

INTEGRATING A VICTIM PERSPECTIVE IN NSW HOMICIDE CASES

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In Australia, where a victim dies as a result of an offence, a family victim impact statement may be tendered detailing the trauma occasioned to family members. All states except New South Wales (NSW) allow such statements to be considered during sentencing. Currently, NSW provides for the tenure of such statements but current authority excludes their consideration on the basis that such statements enable the valuing of one life as greater than another. This article discusses the need to reconsider this rule in accordance with recent Australian and international cases indicating the possible relevance of family statements to the sentencing process. This article further considers the need to redress the exclusion of family perspectives on the basis that their inclusion is consistent with policy changes to NSW law and practice in the mid 1990s integrating the victim in key legal proceedings and the justice system more generally.

Victim impact statements have, since their formal inception into NSW law in 1996, provided victims of crime increased opportunity to participate in the sentencing process. Currently prescribed under s 28 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), both primary and family victims have the ability to tender an impact statement after conviction, but before sentencing.¹ Family statements may be tendered where the primary victim dies as a result of the offence. Recognition of harm to the victim is a long serving rationale of punishment that is always relevant to the determination of an appropriate sentence. Ordinarily, a sentencing judge will take heed of the impacts of the offence upon the victim through the information tendered in evidence, usually at trial. It is out of the need to construe harm objectively, however, that victim impact statements have tended to fall foul of the established doctrines of punishment that require a sentence to be objectively proportionate to all circumstances of the offence and offender. Such is the case with family statements in NSW. However, various Australian and international jurisdictions now recognise the impact of crime on family members in homicide cases in order to enable *inter alia* the integration of family victims into the justice system, from which they are otherwise generally excluded.

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¹ Primary victims include persons or witnesses to an offence that have suffered personal injury as a result of an offence. Family victims include members of the primary victim's immediate family, see *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3.

Given that a sound interpretation of sentencing doctrine may now allow for the consideration of family statements, it is arguable that the consideration of such statements accords with the ambit of changes concerning victim rights, introduced into the NSW political landscape during the mid 1990s.² In this context, this article considers the need to include the perspectives of family victims not just out of the need to bring NSW law and practice in line with current Australian and international practice, but out of the full realisation of the changes introduced into NSW law and procedure some decade ago to better reflect the significant role victims play in the criminal justice system, and in particular, their relevance to the determination of harm and penalty in homicide sentencing matters.

Victims of crime have been the focus of significant NSW policy development since the introduction of the *Victim Rights Act 1996* (NSW). This Act sought to introduce victim rights onto the NSW regulatory scene with the provision of a Charter of Victim Rights under the charge of the Victims of Crime Bureau, which took responsibility for the implementation of the Charter from 1996. This Charter requires government officials, such as prosecutors, to provide victims a standard of fair treatment and respect, and also extends to victims a right to be informed of their offender's release or escape from custody, or change in security classification where the offender is eligible for unescorted absence from custody. This Act also created the Victims Advisory Board. The role of the Victims Advisory Board is to consult victims of crime, community victim support groups and Government agencies regarding issues relevant to victims of crime, and to act as a liaison between such groups and the relevant Minister. The *Victims Compensation Act 1996* (NSW) introduced the second round of reforms. This Act, now retitled the *Victims Support and Rehabilitation Act 1996* (NSW), repealed the *Victims Compensation Act 1987* (NSW), to prescribe a table of compensable personal injuries and standard amounts payable.³ This Act also simplified the process of restitution from offenders found guilty of an offence. The Act also established a process whereby claims could be made to the Victims Compensation Tribunal, as assessed by a Claims Assessor. The third reform was introduced in its original form in the *Victim Rights Act 1996* (NSW). This reform, the focus of this article, provided for the submission of a victim impact statement after conviction but before sentence in the District and Supreme Courts of NSW. The *Victim Rights Act 1996* (NSW) inserted the current provisions for the tenure of victim impact statements into the *Criminal Procedure Act 1986* (NSW) pt 6A (ss 23A-23E). These sections have since been removed to the *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 3 div 2, which contains the current enabling legislation concerning victim impact statements.⁴

² F Manning and G Griffith, 'Victims Rights and Victims Compensation: Commentary on the Legislative Reform Package 1996' (Briefing Paper 12/96, NSW Parliamentary Research Service, 1996).

