

VICTIM IMPACT STATEMENTS IN CHILD SEXUAL ASSAULT CASES: A RESTORATIVE ROLE OR RESTRAINED RHETORIC?

RITA SHACKEL*

I INTRODUCTION

Recent crime statistics indicate that over 42 per cent of victims of sexual assaults in Australia are children aged 14 years or younger.¹ Over 17 per cent of all reported sexual assaults in Australia in 2009 were perpetrated against children aged 0–9 years.² The victimisation rate for sexual assault victims aged 10–14 in Australia is four times higher than the rate for all age groups.³ These statistics reveal a staggering rate of sexual victimisation of children in our society,⁴ and yet disturbingly, victim research has consistently suggested that child sexual assault⁵

* BSc, LLB, MA, DipEd, PhD (Sydney). Legal Practitioner of the Supreme Court of NSW. Senior Lecturer, The Faculty of Law, University of Sydney. The author gratefully acknowledges the financial support from the NSW Law and Justice Foundation General Grant (Ref: 0610-1054) and the assistance of the NSW Office of the Director of Public Prosecutions in facilitating access to a sample of case files. The author also thanks the three anonymous referees, who reviewed this article, for their constructive and valuable suggestions and comments and the following research assistants who worked on this project at various times: Rachael Ranjan, Jane Caruana, Alexander Ottoway and Tina Dryden.

1 Australian Bureau of Statistics, *4510.0 – Recorded Crime – Victims, Australia, 2009* (16 June 2010), 12 <<http://www.abs.gov.au/ausstats>>.

2 Ibid 17.

3 Ibid 12.

4 These statistics are consistent with those reported in overseas jurisdictions: see, eg, Diana Russell and Rebecca Bolen, *The Epidemic of Rape and Child Sexual Abuse in the United States* (Sage Publications, 2000), 214; Susan J Creighton, *Prevalence and Incidence of Child Abuse: International Comparisons* (April 2004) National Society for the Prevention of Cruelty to Children (UK) <http://www.nspcc.org.uk/Inform/research/Briefings/prevalenceandincidenceofchildabuse_wda48217.html>.

5 The legal definition of child sexual assault may vary between jurisdictions. This article adopts the following general definition: ‘any sexual activity between a child and an adult, or older person. This can include fondling genitals, masturbation, oral sex, vaginal or anal penetration by a penis, finger or any other object, fondling of breasts, voyeurism, exhibitionism and exposing or involving the child in pornography’: Lara Fergus and Monique Keel, ‘Adult Victim/Survivors of Childhood Sexual Assault’ (ACSSA Wrap No 1, Australian Centre for the Study of Sexual Assault, November 2005) 1 <<http://www.aifs.gov.au/acssa/pubs/wrap/w1.html>>. Unique issues arise in relation to sexual assault perpetrated by a minor against a younger child. This article does not seek to address these issues. See, eg, Nigel Stone, ‘Youthful Sex: Experimentation, Expression of Affection or Exploitation?’ (2007) 7 *Youth Justice* 53.

is one of the most under-reported of all crimes.⁶ For example, Fleming, in a retrospective cross-sectional analysis of 710 Australian women, found that only 10 per cent of child sexual assaults were ever reported to the police, a doctor or a helping agency.⁷ Easteal, in a national survey on the hidden incidence of sexual assault, reported that of 2642 victims, 37 per cent had not disclosed their sexual abuse prior to the survey.⁸ Approximately 70 per cent of the male victims in Easteal's survey were assaulted prior to the age of 17 and almost half (47.4 per cent) had not previously disclosed their abuse to anyone.⁹ London et al, in an extensive review of the published research on disclosure of childhood sexual abuse, found that only about a third of child sexual assaults are ever disclosed and that only a small minority of victims report their victimisation to authorities.¹⁰ These statistics indicate that child sexual assault is strongly characterised by a hidden dimension.

The latent nature of child sexual victimisation is at times exacerbated by ill conceived or poorly implemented criminal justice responses to such crime. Unfortunately, many reported cases of child sexual assault are never prosecuted and the conviction rate in such cases remains low.¹¹ Fitzgerald suggests that only about eight per cent of sexual offences committed against children and reported to police are ultimately proven in court.¹² The NSW Standing Committee on Law and Justice in its *Report on Child Sexual Assault Prosecutions* cited an overall conviction rate for child sexual assault offences of 70 per cent compared to 80 per cent for all offences.¹³ This conviction rate was reported as dropping to a meagre 20 per cent where the accused pleaded not guilty.¹⁴ Even in proven cases of child sexual assault, many convicted offenders do not receive a full-time

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- 6 Christine Eastwood, Sally Kift and Rachel Grace, 'Attrition in Child Sexual Assault Cases: Why Lord Chief Justice Hale Got It Wrong' (2006) 16 *Journal of Judicial Administration* 81, 82.
 - 7 Jillian M Fleming, 'Prevalence of Childhood Sexual Abuse in a Community Sample of Australian Women', (1997) 166 *Medical Journal of Australia* 65, 65.
 - 8 Forty-three per cent of victims in this sample were aged 16 years or younger at the time of at the first incident of sexual assault: Patricia Weiser Easteal, 'Survivors of Sexual Assault: A National Survey' in Patricia Weiser Easteal (ed) 'Without Consent: Confronting Adult Sexual Violence' (Paper presented at Australian Institute of Criminology, 27-29 October 1992) <<http://www.aifs.gov.au/acssa/pubs/briefing/b1.html>> cited in Alexandra Neame and Melanie Heenan, 'What Lies Behind the Hidden Figure of Sexual Assault? Issues of Prevalence and Disclosure' (Briefing No. 1 Australian Centre for the Study of Sexual Assault, September 2003) 3.
 - 9 Patricia Easteal, *Voices of the Survivors* (Spinifex Press, 1994) cited in Neame & Heenan, above n 8, 3.
 - 10 Kamala London, Maggie Bruck, Stephen Ceci and Daniel Shuman, 'Disclosure of Child Sexual Abuse' (2005) 11 *Psychology, Public Policy and Law* 194, 198-201.
 - 11 Eastwood, Kift and Grace, above n 6, 82.
 - 12 Jacqueline Fitzgerald, 'The Attrition of Sexual Offences from the New South Wales Criminal Justice System' (Crime and Justice Bulletin No 92, NSW Bureau of Crime Statistics and Research, January 2006) 5.
 - 13 This overall conviction rate includes guilty pleas entered by the accused. Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Report on Child Sexual Assault Prosecutions* (2002), 5 citing Dr Anne Cossins, 'Answers to Proposed Questions', (Submission to Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Report on Child Sexual Assault Prosecutions* (2002) 12.
 - 14 *Ibid* xii.

custodial sentence.¹⁵ For example, Hazlitt, Poletti and Donnelly reported that of 467 offenders convicted of a child sexual assault in the NSW District Court in 2000–02, 35 per cent did not receive a full-time custodial sentence and 17 per cent received no form of detention in sentencing.¹⁶ Fitzgerald has also reported that in 2004 over 43 per cent of offenders convicted of a sexual offence against a child in NSW received a non-custodial penalty; most commonly, a suspended sentence.¹⁷ The median period of detention reported overall for child sex offenders sentenced to full-time custody in 2002–04 was 4 years¹⁸ The most recently reported criminal court statistics in NSW reveal an average custodial sentence of only 9.6 months for persons found guilty of a sexual assault offence involving a child in the Local Courts and an average sentence of 28.8 months in the higher courts.¹⁹

The picture depicted by these statistics is that child sexual assault is commonly experienced in our society, is often unreported, and usually the offender will not be prosecuted. Further, even if prosecuted and convicted many offenders will not be sentenced to prison, and those who are will not be likely to serve a lengthy period in custody. This picture is particularly disquieting when coupled with increasing recognition that ‘few events have a more devastating impact on children than sexual abuse [and] yet the voice of these victims is often muted in the legal process.’²⁰ This muting effect on victims can, in part, be attributed to the inherent nature and underlying dynamics of child sexual assault itself, including the pervasive secrecy that typically cloaks such abuse and the ambivalence, shame and guilt often felt by victims, particularly in cases involving intra-familial sexual abuse.²¹ Additionally, the voices of these victims may also be suppressed by rules of evidence and procedures, which are interpreted and applied restrictively by courts. At times, this is based on misconceived notions of the dynamics of child sexual assault and the impacts of

15 Graham Hazlitt, Patrizia Poletti and Hugh Donnelly, ‘Sentencing Offenders Convicted of Child Sexual Assault’ (Research Monograph No 25, Judicial Commission of NSW, October 2004) 27.

16 Ibid.

17 Fitzgerald, above n 12, 5.

18 Hazlitt, Poletti and Donnelly, above n 15, 29.

19 NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Court Statistics 2009* (2010) 33, 90 <[http://www.lawlink.nsw.gov.au/Lawlink/bocsar/ll_bocsar.nsf/vwFiles/CCS09.pdf/\\$file/CCS09.pdf](http://www.lawlink.nsw.gov.au/Lawlink/bocsar/ll_bocsar.nsf/vwFiles/CCS09.pdf/$file/CCS09.pdf)>. Conviction and sentencing data on child sexual assault offences generally does not reflect the number of decisions overturned on appeal, which research suggests may be a sizeable number of cases. See, eg, Patrizia Poletti and Lynne A Barnes, ‘Conviction and Sentence Appeals in the New South Wales Court of Criminal Appeal 1996–2000’ (Sentencing Trends No 22, 2002, Judicial Commission of New South Wales, February 2002) <<http://www.judcom.nsw.gov.au/st/st22/index.html>>. Preliminary research undertaken by the author surveying decisions of the NSW Court of Criminal Appeal indicates that in 2000–08 190 cases involving child sexual assault offences were successfully appealed in whole or in part. See also, Legislative Council Standing Committee on Law and Justice, above n 13, 138.

20 Ronit D Leichtenritt and Bilha Davidson-Arad, ‘Construction of the Victim Impact Statement for Sexually Abused Minors: A Dramaturgy Response’ (2002) 32 *British Journal of Social Work* 1067, 1067.

21 London, Bruck, Ceci and Shuman, above n 10, 201.

such victimisation,²² as well as at times inflated concerns of unfair prejudice to the offender that may result from the use of Victim Impact Statements ('VISs').

VISs ostensibly offer victims of child sexual assault a distinctive medium through which to be heard in the processes of the criminal justice system and through which other important social and therapeutic benefits may also be gained for these victims.²³ In general terms a VIS is a statement prepared by a victim, and in the case of a child victim usually with the assistance of a professional, that outlines the personal harm suffered as a direct result of the offence.²⁴ The impacts described in such statements may be physical, psychological, social or financial.²⁵ VISs may serve several purposes including: to increase victim participation in criminal processes, victim satisfaction²⁶ and closure, to educate the court on the burden that crime places on the victim, to balance the information the court receives in the sentencing process, and to promote rehabilitation and reformation of the offender.²⁷ Accordingly, VISs not only represent an important restorative tool for the individual victim but also provide a vehicle for pursuing other important public interests and criminal justice goals. These include ensuring that those guilty of child sexual abuse receive appropriate sentences, thereby fulfilling both the sentencing goals of protection and deterrence, and ensuring that the potential for rehabilitation and reform of child sex offenders continues to be recognised as a legitimate goal in sentencing.²⁸ The rehabilitative function of VISs is supported by research that suggests that reformation of the offender is 'much more likely to be furthered by the tendering of a VIS which confronts the offender with the consequences of the offence and which could ... prompt the offender to take responsibility for those

22 Rita Shackel, 'How Child Victims Respond to Perpetrators of Sexual Abuse' (2009) 61 (Supplementary) *Psychiatry, Psychology and Law* S55. See also Clare MacMartin, '(Un)reasonable doubt? The Invocation of Children's Consent in Sexual Abuse Trial Judgments' (2002) 13 *Discourse and Society* 9.

23 Leichtentritt and Davidson-Arad, above n 20, 1068.

24 A 'victim impact statement' is defined in the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26 as 'a statement containing particulars of: (a) in the case of a primary victim, any personal harm suffered by the victim as a direct result of the offence...' See also definitions in other Australian jurisdictions: *Crimes (Sentencing) Act 2005* (ACT) s 47; *Sentencing Act* (NT) s106A; *Victims of Crime Assistance Act 2009* (Qld) s 15; *Criminal Law (Sentencing) Act 1988* (SA) s 7A; *Sentencing Act 1997* (Tas) s 81A; *Sentencing Act 1991* (Vic) s 95B; *Sentencing Act 1995* (WA) s 25. Legislation also permits VISs to be prepared by a person other than the primary victim in some cases, eg in homicide cases. A consideration of the role of VISs prepared by family victims is beyond the scope of this paper. The issues that arise in the case of a VIS prepared by a family victim are different to those that arise in the case of a primary victim and more specifically a child victim.

25 New South Wales Law Reform Commission, *Sentencing*, Discussion Paper No 33 (1996) [11.14].

26 Empirical evidence on the efficacy of VISs as a tool for increasing victim satisfaction with the criminal justice system is mixed. See, eg, Robert C Davis and Barbara E Smith 'Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise' (1994) 22 *Journal of Criminal Justice* 1; Edna Erez and Pamela Tontodonato, 'Victim Participation in Sentencing and Satisfaction with Justice' (1992) 9 *Justice Quarterly* 393; Bruce A Arrigo and Christopher R Williams, 'Victim Vices, Victim Voices, and Impact Statements: On the Place of Emotion and the Role of Restorative Justice in Capital Sentencing' (2003) 49 *Crime and Delinquency* 603, 609.

