Accommodating Justice: an exploratory study of structures and processes that shape victim participation and the Presentation of victim impact statements in the sentencing of homicide offenders in the NSW Supreme Court

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Accommodating Justice:

An Exploratory Study of Structures and Processes that Shape Victim Participation and the Presentation of Victim Impact Statements in the Sentencing of Homicide Offenders in the NSW Supreme Court.

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During the last two decades in response to perceived victim dissatisfaction with criminal justice processes, legislatures in various common law jurisdictions have introduced contentious changes to established sentencing practices that enable crime victims to participate in sentencing hearings. These changes have generated uncertainty in relation to the proper function of the sentencing hearing and raised concerns that victim participation, especially by oral victim impact statements (VISs), is inconsistent with established legal values, detrimental to the offender's entitlement to a fair hearing and harmful to the integrity of the legal proceedings.

This thesis is a qualitative study that explores the mechanisms, structures and processes that shape and contextualise participation by family victims in the sentencing of homicide offenders in the NSW Supreme Court. To do so, it draws on an analysis of data gathered from a variety of sources including: primary legal materials; observation of 18 sentencing hearings; interviews with 14 family victims; and 24 VISs read aloud to the court.

The study has generated significant insight into victim participation in the sentencing of homicide offenders in a common law jurisdiction. It found that the expressive capacities of VISs, though more limited than claimed, are particularly significant for both victims and the court. It also found that the victim participation observed did not interfere with offenders' legal entitlements and enhanced the legitimacy of the legal processes. Key factors associated with this outcome are the quality of inter-personal treatment accorded to family victims in the courtroom and the structures and processes that manage emotionality associated with victim participation.

The key contributions of this thesis to the literature are: the use of a variety of data and modes of analysis to produce a novel and rich picture of victim participation in sentencing; courtroom observation, a form of empirical research little used by researchers in the area; unique narrative analysis of VISs; and extension of knowledge and the debate with regard to the expressive capacities of VISs, the management of emotions and the role of the sentencing court as a community forum dealing with the aftermath of homicide.

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- Booth T (2003) Homicide, family victims and sentencing: Continuing the debate about victim impact statements. *Current Issues in Criminal Justice* 15: 253.

- Booth T (2007a) Penalty, harm and the community: What role now for victim impact statements in sentencing homicide offenders in NSW? *University of New South Wales Law Journal* 30(3): 664-685.

- Booth T (2007b) The contentious role of victim impact statements in sentencing homicide offenders in NSW. *Law Society Journal* 45: 68-71.

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Abstract

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This thesis is a qualitative study that explores the mechanisms, structures and processes that shape and contextualise participation by family victims in the sentencing of homicide offenders in the NSW Supreme Court. To do so, it draws on an analysis of data gathered from a variety of sources including: primary legal materials; observation of 18 sentencing hearings; interviews with 14 family victims; and 24 VISs read aloud to the court.

The study has generated significant insight into victim participation in the sentencing of homicide offenders in a common law jurisdiction. It found that the expressive capacities of VISs, though more limited than claimed, are particularly significant for both victims and the court. It also found that the victim participation observed did not interfere with offenders' legal entitlements and enhanced the legitimacy of the legal processes. Key factors associated with this outcome are the quality of inter-personal treatment accorded to family victims in the courtroom and the structures and processes that manage emotionality associated with victim participation.

The key contributions of this thesis to the literature are: the use of a variety of data and modes of analysis to produce a novel and rich picture of victim participation in sentencing; courtroom observation, a form of empirical research little used by

researchers in the area; unique narrative analysis of VISs; and extension of knowledge and the debate with regard to the expressive capacities of VISs, the management of emotions and the role of the sentencing court as a community forum dealing with the aftermath of homicide.

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1. Introduction

In most common law jurisdictions, the post-war decades have witnessed enormous change in the status of the 'victim of crime'[1] in criminal justice and the role of that victim in the development of penal policies – from "outsider *par excellence"* (Ryan, 2003: 68) to becoming the "centre of contemporary discourse" (Garland, 2001: 11). The increasing political and penal prominence of crime victims in criminal justice policy has been well-documented as a product of a complex and diverse set of discourses, the most significant of which include:

- the emergence of victim advocates and organised victim support groups lobbying for change and raising general awareness of the plight of crime victims in criminal justice processes (Mykyta, 1981; Rock, 1990, 1998; Walklate, 2007b: 8-17; Booth and Carrington, 2007);
- the emergence of crime victimisation surveys and the 'dark figure of crime' (Wilson and Brown, 1973: 74-90; Grabosky 1989; Walklate, 2007: 11-17; Wolhunter, Olley and Denham, 2009: 34-40);
- cultural changes in our society's sensibilities that have led to the 're-emotionalisation of law and its processes' and shifts in approaches to criminal justice - a key feature of these shifts being a focus on victims and their emotional needs (Karstedt, 2011:3, 2002; 2006; Laster and O'Malley, 1998);
- the articulation of victims' rights in human rights frameworks such as the United Nations 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Declaration, the European Convention on Human Rights and the International Criminal Court (Rock, 2004; Doak, 2008; Doak et al, 2009; Kirchengast, 2011); and

[1] It is important to note that the 'victim of crime' referred to here is a reference to the political projection of the crime victim described by Garland (2001). Crime victims in reality do not comprise a homogenous group and not all victimisation is regarded as equally deserving of recognition by policy makers.

- the prioritisation of the perceived needs and concerns of victims by government in the development of penal policies (Henderson, 1985; Elias, 1993; Garland, 2001; Jackson, 2003; Goodey, 2005; Walklate, 2012).

Early studies of victims and their experiences in the criminal justice system found major sources of dissatisfaction to be the lack of information, support and assistance, consultation, protection during courtroom ordeals, and voice in the legal proceedings more generally (Shapland, Willmore and Duff, 1985). Consistent with the increasing prominence of victims in penal policies during the last three decades, the perceived concerns and needs of victims have been met by a growing sensitivity of legislatures in common law jurisdictions (Goodey, 2005). Concomitant changes to laws and criminal justice processes have facilitated increasing victim participation in the criminal justice system (Hall, 2009). Waves of legislative reform have acknowledged and promoted the 'rights' of crime victims through the promulgation of victims' rights charters, the provision of support services, protections for vulnerable witnesses and other benefits. Reforms that aim to facilitate victim participation through the provision of pertinent information, support and assistance, and criminal injuries compensation have generally been welcomed as appropriate mechanisms through which to recognise and accommodate victims' interests and concerns.

Those reforms entitling victims to participate in the sentencing hearing through victim impact statements (VISs) however have not been so readily accepted. (Henderson, 1985; Ashworth, 1993; Bandes, 1996, 2009; Sarat, 1997; Hoyle et al, 1998, 2011; Erez, 2000; Booth, 2000, 2007; Sanders, et al, 2001; Edwards, 2004; Kirchengast, 2008). Victim impact statements are tendered to the court either in writing or, in some jurisdictions, orally after conviction and prior to sentencing the offender. Although there are significant variations in legislative frameworks with regard to such matters as the definition of 'victim', the contents of a VIS and form of presentation, typically a VIS is an account of the harm sustained by the victim as

a result of the offence. In the Northern Territory[2] and some US jurisdictions (Schuster and Propen, 2010) however, crime victims can also use their VISs to express an opinion about the appropriate sentence to be imposed. Because this latter use of VISs is very controversial and most common law jurisdictions do not permit VISs to be used in this manner, this thesis will only be concerned with those VISs that provide an account of the harm caused by the offence to victims and their families.

By way of overview,[3] opponents of victim participation in the sentencing process in common law jurisdictions argue that victim input is:

- Antithetical to the adversarial nature of legal proceedings;
- Irrelevant to the purposes and legal goals of sentencing;
- Detrimental to the offender's interests and entitlement to a fair hearing; and
- Harmful to the integrity of the legal proceedings.

On the other hand, proponents of such victim participation contend that victim input:

- Includes valuable information relevant to the seriousness of the offence and the determination of penalty;
- Serves other legitimate expressive purposes that are important in the sentencing process;
- Provides therapeutic and restorative benefits for crime victims; and
- Enhances the fairness of the proceedings overall.

1.1 Thesis Topic

Particularly contentious during the last decade has been the presentation of oral VISs and, more recently, video impact videos or DVD's (VIDs) to the sentencing

[2] Section 106B(5A) *Sentencing Act* (Northern Territory).
[3] These matters will be discussed in more detail in chapters two and three of this thesis.

court in the context of sentencing homicide offenders (Bandes, 2008; Logan, 2008; Rock, 2010; Hoyle, 2011).[4] In addition to the general objections expressed above, opponents of oral VISs have expressed concern that statements in such form threaten the court's integrity and the offender's entitlement to a fair hearing. It is said that the very nature of VISs means that they are highly subjective and emotional; read aloud to the court by the victim, these statements have the potential to generate inappropriate emotional displays, embarrassment and confrontation in legal proceedings. Opponents argue that such emotionality is inappropriate in the courtroom, inconsistent with legal values, potentially uncontrollable and disruptive as well as presenting an onerous management task for the sentencing judge.

The recent experience of family victims in the UK is illustrative of this disquiet. In the UK in 2006, in relation to offenders convicted of murder and manslaughter, a pilot scheme permitted members of the deceased's family ('family victims') to read their VIS aloud to the sentencing court.[5] When the scheme was rolled out nationally in 2008 however, family victims had lost their entitlement to read their statement aloud despite the fact that evaluation of the scheme did not reveal significant problems (Sweeting et al, 2008). The scheme evaluation, found however, that many of the legal practitioners involved in pilot cases were of the view that such oral VISs and consequent emotionality were not appropriate in an adversarial sentencing court (Sweeting, et al, 2008; Rock, 2010). Nonetheless, it was recommended that further consideration should be given to oral VISs because of findings that family victims welcomed the opportunity to present their own VISs orally to the court (Sweeting, 2008: 34). Currently in the UK, it appears that oral delivery of VISs by family victims is a matter for judicial discretion (Casey, 2011: 42) or through counsel (Doak et al, 2009: 675).

[4] For the purposes of this thesis, homicide offenders are those offenders who have been convicted or murder or manslaughter.

[5] In this scheme, the VIS was referred to as a 'family impact statement'.

That victim participation by oral VISs has the potential to produce tension and conflict in the courtroom and bring the integrity of the proceedings into question more generally was demonstrated in a recent case heard by the Supreme Court in Victoria, *Borthwick* [2010] VSC 613 (Iaria, 2010; ABC Radio National, 2011; Booth, 2011b).[6] Borthwick was convicted of the manslaughter of Mark Zimmer and at the sentencing hearing in September, 2010, family victims submitted VISs to the court wanting to read them aloud.[7] The defence objected to the content of the statements on the basis that it did not relate to the impact of the offence on the family as required by law; it was reported that the defence did not want this material heard in open court and ultimately placed on the court record. According to media reports, the court then spent some 90 minutes reviewing these objections, editing and deleting 'inadmissible' material in the VISs in open court. Amended versions were then handed back to the family victims who appeared appalled at the outcome; the deceased's sister tore her VIS in two and "stormed out of the courtroom in tears" (Iara, 2010). Members of the deceased's family subsequently gave media interviews detailing their distress and anger at their treatment in the courtroom and making public those deleted sections of their VISs (Booth, 2011b).

Following negative publicity and calls to review the handling of VISs in the courtroom, a new practice direction for sentencing hearings in the Victorian Supreme Court commenced in May, 2011.[8] The defence are expected to scrutinise the VISs as they come to hand and give the Prosecution notice of any concerns; the parties will discuss contentious issues in the statements before the hearing. If these issues can be resolved, conflict as occurred in *Borthwick* can be avoided. If it appears that the issues cannot be resolved and moreover that the dispute may well become 'ugly' during the sentencing hearing "and impact on the conduct of the

[6] Informing regarding the courtroom events in this case has been obtained through media reports (Iaria, 2010) and a three-part documentary in relation to the case broadcast by ABC Radio National (25/1/11, 1/2/11, 8/2/11).
[7] According to *Sentencing Act 1991* (Vic), family are entitled to submit VISs and those VISs are relevant to the determination of penalty. The law will be discussed in further detail below.
[8] Practice note 3 of 2011.

plea" then a preliminary hearing could be conducted to rule on these contested issues.[9] Clearly the aim is to prevent disruption of the defendant's plea hearing as occurred in *Borthwick*. It is striking however that the practice direction does not address questions relating to the *quality* of the family's experience in the courtroom.

According to Garland, VISs have led us into "unfamiliar territory where the ideological grounds are far from clear and the old assumptions an unreliable guide" and our sense of how things work needs to be clarified (2001: 4-5). Whereas research studies have addressed the implementation of statutory VIS schemes (Erez et al, 1994; Hoyle et al, 1998; Sanders et al, 2001; Chalmers et al, 2007; Sweeting et al, 2008), the relevance of VISs to sentencing and the impact of VISs on penalties (Roberts and Manikis, 2011), the perspectives of legal professionals and the satisfaction of victims in relation to VISs (Erez, 2000; Victim Support Agency, 2009; Rock, 2010; Roberts and Manikis, 2011), very little work has been done with regard to actual victim participation in the courtroom and the impact of oral VISs on the dynamics and integrity of the proceedings (Shapland and Hall, 2010).

1.2 Thesis Question

In response to *Garland,* this thesis aims to investigate this unfamiliar territory in a particularly controversial area: the sentencing of homicide offenders in the NSW Supreme Court. Because crime victims are not a homogenous group, the focus of this study is limited to the participation of a discrete group of crime victims - the family of the deceased victim, or 'family victims', in the sentencing of homicide offenders. In section 26 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (*CSPA*), a family victim is statutorily defined as being a member of the deceased's "immediate family". This section sets out exhaustively the categories of family

[9] Practice Note 3 of 2011 (Victoria), paragraph 8.

relationships that constitute the 'immediate family'.[10] For the purposes of this thesis, 'homicide' offenders' are those offenders who have been convicted of either murder or manslaughter under the *Crimes Act 1900* (NSW), either at trial or by guilty plea, and sentenced in the NSW Supreme Court.

In NSW since 1997, family victims have been entitled by virtue of legislation to submit a written VIS to the sentencing hearing in matters where the primary victim has died as a result of the offence.[11] Following legislative amendment in 2003, family victims can choose to read their VISs aloud personally or by a representative to the sentencing court.[12] There is no prescribed VIS form and nor is there an agency designated to prepare VISs for family victims.[13] According to the regulations, the statement should be no more than 20 x A4 pages in length and signed by the family victim author.[14] Subject to the regulations, a VIS can include or be comprised of "photographs, drawings or other images".[15] Section 26 of the *CSPA,* limits the content of the statement to the impact of the deceased's death on the family.[16]

With regard to use in sentencing, a VIS is submitted to the court between conviction and sentence and while a sentencing court *must* receive a VIS properly

[10] A family victim is defined in section 26 *Crimes (Sentencing Procedure) Act 1999* (NSW) as a member of the deceased primary victim's immediate family which means:

a. The victim's spouse
b. The victim's de facto partner
b1. The person to whom the victim is engaged to be married
c. Parent, grandparent, guardian or step-parent of the victim
d. Child, grandchild or step-child of the victim or some other child for whom the victim is guardian
e. Brother, sister, half-brother, half-sister, step-brother or step-sister of the victim.

[11] Section 28(3) *Crimes (Sentencing Procedure) Act 1999* (NSW). Prior to this time, VISs from family victims were inadmissible in the sentencing hearing for homicide offenders (*R v de Souza* BC9501616). This aspect will be discussed in more detail in chapter three.

[12] Section 30A *Crimes (Sentencing Procedure) Act 1999* (NSW).

[13] An information booklet has been produced by Victims Services to assist victims making a VIS and it includes guidance as to what information can go in the VIS. This booklet is available at http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll_vs.nsf/vwFiles/BK03_VIS.pdf/$file/BK03_VIS.pdf last accessed on 26 October 2012.

[14] Regulation 10 *Crimes (Sentencing Procedure) Regulation 1999* (NSW).

[15] Section 30(1A) *Crimes (Sentencing Procedure) Act 1999* (NSW)

[16] Section 26 *Crimes (Sentencing Procedure) Act 1999* (NSW)

submitted by a family victim,[17] that court *must not* take account of that VIS in the determination of penalty "unless it considers that it is appropriate to do so".[18] The NSW Court of Criminal Appeal (NSWCCA) has taken the view that VISs from family victims providing details of the harm suffered by the deceased's family as a result of the deceased's death are not relevant to determining penalty for homicide offenders (*R v Previtera* (1997) 94 A Crim LR 76).[19] In *R v FD; R v JD* (2006) 160 A Crim R 392, Sully J in the NSW Court of Criminal Appeal indicated that such VISs serve other purposes:

> *[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 (*414*).*

It is noteworthy that the NSW Supreme Court's approach to VISs from family victims is unique amongst the Australian jurisdictions. Despite little uniformity in terminology or formal, procedural and evidential matters between the various Australian VIS statutory models, a common feature of those statutory schemes other than NSW is that VISs from family victims are relevant to the sentencing court in formulating penalty for homicide offenders.[20] Indeed from an international perspective, common law jurisdictions such as Canada, New Zealand, the United Kingdom and Scotland also take account of VIS from family victims in sentencing (Kirchengast, 2011). Changes to the existing NSW law to bring it into line with other jurisdictions were foreshadowed by the recently elected NSW government (NSW Department of Attorney-General and Justice, 2011) but recent communication from

[17] Section 28(3) *Crimes (Sentencing Procedure) Act 1999* (NSW)
[18] Italics have been added. Section 28(4)(b) *crimes (Sentencing Procedure) Act 1999* (NSW)
[19] The legal framework will be examined in detail in chapter five of this thesis.
[20] The legislative frameworks for VISs in the Australian jurisdictions are located as follows: *Sentencing Act 1991* (Victoria) Part 3, Div 1C); *Criminal Law (Sentencing) Act 1988* (SA) s 7A; *Sentencing Act 1995* (WA) Part 3, Div 4; *Sentencing Act 1995* (NT) s 106B; *Sentencing Act 1997* (Tas) s81A; *Crimes (Sentencing) Act 2005* (ACT) Part 4, Div 3; *Victims of Crime Assistance Act 2009*, s15.

the Department of the Attorney-General and Justice indicates that following legal advice, there are no plans to move forward with the proposed change.[21]

This thesis seeks to investigate victim participation in the sentencing hearings of homicide offenders in NSW and particularly the presentation of oral VISs in the legal proceedings. The investigation will be guided by three primary questions:

1. How does family victim participation 'work' in the courtroom?
2. What are the implications for the offender's entitlement to a fair hearing?
3. What are the implications for the integrity of the proceedings?

It is important to note that the thesis does not aim to measure the actual impact of family victim participation on either the offender's interests or the integrity of the sentencing hearing. Rather, the aim is to produce a rich picture of victim participation in the courtroom and thereby gain valuable insight into this aspect of criminal justice. For this purpose the following issues will be addressed: the nature and performance of family victim participation in the sentencing of homicide offenders in NSW; courtroom dynamics and the nature and extent of response to such victim participation.

For the purposes of this thesis, victim participation, fairness to the offender and the integrity of the legal proceedings, are conceptualised as follows.

1.2.1 Victim Participation

The *Oxford English Dictionary* defines 'participation' as "the action or fact of having or forming part *of* something, the sharing *of* something".[22] Aptly described as "something of an abstract term" (Doak, 2005: 295), the nature of participation is

[21] Email communication with Mandy Young, Director of Victims' Services.
[22] Italics have been added.

shaped by context (Edwards, 2004: 973). Participation can be conceptualised as active or passive, direct or indirect (Wemmers, 2008), involving "interaction and involvement with others" and ranging across such actions or facts as "being in control, having a say, being listened to or being treated with dignity and respect" (Edwards, 2004: 973). Two components of sentencing hearings are relevant to the analysis of victim participation in this thesis: the determination of the ultimate penalty specifically and the legal proceedings more generally. Each will be discussed in turn.

1.2.1.1 Participation in determination of penalty

This thesis adopts Edwards' typology of victim participation in decision-making as either "dispositive" or "non-dispositive", which can be applied to the determination of penalty at the sentencing stage (Edwards, 2004: 974-977). According to this typology, victim participation is dispositive where victims have 'control' over the sentencing decision and their determination is final. For example, under Sharia law, the relatives of a homicide victim have a choice between extending forgiveness and mercy to the offender, claiming compensation or imposing the death penalty (Edwards, 2004: 975).

Non-dispositive participation covers a range of activities where the victim does not decide the ultimate penalty but nonetheless through processes of consultation, information-provision and expression, provides input that might influence the sentence imposed. A consultative process would require that victims inform the decision-maker of their preferences for sentence and those preferences are then weighed against competing interests relevant to the final decision. For example, in Germany, a civil law jurisdiction, victims can address the court and propose a sentence to be imposed in the particular circumstances although the determination of the ultimate penalty remains a matter for the court (Kury and Kilching, 2011: 49). Another non-dispositive form of participation occurs where the victim provides information, relevant to sentence, to the decision-maker for his or her consideration. The classic model of such victim participation at the sentencing

stage is the submission of a VIS providing details of the impact of the offence on the victim that can be taken into account by the judge in determining penalty.

1.2.1.2 Participation in the legal proceedings

For the purposes of this thesis, direct and active participation occurs in circumstances where the victim is integrated in the proceedings as either a party or quasi-party, afforded an expressive role or through the submission of a written VIS; indirect victim participation occurs where the interests and concerns of victims are recognised and acted upon by the court in the course of the proceedings.

Direct participation

Victims might be integrated into the sentencing hearing "in a formal and recognised role" though not necessarily with all the rights of the offender (Wemmers, 2009: 410). Such status might characterise the victim as a party or quasi-party, or a participant with formal status who might participate either vicariously through a legal representative (Sebba, 1996: 204) or in person. In such a position, victims would occupy a central space in the hearing and be in a position to ask questions of witnesses as well as address the court with regard to the evidence and/or penalty. Such active participation is a feature of some civil law jurisdictions. For example, in Germany, victims can be legally represented and participate in the trial as a Nebenklager or accessory prosecutor (Kury and Kilching, 2011).

Another form of direct participation is where victims are afforded an expressive role in the hearing. In Edwards' typology, he describes this non-dispositive form of participation as 'expression': "the victim wanting to provide information or communicate feelings to the decision-maker. The only obligation on the criminal justice system may be to allow the victims an opportunity to emote" (Edwards, 2004: 976).

> *[T]hrough expression, the victim selects the information that he wishes to make known to the court. The victim might want to provide the same information as the court requires, but present it in emotional, subjective terms, to go into greater detail than the court needs, and relate information beyond that required by the court. It need not even be information that the victim wishes to provide: he may just want to shout, cry or scream – all expressive forms of communication*.' (Edwards, 2004: 976)

In this role, whilst lacking formal standing as a party, victims would be given the opportunity to speak to the court about the impact of the crime on them and their families. An example of this form of participation in active mode would be reading their VISs aloud to the court. Victims would be allocated space in the courtroom for this purpose and heard by the court though the statement has no impact on the penalty imposed.

Finally, participation can also be characterised as direct, though passive, when those victims who choose not to read their VIS aloud instead submit their written statement to the court in circumstances where the court is obliged to receive it.

Indirect Participation

This form of victim participation can be demonstrated in two ways. First, by the personal involvement of victims in the hearing as audience members located in the public gallery away from the proceedings (Sebba, 1996: 205); second, where victim interests and concerns are recognised and acted upon by the court in the course of the proceedings. An example of the latter form of indirect participation would be the treatment of victims by other participants with sensitivity. For instance, the prosecution or defence might refrain from making certain remarks to the court that could be distressing to family members. Alternatively, before setting a date for sentence, the judge might enquire as to the availability of the family victims to ensure that they would be able to attend.

1.2.2 Fairness to the Offender

Much of the reform of the substantive criminal law and procedure over the past 150 years has been a function of the elevation of 'fairness' as a core principle of the criminal trial and recognition of its dynamic nature (Spigelman, 2004); a fundamental element of our criminal justice system is "that a person should not be convicted of an offence save after a fair trial according to law" (Gaudron J in *Dietrich* (1992) 177 CLR 292, 362). For the purposes of this thesis, whether or not participation of family victims is detrimental to the homicide offender's interests and entitlement to a fair hearing will be evaluated against specific rules protecting the interests of offenders in the sentencing hearing and the more general requirement that the hearing be conducted 'fairly', according to due process.

With regard to sentencing, particular legal principles have emerged to protect the interests of the offender during the hearing and at the imposition of penalty. In short, the offender is entitled to:

- be legally represented and have the opportunity to address the court;[23]
- a full opportunity to meet the case against him/her (*R v McHardie* [1983] 2 NSWLR733*);*
- be sentenced justly and according to law (*Veen v R (No. 2)* (1988) 164 CLR 465);
- reasons for the sentencing judge's decision that are also published in oral form (*Pettitt v Dunkley* [1971] 1 NSWLR 376); and
- be judged by an independent and impartial tribunal (Edwards, 2009: 299).

Together with these specific safeguards, there is also a more general requirement that the sentencing hearing be conducted according to the 'requirement of fairness'. The concept of fairness "defies analytical definition" (Deane J in *Jago v District Court of New South Wales* (1989) 168 CLR 23, 57) and does not operate within closed categories (Gaudron J in *Dietrich* (1992) 177 CLR 292, 363). Whether

[23] Section 36 *Criminal Procedure Act 1986* (NSW).

particular events or circumstances constitute a breach of the requirement of fairness will be decided on a case by case basis involving an "undesirably, but unavoidably, large content of essentially intuitive judgment. The best that one can do is to formulate relevant general propositions and examples derived from past experience." (Deane J in *Jago v District Court of New South Wales* (1989) 168 CLR 23, 57). When assessing whether a particular hearing is fair, it is important to bear in mind that the requirement of fairness is a dynamic principle adapting to and reflecting changing community perceptions and standards:

> *Notions of fairness are inevitably bound up with prevailing social values. It is because of these matters that the inherent powers of a court to prevent injustice are not confined within closed categories. (*Gaudron J in *Dietrich,* (1992) 177 CLR 292, 364*)*

The question is whether the relevant event or circumstances of the hearing deprived the proceedings of that quality of fairness "to a degree where a miscarriage of justice has occurred" (Spigelman, 2004: 31).

1.2.3 Integrity of the Sentencing Hearing

By necessity, fairness to the offender as conceptualised above is a critical component of the integrity of the sentencing proceedings. Distinct from discrete issues relating to the offender's entitlement to a fair hearing, however, is the broader requirement that courts have a duty to maintain public confidence in the administration of justice and the integrity of their processes (Spigelman, 2004: 31). This duty is related to the perceived 'legitimacy' of the legal proceedings; the degree to which the institutional actors behave according to established laws or rules and the entitlement of the court to enforce the rule of law and be obeyed (McEwen and Maiman, 1986: 257-258***).*** Tyler argues that people are more likely to cooperate with the courts when they regard the courts as 'legitimate' and entitled to be obeyed (2003:306; Tyler and Huo, 2002). The more people view courts as legitimate, the more willing they are to accept decisions and comply with directions

from the courts and "the likelihood of defiance, hostility and resistance is diminished" (Tyler, 2003:286). Under the auspices of procedural justice, the legitimacy of the courts is a function of the quality of the procedures that are utilised and the perceptions of the people involved in those procedures (Tyler, 1988, 2003; Mack and Roach Anleu 2010:139).

For the purposes of this thesis, there are three key components to the integrity of the hearings. First, judicial officers are required to behave in a manner that demonstrates conformity with key values of "our judicial tradition" – "manifest neutrality, restraint and impartiality" (Kirby, J in *Chow v DPP* (1992) NSWLR 593, 606; see also Mack and Roach Anleu, 2010: 140). Second, sentencing hearings proceed in an orderly manner (Kirby J in *Chow v DPP* (1992) NSWLR 593, 599). Third, the court treats all participants in the sentencing hearings (not just the offenders) with dignity, courtesy and respect and those participants are afforded procedural justice appropriately (Tyler, 2003: 350; Tyler and Huo, 2002; King, 2003, 2008). Perceptions of procedural injustice can lead a person to experience negative emotions and affect the degree to which they comply with the decisions and directions of the court which in turn could lead to, *inter alia*, disruption of court proceedings (Murphy and Tyler, 2008).

1.2.4 A Final Note on Terminology

The terminology, 'crime victims' and 'family victims' is widely used in policy and legislative frameworks as well as the literature and these terms have been adopted in the thesis. I recognize however that the term 'victim' has particular political and social implications and is often eschewed as a label for those wronged by crime. For instance, one family victim told me: "I don't want to wear the label 'victim'…don't have pity on me, it was just something that happened to me." In the context of homicide, the description of 'homicide survivor' might be preferred by those who see this terminology as encapsulating their strength rather than weakness, activity rather than passivity (Rock, 1998: 26). And certainly if the study was confined to

research in relation to family victims and their experiences, I would use the terminology of homicide survivor (as indeed I have done elsewhere see Booth, 2011a). Given that this thesis is exploring the impact of victim participation on legal processes and outcomes, however, to avoid confusion that might be generated by the conflicting language of the legislation, cases and literature, the terms 'crime victims', 'victim participation' and 'family victims' will be used.

1.3 Overview of Methodology

1.3.1 Summary of existing research

There is previous research that has analysed the content of VISs submitted by family victims and identified prevalent themes (Booth, 2001; Szmania and Gracyalny, 2006; Rock, 2010). The first study is my own qualitative content analysis of 78 written VISs that were submitted to the NSW Supreme Court from 2nd April, 1997 (the start of the legislative scheme) to December 31 2000.[24] This study was confined to identifying common themes in the statements submitted. Szmania and Gracyalny have analysed 40 VISs from family victims that were read aloud to a US sentencing court for the purpose of sentencing a serial homicide offender in 2003. While their analysis is more concerned with the communicative function of VISs (though not the 'telling' of the VISs in the courtroom), they have highlighted critical themes that emerged in the analysis. Finally, as part of the evaluation of the FIS sentencing scheme in the UK (see 1.1), Rock has also identified key themes that emerged in the VISs that were submitted by the family victims in three cases as well as some aspects of the 'telling' of those statements.

Until very recently, there was a dearth of research on victim participation in the sentencing hearing itself (Shapland and Hall, 2010). Firsthand accounts of VISs presented in the courtroom have generally come from journalists' reports (Logan

[24] Indeed it was this research that sparked my interest in this research area and led to the development of this PhD project.

2008; Lowe 2010). Some researchers have also analysed court transcripts (Logan, 2008) or a digital video recording of a sentencing hearing (Szmania and Gracyalny, 2006). Exceptions are recent studies from the United States (Propen and Schuster, 2008, 2010; Schuster and Propen, 2010) and the UK (Rock, 2010).

The US study, conducted in Minnesota between 2004 and 2006, comprised interviews with 22 sentencing judges, 16 victim advocates and observation of 17 sentencing hearings involving matters of family and sexual violence, homicide and identity theft (Propen and Schuster, 2008). In Minnesota, victims can submit both oral and written VISs and also, more controversially, make submissions regarding the penalty to be imposed. While researchers indicated that their observation work sought to further understand courtroom dynamics, they did not code the data and "sparingly allude to them anecdotally when they offer insight into our analysis" (Propen and Schuster, 2010: 10). Publications from the study thus far have focused on the impact of oral VISs on judges' sentencing decisions, judicial responses to the expression of grief and anger in the VISs and analysis of the VISs submitted as rhetorical devices (Schuster and Propen, 2010).

As part of the evaluation of the UK VIS pilot referred to above, Rock conducted four case studies of homicide matters that commenced in London in 2007 (Rock 2010). The case studies involved observation of the proceedings of three matters in their entirety (one resulted in an acquittal) and interviews with the principals involved in each case, other than the offender (Rock, 2010:204). Unlike the US study, a significant aim of the project was to analyse the "social dynamics entailed in making victim impact statements" (Rock, 2010:204) and in his account of the research, Rock provides a rich description of the preparation, content and making of VISs in these matters from the perspective of the family victims involved. Rock found that the oral VISs met with resistance from legal professionals, that the VISs in the matters observed had "only a modest effect on the families' satisfaction and very little effect on sentencing" (2010:225).

1.3.2 Research Design

This project is designed as a small in-depth qualitative study that sets out to build on previous research. The study aims to investigate how participation of family victims in the sentencing hearings of homicide offenders works in the courtroom and the implications of such participation for the offender's interests and the integrity of the sentencing hearing more generally. To this end data has been drawn from four main sources:

1. Analysis of the primary legal materials;
2. Observation of 18 sentencing hearings in the NSW Supreme Court heard between July 2007 and December 2008;
3. In-depth semi-structured interviews with 14 family victims conducted between April 2007 and October 2008; and
4. Narrative analysis of 24 victim impact statements read aloud to the court in the hearings observed.

The research was approved by the relevant human research ethics bodies at the University of New South Wales (UNSW) in two stages. Stage one comprised approval from the UNSW Human Research Committee (HREC) for the interviews and observation of sentencing hearings. Stage two comprised approval from the UNSW Human Research Ethics Panel for access to those VISs that were read aloud to the court in the hearings observed.

1.3.3 The Limitations of the Study

1.3.3.1 Observation Fieldwork

The main object of study is victim participation in the courtroom. Because the study is comprised of 18 sentencing hearings in the NSW Supreme Court, the extent to which the results can be considered to be of more general application is limited. It is not the aim of the study however to be representative of victim participation in the sentencing hearings of homicide offenders more generally; rather the study is

exploratory in nature and intended to illuminate the nature and dynamics of participation of family victims in sentencing hearings. The findings will provide a basis for further research.

1.3.3.2 Interviews

The interview component of the study is comprised of a small number of participants (14) which limits the extent to which the results can be considered to be of more general application. Again it is not intended that this sample (and indeed the study) be representative of a discrete group of victims but rather exploratory in nature. The aim of talking with family victims about their experiences was to develop some insight into courtroom events as well as 'backstage' processes to the hearing, such as preparation of VISs and consultation with the Office of the Director of Public Prosecutions (ODPP) that would inform interpretation of my observations.

Twelve of the 14 participants were recruited from the Homicide Victims Support Group (HVSG) through an article seeking participants that was published in the HVSG monthly newsletter; one other participant had been recruited through another support group although she had also been associated with the HVSG closely at one time. The remaining participant contacted me directly after she read an article I published in the *Law Society Journal* (Booth, 2007b); her family was not associated with any victim support group. Thus, an inbuilt bias of this study is its limited recruitment base and family victims who have elected not to have contact with these groups did not have an opportunity to join the study. There may well be important reasons why those victims have decided to 'go it alone' (or otherwise supported) which might have had an impact on their experiences of the sentencing process. Moreover, participants recruited from a victims support group might be more politically 'active' or 'aware' with more of an 'agenda' than family victims outside these groups (Rock, 1998). Nonetheless, I am confident the HVSG represents a broad cross-section of family victims. Over half of those family victims I

observed in the sentencing hearings were accompanied by a support person from the HVSG. Furthermore, the HVSG has a memorandum of understanding with the NSW Police; as a result of which the HVSG comes into contact with most of the family victims in NSW. The newsletter, through which I sought participants for my study, is sent to all of those family victims who have had dealings with the group in the past although they may not have been active members or continued to have contact with the group.

There are two further limitations in relation to the interview data that are relevant – gender and ethnic diversity. Only 2 of the 14 participants were men. While it would have been preferable to have had a greater gender balance, this imbalance was also reflected in the hearings observed and it is consistent with other research findings that reported a preponderance of women presenting VISs (Erez, Ibarra and Downs, 2011:27; Meredith and Paquette, 2001: 14-15; Szmania and Gracyalny, 2006). With regard to ethnic diversity, all but one of the participants was from an Anglo-Australian background; the remaining participant was from New Zealand of Maori heritage. Again however this lack of ethnic diversity was reflected in the hearings observed where only one non-Anglo family victim, from an Asian background, read her VIS to the sentencing court. In two other matters the family victims came from an indigenous Australian and Vietnamese background respectively but no VISs were read to the court in either case.

1.4 Thesis Structure

Chapter One: Introduction

Chapter Two: The functions of victim impact statements in sentencing hearings

Although this thesis does not confine the concept of victim participation to the submissions of VISs, VISs are nonetheless the major vehicle by which family victims are able to directly participate in the sentencing hearing. Chapters two and three of this thesis draw from a range of theoretical, doctrinal and empirical sources and

address the functions and controversial nature of VISs. This chapter addresses the instrumental and expressive functions of VISs in the context of an adversarial sentencing hearing. The use of VISs in the sentencing of homicide offenders is dealt with in some detail.

Chapter Three: The contentious nature of victim impact statements in sentencing hearings

The aim of chapter three is to address contentious issues relating to the nature and use of VISs in the sentencing hearing with particular regard to the sentencing of homicide offenders. This chapter explores the implications of those issues for the offender's entitlement to a fair hearing and the integrity of the legal proceedings more generally. These issues will be addressed under four broad headings: VISs as evidence in the sentencing hearing; impact of VISs on penalty; emotion; and victim participation in adversarial legal proceedings.

Chapter Four: Research design

In four parts, this chapter provides details of the research design employed in this study. A combination of data gathering techniques are used: observation of sentencing hearings, interviews with family victims and a narrative analysis of VISs. Part one explains why these research methods were adopted and the difficulties of conducting such sensitive research. Part two describes the observation fieldwork: access to the settings and selection of cases as well as gathering and analysing the data. The focus of part three is the interviews with family victims: recruitment, profile of participants and the conduct of the interviews. Part four describes the approach to the analysis of the content and performance of 24 VISs, read aloud to the court in the cases observed, using narrative analysis techniques. The combination of data has produced a rich, rounded picture of victim participation in the sentencing process.

Chapter Five: The legal framework

This chapter describes and analyses the legal framework within which family victims submit VISs in NSW. The legislation that regulates VISs in NSW retains significant judicial discretion and this chapter will explore the constraints that have developed on the discretion of NSW sentencing judges with regard to the use of VISs in sentencing. While VISs are not used to influence penalty in NSW, the VISs are used for expressive purposes.

Chapter Six: Family victim participation in the sentencing hearings

Chapter six is the first of two chapters that analyse the empirical data. Using theatrical imagery and dramaturgical principles, the object of this chapter is to interpret and analyse events in the courtroom and thereby illuminate participation by family victims. Part one of the chapter analyses the 'production' of the hearings and part two examines performance including form and sequence of the proceedings, courtroom conduct and presentation of VISs. The only way that they can actively participate is to speak and be heard through oral VISs. Indirect victim participation however is also evident in a number of cases through overt judicial recognition to the concerns and interests of family victims in those particular matters. This chapter produces a rich picture of victim participation in the sentencing hearing.

Chapter Seven: A narrative analysis of victim impact statements

The second of two chapters to analyse the data, Chapter seven enhances the rich picture of family victim participation that has emerged through a narrative analysis of the content and presentation of 24 oral VISs in the hearings observed. VISs are carefully constructed documents subject to legal restrictions and a filtering process by which they might be edited and amended. While much of the content was related to the harms suffered by family victims as a result of the deceased's death, a significant quantity of the approved content dealt with matters outside the legislative limits and in some cases, quite prejudicial to the interests of the offender. The VISs recounted poignant, distressing and frequently confronting stories of loss; family victims expressed anger and sadness, shed tears and broke

down as they recounted the impact of the death of their family member on their lives. Although the emotional tension in the courtroom was raised in those matters where VISs were read aloud, contrary to concerns that such emotion could disrupt the proceedings, the hearings remained orderly, formal and decorous in all but one case.

Chapter Eight: Discussion

Chapter eight considers key issues that emerge from the analyses in Chapters five, six and seven namely: the restricted use of VISs by the sentencing court; the limitations of the expressive capacities of VISs; the processes and structures that contain and manage the emotionality associated with victim participation; and the sentencing court as a forum for dealing with the aftermath of homicide according to the rule of law.

Chapter Nine: Conclusion

2. The Functions of Victim Impact Statements in the Sentencing Hearing

Victim impact statements are the primary vehicle for victim participation in the sentencing hearing. For the purposes of this thesis, a VIS describes the harm that the victim has sustained as a result of the crime. In the case of homicide offenders, the VIS provides details of the impact of the deceased's death upon members of the deceased's family (family victims). Subject to legislative constraints, research and anecdotal evidence indicates that victim input can take a variety of forms including: written statements, oral statements, photographs, paintings, letters, diaries, scrapbooks, videos, DVD's, and funeral eulogies (Booth, 2001; Kennedy, 2008; Logan, 2008; Victim Support Agency, 2009). In those jurisdictions where victims are permitted to read their VISs aloud to the court, research indicates that while low numbers of victims elect to do so, those most likely to present oral statements are family victims (Justice Strategy Unit, 1999; Meredith and Paquette, 2001; Victim Support Agency, 2009). An evaluation of the operation of the VIS legislation in Victoria by the Victims Support Agency (Victim Support Agency, 2009; hereafter referred to as the 'Victorian study') found that "although it is rare for victims to want to read out their VIS, when they do, they are passionate about this" (2009: 76). In the same study, a participant from a police focus group said: "Some victims, particularly when they are family victims... are very keen to let the judge, court and offender know how they are feeling and want to tell the court about who it was who was killed" (2009: 76).

The use of victim impact videos or DVD's (VIDs) in place of, or as a supplement to, VISs presented in more traditional forms has been the subject of recent debate in

the US (Kennedy, 2008; Capers; 2009; Austin, 2010; Schroeder, 2010). A VID is "typically a montage of photographs displayed in sequence on a courtroom screen" and might include clips from videos or home movies, narration and a musical soundtrack (Kennedy, 2008: 1078). According to Austin, VIDs reflect cultural changes in mourning rituals that involve extensive use of digital media technology and the Internet by which to remember the deceased (2010: 985). Similar to memorial videos increasingly common at funerals, VIDs aim not 'to see off' the deceased but to invoke the 'cult of memory' and memorialise the deceased (2010: 985). In Austin's opinion, the use of VIDs in sentencing is likely to increase because the:

> *[s]entencing hearing represents an opportunity for survivors to pursue their ethical obligation to remember their loved ones and have others do the same. The fact that a victim lost his or her life to criminal violence heightens his or her entitlement to being remembered.* (2010: 986)

Drawing from a range of theoretical, doctrinal and empirical sources, Chapters Two and Three of this thesis explore the functions and controversial nature of VISs in the adversarial sentencing process with particular reference to statements submitted by family victims in the sentencing of homicide offenders. This chapter is divided into two parts that address the functions of VISs in the sentencing process which are generally articulated in instrumental and/or expressive terms. From an instrumental perspective, VISs have been said to enhance particular purposes of sentencing as well as serve public policy and ideological goals by alleviating victim dissatisfaction with the criminal justice system and promoting a sentencing policy agenda responsive to the needs of victims (NSW LRC, 1996; Cassell 2009; Erez; Roberts and Manikis, 2010; Garland, 2001). Part one of this chapter explores the instrumental function of VISs whereby they are used in the sentencing hearing, as evidence of the harm sustained by victims, in the determination of penalty. In particular, the relevance of VISs to the sentencing function, how VISs are used, and specific issues that arise in the context of sentencing homicide offenders will be addressed.

In addition or alternatively, VISs are said to serve expressive purposes by introducing restorative elements into the sentencing hearing for both victims and offenders as well as generating therapeutic benefits for victims. According to Erez (2004), as originally conceived, VISs were designed to serve expressive functions that were victim-focused and aimed to redress the former exclusion and marginalisation of victims in the sentencing hearing as well as improve their courtroom experiences. From this perspective, VISs are used to give victims a 'voice' in the sentencing process whereby they can recount their experiences and express their feelings about the crime to both the court and the offender (Cassell, 2009; Roberts and Erez, 2004, 2011). Part two of this chapter explores the expressive functions of VISs through an analysis of the therapeutic and the restorative aspects of VISs in the sentencing hearing.

2.1 The Instrumental Function of Victim Impact Statements in Sentencing

The relevance and use of VISs in the determination of penalty has been a controversial issue in common law jurisdictions.[25] A common feature of most statutory frameworks is the lack of clear guidance regarding the use of VISs in the sentencing hearing, that is, whether or not VISs are to be considered in the sentencing process and if so, what weight is to be given to them (Roberts and Manikis, 2010: 2). Section 28(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) exemplifies the issue: "*If* it considers it *appropriate* to do so, a court *may* receive and *consider* a victim impact statement at any time after it convicts, but before it sentences, an offender" (italics added). According to this and similar provisions, questions of relevance and use of VISs in sentencing are left to the discretion of the sentencing judge subject to sentencing principles and laws as well as the prospect of appellate review (Roberts and Manikis, 2010: 2). Arguably the

[25] For the purposes of this section, US jurisdictions will be largely excluded from the analysis. In many US jurisdictions, homicide offences can attract capital penalties and in many cases the relevant decision-maker is the jury rather than the sentencing judge.

ambiguity of the legislative models reflects the status of victims as "ambiguous participants" in sentencing proceedings (Edwards, 2004). In recent work, Hoyle recounts the experiences of her research team evaluating the pilot VIS scheme in the UK in the late 1990's (2011).[26] The Home Office declined to state the purpose of the VIS scheme because "this was an empirical question that was [the researchers'] to answer". According to Hoyle this was "the cart pulling the horse: having introduced the schemes without deciding what VIE was for, the Home Office was asking us to supply the answer by observing the schemes in the field" (Hoyle, 2011: 260).

In the sections that follow, the relevance of VISs to particular purposes of sentencing, retribution and rehabilitation, will be considered. Related issues regarding the relevance of VISs from family victims are particularly contentious and will be discussed separately.

2.1.1 Retribution

Traditionally VISs have been associated with retributive purposes of sentencing. Essentially retributive theories of sentencing try to establish a link between punishment and wrongdoing (Ten, 1987: 146). The offender deserves to be punished in proportion to his or her 'just desert'. This principle requires that the penalty imposed must be proportionate to the objective seriousness of the offence; offence seriousness is measured according to the culpability of the offender and the harm caused by the offence (von Hirsch, 1976; Fox, 1993; *Veen v R (No. 2)* (1988) 164 CLR 465). Culpability is related to the concept of 'blameworthiness' which requires that the degree of criminal responsibility and quantum of punishment be linked to personal awareness of the consequences of one's conduct. 'Harm' is the degree of injury caused or risked by the conduct and the more grave the conduct, the more serious the offence (von Hirsch, 1976: 79).

[26] In that scheme the VIS was referred to as a personal statement.

Thus, it has been held that the harm sustained by a victim as a result of an offence and foreseeable by the offender is relevant to the formulation of penalty at common law (*R v P* (1992) 111 ALR 541). An important rationale for VISs then is that they are devices by which the court is made aware of the harm suffered by victims because such information is frequently needed in sentencing. In the case of guilty pleas, little evidence relating to the offence is before the court (Garkawe, 2007: 96). In other matters**,** although there has been a trial, the sentencing judge may not have current and accurate information regarding the harms sustained by the victim (Shapland and Hall, 2011: 177). Shackel argues in relation to child victims of sexual assault that because the information provided in VISs might be different to the empirical and clinical evidence already available to the court, VISs can also function as important educative tools for the courts (2011: 245; see also Garkawe, 2007: 96). Therefore proponents of VISs contend that the statements can serve an informative function in the sentencing process and enhance proportionality and accuracy in the penalty imposed (Sumner, 1999; NSW Law Reform Commission, 1996; Kirchengast, 2008; Roberts and Manikis, 2010; Shackel, 2011).

Against this view, however, it is put that the harm caused by the offence is already known to the court, either because it is an expected consequence of the particular offence or has been the subject of evidence before the court. The harm caused by the offence is already embedded as a key element of the offence; it is the function of the sentencing court to determine the offender's culpability (NSW LRC, 1996: 11.19; Sanders et al, 2001: 454). Consideration of VISs in this context could improperly shift the focus of the hearing to the harm caused by the offence at the expense of the offender's culpability.

Shackel makes the more controversial point that VISs are useful to sentencing because they inform the court of the *specific* harms suffered by individual victims. In her view, sentencing courts should recognise the highly subjective harms caused by the crime because they are relevant to assessing the seriousness of the specific

offence (2011: 245). This argument raises the contentious issue of the extent to which it is appropriate to take account of the *actual* harm sustained by the victim whether or not it was anticipated by or reasonably foreseeable to the offender at the time of the commission of the offence (Ashworth, 1993; Garkawe, 2007). The nexus between offender liability and unforeseeable harm is problematic because the consequences of the offence for a victim will often depend upon certain personal characteristics of the victim and/or the victim's access to treatment and necessary services during the period following the offence. For Sumner, it is proper that any penalty should reflect the actual harm sustained by the victim (1999: 56-58). Ashworth, however, contends that consideration of such evidence renders the offender's liability subject to 'chance' and therefore inappropriate and unfair (1993; see also Garkawe, 2007: 102). Taking account of unforeseeable and subjective harms sustained by the victim in the determination of penalty could also produce disproportionate sentences and sentence disparity because penalty is a function of the victim harm rather than offender culpability (Garkawe, 2007: 102). This issue will be further discussed below in chapter three.

2.1.2 Rehabilitation

It has also been claimed that VISs can serve rehabilitative sentencing purposes (NSW LRC, 1996: 11.34; Cassell, 2009; Shackel, 2011: 214; Shapland and Hall, 2011: 186). Early in the debate regarding VISs, Henderson disagreed with this argument on the basis that rehabilitation is offender-focused and unless the victim knows the offender and is familiar with his or her situation, a victim cannot supply a court with relevant information (Henderson, 1985: 988). More contemporary theories relating to desistance argue however that confrontation with the effects of his or her offending could assist the offender to take responsibility for the consequences of his or her actions and generate self-rehabilitation (Hall, 1992: 148; NSW LRC, 1996: 11.34; Cassel, 2009: 624). From a restorative perspective, Shapland and Hall argue that being able to appreciate the harm caused to the victim as revealed by the VIS and to apologise to the victim during the sentencing phase could be an important

restorative event and "staging post" on the way to 'desistance' for the offender (2011: 187; see also Roberts and Erez, 2004).

Little is known of the impact of VISs on offenders and it is an area identified for future research (Roberts and Manikis, 2011: 36). Certainly, the positive effects of confrontation with the results of crime victimisation on offenders have been noted in restorative contexts (Johnstone, 2002: 98-102). In contrast, research regarding victim impact programs (VIP) in the US that involve crime victims discussing their victimisation experiences with offenders (not their offender) is more equivocal. While the results suggest that VIPs have little impact on the development of empathy or future desistance of participants, an interesting finding is that female offenders in comparison to males are more likely to desist from further offending (Jackson and Bonacker, 2006).

2.1.3 The use of victim impact statements in sentencing homicide offenders

With respect to homicide sentencing, the issue is not the relevance of the harm caused by the offence to the immediate or 'primary' victim; that victim is dead and that harm, the death, is an essential element of the homicide offence. In homicide cases, the VISs are submitted by the members of the deceased's family - the 'family victims'- and these statements are designed to provide details of the impact of the deceased's death upon the deceased's family including consequences such as the emotional and psychological harm and the personal qualities of the deceased victim (Booth, 2001; Logan, 2008; Bandes, 1996; Szmania and Gracyalny, 2006; Cassell, 2009; Rock, 2010, Schuster and Propen, 2010).

To illustrate the nature of VISs from family victims, a VIS, said to be the second read aloud to the NSW Supreme Court and published together with photographs of the

deceased and his mother, the family victim on the front page of a Sydney tabloid, (Jago, 2003) is extracted below.

> *The loss of my son was the most devastating event in my life. He was a beautiful person with the world at his feet. He dreamed of travelling, loved children and often talked about having his own.*
>
> *I will never get to see him achieve any of this. His children, my grandchildren, will never be.*
>
> *I loved him more than life itself.*
>
> *It is killing me as a parent not to be able to hug him, to kiss him, and to tell him I love him. There are reminders of his life everywhere that can put a smile on your face one day and the next reduce you to tears. To see young men out with their mothers breaks my heart. I think to myself "that should be me".*
>
> *I miss the everyday little things. He always made me laugh with the funny things he said. Watching his beautiful face as he slept before waking him to go to work.*
>
> *I will never see him run out on to a football field, his amazing ability to lift his team when they were down.*
>
> *Unlike before, anxiety attacks are a regular part of my life. I look in the mirror and I don't want to be the person looking back at me. A football acquaintance said to me "looking into your eyes brings meaning to the words dying with a broken heart."*
> *My marriage has broken down and I no longer have any direction. I still hope at times that I will wake up and it will all be a bad dream.*
>
> *I will always remain proud, honoured and privileged to be the mother of such a beautiful, talented young man.*

The relevance of consequences suffered by family victims to the determination of penalty for the homicide offender has been a source of vigorous debate, particularly in the United States in the context of capital sentencing. Opponents argue that not only are the consequences to the deceased's family too remote from

the offence, but the nature and extent of such harms are subject to multiple variables over which the offender has no control (see below 3.2). The crux of the argument is that consideration of such victim impact evidence (VIE) could generate penalties reflecting the comparative worthiness of the deceased relative to other dead victims, and/or articulate responses of family victims rather than the culpability of the offender (Booth, 2000, 2007; Finn de Luca, 1999; Bandes, 1996; Logan, 2008). Accordingly, the more valuable and worthy the deceased as revealed by VISs, the greater the impact of the death on the deceased's family, the greater the harm caused by the offence and, the greater the penalty imposed.

A review of cases and commentary across a variety of common law jurisdictions reveals three main approaches to the use of VISs from family victims in sentencing homicide offenders (Booth, 2007a; Kirchengast, 2008, 2011; Roberts and Manikis, 2010). The first approach characterised as a 'prohibition approach' and practised by NSW courts, does not consider the VIE in determining penalty (Booth, 2007a). This approach and its implications will be examined in detail in chapter five of this thesis and will not be discussed further in this section. The second approach involves using VISs as evidence of specific harm to family victims and the third approach uses VISs from family victims as evidence of general harm to the community. Examples of the second and third approaches are set out below.

2.1.3.1 VISs as evidence of specific harm to the family victims

A recent decision of the Quebec Court of Appeal, *R v Cook* (2009) QCCA 2423, illustrates the complexity of the issues involved. In that case, the offender was convicted of manslaughter of his former partner. On appeal, the appellant argued that the sentencing judge had misused a VIS from the deceased's daughter to find that the deceased's death had a "devastating effect" on her family which constituted an aggravating factor in sentencing. Section 722(2)(1) of the Canadian *Criminal Code* provides that "for the purpose of determining the sentence to be imposed on the offender", the sentencing court "shall consider" a VIS "describing the harm done to, or loss suffered by, the victim arising from the commission of the

offence". In *Cook* the Court interpreted this provision to mean that the sentencing judge *must* consider any VIS and further, that its contents can constitute aggravating or mitigating factors (68).

The problem in this case was that the sentencing judge had apparently characterised the aggravating factor revealed by the VIS as taking the life of "someone who was loved and well-respected by her family and others in her entourage" (71). According to the appellant, this constituted judicial error because "there is no hierarchy of persons whose lives are considered more valuable than others for sentencing purposes". The appeal Court agreed with this proposition and said: "every human life is valuable, and the precipitous termination of life by homicide is no more or less egregious depending on the personal characteristics of the deceased, whatever they may be" (71). Nonetheless, taking account of all remarks made by the sentencing judge with respect to the VIS and the extracts taken from the VIS in the judgment, the Court explained that this was not what the sentencing judge had meant. Rather, the judge was referring to the effect on the deceased's daughter and other family members of the deceased's sudden death (72) and "viewed in that light…the trial judge committed no error in making use of [the VIS] to reach a conclusion that the effect of [the deceased's] death on her immediate family, constituted an aggravating factor" (73).

Roberts and Manikis agree that while it would be wrong to impose a harsher sentence reflecting the "status or moral worth" of the victim it is not wrong to impose a sentence that is proportionate to the harm caused (2010: 8). Following their analysis of *Cook*, Roberts and Manikis contend that the harm caused by a homicide offence goes beyond the death of the deceased by creating "permanent social harm" or "ancillary harm" that affects the family and friends of the deceased (2010: 10). By way of illustration they compare two cases of second degree murder: in the first matter the deceased victim was a "friendless hermit" and in the second, a member of a large, close-knit family; in all other respects, the circumstances of the offence and the offender are identical (2010: 8). Although the mandatory

penalty is life imprisonment, the judge has to determine the non-parole period that each offender must serve. In the first case, that period is determined as 10 years and in the second, it is determined as 12 years. Roberts and Manikis argue that this difference is appropriate not because the life of the hermit is of less value, but because greater harm was inflicted in the second case – that being the harm caused to the deceased's family members or the "ancillary harm" which is relevant to the gravity of the offence (2010: 8). According to this argument, VISs serve an important informative function by ensuring that the court has comprehensive knowledge of the harm inflicted by the offence (Manikis and Roberts, 2011: 133). Not all homicide offences cause the same level of harm "despite the common element of death" (2010: 8) and failure to consider ancillary harm would result in a disproportionate sentence that is not in the public interest (Manikis and Roberts, 2011: 133; Roberts and Manikis, 2010: 13).

There are limits to the application of this principle, however, as the ancillary harm must have been reasonably foreseeable to the offender and should not "escalate the severity of the sentence to an excessive degree" (Manikis and Roberts, 2010: 13; 2011: 142). The offender's rights are not infringed because he or she can still monitor the statements for prejudicial and non-probative material and have limited rights of cross examination of the victim author with regard to exaggerated claims of harm (2010: 15).

Their argument has provoked controversy. Quigley describes the justification for differential penalties in the cases of the hermit and the much loved family member as "unconvincing if not appalling" (2010: 41). Furthermore, he regards the limit imposed whereby the ancillary harm must be foreseeable as introducing "an unworkable level of complexity to the determination of a sentence" (Quigley, 2010: 40). More generally opponents have argued that taking account of ancillary harm could elevate victim-driven sentencing at the expense of other principles of sentencing (such as denunciation, protection and rehabilitation) and render VISs "a vehicle through which to seek vengeful sentences" (Quigley, 2010: 41; Chasse,

2010). According to Chasse, ancillary damage should be the subject of a civil claim and not a sentencing hearing (2010: 32; see also Hunt CJ at CL in *R v Previtera* (1997) 94 A Crim LR 76, below at 5.3).

Both the South Australian and Western Australian Supreme Courts have also indicated that the effect of the deceased's death on the deceased's family can be an aggravating factor in sentencing. In *R v Birmingham (No. 2*) (1997) 69 SASR 502, the South Australian Supreme Court said that whilst it was "unquestionably right, not only as a philosophical proposition but for the purposes of the law, that courts should not put a greater value on one human life as opposed to another" taking account of victim impact evidence from family victims did not represent a breach of this principle (548). Instead, it was a question of perspective: "it is not a matter of valuing one life more than another… it is a question of having regard to the totality of the 'injury, loss or damage' which may include [that] suffered by family victims" (548). The Court also noted that the offender was required to take the victim as he or she was and the penalty should reflect the extent of harm so caused to the victim. The Western Australian Court of Criminal Appeal considered the role of VISs from family victims when sentencing a homicide offender in *R v Mitchell* (1998) 104 A Crim R 523 and said: "[p]lainly the tendency of a victim impact statement will ordinarily be to increase the sentence that otherwise would be imposed. In other words, the facts disclosed in a victim impact statement are, in effect, aggravating circumstances" (531).

2.1.3.2 VISs as evidence of general harm to the community

Justice Vincent explained the role of VISs from family victims in homicide cases in the Victorian case of *R v Beckett* [1998] VSC 219 as follows:

> *The introduction of such statements was not, as I see it, intended to effect any change in the sentencing principles which govern the exercise of discretion by a sentencing judge. What such statements do is introduce in a more specific way* factors which a court would ordinarily have considered in a broader

> context. *They constitute a reminder of what might be described as the human impact of crime (*79*,* emphasis added*).*

An example of a sentencing court treating VISs as representative of general harm to the community is provided by a decision of the Canadian Court (British Columbia) in *R v Readhead* [2001] BCPR 208. Beginning with the principle that sentencing serves the public interest, the Court continued:

> *[I]t would therefore be illogical to allow the individual response of the individual victim to impact on the nature of the sentence to any great degree. The criminal law, in effect, generalizes the impact of what is, in essence, harm done to an individual. The sentence which results represents the power of the response of the community to the harm done to one of its members, and that response serves as protection for every member of the community. In this process, the law, of necessity, must reduce the focus on the individual circumstances of the victim. The loss of a life is the loss of a life. The sentence which results for a conviction for criminal negligence causing death must not vary where the life lost was an extraordinary one as opposed to an average one…I am profoundly disturbed by any suggestion to the contrary. Judges who are bound to sentence such an offender do not measure the value of the life or lives lost and then adjust the sentence accordingly.*

According to Kirchengast, VISs from family victims can be regarded as consistent with a "broad and general societal reaction against the violence of homicide and the need to protect and preserve life" (2011: 134). This is the "broader context of the offence" and it is relevant to an assessment of the seriousness of the offence (Kirchengast, 2011: 141). Thus, using those relevant parts of family victims' VISs that can be regarded as representative of the wider community's attitude towards the crime, a sentence can be imposed that is proportionate to the gravity of the offence (Kirchengast, 2008: 630). Kirchengast argues that the community's attitude to crime (as communicated by the VIS) will be relevant where the circumstances require that the penalty reflect the purposes of general deterrence and denunciation (2011). For example, in *Layden v R* [2008] EWCA 902, the appellant had been convicted of manslaughter using a knife. On appeal, the Court of Appeal

of England and Wales found that though the sentence imposed was severe, it was not excessive given the need for deterrence in the circumstances. The Court said:

> *The appellant is a young man who was just over 17 at the date of the offence. He is of substantially good character, having been convicted of only one relatively minor offence some three years earlier, and was assessed by the writer of the pre-sentence report as presenting a low risk of re-offending…*
>
> *In view of the doubt surrounding the precise circumstances in which the deceased met his death the appellant deserved considerable credit for his plea of guilty; he also deserved credit for calling the police and for the remorse which he now feels for what he has done. The judge took these matters into consideration. We have also seen the victim personal statement made by the deceased's mother which makes it abundantly clear what a profound impact his death has had on her and her family.*
>
> *This is, on any view, a very sad case which once again highlights the dangers involved when knives are produced in situations fraught with emotion and fuelled, as was the case here, by alcohol. We have to bear in mind that the carrying of knives is increasingly widespread and gives rise to a very grave risk of death or serious injury when brandished in the course of confrontations of this kind. For that reason where death or serious injury results judges can be expected to pass heavy sentences, not only to mark the gravity of the offence itself but also to deter others who may be minded to act in a similar manner* (14-16).

There are difficulties with this argument however. Clearly not all VISs will address matters that reflect a 'wider community' view of the seriousness of the crime. Furthermore, aside from practical difficulties in determining which parts of the VISs are relevant for this purpose (see the VIS extracted above and chapters five and seven below), community interests are also necessarily wider than those immediate personal interests of the family victim (Walters, 2006). The wider community interest takes into account public safety, harm caused to the victim, crime prevention, crime reduction, consistency and fairness in sentencing and just treatment to the offender (Henderson, 1985: 1003; Booth, 2000: 305; Walters, 2006).

2.1.4 The Evidence

Studies of the perspectives of judicial officers have found that the majority generally support VISs in principle and find the statements useful in sentencing (Roberts and Manikis, 2011; Henley, Davis and Smith, 1994; Erez, Roeger and O'Connell, 1994; Roberts and Edgar, 2006; Leverick et al, 2007; O'Connell, 2009; Victim Support Agency, 2009).[27] The findings of the evaluation of the Scottish VIS regime suggest that VISs are especially useful in providing valuable information of a medical nature (Chalmers et al, 2007; Leverick et al, 2007) and two thirds of the respondents in a recent survey of Victorian judges and magistrates (the 'Victorian study'), said that VISs were most useful in the context of offences of violence and sexual assault (Victim Support Agency, 2009). Almost three quarters (73%) of judicial officers in that latter study said that the primary role of VISs was to give them an understanding and assessment of the impact of the crime on the victim (Victim Support Agency, 2009: 33). The Victorian study concluded that their findings supported the inference that VISs have a value and purpose in the sentencing process:

> *VISs are not seen as a tool that interferes with or otherwise compromises sentencing principles or priorities but instead give the sentencer the benefit of a more complete picture, so that they are aware of the extent of the harm suffered by the victim.* (VSA, 2009: 41)

It is worth noting however that a study of Canadian judges, however, found that though 50% thought that VISs were useful in all or most cases and 31% thought they were useful in some cases, a significant minority (25%) said that they never or almost never found the information relevant to the sentencing process (Roberts and Edgar, 2006).

[27] In their 2011 report for the Commissioner for Victims and Witnesses in England and Wales, Roberts and Manikis have compiled the most recent review of empirical research into the use of VISs in sentencing in most common law jurisdictions.

Consideration of VISs in formulating penalty however might also result in disproportionate and disparate sentences which will be discussed below at 3.2.

2.2 The Expressive Functions of Victim Impact Statements

Changing sensibilities in increasingly emotionalised cultures of late modern society (Laster and O'Malley, 1996; Karstedt, 2002, 2011) together with a significant growth in emotion and law research have provided the impetus for what Karstedt describes as a re-emotionalisation of law and legal processes (Karstedt, 2002, 2011; see also Laster and O'Malley, 1996). Conceptualising VISs as 'expressive' and part of a shift in approach to criminal justice from the traditional adversarial, legalistic model (Ashworth, 1993) to emerging restorative and therapeutic approaches (Daicoff, 2006; King et al, 2009) reflects such changing sensibilities. Some writers argue that the expressive functions of VISs have a positive impact on victims' experiences in the sentencing hearing because victims are provided with a much desired voice and a defined role in the sentencing process (Erez, 2004; Cassell, 2009; Garkawe, 2007; Giannini, 2008). The 'expressive capacities' of VISs are said to bring victim-focused restorative elements into the courtroom as well as provide victims with therapeutic benefits (Roberts and Erez, 2004; Garkawe, 2007; Gianni, 2008). Giannini contends that the presentation of oral VISs in particular involves victims in a positive legal ritual (2008). In her view:

> *Through the rite of allocution,*[28] *the victim has an opportunity for transformation, empowerment and healing. The victim may enter the courtroom belittled or terrorised. However, by sharing with the court and defendant how the defendant's actions impacted her, the victim can begin to readjust the moral and social imbalance between herself and the defendant and shift from being a victim to being a survivor* (2008: 452).

