

# *Sentencing Law and the ‘Emotional Catharsis’ of Victim’s Rights in NSW Homicide Cases*

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## *Abstract*

The New South Wales Court of Criminal Appeal (‘NSWCCA’) continues to endorse the principle that victim impact statements drafted by family members of homicide victims, while being received into sentencing proceedings, cannot influence the sentences of offenders. Family perspectives on the impact of the death of the primary victim are restricted out of the need to assess harm in terms of the immediate circumstances of the offence, maintaining respect for the equality of human life. Despite this limiting principle, the NSWCCA acknowledges that impact statements continue to be important, providing, as indicated by Sully J in *R v FD; R v FD; R v JD* (2006) 160 A Crim R 392 (‘*R v FD; R v FD; R v JD*’), an ‘emotional catharsis’ for victims of crime. However, recent amendments to the *Crimes (Sentencing Procedure) Act 1999* (NSW) require that a court recognise the harm done to the victim and community. In the context of this amendment, the NSWCCA has suggested that the rule excluding family statements may now need to be revised to include the perspectives of family members as representing those of the community. This article explores this proposal in terms of the status of family statements in other jurisdictions where such statements are deemed relevant to sentence.

## *1. Introduction*

The New South Wales Court of Criminal Appeal (‘NSWCCA’) has, across a number of leading decisions, declined to consider the opinions of family victims in homicide cases. Most notably, *R v Previtera* (‘*Previtera*’)<sup>1</sup> the principal authority expressing this rule, makes this prohibition on the basis that the seriousness of the death of the primary victim must be considered in the circumstances of the actual offence, from which family victims are generally removed. Family victims are relatives of the primary or deceased victim that, under s 28(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), have the option to submit an impact statement detailing the consequences of the death of the

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1 (1997) 94 A Crim R 76.

primary victim upon them, after conviction but before sentence.<sup>2</sup> Current authority recognises, however, that the views of family members, while admissible in sentencing proceedings, must not influence the assessment of harm occasioned as they are not involved in the circumstances of the offence and because their opinions are not seen, in any event, as objective. Following this line of reasoning, *Previtera* reiterates the rule of law concerning the universality of the value of human life; that in death we are all equal.<sup>3</sup> The reasoning behind this rule identifies that the seriousness of any homicide requires the death of the victim be weighed objectively by the sentencing court. This means that the views of family members should not contribute to the determination of the gravity of harm occasioned to the primary victim in any way. Under authority of *Previtera*, any statement tendered by any family member in a New South Wales ('NSW') homicide case cannot have an impact on the harm caused to the primary victim, whether this be by way of aggravating or potentially mitigating sentence. Including a family perspective on the impact of the death of the primary victim would thus see harm constituted by subjective views that, under current sentencing principle, would risk the valuing of one life as potentially greater than another. This, as Hunt CJ at CL reasons in *Previtera*, would contradict the fundamental value of the equality of human life, a principle for which there is now ample authority.<sup>4</sup>

Throughout the line of cases dealing with victim impact statements, the latest case of *R v FD; R v FD; R v JD* continues the restrictive interpretation of the NSWCCA by applying the rule that the trauma caused to family members by the loss of the primary victim cannot be taken to be an objective and thus reliable account of the harm that was actually occasioned as a result of the offence. In the alternative, the NSWCCA suggests that victim participation in sentencing is still valuable in terms of the cathartic venting of emotions it provides to family victims. While valuable to victims in this regard, the court makes clear that this venting is not to be included as justiciable — something that ought to be included as a factor relevant to the determination of sentence. This article examines this latest prohibition on the use of victim impact statements in homicide cases, arguing that there is indeed room within the current sentencing law as it is applied in NSW to accord family victims some voice in sentencing proceedings. This voice, it is argued, can be included as relevant to the assessment of harm without jeopardising the court's objectivity toward the offender, as required by law. Although a court

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2 A primary victim is defined, in relation to an offence, as '(a) a person against whom the offence was committed, or; (b) a person who was a witness to the act of actual or threatened violence, the death or the infliction of the physical bodily harm concerned, being a person who has suffered personal harm as a direct result of the offence.' A family victim 'in relation to an offence as a direct result of which a primary victim has died, means a person who was, at the time the offence was committed, a member of the primary victim's immediate family, and includes such a person whether or not the person has suffered personal harm as a result of the offence.' See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26.

3 *R v Previtera* (1997) 94 A Crim R 76 at 86 ('*Previtera*'). See also *R v De Souza* (unreported, Supreme Court of New South Wales, Dunford J, 10 November 1995).

4 See, for example, *R v Bollen* (1998) 99 A Crim R 510; *R v Dang* [1999] NSWCCA 42; *R v Newman*; *R v Simpson* [2004] NSWCCA 102; *R v King* (2004) 150 A Crim R 409; compare *R v Birmingham (No 2)* (1997) 69 SASR 502.

will inform itself of the harm done to the victim through information in evidence, family statements provide a unique opportunity for the participation of persons intimately connected to the primary victim who may be able to provide perspectives on the harm resulting from an offence, which may not otherwise be before the court.

This latest decision of *R v FD*; *R v FD*; *R v JD* affirms the initial restrictions put in place by *Previtera* in new ways. In the leading decision of the court, Sully J outlines four points as to why victim impact statements are so controversial, especially in light of *Previtera* requiring that the impacts of the offence on family members ought not be taken into account when determining sentence. Considered in detail below, Sully J's points include: (1) that offenders ought not be sentenced under a 'lynch mentality'; (2) that the offender should not be sentenced in a manner that is dictated by the victim; (3) that victims still deserve a forum through which they can make a public statement to allow for the 'emotional catharsis' of including their grief and loss on record; and (4) that impact statements provide a means of implementing a political imperative originating from the perceived lack of trust voters have in the sentencing process. Point three raises the notion that impact statements facilitate an 'emotional catharsis', in that the presentation of a statement, irrespective of its ability to be actually considered in sentence, provides therapeutic benefits assisting with the emotional recovery of the victim. This relates to Sully J's fourth point on the political imperative of the integration of victim rights in sentencing, which, arguably, may conflict with the 'accumulated wisdom of the common law of crime and punishment'.<sup>5</sup>

## 2. NSW Decisions

Under *Previtera*, victim impact statements have a different role to play in sentencing depending on whether they are tendered in acknowledgement of a fatal or non-fatal offence. Put another way, statements may be treated differently if they are tendered during sentencing proceedings for homicide cases as opposed to an offence in which the primary victim survives. Different provisions of similar effect allow for the tenure of impact statements across the states and territories of Australia.<sup>6</sup> No distinction is made between different types of victims, with the exception of NSW, where a separate power for the reception of impact statements is provided for primary and family victims. Under s 28(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), a court must receive an impact statement where the primary victim dies as a result of an offence, although the court may make any comment on it that it thinks appropriate. For all other offences, s 28(1) prescribes that the court has the option to receive an impact statement. The peculiarity of the separation of these powers is emphasised by the fact that while s

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5 *R v FD*; *R v FD*; *R v JD* (2006) 160 A Crim R 392 at 414 ('*R v FD*; *R v FD*; *R v JD*').

