victim of Offences Act] with the intention of making better provision for the victims of criminal offences by, among other things, ensuring… that appropriate arrangements are made to ensure that the sentencing Judge is informed about any physical or emotional harm suffered by the victim…"

[92] Sanders et al., above note 84, 452 are sceptical of this, stating: "Most cases are typical cases: that is the impact of the crime on the victim is as one would expect given the nature and seriousness of the crime… In the rare cases where VIS do say something unexpected they usually need to be supplemented by verifiable concrete evidence in order to make a difference." As the cases noted above demonstrate, this view does not appear to be shared by the New Zealand judiciary, and is also contested by other academics. See Erez, above note 83, 554.

[93] T032730, 19 March 2004, HC.

[94] Ibid, para 7.

[95] [1999] 1 NZLR 146 (CA).

[96] The family's disbelief of the complaint would of course be irrelevant in determining the accused's substantive liability.

Victim satisfaction, on the other hand, is about providing victims with the ability to "engage in the criminal justice process…reduce the power imbalance they felt with the defendant, resolve the emotional aspects of the [crime], achieve emotional recovery, or achieve formal closure".[97] Unfortunately, the decision to adapt VIS as providing benefit to the adversarial model means that restrictions must be put in place to ensure that only useful information comes before the courts – with "useful" being defined solely in accordance with what the court actually needs. In *R v Burns (No. 1)*, for example, as part of a VIS, one victim expressed the understandable and not uncommon fact of wanting to cause harm to the offender. He was chastised for doing so, with Chambers J noting:

> I can well understand the cathartic effect of saying what it is he feels and would like to do. But statements of that sort are not appropriate in victim impact statements. There needs to be some control by the police and the Crown over the contents of these statements.

This type of judicial language, in which victims are to be "controlled" in their use of VIS has become extremely widespread. Control over VIS, whether it be by the police, the Crown or the courts themselves, is the direct result of a decision to restrict the purposes of VIS to benefiting *the courts* in the sentencing process. Judges now encourage victims to stick to the relevant facts alone – with relevance being defined in accordance with the court's needs – and have scolded police officers and prosecutors who tender statements that fail to do so.

Many judges have gone much further, and have set out strict legal guidelines about the type of information that can be contained within a VIS. Not surprisingly, a whole new area of jurisprudence has emerged defining the "proper" limits of a VIS, whereby statements that fail to comply with the guidelines are excluded or edited. Amongst other things, VIS may not contain:

- overly emotive language[98];
- criticisms of the offender[99];
- discussion of the offender's mental state[100];
- assertions regarding the facts of the offence[101];
- recommendations of any sort regarding the possible penalty[102];
- discussion of the manner in which the defence was conducted[103];
- any post-offence conduct by the accused[104];
- conduct unrelated to the offence[105].

Whether or not this type of material needs to be included in a VIS for a judge to reach a final sentence, it is undeniable that the creation of these sorts of restrictions is bound

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[97] Erez, above note 83, 552.
[98] *R v Hopkirk* (1994) 12 CRNZ 216 (CA); *R v Namana* (2001) 2 NZLR 448 (CA).
[99] *R v Gabriel* (1999) 137 CCC (3d) 1 (Ont SCJ).
[100] *R v Bremner* (2000) 146 CCC (3d) 59 (BCCA); *R v Burns (No. 1)* (2000) 18 CRNZ 212 (HC).
[101] *R v Gabriel* (1999) 137 CCC (3d) 1 (Ont SCJ).
[102] *R v Hopkirk* (1994) 12 CRNZ 216 (CA).
[103] *R v Burns (No. 1)* (2000) 18 CRNZ 212 (HC).
[104] *R v Burns (No. 1)* (2000) 18 CRNZ 212 (HC).
[105] *R v Hopkirk* (1994) 12 CRNZ 216 (CA).

to dilute the effectiveness of the process from a perspective that concentrates on trying to enhance victim satisfaction. In essence, rather than allowing victims to choose what they wish to express, and speak in their own "non-legal" terms, victims are given a restrictive voice, and told quite expressly about what they are permitted to say.

The creation of legal requirements has even led to a new sort of hearing: the motion to strike aspects of a VIS. In *R v Schofield*[106], counsel for the accused brought an application before a judge who was not responsible for sentencing, asking the motions judge to rule upon the admissibility of certain aspects of the VIS. The motions judge obliged, holding that "the police have not exercised appropriate control" with respect to the VIS, and that some of the statements "contained material clearly in breach of numerous court decisions as to the content of victim impact statements". Consequently, the judge ordered that the offending statements not be filed "until the amendments stipulated in this judgment are made".

The decision to restrict VIS to providing information useful to the courts may have even more bizarre ramifications than the editing of written statements. One of Parliament's latest initiatives – following the practice in other jurisdictions – is to give victims the ability to literally use their own "voice" during a sentence hearing by allowing them to read their own VIS in court. Section 21(2)(b) of the Victims Rights Act 2002 states that a victim is entitled to read a statement, so long as the judicial officer "does not direct otherwise". This provision provides a major conundrum for the "information" model of VIS, because under this paradigm it is difficult to envisage leave to read a statement ever being granted. Oral statements provide no advantage whatsoever to the judge making a decision on sentencing, as the information can be transmitted just as easily in writing. Indeed, given the emotion expressed by most victims when undertaking this task, and the unpredictable nature of such a procedure, it is arguable that many judges will be uncomfortable in letting victims read their own VIS, and there is anecdotal evidence suggesting that judges have refused to allow victims to read their statements on the grounds that this procedure would not assist in rendering a decision on sentence.[107]

This type of reasoning misses the point entirely. Oral statements were obviously provided for one purpose only: to give victims a greater chance to express their feelings about the crime in their own voice. Their inclusion in the Victims Rights Act 2002 provides further support for adopting a VIS model premised on what these initiatives were created for in the first place: a chance to provide victims greater satisfaction within the criminal justice system.

Arguments Against a Model Predicated on Victim Satisfaction

[106] S5/01, 10 April 2001, HC.

[107] This anecdotal information was provided in a meeting with Victim Support officers in October 2005, who reported that several judges in Auckland had refused to allow the reading of VIS for exactly this reason. The office is no longer recommending to victims that they apply to read the statements orally. We are in the process of attempting to track down the cases in question, but have been unsuccessful to date. It should be noted, however, that oral statements have been given in at least a few New Zealand cases, though there are no statistics on how widespread the practice is.

