Contemporary Comment

Homicide, family victims and sentencing: continuing the debate about Victim Impact Statements

In October 2003, I attended a conference in Canberra — *Innovation: Promising Practices for Victims and Witnesses in the Criminal Justice System* organised by the ACT Office of the Victims of Crime Coordinator. Participants addressed a number of issues including therapeutic justice and problem-solving courts, restorative justice (particularly in the context of sexual assault offences), circle sentencing, criminal injuries compensation and victim involvement at various stages of the criminal justice system. My paper addressed the issue of victim involvement in the process of sentencing and, more specifically, the relevance of victim impact statements (VISs) from family victims[1] in the context of homicide offences. I expressed the view that it is time to shift the debate from a consideration of VISs as factors in the sentencing equation to a broader perspective of the role of VISs in the *process* of sentencing in homicide matters.

The Debate

The debate surrounding VISs from family victims has traditionally focused on the integrity of the sentencing process and problematic sentencing outcomes (Ashworth 1993; Erez 1999; Henderson 1985; Talbot 1988; Booth 2000 and Booth 2001). Will consideration of a VIS as a factor in determining the penalty for a homicide offender interfere with the fundamental sentencing principle of 'proportionality'? Can the myriad of harms suffered by family victims as a result of the homicide be harnessed and appropriately accommodated in a retributive sentencing framework (Booth 2001)? VISs from family victims have been regarded as especially controversial because of concerns that consideration of such evidence could threaten the objectivity of the sentencing process and result in penalties reflecting the comparative worthiness of the deceased relative to other dead victims and/or articulate response of family victims (Booth 2000; Finn De-Luca 1999):

> It is regarded by all thinking persons as offensive to fundamental concepts of equality and justice for criminal courts to value one life as greater than another. It would therefore be wholly inappropriate to impose a harsher sentence upon an offender because the value of the life lost is perceived to be greater in one case that it is in another (Hunt J in *R v Previtera* at 86).

The various positions taken in this debate are reflected in the different responses of the governments and appellate courts in Australian jurisdictions. Whereas a family victim may submit a VIS in all Australian jurisdictions, the role and weight to be accorded to that VIS varies. For instance, in NSW, by virtue of s28 (3) of the *Crimes (Sentencing Procedure) Act* 1999, the question whether it is appropriate to take a VIS from a family victim into account in connection with the determination of penalty is a matter for the court to decide. To date the NSW Supreme Court has taken the view that a VIS from a family victim is not a relevant factor to be taken into account in the question of penalty to be imposed on a homicide

1 By family victims I mean close family members or friends of the deceased.

offender (*R v Previtera, R v Bollen*). Nonetheless, the legislation requires that VISs from family victims be accepted and acknowledged by the court in the course of the sentencing process in NSW.

By way of contrast, the courts in VIC, SA and WA are required by legislation to take account of VISs submitted by family victims in the determination of penalty[2] although judicial opinion differs as to how much weight is to be given to this evidence. In Victoria, sentencing remarks suggest that the courts tend to regard the evidence as a reminder of the 'human element' and the loss sustained generally by family victims in homicide cases although the VIS itself is not a separate factor (*R v Willis*). The courts in SA and WA are less circumspect and appear to regard the VIS as evidence that may be important for its impact in the individual case — the offender must take the deceased as he or she finds him (*R v Birmingham (No. 2)*). If the deceased's death has caused considerable distress, this might be a factor that could influence the severity of the penalty.

As I have argued previously, I agree with the position taken by the NSW Supreme Court — VISs from family victims should not be taken into account in the determination of penalty (Booth 2000). Given our current paradigm of criminal justice, the content of a VIS from a family victim is not relevant to the harm caused by and the objective circumstances of, the offence, namely the homicide and the circumstances of the death (*R v Previtera*, Booth 2000). Even if a wider interpretation of 'harm' caused by the offence of homicide is assumed and the evidence is thereby considered relevant, the nature of the harm suffered by the family victim is not susceptible of assessment (Booth 2001:39). How would individual responses be measured? Which particular responses would amount to aggravating factors? Furthermore, would this process lead to an assumption of a de facto 'ideal' victim or 'proper' victimisation (McCarthy 1994)? And even if these difficulties could be overcome or appropriately accommodated how could the court avoid making invidious comparisons between the worthiness of deceased victims and/or family victims in taking account of this evidence?

During discussion following my paper, it was suggested that the position of the NSW Supreme Court does not avoid these sentencing problems. According to this argument, the formal stance of the court is merely rhetoric for it is unlikely that judges can remain immune from the emotional impact of such evidence. How can judges avoid their own humanity and not be distracted by the impact of such emotive evidence (Hinton 1996)? Indeed, but why is their humanity in this context more threatening to the 'objectivity' of the sentencing process than in other circumstances? Surely similar concerns must apply to judges' responses to other aspects of the matter before them such as the manner of death or the personality of the offender. Are we similarly concerned about the human response of the judge in relation to these aspects of the crime?

A more recent challenge to the integrity of sentencing and judicial objectivity in homicide matters in NSW is said to be legislative reform that allows a VIS to be read aloud to the court.[3] It is an innovation that when first utilised in a homicide matter, was met with front-page coverage in the tabloids.[4] The media obviously found this angle of homicide, the grief and loss of a mother following the murder of her son, 'sexy' or appealing to many in

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2 *Sentencing Act* 1991 (VIC) s5 (2), *Criminal Law (Sentencing) Act* 1988 (SA) s 10, and *Sentencing Act* 1995 (WA) s 24.