6 See, for example, *Sentencing Act 1991* (Vic) s 95A; *Children and Young Persons Act 1989* (Vic) s 136A; *Sentencing Act 1995* (WA) s 24; *Crimes (Sentencing) Act 2005* (ACT) s 53; *Sentencing Act 1995* (NT) s 106B; *Criminal Law (Sentencing) Act 1988* (SA) s 7A; *Sentencing Act 1997* (Tas) s 81A; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28; *Criminal Offences Victims Act 1995* (Qld) s 14.

28(1) provides the court with discretion to receive an impact statement, s 28(3) provides that reception is mandatory. Further, no authority or rule of law exists to prevent the inclusion of the views of the primary victim for non-fatal offences, unlike fatal offences where the consideration of the views of family victims is strictly prohibited. In fact, in ruling family statements as irrelevant, Hunt CJ at CL goes to the extent of indicating how useful impact statements may be to a sentencing court in a non-fatal offence.<sup>7</sup> This indicates a serious inconsistency in NSW law and procedure compared to the other states and territories of Australia that do not distinguish between types of impact statement. Internationally, no other jurisdiction differentiates primary and family victim impact statements on a substantive or procedural basis either.

A sentencing court will generally inform itself of the impacts of the offence on the victim from information and material adduced into evidence, usually at trial. The case of *R v Lewis*<sup>8</sup> stands as authority for the fact that a sentencing court may take into account harm caused to family victims, particularly where the harms occasioned to family members were readily foreseeable at the time the offence was commissioned. In this matter, the defendant arranged for the contract killing of his wife, leaving their three children without a mother. Victim impact statements were not adduced during sentencing. Despite this, the plight of the children having to grow up without their mother was seen as an aggravating factor to be considered in sentence, the impacts of which could be determined objectively from material already in evidence. Other than what may be foreseeable to the offender, a court has a general duty to consider the harm occasioned to the victim and the community when formulating sentence.<sup>9</sup> The issue here is that harm must be construed by the court itself, in order to determine the gravity of the injuries to the victim in an objective way. In terms of victim impact statements, therefore, a common sense approach dictates that victims themselves may not be the best means of determining, at least objectively, the actual impacts of the offence.<sup>10</sup>

In *Previtera*, Hunt CJ at CL indicates that where the primary victim survives the offence and decides to present an impact statement during sentencing, that such a statement may well assist the sentencing court realise the impacts of the offence on the victim. Such impacts may include the ongoing consequences of the offence not entered into evidence at trial, such as ongoing stress and anxiety, or problems with relationships, friends or work. Issues arise, however, as to the veracity of the information tendered. The case of *R v Slack*<sup>11</sup> addressed the problem of taking facts against the accused, facts which generally tend to aggravate the harm occasioned, without the requirement that such information be established on the persuasive

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7 *R v Previtera* (1997) 94 A Crim R 76 at 86. The utility of impact statements in non-fatal offences is discussed below.

8 [2001] NSWCCA 448.

9 *R v Dixon-Jenkins* (1991) 55 A Crim R 308; *R v Webb* [1971] VR 147; *R v Pinder* (1992) 8 WAR 19.

10 *R v RKB* (Unreported, NSWCCA, Badgery-Parker J, 30 June 1992). See also *R v Slack* [2004] NSWCCA 128 at [61]; *R v Newman*; *R v Simpson* [2004] NSWCCA 102 at [80]–[85]; *R v Wilson* [2005] NSWCCA 219.

11 [2004] NSWCCA 128.

burden, beyond reasonable doubt.<sup>12</sup> Issues of proof aside, when it comes to family statements tendered in homicide cases, the information presented cannot tell of impacts greater than the actual consequences of the offence — the death of the primary victim. The universal value of human life thus estops the consideration of further facts that weigh against the accused, potentially aggravating the assessment of harm beyond the circumstances of death to include other characteristics of the primary or family victims that only come to be emphasised because the primary victim has family members that considered them valuable.

Despite a clear ruling as to their use in sentencing hearings, the role of family impact statements have continued to present as grounds of appeal in successive sentencing appeals since *Previtera* was determined. This is due partly to the fact that sentencing courts will often receive impact statements in homicide cases. Where family victims submit such statements, the sentencing judge will generally indicate that a statement or statements have been tendered before the court, pursuant to the requirement that a court receive such statements under s 28(3). Judges regularly refer to the content of such statements, providing family members an opportunity to inform the court of the consequences of the offence on them. However, under *Previtera*, where family statements are tendered, the judge would need to make clear the fact that the contents of the statement have not influenced sentence. This may be a challenging task for a judge who is trying to balance the need to acknowledge persons significant to the primary victim while acceding to principles that require the exclusion of family statements. The difficulty of this task has no doubt led some judges to consider impact statements, or to at least fail to distinguish them, even in a cursory way, when determining sentence.<sup>13</sup> This situation is generally remedied by the NSWCCA allowing an appeal against sentence, and re-sentencing the accused to some lesser term. This tendency has led some judges now to indicate explicitly that a statement has not been considered.

Apart from difficulties in sentencing construction, the NSWCCA has on two occasions noted that *Previtera* may need to be reconsidered, following changes to NSW sentencing law. The case of *R v Berg*<sup>14</sup> raised initial concerns over the need to revisit approaches to sentencing in light of s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW). Specifically, s 3A(g) provides that a sentence may reflect the harm done to the victim and the community. Spigelman CJ recognised that, in light of the insertion of s 3A into the *Crimes (Sentencing Procedure) Act 1999* (NSW) in 2002, that certain sentencing principles may need to be reviewed.<sup>15</sup> His Honour indicates that this may include the use of family impact statements where such statements allow an appropriate assessment of the harm occasioned to the community. Specifically, Spigelman CJ indicates:

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12 Tyrone Kirchengast, 'Victim Influence, Therapeutic Jurisprudence and Sentencing Law in the New South Wales Court of Criminal Appeal' (2007) 10 *Flinders Journal of Law Reform* 143 at 143–159.

13 See, for example, the remarks of the sentencing judge and the response of Hunt CJ at CL in *R v Bollen* (1998) 99 A Crim R 510 at 530.

14 [2004] NSWCCA 300.

15 *Re Attorney General's Application Under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 2 of 2002)* [2002] NSWCCA 515 at [57]–[59].

The reasons given in *Previtera* may need to be reconsidered in an appropriate case, by reason of the conclusion of the statement of the purposes of sentencing in s3A of the *Sentencing Procedure Act* 1999. I refer particularly to the reference in s3A(g) “To recognise the harm done to ... the community.” .... It appears to me strongly arguable that the recognition of this purpose of sentencing would encompass the kind of matters which are incorporated in a victim impact statement. It may in some cases, be appropriate to consider the contents of such statements in the sentencing exercise. This was not a purpose of sentence recognised by Hunt CJ at CL in *Previtera*, see at p86.<sup>16</sup>

*R v Tzanis*<sup>17</sup> continued this line of enquiry by explicitly raising the need to reconsider *Previtera*. Despite convening as a court of five judges, the NSWCCA chose not to reconsider the issue as it did not, in the opinion of the court, arise on the issues of that particular matter. The court did suggest the gravity of the issue, however, being potentially one for the High Court. The court also suggests that the issue continues to beg consideration, albeit in a matter where it arises:

It appears that no suitable vehicle has emerged for the purposes of the grant of special leave by the High Court to resolve these differences. This Court has sat a Bench of five in order to reconsider *Previtera* and *Bollen* if necessary. Nevertheless it is not appropriate to do so unless the issue squarely rises.<sup>18</sup>