27 See, eg, New South Wales Law Reform Commission above n 25, [11.34]; Paul G Cassell, 'In Defense of Victim Impact Statements' (2009) 6 *Ohio State Journal of Criminal Law* 611, 611-2.

28 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(d).

consequences.²⁹ This rehabilitative goal in sentencing child sex offenders is particularly important in light of the relatively high risk of recidivism identified at least amongst some offenders, despite the hidden dimension of this crime, which often facilitates continued and hidden offending.³⁰ Such estimates are likely to be conservative in the face of under-reporting of child sex offences and the hidden nature of such crime.³¹ Thus the tendering of VISs to sentencing courts and their use in the sentencing process represents not only 'an important step in the recognition of the rights of the victims of crime' but signals an 'historic step' in breaking down the '[exclusive relationship] between the state and the offender.'³² Victims of crime, the offender, the broader community and the state each have a vested interest in the sentencing outcome. More often than not, the interests of victim, the community and the state will coincide; or at least, usually will not be in direct conflict. Sometimes, however, the sentencing process will be called upon to accommodate and balance competing interests in the individual case. VISs should not be presumed to unfairly compromise the interests of the offender, the state or the broader community, in favour of the victim's interests. Indeed a range of interests may be served concurrently if VISs are more aptly regulated and used 'constructively and [possibly even more] extensively' than occurs presently in Australia.³³

This article provides the first comprehensive discussion in the literature of the use of VISs in child sexual assault cases specifically within an Australian context. It argues that courts and other agents involved in the processes that regulate VISs have stifled the use of such statements and thereby diluted the potential benefits of VISs. The article advocates for a more flexible, consistent and constructive way to conceptualise the role and use of VISs in sentencing offenders in child sexual assault cases. The analysis presented in this article seeks to stimulate rethinking of the current restrictive approach to the use of VISs in such cases. Although a detailed analysis for reform of the regulatory framework for VISs in Australia is beyond the scope of this discussion, this article does offer at least some general directions for consideration and future reform in the use of VISs in child sexual assault cases.

29 New South Wales Law Reform Commission, above n 25, [11.34]. See also Phillip Talbert, 'The Relevance of Victim Impact Statements to the Criminal Sentencing Decision' (1988) 36 *UCLA Law Review* 199, 218; Cassell, above n 27, 623–4.

30 See, eg, Karen Gelb, 'Recidivism of Sex Offenders Research Paper' (Victorian Sentencing Advisory Council, January 2007) 30–1.

31 See, eg, *Ibid* 21–2; Mary Stathopoulos, 'Measuring Sexual Offender Recidivism' (Research Summary No 25, Australian Centre for the Study of Sexual Assault, 2010) <<http://www.aifs.gov.au/acssa/pubs/newsletter/n25/n25-3.html>>.

32 New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 November 1987, 15, 915 (Barry Unsworth) quoted in Joan Baptie, 'The Effect of the Provision of Victim Impact Statements on Sentencing in the Local Courts of New South Wales' (2004) 7 *The Judicial Review* 73, 76. See also, Peter Sankoff, 'Is Three Really a Crowd? Evaluating the Use of Victim Impact Statements Under New Zealand's Revamped Sentencing Regime' (2007) *New Zealand Law Review* 459, 471.

33 Jeffrey Miles, 'The Role of the Victim in the Criminal Process: Fairness to the Victim and Fairness to the Accused' (1995) 19 *Criminal Law Journal* 193, 193.

II THE ROLE AND USE OF VICTIM IMPACT STATEMENTS IN CHILD SEXUAL ASSAULT TRIALS

There is growing recognition and acceptance throughout the global and criminal justice communities that the impact of crime on victims should be recognised in criminal processes not only as a matter of victim rights but also to serve other criminal justice and public policy goals. Former Chief Justice Gleeson has observed that, '[o]ne of the most notable changes in the administration of criminal justice in recent years has been a growing awareness of a need to take account of the impact of offences on victims.'³⁴ In NSW this view is reflected in the Charter of Rights for Victims of Crime as formalised by the *Victims Rights Act 1996* (NSW). In particular, section 6.14 of this legislation provides that a 'victim should have access to information and assistance for the preparation of any victim impact statement authorised by law to ensure that the full effect of the crime on the victim is placed before the court.'³⁵ Similar principles have now been articulated in one form or another in most Australian jurisdictions.³⁶ Moreover, the law of sentencing requires a sentencing court to have regard to the effects of the crime on the victim.³⁷

A The Rights of the Child as a Victim of Crime

Generally speaking, at an international level the United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* notes that all victims of crime are to be treated with compassion and respect for their dignity and more specifically provides that the

responsiveness of judicial and administrative processes to the needs of victims should be facilitated by ... allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected...³⁸

34 AM Gleeson, 'Civil or Criminal – What is the Difference?' (2006) 8 *Judicial Review* 1, 7 cited in Judicial Commission of NSW, *Sentencing Bench Book* (2007), [12-790]

<<http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/victims.html#p12790>>.

35 The guiding principles contained in the Charter of Rights for Victims of Crime are not legally enforceable (*Victims Rights Act 1996* (NSW) s 8) but many have been adopted as a matter of policy by government departments that deal with victims of crime: Rowena Johns, 'Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services' (Briefing Paper No 10/02, Parliamentary Library, Parliament of New South Wales, 2002) 3

<[http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/578c6f10c6d98565ca256ecf00083b4d/\\$FILE/10-02.pdf](http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/578c6f10c6d98565ca256ecf00083b4d/$FILE/10-02.pdf)>. This is the case also in other jurisdictions with similar legislation in Australia.

36 *Victims of Crime Act 2001* (SA) pt 2 div 2; *Victims of Crime Assistance Act 2009* (Qld) ch 2 pt 2; *Victims of Crime Act 1994* (ACT) s 4; *Victims' Charter Act 2006* (Vic) pt 2; *Victims of Crime Act 1994* (WA) s 3, sch 1. The Northern Territory & Tasmania do not have a charter or statement of victim rights articulated in legislation or otherwise.

37 See, eg, *Porter v R* [2008] NSWCCA 145 (26 June 2008) [54] and *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g). This is discussed further in Part IIC below.

38 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GAOR, 40th sess, 96th plen mtg, Agenda Item 98, UN Doc A/Res/40/34 (29 November 1985) annex ('*Declaration of Basic Principles for Victims of Crime and Abuse of Power*') art 6.

This right is echoed as regards children specifically in the United Nations *Convention on the Rights of the Child* (CRC) which provides that ‘the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child...’³⁹ Recently, the Committee on the Rights of the Child emphasised that this right extends to affording a voice to children who are ‘victims of physical or psychological violence, sexual abuse or other crimes’⁴⁰ in the conduct of the case and his or her involvement in the judicial process.⁴¹ This clearly includes involvement of the child victim, as appropriate, in the sentencing phase of a crime committed against them.

In Australia, there appear not to be any legislative provisions or explicit policy statements in any jurisdiction that specifically and expressly articulate the rights of the child as victim to participate in the judicial process and which clearly endorse the child’s right to inform the court of the impact of the crime, or moreover, which formulate specifically the processes for preparation and reception of VISs in the case of a child victim. Only three states – South Australia, Victoria and Queensland – in articulating the guiding principles for treatment of victims of crime, have recognised the need for criminal agencies to take into account, and be responsive to, the particular needs of individuals on the basis of gender, race, sexual orientation, disability and *age*.⁴² However, even in these jurisdictions the unique needs that arise in childhood and the nature of these needs are not specifically recognised. At best some jurisdictions have prepared information sheets that are directed to informing children of their rights as a victim of crime generally⁴³ and more specifically to helping children complete a victim statement. For example, in South Australia, the Attorney-General’s Department has drafted a modified VIS pro-forma for children and young people.⁴⁴ This document is presented in a simplified form and encourages children to express themselves in words and also by using drawings. Such initiatives are certainly welcomed but nevertheless fall far short of a clear, coordinated and consistent scheme that recognises children’s rights and their unique needs and vulnerabilities as victims of crime, and which assists and

39 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12.

40 Committee on the Rights of the Child, *General Comment N. 12: The Right of the Child to be Heard*, 51st sess, UN Doc CRC/C/GC/12 (20 July 2009), 11 [32].

41 *Ibid* 16 [63].

42 *Victims of Crime Act 2001* (SA) s 6(b)(i); *Victims of Crime Assistance Act 2009* (Qld) s 8(1)(b); *Victims’ Charter Act 2006* (Vic) s 6(2).

43 See, eg, NSW Victims Services ‘Listen Up – Information for Young People’ (Pamphlet in cartoon format which gives information about the NSW Charter of Victims Rights, July 2010)

<http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll_vs.nsf/pages/VS_publicationsrights>; Department of Justice and Attorney-General Qld ‘Are you a Victim of Crime?’ (Brochure for Children and Young People, July 2010) <<http://www.justice.qld.gov.au/justice-services/victims-of-crime/victim-assist-queensland/forms-and-publications>>.

44 Commissioner for Victims’ Rights South Australia, ‘Victim Impact Statement Form for Children and Young People’ (Government of South Australia, 11 May 2007) <http://www.voc.sa.gov.au/Publications/Victim_Impact_Statements/VIS.asp>.

empowers the child victim in negotiating all stages of the criminal process with due recognition of their needs.

The impact of not having a cohesive legislative and policy framework in Australia directed specifically to the rights of children as victims is aggravated by the general legal framework for receiving VISs which is only broadly cast and lacks uniformity across the states and territories.⁴⁵ For example, in NSW, VISs are usually prepared by the victim with or without the aid of an assisting professional. In comparison in South Australia, a police pro forma is the accepted means for prosecutors to appraise the court of the consequences of the crime for the victim.⁴⁶ Differences also exist between jurisdictions as to what form a VIS may take and what may be included in such a statement. For example, in NSW a VIS must in all cases be tended in written form, whereas in Western Australia a VIS may be presented to the court orally.⁴⁷ In the Northern Territory a VIS may include a statement regarding the victim's wishes in respect of the order the court may make, however, in Western Australia, a VIS must not include an opinion on the sentence that should be given by the court.⁴⁸ This cacophony of legislative provisions for the use of VISs arguably points to both legislative uncertainty and a lack of theoretical clarity about the proper role and function of VISs in the sentencing process. A clear paradigm for the use of VISs needs to be adopted in Australia. This paradigm should cohesively drive the development of specific provisions and implementation of policies and rules which relate more specifically to the child victim. As Sankoff argues this paradigm need not be limited exclusively to either a public or private characterisation; it is arguable that the modern criminal justice landscape now permits and indeed even demands a public/private hybrid approach to sentencing and its processes.⁴⁹ This is 'neither unusual nor offensive to basic notions of justice.'⁵⁰ Sankoff is here referring to the New Zealand criminal justice landscape where the fact that both public and private interests have relevance in the sentencing process is undeniable given that the *Sentencing Act 2002* (NZ) 'states quite explicitly that providing for the interests of victims of crime is a legitimate purpose of sentencing.'⁵¹ Sankoff argues that additionally

45 For a general comparison of the legislative provisions that regulate VISs in Australia see Victims Support Agency, 'A Victim's Voice: Victim Impact Statements in Victoria' (Department of Justice Victoria, October 2009) Appendix C <http://www.justice.vic.gov.au/wps/wcm/connect/vsa/voc/resources/3/5/35394080436261508c44cf898c252b91/A_Victims_Voice-Victim_Impact_Statements_in_Victoria.pdf> .

46 Martin Hinton, 'Guarding Against Victim-authored Victim Impact Statements' (1996) 20 *Criminal Law Journal* 310, 310.

47 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30(1); *Sentencing Act 1995* (WA) s 25(1).

48 *Sentencing Act* (NT) s 106B(5A); *Sentencing Act 1995* (WA) s 25(2).

49 Sankoff, above n 32, 479.

50 *Ibid* 481.

51 *Ibid*.

[s]everal related initiatives buttress the notion that ... the particular interests of the victim [should now] be regarded as relevant to the overall sentencing determination ... Undoubtedly the most significant of these is the augmented use of restorative justice measures that have become incredibly popular in New Zealand.⁵²

These arguments are no less valid in an Australian context. For example, in NSW the *Crimes (Sentencing Procedure) Act 1999* denotes recognition of 'the harm done to the victim of the crime and the community' as a valid purpose for which the court may impose a sentence.⁵³ Indeed this formulation explicitly recognises both the private interests of the victim and the broader community (public) dimensions of sentencing. Moreover, restorative justice measures are as much a part of the criminal justice landscape in Australia as in New Zealand.⁵⁴

In contrast to Australia where there is no specific legislative or policy framework that recognises and facilitates a child victim's preparation of a VIS, at an international level the rights of a child victim to place before the court the impacts of crime have been formally recognised. *The Model Guidelines for the Effective Prosecution of Crimes Against Children* promulgated by the International Association of Prosecutors and the International Centre for Criminal Law Reform and Criminal Justice Policy provide that prosecutors should 'ensure that the court takes into account the severity of the physical and psychological harm experienced by the child'⁵⁵ in sentencing. This may include oral or written victim impact statements.⁵⁶ This guideline recognises the role of the prosecutor both as advocate for the child in presentation of the impacts of crime to the sentencing court, and as advocate in furtherance of the public interest in ensuring that such impacts of crime are made known to the court. There is no conflict in this dual role for the prosecutor so long as prosecuting counsel is not 'seen as counsel for the victim at the expense of justice.'⁵⁷ This view of the prosecutor's role accords with a public/private hybrid approach to sentencing, which recognises both the harm suffered by the victim, and the interest of the community in such harms being placed before the court as legitimate concerns in sentencing. The interests of the convicted person, in receiving a fair and proportionate sentence to the offence are protected by the

52 Ibid.

53 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g). See also *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(g); *Sentencing Act 1991* (Vic) s 5(2)(daa); *Criminal Law (Sentencing) Act 1988* (SA) s 10.