The preceding sections demonstrate that the use of VIS has been limited by a decision to admit them for the purpose of providing the courts with information it can use. Given the apparent conflict with the legislature's desire to enhance the voice of victims in a meaningful way, it is necessary to delve more deeply and examine why the courts have chosen to limit the use of VIS so dramatically. While the reasons for approaching VIS in this manner have been described in many different ways, the rationales tend to fall into three general types of critique. The first relates to the difficulty of integrating VIS into the sentencing process on the basis that the victim has no role to play in a determination of penalty. Finding an appropriate sentence is a public matter, and victim participation threatens the ability to retain proportionality in sentencing, a value that has traditionally received great prominence in the common law world. The second concern suggests that a model premised on victim participation will inevitably prejudice the accused. Finally, the third critique looks at the value of VIS, and contends that even if the first two concerns can be surmounted, it is not worth advancing a model premised on victim satisfaction, as VIS do not actually function as a means of satisfying victims. We shall explore each of these rationales in turn.

a) Sentencing is not a tripartite proceeding – It serves the public interest

It should come as no surprise that the primary reason for limiting the victim's role in the sentencing process is the fact that the victim's point of view has no historical relevance to the ultimate decision on the accused's punishment. As we have already demonstrated, the common law trial has excluded the victim from having any impact on sentence for centuries. Sentencing has traditionally been a public matter, and the goal of the process is to determine an appropriate sentence that objectively serves the public interest. As Ashworth has suggested, sentencing "is a matter of public interest on which the victim has no particular claim to be heard[108]".

Under this paradigm, it is appropriate that the sole role of the victim is to supply information to assist the court in coming to a determination. As Chambers J bluntly noted in *Schofield*, "the principal purpose of a victim impact statement is not to provide an outlet to a victim's anguish but rather is *to assist the sentencing judge in his or her task* by providing information[109]" [emphasis added]. Naturally, the trial judge's task in sentencing is to determine the sentence that is most reflective of the overall public interest.

In *R v P*[110], the Federal Court of Australia expressed similar concern, taking care to minimize the role of the victim by ensuring "that the VIS be presented in such a way that the prosecuting authority will not only not be seen to be promoting the interests of the victim at the expense of the interests of justice, but also the reality will be quite otherwise". Canadian courts have been even more frank on this subject. In *R v Frigenette*[111], the British Columbia Court of Appeal made it clear that "when the state intervenes and an accused's conduct is deemed criminal, his conduct is a crime against society and it is therefore the public, not the private interest which must be

[108] Ashworth, above note 85, 199.
[109] S5/01, 10 April 2001, HC.
[110] (1992) 111 ALR 541, 545 (Fed Ct).
[111] (1994) 53 BCAC 153, 155 (BCCA).

served by the sentencing process." Hill J sounded a similar tone in *R v Gabriel*[112], stating:

> 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.

It is difficult to argue with reasoning of this type. If the purpose of sentencing is *solely* to address the public interest in sentencing the offender, there is little sense in contending that a restrictive approach to VIS is improper. Unfortunately, what comments of this type ignore is that in New Zealand, it is by no means clear that a purely "public" approach to sentencing still exists. Indeed, one cannot ignore the fact that the whole point of the 2002 legislative initiatives was to allow victims to have input into the process: to force the courts to accept the fact that private interests – to some undefined extent – actually matter during sentencing.

This "hybrid" sentencing process, whereby public and private[113] interests both have relevance, is an undeniable aspect of the modern New Zealand system. As aforementioned, the Sentencing Act 2002, which authoritatively establishes the principles upon which offenders are punished, states quite explicitly that providing for the interests of victims of crime is a legitimate purpose of sentencing. While this term has yet to receive judicial consideration[114], it is difficult to imagine that it was intended to reflect the existing view of sentencing as a purely public object. Parliament has expressly provided that victims are not to be ignored in sentencing, and a number of specific changes to the process ensure that the particular details and desires of the victim are now quite relevant to the ultimate sentencing determination.

Undoubtedly the most significant of these is the augmented use of restorative justice measures that have become incredibly popular in New Zealand. It is beyond the scope of this paper to discuss these processes in detail[115], but what is particularly significant about them is that they recognize that a public/private hybrid approach to

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[112] (1999) 137 CCC (3d) 1, 15 (Ont SCJ).

[113] We recognize that one could characterize satisfaction of the victim's desires as constituting a "public" interest, but in our view, nothing turns on this. The discussion under this heading proceeds on the premise that what the victim desires, or indeed, any satisfaction of the victim's needs is not a relevant goal of sentencing, as it is only the broader public interest that must be measured in sentencing. Whether one characterizes the victim's interests as private, or as part of a broader "public" interest, does not really matter. Either way, if one recognizes that the victim's interests are relevant, the force of the basic premise is weakened considerably.

[114] In *R v Tuiletufuga*, CA 205/03, 25 September 2003, the Court of Appeal correctly critiqued a trial judge who used this section of the Act to increase an offender's sentence on the grounds that the victims were "entitled to feel vindicated by a heavy sentence". The court held that "to interpret that purpose as an indication that heavy sentences should be imposed so the victims may, personally, feel vindicated cannot have been the legislature's intent. Vindication of the law is inherent in the statutory purposes of accountability, promotion of a sense of responsibility and acknowledgement of harm by an offender, denunciation and deterrence".