3 Section 30A *Crimes (Sentencing Procedure Act)* 1999 NSW

4 For example under the headline 'I loved him more than life itself?' the *Daily Telegraph* 5/8/03 dedicated the front page of the paper to the family victim, Lorraine Jago (the deceased was her son Jai Jago), and reported the content of her VIS seemingly verbatim.

our society. Such garish headlines were followed by warnings that this development could cause 'sensationalism' of such matters. Of course, many aspects of sentencing in homicide matters attract prominent media coverage and no doubt these matters could also contribute to the 'sensationalism' of the process. It seems a little disingenuous to isolate the reporting of family victims reading their VIS aloud to the court in this context.

Although it is beyond the scope of this comment, it is important to note that the notion of 'objectivity' in this context is particularly problematic and has itself been the subject of much critique (Naffine 1990; Rogers & Erez 1999). Sentencing is an extraordinarily difficult balancing exercise and one in which a judge will be pulled in a variety of directions (*Veen v The Queen (No. 2)*). Sentencing judges are afforded wide discretion[5] with which to ascertain and weigh relevant sentencing factors in a legal culture that values a principled approach to sentencing and does not encourage decision-making that is unduly swayed by emotional considerations.

Changing Direction

Another aspect to this debate is the proposition that the preceding discussion about VISs and sentencing outcomes is largely futile because research findings suggest that even where VISs are taken into account to determine penalty, they have very little effect on sentencing outcomes (Erez, Roeger & Morgan 1994; Davis & Smith 1994; Erez & Rogers 1999; Sebba 1996).[6] If this is the case, it is argued that VISs are of no effect and victims submit their statements with false expectations. Of course, a substantial premise of this argument is that victims submit VISs primarily for the purpose of influencing the penalty imposed. However, this image of the 'vengeful' victim is not reflected in the research and it would be erroneous to assume that there is one 'type' of victim of crime (Strang 2002). Victims submit VISs for a myriad of reasons including a desire to influence penalty but also to take the opportunity to speak, to be heard and be acknowledged as stakeholders in the conflict (Erez 1999; Sebba 2001; Booth 2001; Strang 2002:8). Certainly, these needs of family victims are recurrent themes in restorative justice discourses.

If we widen the debate from sentencing *outcomes* to incorporate the sentencing *process*, VISs are not ineffective. From a Durkheimian perspective, punishment serves an important communicative and symbolic function through which society's values, beliefs, and anxieties are projected and resolved (Garland 1990; Hutton 2002:587). The thesis of my paper was that this expressive function is served by VISs in two significant ways. First, through submission of VISs, family victims are given an opportunity to speak and a defined role in the sentencing process. Second, VISs are devices through which, by way of acknowledgment and comment, the courts are able to communicate a message that encompasses the wider legitimate interests of family victims and is emotionally responsive to those interests. The relevance and purpose of VISs from this standpoint is to give the court scope to express changing values and expectations of the community and family victims in particular. Sentencing courts are now being compelled to confront and grapple with emotionalism in the sentencing process and to engage openly with the expressive and emotional aspects of victimisation.

My doctoral thesis was derived from research analysing the role of VISs in sentencing judgments in homicide matters in NSW, VIC, SA and WA between 1997 and 2002. The

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5 Albeit, now guided by legislated standard minimum sentences in NSW.

6 Whether or not this is the case. I would argue that the extent of influence of VISs on penalty is extremely difficult to measure given current penal policies that have caused penalties to increase generally.

aim of this research was to compare and contrast legislative and judicial responses to the reception of victim impact evidence from family victims and the manner in which the 'harm' suffered by family victims was factored into the sentencing equation. However, what was striking was not the differences in the weight given to VISs in the formulation of penalty, but the common sentencing trends in language and ritual acknowledging the interests of family victims and reflecting an emotional response to their victimisation. Such trends include use of emotive and evocative language, techniques to give the deceased and family victims 'personality' and sentencing remarks that refer to the plight of the family victim. Across the jurisdictions the changing ambit and quality of sentencing remarks indicate that the courts are prepared to engage with family victims and emotional issues stemming from victimisation. The invisibility of family victims that was typical of sentencing judgments prior to submission of VISs is a relic of the past. From this viewpoint, VISs have been highly effective and have produced a positive impact on the sentencing process.

Conclusion

In my view, the changing quality and ambit of sentencing judgments to better engage with the interests of family victims is a positive innovation that contributes to a transformation of the sentencing process and reflects significant social and cultural changes that have occurred over the past two decades in Australia. It is neither possible nor desirable that we should revert to a situation where VISs from family victims are not admissible in the sentencing process, although it is proper that the evidence is irrelevant to determination of penalty. In recent years we have witnessed a shift from the conventional criminal justice paradigm to an increasingly popular restorative approach to criminal justice. This shift has reflected a concern for victims and the proliferation of restorative justice programs has heightened our society's awareness of the victim of crime and his or her stake in the conflict generated by the crime. Given the social, political and legislative changes wrought in the last decade, courts must not only acknowledge the interests of family victims but must also be observed to respond to those victims within the confines of the traditional rules of 'objectivity' and parity in sentencing. VISs are an ideal vehicle with which to achieve this.

Tracey Booth

Lecturer, School of Law, University of Western Sydney

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