54 See, eg, Standing Committee of Attorneys-General, *Restorative Justice and the Criminal Justice System in Australia and New Zealand: An Overview* (11 March 2011) <http://www.lawlink.nsw.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_restorativejustice>; Corrective Services NSW Restorative Justice Unit, *Working with Victims of Crime, Offenders and the Community for Reconciliation and Healing* <<http://www.correctiveservices.nsw.gov.au/information/restorative-justice>>.

55 International Centre for Criminal Law Reform and Criminal Justice Policy and the International Association of Prosecutors, *Model Guidelines for the Effective Prosecution of Crimes Against Children*, VI 20 (5 September 2001) <http://www.icclr.law.ubc.ca/Site%20Map/Programs/Model_Guidelines.htm>.

56 Ibid.

57 Miles, above n 33, 205.

prosecutor's impartiality as guaranteed by professional practice rules and prosecution guidelines.⁵⁸

B Reception of Victim Impact Statements

At common law a court may admit a VIS in a child sexual assault case to provide the court with information about the impact of the crime on the victim which is not otherwise available to the sentencing court. The Federal Court in *R v P*⁵⁹ noted that

there is no question that increasing public concern about the position of victims of crime in the criminal justice system has been accompanied by repeated instances of judicial recognition that loss or damage suffered by a victim is a factor to be taken into account in the sentencing process.⁶⁰

Moreover, the Court stated that:

[i]n the absence of statutory provisions for victim impact statements ... [there is no] impropriety in the Director of Public Prosecutions, or the representatives of the Director, whether acting as counsel or as solicitor, ensuring that the court has before it sufficient material of a proper kind to enable it to proceed to sentence upon a realistic assessment of the injury to or loss suffered by a victim.⁶¹

The Federal Court, however, in this child sexual assault case, cautioned that

[i]t is essential ... that the material be presented in such a way that the prosecuting authority will not only not be seen to be promoting the interests of the victim at the expense of the interests of justice, but also the reality will be quite otherwise. Vengeance is not to be equated with justice.⁶²

Statutory provisions now govern the reception of VISs in most jurisdictions in Australia.⁶³ However, as noted above there is little uniformity between states in provisions that regulate the reception, form, content and use of VISs.⁶⁴ In NSW, a VIS may be received in child sexual assault cases in the Local, Supreme and District Courts after conviction but before sentencing an offender.⁶⁵ Similarly, in all other Australian jurisdictions a VIS is to be tended after conviction but prior to sentencing.⁶⁶ The statutory formulation in NSW does not

58 See, eg, New South Wales Bar Association, *New South Wales Barristers' Rules* (12 April 2001) r 71; Law Council of Australia, *Model Rules of Professional Conduct and Practice* (March 2002) r 20.12; NSW Office of the Director of Public Prosecutions, *Prosecution Guidelines* (June 2007) r 3.

59 (1992) 39 FCR 276.

60 *Ibid* 279.

61 *Ibid* 281.

62 *Ibid*.

63 There is no specific commonwealth statutory provision that regulates the reception of VISs in the case of federal offences: see, eg, Kate Warner, *Sentencing in Tasmania* (Federation Press, 2nd ed, 2002) 26. See also *Crimes Amendment (Victim Impact Statements) Bill 2006* (Cth).

64 See generally *Sentencing Act 1995* (WA) pt 3 div 4; *Crimes (Sentencing) Act 2005* (ACT) ch 4, pt 4.3; *Sentencing Act 1995* (NT) s 106B; *Sentencing Act 1991* (Vic) pt 6 div 1A; *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3 div 2; *Sentencing Act 1997* (Tas) s 81A; *Criminal Law (Sentencing) Act 1988* (SA) s 7A; *Criminal Offence Victims Act 1995* (Qld) s 14.

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

66 See generally *Sentencing Act 1995* (WA) s 24(1); *Crimes (Sentencing) Act 2005* (ACT) s 52; *Sentencing Act 1995* (NT) s 106B(1); *Sentencing Act 1991* (Vic) s 95A; *Justice Rules 2003* (Tas) r 54D; *Criminal Law (Sentencing) Act 1988* (SA) s7A(3)(a); *Criminal Offence Victims Act 1995* (Qld) s 14.

mandate the court to accept and consider a VIS but the Court may ‘if it considers it appropriate to do so.’⁶⁷ The NSW legislation requires that a VIS must be in writing.⁶⁸ This requirement applies even in the case of a child victim however ‘[p]hotographs, drawings or other images may be included in the victim impact statement.’⁶⁹ Moreover, a VIS received by the court may be read out by a victim or in the case of a child by someone having parental responsibility for the child⁷⁰ ‘at such time as the court determines after it has convicted, but before it sentences, the offender.’⁷¹ If the proceedings for the offence concerned are proceedings in which the child victim is entitled to give evidence by means of closed-circuit television, the child is also entitled to read out his or her VIS by way of such arrangements.⁷² These provisions seemingly are directed towards facilitating the making of a VIS by all victims of crime including a child victim. For example, the provisions permit for visual representations to be included in a VIS, which may in particular assist child victims to articulate the impacts of crime. Research has shown that children tend to feel an affinity with visual means of communication, and that often visual channels of communication elicit different perspectives and information not otherwise obtainable through the written word.⁷³ Even so, the NSW legislation does not permit for a child victim to provide an oral VIS, as a written VIS must in all cases be received by the court. This is contrary to the more flexible approach that has been advocated at an international level and adopted in some other Australian and overseas jurisdictions,⁷⁴ which arguably recognises, and is better suited to, children’s developing language and cognitive skills. For example, in WA, NT, ACT and Victoria a VIS may be tendered to the court either in oral or written form.⁷⁵

Statute also governs the preparation and content of VISs although such functional requirements vary between jurisdictions in Australia. In NSW, the *Crimes (Sentencing Procedure) Regulation 2010* specifies who may prepare a VIS, namely, a victim, their representative or a qualified person designated by the victim or by the prosecutor.⁷⁶ Only a prosecutor may tender such a statement to the court in NSW.⁷⁷ There are variations between Australian jurisdictions as to who can tender a VIS and the requirements for serving a VIS on the defence.⁷⁸

67 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(1). A victim of crime in NSW is not required to prepare a VIS: s 29(1).

68 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30(1).

69 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30(1A).

70 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A(1).

71 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A(2).

72 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A(3).

73 Lisa Whiting and Jack Forbes, ‘Involving Children in Research’ (2009) 21 *Paediatric Nursing* 32, 34.

74 For example, in the United States, 47 states permit for oral victim impact statements at sentencing: The National Centre for Victims of Crime, *Victim Impact Statements* (1999) <<http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32515>>.

75 *Sentencing Act 1995* (WA) s 25(1); *Crimes (Sentencing) Act 2005* (ACT) s 52(1); *Sentencing Act* (NT) s 106B(8); *Sentencing Act 1991* (Vic) s 95A(2)(b).

76 *Crimes (Sentencing Procedure) Regulation 2010* (NSW) reg 8.

77 *Crimes (Sentencing Procedure) Regulation 2010* (NSW) reg 11.

78 See generally, Victim Support Agency, above n 45.

The legislation in most jurisdictions only prescribes the content and form of a VIS in general terms.⁷⁹ For example, in most jurisdictions, there are no specific requirements with respect to the format of a VIS and generally the content of a VIS is described in terms of the particulars of any ‘personal harm’ suffered as a direct result of the offence.⁸⁰ Perhaps a more comprehensive, streamlined and uniform framework for regulation of VISs across Australia may allay some of the unease sentencing courts have revealed in using VISs, particularly concerns that such statements are dangerously amorphous and may consequently unfairly prejudice the offender in sentencing.

Despite a legislative framework that permits for reception of VISs in the sentencing process, some commentators have noted that the approach to the use of VISs in Australia generally, however, has been more restrictive than that seemingly permissible by the existing framework.⁸¹ Proppen & Schuster submit this may be so because the legal system is still negotiating how to respond to VISs, which are often emotional statements and accordingly may ‘disrupt a system supposedly based on rationality and neutrality.’⁸² The potential for unfair prejudice to the offender in the sentencing process borne of the ‘overly’ emotive or ‘intemperate’ character attributed to VISs is frequently touted by critics of VISs as a reason for courts not to rely on such statements in sentencing offenders. Arrigo and Williams explain that

the major criticism of VIS centers on the extent to which the presentation of victim impact evidence evokes prejudicial or otherwise harmful (i.e., biased) emotions from [the court], thereby undermining the criminal offender’s intrinsic humanness, succumbing instead to the more punitive dimensions of our own existences.⁸³

In a similar vein, Hinton specifically objects to the use of victim-authored statements on the basis that:

[a] victim impact statement written by the victim in which he or she details the personal injury, loss or damage suffered is, prima facie, at odds with the sentencing process. It follows then, that the subjective appraisal of the injury, harm or loss caused a victim by a particular crime may exceed an objective appraisal.

79 Ibid.

80 *Sentencing Act 1995* (WA) s 25(1)(a), s 25(1)(b); *Crimes (Sentencing) Act 2005* (ACT) s 47; *Sentencing Act* (NT) s 106A; *Sentencing Act 1991* (Vic) s 95B(1); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26; *Sentencing Act 1997* (Tas) s 81A(2); *Criminal Law (Sentencing) Act 1988* (SA) s 7A(1).

81 Johns, above n 35, 19.

82 Amy Proppen and Mary Lay Schuster, ‘Making Academic Work Advocacy Work: Technologies of Power in the Public Arena’ (2008) 22 *Journal of Business and Technical Communications* 299, 308.

83 Arrigo and Williams, above n 26, 614. Arrigo and Williams discuss the use of VIS in the context of capital cases in the United States. The issues that arise in such cases are arguably different to those that arise generally in sentencing other offenders, however, it is beyond the scope of this paper to canvass these issues more specifically.

... Such statements may 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 subconsciously, is disproportionate to the other circumstances to be taken into account in arriving at the correct penalty.⁸⁴

Cassell refutes this view by drawing on empirical evidence that shows VISs have a minimal effect on sentence severity.⁸⁵ Overwhelmingly, the evidence reveals that VISs do not distort the sentencing process.⁸⁶ More controversially, Cassell posits that '[e]ven apart from debating the empirical effects of the emotion conveyed by victim impact statements, a more fundamental response is possible: What's wrong with emotion?'⁸⁷ He concludes:

Indeed, if we were to attempt to move to an emotionless system of criminal justice, perhaps the biggest losers might be criminal defendants. Defendants, defense attorneys, and family members frequently make emotional pleas at sentencing for mercy, pleas that the law routinely allows. Their pleas, no less than the pleas of victims, are a proper part of the criminal justice system.⁸⁸

This view highlights the multiplicity of interests with which the criminal justice system is concerned. Moreover, as some commentators argue, law 'greatly overstates both the demarcation between ... [emotion and reason] and the possibility of keeping reasoning processes free of emotional variables.'⁸⁹ Further, '[e]motion and cognition, to the extent that they are separable, act in concert to shape our perceptions and reactions.'⁹⁰ Accordingly, the emotional dimension of VISs should not be presumed to diminish the potential benefits such a tool offers in the sentencing process and the array of interests that can be served; indeed the insights it offers may well enhance sentencing outcomes. This view is consistent with recognition that the modern criminal justice system should seek to serve a range of interests and provides further support for a public/private hybrid paradigm for sentencing in which the interests of the victim, offender, community and the state are recognised and balanced, rather than a traditional two party model of state and offender.

Furthermore, a 'judge [always] retains [the] discretion to screen out extremely prejudicial testimony.'⁹¹ In Australia at common law⁹² and under uniform evidence legislation a trial judge has the discretion to 'refuse to admit

84 Hinton, above n 46, 314.

85 Cassell, above n 27, 635. See also, Edna Erez and Leigh Roeger, 'The Effect of Victim Impact Statements on Sentencing Patterns and Outcomes: The Australian Experience' (1995) 23 *Journal of Criminal Justice* 363, 373.

86 See generally, Edna Erez and Linda Rogers, 'Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals' (1999) 39 *British Journal of Criminology* 216.

87 Cassell, above n 27, 637.

88 Ibid 638.

89 Susan Bandes, 'Empathy, Narrative, and Victim Impact Statements' (1996) 63 *The University of Chicago Law Review* 361, 368.