[115] For background on the development of restorative justice initiatives in New Zealand, see Morris, Maxwell and Robertson "Giving Victims a Voice: A New Zealand Experiment" (1993) 32 How J Criminal Just 304; Morris and Maxwell "Restorative Justice in New Zealand" in von Hirsch et al (eds), *Restorative and Criminal Justice* (2003).

sentencing is not unusual or offensive to basic principles of justice. While at no time is the public interest ignored, it is clear that the victim's view on sentence, and the fact that the victim has "accepted an offer [of reparation] as expiating the wrong" is something to be regarded with "substantial weight", even though these elements "need to be balanced against other sentencing policies".[116]

The victim's voluntary decision to participate in restorative justice, where the offender is also willing, can impact what the public interest ordinarily requires under the classic headings of rehabilitation, denunciation and deterrence. As Nicholson J. noted in *D v Police*[117], the sentencing process now requires judges to consider things like "a very positive outcome from a restorative justice group conference and the help that gave to victims in healing the hurt which the offending had caused them, particularly by helping the family difficulties to be healed for the benefit of all".[118]

Though some judgments examining the focus of VIS seem to deny the ramification of these developments, it is impossible to ignore the fact that sentence hearings more and more are serving a broader range of objectives, and punishments are being regularly affected by concerns unrelated to either the offender's potential for rehabilitation or the state's interest in deterrence, denunciation or retribution. The latest trend goes well beyond the confines of restorative justice proceedings and relates to the manner in which the Sentencing Act 2002 directs judges to consider the manner in which the offender has dealt with the victim's private interest in *every* case where there is an identifiable victim. Section 10 of the Act states that:

> **(1)** In sentencing or otherwise dealing with an offender the court must take into account—
>
> (a) any offer of amends, whether financial or by means of the performance of any work or service, made by or on behalf of the offender to the victim:
>
> (b) any agreement between the offender and the victim as to how the offender may remedy the wrong, loss, or damage caused by the offender or ensure that the offending will not continue or recur:
>
> (c) the response of the offender or the offender's family, whanau, or family group to the offending:
>
> (d) any measures taken or proposed to be taken by the offender or the family, whanau, or family group of the offender to—
>
> (i) make compensation to any victim of the offending or family, whanau, or family group of the victim; or
>
> (ii) apologise to any victim of the offending or family, whanau, or

[116] *R v Clotworthy* (1998) 15 CRNZ 651 (CA).

[117] (2000) 17 CRNZ 454, 459 (HC).

[118] See similarly *R v Sami* [2006] DCR 128, 136, where McElrea J noted:

> Where a defendant such as Mr Sami takes part in a conference with a direct face-to-face meeting with the victim (and is willing to answer her questions and to be accountable to her in a very direct way) the Court in my view can accept, as a mitigating factor, that he has already been held accountable in that face-to-face way for harm done, and he has been held accountable in a way which is likely to promote a sense of responsibility for harm and some personal acknowledgement of that harm. The conference has also provided for the interests of the victim by making things easier for her and her family to put this incident behind them and to move on in their lives.
>
> Different Judges have mentioned this assistance that can be provided to victims in this way, and where it lessens the trauma for the victim and assists them to heal the wounds of the past then that is certainly something which is not only part of the restorative process but is relevant to sentencing.

family group of the victim; or

(iii) otherwise make good the harm that has occurred:

(e) any remedial action taken or proposed to be taken by the offender in relation to the circumstances of the offending.

(2) In deciding whether and to what extent any matter referred to in subsection (1) should be taken into account, the court must take into account—

(a) whether or not it was genuine and capable of fulfilment; and

(b) whether or not it has been accepted by the victim as expiating or mitigating the wrong.

(3) If a court determines that, despite an offer, agreement, response, measure, or action referred to in subsection (1), it is appropriate to impose a sentence, it must take that offer, agreement, response, measure, or action into account when determining the appropriate sentence for the offender.

Reparation and apologies of this sort are emerging as a major factor in sentencing, as the payment or offer of reparation to a private victim is considered to expiate or mitigate the wrong, and, more importantly, acts as a factor reducing the offender's overall sentence. In *R v Zhang*[119], for example, the ringleader of a gang that committed extortion against eight Asian students was sentenced to ten and half years imprisonment. In passing sentence, McLean J noted that fourteen years was the appropriate starting point for the serious offending, that it should be cut off by 2.5 years because the victims had been offered $64,000 in reparation.[120] Responding to criticism that the payment was "blood money", the officer in charge of the investigation responded "it can't be seen as buying off the victims because the victims are happy with the result. The victims have no problem with the 2.5 year reduction".[121]

Moreover, even the victim's views on sentence are not automatically ignored. In direct contrast to the position in certain jurisdictions that "a sentencing regime cannot administer justice or maintain public confidence if it allows itself to be guided by the wishes of a victim to impose either a harsh or a lenient sentence[122]", New Zealand courts are quite prepared to consider the private interest of a victim in coming to an appropriate sentence, at least where "the victim volunteers a plea of clemency or compassion".[123] As Goddard J noted in *R v Hadland*[124]:

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[119] Unreported Decision, Auckland High Court (McLean J). Summarized in Binning, "Extortionist's Victims Happy with Payouts", *New Zealand Herald*, 30 October 2003, A4. See also *R v Burns*, CA 249/04, 26 November 2004 (CA).

[120] A further year was taken off for Zhang's late guilty plea.

[121] Binning, above note 119.

[122] *R v Tkachuk* (2001) 159 CCC (3d) 434 (Alta CA). See also Ashworth, *Sentencing and Criminal Justice*, 4th ed. (2005), 356: "It is unfair and wrong that an offender's sentence should depend on whether the victim is vindictive or forgiving: in principle, the sentence should be determined according to the normal effects of a given type of crime, without regard to the disposition of the particular victim".

[123] This is contrary to the approach taken in the U.K. In *R v Nunn* (1996) 2 Cr App R (S) 136, Judge L.J. held:

> [T]he opinions of the victim… about the appropriate level of sentence do not provide any sound basis for reassessing a sentence. If the victim feels utterly merciful toward the criminal, and some do, the crime has still been committed and must be punished as it deserves. If the victim is obsessed with vengeance, which can in reality only be assuaged by a very long sentence, as also happens, the punishment cannot be made longer by the court than would otherwise be appropriate. Otherwise cases with identical features would be dealt with in widely differing ways, leading to improper and unfair disparity.

> Although a victim's views are not necessarily persuasive and may not even be taken into account, the views expressed by the complainant in this case deserve respect. This Court has, in the past, taken into account a victim's wishes and also the interests of the family in reducing an otherwise appropriate sentence. This for the purpose of avoiding further victimization of the victim and other innocent members of an offender's family.