This part is divided into two sections. Section one examines the restorative elements that VISs are said to bring to the sentencing hearing whilst section two

[28] Allocution is the presentation of an oral statement to the court.

explores the claim that VISs can provide therapeutic benefits to victims through empowerment and the cathartic experience of talking about their feelings in relation to the crime.

2.2.1 The Restorative Aspects of Victim Impact Statements

According to Daly, "restorative justice is a contested concept, with different political agendas…and it has increasingly become an idea without boundaries or limits. The restorative justice field is dynamic, evolving and extraordinarily varied" (2011, 4). This part does not set out to explore or critique the concept of restorative justice but it does seek to understand how VISs might be considered part of this field in criminal justice. This section will be victim-focused; see above at 2.1.2 for an offender-focused discussion of restorative aspects of VISs.

While a precise definition of restorative justice is elusive, it can be conceived broadly in terms of process, values, aims and outcomes (Braithwaite and Strang, 2001; Strang, 2002; Shapland et al, 2006; Dignan, 2007; Walklate, 2007b; Hoyle, 2010); and its essence is the recognition that key stakeholders in a criminal matter are the offender, the victim, their communities and the wider community (Strang, 2002; Hoyle, 2010). Miers' explanation of restorative justice provides a useful starting point to this section (2001: 8):

> *In broad and simple terms, restorative justice signifies those measures that are designed to give victims of crime an opportunity to tell the offender about the impact of the offending on them and their families, and to encourage offenders to accept responsibility for and to repair the harm they caused. Its general aims are to reduce the offending, to restore the relationship between the victim and the offender that was disturbed by the offence and to improve victims' experiences with the criminal justice system* (quoted in Walklate, 2007b: 122).

Key restorative values include: fairness, restoration/ healing, inclusivity, collaboration, respect, support, safety, democracy, empowerment, accountability, responsibility, and reparation (Strang, 2002; Dignan, 2007; Hoyle, 2010). In a restorative process such as conferencing, all stakeholders actively participate in a discussion about the effects and consequences of the crime, offender responsibility for the crime and ways to repair the harm that has been caused. Procedural fairness is said to be a key component of restorative events (Shapland et al, 2006: 512) and vital features include dialogue, emotion, respect and dignity, reparation and apology (Walklate, 2007b; Shapland et al, 2006; Hoyle, 2010).

In contrast to the "inclusive and collaborative nature" of restorative justice (Hoyle, 2010: 2) with its focus on "promoting mutual respect, empathic exchanges and restoration of relationships" (Hoyle, 2010: 40), traditional criminal justice is offender-focused, punitive, and unable or reluctant to deal with victims' needs and concerns (Hoyle, 2010; Szmania and Mangis, 2005). While victims are excluded and rendered powerless in such traditional legal processes, many restorative justice practices can be described as victim-oriented (Shapland, 2006; Goodey, 2005). The very nature of a restorative justice approach requires that victims be recognised and treated as key stakeholders in the dispute. A restorative process can give victims a voice; the other stakeholders listen to victims talk about their experience and the harms caused by the crime. Victims are encouraged to speak and the concomitant expression of emotions by victims is regarded as "natural" as they recount the effects of the crime, unlike traditional legal processes that work to "disparage and control such emotions" (Shapland et al, 2006).

Victim-centred outcomes of restorative events can include offender accountability and responsibility for the crime as well as material and/or 'symbolic' reparation (Daly, 2011; Szmania and Mangis, 2005). Material compensation for harm caused to the victim is a "visible and largely unambiguous part of the process" whereas symbolic reparation is a more complex outcome (Daly, 2011: 28). The first aspect of symbolic reparation is apology: in taking responsibility for his or her actions, the

offender communicates remorse and apologises to the victim (Strang, 2002; Shapland et al, 2006; Walklate, 2007; Szmania and Mangis, 2005). According to Shapland et al (2006) this apology "acknowledges the harm done and reinstates the victim as someone to whom respect and reparation is due" (2006: 515). Research demonstrates that an apology by the offender is a common feature of restorative justice communication (Shapland, 2006) whereas expressions of remorse and apology are rare in legal proceedings (Szmania and Mangis, 2005; Bibas and Bierschbach, 2006). The second aspect of 'symbolic reparation' is more controversial because it looks to the response from the victim indicating forgiveness (Dignan, 2007; Shapland et al, 2006; Daly, 2011). Research has demonstrated that it is rare for victims to accept apologies and offer forgiveness in the course of restorative events (Dignan, 2007: 321).

Some writers argue that VISs can bring restorative elements into sentencing hearings (Erez, 2004; Roberts and Erez, 2004; Hoyle, 2010; Shapland and Hall, 2011). From a victim perspective, VISs are mechanisms through which victims are acknowledged and recognised by the State in the sentencing hearing and given a role (Erez, 2004; Hoyle, 2010). For Roberts and Erez (2004, 2010), a large part of the 'restorative value' of VISs is their communicative potential. Victim impact statements empower victims to speak about their experiences, their feelings and be heard by other stakeholders in the matter (Erez, 2004). Szmania and Gracyalny (2006) found in their study of 40 VISs read aloud to a US court in a non-capital homicide sentencing case that the communicative function of VISs extends beyond the court and the offender to a larger community including law enforcement officials, the public and the media.

According to Roberts and Erez, not only are victims provided with a voice but the expressive capacities of VISs, particularly oral VISs, can facilitate reciprocal communication between victim and judge, and victim and offender (2004: 231). In response to VISs, the court has the opportunity to communicate state recognition of their harm which is "not simply a message of sympathy but recognition that

these victims have been wronged" (Roberts and Erez, 2004: 231). If the judge speaks speak directly to victims, the court also has the opportunity to validate victims' experiences (Roberts and Erez, 2004: 231). Similarly, VISs have the potential to facilitate reciprocal communication between the victim and the offender in the courtroom in a way that can "achieve some of the benefits of victim-offender reconciliation programs" (Roberts and Erez, 2004: 232). Through their VISs, victims disclose their feelings and tell offenders about the consequences of the crime; such disclosure can elicit emotions in offenders that generate remorse (Stubbs, 2007: 169; Roberts and Erez, 2004: 232). By way of response to the victims, offenders have an opportunity to accept responsibility, express regret for their actions and apologise (Roberts and Erez, 2004: 232). Scholars suggest that the benefits of apology for victims in the criminal context include: a lessening of anger and resentment such that forgiveness might be possible and forgiveness can be significant for psychological healing; repair of relationships; and a restoration of self-worth (Blecher, 2010: 97-98; Petrucci, 2002: 352; Bibas and Bierschbach, 2004: 8). For offenders, an apology has been described as 'humbling' as well as demonstrating their humanity (Blecher, 2010: 98). As scholars have pointed out however, many of the claims made in relation to apologies in both restorative justice and criminal justice settings have not been tested (Stubbs, 2007; Petrucci, 2002).

Scholars such as Hoyle and Dignan are more circumspect in relation to the restorative qualities of VISs (Dignan, 2007; Hoyle, 2010). Hoyle describes VISs as "restorative practices" and part of a court-based restorative response that recognises the unique status of the victim whereby victims are brought into the sentencing process (Hoyle, 2011: 15). But in contrast to the "dynamic and relational" dialogic processes of restorative justice where people talk to each other, her view in contrast to Roberts and Erez (2004) is that VISs do not facilitate victim-offender dialogue in the courtroom (Hole, 2011: 14; see also Dignan, 2007: 311). Rather, VISs are delivered as monologues; during the process court officials and victims rarely talk to each other and victims and offenders do not speak to each

other at all (2010: 15). Due to this absence of dialogue, Dignan does not characterise VISs as restorative processes at all (Dignan, 2007: 311).

Hoyle argues further that as a result, VISs only provide space for "one-way emotional traffic" and the emotion generated is not "mediated by civility"; VISs generate emotion without the safeguards of deliberation and deliberate accountability (Hoyle, 2010: 64). For Hoyle, the concept of 'deliberative accountability' is essential to restorative justice:

> *All participants should have the opportunity to provide accounts of their experiences, motivations and feelings about past behaviours; should be empowered to challenge each other's accounts, ask for clarification or explanation when things are not clear. Within this process of deliberation and mutual accountability, truths beyond evidential truths emerge, contexts are fully explored and the group can move towards consensus on what needs to be done to repair the harm* (Hoyle, 2011: 64).

Unlike a restorative dialogue, VISs therefore have the potential to denigrate offenders with no room for response (Hoyle, 2011: 64). This aspect will be discussed in further detail in the following chapter.

2.2.2 The Therapeutic Benefits of Victim Impact Statements

Therapeutic justice is not so much a theory as a perspective or lens through which to observe the operation and impact of the law (Wexler and Winnick, 1996; King et al, 2009; Erez, Kilching and Wemmers, 2011). Broadly, a therapeutic perspective is concerned with the impact of laws, legal procedures, legal actors and legal institutions on the well-being of those who are involved in legal processes and, in doing so, "draws our attention to the emotional and psychological side of the law and the legal process" (Wemmers, 2011: 68). The law and its institutions are regarded as "social forces that produce behaviours and consequences which are sometimes therapeutic or anti-therapeutic" (Wemmers, 2011: 68). Therapeutic approaches generally focus on improving the operation of the law and the legal

environment to maximise the law's therapeutic value for participants and reduce any anti-therapeutic impact (Wexler and Winick, 1996; Goldberg, 2005; King et al, 2009; Erez, Kilching and Wemmers, 2011).

The traditional trajectory for the development of therapeutic approaches has tended to revolve around the impact of law on the well-being and rehabilitation of the defendant, particularly in the context of problem-solving courts and/or in dealing with the causes of crime (Erez, Kilching and Wemmers, 2011; Goldberg, 2005). King (2008), however, has identified voice, validation, respect and self-determination as being core therapeutic values and universal to all who are affected by the law and recent research connects a therapeutic justice perspective to the experiences of victims in criminal legal processes (Erez, 2004; Roberts and Erez, 2004; Erez, Kilching and Wemmers, 2011; Winnick, 2008-2009, 2011; King, 2008; Doak et al, 2009; Wemmers, 2011; Erez, Ibarra and Downs, 2011).

A therapeutic approach to crime victims relates to the impact of the legal proceedings on victim welfare (Erez, Kilching and Wemmers, 2011: x). The negative experiences of many victims in the criminal justice system have been well documented, often described in the victimological literature as "secondary victimisation" (Wemmers, 2011: 69; Herman, 2003: 159). For instance, Herman reviewed studies relating to the social and psychological barriers that hinder victim participation in the legal system and found that crime victims can experience "a revictimization" and "face serious obstacles and risks to their health, safety and mental health" (2003: 159). Anti-therapeutic aspects of criminal legal processes in relation to victims have a negative impact on their welfare and are said to include: unfair processes (Winnick, 2011; Wemmers, 2011); giving evidence - especially undergoing cross examination (Herman, 2003); being treated in ways that are emotionally distressing and disempowering, disrespectful and an affront to dignity (Winnick, 2011; Wemmers, 2011); lack of sensitivity to the feelings and position of victims (Erez et al, 2011); court outcomes such as plea agreements or penalty (Erez et al, 2011; Wemmers, 2011); lack of voice (Wemmers, 2011; Erez, Ibarra and

Downs, 2011); and being excluded from and unwelcome in legal processes that are seen as the domain of a 'club' of professional court participants indifferent to the victim's situation (Erez, Ibarra and Downs, 2011).

If legal processes can have anti-therapeutic effects, the next issue for many researchers is how legal processes might have therapeutic value or benefit for victims. To assess therapeutic value, it is necessary to specify the therapeutic benefit that legal processes might bring crime victims (Pemberton and Reynaers, 2011: 237). A variety of discrete and overlapping therapeutic benefits for victims have been suggested including: healing and recovery; catharsis and emotional redress; agency and control; validation and vindication; closure and/or moving on; and reconciliation (Wemmers, 2011; Winnick, 2011; Erez, Ibarra and Downs, 2011; Pemberton and Reynaers, 2011). There are writers however who question the vagueness or "generalist" nature of some of these therapeutic notions (Pemberton and Raynaers, 2011; Doak, 2011; van Stokkom, 2011; Bandes, 1999). Indeed Pemberton and Raynaers point out that therapeutic notions such as 'healing' and 'closure' are not, in fact, even used in the psychological literature in relation to the therapeutic approaches for victims of crime (2011: 235). In their view, therapeutic benefits for victims should be aligned with criminal justice goals in relation to victims and punishment of the offender (2011: 236-237). Through this lens, the criminal justice goal of retribution is related to victims' need to see offenders punished that stems from their feelings of anger and desire for revenge; moreover, victims' need for protection from further victimisation is linked to 'behaviour control', a utilitarian basis for punishment (Pemberton and Raynaers, 2011: 236-237). Given anger and anxiety are emotional states that are well recognised by the scientific literature, Pemberton and Raynaers contend that reduction of anger and anxiety are appropriate therapeutic benefits to be sought for victims in legal processes (2011: 237).

Wemmers conducted a small study of 22 criminal justice professionals in Quebec,[29] to assess the potential therapeutic value of participation in criminal justice processes for the "healing of victims of crime". This study aimed to identify factors that in the view of these professionals could either enhance or negatively impact upon victims' welfare (Wemmers, 2011: 72). Findings show that participation is regarded as therapeutic when victims are shown recognition and respect and, further, victims are given a voice in the processes (Wemmers, 2011: 80). Being shown recognition and respect means that victims are listened to and heard. Conversely, participation could have anti-therapeutic effects if these attitudes were not shown or authorities were perceived to be unconcerned and indifferent to or ignoring victims (Wemmers, 2011: 76). As Wemmers observes, these findings are consistent with procedural justice research. Essentially, procedural justice is about fairness and research has shown that participants in decision-making processes are more affected by the quality of procedures by which decisions are made than the outcomes (Tyler, 2003; Wemmers, 2008, 2011; Mack and Roach Anleu, 2010). According to Wemmers, procedures perceived as fair by victims are therapeutic:

> *When victims are validated, respected, considered and consulted, they will find that they were treated fairly by authorities...a key feature of procedural justice is that when people feel that they were fairly treated, this provides a cushion of support, making unfavourable decisions more palatable* (Wemmers, 2011: 80).

Providing victims with a voice at any stage of the criminal justice process was also found to have therapeutic impact because a voice allows victims "to assert themselves, denounce their aggressor and regain a sense of control over their lives" (Wemmers, 2011: 80). Participants considered that the most important stage to have a voice was the first time the victim reported the crime to the police; because none of the study participants "spontaneously" mentioned VISs as a means of expression for victims, Wemmers concluded that VISs "are not considered important" (2011: 81).

[29] Of the 22 professionals: three were judges, eight were prosecutors and 11 were victim support workers.

In a study to investigate the potential for therapeutic and anti-therapeutic impacts on victim welfare generated by adversarial legal processes of criminal justice in a US jurisdiction, Erez, Ibarra and Downs interviewed 27 criminal justice professionals[30] and 7 'victim-turned-activists' (2011). Consistent with Wemmers' findings, the researchers found that providing victims with a voice has the potential to generate therapeutic benefits for victims including a sense of agency and control as well as "self-insight" into their experiences of victimisation (Erez, et al, 2011: 20). Validation, i.e. the extent to which victims' experiences were recognised and taken into account, was also regarded as having significant therapeutic impact on victims' welfare. This could be achieved in a variety of ways including particular symbolic and visual cues in the courtroom as well as the manner in which victims' stories were handled by the judge and prosecutor. A third potential therapeutic impact identified in this study was that proceedings could assist victims to 'move on' with their lives; a concept that was preferred by participants to the more problematic notion of 'closure' (Erez et al, 2011: 23).

Contrary to Wemmers' findings however, participants in the US study *did* regard the VIS as a vehicle through which these therapeutic benefits could be achieved. The participants agreed that a VIS could be therapeutic for victims because it allowed them to tell their stories and describe the impact of the crime; telling the offender, in a face-to-face encounter, of the consequences of his or her action could also be therapeutic (Erez, Ibarra and Downs, 2011: 24). The researchers found that the VIS took on a "more serious and heightened significance" in homicide cases (Erez, Ibarra and Downs, 2011: 25). Participants agreed that it could be therapeutic for family victims to express their rage and anguish as well as speak for the deceased (Erez, Ibarra and Downs, 2011: 26). One family victim was quoted as saying: "I felt very strong that day, being able to say for the first time what we wanted to – I felt very strong. I got to say what I needed to. I think giving the impact

[30] Of the 27 professionals: 3 were judges, 11 were prosecutors, 5 were probation officers and 8 were court-based victim advocates.

statement just empowered us" (Erez, Ibarra and Downs, 2011: 26). Nonetheless, the researchers caution that VISs are not guaranteed to generate therapeutic benefits. One issue raised by participants concerned the potential anti-therapeutic effects of judicial control over the victim's "cathartic moment" in an effort to manage tension in the courtroom (Erez, Ibarra and Downs, 2011: 27).

While not tested empirically, on theoretical grounds Pemberton and Raynaers contend that VISs could have therapeutic impacts for victims by reducing their anger and anxiety. For these writers it is not so much the "mere act of expression" that is beneficial, "but the significance of expression during a court case" (2011: 240). First, they point to research that indicates victims feel a heightened sense of procedural justice when they are able to participate in the criminal justice processes; that enhanced sense of procedural justice could reduce victim anger which in turn could have a beneficial effect on victim's mental health (2011: 240). Second, based on literature concerning recovery from post-traumatic stress, they argue that choosing to give a VIS to the court can give victims control over their own recovery and provide an avenue for action (2011: 240). These researchers do caution however that any therapeutic benefits of VISs are subject to the individual psychological characteristics of the victims, their experiences and the context of their victimisation (2011: 241).

Goldberg argues that therapeutic justice has already had a significant impact on the judicial landscape particularly in problem-solving courts (2005). A therapeutic approach to judging requires judges to be interested rather than dispassionate; engage in open communication where stories are heard rather than limiting communication; engage in direct dialogue with parties rather than through the lawyers; be perceptive rather than impervious to emotional nuances; and conduct proceedings with less emphasis on formality and more focus on the concept of 'inclusiveness' (Goldberg, 2005:4). As such, "though it is not social work, therapeutic judging requires a greater commitment of emotional energy than traditional judging" (Freiberg, 2007:217). While it is said that this shift to a more

therapeutic approach has led judges to consider how they can better treat those in the courtroom "with courtesy, respect and dignity" (King, 2003:172) some judges and legal practitioners have been more resistant claiming they lack appropriate training and are cautious of the inherent challenge to the traditional passive role of the judge in the courtroom (Freiberg, 2007: 217).

2.2.3 The Evidence

Not all commentators are persuaded however that victims will benefit from the expressive capacities of VISs. Indeed, some argue that the process could be counter-productive and perhaps destructive for victims seeking solace. According to Henderson, VISs are a largely symbolic gesture and great care must be taken to ensure that harms inflicted by the crime are not exacerbated by the perfunctory treatment of victims and their VISs in the sentencing process (1985: 1005). Some researchers contend that victims' welfare will also be affected by their expectations regarding the impact of their VISs on the sentence imposed (Sanders et al, 2001). If victims expect that their statement will influence the severity of the penalty and they fail to achieve their aims, victims could be left bitter and angry about their experiences in the sentencing hearing (Sanders et al, 2001; Bugg, 1996).

Presenting a VIS to the court is also a "risky and anxious activity" because there is always the chance that the story may not be told effectively thereby imposing "risk and anxiety on an already vulnerable group of people" (Gewirtz, 1995: 882). For Rock, VISs might be damaging rituals for victims because the courtroom audience does not constitute a group of "like-thinking, like-feeling, supportive and sympathetic insiders" (Rock, 2010: 219). In most jurisdictions, victims are not free to say what they want in their VIS and it may be that some or all of a VIS could be amended or rejected as occurred in *Borthwick* discussed above at 1.1. Such outcomes could be demeaning for victims rather than legitimising their experiences during and following the offence (Richards, 1992:133; Bandes, 1996). Christian Zimmer told Radio National of his experiences as a family victim in *Borthwick*:

> *We did spend a lot of effort and a lot of tears went into this [preparing VISs], and really we put our heart and soul into this, and to have it torn apart in front of us at the court, where they had plenty of time to review it prior to today's hearing, and they just didn't care, they were heartless and they tore it in front of us, in front of the court, and then they expect us to be quiet about it* (ABC Radio National, part three, 2011).

Research has shown that victims submit VISs for a myriad of reasons. The image of the vengeful victim is not reflected in the research and it would be erroneous to assume a generic victim response (Roberts and Manikis, 2011: 23). Studies have found that victims are more likely to submit a VIS for expressive reasons; perhaps to express their own feelings about the crime, communicate with the judge and/or the offender (Erez et al, 1994; Chalmers et al, 2007; Victim Support Agency, 2009). For instance, the UK evaluation of the pilot personal statement scheme in the late 1990's found that some two thirds of the victims made VIS for expressive reasons, half of the victims for instrumental reasons (ensure offender went to prison or received a longer penalty) and one half for procedural reasons (Sanders et al, 2001). A qualitative study in the UK also found that victims used VISs for therapeutic reasons, an outlet to express their feelings and also out of a sense of duty to the police (Graham et al, 2004). More recently, the evaluation of the Scottish scheme found that the most common reason for submitting a VIS was the desire to express feelings about the crime and harm sustained (Chalmers et al, 2007: 368). Even though the victims were aware that their VIS would have no influence on the ultimate punishment, the therapeutic benefits were thought to be of value.

As to victim satisfaction, research suggests that generally crime victims have positive views about the value of VISs; that VISs can be empowering and cathartic and provide an important opportunity to be heard in the process (Roberts and Manikis, 2011: 25). Nonetheless findings also reveal that a variety of factors can affect their level of satisfaction including:

- Poorly implemented VIS schemes (Hoyle et al, 1998; Erez et al 1994);
- The extent to which victims are aware of their entitlement to submit a VIS (Hoyle et al, 1998; Erez et al 1994);
- Victim understanding and expectations of how VISs will be used in the process (Erez and Tontonato, 1992; Erez et al, 1994; Hoyle et al, 1998; Sanders et al, 2001; Rock, 2010);
- The extent of adequate information and support for preparation of VIS (Hoyle et al, 1998; Roberts and Manikis, 2011); and
- The experience of presenting their VISs to the court, lack of control over content and reception of VISs in court (Meredith and Paquette, 2001; Victim Support Agency, 2009; Rock, 2010).

Not surprisingly given the ambiguity of the legislative provisions, studies reveal that victims are often confused about the nature and purpose of a VIS (Roberts and Manikis, 2011; Grahame et al, 2004; VSA, 2009). Roberts and Manikis argue that a consistent finding in the research is that victim satisfaction with VISs depends a great deal upon their expectations as to the purpose and use of the statements in the sentencing process (2011: 27). A significant finding of the 1998 evaluation of the UK personal impact statement scheme was that unrealistic expectations may result in lower levels of satisfaction (Sanders et al, 2001).

The findings of the Victorian study (Victim Support Agency, 2009) noted that a particular source of dissatisfaction for victims was their experiences with the rules of evidence in the courtroom. Although cross examination by defence counsel was extremely rare in all studies, defence challenges to the content of their VISs were 'disheartening' and having their VISs edited because of inadmissible content was very difficult. The Victim Support Agency (VSA) recommended that at the outset victims should be given clear, timely and comprehensive information and guidance about the process. Victims could then make an "informed choice" about what to include in their statement and "alleviate to some degree, feelings of

disappointment and distress if the contents of their VISs are ruled inadmissible" (Victim Support Agency, 2009: 11.1).

Interestingly, I have been unable to find any reference to offender remorse or the desire for an apology on the part of crime victims in the extant research with regard to VISs.

2.3 Summary

Victim impact statements are said to serve an instrumental function in the sentencing hearing by providing the court with details of the harm sustained by the victim that are relevant to assessment of the seriousness of the offence. Consideration of such material in the sentencing process is said to enhance the proportionality and accuracy of the penalty ultimately imposed. Not all writers, however, agree that VISs are useful in this context. The harm caused by the offence is known to the court and is an existing element in the definition of the crime. Moreover, many take the view that, in fact, taking account of VISs in determining penalty could shift the focus of the exercise from the offender's culpability to the victim's experiences.

The use of VISs in determining penalty in the context of sentencing homicide offenders is particularly controversial. Opponents to the use of VISs in this context argue that the harm caused to the deceased – death – is established and VISs from family victims can add nothing to the sentencing process. Taking account of emotional and psychological harm sustained by family victims as a result of the deceased's death could produce penalties that, in breach of fundamental sentencing principles, reflect the comparative worthiness of the deceased victims rather than the culpability of the offender. A review of cases and commentary in a range of common law jurisdictions reveals that there are three main approaches to VISs from family victim in sentencing:

1. A prohibition approach that says such VISs are not considered at all;
2. VISs provide evidence of specific harm caused to family victim; and
3. VISs are a source of evidence for the general impact of VISs on the community.

Although there is some research that suggests judicial officers support the use of VISs in sentencing and find them useful, there is very little evidence relating to the use of VISs in the sentencing of homicide offenders. Research in relation to the impact of VISs on penalties will be considered in further detail in the following chapter.

Whereas the use of VISs to inform the penalty to be imposed is connected to traditional legal goals of the sentencing hearing, the use of VISs as expressive devices in the sentencing hearing reflects recent changes in community sensibilities and shifts to restorative and therapeutic approaches to criminal justice. The expressive function of VISs is largely victim-focused and centres on victims' experiences in the sentencing hearing. Many writers argue that through giving victims a voice and a defined role in the sentencing hearing, restorative elements are brought into the courtroom that could both enhance victims' experiences of justice as well as provide therapeutic benefits. Emotionality and procedural justice are key components of restorative events and therapeutic justice. From a restorative perspective, victims have the opportunity to recount the effects of the crime on them as well as their feelings; and both the judge and the offender have the opportunity to respond to the victim. The court can validate the victims' experiences by recognising the harm they have suffered and the offender can accept responsibility and express remorse for his or her actions.

There is evidence to suggest that generally victims value VISs for their expressive capacities and, while studies indicate that the majority of victims are satisfied with their experiences submitting VISs, the research also shows that this level of satisfaction is dependent on a variety of factors.

The next chapter considers the contentious nature of both the instrumental and expressive functions of VISs, from the perspective of the offender's entitlement to a fair hearing and the integrity of the proceedings, with particular reference to the sentencing of homicide offenders.

3. The Contentious Nature of Victim Impact Statements

Victim impact statements give victims a role in the sentencing hearing. As the previous chapter demonstrates, the functions of VISs can be viewed from an instrumental perspective - providing assistance to the court in determining penalty - and/or in expressive terms - a vehicle for the victim to be heard in the process and communicate their feelings. This chapter draws from a range of theoretical, doctrinal and empirical sources to investigate the contentious nature of VISs in the sentencing process, with particular reference to statements submitted by family victims in the sentencing of homicide offenders.

By way of outline, many opponents of victim participation in the sentencing process in common law jurisdictions argue that victim input can be:

- Antithetical to adversarial criminal procedure in sentencing proceedings;
- Irrelevant to the purposes and legal goals of sentencing;
- Detrimental to the offender's interests and entitlement to a fair hearing; and
- Harmful to the integrity of the legal proceedings.

On the other hand, proponents of such victim participation contend that victim input can:

- Bring valuable information to the court that can be relevant to the seriousness of the offence and the determination of penalty;
- Serve other legitimate expressive and communicative purposes that are important in the sentencing process;
- Provide restorative and therapeutic benefits for crime victims and, to a lesser extent offenders; and
- Enhance the fairness of the proceedings overall.

The aim of this chapter is to identify controversial aspects of VISs in the sentencing hearing and explore the implications of those aspects for the offender's entitlement to a fair hearing and the integrity of the legal proceedings more generally. These issues will be addressed under four broad headings: the use of VISs as evidence in the sentencing hearing; impact of VISs on penalty; the emotionality of VISs; and victim participation in the adversarial sentencing hearing.

3.1 Victim Impact Statements as Evidence in the Sentencing Hearing

The use of VISs in the sentencing process as evidence of harm sustained by victims as a result of the crime is regarded as problematic particularly from the offender's perspective. In this section the following issues are addressed:

- Judicial impartiality;
- Probative value of VISs;
- Challenging VISs; and
- Reliance on the sentencing judge.

3.1.1 Judicial Impartiality

Impartiality is a core value in the legitimate exercise of judicial authority (Mack and Roach Anleu, 2010: 138). At common law, a sentencing judge is required to conduct proceedings in a manner which is impartial and would appear impartial to the dispassionate observer (*Chow v DPP* (1992 28 NSWLR 593)). While judges are human beings with conscious and unconscious biases and prejudices "it is the essence of justice that judges exercise control and discipline over their own feelings and judge each case on its own merits, impartially and neutrally without regard to any personal bias and generalisations" (Ipps J in *Galea* (2004) 148 A Crim R 220, 221). A South Australian case, *R v Agostinelli* (1995) 82 A Crim R 326, demonstrates how the use of VISs by the sentencing judge might breach this rule of impartiality.

In that matter the offender had pleaded guilty to the murder of her husband and there was a factual question as to the motivation for the killing. Against the view that the killing was "a premeditated and deliberate and cold-blooded act of murder", the offender argued that she acted to protect herself and her sons from the deceased's abuse and proposed to call evidence in support of her case (327). The following exchange demonstrates the sentencing judge's use of VISs as a basis for scepticism for this course:

> *Defence Counsel: It wasn't disenchantment that eventually caused her to wish him dead. It was the way he treated her boys and … I can call the boys themselves, they are here.*
>
> *Judge: I think I would probably, looking at these victim impact statements, probably hear a lot of evidence to the contrary, I should think.*

Following similarly sceptical comments from the judge, the offender declined to call evidence regarding her motive. On appeal, the appellant argued that the judge's conduct had prevented her from presenting her case fairly. The Court of Appeal found that the nature of the judge's remarks objectively suggested that he was expressing a pre-determined view and failed to maintain an appropriately neutral position. In the course of judgment, the Court said:

> *[C]onfidence in the integrity and impartiality of the judicial system is of fundamental importance and recent decisions of the High Court indicate the very high standards of manifest neutrality and impartiality to be adhered to by courts in Australia (R v Agostinelli* (1995) 82 A Crim R 326, 337*).*

3.1.2 The Probative Value of Victim impact statements

Some writers take the view that it is problematic to rely on VISs as evidence of the harm sustained by the victim because the content might be factually inaccurate and/or contain material that is prejudicial or inflammatory to the interests of the offender (Bandes, 1996; Edwards, 2009; Logan, 2008). Moreover, there are specific

difficulties associated with the form of VISs. In the case of oral statements, there is the possibility that the victims might go 'off-script' as they read their VIS aloud to the court and introduce publicly hitherto unseen inaccurate or inflammatory material. More recently, in the context of sentencing homicide offenders, concerns have been expressed in relation to the probative value of VID's in that the content of that form of VIS is rarely linked to the loss sustained by the deceased's family. Each of these issues will be addressed in turn.

3.1.2.1 Factual Material

Findings of fact are crucial to determination of the seriousness of the offence**.** When performing an informative function, VISs can be used to provide information in relation to the severity of the harm caused to victims by the offence. There is potential however for the subjective nature of VISs to undermine the accuracy of the factual basis of sentences through an exaggeration of the harm inflicted or incorrect factual statements (Edwards, 2009: 299).

A VIS might also recount facts which although accurate, support a more serious offence than that with which the offender has been convicted. This would breach a fundamental sentencing principle which makes it unlawful for a sentencing court to take account of circumstances in sentencing that would warrant a conviction for a more serious offence (*R v de Simoni* (1981) 147 CLR 383). For example, in *R v Bakewell* BC 9602796, the offender had been charged with the offence of sexual intercourse in circumstances of aggravation (s61J *Crimes Act 1900* NSW) but pleaded guilty to the less serious offence of sexual intercourse with a child of 13 years (s66C *Crimes Act 1900* NSW). A VIS submitted to the court included a psychological assessment of the emotional harm sustained by the victim that was based on the presence of aggravating circumstances which were not relevant to the less serious offence for which the offender was being sentenced**.** The offender appealed to the New South Wales Court of Criminal Appeal (NSWCCA) on the basis that the penalty was manifestly excessive and the judge had erroneously taken

account of particular aggravating factors. During the course of his judgment, Gleeson CJ observed:

> *Where a person is charged with a certain offence and the Crown accepts a plea of guilty to a lesser offence, it is often the case that the victim of the crime gives an account of the circumstances which, if true, means that the offender was, in reality, guilty of the more serious offence. That can place the sentencing judge in a very awkward position, as the facts of the present case demonstrate.*
>
> *The consequence is that particular care may need to be exercised where a sentencing judge is invited by the Crown to receive a victim impact statement, and take that victim impact statement into account for the purpose of the sentencing process. As the facts of the present case illustrate, the victim impact statement may well be based upon an account of the facts which includes circumstances of aggravation of the kind referred to in Di Simoni.*
>
> *When that occurs, it will often be impossible to separate consideration of the impact upon the victim of the events, as he or she describes them, from consideration of what the impact might have been, absent the aggravating features of the case. Indeed, in many cases, as in the present, any attempt to do that would be hopelessly artificial* (8).

3.1.2.2 Prejudicial Content

Further difficulties can arise for an offender where the content of a VIS is not confined to the effects of the crime on the victim but also encompasses prejudicial and/or inflammatory statements characterising the offender and his or her actions, commenting on the offence and/or criminal justice processes, or giving opinions as to the appropriate penalty to be imposed (Logan, 2008; Booth, 2001*).* The VISs submitted to the sentencing court in *Borthwick* exemplify this issue. During the sentencing hearing, defence objections to sections of the VISs on the basis of relevance were upheld and the offending portions deleted from the statements. Following the hearing, the family victims publicly expressed their anger and distress at this result and the deleted sections of their VISs were published in various forums. The deceased's father told the *Law Report* on Radio National: "I wrote in my statement that Leon Borthwick brutally ran down and killed my son, and that

was too harsh and I'm not allowed to say that he brutally ran down and killed my son" (ABC Radio National, 2011, part three). It can be seen that not only was this remark irrelevant to the impact of the deceased's death on the family victim but it was also prejudicial to the interests of the offender because it suggested culpability (intent to kill) for an offence (murder) for which he was not convicted.

The deceased's sister read out three parts of her VIS that had been deleted on talk back radio. In summary she said:[31]

1. The "killer tormented" her brother months before this death showing an "overwhelming aggression". Her brother "lived in constant fear" because it was only "a matter of time before Leon found a way to kill him".
2. Her brother was subjected to "months of harassment, bullying, attacks with weapons, stalking, threats to kill". In response her brother "did nothing", he was "blameless", "a product of his innocent nature". "Leon should take responsibility for his actions."
3. There "was one truth, Mr Zimmer is dead and he died at the hands of Leon Borthwick" (Booth, 2011b).

Again, not only are these sections unrelated to the impact of the deceased's death on the family, but they are prejudicial to the offender suggesting the commission of other linked crimes, raising facts not in evidence as well as suggesting a level of culpability for a more serious offence. It is striking that the Prosecutor saw nothing untoward about either statement. She told the *Law Report*: "You can say in your words how this has affected you. And that's what they have done as far as I'm concerned. I had looked at them. I didn't see anything objectionable but, you know, it's in the eyes of the beholder I suppose" (ABC Radio National, part three).

[31]The interview available is from http://www.3aw.com.au/blogs/3aw-generic-blog/3aw-allows-statement-court-didnt/20100914-159zj.html. Radio 3AW had had legal advice that it would not be unlawful to read out the deleted sections of the VIS.

3.1.2.3 Going 'Off Script"

In the course of sentencing a homicide offender in the Canadian case of *R v Gabriel* (1999) C.C.C. (3d) 1, the judge said of VISs read aloud by family victims to the court: "it is not infrequent that a victim has ... improvised beyond the four corners of the statement directing accusations and personal invectives towards the offender" (12). The victim's departure from the 'approved script'[32] with negative consequences for the offender has the potential to "put judges in a difficult and comprising position that does little to serve the interests of justice" (Hoyle, 2011: 275; see also Rock, 2010). A notorious example is provided by the sentencing hearing of Wayne O'Donoghue in Ireland in 2006 (Hoyle, 2011; Independent, 2007a, 2007b). In that case, the mother of the deceased boy read her 11 page VIS to the court. At the end of her statement she then, in the words of the sentencing judge, "at breakneck speed, made allegations over a 30 second period which were scandalous in nature and which formed no part of the prosecution case" (Independent, 2007b). Her remarks made public suppressed evidence regarding the presence of semen, evidence that had been judged unnecessarily prejudicial and of little probative value at trial (Power, 2006). At the sentencing hearing, the judge ignored the comments and did not confront the family victim; as one reporter said "it would have taken a very brave, even foolhardy judge to have censured Mrs…for what she did" (Power, 2006). The family victim was unrepentant and later quoted as saying:

> *The features that I alluded to, semen and the like…were matters that any responsible mother would allude to…Was I to go into court and give a statement which made no reference to these matters although they were of considerable concern to me? I think I would not have done justice to my much-loved son, Robert, if I had done so. Whether Mr Justice Carney or [offender] likes it or not, these were the features of the case* (Independent, 2007a).

In a subsequent speech the sentencing judge expressed his disapproval:

> *The sentence was expressed to be designed to provide for the reconstruction of Wayne O'Donoghue's [offender] young life…the sentencing objective was*

[32] The 'approved script' is a reference to the written VIS already approved by the court.

> *totally frustrated by Majella Holohan's calculated outburst and the enthusiastic adoption of it by the tabloid press. The tabloids stirred up such hatred for Wayne O'Donoghue that he has no future in this country when his time is served…It is not acceptable that a sentencing objective of the High Court upheld by the Court of Criminal Appeal should be frustrated by a coalition between the victim and the tabloid press* (Independent, 2007b).

Although examples of a victim speaking 'off-script' are rare in the literature, other incidents have been reported (Rock, 2010; *R v Colley* [2010] NSWSC 1475). Very recently in May 2012, an incident occurred in the NSW District Court. In that case, the offender was convicted of manslaughter of a 19th month old child who died after the car she was travelling in was hit by another car driven by the offender during a police chase. It was widely reported that during the sentencing hearing the deceased's father, who was wearing a T-shirt with a photograph of his daughter and the caption "Justice for Skye", screwed up the VIS he was reading and spoke to the offender directly: "You are a coward…she died in my arms. She was so scared, but she didn't shed one tear. You did not bring a tear to my daughter's eye" (Hall, 2012).

3.1.2.4 Victim Impact Videos/DVD's

The use of VIDs has increased in the US during the 2000's and opponents of this form of VIS argue that VIDs have the potential to be unfairly prejudicial and non-probative (Kennedy, 2008; Capers; 2009; Austin, 2010; Schroeder, 2010). An example is provided in a 22 minute video called 'Sara Nokomis Weir 1974-1993' that was shown to the jury during the capital phase of the hearing in *People v Kelly* 171 P.3d 525. Kelly had been convicted of Sara Weir's murder and the VID was submitted as a form of victim impact evidence. Narrated by her mother and set to music by the artist Enya, the video comprises photographs and home movie clips depicting Sara's life from birth to adulthood (she was 19 when she died) as well as her family and friends (Austin, 2010: 980; Capers, 2009: 3).[33] The final image is that of a horsemen galloping across countryside accompanied by the deceased's

[33] This video can be viewed online at http:www.supremecourt.gov/media/media.aspx (accessed 18 May 2012).

mother's words: "As time goes by I try very hard not to think of Sara in terms of this terrible crime that we've had to deal … but rather think of her in a place like this … This is the kind of heaven she seems to belong in" (quoted in Capers, 2009: 3).

On appeal, the California Supreme Court rejected the offender's argument that the VID was unfairly prejudicial and non-probative and said the VID:

> *[h]elped the jury to see that the defendant took away the victim's ability to enjoy her favourite activities, to contribute to the unique framework of her family – she was of Native American descent and adopted into a Caucasian home – and to fulfill [sic] the promise to society that someone from such a stable and loving background can bring. The videotape further illustrated the gravity of the loss by showing Sara's fresh-faced appearance before she died…Sara appears at all times to be reserved, modest and shy…her demeanor [sic] is something words alone could not capture. Such images corroborated evidence at the guilt phase, that could be considered in aggravation of the penalty, suggesting that defendant preyed on Sara's naïve and trusting nature…the viewer knew Sara better after viewing the videotape than before, but the tape expressed no outrage over her death, just implied sadness. It contained no clarion call for vengeance* (quoted in Austin, 2010: 980-981).

Bandes argues however that the court misunderstood the problem with emotion in this context: "it searched for a salient emotional message, found none, and thus overlooked the devastating emotional impact of the testimony" (Bandes, 2008-2009: 500). The US Supreme Court declined to hear an appeal from this decision despite a vigorous dissent from Stevens J who said:

> *Although the video shown...was emotionally evocative, it was not probative of the culpability or character of the offender or the circumstances of the offence...[or] the impact of the crimes on the victim's family members...as these cases demonstrated when the victim impact evidence is enhanced with music, photos or video footage, the risk of unfair prejudice quickly becomes overwhelming... their primary, if not sole, effect was to rouse jurors' sympathy for the victims and increase jurors' antipathy for the capital defendants. The videos added nothing relevant to the jury's deliberation and invited a verdict*

> *based on sentiment, rather than reasoned judgment* (*Kelly v California* 129 S Ct. 564, 567).

Opponents argue that VIDs lack probative value and their highly subjective and emotive nature unfairly prejudices the offender because of the risks of inappropriate decision making (Kennedy, 2008; Capers, 2009; Austin, 2010: 983; Hoyle, 2011: 267-269). The emotive power of music in particular means that musical soundtracks are likely to exacerbate "unreasoned, unreflective emotion" in the decision-maker (Capers, 2009: 6; see also Kennedy, 2008: 1101; Austin, 2010: 994). Kennedy points out that VIDs "present a more, coherent, visually compelling story" than more traditional forms of VIS and "tend to draw the jurors in, thus increasing their sense of identification with the victim and anger towards the defendant" (2008: 1099): "the visual images add a sense of what is real to what otherwise remain abstract and difficult to latch on to or invest in emotionally" (Austin, 2010: 987).

Aside from the potential prejudicial quality of the emotive impact of VIDs, Austin argues that they are also of limited probative value (2010: 987). In her analysis of VIDs and memorial videos more generally, Austin argues that VIDs portray generic, idyllic and sanitised portraits of family life that reveal nothing substantive about the specific personal qualities of the deceased, his or her contribution to that family life and the precise nature of the family victims' loss (2010: 987-990). Musical soundtracks especially lack probative value unless clearly linked to the deceased's tastes or accomplishments (Austin, 2010: 994). Moreover, in her view, the content of VIDs such as that used in *Kelly* might increase the likelihood "that sentencing will turn on the social worth or class, race, age and gender of the victim – factors that may be readily discerned from a victim impact video" (2010: 990). Thus it might be that rather than be a function of the offender's culpability, penalty might reflect personal characteristics of the victim.

Lest it be thought that VIDs are confined to American sentencing courts, research indicates that VIDs have also been admitted in Victorian sentencing courts. A family

victim that submitted a VID to the sentencing court told a focus group in the Victorian study:

> *You have this statement to do, it is the only thing that you can show everyone, especially the judge. You present it to the people who have no idea about your own son. A written statement was not enough. I wanted people to see him, I chose music to go with the pictures, showed a loving son, brother, girlfriend, his experiences in life, aspirations that will not be realised, all that sort of family unit stuff that cannot be put on a piece of paper* (Victim Support Agency, 2009: 79).

Section 8L (2) of the *Sentencing Act 1991* (Vic) provides that a VIS "may include photographs, drawings or poems and *other material* that relates to the impact of the offence on the victim or to any injury, loss or damage suffered by the victim as a direct result of the offence".[34] The recently published *Guide to the Victorian Court System for Bereaved Families* interprets 'other material' widely advising victims that "you may be able to include pictures, photos, poems, paintings or *DVDs* in your Victim Impact Statement" (2012: 50).

3.1.2.5 The Evidential Quality of Victim Impact Statements

Significant difficulties have also been identified with regard to evidential quality of VISs (Edwards, 2009; Kirchengast, 2007). Problems arise because VISs from crime victims are generally unsworn and untested by cross examination (the offender's entitlement to cross examination will be explored in further detail below at 3.1.3.2). In *R v Berg* [2004] NSWCCA 300*,* Wood J gave the following warning in relation to the use of VISs in determining facts:

> *However, I would sound a note of caution in relation to the proper approach to fact-finding concerning the impact of a crime upon other members of the community or, upon the victim. If that is to be achieved by way of victim impact statements, then an injustice may occur in relation to a person standing for sentence, in so far as the maker of the statement would not normally be available for cross-examination…extreme care needs to be taken*

[34] Italics have been added.

> *by those who prosecute and defend these cases, and also by trial Judges in always ensuring that there is a proper evidentiary basis for any findings of fact which go towards aggravating or mitigating a sentence* (48-49).

Given then the nature of VISs as subjective assessments of harm sustained by crime victims, in circumstances where the court has to be certain of the facts adverse to the offender beyond reasonable doubt,[35] Sperling J of the New South Wales Court of Criminal Appeal, has suggested that:

> *[S]ubstantial weight cannot be given to an account of harm in a unsworn statement, not necessarily and almost certainly not in the victim's own words, untested by cross examination and in the nature of things, far from being an objective and impartial account of the effect of the offence on the victim (R v Slack* [2004] NSWCCA 128 [62]).

3.1.3 Challenging Victim Impact Statements

According to the principles of fairness the offender is entitled to meet the case against him or her and challenge the evidence. While theoretically evidence can be challenged by objection or cross examination of the victim-author, from a practical perspective each option can be problematic in the context of VIS.

3.1.3.1 Objections

Objecting to the content of VISs appears to be the most useful strategy in the case of prejudicial content because, if successful, the inadmissible content will be deleted from the VISs and not read aloud to the court or taken into account in sentencing. Nonetheless there are risks of alienating the court and the family victims that may have negative implications for the offender's interests and the hearing more generally. Returning to *Borthwick* to illustrate this point, there the court engaged in a very lengthy and public process, some 90 minutes, editing the statements. Amended versions were then handed back to the family victims who

[35] This would be the case if the harm to the victim was asserted as an aggravating factor in sentencing.

appeared appalled at the outcome and, indeed the deceased's sister demonstrated her anger by tearing up her statement and leaving the courtroom. From the offender's perspective the deceased's family's expressions of anger and distress increases the emotional tension in the courtroom and might also suggest a shift in the focus on the hearing (Booth, 2011b). There is also the time factor. In *Borthwick*, so much time was spent sorting out the VISs that the hearing could not be completed and proceedings were adjourned part heard for two months. Arguably the law was also brought into disrepute and this will be discussed further below.

3.1.3.2 Cross Examination

Cross examination of victim-authors is so fraught an issue that it is an option rarely exercised by offenders. Research shows that it is extremely rare for a victim to be cross-examined in relation to his or her VIS (Roberts and Manikis, 2010: 18). Indeed in the Victorian study, 98% of the judicial officers surveyed said that it never happened (Victim Support Agency, 2009: 73). Nor is it difficult to understand why such cross examination would be tactically unwise for an offender, especially one who hopes to be seen by the court as remorseful (Edwards, 2009: 300; Manikis and Roberts, 2011: 142). The stressful experience of cross examination could have an adverse effect on victim welfare particularly in those cases where the offender is not legally represented (Cassell and Erez, 2011: 171). It is also likely that cross examination of victims would not be considered as facilitating justice by the community at large. Indeed, such an event would probably end up on the front page of the local tabloid as yet another example of insensitivity in the courts.

Cole argues that cross examination could also backfire because the victim would then have an opportunity to elaborate on the harm they have suffered providing potential to increase rather than decrease penalty (Cole, 2010: 148). Paradoxically, the failure to cross examine could be interpreted as acceptance of what might in the circumstances be an excessive and/or exaggerated or prejudicial response with no recourse on appeal. Sanders et al argue however, that the lack of cross examination is a function of how "rarely defence lawyers feel that the contents of

VIS will adversely affect their clients" and negotiation with the prosecution beforehand as to content (2001: 454). The literature suggests that as a matter of strategy rather than challenging VISs through objection or cross examination, many legal professionals rely on the judge to deal with VISs appropriately. This will be discussed further in the next section.

3.1.3.3 Relying on the Judge

Many commentators and legal professionals are confident that the offender can rely on the professionalism and training of the sentencing judge to disregard overly emotional, prejudicial and non-probative victim impact evidence for the purposes of sentencing (Garkawe, 2007; Manikis and Roberts, 2011: 135; Cole, 2010: 147; Shapland, 2010). In Cole's experience of sentencing in Canada:

> *Judges do not utilise improper comments in any way. Indeed they thoughtfully recognise the impact the crime had on the victim but make a point to emphasise that they do not take improper commentary into account. If the decision makers do not take legally objectionable commentary into consideration and in fact go further by recognising that it does not play a role at sentencing, ultimately there is no harm to the legal rights of the offender and the victim can be permitted to express themselves freely* (2010: 147).

This more flexible approach to the content of VISs is consistent with the position advocated by the Victorian courts. In *Dowlan* [1998] 1 VR 123*,* VISs had been tendered to the sentencing court containing inadmissible material to which the offender objected. The VISs were not read aloud to the court and the Victorian Court of Appeal found that the sentencing judge did not give weight to those statements beyond what was permitted by the legislation. The Court was of the view that making rulings with respect to each part of the statements subject to objection was not "necessary or even desirable". Furthermore:

> *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. If objection is taken, on a matter of substance, to any part of the statement, the judge should either rule it inadmissible or make it clear, during the plea or in sentencing reasons, that no reliance would be, or was being, placed on that part of the statement* (Charles JA, 140).

Comments made by the Prosecutor in *Borthwick* are also consistent with a legal culture whereby victims are 'cut some slack' as to what they can say in their statements because the parties are relying on the sentencing judge to discard the irrelevant material. She told the *Law Report*:

> *I mean most defence don't take the point. They might acknowledge that there are words in a victim impact statement...that technically might be objectionable. But it's often said to the judge that from defence's point of view, that there are inadmissible parts, '...but we're not taking the point, Your Honour, but we ask Your Honour to ignore those parts or give little weight to those parts'. That's been the usual practice. That wasn't what happened here* (ABC Radio National, Part three).

The form of VISs is a complicating factor however. The 'usual practice' referred to by the prosecutor above appears to have developed in relation to the submission of *written* VISs (Booth, 2011b). Circumstances in *Borthwick* differed, however, because the family victims wanted to read their VISs aloud to the court. According to media reports, the defence did not want this irrelevant and prejudicial material becoming part of the public record as it inevitably would have done if the VISs were read aloud in their original form in open court. The controversial aspects of form of VISs will be discussed in the following section.

3.2 The Impact of Victim Impact Statements on Penalties

The effect of VISs, in relation to both content and presentation, on penalties imposed has long been a matter of controversy. Critics are concerned that decision makers might be unduly swayed by VISs leading to the imposition of disproportionate, heavier penalties in breach of such fundamental sentencing principles as proportionality and parity. As discussed in the previous chapter (2.1.3), a matter for concern is that sentencing judges might give undue weight to the harm caused by the offence at the expense of the offender's culpability.

The potential for unfair sentencing outcomes is also said to be heightened by the non-mandatory and highly personal nature of VISs. Research reveals varying rates at which victims take up the opportunity to submit VISs. In lower courts, the take-up rate is much lower than the case in higher courts (Chalmers, 2007; Victim Support Agency, 2009) and VISs are more likely to be submitted in serious cases of violence, sexual assault and/or homicide. Thus, take up rates for family victims tend to be higher than for other offences (Roberts and Manikis, 2011; Victim Support Agency, 2009). Inevitably, VISs will vary in quality subject to the personal characteristics of the victim-authors and the resources available to assist victims prepare their statements (Richards, 1992: 133; Hall, 1991: 233; Booth, 2001: 303; Garkawe, 2007: 94). In this regard Capers points out that VIDs are an option only available to those family victims who have recorded family life on film or photographs and have the wherewithal to produce one (2009: 7). According to Hall, "our justice system must strive to minimise and mute as many disparity-inducing factors as possible. It cannot be disputed that inviting victim input pushes us further away from the idea of even-handed sentencing" (1991: 258). Conversely, White J of the US Supreme Court described this as a "makeweight consideration" in his dissenting judgment in *Booth v Maryland* (1987) 482 U.S 496:

> *[n]o two prosecutors have exactly the same ability to present their arguments...and no two witnesses have exactly the same ability to present*

> *their arguments...there is no requirement in capital cases that the evidence and the argument be reduced to the lowest common denominator* (518).

Given these concerns, the impact of such victim input on sentencing patterns and penalties has been the subject of research. A review of the literature in common law jurisdictions where the judge is the decision-maker (this excludes capital sentencing in the United States)[36] reveals a consensus that VISs generally have had little impact on sentencing outcomes or patterns although researchers tend to agree that it is very difficult if not impossible to measure impact (Roberts and Manikis, 2011: 30). This latter point was articulated clearly by researchers evaluating the VIS scheme in Scotland:

> *The consensus was that even though they [the judicial officers] were required to take account of VISs in sentencing, it was impossible to isolate the effect of VISs on the eventual sentence passed given the number of factors that are taken into account in arriving at an appropriate sentence. Thus it is not possible to state conclusively whether or not sentences are more severe in cases where there is a VIS* (Chalmers et al, 2007:376).

Roberts and Manikis contend that there are five reasons why victim input has not led to harsher sentencing:

1. Judges are trained to disregard prejudicial and non-probative evidence;
2. In those jurisdictions where VISs are screened before the sentencing hearing, irrelevant and prejudicial material is deleted before it reaches the court;
3. Victims do not generally seek harsh penalties and in any event are not allowed to express an opinion about sentencing in most jurisdictions;
4. The harm suffered by the victim detailed in most VISs is harm about which the court is already aware; and
5. Some victims seek leniency for the offender from the court rather than a heavy penalty (2011: 33).

[36] In most US jurisdictions, the imposition of a capital penalty is matter for a jury rather than a sentencing judge. The relevant research is concerned with the impact of VIE on the decision-making capacities of lay jurors rather than trained judicial decision-makers.

In addition, there are scholars who suggest that organisational barriers are also utilised to resist meaningful input from victims (Hoyle et al, 1998; Erez and Laster, 1999; Erez and Roegers, 1999). Henley, Davis and Smith (1994) described the response of judicial officers to VISs as "generally lukewarm" and that judges were paying "lipservice" to victim input in sentencing rather than being committed to the scheme. Similarly Erez and Rogers found that South Australian legal professionals including judicial officers, resisted the incorporation of VISs through a "rich and varied repertoire of strategies used ... to maintain their autonomous status, circumvent external demands to consider victim input and justify overlooking concrete presentations of harm" (Erez and Rogers, 1999: 234-235).

Nonetheless there are commentators who remain suspicious of the impact of VISs on penalties. Hoyle argues that research has provided no evidence that "in reality, judges can or do disregard inadmissible or prejudicial information" (2011; 275) and VISs may well have an impact on the penalty in individual cases (2011: 264). In support of her argument, Hoyle recounts a 2006 UK homicide sentencing case where a VIS submitted by the deceased's brother likened the killing to "an execution" rather than a murder. Together with other aggravating features, Hoyle suggests that, "it is possible that [the judge] was also influenced by the inflammatory reference to 'execution' in this statement" (2011: 272). On appeal, the offenders argued that the sentences imposed were excessive because disproportionate weight was given to the VISs. This submission was rejected by the Court of Appeal though it was noted that the VIS read aloud by the deceased's fiancée was "heart-rending". Not only was the offenders' appeal unsuccessful on this ground but the court then increased the penalty imposed on one of the offenders because it was found to be lenient (Hoyle, 2011: 272). For Hoyle, it is:

> *[i]mpossible to disaggregate the impact of the VIE from other factors in the appellate judges' minds...But it seems evident that they exercised at least some influence, leading one to the uncomfortable inference that if the victim had been less loved by his fiancé, his killers might have received a shorter time in prison* (2011: 272).

Hinton has explained, such VISs:

> *[m]ay inadvertently serve to distort the sentencing process in that the heart-wrenching contents may stir the sensibilities of the judge so much so that the weight given to the consequences of the offence by the judge, consciously or unconsciously, is disproportionate to the other circumstances to be taken into account in arriving at the correct penalty* (1996: 314).

According to Hoyle, the influence of VISs on sentences embodies "a grave and unjustified inroad into defendants' due process rights, as what ought to be dispassionate decisions become subsumed by public passion, the expression of uncontrolled emotion" (2011: 278). To prevent such a result and at the same time allow victims to retain their opportunity to be heard, she argues that VISs should be heard by the court *after* the sentence is handed down (2011: 278-9).

3.3 The Emotionality of Victim Impact Statements

As chapter two revealed (2.2), the experience of emotions and the expression of feelings are essential elements of the expressive function of VISs. By their very nature, VISs are devices designed to allow victims to describe their emotions and express their feelings as a result of the crime; oral VISs provide victims with the space to publicly emote and talk about their experiences to the court (Bandes, 2008, 2009; Karstedt, 2011). Such 'emotionality', especially the public expression of emotions in the courtroom is, however, regarded by many, particularly legal practitioners, as problematic for the law and the conduct of legal proceedings in the courtroom (Rock, 2010; Schuster and Propen, 2010). This section explores the contentious nature of the emotionality of VISs with a focus on homicide offences, under the following headings: the intersection between laws, legal processes and emotion; the ambience of the courtroom; the appropriateness of emotionality in the courtroom; and meeting the emotional needs of victims.

3.3.1 The Intersection between Laws, Legal Processes and Emotion

The traditional dichotomy between law and legal process on the one hand and emotion on the other, eschews emotion in the courtroom. According to Maroney:

> *A core presumption underlying modern legality is that reason and emotion are different beasts entirely: they belong to different spheres of human existence; the sphere of law admits only of reason, and vigilant policing is required to keep emotion from creeping in where it does not belong* (2006: 120).

Much opposition to VISs, particularly oral VISs and VIDs, reflects this resistance to the encroachment of emotion, and the view that expressive displays in legal processes are something of an anathema to the objectivity and rationality of law (Maroney, 2011a, 2011b; Karstedt, 2002, 2011; Bandes, 1999; Rock, 2010; Schuster and Propen, 2010). Legal processes are "intended to be controlled, calm and calming; rational and purposeful; well-mannered and dignified; forensic and professional" (Rock, 2010: 219). In contrast, emotion is regarded as irrational and unrestrained (Maroney, 2011a: 634).

A significant growth in research and scholarship in theories of emotion and connections with law during the last two decades, however, has debunked the myth of dispassionate law and legal process leading to a well-documented intersection between criminal law, legal procedure and emotion (Pilsbury, 1989; Laster and O'Malley, 1996; Bandes, 1999; Maroney, 2006, 2011a, 2011b; Karstedt, 2002, 2006, 2011). The ubiquity of emotion in substantive criminal laws and criminal legal procedures has been the subject of much discussion in the literature (Bandes, 1999; Karstedt, 2002; Maroney, 2006; 2011a, 2011b). More recently during the last decade, research has emerged documenting and analysing the emotion work required of judicial officers and other legal professionals in the courtroom (Laster and O'Malley, 1996; Roach Anleu and Mack, 2005; Schuster and Propen, 2010; Maroney, 2011b). 'Emotion work' is drawn from the concept of 'emotional labour' (Hoschild, 1983) and in this context comprises the work

undertaken by judicial officers in the course of their duties to manage their own emotions, the emotions of others in the courtroom and the emotional tension in the proceedings. A former NSW Supreme Court judge has described the work of "keeping natural human reactions, responses, preferences and prejudices under control and non-influential" as "exhausting as it is necessary" (Levine, 2011: 8). In their study of judicial responses to VISs, Schuster and Propen (2010) found that many of those judges who used strategies to conceal and suppress their responses to the VISs were concerned about becoming too detached or numb in their dealings with victims in the courtroom. In the light of this research, for many researchers the contentious issues are not that criminal laws and legal processes involve emotions or the expression of feelings; rather controversy arises from the appropriateness of different emotions in particular circumstances; the degree of emotional expression; and recognition, acknowledgment and management of emotions in the courtroom overall (Bandes, 1999; Doak, 2008: 153; Schuster and Propen, 2010; Maroney, 2011b: 1502).

Opponents of VISs from family victims in the sentencing hearing argue that the statements (especially those read aloud) can introduce an inappropriate degree of emotionality and subjectivity into an otherwise rational and objective sentencing hearing**.** Such emotionality threatens to detract from the formality, dignity and neutrality of the processes and decision-making (Hinton, 1996; Abromovsky, 1992; Talbert 1988; Bandes, 1996; Sarat, 1997; Rock, 2010; Hoyle, 2011). According to Rock:

> *Victim impact statements introduce a new presence in the courtroom, a presence that some fear is laden with emotionality, potentially uncontrolled, lacking the calm dispassionate tones of criminal procedure, liable to improperly influence the sentencing process* (2008: 116-117).

Research in a variety of jurisdictions has shown that legal practitioners have been cautious in their response to oral VISs. A review of the opinions of judicial officers in South Australia in 1999 disclosed concerns that oral VISs would "foster a more

adversarial approach to sentencing" (Justice Strategy Unit, 1999: 141). Fears were expressed that the court could lose control over the process as a consequence of the "emotional outpourings" of victims in the courtroom (Justice Strategy Unit, 1999: 142). Similar concerns have been articulated by Scottish judges. While the evaluation of the scheme found that most judges were neutral about the idea of VISs, nonetheless "opinion was generally negative" about the prospect of a victim reading his or her VIS aloud to the courtroom during the hearing. Several judges worried about the prejudice caused to the offender if the information contained in the VIS went beyond the offence for which an offender had been convicted (Chalmers et al, 2007: 377). Under the current system of written VISs, the Scottish judges believed that they could disregard any irrelevant material without making it public. Defence counsel in the Victorian study raised also concerns that giving victims the right to read their VIS aloud might increase the emotional nature of the sentencing hearing which could result in a harsher sentence (Victim Support Agency, 2009: 77; see above at 3.2).

Many of the legal professionals involved in the family impact statement pilot scheme in the UK (described at 1.1) were opposed to statements being read aloud by family victims to the court on the basis that the surrounding emotionality would have a detrimental impact on proceedings (Rock, 2010). Even though the concerns of legal professionals were not borne out by evaluation of the scheme, nonetheless judicial officers and legal practitioners continued to resist the oral presentation of VIS by family victims (Sweeting et al, 2008; Roberts and Manikis, 2011). When the scheme was rolled out nationally, VISs could no longer be read aloud to the court by family victims. The problem according to the evaluation of the scheme was that many legal practitioners simply resisted the incorporation of such emotionality into the legal proceedings (Sweeting et al, 2008).

The reactions of commentators and legal professionals to VISs suggest that it is the types of emotions involved and the legitimacy of the expression of those emotions in the sentencing hearing that is problematic (Bandes, 1996, 2009; Rock, 2010,

Schuster and Propen, 2010; Karstedt, 2006, 2011). Research indicates that, not surprisingly, the principal emotions expressed through VISs from many family victims are sadness and anger (Rock, 1998, 2010; Bandes, 1996; Eckman, 2003; Logan, 2008; Szmania and Gracyalny, 2006; Schuster and Propen, 2010). Rock describes family victims as experiencing a bereavement that is different to bereavement in other circumstances (1998: 30; see also Parkes, 1993). The "sudden and unexpected" nature of the deceased's death, the absence of "anticipatory mourning" and "reconciliation" and the likelihood of "a mass of unfinished business emotional and practical business" means that for many family victims, anger and grief are natural states (Rock, 1998: 39). Anger can vary in strength ranging from mild irritation and/or annoyance at one end of the scale to severe rage and fury at the other; it can also vary in type such as sullen, resentful or indignant anger (Ekman, 2003: 58). Feelings of anger can be demonstrated in a variety of ways including: facial expressions, body language, tone of voice, audible quality of voice as well as acts of physical violence. In Rock's study of homicide survivors in the 1990s he found that anger was the "one word used to describe the emotions experienced" by many family victims: "the intentional, reckless and chaotic nature of homicide can excite a quite extraordinary and unrelenting anger which is directed both at the world at large, at specific others and at the killer above all" (1998: 48).

While many family victims feel anger toward the offender, the person responsible for the loss (and perhaps also the criminal justice system more generally), most undoubtedly feel sadness, grief and perhaps agony in relation to the loss of the deceased (Ekman, 2003: 85). According to Charmaz and Milligan, grief is a variation on sadness that is specifically responsive to loss (2007: 519). It is an emotion that can generate a range of feelings including sadness, regret and anxiety and varying levels of intensity (Charmaz and Milligan, 2007: 519) and be demonstrated in various ways including tone of voice, crying, and talking about what has been lost.

The next section addresses concerns with regard to the impact of such emotionality on courtroom ambience.