90 Ibid.

91 Cassell, above n 27, 633.

92 At common law, the court's discretion to exclude 'unfairly prejudicial' evidence has been expressed in various formulations: see, eg, *Perry v R* (1982) 150 CLR 580; *R v Lynch* [1979] 2 NSWLR 775, *Driscoll v R* (1977) 137 CLR 517.

evidence if its probative value is substantially outweighed by the danger that evidence might' be 'unfairly prejudicial to a party.'⁹³ Moreover, the uniform evidence legislation requires a judge in a criminal trial to 'refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.'⁹⁴ This discretion entrusted to the trial judge confirms that judges are deemed capable of determining whether or not evidence is so prejudicial as to necessitate exclusion – arguably a sentencing court is no less capable of exercising such discretion and making such judgments in the course of sentencing. Importantly the discretion accorded to judges at trial is to exclude 'unfairly' or excessively prejudicial evidence not evidence that is merely prejudicial.⁹⁵ Some sentencing legislation in Australia gives the sentencing court the power to declare a VIS partly or wholly inadmissible, however, these provisions confer a wide discretion, and do not provide the court with any guidance or a clearly articulated basis upon which to exercise this discretion.⁹⁶ If evidence contained in a VIS is deemed unfairly prejudicial by a sentencing court, the court should be able to exercise its discretion to exclude such evidence, either in part or in its entirety, but arguably only where this is necessary as a matter of fairness, considering all the interests at stake and when the dictates of justice so require. Exclusion of impact evidence should not be presumed necessary in most cases. As discussed later in this article, in the case of child sexual assault offences, sentencing courts seemingly have been so cautious in their use of VISs in the sentencing process that reliance on such statements has effectively been presumed to be dangerous and to pose a risk of unfair prejudice to the offender in all but the rarest of cases.⁹⁷

C VIS and Sentencing Principles Applied to Sentencing Child Sex Offenders

A sentencing court is to consider the impact of the crime on its victim(s).⁹⁸ However, the court may not take into account any aggravating circumstances which would have warranted a conviction for a more serious offence,⁹⁹ or any harm, loss or damage sustained by the victim that would not have been

93 *Evidence Act 1995* (NSW) s 135; *Evidence Act 1995* (Cth) s 135; *Evidence Act 2001* (Tas) s 135; *Evidence Act 2008* (Vic) s 135.

94 *Evidence Act 1995* (NSW), s 137; *Evidence Act 1995* (Cth) s 137; *Evidence Act 2001* (Tas) s 137; *Evidence Act 2008* (Vic) s 137.

95 The provisions of the Uniform Evidence Acts apply in sentencing proceedings to the extent that the sentencing court directs: ss 4(1)(d), (2). Where a direction is not made under s 4 of the uniform legislation or in non-uniform evidence jurisdictions the common law relating to evidence continues to apply in sentencing proceedings except to the extent that it has been affected by other statutory provisions. For a discussion of the danger of unfair prejudice see, eg, Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) vol 1, 351–52 [644].

96 *Sentencing Act 1991* (Vic) s 95B; *Sentencing Act 1995* (WA) s 26(2).

97 See below Part III.

98 See, eg, *Porter v R* [2008] NSWCCA 145 (26 June 2008) [54] (Johnson J) (Bell JA and McCallum J agreeing). His Honour cited *R v Webb* [1971] VR 147, 150–1; *R v P* (1992) 64 A Crim R 381, 384–5; *Siganto v The Queen* (1998) 194 CLR 656, 664–6 (Glesson CJ, Gummow, Hanev and Callinan JJ).

99 *R v De Simoni* (1981) 147 CLR 383, 389 (Gibbs CJ).

foreseeable to the reasonable person.¹⁰⁰ Hinton argues that victim-authored VISs in particular risk trespassing on such basic sentencing principles and accordingly only VISs ‘prepared by people from an objective standpoint [should] be accepted.’¹⁰¹ This view raises practical difficulties about who would prepare such statements and whether the underlying rationale for VISs would be compromised by such an intransigent approach. One of the strengths of the VIS is that it is a statement by the victim of the harm caused to them by the offender’s criminal conduct. This dimension of the VIS is fundamental and should not be diluted. As discussed later in this paper, the use of a victim’s statement of the personal impacts of the crime they have experienced, does not deprive the court of the opportunity to make an ‘objective’ assessment of such impact nor of the appropriate sentence that should be given in the instant case. Arguably, courts *should* have the experience and tools to adjudge VISs and their subjective content through an ‘objective’ lens, either in exercise of judicial discretion or in application of relevant legal rules and principles. Ultimately, as is discussed below, the VIS is but one source of information available to the court in sentencing and is to be evaluated alongside other relevant information available to the court.

In NSW, statute accords the court general discretion in relation to sentencing offenders.¹⁰² Pursuant to section 21A(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), a sentencing court must take certain matters into account in sentencing an offender. These matters include any aggravating or mitigating matters relevant and known to the court¹⁰³ and any other ‘objective or subjective factor that affects the relative seriousness of the offence.’¹⁰⁴ The types of aggravating factors which a court is required to take into account that are most relevant to the sentencing of child sex offenders include that:

- the offence involved the actual or threatened use of violence;
- the offender has a record of previous convictions;
- the offence was committed in the home of the victim or any other person;
- the injury, emotional harm, loss or damage caused by the offence was substantial;
- the offender abused a position of trust or authority in relation to the victim;

100 See, eg, *R v Thompson* (1975) 11 SASR 217; *R v McCormack* [1981] VR 104. Some commentators have questioned the correctness of this approach: see, eg, Christopher Sumner, ‘Victims of Crime & Criminal Justice’ (1999) 2 *Journal of the Australasian Society of Victimology* 31.

101 Hinton, above n 46, 311.

102 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21.

103 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(1)(a)–(b).

104 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1)(c).

- the victim was vulnerable, for example, because the victim was very young or had a disability;
- the offence involves multiple victims or a series of criminal acts.¹⁰⁵

On the other hand, section 21A(3) requires the sentencing court to also take into account certain mitigating factors. Those most relevant to the sentencing of child sex offenders include that:

- the injury, emotional harm, loss or damage caused by the offence was not substantial;
- the offender was a person of good character;
- the offender is unlikely to re-offend;
- the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise;
- the remorse shown by the offender;
- a plea of guilty by the offender.

However, pursuant to section 21A(5A) in determining the appropriate sentence for a child sexual offence, the good character or lack of previous convictions of an offender is not to be taken into account as a mitigating factor if the court is satisfied that the factor concerned was of assistance to the offender in the commission of the offence. This provision recognises the unique dynamics that commonly underlie child sexual assault offences. For example, that child sexual abuse is commonly perpetrated by a person known to the child and in a trusted relationship with the child or the child's family, or in a position of responsibility, which facilitates access to the victim and enables the acts of abuse.¹⁰⁶ This provision also recognises the role that the 'grooming' of a victim may play in child sexual assault offences.¹⁰⁷

In most jurisdictions in Australia, the legislative provisions that regulate tendering of a VIS in the sentencing process do not abrogate the common law. For example, section 21A of the NSW legislation provides that '[t]he matters referred to in this subsection are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.'¹⁰⁸ The fact that an aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence.¹⁰⁹

105 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2).

106 See, eg, MacMartin, above n 22, 32.

107 See generally, Samantha Craven, Sarah Brown and Elizabeth Gilchrist, 'Sexual Grooming of Children: Review of Literature and Theoretical Considerations' (2006) 12 *Journal of Sexual Aggression* 287.

108 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1).

109 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5).

III USE OF VICTIM IMPACT STATEMENTS BY AUSTRALIAN SENTENCING COURTS IN CHILD SEXUAL ASSAULT CASES

The next issue for consideration is the extent that, and manner in which, sentencing courts ‘in practice’ utilise VISs in sentencing child sex offenders in Australia. Are VISs essentially employed as a symbolic means only for victims to be ‘heard’ in the sentencing process in recognition of the therapeutic and cathartic benefits attached to such statements, or are VISs actively and purposefully utilised by courts to ensure informed decision-making in sentencing? That is, do VISs impact the sentences given by courts in child sexual assault cases? If not, to what extent *should* the use of VISs be extended for this purpose? These questions require evaluation of what appears to be a chasm in the theoretical and practical constructs that regulate the use of such statements. Do we want VISs to operate as a communicative tool that serves both the needs of victims and informs sentencing decisions in a just way, or are we content for VISs to continue simply as the rhetorical construct that current jurisprudence has seemingly produced a construct that arguably dilutes the core utility of the VIS?

Given the legal framework that permits the reception of a VIS in Australia in child sexual assault cases, the use of VISs should more readily be embraced as a means to promote fairness, transparency, and to enhance the proportionality and accuracy of sentencing in such cases.¹¹⁰ VISs should be used more constructively in the sentencing process in such cases – the use of VISs by courts should accord with the legislative intention behind this tool and recognise the changed landscape of modern adversarial criminal justice, which although remaining essentially public interest driven is undeniably now also alert to some private interests.¹¹¹ This potential role for VISs, however, seems not to have been fulfilled for two main reasons in the case of child sexual assault. First, Australian courts have consistently required that impact evidence contained in a VIS satisfy a heavy evidentiary burden before it can be relied upon in sentencing decisions. Secondly, courts have tended to use VISs to mitigate the seriousness of child sexual assault rather than recognise the devastating impact of such victimisation on many of its victims. Each of these two juridical barriers to the functional use of VISs in sentencing child sex offenders is discussed further below.

A The Evidentiary Burden for Acceptance of Impact Evidence

Kirchengast argues that despite increased legislative recognition of victim rights and the therapeutic benefits of VISs, victim impact evidence has had little actual impact on the sentences handed down generally by Australian courts including in child sexual assault cases.¹¹² Other research has found likewise.¹¹³

110 Edna Erez and Kathy Laster, ‘Neutralising Victim Reform: Legal Professionals’ Perspectives on Victims and Impact Statements’ (1999) 45 *Crime and Delinquency* 530, 531.

111 Sankoff, above n 32, 481.

112 Tyrone Kirchengast, ‘Recent Developments in Victim Agency in the New South Wales Justice System: The Case of Victim Impact Statements’ (2006) 13 *James Cook University Law Review* 125.

According to Kirchengast, a key reason for this is the restrictive interpretation courts have placed on the evidentiary burden deemed necessary in sentencing decisions.¹¹⁴ For example, the NSW Court of Criminal Appeal in *R v Slack*¹¹⁵ – a child sexual assault case involving a victim aged under 16 – held that in considering harm to the victim as an aggravating factor relevant to sentencing the offender, the court must be satisfied as to the factual basis of any such assertions of harm by the victim beyond a reasonable doubt.¹¹⁶ This view is consistent with that adopted in *R v Olbrich*, where a majority of the High Court stated that a sentencing court ‘may not take facts into account in a way that is *adverse* to the interests of the accused unless those facts have been established beyond reasonable doubt.’¹¹⁷ In other words, on this view, evidence of harm suffered by a victim as described in a VIS will only be taken into account by a sentencing court where such harm meets the criminal burden of proof and has been established beyond a reasonable doubt. This would in the usual course of events require at least that evidence of this harm have previously been adduced at trial and tested according to the applicable rules of evidence. However, admission of evidence of harm suffered by the victim in the course of the trial does not necessarily equate with proof of such facts beyond a reasonable doubt, as proof of the ultimate facts in issue, that is proof of the elements of the crime and guilt of the accused beyond a reasonable doubt, does not require that all facts that lie behind proof of such facts also be proved beyond a reasonable doubt.¹¹⁸ Furthermore, it is unlikely that evidence of the harm suffered by a victim, particularly in the longer term, will be relevant to proof of the offender’s guilt at trial. If such evidence is adduced in the course of the trial, more often than not, it will be adduced and admitted for a purpose other than proof of guilt, for example, a credibility purpose – the test for admission and use of such evidence then is that of relevance.¹¹⁹ This means that sentencing courts are setting the evidentiary burden for acceptance of impact evidence at a standard that is often incompatible with the nature of, and the manner in which, such evidence is used, if at all, within the trial context.

In contrast, evidence of mitigating factors adduced by the defence at sentencing need only be proved on the balance of probabilities. On what basis is this justified? This difference may be questionable when one considers that the

113 See, eg, Edna Erez, Leigh Roeger and Frank Morgan, *Victim Impact Statements in South Australia: An Evaluation* (Research Report Series C, No 6, Office of Crime Statistics of the South Australian Attorney-General, August 1994) 68-9.

114 Kirchengast, above n 111, 139-46.

115 [2004] NSWCCA 128 (7 May 2004).

116 *Ibid* [58] (Sperling J).

117 (1999) 199 CLR 270, 281 (Gleeson CJ, Gaudron, Hayne and Callinan JJ). The High Court here endorsed the view adopted by the Victorian Court of Criminal Appeal in *R v Storey* [1998] 1 VR 359.