This type of approach clearly frightens some critics. Professor Don Stuart, for example, has written that:

> A criminal trial is about the just punishment of the accused, not about personal redress for victims. What, for example, if the input of victims were to be determinative on the issue of sentence? It surely would be unjust to have a length of a prison sentence determined by whether the victim wants revenge or compassion.[125]

Professor Stuart is certainly correct. It would be unjust to have prison sentences determined exclusively by victim input, and a number of theorists have written about the drawbacks of restorative theories of sentencing, and in particular the concern that victim driven initiatives make sentence too arbitrary.[126]

Still, New Zealand has hardly gone down the road suggested by Professor Stuart. Neither Parliament nor the courts have suggested turning the sentencing process over to the whim of the victim and returning to the situation that existed in the eleventh century. Instead, they have attempted to marry public and private goals. As the New Zealand Court of Appeal noted in the recent decision of *R v Taueki*[127]

> Sometimes the victim… will ask the Court to impose a lenient sentence. This provides something of a dilemma for a Court, but in our view the position is now clear that the Court should not condone violent conduct even if the victim does so: there is a public interest at stake as well as the interest of the victim. *That is not, however, to say that the views of the victim are to be ignored: rather it is simply to emphasise that the views of the victim do not outweigh the public interest.* [Emphasis added].

To be sure, this is not necessarily ideal, and it is not entirely clear *how* victim views factor into the mix. Ashworth has critiqued efforts like this which attempt to balance the personal interests of the victims and the wider social and public interest as "a mere fudge unless decisions have been made on a reasonably clear and principled weighting of the interests that come into play[128]". Nevertheless, the New Zealand

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Canadian courts have articulated similar viewpoints: *R v Bremner* (2000) 146 CCC (3d) 59, 68 (BCCA); *R v Tkachuk* (2001) 159 CCC (3d) 434, 441 (Alta CA) Still, the position is not universally accepted. See for example *R v Hollinsky* (1995) 103 CCC (3d) 472 (Ont CA). It is beyond the scope of this paper to fully consider the view articulated in *Nunn*, especially as it is not followed in New Zealand, but there is some reason to be sceptical of the notion that the sentencing process, which already balances and counterbalances dozens of individual factors, would truly sink into unreasonable disparity if it were to consider one additional factor: the individual views of the victim.

[124] CA 204/01, 26 September 2001, [2001] NZCA 250.

[125] Stuart above note 5 at 335.

[126] Most notably Professor Ashworth, above note 85. See also Wasik "Reparation: sentencing and the victim" [1999] Crim LR 470.

[127] [2005] 3 NZLR 372, 383-384 (CA).

[128] Ashworth, above note 85, 196.

courts and others clearly believe that victim interests can be balanced into the equation, and that there are recognizable benefits to doing so. Proportionality in sentence is hardly abandoned under this formula, as it retains the important function of setting parameters that limit the extent to which the victim can affect the overall sentence.[129]

While this new approach certainly creates challenges that require greater consideration in future[130], for our purposes it seems quite apparent that the victim does have an interest that can be considered in sentencing even though it must at all times be balanced against what is required by the public interest. This certainly seems inconsistent with attempts to restrict the use of VIS to informational purposes on the grounds that sentencing is exclusively a public matter. The principles that guide the sentencing process remain in a continuous state of evolution, and at the moment, the private interests of the victim of crime are becoming an indisputably important factor to consider in reaching an appropriate resolution regarding an offender. Excluding the need to provide the victim with greater satisfaction in the use of a VIS as a matter of principle seems contrary to a raft of developments that have established victim interests as relevant factors in the sentencing process.

b) *A Runaway Model of Victim Participation*

The second major concern of victim participation relates more closely to the reason for which victims were excluded from the criminal justice system in the first place. Victims, it is suggested, are inherently biased parties who will sway the court from doing justice. If victim participation is permitted, critics fear that a "runaway model for victim participation[131]" will cause significant prejudice for criminal defendants. Essentially, the worry is that allowing victims into the sentencing process will give the appearance of revenge motivation and vindictiveness, or worst of all, sway judges into adopting the unprincipled view of the victim. This type of critique actually encompasses two separate concerns, which are worth considering separately.

i) <u>Victim Input Will Merely Drive Up Sentences</u>

A first major concern is that victim participation will inevitably have the consequence of imposing harsher sentences on offenders.[132] This concern does not relate specifically to the use of VIS in the courtroom, but expresses a broader worry about a slippery slope towards more severe penalties. Clayton Ruby, for example, has written:

> The principal danger is that victims may turn to "offender bashing campaigns"… Victim groups, their criminologists and their political spokesmen not only demand a better lot for those who are victimized but, along with these demands and often

[129] Cavadino and Dignan "Reparation, Retribution and Rights" (1997) 4 International Review of Victimology 233, 247.
[130] See Ashworth, above note 85, 194-196, who raises a number of important questions about the merging of these interests.
[131] *R v Gabriel*, (1999) 137 CCC (3d) 1 (Ont SCJ).
[132] See for example Mosteller "Victims' Rights and the Constitution: Moving from Guaranteeing Participatory Rights to Benefiting the Prosecution" (1998) 29 St Mary's LJ 1053.

> overshadowing them, call for harsher penalties and more severe treatment for offenders.[133]

Effectively, Ruby and others fear that turning over any aspects of the sentencing process to victims will have a "trickle down" effect, one that will lead to more of what most victims are said to commonly want: more severe penalties of incarceration for offenders. Little by little, this line of thought proposes, courts will become more receptive to these views, and inevitably, harsher penalties will be the result.

Given its conjectural nature, this particular concern is difficult to address, especially in the New Zealand context. One thing that cannot be contested is that the last decade has seen a surge upwards in imprisonment figures[134], and the topic of whether this is a positive trend remains hotly contested in New Zealand.[135] Maximum penalties have been raised for a host of offences[136], and there is reason to believe that lobbying from victims groups has been one reason for this.

Still, lobbying by victims groups outside of court is not necessarily related to the manner in which victim participation will be utilized in court. International studies show that sentence severity is not necessarily linked to victim participation in sentence hearings, though there continues to be debate about this.[137] Most studies also acknowledge the obvious fact that victims come in all 'shapes and sizes' and not all of them are revenge motivated. As one judge has noted, "we need to have more confidence in our system and in victims. Victims can appreciate and respect the principles governing the justice system if we invest the time in supporting, explaining and involving them in a meaningful way".[138]

Additionally, it seems problematic to regard victim participation in New Zealand solely as a "negative" from the point of view of sentence increases. Based on the decisions discussed in the preceding section, it is clear that overall sentence proportionality is affected when the interests of the victim are taken into account, but at least insofar as imprisonment is concerned, the 2002 amendments provided the defendant with opportunities to mitigate sentence in ways that never previously existed. In any case with an identifiable victim, the ability of the offender to offer or make reparation as a means of expiating his or her wrong, and the victim's

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[133] Ruby "Review of E.A. Fattah, *From Crime Policy to Victim Policy: Reorienting the Justice System* (1987-88) 30 Crim LQ 126, 127.