3.3.2 Courtroom Ambience

Some commentators argue that VISs can generate emotions and emotionality that have the potential to be confrontational, disruptive and polluting, cause embarrassment and discomfort, and be unwelcome as well as unproductive (Schuster and Propen, 2010; Rock 2010; Bandes, 1996, 2009; Abramovsky, 1992; Sarat, 1997; Gewitz, 1996; Arrigo and Williams, 2003). The delivery of oral VISs in particular has the potential to be "highly emotional, intensifying the statement's impact in a way that cannot be conveyed merely by words" (Hoyle, 2011: 274). Abramovosky describes the effect of oral VISs on the atmosphere of the court as turning it into an "emotional battleground...charged with drama...pandering to the media" (1992: 25). According to Sarat, the integration of VISs has transformed courts "into sites for ritual grieving", prompting a return to vengeance and challenging "the prevailing identity of law" (1997: 164). In his view, VISs legitimate revenge in the legal system, blur the traditional boundary between public and private interests and undermine justice (1997: 165).

For Doak however, it is "patronising" to characterise victims' emotions as "somehow invalid or irrational"; victims are simply being human (2008: 152). According to Solomon, anger is traditionally viewed as a 'negative' emotion, "always irrational, always simplistic" (1985). But he argues, anger can be entirely appropriate on some occasions (1985); and it is likely that the determination of punishment for a person convicted of killing your family member would be such an occasion. A major obstacle in accepting such emotionality in the legal proceedings seems to be that "manifestations of anger and passion tend to be considered unseemly in the West, showing an embarrassing want of self-control and

rationality…there is little endorsement of unconfined public expressions of grief" (Rock, 1998: 49-50; see also Schuster and Propen, 2010: 81-83).

In their analysis of judicial responses to VISs,[37] Schuster and Propen use a framework they call 'judicial emotionology' – the hierarchy of emotional standards within a legal culture – to explain why particular emotions were regarded as good or bad, and expression of those emotions, reasonable or excessive (2010: 101). Most of the judges in their study viewed grief as an understandable and acceptable emotion in the courtroom until expression of that grief became excessive and threatening courtroom order (Schuster and Propen, 2010: 90). According to Schuster and Propen, "emotionology then in the courtroom includes acceptance of managed and reasonable expectations of grief and the responsibility of that management rests on the shoulders of victims until judges feel that they have to step in to curtail the victim's speech or action" (2010: 91). Anger was not well regarded by judges in this study especially when it was associated with personal revenge: "many of the judges found anger...an unwelcome, uncomfortable and unproductive emotion in the courtroom" (Schuster and Propen, 2010: 92). Compassion on the other hand, was generally recognised as a "good emotion" in this courtroom emotionology (Schuster and Propen, 2010: 94).[38] The expression of compassion reinforced judicial authority, facilitated an orderly courtroom and reflected victim cooperation with the goals of the legal proceedings (Schuster and Propen, 2010: 94).

3.3.2.1 The Research

Two studies involving the impact of emotionality of VISs on the dynamics of the courtroom more generally emerged in the late 2000's. The first study was that conducted by Schuster and Propen above (3.3.2) in Minnesota between 2004 and 2006. It comprised interviews with 22 sentencing judges and observation of 17

[37] It is important to note that this is a study of non-capital offences in the US.
[38] The exception was in the context of domestic violence offences where compassion shown to the offenders by victims was regarded as strategic and suspicious (Schuster and Propen, 2011: 94).

sentencing hearings involving matters of family and sexual violence, homicide and identity theft (Propen and Schuster, 2008; Schuster and Propen, 2010). Under Minnesota law, victims can submit both oral and written VISs and, more controversially, make submissions regarding the penalty to be imposed. The stated aim of the study was to examine the impact of oral VISs on judges' sentencing decisions although a range of judicial conduct was described. It was reported that most judges conveyed a "welcoming and accommodating impression" to victims and many also demonstrated active listening through eye contact and addressing validating comments to either the victim or the offender (Schuster and Propen, 2010). A few judges, however, were observed talking to clerks or leafing through papers while victims were reading their VISs. The interview data revealed that many judges were uncertain of the best way to respond to VIS and cautious about the expression of grief and anger in the courtroom. Many judges tended to say very little to the victim, preferring to conceal the emotional impact of the VIS on him or her and maintaining "their own sense of appropriate legal discourse, control, authority and human decency" (Propen and Schuster, 2008: 320).

Concerns expressed by the judges in the Minnesota study that there was the potential for losing control of the courtroom or becoming personally unsettled, were not realised in all but one case. In the exceptional matter the researchers noted that upon hearing a highly emotional VIS, the clerk, the prosecutor and the judge were in tears. While the focus of this study was on the relationship between VISs and the sentencing decisions, the researchers also indicated that their observation work sought to further understand the courtroom dynamics although there was little analysis of this aspect of their work (Schuster and Propen, 2010).

The second study conducted by Rock (Rock 2010), was part of the evaluation of the UK FIS pilot (referred to above; Sweeting et al, 2008) and comprised four case studies of homicide matters in London in 2007. The proceedings of four matters were observed in their entirety (one matter resulted in an acquittal) and the principals involved, other than the offender, were interviewed in each case (Rock,

2010). Unlike the Minnesota study, a significant aim of the project was to analyse the "social dynamics" and "ritual" involved in presenting VISs in the courtroom (Rock, 2010: 204). In his account of the research, Rock provides a rich description of the preparation, content and making of VISs in these matters though there is less description of the dynamics of the proceedings (Rock 2010).[39]

Rock described the oral presentation of a VIS as a "dramatic event" and "a ritual of lamentation" (2010: 217). While the presentation of the VISs was emotional and many victims "sobbed" in the courtroom, he describes the legal professionals involved as appearing disinterested, not registering responses while the "the naked emotions of the mourner" were laid before them (2010: 219). Nor did he find that the offenders demonstrated any response to the VISs read to the court. Only in one case, does he describe any problems associated with the victim participation. In that matter, both the daughter and the mother of the deceased were each stopped by the prosecutor while they read their statements because they 'went off script' criticising the jury's verdict and the judge's conduct of the trial. The same family victims also stormed out of the courtroom shouting and swearing at the judge when the penalty was handed down. In the little description that is provided of the courtroom dynamics, the concerns in relation to emotion 'polluting' the proceedings as discussed above do not appear to be borne out by the research.

3.3.3 Appropriateness of emotionality in the courtroom

According to Rock, while confident that judges could manage the emotion work and control the court, the issue for many of the legal professionals involved in the UK FIS pilot study was that, aside from impact on penalty or emotional ambience of the courtroom, the emotionality generated by VISs "was quite tangential to the proper

[39] The findings of his research will be discussed in more detail in chapter seven below.

business and sentimental order of the court" (Rock, 2010: 221). One prosecutor was quoted as saying:

> *Why are we doing that [allowing family victims to read their VISs aloud] and should we be doing that or should we be keeping the court process very separate, very clinical?...I think we've probably gone...too far in bringing them into the court process because I think the court process should be absolutely clinical so you don't run the risk of the emotion coming in* (2010: 221).

Shapland argues that this position reflects a "worrying view of the court and its role in criminal justice" (2010: 365). In her view, the court is a forum for the community to deal with the aftermath and "social disquiet" caused by violent crime**.** If it does not do so, the legitimacy of the legal proceedings is compromised (2010: 365).

> *In my view lawyers who are against any expression of emotion in court are confusing the role of the judge (to be impartial, calm and calming, presiding over proceedings) with the role of the court. They may also be reflecting concern over judges' (or their own) potential ability to deal with proceedings if emotion is expressed. Blaming emotion however is removing expression of societal disquiet from the court as a forum, leaving it, potentially to the media or the informal justice (e.g. lynch mobs). If that were to occur, it would seem to work against the rule of law* (Shapland, 2010: 365).

Drawing from Durkheim's work that punishment is an expression of emotions, Karstedt contends that "formal criminal justice actually comprises settings and procedures that seem to be capable of accommodating emotions" (2006: 231) and facilitating processes to oversee the transformation of emotions such as grief and anger to "feelings of solidarity, morality, sympathy and hope" (2006: 230). More recently, contributions to this debate have drawn on the concept of 'emotional intelligence' (Sherman, 2003; King, 2008; Karstedt, 2011). This concept comprises four key principles: awareness of emotional states in self and others; empathy for the experiences of others; cultural understanding of display rules; ability to regulate one's emotions and respond to conflict both calming and inspiring confidence (Bas van Stokkom, 2011: 250). According to Karstedt, an emotionally intelligent response

would acknowledge the emotions and emotional needs of both offenders and victims and thereby "avert some of the more detrimental effects of unrestrained emotions gushing into the arena of criminal justice" (Karstedt, 2011: 3).

The next section addresses the difficulties faced by the court in attending to the emotional needs of victims – as might be required in a therapeutic approach to victim participation in the sentencing process.

3.3.4 Meeting the Emotional Needs of Victims

An issue to be considered is what the law *should* be required to provide victims (van Stokkom, 2011; Bandes, 1999-2000). With regard to the therapeutic impact of legal processes, some writers question what role, if any, the law should bear to assist victims achieve particular emotional states. Firstly, despite the vast literature dealing with emotion and emotional states, this issue is complicated by a lack of authoritative definition for any particular emotion or emotional state (Bandes, 1999-2000: 1602-3). Secondly, not only are the needs of victims highly individual but they change over time. Accordingly, if VISs are to be therapeutic for victims, a generic approach to victim participation in the legislature and the courtroom will not be sufficient**.** What might be 'therapeutic' for one victim may be quite inappropriate for another. Furthermore, because legal systems are required to accommodate other, sometimes competing, justice needs and interests including those of the offender and the community, it is likely that there will be constraints on the extent to which the law can achieve therapeutic aims (van Stokkum, 2011: 210; Wemmers, 2011).

Scholars have also noted the reluctance of judges to engage with therapeutic approaches (King et al, 2009: 37). Many judges take the view that they are not trained as therapists and the achievement of therapeutic outcomes is a matter for health professionals, not legal professionals, and legal processes in the courtroom

(King et al, 2009: 37). Nonetheless, many writers argue that judges do not have to act as therapists in the courtroom. Rather a therapeutic approach is one that requires a judge to be aware of the potential impact of legal processes on a range of people in the courtroom (including victims) and the quality of inter-personal treatment that those people experience. King goes so far as to say that a failure to be aware of and consider the non-legal dimensions of matters before the court can compromise the integrity of legal processes (2008: 1119).

3.4 Victim Participation in the Adversarial Sentencing Hearing

The final part of this chapter moves from specific concerns to the contentious issue that victim participation is not compatible with the traditional adversarial legal framework more generally. This part is divided into two sections: modification of the traditional legal framework and the requirement of fairness.

3.4.1 Modification of Traditional Framework

Some legal theorists have claimed that victim participation in sentencing is not compatible with modern, 'conventional' criminal legal processes in common law jurisdictions that are adversarial in nature with defined legal goals (Ashworth, 1993: 502). Within this legal framework, crime is regarded as an offence committed against the wider community or the state rather than against the individual victim. Because the criminal justice system assumes that the crime transcends the interests of individuals and is an affront to the community, the central aspect of this model of criminal legal justice is the prosecution of the offender by the State to the extent required by the public interest (Ashworth, 1993). A feature of this modern adversarial legal system is said to be the exclusion of the victim: the victim is not a party to the proceedings, is not represented by the prosecution and does not have separate legal representation. The private interests

of the victim are subsumed under the public interest umbrella and the victim's role is limited to that of prosecution witness. Victims' remedies in relation to the harm suffered are compensatory in nature and recovered in civil proceedings (Ashworth, 1993, 2000).

Christian Zimmer, the deceased's father in *Borthwick* aptly described the position of the victim in this model to the *Law Report*:

> *At the start, you actually think that the prosecution is working for you to get justice. But you're clearly told, that's not the case. The prosecution is not there for the victims; the prosecution represents the state. You've got the defence, representing the accused, but no-one represents the victim. So I actually tried to hire a barrister to represent the victim, because I said, "Who's representing Mark? Who's representing his interests?" And they said, "Well you can't. Mark isn't represented. He's left out. It's not about him." And that's the first shock* (ABC Radio National, 2011, part three).

The adversarial framework enables the state to control the response to crime in a criminal justice system through criminalisation of conduct, prosecution of the accused and punishment of the offender (Young, 2000: 228). Core values of this model are certainty, rationality and objectivity, the public administration of justice and the promotion of consistent and fair treatment for offenders. Promoting the 'private' interests of the crime victim in this setting threatens adversarial legal values and processes and "hence the overall legitimacy of the criminal justice system" (Doak, 2008: 154). Victim participation is said to shift the focus of the hearing from the offender to the victim, compromise the rights and protections accorded to the offender and substitute a highly emotional, subjective approach for the objective, neutral approach long practised by criminal courts (Sarat, 1997; Hall, 1990-1991; Hinton, 1996). By manipulating the focus of the sentencing process, a VIS requires the sentencing court to depart from the conventional model of criminal justice; the rights gained by victims derogate from the offender's right to a fair trial (Sebba, 1996).

Challenges to claims of a lack of compatibility between the interests of victims of crime and the conventional adversarial model of criminal justice have emerged in recent years (Sankoff, 2007; Doak, 2008; Kirchengast, 2010). Much of this work has been critical of traditional legal theorists' unreflective acceptance of the contemporary sentencing hearing as "something of given purpose and form" (Kirchengast, 2010: 9)**.** Doak describes this traditional approach as "purist" and derived from an overly narrow conception of crime and criminal process (2008: 156). Kirchengast argues that that the 'trial' is a dynamic institution of social power adaptive to changing social needs and conditions in which wrongdoers are held to account against "a complex array of discourses that seek to satisfy various social and political ends" (2010: 9). According to this view, the trial does not "take a prescribed form, or function according to a particular narrative, as it is a product of the intersection of varying needs, debates, issues and conflicts over time" (Kirchengast, 2010: 9). Kirchengast supports his argument with a description of the various legislative modifications to the adversarial legal proceedings by parliaments over recent years including: the development of specialist courts, the inclusion of different voices in sentencing such as through circle sentencing, and abrogation of defendant's due process rights in various contentious ways including preventive detention (Kirchengast, 2011; see also Ashworth and Zedner, 2008).

According to this argument, victim participation in sentencing then, represents a modification of the adversarial sentencing hearings in response to perceived interests and needs of victims that can be grouped under three broad headings. There is first the notion of a victim as 'consumer' of criminal justice agencies and processes. Given the well-documented victim dissatisfaction with the criminal justice system, recognition of addressing victim interests is important to encourage reporting crime and cooperation with all stages of criminal justice (Young, 2000: 229; Shapland and Hall, 2010). Second is recognition of victims as 'injured' by the crime and 'stakeholders' in the ensuing dispute resolution described by Young as a "resurgence of a philosophical belief that crime is fundamentally a matter directly concerning victims and that they therefore should have the right to be centrally

involved in criminal justice" (2000; 229; see also Christie, 1977*).* Trends in international criminal justice and human rights also support the view that crime "should not just be conceptualised as an offence against the state, but also in terms of the harm it causes to individual victims and communities" (Doak, 2008: 156). Third has been the "return of emotions" to law and legal processes following changes to society's emotional culture and shifting sensibilities (Karstedt, 2002: 301). A key feature of this emerging emotional paradigm is the focus on victims and their emotional needs**.** In the sentencing hearing, VISs provides victims with space for expression of their emotions in the process.

3.4.2 The Requirement of Fairness

A contentious issue that arises from the modification of the sentencing court to provide space for the victim in proceedings relates to the requirement of fairness, so crucial to the integrity of the hearing. Generally fairness in connection with victim participation is dealt with in the context of the offender's entitlement to a fair trial and many of the specific issues in this regard are addressed in the preceding sections of this chapter. Changes in community sensibilities, however, have generated changes to community standards and expectations of fairness in the courtroom (Spigelman, 2004; *R v Dietrich* (1992) 177 CLR 292). Although the principle of fairness is usually associated with the offender's rights, it is important to note that it also extends to the interests of all parties to the matter as well as to victims and the community at large (Brennan J in *Jago v District Court of NSW* (1989) 168 CLR 23, 50; Spigelman, 2004: 33). Some scholars argue that changing sensibilities and shifts in approaches to criminal justice mean that failure to accommodate the interests and concerns of victims in a manner that maintains public confidence in the administration of justice can threaten the integrity of the proceedings (Garkawe, 1994; Shapland, 2010; Shapland and Hall, 2010).

According to Shapland (2010), the sentencing court is a forum charged by the community to deal with the aftermath of crime. In these circumstances while the

offenders clearly have an entitlement to a fair hearing, the principle of fairness requires that the interests of family victims are also respected (Garkawe, 1994). The modification of the hearing to include victims is recognition that victims have interests that can be affected by the proceedings. More specifically, in exercising their legal entitlement to prepare and submit VISs, victims have interests that are "substantially affected" by the handling their statements in the courtroom (Garkawe, 1994: 603). The requirement of fairness in these circumstances requires the sentencing court to consider the interests of victims as well as those of the offender (Garkawe, 1994).

Procedural justice, or the way that participants are treated in the courtroom, is a significant component of the requirement of fairness and ultimately the legitimacy of the legal proceedings (Mack and Roach Anleu, 2010; Tyler, 2003). Although discussion of procedural justice is usually centred on the defendant's entitlements in the sentencing hearing, the principles can be extrapolated to apply to the treatment of victims in the courtroom (Wemmers and Cyr, 2006; Garkawe, 1994). Changing legal requirements and community sensibilities in relation to victims suggest that victims cannot be ignored or treated with disrespect in the courtroom without the potential for casting doubt on the integrity of the legal proceedings (King, 2008).

3.5 Summary

A feature of the modern sentencing hearing in common law jurisdictions has been the marginalisation of victims in the conduct of the hearing and determination of penalty. The sentencing hearing, however, can be also regarded as a social institution that is responsive to changing social needs. Legal frameworks that establish victim participation by VISs and modify the sentencing hearing have responded to the perceived needs and interests of victims.

Modification of the sentencing hearing to provide space to victims of crime raises many contentious issues explored in this chapter with particular reference to homicide matters. From the perspective that VISs serve an instrumental function in the determination of penalty, a review of the literature suggests that VISs could derogate from the offender's entitlement to a fair hearing as well as challenge the integrity of the legal proceedings. The use of VISs as evidence relating to the seriousness of the crime is problematic because the content can be of limited probative value, and/or prejudicial and inflammatory and of no probative value at all. Moreover, because it is difficult for the offender to challenge or interrogate the factual and/or prejudicial, inflammatory content of VISs, he or she might not have a proper opportunity to meet the prosecution's case. The form of VISs, particularly oral statements or VIDs, exacerbates these problems and raises concerns that an offender might not be judged according to a proper application of the law to the facts and punished justly. At the end of the day, to avoid these difficulties the literature suggests that offenders can rely on the sentencing judge to deal with VIE appropriately. Certainly the empirical evidence suggests that VISs have not had an adverse impact on penalties; but to what extent judges are immune from the emotional power of the statements remains contentious for some commentators. *Agostinelli* demonstrates the potential for VISs to adversely impact on the integrity of the sentencing proceedings by threatening judicial impartiality and neutrality.

The expressive functions of VISs are also contentious. As well as modifying the adversarial form of the hearing by giving victims a role in the sentencing process, emotion and the expression of feelings are core elements of the expressive capacity of VISs. The law has long regarded emotion within its processes and institutions with suspicion and major concerns in relation to VISs are centred on the impact of emotionality on the conduct of proceedings and the work of the court. Not only do many writers consider that it is not the role of the court to assist victims to achieve therapeutic benefits but there is concern that VISs might adversely affect the formal, dignified and objective nature of the proceedings. The exclusion of emotion from the courtroom, however, is challenged by many commentators. First, our

community's changing sensibilities have led to the re-emotionalisation of law and its processes and the incorporation of victim participation simply reflects contemporary notions of fairness. Second, the court is a forum that must deal with the aftermath of crime and the emotions generated, in an appropriate manner.

More generally, victim participation in the sentencing hearing is said to be incompatible with the legal goals and procedures of the adversarial hearing. However the legislature has modified the hearing to recognise the interests of the victim and as a forum charged with dealing with the aftermath of violent crime, all participants, including the victims, are entitled to be treated fairly by the court.

This thesis investigates victim participation in the sentencing of homicide offenders in NSW in the light of these contentious issues. Together with an analysis of the use of VISs from family victims in the determination of penalty in NSW, this study also seeks to build on empirical work that has studied victim participation in the courtroom. The next chapter turns to the research design employed by this thesis.

4. Research Design

This project is designed to explore victim participation in the sentencing hearings of homicide offenders in NSW. The use of VISs for instrumental purposes in sentencing is addressed largely through an analysis of the legal framework using a traditional legal method approach. This analysis will be the subject of Chapter Five**.** The bulk of this chapter is given over to the design of the empirical component of this study.

The integration of victim participation in the courtroom and the expressive capacities of VISs are addressed through an approach that comprises both descriptive and explanatory components (Davies, 2011; Semmens, 2011; Webley, 2012). In terms of the descriptive, this thesis aims to create a rich picture of victim participation in the courtroom and thereby gain insight into this little known aspect of criminal justice. Such a picture will include the following:

- The manner by which family victims are incorporated into the sentencing hearing;
- The nature of family victim participation in the courtroom;
- The response to victim participation by other participants; and
- The dynamics of the sentencing hearing.

From an explanatory perspective, this thesis seeks to investigate the possible mechanisms, structures and processes, which shape and contextualise victim participation in the sentencing hearing.

These issues are addressed using a combination of data gathering techniques: observation of sentencing hearings, interviews with family victims involved in the sentencing process and analysis of VISs. Although this was a relatively small qualitative study that could be completed within the constraints of a PhD project,

the combination of data has produced a rich, rounded picture of victim participation in the sentencing process.

The chapter is divided into four parts. Part one sets out the background to the study - why these research methods were adopted and the difficulties of conducting such sensitive research. Part two focuses on the observation fieldwork: access to the settings and selection of choice of cases as well as gathering and analysing the data. The interviews with family victims are the subject of part three: recruitment, profile of participants and the conduct of the interviews. The final part deals with documentary analysis of VISs read aloud to the court in the sentencing hearings observed. It is important to note that there is very minimal overlap between the observation dataset and the interview dataset. That is, only one family victim interviewed was also involved in a sentencing hearing observed; otherwise I did not interview any participants involved in the sentencing hearings observed and I did not observe any court proceedings involving those family victims interviewed.

4.1 Background to the Study

The data for the empirical component of this study were gathered from a variety of sources: observation of 18 sentencing hearings in homicide matters in the NSW Supreme Court, analysis of 24 VISs read aloud to the court at those hearings and interviews with 14 family victims, 11 of whom had submitted VISs to a sentencing hearing (though only one was observed during the fieldwork). This part is divided into two sections. The first section explains why these research methods were adopted for this study. The sensitive nature of the research undertaken for this thesis is the subject of the second section.

4.1.1 Observation Fieldwork

Victim participation in the courtroom is a key issue addressed by this thesis and thus it is necessary to know what happens in the sentencing hearings. There is however a dearth of empirical research on this aspect of the sentencing process, particularly in relation to oral VISs (Shapland and Hall, 2010: 166). While some researchers have analysed court transcripts (Logan, 2008) or a digital recording of a sentencing hearing (Szmania and Gracyalny, 2006), firsthand accounts of the presentation of VISs in the courtroom have generally come from journalists' reports (Shepherd, 2003; Logan, 2008; Lowe, 2010). Exceptions are recent studies from the United States (Propen and Schuster, 2008, 2010; Schuster and Propen, 2010) and the United Kingdom (Rock, 2010) that involved some observation of victim participation in courtroom.

In light of this paucity of research in the courtroom, observation fieldwork was vital by which to gain insight into what happens in the courtroom. As a result of this fieldwork, I have been able to observe the dynamics of the sentencing hearings firsthand and gather rich data in relation to the integration of victim participation, especially the presentation of oral VISs, in the sentencing hearing.

4.1.2 Interviews

While family victims per se are not the focus of this study, their experiences of the sentencing hearing are an important component of the overall picture. In particular, the interview data provides vital background to interpreting courtroom observations and the VISs, as well as gaining insight into the structures and processes involved from the perspectives of family victims. The question was how best to explore the perspectives of family victims. Collecting data through a questionnaire or survey was problematic. From a methodological point of view, because a survey has to be designed in advance, the questions and potential

variables are identified and developed on the basis of the existing research (May, 1997: 102-117; Bryman, 2008). For the purposes of this project, this approach would have been difficult, given the lack of research about family victims' experiences in the sentencing hearing itself.

Given the exploratory nature of my study, I decided that speaking with family victims guided by a flexible thematic format would be more productive. Through listening to family victims' stories and ensuing discussion of their experiences in the sentencing hearing, the aim was to uncover and explore rich data. Such an approach would also give family victims an opportunity to 'speak'. As indicated by the literature review in chapters two and three, a major theme in the context of victim participation is that family victims, through victim impact statements, have been given a 'voice' in the sentencing hearing. The acquisition of such a 'voice' has been regarded as a significant achievement for family victims in our criminal justice system. In these circumstances it is important to hear the voice of victims directly in the interview process rather than mediated through a written survey.

4.1.3 Documentary Analysis

The observation and interview data reveal that the most significant component of family victim participation in the sentencing hearing is the oral VIS, especially when read aloud to the court by the victims themselves. Therefore the study includes an analysis of the content and structure of the oral statements presented in the hearings observed in order to provide a more rounded and richer picture of victim participation in those matters. Although VISs are a crucial aspect of victim participation in the sentencing process, there is only a small amount of existing research in relation to the content VISs submitted in homicide cases (1.3.1). Most of the studies conduct a thematic analysis of the statements and identity common themes (Booth, 2001; Szmania and Gracyalny, 2006; Logan, 2008). As part of the evaluation of the FIS sentencing scheme in the UK (see 1.1), while Rock identified key themes that emerged in the VISs that were submitted by the family victims in

three cases he also analysed some aspects of the 'telling' of those statements or 'performance' of victim participation in the courtroom. Aside from family victims, research has also emerged analysing the content of VISs submitted by child victims of sexual assault in NSW with a view to determining how those VISs might inform the sentencing court in relation to the harm suffered by these victims as a result of the offences (Shackel, 2011). My work will provide a unique narrative analysis of 24 statements focusing on both the content and performance of those statements, which will build on this research.

4.1.4 Sensitive research

There is no doubt that the research undertaken for this thesis encompassing such topics as violence, killing, bereavement, distress, anger, crime and experiences in the legal system, is research of a 'sensitive' nature. According to Lee, sensitive research encompasses topics that "potentially involve a level of threat or risk to those studied which renders problematic the collection, holding and/or dissemination of research data" (Lee, 1993: 4). On the basis of my experience conducting this research, I would add that sensitive research is research that similarly poses a threat or risk to the researcher. Being immersed in stories of loss and suffering for the duration of this project has been emotionally exhausting particularly in the context of the interview fieldwork. Three significant issues emerging from the sensitive nature of the research will be discussed in this section:

- Looking after interview participants;
- Looking after the researcher; and
- Learning from the experience.

4.1.4.1 Looking after the interview participants

I was particularly mindful of the sensitive nature of the research when planning the interview component of this study and ethical considerations relating to the identification; and minimisation of potential risks of this fieldwork were key

features in the design. In relation to the interviews, the major potential risk identified was that a participating family victim might suffer psychological and/or emotional distress during or following the interview as a consequence of talking about painful and traumatic events. In consultation with the New South Wales Homicide Victims Support Group (HVSG) and the UNSW Human Research Ethics Committee (HREC), I developed strategies to minimise this risk. Before the interview began, all participant family victims were informed that they might "suffer emotional distress as a result of discussing the death of [your] relative and [your] experiences during the sentencing process".[40] I anticipated that given the participants were self-selected[41] those participants would have considered whether they would be unduly distressed by the process before the interview was arranged.

Of course, because family victims could still become very distressed during the interview, all participants were advised at the outset that they could end it at any time. Even though no participant chose to end an interview, I monitored the interviews carefully as they unfolded looking for visible signs of distress such as: tears, being stuck and unable to move on, silence and/or a lack of interest in continuing. Other strategies designed to assist family victims during the interview included: giving participants the option of writing down their responses rather than verbalising them, offering to call a counsellor and/or validating their experiences by acknowledging the difficulties and their courage in speaking to me.[42] De-briefing mechanisms were also available to participants after the interviews.[43]

[40] This statement was included on the information sheet attached to the consent form that was handed to each participant before the commencement of the interview (see appendix 2). I also spoke to this information sheet with participants and clarified any parts as required.

[41] Most of the participants were recruited through the HVSG. The HVSG has a memorandum of understanding with the NSW Police whereby police refer family members of homicide victims to the HVSG for support shortly after the killing. I published a short piece in the HVSG newsletter about the research project inviting homicide survivors to contact me directly if they were interested in participating.

[42] Martha Jabour, the director of the HVSG, advised me in relation to these strategies and I am grateful that she shared her expertise and experience with me.

[43] The HVSG offered counselling to participants and some participants might also have been eligible for 20 hours of free counselling through Victim Services in Attorney-General's department.

4.1.4.2 Looking after the researcher

I gave little thought as to how I would experience the interviews or my well-being generally while I was in the field or, indeed, for the duration of the project. Such neglect of the researcher as an 'active' participant in the research project has been well-documented, with any reflection on risks to the researcher being either "cursory" or occurring "in an ad hoc contingent fashion once in the field" (Dickson-Swift et al, 2008: 134). There were no specific questions on the (then) HREC form directing me to consider my well-being generally; indeed the questions on the form at that time and much of the discussion in the literature tended to focus exclusively on the impact of the research on participants, rather than the researcher (Dickson-Swift, James and Kippen, 2005). A recent study of HREC forms from most Australian universities shows that this neglect of the well-being of the researcher is not uncommon at the institutional level and few forms studied in that project explicitly recognised the harms that might be suffered by the researcher in the process (Dickson-Swift, James and Kippen, 2005). My only real concern was for my physical safety when I was conducting the interviews in participants' homes because I would be alone with strangers. I dealt with this by staying in phone contact with someone I knew before and after interviews. Otherwise, I entered the field with no strategies in place that focused on my well-being as the researcher.

I did not enter the field prepared for the roller-coaster of emotions that I would experience and the intense emotional work that I would undertake during this project. Because I had read VISs in a previous study (Booth, 2001) and many sentencing judgments in homicide matters before the interviews, I entered the field anticipating distressing stories of death, loss and suffering and believed I knew what to expect at the interviews. As it emerged, however, I significantly underestimated how harrowing it would be for me to hear these stories directly from the bereaved, unmediated by written form. Like Cowles (1988), I became acutely aware of my inexperience in dealing with victims of violent crimes and I was not prepared for the extent and intensity of emotion I observed and experienced during the interviews. In contrast to the documentary materials, I could not 'put aside' the interviews

when they became too confronting, nor could I express my feelings - shed tears, gasp in horror, exclaim with anger or outrage – without restraint. Speaking directly with family victims, looking at family photographs and handling memorabilia humanised the stories and participants' experiences in a manner that I had not experienced when I read secondary sources. Face-to-face with grieving and at times angry family victims, I listened to and engaged with: stories of violence and killing; dumped, damaged and mutilated bodies of children, parents, partners and siblings; police investigations; loss, grief and anger; legal proceedings; and the hollow aftermath of homicide. Unsurprisingly, in most cases the killer had been known to the deceased and his or her family and the betrayal of this relationship added a tragic layer to many of the stories being told.

Witnessing participants' expressions of grief, pain and anger, together with their intense vulnerability was difficult and stressful. The strategies I had planned by which to manage participants' emotions during the interviews seemed woefully inadequate. In reality, I had to 'handle' participants' feelings continuously, demonstrating that they were being heard, understood and respected, that their views were legitimate and important. I worked to avoid the interview becoming an abyss of pain and tried to minimise embarrassment and discomfort in a manner that was helpful, not patronising. In spite of this, I struggled to find and/or make appropriate responses and, as a result, often felt helpless and inadequate.

I also worked hard to manage the display of my feelings. As Dickson-Swift et al (2009) point out, there are rules for how researchers are supposed to feel and act in the research process. The traditional view is that researchers should remain detached and affectively neutral during the fieldwork. In recent years this approach has been challenged on the basis that it is neither possible nor desirable. Indeed, some researchers argue that it is important to display emotions in the field, as it signals that the researcher has connected in a very personal and emotional way to the participant's story and such a connection is an important feature of establishing rapport.

Being a lawyer, much of my professional socialisation has emphasised neutrality, the 'unemotional' being much prized and any display of emotions viewed with suspicion and even disdain. Although I did not regard myself as an objective researcher, I actively sought to avoid becoming openly emotional during the interviews. I was concerned that a display of my feelings would be embarrassing and shift the focus from the participants' experiences to me and that this would be inappropriate. Thus, I strived to maintain my composure, while at the same time trying to connect with and be responsive to the participants in other ways, such as looking at photographs and memorabilia in a manner that demonstrated my engagement with their stories. Accordingly, I attempted to suppress my tears, disguise my horror, disgust and/or anger and resisted urges to physically comfort participants. I found that a particularly useful strategy to reduce emotional tension was to physically move around, looking at photographs and other memorabilia; making detailed handwritten notes also gave me time to control my emotional responses. These notes proved useful to refer back to during the interviews at various times.

I experienced strong surges of guilt as well. In speaking with me, participants were forced to dredge up their most painful memories**.** By having them relive such traumatic experiences, I was contributing to their burdens. Consequently, I frequently felt like an intruder in the participants' lives, a voyeur exploiting the deceased, the participants and their stories. There seemed to be nothing reciprocal about this research; the benefits of the research were all for me and I was giving nothing in return. In sum, I found the interview fieldwork very stressful. Following the first six interviews, rather than attempt to recruit more participants, I decided to take a short break and worked on an analysis of the data and observation fieldwork. As time went on, I found various reasons not to resume the interviews. With the benefit of hindsight, I was emotionally and physically exhausted and hesitant to re-enter the field. Eventually a sense of responsibility to those who had already participated overcame my inertia and I recruited the remaining participants. I was so eager to finish the interview component of the fieldwork,

however, that I ended up interviewing six participants over only one month and the final two on the same day. The latter two participants lived in country NSW within a short drive of each other by car. These interviews were two of the most harrowing that I completed and at the end of that day I was completely drained.

The stress associated with the fieldwork did not end with the interviews. The transcription process was also stressful as I relived my interview experiences and heard the stories of the participants again. Similarly, the constant reading and re-reading of VISs during the documentary analysis process was also harrowing although, unlike speaking with family victims directly, I did not have to suppress my feelings and in the privacy of my workspace I was able to express myself, including writing reflection notes of my experiences.

Moreover, the processes of analysis and 'writing up' my findings have been problematic. As Blakely (2007) has observed, dealing with sensitive issues intensifies researchers' feelings of obligation and participants' expectations of the representation of their experiences. I feel a sense of responsibility to the interview participants because they gave so much of themselves and wonder if they might disagree with my interpretations of their experiences or their feelings and/or feel that I have misrepresented them. Although I agree with Ribbens (1989: 589) when she says that 'ultimately there are limits to the extent to which our research can be regarded as being on behalf of the people we are researching', nevertheless I feel responsible to the family victims I spoke with in the study.

4.1.4.3 Learning from this Process

Thus, during the study preparation the focus was on the experiences and welfare of family victims I would interview and little consideration was given to my own well-being. An emerging literature however recommends various strategies to assist researchers in attending to their own needs, as well as those of other participants.

At the individual level, useful strategies for the researcher that have been identified include: careful spacing of interviews to decrease fatigue, transcribing with breaks (McCosker, Barnard and Gerber, 2001), keeping a reflective journal of research experiences in the field, as well as field notes (Beale et al, 2004) and debriefing.

With hindsight I'm disappointed that I did not organise a formal debriefing mechanism for myself before entering the field. Even though I relied on an informal network of colleagues, family and friends from time to time, issues of confidentiality and fear of being burdensome meant that I tended to deal with much of the stress by myself. Professional supervision has been recommended to help researchers deal with stress (Dickson-Swift et al, 2008) and I regret not having such a mechanism in place. I also regret not establishing some form of follow-up with participants after the interviews, not for the purposes of establishing friendship but to reassure them that I was concerned for their well-being and engaged with their stories. I often thought about contacting participants afterwards to see how they were going but I hadn't talked about this possibility previously and was worried about crossing some invisible line; perhaps such contact would be viewed as intrusive or insensitive, or maybe exacerbate their distress. In the end I did not contact the participants following the interviews but I was ridiculously pleased when some of the participants contacted me about various matters.

4.2 Observation of Sentencing Hearings

I observed 18 sentencing hearings of homicide offenders for this study in the NSW Supreme Court between July 2007 and December 2008. This section addresses the issues of moving into the setting and gathering the data.

4.2.1 Moving into the setting

Moving into the setting broadly comprised three issues:

- Selection of the appropriate sentencing court as setting for the project;
- Selection of cases in that setting; and
- Access to that setting.

4.2.1.1 The Setting

The first issue to be determined was the best location from which to observe sentencing hearings for homicide offenders. In NSW, homicide matters are heard in both the Supreme Court and the District Court; murder and manslaughter matters can be heard in the Supreme Court while manslaughter and driving offences causing death can be heard in the District Court. Initially, I intended to observe victim participation in both courts over the range of homicide matters but identifying relevant cases at the District Court level was problematic. Like the Supreme Court, the District Courts do publish court lists but, at the time the fieldwork commenced, those lists were not as easily interpreted as those of the Supreme Court because insufficient detail was provided of the nature of the matters to be heard.[44] On the basis of the information published, it was hard to determine whether a particular matter listed would be a sentencing hearing where the court would hear submissions that might include VISs. Pursuing matters in the District Court was likely to be time-consuming in the quest to find matters relevant to the study. In the light of the wide range of geographical locations of the District Courts, the travelling time involved and ensuing uncertainty together with limited resources, observing matters in the District Courts was not a practical option. In these circumstances, I have confined my observation fieldwork to sentencing hearings of homicide offenders in the NSW Supreme Court.

While Supreme Court judges do travel on circuit to hear matters in regional towns, all matters observed have been heard in Sydney. The Supreme Court is not housed in any one particular building. The main building, comprised of a number of

[44] Appropriate matters could be identified in the court lists published by the Supreme Court through helpful descriptions of matters such as “sentencing submissions” or “sentencing hearing”; these descriptions were not used by the District Court.

courtrooms, is a modern tower construction located in Queens Square in the Sydney CBD. Most of the matters observed, however, were heard in small 19th century court houses in various locations within a short distance of Queens Square.

4.2.1.2 Case Selection

My original scheme was to obtain notice of appropriate matters coming up for hearing through the Witness Assistance Scheme (WAS) in the NSW Office of the Director of Public Prosecutions (ODPP). Unfortunately, due to budget constraints, the ODPP was unable to provide any assistance for the project. Ultimately, it was through the interview component of the fieldwork that a strategy for identifying and selecting relevant hearings to observe was devised. The first sentencing hearing I observed was the result of an invitation from an interview participant, Laura, who was also simultaneously involved in court proceedings relating to her son's murder. Laura invited me to the sentencing hearing to observe the presentation of VISs by family members. As a result of this contact I was able to work out a strategy to select appropriate matters from the Supreme Court lists published online. Thereafter the cases observed were selected randomly from published court lists.

At the time I conducted the observational fieldwork, most Supreme Court sentencing hearings were conducted on Fridays (although it was not unusual for submissions to be heard on other days). Each Thursday afternoon I checked the court list published online. Criminal matters were listed giving the name of the parties, the judge, location, time and type of hearing. For the purposes of this study I was interested in matters marked 'sentence submissions' or 'sentencing hearing'. To ensure that the subject offence of the sentencing hearing was murder or manslaughter,[45] I would 'Google' the name of the offender in potential matters hoping to find media coverage that might indicate the nature of the offence. On most occasions I ascertained the nature of the matter before going to court. I did not follow up cases that identified the offender by his or her initials because

[45] The NSW Supreme Court has jurisdiction to hear other indictable matters such as particular drug offences or serious sexual assaults although most of the matters heard are murder/manslaughter.

generally this indicated a juvenile offender and in all likelihood the court would be closed to the public.

Once appropriate matters were identified, I usually arrived at the court about 15 minutes before the scheduled starting time. If I had identified two potential matters and the courts were close to each other, I used this time to find out which matter was more likely to involve victim participation. Often times I was able to make an assessment because I saw HVSG support counsellors with groups of people (who I assumed to be family victims) at the courthouse and I would follow them. Being early also meant that I would get a seat in the public gallery from which I would be more likely to see and hear the proceedings. Most of the 19th century court houses I attended were very small and little space was provided for members of the public. In many of the matters I observed, especially those that had received media attention, there were often large numbers of people crowded in the public gallery and it was not uncommon for people to be standing at the back of the court (if there was room). No seats in the courtroom are set aside for those closely affected by the matter such as the deceased's family members or supporters and the lack of space was frequently a problem in the hearings observed.[46] On a couple of occasions the judge offered seats in the jury box to members of the pubic who were standing at the rear of the court.

Between 6th July 2007 and 10th December 2008, I observed 18 sentencing hearings in the NSW Supreme Court conducted by 11 different judges in a range of courtrooms. Of these hearings, seven offenders had been convicted of murder, 10 offenders had been convicted of manslaughter and one offender had been convicted of being an accessory after the fact to murder. Table 4.1 below provides details of the matters observed. Due to ethical obligations regarding the VISs that were presented in these matters, the cases have been de-identified and are referred to by number. The number reflects the chronological order in which I

[46] The HVSG support worker that accompanied the family victims in the first matter that I observed complained about the crowded courtroom describing those who were not connected with the matter as "voyeurs" and "taking up seats".

observed the hearings. All of the hearings observed involved offenders who were adults at the time of sentencing;[47] one of the offenders in hearing 17 was identified only by his initials because he had been a minor at the time the offence was committed and there were non-publication orders in place.[48] When the judge asked the offender's counsel whether his client wanted a closed court or was content to continue with the non-publication orders, the offender agreed to an open court with continuation of the non-publication orders.

Table 4.1

Case	Date	Conviction	Courtroom
1	2007	Murder	King Street
2	2007	Accessory after the fact to murder	Court 5 Darlinghurst
3	2007	Manslaughter	Court 3 King street
4	2007	Murder	St James Road Court
5	2007	Manslaughter	St James Road Court
6	2007	Manslaughter	St James Road Court
7	2007	Manslaughter	Court 13A Queens Square
8	2007	Murder	Darlinghurst
9	2007	Murder	Court 5 Darlinghurst
10	2008	Murder	Court 3 King street
11	2008	Manslaughter	Court 5 King street
12	2008	Murder	Court 3 King street
13	2008	Murder	Court 2 King street
14	2008	Manslaughter	Court 13A Queen Square
15	2008	Manslaughter	Court 1 A Queen Square
16	2008	Manslaughter	Court 5 King street
17	2008	Manslaughter	Court 1A Queens Square
18	2008	Manslaughter	King Street court 2

[47] By virtue of section 10 *Children (Criminal Proceedings) Act* 1987 (NSW), the general public is excluded from proceedings that involve an offender who is under the age of 18 years.
[48] Non-publication orders mean that the name of that offender cannot be published and nor names of other relevant parties in the matter if publication of those names could lead to the identification of the offender.

4.2.1.3 Access to the setting

Access to the courtroom settings for hearings involving adult offenders was largely unproblematic. The principle of 'open justice' requires that court proceedings be conducted in public (John *Fairfax Publications PL v District Court of New South Wales* [2004] 61 NSWLR 344, 352). Thus, as a member of the public, I did not need permission to observe the hearings.

It is important to consider the nature of the researcher's involvement with the subject of what is being observed or membership of the group being studied (Bryman, 2008; May, 1997). According to Gold's classic observer typology (1958: 218), an observer can adopt one of four roles. First, there is the *complete observer* who is completely detached from the setting, neither seen nor noticed by those being studied. Second, the *observer-as-participant* is known to those being observed but does not have a role in the particular setting. In this role, the researcher is in the setting as a researcher - there to observe and record those observations with minimal interaction. Third, the *participant-as-observer* is more engaged with the setting often as a participant in the group although his or her role as a researcher is still recognised. Finally, as the *complete participant,* the researcher is an active participant in the setting and conducts the research as an insider.

The relevant settings in this study were the 18 sentencing hearings conducted in a range of courtrooms. Each hearing comprised a number of participants - the judge, legal professionals, court staff, offenders, family victims, offender's family and supporters and members of the public. As noted above, I attended the first hearing at the invitation of the family victim. I met the deceased's family and supporters at the courthouse prior to the hearing and sat behind them in the very small courtroom. I also spoke with them and the prosecution lawyers at the conclusion of the hearing. At this hearing my role could be described as an observer-participant because I was known to the family victims as a researcher and interacted with them in the setting while I watched and recorded my observations.

All other matters were selected randomly from court lists and I attended the court as a member of the public. If possible, before each matter commenced, as a matter of courtesy when I arrived at court I advised the court officer that I was a researcher and requested permission from the judge to take notes. All judges gave permission. Otherwise, generally the legal professionals, court staff, offenders, family victims and other people in the courtroom were unaware that I was in court as a researcher, observing and recording my observations of the sentencing hearing. Support counsellors from the HVSG, who were present in court and aware of my research, recognised me but usually we did not speak to each other. During the hearings observed, I had no direct contact with family victims or offenders.

With regard to these randomly selected matters, I would describe my role as somewhere between the complete observer and the observer-as-participant. Although detached from the settings in that I was unconnected to the matter being heard and my attendance was irrelevant to the conduct of the hearings, many of the judges knew I was a researcher taking notes and my presence was visible to all in the courtroom; nor did I seek to hide the fact that I was observing and taking notes. Indeed, the courtrooms and public galleries were usually so small that on many occasions I made eye contact with a number of participants but, aside from journalists, no one asked me what I was doing. Furthermore, I also interacted in the settings as a member of the public. From the public gallery I participated in court rituals and formalities such as standing when the judge came on and left the bench and conforming to implicit behavioural norms in the courtroom while the proceedings were being conducted. From a jurisprudential perspective, participation by members of the public is important to the operation of the principle of open justice and enhances public confidence in the administration of justice. Public confidence in the courts is a critical aspect of the 'open justice' principle. Thus, as a member of the public, my role was to observe the operation of justice and ensure not only that justice was done but seen to be done.

It is important to consider whether my presence in the settings had an impact on the conduct of the hearings and in particular whether the:

- participants in the hearings changed their behaviour because I was there; and/or
- hearings were conducted differently because I was watching (Webley, 2012: 937; Semmens, 2011: 69-71).

Although many of the judges knew that I was observing the proceedings, courtrooms are public settings where it is common for journalists, students and/or other members of the public, including friends and supporters of the offenders and victims, to observe the proceedings from the public gallery. The principle of 'open justice' means that court proceedings and the conduct of the participants are always under scrutiny and participants, particularly the legal professionals, behave accordingly. Similarly, hearing participants and members of the public gallery were also aware of the presence of legal professionals and strangers in the courtroom. Certainly I sought to dress and behave in a manner whereby I blended into the setting and in my view the very 'naturalness' of my observation meant that my presence did not cause those involved in the hearing to do anything out of the ordinary or indeed differently to how they would have done something had I not been there (Bryman, 2008). Given these factors, I do not think that my presence in the courtroom watching and taking notes in any way significantly influenced participants' behaviour or the conduct of the hearings.

4.2.2 Gathering the data

This section seeks to address two broad issues involved in gathering the data:

- approach to the fieldwork; and
- recording the data.

4.2.2.1 Approach to the fieldwork

I commenced the observation field work with minimal pre-structuring. This did not mean that I went into the courtrooms unaware of relevant concepts or theories in relation to what I would see (Bryman, 2008: 395). As a former practising lawyer, I entered each courtroom with knowledge and experience of the legal framework, rituals, format and conduct of sentencing hearings. Furthermore, despite little extant research in relation to the dynamics of victim participation in the courtroom, more general concerns with regard to VISs in this context had been well-documented. I had also considered observational research in the courtroom more generally including work by Milseki (1970-1971), Carlen (1976), McBarnett (1981), Conley and O'Barr (1990), Rock (1993), Konradi and Burger (2000), Ptacek (1999), Tait (2001) and Hunter (2005). Thus, while I commenced the fieldwork with a general understanding of the process and perceived problems, in keeping with a grounded theory approach to the analysis, I did not enter the field with an observational template setting out preconceived categories (Charmaz, 2006).

Adopting Charmaz's grounded theory approach to data gathering and analysis, I employed a constant comparative approach from the first hearing observed, intending to develop concepts, categories and theory grounded in the data collected (Charmaz, 2006). Initially, my observations were concerned with very broad issues (Charmaz, 2006: 255):

- spatial characteristics of the setting;
- identity of the participants;
- characteristics of the participants;
- demeanour of participants;
- actions of participants;
- words of the participants;
- details of VISs;
- courtroom dynamics;
- outcomes; and
- personal impressions.

My approach to the observation fieldwork gradually became more focused on aspects of the hearings that were emerging in my analysis as significant at a theoretical level (Bryman, 2008). For instance, in the first hearing observed, I was struck by the judge's manner toward the family victims and his style in approaching the interests and concerns of deceased's family. This judge was more engaged with the family victims than the more distant, businesslike judge I had expected. Early in the fieldwork it also became apparent that oral VISs as distinct from written VISs added an emotional layer to the hearing, but that the proceedings in all cases remained orderly, formal and decorous. After observing the sixth matter, I withdrew from the field for a short time to develop my analysis and reflect on the categories that were emerging from the data. I returned to the field in November 2007 wanting to test tentative ideas in relation to the interpersonal treatment of victims by judges and particular professional tactics of the legal professionals involved that seemed important to the unproblematic victim participation observed. I was hoping to observe a 'deviant' case where proceedings were disrupted by victim participation against which I could test my emerging ideas (Silverman, 2010: 281).

There was some disruption caused by victims in the tenth hearing observed. After this hearing I again withdrew from the field to test my emerging theories. I followed this pattern of returning to the field and retiring from the field for short periods to further develop my analysis in May and again in October. Following the 18th hearing in November 2008 I left the field permanently. At this time I was emotionally exhausted as a result of observing and documenting people's losses, grief and anger for some 18 months (see above 4.1.4.2). But I was also satisfied that I had explored and elaborated my categories fully for the purposes of covering the topic in depth (Charmaz, 2006). I was no longer gathering data that generated refinement or modification of the categories, concepts and emerging theory (Bryman, 2008).

4.2.2.2 Recording the data

While it would have been of advantage to video or audio record my observations in the courtrooms, this was not an option in the NSW Supreme Court. Section 9 of the *Court Security Act* 2005 (NSW) provides that a person must not use a recording device to record sounds or images in the courtroom without express permission to do so. I was informed by the manager of the NSW Supreme Court Criminal Registry that I would not be given permission to audio-record the proceedings for reasons of security; this seemed to be a general rule because journalists in the courtrooms also did not appear to audio-record the proceedings. In any event, given the notoriously poor acoustics of courtrooms and the difficulties that could be experienced achieving the optimum position for such recording, there were no guarantees that such recording would have been necessarily successful in the research setting.

Even though I was unable to video or audio record the events, I was entitled to take written notes during court proceedings open to the public (*Home Office v Harman* [1982] 1 All ER 532). Thus, I recorded my observations as comprehensively as possible by hand using my own form of shorthand. All speech, whether evidence such as VISs or comments by participants, I tried to record verbatim rather than paraphrase what I heard. I wrote the most detailed field notes that I could. At the conclusion of each hearing, I returned to my office nearby in the city as soon as possible and transcribed my written notes whilst the matter was still fresh in my mind; all field notes were transcribed within a few hours of the matter being observed. When writing up my field notes I expanded, elaborated and reflected upon what I had seen in the courtroom (Bryman, 2008). When I had finished, not only had I recorded my observations, but I also recorded my feelings or perceptions of what I had seen or heard. These 'reflective notes' enhanced my awareness of my responses to specific features of the matter and were particularly important when I was in the process of analysing the 'performance' of the oral VISs.

To enhance the validity of the observation data, I supplemented my field notes with digital copies of the transcripts of 16 of the 18 sentencing hearings observed obtained from the criminal registry of the Supreme Court.[49] The Supreme Court is a court of record and all proceedings are recorded. Transcripts of Supreme Court sentencing hearings are prepared from these recordings and submitted to the presiding judge for approval before they are made available. A notable feature of most of the transcripts I received was the absence of certain matters I had recorded in my notes. The most notable absences were the VISs that were read aloud to the court in 10 of the 13 matters observed. These VISs were not extracted in the transcripts; at the point where the VIS was read in the hearing, a short sentence was inserted such as "statement of witness read". Moreover, in at least two matters, conversations between the judges and the family victims that I had recorded also did not appear in the transcript. Thus, in the course of my analysis, I had to consider the significance of what was excluded from the transcripts (Sarat, 1999). Certainly it might have been connected to issues of the deceased's family's privacy and a way of preventing the offender from gaining access to a copy of VISs.[50] Alternatively the absence might reflect the lack of importance of victim participation to the legal goals of the hearing.

I made further application to the Registrar for access to copies of those VISs read aloud in the courtroom. This was a more complicated process than obtaining copies of the transcripts and is discussed in more detail below in the documentary analysis section. Ultimately, even though I was unable to audio record the hearing, I am confident that the combination of data sources – transcribed field notes, court transcripts and copies of VISs read aloud – provides a valid and reliable data set.

[49] One transcript could not be found and I was not given the transcript for matter no. 17 because one of the offenders was a juvenile at the time of the offence and the file was closed.
[50] Section 28(5) *Crimes (Sentencing Procedure) Act 1999* NSW prevents offenders from retaining a copy of the VIS.

4.3 Interview fieldwork

I interviewed a total of 14 family victims between April 2007 and October 2008, 11 of whom had submitted a VIS to the sentencing hearing in a homicide matter. Nine interview participants gave me copies of the VISs they submitted to the sentencing hearings. In this section I address recruitment and the conduct of the interviews.

4.3.1 Recruitment

Recruitment comprises two issues:

- Strategy for recruitment of participants; and
- Profile of those participants.

4.3.1.1 Strategy

After the NSW ODPP indicated that it was unable to provide assistance for my study, I revised my strategy and approached two victim support groups, the HSVG and Enough is Enough, for assistance. Ultimately, 12 of the 14 interview participants were recruited through HVSG and none through Enough is Enough.[51] The NSW police and the HVSG have a memorandum of understanding whereby, in the case of homicide, the deceased's family members are put in touch with the HVSG and provided with support and assistance as required. Although there is bias inherent in being a victim support group, given the memorandum of understanding with the NSW police, the HVSG was the first port of call for most family victims in NSW and it maintains a large membership with whom it keeps in regular contact. Furthermore, at least six families were supported by the HVSG in the cases that I observed. Thus, a recruitment strategy through the HVSG promised to reach a wide range of family victims.

[51] I approached Enough is Enough because I had met its director, Ken Marslew, at various conferences and he had indicated to me that he was very keen to participate in research. In the end, though, I did not recruit any participants from this particular group.

Following discussion with the HVSG's director I invited members to participate in my research through the HSVG monthly newsletter rather than approach family victims directly or through HVSG support workers. In March 2007 I published a short piece in the HVSG's newsletter explaining the nature of my project and inviting potential participants to contact me either by telephone or email. The response rate was much lower than I had anticipated however, with only seven family victims volunteering to participate. I followed this up with a second piece in September 2008. In the end I recruited a total of 12 participants from the HVSG. Of the two remaining participants, one contacted me after reading my article about family victim participation in the sentencing process published in the *Law Society Journal* (Booth, 2007b) and the final participant was recruited through another NSW victims support group, Homicide Survivors Support after Murder.[52] As discussed above, the participants were interviewed in two stages: eight family victims were interviewed between April 2007 and December 2007 and the remaining six family victims were interviewed in October 2008.

Not all interview participants submitted a VIS in a sentencing hearing. Initially my plan was to interview only those who had participated in a sentencing hearing by way of VIS. Recruitment was more difficult than I anticipated, however, and by interviewing family victims who had been involved with legal proceedings more generally, I was able to obtain valuable data about the legal processes and the perceptions of participation. Ultimately, 11 of the 14 participants in the sample submitted VISs to a sentencing hearing; while one of those matters was decided before the legislative framework was established, nonetheless, the sentencing court read the VISs tendered. Of the remaining three cases, in two matters the offender was found not guilty by reason of mental illness and there was no sentencing hearing. The family victims involved in these matters had since submitted VISs to the Mental Health Tribunal review hearings and my discussion with these participants produced rich data with regard to the purpose of VISs. In the final case, the deceased's family elected not to submit VISs although the family

[52] I was put in contact with this group by a student who knew about my research project.

victim interviewee, Hilary, believed they had actively participated by attending each day of the hearing including the sentencing hearing.

4.3.1.2 Profile of participants

The interview participants were predominantly women (n=12) although on two occasions the woman was accompanied by her male partner who also contributed to the interview. Half of the participants were aged over 50**,** two were aged over 70, five were aged 50- 60, six were aged 35-49 and one was aged 20. All participants except one were born in Australia. At the time of the interviews, seven participants lived in Sydney and seven lived in rural or coastal areas of NSW.

Details of the profile of the participants are presented in table 4.2 below. All participants have been de-identified and given a pseudonym by which they will be referred in this study. The number allocated to each interview indicates the chronological number of the interview and the year is the date of the sentencing hearing. Of the deceased victims involved, 12 were male; nine were aged less than 50 years; and three (including two female) were aged less than 20 years. In two matters, the offenders were found not guilty on the basis of mental illness. In the remaining 12 cases, seven offenders were convicted of murder and six were convicted of manslaughter (in one case there were two offenders and one was convicted of murder while the other was convicted of manslaughter).

Table 4.2: Profile of Interview Participants

Family Victim	Details of deceased	Relationship to deceased	Location of interview	Submission of VIS
1. Sandra, 2005	Male, 29	Mother	Home	Oral
2. Sharon, 2004	Male, 49	Wife	HVSG office	written
3. Ted, 2005 (2nd trial)	Male, 33	Father	HVSG office	First trial – written Second trial – oral (change in legislation
4. Josephine, 2004	Male, 70	Granddaughter	UNSW	Oral
5. Phillip, 2004 (also primary victim)	Male, 25	Father	HVSG office	Oral
6. Val, 2003	Male, 50's	Sister	Home	No VIS - NG by reason of mental illness
7. Hilary, 2007	Male, 70 Female, 70	Daughter-in-law	Café	No VIS
8. Laura, 2007	Male, 19	Mother	Home	Oral
9. Terry, 2003	Male, 46	Sister	Telephone	Oral (read by 3rd party)
10. Susan, 2004	Male, 33	Sister	Home	Oral
11. Coral, 2008	Male, 50's	Sister	Home	Written
12. Eleanor, 2006	Male, 70's	Wife	Home	No VIS - NG by reason of mental illness
13. Cathy, 1994	Female, 9	Mother	Home	Written
14. Shauna, 2008	Female, 16	Mother	Home	written

4.3.2 The Interviews

I interviewed all but one participant face-to-face; the remaining participant was interviewed by telephone because her home in regional NSW was a considerable distance from Sydney. The sensitive nature of the research topic meant that it was important for participants to be comfortable when we spoke so participants were encouraged to select the venue and time for interview. More than half of the participants (n=8) elected to be interviewed in their homes; of the remainder, three were interviewed at the HVSG office, one at an office in the Law Faculty at UNSW and one in a city cafe. Other than the telephone interview which lasted

approximately 45 minutes and the interview with Josephine which lasted approximately 50 minutes, the length of the interviews ranged between 90mins and 2.5 hours. The interviews ended when participants indicated that they were ready to finish. In a few cases where the interviews were conducted in the participants' homes (n=4), I was offered refreshments and we chatted about more general topics. Unlike the experiences of other researchers (see Ribbens, 1989), I did not form friendships with any of the participants and, aside from a few follow-up calls from participants dealing with specific matters, I have not been in contact with the participants since the interviews.

Interviews 1-4, 6 and 8 were audio-recorded with the consent of the participants and I transcribed these interviews in full within days of each interview. Extensive hand-written notes were taken for the remainder of the interviews and transcribed either the same day or in the case of the last two interviews, the following day.

Two specific issues will be addressed in this section:

- Interview format; and
- Conduct of interviews.

4.3.2.1 Interview Format

As has already been noted, through the interviews I aimed to gain insight into participants' experiences in the sentencing hearing as well as rich data that would help me interpret and analyse what I observed in court and read in the VISs. Through conversation with the participants and listening to their stories, I sought to uncover and explore the issues that were important to them and gain understanding of the processes and structures that shaped their experiences. The in-depth interviews were conducted in a semi-structured format to facilitate this conversation and provide scope for comparative analysis across the interviews (Bryman, 2008; May, 1997). The interview schedule was arranged around certain themes designed to explore family victims' experiences and perceptions of the sentencing process. Key open-ended questions were included to give family victims

ample opportunity to raise issues of importance not already identified. At the design stage I submitted a draft interview schedule to both the HVSG and WAS for feedback. The interview schedule is contained in Appendix one. After the schedule was piloted with the first two participants, amendments were made to the schedule; these amendments are highlighted in the appendix.

4.3.2.2 Conducting the interviews

Prior to each interview, I read the sentencing judgment of the relevant offender to give myself some background in the case before I met the participant.[53] All interviews covered the material in the interview schedule though not necessarily in the order set out. I began each interview by introducing myself and the aims of the research project. After explaining the consent form (contained in Appendix two), I told the participants that they could stop the interview at any time and/or not answer any questions as they chose. Following these introductory remarks I started with broad biographical questions looking for information about the participant, the deceased's family, the deceased and the crime. From here, I followed participants' leads. Flexibility was crucial because I wanted family victims to identify their own issues of importance. Rather than control the direction and content of the interviews, I aimed to foster a dialogue with the participants. I wanted to capture the perspective of the family victims largely unfettered and learn about their experiences.

The core topics addressed in each interview were:

- Motivation to submit a VIS and, if relevant, read that VIS aloud to the court;
- The content of VISs, both as restricted by the law, and desired by the interview participant;
- Preparation of VISs including any relevant information and assistance received;
- Editing VISs before the sentencing hearing;

[53] This wasn't possible in Josephine's case because I was unable to locate a copy of the sentencing judgment.

- Courtroom experience;
- Experience of reading VIS aloud (if applicable);
- Handling of VISs in the hearing;
- Purpose and use of VISs in the hearing;
- The responses of the judge, legal professionals, offenders and others involved to the VISs;
- Expectations of submitting a VIS;
- The role of the family victim in the sentencing process; and
- Overall experience of participating in the sentencing process.

Establishing and maintaining rapport was a crucial aspect of each interview and I actively sought to create a supportive, informal environment in which I hoped that family victims could feel comfortable speaking to me about intimate, painful matters. I made a conscious decision that I would not approach the interview in the guise of a detached, impersonal researcher. Instead, I sought to act naturally and rely on my interpersonal skills to 'connect' with participants and convey my interest in and respect for their experiences. I ensured that I greeted each participant warmly and maintained a warm countenance throughout the interview. Usually this warmth was not contrived as I genuinely admired those participants who spoke to me in spite of the pain that it caused them and I was interested in hearing their stories. Incidentally, it was much easier to establish rapport in the face-to-face interviews than over the telephone, where, in the absence of visual cues, it was difficult to gauge the participant's responses to our discussion and establish the requisite rapport with each other.

The interviews, however, were often comprised of more than conversation. Not only did we discuss their experiences, but many participants showed me their VISs, eulogies and other related documents to read and discuss. In many cases, participants also showed me family photographs featuring the deceased and other

items of memorabilia.[54] Although participants were generally responsive and appeared very keen to talk about their experiences, the interviews were inevitably emotional and frequently fraught. Participants frequently expressed negative emotions, such as sadness, anger and frustration, but in speaking of the deceased, most participants also expressed positive emotions, such as love and joy. While much of the anger was directed, unsurprisingly, at the killing and the offender, considerable anger and frustration were also directed at aspects of the legal system such as trial procedure, appeals and delays. Not surprisingly, many of the participants shed tears as they spoke of their experiences. Although a few participants needed to have a break or shift away from a topic while they regained their composure, no one asked me to stop the interview or appeared too distressed to continue. I made sure that no participants were hurried at any stage and acknowledged their sadness and courage in speaking about their loss.

4.4 Documentary Analysis of Victim Impact Statements

To further enrich the picture of 'performance' of family victim participation in the sentencing hearings observed, I analysed the content and performance of 24 VISs that were read using narrative analysis techniques (Reissman, 2008; Gubrium and Holstein, 2009). According to Reissman, what makes a text 'narrative' "is sequence and consequence: events are selected, organised, connected, and evaluated as meaningful for a particular audience" (Reissman, 2005:1). Victim impact statements can be regarded as narratives for this purpose because in a "storied form" (Reissman, 2005: 1) they recount the family victims' personal experiences as a result of the killing of their family member: loss, grief, anger and remembering the deceased. The objective of this analysis was to explore both what was 'told' in the statements and the 'telling' of the statements in the courtroom in order to gain a "fuller picture" of the impact of VISs in the sentencing hearing (Riessman: 2008:11).

[54] For instance, Laura took me into her deceased son's bedroom and showed me his ashes, guitar and other personal items.

In this part I address two methodological issues – access to the VISs and approach to the analysis.

4.4.1 Access to victim impact statements

Once received by the sentencing court, VISs are not confidential documents. The Court can make copies available to the defence, the offender or "any other person" on such conditions "as it considers appropriate" although with regard to the offender, there must be a condition that he or she is prevented from retaining a copy.[55] A total of 38 VISs were received by the courts in the hearings observed and 30 of those statements were read aloud. As noted above, I recorded my observations of the content and presentation of the oral VISs in detailed field notes intending to supplement these notes with copies of the statements extracted in the transcripts. Because only three VISs were extracted in the transcripts, however, I was required to make a formal application to the Supreme Court for access to the statements. As a non-party to the proceedings, I was not allowed access to the VISs other than with the consent of the registrar. I limited my application to copies of the remaining VISs that were read aloud to the court.