### 3. *Discords with the Other States*

The need to review the terms of *Previtera* is also brought to the fore by the fact that NSW procedure regarding family statements differs significantly from that of the other jurisdictions. Various jurisdictions both in Australia and internationally have, in different ways, resolved the problems associated with the use of family impact statements. Whether by statutory amendment of sentencing law or by the inclusion of statements as part of the trial process, each jurisdiction has sought to include the views of family members as an aspect of the objective assessment of the seriousness of the harm of the offence. The recognition of family statements has been problematic on the basis that such statements tend to be identified as representing the subjective views of victims, removed from the actual offence, reflecting upon the broader consequences of the offence on their personal lives. As seen in the Victorian case of *R v Willis* (*‘Willis’*),<sup>19</sup> the views of family members may be relevant to sentence so long as they are included in terms of those factors that a court would ordinarily consider in a broader context. This may include a consideration of the appropriate community sentiment towards the nature, gravity and consequences of the offence — something which is of *prima facie* relevance to the assessment of the seriousness of the offence and offender. It would be for the sentencing judge to determine, after reading the impact statement, the extent to which it may contribute a suitable perspective that represents such community

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16 *R v Berg* [2004] NSWCCA 300 at [43–44] (Spigelman CJ).

17 [2005] NSWCCA 274.

18 *R v Tzanis* [2005] NSWCCA 274 at [16].

19 [2000] VSC 297.

sentiment.<sup>20</sup> Significantly, this raises the status of family statements to a justiciable standard, enabling such statements to be taken seriously as relevant to the determination of an appropriate punishment, rather than being received and then automatically excluded, as a matter of process.

The case of *Willis* indicates, however, that apart from practical issues of deregulating the application of family statements in homicide cases, and thus reducing the number of grounds of appeal before the NSWCCA, room exists for the modification of *Previtera* on the basis of the relevance of family statements in the proper application of the principles of sentencing. The fundamental principle of sentencing that constitutes the sentencing process in Australia was outlined by the High Court in *Veen v The Queen (No 1)*<sup>21</sup> and *Veen v The Queen (No 2)*.<sup>22</sup> These authorities provide that a sentence must be objectively proportionate to all ends of sentencing. That is, the final or head sentence must reflect the objective seriousness of the offence and offender. Under the doctrine of proportionality, a sentence cannot be increased or decreased to reflect one or more of the rationales of sentencing, such as the need to protect the community against the prospect that the offender could re-offend. In the case of murder this, of course, does not preclude the passing of a lengthy or even life sentence. What it does require is that a sentencing court be aware of and consider all relevant aspects of the circumstances of the offence, and the subjective characteristics of the offender. It is against the need to construe these ends objectively, in the sense that it is the court itself which comes to weigh the gravity of the issue, characteristic or factor to be taken into account, which has seen the express exclusion of victim impact statements in homicide cases. As a victim impact statement is written, with possible assistance, by the victim themselves, the courts have tended to discount the value of their content as merely subjective — unable to be taken as an objective measure of the true impacts of the offence. This is especially the case where the primary victim dies, and the court is able to assess the impact of the offence narrowly, through considering the immediate circumstances of the death of the victim. As indicated in *Previtera*, this is consistent with an independent and objective assessment of the impact of the offence on the victim, while also respecting the principle of the universality of the value of human life.

However, the need to ensure that an objectively proportionate sentence is passed need not exclude the views of family members. As Vincent J remarks in *Willis*, the views of family members may be taken as a specific reference to the community's attitude towards the offence. With reference to the vehicle of a family impact statement, his Honour indicates:

What they do is to introduce in a more specific way, factors to which a court would ordinarily have regard in a broader context. They constitute a reminder of

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20 See *Sentencing Act 1991* (Vic) s 5(2)(daa)-(db), which requires that a court, in sentencing an offender, have regard to the 'impact of the offence on any victim of the offence' including 'the personal circumstances of any victim of the offence', as well as 'any injury, loss or damage resulting directly from the offence'.

21 (1979) 143 CLR 458.

22 (1988) 164 CLR 465.

what might be described as the human aspect of crime and draw to the attention of the judge who would of necessity have to consider the possible and probable consequences of criminal behaviour, not only its significance to society in general but the actual effect of a specific crime upon those who have been intimately affected by it.<sup>23</sup>

In this matter, Vincent J advocates that the views of family victims are a relevant part of a broader picture on the assessment of the harmfulness of the offence, and the impacts this has caused. Clearly, this will include the death of the victim, which must be viewed objectively against the general value of human life. However, as Richard Fox has argued, 'the problem is to weigh the harmfulness of criminal behaviour that invades different interests'.<sup>24</sup> Fox indicates that it is possible to value the interests of different groups when determining the seriousness of an offence. This issue here is to incorporate these interests into an objective assessment, as required by the doctrine of proportionality. This does not mean that the words of family victims are allowed to impact on the final sentence without scrutiny. What it does is provide an opportunity for a sentencing court to take the views of family victims into account where impact statements are tendered that are indeed relevant to the overall objects of sentencing. This approach challenges the assumption that victim impact statements are of inherently limited use in accordance with a more inclusive approach that requires the sentencing court to value the human aspect of crime by consulting, where relevant, a family's views on the impact of the loss of the victim upon them. It is this approach which brings the Victorian cases within the scope of s 3A(g) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

The assumption that impact statements introduce merely private, subjective opinions was also raised in the Victorian case of *R v Penn* ('*Penn*').<sup>25</sup> This case, one of culpable driving occasioning death, held that where evidence is presented detailing the loss or trauma felt by family members that such evidence should not be taken into account, out of respect for the equality of human life. Despite this, a court has a general duty to consider the community reaction to an offence which is all the more important where a sentence calls for significant general deterrence. Culpable driving is one such offence. However, as the court indicates, the extent to which a sentencing court may utilise evidence of the impact of the offence upon family members as a general reflection of community sentiment may well be limited. The court rules:

One of the reasons for community revulsion is a general recognition of the needless waste of human life together with sorrow and distress that is usually the concomitant of this particular offence. It was submitted that the theory of moral responsibility upon which punishment under the criminal law exists focuses upon the potential harm criminal conduct could cause to any person, rather than upon the consequences actually resulting, at least indirectly, to particular persons.<sup>26</sup>

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23 *R v Willis* [2000] VSC 297 at [16] ('*Willis*') (Vincent J). See also *R v Beckett* [1998] VSC 219.

24 Richard G Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19 *Melbourne University Law Review* 489 at 499.

25 (1994) 19 MVR 367.



The sentencing judge in *Penn* drew from the experiences of the wife of one of the victims when referring to the consequences of culpable driving. The Victorian Court of Criminal Appeal ('VCCA') held that the original sentence was not manifestly excessive but was less clear as to the ability to characterise the harm occasioned as one of real consequence to the community. Referring to an earlier decision of the court, the VCCA indicates that:

The reference to the widow and children is to be read as being made in the abstract. That is to say, as an example of the importance of general deterrence. The matters which the sentencing judge can give weight are those to which he can take judicial notice. Beyond that he should not go.<sup>27</sup>

The VCCA rules that a court may have regard to 'the carnage on the roads', 'the enormous toll of human suffering' and 'the waste of human and economic resources' when considering the consequences of an offence.<sup>28</sup> In doing so, the VCCA indicates that general reflection on the impact of an offence on family members may go beyond the acceptable limits of sentencing law, unless, perhaps, the information referred to is relevant to the explication of one of the accepted rationales of sentencing which needs to be considered when contemplating a proportionate sentence. This is not to say that the trauma caused to family members will always be relevant. Arguably, the sentence in *Penn* was not disturbed because of the legitimate need to rationalise sentence with the aim of general deterrence for culpable driving offences, something which family trauma may be able to justify by indicating the terrible loss such offences cause to the community generally, and in particular, the family of road accident victims. *Penn* is therefore potentially consistent with *Willis*.