[134] New Zealand has 185 inmates per 100,000 population, the second highest rate of incarceration in the Western world to the United States: Burton (Minister of Justice) "Justice and the Growing Prison Population", Speech to the Prison Fellowship Conference, 14 May 2006, available at http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=25739. See also Roberts "Sentencing Reform in New Zealand", (2003) 36 Australia and New Zealand Journal of Criminology 249.

[135] See the contrasting views of Burton "Our Soaring Prison Numbers", *New Zealand Herald*, 12 May 2006, A11; Whyte "Prison Rate Reflects Society", *New Zealand Herald*, 22 May 2006, A13.

[136] Over the past decade or so, maximum penalties have been raised for a host of offences. Where this occurs, "it is clearly Parliament's expectation that substituting higher maximum terms of imprisonment for offences will result in correspondingly higher sentences": *R v Accused* (1999) 17 CRNZ 190, 195 (CA).

[137] See Davis and Smith "The Effects of Victim Impact Statements on Sentencing Decisions" (1994) 11 Justice Quarterly 453; Erez and Roeger "Crime Impact v Victim Impact: Victim Impact Statements in South Australia" (1995) 6 Criminology Australia 3; Sanders et al, above note 84, 451.

[138] *R v Bullen* (2001) 48 CR (5th) 110, 118 (Yuk. Terr. Ct).

willingness to accept this form of apology is a factor that is taken into account when determining a proper penalty. Judges in New Zealand also welcome submissions of mercy by victims, and there are numerous reported cases where victims have made a case for leniency to the offender that have been taken into account. Moreover, the willingness to consider the interests of the victim through restorative justice initiatives is viewed almost universally as a factor imposing downward pressure on overall sentences.

This is not to suggest that these cases constitute a majority, but they tend to rebut the notion that victim participation *as a matter of principle* leads to increased sentence severity, and also remind us that victims are not always bitter and demanding of high periods of incarceration. Ultimately, the question of how victim input correlates to sentencing outcomes is a matter that will require further study, but it seems inappropriate at this early stage to use a fear of sentences being driven up as a rationale for excluding victim satisfaction as a legitimate interest to be considered by the criminal justice system.

ii) Sentences will be unfairly prejudiced by the receipt of information and the focus on satisfaction of the victim at the expense of "truth"

The most popular critique of a model premised on satisfying victims is that doing so will actually prejudice the offender. In essence, this theory premises that admitting information in the sentence hearing that cannot be used to actually render a decision on penalty risks being used to the detriment of the accused. As the Court of Appeal noted in *R v Haddon*[139], "even unconsciously the judge may be affected by the error or irrelevancy". Hall has similarly noted that:

> Where a VIS steps beyond [describing the impact of the offence] it is not only unhelpful to the sentencing judge, but it may raise the inherent danger that the judge, even if only subconsciously, may be influenced in imposing sentence by inappropriate comments and intemperate language or suggestions as to penalty that are contained in the VIS.[140]

Of all the rationales offered to justify restraining victims from expressing themselves freely through a VIS, this may be the most perplexing. There are two aspects that cause difficulty. First, there remains a real lack of clarity regarding what types of victim interests can be considered in sentencing, which makes comments about what actually is "inappropriate" difficult to apply.[141] More importantly, even assuming that the information model of VIS has correctly identified what sort of material is extraneous to a sentence determination, what this line or reasoning suggests is that admitting irrelevant information that cannot affect sentences is worrisome, as it risks diverting judges from their true task, and in a worst case scenario, tempting them to use this material adversely against the offender. While

[139] (1990) 6 CRNZ 508, 511.
[140] Hall, above note 82, 148.
[141] This is an interesting question that is beyond the scope of this paper, but given the fact that victims are permitted to express mitigating views on sentence – to be balanced with what the public interest might require – one has to ask why a view pushing for a harsh penalty cannot be considered as well. Once a decision has been made to move from a strict approach to proportionality and embrace some consideration of the private interest, many of the objections to allowing these views to have an impact begin to dissipate.

this proposition sounds reasonable enough on the surface, premised on the notion that judges are human beings who cannot always ignore prejudicial information put before them[142], it does conflict with commonly accepted practice regarding the admissibility of material in court.

As every criminal practitioner knows, judges hear prejudicial information in virtually every hearing over which they preside, and strangely enough, the justice system continues to function. For reasons of expediency and efficiency, judges routinely hear pre-trial and pre-sentence applications about evidence that may or may not be admissible ultimately, and even when excluding such evidence, go on to consider the defendant's case. While this situation may not be ideal, few suggest that it irremediably taints the process. Judges are well versed in this procedure, and our system of justice functions on the notion that judges are trained in administering the law and tasked with rendering a fair and objective result. Where they hear prejudicial information, we accept that they will instruct themselves not to draw an adverse inference, and appeals are rarely allowed on the basis that a judge did so, unless his or her reasons offer some basis to be sceptical about this point.

Our entire system of evidentiary admissibility rests on this structure. Evidence is admitted where its probative value exceeds its prejudicial impact, and it is accepted that proof will be put before the trier of fact even where it holds the possibility of leading the judge or jury down an impermissible chain of reasoning. To avoid this, judges are instructed to caution themselves or the jury that the wrongful inference should not be drawn.

There are countless examples in which this occurs. Similar fact evidence is admitted routinely, notwithstanding its potential for leading the trial judge to brand the defendant as a person of "bad character". Should the defendant take the witness stand, he or she risks facing his prior criminal record, ostensibly on the basis that it is useful as a means of testing credibility. Once again, the judge is tasked with reminding him or herself of the fact that such evidence cannot be used for any other purpose, even where the defendant is charged with a similar offence, and the inference of using the record to infer guilt is extremely tempting. In pre-trial application, judges are also used to hearing about evidence that may never make it to the trial proper. Evidence obtained in violation of the Bill of Rights 1990, for example, which may point conclusively towards the offender's guilt, is often excluded by the very trial judge who then go on to consider whether the rest of the admissible evidence will nonetheless establish the charge beyond a reasonable doubt.