Consent was granted after I obtained further ethics approval from the UNSW Human Research Ethics panel for access to and use of such VISs[56] as well as a letter from my supervisors regarding my competency as a researcher. Scanned copies of 24 of the 30 VISs read aloud to the court were forwarded to me electronically. The remaining six statements were either not found in the court files or were unavailable. A profile of the 24 VISs analysed is contained in Appendix 3. For identification purposes, the hearings are numbered 1-18 and the VISs in those matters have been assigned related numbers (see author column). The grammar and layout of the statements suggested that none had been prepared by a

[55] Section 28(5) *Crimes (Sentencing Procedure) Act 1999* (NSW).
[56] The conditions of the approval focused on preserving the confidentiality, privacy and anonymity of the family victims involved.

professional third party. There is no designated VIS form to be used in NSW sentencing courts and the VISs were highly individual, personal documents presented to the court in a variety of formats; four were handwritten, one was in the form of a poem and one had a photograph of the deceased on the cover sheet. Only four statements complied fully with the mandatory identification requirements[57] and formal cover sheets were attached to two VISs. The length of each statement varied considerably - from 230 words to over 2500 words; the length of the VISs is indicated in the final column both in terms of page numbers (and size of paper) and the approximate number of words for each VIS.

4.4.2 Approach to the Analysis

My approach to the analysis of the VISs has been two-fold. First, in order to be able to interpret the VISs, relevant features of the 'production context' (Gubrium and Holstein, 2009) were identified. The content and the telling of the statements were then analysed in this particular context. In this section I address:

- the narrative environment; and
- the process of analysis.

4.4.2.1 The Narrative Environment

The analysis of VISs cannot be separated from their production context because they are inevitably shaped by this "narrative environment" (Gubrium and Holstein, 2009:10). Thus, using data from a combination of sources - interviews, legislation, prosecution guidelines, VIS information package, observation fieldwork and the VISs themselves - the details and working conditions of the "narrative occasions" were identified (Gubrium and Holstein, 2009:10).

[57] Regulation 10 of the *Crimes (Sentencing Procedure) Regulation 2010* (NSW) provides that VISs must: identify the name of the victim or victims to whom it relates as well as the name of the primary victim and the nature of the relationship between the family and primary victim; set out the name of the person who prepared the statement; be signed and dated by the person who prepared the VIS; and indicate that the victim or victims do not object to the statement being given to the court.

A VIS is a handwritten or typewritten document[58] that is submitted to the sentencing court after conviction and prior to sentence.[59] As already noted, the content of the statement is restricted by law to the impact of the primary victim's death on the deceased's family and cannot contain "anything that is offensive, threatening, intimidating or harassing".[60] By virtue of section 30(1A) *Crimes (Sentencing Procedure) Act*, "photographs, drawings or other images" can be included in VISs. Once received by the court, the family victim is entitled to read the statement aloud to the court before the offender is sentenced.[61] Although submission of VISs is not mandatory in the sentencing process, a review of available sentencing judgments in homicide matters during the period 2003-2012 (contained in Appendix 4) for the purposes of this study suggests that VISs are submitted in the majority of cases.

While there are legislative requirements that a VIS must be legible, written on A4 size paper and no longer than 20 pages in length including all medical reports and other annexure,[62] there is no prescribed VIS form in NSW. Clause 14 of the *Charter of Victims' Rights* states that a "victim will have access to information and assistance for the preparation of any victim impact statement...to ensure that the full effect of the crime on the victim is placed before the court". Unlike other Australian jurisdictions there is no person or agency designated to prepare VISs for the family victims. The VIS can be prepared for submission to the sentencing hearing by:

- a family victim (with or without assistance from a relative, friend or support person);[63] or

[58] Section 30(1) *Crimes (Sentencing Procedure) Act 1999* (NSW) and regulation 9(a) *Crimes (Sentencing Procedure) Regulation 2010* (NSW).
[59] Section 28(1) *Crimes (Sentencing Procedure) Act 1999* (NSW).
[60] Regulation 10(6) *Crimes (Sentencing Procedure)Regulation 2010* (NSW).
[61] Section 30A *Crimes (Sentencing Procedure) Act 1999* (NSW).
[62] Regulation 9 *Crimes (Sentencing Procedure) Regulation 2010* (NSW).
[63] Information package produced by Victims Services in the NSW Department of the Attorney-General and available at http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll_vs.nsf/vwFiles/BK03_VIS.pdf/$file/BK03_VIS.pdf

- a representative of that family victim; or
- a designated 'qualified person' such as a counsellor.[64]

Assistance is available from a variety of sources. All victims receive an information package available from Victims Services in the NSW Department of Attorney General and Justice ('information package') which provides guidance in the preparation of VISs as well as the names and contact details of relevant agencies. The information package also includes (an optional) template cover sheet that can be attached to the VIS. Prosecution Guidelines of the NSW ODPP require that VISs be submitted to the Crown prior to the hearing so that the Crown can 'vet' the content and consult with the victims regarding any changes that might have to be made before court. This process will be discussed in more detail below (7.1.4).

While it is clear that VISs are documents produced for use in the sentencing hearing, it is less clear to whom they are to be addressed and what purpose these statements are supposed to serve in that context. Little formal guidance is provided in the legislation which simply directs the court to consider VISs from family victims "in connection with the determination of the punishment" only "if it considers that it is appropriate to do so."[65] Research findings discussed in chapters two and three suggest that the purposes of VISs are varied and contentious. In NSW, VISs from family victims do not serve instrumental purposes because the content of the statements cannot influence the penalty according to the law (see next chapter). The information package that is distributed to family victims by Victims Services in the department of the Attorney-General and Justice suggests that VISs serve expressive purposes as victims are informed that a VIS "can provide the victim with an opportunity to participate in the criminal justice process by the informing the court about the effects of the crime on them." Thus VISs provide family victims with the opportunity to speak to certain audiences and be heard in relation to the

[64] According to regulation 8 of the *Crimes (Sentencing Procedure) Regulation 2010* (NSW) a 'qualified person' is an approved counsellor or a person "who is qualified by training, study or experience" to prepare the VIS. The victim or the prosecutor in the relevant matter can designate a qualified person to prepare the statement.
[65] Section 28(4)(b) *Crimes (Sentencing Procedure) Act 1999* (NSW).

impact of the offence. Because the VISs were produced by family victims in a context where the purpose of VISs was unclear, the issues of purpose, audience, and by extension, the communicative function of VISs are significant issues addressed in the analysis. These issues will be discussed in more detail in Chapter Seven.

4.4.2.2 Methods of Analysis

The analysis of VISs in this thesis focuses on the "told and the telling" of the VISs, the narrators (family victims) and the response of the listeners (Gubrium and Holstein, 2009:84). According to Bauman:

> *Narratives are keyed both to the events in which they are told and to the events that they recount, towards narrative events and narrated events…Walter Benjamin stated it well: 'The storyteller takes what he tells from experience – his own and that reported by others. And he in turn makes it the experience of those who are listening to his tale* (quoted in Gubrium and Holstein, 2009:84).

The analysis begins with what was 'told' - the content of the VISs. In this study, the VISs have been read and coded several times with different objects in mind (Riessman, 2008: 64). Drawing on methods employed by Shapland in her study of defence mitigation speeches (1981), during each coding stage the data have been divided into semantic units, words and phrases, which relate to the particular research objective. For instance, in the first coding stage, the units of analysis identified relate to the legislative requirement of the *impact* of the deceased's death on the deceased's family. All words and phrases that relate to some aspect of impact on the deceased's family guided by the list of 'impacts' set out in the information package[66] have been identified, counted and categorised. This process has been repeated during later coding stages where further units of analysis have been interrogated and factors categorised in the light of emerging themes from the

[66] The impacts listed in the information package were: physical, emotional, psychological, material and changes in social behaviours.

data and also against the previous research findings of Booth (2001), Szmania and Gracyalny (2006), and Rock (2010). While the VISs are highly individual documents, recurring and dominant themes have been identified and categorised in this process. Two broad categories have emerged from this analysis: the deceased and unlawful material. Detailed findings from the analysis will be discussed in Chapter Seven.

The next step in the analytic process considers the 'telling' – *how* the story was told in the courtroom. This step has been divided into two stages: the organisation of the statements and the presentation of the VISs or courtroom performance. For the first stage, using narrative analysis techniques, the statements have been broken down into larger units of analysis such as paragraphs or longer extracts according to themes derived from the content analysis. The units of analysis have been analysed according to how each achieved its particular effect; the structural factors used (Riessman: 2008: 101). These factors identified include: tone, emotions expressed, how emotions were projected, the stories told, organisation of information, and the language and narrative devices used. I commenced this phase with the advantage that I had read each statement several times and developed sensitivity to various structural elements. This process has been repeated several times for each statement as different narratives have emerged. Analysis reveals that the VISs have been organised around four narratives: narratives of pain and suffering, narratives of memorialisation, narratives of condemnation and narratives of disempowerment. The analysis and findings will be addressed in more detail in Chapter Seven.

The final stage of this process has been an analysis of the presentation of the VISs in the courtroom. For this stage, I also draw upon non-textual data obtained from my observations and interviews with family victims.

> *Storytelling is...communicatively mediated by gesture, movement, selective detail, emphasis, call and response. Orienting to the situated performance of*

> *storytelling brings this to the fore. It is eminently discernible through ethnographic attention to the staging of accounts and audience responses to narrative actions – yet another dimension of the narrative work that...constructs stories as scenic entities* (Gubrium and Holstein, 2009: 91).

The objective of this analysis is to gain greater insight into the presentation of oral VISs and in particular to explore in detail the 'ritual' and impact of the performance in the courtroom (Rock, 2010). Drawing from Gubrium and Holstein's work (2009), my analysis addresses the following aspects:

- the key features of the family victims' role;
- the sequence of actions that comprised the presentation of VISs;
- interactional ground rules and behaviour norms; and
- the expressive means employed by performers and listeners.

Therefore this analysis involves consideration not only of the victims' performances, but also the responses of the audience. According to Riessman, "performances are expressive, they are performances *for* others. Hence the response of the listener ... is implicated in the art of storytelling" (2008: 106). In considering the responses of the 'listeners' not only have I had regard to what I observed of the courtroom audience including the sentencing judges, the legal representatives, the offenders and those in the public gallery, but also being a member of the audience, I have had regard to my own responses (Reissman, 2008: 109).

4.5 Summary

In summary, this empirical study uses a variety of methods for gathering and analysing data to ensure a rich and rounded picture of family victim participation in the sentencing of homicide offenders. The main sources of data are: observation of sentencing hearings, interviews with family victims and VISs submitted to the hearings observed. Because the focus of the study is the impact of family victim participation in the sentencing hearings, the observation fieldwork has been

essential to gain understanding as to what is happening in the courtrooms. Data gathered in the interviews has helped me to identify, interpret and analyse what I have seen in the courtroom both from the perspectives of family victims but also more generally.

Analysis of the VISs is an important part of the methodology because the VIS is the primary vehicle for family victim participation in the hearings observed. A content analysis of the statements provides an overview of what victims were telling the court and techniques of narrative analysis are used to gain insight into *how* the victims recount their stories to the court including matters such as; the emotional nature of the statements, the emotions projected and the overall impact on the courtroom dynamics, concerns identified in chapter two.

The following chapter turns to an analysis of the legislative framework that governs the use of VISs in the sentencing of homicide offenders in NSW.

5. The Legal Framework

Chapters Two and Three of this thesis demonstrate that the relevance of VISs from family victims to the sentencing process is a matter of contention and the approach taken in NSW is different to that of other Australian and international common law jurisdictions (2.1.3). The aim of this chapter is to set out and analyse the legal framework that regulates the use of VISs from family victims in the sentencing of homicide offenders in NSW.

The chapter is divided into five parts. Part one provides an overview of the substantive laws that govern the sentencing of homicide offenders in NSW as, ultimately, VISs are incorporated into this framework. Part two contextualises the current law by charting the decade-long process of developing a legislative model for victim participation in sentencing. It begins with the first Parliamentary Bill in 1987 introducing VISs into the sentencing process and finishes with the commencement of legislative VIS framework in 1997. The legislative model preserves judicial discretion to a certain extent and the Supreme Court's interpretation of this legislation and the rule in *R v Previtera* (1997) 94 A Crim LR 76 is the subject of part three. Part four investigates the development of the law following *Previtera* during the 2000s; and finally, part five sets out the state of the law as at 30 June 2012 and the relevance of VISs to the sentencing laws outlined in part one.

5.1 Sentencing Homicide Offenders in NSW

The object of the sentencing hearing is to determine penalty and it is the task of the sentencing judge to evaluate the seriousness of the offence proven, locate the offence on the range of seriousness for that particular crime and impose the

appropriate punishment according to law.[67] The purposes for which a court may impose a penalty are set out in s 3A *Crimes (Sentencing Procedure) Act 1999* (NSW) (*CSPA*) as follows:

(a) To ensure that the offender is adequately punished for the offence;
(b) To prevent crime by deterring the offender and other persons from committing similar offences;
(c) To protect the community from the offender;
(d) To promote the rehabilitation of the offender;
(e) To make the offender accountable for his or her actions;
(f) To denounce the conduct of the offender;
(g) To recognise the harm done to the victim of the crime and the community.

The maximum penalties for murder and manslaughter are prescribed by legislation. Section 19B *Crimes Act 1900* (NSW) provides that the maximum penalty for murdering a police officer in the execution of his or her duty in certain circumstances is life imprisonment. Subject to limited exceptions set out in s19B(3), a sentencing judge cannot impose an alternative penalty. In other cases of murder, while the maximum penalty is imprisonment for the offender's natural life without parole,[68] this is reserved for those cases regarded as the 'worst' types of that crime (*R v Fernando* [1999] NSWCCA 66).[69] In all other cases where a lesser penalty is imposed, Part 4 division 1A of the *CPSA* sets out "standard' non-parole periods" for the crime of murder, which vary according to the status of the deceased victim. If the deceased was a child under 18 years, police officer, judicial officer, emergency services worker, correctional officer, council enforcement officer, health worker, teacher, community worker or other public official exercising public or community functions the applicable non-parole period is 25 years; in all other cases it is 20 years. The standard non-parole periods represent the middle range of seriousness for the offence (s54A) and can be reduced or increased by the sentencing judge according to the application of mitigating and/or aggravating factors (*Muldrock v R*

[67] Unlike the guilt stage of a trial, a jury does not participate at the sentencing stage of the matter.
[68] Section 19A *Crimes Act 1900* (NSW).
[69] Section 61 *Crimes (Sentencing Procedure) Act 1999* (NSW).

(2011) 244 CLR 120). Section 24 of the *Crimes Act 1900* provides that manslaughter is punishable by a maximum penalty of 25 years imprisonment. It is important to note that standard non-parole periods do not apply to sentencing manslaughter offenders, no doubt a reflection of the wide variety of factual situations and levels of culpability that comprise this particular offence.

Thus, aside from cases falling under s 19B of the *Crimes Act*, the ultimate penalty imposed is a function of the judge's discretion guided by the purposes of sentencing and sentencing principles. The principle of proportionality requires a judge to evaluate the relationship of the penalty to the facts and impose a penalty that is proportionate to the seriousness of the offence committed (*Veen v R (No. 2)* (1988) 164 CLR 465). Seriousness in this context is measured according to the harm caused by the offence and the degree of culpability of the offender. The sentence imposed should also be consistent with penalties imposed in other similar cases (*Postiglione v R* (1997) 189 CLR 295): "like cases should be treated in like manner" (Gleeson CJ in *Wong v The Queen* (2001) 207 CLR 584, 591).

As noted at 2.1.1, the harm caused by the offence is a factor relevant to an assessment of the seriousness of the offence and forms part of the objective circumstances of the offence. The sentencing court, however, can only take into account harm that was foreseen by the offender or ought to have been foreseen by the offender (*Josefski v R* [2010] NSWCCA 41). Moreover, the consequences of the offence cannot be taken into account in determining penalty if those circumstances would amount to a more serious crime (*R v de Simoni* (1981) 147 CLR 383). By virtue of section 21A of the *CSPA*, the sentencing court is also required to take account of specified aggravating and mitigating factors set out in the provision as well as any other relevant statutory or common law factors in the determination of the appropriate penalty. With regard to the consequences of the offence, section 21A(2)(g) provides that substantial injury, emotional harm, loss or damage caused by the offence is an aggravating factor. Conversely, section 21A(3)(a) provides that it will be a mitigating factor where the injury, emotional harm, loss or damage

caused by the offence is not substantial. Other specified aggravating factors that relate to features of the offence specific to the particular victim include:

- S21A(2)(a): the status of the particular victim including judicial officer, police officer, health worker and teacher;
- S21A(2)(cb): the offence involved the offender causing the victim to take, inhale or be affected by a narcotic drug, alcohol or any other intoxicating substance;
- S21A(2)(h): the offender was motivated by hatred for or prejudice against the victim;
- S21A(2)(k): the offender abused a position of trust or authority over the victim; and
- S21A(2)(l): the victim was vulnerable.

Section 21A(3)(c) provides that it will be a mitigating factor where it is found that the offender was provoked by the victim. The victim's attitude to punishment of the offender, whether it be forgiveness or vengeance, is not relevant to the determination of penalty (*R v Palu* (2002) 134 A Crim R 74).

New South Wales courts utilise an 'instinctive' or 'intuitive synthesis' approach to sentencing (*Markarian v R* (2005) 228 CLR 357). This approach was explained by McHugh J in *Markarian,* as one by which the judge "identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case" ((2005) 228 CLR 357, 387). In this process "greater or lesser weight will be allocated to some factors depending on their relevance to the person convicted and his or her crime. Ultimately community and legal values are translated into a number of years, months and days" [*Markarian* (2005) 228 CLR 357*,* 378]**.** According to McHugh J, a sentence is a "product of human judgment, based on all the facts of the case, the judge's experience, the data derived from comparable sentences and the guidelines and principles authoritatively laid down in statutes and authoritative judgments" (378). In determining a penalty that is just and appropriate in the

circumstances, the sentencing judge takes account of the objective circumstances of the offence, the offender's subjective circumstances as well as any relevant aggravating or mitigating factors to arrive at a single result without assigning particular quantitative values to individual sentencing factors (*Markarian v R* (2005) 228 CLR 357, 378).

This chapter will now turn to the emergence of a legislative framework for victim participation in the sentencing process.

5.2 The Emergence of a Legislative Framework for Victim Participation in Sentencing

In order to contextualise the current legislative framework, this part charts the emergence of legislative provisions from the mid 1980's to the commencement of the *Victims' Rights Act 1996* (NSW).

5.2.1 Cautious Beginnings in New South Wales

In 1986, South Australia passed legislation providing for victim input to the sentencing court. Following this lead, in the same year the NSW Government established a Task Force to consider services for victims of crime and whether VISs should be incorporated into the sentencing procedure. The Task Force regarded VIS as serving the victim rather than the court: "proponents of victim impact statements claim that their introduction would make the criminal justice system more accountable to crime victims and that increasing victim involvement would reduce the alienation and dissatisfaction they feel in their contact with the criminal justice system" (NSW Task Force, 1987: 104). Opposition to victim participation in sentencing was ideological: the criminal justice system was concerned with the State and the offender. After reviewing several international and national developments in the area and without resolving the debate or indicating a

preference for a particular direction, it was recommended that a VIS scheme should not be implemented in NSW until the South Australian program had been evaluated (NSW Task Force, 1987: 105).

The government of the time however disregarded this advice and passed the *Crimes (Sentencing) Amendment Act 1987* with bi-partisan parliamentary support. When introducing the Bill to Parliament, the then NSW Premier Mr. Barrie Unsworth foreshadowed significant change to the legal status of the crime victim:

> *The victims of crime have often been called the cinderellas of the criminal justice system. They are the forgotten participants….the recognition of the rights and needs of victims of crime is one of the government's highest priorities…The proposed New South Wales Legislation will allow the tendering of victim impact statements to the court at sentence. It is an important step in the recognition of the rights of the victims of crime. It is an historic step for a common law jurisdiction like NSW where the criminal trial has been exclusively a relationship between the State and the offender.*[70]

By virtue of this Act, section 447C was inserted into the *Crimes Act 1900* to establish a statutory basis for the submission of written victim impact statements to the sentencing court dealing with indictable offences involving an act of actual or threatened violence (including sexual assault). This section provided that, between conviction and sentence, a District or Supreme Court "may receive and consider a victim impact statement relating to an offence if the court considers it appropriate to do so". A VIS was defined as written statement "containing particulars of any injury suffered by any victim as a result of the offence." "Injury" was defined as "bodily harm, pregnancy, mental illness and nervous shock". Only those persons against whom the offence was committed or were witness to the act of actual or threatened violence and had suffered injury as a result of the offence were "victims" that could submit a VIS under this provision and accordingly family victims were excluded from the legislation.

[70] The Hon B. Unsworth, Second Reading Speech, *Crimes (Sentencing) Amendment Act 1987* (NSW), *NSW Parliamentary Debates*, Legislative Assembly 12th November 1987, at p.15, 915

Section 447C was never proclaimed however and the admissibility and use of VISs by NSW sentencing courts continued to be governed by the common law.

5.2.2 Participation by Family Victims in Sentencing during the early 1990s

The victim as a significant political subject in NSW gained momentum as the 1980s progressed. Following a change of government in 1989, the subsequent NSW Liberal Government acted on election promises to strengthen the rights of the crime victims of the crime and implement the 1985 UN Declaration through a Charter of Victims' Rights.[71] The NSW *Victims' Rights Charter* published in 1989 aimed to give victims protection within the existing structural constraints of the criminal justice system. Major features included provisions dealing with the speed of the trial process, victims' compensation and information. The Charter had no legislative effect however and operated as a set of administrative guidelines to establish standards in government departments to ensure

In 1994, Parliament sought to amend section 447C and "ensure that the victims of actual or threatened violence are given every opportunity to bring to the notice of sentencing courts the impact which the crime has had on them and particulars of the injury suffered by them at the hands of the offender concerned."[72] It was also proposed to amend section 447C to allow the submission of VISs by or on behalf of family representatives of a deceased victim or incapacitated victims. Although the government maintained a continuing commitment to crime victims, the Act was not amended and section 447C remained in hiatus.

[71] Attorney-General J Dowd, *NSW Parliamentary Debates* 27th July 1989, 8619
[72] The Hon. J Hannaford, Attorney-General, Second reading speech, *NSW Parliamentary Debates*, 27/10/94 at p. 4790

Despite the lack of statutory base, VISs submitted in cases relating to sexual assault and child sexual abuse appeared to be an established sentencing practice in NSW by the early 1990's.[73] As Dunford J said in *R v de Souza* (1995) BC9501616:

> *Notwithstanding that s447C has not been proclaimed to commence, victim impact statements have been admitted in a number of cases particularly in cases of sexual assault…and the court has always been required to take into account the impact of criminal behaviour upon the victims of that behaviour.*

Generally, these VISs were prepared by professionals such as social workers or psychologists although it appears that the sentencing court did not often regard such evidence as particularly helpful. For instance in *R v Muldoon* (1990) BC9001625 Hunt J said that the content of the VISs submitted in that case was not "surprising and in every case those matters would normally have been assumed without the need for formal assessment." Similarly, in *R v Beilaczek* (1992) BC9202765 the court said that while the VIS was "submitted as affording some measure of the seriousness of the offence… [the report] tells me nothing which one would not have assumed as to the effects of the offence upon the child" (9).

Consideration of VISs from family victims in homicide cases proved more controversial however. Anecdotal evidence suggests that the first VISs submitted by family victims in NSW occurred in the sentencing hearing of Andrew Garforth, convicted of the murder of nine year old Ebony Simpson in 1993. The offender objected to the tender of these VISs. While declining to admit the VISs, Newman J said "plainly enough, the effect of these events upon the victim's family would be horrific".[74] Newman J did however adjourn the court so that he and the legal teams could read the statements that had been submitted by Ebony's parents. Although

[73] For a range of cases where VISs were submitted and accepted by the sentencing court see *R V Cowan* BC9002725, *R v Deas*BC900229987, *R v Waters* BC9001835, *R v Muldoon* BC9001625, *R v King* BC9101647, *R v Nichols* BC9101431, *R v Bielaczek* BC9202765, *R v PJP* BC9202756, *R v Jones* BC9302329, *R v Drayton* BC9403194, *R v Gebrail* BC9403319, *R v Norris* BC9501632.

[74] *R v Garforth* unreported judgment, Newman J, NSW Supreme Court 9th July, 1993. Newman J's words were quoted in *The Age* (Hickie, 1993).The VISs were not mentioned in the Court of Criminal Appeal's later review of the sentencing decision of this case, *Garforth* BC9402546.

the court did not take account of the VISs in determining penalty, clearly it was considered important to acknowledge the victims and their statements. Almost two years later when sentencing an offender for manslaughter, the sentencing court in *R v Blacklidge* (1995) BC9505635 did accept VISs submitted by members of the deceased's family after an objection by the offender was withdrawn. Referring to those VISs in the course of sentencing, the court said:

> *'The consequences of crime for which the prisoner is being sentenced are great. Not only has a life been taken but the loss has serious repercussions for those who are left as is demonstrated by the victim impact statements which have been tendered this morning.'*

There was no indication of the weight given, if any, to those VISs in the determination of the penalty.

Shortly after *Blacklidge* was decided, the issue of VISs from family victims was again addressed by the NSW Supreme Court in *R v de Souza* (1995) BC9501616 where the offender was convicted and sentenced for the murder of a young woman. At the sentencing hearing, the Crown tendered several VISs from various members of the deceased's family detailing the effects of the deceased's death upon them including: symptoms of depression, lack of concentration, nightmares, insomnia, alcohol and drug use and the development of serious health problems. The VISs also described the good character of the deceased as well as the authors' opinions on the use of steroids, the character of the defendant and the appropriate sentence to be imposed in the circumstances. Following objection by the offender, the Court considered the significance, if any, that should be attached to the statements in the sentencing process. So far as the material relating to steroid use, characterisation of the defendant and penalty was concerned, the Court held that this was clearly irrelevant and inadmissible. Characterising the family members as 'secondary victims' the Court found that those sections of the VISs dealing with the impact of the deceased's death upon them and the descriptions of the deceased were also not relevant to an assessment of the objective seriousness of the offence. Because

the objective seriousness of the offence of murder was measured by the death of the deceased and the manner and circumstances of that death, the VISs were not admissible because they provided no material relating to these issues and could serve no useful sentencing purpose. While acknowledging that obviously "any death, particularly that of a happy, vibrant, caring twenty-one year old from a loving family must have a devastating effect on those who are left behind", Dunford J warned of the potential prejudicial nature of such victim impact evidence: "Each human life has an intrinsic value. The value of one homicide victim cannot it seems to me, be of more intrinsic value than another because he or she comes from a close family with loving relatives."

5.2.3 The 1990s: Achieving a Statutory Framework

Following extensive public debate and consultation, the NSW Law Reform Commission (LRC) completed its report on sentencing in 1996. Its terms of reference included the role of victims in sentencing and, particularly, the use of VISs. With the exception of homicide cases, the LRC recommended that VISs which addressed the physical, psychological, social and financial consequences of the offence on the victim should be admissible at sentencing hearings for the purposes of providing the sentencing court with an indication of the seriousness of the offence. Furthermore, such VISs should be in writing, signed, verifiable on oath and admissible in the court's discretion and at the victim's option. The LRC recommended however that VISs from family victims in homicide cases should not be admissible because the consequence of the offence to the victim (death) was already known; a VIS from a family victim could not "supply any information relevant to the effect of the crime on the victim of which the court might be unaware." Victim impact statements from family victims in homicide cases could only be of use to attempt to persuade the court to impose a harsher sentence where the deceased was more valued or loved than a deceased "who was alone, unhappy or elderly" and this would be "offensive to fundamental conceptions of equality and justice" (NSW LRC, 1996: 2.22). Moreover, the LRC did not think it

appropriate that the sentencing court should provide a forum for family victims to express their grief and anger and thereby facilitate the healing of family victims (1996: 2.23).

The increasingly important status of the victim as a political subject in the mid 1990's was demonstrated by the proclamation of the *Victims' Rights Act 1996* (NSW) on 2nd April 1997 (*VRA*). Enshrined in section 6, the Charter of the Rights of Victims of Crime was designed to govern the treatment of crime victims by government agencies. Rights afforded to victims of crime encompassed treatment, access to services, information and compensation as well as access to information and assistance for the preparation of any VIS to ensure that the full effect of the crime on the victim is placed before the court. The two-fold objective of the *VRA* stated in section 3 to "recognise and promote the rights of victims of crime" was implemented through a package of support services and benefits. Together with the establishment of the Victims of Crime Bureau, the Victims Advisory Board and a formal declaration of the *Charter of Victims' Rights*, the *Criminal Procedure Act 1986* (NSW) (*CPA*) was amended to facilitate submission of victim impact statements (VIS) to the court in certain circumstances. Like its predecessor section 447C, VISs could only be submitted in relation to indictable offences involving an act or actual or threatened violence (including sexual assault) being dealt with by the Supreme Court or the District Court on indictment.

In its original form, the Bill made no provision for family victims to submit VISs in homicide cases and when introduced into Parliament, the Hon JS Tingle moved that the Bill amended to:

> *[e]nsure that the court will receive such statements [from family victims], which it is not required to do so [sic] at present, and to read and acknowledge them…The amendments do not provide that a court must consider a VIS submitted by a family member when determining the length of sentence. The tendering, reading and acknowledging the VIS in court will give the secondary victims of the offences the satisfaction of knowing that their trauma and*

agony has been acknowledged in public by the court and that they have received some measure of the restorative justice that I believe is involved in this type of procedure.[75]

Ultimately, despite the LRC's recommendation that VISs from family victims should be inadmissible in homicide cases (1996), section 23C was inserted into the *Criminal Procedure Act 1986* (NSW) in 1997 to allow family victims to submit VIS in the sentencing of homicide offenders. Section 23C provided:

(1) A court may receive and consider a victim impact statement relating to an offence, if the court considers it appropriate to do so, after a person has been convicted of the offence and before the court determines the punishment for the offence.

(2) A victim impact statement may also be received and considered by the Supreme Court when it determines an application under section 13 of the Sentencing Act 1989 for the determination of a minimum term and an additional term for an existing life sentence referred to in that section.

(3) The court must receive a victim impact statement given by a family victim under this section and acknowledge its receipt and may make any comment on it that the court considers appropriate. However, the court must not consider the statement in connection with the determination of the punishment of the offence unless the court considers that it is appropriate to do so.

A "family victim" was defined in section 23A as a person "who is, at the time the offence was committed, a member of the immediate family of a primary victim of the offence who has died as a result of the offence (whether or not the person suffered personal harm as a result of the offence)". A "member of the immediate

[75]NSW Legislative Council *Parliamentary Debates (Hansard)* 51st Parliament, 2nd session, p 6386 (21st November 1996).The provision was the product of intense lobbying by organized victim support groups such as the Homicide Victims Support Group and Enough is Enough. Some years later Mr. Tingle explained that he originally moved this amendment as a result of the particular experience of one bereaved parent, Ken Marslew, the founder of the victim support group *Enough is Enough.* Ken Marslew's son was killed during an armed hold up and in the course of the sentencing of the three offenders involved, Mr. Marslew sought to hand up a VIS to the judge on three separate occasions "pointing out that the murder had damaged him, ruined his marriage and caused great stress to the family and on three occasions the presiding judge refused to accept it."

family" was confined to a person in a defined relationship with the deceased. Section 23B(A) defined a VIS from a family victim as a statement containing particulars of the impact of the death of the primary victim on the members of the immediate family of the primary victim. Neither primary nor family victims were permitted to express an opinion about the offender or the sentence to be imposed in a particular case.

Arguably, the language of these provisions revealed the relationship between the ambivalence with which the government regarded victim participation in sentencing and the political influence of various victim organisations upon penal policy. With regard to primary or direct victims of crime, section 23C stipulated that the court "*may* receive and consider", if *appropriate*, a VIS from a primary victim after the offender had been convicted and prior to determination of penalty. In contrast, it was stipulated that the sentencing court "*must* receive the VIS from the family victim and acknowledge its receipt" and make any comment on it that it considered appropriate. However, there was no provision to ensure that the court actually took the submitted VIS into account in the sentencing process. Indeed, once received, acknowledged and perhaps commented upon, section 23C(3) provided that the court did *not* have to take account of the VIS in connection with the determination of sentence for the offence unless it considered it *appropriate* to do so. The absence of provisions compelling the court to take account of the submitted VIS from family victims arguably reflected Parliament's intention to preserve judicial discretion in sentencing matters thereby preserving the status quo.

To the extent that these provisions acknowledged the family victim and gave that victim a 'voice' in the sentencing process, the legislation addressed criticisms from victims' rights groups to the effect that the criminal justice system had hitherto focused on the offender at the expense of the victim (NSW Law Reform Commission, 1996). This was made clear during the second reading of the *Victims' Rights* Bill when the Attorney-General Mr Whelan said:

> *The government has acknowledged the views expressed by some victims groups regarding the desirability of affording an opportunity for the family of a victim who has died as a result of a violent criminal act to be able to present to the sentencing court a victim impact statement which contains information about the impact on the family of the victim's death.*[76]

Given then the preservation of judicial discretion in the legislative framework, the next section analyses the response of the NSW Supreme Court to the issue of *appropriateness* in taking account of VISs from family victims in determining penalty.

5.3 The Judicial Response: *R v Previtera*

R v Previtera (1997) 94 A Crim 76, was heard by the NSW Supreme Court shortly after section 23C(3) came into force. Previtera pleaded guilty to the murder of an elderly woman. At the sentencing stage of the matter, the Crown tendered a VIS authored by the deceased's son detailing the reactions of the author and his sister to the killing of their mother in terms described by the sentencing judge, Hunt CJ at CL, as "moderate and compassionate" (85). As required by the legislation, the sentencing judge acknowledged receipt of the VIS and extended his sympathy to the family victims "for their tragic and senseless loss" (84). His Honour found however that it could never be appropriate to take a VIS from a family victim into account in sentencing if that VIS dealt only with the effect of the death upon the victim's family.

Reasons for this resistance to taking account of VISs from family victims were largely twofold. First, according to Hunt CJ at CL, only the consequences of the crime upon the victim directly injured by the crime (the deceased victim in a homicide case), form part of the objective circumstances of the offence and are relevant to sentencing. Only in 'rare' cases might a VIS from a family victim provide

[76] NSW Parliamentary debates, 27th November 1996 at p 6694)

information directly relevant to the manner and circumstances of the death such as details of the slow, lingering death of the deceased as a result of the offence. In his Honour's view, VISs from family victims simply concerned with the impact of the deceased's death on the family were relevant to civil issues of compensation only and not punishment. On this point his Honour said:

> *There is a fundamental difference – both in law and in common sense – between punishing the offender for his crime and compensating the victim and others affected by that crime for their loss or injury suffered as a result of that crime. The task of the criminal court in imposing a sentence is to punish; it is not to compensate* (85).

Second, if sentencing judges do take account of victim impact evidence from family victims, the resulting penalty might reflect not the culpability of the offender but instead the value and worthiness of the deceased person. The more valuable and worthy the deceased, the greater the impact of the death on the deceased's family, the greater the harm caused by the offence and, the greater the penalty imposed. Echoing Dunford J in *R v De Souza* referred to above, Hunt CJ at CL said, in such circumstances: "it would … be wholly inappropriate to impose a harsher sentence upon an offender because the value of the life lost is perceived to be greater in the one case than it is in the other."[77] This approach to the use of VISs from family victims in sentencing homicide offenders was subsequently approved by the NSW Court of Criminal Appeal in *R v Bollen* (1998) 99 A Crim R 510 and *Dang* [1999] NSWCCA 42.

As the VIS extracted in Chapter Two [2.1.3] and forthcoming discussion in Chapter Seven demonstrate, the effect of a homicide offence on members of the deceased's family extends over a wide range of harms but overwhelmingly the impact of the deceased's death on the family victim results in varying degrees of emotional and psychological suffering. Given that the degree of emotional suffering will reflect the value and worthiness of the deceased to the family victim, the sentencing court, in

[77] Ibid 86-87.

taking account of the harm sustained by the family victim, will be effectively required to evaluate the life of the deceased. Adams J explained the problem succinctly in *Dang* [1999] NSWCCA 42:

> *Assume the deceased was friendless; assume the deceased had no family. It would be monstrous to suggest that that meant for some reason killing her should attract a lesser penalty than would be the case if, as is the situation here, she had a loving family and grieving relatives. Essentially then, the reason that victim impact statements in cases involving death are not taken into account in imposing sentence is that the law holds, as it must, that in death we are all equal and the idea that it is more serious or more culpable to kill someone who has or is surrounded by a loving and grieving family than someone who is alone is offensive to our notions of equality before the law* (25).

5.4 Challenges to *Previtera*

Previtera is authority for the proposition that VISs from family victims cannot be used by the court to influence the penalty imposed on a homicide offender. As already noted, New South Wales is alone in its approach to VISs from family victims amongst the Australian jurisdictions and indeed other common law jurisdictions such as Canada, United Kingdom and New Zealand (Kirchengast, 2011; see above 2.1.3). This section considers the challenges to *R v Previtera* that followed in the 2000's.

5.4.1 *R v Lewis* [2001] NSWCCA 448

As already noted, in determining the penalty for homicide offenders, Hunt CJ at CL in *Previtera* said that the relevant harm to be considered is the deceased's death and manner of circumstances of his or her death. While no VISs were submitted in *R v Lewis* [2001] NSWCCA 448, an issue before the NSW Court of Criminal Appeal (NSWCCA) was the harm relevant to the seriousness of a homicide offence. In that

case, the offender was convicted of the murder of his partner and one other person. He was sentenced to life imprisonment for the murder of his partner and, in the course of sentencing the judge found that the homicide offender's knowledge that the deceased's death would deprive five children of the care and comfort of their mother had bearing on his culpability. On appeal, the offender argued that if this knowledge affected his culpability it would have a capricious effect. A person would be less culpable if killing strangers about whom a person knew nothing than when killing a person of whom the offender had knowledge. The NSWCCA found however, that although *Previtera* was authority for the proposition that the effect on family victims was of itself not relevant to culpability, the harm that a person *knows* will be caused by his or her actions is relevant to culpability and therefore to penalty. The Court said:

> *In this case, quite plainly, the applicant knew that the death of Ms Pang would deprive five children of their mother, and prima facie that is serious harm, in addition to the death of Ms Pang, which the applicant knew would be caused by his offence. This is not to say that the crime is more serious because Ms Pang was in some way more worthy than other possible victims, merely to recognise the harm caused to the children by the loss of their mother; and to recognise that where the offender knows that this harm will be caused, that can be relevant to the culpability* (67).

Thus, *R v Lewis* is authority for the principle that the homicide offender's culpability will be influenced by the degree of harm that the offender knows will be caused by his or her actions. The "gravamen" of the penalty imposed in such cases is the culpability of the offender (who targets such victims aware of their particular vulnerability or status) rather than the harm that has occurred to the victim and in this way the status and characteristics of the victim are rendered less important (Wasik, 1998: 115).

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

Section 3A was inserted into the *CSPA* in 2002 and, as already noted 5.1 above, articulates the purposes for which a court may impose a penalty. The sentencing purpose set out in s3A(g) requires recognition of the harm caused to the victim and the community, reflecting the continuing importance of the crime victim as a political subject. In the light of this provision and the different approaches to VISs from family victims of other Australian jurisdictions (Kirchengast, 2008), early in the 2000's the NSWCCA indicated that it may be time to reconsider the role of VIS from family victims in sentencing.[78]

When hearing an application for a guideline judgment for the offence of assault police under s60(1) of the *Crimes Act 1900* (NSW) in 2002, Spigelman CJ observed that it was arguable that "some of the purposes of sentencing" set out in section 3A of the *CSPA* constituted "a change of pre-existing sentencing principle"(*Re Attorney-General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 2 of 2002)* [2002] NSWCCA 515, 57). In particular he noted that the purpose set out in s 3A(g), requiring the court to recognise harm done to the community, may introduce a new element into the sentencing task. The Chief Justice subsequently expanded on this theme in *R v Berg* [2004] NSWCCA 300:

> *[t]he reasons given in Previtera may need to be reconsidered in an appropriate case…it seems to me strongly arguable that the recognition of this purpose of sentencing [i.e. harm to the community] would encompass the kinds 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 CJCL in Previtera.*[79]

[78] *R v Berg*[2004] NSWCCA 300, *R v FD; JD* (2006) 160 A Crim R 392, *Re Attorney-General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW)(No 2 of 2002)* [2002] NSWCCA 515, *Tzanis* [2005] NSWCCA 274.

[79] Although *R v Berg* involved a driving offence causing death, it was not an appropriate case to decide this issue because no VIS had been submitted by a family victim.

In an attempt to resolve this issue, the NSWCCA sat as a bench of five judges in *Tzanis* [2005] NSWCCA 274 to reconsider the approach in *Previtera*. Tzanis had been convicted of dangerous driving occasioning death contrary to s52(A)(1)(c) of the *Crimes Act 1900* (NSW) and dangerous driving occasionally grievous bodily harm contrary to s52(A)(3)(c) of that Act and appealed against the severity of the sentence imposed. One ground of appeal was that the sentencing judge had erred having regard to the aggravating factor set out in s21A(2)(g) *CSPA* namely that the "injury, emotional harm, loss or harm caused by the offence was substantial". The applicant argued that the sentencing judge could not take account of this aggravating factor with regard to the two offences because a death was an essential element of the first and grievous bodily harm was an element of the second. In the case of death, the injury was already 'substantial' and a necessary element of the offence and according to s 21A(4), could not be counted again as an aggravating factor. With respect to the grievous bodily harm, the seriousness of the injury was already relevant to the objective gravity of the offence.

The NSW CCA found that the sentencing judge's reference to 'harms' could not be understood as a reference exclusively to, if indeed at all, the harm caused to the family victims whose VISs were submitted to the sentencing court. By using the plural 'offences', Spigelman CJ found that the trial judge was referring to both offences and that this indicated that he had erroneously, with respect to the offence causing death, taken the death into account as an aggravating factor. Furthermore, the court noted that there was no VIS submitted with respect to the second offence dealing with grievous bodily harm. In these circumstances, although the court had been ready to hear argument on the question, the issue of the authority of *Previtera* was not decided.

It is arguable however that the requirement of recognising harm to the community did not introduce a new element into the task of sentencing homicide offenders because it was already part of the common law (*R v King* [2004] NSW CCA 444; Booth, 2007a). In *R v MA* (2004) 145 A Crim R 434, Dunford J (with whom Studdert

and James JJ agreed) said that s3A was "in substance a codification and elaboration of the purposes of criminal punishment described in *Veen v R (No. 2)"* . In *Veen (No. 2)* ((1988) 164 CLR 465), Mason CJ, Brennan, Dawson and Toohey JJ said:

> *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* (476).

The NSWCCA has also acknowledged the importance of the recognition of the harm to the community in sentencing. In *R v Palu* [2002] NSWCCA 381*,* Howie J (with whom Levine and Hidden JJ agreed) said:

> *A serious crime is a wrong committed against the community at large and the community itself is entitled to retribution….matters of general public importance are at the heart of the policies and principles that direct the proper assessment of punishment, the purpose of which is to protect the public, not to mollify the victim* (37).

Nor is it by any means clear that Hunt CJ at CL did overlook harm to the community as he determined the penalty in *Previtera*. During the course of his judgment, his Honour said that it was important

> *[t]hat the sentences imposed by the criminal courts are acceptable to the community (including the victims and others affected by the crime), important that those sentences are such as to demonstrate to the community that the offender has been given his just deserts…that justice has been done* (86).

Furthermore, his Honour pointed out that the very nature of the offence of murder recognises the harm caused to the community by a killing:

> *The law already recognises without specific evidence, the value which the community places upon human life; that is why unlawful homicide is*

> *recognised by the law as a most serious crime, one of the most dreadful crimes in the criminal calendar* (86).

The common law dictates that human life is protected by the principle of the sanctity of life and is so protected by virtue of the value that our community places on all human life. The loss of a life leaves the deceased's family and the wider community bereft. The death does not occur in a vacuum and it is proper and logical that the penalty imposed should reflect the broader impact of an offence on the community.

There is therefore, a strong basis for arguing that the words of the provision do not introduce a new sentencing element. Nor is there compelling evidence to suggest that it was Parliament's intention that the combined effect of ss21A(2)(g) and 3A(g) of the *CSPA* should be that VISs from family victims were relevant to the determination of penalty in homicide cases (Booth, 2007a). Certainly the Attorney-General's frequent references to the High Court decision in *Veen* and the common law in his reading speech for the Bill indicate that Parliament did not intend to change the law.[80] Furthermore, at the outset when s 3A was inserted into the *CSPA*, the provisions regarding the submission of VIS by family victims remained substantially unaltered. Nor did the Attorney-General discuss the impact of the amendments on the role of VIS from family victims in the sentencing process in his reading speech for the Bill. Given the importance of the victim as a political subject, Parliament would be expected to state explicitly if any change in the existing law was intended to affect crime victims; that the Attorney-General did not do so strongly suggests the absence of intention to change current sentencing practice in NSW. Support for this contention can be found in Hulme J's comments in *R v FD; R v JD* (2006) 160 A Crim R 392:

> *there is a deal to be said for the view that, had Parliament intended to make the radical change in the law, particularly in cases involving death…one would*

[80] New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002 (Bob Debus, Attorney General).

have expected it to say so much more clearly than by general terms it has used (429).

Moreover at that time, Parliament had ample notice of the ruling in *Previtera* and the consistent approach of the NSW sentencing courts to VISs from family victims and at no stage had it taken the opportunity to amend the substance of the provisions regulating the role of VIS in sentencing. Despite various procedural and evidential amendments to the VIS provisions over the years, the essential wording of the provision regarding the status of VISs from family victims in sentencing remained unchanged and the appropriateness of taking account of VIS from family victims in the determination of penalty continued to be a matter for judicial discretion.

The following section investigates, through an analysis of Crown appeals, challenges to *Previtera* and the status quo following *Berg* and *Tzanis*.

5.4.3 Crown Appeals

According to the High Court, Crown appeals against sentence "should be a rarity" (*Griffiths v The Queen* (1977) 137 CLR 293, 310) and indeed, there appear to have been only two Crown appeals[81] in relation to the restricted use of VISs from family victims by sentencing judges in homicide cases since *Dang* in 1999.[82] In the first case, *R v FD; R v JD* (2006) 160 A Crim R 392, FD was convicted of murder while JD was convicted of manslaughter. The Crown appealed on the basis that the sentences imposed in each case were manifestly inadequate and the sentencing

[81] It should be noted that a third Crown appeal was heard in *Dawes* [2004] NSWCCA 363 where the Crown appealed against a sentence imposed on an offender for manslaughter arguing that the sentencing judge had erred in taking account of the VIS from the family victim. In that case, however the family victim had asked for leniency for the offender and the Court of Criminal Appeal found that the sentencing judge did take this attitude into account in determining penalty in breach of *R v Palu* (2002) 134 A Crim R 174. The Court of Criminal Appeal reiterated the rule that the attitude of the family victim to the punishment of the offender is not relevant to sentencing.

[82] A search of decisions of the NSW Court of Criminal Appeal 1999-2012 was conducted across three databases: Casebase, Westlaw AU and Austlii.

judge had erred in his treatment of the VISs from the family victims. In his sentencing judgment, the judge had said of the VISs:

> *In the course of the sentencing hearing, three victim impact statements were read aloud…in relation to those statements, I have had regard to the relevant provisions [of the CSPA] and…R v Previtera, R v Berg …each [family victim] has expressed intense grief for himself or herself and for the family eloquently, and it is appropriate that I should acknowledge the dreadful loss that Simon's death has caused to his family and, from what they said, to the community. For myself, the process of sentencing is to be dispassionate and objective* (414).

The Crown submitted that the change in statutory provisions referred to in *Berg* and *Tzanis,* altered the law established by *Previtera*. Accordingly, the sentencing judge erred in his treatment of the VISs because in determining an appropriate penalty, he did not take into account the:

- Impact of the offence on the family victims; and
- Substantial emotional harm and loss suffered by the family victims as an aggravating factor under s21A(2)(g) as he was required to do under the *CSPA*.

Section 21A(2) limits the use to be made of the aggravating factors in s21A(2) by providing that the sentencing court "is not to have regard to any such aggravating or mitigating factor in sentencing if it would be contrary to any Act or rule of law to do so". Thus, the operation of s 21A(2)(g) is limited by the rule in *Previtera* and substantial emotional harm sustained by a family victim is not an aggravating factor in sentencing (*Wickham* (2004) NSWCCA 193). If *Previtera* is overruled however, VISs from family victims could be used as evidence of substantial emotional harm and increase the penalty imposed on the homicide offender.

Sully J, with whom Hall J concurred, acknowledged that the VIS provisions were controversial because they balanced interests "not easily balanced" (414):

There is first, the imperative need to ensure that no offender is sentenced upon a basis that yields to a lynch mentality…

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 victims. And even less so upon a basis…that responds…to the malignant prejudices that are the daily fruit of what Brennan J described in The Queen v Glennon (1992) 173 CLR 592…[as] 'the promotion of [TV and radio] personalities who affect to convey the moral conscience of the community'…

There is thirdly, the need to afford 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 ignored altogether, or expressed in what they see as an inadequate way.

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 (414).

After quoting at length from *Previtera* and noting the "finely calibrated ambiguities" of the relevant provisions (415), Sully J decided that the "present appeal is not an appropriate vehicle for determining current differences of opinion" (416). He saw no reason "to become enmeshed in philosophical or semantic niceties" because the sentencing judge's remarks did not support the Crown's claim and he dismissed this ground of appeal (416). As to the trial judge's remarks that he remained "dispassionate and objective", Sully J found the judge to be saying that he was not required by the legislation to treat the VISs "in any way that is merely passionate and subjective. Those latter qualities are the antithesis of just and principles sentencing, whether the passion and subjectivity are those of the Judge, of the victim, of the media, or of the legislators, or of any combination of them" (416). Similarly Hulme J, who dissented on other grounds, felt that he did not have to

decide the issue because he found for the Crown on other grounds (429). Thus, the NSWCCA again avoided deciding the issue.

In the second case, *Mah v R; R v Mah* [2006] NSWCCA 226, the Crown appealed on the basis that the sentence imposed on the offender for murder was manifestly inadequate. The Crown contended that the sentencing judge had erred "in dismissing the victim impact statement as irrelevant" on the basis of *Previtera*. The alleged consequence of this error was that the judge did not take into account relevant considerations such as the increased culpability of the offender for murdering a friend "of whose family circumstances and likely effect upon whom he would have been aware, and, an increase of harm to a substantial degree by a breach of trust and an exacerbation of the harm done by the conduct of the respondent" (59). Grove J, with whom the other members of the Court agreed, dismissed this ground of appeal finding that rather than ignoring the VIS from the deceased's mother, the sentencing judge in fact discussed that statement in his judgment (60). Thus according to Grove J, "the statutory duty to acknowledge receipt of the statement was fulfilled and…his Honour made an appropriate comment" (62). Although the sentencing judge said that the rule in *Previtera* meant that the VIS was not relevant to penalty, Grove J said that this comment should be understood in the context of later remarks made by the sentencing judge to the effect that the impact death of the victim on the family was not a factor that could aggravate the offence (61). Furthermore, the consequences referred to by the Crown, were part of the objective circumstances of the offence which the sentencing judge described and took into account in sentencing (64).

5.5 The Current State of the Law

Thus the rule in *Previtera* continues to prevail in NSW sentencing courts and the impact of the offence suffered by family victims as detailed in their VISs cannot influence the penalty to be imposed on a homicide offender (*SBF v R* [2009]

NSWCCA 213). This part is divided into two sections. First, the current provisions that regulate the submissions of VISs by family victims will be outlined. Second the use of VISs by sentencing judges will be examined through an analysis of offender appeals and review of sentencing judgments.

5.5.1 Current Statutory Provisions

In 1999, the VIS provisions analysed in *Previtera* were reformatted and incorporated into Division 2 of Part 3 the *CPSA.* Despite Hunt CJ's criticism of the "poor" drafting of s 23C in *Previtera*, the terminology remains substantially the same and the provisions are now located in section 28 of the *CSPA*. The relevant provisions provide as follows:

> 28 (1) If it considers it appropriate to do so, a court may receive and consider a victim impact statement at any time after it convicts, but before it sentences an offender.
>
> (3) If the primary victim has died as a direct result of the offence, a court must receive a victim impact statement given by a family victim and acknowledge its receipt, and may make any comment on it that the court considers appropriate.
>
> (4) Despite subsections (1), (2) and (3), a court:
>
> (a) must not consider a victim impact statement unless it has been given by or on behalf of the victim to whom it relates or by or on behalf of the prosecutor, and
>
> (b) must not consider a victim impact statement given by a family victim in connection with the determination of the punishment for the offence unless it considers that it is appropriate to do so.

Submission of VISs by family victims is not mandatory and the absence of a VIS in any matter does not give rise to an inference that the commission of the offence had little or no impact on the victim.[83] Section 26 of the *CSPA* provides that a VIS

[83] Section 29 *Crimes (Sentencing Procedure) Act 1999* (NSW).

from a family victim provides details of the impact of the deceased's death on members of the deceased's family. As originally envisaged, VISs took the form of a written statement. By virtue of s 30A inserted into the *CSPA* in 2003, family victims (or their representatives) are now also entitled to read their VISs aloud to the sentencing court. The *CPSA* was further amended in 2008 to provide that a VIS can also include photographs, drawings or other images.[84] As to this last amendment, in his reading speech the Parliamentary secretary said that a broader form of VIS "may be a better and more effective way for some victims and their families to convey the harm they have suffered as a result of a crime" (Hansard, 10747). Given the context, it may be that the words "other images" could be interpreted to include VIDs although this remains to be tested; there is no indication from the review of the cases contained in Appendix 4 that VIDs have been submitted to NSW sentencing courts. Finally, there are no provisions relating to the evidential quality of VISs such as requiring the statement to be sworn and able to be tested by cross examination.

5.5.2 Offender appeals

A search of available judgments of the NSWCCA reveals that since 1997 there have been five appeals brought by offenders on the basis that, *inter alia*, the sentencing judge took account of irrelevant material (VISs from family victims) in determining penalty.[85] The NSWCCA has distinguished between judicial comments that, on the one hand, indicate the VISs were relevant to determining penalty and, on the other, simply publicly acknowledge the impact of the crime. For instance, in *R v Bollen* (1998) 99 A Crim R 510, Hunt CJ (with whom the other members of the NSWCCA agreed), found the sentencing judge's remarks that "the community had lost one of its number and the Groves family had lost a loving member – one who was a husband, father, son and brother" amounted to no more than a recognition of "the

[84] Section 30(1A) *Crimes (Sentencing Procedure) Act 1999* (NSW).
[85] *R v Bollen* (1998) 99 A Crim R 510; *R v Dang* [1999] NSWCCA 42; *R v Mansour* [1999] NSWCCA 180; *R v Slater* [2001] NSWCCA 65; *R v Tzanis; SBF v R* [2009] NSWCCA 213. The appeal and outcome in *Tzanis* has been discussed above and that discussion will not be repeated in this section.

value which the community places upon human life" (529-530) and therefore, not prohibited. The sentencing judge went on to say however that he had "borne in mind" and "found useful", the seven VISs that detailed the reaction of the family victims to the deceased's death. Not only did the VISs give the family victims a role in the criminal justice process but those statements "helped remind the sentencing judges that the loss of any individual has real effect upon others" (530). The NSWCCA found that these latter remarks did indicate that the sentencing judge had taken erroneously irrelevant material into account in determining penalty.

Again in *R v Dang* [1999] NSWCCA 42, the NSWCCA found that the trial judge fell into error when, referring to VISs submitted, he found as an objective fact that members of the deceased's family suffered grief as a result of the deceased's death. Such a finding according to the appeal court was tantamount to the sentencing judge taking account of irrelevant material in determining penalty.

Similarly in *R v Mansour* [1999] NSWCCA 180, the appellant argued that the sentencing judge had erroneously taken account of VISs from family victims in sentencing when he said: "I think it is fair to say that the result of this collision and the loss of that young lady's life has caused what can only be described as immeasurable grief to her family. The material in the form of Victim Impact Statements supports that situation". The NSWCCA rejected this submission and Spigelman CJ (with whom the other members of the court agreed) said:

> *It is entirely appropriate that trial judges acknowledge the impact of crime on victims and their families in this public way. The purposes of the criminal justice system are well served by such public recognition of the grief imposed on families of victims. Unlike Bollen there is nothing to suggest that his Honour gave this consideration weight in determining the sentence eventually imposed* (7).

In the most recent appeal, *SBF v R* [2009] NSWCCA 213, the offender argued that by making extensive reference to the content of the VISs in the judgment without

reference to the restrictions imposed by *Previtera*, the sentencing judge had taken account of the VISs in a manner prohibited by law. After discussing the content of the statements, the sentencing judge had said: "I have taken these statements into account in the way in which it is appropriate to do so on sentence". Then turning to defence submissions regarding the VISs (where *Previtera* had been referred to in argument) the judge said:

> *[defence counsel] submitted that whilst the victim impact statements excited feelings of sadness they were not relevant to sentencing proceedings. Whilst this may strictly be true, in my view they do no more than outline, in a very real way, a glimpse of what must be expected to flow from the deaths of two young men and the very serious injury of a young woman* [62].

The NSWCCA found that by these remarks the sentencing judge had not misused the VISs and rejected this ground of the appeal. According to the Court, comments made by the "experienced" judge indicated that he "was conscious of the limitations upon the use of this evidence" and indeed, "were references to the well-known *Previtera* principle" (90). With regard to the extensive reference made to the content of the VISs, the NSWCCA found no restrictions in the legislation on the extent to which a sentencing judge may set out the content of VISs; there is no rule that VISs have "to be referred to in some shorthand way" (90). Indeed according to the NSWCCA:

> *It is understandable that…his Honour set out the contents in some detail, a course which was open to the Court under s28 of the Act. The victim impact statements outlined the devastating consequences upon the families of the deceased young men and also the profound effects upon the young woman who survived the collision* (88).

In *R v Slater* [2001] NSWCCA 65, the applicant argued that the sentencing judge in a section 13A application[86] erroneously took account of the VIS from the deceased's

[86] The applicant had been sentenced to a life penalty prior to 1989 and was seeking a redetermination of this penalty i.e. the imposition of a non-parole period and remaining term.

mother when considering the need to protect the safety of the community as required in the context of those applications. The offending passage read:

> *[t]here is a need in the present particular case to have regard to something that is said by Mrs Hazel McIlwain, the mother of the late Miss McIlwain who has made a Victim Impact Statement...'I would be frightened if they were let out. As it is, I can't have anyone walking behind me. I can't go on holidays, as I feel something might happen to me. I am very frightened of the dark and will only drive my car in town because if it broke down in the country I might get murdered...'Mrs McIlwain is a lady aged some seventy two* (19).

Rejecting this ground of appeal, the NSWCCA found these words merely provided the basis for the judge's direction that the VIS be forwarded to the Commissioner for Corrective Services and the Serious Offenders Review Committee to be used in connection with imposing conditions on the offender's parole in the future (24). According to the NSWCCA this was "quite an appropriate use" of the VIS and had no effect on the sentence imposed.

5.5.3 Use of Victim Impact Statements in Sentencing Homicide Offenders

While the rule in *Previtera* continues to apply and VISs that detail the impact of the crime on family victims cannot be used to increase penalty, such statements are nonetheless used by sentencing judges to serve other purposes. Five key purposes emerge from an analysis of the above appeals and a review of sentencing judgments more generally contained in Appendix 4.

The first four purposes reflect the expressive functions of VISs as discussed above at 2.3. First, VISs give family victims a 'voice' in the sentencing hearing and an opportunity to express their feelings. In *R v Ryan; R v Coulter* [2011] NSWSC 1249 the sentencing judge explained this purpose as follows:

> *The court has received a number of very moving victim impact statements from members of the victim's family…these statements were received on the basis that they provide those persons affected with a voice in the proceedings. They have no bearing on the sentence ultimately imposed, because the long-standing policy of the criminal law values life equally* (23).

Second, as noted by the NSWCCA in *Mansour* and *Bollen* above, acknowledgment of the VISs in sentencing provides the court with an opportunity to publicly recognise the impact of the crime on the victim and validate their loss (*Winefield* [2011] NSWSC 337). For example, in *Cotterill* [2012] NSWSC 89, the sentencing court said that commenting on the VIS gave it the opportunity "to acknowledge the devastating impact on those who knew and loved the deceased and the courage with which they have faced her death" (4).

Third, VISs, especially oral VISs, bring home to the offender the harm caused by the offence: "One of the purposes of reading victim impact statements aloud is to reinforce to the offenders … the devastating consequences of their actions" (Hall J in *R v DGP; R v PB* [2009] NSWSC 1154, 81). Fourth, VISs from family victims serve to remind both the court and the community "of the appalling and devastating loss and distress that results from violent crime" (*R v DGP; R v PB* [2009] NSWSC 1154; see also *R v Vulovic (no. 4)* [2012] NSWSC 212).

The fifth purpose is perhaps better described as instrumental. Commenting on the VISs provides the sentencing judge with an occasion to explain the legal goals of sentencing and thereby educate and 'manage' the expectations of the deceased's family in relation to the penalty to be imposed. As Fullerton J explained in *Winefield* [2011] NSWSC 337*:*

> *While Caleb's family may expect to see their loss reflected in the sentence to be imposed, that is not the object of sentencing in our system of justice. No sentence of imprisonment, whatever its length, can compensate for the loss of a loved one. The law values life and treats the taking of a life as the gravest of crimes irrespective of who the deceased was and whatever others might think*

of him or her. The offence of manslaughter cannot be made more serious because the deceased was a good person and because of the pain that others feel at their loss however intense and real that pain is. I do, however, take the statements of the family into account in the way permitted by law.

A review of the sentencing judgments indicates that current sentencing practice with respect to VISs generally follows a typical path. Any VISs submitted by family victims are acknowledged; the content of those statements is referred to in varying detail; the sympathy of the court is extended to those victims; and the limitations on the use of the VIS in sentencing are noted.[87] For example, Garling J's careful acknowledgement of the VISs and recognition of the family victims in *R v Cook* [2012] NSWSC 480, is typical of many sentencing judgments. Under a sub-heading 'Victim impact statements' he said:

The effect which Mr Cook's conduct has had on Mr Burrows' family, has been expressed in statements in Court by Mrs Christine Burrows, Mr Burrows' mother, and also by Ms Teigan Burrows and Ms Rhiannon Burrows, the sisters of Mr Burrows. I acknowledge the contents of these statements. I express my sympathy to the Burrows family for their tragic loss (70).

It is clear that their lives have forever been changed by the events of 30 October 2010. I hope that they will understand, and in time come to accept, that the extent of their grief and loss cannot be used by the Court as the measure for the determination of an appropriate sentence (71).

I will have regard, in fixing the appropriate sentence to those statements in the way in which the law allows me: R v Previtera.

Judicial styles do vary however and it is not uncommon for sentencing judges to use more emotive language – such as 'heart-rending', 'moving' and 'eloquent'- to describe the VISs received by the court. Mathews AJ's sentencing remarks in *R v Filippou* [2011] NSWSC 1607 provide an example of such an approach:

[87] For instance see *R v NR* [2011] NSWSC 280, *R v Winefield*[2011] NSWSC 337, *R v Bennett* [2009] NSWSC 1382, *R v Sullivan* [2010] NSWSC 755, *R v Horton* [2010] NSWSC 1007, *R v Iskov*[2010] NSWSC 1074, *R v Milat and Klein* [2012] NSWSC 634.

The anguish and grief caused by the offender's actions is immeasurable. The offender expressed concern about the effect upon his own family, but this cannot be compared to the devastating and permanent loss suffered by the family and friends of the two victims. Luke and Sam Willis were fine young men, with diverse talents, who were just embarking on their lives and careers which were full of promise. All of this was cruelly brought to a sudden and untimely end. They were the only boys in the family, and the loss suffered by the rest of their family was graphically expressed in extremely moving victim impact statements which were read to the Court by their father, mother and sister Jessica. I would like to convey to each of them the sincere condolences of myself and of the Court. I take these statements into account in the manner provided by the legislation.

5.6 Summary

This chapter has provided analysis of the legal framework that regulates the submission of VISs by family victims in the sentencing of homicide offenders in NSW. Prior to the commencement of legislation in 1997, VISs from family victims were generally not admissible in the sentencing process (*R v de Souza*). By virtue of the current legislative model, sentencing courts are now required to both receive and acknowledge VISs from family victims and courts might also comment on those statements if it is considered appropriate. Judicial discretion as to the influence of the VISs on penalty, however, has been retained in s 28(4)(b) and the sentencing court must not consider a VIS in determining penalty unless it considers that it is appropriate to do so.

The question of whether it is appropriate to take account of the impact of the deceased's death on the deceased's family as evidenced in VISs in sentencing, has been a vexed issue for the court. Shortly after the legislation commenced in 1997, the NSW Supreme Court ruled in *Previtera* that it is not appropriate to consider VISs from family victims in determining penalty. The basis of the court's reasoning is that to do so would involve the court in measuring the seriousness of the offence against the value and worthiness of the deceased victim and his or her family rather than the offender's culpability and the objective circumstances of the offence. Such

a process would offend fundamental principle of justice and equality before the law. This approach was subsequently approved by the NSWCCA.