The tensions that reside between *Willis* and *Penn* came to be addressed, however, in *R v Miller* ('*Miller*').<sup>29</sup> The defendant, suffering from various developmental disabilities, murdered a 20 year old female shop attendant during an unprovoked attack. The court held that the defendant's limited intellectual development and lack of availability of suitable community care justified a sentence on the basis of specific rather than general deterrence and denunciation. The requirement that other potential offenders be deterred was reduced, given the specific nature of the circumstances of the offence. This meant that that the need to recognise the impact of the offence on the family of the primary victim was reduced in accordance with the significance of the subjective characteristics of the offender as explanation for the offence. The need to cite impacts, as a reflection of the need for general deterrence as per *Penn*, thus decreased in accordance with the need to deter this particular offender in determining a proportionate sentence. The court, comprised of Southwell, Ormiston and McDonald JJ, ruled, however, that family impact statements may be used as evidence of the community's reaction to the offence:

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26 *R v Penn* (1994) 19 MVR 367 at 370 ('*Penn*'). As to the application of the principles raised in *Penn* see *Inkson v The Queen* (1996) 88 A Crim R 334.

27 *R v Penn* (1994) 19 MVR 367 at 370.

28 *R v Penn* (1994) 19 MVR 367 at 370.

29 [1995] 2 VR 348.

In the present case, there was evidence of the fear that had been felt by residents of Bendigo at the time following the murder; there was evidence in the depositions from the mother of the deceased, which touched upon their loss. We are not persuaded that the judge misdirected himself by referring to, and taking into account of, the effect on the Bendigo community of this crime, or the anguish of her family. Common sense would allow inferences to be drawn in respect of these matters, in the absence of direct evidence.<sup>30</sup>

The VCCA indicates that family statements are relevant despite the lack of need for general deterrence because there is always a need to consider the community's reaction to an offence when determining the gravity of the offence and the harm it has caused. The VCCA thus stresses a more inclusive approach than in *Penn*, especially considering that the remarks of the sentencing judge in *Penn* generally went beyond the scope of that which could be considered when maintaining a strong community perspective under the rationale of general deterrence. The case of *Miller* called for a narrower approach to dissuade the particular offender from recidivist behaviour. Given this context, therefore, the VCCA's ruling that the sentencing judge did not fall into error by referring to the trauma suffered by the Bendigo community and the family of the primary victim is particularly significant.

*Miller* also distinguishes the ruling of *Penn* out of recognition of the changes instituted by the *Sentencing (Victim Impact Statement) Act 1994* (Vic), which, *inter alia*, sought to change Victorian sentencing law so that a sentencing court could take account of any 'injury, loss or damage' that directly occurred as a result of an offence. This Act also amended the *Sentencing Act 1991* (Vic) s 5(2) by drawing specific reference to the personal circumstances of the victim of the offence and any injury, loss or damage that resulted directly from the offence. For the VCCA in *Miller*, the 1994 Act also clarified the way in which impact statements may provide evidence of harm relevant to sentence, while also emphasising the relevance of evidence of victim trauma, injury and loss that is not provided by impact statement. A key characteristic of these amendments, however, in terms of the use of family statements in sentencing hearings, included reference to the fact that a court should consider the impact of an offence on 'any victim of the offence'. This clearly includes family victims. In *Miller*, the VCCA interpreted these amendments to delimit potential restrictions put in place by *Penn* allowing the inclusion of family perspectives as a matter relevant to the determination of a proportionate sentence.

#### 4. *International Decisions*

The jurisprudence of the VCCA integrating a family victim perspective in homicide matters finds support internationally. While this support does not emerge coherently, the consensus seems to accept that the views of victims, family or primary, may be taken into account in appropriate circumstances. Certainly, no specific prohibition exists similar to *Previtera*, other than common law orthodoxy

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30 *R v Miller* [1995] 2 VR 348 at 354 ('*Miller*') (Southwell, Ormiston and McDonald JJ).

advocating that death should be the ultimate harm. New Zealand, Canada and England and Wales have each explored the issue of integrating victim perspectives in sentencing, with the United States exploring the issue with regard to victim evidence in capital sentencing hearings.

In New Zealand, family statements are permitted to influence sentence under ss 4 and 17 of the *Victims' Rights Act 2002* (NZ). Combined, these sections permit any person experiencing loss to submit an impact statement during sentencing. Section 17 requires that the prosecutor make all reasonable efforts to ensure that relevant information on any 'physical injury or emotional harm suffered by the victim through, or by means of, the offence' including any 'loss of, or damage to, property suffered by the victim through, or by means of, the offence', is put before the court. Any other effect of the offence may also be recorded. 'Victim' is defined under s 4 of the Act as including, *inter alia*, 'a member of the immediate family of a person who, as a result of an offence committed by another person, dies or is incapable'. Further, s 20 prescribes that the prosecutor may decide to treat as a victim any person who does not otherwise fit the definition of victim provided under section 4, but who is disadvantaged by the offence and able to supply particulars of that disadvantage to the prosecutor. The New Zealand prescriptions take a comparatively broader view toward the inclusion of victim perspectives than is currently the case in NSW. The case of *The Queen v Carlos Namana*<sup>31</sup> is authority for the use of victim impact statements as particular examples of community sentiment towards the offence, which in this case, included the consideration of thirteen impact statements, seven from the immediate family and six from the colleagues of a murdered police officer. The statements were used in the context of informing the general reaction to the offence, similar in many respects to *Miller*. Another New Zealand case, *Sergeant v Police*,<sup>32</sup> is authority for the proposition that impact statements give victims valuable input into the administration of justice.<sup>33</sup>

As for the Canadian experience, s 722(4) of the Canadian *Criminal Code* RSC 1985, c C-46 ('*Criminal Code*') prescribes that 'victim' refers to either the victim is directly harmed or, where that victim is dead or incapacitated, the spouse, common law partner or relative of the original victim. The leading case on family victims in Canadian homicide cases is *R v Gabriel* ('*Gabriel*').<sup>34</sup> In *Gabriel*, Hill J of the Ontario Superior Court of Justice indicates similar concerns as to the valuing of the life of the deceased as more significant than another. His Honour states:

In a case of a crime resulting in death, human experience, logic and common sense surely go some distance to presuming the existence of profound grief, loss and despair. It has been observed that "the criminal law does not value one life

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31 [2000] NZCA 348.

32 (1997) 15 CRNZ 454.