118 See, eg, *HML v The Queen* (2008) 235 CLR 334, 360 (Gleeson CJ).

119 Under the Uniform Evidence Legislation pursuant to s 55(1) ‘evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding’: see, eg, *Evidence Act 1995* (NSW).

accused is now a criminal.¹²⁰ Indeed should the principles that protect fairness to the accused at trial be the same as those that protect fairness to the criminal in sentencing? It is arguable, that the array of interests and their prioritisation in the sentencing process, are not the same as those at trial, and on this basis the principles governing sentencing decisions may legitimately, and at times, should properly differ according to the interests of justice. When it comes to sentencing, generally ‘the need to protect the community and to impose deterrent sentences takes priority over the interests of the offender.’¹²¹

In any case, to overcome the evidentiary deficit attributed by courts to impact evidence it would seem necessary for the prosecution to present evidence at sentencing in order to prove the matters raised by the victim in a VIS.¹²² The VIS will not of itself in most cases suffice, however, some jurisdictions in Australia permit for medical or other reports to be attached to a VIS.¹²³ Adducing evidence in support of facts asserted in a VIS may in some cases be appropriate and not unnecessarily burdensome on the sentencing process and the participants. In many cases, however, simply because of the nature of child sexual assault, the passage of time since the assault, and the nature of the impacts of such crime, such an approach may not be desirable. Two possibilities at least then emerge. First, why not permit VISs to be sworn or otherwise attested to by the victim? This approach has been adopted in Victoria.¹²⁴ One of the dangers of having sworn VISs is that such statements and victims may be subjected to cross-examination on the basis of fairness to the offender, which in the case of a victim of child sexual assault may represent an unacceptable risk of re-traumatisation. Secondly, why not permit the sentencing court to adjudge the weight to be attributed to a VIS? As discussed above, the conduct of a criminal trial is premised on the court’s capacity to adjudge such matters as reflected in the judicial discretion to exclude excessively prejudicial material from the decision-making process.

Justice Sperling in the court’s leading judgment in *R v Slack*, stated that:

substantial weight cannot be given to an account of harm in an 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.¹²⁵

Accordingly, the decision in *R v Slack* now requires a sentencing court to take into account the impact of criminal behaviour on the victim by applying an

120 Miles, above n 33, 194.

121 Ivan Potas, ‘Sentencing for Child Sexual Assault: With Particular Emphasis on the Law in NSW’ (Paper presented at Sentencing: Principles, Perspectives and Possibilities Conference, Canberra, 10–12 February 2006) 7
<<http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2006/Sentencing%20Conference/Sen%20conf%20papers%202006/Potas.pdf>>.

122 *R v Olbrich* (1999) 199 CLR 270, 281 (Gleeson CJ, Gaudron, Hayne and Callinan JJ).

123 See, eg, *Sentencing Act 1991* (Vic) s 95BA. But see *R v King* (2004) 150 A Crim R 409, 442–3.

124 *Sentencing Act 1991* (Vic) s 95A(2).

125 *R v Slack* [2004] NSWCCA 128 (7 May 2004) [62].

objective test of the crime's effect on the victim.¹²⁶ This view in part seems counterintuitive and contrary to the rationale that purportedly underpins the making of a VIS, and the legislative intention of receiving into the sentencing process individual statements by victims of the impact 'on them' of the crime committed against 'them.' Application of a strictly objective test of the impact of child sexual assault on a victim is also difficult to reconcile with the findings of what is an extensive body of empirical and clinical research, largely grounded in the fields of psychology, psychiatry and other allied health and social disciplines, that clearly points to the fact that the effects and impacts of child sexual assault are multifarious, extremely diverse and influenced by a complex matrix of facts and circumstances individual to the case.

A review of the vast literature on the effects and impacts of child sexual assault highlights that there is no complex of symptoms identifiable in a majority of victims of such abuse.¹²⁷ Every child is unique and every case of child sexual abuse has its own individual characteristics, which contribute to the underlying dynamics of the abuse situation and to its aftermath. Therefore, 'presuming [that] clear patterns exist which can be applied to all children may be misleading.'¹²⁸ Psychological and clinical research on the effects of child sexual victimisation points to an extremely wide variability in the sequelae of such abuse and to the multiplicity of factors that may influence victims' responses to such abuse. The documented effects of child sexual abuse include a broad array of social, behavioural, psychological, emotional and health impacts. Circumstantial variables that have been linked to the impact of child sexual assault include age of the victim,¹²⁹ family support,¹³⁰ circumstances of the disclosure¹³¹ and characteristics of the abuse including the victim's relationship with the offender.¹³² For example, one consistent finding amongst studies is that a more serious invasion of the body, such as penetration, is more strongly linked to psychosomatic symptoms.¹³³

The impacts of child sexual abuse may manifest both in the short-term and long-term. Numerous studies have reported differences in functioning between child sexual abuse victims and children who have not been abused; for example, some studies have found that pre-school victims of sexual abuse tend to be more sensitive, aggressive, fearful, inhibited, immature, socially deficient and

126 Ibid [61].

127 Suzanne M Sgroi, 'Discovery, Reporting, Investigation, and Prosecution of Child Sexual Abuse' (2000) 29 *Sexuality Information and Education Council of the US Report* 5, 9.

128 David PH Jones, 'Editorial: Disclosure of Child Sexual Abuse' (2000) 24 *Child Abuse and Neglect* 269, 270.

129 Judy Gutman, 'The Effects of Child Sexual Abuse: Is there a Child Sexual Abuse Syndrome' (1997) 4 *Journal of Law and Medicine* 361, 363.

130 Ibid.

131 Eva Jonzon and Frank Lindblad, 'Adult Female Victims of Child Sexual Abuse: Multitype Maltreatment and Disclosure Characteristics Related to Subjective Health' (2005) 20 *Journal of Interpersonal Violence* 651, 661.

132 Ibid 652.

133 Ibid 663.

neurotic.¹³⁴ Other studies have reported that even older victims of child sexual abuse are more likely to exhibit concentration problems; aggression; symptoms of withdrawal; somatic complaints; certain personality traits (eg, being nice or pleasant or too eager to please); anti-social behaviour; nervous/emotional problems; depression; body image/self-esteem problems; fear; and symptoms of post traumatic stress.¹³⁵ Studies that have focussed more specifically on the long-term impacts of child sexual abuse have reported an increased risk for outcomes such as substance use and misuse, psychiatric disorders and suicide.¹³⁶ Additionally, a number of studies have linked child sexual assault to an increased risk of re-victimisation. Mouzos and Makkai found that the risk of sexual violence in adulthood doubles for women who were abused as a child (54 per cent versus 26 per cent).¹³⁷ The 1996 Australian Bureau of Statistics survey, *Women's Safety Australia*, found that a history of violent victimisation, either as a child or adult, was a strong predictor of future victimisation regardless of age, educational attainment, employment status, income or marital status.¹³⁸ A recent review of published research on the impacts of child sexual assault found that child sexual abuse victims are not only more vulnerable to later sexual re-victimisation but that there is a link between child sexual abuse and later engagement in high-risk sexual behaviour.¹³⁹ Child sexual assault has also been linked to the 'cycle of abuse' where child victims themselves may later become abusers.¹⁴⁰ Ultimately as Mullen and Fleming hypothesise:

the fundamental damage inflicted by child sexual assault is to the child's developing capacities for trust, intimacy, agency and sexuality, and that many of the mental health problems of adult life associated with histories of abuse are but second-order effects.¹⁴¹

Courts, like legislatures, are increasingly demonstrating a better understanding and recognition of the potentially devastating effects of child sexual assault on the victim, the family unit and the community more broadly.¹⁴² For example, the NSW Court of Criminal Appeal in *R v BJW*¹⁴³ recognised that:

134 Gutman, above n 12, 365.

135 Ibid.

136 Shanta R Dube et al, 'Long-Term Consequences of Childhood Sexual Abuse by Gender of Victim' (2005) 28 *American Journal of Preventative Medicine* 430, 434.

137 Jenny Mouzos and Toni Makkai, 'Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey' (Research and Public Policy Series No 56, Australian Institute of Criminology, January 2004) 87.

138 Australian Bureau of Statistics, *4128.0 – Women's Safety Australia 1996* (11 December 1996) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4128.0Main+Features11996?OpenDocument>>.

139 Kevin Lalor and Rosaleen McElvaney, 'Child Sexual Abuse: Links to Later Sexual Exploitation/High-Risk Sexual Behaviour, and Prevention/Treatment Programs' (2010) 11 *Trauma, Violence, & Abuse* 159, 163–5.

140 Annette van der Merwe, 'Addressing Victims' Harm: The Role of Impact Reports' (2008) 30 *Thomas Jefferson Law Review* 391, 391.

141 Paul Mullen and Jillian Fleming, 'Long-Term Effects of Child Sexual Abuse' (National Child Protection Clearinghouse, Australian Institute of Family Studies, Issues in Child Abuse Prevention, Issues Paper No 9, Autumn 1998) cited in Fergus and Keel, above n 5, 3.

142 See generally Potas, above n 119, 3–4.

143 *R v BJW* (2000) 112 A Crim R 1.

The impact on the complainant, then a child, of ... sexual abuse ... can safely be assumed to have been traumatic and appalling. The maximum penalties the legislature has set for such offences reflect community abhorrence of and concern about adult sexual abuse of children.¹⁴⁴

Whilst the effects of child sexual assault are now more widely recognised within and outside the courtroom, there is still a clear need for courts to consider the individual circumstances of each case in order to properly and fairly adjudge the personal nature of impacts on a victim. The utility of the VIS in placing such personal and individual information before the court is clearly evident.

Given an extensive body of research, which shows that the effects of child sexual assault are typically influenced by factors individual to the case including victim and offender characteristics, the nature and circumstances of the assault and the response of others to disclosure of the offence, a further question arises – on what basis then is a sentencing court to apply an objective test of the impact of child sexual assault in sentencing the individual offender? Can a strictly objective test be justified? The basis for such an objective or other test requires clarification. The danger that arises here is that application of an objective test of harm on a victim, arguably, may tend to minimise such harm and thus also potentially mitigate the seriousness of the crime that has been committed.

As noted above, Sperling J also points to procedural deficits attributed to the VIS that derogate from its status, namely, that a VIS is an unsworn statement which typically will not be in the victim's own words and which remains untested according to the procedural standards applied in the context of a criminal trial. Arguably the sentencing phase of a criminal case may be differentiated from the trial itself. First, it is noteworthy that sentences in Australia are dispensed by judges alone, whereas in many criminal trials for child sexual assault offences, verdicts are rendered by a jury. The potential for unfair prejudice against the accused is arguably accordingly more substantial at trial. Moreover, at sentencing, the accused is now a criminal; guilt has been established. This is not to suggest that fairness in the sentencing process should be compromised, however, the interests of fairness may shift in sentencing and be recalibrated according to a range of interests of which fairness to the offender is but one. This recalibration may very well result in approaches that diverge from the application of rules at trial directed to ensuring the fundamental right of the accused to a fair trial. Justice Kirby, in *R v Olbrich*,¹⁴⁵ took a different view:

as a matter of principle, specifying the facts which justify the sanction is no less important a judicial task than identifying the facts which justify the conviction.¹⁴⁶

sentencing proceedings remain part of the criminal trial. They do not cease to be so upon the conviction of the accused, either following a jury's verdict or a plea of guilty ... The criminal trial process does not cease to be accusatorial after the conviction is recorded and during the proceedings relevant to the determination of the sentence.¹⁴⁷

144 Ibid 6 (Sheller JA).

145 (1999) 199 CLR 270.

146 Ibid 282.

147 Ibid 291.

However, as Kirby J himself notes: ‘the task of finding the facts relevant to sentencing is a judicial one. It must be performed by the sentencing judge ... it is for the judge to resolve any disputed questions about the evidence for himself or herself.’¹⁴⁸ Furthermore, it must be recognised that ‘a degree of informality has ordinarily marked sentencing procedures.’¹⁴⁹ Indeed ‘the sentencing process is a blend of statutory requirements and judicial discretion.’¹⁵⁰ Accordingly, ‘the four sentencing requirements of deterrence, rehabilitation, retribution and protection of the community, require the court to consider and factor in matters that are generally or specifically relevant to the interests of the victim.’¹⁵¹ In this respect, each case will require judicial consideration of such competing influences in sentencing the particular offender. Consistency in sentencing is but one factor for the court to consider in determining an appropriate sentence. The exercise of judicial discretion by its very nature ‘carries with it the probability of some degree of inconsistency.’¹⁵² A degree of inconsistency in sentencing does not necessarily constitute an injustice – the sentence must be determined in the context of the individual case and the interests of the community and victims as a whole.¹⁵³

Additionally, in the context of child sexual assault cases where many of the victims even at the time of the trial and at time of sentencing are still children, the requirement that victim impact statements should be in the victim’s own words seems not only unreasonable, but indeed unfair, given that the legislative requirements in most Australian jurisdictions do not permit VISs to be received other than in written form. It is conceded that the impact of this requirement may be somewhat mitigated by permitting a professional to assist a child victim in preparing their statement. But perhaps additionally, if VISs could be received orally by a sentencing court, then at least one of the impediments identified by Sperling J could be overcome, as the capacity of children, particularly younger children, to express complex ideas and feelings in writing, in their own words, is much more difficult than doing so orally. An oral statement of this kind could be provided via CCTV or be otherwise recorded so as to minimise any potential trauma to the child.

Following the decision in *R v Slack*, a number of other superior courts have adopted a similarly restrictive approach to the use of VISs in sentencing.¹⁵⁴

148 Ibid 290.

149 Ibid.

150 Baptie, above n 32, 78.

151 Ibid.

152 *Wong v The Queen; Leung v The Queen* (2001) 207 CLR 584 (Gleeson CJ) quoted in Baptie, above n 32, 78.

153 Baptie, above n 32, 78. See generally Ivan Potas, ‘Sentencing for Child Sexual Assault: With Particular Emphasis on the Law in NSW’ (Paper presented at Sentencing: Principles, Perspectives and Possibilities Conference, Canberra, 10–12 February 2006) 15.