Despite challenges to *Previtera* during the 2000's, the NSWCCA has affirmed the restrictions on the use of VISs and the principle in *Previtera* continues to apply. As a result, family victims cannot participate in the Court's decision-making and the contents of their VISs are not considered by the court to determine penalty. Nonetheless, because the court is required to receive and acknowledge a VIS from a family victim and VISs may be read aloud to the court, family victims can participate directly in the sentencing hearing. They are accorded an expressive role whereby they can tell the court about the impact of the deceased's death on them and their family. These statements are a visible feature of the sentencing landscape. While not serving an instrumental function with regard to formulation of penalty, the VISs are used to serve a variety of expressive purposes in the sentencing process: to give victims a voice in the hearing, to publicly acknowledge and validate the impact of the crime on the family, to remind both the court and the community of the harms caused by such violent crimes and to bring home to the offender the consequences of his or her actions. New South Wales sentencing courts also use VISs in their judgments to contextualise the VISs in the bigger sentencing picture for the family and prepare them for the fact that the sentence imposed will reflect legal goals of the sentencing process rather than the extent of their loss.

The following two chapters present the findings of the empirical component of this study - that is, family victim participation in the sentencing hearing in this legal context. Chapter Six deals with the nature and dynamics of victim participation in the hearings observed and Chapter Seven presents the findings of an analysis of the VISs read aloud in those hearings observed.

6. The Nature and Dynamics of Victim Participation

The 'dramatic' nature of courtroom proceedings has been well documented (Carlen, 1976: 19, Ball, 1975); as in a theatre, the courtroom "is a space open for many kinds of drama, physical and verbal re-enactments of events and forced resolution of human conflicts" (Dahlberg, 2009: 183). Theatrical imagery with its key elements of production and performance is particularly apposite to the sentencing hearing: "the 'denouement' of criminal proceedings" and a drama that has been likened to a "reality-based documentary" (Dignan et al, 2007: 6-7). Dignan et al argue that "a dramaturgical perspective can be useful for ordering facts about and highlighting aspects of the encounter that might otherwise pass unremarked" (2007: 24). Using theatrical imagery and dramaturgical principles (Goffman, 1973), the object of this chapter is to illuminate family victims in the sentencing hearing and identify the nature of the integration of the family victim in the sentencing hearing (Dignan at al, 2007: 6).

It is evident that the major vehicle for victim participation in the sentencing hearing is the VIS. The legal framework for the submission of VISs set out in the previous chapter indicates that input from family victims through their VISs is not used to influence penalty. Family victims are not parties or quasi-parties to the hearing. They lack control of and cannot provide input into the decision making; they are not consulted and nor their views taken into consideration in the formulation of penalty. Nonetheless, the law does afford family victims the opportunity to express their feelings through their VISs and thereby participate directly in the conduct of the sentencing hearing. Given that a significant focus of this thesis is on the events in the courtroom, this chapter will examine the participation of family victims in the sentencing hearing for homicide offenders through VISs and otherwise. In doing so, the following issues will be addressed:

- The status of the family victim in the hearings;
- The nature of participation, if any, by family victims in the hearings;
- The extent to which family victims participated in the proceedings; and
- The extent to which family victims were integrated in the sentencing hearing.

This chapter is divided into two parts. Part one will examine the 'production' of the sentencing hearing including the plot, the players and the staging. Part two will examine the 'performance' of the sentencing hearing.

6.1 Production of the sentencing hearings

This part will address key components of the production of the sentencing hearing: the plot, the players and the staging of the production.

6.1.1 The Plot

A key element of any theatrical production is the 'plot' – the story that is told by the performance. Usually, the plot is contained in a prepared 'script' in which the performers are provided with their lines and the action is divided into segments prior to the commencement of the performance. While not scripted in the traditional sense, sentencing hearings cannot be described as 'improvised' since the action takes place within a clearly defined legal framework comprised of legal norms and rules.

Criminal proceedings begin when an accused person is charged with an offence related to the killing of the deceased. It is well recognised that the chief protagonists in the proceedings are the State and the accused; it is the State that deals with the accused in relation to the crime not the deceased's family (see 2.1; Christie, 1977). As with other common law jurisdictions, legal proceedings are

conducted according to an adversarial model and, in the context of criminal matters, this means that the hearing is fashioned as a contest between the protagonists. The prosecution is conducted on behalf of the Crown by the NSW Director of Public Prosecutions (DPP). Under the *Director of Public Prosecutions Act 1986* (NSW), the Office of the Director of Public Prosecutions (ODPP) is a separate and independent prosecution service that institutes and conducts prosecutions for indictable offences (including murder and manslaughter) in the Supreme and District Courts on behalf of the Crown in NSW. Crown Prosecutors, who hold office under the *Crown Prosecutors Act 1986* (NSW), appear as counsel (barristers) for the ODPP. Following guidelines published by the ODPP (hereafter Prosecution Guidelines),[88] the prosecution will decide whether to institute proceedings and in turn the accused will decide whether the charge will be defended. By virtue of section 37(2) *Criminal Procedure Act 1986* (NSW), the accused is permitted to be represented by legal counsel and all offenders were legally represented in the matters observed.

The sentencing hearing takes place after the accused has been convicted of the offence, hereafter the offender. Subject to any contrary legislative provision, sentencing hearings are conducted in courtrooms open to the public and provision is made for public seating. Of the 18 matters observed, seven offenders were convicted of murder, 10 convicted of manslaughter and one convicted of being an accessory after the fact (see Table 4.1 at 4.2.1.2). The legal objects of the sentencing hearing were set out in the previous chapter. Essentially, it is the task of the sentencing judge[89] to evaluate the seriousness of the offence, locate the offence on the range of seriousness for that particular crime and determine the appropriate punishment according to law. The Crown and the defence present evidence to the court and make submissions with respect to the appropriate penalty to be imposed in the circumstances.

[88] Section 13 *Director of Public Prosecutions Act 1986* (NSW).
[89] Unlike matters related to guilt in a trial, a jury does not participate at the sentencing stage of a matter.

While the cases observed adhered to this broad model or 'plot', each matter nonetheless comprised unique circumstances that inevitably shifted the focus of the hearing. For instance, in two cases there was a dispute between the prosecution and the defence as to the factual basis of the crime (hearings 4 and 6) and, in those matters, much of the court's time was given over to hearing evidence of disputed factual issues. In eight matters, the focus of the hearing was the seriousness of the offence and matters relating to the culpability of the offender including alcohol consumption, mental illness or the deceased's conduct were the subject of argument (hearings 1, 2, 4, 7, 10, 11, 12, 18).

From this plot overview the chief actors that emerge in the sentencing hearings are the parties – the prosecution and the offender represented by defence counsel - and the sentencing judge. Because the offender was legally represented in all matters, the offender personally had a minimal role in the hearing; his or her case was put to the court by counsel. In this thesis when reference is made to the defence or offender as an actor or player that reference is to the offender's legal representative unless stipulated otherwise. The roles of the key players are considered in further detail below together with an overview of the minor roles in the hearings observed.

6.1.2 The Players

The roles of the chief actors –the prosecution, the defence and the sentencing judge - can be described as 'occupational' because the players have been trained to take on these roles (Dignan et al, 2007: 6-7). In these roles, the players suppress their personal identities and adopt a highly professional persona for the duration of the hearing. Such roles come with "established fronts" (Goffman, 1973) the particular features of which observed in the hearings including: distinctive costuming, formal and technical language skills, detachment and neutral affect, polite and respectful manner, gravitas and a measured approach to the conduct of the matter generally.

While not appearing as a key player in the plot of the hearing, because the public nature of the hearing is a crucial element, the audience can be regarded as having an important role (Ball, 1975). The roles of the parties (prosecution and defence), sentencing judge and audience will be examined in turn.

6.1.2.1 The Parties

Both parties to the sentencing hearing were legally represented in the matters observed. The offenders were represented by counsel and the Crown was represented by a Crown Prosecutor on behalf of the NSW DPP. According to Prosecution Guidelines:

> *A prosecutor is a "minister of justice". The prosecutor's principal role is to assist the court to arrive at the truth and to do justice between the community and the accused according to law and the dictates of fairness. A prosecutor is not entitled to act as if representing private interests in litigation. A prosecutor represents the community and not any individual or sectional interest.*[90]

Thus at law, the prosecutor does not represent the private interests of the family victims at the hearing but instead represents the community or public interest. The guidelines characterise the "community's interest as two-fold: that those who are guilty are brought to justice and those who are innocent not be wrongly convicted".[91] Family victims were not parties to the hearing nor legally represented in the proceedings. Having said this, family victims were not completely disregarded. Data from the interviews and the observations as well as the prosecution guidelines indicated that the Crown had responsibilities with regard to the family victims that were separate from the public interests represented. This point will be elaborated upon further below.

Subject to the rules of procedure, the parties are independent and partisan and through their legal representatives, shape the hearing through the identification of the contentious issues, the evidence presented and sentencing submissions put to

[90]Guideline 2.
[91]Guideline 3.

the court. As such, the parties have a marked influence over the course of the hearing and penalty to be imposed as they actively participate in the hearing (Sward, 1988-89:312). Party control over the development and presentation of the case necessarily requires that the parties have a voice in the hearing and the opportunity to respond to the evidence (Sward, 1988-89: 312). In reality, however, this case control was held by the parties' legal representatives in the courtroom (Sward, 1988-89:312).

The law imposes a duty on the parties' legal representatives to assist the sentencing court in determining the appropriate penalty (*Giannarelli v Wraith* (1988) 165 CLR 543) and the Crown has a particular duty to assist the court to avoid appealable error (*R v Jermyn* (1985) 2 NSWLR 194). In the cases observed, parties' counsel assisted the court by tendering a range of material including: copies and/or summaries of relevant cases, sentencing schedules setting out the range of penalties for a particular offence in certain circumstances, sentencing statistics from the NSW Judicial Commission and written submissions in relation to penalty. In two cases, the judge asked counsel to submit further written submissions dealing with specific issues relevant to penalty that had arisen during the course of the hearing. The prosecution is required to present evidence in relation to all relevant facts in a manner that is "fair, reasonable and practical in the circumstances of the particular case" (*R v Rumpf* [1988] VR 466) as well as test the defence case fairly if necessary (*R v Gamble* [1983] 3 NSWLR 356). The Prosecution may make sentencing submissions as to the appropriate approach in the particular case but should not recommend a particular penalty (*R v Gamble* [1983] 3 NSWLR 356). Defence counsel is required to identify relevant sentencing factors for the court and ensure that the requisite evidence and submissions in relation to mitigation of penalty are before the court (*R v Majors* (1991) 27 NSWLR 624 at 627). As with the prosecution, defence counsel does not recommend a specific penalty to be imposed.

6.1.2.2 The Sentencing Judge

A key feature of the role of sentencing judge is to preside over and manage the proceedings independently and in an impartial manner. The judge must ensure that the parties comply with the law, the hearing is conducted fairly, outcomes are lawful and the integrity of the process is maintained overall (Spigelman, 2004). On the basis of the evidence submitted, the sentencing judge is required to make findings of fact upon which the penalty will be based, decide any questions of law and determine the penalty to be imposed on the offender given the circumstances of the crime. Ultimately the judge is accountable for process and outcomes and must provide an explanation of the basis on which the sentence is imposed (Dignan et al, 2007: 14). This explanation takes the form of judgment that includes a summary of the facts on which the penalty is based, findings in relation to any matters of aggravation and/or mitigation and the reasoning which leads to the imposition of a particular penalty (*Thomas v R* [2006] NSWCCA 313).

The role of the judge in adversarial legal proceedings as manager or director of the hearing is often described as 'passive' when compared to the parties' responsibilities for the conduct of the hearing. In the cases observed, the judge was clearly directing the proceedings and was treated with deference by the parties as well as others involved in the hearings. It was the judge who decided when evidence would be heard, where family victims would be positioned while they read their VISs, if and when matters would be adjourned.

6.1.2.3 The Audience/Public

Ball argues that the audience is a crucial aspect of the principle of open justice (Ball, 1975: 86). Open justice requires that records of proceedings and outcomes be published (Dignan, 2007: 18) and proceedings held in an open court. An 'open' court is one with accommodation for members of the public whereby justice is seen to be done and courts held accountable. Open justice is said to promote reliability and accuracy of process and outcomes (Ball, 1975, Dignan et al, 2007: 20). All cases observed were conducted in an open court and those in the audience included

members of the public that had a connection to the matter: the deceased's family and supporters, family victims who presented VISs, family and supporters of the offender, journalists, police officers and me, a researcher. The audience in the two cases that had attracted considerable media attention also contained a number of members of the public that appeared unrelated to the offender or the deceased.

For the most part, members of the audience sat in the public gallery, silently observing the hearing being played out by the chief actors before them. While they did join in the performance of certain rituals in the courtroom such as standing when the judge entered and left the courtroom, they did not interact with the players whilst the hearing was being conducted. The only time that audience members interacted with the players during the hearing occurred when a member of the public was called or 'invited' to join the hearing to give evidence as a witness or read their VIS aloud to the court. Only in hearing 10 did some family victims act differently and communicate from their place in the audience to those key players engaged in the hearing. This will be discussed further below.

6.1.2.4 Minor roles

The minor roles in the hearings observed were either short speaking roles controlled by the key players or occupational roles related to the administration of the hearing more generally. Witnesses who gave oral evidence and family victims who read their VISs aloud to the court had short, 'walk-on', speaking roles during the hearing. There were no other players who participated in this manner in the hearings.

Occupational roles in relation to the administration of the hearing were various and included court officers, tipstaff, court reporters and occasionally a judge's associate. Court officers were responsible for a variety of tasks during the hearing including calling witnesses and administering the oath or affirmation prior to evidence, passing documents from the legal representatives to the bench and announcing the arrival and exit of the sentencing judge. From his or her position directly in front of

the bench, a court official acted as a conduit for documents and other items of evidence tendered by the parties' legal representatives at the 'bar table' to the court. A tipstaff provided administrative and procedural support to judges and it was to the tipstaff that I made my request to take notes during the hearing. Court reporters recorded the proceedings either in writing or audio and transcripts were prepared from these recordings. In two matters, the judge also had an associate who sat at the end of the bench and appeared to be responsible for keeping track of the documents in the cases.

6.1.3 Staging

While the sentencing hearings were staged in a variety of 19th and 20th century courtrooms, the 'setting' of each – the fixtures, fittings and physical layout (Goffman, 1973: 32) – displayed the same distinctive features. Courtroom space is configured in a series of "clearly demarcated and hierarchical zones" that reflect the adversarial model of legal proceedings (Mulcahy, 2007: 386). The "spacing and placing" of people in the courtroom within and without these zones, directly correlates with the status and roles of those persons in the proceedings and should be regarded as "strategic to their ability to effectively participate in the hearing" (Carlen, 1976: 21). For the purposes of this study, the main zones of the courtroom have been identified in the hearings observed as the central performance zone, the public gallery and peripheral zones comprising the dock and the jury box. These zones will be addressed in turn.

6.1.3.1 Central Performance Zone

This was the stage upon which the business of the hearing was conducted and 'insiders' to this zone were the chief actors and selected court staff during the course of the hearing. Movement within and into this area was restricted and controlled by police officers and court officials patrolling the boundaries. The stage was triangular in configuration and at the apex sat the judge on the 'bench'. This judicial space was the highest point in the room and accessible only by a private

entrance behind the bench. From this position, consistently with his or her task to manage the proceedings, the judge could oversee all persons and action in the courtroom. The supremacy of the judge's position in the legal proceedings was reinforced by the positioning of the coat of arms behind the bench making "clear that the full authority of the state and legitimate force is behind the judge" (Mulcahy, 2007: 385). If the judge was accompanied by an associate, he or she sat at the end of the bench. No person in the courtroom aside from these associates and tipstaff had direct physical contact with the judge during the hearing.

Generally, the witness box was located near the judicial space although its exact position varied in the different courtrooms. In most cases, it was located below and a little to the right of the judge and positioned at such an angle that the judge was able to see the witness; on the other hand, most witnesses had their head turned away from the judge facing into the court while they were being questioned (or in some cases, reading their VISs). Most of the time the witness box stood empty during the hearings observed**.** It was occupied by witnesses giving evidence or family victims reading their VISs, from other courtroom zones, on a transient basis as the need arose.

The bottom of the triangle and outer boundary of the central performance zone was marked by the 'bar table' where the parties' legal representatives were located facing the judge. This was usually a long wooden table, with a lectern in the middle and otherwise generally laden with papers and books. Counsel, bewigged and robed, were seated at the bar table with their instructing solicitors formally attired, seated behind them for the duration of the hearing. From this position, the legal representatives could see the judge and the performance space clearly.

Court staff performing the minor occupational roles described above were generally located in designated spaces between the bench and the bar table. Court reporters, court officers and tipstaff sat immediately below and in front of the bench. As a result, there was no visual contact between court staff and the judge.

6.1.3.2 The Public Gallery

As 'outsiders' to the business of the hearing, the audience was located in the public gallery situated at the rear of the courtroom and 'fenced off' from the central performance zone by a railing or some other physical barrier. Most public galleries were small and space was significantly limited. It did not appear that any special provision had been made for the family and supporters of either the offender or the deceased as seating was allocated on a first-in-first-seated basis and all members of the public were required to sit close together. In the first hearing I attended, the HVSG support worker with the deceased's family directed them to take seats on the side of the public gallery behind the Crown's space at the bar table. Thereafter, in most of the cases observed, choice of seating in the public gallery seemed to be determined according to the 'side' of the matter: the prosecution or the defence. This meant that family and friends of the deceased victim generally sat in the public gallery space on the side of the courtroom behind the prosecution and the offender's family and supporters were usually located in the space behind the defence at the bar table.

In the larger courtrooms, the public galleries were physically divided by a narrow aisle thus creating two spaces with rows of tiered benches. Not all courtrooms had this sort of division however and, in those cases, family and friends of both parties together with other members of the public and journalists would be seated (or crowded) together on the gallery benches. Although I saw no disputes in the courtroom between the families and supporters of the deceased and the offender, two family victims interviewed talked of staging problems that stemmed from this physical proximity with the defendant's supporters.

The audience in the public gallery looked onto the central performance zone and were able to see the judge, the witness box and the offender in the dock. In all courtrooms except one, however, the audience was looking at the backs of legal representatives' heads as the hearing was conducted. Audience members were not called on to speak from the public gallery and, in this position, were effectively

excluded from the conduct of the hearing. While the audience might be an important component of 'open justice' it was clear the audience was expected to play a more marginal role in the hearing (Tait, 2001: 211).

6.1.3.3 Peripheral Zones

Also 'outsiders', both the jury box and the dock were located in spaces peripheral to the central performance zone. Generally, the jury box was situated on the opposite side of the room from the dock and outside the central performance zone. Because juries are not used in sentencing hearings in NSW the box stood empty. On two occasions the judge gave members of the public permission to sit there when the public gallery became overcrowded.

The offender sat in the dock, a structure usually positioned perpendicular to the bench and the bar table. In this position, the offender was visible to the key protagonists in the central performance zone. The offender was in custody in 17 of the 18 cases and accompanied by two corrective services officers who maintained a position near the dock for the duration of the hearing. In hearing 12, a translator was also situated in the dock alongside the defendant. Access to the dock was by means of either a private entrance below the dock from cells under the courtroom or through the main courtroom door. Offenders remanded in custody entered the dock through the private entrance from the cells below the courtroom. In hearing 16, the offender, who was at liberty on bail, entered the courtroom through the main door and sat in the dock unaccompanied. Although the focus of the sentencing hearing is the offender, the location of the dock reflected the peripheral role of the offender in contrast to his or her legal representative in the actual business of the hearing (Carlen, 1976; McBarnett, 1981).

6.1.3.4 Aspects of the setting

Much courtroom research has taken place in magistrate's courts (the lower courts) and common themes have revolved around the crowded spaces, the 'conveyor-belt' approach to dealing with court lists and (the lack of) ideology of justice

(Carlen, 1976; McBarnet, 1981). Sentencing hearings conducted in the NSW Supreme Court are markedly different however from the conduct of matters in lower courts in many respects. Unlike Magistrates' Courts, the courtrooms of the Supreme Court observed are not noisy, crowded, chaotic spaces with people milling around and lawyers jostling for a place at the bar table. Each sentencing hearing observed was the only substantive matter in the list for that session and this meant that generally there were no other persons waiting their turn.[92] The courtrooms tended to be quiet with all present focused on the hearing being conducted in the central performance zone.

Sentencing hearings also took much longer to complete than the speedy resolution of matters in the lower courts. Fifteen of the 18 hearings were completed within two-three hours and then adjourned for sentence. Three sentencing hearings observed were not completed on the day and were adjourned part heard. The judge did not impose penalty on the day of the sentencing hearing in any matter that was observed and periods of adjournment ranged from one week to a month to give the judge time to consider the appropriate penalty to be imposed.

6.2 Performance

The sentencing hearing is bounded by a legal framework where the object of the proceedings is clear: the determination of the appropriate penalty to be imposed on the offender in the particular circumstances. As has been demonstrated, family victims are not afforded a major role in the plot and instead, the key players in the hearing are the parties, and the sentencing judge. By virtue of the 'insider' and 'outsider' opposition that characterises the staging of the hearings (Rock, 1993), the key players control the conduct of the proceedings in the central performance zone of the courtroom.

[92] A court day is notionally divided into two sessions, morning and afternoon. The morning session usually commences at 10.00am and the afternoon session at 2.00pm. One matter scheduled to start at 10.00am was delayed by the hearing of an urgent matter listed at 9.30.

This part considers the actual performance of the sentencing hearings observed under the following headings:

- Characteristics of legal performances;
- The form and sequence of events;
- Submission and reception of VISs;
- Indirect participation; and
- Offender remorse.

6.2.1 Characteristics of Legal Performances

Shaped by common law traditions of ceremony and discipline, distinctive features of legal performances in the hearings observed included formality, dignity, solemnity, ritual, legal norms and rules and the values of reason and objectivity (McBarnett, 1981; Tait, 2001). According to Ball, "one of the characteristics of judicial theatre is its ordered sequences and exchanges" (Ball, 1975: 97) and this was certainly a feature of the sentencing hearings observed. Also characteristic of the hearings was the evident experience with which the key legal players produced the ordered sequences and exchanges.

Like performers in a good theatrical production, the chief actors in their occupational roles presented professionally and collaboratively as a well-rehearsed team to achieve a common goal: a productive, efficient and fair sentencing hearing (Carlen, 1976: 31). As 'insiders', the key players shared specialist and exclusive knowledge of the relevant rules and *modus operandi* of the hearings as well as a distinctive language. More formal than everyday conversation (Conley and O'Barr, 1993), the dialogue between the parties was sprinkled with Latin phrases: "We're ad idem on that matter" or "as to the evidence of the state of consciousness, I think your Honour has in effect in arguendo with my learned friend referred to most of them" as well as 'legalese', an 'insider' language peculiar to the practice and process of law: "Your Honour, in my submission it's a section 108 point."

Despite the rhetoric of 'open justice', this production did not require the key players to ensure that the audience understood what was happening at any given stage. A significant characteristic of key players' performances was the 'civil inattention' with which those actors regarded people outside the central performance zone (i.e the audience and offender in the dock). Drawing from Goffman's work (1972), civil inattention in this context means that while the legal protagonists in the sentencing hearing were obviously aware of the audience and the offender – though the legal representatives had their backs turned to the audience, the judge had a clear view of the courtroom and many were observed to frequently look at the audience - they did not interact, invite more familiarity or conversation with, the 'outsiders' unless and until they were invited into the central performance zone. It was not that the audience and the offender were being ignored, but they were obviously both physically and practically 'excluded' from the business of the hearing being outside the central performance zone. And while there appeared to be no onus on the key players to be more inclusive, there some notable exceptions that will be discussed further below.

6.2.2 Conduct of the Hearings

This section turns to the form and sequence of the proceedings and courtroom behaviour.

6.2.2.1 Form and sequence of the hearings

Each hearing followed a similar sequence of events. Once the time to start had been reached and the legal representatives and the offender were in their places, the judge entered the courtroom, amidst some fanfare, in a ritual performed by all in the courtroom and took his or her seat on the elevated bench. The judge's entrance marked the commencement of the hearing.

As already noted, there were essentially two components to the sentencing hearings observed – evidence in relation to the objective and subjective circumstances of the offence and submissions with regard to the appropriate penalty. The Crown generally began the business of the hearing by tendering a bundle of written documents that might include a statement of agreed facts, the offender's criminal and custodial histories, and other reports or materials as required. Unlike a trial to determine guilt, much of the evidence was tendered in written form such as doctors' reports or statements of facts, rather than presented orally. Indeed in 9 of the 18 hearings the only oral material presented to the court was the VISs. The written documents were not usually read aloud to the court although there were exceptions which will be discussed below. Any VISs were also tendered by the Crown at this stage.[93] In two matters (hearings 7 and 18) the Crown also told the court that the family victims were aware of the basis upon which the court could receive those documents. Once the material was tendered, the parties' legal representatives usually indicated any matters in dispute.

A striking feature of the hearings was that the VISs were dealt with by the court first before moving to substantive issues regarding sentence in all hearings but one.[94] Each VIS was tendered to the court in writing and on receipt either allocated an exhibit number or 'marked for identification'. On tender, objections to VISs were addressed; formal objections were made in only two of the 18 matters observed (discussed in more detail below 6.2.3.3). Once objections were resolved, family victims could read their statements aloud to the court if they chose. Consistent with research (3.1.3.1), no family victims were cross examined on their VISs in the matters observed.[95] Joh's description of VIE as "occupying a strange and awkward presence in a sentencing proceeding" (2000: 37) is an apt description of the oral

[93] According to regulation 11 of the *Crimes (Sentencing Procedure) Regulation 1999* (NSW), a VIS can only be tendered to the court through the Prosecutor. In all but one matter observed, the VISs were tendered through the Crown. In the exceptional case, the VIS written by the deceased's sister was tendered by the defence and read aloud to the court by the judge. This VIS purported to support the actions of the offender because the deceased "got to die on his own terms."

[94] Hearing 8 was the exception. In this matter, there was an issue regarding a connected High Court appeal that had to be resolved before the hearing could proceed.

[95] The family victims interviewed who read their VIS to the court were also not cross examined.

VISs observed in the sentencing hearings.[96] The content of those statements (described in more detail in the following chapter) appeared unrelated to matters that went before or after the statements were read and, in most cases, were not referred to again in the hearing (Gubrium and Holstein, 2009: 45). It was my impression that the court, by dealing with this aspect first, endeavoured to get the VISs 'out of the way' so that the real business of the hearing could proceed. In fact on most occasions, immediately the victim had finished reading his or her statement and often even before the family victim had resumed his or her seat in the public gallery, the court continued with the hearing straightaway. Another striking feature was that despite the evident distress of many of the family victims who had read their VISs and/or the audible distress of audience members (see further below), no time was provided for those distressed to recover their composure and 'regroup'.

Contentious issues dealt with by the court after the VISs were finished varied. In two cases there was a dispute as to the factual basis for sentencing. The sentencing judge is required to make findings as to the relevant facts on which the penalty will be based (*The Queen v Olbrich* (1999) 199 CLR 270). Findings of fact in relation to motive or the extent of the offender's involvement in the crime are particularly important to assessment of the offender's culpability (*Cheung v The Queen* (2001) 209 CLR 1). A dispute as to the factual basis of the offence occurred in three matters observed. In the event of a guilty verdict following a trial, the judge must sentence on a version of the facts that is consistent with this verdict (*Cheung v The Queen* (2001) 209 CLR 1) and this might not be straightforward. Although convicted of murder, there may still be an issue as to the offender's motive or whether the offender's act causing death was accompanied by intent to kill or inflict grievous bodily harm or a reckless indifference to human life. Different levels of culpability attach to different states of mind and impact on the penalty imposed. In the event that the offender is convicted of manslaughter, it may be unclear on which basis

[96] Those VISs only submitted in written form were part of the documents submitted by the Crown to the court and not dealt with separately.

the jury found that offence proved; particularly if more than one option was left to the jury.[97] For instance, the degree of culpability might vary depending on whether the killing was a result of provocation or excessive self-defence. There might also be a dispute between the parties in interpreting a guilty plea.

Oral evidence was called in these two matters and the witnesses were audible in the public gallery. Not all evidence was presented orally and there was evidence presented in formats that excluded the audience. For instance, in hearing 4, where there was a dispute as to the motive for the killing, the Crown tendered a transcript of a recorded telephone conversation between the offender and another person. An audio recording of the transcript was then played to the court so that the judge could be satisfied of the accuracy of the transcript. The recording was only audible through earphones provided to the legal representatives, the judge and the offender so that they could listen to the tape. Without earphones, the audience could not hear the tape and were given no further information as to its content. The exclusion of the audience was again a feature in hearing 6 where the Crown showed a DVD recording of CCTV footage that was relevant to the circumstances of the killing. The screen was located at the front of the courtroom in view of the judge and the legal practitioners at the bar table; the offender was moved from the dock to the jury box to watch the DVD. The audience however, could not see the screen from public gallery.

Following the evidence, the legal representatives then spoke to their written submissions regarding the seriousness of the offence and the appropriate penalty. Oral evidence relating to mitigating factors on behalf of the offender was called in eight matters. After submissions were complete, a date for sentence (or further

[97] A conviction of manslaughter can relate to either voluntary or involuntary manslaughter. There are two types of involuntary manslaughter defined at common law: manslaughter by criminal negligence (*Lavender v The Queen* (2005) 222 CLR 67) and manslaughter by unlawful and dangerous act (*Wilson* (1992) 174 CLR 313). If a conviction for manslaughter results from circumstances where the jury is satisfied that the offender was provoked to kill (s 23 *Crimes Act 1900* NSW) or killed by way of excessive self-defence (s 418 *Crimes Act 1900* (NSW)), this is voluntary manslaughter. Manslaughter is always available as an alternative verdict on a murder charge: *R v Kanaan* (2005) 64 NSWLR 527.

hearing if the matter was being adjourned for further evidence) was then negotiated by the chief actors. The family victim was consulted in relation to dates for further hearing in only in one matter (hearing 8) but otherwise no enquiries were made in court as to family victims' availability. This lack of attention to the deceased's family was an aspect that particularly annoyed one of the interview participants, Sharon. Her daughter had been unable to attend court the day the VISs were submitted and thus missed her opportunity to read her statement aloud. According to Sharon:

> *[e]verything revolved around when it's convenient for the system and the offender. The victim is not considered at all. The first sentencing hearing was inconvenient for my son. I said can't you change the date so my son can be here too? No said the DPP.*

6.2.2.2 Courtroom behaviour

The key legal players cooperated to ensure that the proceedings ran smoothly with appropriate dignity and decorum (Goffman, 1959: 83). All legal players conformed to speech-making rules and though the legal representatives were partisan and independent; they conducted themselves with restraint and politeness, deferring to the judge as necessary. Likewise, the audience also complied with behavioural norms that required all members to sit quietly and not interrupt (Konradi and Burger, 2000).

Disorder was not a feature of 17 of the 18 hearings observed; the exception was hearing 10. In this particular matter the deceased's family had been particularly distressed during the presentation of their VISs (this case will be discussed further in the next chapter). After the VISs were completed and the offender was giving oral evidence about his mental illness and alcoholism, there was some disruption in the public gallery. The offender with his head down was speaking quietly and, from the public gallery, the deceased's brothers (who were sitting across the aisle from me) were swearing at him loudly telling him to speak up. After a couple of minutes the police asked two of the brothers who were shouting to leave the courtroom

and they did so. Consistent with the civil inattention with which they had been regarding the audience, the parties and the judge did not respond to the disturbance. Indeed, the judge did not look at the brothers as they shouted and nor did he exhibit surprise at this ruckus; instead he asked the offender to speak up and continued to focus on the evidence.

6.2.3 Victim Impact Statements

Victim impact statements were submitted in all hearings observed. An oral victim impact statement was the opportunity for family victims to speak in the hearing; if the family victim chose to read their statement aloud to the court, they were invited to enter the central performance zone of the courtroom. In this section, findings in relation to the submission and reception of the VISs are presented under the following headings:

- Submission of VISs;
- Distinction between written and oral VISs;
- Reception of VISs;
- Handling VISs.

An analysis of the content and presentation of the VISs read aloud to the court is the subject of the next chapter.

6.2.3.1 Submission of Victim impact statements

Thirty-eight written VISs were received by the court in the 18 matters observed. In accordance with the legislation, the Crown tendered all VISs except one written by the deceased's sister in hearing 16 which was tendered by defence counsel.[98] Thirty-six of the 38 statements were authored by a family victim; the Crown

[98] Although no comment was made by the court or the Crown, it is interesting to note that this practice appears to be contrary to the legislation. Regulation 11 of the *Crime (Sentencing Procedure) Regulation 1999* provides that a VIS can only be tendered to the court by the prosecutor. Nonetheless, in this case the VIS from the deceased's sister was tendered by the defence and read aloud to the court by the judge. The VIS purported to support the actions of the offender because the family victim was "at peace with the knowledge that he [the deceased] got to die on his own terms; it was the "peaceful death that he would have wanted".

informed the court that the two remaining VISs (in hearings 3 and 14) were written by a social worker, on behalf of the family victim. Aside from hearing 10,[99] it appeared that, consistent with the Prosecution Guidelines and interview data, the VISs had been submitted to the Crown in advance of the hearing. According to those guidelines, the Crown is required to ensure that a VIS complies with the legislation and consult with victims in relation to any changes that need to be made.[100] All victims interviewed, who had submitted a VIS, were required to give their statement to the Prosecution prior to the hearing.

A striking feature of this aspect of the fieldwork was that, in the vast majority of cases, family victims chose to present their VISs to the court in oral form (n=30); only eight VISs were not read aloud to the court in six matters. As can be seen from Table 6.1 below, 30 of the 38 VISs were read aloud to the court in 13 of the 18 matters: 22 by family victims personally, six by a victim representative from the HVSG, one by the Crown Prosecutor and one by the judge. Breaking down the data according to gender, of the 38 VISs, 15 were authored by male family victims. Of those VISs read aloud to the court, 13 VISs were read by female family victims and 9 VISs by male victims whilst all of the HVSG representatives who read VISs were women. The male family victims read the VISs aloud to the court in only two of the 13 matters, however, and it was my impression that consistent with research, the presentation of VISs in oral form was a gendered action (Erez, Ibarra and Downs, 2011:27; Meredith and Paquette, 2001: 14-15; see 1.3.3.2).

[99] In hearing 10, a number of handwritten VISs were handed to the Crown and the court the day of the hearing. This case is discussed in more detail below.

[100] This aspect will be discussed in more detail in the following chapter.

Table 6.1: Victim Impact Statements Submitted

Case	Number of VISs received	Oral Presentation	Family Victim relationship to deceased
1	2	1 mother 1 victim rep for father (HVSG)	Mother Father
2	3 inadmissible	No	Sister; Mother; Partner (woman)
3	1 (prepared by social worker)	No	Widow of deceased
4	2	1 – partner (woman) 1 – victim rep for deceased's sister (HVSG)	Partner (woman) Sister
5	5	1 – mother 4- brother D read 4 VISs from other brother S, father and deceased's former partner who was a witness to the killing)	Mother; Father Brother x 2 Partner and witness to the killing (woman)
6	2	No	De facto partner (woman) Brother
7	2	1 victim rep for Father (HVSG)	De facto partner (man, not present); Father
8	1	1 sister 1 brother	Sister Brother
9	3	1 Granddaughter 1 daughter	Granddaughter; Daughter; Son
10	6	2 brother K (read for another brother as well) 3 brother 1victim rep for mother (HVSG)	Brothers (5) Mother
11	3	1 victim rep for sister (HSVG) 1 mother 1 de facto partner (woman)	Sister Mother Partner (woman)
12	2	1 wife 1 Crown for the father	Wife; Father and mother (seemed joint)
13	1	1 mother	Mother
14	1 (prepared by social worker)	[The Crown indicated to the court that the family wanted the VIS read aloud but that there was no family member there to do this.]	1 mother (prepared by clinical social worker and dated in April)
15	1	1victim rep for mother (HVSG)	1 mother
16	3	2 daughter 1 deceased's sister	Daughter; Daughter; Sister
17	2	No	Mother of deceased [primary] victim of malicious wounding charge
18	1	1 mother	Mother

6.2.3.2 The Distinction between written and oral Victim Impact Statements

Unsurprisingly, there is a significant difference between the impact of VISs submitted in writing only and those also read aloud to the court on the dynamics of the hearing.

Written Victim Impact Statements

The written statements were tended to the court by the Crown with other written documents at the beginning of the hearing. At this stage the Crown also indicated whether the family victim wished to read that statement aloud to the court. Thus, in hearing 6, the Crown acknowledged the presence of the author of the written VIS in the public gallery but informed the court that the family victim did not want his VIS read aloud. In hearing 14, the Crown informed the court that although the deceased's mother had wanted her VIS read aloud no family member had been able to attend the sentencing hearing and thus there was no one available to read the VIS aloud.[101] In both matters the sentencing judge acknowledged the remarks and nothing further was said on the subject. There were indications of variable judicial practices however. A different sentencing judge told the Crown after written VISs were tendered in hearing 5: "Madam Crown, it's my practice – I am not entirely sure what other judges do – that in relation to victim impact statements where the person does not wish to read them, I usually ask the Crown to do so". In that case it was not an issue because the family victims chose to read their statements aloud to the court. Similarly, in hearing 16, the defence tendered a written VIS from the deceased's sister that the judge himself elected to read aloud to the court in the absence of the family victim. A different situation arose in hearing 12, in which the father of the deceased had come into the central performance zone to read his VIS but became too distressed to do so. The judge in that case accepted the Crown Prosecutor's offer to read it on behalf of the deceased's father.

[101] According to Prosecution Guidelines, a VIS may not be read aloud to the court by a legal representative of the prosecution.

The reception of written VISs tended to be quick and family victims associated with the written VISs were not in court in at least four matters. Only in three matters did the judge take the time to read the written VISs while sitting on the bench and acknowledge those statements with the comment: “yes I’ve read that”. Otherwise, the VISs were put to one side with the rest of the written material that had been tendered presumably to be read later when the judge was off the bench. The content of the written VISs was not disclosed publicly in the court. Nor were the family victims acknowledged (even in that case where the Crown had told the court that the family victim was in the courtroom) and the statements were discussed by the key players as if the victims were not there. The reception of written VISs was indeed “bloodless” as has been described by Barnard (Barnard, 2001-2002:71).

Oral Victim Impact Statements

Consistent with Rock’s findings (2010), oral VISs were a striking component of the hearings observed. When the court was ready to hear the statement read aloud, the family victim was called from the public gallery, invited to enter the central performance zone and come to the front of the sombre, silent courtroom. Like other courtroom rituals there were elements of ceremoniousness associated with the presentation of oral VISs in the courtroom: the formal invitation into the central performance zone, the heart of the hearing, to read their statement; a respectful silence as they read; and the formal attention of the other participants.

Because oral VISs are ‘new rituals’ (Rock, 2010), however, they lack tradition and, as a result, some confusion on the part of the Crown and also court officers was evident at times. There appeared to be no designated space from which the family victim was to read his or her statement and this absence revealed various judicial practices. In the vast majority of cases, family victims were told to sit in the witness box (n=9) or the jury box (n=2). From either position they could look out into the court and the public gallery, access tissues and water as needed and be moderately comfortable while they read their statement. On two occasions though, the judge directed the family victims to stand near the bar table facing the judge, with their

backs to the audience and without support for their VIS as they read, or access to other comforts.

When there was a clash between the VIS ritual and more traditional legal rituals, the legal ritual prevailed. In hearing 4, after she called into the central performance zone, the family victim obviously tried to avoid walking near the offender and sought to walk in front of the bar table to the witness box. She was practically tackled by court officers who prevented her from doing so; rules of procedure dictate that no-one is supposed to walk in front of the bar table while the court is in session. The family victim was re-directed to walk behind the bar table and, as a result, had to pass very close to the offender.

Regardless of their position, family victims were always in close physical proximity to the offender and a bar table crowded with bewigged and gowned lawyers. In all matters except one, when the family victims took their place they commenced reading their statement without further ado. The exception occurred in hearing 5 where the judge requested that the Crown ask the family victims some "identifying questions" before reading their statements.

The presentation ritual of VISs also differed significantly from other oral testimony rituals in many respects. First, the family victims (or representatives) were not sworn or affirmed before they read their statements because, as several judges noted, they were not witnesses and by implication the VISs were not considered evidence.[102] Second, family victims were not questioned by the Crown to extract the content of their VISs in the traditional question/answer format of examination-in-chief. Instead, the victims read their written statements aloud to the court in an uninterrupted narrative or monologue form as described by Hoyle (2011: 14; see 2.3.1). Although the distress of audience members in the public gallery was audible in some cases, the courtroom was generally otherwise silent as the VISs were read. Not surprisingly in that environment, many family victims exhibited distress and

[102] This is consistent with the law as it stands that VISs cannot influence the penalty to be imposed.

signs of nervousness – shedding tears as they read, holding their VISs with hands that trembled and speaking with quavering voices. Some judges acknowledged this nervousness and spoke reassuringly to the family victim. For example, in hearing 8 the family victim appeared extremely nervous and was having trouble reading her VIS and the judge said to her: "take your time, I'm interested to hear what you have to say, don't be nervous." The presentation of oral VISs will be discussed in more detail in Chapter Seven.

The oral VISs varied considerably in length (see Appendix 3) ranging from approximately five to 25 minutes per statement. The total time given to VISs in each matter usually did not exceed 40 minutes although, in hearing 5, five VISs took 90 minutes to complete. Even though several VISs were lengthy, or presentations delayed by the victim's distress, no family victims were hurried to finish reading their statements. In fact, on one occasions, the judge adjourned the matter briefly to enable the distressed family victim to recover his composure. When family victims finished reading their VISs, they returned to their seat in the public gallery or, in two cases, left the courtroom. As noted above, all hearings then continued without any respite for those family victims who were distressed after the VISs were read.

6.2.3.3 Reception of the VISs

Reception of VISs comprises the tender and scrutiny of VISs, handling objections and editing the statements if necessary. A significant feature of this stage in 16 of the 18 hearings was a marked lack of debate regarding the content of most of the VISs submitted. This was significant because many of the statements addressed matters outside the legislative guidelines and included comments that were prejudicial to the offender's interests (see Chapter Seven). On three occasions, while acknowledging that some parts of the VISs were outside the legislative guidelines, the defence declined to take the matter further. In hearing 9, for example, after the VISs were tendered by the Crown the defence said: "There may be some material there that is irregular in terms of content, but I don't want to

make anything of that Your Honour". This muted response appears to be consistent with the view that the parties rely on the sentencing judge to deal with the material appropriately (see 3.1.3.3).

Formal objections to the VISs tendered were made in only two cases – hearings 2 and 16. In hearing 2, the offender had been convicted of being an accessory after the fact to murder and the Crown sought to tender three VISs from the sister, mother and partner of the deceased victim. The defence objected to the tender of the VISs on three bases:

1. The authors of the VISs did not qualify as family victims because the deceased did not die as a result of the offender's offence. The relevant statutory provision provides that a family victim may submit a VIS where the deceased has died "as a direct result of the offence".[103]
2. The authors do not qualify as primary victims.
3. If the authors are qualified to submit a VIS, the statements in their current form are inadmissible "as they are greatly inconsistent with the agreed facts, and one of them constitutes an express breach of the *De Simoni* principle. It suggests assistance and encouragement to the offender in the course of the killing of the deceased."

Neither the Crown prosecutor nor the family victims in the public gallery showed any surprise at the objections and it seemed that the dispute was expected. In response, rather than dealing with the specific objections, the Crown instead spoke more globally reminding the court that the rationale of the legislation was to "provide an opportunity for the victim to say how he or she feels". Further the Crown argued that while the offender "hasn't caused the death, she has obstructed justice" and the court should accept the VISs. After some consideration, the judge upheld the first objection on the basis that the authors of the VISs did not qualify as family victims and the VISs were rejected. By way of obiter however, the judge remarked that the third basis for objection would not have been successful. In his

[103] Section 28(3) *crimes (Sentencing Procedure) Act 1999 (NSW).*

view, given that the content of the VISs was not going to be taken into account in determining penalty in any event, it would be likely that the court could receive the VIE. This approach is in marked contrast to that taken by the sentencing judge in the second matter where objections to the VISs were taken, hearing 16.

Objections to the content of two VISs from the deceased's daughters were vigorously argued in hearing 16. When the Crown tendered the VISs he informed the court that the defence objected to some of the content. As before, the legal representatives and the family victims exhibited no surprise at the objections. The defence barrister handed up copies of the statements on which the "objectionable parts" had been highlighted but did not further explain why those parts were outside legislative guidelines.[104] In reply, the Crown argued that all parts of the VISs were admissible and should be read out in court. After reading the statements, the judge agreed with the defence in relation to the first VIS and in part with respect to the second. Consistent with events in *Borthwick,* His Honour did not explain in open court what was objectionable or why. His tone of voice however did indicate annoyance that certain matters had been included in the VISs. In making his ruling, the judge remarked that the law was clear and the purpose of VISs "was to inform the court and the offender of the consequences of their actions on people"; VISs were not designed so that "people can come to court and make statements about other witnesses or matters involved in the crime that do not concern them." Unlike *Borthwick,* the judge told one of the family victims that it was not her fault; in fact he expressly shifted the blame to victim assistance when he said "people who helped victims prepare these statements had to realise this so as not to deprive victims of the chance to speak."

In the same case, the Crown objected to content of a VIS from the deceased's sister tendered by the defence. As the defence had done, the Crown highlighted the

[104] This was an interesting omission because the parts of these VISs that read aloud made reference to the nature of the crime, the offender's machinations in the commission of that crime, the lies told at the trial, the ensuing media circus and the bias amongst the media and members of the legal profession – matters arguably outside the legislative guidelines. The VISs were not extracted in the transcript and copies were not available from the court.

objectionable parts on a copy of the statement for the judge to consider and argued that "they don't relate to matters that are for legitimate comment in a victim impact statement." The judge read the statement and found the last paragraph was not admissible although he also remarked that the Crown "was worrying about" evidence that the sister had given at the trial.

6.2.3.4 Defence Handling Victim Impact Statements

This somewhat muted response to the reception of VISs by the defence appeared to be a feature of sentencing submissions.[105] In the majority of cases (n=13), once submitted and dealt with, VISs were not referred to again during the course of the hearing. Of those defence counsel that referred to VISs, only one spoke to his submission with respect to the weight to be given to the VISs in sentencing (hearing 11).[106] This submission was lengthy and the only one of its kind observed. Counsel began by explicitly recognising the "devastation on those who loved the deceased" and extending "every sympathy and understanding to the family" on behalf of the offender. Nevertheless, he reminded the court about the law in *Previtera* and submitted that this was not a case where the tensions revealed by Court of Criminal Appeal in *Berg* by virtue of ss 3A and 21A of the legislation should be resolved "although clearly that day will come" [5.4.2]. No submissions were made as to why this was not such a case. Neither the Crown nor the judge responded to this submission in the courtroom and it is noteworthy that this submission was not addressed in the final sentencing judgment.

Another defence approach was to link the offender's acknowledgment of and/or response to the VISs with offender remorse. A detailed discussion of offender remorse is set out below (6.2.5). The point to be made in this section is that in

[105] This category emerged in my analysis as a result of a conversation with a public defender who told me that because she had no idea how to deal with VISs, she tended to ignore them in her sentencing submissions.

[106] I have not been privy to the written sentencing submissions in any of the hearings observed and acknowledge that it may be that written submissions were made on this issue. If that was the case, no reference has been made to those matters in open court or the subsequent sentencing judgments.

hearings 4, 7, 11 and 18, the defence referred to the remorse demonstrated by the offender in relation to the family victims in submissions. For instance in hearing 11 where the offender apologised to the deceased's family in direct evidence, counsel submitted:

> *In my submission, both through the reports and from the evidence that the accused has given both at trial and today, your Honour would find that he is clearly remorseful and contrite…your Honour would be satisfied that he is genuine.*

6.2.4 Indirect Victim Participation

Submitting a written VIS or reading that statement aloud to the court provided family victims with their only opportunities for direct participation in the sentencing hearing. This study finds that family victims also participated indirectly as conceptualised in the introduction to this thesis at 1.2.1.2. In some cases, the sentencing judge and/or the parties recognised and acted upon the interests of the family victims in a manner that acknowledged them as stakeholders in the matter. Such actions included making some matters of evidence more visible to the audience, clarifying aspects of the law relating to sentencing and future steps in the legal process. This section discusses this form of participation by both sentencing judges and the parties.

6.2.4.1 Sentencing Judges

Some sentencing judges took steps to make matters of evidence more visible to the audience and presumably of interest to the deceased's family in particular. In hearing 16, the judge read the VIS from the deceased's sister aloud to the court and, in hearing 18, the judge arranged for the letter to the court from the offender to be read aloud. Similarly, in hearing 5, the sentencing judge used his authority to

have an agreed statement of facts read aloud to the court.[107] In that case, the oral VISs had revealed the victims' anger at legal processes, the lack of trial and also their lack of understanding of what had actually happened or how the deceased would be portrayed. In reply to a question from the judge the Crown said that the deceased's family had not received a copy of the facts but she would "distribute it to the members of the family and explain it to them". Although he recognised that reading the statement would take time, the judge decided that it was appropriate that the statement be read aloud to the court: "I am unhappy about matter of crucial importance being the subject of documents in a criminal trial". The judge went on to explain how the statement was formulated by the parties and said:

> *'Everybody who has an intimate knowledge of some part or other of a case will feel that the agreed statement of the facts leaves something out. That's because of the particular perspective that someone who is connected with the case has. However it is not possible for every case to become a Royal Commission of inquiry about either the victim or the accused.'*

When read aloud, the statement of facts revealed that the provocative conduct and mental illness of both the deceased and the offender had been significant contributing factors to the criminal events. The judge's action appeared to be a direct response to the concerns of the victims that had been expressed in their statements.

In hearing 8, another example of sensitivity to the concerns of victims was also demonstrated during a discussion of the evidence. In that case, the sentencing judge said to counsel: "As I recall it and forgive me if I'm repeating things that the family probably won't want to hear, but the bodies were cremated weren't they?"

In three matters the judge also took time to clarify the law relating to sentencing expressly for the benefit of the family victims who were in the public gallery

[107] An 'agreed statement of fact' is agreed by the parties to represent the facts and circumstances of the offence upon which the court is to sentence the offender (*Della-Vedova v R* [2009] NSWCCA 107).

(hearings 1, 5 and 12). For instance, in hearing 1, the offender had pleaded guilty to murder and it was clear from the evidence and discussion between the legal representatives during the proceedings that the offender's culpability was reduced because of a significant on-going mental illness. The following extract from the transcript demonstrates the judge's concern that the deceased's family should understand the basis on which the offender would be sentenced.

J: Do you have any argument with the assessment that this is of below mid-range seriousness?

C: I don't argue with that.

J: The deceased's family should understand, of course, that there are all sorts of murders in the law but everybody treats a murder the same, particularly when it's a murder of a family member, but there's a difference in sentencing a young man who has clearly got a mental illness and a young man who's a thug. So they should understand that the court has to be more lenient and more merciful with this young man than it might have been with someone else who killed their son. I'm just trying to indicate that they should understand that this is not the worst of murders because of the fact that the offender has a mental illness. Although that doesn't really make it any easier for them, I understand that, they have still lost their child, but they have to understand there is a difference in culpability and the way the court reacts to particularly a young man who has a severe mental illness and problems of immaturity involved.

C: Certainly some of the matters your Honour has raised I have discussed with the family and they understand that's the perception.

J: I'm not indicating anything, it's murder and another young life has been taken for no purpose whatsoever.

C: That's right, your Honour, it's a terrible waste but I think they understand the particular circumstances of this case.

J: I hope they do and all I can ask is that they do appreciate it's a difficult sentencing exercise because of those matters and the court will do its best.

C: I'm sure they understand.

With regard to future steps in the legal process, the interests of the family victims were referred to in two cases when setting a date for judgment. In hearing 12, the judge felt obliged to weigh the interests of the offender against the deceased's family. In adjourning the matter for sentence he said:

> *I want to spend some time reviewing, particularly the psychological material. While I appreciate that the family would wish the matter was over today, I do have to weigh up not only the family situation but the impact also on the…prisoner.*

In hearing 8, when organising a date for sentence the following exchange indicates that the judge was very keen to accommodate and include the deceased's family in the process. This was the only matter observed where the court organised a date for sentencing that was convenient to the deceased's family and also where the judge interacted directly with the family victim outside VISs.

> *J: Ms Crown, extended family of the [deceased], Mrs [X] are you going back to England next Sunday, is that right?*
>
> *C: Mrs [X] is.*
>
> *J: And I take it not intending to return?*
>
> *C: That's right.*
>
> *J: I will list this matter before me at 2 o'clock next Friday for judgment. I am not sure where it will be - obviously it will be in a secure court. If for some reason, it would have to be for some very good reason Mrs [X] I am not in a position to publish judgment next week I will make sure the Crown parties are informed but I am giving you my assurance, subject only to ill health, that a judgment will be published before you leave this country.*
>
> *Mrs X: Thank you ma'am.*

6.2.4.2 The Parties

The parties have less authority and opportunity to acknowledge and respond to the interests and concerns of the family victims in the proceedings. Nonetheless, in

some of the hearings observed, both the Crown and defence counsel responded to those interests in various ways. As already discussed above those actions include:

- The Crown ensured on two occasions that the family victims were able to read their VISs to the court before the proceedings were adjourned part heard (hearings 8 and 13). As a result, the family victims who had come to court prepared to present their statements were able to do so;
- The Crown read aloud the VIS of a family victim too distressed to do himself (hearing 7); and
- The defence counsel acknowledged the "devastation that the death of [the deceased] upon those who loved him" and extending "every sympathy and understanding" to the deceased's family prior to making a submission regarding the weight to be given to the VISs (hearing 11).

In addition, in hearing 5, the defence counsel expressed his sensitivity in relation to the feelings of the deceased's family. Responding to the judge's question about the deceased's mental illness and provocative conduct, counsel said:

> *I would like to think about your Honour if I could? I'm aware that this is an emotionally charged atmosphere and I don't want to be unfair or appear to be unfair to the deceased in any way and I have the utmost sympathy for his family, so I'd like to consider that and consider whether there was anything further that should be put before your Honour as to the deceased's condition which could be regarded as relevant. It may not need to be in the sense that the Crown has accepted the threats and the objective evidence.*

6.2.5 Offender Remorse

The aim of this section is to explore the nature and incidence of offender remorse as performed in the hearings observed. To do so, it is first necessary to distinguish between two concepts of offender remorse:

1. The legal concept of offender remorse in the sentencing hearing characterised in this thesis as offender-focused remorse; and

2. Offender remorse as a restorative element in the proceedings characterised in this thesis as victim-focused remorse.

6.2.5.1 Offender-Focused Remorse

Offender-focused remorse as conceptualised by sentencing law relates to evidence of contrition demonstrated by the offender and presented to the court in mitigation. If accepted by the sentencing judge as genuine, such evidence can reduce the severity of the penalty imposed. Section 21A(3) of the *CSPA* provides that in order to mitigate penalty, the offender must provide evidence of remorse that indicates he or she has:

(i) accepted responsibility for his or her actions; *and*

(ii) acknowledged any injury, loss or damage caused by his or her actions and/or made reparation for such injury, loss or damage.

Thus, the first aspect to note is that as conceptualised at law, the offender is not required to express remorse to the victim to successfully establish evidence of remorse to reduce penalty.

Remorse as a mitigating factor must be established by the offender on the balance of probabilities (*R v Olbrich* (1999) 199 CLR 270) and the degree to which the offender has demonstrated remorse, if at all, is a question of fact to be determined by the sentencing judge (*Alvares v R; Farache v R* [2011] NSWCCA 33, 65). According to the NSWCCA, "the key notion conveyed by the concept of remorse is a commonsense one...it is regret or sorrow for the wrongdoing" (*Georgopolous v R* [2010] NSWCCA 246, 11). Such remorse can be demonstrated by the offender through his or her sworn evidence or by other words and conduct such as an early confession, the provision of assistance to the authorities, statements to a probation and parole officer included in a pre-sentencing report, making reparation to the victim and/or letter of apology from the offender to the victim and/or to the court (*Alvares v R; Farache v R* [2011] NSWCCA 33, 66). The offender can also rely on evidence of his or her remorse as conveyed through the direct oral evidence of

third parties such as expert witnesses (*Sun v R* [2011] NSWCCA 99). While it is not necessary for the offender to give oral evidence of remorse to satisfy the section (*R v Butters* [2010] NSWCCA 1), evidence provided in documentary form such as a letter to the court or conveyed through counsel from the bar table may not be viewed by the court as particularly convincing (*R v Elfar* [2003] NSWCCA 358).

This thesis characterises the legal concept of offender remorse as 'offender-focused' because, essentially, it is evidence that is led to mitigate the severity of the penalty imposed on the offender. Though a contentious sentencing factor in legal scholarship (Bagaric and Amarasekara, 2001; Bibas and Bierschbach, 2004; Tudor, 2005), the cases suggest that a finding that the offender is remorseful is related to forward-looking goals relevant to questions of offender rehabilitation and desistance (*Ali v R* [2010] NSWCCA 35; Bibas and Bierschbach, 2004: 8).

6.2.5.2 Victim-Focused Remorse

Many scholars have suggested that in a restorative justice setting, the victim's recount of the effects of the crime can generate emotions such as empathy, remorse and guilt in the offender. According to Shapland et al (2006: 513) "it is the resolution of these emotions and feelings that create the opportunity" for the offender to acknowledge the harm caused by his or her actions and apologise to the victim. As discussed above at 2.2.1, Roberts and Erez contend that hearing VISs in a criminal justice setting might induce the offender to accept responsibility and apologise to the victim for that has been caused by the crime. This thesis characterises such offender remorse as 'victim-focused' because it is directed to the victim rather than the court.

6.2.5.3 The Nature and Incidence of Offender Remorse

Table 6.2 below charts the incidence and nature of offender-focused and victim-focused remorse in the hearings observed. Drawing on the elements of offender-focused and victim-focused remorse discussed above, a scale of offender remorse

has been devised that moves upwards through three distinct elements: responsibility for the crime, contrition for the killing and apology to the family victim for the harm they have suffered. The first four columns set out the nature and extent of remorse in each particular case and the final column indicates the court response to evidence of remorse.

Table 6.2: Chart of Offender Remorse

Case	Acceptance of Responsibility	Contrition	Apology	Court Response
1	Guilty plea to murder shortly before hearing due to commence; mental illness.	None	None	
2	Guilty plea (to accessory after fact to murder) offered at earliest opportunity.	None	None	
3	Not guilty plea to murder; convicted of manslaughter by jury on basis of substantial impairment.[108]	None	None	
4	Guilty plea to murder at earliest opportunity; alleged deceased provocation mental, physical and sexual abuse.	Oral evidence of offender: Q: How did hearing [VISs] make you feel? A: I was upset, terribly ashamed of my actions, and I couldn't believe that I have caused so much pain to someone. Q: Are you sorry for the fact that you killed [the deceased]? A: Yes. If I could, I'd go back and change it, not do it.	Oral evidence of offender	Not accepted: "I am not persuaded that this somewhat belated statement indicates any genuine contrition or even insight into the enormity of what he has done."
5	Charge of murder;	Oral evidence of	None	Accepted: "I am

[108] A finding of substantial impairment under s23A *Crimes Act 1900* (NSW) reduced a charge of murder to a conviction of manslaughter.

	Crown accepted guilty plea to manslaughter on basis of substantial impairment; alleged provocative acts of deceased	lay witness: "he is emotional and teary eyed when he speaks about it". Acknowledged pain caused.		satisfied that the offender is truly remorseful and contrite over what he did."
6	Guilty plea to manslaughter (unlawful and dangerous act) at earliest opportunity; alleged deceased used provocative words	Oral evidence of offender: "I am shocked that I have done it. I am fully aware of my emotions and where it has led me and the pain I have caused especially to family and friends". Oral evidence of lay witness.	None	Accepted: "I take the view that the offender has displayed remorse. He has expressed it to his mother and to others: and to a lesser extent, in court."
7	Charge of murder; Crown accepted (late) guilty plea to manslaughter (unlawful and dangerous act); shifted blame to co-accused alleged not the planner and instigator, alcoholic, dysfunctional family	Through counsel: "The offender instructs me that he wishes to apologise sincerely to the family of the deceased, to the court, to his parents and to the community generally."	Through counsel.	Not accepted: "This is not a submission that I am prepared to accept, not only because the offender was not prepared to frankly say so and be tested on his account...but because there is substantial evidence to the contrary."
8	Not guilty to murder No admissions.	None	None	
9	Not guilty to murder No admissions.	None	None	
10	Guilty plea to murder at earliest opportunity; intoxication, history of domestic violence	Oral evidence of offender: I am really very sorry for what I have done. I am just really really sorry for what I have done to [deceased]. Letter to court.	None	Accepted: "There is no question but that the offender is genuinely remorseful about his conduct".
11	Not guilty plea to murder (early offer to plead to MS); convicted of manslaughter on	Oral evidence of offender: "I am sorry, I am sorry. I feel for	Oral evidence of offender	Accepted to an extent: "I accept that there is some evidence of recent remorse

	basis of excessive self-defence.	[deceased's family] so much". Pre-sentence report.		although it is mixed with an element of self-justification".
12	Not guilty plea to murder (provocation/substantial impairment); convicted of murder; intoxicated; deceased alleged to be intoxicated and abusive.	Oral evidence of expert witness. Q: Has offender…expressed to you remorse for what he did? A: yes, consistently from the first time I saw him and it appears to be genuine remorse. He says that he wishes he could turn back the clock, that it hadn't happened, that the man hadn't died.	None	Accepted: "I am satisfied that the prisoner is remorseful".
13	Entered guilty plea to murder before hearing; mental illness; intoxication	Oral evidence of lay witnesses. Medical report Letter to the court.	None	Accepted: "The prisoner is genuinely remorseful for his actions...he is suffering substantially for his crime".
14	Not guilty plea to murder (early offer to plead to MS); jury unable to agree, Crown accepted plea to manslaughter on basis of substantial impairment. Alleged deceased violent and abusive.	Oral evidence of offender at trial.	None	Accepted:
15	Not guilty plea to murder (though accept responsibility for killing); convicted of manslaughter on basis of substantial impairment.	None	None	Found that the offender accepting responsibility for the killing did not demonstrate contrition but a willingness to facilitate the course of justice.
16	Not guilty plea to murder (Crown refused to accept plea to aid and abet suicide); convicted of manslaughter (gross	None	None	

	negligence).			
17	Guilty plea to manslaughter (unlawful and dangerous act).	None	None	
18	Not guilty plea to murder (offer to plead to manslaughter); convicted of manslaughter on basis of unlawful and dangerous act; intoxicated; alleged self-defence and provocation.	Letter from the offender read to the court: He was "devastated" and said he was "sorry" to the deceased's family and his own family: "this letter comes from my heart".	Letter from the offender read to the court.	Accepted to small extent: "He (the offender) did not give evidence in the proceedings so the weight to be given to the letter is not great".

Responsibility or acceptance of guilt is at the lower end of the scale. This element relates to the extent to which the offender has 'faced up' to his or her actions in killing the deceased; the offender's account of his or her culpability at trial or during plea negotiation (Goffman, 1971: 109-110). Acceptance of responsibility is an element of both offender-focused and victim-focused remorse and analysis of the hearings has investigated the extent to which the offenders have distanced themselves from the crime by way of defence, justification and/or excuse (Goffman, 1971: 110; Tavuchis, 1991: 22-23). This element is also relevant to the conditions under which remorse is displayed in the hearing.

Contrition is mid-range on this scale and reflects acknowledgment of the harm caused by the offence and demonstration of regret and/or sorrow for the killing. Evidence of contrition is presented to the court by way of mitigation and can include an apology to the court for killing the deceased. While contrition can extend to an acknowledgment of the consequences caused to the deceased's family, in this thesis contrition is directed to the court and it is distinct from an apology directed to the family victim. An apology is at the top of the scale and it is conceptualised here as a communicative act containing the words 'sorry' or 'apologise', or other explicit acknowledgment of harm caused to the deceased's family (Szmania and

Mangis, 2006: 338; Shapland et al, 2006: 514; Goffman, 1971: 109; Tavuchis, 1991: 22).

With regard to acceptance of responsibility, two offenders denied responsibility altogether (hearings 8 and 9) while the remaining offenders provided accounts that sought to explain, justify or mitigate their culpability in the killing. In some six matters (4, 5, 6, 12, 14, 18) the offenders attempted to shift some of the blame for the crime to the deceased on the basis of provocation and/or self-defence; in hearing 7, the offender attempted to shift the bulk of the blame onto his co-accused on the basis that the latter was the planner and instigator of the crime. Many offenders also sought to mitigate their culpability for a variety of personal circumstances including: mental illness (n=6) and intoxication at the time of the killing (n=4).

Consistent with extant research, apology did not play a significant role in the hearings observed and most of the remorse demonstrated can be characterised as offender-focused (Bibas and Bierschbach, 2004; Szmania and Mangis, 2005). The data in table 6.2 shows that evidence of contrition with regard to the killing was led by offenders in just over half of the matters (n=10) in a variety of forms: direct oral evidence by offenders (n=5); letter from offender to the court (n=3); direct oral evidence of third parties (n=4); written reports of third parties (n=2); and by counsel (n=1). An example of contrition by oral evidence of the offender is provided in hearing 10. In that case, defence counsel led the offender through the following exchange in examination-in-chief:

> *Q. How do you feel about what you have done to the [deceased]?*
>
> *A. I am really very sorry for what I have done. I am just really really sorry for what I have done to [deceased].*

The data in table 6.2 also reveals that evidence of remorse was accepted by the judge in six cases, and to a limited extent in two others.