33 For a more recent case involving family victim impact statements under the 2002 Act, see *Khan v R* [2005] NZCA 148.

34 (1999) 137 CCC (3d) 1.

over another” and that “[a] consideration of the measure of loss of a human life is not only a demeaning process but also leads to a potentially egregious weighing of the worth of an individual’s life.”<sup>35</sup>

However, against the provisions allowing for the tenure of victim impact statements under s 722 of the *Criminal Code*, Hill J takes a more progressive perspective on the inclusion of the victim, including family victims, thus:

A significant concern of the sentencing hearing is finding a disposition tailored to the individual offender in an effort to ensure long range protection of the public. As a consequence, much becomes known about the accused as a person. In this process, there is a danger of the victim being reduced to obscurity — an intolerable departure from respect for the personal integrity of the victim. The victim was a special and unique person as well — information revealing the individuality of the victim and the impact of the crime on the victim’s survivors achieves a measure of balance in understanding the consequences of the crime in the context of the victim’s personal circumstances, or those of survivors.<sup>36</sup>

Hill J indicates that victims have an important role to play in sentencing an offender. This significance is not solely derived out of respect for the suffering of the victim or their family but, as is indicated, as a means of balancing the consequences of the offence. In this way, Hill J suggests that the views of family victims may be incorporated into an objective assessment of the offence in an expanded interpretation of the doctrine of proportionality, the very doctrine being interpreted more narrowly by the NSWCCA to exclude family perspectives. His Honour notes that victim impact statements are not the only solution to the participation of the victim, especially in the context of the significance of victim’s compensation and restitution as addressed by Hunt J in *Previtera*. However, Hill J does acknowledge that a family victim is able to provide information relevant to sentence given their connection to the original victim harmed.

The holding of *Gabriel* is similar in this respect to the ultimate finding of the United States Supreme Court decision of *Payne v Tennessee* (*Payne v Tennessee*).<sup>37</sup> The issues raised in *Payne v Tennessee* were first dealt with across two earlier decisions of the court, namely *Booth v Maryland* (*Booth v Maryland*)<sup>38</sup> and *South Carolina v Gathers* (*South Carolina v Gathers*).<sup>39</sup> In *Booth v Maryland* the court held that the Eighth Amendment to the United States Constitution prohibited a sentencing jury in a capital trial from considering victim impact evidence concerning the personal characteristics of the victim, including the emotional impact of the offence on the family of the primary victim. This

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35 *R v Gabriel* (1999) 137 CCC (3d) 1 at 19 (*Gabriel*) (Hill J). See also *R v Bremner* (2000) 146 CCC (3d) 59 and *R v DMP* (1999) 244 AR 180. As to limitations on the extent to which victim impact statements may characterise the harm occasioned, see *R v McDonough and McClatchey* (2006) 209 CCC (3d) 547; *R v Readhead* (2001) BCPC 208.

36 *R v Gabriel* (1999) 137 CCC (3d) 1 at 11–12 (Hill J).

37 115 L Ed 2d 720 (1991).

38 96 L Ed 2d 440 (1987).

39 104 L Ed 2d 876 (1989).

ruling was based on the assumption that such evidence inhibited the defendant's right to due process, given the highly emotive character of the content of the impact statements. *South Carolina v Gathers* extended this prohibition in terms of statements made to the jury by the prosecutor regarding the personal attributes of the victim. *Payne v Tennessee*, however, overruled these decisions, holding that the Eighth Amendment did not estop a jury from considering the personal characteristics of the victim in capital trials nor from a prosecutor arguing similar evidence during sentencing.

In England and Wales, all persons experiencing injury or loss in relation to an offence have the ability to make a 'victim personal statement', the equivalent of a victim impact statement. In addition to any statement given to the police, a victim personal statement becomes part of the case file to be read by all parties to the case, including the prosecution, defence and the courts. Such statements may be considered during sentencing, in the discretion of the court, when determining the objective seriousness of the harm that has been occasioned to both primary and family victims. Concern for the inclusion of victim perspectives in sentencing developed, however, out of the need to limit victims recommending particular sentencing options when drafting their statements. Actual sentencing, it is felt, ought to be left for the judge. However, against the orthodoxy of rejecting the views of victims recommending particular sentencing options, ground has been made toward a more inclusive perspective in which, in certain limited circumstances, the impacts of particular sentences on the victim will be taken into account as a relevant consideration should a case come for review before the Court of Appeal of England and Wales.

In the case of *R v Perks* ('Perks'),<sup>40</sup> the defendant appealed his sentence of four years' imprisonment for robbery on the basis of a letter written by the husband of the robbery victim, addressed to the Crown Prosecution Service. The letter indicated the devastating physical and mental impact of the attack on his wife, in which the author expressed his anger toward the offender, indicating that he ought to be imprisoned so that an example could be made of him. The letter was included in the case file and could be read by all parties to the matter, including the judge. The issue was that the sentencing judge took this letter into account. Allowing the appeal, Garland J of the Court of Appeal states:

The opinions of the victim and the victim's close relatives on the appropriate level of sentence should not be taken into account. The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender subject to two exceptions: i) Where the sentence passed on the offender is aggravating the victim's distress, the sentence may be moderated to some degree. ii) Where the victim's forgiveness or unwillingness to press charges provide evidence that his or her psychological or mental suffering must be very much less than would normally be the case.<sup>41</sup>

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40 1 Cr App R (S) 19 [2001].

41 *R v Perks* [2001] 1 Cr App R (S) 19 ('Perks') (Garland J).

The broader implications of *Perks* involve the way in which a court should consider whether a particular sentence will indeed aggravate the harm caused to the victim. Where an existing relationship with the offender can be established, a court may decrease the sentence to lessen the impact of the sentence on the victim. This is most likely to arise where there is a relationship of dependence between the victim, or the victim's family, and the offender, and where a court is considering a lengthy term of imprisonment, or imprisonment for an offence where the offender faces the possibility of a suspended sentence or non-custodial term. The cases following *Perks* have dealt with this issue in terms of statements specifically requesting a minimal term. In the case of *R v Nunn* ('*Nunn*'),<sup>42</sup> the appellant pled guilty to causing death by dangerous driving, after losing control of his car and killing his passenger. Before sentencing the appellant, the family of the deceased supplied the Court of Appeal with statements indicating that the length of the original sentence, imposed on a person known to the family of the deceased, was making it difficult for them to cope with the trauma they were experiencing. They indicated that the defendant had suffered enough. In sentencing the defendant, however, Judge J indicated that the victim's opinions were generally irrelevant, with the following exception:

[T]he Court is concerned not with the judgment of the deceased's mother and sister about the level of sentence imposed on the applicant, but with the clear evidence, which we accept, that by its very length the sentence on [the victim's] friend is adding to the grief and anxiety which they are suffering... When the mother and sister of the deceased and the rest of the family have already suffered so much, we do not think that these adverse consequences of this particular sentence should be disregarded. In mercy to them we shall reduce the sentence as far as we can, consistent with our continuing public duty to impose appropriate sentences for those who cause death by driving dangerously under the influence of drink.<sup>43</sup>

The consequence of *Perks* and *Nunn* is the potential passing of a lesser sentence on the basis of taking the perspective of the victim, including family victims, into account. *Nunn* stands for the proposition that the view to reduce sentence needs to be construed objectively, not being informed by the judgement of the victims themselves. However, in the case of *R v Mills* ('*Mills*'),<sup>44</sup> involving attempted rape by a former partner of the victim, the court looked favourably upon evidence of an improving relationship between the defendant and victim. Judge LJ indicated in reducing sentence from six to three years imprisonment:

We have considered the evidence of the victim with great care. We have reflected on all the circumstances of this somewhat unusual case. As a matter of principle, the victim of a crime cannot tell the court that because he or she has forgiven the perpetrator the court should treat the crime, in effect, as if it had not happened. This was a serious offence. Attempted rape is always a matter of general public

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42 [1996] 2 Cr App R (S) 136.