³ Where determining the compensation payable following a criminal incident, the *Victims Compensation Act 1996* (NSW) prescribed a narrow definition of 'act of violence', limited to actual acts of a violent nature. All compensable injuries had to flow from an act that would fall within this definition.

⁴ The original provisions were contained in the *Crimes (Sentencing) Amendment Act 1987* (NSW), inserting s 447C into the *Crimes Act 1900* (NSW). However, this provision never commenced, and was later repealed by the *Victim Rights Act 1996* (NSW), to be transferred and re-enacted in the *Criminal Procedure Act 1986* (NSW).

The effect of the third reform for the introduction of victim impact statements in NSW criminal practice has been the most contentious, given the NSW Court of Criminal Appeal's ('NSWCCA') tendency to deem as irrelevant the experiences of family victims provided by impact statement, despite explicit provisions that allow family victims to tender a statement of evidence describing the damage caused by the death of the primary victim. This reasoning by the NSWCCA is couched within a logic that victims tend to take crime personally, such that they are readily identified as poor sources of information from which to construe the objective seriousness of an offence. Rationalising a sentence proportionate to the various ends of punishment, which as *R v Veen [No 1]*⁵ and *R v Veen [No 2]*⁶ indicate, includes the difficult task of balancing such objects as the need to recognise harm done to the victim and community, the need to protect society, the rehabilitation of the offender, and the need for general and specific deterrence, is thus taken to be a task ill performed by victims personally.

In NSW, where an impact statement is tendered by a primary victim following a non-fatal offence, however, a court will usually take it into account so long as the information provided is relevant to the objective assessment of the harm occasioned. Where available, such impact statements may inform the sentencing court of the impact of harms not otherwise before the court in evidence. Problems have been identified, however, where family impact statements are tendered following the death of the primary victim.

Out of the need to maintain an equal and proportionate assessment of the harm occasioned *R v Previtiera*,⁷ rules that sentencing courts must exclude any consideration of family impact statements where the primary victim dies. This is because, as Hunt Chief Judge (CJ) at Common Law (CL) states, death is the ultimate harm, such that it is offensive to think that a sentencing court may, by reference to a family victim impact statement, 'value one life as greater than another'.⁸ This, as extracted below, is out of the need to consider the death of the primary victim in terms of the immediate circumstances of the offence. No particular opinion on the victim, from family members or others, ought to be permitted to indicate harms not directly related to the circumstances of an offence. To allow this would be to permit the possibility that the primary victim was more valued than another victim, who may lack such support. Such subjective views are thus seen as incompatible with the purpose of sentencing. *Previtiera* consequently endorses the sentencing principle that all life is of equal value. Hunt CJ at CL indicates this in the following terms:

A problem arises, however, in those cases – such as the present – where the crime involves the death of the victim. The consequences of the crime upon the victim (death) has already been proved (or admitted) by the time the offender comes to be sentenced...

The law already recognises, without specific evidence, the value which the community places upon human life.⁹

⁵ (1979) 143 CLR 458.

⁶ (1988) 164 CLR 465.

⁷ (1997) 94 A Crim R 76.

⁸ Ibid 86.

⁹ Ibid.

Hunt CJ at CL indicates that victim interests can be more appropriately dealt with as a matter of victim's compensation than in the context of a sentencing hearing, which requires an objective assessment as to offence seriousness and offender culpability.¹⁰ In terms of this objective assessment, Hunt CJ at CL strongly opposes the notion that in homicide cases, the views of family victims not directly injured in the crime may be able to somehow contribute to an assessment of the offence without derogating from the principle of the universality of the value of human life.¹¹ Assessments of harm as indicating offence seriousness thus need to be limited to the immediate circumstances of the death of the victim out of respect for this principle.