It can be seen that in four matters, the offender used words in his or expression of remorse that indicated he or she was apologising to the family victims or acknowledging the harm that was caused to the deceased's family (hearings 4, 7, 11 and 18). Only in hearings 4 and 11 were these words uttered by personally by the offenders; in hearing 7 the apology was offered through defence counsel while in hearing 18, the offender's apology was contained in a letter to the court.

6.3 Summary

In summary, the findings indicate a low level of family victim integration in the sentencing hearing unless the family victim elects to read his or her VIS aloud to the court. Reading a VIS aloud was the only opportunity for family victims to speak and be heard in the hearings and the numbers indicated (n=30) that a significant number of family victims elected to be heard in this manner. To do so, family victims came 'inside' the hearing, entered the central performance zone from the public gallery and read their statements in accordance with presentation conditions established and controlled by the sentencing judge. The similar sequence of events in each hearing reveals the clear demarcation of VISs from the rest of the hearing. In almost each case, VISs were read aloud to the court before the hearing 'proper', that is, before the parties introduced evidence and submissions on sentencing were heard. In so doing, family victims' concerns revealed in their VISs were kept separate from the legal 'business' of the hearing, the determination of an appropriate penalty in the circumstances.

The response to the VISs and the impact of VISs on the ambience of the courtroom will be considered in more detail in the following chapter. For now it is noteworthy that once the VISs were presented to the court, they were not referred to again in the majority of matters. Aside from one matter where the relevance of VISs to penalty was referred to in submissions, if VISs or family victims were referred to all, it was in connection with establishing the offender's remorse; a matter in

mitigation of penalty. Offender remorse, however, was not a major feature of the hearings observed and a direct oral apology was made by the offender to the deceased's family in only two matters observed.

Each hearing adopted a similar form and sequence and followed an orderly procedure. In their occupational roles, the key legal players conducted themselves with dignity and restraint; the audience (including family victims) complied with implicit behavioural norms befitting the formality of the event and sat quietly at the back of the court in the public gallery watching. Only in one hearing was there disorder in the public gallery caused by family victims.

Family victims are 'outsiders' to the business of the hearing; they are not parties or quasi-parties; they are not legally represented and, by virtue of their location in the public gallery, they are physically excluded from the action. While the courts might be open to the public in celebration of the principle of open justice, there is no onus on the legal players to include the family victims in the unfolding of the evidence, the submissions or to explain what was happening. Family victims sat behind the key actors as the hearing unfolded. The 'civil inattention' with which they were regarded by the key players indicated that in most cases their involvement in the hearing was limited to VISs and 'audience participation'. Of course, that was not the case in all matters and as indicated in section 6.2.4, judicial recognition and acknowledgement of victim interests and concerns suggested a victim involvement in the hearings beyond that of 'audience participation' at least in those cases.

The following chapter turns to an analysis of the content and presentation of the oral VISs in the hearings.

7. A Narrative Analysis of Victim Impact Statements

The findings presented in the previous chapter indicate that the vast majority of family victims elected to read their statements aloud to the courtroom. This chapter aims to provide a rich picture of this form of family victim participation through an analysis of the content and presentation of the statements in the courtroom.

As foreshadowed in chapter four, this analysis sets out to explore the 'told' and the 'telling' of 24 VISs that were read aloud.[109] The chapter is divided into four parts. Part one explores the narrative environment of the VISs focusing on those factors that shape the statements before they are presented to the court. Part two provides an overview of the content of the VISs. In this part, I identify and categorise the various factors that were addressed by the family victims in their statements. The focus of part three is on the 'telling': how the family victims organised the factors into narratives and the tone of the statements. Finally, part four presents an analysis of the 'performance' of the VISs.

7.1 The Context of Production

Victim impact statements must be interpreted and understood in the light of their production context because "telling and writing stories is invariably situated and strategic, taking place in institutional and cultural contexts with circulating discourses and regulatory practices, always crafted with an audience in mind" (Reissman, 2008: 183). The production context shapes the statements that are read

[109] This sample of VISs comprises those for which I received copies from the Court.

aloud in court and this part addresses three significant aspects of production of VISs:

- Preparation of VISs;
- Purposes and intended audience of the VIS prepared; and
- Filtering those VISs before they are submitted in the courtroom.

7.1.1 Preparing a Victim Impact Statement

Victim impact statements are not 'free writes' - family victims cannot write what they please. The statements are bounded by a variety of legal and personal constraints. The foremost institutional constraint is the law**.** Chapter Five sets out the legal restrictions on the content and presentation of VISs in NSW. Despite these restrictions however, there is no form or template for the construction of VISs and victims are required to use their own words to recount the impact of the offence on them and their families. At the outset then within the legal frame, it is the experiences of the writers, who they are and what has happened to them, which the statements produce (Bandes, 1996: 384). Roberts and Erez describe such victim-authored statements as reflecting "the true voice of the victim" (2004). The importance of the uniqueness of victims' experiences is emphasised by the information package produced for victims of crime by Victims Services: "The crime itself and the impact of the crime are different for everyone. This is why your victim impact statement must be written in your own words" (2011: 6).[110] As a result of this individual approach, the oral VISs varied considerably in length, format, writing, style and content, representing the individual experience and ability of each victim.

Many of the VISs commented on how difficult it had been for the authors to find the right words with which to express their feelings. The interview data indicated that preparation of VISs is time-consuming. Those participants who submitted a VIS told me they spent considerable time crafting their statements. Phillip was pleased

[110] Victim Services is part of the NSW Department of the Attorney-General and Justice.

that he and his family had “ages to prepare” because “for months I thought about what I would say”. Laura put a great deal of effort into her statement because she felt “I had to get it right...it had to be right. I spent so much time on the language because I really wanted to get across the loss, that terrible loss... and I just wanted people to know what it was like”.

Resources are available to family victims to assist them in the preparation of their VISs. The information package by Victims Services provides considerable guidance including the names and contact details of relevant agencies; all but two victims interviewed found the package useful.[111] The information package also includes a template cover sheet that can be attached to the VIS. While the use of this cover sheet is optional, the formal identification information it conveys is not and will need to be provided in the VIS submitted to the court.[112] The interview participants also commented on the extensive assistance that they received from the HVSG and also, in two cases, the Witness Assistance Service (WAS) in the ODPP. For example, a counsellor from the HVSG explained to Ted how to prepare his statement and once completed, it was typed up for him in the office. Similarly, Josephine wrote her statement in the HVSG office so her counsellor could help her. Such assistance will also shape the final version of the statement. The influence that victim support groups might have over the content of VISs was demonstrated in remarks made by one of the judges observed. In hearing 16, after ruling parts of two VISs submitted inadmissible, the judge remarked:

> *Now, it's about time that those persons who assist victims to make impact statements are aware of the purpose of a Victim Impact Statement and that they don't lead to this situation where it's for this court to have to, in some*

[111] The remaining two victims were involved in the sentencing procedure during the 1990’s and at that time there was no information package available to them.

[112] Regulation 10 of the *Crimes (Sentencing Procedure) Regulation 2010* (NSW) provides that VISs must: identify the name of the victim or victims to whom it relates as well as the name of the primary victim and the nature of the relationship between the family and primary victim; set out the name of the person who prepared the statement; be signed and dated by the person who prepared the VIS; and indicate that the victim or victims do not object to the statement being given to the court.

way, deprive a victim of making statements that they wish to make in the court.

7.1.2 Purposes of Victim Impact Statements

Narratives are intended to persuade an audience of their content (Reissman, 2008) and thus, the purpose and intended audience of the VIS are major factors that shape the content and presentation of the statement. Because I interviewed only one family victim who also participated in a sentencing hearing observed (Laura, VIS 1A), my findings in this regard are not intended to reflect the subjective intentions of the remaining family victims observed. The findings in this section are drawn largely by implication from the content and language of the VISs presented in the hearings and supplemented with data from the interviews and extant research. In Chapter Two, the purposes for submitting a VIS were broadly categorised as being instrumental or expressive and this section will use these categories to explore the purposes of the statements.

7.1.2.1 Instrumental purposes

For this study, VISs are prepared to serve an instrumental purpose when the intention of the writer is to provide information that will influence the penalty imposed. Although the law set out in Chapter Five makes it clear that VISs from family victims do not influence penalty in NSW, nonetheless the wording of two VISs read aloud to the court suggested that the writers were motivated to influence sentence. The most overt of these statements was VIS 8B, submitted by the brother of the deceased under the heading: "Impact statement on behalf of family of [deceased] for *consideration* in the sentencing of their murderer [name]".[113] It was a short statement and predominantly concerned with a comparison between worthiness of the deceased victims – "both had mothers, brothers and sisters who could not even to begin to put a value on their lives" – and the offender, a man "who holds human life in so little regard and showing no remorse for his actions will

[113] Italics added for emphasis.

be taken out of society to prevent him from ever putting a dollar amount on a person's life again". When he had finished this comparison, the family victim said to the court: "When Her Honour...hands down his sentence I hope he [sic] will appreciate the true value of taking [deceased's'] lives, as we the family of [deceased] believe he deserves every minute he will spend behind bars."

Again, in VIS 13A, the deceased's mother had been particularly critical of the offender who was well known to her. In closing she told the court: "What [offender] has done is unforgiveable. I want him to suffer for what he has done to [deceased]. I am asking for justice for my son."

It would not be surprising, however, if more of the victims observed had prepared their statements wanting to influence penalty through their VISs despite knowing (or supposedly knowing) that the law decrees otherwise. Three of the family victims interviewed said they had prepared and presented their statements hoping or anticipating that those statements would influence penalty. For example, Fiona said candidly that although she knew that the judge was not supposed to take account of her VIS in sentencing:

> *I was hoping that the judge would hear it and with mine, I was hoping that he would think that this person here has taken away a father, he's left three little girls without their father and then just hear the hurt in my voice and how I've been hurt and give him a bit longer in jail.*

7.1.2.2 Expressive Purposes

As discussed at 2.2, VISs are said to serve expressive purposes when the victim can express his or her feelings about their loss and the effect of the crime. Rock found in his study that while the "concrete object" to be achieved by preparing a VIS was "not...entirely evident" in the guidelines "it may be presumed that one important purpose was catharsis" (Rock, 2010: 209). Similarly in this study, analysis of the VISs observed suggests that the intentions of the family victims were to express their feelings in relation to the loss of their loved one and the impact of that loss on their

lives (n=23).[114] In hearing 5, for example, the deceased's brother said: "I am here to talk about, as a victim, how this crime has affected my family and I as well as the impact it has had on my life and the life of my family and friends." This finding is also consistent with research findings reviewed in chapter two at 2.2.3 and the interview data. During her interview, Cathy said that "I wanted them to understand the whole impact of the crime...it doesn't just stop with [deceased's] death." She went on to say, as did most of the victims interviewed, that the VIS was a valuable tool for victim participation: "it's the only opportunity people like us get to be able to talk, tell what it's like."

Both Rock (2010) and Szmania and Gracyalny (2006) found that an expressive purpose of most of the victims in their study was to use their VISs to defend the deceased's reputation and present him or her as an important and valued citizen of the community. In Rock's study, the facts of the crimes involved some provocative behaviour on the part of the deceased, three of the four deceased victims had prior convictions for violent offences and one was also on bail awaiting trial for an offence of violence at the time of his death. Most of the victims in Szmania and Gracyalny's study had been prostitutes targeted by a serial killer. Rock found that the family victims he interviewed believed that "the victim had been maligned, reified and belittled; they as his family had been maligned" in the trial (215). In these circumstances, Rock argued that the VIS:

> *was above all a tool formally to redeem the family, and to restore respect and normalise the dead, to make him again appear through biographical construction as a rounded, admirable figure, free of, or despite, the taint that had been levelled against him* (2010:216).

This purpose was also revealed in the VISs in four cases observed (hearings 5, 11, 12 and 13). In hearing 12, for example, the deceased had been extremely intoxicated

[114] The exception was VIS 8B discussed above where the statement was short and primarily concerned with criticising the offender and penalty. Having said that, the family victim did describe his family's loss: "As we the family of [deceased] will spend the rest of our lives remembering them as our daughter or son, brother or sister, each time we do this pain of what happened to [deceased] will always come back and we will shed a tear."

at the time of his death and his conduct toward the offender had been found to manifest an element of provocation and a mitigating factor under s21A(3)(c) of the *CPSA*.[115] His father told the court of the deceased's positive qualities and importance to his family.

> *Our family is no longer strong with the loss of our son...[deceased] as a brother to his three sisters, was always supportive of what we wanted to with our lives. He always encouraged us to do whatever made us happy. With his unselfish generosity and his unwavering loving support [deceased] was always there when he was needed, in good times and in bad. That support and dedication to family has, and will continue to leave a void in our lives. He is and will continue to be deeply missed.*
>
> *From our daughters perspective it also saddens them to bury their only brother, watch their parents suffer in pain, and realising that there is nothing that you can do to take that away. Knowing that [deceased's] children will have to suffer a life without their father, and the joys and security that a father brings to a family, is devastating and should never have to be so* (VIS 12B).

This finding is also consistent with the interview data. For instance, Coral had been concerned at the negative portrayal of her deceased brother during the trial: "the jurors must have gone home and told their families that Chopper Reid's son was on trial". Her VIS was used "as a ploy to get him [deceased] some respect...he had struggled so hard to get off drugs, all he wanted was respect and he had a hard time getting any."

7.1.3 The Intended Audience

Given that the most common purpose of submitting a VIS was to express the authors' feelings in relation to the offence and their loss, the next issue to consider is to whom these VISs were addressed. The legislation provides no guidance in this regard and the information package does not expressly identify the intended

[115] Provocation in this context if proved, serves to mitigate the penalty imposed on the offender.

audience of the VISs beyond references to the victim informing "the court". The ambiguity of the audience suggested by this wording is reflected in the majority of statements that were not addressed to anyone in particular (n=15). Of the nine statements remaining: one was addressed to the judge specifically (VIS 5B);[116] three specifically addressed the judge at different stages; two were addressed to the offender directly (VIS 11A, 11C); and three addressed remarks to a generic 'you'.

Laura's VIS (VIS 1A) was one of those VISs that did not address anyone expressly. When I asked her during the interview with whom she had been trying to communicate, she said that she had been speaking to the offender's mother and defence counsel in particular as well as anyone else in the courtroom except the offender – she was concerned that the offender would show no remorse and this would distress her even further. My observations suggest that as they were reading their statements aloud, many family victims by non-verbal cues appeared to address remarks to certain people in the courtroom – usually the judge or the offender. For instance, on at least seven occasions family victims appeared to be speaking to the offender much of the time by looking at the offender as they made remarks that were relevant. In hearing 10, one family victim looked at and directly addressed the offender after he had finished reading his VIS: "You'll suffer [offender]". Even if not looking at the offender while speaking, family victims might still have been speaking to the offender. One of the interview participants, Susan, said that although she did not look at him,[117] she spoke "loudly and clearly" because she wanted the offender to hear what she had to say: "I wanted him to understand it is a big loss for us". These findings are also consistent with Rock's research that the family victims in his study variously addressed the judge, the offender and the wider world (Rock, 2010).

[116] In letter form, the VIS commenced "Dear Sir" and then posed the question: How does a man tell another man...".

[117] Susan told me that she didn't know that she could look at people in the courtroom as she read her statement and if she looked up, she only looked at the judge.

7.1.4 Filtering Victim Impact Statements

In this study, 'filtering' VISs is the process of amending VISs before they reach the courtroom to ensure that they conform to the law. This filtering process determines "*which* narratives are appropriate" as well as "*how* these stories are told" (Bandes, 1996: 384). Because the law requires that VISs are tendered by the Crown, the Crown is the major filter. Prior to submission to the Crown, however, statements might also be filtered through other means such as family members and/or victim support groups. In hearing 5, for example, the deceased's brother told the court he filtered the statements of family members: "I have had to heavily edit those statements I have received, since families have a ridiculous limit on how much they can say" (VIS 5C). It was common among those I interviewed to have their statements reviewed by their counsellor at the HVSG and have changes made at this stage before going to the Crown.

Prosecutorial guidelines require the Crown lawyers to consult with family victims in relation to the preparation and presentation of VISs. Before the sentencing hearing, victims are asked to submit a draft VIS to the Crown for review.[118] According to the guidelines, the Crown must ensure that the VISs deal only with the impact of the deceased's death on the family and contain no offensive, threatening and/or harassing material. Many of the family victims interviewed had their statements amended at this stage. For instance, Fiona was told to rewrite that section of her VIS where she described her son's killers as "a bunch of murdering bastards". She told me "I wasn't happy but I had to change it otherwise I wasn't going to be allowed to read it out". Ted's statement also required amendment: "I had to modify it, she [DPP solicitor] told me the paragraphs and sentences to take out. I was a bit obstreperous about it because they should have been left in. It was my

[118] Those interviewed submitted a draft to the Crown before the hearing. The victims in all but one matter observed also appeared to have had gone through this process. Only the deceased's brothers in hearing 10 did not go through this process with the Crown. In that case, the Crown told the court that he had only received their VISs the morning of the hearing.

personal summing up of what had happened but she said I wasn't allowed to mention things like that".

In the hearings observed, several victims who presented their VISs also expressed their frustration at having their statement amended and not being able to say what they wanted (see below). Once the VISs go through this 'filtering' process with the Crown, copies are forwarded to the defence.[119] This seemed to be the practice in all hearings observed except hearing 10, where the Crown told the court that both the defence and the prosecution had received the VISs from the deceased's brothers on the morning of the hearing.

7.2 Overview of the Content of the Victim Impact Statements

The aim of this section is to identify the factors that were addressed by the family victims in their statements and provide a profile of the content of the VISs (Bryman, 2008: 612). Following the processes of coding and categorisation discussed in Chapter Four (4.4), the factors have been divided into categories under three broad headings:

- Impact of deceased's death;
- The deceased; and
- Inadmissible material.

7.2.1 Impact of the Deceased's Death

My approach to the analysis of the content of the VISs began with the legislative requirement that VISs should contain particulars of the impact of the deceased's death on members of the deceased's family.[120] Prior to coding the statements according to impact, I considered the sorts of issues that might be comprised in this

[119] Prosecution Guidelines 18.
[120] Section 26 *Crimes (Sentencing Procedure) Act 1999* (NSW).

category. Previous research by Booth (2001) and Rock (2010) had identified broad themes relevant to impact but the aim of this study was to produce a more comprehensive analysis. To this end, I began with the list of potential impacts set out below, generated from the information package, a resource provided to all family victims by Victims Services.

- Physical injuries, impact on health, medical treatment;
- Emotional impact and wellbeing;
- Psychological or mental health impact;
- Changes in your behaviour, attitudes, or how you think about things;
- Changes in your normal coping skills;
- Changes in your social life or impact on relationships with other;
- Impact on your financial or housing situation; education or employment.

Victims were further advised in the package that they might also include a little of their history and compare their life before and after the crime. Each VIS was coded for 'impact' factors based on the list above and then again for additional 'impact' factors that had emerged during this process. After coding the VISs twice, the 'impact' factors that came out across the statements were counted and categorised. The data is summarised in table 7.1 below followed by a brief discussion of each factor.

Table 7.1: Impact Factors

Impact	VISs[121]	Number	Percentage
Emotional wellbeing			
Feelings	All	24	100
Constantly in thoughts	1B 10A 11B 13A 5A	5	21
Grief Actions	1A 5A 18A 5D	4	16.5
Guilt	5C 10A 15A 11B	4	16.5
Anger	10A 11C 13A 5A 5D 10S 5C 11B	8	33
Fear/loss of security	8A 11C 12B 15A	4	16.5
Special nature of grief	1A 1B 5A 18A	4	16.5
Mental health			
Psychological problems	5E 8A 11A 11C 12A 18A	6	25
Psychiatric care	12A	1	4
Suicidal thoughts	12A 18A	2	8
Physical Health			
Illness	10A 12A	2	8
Physical wellbeing	7A 13A 18A 12A 10A 5D 5A 11C	8	33
Family			
Damaged family relationships	5A 5C 7A 8A 10A 10S 11C 12B	8	33
Impact on children	5E 7A 11B 12A 12B 1A 10M 10S 10A 8A	10	42
Impact on other family members	1A 5C 10S 12B 15A 18A 10A 10M	8	33
Impact on Parenting	10A 11B 12A	3	12.5
Impact on family events	5C 5D 18A 12A 12B	5	21
Social Life			
Changes in personality	1A 5A 5C 5D 8A 11C 12B 15A	8	33
Changes in social behaviours	1B 5A 5C 5D 11C 18A 5E 10A 10O	9	36.5
Changes in life plans	5A 11B	2	8
Hardships			
Financial	5C 5E 12A	3	10
Work (employed/own business)	5A 5C 5D 11A 12A	5	21
Housing	12A	1	4
Education	5C	1	4

[121] Each VIS has been identified according to which hearing it was heard (number) and the individual who made that statement (letter).

7.2.1.1 Emotional Wellbeing

Every VIS analysed referred to the impact on family victims' emotional wellbeing. In this category I distinguished feelings of grief and loss from feelings of anger, guilt and fear. Family victims described their feelings of grief, pain, loss, anguish, heartache, despair and sadness: "I miss him so much…I grieve for him every day". Whereas these feelings of grief were related to the death of the deceased, anger, guilt and fear were more likely to be associated with the offender, the killing or the legal processes.

The other factors identified as impacting on emotional wellbeing were: thinking about the deceased constantly (which could be both distressing and tormenting) and the actions taken by victims to assuage their loss, 'grief actions': "I was mad with grief. I had to have him with me and the closest thing I had was a photo taken at his brother's birthday dinner 3 days before he died. I had it hanging around my neck, close to my heart." In four matters, the family victims (all parents) spoke of the special nature of their loss: "the greatest fear of any parent – the loss of your child". In hearing 1, the deceased's father said:

> *I try to have as normal a life as I can but the grief is constant. I remember the first time I went to a Homicide Victims Support Meeting. People were still grieving after 12 and 15 years and I thought to myself: I don't want to be like that, I have to get through this, but I realise as time goes on what these people are going through. This type of grief is destroying and doesn't go away with time* (VIS 1B).

7.2.1.2 Mental Health

Mental health was a factor discussed in 25 per cent of the VISs. Family victims talked of suffering a range of mental illnesses as a result of the offence - post traumatic stress disorder, self-harm, panic attacks and depression – for which they had received counselling and took medication. Two family victims told the court that they had contemplated suicide. One family victim was so adversely affected by

mental illness that following a suicide attempt she was hospitalised for psychiatric care.

7.2.1.3 Physical Health

Serious physical illness was an issue for only two family victims. One family victim was so shocked and distressed as a result of her daughter's death that she suffered a series of heart attacks and required surgery (VIS 10E). Another referred to the "colossal physical toll" that she had experienced (VIS 12A). More general impact on physical wellbeing, however, was relatively common and encompassed sleeplessness, nightmares, weight loss and weight gain.

7.2.1.4 Family

This category comprises a variety of factors relating to the impact of the deceased's death on family life or family members. The destructive impact on family relationships was a significant issue. Families were variously described as "devastated", "wrecked" and "shattered" in the aftermath. A particular concern for 10 family victims was the impact on children, particularly their loss of a parent's love and care: "to have to bury our son and then to have to watch your grandchildren grow up without their father and the joys and security that a father's love and care, just absolutely breaks your heart"(VIS 12B). For three family victims, the adverse impact on their parenting was a serious problem. For instance, in hearing 11, the deceased's partner admitted that her daughter "had suffered because for a long time I have been so angry, hurt and empty, and couldn't pull myself together to do things with her because I wanted to be shut away from the world" (VIS 11B). Several family victims were concerned about the destructive impact on parents, partners and siblings: "my family is dying a slow, painful death as a direct result of [offender's] actions" (VIS 5C). Finally, five family victims spoke of the detrimental impact on family events such as birthdays, wedding anniversaries and Christmas: "I know that whenever our family has a birthday,

wedding or Christmas, it will always have a sad side to it…to date we haven't really been able to celebrate anything without thinking of who is missing" (VIS 5D).

7.2.1.5 Social Life

The factors in this category relate to changes in personality, social behaviours and life plans. Personality changes were a major issue for many family victims who described themselves as "not the same person anymore". Other personality changes included being "short-tempered", "over-sensitive" and "distrustful". The most common change in social behaviour was avoiding social contact: "I avoid going to places where [deceased] used to go fearing that we might see someone we used to know. I find it easier to avoid people than to hear the inevitable question, 'how are you going?'" (VIS 1B). In hearing five, the identity of the offender as a Vietnam Veteran had a major impact on the deceased's brothers. Both of them recounted the different manner in which they now treated Vietnam veterans: "As a proud Australian I am truly ashamed that at the Dawn ANZAC Service after [deceased's] death, I turned my back on some Vietnam veterans in motorcycle gear. I wish I could go back and apologise to them" (VIS 5C). The final factor in this category refers to changes in family victims' futures including changes to retirement plans and family planning documented by two family victims.

7.2.1.6 Hardship

The factors in this category relate to finances/income, work, housing and education. Poor emotional and/or physical wellbeing interfered with five family victims' ability to either run their own business or perform properly in their employment. As a result, two of these victims were forced to close their businesses. The financial hardship was associated with being unable to work.

7.2.2 The Deceased

As explained in Chapter Four after the 'impact' analysis was finished, I went back to the data and coded and categorised the remaining content of the statements in light of emerging themes and factors that had been identified (4.4). For ease of discussion these categories are divided under two headings: 'the deceased' and 'unlawful material'. The data relating to the deceased is summarised in Table 7.2 below. A discussion of the factors that are comprised in the categories follows.

Table 7.2: Factors Relating to the Deceased

The Deceased	VISs	Number	Percentage
Deceased's death			
Learning of death	1A 10S 10M 18A 5D 12A 12B 11C	8	33
Viewing the body	1A 10S 11A 11C 12A 18A	6	25
Funeral	5A 10M 18A 12A 10S	5	21
Witnessing the killing (primary victims)	11B 5E	2	8
Deceased as a person			
Positive qualities	1A 1B 5A 5B 7A 8A 8B 10M 10S 10A 10T 11B 11A 11C 12A 12B 13A 15A	18	75
Negative qualities	5A 5C 15A 5E	4	16.5
Relationship with the deceased	1A 5B 5A 10M 10S 10O 10C 10T 11A 11C 11B 12A 12B 15A 13A 18A	16	67
Anecdotes	1A 1B 10S 10A 12B 5A 15A	7	29
Deceased's Loss	1A 5A 7A 10M 10S 13A 8B	7	29

7.2.2.1 Deceased's death

Consistent with the findings of previous research (Booth, 2001), several VISs addressed the actual dying and death of the deceased. Two family victims who witnessed the killing described the deceased's dying. A number of family victims told the story of learning of the deceased's death: "I can still remember that

morning vividly. I heard Mum cry out my name at the top of her voice…I ran downstairs to have Mum collapse in my arms, crying, telling me that someone had shot [deceased]" (VIS 5D). One quarter of the family victims described their experiences at the morgue viewing the deceased's body. Some descriptions were graphic and others poignant: "At the morgue I said to him all those things you can't possibly say to a 19 year old teenage boy. How much I loved him and hoped that this would be the start of a long and beautiful sleep" (VIS 1A). The funeral was also a significant factor for many victims who talked of how many people came and the tributes that were given.

7.2.2.2 Deceased as a person

The deceased as a person was a very important factor in previous research (Booth, 2001; Rock, 2010) and also for the vast majority of family victims in this study. Eighteen VISs addressed the deceased's positive personal qualities including descriptions of the deceased as being generous, ethical, caring, physically attractive, loving, and good-humoured. The deceased was remembered in a variety of ways: "a devoted husband and father"; "loyal to his family and many friends"; "a loving son"; "a hard worker"; "honest, trustworthy loving mother and person"; "valued citizens of the community"; "a happy, kind-natured kid". Many victims expressed pride in the deceased's achievements during life and also posthumously. In hearing 10, the deceased's mother was proud that both the deceased's "high school and primary school placed plaques in her memory. There is now the [deceased's name] Award recognising a student who shows a big effort at school" (VIS 10E). It was more unusual for family victims to speak of the deceased's more negative personal characteristics and this occurred in only two matters – hearing 5[122] and hearing 15.[123] These family victims also stressed the deceased's positive qualities.

[122] Mental illness and drug use.
[123] Drug use.

Anecdotes or stories about the deceased were told in seven VISs; in one of those VISs, 20 separate stories from various stages of the deceased's life were recounted (VIS 5A). The final factor in this category, the family victims' relationship with the deceased, was an important issue in 16 VISs. Family victims spoke of their relationship with the deceased, both its nature – "My son … my first child, a true miracle" (VIS 1B) – and its quality – "[the] relationship was strained at times, but the deep love between a father and his son wasn't far beneath the surface of those harsh words" (VIS 5B).

7.2.2.3 Deceased's loss

This factor reflected the distress of several family victims that in dying prematurely, the deceased had lost a variety of life opportunities: "[deceased] had so much to live for after working so hard to achieve what they had financially"; "[deceased] hadn't lived his life at all"; "robbed of getting his life on track". In hearing 7, the deceased's father described his daughter's loss: "for the school plays she won't see, for the school formals she won't attend, for the 1st day of kindergarten to year 12 that she will never see…for all the scrapped [sic] knees that she will never kiss better" (VIS 7A).

7.2.3 Inadmissible Material

This category comprises factors that do not relate to the impact of the deceased's death on the family and are therefore outside the legislative guidelines.[124] The data is summarised in table 7.3 below followed by a discussion of the factors.

[124]Family victims are also expressly advised in the information package to avoid discussing court outcomes or the offender.

Table 7.3: Inadmissible Material

	VISs	Number	Percentage
Penalty	13A 12A 7A 5B 11A 10M 10S 10C 10A 5B 5C 7A 8B 11A 13A	15	62.5
Offender	8B 13A 10S 5B 5C 11A 11B 11C 15A	9	37.5
The killing			
Circumstances	18A 12A 10M 10S 1B 5B 5C 5E 11C 13A 12B 5A 5D 8B 15A 11A	16	66.5
Characterisation of the crime	5A 5B 5C 11C 11A 5E	6	25
Criminal Justice			
Legal processes	12A 5A 5C 11C 13A	5	21
Victims' rights	12A 10S 5A	3	12.5
Editing VISs	5A 5C 10S	3	12.5

7.2.3.1 Penalty

This was a key theme identified in the VISs analysed by Szmania and Gracyalny (2006) although in that study victims were permitted to make penalty recommendations. In NSW, such material is inadmissible and although none of the family victims in this study actually made a recommendation, nonetheless, over half of the family victims did refer to the penalty to be imposed. Comments made included:

- "I'm asking for justice for my son" (VIS 13A);
- The wife of the deceased victim in hearing 12 wanted her children "to see justice being done, that there is punishment for wrongdoing, that the law protects us" (VIS 12A);
- "We no [sic] this letter cannot influence you in any way, but please remember the pain and heartache that we suffer everyday" (VIS 7A);
- In hearing 10, the deceased's brother said that the offender "should be made to suffer like he has made my sister and my family suffer";

- "I want the community to feel safe, not scared to walk the streets. You must realise that it could be your son next time, and no man should have to go through a hell like this" (VIS 5B); and
- In hearing 11, the deceased's sister asked the judge "to stand as a champion for social justice and deliver a sentence that will deter other would be killers from destroying more lives" (VIS 11A).

7.2.3.2 Offender

Consistent with findings by Booth (2001) and Szmania and Gracyalny (2006), a substantial number of family victims expressed their feelings about the offender and characterised him in various ways including as an "evil person" and "cowardly". For instance, the deceased's brother in law in hearing 8 described the offender as a person "who holds human life in so little regard and showing no remorse for his actions" (VIS 8B).

7.2.3.3 The Killing

A large majority of family victims referred to the circumstances of the killing in terms such as: "brutal" and "senseless", "a despicable act", "vicious execution", "callous and cruel" and "a heinous crime". In hearing 18, the deceased's mother asked the court to remember that her son had died as a result of "21 stab wounds, not one or two".

The other factor in this category refers to six VISs in two cases, where the family victims referred to the killing as a 'murder' when the offender had in fact been convicted of manslaughter. This would ordinarily be regarded as a serious breach of the sentencing law (*de Simoni*) and victims are advised in the information package that in their VISs they can only refer to the offence with which an offender has been convicted.

7.2.3.4 Criminal Justice

This final category encompasses matters relating to criminal justice processes. Critical comments in relation to aspects of legal process were made in five VISs and addressed a range of issues including access to bail and appeals. A significant source of resentment for family victims in two matters (hearings 5 and 10) was being unable to say what they wanted in their statements (presumably a reference to the 'filtering' of VISs discussed above). In hearing 10, the brother of the deceased told the court: "we should be able to speak…straight from our hearts and mouths, not told what we can write and to read from a piece of paper" (10E). The final factor identified in this category was reference to the rights (or lack of) for victims in the legal process. The views of the four family victims who made reference to rights can be summed up by the deceased's wife in hearing 12: "the family as silent victims have no control of the justice system" (VIS 12A).

7.3 Narrative Analysis

According to Reissman, "narratives are strategic, functional and purposeful", designed to be persuasive while achieving certain ends (2008: 8). The VISs heard in this study did not merely list or 'report' the factors identified above at 7.2; the statements presented an evaluation of the bereft state of the family victim authors, aptly described as "emotionally searing accounts" (Logan, 2008: 736; see also Rock, 2010) in a storied form. The content of the VISs was presented in particular narratives that have been identified as follows: pain and suffering, memorialisation of the deceased, condemnation of the offender and disempowerment. The features of each narrative will be discussed.

7.3.1 Narratives of Pain and Suffering

In this study, all but one of the VISs described family victims' grief and devastating loss.[125] Such "narratives of pain and suffering" (Joh, 2000: 25) expressed in highly subjective and emotional language, recounted the loss, grief, pain, hurt, anger, guilt and/or fear that had been suffered by the family victim as a result of the offence. In hearing 1, for example, the deceased's mother eloquently described the nature of her continuing grief:

> *I can go for at least a day without crying for him and twice since it happened I felt something close to approaching the person I once was. At first when this happened I thought that maybe life was becoming more bearable but it doesn't last. It is always there waiting to knock you down. You don't know when it will happen and may not be related to any particular event or time. It is the enormous wave of grief that suddenly engulfs you and it's as if you can't breathe. You are so overwhelmed by the blackness of it, that you feel you are going to drown in it, that you will never come out the other side. The pain of losing [deceased] is something that I will never get over. My whole life is lived with this terrible burden of sadness that underlies everything that I do. I think about him all day every day and I will until the day I die. When the longing for his physical presence becomes too hard to bear, I find that I can put my face into his baseball cap and still smell him* (VIS 1A).

In hearing 5, the deceased's father used a different technique to try to explain his grief to the judge:

> *How does a man explain his feelings to another man when he has lost his son?*
>
> *Does he tell you that it has been 1 year 7 months 9 days and approximately 2 hours since his son was brutally murdered?*
>
> *Should be embarrassed to say that he has shed tears each and everyone of those days?*

[125] VIS 8B was the exception. This VIS was relatively short and while it did refer to the pain caused by the offence, the focus of the statement was directed to the heinous nature of the offender's actions.

> *Can he admit to cowardly staying up late most of those nights because he can't bear to hear his wife crying herself to sleep?*
>
> *How does he describe the daily agony of walking past or driving over the scene of this vicious execution?* (VIS 5B)

A common feature of these narratives of pain and suffering was stories of family victims dealing with grief, their "survival mechanisms" (VIS 1A). For instance in hearing 18, the deceased's mother told the court that "grief can make you do some irrational things":

> *On the first anniversary of his death in December last year, the hours leading up to when he died at four in the morning felt like a countdown. I couldn't rest, so I went to the cemetery that night and as the gates are locked at sunset, I climbed over the fence, found his grave in the dark and just sat with him. The clouds moved away and a big bright moon came out and it was just the two of us there. It felt like he was saying "You're here Mum" and I stayed with him till the sun came up, it was something that finally gave me some peace* (18A).

In hearing 5, the deceased's brother described the manner of his parents' tending his brother's grave:

> *Their ... life now seems to be going to work and then trying to be busy enough not to think...It is pathetic to see my parents going out to Forest Lawn to tend [deceased's] grave multiple times per week. Dad's car looks like a mini Jim's Lawn Mowing Service. It has everything from a small lawn clipper, watering cans, grass treatment products, lawn chairs, not to mention weedkillers and a vast array of different cleaning products to keep the headstone clean. They have an entire routine that they go through...it is sad beyond words because all they feel they can do to honour [deceased] and keep his memory alive, is to have the shiniest and best kept plot in the cemetery* (VIS 5C).

These narratives of pain and suffering reflect Minow's argument that VISs tend to focus on certain emotional reactions associated with victimhood such as rage, helplessness and fear: "victim stories…often adhere to an unspoken norm that prefers narratives of helplessness to stories of responsibility and tales of

victimisation to narratives of human agency and capacity" (Minow, 1996: 32). In hearing 8, for example, the deceased's sister told the court that "not only were [deceased's] lives taken, but also part of me and the beliefs I was taught as we grew up together were destroyed":

> *I have become a shell of my former self, seemingly in a body that is not reminiscent of mine at all...I was plunged into a world of trauma where my husband and our children paid the ultimate price, the breakdown of our marriage and a family shattered by circumstances. We were starved and deprived of life's little luxuries 'of being a family unit' as I began physically shutting down!! How could I possibly be there for anyone consumed as I was by feelings of despair, pain, grief and that awful fear? I had become a shadow of the Mum and wife they had once known* (8A).

In hearing 12, the deceased's wife told the court:

> *Our son... decided that this world was too hard to live in without his daddy. He put on his batman outfit, and climbed onto the roof of the car. He sadly told me that he wanted to jump off so that he could be heaven with his dad. These feelings [son] experienced then have never gone away. In fact he still wants to be in heaven with his father even now. During this trial, he put a plastic bag over his head at school, saying he wanted to suffocate himself. The purpose was to be reunited with his father. The school psychologist and principal hold grave concerns in relation to his demonstrated suicidal actions. He now cuts himself in a form of self harm, as an outlet for his internalised grief. He has been diagnosed with major depression and anxiety...this child of only 10 years, is now taking prescribed anti-depressants* (VIS 12A).

In hearing 5 the deceased's brother said:

> *My family is dying a slow, painful death as a direct result of [offender's] actions. [brother's] weight is ballooning out of control, he has trouble sleeping and his physical and mental health is slowly declining...Dad now smokes more than ever and finds it hard to show his feelings. Mum has already spoken about her lack of interest in her own health and well being, a far cry from the vibrant and vigorous nurse that she was prior to [the killing].* (5C)

Only one VIS talked of the victim seeking strength.

I would like to exit this road of darkness, sadness, frustration, anger and pain that I was placed on, and take the road that leads to light…a journey to defeat the Black Dog of Depression, to conquer and face my demons that have stalked and haunted me for almost eight years.

From today onwards I refuse to cry in that lonely room when there is no one around…I vow to salvage and restore faith, to stay focused, constructive and diplomatic, to hold my head up high with dignity and grace as an example of enduring love, and of the Human Capacity for gratitude and chance, to be taller and stronger that I was yesterday…not only for [deceased] but also for [husband] who has suffered like no man ever should…for our three children, myself and all my loved ones (VIS 8A).[126]

In her sentencing judgment, the judge praised this family victim: "Her [family victim] determination to salvage her faith in human kindness is a measure of her strength and her fortitude in the face of loss".

7.3.2 Narratives of Condemnation of the Offender

Narratives of condemnation of the offender sought to denigrate the offender and were organised around stories of "accountability and agency on the part of the defendant" (Joh, 2000: 25) reminding the court of the brutality of the offender's actions.[127] In hearing 10, for example, the deceased's mother told the court:

My family is broken and torn apart. [The deceased's] brothers and sister do not know what to do with their grief and their anger at what the offender has done. How do they stop thinking about her brutally beaten and battered body? How can they possibly accept such an outrage?

I am broken too. I am tormented by thoughts of what my baby girl went through. She was just 19 years old. I imagine her cries – I know she would

[126] The ellipses in this quote were in the original version of the VIS.
[127] VIS 5A, 7A, 8B, 11B, 11C, 10E.

have been calling out for me. I am so lonely without her. I can't function properly knowing she is not here...it is one long horrible nightmare.

The offender has taken a daughter from me, a sister from her siblings and a mother from her little boy. He has robbed [deceased] of her life. I can imagine no sentence that will ever equal the appalling crime he has committed (10F).

One family victim who had witnessed the killing organised her condemnation of the offender around a particularly graphic description of the "violent and brutal" nature of the event.

Who said time would heal the pain?
So very clearly I still see him shot down in the rain
With bullets in his chest as he tried his best
To escape the devil calling him to his unnatural rest
With blood pouring out of his back
His pain heaped on my chest
And the rain falling, to dilute blood which lay thick on the murderer's hand.
And I stand alone stricken with shock and grief
From this witness I find no relief

With his pulse failing
Falling, falling into a dark abyss
More bullets on his neck and chest, there is no amiss
That this evil, most foul deed was re-enacted beforehand with no remiss
Screaming to stop his killing
My tears falling like rain from death to life I hoped he might regain
Screaming, screaming!!
Drowning the sounds of bullets piercing my most precious, most love one's heart
Has it stopped?

I stood with hope in my heart for he moved with life still in him
Aaah…but the devil hungry for blood – his intention, his purpose to extinguish my light most bright
As blood spilled and the murder done (5E).

The scorn and contempt with which family victims regarded the offenders was a common feature in these narratives. "I ask that your Honour sees the actions of this man for what they were. The cowardly slaying of an unarmed man with an illegal and deadly weapon that was manufactured with only one purpose in mind" (VIS 11A). In hearing 15, the deceased's mother was scathing of "the terrible way" her son had died "chased like an animal, cornered at a concrete barricade punched and kicked and eventually killed by three men who continued to kick him as he lay dying on the ground" (VIS 15A). In two cases, the narratives of condemnation were also organised around graphic descriptions of the deceased's damaged body and implicit in these descriptions was the brutality of the offender. In hearing 10, for example, the deceased's brother described viewing his sister's body and the extent of her injuries as follows:

> *I needed to identify my sister. This is something I would not wish upon anybody. This was the worst day of my life...Upon arrival to the morgue we were spoken to by a counsellor and two detectives they were trying to prepare us for the viewing, telling us that they needed to remove her brain, all her insides and to shave her long hair bald so tests could be done. They said we may not recognise her. Then it was time to go in, I let out the loudest cry.*
>
> *There I saw my baby sister lying on a cold metal table with a sheet covering the rest of her body. I could only see and still see to this day is my sister with no hair, her head split from one side to the other and black eyes. There were gashes on her nose and on her chin and a great big hole in the side of her face. This did not look like the beautiful [X] our sister. She was a complete mess. No one deserves to be brutally bashed like that...my wife and I both have nightmares about this viewing* (10E).

Conversely there were no narratives of "mercy, kindness, forgiveness to offenders" (Joh, 2000: 28). Indeed, in hearing 11, the deceased's mother told the offender:

> *My youngest child was inhumanly and brutally stabbed to death and taken from me. [offender] you stabbed [deceased] twelve times then coldly and callously left him to die. Fleeing the scene concealing and destroying evidence,*

planning and carrying out your escape. Your actions are beyond my comprehension and I will never condone or forgive such an atrocity (11C).

In 15A, the family victim did acknowledge that the offender had had a hard life as had the deceased but, she said, "is a hard life an excuse for killing someone?" Consistent with Schuster and Propen's (2010) research findings that sentencing judges respond more favourably to expressions of compassion in VISs, it was this part of the VIS that the judge later noted favourably in her sentencing judgment:

What was particularly moving, and heartening, was [family victim's] acknowledgement that the offender has had a hard life, as did her son. That remark exhibits a measure of strength and good grace, which I hope will stand well for [family victim] in her grief.

7.3.3 Narratives of memorialising the deceased

Narratives of memorialisation remember, praise and mourn the deceased (Kunkel and Dennis, 2003: 3). By recounting his or her personal qualities and life stories, the scale of the deceased's family's loss is evident (Rock, 2010); the deceased is 'humanised' and made visible to all in the courtroom. In hearing 13, remembering her son, the deceased's mother said:

How can I possible explain the nightmare of losing [deceased]? It was so easy to love [deceased]. He was a happy, kind-natured kid. He hated cruelty. He was compassionate toward people and animals. I remember crying over a dying kitten and [deceased] desperately trying to give it mouth to mouth to save it and stop my tears. As he grew older [deceased] brought 'stray' kids home who were having a tough time. He was always there for the underdog and often wore bruises and had buttons off his shirt from when he had gone into battle for them.

When I became ill [deceased] was there for me. He was a young kid about eleven or twelve trying to take over and pay the bills and look after a mother who was too sick to look after him. I can remember him calling through the house "where are you Mum? You alright Mum?"

[deceased] had the best smile, full of brightness. He greeted everyone with 'How's it going mate? Have a good one." It made me feel so good when I would hear people saying what a lovely bloke [deceased] was, and how nothing was too much trouble for him.

[deceased] became a father when he was seventeen. He was so chuffed about becoming a dad. He thought that he had his own little family unit. It made me proud when his ex-partner wrote to me telling me what an excellent father he was, how much he had loved his kids and how I had raised a nice man.

In hearing 10, the deceased's brother told her 'story':

[deceased] was born in Perth, Western Australia to a soldier father and fulltime mother of 6 children before her, making her the baby girl of a large dominately [sic] male family other than an elder sister.

She was very much a curious and energetic child growing up, always bubbly and had that cheeky and big beautiful smile, which was where [deceased's] nickname...was to stick with her short life.

[deceased] enjoyed school as a youngster and often made special bonds with teachers and peers that developed her determination and will to succeed with whatever she put her mind to. [deceased] loved all genres of music and was quite a singer herself, there's plenty of songs we shared that were heartfelt and will be forever missed but cherished, even to her passion for art whether it be her keen eye for detail in drawings or paintings or patience in crafts of traditions, could've been baking a cake or preparing a meal. She had flair and good sense of pride to go with her patience, it's with these attributes and her strong heart that reached out to many people that had the honour to meet such a gorgeous gifted girls such as [deceased]. She was so easy going and wellspoken growing up, very likeable, always could lend an ear or be there for moral support.

Anecdotes about the deceased were also a common component of such narratives. In hearing 5, for instance, the deceased's mother recounted this story about her son:

In 2002 my parents took [deceased] with them on a holiday to China. He had never been overseas, and he was really excited. [His brothers] gave him a camera for his birthday, so he could record his experiences. He was with a whole group of, all old enough to be his grandparents. They all loved him and he had a ball. He was the chief taste tester, the entertainer, whatever anyone in the group wanted he would get it. He saw sights that he had never seen before. He couldn't believe the poverty. He cried when he saw people living with disabilities in squalor. One night he recited a poem that he had written while they were on a cruise. The whole group, were amazed at the beautiful and descriptive way he captured the scenery that they were travelling through. My parents still, to this day, talk about that trip, and the effect [deceased] had on them all (VIS 5A).

Consistent with previous research (Booth, 2001, Henderson, 1987), it was much more unusual for family victims to include negative matters in their memorialisation of the deceased. While this did occur in only two matters (5 and 15), those family victims also endeavoured to include the deceased's positive characteristics. In hearing 15, for instance, the deceased's mother talked about her son's difficulties at school and drug problem.

Sadly [deceased] did get into drugs at a very early age... [deceased] ended up expelled from school in year 9 and through Probation and Parole he was sent to Father Riley's camp for around two and a half years. He completed his school certificate there and felt he was lucky to be given a second chance. He came home a totally different boy and for a while he was good. He fell again but picked himself up and got onto a methadone program and got work when he could...The [deceased] I knew had a heart of gold and did not want to hurt anybody...[deceased] had more friends than enemies and a contagious smile. When [deceased] was off drugs he was very popular. He was on methadone for four years and could hold his head high (VIS 15A).

7.3.4 Narratives of disempowerment

This narrative is characterised by family victims' feelings of frustration and helplessness at their lack of control and authority in criminal justice processes and often organised around themes of victim innocence and quest for justice.

Disempowerment in legal proceedings is a distinctive characteristic of this narrative. In hearing 12, for example, the deceased's wife told the court:

> *The court process has been one very long and drawn out painful experience for me, and my entire family. It is very hard, almost impossible to move forward and have any form of closure as feelings of frustration, helplessness, and despair overwhelm and consume us. This coupled with the grim realisation that the family as silent victims have no control of the justice system. The mere fact that we had to now endure further court hearings, after the initial trial and successful conviction of murder, to the present situation where we are again in court traumatically re-living [deceased's] death. In our minds, it would be hard to accept any alternative outcome, other than the initial verdict. With the distinct possibility of further appeals, we fear that this devastating court cycle could begin again, leaving absolutely no closure, or glimpse of hope in justice for us* (VIS 12A).

A common feature of disempowerment related to the restrictions on content of VISs. The constraints on what victims could say in their VISs were a source of anger for many family victims. In hearing 5, the deceased's mother was angry that her family's VISs had to be edited to make them "ACCEPTABLE. What [offender] did was not acceptable, but I have had to be careful what I say. Due to protocol, I am not permitted to say what I really feel. This is so unjust" (VIS 5A).[128] In the same case the deceased's brother said of his family:

> *The way they have been treated by the courts is still raw. I have had to heavily edit those statements I have received, since families have a ridiculous limit placed on how much they can say, sadly very different from the unlimited testimony the defence can offer. It is ironic because we have done nothing wrong, yet seem to have the most restrictions placed on us* (VIS 5C).

In hearing 5, frustration at the lack of finality of legal proceedings and the lack of victims' rights in the process was also expressed by the deceased's mother:

[128] 'Acceptable' was written in upper case in the original version.

This is consuming my life at the moment. I feel totally helpless, as if my hands are tied behind my back, and there's nothing I can do about it. It's hard enough to deal with the fact that we have lost our son to murder, but we can't even have closure.

We are law abiding citizens, and innocent victims of this horrendous crime, and I feel as if we have no rights (VIS 5A).

7.4 The 'Performance' of Victim Impact Statements

The features of the oral VIS ritual in the courtroom and the space for this presentation were described in Chapter Six (6.2.3.2). In this part I address the 'performance' of oral VISs and for this purpose, the analysis extends to all 30 oral VISs observed. This part is divided into three sections and the first section compares the presentation of VISs to the court by victims personally with presentation of VISs by victim representatives. The second section addresses the impact on the emotional tension of the courtroom. While I cannot speak for the subjective feelings and impressions of the other participants and I do not seek to 'measure' the emotional tension in the room, my description in this section stems from my impressions as the "reasonable observer following the proceedings at the back of the courtroom" (Kirby J in *Chow v DPP* (1992) NSWLR 593, 608). The third section analyses the responses of those in the courtroom to the statements presented again from my position as a 'reasonable observer'.

7.4.1 The Oral Presentation of Victim Impact Statements

All family victims read their VISs from a position in the central performance zone, a space closely controlled and monitored by the judge and designed to shape and constrain the interaction (Gubrium and Holstein, 2009: 110). Whether seated or standing, victims were unable to move around and hand gestures were also limited because family victims were reading from the statements they held in their hands.

Thus the performance of the oral VISs was centred on the expressive reading of the VISs in the courtroom. The best way to get a sense of the way the VISs were 'told' to the court is to compare and contrast the performances of the family victims who read their own statements and/or those of other family members (n=23),[129] with those read to the court by victim representatives from the HVSG (n=6). The remaining VIS was read to the court by the Crown Prosecutor when the family victim was unable to continue (hearing 7).

Two different victim representatives from the HVSG read the six statements to the court and both women appeared familiar and confident with the legal processes. They read smoothly from the written VISs speaking in measured tones; they did not cry, use an angry tone of voice and nor did they appear nervous. Generally, the representatives focused on the written document they were reading aloud. Where the statements addressed remarks to a particular person (such as the offender or the judge) however, the representative would then look up and address those remarks directly to the person concerned. Overall, the reading of VISs by HVSG representatives did not involve an emotional display and, despite the emotional content of statements, there was little change to the emotional ambience of the courtroom.

By way of contrast, the presentation of the oral VISs by family victims were often the "dramatic events" described by Rock (2010:); highly individual performances that frequently involved displays of emotions on the part of family victims and their families and, occasionally, other courtroom participants. While some family victims were articulate and comfortable with public speaking, others did not appear accustomed to being the focus of attention. Not surprisingly then the presentations were of varying standards and language inequities were particularly visible. A small number of family victims were very articulate; good storytellers, comfortable speaking in public and drawing the audience into their experiences. These were the victims who were more likely to look up as they read and direct comments to

[129] In two hearings, 4 VISs were read to the court by other family members (hearings 5 and 10).

particular people in the courtroom. Others evidently found the experience very difficult. Given the exposure of their private feelings in an unfamiliar and intimidating environment, as already noted the majority of the family victims appeared very nervous, holding their VISs in hands that trembled and speaking with quavering voices.

Consistent with research discussed at 3.3.1, the predominant emotions expressed by victims were sadness and anger. Most victims exhibited distress, ranging from being a little teary or choked up as they read their statements to actually sobbing as they read (n=12). These latter victims frequently stopped reading to regain composure, wipe their eyes and use tissues. One family victim became so distraught that the judge adjourned the matter for five minutes to enable him to recover (hearing 5) and another victim was unable to continue at all (hearing 7). Many family victims also expressed anger and frustration through the content of their statements and their tone of voice; one family victim even raised his voice as he read from his statement (hearing 10). Unlike the victim representatives, family victims did not speak in measured tones.

7.4.2 The Emotional Tension in the Courtroom

A combination of the emotionally expressive nature of the content and oral presentation of the VISs as described together with the audible distress of family members in the public gallery as the VISs were presented in most of the hearings, generated a rise in the emotional tension of the courtroom during this part of the proceedings. Contrary to concerns detailed above in Chapter Three at 3.3, however, from my perspective at the back of the courtroom, the presentations did not generate violence and/or confrontation. There was, however, an element of discomfort at times that stemmed from public displays of grief and the disclosure of highly personal, private matters by family victims to an audience of strangers. Moreover, in three particular matters, the vehement expressions of anger by the victims were at times disturbing (hearings 10, 11 and 5).

Despite the emotionality associated with the VISs, for the most part family victims conducted themselves with dignity and restraint and, aside from hearing 10, there were no noisy demonstrations of grief and/or anger observed. The presentation of the VISs also proceeded in an orderly manner in all hearings except hearing 10; in which the proceedings were disrupted by the emotional outpourings of the deceased's brothers who at various stages cried, shouted and threatened the defendant. In that matter, the offender had been convicted of the murder of his partner and appeared to be well known to the deceased's family. During the presentation of their VISs, the brothers of the deceased cried loudly and shouted threats at the defendant such as: "[offender] you need to suffer the way you have made us suffer". In addition, this was the only case where a comparison of my observation notes against the copy of the VIS received from the court, suggests that a family victim reading his VIS went 'off –script' to a very small extent. After the deceased's brother finished reading his statement, he looked up at the offender and said: "you'll suffer [offender]". Neither the judge nor the legal representatives made any comment.

7.4.3 Response to Victim Impact Statements

Because performances are expressive and necessarily performed for others, the responses of the listeners/audience contribute to the shape of the performance (Reissman, 2008: 106). The most striking feature of the hearings observed was the marked lack of affect displayed by the key players in response to the content of the VISs presented in the courtroom. Whereas at a funeral those listening to the eulogy generally exhibit signs of solidarity in celebrating and grieving for the deceased such as head nodding, smiling, laughter, tears and eye contact with the speaker and other participants, there were no such responses to the VISs in the hearings observed. The statements were not directed to an audience that could be described as a "well-defined congregation of like-thinking, like-feeling, supportive and sympathetic insiders" (Rock, 2010: 219) (aside from family and friends in the public

gallery) that demonstrated a willingness to grieve for and share the celebration of the deceased's life with the family victim. Though responding empathically and respectfully to the family victim as they presented their statement, by and large the key players maintained a neutral affect regarding the content of the statement itself, reflecting the professional stance that it "would be inappropriate for them to register a response to what they and see and hear" (Rock, 2010: 219).

Of course while this analysis is limited to the observed responses of the sentencing judges, it is likely that maintenance of this neutral affect required considerable emotion work from most judges. As an observer, I found much of the content incredibly sad and poignant and it would not be surprising if that was the case for most of the legal professionals involved. A former NSW Supreme Court judge has described his responses to VISs read aloud to the court in homicide cases as ranging "from a flush of discomfort, as if I was an intruder in the public expression of private grief, on the one hand, to what I like to consider to have been natural compassion, sadness and despair on the other" (Levine, 2011: 12).

7.4.3.1 Judges

Judicial styles dealing with VISs and family victims varied. A typology of judicial demeanour in response to the presentation of VISs by both family victims directly and their agents has been developed for the purposes of this study. Demeanour has been assessed using what Mack and Roach Anleu describe as a "holistic analysis" that takes account of verbal and non-verbal behaviours including tone of voice, gestures, facial expressions, words and actions (Mack and Roach Anleu, 2010: 148). Drawing from the typologies of judicial demeanour developed by Mileski (1970-1971), Ptacek (1990) and Mack and Roach Anleu (2010), four types of judicial demeanour have been identified in relation to all VISs presented to the court:

1. *Welcoming*: judges who were welcoming demonstrated personal engagement in their interaction with family victims. They used courteous, solicitous and helpful words or actions to try and make the family victim

comfortable. Welcoming judges were respectful, interested, patient, reassuring and responsive to victims' needs and concerns; their tone of voice was pleasant and they were active listeners. This demeanour was used only in response to family victims who read the statements.

2. *Courteous*: judges who were courteous were less engaged and more detached than welcoming judges. They listened to the statements, were patient and polite but more formal; they rarely spoke directly to the person reading the statement. This was the most commonly seen demeanour and the response to almost all agents who read the VISs.
3. *Businesslike*: the more businesslike judges were impersonal, made minimal acknowledgement of the VISs and dealt with the statements in a routine manner. This was the demeanour demonstrated by all judges dealing with VISs submitted only in writing to the court but also on a few occasions of agents reading the statements to court.
4. *Annoyed*: the annoyed judge expressed this demeanour through tone of voice and words used.

Table 7.4 below identifies the judicial demeanour exhibited in each hearing that involved oral VISs. Sentencing judge's responses differed according to whether the VISs were read aloud by family victims personally or by their agents. Given these different responses, a sentencing judge could exhibit multiple demeanours at the VIS stage in one hearing depending on how and by whom the VIS was presented to the court.

Table 7.4: Judicial Demeanour

Hearing	Judge	*VIS Presentation*	Judicial Demeanour
1.	A	VIS 1: read by FV VIS 2: read by agent	VIS 1: Welcoming VIS 2: Courteous
4.	D	VIS 1: read by FV VIS 2: read by agent	VIS 1: courteous VIS 2: courteous
5.	E	VIS 1: read by FV VIS 2: read by FV VIS 3: read by FV VIS 4: read by FV VIS 5: read by FV	All: welcoming
7.	G	VIS 1: written VIS 2: agent	VIS 1: Businesslike VIS 2: businesslike
8.	H	VIS 1: read by FV VIS 2: read by FV	All: welcoming
9.	I	VIS 1: read by FV VIS 2: read by FV VIS 3: written	VIS 1: courteous VIS 2: courteous VIS 3: Businesslike
10.	K	VIS 1: read by agent VIS 2: read by FV VIS 3: read by FV VIS 4: read by FV VIS 5: read by FV VIS 6: read by FV	VIS 1: Businesslike VIS 2-6: courteous
11.	L	VIS 1: agent VIS 2: read by FV VIS 3: read by FV	VIS 1: courteous VIS 2: welcoming VIS 3: welcoming
12.	C	VIS 1: read by FV VIS 2: Crown	VIS 1: courteous VIS 2: businesslike
13.	C	VIS 1: read by FV	VIS 1: courteous
15.	M	VIS 1: agent	VIS 1: courteous
16.	A	VIS 1: read by FV VIS 2: read by FV	Both: welcoming VIS 1: also annoyed
18.	E	VIS 1: read by FV	Welcoming

Four judges had a welcoming demeanour in six cases dealing directly with family victims. Welcoming judges demonstrated a variety of empathic responses conveying respect and sensitivity for victim needs and concerns. Empathy involves reading both verbal and non-verbal cues and being sensitive to the affective state of the situation (Eisenberg and Strayer, 1987: 5-6). According to Goldberg, empathic responses by judges in the courtroom include asking questions to indicate

interest, acknowledging not only the facts but the emotional responses of crime victims to court events and acting in a "trustworthy, credible manner" (Goldberg, 2005: 10). Particular actions such as speaking clearly, making eye-contact, referring to participants by name and active listening enhance an empathic response in the courtroom (Goldberg, 2005).

Through a variety of empathic responses to victims, welcoming judges acknowledged the personal status of the family victims and responded sensitively to their affective state. Speaking clearly and often addressing family victims by name (Mrs X, Mr Y), these judges took steps to put victims at ease such as providing glasses of water and tissues, and in some cases encouraging them to relax and take their time while they read their VISs. Often as victims shed tears, they would be unable to speak or would stop speaking so as to take a sip of water or wipe their faces. On one occasion, the judge dealt with episodes of acute distress by adjourning the matter for a brief time so as to give the victim an opportunity to regain his or her composure. In other matters, judges spoke directly and soothingly to the victim encouraging them to "Take a breath Mr. …" or "take a big breath, take a moment and have a drink". In hearing 16, the family victim began reading her VIS very quickly. The judge asked her to speak more slowly: "if you read it that fast people can't appreciate what you are saying".

Welcoming judges also demonstrated active listening by appearing attentive and/or actively engaging with the victim and their VIS (Wood, 2012: 75). This was achieved by a variety of means including: watching the family victim as he or she read and following the written VIS as it was read. In hearings 5 and 18, Judge E also took action to better see the victims as they read. In hearing 5, he moved the lamp on the bench that was blocking his view and, in hearing 18, he physically changed position on the bench and moved closer so that he could more clearly hear the victim speak.

Seven judges had a courteous demeanour in eight matters. All agents presenting VISs were greeted with a courteous demeanour and, in four cases, the sentencing judges dealing with family victims also had a courteous demeanour. Courteous judges were less personally involved and less engaged with the family victims than welcoming judges. In these cases, generally either the Crown or court officials readied the family victim or their agent for presentation of the statements. If judges spoke to the family victims directly, their comments tended to be minimal such as "you may start when you're ready Mrs X". In hearing 4, judge D responded to both VISs with the same short formal speech: "I acknowledge your very moving statement as to the impact of the deceased's death. I express the sympathy of the court and myself to you and your family". Like welcoming judges, courteous judges appeared attentive although rather than watching the victim read their VIS they tended to follow the written statement before them. Exceptions were in hearings 4 and 12 where the judge appeared to be reading other documents at one stage during the presentation of the VISs.

Two sentencing judges, one welcoming the other courteous, were required to defuse victims' anger directly. In hearing 5, the mother of the deceased spoke in angry tones as she told the court that she was angry because her VIS had been edited to make it "acceptable". The welcoming judge responded by saying that if there was anything more she wanted to say "and it could not be said in open court" then she "could write it down and send it to my associate and I will read it." This response appeared to mollify the victim who nodded her head and resumed reading her VIS to the court. In hearing 10, while reading his VIS one of the deceased's brothers raised his voice and said that his "fucking heart had been ripped out***".*** In response Judge K said "take a breath Mr B". Judge K also disregarded the aggressive comments directed at the offender by a couple of the brothers as they read their statements: "you'll suffer [offender]".

A businesslike demeanour was usually confined to dealing with written VISs although two judges, G and C, also wore such demeanour when agents presented

VISs to the court. These judges did not look at the readers or acknowledge the agents or the family victims in the courtroom. Only one judge was observed with an annoyed demeanour (hearing 16). As noted above, objections to VISs were upheld in this particular case and the judge indicated his annoyance was with those who had helped the victims write their statements rather than the family victims themselves.

Whether welcoming or courteous, the judges did not speak to family victims about the content of their statements or their experiences with communication being limited to the mechanics of presentation. One welcoming judge, however, did respond directly to the content of the VISs that had been read to the court at a later stage of the hearing. In hearing 16, after listening to the VISs, the judge asked the Crown and Defence counsel whether he should take account of the fact that the criminal conduct had deprived the deceased's daughters of being able to say goodbye to their father. In his view this was a "very significant part of their loss" and "it just affected me when I heard his daughters say that – it is a big part of grieving". These comments indicated that not only had he been listening but he was interested.

7.4.3.2 Offenders

A lack of response by offenders to family victims and their VISs was a striking feature of most of the hearings observed. Four offenders in this study were not observed to look at the family victims at all as the victims read their VISs to the court; these offenders sat in the dock with their heads bowed or their eyes downcast (hearings 1, 4, 10 and 12). In six other matters (hearings 5, 7, 8, 13, 16 and 18), the offenders were observed to look at the victims or their agents who read the statements aloud to the court but these offenders remained impassive. These findings are consistent with Rock's study where he found the offenders observed to be largely "remote, inscrutable, impassive" while the VIE was presented (2010: 219).

Only three offenders showed any sort of response while the statements were being read (hearings, 9, 11 and 15). During the presentation of VISs in hearing 9, the offender sat in the dock leaning forward, watching the family victims intently as they read, and appearing to listen with interest to their statements. The offender in hearing 15 watched the agent read the deceased's mother's statement and was observed to smirk on one occasion when the reader referred to the deceased's personal qualities. Only in one matter (hearing 11) did the offender exhibit distress and cry audibly while he watched and listened to the family victims read their statements to the court.