43 *R v Nunn* [1996] 2 Cr App R (S) 136 at 140–141 ('*Nunn*') (Judge J).

44 [1998] 2 Cr App R (S) 252.

concern, in addition to its more immediate concern to the victim. It is clear that the victim in this case has chosen to forgive the perpetrator of the crime, and has said so in terms, perfectly genuinely. That cannot decide the appropriate level of sentence, but we take her evidence into account as indicating the current extent of the impact of this particular crime on the victim. Having considered the matter in the light of the information before us, we have come to the conclusion that the sentence ... was too long.<sup>45</sup>

The difference between *Nunn* and *Mills* includes the way in which the court came to the decision to reduce each sentence, taking into account the impacts a lengthier sentence would have on each of the victims. Compared to *Nunn*, *Mills* demonstrates that the court may be more willing to take the victim's perspective into account. In *Mills*, the court is clearly considering testimony from the victim herself. This testimony is weighed objectively by the court and it is emphasised that this information in itself cannot determine sentence. However, the court does orientate itself toward a more inclusive, restorative approach that includes the perspective of the victim by adhering to the impacts of the sentence on the victim, as told by the victim personally.

### 5. *Restorative Discourse in England and Wales*

The Court of Appeal of England and Wales has modified sentencing orthodoxy in very significant ways by permitting the inclusion of victim perspectives when formulating an appropriate sentencing. The ability to consider the perspectives of both primary and family victims is, in various respects, consistent across various jurisdictions. However, the approach adopted in England and Wales goes one step further by allowing victims to influence the actual sentencing option in certain circumstances.<sup>46</sup> This is a highly significant development in the context of the slow but gradual integration of victim perspectives in sentencing, particularly against the restrictive approach currently in place in NSW. Ian Edwards has commented on this development in English law, suggesting that the Court of Appeal has tentatively moved towards a restorative model of sentencing in which all agents to the original offence are accorded some role.<sup>47</sup> This restorative approach, Edwards argues, focuses on the individual victim and the notion that crime is a violation of individual rights.

The restorative model integrates the interests of the state, offender and victim in a more balanced way. However, the Court of Appeal, at least in the context of sentencing options, has yet to delineate fully how the victim will be integrated into sentencing proceedings. The problem is one of defining the nature of the relationship between victims and the public interest given the need to rationalise a

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45 *R v Mills* [1998] 2 Cr App R (S) 252 at 254 ('*Mills*') (Judge LJ).

46 As to the latest developments incorporating the victim into criminal proceedings in England and Wales, see Tyrone Kirchengast, 'Integrating a Victim Perspective in NSW Homicide Cases' (2007) 7 *Queensland University of Technology Law and Justice Journal* 279 at 289–290.

47 Ian Edwards, 'The Place of Victims' Preferences in the Sentencing of "Their" Offenders' (2002) *Criminal Law Review* at 689–702.

sentence based on the objective seriousness of the offence and offender. The way in which these interests are to be balanced, traditionally identified as competing, is yet to be fully articulated within judicial discourse. Edwards indicates, however, that the decisions of *Perks*, *Nunn* and *Mills* suggest that the Court of Appeal is attempting to define victim interests as part of the broader public interest. Indeed, Edwards goes as far as to suggest that '[w]ith the advent of victim participation rights and procedural involvement, we may be witnessing a reorientation of the nature and purpose of criminal justice'.<sup>48</sup> This is consistent, with the exception of NSW, with the movement of criminal law toward an expanded or more inclusive notion of the doctrine of proportionality, in which victim perspectives are rationalised as a particular example of public sentiment towards the offence and offender. As such, Edwards suggests that the discourse of the state as securing the public interest is being displaced by a more dialogic process in which private interests are being legitimately identified as part of the collective public interest. The problem is that the provision of victim interests as a source of information relevant to sentence must be weighed against all other sources of information such that a victim's perspective must be deemed relevant by the sentencing court.<sup>49</sup> It is crucial that the victim is not granted automatic rights of audience before the court, but be seen as a legitimate contributor of relevant information to the sentencing process, as granted by the court. Edwards indicates this through the guarded approach taken by the Court of Appeal:

The way in which the Court of Appeal has reasoned in *Perks* indicates that it is anxious to ensure victims are given no place as decision-makers or consultees, whilst allowing victims to be information-providers whose information is relevant but which must be weighed as part of a broad range of information. By accommodating forgiveness within a proportionality framework, victims remain mere providers of relevant information about the consequences of the offence, allowing the courts to maintain that victims do not and should not have actual control.<sup>50</sup>

The lack of autonomy of victim input into proceedings is something of which Edwards is critical. He further suggests that a victim's expectations should not be unrealistically raised, but should take practical form, such that any change does not become a mere gesture on the part of government. Against the paucity of rights afforded to victims in NSW sentencing proceedings, the line of reasoning up to *Mills* defines a radical new role for the victim. The interesting point of this development is the way in which the international doctrine of victim rights accords with an expanded notion of the doctrine of proportionality inclusive of the victim's perspective as a particular manifestation of public will. The proposal is not the mere conflation of the private interests of the victim with that of the public good,

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48 Id at 701.

49 This is already the case with any information presented by impact statement. No right of automatic inclusion exists, and it is for the sentencing court to deem those parts of a statement relevant consistent with the forensic judgment of the court when construing sentence. See, for example, *R v Raimondi* (1999) 106 A Crim R 288; *Staats v R* (1998) 101 A Crim R 461.

50 Ian Edwards, above n47 at 701.



but the integration of the victim's perspective as a specific representation of the community's response to crime. This, in the context of the Australian approach under *Veen v The Queen (No 1)* ('*Veen (No 1)*')<sup>51</sup> and *Veen v The Queen (No 2)* ('*Veen (No 2)*'),<sup>52</sup> is consistent with the need to balance at times competing interests in an objective way so as to bring about a sentence proportionate to the gravity of the offence. Not all parts of an impact statement will be automatically relevant to sentence; the forensic judgment of the court must determine what merits mention in the circumstances of an individual case. As to the nature of this balancing process:

The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.<sup>53</sup>

As Wilson J puts it in *Veen (No 2)*, reflecting on the holding of *Veen (No 1)*:

The decision in the case stands as authority for the proposition that a sentence should not exceed that which is appropriate to the gravity of the crime considered in the light of its objective circumstances.<sup>54</sup>

The upper limits of a sentence should thus be determined by reference to what may characterise an objective assessment of offence seriousness. To return to the work of Richard Fox, certain characteristics will be intrinsic to the objective seriousness of an offence. These include the victim's vulnerability, the level of harm occasioned, and the offender's personal culpability, including their mental state at the time of the offence. Fox indicates that '[h]arm must include both advantages gained by the offender and losses caused to the victim.'<sup>55</sup> Andrew von Hirsch indicates the general principle, however, that 'the quantum of punishment should depend on how reprehensible the conduct is'.<sup>56</sup> The appropriate quantum of punishment, moreover, must reflect the harm occasioned to the victim, and specifically the degree of injury caused or risked by the offensive conduct, in an objective way.<sup>57</sup> Proportionality thus reminds us that the sentencing process involves the weighing up of harms constituted under socially identified values and standards.