Hunt CJ at CL also recognises the additional problem of establishing family impact evidence beyond reasonable doubt given its tendency to introduce facts against the offender.¹² *Previtera* has since been supported by a number of leading decisions, the consequences of which affirm the notion that harm ought to be primarily assessed in light of the factual circumstances of the case, in particular the immediate circumstances of the offence, and not in terms of the subjective experiences of victims traumatised by the loss of the deceased.¹³

Under s 28(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) a court must receive a family impact statement, albeit making any comment on it that the court thinks appropriate. *Previtera* rules that despite the requirement that family impact statements be tendered, courts are not to allow the contents of such statements to impact on the sentencing process. This has led to difficulties where impact statements are referred to in the remarks of a sentencing judge, particularly where the judge fails to indicate that the material therein has in fact not been taken into account. Sentences will present appealable error where the sentencing court has acknowledged receipt of an impact statement in this way, out of its *prima facie* relevance to the exploration of the consequences of an offence, only to then not distinguish the statement as irrelevant to sentence.¹⁴ The usual result where a statement is not clearly delineated from impacting on sentence is, where appropriate, the re-sentencing of the offender by the NSWCCA.

However, issues of sentence construction aside, the NSWCCA has indicated that the rule for which *Previtera* stands may need to be revisited in light of s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), inserted into the Act in 2002. Section 3A(g) provides that a court may impose a sentence on an offender to recognise the harm done to the victim and the community. As such, Spigelman CJ indicates in the case of *R v*

¹⁰ Also see recommendation 3 of the New South Wales Law Reform Commission, *Sentencing*, Report No 79 (1996). Hunt CJ at CL advocates the treatment of family impact statements in homicide cases along similar lines to those proposed by the NSWLRC.

¹¹ The one exception recognised by Hunt CJ at CL may be where the primary victim dies a slow, lingering death. The circumstances of the offence would thus come to encompass family victims, who may come to care for the primary victim before death. See *R v Previtera* (1997) 94 A Crim R 76, 86.

¹² See *R v Slack* [2004] NSWCCA 128. Also see T Kirchengast, 'Victim Influence, Therapeutic Jurisprudence and Sentencing Law in the New South Wales Court of Criminal Appeal' (2007) 10 *Flinders Journal of Law Reform* 1, 143-59.

¹³ *R v Bollen* (1998) 99 A Crim R 510; *R v Dang* [1999] NSWCCA 42; *R v Newman*; *R v Simpson* [2004] NSWCCA 102; *R v King* [2004] NSWCCA 444; contra *R v Birmingham (No 2)* (1997) 69 SASR 502.

¹⁴ For an example of such errors, see *R v Dawes* [2004] NSWCCA 363, [30]; *R v Dang* [1999] NSWCCA 42, [15].

Berg,¹⁵ that family impact statements may be allowed to influence sentence where the content of the statement may properly inform the court as to the harm done to the community. His Honour indicates:

The reasons given in *Previtera* may need to be reconsidered in an appropriate case, by reason of the conclusion of the statement of the purposes of sentencing in s3A of the *Sentencing Procedure Act 1999*. I refer particularly to the reference in s3A(g) “To recognise the harm done to ... the community.”...