This occurs in sentence hearings as a matter of course. As Thomas J noted in *Curtis v Police*[143]:

> In the sentencing process a considerable amount of material is put before the sentencing Judge in practice which is untested and which may be hearsay. Matters of fact are frequently referred to in counsel's submissions, and supporting evidence, such as testimonials, doctor's certificates, employment records or the like, is accepted

[142] There are many scholars who question the validity of this notion, though it remains an essential part of judicial practice. See for example Knazan, "Putting Evidence Out of Your Mind" (1999) 42 Crim LQ 501; Brewer and Williams, eds., *Psychology and Law: An Empirical Perspective* (2005).
[143] (1993) 10 CRNZ 28, 35-36 (HC).

> without being sworn to as evidence or tested by cross-examination. Hearsay statements are often received, for example, in the presentence report. The sentencing judge exercises care as to how such untested material and hearsay evidence is to be treated and in deciding what weight, if any, is to be given to it, especially when its accuracy is challenged. Any number of cases have emphasized the need for caution in considering material of this kind.

The bottom line is that it would be both undesirable and effectively impossible to run a justice system in which the trial judge was not faced with hearing this sort of potentially prejudicial information. Nonetheless, in spite of the risk, this evidence is routinely heard. Judges risk hearing about prejudicial evidence because there are greater goals to be served. Where the evidence is admitted, it is because the probative use warrants the risk. Where the evidence is excluded, it is because it would cost too much to change judges or restart a trial.

If this is the case, and our trust in a judge's ability to suppress prejudicial inferences is so high, why can't we simply extend the same sort of reasoning to VIS?[144] Is there something about the fact that it emanates from a victim that separates it from all other types of evidence? If victim satisfaction is viewed as a laudable goal for the justice process to pursue, why can this principle not be to justify information that may not serve an otherwise relevant end – just because it makes the victim feel better to express it. One suspects that the reasons for being so rigid with VIS is not actually premised on a risk of prejudice, but upon the unspoken rationale that the risk of prejudice outweighs the *value* of allowing victims to speak freely.[145] In other words, this argument may just be another way of suggesting that satisfying victims is not a valid purpose of sentencing.

c) *VIS do not actually provide victims with satisfaction*

A third major criticism of the model focussing on victim satisfaction is that VIS are incapable of actually succeeding in this goal. In other words, there is no good reason to give victims the ability to speak freely in the courtroom, as it will never give them the satisfaction upon which the freedom to speak is purportedly premised. This rationale is an interesting one, and differs significantly from the first two, in that it is focussed not on prejudice to the process, but rather, on prejudice to the victims (or prejudice to the system in the sense that the utilitarian balance between benefits is being improperly measured, on the grounds that victims are not actually benefiting from VIS).

The study of VIS and their ability to meaningfully satisfy victims by giving them input into the sentencing phase remains a work in progress. While scholars like Erez have completed studies that show some increase in satisfaction for victims[146], the

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[144] One also cannot forget that all sentences are subject to the appeal process, and to judges who are even further removed from the potential "prejudice" of a victim's individual pleas. Appellate judges are tasked with determining whether an overall sentence was unreasonable and seem aptly suited to ignore any difficult aspects of a VIS, or determine whether the sentencing judge was unfairly prejudiced by one.

[145] Ashworth makes arguments of this nature, suggesting that using VIS to promote victim satisfaction is "questionable as a justification, since there may be other, more effective or more appropriate methods of achieving the same result": Ashworth, above note 85, 197.

[146] Erez, above note 83.

results are anything but definitive at this stage. Moreover, even where the results show progress, there are real questions about what is actually being demonstrated. As Sanders et al. have contended:

> As far as the therapeutic goal is concerned, only around one-third of victims making a VIS felt better as a result of making it, and 18 per cent felt worse. The remainder, around half, said that they were not affected either way. A net therapeutic benefit to around 15 per cent of users of the scheme is not particularly successful…[147]

The issue of victim satisfaction is an important one to consider. If victims are not profiting and receiving any cathartic or therapeutic benefit from the use of VIS, it would be nonsensical to create a model for their use premised on providing satisfaction to victims. Nonetheless, the studies are far from clear that this is, in fact, the case.

More importantly, one has to also question how these studies were conducted and whether they took place against a background of VIS being admitted under the information model discussed above. Certainly, the treatment of VIS by the New Zealand judiciary over the first fifteen years under which the use of this tool was permitted is unlikely to provide many charitable comments about their effect. Assessing the ability of VIS to provide therapeutic benefits based on their current use seems somewhat self-justifying. As Stuart C.J. noted in *Bullen*:

> Not all victims want to participate. Those who do not may have had, or heard about, a bad experience as a victim, or perhaps the system did not appear to sufficiently welcome their participation. Unfortunately, in some respects, the justice system continues to primarily function on attitudes and values that stem from a time when victims were largely ignored except to the extent they were essential for a trial. The justice system is just beginning to respect the interests of victims. When they are properly respected, more victims will become involved.[148]

Indeed, given the manner in which VIS have been treated by many courts, it is not at all surprising that the potential therapeutic impact of this device has been muted. To create a process that limits what victims can say, directs them in the best way of saying it, and then proceeds to formally excise aspects that are not of use to the courts creates a system that is bound NOT to satisfy victims. This is not to suggest that VIS – even if granted a wide leeway as to their use – are inevitably going to provide satisfaction for victims. Still, before determining that VIS fail to provide this benefit, it stands to reason that we should first consider the manner in which the technique was actually utilized.

A good example of how the approach to VIS can impact upon the ability of the tool to promote satisfaction can be seen from the case of *R v Schofield*[149], discussed earlier. In that case, the victims were adamant about their desire to file a VIS, but made it clear that they wished to have free rein to express themselves in own way, and in particularly wished to express their views on the proper sentence the offender should receive. Although the Crown prosecutor spoke directly with the

[147] Sanders et al, above note 84, 450.
[148] (2001) 48 CR (5th) 110, 117 (Yuk. Terr. Ct).
[149] See similarly Roach, above note 9, 291.

victims and attempted to edit their statements, "he had been told by [the victims] that, if their statements could not be as they wanted them to be, they would not submit statements at all". The judge remarked that this "was, with respect, an unhelpful attitude", and proceeded to excise large parts of their VIS, including aspects of the statement that were "unduly emotional". It is not too difficult to imagine what the response of these victims would be if they were asked about whether they received any satisfaction through the VIS process.