This is consistent with the focus within modern sentencing doctrine on offenders receiving their 'just deserts', emphasising the desirability of

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51 (1979) 143 CLR 458.

52 (1988) 164 CLR 465.

53 *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 476. See also *Hoare v R* (1989) 167 CLR 348 at 354; *R v Dodd* (1991) 57 A Crim R 349 at 354.

54 *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 486 (Wilson J).

55 Richard G Fox, above n24 at 499.

56 Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime and Justice* 55 at 56.

57 Andrew von Hirsch, *Doing Justice: The Choice of Punishments* (1976) at 79.

apportioning the severity of punishment consistent with an offenders' overall blameworthiness.<sup>58</sup> This is to ensure that offenders are sentenced to an appropriate level of punishment and also to restrain arbitrary or capricious punishment. It is out of fear of the latter that courts have tended away from family statements in homicide cases, as family perspectives are identified as inherently private and thus unable to inform the passing of a publicly recognised sanction addressing the circumstances of the offence. Andrew von Hirsch and Andrew Ashworth comment that proportionality replaces retributive or tailionic conceptions of an 'eye for an eye'.<sup>59</sup> Rather than support harm-for-harm equivalence, proportionality calls for the balancing of socially recognised interests and harms, so as to maintain a measure of predictability between the wrongful act and sanction. Information provided by victims must thus be brought within the field of socially recognised harm to have an impact on offender blameworthiness, such that the sentence be phrased objectively. This 'expanded' notion of proportionality would strike the middle ground without unduly restricting offender rights, a problem with the restitutive model of criminal justice discussed by Ashworth.<sup>60</sup>

In the context of the approach taken in England and Wales, the inclusion of family perspectives is not permitted by merely combining a private perspective with the public interest. Rather, the will of the victim becomes part of the broader public interest so that the focus of the assessment of harm undertaken by the sentencing court is always objective. It is thus not a matter of including a subjective perspective bringing about a weakened objective analysis, but of redefining the parameters of the objective analysis required so that certain remarks from victims may be included as part of what Wilson J identifies as the 'objective circumstances' of a case.

## 6. *The Australian Context Revisited*

No Australian case has dealt with the international cases discussed, though the case of *R v Birmingham (No 2)* ('*Birmingham (No 2)*')<sup>61</sup> does consider the application of the rule clarifying *Penn* handed down in *Miller*, in South Australian law. *Birmingham (No 2)* is a significant case, as it is the only decision to consider directly in the terms of *Previtera* against the alternative approaches developed in Victoria. In this decision, Perry J provides a separate ruling dealing with the issue of family impact statements that were taken into account in his Honour's earlier sentencing decision on the same matter. It is this matter which ultimately brings us back to the recent NSW decision of *R v FD; R v FD; R v JD* in which Sully J stipulates four grounds upon which victim impact statements ought to be restricted. In *Birmingham (No 2)*, the defendant pled guilty to three counts of dangerous driving causing death, causing grievous bodily harm and causing bodily

58 Andrew von Hirsch & Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (2005) at 110–130.

59 *Id* at 4.

60 Andrew Ashworth, 'Victim Impact Statements and Sentencing' (1993) *Criminal Law Review*, July at 503.

61 (1997) 96 A Crim R 545.

harm. Victim impact statements were tendered by the parents of the deceased victim. Reviewing the relevant authorities of *Previtera*, *Penn* and *Miller*, Perry J concludes:

But with respect to those who have expressed the contrary view, it appears to me that there is no breach of that basic principle, to make allowance for the trauma and upset suffered by surviving members of the victim of a homicide in the context of the *Criminal Law (Sentencing) Act*. In my opinion, the words in that Act, “any injury, loss or damage resulting from the offence”, are apt to describe not only the effects of the offence upon the immediate victim, but also the effects, insofar as they answer that description, on others.

In that context it is not a matter of valuing one life more than another. Rather it is a question of having regard to the totality of the “injury, loss or damage”, which may include injury, loss or damage suffered by others apart from the immediate victim.<sup>62</sup>

On the point of the need to guard against the inclusion of victim impacts which are out of step with community sentiment, Perry J remarks:

[T]here is an obvious difference between the abhorrence of the community at large to a particular crime and the “injury, loss or damage” suffered by the immediate victim and near relatives of the immediate victim.

As for the former, in my opinion, that is not within the scope of what must be allowed for under s 10(e) of the *Criminal Law (Sentencing) Act*. The court is entitled to take community outrage into account but in a guarded and circumspect manner. It would not be right to yield to anything which might be described as a “lynch mentality”.

When community outrage is a reaction to what might be horrifying circumstances of a particular crime, it is those horrifying circumstances, being circumstances of aggravation, which attract the appropriately heavier penalty, rather than community outrage.<sup>63</sup>

It is this ‘lynch mentality’ which Sully J refers to in *R v FD*; *R v FD*; *R v JD* as something palpably incompatible with the common law of sentencing. Sully J remarks:

There is, first, the imperative need to ensure that no offender is sentenced upon a basis that yields to a “lynch mentality”, to borrow from Perry J in *Reg v Birmingham [sic] (No. 2)* (1997) 96 A Crim R 545 at 549.<sup>64</sup>

Community sentiment remains significant, however, as one way of determining the gravity of the offence on the calendar of criminal offending. The ‘lynch mentality’ to which Perry J draws reference in *Birmingham (No 2)* is set apart from the broader consequences of an offence identified in the Victorian cases, above. These cases consider community attitude as a rational indicator of the general

62 *R v Birmingham (No 2)* (1997) 96 A Crim R 545 at 548–549 (*‘Birmingham (No 2)’*) (Perry J).

63 *R v Birmingham (No 2)* (1997) 96 A Crim R 545 at 549 (Perry J).

64 *R v FD*; *R v FD*; *R v JD* (2006) 160 A Crim R 392 at 414 (Sully J).

harms occasioned. Some ground has been made in the literature arguing for the continued support of *Previtera* with regard to the use of family impact statements as evidence of the general harm brought about by the offence.<sup>65</sup> The position which has emerged supports the use of impact statements as a representation of the ‘general’ impact of the offence. The usual circumstance will be, however, that the impact statements tendered will be of use to the sentencing court, as Perry J found in the matter at hand:

I must say that given the youth of the deceased and the circumstances of his death, the grief and outrage felt by the surviving parents is very much what I might have expected, even if I had not had the benefit of the victim impact statements in question. It follows that even without the benefit of those statements, I doubt that I would have imposed a less severe sentence.<sup>66</sup>

In the context of the reception of family statements in Victoria and South Australia,<sup>67</sup> the NSWCCA in *Previtera*, and the subsequent decisions which advocate its authoritative status, suggest that NSW courts take a conservative position on the harm resulting from the death of the primary victim. This position against the use of family impact statements is reflected across the remainder of the issues raised by Sully J in *R v FD*; *R v FD*; *R v JD*. His Honour goes on to outline a second reason, connected to the first, as to why victim impact statements ought to be further restricted:

There is, secondly, the no less imperative need not to allow an offender to be sentenced upon a basis, or in a particular manner, that is dictated, more or less, by the victim(s). And even less so upon a basis, or in a particular manner, that responds, more or less, to the malignant prejudices that are daily the fruit of what Brennan J described as follows in *The Queen v Glennon* (1992) 173 CLR 592 at 611: “Another phenomenon which has contributed to the problem in recent years, especially in the media of television and radio, is the promotion of personalities who affect to convey the moral conscience of the community and to possess information, insights and expertise in exceptional measure.”<sup>68</sup>

In the context of the Victorian and South Australian decisions, current sentencing authority does not permit the consideration of biased, exaggerated, or prejudicial material. This is even the case where community attitude may support extremist causes. It is within the discretion of each sentencing court to reject material, including victim impact evidence, when considering sentence. Even on the broadest reading of *Miller and Birmingham (No 2)*, material prejudicial to the fair treatment of the defendant will be excluded. Perry J states this succinctly by

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65 Tracey Booth, ‘Penalty, Harm and the Community: What Role Now for Victim Impact Statements in Sentencing Homicide Offenders in NSW?’ (2007) 30 *University of New South Wales Law Journal* 664 at 679.