154 [2004] NSWCCA 128. See, eg, *R v Bain* (2006) 161 A Crim R 36; *R v Wilson* [2005] NSWCCA 219.

B Judicial Characterisation of the Seriousness of Child Sexual Assault

The current legal framework in Australia for reception of VISs by a sentencing court essentially stipulates that a VIS should only influence the court's decision-making if it provides the court with additional information not known to the court relevant to any aggravating, mitigating or other subjective or objective factors that may affect the court's assessment of the relative 'seriousness' of the offence. Accordingly, a key question for consideration is how do sentencing courts characterise the seriousness of child sexual assault? Unfortunately, there is little research available in Australia that has directly examined this question. This in part is attributable to the seemingly scant reliance by sentencing courts on VISs in sentencing child sex offenders.

Analysis of how sentencing courts characterise the seriousness of child sexual assault offences logically must begin by considering the potential sources of information available to the court in undertaking this exercise. First, the court will bring to the bench its own understanding of the nature and impacts of child sexual assault on victims. Arguably such views, although increasingly better informed, may still fall short of an 'objective', well-informed and nuanced understanding of the nature of child sexual assault and its sequelae.¹⁵⁵ Secondly, the sentencing court may make use of submissions made by the offender and/or the prosecution, including relevant medical, psychological or other expert reports. Thirdly, the court may have the benefit of a VIS prepared by the victim with or without the assistance of a professional. Fourthly, the court may draw on relevant research and other published materials on the impacts of child sexual assault. Unfortunately, empirical research is seriously lacking on the extent to which these sources of information either in isolation or in combination are actually utilised by courts in the sentencing of child sex offenders. Arguably, each of these sources may provide the court with different information and a range of perspectives for the court to draw upon in characterising the seriousness of the offence in the individual case. Of particular importance in the current discussion is the contribution that may be made by a VIS, that is, what does a VIS promise to tell the court that may inform the court's characterisation of the seriousness of the offence, over and above what may be revealed to the court through other sources? The answer to this question is explored below by drawing on a modest sample of 17 VISs extracted from the case files of the NSW Office of the Director of Public Prosecutions (ODPP).

1 *Victim Impact Statements – A Different Voice?*

Despite an extensive body of empirical and clinical research on the effects and impacts of child sexual assault on victims as discussed above, there is comparatively little research, and thus analogous understanding, of the impacts of child sexual assault from victims' perspectives, that is, as described by individual child victims themselves particularly outside a clinical and therapeutic context.

155 See, eg, Rita Shackel, 'Understanding Children's Medium for Disclosing Sexual Abuse: A Tool for Overcoming Potential Misconceptions in the Courtroom' (2009) 16 *Psychiatry, Psychology and Law* 379.

Arguably, one reason for this is the ethical barriers that preclude such research, or render it difficult to conduct, especially where the victim is still a child. At the outset researchers proposing to conduct research involving child victims must weigh up the need for the research and the benefits of the research for individual participants as against the potential adverse effect on such participants.¹⁵⁶ Child victims of abuse are recognised as being particularly vulnerable to the potential adverse effects of participation in research, which requires them to recount their experience of abuse.¹⁵⁷ As and Chandra submit that research on child sexual and emotional abuse involves two unique components: ‘First, it includes the possibility that some revelations are occurring for the first time and are likely to be emotionally charged. Second, research of this nature by its very act of disclosure may involve risks for the respondent.’¹⁵⁸ Other potential barriers in conducting research involving victims of child sexual assault include: establishing a route for recruitment; obtaining ‘informed’ and freely chosen consent where the victim is still a child¹⁵⁹ – key to this issue are the difficulties in appraising the potential risks of involvement and defining the limitations of confidentiality;¹⁶⁰ and securing parental consent – the sensitive, intimate and personal nature of sexual assault and the potential for social stigmatisation may influence refusal to participate, particularly in cases involving intra-familial sexual abuse. Researchers undertaking research involving children who have been abused must also face the challenges of debriefing participants, offering appropriate feedback and follow-up that meets the needs of victims and provides support to participants if necessary.

Arguably, VISs may represent a unique vehicle through which insights might be gained about how victims of child sexual assault perceive the impact of the crime and thus provide an inimitable source for analysing and understanding the harms of such crime as described by child victims themselves within a non-therapeutic context. Accordingly VISs not only represent an important tool for

156 Including recognition of the child’s right to be involved in research: Neerosh Mudaly and Chris Goddard, ‘The Ethics of Involving Children Who Have Been Abused in Child Abuse Research’ (2009) 17 *International Journal of Children’s Rights* 261.

157 See, eg, *ibid.*

158 Veena As and Prabha S Chandra, ‘A Review of the Ethics in Research on Child Abuse’ (2007) 4 *Indian Journal of Medical Ethics* 113, 113.

159 World Medical Association, *World Medical Association Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects* (Adopted at the 18th World Medical Association General Assembly, Helsinki, Finland, June 1964). The Declaration recognises that ‘[s]ome research populations are particularly vulnerable and need special protection. These include those who cannot give or refuse consent for themselves and those who may be vulnerable to coercion or undue influence’: [9]. The Declaration does not permit non-therapeutic research on non-consenting participants: ‘Participation by competent individuals as subjects in medical research must be voluntary. Although it may be appropriate to consult family members or community leaders, no competent individual may be enrolled in a research study unless he or she freely agrees’: [22].

160 Confidentiality may be limited in research involving child participants by the researcher’s professional responsibilities to report suspected abuse and the duty to protect. In most jurisdictions the researcher’s duty to report and protect participants is ambiguous: see, eg, Emma Williamson, Trudy Goodenough, Julie Kent and Richard Ashcroft, ‘Conducting Research with Children: The Limits of Confidentiality and Child Protection Protocols’ (2005) 19 *Children & Society* 397.

informing courts about the personal impacts of a victim of child sexual assault but, from a broader perspective, such statements also provide a unique medium for victims to simply be heard, which may represent an important cathartic and restorative milestone for victims.¹⁶¹

Importantly, however, the contents of a VIS may be limited in several key respects. First, child victims will often be assisted in preparation of their statement and so the VIS is usually the product of the child victim and others together.¹⁶² Leichtentritt and Davidson-Arad characterise the VIS ‘not as a systematic description of the victim made by the [assisting professional], but rather as a construction resulting from the relation between the child’s story and the [professional’s] understanding and interpretation of it.’¹⁶³ Accordingly the processes for preparation of a VIS are likely to influence and shape the statement. In this regard, if counsellors and other ‘helping’ professionals are usually involved in preparation of VISs, arguably, a therapeutic voice may be reintroduced into such statements. Secondly, the VIS may be constructed with a particular purpose in mind such as obtaining a maximum sentence, gaining compensation or assisting the victim with their healing. In this respect the normative structures that may shape VISs need to be acknowledged. Proppen and Schuster argue that victim advocates who are involved in writing VISs acknowledge and understand judicial norms that determine the reliance placed on a VIS in sentencing.¹⁶⁴ Accordingly, victim advocates ‘help victims write VISs that will fit within the norm and, therefore, have a greater chance of being persuasive to the court.’¹⁶⁵ The danger here, however, is that normative values may become further entrenched rather than allowing the VIS to serve as a potentially transformative tool.¹⁶⁶ Thirdly, the content of VISs will also almost certainly be directly impacted by legislative requirements for the reception of such statements in court. This latter point highlights further the need for legislative provisions that are clear, uniform and directed towards a clearly articulated rationale for the use of such statements in the sentencing process.

Despite these factors that may mould the content of a VIS and which caution against viewing VISs in child sexual assault cases as unadulterated expressions by child victims of the impacts of sexual assault, analysis of VISs is nevertheless justified, at least, as offering up an additional and alternative source of information (albeit a mediated voice) about the impact of this type of crime on its

161 See, eg, Sam Garkawe, ‘The Effect of Victim Impact Statements on Sentencing Decisions’ (Paper presented at the Sentencing: Principles, Perspectives & Possibilities Conference, Canberra, 10–12 February 2006) 11.

162 The extent to which, and manner in which, child victims are assisted in preparation of VISs has to date not been examined empirically in Australia.

163 Leichtentritt and Davidson-Arad, above n 20, 1067.

164 Proppen and Schuster, above n 82, 299.

165 Ibid 300.

166 See generally Arrigo and Williams, above n 26, 609. This is supported by the findings of Mary Lay Schuster and Amy Proppen, ‘Degrees of Emotion: Judicial Responses to Victim Impact Statements’ (2010) 6 *Law, Culture and the Humanities* 75, 103 that judges are more likely to reject or curtail VISs that threaten the court’s authority or control.

victims. Drawing on a multiplicity of sources for information and insights can offer a more holistic picture and thus deeper understanding of the impacts of child sexual assault. This is just as true from a research perspective as it is for a sentencing court charged with assessing the impact of the crime on a victim.

(a) The Sample Analysed

As part of a larger research project on prosecutorial decision-making in child sexual assault cases, the author undertook detailed analysis of a sample of 80 case files from the NSW ODPP.¹⁶⁷ In total, these 80 files contained 17 distinct VISs prepared by different complainants.¹⁶⁸ These VISs were analysed using content and narrative discourse analysis techniques. This mode of analysis draws on language as a source of information. In this instance the focus of analysis is on the story told through the use of language via the naturalistic medium of the VIS. The story told through this medium may then be juxtaposed with information sourced elsewhere, for example, clinical accounts or in the case of a sentencing court other information available to the court. Importantly, '[d]iscourse analysis encourages us to notice what may be missing from an account.'¹⁶⁹ Deeper and more coherent understanding arguably can be obtained through this means of analysis. On the other hand, the use of such analytical devices particularly where there is a strong emotive element raises questions and for some, potential discomfort about the role of storytelling in the legal forum.¹⁷⁰ The limitations of this analysis must be recognised, in particular, the realisation that 'every understanding of the law is partial, situated, and contingent'.¹⁷¹ As noted above, however, a multiplicity of voices and perspectives can enhance understanding, that is, so long as the limitations and potential biases of the medium are also recognised. This is particularly important in the context of sources used by a sentencing court; however, recognition of potential bias does not mean the source should be excluded. Exclusion is mandated when such bias is manifestly unfair in the particular circumstances.

The main objectives of the analysis of this sample of VISs is to examine the impacts of child sexual assault on victims as articulated through the medium of the VIS and identify any possible recurring themes in the impacts described by victims in such statements. As discussed above, however, this analysis is complicated by a number of potentially mediating influences including that often the child victim alone will not prepare the VIS. There is little research available on the factors that influence the decision to prepare a VIS, what is included in the statement and who is involved in assisting the child victim draft the statement.

167 The overall aim of this broader project was to examine the basis of prosecutorial decision-making in child sexual assault cases. Based on the findings of previous research, largely conducted overseas, it was hypothesised that certain case characteristics might impact prosecutorial decisions to accept or withdraw a case from prosecution.

168 VISs may have been prepared in other cases but not included on the ODPP case file.

169 MacMartin, above n 22, 32.

170 Bandes, above n 89, 363.

171 Ibid 388.

For example, it may be expected that younger children are more likely, when compared to adolescents to have assistance in preparation of their VIS. In the sample studied here, analysis revealed that the age of the victim at the time the VIS was prepared might indeed impact on the identity of the person who prepared the statement. Overall, the mean age of the victim at the time of preparation of the VIS was 16 years of age. The mean period of delay between age at the time of abuse and preparation of the VIS in this sample was four and a half years. A one-way analysis of variance showed that the relationship between the age of the victim at the time the VIS was prepared and the person who drafted the VIS was significant ($F(2,16) = 3.92, p=0.04$). The average age of the victim at the time the VIS was prepared was 11.25 years where the statement was prepared by a parent, 16 years of age where the statement was prepared by or with a professional (eg counsellor, social worker, psychologist or solicitor) and 19.6 years of age where the statement was prepared by the victim alone.

Further, one might ask whether the nature of the crime is relevant to whether or not a VIS is prepared. In this sample of 80 case files, victims were seemingly more likely to prepare a VIS in the case of multiple accused. In almost 81 per cent of matters involving multiple accused, a statement was prepared and included on the ODPP file compared with only 59 per cent of cases involving a single accused. This finding leads us to ask why victims who are abused by multiple offenders rather than a single offender are more likely to draft a VIS. Perhaps it is because victims of multiple accused experience greater trauma and more often require therapeutic intervention, for example counselling, and consequently involvement in such interventions facilitates preparation of a VIS. This view is supported by the finding in our sample that the majority of VISs prepared in cases involving multiple accused were prepared in conjunction with a counsellor. This finding although not statistically significant because of the small sample size, may indicate that the nature of the incident might possibly impact on the complainant's decision to draft a VIS and the prosecutor's decision to request one. Further analysis of our sample revealed that penetration, for example, may correlate with the preparation of a VIS (64.5 per cent). Alternatively, it may be that cases involving multiple accused are more likely to involve perpetrators unknown to the child victim; whereas cases involving a single accused may more often involve someone known and possibly in a familial relationship with the child victim. The vast majority of cases in our study (74 per cent) involving multiple accused involved an accused unknown to the victim.