A secondary concern is that VIS raise victim expectations which are dashed when judges ignore the recommendations contained within a statement.[150] This is a particularly difficult criticism to assess, as the courts have yet to firmly resolve to what extent victim recommendations actually factor into a sentence determination. Moreover, Professor Erez has sensibly pointed out that the problem of expectations in a VIS is one that requires a wider assessment of support for victims throughout the trial process, suggesting that:

> [T]he potential problem of heightening victim expectations can be resolved by explaining to victims that the VIS is only one of the factors judges use to determine the type and severity of penalties. As Ashworth recognizes, research has shown that victims who receive explanations of the proceedings throughout the process tend to be satisfied with the outcome. Further, explanations may enhance victim satisfaction even when the outcome does not reflect victims' conception of a deserved sentence. there is no reason to suspect that explanations about the multiple factors that affect sentencing decisions will not be effective in preventing heightened expectations.[151]

What this means, of course, is that the success of a VIS regime cannot be considered in isolation from the services that are in place to support it. There is no question that a scheme allowing for VIS must have resources in place to ensure that the process operates in the best manner possible, and that explanations are provided to victims to ensure that their expectations are not unfairly raised. Still, while it is something that must be addressed, the concern of raising victim expectations hardly seems an insurmountable barrier to a broader use of VIS in the courtroom.

Victim Satisfaction: Is There Another Way?

To a large degree, what the preceding analysis suggests is that many of the roadblocks precluding victims from expressing themselves more freely through VIS seem suspect. Perhaps it is worth considering whether another way is possible. It seems virtually undeniable that victims and in particular the use of VIS are here to stay. Parliament has drafted two major pieces of legislation that have victims as a major point of focus, and if anything, seem inclined to continue to reassess whether criminal justice can withstand further victim involvement. Rather than trying to dilute the ability of victims to speak freely and minimize the potential impact, perhaps it is worth asking instead whether the criminal justice system can accommodate a victim speaking in their own words, and whether it is possible to maximize the benefit to the

[150] Ashworth "Victim Impact Statements and Sentencing" [1993] Crim LR 498; Sanders et al, above note 84, 450. There is a related, and equally difficult, question of whether recommendations leave victims exposed to intimidation, retaliation or guilt: Reeves and Mulley, "The New Status of Victims in the UK: Opportunities and Threats" in Crawford and Goodey (eds*), Integrating a Victim Perspective within Criminal Justice* (2000) 125, 140.

[151] Erez, above note 83, 553.

victim while still preserving the values required by a (predominantly) public oriented system of justice.[152]

What does this approach actually entail? Primarily, what seems to be needed most is a change in philosophy, and rejection of the proposition that VIS are intrinsically troublesome documents that risk bringing the administration of justice into disrepute. It means treating victim satisfaction as a legitimate purpose of the sentencing process, while nonetheless ensuring that public objectives are not subordinated to the demands of a private interest.

While decisions applying this sort of philosophy are much less prevalent, there are judges who have begun utilizing it, specifically rejecting statements from courts hoping to keep VIS within the tiniest possible niche. What is perhaps most admirable about these decisions is their simple recognition that victim satisfaction is an important aspect of what VIS are all about. In the oft-cited judgment of *R v Dowlan*[153], the Victorian Court of Appeal considered the appeal of an offender who pleaded guilty to multiple counts of indecent assault upon young students under his care. Several of the victims tendered VIS, and the trial judge referred to these statements in detail in sentencing the accused to nine years and eight months of imprisonment.

The accused appealed, contending that the VIS were severely flawed, on two grounds. First, the statements had problems with causation, in that there were effects described by the victim that could not conclusively be attributed to the accused, and second, that some statements were overly emotive, in that they were made in circumstances of "a good deal of anger" directed against the accused. The appellate court recognized that there were aspects of the statements that fell into these categories, but was not convinced that the trial judge had been swayed by this information. More importantly, the appellate judges were critical of a process that would minutely scrutinize every aspect of a VIS, on the grounds that this would detract from the primary purpose of the new regime. For a majority of the Court, Charles JA held:

> The evident purpose of the… legislation was to give victims of crime an opportunity to place before the courts their own statement of the impact a crime has had upon them and their families and in doing so both to involve victims in the workings of the criminal justice system and to ensure that judges are educated as to the consequences of the crimes with which they are concerned in sentencing. It would be quite destructive of the purpose of these statements if their reception in evidence were surrounded and confined by the sorts of procedural rules applicable to the treatment of witness statements in commercial cases. The reception of victim impact statements must, it seems to me, be approached by sentencing judges with a degree of flexibility; subject, of course to the overriding concern that, in justice to the offender, the judge must be alert to avoid placing reliance on inadmissible matter.

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[152] Ashworth, above note 85, and others have suggested that the onus lies with proponents of restorative measures to justify their use, which may be true as a matter of principled argument. Still, given government's strong preference for these tools as a way of changing the sentencing process, legislated through a democratic process, courts which refuse to implement them in the way Parliament suggests should have to justify their own reasons for reaching a different interpretation of the provisions, especially where these seem so contrary to the statutory intent.

[153] [1998] 1 VR 123 (CA).

On many levels, this decision seems simple enough, but it demonstrates a much different philosophy than the cases discussed earlier in the article. The reasoning does not ignore the possibility that a VIS could prejudice the sentencing process, but at the same time, Charles JA realized that setting up procedural impediments to the admission of VIS is likely to be highly destructive. Statements of this nature demonstrate a more nuanced understanding and respect for what VIS were designed to do, and avoid the hostility that is often directed towards victims who step out of the narrow role they are afforded. Moreover, they express trust in the sentencing judge's ability to reach proper conclusions while simultaneously respecting the need to allow victims to speak in their own words.