As discussed above (2.2.3 and 6.2.5), there are scholars who argue that the victim's disclosure of their loss and suffering through their VISs has the potential to generate an emotional response in the offender that creates an opportunity for offender to express remorse and apologise to the victim. Table 6.2 reveals that while just over half of the offenders expressed remorse in some fashion for the killing (n=10), only four offenders expressed remorse that included an apology for family victims or an acknowledgment of harm caused to the deceased's family; two directly by oral evidence (hearings 4 and 11), one through a letter to the court (hearing 18) and one through counsel submission (hearing 7). It is important to note that these apologies were not contemporaneous with the presentation of the VISs and in fact, all were tendered later in the proceedings during submissions on sentence. The direct apologies were elicited by counsel during examination. For example in hearing 11, defence counsel led the offender through the acknowledgment of the VISs and an apology to the deceased's family for his actions.

Q. You have heard the victim impact statements read by a woman on behalf of [family victim], you have heard a victim impact statement read by [deceased's] mother and by [deceased's partner]?

A. Yes.

Q. During the course of the trial you expressed in terms how you felt about

being responsible for [deceased's] death?

A. Yep.

Q. Is there anything else that you want to tell them or the Court?

A. [crying] Yeah, I am sorry, I am sorry. I have a son and I can only - I couldn't imagine what it would feel like to lose him. I feel for [deceased's partner] so much and the [deceased's] family. Nothing I do will take it back, I know that.

In hearing 18, defence counsel tendered a letter from the offender addressed to the Court apologising to the deceased's family. The judge responded by saying that the "better course" was that the letter should be read on to the record and counsel then read the letter to the court.[130] In his letter, the offender told the court that he "wanted to express his thoughts and feelings" about the crime and that he was "devastated and sorry" for the deceased's family and his own family.[131]

A more indirect apology to the family victims was made by the offender through his counsel in hearing 7. From the bar table counsel said:

> *The offender instructs me that he wishes to apologise sincerely to the family of the deceased, to the Court, to his parents and to the community generally in relation to what was a most stupid act on his behalf, unlawful and dangerous causing the death of Miss [X] last year.*

7.4.3.3 Legal Representatives

Seated behind the legal professionals, while I could not see their faces, I could observe their actions. The Crown prosecutors usually stood watching the family victim read their statement, following their progress from a written statement. The Crown was generally attentive and in one matter read the VIS to the court when the family victim was unable to continue. Like the judge, the Crown maintained a

[130] It is interesting to note that this letter was not extracted in the transcript of the proceedings.
[131] Although read aloud to the court, the offender's letter was not extracted in the transcript of the proceedings.

neutral visage although, in hearing 18, though after a particularly sad VIS was read to the court, the Crown Prosecutor did take out a handkerchief and blow his nose before continuing with the Crown case. It might have been coincidental but in that case, the VIS had a photograph of the deceased attached and the emotional tension of the courtroom was particularly 'thick' when the deceased's mother finished reading her statement.

On the other hand, many of the defence legal representatives paid little regard to the family victims reading the VISs and instead were observed to carry on with other tasks such as reading documents or attending to the recording equipment. Indeed on one notable occasion (hearing 10), the disregard was such that, when her mobile phone rang audibly in court, the defence barrister left the courtroom with her phone while a family victim was reading his VIS. The family victim continued to read and there was no response from the judge or other key player to this event.

7.4.3.4 Other Audience Members

Members of the public were less guarded in their responses and sounds of grief were frequently audible from the public gallery, presumably members of the deceased's family. In two separate matters after the family victims read their VISs, I also observed a corrective services officer that had accompanied the offender, hurry out of the courtroom in tears. On two other occasions I also observed reporters wipe away tears or blow their noses after presentation of the evidence. Being an audience member, I found myself moved by both sympathy and compassion in each case as I listened to the family victims' stories.

7.5 Summary

Victim impact statements are not products of a stream of consciousness in the courtroom, but carefully constructed documents subject to constraints and

monitoring. The content and presentation of the VISs observed were shaped by a variety of factors including the:

- Restrictions on content and, to a lesser extent, form imposed by law;
- Resources available to assist family victims prepare the statements;
- Filtering processes by which VISs are edited and amended; and
- Purpose of and intended audience for the statements submitted to the sentencing court.

Much of the content of the VISs related to a myriad of harms that were caused by the offence as well as remembering the deceased. Despite concerns that victims might speak of matters outside their VISs, only one family victim appeared to deviate from the approved content to a very minor degree and did so without censure from the court. More striking, however, was that despite legal constraints and the filtering process, much of the approved content of the VISs heard was outside legislative limits, referring to a range of inadmissible material such as the killing, the offender, the penalty and the legal process. The VISs were organised around four major narratives – pain and suffering, memorialisation of the deceased, condemnation of the offender and disempowerment – designed to persuade the audience of the value of the deceased, the brutality and violence of the offender, and the scale of the family's loss.

Victim impact statements and particularly oral VISs are expressive mechanisms by which victims are given space and the opportunity to emote and talk about their feelings. Inevitably, the performance of these oral VISs raised the emotional tension in the courtroom. The stories recounted were poignant, distressing and powerful descriptions of loss. The family victims expressed anger and sadness, shed tears and broke down as they recounted the impact of the death of their family member on their lives. But despite the increase in the emotional tension in the courtroom, contrary to concerns that emotionality generated by victim participation could be disruptive and/or violent, in all but one case, the hearings remained orderly, formal and decorous.

Much of the oxygen was 'sucked out' of the emotionality of the VISs through the muted responses of the key players. While judges displayed a range of demeanours in relation to the mechanics of presentation of VISs, all judges maintained a neutral affect when dealing with the content of the statements. The sentencing judges occupied professional roles managing the sentencing hearings according to law; they were not audience members joining the family victims to mourn and remember the deceased. Offenders were even less responsive. The majority observed either did not look at the victims or, if they did, they remained impassive. Of the three that showed any response, only one showed remorse as he shed tears.

Overall, while the narratives told were powerful and very different to other evidence in the sentencing hearing, the 'telling' of the statements did not have a destructive effect on the conduct of the hearings.

Chapters Five, Six and Seven combined produce a rich picture of victim participation in the sentencing of homicide offenders in NSW. The following chapter will discuss key issues that emerge from this picture.

8. Discussion

The aim of this thesis has been to investigate the participation of family victims in the sentencing of homicide offenders in NSW and particularly the presentation of oral VISs in the legal proceedings. This investigation has been guided by three primary questions:

1. How does family victim participation work in the courtroom?
2. What are the implications for the offender's entitlement to a fair hearing?
3. What are the implications for the integrity of the legal proceedings?

Through an analysis of data gathered from a combination of sources – primary legal materials, observation of sentencing hearings, interviews with family victims and oral VISs presented to the court – a rich picture of victim participation in the sentencing of homicide offenders in the NSW Supreme Court has emerged. The object of this chapter is to consider key issues that emerge from this picture, namely:

- The restricted use of VISs by the sentencing court;
- The limitations of the expressive capacities of VISs;
- The containment and management of emotionality associated with VISs; and
- The sentencing court as a forum dealing with the aftermath of homicide.

This chapter begins with a summary of the main study findings and then addresses the key issues in turn. Unlike previous chapters, this chapter does not end with a summary of significant points; conclusions will be reserved for the final chapter (Evans and Gruba, 2002: 119).

8.1 Study Findings

The study findings presented in Chapters Five, Six and Seven are summarised as follows.

- Legislative modification of the adversarial sentencing hearing incorporates family victims into the process via VISs but does not entitle them to legal representation or standing as parties or quasi-parties. Family victims are members of the public and comprise part of the audience in the public gallery. The modification required to the hearing is minor and only impacts on the adversarial shape and conduct of the hearing in the case of oral VISs.
- The family victims in this study participated both directly and indirectly in the hearings observed. Direct participation was by VIS and of the total number of VISs submitted in 18 hearings (n=38), the vast majority (n=30) were read aloud to the Court by the victim personally or by his or her representative. Indirect participation occurred through family victim attendance at the hearing in most matters (n=16) and recognition of victim interests and concerns by key participants in one-third of matters observed (n=6).
- According to the law in NSW, VISs from family victims are not used by the Courts for the instrumental purpose of determining the penalty to be imposed. In many sentencing judgments, however, another instrumental purpose was revealed: to educate and manage the expectations of family victims with regard to penalty. The courts also utilised the VISs to serve expressive functions including public recognition and validation of the family victims' experiences and to reinforce to the offender the consequences of his or her actions.
- From a family victim perspective, the primary functions of VISs in the sentencing hearing are expressive. Most victims used their statements to talk about their feelings and experiences of loss, memorialise the deceased and make the deceased visible in the proceedings. Despite statutory restrictions, much of the content of the VISs was outside the legislative parameters and many statements contained prejudicial and/or inflammatory material.
- The quality of inter-personal treatment received by most family victims was generally high. Family victims who read their VISs aloud to the court were

accorded dignity, courtesy and respect by the court and given as much time as was necessary to complete their statements. On the other hand, those family victims who did not read their statement to the court were not generally acknowledged or recognised in the courtroom.

- The communicative potential of written VISs is very limited as these statements were not generally read aloud to the court. The communicative potential of oral VISs was greater because family victims were able to convey their feelings to the court and the offender. Nonetheless, oral VISs are presented as monologues and are not a catalyst for discussion with the court or the offender. As a consequence, opportunities for reciprocal communication in the courtroom were substantially limited.
- Most family victims were emotional when they presented their VISs and all VISs were highly emotive statements. The emotionality associated with the VISs did increase the levels of emotional tension in the courtrooms to varying degrees. Nonetheless, there was no violence, no sentencing judge lost control of the courtroom and the hearings proceeded in an orderly, formal and dignified manner. Only in one matter did family victims create a ruckus in the public gallery.
- A striking feature of the hearings observed was the somewhat subdued response to the VISs from the court and the offender. With respect to defence counsel, no family victims were cross examined on their statements and in most cases the VIE was unchallenged by the offender (n=16); rather than object to irrelevant and/or prejudicial material, it appeared that the defence relied on the sentencing judge to deal with the statements appropriately.
- The majority of offenders were not observed to react to the content and/or presentation of the VISs. Victim-focused remorse was rare; only four offenders offered an apology to the family victims and, of these four offenders, only two offered an apology directly through oral evidence.
- Though for the most part courteous and solicitous, sentencing judges maintained a neutral affect with regard to the stories told and victims'

experiences recounted in the VISs. They appeared outwardly calm, formal and alert and were not observed to express any emotions or feelings as they listened to the content, or indicate by word or conduct that they had been affected by the statements.

- In most cases, the VIE was 'cordoned off' at the beginning of the hearing and once completed, the court immediately moved on to the next stage of the hearing.

8.2 The Restricted Use of Victim Impact Statements by the Sentencing Courts

Procedural fairness for the offender has been described as the "central theoretical constraint" on taking account of VISs in the determination of penalty (Edwards, 2009: 299). As discussed in sections 2.2.3 and 3.1.2-3.1.3, the use of VISs from family victims as evidence relevant to determining the penalty of homicide offenders is particularly contentious. A homicide offender's entitlement to fairness is said to be jeopardised by VISs for several reasons. First, as evidence of harm sustained by family victims, VISs generally lack probative value. The nature of a VIS means that it is a highly subjective and emotive statement that could be factually inaccurate and/or prejudicial. Furthermore, because a key principle of fairness is that the offenders should have a full opportunity to meet the case against them, they should be entitled to challenge any VIE. In this context however, traditional legal strategies such as objection or cross examination are problematic and, consistent with research, very few VISs were challenged by objection and no family victims were cross-examined in this study. Third, because VISs are not mandatory and those submitted of variable quality, otherwise similarly situated offenders could be subject to different, inconsistent penalties. Finally, taking account of the harm sustained by family victims and detailed in their VISs as an aggravating factor could render the penalty a function of victim worthiness rather than the culpability of the offender.

Reflecting concerns outlined at 3.1.2, the VISs in this study were highly emotional and many contained prejudicial/inflammatory and/or irrelevant material particularly in the context of the narratives of pain and suffering, condemnation of the offender and disempowerment (7.3). Significantly however, this material was not as prejudicial or inflammatory as that sought to be submitted by the deceased's family to the court in *Borthwick* (3.1.2.2). As to this latter point, the study findings indicate that the filtering process prior to the sentencing hearing referred to at 7.1.4 and discussed further below, is effective in deleting particularly irrelevant and prejudicial material (Roberts and Manikis, 2011). As already noted, Prosecution Guidelines in NSW require the Crown to vet the statements for inadmissible material and consult with victims in relation to changes to be made before the hearing. In contrast, the Victorian DPP takes a different view and according to prosecution policy in that jurisdiction, the Prosecution is not required to vet or edit a VIS before the hearing as that is regarded as a matter for the Court.[132]

New South Wales, however, is unique amongst most common law jurisdictions in that, according to the law, VISs from family victims are not taken into account in sentencing and should have no impact on the penalties imposed on homicide offenders (5.5). Certainly, this statement of principle was reiterated explicitly in most of the sentencing judgments of the cases observed as judges made clear that the VISs did not influence the sentence imposed. Thus, one of the major threats to the offender's entitlement to a fair hearing – the imposition of a disproportionate, inconsistent and unjust penalty as a result of taking VISs into account– should be effectively neutralised in NSW. Nonetheless, Hoyle's point that there is no evidence that judges can and/or in fact do disregard inadmissible and prejudicial evidence is compelling (2.2.4). Thus the next section turns to the question of whether there is evidence to indicate that VISs from family victims have had an impact on penalties despite the law.

[132] Office of Public Prosecutions (Vic) Policy 34: *Victims' Eligibility to Make VISs and the Role of the OPP and the Director* (34.4.2).

8.2.1 Impact on Penalties

While extant research suggests that VISs have generally had little impact on sentencing outcomes or patterns as already discussed, it is very difficult if not impossible to measure impact particularly in jurisdictions such as NSW which adopt an 'intuitive' approach to sentencing (2.2.4). Data in relation to the submission of VISs in sentencing hearings in NSW, homicide or otherwise, have not been collected to date by the NSW Supreme Court or the NSW Bureau of Crime Statistics and Research (BOCSAR).[133] Nonetheless it might be possible to draw inferences from other sources such as sentencing patterns for homicide offenders generally and/or the number and nature of appeals from sentencing decisions; each will source will examined in turn.

Statistics published by the BOCSAR reveal that the average length of prison sentences for murder remained stable during the period 1990-2000, increased during the period 2001-2008 and again stabilised during the period 2009-2011. Lulham and Fitzgerald argue that ascertaining the reasons for the increase during the period 2001-2007 was a "difficult analytic task" given that during this period several major sentencing reforms and media, community and political pressure to be harsher on criminals are factors that might have impacted on decision-making (Lulham and Fitzgerald, 2008: 6). Certainly Poletti and Donnelly in their study of the impact of one of the major sentencing reforms in NSW during this period, the standard non-parole period sentencing scheme,[134] found that sentences for murder have significantly increased since the introduction of this scheme (2010). On the other hand, the average length of prison sentences for manslaughter remained stable during the period 1993-2007 (Lulham and Fitzgerald, 2008: 7) and here it is worthwhile noting that the standard non-parole period sentencing scheme does not apply to the offence of manslaughter. Since 2009, BOCSAR statistics show that the average length of prison sentence for manslaughter has remained stable, even

[133] BOCSAR is part of the NSW Department of Attorney General and Justice.
[134] Standard non-parole periods apply to sentences for murder.

dropping slightly during the period 2009-2011.[135] On the basis of this information, while penalties for murder have increased it cannot be inferred that this is a result of any particular factor such as VISs.

In the absence of statistical evidence linking VISs with penalty, this thesis considers whether any such links have emerged at the appellate level. Of course there are significant and obvious limitations with such a method and at the most any inferences drawn are highly speculative. Turning to offender appeals from the judgments in the hearings observed (8, 9, 11 and 16), three of those appeals (8, 9 and 16) were against conviction (two were successful: 8 and 16) and only one was against sentence (11). With regard to this latter matter (11), the offender appealed against the sentence for manslaughter by excessive self-defence on the basis that the sentence imposed was "unjustifiably harsh" and not warranted by the facts. The appellant argued that in describing the offence as "a most serious case of manslaughter", the sentencing judge was in fact making a grave assessment of the offender's culpability in finding it to be in the worst category. Ultimately, the NSWCCA dismissed the appeal because the penalty was not "unreasonable or plainly unjust" and noted that particularly in cases of manslaughter, "criminality is very much a matter for the judgment of the sentencing judge".

While there was no suggestion by the appellant that the sentencing judge had inappropriately taken account of the VISs submitted in the matter (the content of these VISs are discussed in detail in Chapter Seven), it is impossible to know whether the sentencing judge unconsciously put more weight on the consequences of the offence for the deceased's family at the expense of the offender's culpability (Hoyle, 2011; Hinton, 1996). Sentencing judges in NSW exercise significant discretion in determining the penalty to be imposed and, according to the High Court, "there is no objectively correct sentence, only a range of sentences that the majority of experienced judges would agree applied to the case" (McHugh J in

[135] An important caveat here is that manslaughter is not a separate category; the statistics for manslaughter are combined with those relating to driving offences causing death.

Markarian (2005) 228 CLR 357*,* 384). For instance, the offender in hearing 8 was convicted of murder and sentenced to the maximum penalty - life imprisonment. This conviction was quashed on appeal. At the next trial, he was again convicted of murder but a different sentencing judge imposed a lesser penalty of 40 years. The first sentencing judgment discussed the VISs in some detail whereas the second sentencing judge dealt with them very briefly. Given the nature of sentencing discretion and the intuitive approach to the various factors, it is impossible to draw any conclusions as to the influence, it at all, of the VISs.

The scarcity of appeals both in relation to the hearings observed and offenders in general, and particularly only two since 2001 (5.5.2), could suggest that once early 'teething problems' were sorted out, VISs from family victims in the sentencing of homicide offenders have not been viewed as particularly contentious in sentencing generally nor a factor influencing the penalty imposed to the detriment to the offender. This inference could be considered consistent with the finding that defence counsel rarely challenged the VISs in the sentencing hearings observed, appearing content to have the judge deal with the VIE appropriately. Alternatively it might be argued however that given only two offender appeals have succeeded (*R v Bollen* (1998) 99 A Crim R 510) and *R v Dang* [1999] NSWCCA 42), in the absence of explicit admission, it is extremely difficult to establish that a sentencing judge has indeed given inappropriate weight to VISs from family victims in determining penalty. In these circumstances, appeal on this ground could be considered futile. Again, it is difficult to draw inferences about the impact of VISs on penalties on the basis of the dearth of appeals against sentence.

At the most then it can be said that the impact of VISs on penalties does not appear to be a contentious issue in sentencing homicide offenders in NSW generally. Nonetheless, the possibility cannot be ruled out that VISs could impact adversely on penalty in individual cases (Hoyle, 2011). Hoyle suggests a solution whereby VISs should be presented *after* the sentence is handed down. The offender is thereby offered some protection against the imposition of an unfair penalty and the family

victim retains his or her voice (Hoyle, 2011: 278). This solution is problematic because it reduces the expressive capacities of VISs and the potential adverse impact on the function of the hearing as a forum for dealing with the aftermath of violent crime (Shapland, 2010). These matters will be discussed in more detail in the conclusion to this thesis.

8.3 Limitations of the Expressive Capacities of Victim Impact Statements from Family Victims

The study findings indicate that the primary function of VISs in the sentencing of homicide offenders from the perspective of both the court and the family victims was expressive (5.5.3; chapter seven). It is claimed that a virtue of the expressive function of the VIS is its 'restorative value' in the sentencing hearing (2.2.1). Roberts and Erez (2004) argue that the expressive capacities of VISs have significant communicative potential whereby:

- The victim is accorded a formal role and a 'voice' through which they can communicate their feelings;
- In response, the court can communicate acknowledgement of the harm suffered by the victim as a result of the crime; and
- Emotions are elicited in the offender that facilitates the offender accepting responsibility for the crime and communicating remorse to the victim.

This section examines the limitations on the victim's voice and the potential for reciprocal communication from both the court and the offender to the family victim.

8.3.1 Voice

To have a 'voice' means that a family victim is given formal space in the hearing to express their feelings and speak about the impact of the deceased's death. While the NSW legislature has given family victims that voice in the sentencing hearing through VISs, the study findings reveal a significant distinction between written and oral VISs in terms of victims' capacity to be heard. The communicative potential of written VISs is limited. The family victim may not even know if and/or when the VIS is received by the court. Ted, an interview participant, said that at the first trial in relation to the murder of his son, he gave his written VIS to the Crown and observed the sentencing hearing from the public gallery. As to what happened to his statement: "I don't know when he [judge] actually got it…I don't recall seeing it handed up to the judge." As described at 6.2.3.2, written VISs were submitted by the Crown in the course of routine business and there was little to distinguish these statements from other documents received by the Court. Unless the VIS is presented orally, the audience for that statement is also restricted; in particular it is unlikely that the victim will know exactly who has read their statement and heard their story. Furthermore, most written VISs were not read aloud to the court and thus while the judge might have read the statement privately the contents were not communicated to the offender in particular or the court more generally. Nor were family victim authors of written statements formally acknowledged by the court even when the judge was made aware that the family member was in the courtroom.

Oral VISs on the other hand were distinctive features of the hearings and the vast majority of family victims elected to present their statements in this manner. By reading their VISs aloud in the central performance zone, family victims were able to speak publicly and be heard in relation to the consequences of the crime (Wood, 2006: 75; Szmania and Gracyalny, 2006); those family victims were also acknowledged and recognised by the court as detailed in 7.4.3.1.

With regard to what the family victim can say in their VIS, the first point to note is that they are not restricted by designated matters on a form. Consequently, the VISs were highly personal and individual statements of loss (7.1.1). Nonetheless the law restricts the content of the VIS to the impact of the death of the deceased on the deceased's family. Thus, family victims are not free to say what they want or think is important if it is outside the legislative guidelines (Doak et al, 2009: 667). It was evident from both the interviews and observation data that the Crown actively vets most of the statements before the hearings, deleting and amending content as deemed necessary. The interviews and the observation data also reveal the frustration of many victims at these restrictions on their 'voice'.

Despite these constraints, the legislative guidelines were not strictly enforced by the courts. Family victims did speak unchecked about a broader range of matters than stipulated in the legislation and, in fact, were accorded a good deal more leeway by the Court and defence counsel than expected. As already discussed, the prejudicial material was 'toned down' (a likely product of the 'filtering' processes that occur prior to the hearing, see 7.1.4) and thus less offensive than it might have been. Furthermore, it might be inferred from the generally muted response of the defence that because the VISs should not influence penalty, the stakes are not as high for the offender and there is less pressure to take issue with irrelevant material. In such circumstances, it can be sufficient to rely on the judge to deal with material appropriately and avoid the sorts of confrontations as occurred in *Borthwick*. Finally, giving victims greater scope in their statements can be considered as a 'cooling out' strategy in the management of emotionality associated with VISs, discussed in further detail below.

8.3.2 Reciprocal Communication

This section turns to the potential for reciprocal communication in the sentencing hearing as envisaged by Roberts and Erez (2.2.1). Though claimed as a virtue associated with VISs, there is a lack of research on this issue. In their study of the

communicative function of 40 VISs read aloud by family victims, Szmania and Gracyalny (2006) did not deal with the issue of reciprocal communication. While it is evident that oral VISs provide family victims with some scope in communicating with the court, the offender and the public, the form of and processes associated with VISs impose restrictions on the potential for reciprocal communication between the court-victim and offender-victim. As already noted, a VIS is not a catalyst for dialogue with other participants; VISs are one-way presentations. This means that unless the family victim breaks the rules such as going off script for instance, they are not questioned or interrupted. Nor when the victims have finished reading their statements is there the "freeform discussion" characteristic of many restorative practices (Stubbs, 2007: 174); the court does not invite questions or discussion. Once finished, the family victim leaves the central performance zone and the hearing turns to other matters. Particular issues arise in the context of court-family victim and offender-family victim reciprocal communication that are addressed below.

8.3.2.1 Reciprocal Communication: Court-Victim

The findings reveal that the court response to the VISs occurred at various stages of the proceedings: contemporaneously with the presentation of the statements, later in the sentencing hearing, and at judgment. In essence however, there was little of the reciprocal communication between the victim and the court as envisaged by Roberts and Erez (2004) outside the sentencing judgments. At the time of presentation of the VISs, judges were either courteous and/or welcoming to family victims as they read their VISs and by certain verbal and non-verbal cues indicated that they were listening attentively to the VISs. Direct interaction between judge-victim however was limited to the mechanics of presentation and the sentencing judges made no comment or provided any feedback on the content of the VISs or family victims' experiences (7.4.3.1).

One judge referred to the content of the VISs at a later stage during sentencing submissions (hearing 16) as discussed above at 7.4.3.1. In that case, the judge asked

the parties for further submissions as to whether, in determining penalty, he should take account of matters raised in the VISs. While this comment might not have been directed to the family victims, it validated their loss and indicated he was engaged with their statements so in that sense 'reciprocal'.

Otherwise, there were no acts or words of validation from the court to the family victim during the sentencing hearing that recognised the family victims had been 'wronged' and sustained a significant loss. It is likely that this lack of feedback is attributable to the requirement that judges appear neutral and impartial while they hear the VIE and have regard to that material within the confines of the *Previtera* principle. Thus, this study finds that reciprocal communication from the court to the victim was not a feature of the hearings. Validation of the harm suffered by family victims was however a feature of many, if not most of the sentencing judgments and this aspect will be discussed further below at 8.4.3.3.

8.3.2.2 Reciprocal Communication: Offender-Family Victim

This section addresses the claim that offenders can respond to the VISs by accepting responsibility and expressing remorse directly to the victim. As discussed at 6.3, this form of reciprocal communication between offender and family victim has been characterised in this thesis as 'victim-focused remorse'; table 6.2 charts the nature and incidence of such remorse.

Significant findings of this study are that the vast majority of offenders were not observed to respond to the VIE at all and victim-focused remorse did not feature in most of the hearings observed (7.3.1.1). Although evidence of offender-focused remorse was led in over half the matters (n=10), victim-focused remorse was demonstrated in only four hearings. The evidence of victim-focused remorse in those four matters was not demonstrated contemporaneously with the VISs; rather it was presented later in the hearing connected with mitigation during sentencing submissions. This scarcity of victim-focused remorse is consistent with the experiences of the interview participants; only two interview participants said that

the offender apologised to them at the sentencing hearing or otherwise indicated remorse for the loss sustained by the deceased's families.

There are a number of factors that might explain why victim-focused remorse was rare in the hearings observed. First, according to Bibas and Bierschbach, criminal procedure does little to encourage or even allow meaningful apologies and expressions of remorse from offenders to victims (2004: 12; see also Szmania and Mangis, 2005: 341). It might be inferred from the progress of the case that the offender is not sorry at all. The conduct of defence cases is more geared to leading evidence of offender-focused remorse because this is what might reduce the severity of the penalty to be imposed and in homicide cases where potential penalties are harsh the stakes are high for offenders. Consequently, offender accounts of defence, justification and/or excuse are unlikely to establish conditions for a meaningful apology to family victims and in fact could operate to the detriment of the offender if the sentencing judge does not regard the expression of remorse as genuine (Tavuchis, 1991: 17-19).

The sentencing hearing is also highly structured; there is no victim-offender dialogue and no opportunity for face to face apology or expressions of remorse (Bibas and Bierschbach, 2004: 54). Certainly in the hearings observed, the court did not offer the offender an opportunity to respond to the deceased's family after the statements were presented. Moreover, in those hearings where the offender did offer an apology to the family victims during the hearing (4 and 11), the apologies were mediated by legal representatives, facilitated by the question and answer format of oral evidence. Oral evidence is an interaction between the offender and defence counsel for the benefit of the judge to evaluate the offender's credibility. Thus the expressions of remorse were not offered in the dyadic relation envisaged by Tavuchis whereby apologies are made directly to the injured party; the family victims sat with the public behind the central performance zone (1991: 49; see also Bibas and Bierschbach, 2004: 53).

Second the formal and intimidating nature of the courtroom environment is unlikely to be conducive to such emotional expression on the part of offenders (Szmania and Mangis, 2005; Bibas and Bierschbach, 2004). Offenders might lack the personal skills necessary to communicate an apology or remorse to family victims. They might be embarrassed, inarticulate, lack confidence, lack support, and/or fear humiliation (Szmania and Mangis, 2005: 340-341). In hearing 12 for instance, while the court accepted that the offender was remorseful (see appendix five), it is likely that his intellectual disability and lack of proficiency in English would have severely hampered his ability to offer remorse to the deceased's family even if he had wanted to apologise. It also might be the case that some offenders will not respond empathically to the VISs. There is little research in relation to the development of emotional responses on the part of offenders who participate in restorative programs (Jackson and Bonacker, 2006). A study of victim impact programs in a US jurisdiction found that the 10 week course had little or no effect on the development of the offender's emotional responses (Jackson and Bonacker, 2006).

Another complicating factor in the context of homicide cases might be that there is frequently a pre-existing relationship between the deceased's family and the offender the nature of which could obstruct genuine apology. In at least six matters observed, prior to the killing the family victims and the offenders had been in family relationships and the obvious antipathy between the parties, particularly in hearings 10 and 13 was such that an apology would have been unlikely.

Szmania and Mangis argue that "given the restriction of the courtroom context both procedurally and interpersonally" even if the offender does attempt to communicate an apology or remorse "the effort will likely to be incomplete or inadequate" (2005: 356). In a restorative justice context dealing with serious offences, Shapland et al argue that more is required from the offender to convey meaningful remorse than just the word 'sorry'; in their view the offender's remorse should be "backed up" by actions that show the offender is acting to change his or her life (2006: 514). Coral and Sharon, the two interview participants who received

apologies in the sentencing hearing, expressed contempt and anger that the offender had apologised at all and neither considered the apology genuine. Coral was told that because the Crown had accepted the offender's plea to manslaughter, the offender had to apologise to the family for what he had done. Coral admits she had no interest in what the offender had to say but thought "I'll kick myself if I don't listen". As she listened to his apology, she thought "Bullshit, how dare you insult us more!" Likewise, Sharon was scathing about the offender's apology offered in evidence: "To have him sit across in his little box and say sorry…I said sorry is not good enough, I said bullshit. I was angry."

Neither Coral nor Sharon accepted that the apologies offered by the offenders were genuine in the circumstances. Similarly the reactions of family victims in hearing 11 (discussed further below) also suggested that they doubted the sincerity of the apologies offered by the offenders. While there is little research in relation to apologies from offenders to victims in a sentencing context (though see Strang, 2002: 18-19) there have been studies that have addressed this issue in the context of restorative justice schemes. Daly's study of two Australian restorative justice schemes found that victim and offender participants interpreted each other's words and actions differently (2005: 223). While over 60% of the participating offenders said their apology was genuine, only 30% of those apologies were regarded as sincere by the victims. In an evaluation of three restorative justice schemes in England and Wales, researchers found that apologies from offender were common but "immediate acknowledgment by victims that they accepted the apology was rarer" (Shapland et al, 2006: 514). This finding was attributed to the fact that in the context of serious offences more is required of the offender than just the words "I'm sorry". Following a review of conflicting studies relating to the sincerity of apologies, Dignan concludes that "there are limits on the victim's willingness to see offender's in a positive light" (2007: 321).

This thesis contends that in the context of homicide sentencing, family victims are more likely to be sceptical and less willing to see the offender in a positive light.

First, given the nature of sentencing law (6.3.3), the demonstration of victim-focused remorse could be perceived as motivated by a desire to mitigate penalty rather than by sincere regret or sorrow for the harm caused to the deceased's family. Those offenders that demonstrated victim-focused remorse also linked that remorse to submissions regarding mitigation of penalty. Furthermore the delivery of victim-focused remorse in the sentencing hearing through intermediaries is also likely to militate against a belief that the apology is sincere. According to Tavuchis, it is not possible to "delegate or consign" an apology without altering its meaning (1991: 49) and for Daly an important aspect of a sincere apology is "a genuine display of regret and sorrow" (2011: 46). Because neither offender in hearings 7 or 18 presented their evidence of victim-focused remorse orally to the court there was no personal display of regret or sorrow that could be evaluated by the family victims. Even though the offenders in hearings 4 and 11 *did* express their victim-focused remorse in oral evidence, that evidence was not directed to the family victims who sat behind the court in the public gallery. There was no face to face interaction between the offender and victim that Tavuchis (1991) argues is so important for a genuine apology.

Moreover, it is contended that the conditions established by the progress of the cases worked against the family victims accepting the victim-focused remorse as genuine. In three of the matters (4, 11 and 18) the offenders had sought to shift some of the blame for the killing to the deceased and in hearing 7, evidence of particularly negative remarks made by the offender about the deceased had been presented to the court. In such circumstances, the victim-focused remorse is likely to be viewed as self-serving rather than sincere.

Thus, in the hearings observed, while the subjective opinions of the family victims cannot be known there is a basis for inferring that the apologies offered were regarded with the same degree of scepticism as was shown by Coral and Sharon. Certainly none of the family victims indicated that they accepted the apology from the offender; the family victims in hearings 4 and 18 cried quietly in the public

gallery and the deceased's looked down impassive in hearing 7. In hearing 11 where the offender also cried as he said how sorry he was, the deceased's family sat dry-eyed and stony-faced in the public gallery giving the appearance of rejecting the offender (Tavuchis, 1991: 23).

Although for Roberts and Erez the potential for victim-focused remorse is a positive aspect associated with VISs, scholars have pointed out that many of the claims made in relation to apologies in both restorative justice and criminal justice settings have not been tested (Stubbs, 2007; Petrucci, 2002). This discussion raises the question as to whether victim-focused remorse is indeed something even sought by family victims in the sentencing hearing. Family victims interviewed did not raise victim-focused remorse as an issue of importance and nor did they appear generally interested in apologies from the offender. Laura, one of the few interview participants who talked about remorse, said that if she had looked for remorse from the offender that was not forthcoming, she would have felt worse:

> *As far as I'm concerned he probably did not feel any remorse or anything like that. If I appealed to him and I don't see any signs of remorse it will only make it worse so I was of the opinion that I wasn't going to appeal to him; as far as I was concerned, he was nothing to me.*

Studies of victim satisfaction with VISs do not appear to have reported on the issue of victim-focused remorse in the courtroom.[136] Turning to research in the restorative justice context, although Strang argues that victims want an apology from offenders (2002: 19) there studies suggest that receiving an apology is not a major reason that victims give to participate in a restorative event (Dignan, 2007: 320; Umberit et al, 2006). Umbreit et al's study of participation of victims of serious violent offences (including homicide) in US victim-offender schemes looked at reasons why victims chose to participate in the programs. At the top of the list was the desire for information and answers (58%) and the second most important

[136] I have been unable to find any mention of apology or offender remorse in the review of the existing research by Roberts and Manikis or in specific studies including the recent report from the Victim Support Agency, 2009,

reason was wanting to show the offender the impact of the offence (43%); only 18% wanted to know if the offender was remorseful (18%). While these findings show that some victims of violent crime are interested in communicating with the offender, it does not show how important, if at all, an apology from the offender might be. Drawing from this research and interview findings, it might be inferred that family victims are not looking for an apology at the sentencing hearing.

The final issue to consider is whether in fact victim-focused remorse is appropriate in the sentencing hearing. Tavuchis argues that there are 'apologetic thresholds' whereby the heinous nature of an offence takes it beyond the purview of apology (1991: 21). While it is not suggested that homicide offences are necessarily so heinous, it may be that the sentencing hearing is not the appropriate forum for expressions of victim-focused remorse. As the narratives of disempowerment show (7.3.4) the legal processes can be disheartening, alienating and require significant energy from the family victims. Furthermore, at the time of most of sentencing hearings, the killing is still a relatively fresh event and analysis of the VISs in chapter seven suggests that the family victims came to court still grieving and angry and arguably not ready to hear any expressions of remorse from the offender. For example in hearing 11, the deceased's sister told the offender:

> *I am sure there has been a hideously high price paid to secure what you [offender] would see as a favourable verdict for you in this murder trial. These are tremendous debts that I myself feel you [offender] are responsible and accountable for. In my eyes, you have not in any shape or form, even begun to pay for these debts.*

In the same hearing, the deceased's mother made it quite clear that she was not interested in an apology: "Your actions are beyond my comprehension, and I will never condone or forgive such an atrocity".

Research of predictors for participation of victims of violent offences (including homicide) in US victim-offender reconciliation programs suggests that the more

time that has passed after the commission of a violent offence, the more likely that victims of those offences will participate (Wyrick and Costanzo 1999; Umbreit et al, 2006). In a study of victim-offender mediation programs in two US states, the researchers found that many victims "who would never have considered such a meeting in the immediate aftermath of the crime changed their minds over the years" (Umbreit et al, 2006: 45). Because victims of violent crimes are not usually looking to compensation, Umbreit et al argue that the time lapse is important because victims of violent crimes go through stages of coping and may not be ready to face the offender at an early stage. Although it is impossible to generalise about the needs of family victims, drawing on this research, it is suggested that the sentencing hearing is probably too soon in the grieving process for the family victim to be receptive to victim-focused remorse from the offender.

8.4 Emotionality and Victim Participation

One of the most contentious issues in connection with victim participation is the emotionality associated with oral VISs. Certainly in the matters observed, the oral VISs as distinct from the written VISs added an emotional and, on two occasions (hearings 5 and 10), a volatile layer to the hearing. This emotionality was not surprising given that the victims' stories were distressing and frequently confronting. The family victims expressed anger and sadness, shed tears and broke down as they recounted the impact of the death of their family member on their lives (7.4.1). But, contrary to concerns raised by research, no sentencing judge lost control of the proceedings; victims did not walk out in anger; most victims conducted themselves with dignity and restraint; there was no violence directed at the offender or other participants; the hearings proceeded smoothly and according to law; and the one hearing where there was disruption in the public gallery proceeded nonetheless.

This thesis has identified two factors that make a significant contribution to the relatively unproblematic victim participation observed. First, there are social rules that inhibit the excessive displays of emotion in some settings; second, there are legal structures and processes that both manage and contain emotionality associated with VISs. With regard to the first factor, this thesis does not make claims as to the subjective intentions of the family victims observed. Nonetheless, many of the family victims interviewed spoke of trying to contain their emotions and remain as calm as they could while they read their VISs to the court. This is also consistent with what I observed in the courtroom. According to Karstedt, this restrained conduct can be attributed to social mores she calls "display rules" that "control and inhibit the display of emotions... define the proper social space for emotions and ... restrict emotional action". Drawing from Konradi's work in relation to sexual assault victims' experiences in the courtroom, it is likely that family victims are aware of the social restraints on their behaviour in the formal and dignified courtroom, that they are expected to conduct themselves in a subdued, respectful manner and manage their emotions appropriately; if family victims expressed what they really felt in all its intensity, courtroom proceedings would most likely be reduced to mayhem (Konradi and Burger, 2000; Konradi, 2007).

Given that the operation of such 'display rules' is subject to the personalities of the family victims and the dynamics of the particular matter, it is contended that the second factor is particularly important: the structures and processes that shape the dynamics and manage the emotionality associated with family victim participation in the NSW Supreme Court. Goffman's 'cooling out' process (Goffman, 1952) provides the conceptual framework for this part of the analysis. It is argued here that family victims are 'cooled out' by the legal professionals involved so as to manage and contain the emotional tension in the courtroom and preserve the integrity of outcomes and legal processes more generally. The structures and strategies of the cooling out process seek to defuse victim frustration and anger and assist victims to cope with grief, adjust to the legal constraints and the compromise inherent in their position in the process. In this part, following an

explanation of the conceptual framework, the cooling out structures and processes identified in the sentencing hearings will be examined in three phases: the 'consultation phase', the 'courtroom phase' and the 'sentencing phase'.

8.4.1 Cooling out: a conceptual framework

Goffman developed the concept of cooling out in the context of a confidence game in which cooling out is the final stage of the scam. To avoid the 'mark' (the person duped by the scam) complaining to the police or otherwise generating bad publicity for the scammer's business, the scammer works to cool out – pacify, console and re-orient - the mark. Cooling out is necessary to defuse the mark's anger at his or her financial loss and loss of face; the goal is to "define the situation for the mark in a way that makes it easy for him to accept the inevitable and quietly go home" (Goffman, 1952: 451).

The cooling out process has been shown to operate in many social settings and Clark's seminal work in American higher education provides an example (Clark, 1960). A college education was a recognised pre-requisite for better employment prospects and "moving upward in status" (Clark, 1960: 570). An 'open-door' admission policy operated in publicly supported American colleges as unlimited entry was thought to provide equal opportunity for all citizens to acquire such an education (Clark, 1960: 570). There was a disjuncture, however, between students of poor, academic ability entering college with expectations of advancement but destined to fail because they were unable to meet the performance standards (Clark, 1960: 571). The higher education sector was required to 'handle' these disappointed students in a manner that preserved their motivation but deflected their resentment at their loss of status and prospects (Clark, 1960: 571). Clark's work identified cooling out processes employed by specialised junior colleges to assist low achieving students to realistically evaluate their own abilities and vocational choices and strive for achievable goals.

Given the disjuncture between the legal process and family victims, the sentencing hearing is a setting in which cooling out processes and structures can assist victims to cope with their distress, defuse or reduce victims' anger and/or resentment, help family victims adjust to prevailing constraints imposed by law, and induce them to proceed acquiescently within the legal framework. The events in *Borthwick* provide an example of what might occur if victims are not successfully cooled out. Negative emotions associated with their grief, disappointment and resentment could 'flood out', impede the orderly process of the legal proceedings, threaten the dignity and fairness of the hearing and undermine public confidence in the administration of criminal justice.

In recent years, the role of the court is "being increasingly judged in terms of service quality and its responsiveness to the views and expectations of those involved in the proceedings as well as the wider community" (Jeffries, 2002: 9-10). It is important that in this environment, the court processes, now more than ever in the public eye by virtue of the media, be seen as reflective of community standards and expectations. As has already been discussed, in deference to such community expectations, reforms providing victims with a voice in the courtroom have overridden concerns that VISs have the "potential to be highly prejudicial, vitriolic and unbalanced" (Australian Law Reform Commission, 2006: 14.24) in the sentencing hearing (Laster and O'Malley, 1996:26). Media reports of angry, distressed victims who perceive unfair treatment and re-victimisation by the law and its agents in the courtroom are the stuff of political nightmare. Unlike the shadowy, private world of the "con mob", the court is a critical public institution dispensing justice and as such it "cannot take it on the lam; it must pacify its marks" (Goffman, 1952: 455).

In this thesis, the cooling out processes are conceptualised as part of the emotion work required by the sentencing judge and others outside the court that demonstrate an empathic response to the situation and concerns of family victims.

Drawing from the work of Hochschild (1983) and Roach Anleu and Mack (2005), according to the concept of 'emotion work', 'workers' such as the sentencing judge in the courtroom and those employed by connected agencies outside the courtroom, strive to manage their own emotions as well as those of the family victims.

8.4.2 The Consultation Phase

The consultation phase is that period before the sentencing hearing where the Crown consults with family victims in relation to the preparation and presentation of VISs.[137] To this end, victims are given information, options and assistance. Certain components of this phase perform a significant cooling out function to assist victims to understand and comply with the rules of the sentencing hearing and adjust to legal constraints on their voice. Prosecution Guidelines published by the ODPP require the Crown to obtain and review draft VISs from family victims to ensure that the statements deal only with the impact of the deceased's death on the family and contain no offensive, threatening and/or harassing material. In this process a VIS, a highly personal document that has often taken months to prepare, can be changed or rejected during consultation if it contains inadmissible material. Even though the Crown 'consults' with family victims about any editing of the VISs, the law is not negotiable. Family victims learn that they do not have an unfettered 'voice' in the sentencing hearing and, moreover, that voice might be lost through non-compliance.

If VISs are not reviewed, there is a risk that successful objections could result in statements being deleted in part or in their entirety. Such outcomes are potentially humiliating and frustrating for victims and a source of tension and conflict as occurred in *Borthwick*. Thus the review process serves an important cooling out

[137] Although not directly observed, inferences of this phase have been drawn from documents such as Prosecution Guidelines and the Information package supplied to crime victims from NSW Victims Services, interviews with family victims and the observation fieldwork.

function by both assisting family victims to prepare an admissible VIS that can be read to the court and also in reducing the likelihood of conflict disrupting the hearing.

Once the VISs go through this 'filtering' process, the Prosecution Guidelines require that copies are forwarded to the defence. By this process, the Crown receives notice of any contentious issues and can prepare the family victims for what might occur at the hearing if it cannot be resolved. Thus, in contrast to the situation in *Borthwick*, the lack of surprise on the part of family victims whose VISs were subject to objections in hearings 2 and 16 suggests that they had come to court prepared.

Another important cooling out component during this phase is that family victims have room to 'vent' at their lack of status, control and compromise (Goffman, 1952: 457). It is preferable that victims express their anger and disappointment in the relative privacy of an office under appropriate guidance rather than under the public gaze in the courtroom where such venting could disrupt the hearing and threaten public confidence. A consultation period provides victims with time for reflection and adjustment to the legal framework. This does not mean that many victims are not still angry or disappointed – in the hearings several victims spoke angrily of their frustration at the editing of their VISs and lack of 'rights' but they nonetheless came into the courtroom and complied with the restrictions. Interestingly, it appears that those family victims, who did disrupt the proceedings in hearing 10, did not participate in this consultation phase as they handed their VISs to the court on the day of the sentencing hearing.

Consultation before the hearing reduces the likelihood of these scenarios arising in the courtroom. In this light, consultation can also be viewed as a prevention strategy which aims to ensure that the victim does not require cooling out in the courtroom - a difficult and risky course.

8.4.3 The Hearing Phase

Given the public nature of the hearing and the presence of the offender, cooling out processes are particularly important in this setting. Dealing with the bereaved victim and the emotionality associated with VISs in the courtroom is primarily a challenge for the sentencing judge. Drawing on Roach Anleu and Mack's research on the emotion work of Australian magistrates, it is contended that in their dealing with family victims and their VISs, sentencing judges are required to perform emotion work as they manage their own emotions and those of court users to ensure that the proceedings run smoothly and the process is perceived to be (and indeed is) fair (2005: 593).

Cooling out processes in the courtroom operate to defuse the expression of victim distress and/or anger and lessen the strains of the ordeal in presenting VISs. The object is to maintain orderly proceedings conducive to achieving the desired legal goals. The courtroom phase is divided into two stages: the reception of VISs in the courtroom and oral presentation.

8.4.3.1 The reception of VISs in the courtroom

This stage comprises the tender and scrutiny of the VISs, handling objections and amendment of statements if necessary. As noted, formal objections were made in only two hearings, 2 and 16, and a conspicuous feature of the remaining hearings was the marked lack of debate regarding the content of VISs despite the inadmissible material described in Chapter Seven.

The following exchange took place in hearing 9 after the VISs were submitted. When later read aloud, the VISs contained angry comments regarding punishment, the killing and the criminal justice system.

> *D: There may be some material there that is irregular in terms of content, but I don't want to make anything of that your Honour.*

J: They will be marked as Exhibit B on sentence, and received on the usual basis.

C: I can indicate there are some sections in there, as my friend suggests, that are probably not appropriate for an impact statement, and we do not rely on them.[138]

In hearing 10, when the Crown told the court "there are some colourful remarks in the statements", the judge replied: "That is not unexpected and, given the circumstances, not surprising." These and similar exchanges observed support two claims. First, they suggest that family victims are 'cut some slack' in relation to what they can say in their VISs despite the law. Second, it is a collaborative effort on the part of the legal professionals to 'neutralise' the material. In downplaying and thereby 'neutralising' the inadmissible material, the lawyers do not criticise family victims. Their remarks indicate trust that the sentencing judge will deal with the VISs appropriately and the inadmissible material will have no impact on sentence (Erez and Laster, 1999). The process of neutralising the legal impact of the VISs was also most likely not evident to the family victims involved (Erez and Laster, 1999). From their perspective as non-lawyers, their VISs were accepted and they were then permitted to read their statements as written aloud to the court. While it might be incidental to legal process and the legal professionals are not acting deliberately to preserve the feelings of the family victims, the effect is that the family victims do not experience public interference in their VISs in the courtroom. They were able to present their statements in accordance with expectations fostered during the consultation phases.

Further, it is unlikely that the significance of the words "on the usual basis" would have been apparent to the family victims. Although family victims are supposed to be told that their VISs will not influence penalty, as discussed at 7.1.2.1, it is unclear what expectations may nonetheless be harboured. Again, while it might not have been the subjective intention of the legal professionals to respond sensitively to the

[138] The initials represent - D: defence counsel; J: sentencing judge; C: Crown.

needs of the victims the effect was that there was no public statement that the VISs were irrelevant to sentencing; which might well have humiliated and angered victims in the courtroom.

Turning to the objections in hearings 2 and 16, it is evident that objections to VISs have the potential to place great stress on the hearing as well as the family victims involved and cooling out strategies are essential in the handling of objections in the courtroom. As *Borthwick* demonstrates, where objections are made to VISs, particularly successful objections can generate victim humiliation, anger and/or resentment, disrupt proceedings and bring the law into question. It will be recalled that in hearing 2, the VISs were rejected in their entirety because the court found that the family victims were not qualified to submit VISs (6.2.3.4). Such outright rejection of VISs could have generated tension and conflict in the courtroom but did not. Instead, the family victims sat quietly in the public gallery while the objection was ruled on and did not appear surprised or shocked. This suggests that the family had been prepared for defence approach during the consultation period.

Furthermore, the judge did not simply reject the VISs and move on to the next issue at the hearing. Once made, his Honour took the time to explain the ruling because, he said, he wanted to ensure that the deceased's family understood that they were prevented from submitting their VISs "because of the law not because of anything they have written". In a marked contrast to the sentencing judge in *Borthwick,* the judge's remarks recognised the presence of the victims in the courtroom as well as their interest in the matter by acknowledging their disappointment and taking time to provide an explanation.

In hearing 16, objections were made to the content of VISs (6.2.3.4). Again the lack of surprise on the part of the family victims suggests they had been prepared during the consultation period. This was a high profile case and the very small court room was crowded with friends and supporters of the offender as well as journalists. There was certainly the potential for the family victims to have been humiliated and

angered at the public rejection and editing of their personal statements and these emotions could have flooded out as had occurred in *Borthwick*. As in hearing 2 however, the judge explained the law clearly and at length to the court; he emphasised that the decision to delete sections of the VIS was neither personal nor a reflection on the victims. The judge told the first victim: "It's not a subjective criticism of you Ms [X] but it's a matter we must do according to the law and according to the regulations in respect of victim impact statements". He also expressly shifted the blame to victim support workers:

> *Now it's about time that those persons who assist victims to make impact statements are aware of the purpose of a victim impact statement and that they don't lead to this situation where it's for this court to have to, in some way, deprive a victim of making statements that they wish to make in court.*

Furthermore, the judge reassured the first family victim that the opportunity to read her VIS "was not wasted" because being unable to read the highlighted sections "wouldn't matter very much to the impact of what you say." Both family victims then took their turns to read their VISs aloud to the courtroom as directed and the proceedings continued in an orderly fashion.

Sensitivity to the interests and concerns of the deceased's family was fundamental to the cooling out processes in both cases.

8.4.3.2 The Ordeal of Presenting VISs

When it came to reading their statements aloud to the court, consistent with research, such a public expression of private grief, especially in an alien, intimidating courtroom before the offender appeared to be something of an ordeal for most victims (Rock, 2010; Victim Support Agency, 2009). Cooling out family victims as they present their VISs so that they might remain calm and compliant is primarily a challenge for sentencing judges generally unmediated by the parties or other court personnel. In this study the judge usually dealt directly with unrepresented, bereaved family victims, the expression of their emotions and the

emotions generated by the VISs in the courtroom. The sentencing judge's task is to both provide a space for the victim's voice in accordance with the legislation and maintain an orderly court so vital to the conduct of a fair hearing. It is important that the expressions of emotion by family victims are kept within socially approved limits rather than flooding out, that the family victims defer to the authority of the judge and conform to the behavioural norms of the sentencing hearing, and that the proceedings do and are seen to run smoothly overall.

While the sentencing judges maintained 'affective neutrality' in relation to the content of the VISs, they adopted either a welcoming or courteous demeanour when dealing directly with the family victims in relation to their presentation (7.4.3.1). All judges afforded family victims reading their VISs aloud a degree of procedural justice that, through a variety of verbal and non-verbal cues, conveyed dignity, respect and sensitivity to the family victims' ordeal of reading their VIS aloud to the court. Procedural justice is considered to be an important element of the expressive function of VISs and research has shown that it is a significant factor in the victim's experience of criminal proceedings (2.3, 3.4). While a legislative right to submit a VIS can create an image of a procedurally fair process, the treatment of the victim in the courtroom is crucial to that victim's assessment of the fairness of the procedure which in turn is crucial to that victim's compliance with the normative behavioural rules of legal proceedings (Wemmers, 1998: 74; Tyler, 2003: 298). It is contended that the positive treatment that the family victims received in the courtroom from the judges as they presented their statements, made it more likely that those family victims would defer to the court's authority and cooperate with implicit expectations that the hearing would run smoothly and in an orderly manner.

8.4.3.3 The Judgment Phase

For the purposes of this thesis, the judgment phase is that event where the sentencing judge announces the penalty to be imposed and reads aloud his or her reasons for decision to the court (*R v Thomson and Houlton* (2000) 49 NSWLR 383).

This event usually occurs within weeks of completion of the sentencing hearing. According to law, when the sentence is passed the sentencing judge is required to provide an oral explanation to the offender, victims and other persons that might be in court (*R v Bottin* [2005] NSWCCA 254). Through the sentencing judgment, the judge reveals his or her reasoning process by identifying the facts that have been found to support the offence, any relevant aggravating or mitigating factors that have been considered and applied, and application of any legal principles (*R v Lesi* [2010] NSWCCA 240). In the event that VISs are submitted to the court, section 28(3) of the *CSPA* requires the court to acknowledge receipt of VISs and make any comment that the court considers appropriate. Not surprisingly, the sentencing judgment, both reasoning and penalty, is a very significant event for family victims. The frustration and resentment felt by many victims in relation to the perceived leniency of the penalty has been well-documented and, according to Rock, many victims equate the penalty imposed with the value that has been ascribed to the deceased victim (2010).

A significant cooling off strategy at this stage of the process is to acknowledge the family victims and, through comment on their VISs submitted during the hearing, validate their experiences. Researchers have found that validation in this manner is important for victims (Roberts and Manikis, 2011). All interview participants had copies of the sentencing judgments in 'their' cases and four participants commented favourably on the judge's comments about the VISs. For instance, Josephine was positive about the sentencing judges' comments in his judgment that recognised how important the deceased had been to his family and what kind of man he was: "it was nice that he had listened and remembered. Because when you're up there it's not like anyone's listening".

As found in Chapter Five, three sentencing judges suggested that the VIS served other purposes such as to bring home the nature of the offence to the offenders and reminding the court of the loss more generally. In hearing 11, the court said: "One of the purposes of reading victim impact statements publicly in the

sentencing proceedings is to bring home to the Offender and others who might act in a similar way, the appalling consequences of the Offender's actions extending beyond the death of Mr [deceased]". In hearing 3, the court said that while "there are limitations as to the use the court can put such statements they do help to bring home the loss offences such as that presently under consideration create." Five sentencing judgments also provided an explanation of the sentencing considerations so far as was relevant to the concerns of the family victims. In hearing 1, for instance, the court said:

> *The statements made by the deceased's mother and father show clearly the impact of this killing on their lives. But the law is that I cannot take their particular loss and the effect of the killing upon them into account to increase the sentence to be imposed…I sincerely hope that they can understand that the Court cannot impose upon a mentally ill and young offender a sentence that would have been appropriate for someone, for example, who had bludgeoned their son to death for spite, thuggery, robbery or any other sane but criminal reason…*
>
> *It is not the Court's function to try and settle the score as it were where an offence has resulted in the death of another human being whoever that person might be. One often hears complaints that the sentence did not represent the value of the life of the deceased. But if you think about it, it never can. How does one value the life of a young man in the eyes of his family and friends … Retribution is only one of the many aspects of punishment even though it is a very significant one when the court is dealing with an offence where a human life has been taken. The Court understands and truly sympathises with the loss occasioned to the deceased's family and friends. But it cannot hope to replicate that loss in the punishment it inflicts on another young man, particularly one with such a severe mental illness which contributed to the offence, and it cannot attempt to do so.*

In relation to the hearings observed, all sentencing judges took the opportunity to comment on the VISs in their judgments to varying degrees and in particular note the loss, anguish, sorrow and/or suffering caused to the deceased's family as a result of the killing of the deceased. References to the VISs ranged from a brief paragraph comprising two sentences to three lengthy paragraphs taking almost a

whole A4 page; over half of the sentencing judgments (9) devoted more than one paragraph to the VISs received. The comments regarding the VISs were shorter in those cases where the statements were not read aloud to the court. In hearing 14, for instance, the court acknowledged the VIS tendered as follows:

> *A victim impact statement was tendered on behalf of members of the deceased's family. They held in very high regard and have suffered as a result of his death. The sympathy of the court goes out to them.*

Thirteen of the judgments identified the nature of the relationship between the family victims and the deceased and in eight of the judgments, the family victims who submitted VISs were named. Sympathy was extended by the court in eight judgments as, for example, in hearing 15**:** "The Court expresses its sympathy and understanding to Mrs [victim] and her family."

Many of the judgments went further and commented on the content of the VISs and the family victims' experiences of loss demonstrating that the sentencing judge had engaged with the statements. In hearing 10, for example, the sentencing judge said:

> *Those statements provide eloquent testimony to the love which her family had for the deceased. Despite her young age, it is clear that the deceased had a calming and restraining influence upon her brothers and provided support for her mother. She had a strong relationship and bond with her brother's children and those children have suffered deeply as a result of her death. The statements refer to the loss which [deceased's child] has experienced in having lost a loving mother and being forced to live his life without ever knowing her. These statements afford clear evidence of the value of the life of the deceased and the grief her death has occasioned to all her loved ones.*

In hearing 8, the Court acknowledged that the family victim had "described her sister as an irreplaceable family member and her and her husband as valued citizens stolen from her. I am satisfied that this has occasioned her the deepest grief and has been productive of deep and enduring trauma which has shattered

her family and caused a breakdown in her marriage." In hearing 15, the Court also commented upon the content of the VIS tendered.

> *Mrs [family victim] statement was a moving reminder of the tragedy brought into the life of a mother who loses a son. What was particularly moving, and heartening, was Mrs [family victim] acknowledgement that the offender has had a hard life, as did her son. That remark exhibits a measure of strength and good grace, which I hope will stand well for Mrs [family victim] in her grief.*

A particularly striking feature of at least ten of the sentencing judgments was the use of emotive language. Unlike the neutral affect and language displayed by the judges in the courtroom during the hearing, the sentencing judgments revealed more emotional responses to the VIE. The deaths were described as "tragic" and/or "a terrible experience for any parent"; the VISs submitted were "moving" and "eloquent" revealing the "profound consequences", the "heartache", the "deep enduring trauma", the "anguish", the "devastation" and the "deepest grief" occasioned by the deceased's death. In hearing 5, for instance, the court said that the VISs:

> *[e]xpress in moving terms the dreadful loss they have suffered from the death of their loved one…his tragic and untimely death will be a cause of continuing grief and loss, which can never be assuaged. Least of all by anything that the court can do.*

Perhaps not surprisingly, those judgments with perhaps the most extensive comment and validation were those matters (hearings 5 and 10) where the family victims had been angriest in the courtroom.

8.5 A Forum Dealing with the Aftermath of Homicide

Drawing on Shapland's work (2010), it is contended that the sentencing courts in this thesis should be regarded as community forums responsible for dealing with

the aftermath of homicide in accordance with the rule of law. As such, together with formulating penalty, the court is required to adequately recognise and acknowledge all interests that are affected in this process whether the interest-holders are 'parties' or not. 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; Booth and Carrington, 2007). Through VISs, victims are able to speak and have a defined role in the process. Victim impact statements are also 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 responsive to those interests (Booth, 2003; Booth and Carrington, 2007). From this standpoint, the relevance and purpose of VISs is to give the court scope to express changing values and expectations of the community and family victims in particular.

This does not mean that VISs have a therapeutic function in the courtroom (2.2.2). Indeed, such a claim is problematic. First, it is difficult to conceptualise what this actually means in the absence of an agreed therapeutic model (Doak et al, 2009) especially given the individual nature of family victims' needs. Second there is the question of what may be (appropriately) required from sentencing judges in achieving therapeutic outcomes (3.3.4). In this study, the sentencing judges in this study did not act as 'therapists' in the courtroom. There was nothing to suggest that judges tried to assist victims to achieve particular emotional states such as "a sense of forgiveness, reconciliation and closure" for victims of crime (Doak et al, 2009: 688). Rather the quality of inter-personal treatment afforded to those victims who read their VISs aloud suggests that the response of the courts to victim participation was more about reducing obvious anti-therapeutic effects of court processes that have proved distressing, disempowering and/or disrespectful for victims in the past.

Shapland and Hall argue that a significant factor undermining public confidence in the criminal justice system generally is the poor treatment of victims and their

exclusion from the criminal justice process (2010: 188). In the context of sentencing, poor treatment of victims could compromise the legitimacy of the process (Shapland, 2010: 365). An example of the tension and conflict that can be generated both within and without the courtroom if the court does not adequately respond to the needs of family victims is provided by *Borthwick* (Booth, 2011b). The treatment that the deceased's family received from the court in that case (1.1) was remarkable for its lack of sensitivity. For those family victims, the process could be described as counter-productive and perhaps even destructive, consistent with concerns expressed in relation to the welfare of victims in this process that have been expressed by various commentators (Henderson, 1985; Richards, 1992:133; Bandes, 1996; Rock, 2010, Gewirtz: 1995: Hoyle, 2001; Bugg, 1995). In that case the court had had ample opportunity to observe the distress and anger of the deceased's family during the trial and sentencing hearings which by their nature are frequently volatile. But, according to reports, the court was not responsive to the 'affective state' of the family victims during the sentencing process.

The findings of this thesis reveal that the interests and concerns of the family victims were generally recognised and respected in the sentencing courts observed. In the two cases where the VISs were the subject of challenge (hearings 2 and 16), the courts responded very differently to the court in *Borthwick.* Fairness required that the offenders be heard, irrelevant and/or prejudicial evidence excluded and the VISs appropriately amended if necessary. The principle of fairness also required however that the interests of the family victims were respected. In submitting a VIS that they hoped to read aloud, the family victims had interests that were substantially affected by the handling of objections to their statements (Garkawe, 1994: 603; Booth, 2011b). The requirement of fairness in these circumstances required the courts to consider the interests of the family victims as well as the offenders. Often this process is described as the 'balancing' of competing interests but the metaphor of balance is misleading. The interests of the defendant and the family victims in the sentencing hearing are qualitatively different and not mutually exclusive (Garkawe, 1994: 603). The offender's interest is in preventing unfair

restriction on his or her liberty whilst the interests of the family victim lay in having a voice and being heard on the impact of the crime. In this context, protecting the interests of the offender does not mean it is necessary to ignore the interests of the family victims (Booth, 2011b).

An important feature of a forum dealing with the aftermath of homicide is that it does not suppress emotion (Shapland, 2010). Rather emotionality is respected while managed and contained to enable the proceedings to operate fairly for all concerned. Modification of the sentencing hearing to allow oral VISs gives family victims the opportunity to emote in the courtroom. As already discussed, while the emotional tension was raised in the courtrooms observed, particular structures and processes managed the emotionality such that proceedings continued in an orderly and dignified manner. Consistent with Karstedt's observation that criminal courts are designed to deal with intense emotions (2002: 300), the courts observed accommodated family victims' emotional expression without impairing the dignity or formality of the forum. In doing so, some courts appeared to adopt a rather 'robust' approach, an approach well encapsulated by the sentencing judge in hearing 5 (a hearing where the family victims were obviously angry and grieving) who told defence counsel:

> *I think that the purpose of the legislation is indeed to allow things to be said even things which are unpalatable or unreasonable. When you are grieving for a child or a brother or a sister, no one expects objective rationality and I think that the system of justice is quite strong enough to put up with even strong statements.*

9. Conclusion

During the last two decades, a marked feature of criminal justice policies in Australia and other common law jurisdictions is the prominence of the perceived interests and concerns of crime victims. In efforts to reduce victim marginalisation and dissatisfaction with criminal justice processes, legislative reforms have targeted key issues including: support, information, protection, and voice in the legal processes.

This thesis has investigated the issue of 'voice' in the context of family victim participation, especially by oral VISs, in the sentencing of homicide offenders in NSW. It has done so through an analysis of data gathered from a combination of sources: primary legal materials; observation of sentencing hearings; interviews with family victims; and VISs read aloud to the hearings observed.

Victim participation through VISs is a well-established feature of the sentencing of homicide offenders in NSW (see Appendix four). Nonetheless, the review of theoretical, doctrinal and empirical sources in Chapters Two and Three reveals that such victim participation and particularly oral VISs in sentencing hearings are contentious aspects of contemporary criminal justice. Much of the controversy in this regard stems from the disjuncture between, on the one hand, the form and the established legal goals of the traditional adversarial sentencing hearing and, on the other, the needs and concerns of many family victims. Recent research with regard to victim participation in the courtroom (Rock, 2010; Schuster and Propen, 2010) reveals concerns that the emotionality of oral VISs will have adverse impacts on the offender's interests and the integrity of the hearing overall. Such concerns have led to resistance to oral VISs by some legal professionals in the UK and elsewhere (Casey, 2011; Sweeting et al, 2008). That this disjuncture between traditional legal goals of sentencing hearings and the role of family victims in those proceedings has

the potential to produce tension and conflict in the courtroom as well as bring the law into disrepute, has been well-documented and demonstrated recently by sentencing proceedings in *Borthwick* [2010] VSC 613.