(b) Impacts Described in the VISs

Analysis of this relatively modest sample of 17 VISs suggests that VISs unsurprisingly are not likely to exhaustively identify the harms experienced by victims but rather that VISs capture only a snapshot of the impacts of the sexual assault on the victim. One victim in our sample highlighted this fact in her VIS stating:

The full impact on my life of [the offender]'s criminal actions toward myself is difficult and very painful to assess. In this statement I've attempted to identify and outline areas of impact and provide details. However the hurt I feel cannot be quantified and is not fully expressed here (VIS1 – C1).

A VIS may not be exhaustive for any of a number of reasons. First, there is the possibility that some issues are simply too painful or confronting for the victim to confront and discuss. Alternatively, the complainant may not perceive the full extent of the harm suffered at the time the VIS is prepared, this is particularly likely if the victim is still a child when the VIS is prepared. Many impacts of child sexual assault do not manifest in the short-term. Secondly, the harms identified and included in the VIS may be addressed because of the medium itself ie what is discussed in the VIS is shaped by the perceived function and intended purpose of the VIS. Additionally, others who have assisted the complainant with the VIS may, as discussed above, also influence the content of the VIS.

Even recognising these potentially intervening influences on VISs in child sexual assault cases and the likelihood that such statements provide only a snapshot of the impact of such crime on victims, analysis of this sample of VISs identified a number of recurring and dominant themes in the victims' statements.¹⁷² This analysis does not seek to homogenise the experiences of these victims but rather recognise that whilst VISs are highly idiosyncratic in nature, as are the impacts of child sexual assault, nevertheless, some commonalities in the experiences of victims are discernable. The impacts and harms discussed by the victims in their statements in the sample analysed may be broadly categorised into the following seven domains:

- i) Impact of the sexual assault on family dynamics and relationships;
- ii) Emotional impact of the sexual assault;
- iii) Impact of sexual assault on the victim's education;
- iv) Social impact of the sexual assault;
- v) Health consequences following the sexual assault;
- vi) Relationship with the accused following the sexual assault;
- vii) Impact of the assault on the victim's sexual behavior.

These seven areas of impact broadly accord with the types of effects identified in empirical and clinical research on the sequelae of child sexual victimisation. The specific issues raised by victims in our sample in relation to each of these areas are examined further here:

172 This is consistent with other research that documents strong common themes in analysis of victim impact statements: Tracey Booth, 'Voices After the Killing: Hearing the Stories of Family Victims in New South Wales' (2001) 10 *Griffith Law Review* 25, 31.

(i) *Impact of the Sexual Assault on the Family and Relationships*

The majority of victims (n=12) described some form of family disruption in their VIS following on from the sexual assault. One victim described this as a loss of part of her family (VIS1 – C1) and another victim felt she had destroyed her family by disclosing the abuse (VIS10 – C1). A different victim who tried to pretend nothing was wrong around her family described a feeling of isolation stating that ‘the relationship didn’t feel the same for a long time’ (VIS12). Some victims described being unable to relax or feel safe in their own home (VIS12) following the abuse and being nervous around members of the opposite sex in their family (VIS12, VIS10 – C1, VIS10 – C2). When the perpetrator was the partner of the victim’s mother, three of the five victims in this sample indicated that their relationship with their mother became strained following disclosure of the abuse. One of the victims felt that her mother became angry with her and blamed her for disclosing the abuse. As a result, this victim decided to leave home at 14 years of age (VIS1 – C2). Another victim ran away from home as she viewed her mother as being ‘on the side’ of her stepfather (VIS24) and the third victim decided to leave home and live with her father and stepmother (VIS11). In comparison, where the perpetrator was a friend or stranger, victims did not mention any disruption to family relationships specifically, however, some victims nevertheless mentioned an adverse impact on the functioning of the family unit more generally (n=9).

This analysis reveals that the family unit and family relationships are vulnerable to damage in the aftermath of disclosing child sexual abuse. Furthermore, as suggested by empirical research, family support may mediate some of the impacts of child sexual assault. Whether or not support is forthcoming may depend on the relationship between the offender and victim.

(ii) *Emotional Impact of the Sexual Assault*

All of the VISs analysed in this sample described some emotional sequelae following the sexual abuse. In particular, every victim in the sample described feelings of ‘fear’ and ‘anger’. Other emotions frequently described by victims included: feelings of ‘worthlessness’ (n=3); ‘sadness’ (n=4); ‘loneliness’ (n=5); ‘insecurity’ (n=4); ‘helplessness’ (n=8); and a lack of their previous ‘enthusiasm’ for life (n=10). For many of the victims the emotions described were seemingly indicative of a heightened state of agitation – for example many victims described feeling ‘restless’ (n=3); ‘cranky’ (n=5); ‘confused’ (n=3); or perpetually ‘on edge’ (n=10). For most victims their emotional distress manifested in either nightmares (n=14) and/or difficulties sleeping (n=10). Many victims also described feelings that reflected a mistrust of others following the abuse, for example, being ‘withdrawn’ (n=5); ‘watchful’ (n=10); and ‘nervous’ (n=6). Further many victims were fearful of the responses of others who knew about the sexual abuse or who might find out about it. For example, a majority of victims described feeling guilty (n=8) and/or ashamed about the abuse (n=9). One victim who was 12 years of age at the time her VIS was prepared was worried that people would look at her and be able to tell that she had been abused or think that she was lying (VIS4). Another victim was so frightened of the

repercussions of proceeding with the case due to threats received from the relatives of the offender that she indicated that she no longer wished to participate in the legal proceedings (VIS7). A victim aged only 10 at the time of the abuse talked about being blamed for what happened by the relatives of the offender and their suggestions that she consented or was merely out to get him (VIS11). The two male victims in this sample engaged in or were subject to physical violence as a result of the abuse. One victim wrote that he was involved in fights and arguments at school because some people knew of the sexual assault (VIS3) and the other male victim was harassed and physically abused by local teenage boys who found out about the incident (VIS9). There is seemingly a strain of bitterness in some of the VISs from older victims who felt they could no longer just be children or be the same after the abuse (n=5). For example, one victim stated: 'I am very angry because my life has changed ... I hope in time I am able to get some of my life back and leave this past crime behind me' (VIS3). Another victim expressed the profound impact that child sexual abuse may have on victims stating: 'Sometimes I get overwhelmed by the cruelty and debauchery humans are capable of. Sometimes I get overwhelmed by fear and a sense that the world is not a good place. These feelings are really black and awful but they pass. I believe I would not have them if my father had not sexually abused me' (VIS1-C2).

It is apparent from this analysis that victims experience the emotional impact of child sexual assault in a very individual and personal way, however, for most victims there is shared emotional turmoil following the abuse. What differs between victims is the form and depth of such emotional sequelae. This analysis suggests that children sexually abused by a close and trusted family member may in particular struggle with emotional unrest and confusion.

(iii) Impact of Sexual Assault on the Victim's Education

A majority of victims described interruptions to their schooling. Eight victims reported dropping out of school following their abuse. One victim said that she was stressed and tense in primary school and found high school depressing and 'horrible'. She dropped out when she was 14 years old (VIS1 – C2). Another victim found it difficult to cope with the stress of school activities such as exams since the stress made her think about the abuse (VIS12). Eleven victims reported a lack of concentration and impaired ability to perform at school following their abuse. A number of victims also experienced social problems at school. One victim indicated that she was harassed and intimidated by the friends of the offender at school (VIS7). Another victim stated that he was involved in fights and arguments at school because some people knew of the incident (VIS3). Other victims were often disciplined (VIS1 – C2) and one such complainant was suspended from school for two weeks after reporting the incident (VIS11). The impact of child sexual assault on victims' schooling and educational outcomes has been less frequently examined compared to other impacts of such victimisation. The current analysis clearly highlights that child sexual assault can have a devastating effect on the victim's education, which in turn may pave the way for life-long disadvantage and a series of other adverse outcomes. By way of

a theoretical exercise only, if the 47 per cent school dropout rate as found in this sample is extrapolated to the broader population of sexually abused children, the magnitude of this devastation and the social consequences are immediately apparent.

(iv) Social Impact of the Sexual Assault

A number of victims (n=6) described difficulties in developing or maintaining healthy relationships. Several victims described feelings of alienation and isolation from friends (n=6). One victim avoided important social engagements because she felt she was not able to go out 'like an ordinary person any more, even in the daytime.' Many of her friends felt that she had changed; consequently she lost all contact with most of her friends (VIS5). Another victim developed a high-pitched squealing voice that she knew was annoying to people and other children would tease her about it (VIS1 – C2). One of the two male victims in this sample of VISs described being outgoing and having a large number of friends prior to the abuse. After the incident he found it hard to communicate with people and his circle of friends was limited to only one or two people that he could trust (VIS3). An additional victim felt that she did not have many friends. She had a difficult time breaking down social barriers and fitting into social groups due to her lack of self-esteem (VIS12). One of the older victims in this sample felt that she did not have any friends and there was only one girl at school that she could talk to after the abuse was disclosed (VIS24).

A majority of victims (n=13) also described feeling uncomfortable going out alone and uneasy in big crowds and preferred the presence of their parents or a trusted adult after the abuse. Several victims reported receiving threats from people in the community associated with the offender(s).

This analysis reveals the myriad of social consequences experienced by victims following disclosure of sexual abuse. A majority of victims in this sample expressed negative and detrimental social consequences, however, as with other impacts described by victims, how such consequences manifest and are experienced is highly personal.

(v) Health Consequences Following the Sexual Assault

Five of the victims in this sample indicated that their physical health was adversely affected by the sexual abuse. A number of victims reported that the abuse led to substance abuse, eating disorders or self-mutilation. One victim said that she did not eat much anymore. She also indicated that she was using drugs when she dropped out of high school. This victim had multiple sexual partners and contracted a sexually transmitted infection on two occasions (VIS1 – C1). Another victim said that she had difficulties with eating and suffered significant weight loss following the abuse. She stated that she did not eat for days on a regular basis and fought with body image issues (VIS5). This victim was aged 15 at the time the VIS was prepared. Two victims cut their wrists (VIS13 and VIS14), one burnt herself (VIS14) and two engaged in alcohol abuse (VIS14 and VIS12) following on from the abuse. One victim indicated that persistent alcohol abuse resulted in her going to the emergency ward twice. When she drank alone

she became suicidal and tried to harm herself on numerous occasions (VIS12). Another victim who consumed large amounts of alcohol also attempted suicide (VIS14). Two victims struggled with suicidal behaviour, ideation and suicide attempts following the abuse. Both these victims were assaulted by more than one accused (VIS5, VIS19).

Nearly all victims in this sample reported mental health issues after the abuse. Eleven victims suffered from depression, four from panic symptoms such as trembling, heart racing and difficulty breathing when leaving the house, eight from anxiety and three from stress and tension. Many victims (n=11) also had to undergo extensive periods of counselling after the abuse.

This analysis reveals a wide range of adverse health consequences for victims following child sexual abuse. Some are short-term in nature, others longer term and some are more of a permanent nature. Clearly, the health impacts of child sexual assault are distinctly individual and personal in nature.

(vi) Relationship with the Accused Following the Sexual Assault

Two victims wrote of their relationship with their father after he sexually abused them. They were frightened of the accused and the betrayal of trust left them devastated. One victim wrote of the changing relationship between her and her father over the years. Initially she was confused about how to react to the abuse and how to interact with her father. This turned to fear and uncertainty and a feeling that he did not love her or care for her since he had already 'used' her. This victim, however, still sought to improve their relationship by talking to her father about what happened but he maintained that there was nothing wrong with his behaviour. This victim finally had to limit and then cut off all contact with her father and this caused her 'an enormous amount of grief' (VIS1 – C2). The other victim abused by her father stated that she detested the accused and spent her childhood years avoiding situations that might leave her alone with him. She viewed him as a 'monster' and expressed strong anger towards him (VIS12).

Another victim described confusion about his abuse. He told his mother that he felt guilty about the abuse and that he thought he should forgive the offender. He kept in contact with the offender and attended his residence on at least one occasion after the incident. He initiated contact with the offender and his partner on the street on one occasion to tell them about the harassment he had experienced from teenage boys following the abuse. The offender told the boy not to come to his house any more when he heard about the rumours that were being spread regarding the incident and threatened the victim not to disclose the incident to the police (VIS9).

In three matters while the victim did not expressly mention contact with the accused, the victim stated having experienced threats from persons associated with the offender. In one case (VIS11) the victim experienced threats from the offender's relatives and in another case (VIS7), the victim experienced threats from the offender's friends after the incident. In yet another case (VIS15) the victim stated that she feared the offender and their associates given the small town in which they all resided.

In three matters the file contained some information on the ongoing relationship between the offender and victim. In one case (VIS12) the victim did not directly address her relationship with the offender, but the evidence on file indicated that the offender was her cousin and she still met him at family events. The victim in another case (VIS1 – C1) also had some contact with her father after the incidents. In the third case the victim's stepfather was convicted and imprisoned (VIS24) for the assault but there was evidence that he had written letters to her after arrest.

This analysis suggests that for some victims negotiating their relationship with the offender is an ongoing source of stress.