66 *R v Birmingham (No 2)* (1997) 96 A Crim R 545 at 549 (Perry J).

67 The other States and Territories similarly make no distinction between the reception of primary and family statements. See above n5 for the power to tender victim impact statements in each jurisdiction of Australia.

68 *R v FD*; *R v FD*; *R v JD* (2006) 160 A Crim R 392 at 414 (Sully J).

indicating that '[t]he court is entitled to take community outrage into account but in a guarded and circumspect manner.'<sup>69</sup> The proper procedure against the potential inclusion of extremist views as to the nature of the offence, offender, the punishment they deserve, or the extent to which the victim ought to be able to contribute to the sentence to be handed down, is to allow the sentencing court to do what it has always done — to exercise its discretion to accept or reject evidence as based on a fair assessment of the impacts of that evidence.

In terms of *Previtera*, the discretion of the court to include family perspectives as a particular representation of community sentiment will limit the consideration of any disproportionate view. In Victoria, South Australia and internationally, fears that taking family statements into account will cause sentencing disparity through the valuing of one life as greater than another have been abated by the fact that sentencing courts are held to consider information relevant to their objective analysis, as required by law. As has been demonstrated across all jurisdictions in which family statements are permitted as relevant, it is not a matter of victims gaining control of sentencing proceedings, obtaining some automatic right of participation forcing judges to sentence offenders in accordance with their wishes, but of family victims being accorded some legitimate role where they provide information potentially useful to the objective analysis required of all sentencing courts. The discretion of the court will remain central to determining what information is useful or not.

The third of Sully J's concerns identifies impact statements as a means by which victims are provided an opportunity to express the impacts of the crime upon them. This facilitates a therapeutic effect by allowing the victim to express their concerns to the court. While this is not an issue in non-fatal offences in which impact statements may be taken into account as relevant to the assessment of the harm occasioned, the antithesis is true of family statements in homicide cases where the information presented is deemed irrelevant. Sully J indicates, however, that the opportunity provided to victims is nonetheless of some value:

There is, thirdly, the need to afford the victims of crime, and especially the victims of violent crime, a forum in which they can make a public statement in words of their own choosing, in order to have the emotional catharsis of ensuring that their grief and loss have not been either ignored altogether, or expressed in what they see as an inadequate way.<sup>70</sup>

Various sources confirm that the ability to tender an impact statement, even reading it aloud in court, provides beneficial outcomes for victims afforded the privilege. Edna Erez indicates three key benefits for victims allowed to tender an impact statement following an offence.<sup>71</sup> These include the ability to contribute to proceedings, to have an impact statement read with a view to it being considered

69 *R v Birmingham (No 2)* (1997) 96 A Crim R 545 at 549 (Perry J).

70 *R v FD; R v FD; R v JD* (2006) 160 A Crim R 392 at 414 (Sully J).

71 Edna Erez, 'Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings' (2004) 40 *Criminal Law Bulletin* 483 at 491–98.

in sentencing, and where the impact statement acknowledges an offender's guilty plea, where one has been made. However, Erez argues that the therapeutic benefits of tendering and reading an impact statement will only be available where the victim believes that their statement is considered significant. This means that it is paramount that the judge takes the impact statement seriously and reads it with the intention of using it, where relevant, in sentencing the offender.

This raises the possibility, currently the case in NSW under *Previtera*, that where a statement is received by a sentencing court but then put aside, rejected as something potentially prejudicial to the determination of a fair, impartial and proportionate sentence, that any therapeutic benefits will be limited. Indeed, rather than ameliorate the harm caused by the offence, excluding family statements may well aggravate the harm caused to family victims. Knowing that their statement is excluded as repugnant to the ends of justice could, perhaps, cause serious damage to family victims and increase disillusionment with the justice system. Jo Goodey has argued that 'a mute political gesture to appease certain victims and victim lobby groups' would almost certainly exacerbate the political climate toward the recognition of victim rights which, in the longer term, could cause some damage to the public confidence of the criminal justice system'.<sup>72</sup> Exaggerated or unfair statements still need to be rejected in order to maintain the principles outlined in *Miller and Birmingham (No 2)*. In this context, the 'emotional catharsis' spoken of by Sully J seems to eschew the full consequences of *Previtera*, and the damage that ruling may well be doing to families informed of the exclusion of their impact statements.

It is NSW Parliament's attempt to redress such disillusionment that is addressed by Sully J's fourth point:

There is, fourthly, a political imperative deriving from perceived voter dissatisfaction with sentencing outcomes in serious criminal cases, and especially in cases of serious crimes of violence. This is, for many a politician, an issue of real consequence; but it is no easy matter to deal with volatile electoral emotions in a way that does not lay waste the accumulated wisdom of the common law of crime and punishment.<sup>73</sup>

The 'accumulated wisdom' of crime and punishment raised by Sully J is something that includes, rather than excludes, the tendency to permit family statements as relevant to sentence in homicide cases. The experience in Australia and internationally has been to allow such statements in the discretion of the court. Apart from NSW, no other jurisdiction automatically excludes family statements. Indeed, the approach adopted in England and Wales has gravitated toward a restorative model of participatory justice, recognising a radically expanded role for victims in terms of the mitigation of lengthier sentences, in acknowledgement of the unique relationship between victim and offender.

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72 Jo Goodey, 'An Overview of Key Themes' in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice: International Debates* (2000) at 23.

73 *R v FD*; *R v FD*; *R v JD* (2006) 160 A Crim R 392 at 414 (Sully J).

This, at least in terms of a broader common law from which NSW continues to draw, makes for compelling ground upon which to review *Previtera* and the logic of Sully J in *R v FD*; *R v FD*; *R v JD*. No particular reason, specific or unique to NSW, exists for the retention of a separate procedure. No benefit is gained other than maintaining an artificial distinction between primary and family victims based on the incorrect and unjustified assumption that sentencing discretion will miscarry on account of relevant family viewpoints. The need for change for the inclusion of family perspectives is even more legitimate in light of the requirements of s 3A(g) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), providing a new basis upon which to review old assumptions about the connections between the community and victims. Together, *R v Berg*<sup>74</sup> and *R v Tzanis*<sup>75</sup> at least hint at the notion that community and victims may be more contiguous than first realised. Viewed as informing one another, victims and the community can be considered as sharing similar interests and values. As *Miller* indicates, sentencing courts ought not separate them on the basis of some sense of illegitimacy that brands victims with an intractable mark of prejudice against the ends of criminal justice.

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74 [2004] NSWCCA 300.

75 [2005] NSWCCA 274.