It appears to me strongly arguable that the recognition of this purpose of sentencing would encompass the kind of matters which are incorporated in a victim impact statement. It may in some cases, be appropriate to consider the contents of such statements in the sentencing exercise. This was not a purpose of sentence recognised by Hunt CJ at CL in *Previtera*, see at p86.¹⁶

This suggestion for reform was again addressed in *R v Tzanis*,¹⁷ where the NSWCCA convened as a special panel of five judges to specifically determine the issue of the admissibility of family statements. Though declining to consider the issue on that occasion, the court did indicate the gravity of this issue by suggesting that ‘no suitable vehicle has emerged for the purposes of the grant of special leave by the High Court’.¹⁸

The issue of what to do with family impact statements in homicide cases has clearly emerged as one of great significance, particularly when viewed against the weight of sentencing principle that requires that punishments be construed objectively, proportionate to all factors that present as relevant to the determination of an appropriate punishment. Against the significance of the ruling of *Previtera*, changes to NSW sentencing law put into effect in 2002, the role of family statements in other jurisdictions, and the broader context of victim rights and participation in sentencing introduced into NSW law and practice in 1996, a need exists to assess the extent to which NSW law may now be out of step with the need to recognise family victim rights as significant to the sentencing process. The need to reform the principles laid down in *Previtera* will thus be considered in the context of the general movement toward the acceptance of family perspectives, on a local and internationally scale.

I THE DOCTRINAL BASIS FOR THE INCLUSION OF FAMILY PERSPECTIVES

Various jurisdictions have, to date, resolved problems of recognising the value of family impact statements by understanding that such statements may present information relevant to sentence so long as that information accords with an objective assessment of the seriousness of the harm occasioned to the victim.¹⁹ For example, the Victorian case

¹⁵ [2004] NSWCCA 300.

¹⁶ *Ibid* [43-4].

¹⁷ [2005] NSWCCA 274.

¹⁸ *R v Tzanis* [2005] NSWCCA 274, [15].

¹⁹ Each state and Territory allows for the consideration of family impact statements. Only NSW provides a different power for the consideration of primary and family statements. See *Sentencing Act 1991* (Vic) s 95A; *Children and Young Persons Act 1989* (Vic) s 136A; *Sentencing Act 1995* (WA) s 24; *Crimes (Sentencing) Act 2005* (ACT) s 53; *Sentencing Act* (NT) s 106B; *Criminal Law (Sentencing) Act 1988* (SA) s 7A; *Sentencing Act 1997* (Tas) s 81A; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28; *Criminal Offences Victims Act 1995* (Qld) s 14.

of *R v Willis*,²⁰ is authority for the relevance of the views of family members toward an objective assessment of the offence. In this matter, the Victorian Supreme Court indicates that family impact statements may inform the sentencing process where material is presented relevant to the broader context of community sentiment towards an offence. Community sentiment is of significance to any sentencing court when phrasing the seriousness of the offence in an objective way. *Willis* indicates that this regard to the community provides the vehicle for the inclusion of family impact statements: ‘What they do is to introduce in a more specific way, factors to which a court would ordinarily have regard in a broader context. They constitute a reminder of what might be described as the human aspect of crime’.²¹

Willis addresses issues of disparity raised in *R v Penn*,²² a case involving culpable driving causing death, holding that the extent to which a sentencing court may consider evidence of the impact of the offence upon family members as a reflection of community sentiment may indeed be limited. Out of the need construe harms objectively, in terms of the community’s abhorrence of the needless waste of life caused by road accidents, the Victorian Court of Criminal Appeal (‘VCCA’) indicates that the specific consideration of the impact of an offence on family members may go beyond the tolerable parameters of sentencing principle. A later case, *R v Miller*,²³ rejected the holding of *Penn* out of consideration of the changes introduced by the *Sentencing (Victim Impact Statement) Act 1994* (Vic), which sought *inter alia* to modify Victorian sentencing law to enable a sentencing court to take account of the ‘injury, loss or damage’ that occurs as a direct result of an offence. This Act also amended the *Sentencing Act 1991* (Vic) s 5(2) by specifically connecting the personal circumstances of the victim to the injury, loss or damage that resulted from the offence. The VCCA in *Miller* also clarified the way the *Sentencing (Victim Impact Statement) Act 1994* (Vic) allows for the use of impact statements as a vehicle by which evidence of harm may be ascertained as relevant to sentence, while also emphasising how evidence of victim trauma, injury and loss not provided by impact statement may also continue to be relevant.