(vii) Impact of the Assault on the Victim's Sexual Behaviour

A number of victims in this sample mentioned the impact of the abuse on their sexual development and sexuality. Eight victims described feeling confused about sex and sexuality after the abuse. One victim pleaded for help in his VIS stating: 'I tried to forgive him, but it's killing me inside and I think that's why Ive[sic] been so strange. I don't know who I am any more. I don't know if Im [sic] gay or if [the accused] has turned me gay [sic] Please help me Mum?' (VIS9). Another victim said that the sexual abuse confused her about sex and what it meant. She equated sex with love and had multiple sexual partners in an attempt to feel loved (VIS1 – C2). A victim who had previously never had a boyfriend avoided intimacy because she was afraid of how it would make her feel (VIS15). Another victim found it hard to establish intimacy with her boyfriend and would physically attack him if he touched her and she experienced flashbacks of the incidents (VIS24). Five victims discussed the link between their feelings of 'worthlessness' and poor decisions around selection of sexual partners, promiscuity, destructive sexual relationships and further sexual exploitation. Several victims identified problems around intimacy in relationships (n=5). A number of VISs (n=6) referred to a 'loss of innocence' and 'childhood' in consequence of the abuse. For example, one victim stated: 'he stole my innocence and I will never get it back' and declared: 'due to my father molesting me I feel I have missed a very important stage in my life, my childhood was taken away by my father. I didn't get the chance to have a proper and fulfilled childhood' (VIS12).

This analysis highlights that the impact of child sexual assault on victims' sexuality and their sexual behaviour may manifest in the short-term despite the young age of some victims. Again this points to the array of impacts that may follow child sexual victimisation including some impacts that may not typically be expected or be perceived as relevant to the child victim. This evidences the unique contribution that VISs may make in assisting a sentencing court to better understand the full impact of sexual assault on the individual child victim.

2 The VIS as a Contextual Medium

Overall the analysis of this sample of VISs along the seven dimensions discussed above highlights the myriad of impacts that may flow from child sexual assault. Whilst some commonalities may be discerned from this analysis,

it is clear that individual victims experience the impacts of such abuse in a very personal way influenced by a range of factors that arise in the individual case including the circumstances of the abuse, the nature of the abuse, the support received by others and the victim's relationship with the offender. An important feature of VISs thus seems to be the capacity of this medium to place the impacts of the crime for the individual victim into its 'proper' and individualised context. Accordingly, VISs may serve to remind a sentencing court of the diversity of responses to sexual victimisation and the individual impacts of such crime. The information provided to a court in a VIS is an important piece of the puzzle confronting the court when evaluating the seriousness of the offence in the individual case.

But one question remains – how does the information provided by a VIS differ from that available to the court through the findings of empirical and clinical research? This is an important question for at least two reasons. First, the personal nature of the VIS attests to its value not only as a communicative and therapeutic tool for the individual victim but also as an educative tool more generally for courts. Secondly, any differences that may be ascertained in the impacts described in VISs compared to empirical and clinical data point to the highly subjective nature of the effects of child sexual assault on victims and the need for courts to recognise this in the circumstances of the particular case as stated by the individual victim. The impacts of the sexual assault on the particular victim should be taken into account in assessing the seriousness of the specific assault perpetrated in the case and accordingly reflected in the sentencing decision. As the NSW Law Reform Commission argued: 'a VIS is, potentially ... capable of providing the best evidence of the objective seriousness of the offence.'¹⁷³ Not least of which is because, as noted above, the VIS places the crime in its full and proper context.

What is clear from the VISs surveyed above is that the victims in this sample described a multiplicity of impacts following on from sexual victimisation. Victims described the impact of the assault on different parts of their lives. Many of the impacts described by the victims reflect the findings of research on the effects of child sexual assault. In particular, victims described a range of emotional, social and health impacts following on from the assault. What is striking, however, in the VISs studied, is the unique story told by each victim of the sequelae of their abuse. It is clear that the nature of the offence, the personal characteristics of the victim and the familial and other responses to disclosure of the assault interact in unique ways in each case impacting upon the victim in a distinctly personal way. This finding is really not that surprising given the array of circumstances that arise in an assault situation eg age of victim, relationship with offender, severity of assault, single, multiple or ongoing assaults, and the presence of violence or coercion. Child sexual assault is clearly a crime that rests on complex dynamics unique in each case and results in a complex matrix of impacts on the individual victim. VISs can assist the court in understanding the

173 NSW Law Reform Commission, *Sentencing*, Discussion Paper No 33 (1996) [11.18].

underlying dynamics of the assault situation and the seriousness of the crime that has been perpetrated in the individual case. A VIS is more apt to fulfill this role than are the more general findings of empirical or clinical research on the impacts of child sexual assault; the latter findings are inevitably shaped by the therapeutic context, its processes and desired outcomes, whereas the VIS is shaped by the forensic context, and whilst these different contexts inevitably mediate and influence the information gained about the impacts of child sexual assault, the VIS is ultimately shaped by its forensic roots and therefore, arguably, is better suited to answering the questions that confront a sentencing court.

3 *Other Factors in Judicial Characterisation of Child Sex Offences*

Erez and Laster have argued that judicial resistance to recognition of victim harm as reflected in the decisions of courts extends also to other legal professionals. According to Erez and Laster, legal professionals who are intimately connected with those legal and administrative processes directed at enhanced victim involvement, effectively undermine legislative intentions because of such resistance by 'objectifying and thereby minimizing the nature of injuries sustained by victims; dismissing the claims of victims that they deem unreasonable; reordering priorities; and, more generally, invoking higher order criminal justice values.'¹⁷⁴ Cassell argues that such resistance extends even so far as to the legal academy:

remarkably for such a near-universal feature of criminal sentencing, the right [to deliver a 'victim impact statement' at sentencing] has received virtually no support from the legal academy ... legal academics have generally taken the view that victim impact statements are some sort of ploy to lengthen offenders' sentences or lead to excessive emotionalism in sentencing ... the law professors are wrong.¹⁷⁵

In the absence of Australian research that addresses the characterisation by courts of the seriousness of child sexual victimisation, recourse to overseas findings is useful. Renner et al in a study of sexual assault cases decided in Nova Scotia courts from 1989 to 1993, reported that the features which commonly characterise child sexual assault cases, namely a lack of apparent physical injury of the victim, and a close relationship, often an intra-familial one, between victim and offender, are the actual characteristics relied upon by sentencing courts to mitigate the seriousness of sexual assault offences.¹⁷⁶ Coates, in a qualitative and quantitative analysis of causal attributions¹⁷⁷ in 70 British Columbian written sentencing decisions and trial judgments decided in the period 1986–1994 reported that lower sentences were delivered to those who assaulted children in

174 Edna Erez and Kathy Laster, 'Neutralizing Victim Reform: Legal Professionals' Perspectives on Victims and Impact Statements' (1999) 45 *Crime and Delinquency* 530, 531.

175 Cassell, above n 27, 611.

176 K Edward Renner, Christine Alksnis and Laura Park, 'The Standard of Social Justice as a Research Process' (1997) 38 *Canadian Psychology* 91.

177 This analysis involved examining the causal attributions articulated by judges deciding the case, ie statements made by judges as to why an offender did something.

their family compared to other kinds of sexual assault.¹⁷⁸ This finding raises concerns about whether breach of trust, arguably an aggravating factor in many child sexual assault cases, is actually taken seriously by courts. Coates also reported lower sentences in cases where the judge attributed the cause of the assault to non-violent factors, for example, sexuality or alcohol related factors. As Coates points out, this is in itself a disturbing finding as judges are seemingly here characterising child sexual assault as a ‘non-violent’ criminal act simply as a matter of course.¹⁷⁹

MacMartin however, in a more recent study based on a discursive-analysis of 74 Ontario sentencing judgments involving child sexual assault offences in the period 1993 to 1997, found that offenders were censured on the basis of their breach of trust and the psychological harm visited on their victims.¹⁸⁰ MacMartin suggests that her findings may be indicative of a ‘gradually increasing awareness in the courts of the typical dynamics and contexts of child sexual abuse.’¹⁸¹ MacMartin’s study in analysis of judicial discourse offers important insights into how the seriousness of child sexual assault is characterised by sentencing courts, however, this research does not address the question of how and to what extent such characterisations ultimately impact on the sentences imposed on perpetrators. Arguably an empirical link is missing between the discursive-analytical analysis undertaken by MacMartin (and others, present author included) and the actual sentencing outcomes in such cases. This is not to detract from the invaluable insights offered up by discourse analysis of legal judgments as an independent and legitimate focus of inquiry, but more to the point – how does judicial discourse ultimately translate into sentencing decisions? In other words do judicial characterisations of the seriousness of child sexual assault ultimately impact sentencing in a ‘real’ way or does judicial discourse amount to nothing more than mere rhetoric?

Overwhelmingly, as discussed above, Australian cases and other research data suggests that VISs are perceived and treated by courts largely as a ‘passive’ restorative tool and one that may only legitimately impact sentencing decisions in the rare case. What characterises these rare and legitimate cases is unclear – perhaps this is merely an artifact of judicial discretion manifest in the sentencing process. Propen and Schuster note that whilst all the judges in their study remarked that sentencing guidelines were more important than impact statements in rendering a sentencing decision, every single judge nevertheless was ‘able to recall an impact statement that did [actually] affect a decision.’¹⁸² The findings of Schuster and Propen suggest that impact statements are more likely to be rejected or curtailed by judges when marked by characteristics that are perceived to

178 Linda Coates, ‘Causal Attribution in Sexual Assault Trial Judgments’ (1997) 16 *Journal of Language and Social Psychology* 278.

179 Ibid 292.

180 Clare MacMartin, ‘Judicial Constructions of the Seriousness of Child Sexual Abuse’ (2004) 36 *Canadian Journal of Behavioural Science* 66.

181 Ibid 77.

182 Propen and Schuster, above n 82, 302.

threaten judicial control and authority in the courtroom, for example excessive expressions of grief or anger.¹⁸³ In contrast, compassion was viewed by judges ‘as a mature and transcendent response to the personal effects of a crime, an indication that the victim had moved on. The compassionate victim was wise and cooperative, able to see beyond the personal effects of the crime to social needs for public safety and to understand the limited options available in sentencing.’¹⁸⁴ Hence the compassionate victim is generally likely to cause little trouble for the court and their VIS is more readily accepted as objective and thus more likely to be relied upon.

It is clear from this discussion that much more research is needed in Australia on the factors that characterise the ‘seriousness’ of the offence in child sexual assault cases, the reliance of courts on VISs in this exercise, and the impact of such factors in sentencing child sex offenders.

IV CONCLUDING THOUGHTS

Victim Impact Statements are increasingly being recognised for their therapeutic, communicative, educative and other potential benefits for the individual victim, the court and the community more broadly. The use of VISs in the sentencing process accords with the public interest in ensuring victim satisfaction with criminal justice outcomes and pursuing the goals of sentencing, namely, prevention, deterrence, and rehabilitation.

The way in which VISs are utilised in the individual case will depend on a range of factors. The legal framework in Australia currently permits VISs to be received by a court in sentencing child sex offenders, however a range of barriers, many systemic, act as impediments to such statements being used to ‘give victims a real “voice”’¹⁸⁵ and properly inform and influence sentencing decisions in appropriate cases. Currently, Australia lacks a cohesive legislative and theoretical framework for the use of VISs in sentencing. The need to rectify this situation should be the starting point for future reforms. This article has argued that a paradigm shift ideally grounded in a public/private hybrid characterisation of sentencing should drive this reform process and more specifically the development of specific rules of law and procedures that recognise the rights of the child victim and facilitate the child’s participation in the processes of criminal justice, including the sentencing phase of criminal proceedings. More specifically, it is suggested that the streamlining of the legislative framework for reception of VISs in Australia include more detailed provisions, which regulate, the form, content and manner for tendering such statements with particular focus on the specific needs of the child victim. Key also to such reform is clarification of the purposes for which a sentencing court

183 Schuster and Proppen, above n 164, 75.

184 *Ibid* 103.

185 Sankoff, above n 32, 472.

may rely on a VIS. This paper has argued that the sentencing process requires the court to use the VIS, mindful of the need to balance the respective interests of the victim, offender, community and State alongside other relevant information before the court.

A number of specific issues need to be addressed in the course of streamlining and advancing the use of VISs in Australia. First, the responsibility of the prosecution in requesting and tendering VISs should be clarified. Secondly, the basis for judicial exercise of the discretion to exclude excessively prejudicial impact statements or part thereof should also be clarified. Thirdly, the role of VISs particularly in sentencing child sex offenders is to be recognised as only one part of the criminal justice response to this abhorrent crime.¹⁸⁶ Finally, in navigating future reforms in this area of law we need to acknowledge that:

The law does not stand still. Instead it continues to evolve as the community learns more about the long term consequences of child sexual assault, uncovers the extent of the problem and devises measures to protect children not just from the offences or the offenders but from having to undergo further trauma triggered by the investigation, interrogation, prosecution and court processes themselves. [However, in] all this the law must proceed without prejudicing an offender's right to a fair trial. The development of the criminal law and the procedures for bringing offenders to justice [inevitably will] simply reflect the society's best efforts to find an appropriate path to what presents as an intractable problem.¹⁸⁷

In conclusion, we should welcome change in the processes of criminal justice as an opportunity to enhance fairness for all and recognise the current array of interests both public and private that must be prioritised and served by contemporary criminal processes.

186 Thérèse McCarthy, 'Victim Impact Statements – A Problematic Remedy' (1994) 3 *Australian Feminist Law Journal* 175, 175.

187 Potas, above n 121, 2.