The contributions of this thesis to the research area are:

1. The use of a variety of data sources and modes of analysis to produce a novel and rich picture of victim participation in the sentencing of homicide offenders in the NSW Supreme Court;
2. Courtroom observation of victim participation, a form of empirical research little utilised by researchers in the area;
3. Unique narrative analysis of oral VISs submitted by family victims to the sentencing court; and
4. Extension of the debate with regard to the expressive capacities of VISs, the containment and management of emotionality associated with victim participation and the nature of the sentencing court as a forum for dealing with the aftermath of homicide.

The limitations of this thesis are:

1. As a small in-depth study of homicide sentencing in the NSW Supreme Court, the extent to which the results of the study can be generalised to other common law jurisdictions is limited. The study however was not intended to be representative; rather its nature has been exploratory and designed to illuminate the nature and dynamics of participation of family victims in the sentencing hearing. It is contended that the study findings have provided a rich picture of victim participation and highlighted issues for future research in NSW and other common law jurisdictions.
2. The mostly female, small number and largely mono-cultural backgrounds of the interview participants together with a limited recruitment base limits the extent to which their views can be considered of general application. Again this sample was not intended to be representative of a discrete group of victims. This data was gathered to assist me to develop insight into

victims' experiences in the courtroom, the 'backstage' processes involved in victim participation, and inform my wider analysis of the emergent issues.

Chapter Four of this thesis outlined the research methodology for the study. Chapters Five, Six and Seven together have presented a rich picture of victim participation in its legal context and Chapter Eight has considered key emergent issues arising from the investigation. This final chapter will conclude by drawing together the study findings and analysis in the context of the questions that have guided the investigation:

- How does victim participation work in the sentencing of homicide offenders in NSW?
- What are the implications for the offender's entitlement to a fair hearing?
- What are the implications for the integrity of the legal proceedings more generally?

9.1 Victim Participation in Homicide Sentencing Hearings in NSW

By virtue of the *Crimes (Sentencing Procedure) Act 1999* (NSW), the family victims were able to participate directly in the sentencing hearing through written and oral VISs. Despite fears that such victim participation could cause a departure from the traditional model of criminal justice, it did not; the sentencing courts observed maintained their focus on the legal goal of determining penalty for the offender. Nor did victim participation change the adversarial shape of the hearing. Family victims were not accorded party-status in the proceedings nor provided with any special entitlements in the courtroom beyond reading their statement aloud. All family victims remained 'outsiders' seated with the audience in the public gallery, physically and practically excluded from the main business of the hearing. Family victims only entered the central performance zone of the hearing to read their statements aloud.

According to NSW law, the VISs were not relevant to the determination of penalty and the reception of VISs was 'cordoned off' as a discrete component at the beginning of proceedings, before the 'real business' of the hearing got underway. Thus, the irrelevance of the VIE to penalty was reinforced and victim participation did not detract from the offender's crime, the offender's culpability and/or the offender's future. At the same time, in at least one third of cases, family victims also participated indirectly in the hearings as the court recognised and acted upon their interests and concerns during later stages of the process. This finding together with the fact that the courts did use the VISs for a variety of expressive purposes, including the validation of victims' experiences and bringing home the consequences of the crime to the offenders, suggested that the sentencing courts were responding to a wider range of interests beyond the offender.

The study findings indicate that consistent with extant research, the expressive functions of VISs were particularly important to the family victims. Through their statements, family victims acquired a voice in the hearing. Furthermore, in the absence of a standard form, this voice was their own and the VISs were highly individual accounts designed to persuade the court variously of the value of the deceased, the brutality and violence of the offender and the scale of the family's loss. Much to the frustration of many victims in the study however, their voice was constrained by legislation and filtering processes during the 'consultation' period before the hearing. Nonetheless, victims were afforded more leeway in what they could say in the courtroom than expected and many statements included irrelevant and prejudicial material. The lack of debate regarding the content of VISs in all but two cases indicated that a more robust approach to family victim participation was taken by the court and also suggested that consistent with research, the defence was relying on the judge to deal with the VIE in accordance with the law. It is likely that this approach was in large part a product of the irrelevance of VISs to penalty and also the fact that the prejudicial material in the VISs was more 'toned down' than that in *Borthwick*; this latter factor is likely to be a reflection of an effective

filtering process. Further investigation of the filtering processes in NSW and other jurisdictions is an important area for future research.

The expressive capacities of the VISs also varied considerably depending upon whether the statement was read aloud to the court. Written VISs had no discernible impact on the proceedings as they were submitted with other documents, not read aloud and the family victim authors not acknowledged by the court. Thus the expressive capacities of written VISs were very limited. The vast majority of family victims in this study however elected to read their statements aloud to the court, and consequently oral VISs were a distinctive feature of the majority of hearings observed. This finding confirms previous research suggesting that family victims are more likely to read their VISs aloud than victims of other crimes.

Nonetheless, while oral statements meant that the family victims were able to communicate their feelings and be heard by the court, the opportunities for reciprocal communication – court-victim and offender-victim - and various restorative benefits as envisaged by some scholars were restricted. Victim impact statements were delivered as monologues and did not generate a discussion between the victim and the court and/or the victim and the offender. With regard to court-victim communication, when the VISs were presented sentencing judges did not respond to the content nor validate the experiences of the victims as described; no judge showed any response to the contents of the statements and all maintained affective neutrality necessary for an impartial court. Reciprocal communication came at the next stage of the proceedings, delivery of sentencing judgment, however when most sentencing judges used the VISs to validate the loss suffered by the family victims in their remarks. Thus, confirming previous research, the sentencing judgment was a significant element by which expressive capacities of the VISs could be served.

Offender-victim communication, however, was not a feature of the hearings at any stage**.** Contrary to claims made by scholars, VISs did not appear to generate victim-

focused remorse in most cases and in fact, other than one case, offenders appeared largely unresponsive to the statements. Consistent with research, the form and processes of the sentencing hearings observed as well as the nature of the subject offences, did not support an environment that encouraged the expression of sincere victim-focused remorse. Moreover what little victim-focused remorse was demonstrated did not appear accepted by or welcome to the family victims observed. The findings of this study suggest that VISs from family victims do not facilitate the reciprocal communication between offender and victim and further, that in any event, expressions of victim-remorse may not be the virtue as envisaged by Roberts and Erez, at least in the context of homicide sentencing. In light of claims relating to the 'restorative value' of VISs, this is an important area for future research. Such research should consider not only the perspectives of the court and the victims but also the position of the offender whose voice has not been heard with respect to this debate.

A particularly important finding in this study was that oral VISs did not have the destructive impact on the conduct of the hearings as anticipated by many commentators. Although the concomitant emotionality associated with the VISs undoubtedly increased the emotional tension of the courtrooms, the hearings nonetheless proceeded with dignity and formality. In the one hearing where the family victims did create a ruckus in the public gallery, the judge did not lose control and the proceedings continued in an orderly manner. Overall, most of the family victims reading their statements aloud conducted themselves with dignity and restraint. It is contended that key features of the hearings - the high quality of interpersonal treatment afforded to the family victims by the court and the structures and processes that effectively managed and contained the emotionality – were largely responsible for this outcome.

Key features shaping this picture of victim participation in NSW have been identified: the unique legal framework, the pre-hearing filtering processes, the predominance of oral VISs, the limited but valued expressive capacities of VISs and

the structures and processes that manage emotionality. Future research conducting similar studies in other common law jurisdictions to test the significance of these factors in the context of homicide and other serious offences will be extremely valuable.

9.2 The Offenders' Entitlement to a Fair Hearing

A major challenge to the offender's entitlement to a fair hearing is the use of VISs to determine penalties. Many scholars claim that taking account of VISs can produce disproportionate, inconsistent and unjust sentences. There is nothing to suggest however that this occurred in any of the hearings observed. Most importantly as noted, NSW is a unique common law jurisdiction in that the law explicitly provides that VISs from family victims do not influence the penalties imposed and this principle was reiterated in most of the sentencing judgments. Despite the criticism and concerns by commentators expressed with regard to the 'aberrance' of the NSW position in a broader common law context, in my view it is the correct approach. Not only because taking account of such VIE could breach principles requiring equality before the law and jeopardise the integrity of the sentencing process, but also because it is an important barrier to the imposition of inappropriate penalties. Furthermore, as discussed above, this position has a significant impact on the conduct of the sentencing hearing. In the hearings observed, there was little debate regarding the VISs presented and family victims were accorded a degree of leeway in their statements that enhanced the expressive capacities of their VISs. Arguably this approach reduced the potential for conflict and tension and contributed to the relatively unproblematic nature of the oral VISs in the hearings observed.

Hoyle's argument that consideration of VISs could increase penalty in individual cases is persuasive nonetheless. To avoid this result, she recommends that VISs should be submitted to the court after the offender has been sentenced. In NSW

then, family victims would read their statement to the court after the judge had delivered his or her judgment. There are drawbacks with this approach however. First, it reduces the expressive capacities of VISs. If judges were hearing the statements *after* sentence then they would not be able to recognise or validate family victims' loss in their sentencing judgments. The findings indicate that this validation is particularly important to the family victims and a significant feature of the expressive function of punishment. Not only would such an outcome be detrimental for family victims, but it could arguably detract from public confidence in the processes. Moreover, as a forum dealing with the aftermath of homicide, fairness requires that relevant interests and concerns be recognised appropriately by the court and this would include giving victims an opportunity to be heard. Given the law and the lack of evidence that VISs have negatively impacted on penalties, I would argue that this option is not required in NSW sentencing courts.

Finally there was no evidence to suggest that victim participation more generally derogated from offenders' entitlement to a fair hearing. The hearings focused on the offender and all had ample opportunity to present their case. Nor was there suggestion that the sentencing judges were anything other than impartial as they received the VIE. With respect to the emotionality associated with the VISs, no violence or abuse was directed at the offenders, judges did not lose control and the proceedings remained orderly allowing the court to properly consider the offender's case. While there is potential for oral VISs to have a more destructive impact on sentencing hearings, this potential can be greatly reduced by the implementation of structures and processes to control and manage emotionality that are similar to those in place in the NSW courts.

9.3 The Integrity of the Hearing

The perception of the legitimacy of the proceedings is crucial to the maintenance of public confidence in the sentencing hearing. In the hearings observed, there was no

suggestion that the proceedings were conducted by the judge in anything other than a neutral and impartial manner. Furthermore, despite many dire predictions in the literature in relation to oral VISs, the proceedings remained orderly and formal and the court appropriately dignified; no sentencing judge lost control; no family victims were violent or abusive towards offenders; no family victims stormed out of court and/or complained to the media.

The legitimacy of the proceedings is linked to the quality of the procedures employed. Poor treatment of victims could undermine public confidence and compromise the integrity of the proceedings. A feature of this study was the high quality of interpersonal treatment accorded to the family victims who read their statements aloud. Those victims were treated with dignity, courtesy and respect – the hallmarks of procedural justice. While clearly mindful of the offender's entitlements and the legal goals of the sentencing hearing, many of the sentencing judges' words and actions recognised interests and concerns relevant to the hearing beyond the offender. In doing so, the court was not forced to choose between the interests of the offender or the family victim. Both could be accommodated because they were different and did not conflict. Providing well managed space for the family victim to express their feelings publicly and treating those victims with respect did not conflict with giving the offender's due process entitlements and the imposition of an appropriate penalty.

It is evident from the literature review in Chapters Two and Three that victim participation and oral VISs could have more negative effects on the integrity of the proceedings – *Borthwick* is a classic example of problems that could arise. On the basis of the hearings observed it is contended that an important factor in avoiding such a result is that the sentencing court takes a wider view of its function. While the offender should be afforded appropriate protection and due process and the hearing focus on the question of penalty, public confidence requires that the court reflect changing values and expectations of the community. This means that the court, as a forum dealing with the aftermath of homicide, should respond to the

interests and concerns of all interest-holders with sensitivity. In reaching this conclusion it is important to recognise the pressure placed on sentencing judges to create and manage this forum and further research relating to the emotion work involved especially regarding training and support is necessary.

9.4 Some Concluding Remarks

This thesis has contributed to the literature on victim participation in the sentencing of homicide offenders through an in-depth qualitative study of family victim participation in the sentencing of homicide offenders in the NSW Supreme Court. The study involved a variety of data gathering and analysis methods including courtroom observation, a data source that has been little used in the debate and a unique narrative analysis of VISs read aloud to the courts. This study has confirmed that the expressive capacities of VISs, while limited, are of most relevance to the sentencing hearing and the expressive capacities of oral VISs the most significant for family victims. Victim participation and oral VISs were not destructive of legal processes, the offender's entitlements or the rule of law in the hearings. This study confirms the importance of the quality of interpersonal treatment for all whose interests are affected by the sentencing hearing together with the need for effective structures and processes that both manage and contain emotionality to support the court's function as a forum dealing with the aftermath of violent crime.

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Accommodating Justice:

An Exploratory Study of Structures and Processes that Shape Victim Participation and the Presentation of Victim Impact Statements in the Sentencing of Homicide Offenders in the NSW Supreme Court.

Volume Two: Appendices

Tracey Booth

Thesis submitted to fulfil the requirements for the award of Doctor of Philosophy, 2012

School of Law, University of new South Wales

Contents

Appendix one

Interview schedule (family victims)

Those parts highlighted were added to the schedule after two interviews were conducted.

Introductory comments

- Thank the respondent for agreeing to be interviewed;
- Introduce the researcher
  - details of background and training
  - how the researcher came to be involved in the study;
- Explain the purpose and nature of the study and how the respondent came to be selected;
- Give assurances of anonymity and privacy
  - inform respondents that all information obtained in the interview will be treated in confidence
  - seek permission to tape the interview and explain why this is necessary
  - explain the consent form and have the respondent sign it;
- Explain that there are no right and wrong answers and we are only interested in his or her opinions and experiences;
- Inform the respondent that he or she is free to interrupt, seek clarification of any question and be critical.

Biographical Details

- Family background; relationship to the deceased; details about the deceased; connection, if any, to the offender; circumstances of the homicide;
- Details of any support, information and/or assistance sought and provided by government agencies (particularly from Witness Assistance Service) or victim support groups; how did you find this support?
- How did the offender plead?
- Was there a trial?
- What was the outcome?
- Did you attend any parts of the legal proceedings? How did you find this experience?

Preparing a Victim Impact Statement

- How did you become aware that you could prepare and submit a VIS?
- Were you actively encouraged to prepare a VIS or was it presented as more of an option available to you?
- How long did you have to prepare the VIS?
- What information were you given about VIS and their use?
  - Clarity
  - Completeness
  - Unanswered questions?
- Why did you decide to give a VIS?
- What was your understanding of what VIS were supposed to do?
- How did you find the experience of preparing a VIS?
  - Format
  - Assistance
  - Permission for a copy
- What information did you provide in your VIS?
- Were you told of any restrictions on the types of information which could be included in a VIS? If so, what were they?
- Was there any other information that you would have liked to include in your VIS? If so, what else would you have included and why?
- How significant is it to you that you cannot inform the court of your feelings about the defendant, the nature of the crime or suggest an appropriate penalty?

- Did you have any concerns about completing the VIS (eg. privacy, safety)?

Submitting a VIS

- What happened to your VIS after you completed it?
- Were any parts of your VIS changed? If so, by whom? Why did this happen? What was your reaction?
- Did you attend the court to submit your VIS? How did you come to make this decision? How important was this to you?

Did attend the court to submit VIS

- Did you (or someone on your behalf) read your VIS aloud to the court? If so, how did you feel about this experience? How important was this to you?
- How did you feel about the offender listening to your VIS?
- How did the judge respond to you reading your VIS aloud?
- How was your written VIS given to the court?
- Were you questioned by the defence lawyer on your VIS? If so, what were your reactions to this?
- Did you know that a defence lawyer might question you on your VIS? If not, would this have caused you to change your mind about completing a VIS?
- How did you feel about the way your VIS was received and acknowledged in court?

Did not attend court to submit VIS

- Were you kept up to date?
- Do you know if a judge received your VIS? How do you know this?

VIS and the Outcome

- Did you attend court the day the penalty was determined? How did you come to make this decision? How important was this to you?
- How was your VIS used by the court?
- Did the judge refer to your VIS in sentencing? How did this make you feel?
- Do you feel that your views have been adequately considered by the judge even though they could not be taken into account in determining the final penalty? Did you feel that the sentencing judgment and sentencing remarks by the judge indicated that your VIS had been considered?
- How did you feel about the outcome?
- What effect, if any, do you think your VIS had on the process or outcome of the case? How do you feel about this?

Overall Experience

- How did you feel about the sentencing process and your role in that process?
- Do you feel that the sentencing judge treated you with respect, politeness and was concerned to recognise your rights with regard to the VIS?
- Did you feel that the VIS was a mechanism by which you could adequately express your views?
- Did submitting a VIS give you a sense of involvement in the sentencing process? How important was this to you?
- Did submitting a VIS give you a sense of satisfaction with the process and/or its outcome? How important was this to you?
- How do you feel about the experience of submitting a VIS? Did it meet your expectations? Would you recommend it to others?
- Did you get anything positive out of the experience? Do you have any regrets?
- Do you have any suggestions that might improve the experience of submitting a VIS for others?

Appendix two

Approval No (when available)

THE UNIVERSITY OF NEW SOUTH WALES

1

2 PARTICIPANT INFORMATION STATEMENT AND CONSENT FORM

Family victims' experiences and perceptions of the sentencing process in homicide matters in NSW.

Participant selection and purpose of study

You are invited to participate in a study of the experiences and perceptions of family victims of the sentencing process in homicide matters in NSW. We hope to broaden our understanding of your experiences, as a family victim, of submitting a victim impact statement (VIS) and the sentencing process generally. You were selected as a possible participant in this study because you are a relative of a homicide victim and you were involved in the sentencing proceedings of the person convicted of that homicide.

Description of study and risks

If you decide to participate, there are three parts to this research that you are invited to take part in. Not all parts of the research will be relevant to you. You may choose to participate in all three, one or two as applicable, or none.

1. If the homicide matter that you are currently involved in is not yet complete, we ask your permission to attend the sentencing hearing and watch you submit a VIS to the court. We want to observe first-hand the submission of your VIS and your role in the sentencing process generally. You can either contact us directly with the date or you can give your victim support group permission to notify us of the date.
2. You are asked to give us a copy of your victim impact statement that you submitted to the sentencing court. If you do not have a copy, we will ask you to sign a consent form that gives the Criminal Registry of the relevant Court permission to provide us with a copy of your VIS that has been retained on file.
3. You are asked to participate in an interview. If you agree, you will be asked to talk about the legal proceedings that followed the death of your relative and specifically your perceptions and experiences of the sentencing process. You will be asked about preparing a victim impact statement (VIS), the content of the VIS you submitted, whether it was oral or in writing, your experience of submitting that VIS, the sentencing outcome and your feelings about the sentencing process generally.

As a result of participation, you might expect:

- To suffer emotional distress as a result of discussing the death of your relative and your experiences during the sentencing process. If you do so suffer distress, you may contact your victim support group for counselling, or contact the 24 hour Victims Support Line on (02) 9374 3000 or NSW: 1800 633 063 (toll free) for support, referral and/or information, or apply for up to 20 hours of free face-to-face counselling from Victims Services NSW from approved counsellors. To make an application contact Victim Services NSW by telephone on (02) 9374 3111 or email at vct@agd.nsw.gov.au.
- To give up approximately 60 minutes to participate in an interview although you are only required to give as much time as you are willing to give. You can choose to be interviewed at: your home, the offices of the researchers at the University of New South Wales at Kensington or the University of Technology, Sydney in the city or at a mutually agreeable venue.
- With your consent, the interview will be audio-recorded and once transcribed, the recording will be deleted.

- To find discussion of your experiences therapeutic and beneficial although we cannot and do not guarantee or promise that you will receive any benefits from this study.

Confidentiality and disclosure of information

Any information that is obtained in connection with this study and that can be identified with you will remain confidential and will be disclosed only with your permission, except as required by law. If you give us your permission by signing this document, we plan to publish the results of the study in scholarly articles, in a PhD thesis and at conferences for the purposes of scrutiny and contributing to public knowledge about family victims of crime, victim impact statements and the sentencing process. In any publication, information will be provided in such a way that you cannot be identified.

Complaints about this research

Complaints may be directed to the Ethics Secretariat, The University of New South Wales, SYDNEY 2052 AUSTRALIA (phone 9385 4234, fax 9385 6648, email ethics.sec@unsw.edu.au). Any complaint you make will be treated in confidence and investigated, and you will be informed of the outcome.

Your consent

Your decision whether or not to participate will not prejudice your future relations with The University of New South Wales and the Homicide Victims Support Group. If you decide to participate, you are free to withdraw your consent and to discontinue participation at any time without prejudice.

If you have any questions, please feel free to ask us. If you have any additional questions later, Tracey Booth will be happy to answer them. Ms Booth can be contacted by telephone on 0412799857 or email tracey.booth@uts.edu.au will be happy to answer them.

You will be given a copy of this form to keep.

THE UNIVERSITY OF NEW SOUTH WALES

PARTICIPANT INFORMATION STATEMENT AND CONSENT FORM (continued)

Family victims' experiences and perceptions of the sentencing process in homicide matters in NSW.

You are making a decision whether or not to participate. Your signature indicates that, having read the Participant Information Statement, you have decided to take part in the study.

I consent to taking part in the following (you may circle all three):

1.	Give permission for researcher to observe my submission of a VIS in the sentencing hearing.	YES/NO (Please circle)
2.	Give researchers a copy of my VIS submitted to the sentencing court or permission to obtain a copy of my VIS from WAS or the court.	YES/NO (Please circle)
3.	Interview.	YES/NO (Please circle)

……. **……**
Signature of Research Participant Signature of witness

…… **……**
(Please PRINT name) Please PRINT name

……..
Date

……
Signature(s) of Investigator(s)

…….
Please PRINT Name

Date ……

REVOCATION OF CONSENT

Family victims' experiences and perceptions of the sentencing process in homicide matters in NSW.

I hereby wish to **WITHDRAW** my consent to participate in the research proposal described above and understand that such withdrawal **WILL NOT** jeopardise any treatment or my relationship with The University of New South Wales, Homicide Victims Support Group and or Enough is Enough.

…….
Signature Date

……
Please PRINT Name

The section for Revocation of Consent should be forwarded to Professor David Brown Faculty of Law, Library Building 991C, University of New South Wales, Sydney NSW 2052

Appendix Three

Hearing	Author	Form and compliance with formal requirements	Length
1.	1 mother of deceased VIS 1A	Unknown – extracted in the transcript	2.5 A4 pages of transcript 1584 words
	1 father of the deceased VIS 1B	Unknown – extracted in the transcript	1 A4 page of transcript 533 words
5.	1 mother of deceased victim VIS 5A	Typed on otherwise blank pages; no formal cover sheet but mandatory identification details set out - name, relationship, charges, sentencing hearing; mandatory Statement: "I do object to this statement being given in court" included and statement signed.	5.5 A4 pages, single spaced 3049 words
	1 father of deceased VIS 5B	Typed on otherwise blank pages; no formal cover sheet but mandatory identification details set out - name, relationship, charges, sentencing hearing; mandatory Statement: "I do object to this statement being given in court" included and statement signed. Letter format - 'dear sir'.	1 A4 page single spaced 468 words
	1 brother of deceased VIS 5C	Typed on otherwise blank pages; no formal cover sheet but mandatory identification details set out - name, relationship, charges, sentencing hearing; mandatory Statement: "I do object to this statement being given in court" included and statement signed.	3.5 A4 pages single spaced 2538 words
	1 brother of deceased VIS 5D	Typed on otherwise blank pages; no formal cover sheet but mandatory identification details set out - name, relationship, charges, sentencing hearing; mandatory Statement: "I do object to this statement being given in court" included and statement signed.	1.5 pages single spaced 560 words
	1 witness and former partner VIS 5E	Typed on otherwise blank pages; no formal cover sheet but mandatory identification details set out - name, relationship, charges, sentencing hearing; mandatory Statement: "I do object to this	1.5 pages single spaced 715 words

		statement being given in court" included and statement signed. Format: poem	
7.	1 father of the deceased VIS 7A	Typed on otherwise blank pages; no formal cover sheet but some mandatory identification details set out – name and relationship -and statement signed. Form: described as a 'letter'	1 A4 page 390 words
8.	1 sister to deceased VIS 8A	Typed on otherwise blank pages; no formal cover sheet but some mandatory identification details set out – name and relationship -and statement signed.	2 A4 pages single spaced 960 words
	1 brother to deceased VIS 8B	Typed on otherwise blank pages; no formal cover sheet but some mandatory identification details set out – name and relationship to deceased, name of offender -and statement signed.	1 A4 page, double spaced 276 words
10.	1 mother of deceased VIS 10A	Typed on otherwise blank pages; no formal cover sheet but some mandatory identification details set out – name and relationship -and statement signed and dated.	1.5 A4 pages, single spaced 750 words
	1 brother of deceased (T) VIS	Typed on otherwise blank page; no formal cover sheet but some mandatory identification details set out – name and relationship -and statement signed and dated.	1 A4 page single spaced 238 words
	1 brother of deceased (C) VIS	Informal, handwritten, lined memo pages, signed and dated	1.5 memo sized pages 132 words
	1 brother of deceased (A) VIS	Informal, handwritten, upper case, signed and dated	4 A4 pages 840 words
	1 brother of deceased (O) VIS	Typed on otherwise blank pages; no formal cover sheet but some mandatory identification details set out – name and relationship -and statement signed and dated.	1 A4 page double spaced, 14 font 170 words
	1 brother of deceased (S) VIS	Typed on otherwise blank pages; no formal cover sheet but some mandatory identification details set out – name and statement signed and dated .	4.5 A4 pages single spaced 2254 words
11.	1 sister of deceased VIS 11A	Typed on otherwise blank pages; no formal cover sheet but some mandatory identification details set	1.5 single spaced pages 882 words

		out – name, signed and dated.	
	1 partner of deceased VIS 11B	Typed on otherwise blank pages, formal cover sheet, signed and dated.	1 A4 page, single spaced 544 words
	1 mother of deceased VIS 11C	Typed on otherwise blank page, name and signed	1 A4 page 480 words
12.	1 wife of deceased VIS 12A	Typed on otherwise blank pages, unsigned	2176 words
	1 father of deceased VIS 12B	Typed on otherwise blank pages; no formal cover sheet but mandatory identification details set out - name, relationship, charges, sentencing hearing; signed and dated.	1 A4 pages 494 words
13.	1 mother of deceased VIS 13A	Typed on otherwise blank pages; no formal cover sheet but some mandatory identification details set out - name, signed and dated.	1.5 A4 pages, single spaced 731 words
15.	1 mother of the deceased VIS 15A	Unknown – extracted in transcript.	
18.	Mother of deceased VIS 18A	Formal cover sheet, handwritten, signed and dated, a photograph of the deceased attached to the front.	5 lined (exercise book) pages 1440 ds

Appendix Four

Appendix four presents a concise summary as well as details of all accessible murder and/or manslaughter sentencing cases heard in the NSW Supreme Court from 23rd June 2003 to 30th June 2012 and any VISs that were submitted in those cases. This period has been selected because: section 30A *CSPA* that allows VISs to be read aloud commenced on 23rd June 2003 and this thesis reflects the law as at 30th June 2012. The first table below summarises: the number of matters heard; the number and percentage of matters in which VISs were submitted; and the number and percentage of matters in which VISs were read aloud to the court. In gathering and collating the data, the aim is to contextualise the snapshot of data captured in the study and generate greater insight into victim participation in the sentencing of homicide offenders.

SUMMARY

Year	Number of matters	VISs submitted	%	Oral VISs	%
(to 30/6) 2012	27	20	74	15	56
2011	29	15	52	8	28
2010	47	41	87	9	19
2009	52	33	63	21	40
2008	53	35	66	24	45
2007	63	48	76	22	35
2006	37	26	70	12	32
2005	46	31	67	12	26
2004	57	42	74	15	26
(from 23/6) 2003	31	19	61	4	13

When reflecting on these data, it is important to note two important caveats. First, this data does not purport to capture ALL cases heard by the court during this period. 'Accessible documents' are those judgments that the court has made available to the database Austlii and that I have supplemented with data from Casebase (LexisNexis). Although this data may not represent all cases, nonetheless, I consider that these databases together capture most of the cases and produce the best available data. Second, I am aware that the data with respect to VISs is not

completely accurate and certainly an understatement of the numbers of VISs read aloud in the court. For the purposes of recording data I did two things:

1. VISs are only recorded as being submitted to the court when that event was expressly stated in the judgment. As can be seen from the data below, in most cases judges also provided details of the family victim authors. However, in at least one case that I am aware of, the judge did not acknowledge the VISs that were submitted in that case but for the purposes of consistency in this data collection, I recorded that no VISs were received. Thus while the data indicates that the submission rates for VISs are high in homicide matters in NSW, generally ranging from two thirds to three quarters of matters heard, it might be that VISs may have been submitted in more cases that recorded. The data in 2011 suggests something of an aberration and an explanation for this might lie in the fact that that year, the Court was involved in at least six separate trials arising out of the same incident and VISs were not submitted in any of these cases.

2. VISs are recorded as being read aloud only when the judge expressly stated this was the case. Such express statements include – "I have heard" or the statements were "read to the court". In the absence of such explicit statements, for instance where the judge might have said "I have received statements", the VISs are recorded as submitted only. While I am aware of cases where the VISs were read aloud to the court but the judge did not expressly say so in their judgment (at least 4 hearings observed), for the sake of consistency I recorded these cases as having no oral VISS. It is very likely then that there were other cases where the statements were read aloud despite the absence of express reference in the judgment and the data understates the rate at which VISs were read aloud to the court.

DETAILS OF SENTENCING CASES
2012 Cases

Case	Charge	VIS	Oral VIS
R v Smith [2012]	Manslaughter	8	8

NSWSC 38		mother, father and 6 siblings	
R v Cotterill [2012] NSWSC 89	Murder	3 sister, grandfather and mother	1 mother
R v Scott [2012] NSWSC 70	Manslaughter	2 parents and brother	
R v Fahda [2012] NSWSC 114	Murder	Plural close relatives of the deceased	Plural
R v Dean-Willcocks [2012] NSWSC 107	Manslaughter	1 son	1 victim rep
R v Debs [2012] NSWSC 119	Murder	1 mother	
R v Lambert [2012] NSWSC 94	Murder	1 father	1 victim rep
R v Menzies [2012] NSWSC 158	Manslaughter	none	
R v Marsh [2012] NSWSC 208	Murder	none	
R v Neave [2012] NSWSC 229	Murder	4 daughter, 2 brothers, stepmother	
R v Vulovic [2012] NSWSC 212	Manslaughter	2 sister and cousin	1 sister 1 victim rep
R v Iskander [2012] NSWSC 149	Murder	none	
R v Humphries [2012] NSWSC 419	Manslaughter	none	
R v Hawi [2012] NSWSC 332	Murder	1 mother	1 victim rep
R v Li [2012] NSWSC	Manslaughter	none	
R v Perish [2012] NSWSC	Murder	1 son	1
R v Cook [2012] NSWSC 480	Manslaughter	3 mother and two sisters	3
R v Humphries [2012] NSWSC 521	Manslaughter	None	
R v Richardson [2012] NSWSC 521	Murder	2 parents	
R v Williams [2012] NSWSC 520	Manslaughter	none	
R v Brooks [2012] NSWSC	Murder	3 son and sisters	3
R v Da-Pra [2012] NSWSC 607	Murder	2 family members	2 family members
R v Singh [2012] NSWSC 637	Manslaughter	3 sisters and father	1 sister

R v Braddon [2012] NSWSC		2 brothers	2 by one brother
R v Milat and Klein [2012] NSWSC 634	Murder	4 parents, grandparents	4
R v Mitchell [2012] NSWSC 694	Murder	1 mother	
R v Henzon [2012] NSWSC 726	Murder	1 niece	1

2011 Cases

Case	Charge	VISs	Oral VIS
R v Quealey [2011] NSWSC 42	Manslaughter	1 mother	
R v Beldon [2011] NSWSC 112	Murder	No	Check
R v Pirini [2011] NSWSC 1395	Manslaughter	No	Bk
R v Bugmy [2011] NSWSC 357	Manslaughter	No	
R v NR [2011] NSWSC 280	Manslaughter	2 mother and stepfather	2
R v Ceniccola [2011] NSWSC 302	Murder	1 daughter	
R v Lane [2011] NSWSC 289	Murder	None	
R v Winefield [2011] NSWSC 337	Manslaughter	6 eyewitnesses 4 family members	2 mother grandmother 2 by family friend (grandfather, brother)
R v Mathers [2011] NSWSC 339	Manslaughter	None	
R v Fennell [2011] NSWSC 489	Accessory after the fact to murder	Plural Mother and sisters	Mother and sisters
R v Hoang Huy Nguyen; R v Minh Duc Luong [2011] NSWSC 562	Murder	No	
R v LTN [2011] NSWSC 614	Manslaughter	None	
R v Williams [2011] NSWSC 583	Murder	1 mother	1
R v La Rosa [2011] NSWSC 1394	Manslaughter	None	
R v Aouli [2011] NSWSC 1393	Manslaughter	none	
R v Costa [2011]	Manslaughter	None	

NSWSC 1392			
R V Christiansen [2011] NSWSC 840	Murder	2 family members	
R v Smith [2011] NSWSC 1082	Murder	3 mother, sister, brother	
R v Thompson [2011] NSWSC 1130	Murder	none	
R v Shiels [2011] NSWSC 1177	murder	None	
R v Martin [2011] NSWSC 1189	Murder	2 mother and partner	2
R v Ryan; R v Coulter [2011] NSWSC 1249	Murder	Plural sons and sisters 1 daughter (regarded as an apology for offender than a VIS)	
R v Sheather [2011] NSWSC 1239	Murder	4 wife, son, daughter, mother	
R v Biddle [2011] NSWSC 1262	Murder	6 4 children and 2 sisters	6
R v McKenzie [2011] NSWSC 1460	Murder	1 daughter	
R v Tran [2011] NSWSC 1480	Murder	None	
R v Barghachoun [2011] NSWSC 1534	Manslaughter	Plural family members	Plural
R v AH [2011] NSWSC 1535	Manslaughter	Plural family members	Plural
R v Atai [2011] NSWSC 1617	Murder	None	
R v Filippou [2011] NSWSC 1607	Murder	3 father, mother, sister	3

2010 Cases

Case	**Charge**	**VISs**	**Oral VISs**
R v Penza and Di Maria [2010] NSWSC 16	murder	3 wife child grandchild	3
R v LR [2010] NSWSC 22	murder	1 father	1
R v Gabriel [2010] NSWSC 13	Manslaughter	1 family	
R v Shepherd [2010]	Manslaughter	None	

NSWSC 154			
R v Wong [2010] NSWSC 171	murder	1 'dear friend'	
R v KR [2010] NSWSC 188	murder	1 father	1
R v Tongahai [2010] NSWSC 227	murder	2 wife and brother	
R v Ward [2010] NSWSC 304	Murder	Plural	Plural
R v HT [2010] NSWSC 324	Manslaughter	4 parents and brother	2 read by brothers 2 read by victim rep
R v Cambey [2010] NSWSC 369	murder	4 father, sister, 2 brothers	
R v Good [2010] NSWSC 402	Manslaughter	1 family	
R v Glanville [2010] NSWSC 364	Manslaughter	4 mother, grandmother, father and stepmother, sister	
R v Jones [2010] NSWSC 432	murder	1 daughter	1
R v R v JB [2010] NSWSC 543	murder	Plural	Plural
AA, AC, SS , Tatchell and Wildsmith v R [2010] NSWSC 495	manslaughter	2 wife and sister	
R v Worrall [2010] NSWSC 593	manslaughter	1 family	
R v Doolan [2010] NSWSC 615	Manslaughter	4 mother and sisters	
R v NLH [2010] NSWSC 662	manslaughter	no	
R v Lee [2010] NSWSC 632	murder	No	
R v MJR [2010] NSWSC 653	murder	No	
R v Cavanagh [2010] NSWSC 670	manslaughter	No	
R v Reynolds; R v Small [2010] NSWSC 691	manslaughter	plural	
R v Kwon [2010] NSWSC 671	murder	2 mother and brother	
R v McGuren [2010] NSWSC 744	Murder	2 daughter and sister	2
R v Yuke [2010] NSWSC 754	Murder	1 son	
R v Lechmana [2010]	murder	plural	Plural

NSWSC 849			
R v Sullivan [2010] NSWSC 755	murder	5 family members	
R v Dennison [2010] NSWSC 780	murder	1 parents	
R v DB [2010] NSWSC 812	murder	1 widow	
R v Potts [2010] NSWSC 731	murder	2 sister and partner	1 partner
R v PFC [2010] NSWSC 834	Manslaughter	No	
R v LC [2010] NSWSC 815	murder	1 mother	
R v Armstrong [2010] NSWSC 800	Murder	1 ister	
R v Day [2010] NSWSC 983	Murder	2 sister and son	
R v Campbell [2010] NSWSC 995	murder	None	
R v Lynch [2010] NSWSC 952	manslaughter	1 partner	1 family member
R v Horton [2010] NSWSC 1007	manslaughter	4 + photographs	4
R v Borg [2010] NSWSC 951	murder	plural	
R v Iskov [2010] NSWSC 1074	Manslaughter	5	5
R v Colley [2010] NSWSC 1475	Manslaughter	5 mother, father, brother, 2 sisters	5 by 1 sister **important comment about off script**
R v Holcroft [2010] NSWSC 1294	Murder	1 son	
R v Duncan [2010] NSWSC 1241	Manslaughter	3 parents, sister and son	
R v Sutton [2010] NSWSC 1273	Manslaughter	None	
R v Dong [2010] NSWSC 1242	Murder	1 widow	1
R v Goundar [2010] NSWSC 1170	Manslaughter	1 family	
R v SS	Manslaughter	3 mother, step-father and sister	3
R v Sparks; R v Stracey [2010] NSWSC 1512	Manslaughter	1	

2009 Cases

Case	Charge	VIS	Oral VIS
R v Shamouil; R v David	murder	1 family	
R v O'Donnell	murder	none	
R v Abbas	manslaughter	3 widow daughter sister	2 by victim rep
R v Fordham		1	1
R v Wilson		None	
R v Spania	murder	None	
R v PJS		3 no details	3
R v Edwards	murder	2 sister and daughter	
R v Jackson	manslaughter	None	
R v Jeffrey; R v Mealy	Manslaughter	None	
R v Munter	manslaughter	None	
R v Aytugrul	murder	2 sister and daughter	
R v Seelin	manslaughter	1 father	
R v Boxx	manslaughter	1 No details	1 by victim rep
R v Wicks [2009] NSWSC 266	murder	1 sister	1
R v Fisher [2009] NSWSC 348	manslaughter	3 brother and sisters	
R v Barrett [2009] NSW 338	murder	1 mother	1
R v Maric [2009] NSWSC 346	manslaughter	1 mother	Deceased's mother addressed the court from the public gallery
R v BH [2009] NSWSC 358	murder	None	
R v T.T [2009] NSWSC 437	manslaughter	None	
R v Paddock [2009] NSWSC 369	manslaughter	None	
R v Wilkinson [2009] NSWSC 432	murder	5 mother, sister, father, grandmother, brother	2 mother and sister directly 3 victim rep
R v Whitmore [2009] NSWSC 520	murder	4 parents, brother, sister	
R v Mills [2009] NSWSC 521	manslaughter	1 daughter	

R v Zeilaa [2009] NSWSC 532	manslaughter	None	
R v Chant [2009] NSWSC 593	manslaughter	None	
R v Dowley [2009] NSWSC 722	manslaughter	2 daughters	1
R v Walsh [2009] NSWSC 764	murder	2 father and mother	2
R v Valiukas [2009] NSWSC 808	murder	1 aunt	1
R v White [2009] NSWSC 809	manslaughter	1 sister	1
R v Menta		1 No details	
R v Raad [2009] NSWSC 830	murder	None	
R v Hevesi-Nagy [2009] NSWSC 956	manslaughter	2 son and daughter	2
Carr v R [2009] NSWSC 995	murder	1 mother	
R v Sam; R v Sam [2009] NSWSC 1003	manslaughter	None	
R v BW & SW [2009] NSWSC 1043	Murder and manslaughter	1 sister	1 read by barrister
R v NAA [2009] NSWSC 1077	murder	None	
R v SF [2009] NSWSC 1069	manslaughter	Plural	Plural
R v Cox [2009] NSWSC 1067	murder	None	
R v CW [2009] NSWSC 1155	manslaughter	3 no details	
R v DGP; R v PB [2009] NSWSC 1154	manslaughter	2 family members	2
R v Willetts and Gurney [2009] NSWSC 1201	murder	3 children	
R v Faulkner [2009] NSWSC 1171	murder	1 sister	1
R v Smith [2009] NSWSC 1183	manslaughter	4 mother, grandfather, brother, sister	4 by victim rep
R v Nguyen [2009] NSWSC 1120	manslaughter	None	
R v Benbow [2009] NSWSC 1472	manslaughter	3 parents and partner	1
R v Bennett [2009] NSWSC 1382	murder	1 sister	1
R v Pfitzner [2009] NSWSC 1267	murder	2 No details	2

R v Gloginya [2009] NSWSC 1435	manslaughter	None	
R v Tiwary [2009] NSWSC 1415	murder	None	
R v Dennis [2009] NSWSC		1 No details	
R v Lovett [2009] NSWSC 1427	murder	2 parents	2, 1 read by victim rep
R v Tran [2009] NSWSC 1437	murder	None	

2008 Cases

Case Name	**Offence Type**	**VIS- number submitted**	Oral
R v Owens [2008] NSWSC 1375 19\12\08	Murder	1 son	'parts read to the court'
R v Hatch; R v Norman; R v Wagstaff [2008] NSWSC 1411 19/12/08	Manslaughter	1 mother	1
R v Stevens [2008] NSWSC 1370 18/12/08	Manslaughter	3 sister and two others unspecified	
R v Ha [2008] NSWSC 1368 18/12/08	Manslaughter	None	
R v Webb [2008] NSWSC 1352 22/12/08	Murder	None	
R v Pocock [2008] NSWSC 1435	Manslaughter	None	
R v Stewart [2008] NSWSC 1359 16/12/08	Manslaughter	3 children	3
R v Katic [2008] NSWSC 1330 12/12/08	Manslaughter	plural mother, wife and children	Multiple statements read by victim rep
R v O'Connor [2008] NSWSC 1297 5/12/08	Murder	1 daughter	1
R v Wood [2008] NSWSC 1273	Murder	1 father	
R v CR [2008] NSWSC 1208 28/11/08	Manslaughter	None	
R v Kutschera [2008] NSWSC 1271	Murder	1 grandfather	Read by victim rep
R v Podesta [2008] NSWSC	Manslaughter	1	Read by victim

		mother	rep
R v DL [2008] NSWSC 1199	Murder	None	
R v Justins [2008] NSWSC 1194	Manslaughter	2 daughters	2
R v Lynn [2008] NSWSC 1122	Manslaughter	2 fiancée and sister.	1
R v Kari; R v H; R v Hamid [2008] NSWSC 993	Manslaughter	1 mother and sister.	1
R v May (No 7) NSWSC 971	Murder	None	
R v KR and PR [2008] NSWSC 970	Manslaughter	3 mother, two sisters, and brother	3
R v Horan [2008] NSWSC 990	Manslaughter	None	
R v Newbold [2008] NSWSC 942	Manslaughter	None	
R v Snibson [2008] NSWSC 905	Murder	plural sisters	
R v Howard [2008] NSWSC 934	Murder	1 mother	1
R v Faehndrich [2008] NSWSC 877	Murder	2 No details	
R v Klein [2008] NSWSC 835	Murder	1 mother	
R v Clark (No 3) [2008] NSWSC 795	Murder	No	
R v Youmaran [2008] NSWSC 762	Murder	No	
R v Ferguson [2008] NSWSC 761	Manslaughter	1 family	
R v Tuigalama [2008] NSWSC	Murder	2 wife and father	2
R v Barbetta [2008] NSWSC 688	Murder	2 daughter and sister	2
R v Kennedy [2008] NSWSC 703	Manslaughter	No	
R v Soon [2008] NSWSC 622	Manslaughter	1 mother	
R v Sin [2008] NSWSC 621	Manslaughter	Plural family	
R v Stewart [2008] NSWSC 563	Manslaughter	3 mother, partner and brother.	3
R v Stephens [2008] NSWSC 1429	Manslaughter	None	
R v Williamson [2008] NSWSC 686	Manslaughter	Plural family	
R v Donai [2008] NSWSC 502	Murder	2 sister and brother in law	2

R v Mitchell [2008] NSWSC 320	Manslaughter	No	
R v Galante [2008] NSWSC 319	Murder	4 mother, sister, brother and grandfather	4 3 by victims personally
R v Zammit [2008] NSWSC 317	Manslaughter	None	
R v Salah [2008] NSWSC 311	Manslaughter	None	
R v Forrest [2008] NSWSC 301	Manslaughter	3 brother, sister and child	
R v APT [2008] NSWSC 302	Manslaughter	1 sister	1
R v Wilson [2008] NSWSC 238	Murder	No	
R v Frost [2008] NSWSC 220	Manslaughter	'Letters put before the court,' by the deceased's parents.	
R v Thompson [2008] NSWSC 109	Murder	6 mother and five brothers	6
R v Compton [2008] NSWSC 204	Manslaughter	3 mother, grandfather and step-grandmother	3
R v Smith [2008] NSWSC 201	Manslaughter	3 mother, father and sister	3
R v Collon [2008] NSWSC 174	Murder	1 mother.	1 by victim rep
R v Zhia [2008] NSWSC 145	Murder	No	
R v Leiataua [2008] NSWSC 170	Murder	2 mother and grandmother	2 by victim rep
R v Davis [2008] NSWSC 55	Murder	None	
R v Burrell (No 3)[2008] NSWSC 30	Murder	Plural family	Plural

2007 Cases

Case Name	**Charge**	**VIS- number submitted**	**Oral VISs**
R v Vu Minh Trinh [2007] NSWSC 1495	Murder	No	
R v Turuta [2007] NSWSC 1505	Manslaughter	3 wife and 2 children	3 (by or on behalf of)
R v RHB [2007] NSWSC 14	One count of murder and one count of	4 named but not relationship	Three

	manslaughter		
R v Mawson [2007] NSWSC 1473	Manslaughter	Plural family	
R v Raju [2007] NSWSC 1418	Murder	4 Sister and 3 children	4
R v Darcy [2007] NSWSC 1392	Murder	3 no details	
R v York [2007] NSWSC 1470	Manslaughter	2 girlfriend and parents	
R v Shepherd [2007] NSWSC 1416	Murder	3 Parents, sister, former partner	
R v Taufahema [2007] NSWSC 1460	Manslaughter	1 father	1
R v Harris [2007] NSWSC 1417	Manslaughter	None	
R v Frazer; R v Spencer [2007] NSWSC 1449	Manslaughter	None	
R v CK; R v TCS [2007] NSWSC 1424	Manslaughter	1 parents	
R v Grupe [2007] NSWSC 1303	Murder	3 named but not relationship	
R v Bashford [2007] NSWSC 1380	Manslaughter	2 partner and sibling.	
R v Kaiser; R v Hunt [2007] NSWSC 1362	Manslaughter	2 father and partner	
R v Rocco [2007] NSWSC 1361	Manslaughter	None	
R v Jones [2007] NSWSC 1333	Manslaughter	3 mother and his two nieces	
R v Lea-Caton [2007] NSWSC 1294	Murder	Plural sisters of deceased	Plural
R v Huang Quang Lu [2007] NSWSC 1259	Manslaughter	1 mother	1
R v SSA and Siose [2007] NSWSC 1202	One offender for murder and one offender for manslaughter	1 parents	1 by victim rep
R v DN [2007] NSWSC 1252	Murder	2 named no relationships	
R v Wheatley [2007] NSWSC 1182	Manslaughter	2 grandson and his daughter-in-law.	2 by victim rep
R v Thurlow [2007] NSWSC 1203	Manslaughter	1 mother	
R v Hansell [2007] NSWSC 1136	Manslaughter	None	

R v King [2007] NSWSC 1134	Manslaughter	3 mother and his two sisters	
R v Charman [2007] NSWSC NSWSC 1177	Manslaughter	None	
R v Taiseni, Motupuaka, Leota, Tuifa [2007] NSWSC 1090	Manslaughter	1 family	
R v East [2007] NSWSC 1051	Murder	1 wife	
R v Antaky [2007] NSWSC 1047	Manslaughter	1 wife and children	
R v Taufehema [2007] NSWSC 959	Manslaughter	1 family	1
R v Ferguson [2007] NSWSC 949	Manslaughter	1 sister	1
R v Clark [2007] NSWSC 954	Murder	2 partner and his sister	Two
R v FAP [2007] NSWSC 905	Murder	None	
R v Harvey [2007] NSWSC 871	Murder	2 mother and father	
R v McDonald [2007] NSWSC 813	Murder	1 sister	1
R v Schoultz [2007] NSWSC 809	Manslaughter	None	
R v Zaro [2007] NSWSC 756	Murder	None	
R v Burnes [2007] NSWSC 298	Murder	1 mother	1
R v Stephenson [2007] NSWSC 672	Manslaughter	2 father and family and mother and step-father	2
R v Tan [2007] NSWSC 684	Murder	1 wife	
R v Barton [2007] NSWSC 651	Murder x 2	2 daughter and sister	2
R v Fleming [2007] NSWSC 673	Murder	None	
R v Houri [2007] NSWSC 615	Murder	1 wife	
R v Cavanough [2007] NSWSC 561	Murder	Plural	1
R v Diab [2007] NSWSC 577	Manslaughter	2 sisters	2
R v Robinson [2007] NSWSC 460	Murder	1 details unknown	1
R v Bunce [2007] NSWSC 469	Murder	4 husband, son, mother and sister	

R v Hamilton; R v Sandilands [2007] NSWSC 452	Manslaughter	No	
R v Leach [2007] NSWSC 429	Manslaughter	1 mother	1
R v Kaliyanda [2007] NSWSC 393	Murder	1 brother	1
N v Huang Ming Nguyen [2007] NSWSC 389	Murder	Plural	
R v Trung Son Hunyh [2007] NSWSC 409	Murder	1 family	
R v Saalfeld [2007] NSWSC 376	Murder	1 mother	
R v Durant [2007] NSWSC 428	Murder	No	
R v Mundene [2007] NSWSC 355	Manslaughter	1 mother	
R v Rowe [2007] NSWSC 300	Manslaughter	No	
R v Sutton; R v Sutton [2007] NSWSC 295	Manslaughter for both offenders	No	
R v Johnson [2007] NSWSC 274	Murder: Two counts	No	
R v Joyce [2007] NSWSC 218	Murder	4 daughter and 3 sisters	
R v Norman; R v Olivieri [2007] NSWSC 142	Murder	1 wife	1 by victim rep
Pollock v R [2007] NSWSC 148	Redetermination of life penalty	1 sister	
R v KT [2007] NSWSC 83	Manslaughter	1 wife	1 victim rep
R v Nyugen [2007] NSWSC 389	Murder	plural	
R v Shepard [2007] NSWSC 1416	Murder	plural parents, step-sister and former partner	

2006 Cases

Case Name	Charge	VIS- number submitted	Oral VISs
R v Berrier [2006] NSWSC 1421	Manslaughter	1 mother	
R v Esposito [2006] NSWSC 1454	Manslaughter	No	
R v Moore [2006] NSWSC 1669	Manslaughter	2 mother and sister	
R v Imbrisak [2006] NSWSC 1382	One count of murder and one count of	No	

	manslaughter		
R v DWC [2006] NSWSC 1335	Two counts of murder	2 mother and grandfather prepared by a psychologist	
R v Heatley [2006] NSWSC 1199	Manslaughter	1 mother	1
R v Christov [2006] NSWSC 1179	Murder	'a number'	
R v Clay; R v Lonsdale; R v JM [2006] NSWSC 1220	Two charges of manslaughter (One with affray)	4 partner, daughter and 2 sisters	
R v Steer [2006] NSWSC 1198	Murder	2 mother and son	1 by victim rep
R v MB [2006] NSWSC 1164	Murder	1 family	1 by Crown prosecutor
R v Darwiche and Ors [2006] NSWSC	Two counts of murder	1 mother	
R v Tiwary [2006] NSWSC 1156	Two counts of murder	No	
R v Massei [2006] NSWSC 1298	Manslaughter	No	
R v Jukes [2006] NSWSC 1065	Manslaughter	2 sister and family as a whole	
R v A [2006] NSWSC 1035	Murder	1 wife	
R v Wallace [2006] NSWSC 897	Murder	No	
R v Abdulkader; R v Hohaia [2006] NSWSC 866	Murder	2 mother and father	2
R v Norrie [2006] 830	Redetermination of life penalty	1 wife	
R v Silvano [2006] NSWSC 832	Murder	3 deceased's mother and 2 sisters	
R v Khanh Hoang Nguyen and Ors [2006] NSWSC 850	Murder	1 boyfriend	
R v Clare [2006] NSWSC 812	Manslaughter	No	
R v Shepard [2006] NSWSC 799	Murder	2 mother and brother	1 by victim's wife
R v Colb [2006] NSWSC 811	Murder	No	
R v Nam [2006] NSWSC 802	Manslaughter	3 daughter and 2 sons	
R v Harrison [2006] NSWSC 740	Murder	1 father	1
R v Russell [2006] NSWSC	Manslaughter	3	3 by one family

722		mother, brother and sister	member
R v Mencarious [2006] NSWSC 719	Murder	1 family	1 by victim rep
R v Jalaty [2006] NSWSC 675	Murder	No	
R v Waters [2006] NSWSC 502	Murder	2 mother and father	2
R v Wetherall [2006] NSWSC 486	Murder	1 sister	1
R v Partington [2006] NSWSC 442	Manslaughter	2 sister and brother	2
R v Parkes [2006] NSWSC 331	Murder	No	
R v Matheson [2006] NSWSC 332	Murder	2 mother and sister	
R v Gil Bum Yun [2006] NSWSC 258	Murder	No	
R v CB; R v IM [2006] NSWSC 261	Both charged with Murder	2 Brother Mother prepared by a psychologist	
R v Versluys [2006] NSWSC 188	Murder	1 mother	1
R v King; R v Bugmy; R v CJ [2006] NSWSC 161	Murder	1 wife and daughter	
R v RG [2006] NSWSC 21	Manslaughter	No	

2005 Cases

Case Name	Charge	VIS- number submitted	Oral VISs
R v Weightman [2005] NSWSC 1354	Two counts of murder	1 sister	
Zeng v R [2005] NSWSC 1344	Manslaughter	No	
R v Laurie [2005] NSWSC 1361	murder	1 mother	
R v Taber and Styman [2005] NSWSC	manslaughter	2 daughter and sister	
R v Smit, Smit and Tarrant [2005] NSWSC 1277	murder	3 father, sister, brother in law	
R v Hamshere [2005] NSWSC 1319	Manslaughter	4 ex-partner 3 family members	
R v Turchino; R v HMF [2005] NSWSC 1214	Manslaughter for HMF only. Turchino on concealment only	No	

R v Bullock [2005] NSWSC 1071	Manslaughter	No	
R v Cakovsci [2005] NSWSC 1001	Manslaughter	No	
R v Dunn [2005] NSWSC 1231	Manslaughter	2 brother and sister	2
R v Thammavongsa [2005] NSWSC 915	Murder	No	
R v Ahmad [2005] NSWSC 911	Manslaughter	No	
R v Kramer [2005] NSWSC 910	Murder	No	
R v Cooper [2005] NSWSC 791	Murder	1 mother	1
R v Percy [2005] 1244	Manslaughter	1 mother	
R v Smale (No 2) [2005] NSWSC 903	Manslaughter	Plural family and friends	
R v MAH [2005] NSWSC 871	Murder	1 mother	1
R v Heffernen [2005] NSWSC 739	Murder	2 Father and sister	
R v White [2005] NSWSC 667	Murder	4 children	
R v Gagalowicz [2005] NSWSC 675	Manslaughter	Plural sister and brothers	
R v Hillsley [2005] NSWSC 652	Murder	2 wife and daughter	1
R v JHH [2005] NSWSC 652	Murder	2 wife and daughter	
R v WKD; R v MJN [2005] NSWSC 694	Manslaughter	2 son and daughter	2
R v Nguyen [2005] NSWSC 600	Manslaughter	No	
R v Hantis [2005] NSWSC 549	Manslaughter	No	
R v NMB; R Bugmy [2005] NSWSC 561	Manslaughter	1 family	1
R v Adanguidi [2005] NSWSC 519	Murder	No	
R v Clifford; R v AB [2005] NSWSC 521	Manslaughter for Clifford and Murder for AB	2 mother and friend	2 by crown prosecutor
R v Nicol [2005] NSWSC 547	Manslaughter	No	
R v Dolan [2005] NSWSC 380	Murder	No	
R v Willard [2005] NSWSC 402	Murder	1 parents	1
R v Wills [2005] NSWSC 368	Murder	No	
R v Satorre [2005] NSWSC 367	Murder	1 wife	
R v Ali [2005] NSWSC 334	Manslaughter	2 brother and sister	
R v Hamoui (No 4) [2005] NSWSC 279	Manslaughter	1 brother	1

R v Ward [2005] NSWSC 266	Manslaughter	1 sister, mother and father	
R v MD; R v NA; R v BM; R v JT [2005] NSWSC 344	Manslaughter	1 family	1
R v Vu [2005] NSWSC 271	Murder	No	
R v Reid [2005] NSWSC 230	Murder	1 mother	
R v Derbas and Mohamed Rustom [2005] NSWSC 244	Murder	No	
R v Em [2005] NSWSC 212	Murder	3 wife, another family relation and one unknown	
R v Vuni [2005] NSWSC 184	Manslaughter	1 sister	1
R v Dehaybi; R v JD [2005] NSWSC 184	Murder for Dehaybi and manslaughter for JD	3 mother, father and sister	3
R v Coulter [2005] NSWSC 101	Murder	1 no details	
R v Laurie [2005] NSWSC 1361	Murder	1 mother	
R v Taber; R v Styman [2005] NSWSC 1292	Both charged with manslaughter	2 sister and daughter	

2004 Cases

Case Name	Offence	VIS- number submitted	Oral VISs
R v Cleverly [2004] NSWSC 1279	Murder	1 sister	1
R v Tuigamala [2004] NSWSC 1254	Murder	2 wife and father	
R v Hampton [2004] NSWSC 1215	murder	1 family	1
R v Aslett [2004] NSWSC 1288	Murder	1 deceased's wife	
R v Daniels [2004] NSWSC 1201	Manslaughter	1 parents	
R v Hayes [2004] NSWSC 1195	Manslaughter	1 sister	
R v Keir [2004] NSWSC 1194	Murder	2	
R v Tillman [2004] NSWSC 794	Manslaughter	1 mother	
R v Clarke [2004] NSWSC 1125	Manslaughter	1 partner	

R v Rugari [2004] NSWSC 1126	Manslaughter	1 sister	
R v O'Connell [2004] NSWSC 1120	Murder	No	
R v Nguyen [2004] NSWSC 1067	Murder	No	
R v Kiseljev [2004] NSWSC 1030	Murder	No	
R v Vann [2004] NSWSC 998	Murder	1 family	
R v Taouk [2004] NSWSC 981	Murder	1 wife	
R v Hogan [2004] NSWSC 959	Manslaughter	No	
R v Iglesias [2004] NSWSC 944	Murder	No	
R v Price [2004] NSWSC 868	Manslaughter	2 mother and sister	
R v Gonzales [2004] NSWSC 822	Three counts of murder	3 mother, two sisters	3 by family rep
R v Taufahema [2004] NSWSC 833	Murder	2 father and fiancée	2
R v Azar [2004] NSWSC 796	Murder	1 son	
R v O'Leary [2004] NSWSC 821	Murder	Plural daughter and sons	
R v Eaglesham [2004] NSWSC 747	Murder	No	
R v MS [2004] NSWSC 730	Murder	1 father	
R v Goodwin [2004] NSWSC 757	Two counts of murder	2 son wife	1
R v Tja [2004] NSWSC	murder	1 no details	1
R v Holland [2004] NSWSC 653	Murder	1 mother	
R v Han Hoi Hyunh [2004] NSWSC 627	Manslaughter	no	
R v Wilson [2004] NSWSC 597	Murder	3 wife, son and daughter	1
R v Van Oosterum [2004] NSWSC 532	Manslaughter	No	
R v Knight [2004] NSWSC 498	Murder	No	

R v Mawson; R v Robbins; R v JWC [2004] NSWSC 561	Three charges of Manslaughter	1 mother	1
R v Laing [2004] NSWSC 510	Manslaughter	No	
R v Wilkinson [2004] NSWSC 1307	murder	1 parents	
R v Moloney [2004] NSWSC 477	Murder	2 wife and father	2
R v Muddle [2004] NSWSC 403	Manslaughter	2 parents and sister	2 by crown prosecutor
R v VDN [2004] NSWSC 426	Murder	No	
R v JSK [2004] NSWSC	murder	1 mother	
R v Forbes [2004] NSWSC 421	Two counts of manslaughter	Dec 1 - 2 wife and his parents Dec 2 - 2	4
R v Mercy [2004] NSWSC 472	Manslaughter	1 sister	1
R v Dalton [2004] NSWSC 446	Manslaughter	No	
R v Loeber [2004] NSWSC 293	Murder	1 mother	
R v Stone [2004] NSWSC 224	Murder	1 father	
R v Williams [2004] NSWSC 189	Manslaughter	1 family	1 read by family member
R v Hoang [2004] NSWSC 205	Manslaughter	No	
R v CVA	Manslaughter	no	
R v Boyd [2004] NSWSC 263	Manslaughter	1 mother	
R v Walsh; R v Sharp [2004] NSWSC 111	Manslaughter for Walsh and accessory after the fact to manslaughter for Sharp	Plural family	**Important comments about objection; could not be read aloud**
R v Kwon [2004] NSWSC 146	Manslaughter	1 Family	
R v Kerr [2004] NSWSC 75	Manslaughter	2 partner and sister	1
R v Fraser [2004] NSWSC 53	Three counts of murder	1 mother	1

R v Brown [2004] NSWSC 194	Murder	2 mother and father	
R v TJA [2004] NSWSC 1308	Murder	1 family	
R v JSK [2004] NSWSC 470	Murder	1 mother	
R v Hampton [2004] NSWSC 1215	Manslaughter	1 brother	
R v Han Hoia Huynh [2004] NSWSC 627	Manslaughter	No	
R v Wilkinson [2004] NSWSC 1307	Murder	1 parents	

2003 Cases

Case Name	Offence	VIS- number submitted	Oral VISs
R v Wilson [2003] NSWSC 1257	Manslaughter	No	
R v Vongsouvanh and Namulauulu [2003] NSWSC 1203	manslaughter	2 mother and sister	
R v Hoerler [2003] NSWSC 1187	Manslaughter	1 father	
R v Battur [2003] NSWSC 1164	Manslaughter	1 no details	
R v Marlow [2003] NSWSC 1130	Manslaughter	3 wife and 2 sisters	
R v Yu [2003] NSWSC 1153	Manslaughter	No	
R v Wigney [2003] NSWSC 1136	Murder	4 partner, mother, brother and sister	4
R v Ide [2003] NSWSC 1110	Murder	1 husband	
R v O'Connor [2003] NSWSC 1041	Manslaughter	No	
R v Joseph [2003] NSWSC 1080	Murder	plural no details	
R v Hunyh [2003] NSWSC 1066	Manslaughter	No	
R v Avakian [2003] NSWSC 1042	Manslaughter	No	
R v MA; R v Diab [2003] NSWSC 978	Murder for MA and manslaughter for Diab	2 parents	1 mother

R v Folbigg [2003] NSWSC 895	One charge of manslaughter and three charges of murder	No	
R v Marchant and Crawt [2003] NSWSC 958	Both charged with murder	No	
R v Penisini; R v Lagi; R v Taufahema [2003] NSWSC 892	Murder for Penisini and Taufahema	2 father and fiancé	2
R v Mahejar and Jacobs [2003] NSWSC 885	Both charged with murder	1 mother	1
R v Smit; R v Smit; R v Tarrant [2003] NSWSC 893	All three charged with murder	2 father and sister	
R v KMB [2003] NSWSC 862	Manslaughter	No	
R v Ritchie [2003] NSWSC 864	Murder	1 sister	
R v Maclurcan [2003] NSWSC 799	Manslaughter	No	
R v Laures [2003] NSWSC 785	Manslaughter	No	
R v Monroe [2003] NSWSC 1271	Manslaughter	No	
R v Ng; R v Lew [2003] NSWSC 781	Murder	1 wife	
R v Flanjak [2003] NSWSC 779	Murder	3 husband and two children	
R v Cao [2003] NSWSC 715	Murder	plural 'statements,' mother and sister	
R v Mailes [2003] NSWSC 707	Murder	2 mother and father	
R v O'Hare [2003] NSWSC 652	Manslaughter	1 wife	
R v Maskey [2003] NSWSC 1029	Murder	plural 'statements,' family	
R v Y [2003] NSWSC 468	Murder	No	
R v Scott [2003] NSWSC 627	Manslaughter	2 parents and sister	