In *Miller*, the court rules that where impact evidence accords with community sentiment then it ought to be included as reflecting the community’s response to the offence. Such statements may be even more useful where they present perspectives relevant to sentencing principles in which the court is required to especially consider the community’s attitude toward the offence. Family victim evidence may thus be particularly relevant to the explication of such principles as general deterrence and denunciation. Despite these principles not being of particular issue in *Miller*, the VCCA rules that family perspectives may nonetheless be relevant as a matter of general reflection:

We are not persuaded that the judge misdirected himself by referring to, and taking into account of, the effect on the Bendigo community of this crime, or the anguish of her

²⁰ [2000] VSC 297.

²¹ *R v Willis* [2000] VSC 297, [16].

²² (1994) 19 MVR 367.

²³ [1995] 2 VR 348.

family. Commonsense would allow inferences to be drawn in respect of these matters, in the absence of direct evidence.²⁴

Miller argues for the need to construe offence seriousness and offender culpability objectively, while maintaining a view to the inclusion of the views of family victims, where relevant. It is only where family impact evidence is so out of touch with community expectations that it ought to be excluded, such as where family members are motivated by vengeance or revenge, or where they are unduly forgiving of the offender, that exclusion becomes warranted. The important point is that not all family impact statements are somehow tainted as notionally unreliable but seen as potentially useful, so long as they accord with community expectations toward the expected impacts of the offence.

The South Australian experience also finds for the relevance of family victims in the sentencing process. *R v Birmingham (No. 2)*,²⁵ directly considers the relevance of *Previtera* in South Australian law, finding that it is not so much a matter of the valuing of one life as more important than another but of the allowing of appropriate respect to be given to the injury, loss or damage occasioned as a result of the offence. Family victims are thus to be considered persons able to be injured as a result of an offence, and their experience may be relevant to the determination of the broader consequences of an offence, as relevant to any sentencing court.

Internationally, the Canadian experience suggests that family impact statements may similarly inform offence seriousness. In *R v Gabriel*,²⁶ the Ontario Superior Court of Justice ruled that, despite the principle affirmed in NSW law that no one life ought to be valued above another, that sentencing courts need to include the views of family victims out of respect for their significance to and connection with the primary victim. Respect need also be given to the fact that family victims may also appropriately reflect community viewpoints. It was held that sentencing tends to focus on the offence and the offender, to the exclusion of the victim. In this context, it is possible that victims may be reduced to obscurity. Victim impact statements thus provide a unique tool for the balancing of interests in the sentencing process:

The victim was a special and unique person as well - information revealing the individuality of the victim and the impact of the crime on the victim's survivors achieves a measure of balance in understanding the consequences of the crime in the context of the victim's personal circumstances, or those of survivors.²⁷

Although the court indicates that victims may be included in the justice system in alternative ways, such as victim's compensation programs as recognised by Hunt CJ at CL in *Previtera*, balance may be struck by use of family statements to further inform the sentencing court of community attitudes and expectations following an offence.

The United Kingdom experience suggests that victim impact statements are also seen as an important potential source of information available to sentencing courts. Problems

²⁴ Ibid 354. Also see *R v Birmingham (No 2)* (1997) 69 SASR 502.

²⁵ (1997) 96 A Crim R 545.

²⁶ (1999) 137 CCC (3d) 1.

²⁷ Ibid 11-12.

surrounding the use of victim impact statements have involved, however, their use as a vehicle through which victims may recommend an appropriate sentence where an offender's sentence comes to be reviewed before the Court of Appeal of England and Wales. Such statements are thus considered after the original sentence is handed down, usually in the Crown Court. This practice is dissimilar to that of Australia, where statements may only be considered after conviction but before the original sentence is determined. Recommending a particular sentence is also generally prohibited in Australian jurisdictions.²⁸ Acceptable content of an impact statement may include details of the impacts of the offence on the victim, but must not include details as to any appropriate sentence.