Some recent New Zealand decisions have shown signs of taking a similar approach. In *R v Namana*[154], a case where the accused was convicted of murdering a police officer, thirteen detailed VIS were admitted over the objections of the accused who contended they were irrelevant and used prejudicial language. In allowing the VIS to be tendered, Nicholson J noted:

> I have accordingly considered all the victim impact statements which have been filed. Some of these are understandably very emotive because of the closeness of the authors to the deceased and in the case of police colleagues, because of feelings of vulnerability, stress and anger. I have made appropriate allowance for that and have treated the statements in perspective and with objectivity.

The accused appealed on the basis that the victim impact statements included prejudicial information, but this aspect of his appeal was cursorily dismissed, with the Court of Appeal concluding that "the judge was fully alert to the danger of placing undue weight on those parts of the victim impact statements which might be perceived as unduly emotive. Nor were those statements at the core of the Judge's reasons for deciding upon [the ultimate punishment][155]".

In *R v Ofakineiafu*[156], the accused similarly appealed against sentence on the basis that VIS had been admitted which contained impermissible information, including "trenchant criticisms of the appellant". The Court of Appeal responded that:

> Criticisms of victim impact statements must be assessed with a sense of realism. If such statements are stripped of all emotive language, there is a risk that they will not authentically express the views and feelings of victims…. As well, a sentencing judge can be expected to pick up from a victim impact statement what is relevant and to discard the balance.
>
> In saying this we are not wishing to encourage an "anything goes" approach. The emotionally laden (and to some extent threatening) terms of some of the victim impact statements presented to the Judge went well beyond what is contemplated by the Victim Rights Act 2002.

This seems at least a tentative step in the right direction. While the case sends somewhat of a mixed message, it does recognize that victims need to be able to

[154] (2000) 18 CRNZ 241 (HC).
[155] [2001] 2 NZLR 448, 459 (CA).
[156] CA 301/04, 28 October 2004 (CA).

"authentically" express their own feelings. Even though the court does not wish to encourage an "anything goes" approach, the judgment correctly acknowledges that sentencing judges are capable of excluding irrelevant aspects of a VIS in coming to a decision. In *Ofakineiafu*, the Court of Appeal had little difficulty concluding that the complaints regarding the VIS were ultimately spurious, and that in all the circumstances it was unreasonable to suggest that the trial judge had been swayed by them.

These decisions offer hope that judges are open to allowing VIS to take their natural course and abandoning the "reflex" reaction that such statements are in conflict with the traditional adversarial ideal.

Conclusions

Victims continue to pose major challenges for our traditional system of justice. Given the fact that the place of victims in New Zealand criminal justice – and particularly in sentencing – remains a relatively new development, it is hardly surprising that there continues to be controversy about their proper role.

This paper sought to demonstrate that in spite of major changes to the legislative structure, New Zealand courts continue to struggle regarding how best to approach victims and their role in sentencing. Judges continue to reject an approach that advances victim interests in favour of a model that resembles the tried and familiar. Indeed, in the short term, the major challenge for VIS lies in whether the procedure will be able to eventually shake off the shackles of the adversarial language that has governed for so long, and that has kept third parties like victims perpetually on the sideline. Still, given the clear and decisive move by Parliament to shake up the traditional approach, it is hard to imagine this type of resistance being effective over the long haul. As Stuart CJ noted in *R v Bullen*[157]:

> Any longstanding notion, such as the exclusivity of the two-party criminal process, must be regularly questioned to determine if its rationale remains relevant and if it continues to effectively advance current public interests. The longevity of any practice is not sufficient reason to retain it. There must be more. Incantations to "time immemorial" practices are often offered up as an emotional defence against pressing needs for change…
>
> In the very least, exploring avenues for according victims and communities a more meaningful voice… can retain what is essential for court-based sentencing process and give way on what is not.
>
> From the perspective of victims, the question is not whether they should be granted a special status; they already have one. The question is whether this special status can be enhanced without undermining the fundamental principles of justice and without adversely impacting on the sentencing process. The answer to both questions, based on experience in the courtroom and in restorative justice forums, is yes.

This excerpt makes two useful points. As discussed above, it queries whether adherence to the adversarial ideal in itself is a goal or an obstacle. More importantly, it recognizes that in order to begin getting meaningful answers about victims in the

[157] (2001) 48 CR (5th) 110, 116 (Yuk. Terr. Ct).

sentencing process, it is necessary to start asking different questions.[158] If courts continue to redefine the rationale for victim participation by converting it to the needs of the adversarial process, it is unimaginable that meaningful advances will ever occur, or that we will ever learn whether VIS actually have the potential to provide a useful degree of satisfaction for victims. The more meaningful question has to be how far we can go in enhancing the status of the victim without adversely affecting the interests served by our existing processes. There is no denying that allowing for real participation by victims changes what we have. The sooner we accept that this is the case, the sooner we can begin focussing on the challenges this poses for the existing adversarial process.

The case for involving victims is both just and inevitable. At the same time, there is need to ensure that changes integrating victim interests into the criminal justice system are rational and fair: both to defendants, and to a system that is committed to punishing crime – at least primarily – in the public interest. From a "Realpolitik" perspective, if the system continues to exclude victims by relying on unjustifiable rationales, it risks increasing political pressure for greater change, for victims of crime seem disinclined to simply accept the reasons for maintaining the status quo offered by judges raised in a different era. As one judge has written:

> The screams for vengeance seem much louder, more insistent from victims shut out of any meaningful participation. What is not expressed in an emotional but appropriate way in court can be shouted in anger and frustration in the streets… It is the insult of being shut down that inflames their pain into vengeance. It is this insult that contributes to galvanizing political pressures for change around single issues.[159]

[158] Fait "Victims' Rights Reform – Where Do We Go From Here? More Than A Modest Proposal" (2002) 33 McGeorge LR 705, 715, poses the question in the following manner:

> If a procedure has no effect one way or the other on the truth-seeking goal of the criminal justice process, its inclusion or exclusion should be determined by balancing the benefit and the burden of its inclusion. This is important because some of the proposals relating to victims' participation in the criminal justice process may be justified because they benefit the victim, not because they have a significant impact, either positively or negatively, in arriving at the truth. A similar problem can be found in the right of the victim to be heard at the time of sentencing. The exercise of this right may provide little assistance to the court in determining the truth, but it may provide great benefits to the individual victim. Therefore, unless the right to allocution causes a significant burden on the criminal justice process, it should be retained…"

[159] (2001) 48 CR (5th) 110, 121 (Yuk. Terr. Ct).