The United Kingdom experience thus expressly differs from that of Australia. Not only can both primary and family victim impact statements be considered in all matters, including homicides, but the Court of Appeal has moved beyond arguments as to the equality of life as raised in *Previtera*, to issues of the extent to which impact statements ought to determine the sentencing option appropriate to a particular matter. In this sense, the United Kingdom is now grappling with the extent to which the sentencing process reflects a restorative approach, by including the express wishes of the victim as to the type of sentence the offender should receive, including whether the offender receive a custodial or non-custodial term.²⁹

In the United Kingdom, all persons experiencing loss or trauma as a result of a criminal offence may draft a 'victim personal statement' at the time of or following an offence. This statement, the equivalent of a victim impact statement, will then be placed in the case file to be potentially read by all who come into contact with it. This would notionally include the police, prosecutors, defence and court. Where an appeal is made to the Court of Appeal, victims will have the further opportunity to add a victim personal statement to the file, which may include comment on the impact of the actual sentence upon them. This will be read by the Court of Appeal before it reviews the original sentence.

The case of *R v Perks*,³⁰ considers the ways in which a sentencing court may be able to take into account the likely impacts of a sentence on the victims of an offence when sentencing an offender. *Perks* involved a situation in which the husband of the victim, who had been robbed, wrote to the Crown Prosecution Service during the course of the trial to express his anger toward the offender. The husband of the victim indicated in his letter that the offender should be sentenced to imprisonment so that an example could be made of him. This letter was included in the case file and it was submitted and read by the judge, sentencing the offender at first instance. The issue for the Court of Appeal was whether the sentencing judge took this letter into account, thereby aggravating the sentence that ought to have been handed down from a more proportionate reading of the facts. The Court of Appeal determined that the taking of the letter into account did cause the sentencing judge's discretion to miscarry, and that the original sentence was excessive. However, the Court of Appeal took the opportunity to indicate the extent to which courts were able to take the perspective of the victim into account when

²⁸ With the exception of the Northern Territory experience, which expressly allows recommendations on sentence: *Sentencing Act 1995* (NT) s 160B(5A).

²⁹ See Practice Direction (Criminal Proceedings: Victim Personal Statements) [2001] 4 All ER 640.

³⁰ [2001] 1 Cr App R (S) 19.

determining the most appropriate sentencing option, specifically where a victim requests that a particular sentence be handed down. Such requests could be made by either primary or family victims. The Court of Appeal states:

The opinions of the victim and the victim's close relatives on the appropriate level of sentence should not be taken into account. The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender subject to two exceptions: i) Where the sentence passed on the offender is aggravating the victim's distress, the sentence may be moderated to some degree. ii) Where the victim's forgiveness or unwillingness to press charges provide evidence that his or her psychological or mental suffering must be very much less than would normally be the case.³¹

The Court of Appeal makes clear the point that a victim's opinion on the appropriate sentence to be served by an offender is not relevant except where a sentence may aggravate the distress occasioned to a victim. This means that while a victim may not seek a lengthier sentence, they may be able to request a shorter or minimal term where they can demonstrate that the original sentence is causing real and legitimate hardship. For such a request to stand the chance of success, the victim would need to be involved in some ongoing relationship with the offender, such that the original sentence has real and tangible impacts on the victim, aggravating the original harm occasioned as a result of the offence. It would generally not be enough to indicate that the victim merely feels empathy toward the offender, and that this in itself is causing problems for their recovery.

Applying the principle set out in *Perks, R v Nunn*,³² is a case in point. *Nunn* involved a guilty plea to a charge of death by dangerous driving. The defendant was sentenced to four years imprisonment. On appeal to the Court of Appeal, the family of the deceased, all of whom knew the offender, supplied the court with statements indicating that the length of the original sentence was making it difficult for them to move beyond the original incident. They felt that the offender had also suffered enough. The Court of Appeal responded by indicating that the opinions of victims were not relevant to sentence and could not be entertained out of the need to construe a sentence that was objectively proportionate to all ends of justice. However, the court did indicate that while the views of victims could not be simply adopted, the court could come to its own determination as to the need to reduce sentence so long as that determination is made objectively, in light of the request of the will of the victims. Reducing the original sentence by one year, the Court of Appeal indicated:

When the mother and sister of the deceased and the rest of the family have already suffered so much, we do not think that these adverse consequences of this particular sentence should be disregarded. In mercy to them we shall reduce the sentence as far as we can, consistent with our continuing public duty to impose appropriate sentences for those who cause death by driving dangerously under the influence of drink.³³

The combined effect of *Perks* and *Nunn* thus allow for the consideration of victim input into sentencing so long as that input expresses a view to mitigate sentence which, in the

³¹ *R v Perks* [2001] 1 Cr App R (S) 19.

³² [1996] 2 Cr App R (S) 136.

³³ *Ibid* 140-1.

view of the court, can be taken as an objective assessment of the consequences of the impact of a sentence on the victim(s). *R v Mills*,³⁴ provides a similar approach with regard to the offence of attempted rape, in this instance, by a former boyfriend of the victim. Evidence of the improving relationship between victim and offender was said to be relevant to the reassessment of the sentence of the offender. The Court of Appeal states:

Attempted rape is always a matter of general public concern, in addition to its more immediate concern to the victim. It is clear that the victim in this case has chosen to forgive the perpetrator of the crime, and has said so in terms, perfectly genuinely. That cannot decide the appropriate level of sentence, but we take her evidence into account as indicating the current extent of the impact of this particular crime on the victim. Having considered the matter in the light of the information before us, we have come to the conclusion that the sentence ... was too long.³⁵

Although the court indicates that it cannot merely act on a request of the victim, especially in light of forgiveness for such a serious offence as attempted rape, room exists for the possibility that the views of the victim could be weighed objectively by the court in the reassessment of the appropriateness of the original sentence of the offender.

This, as Ian Edwards argues, shows that the Court of Appeal has moved towards a restorative framework in which the needs of justice are not identified singularly in terms of the public interest.³⁶ Instead, the court has shown that it will consider the interests of the victim, the offender and the public in determining an appropriate sentence. The significant change here is that the perspective on the victim is not being solely informed by the court itself, as the removed arbiter of facts relevant to sentence. Rather, the court is seeking views and perspectives from the victims themselves – something entirely inconsistent with the NSW practice regarding family victims in homicide cases. Edwards suggests that the Court of Appeal has yet to delineate the exact ways in which victim perspectives ought to be introduced as a routine aspect of sentencing. In fact, recent reviews of the reception of victim personal statements indicate that the opportunity to draft one is not always made clear by the police investigating an offence, and judicial officers may well vary in their reception of such material if a statement is made.³⁷ Problems also exist between the need to balance the competing views of victims and the public interest, particularly where they are at odds. However, as Edwards explains, the movement toward a restorative approach coalescing the views of groups traditionally identified as incompatible is an important step toward a more inclusive and thus proportionate perspective on sentencing:

Under restorative conceptions of the sentencing process however such preferences can be accommodated more readily. By according some weight to the feelings of victims,

³⁴ [1998] 2 Cr App R (S) 252.

³⁵ *R v Mills* [1998] 2 Cr App R (S) 252, 254.

³⁶ I Edwards, 'The Place of Victims' Preferences in the Sentencing of 'Their' Offenders' (2002) *Criminal Law Review*, September, 689.

³⁷ Secretary of State for Constitutional Affairs and Lord Chancellor, *Hearing the Relatives of Murder and Manslaughter Victims: The Government's Plans to Give the Bereaved Relatives of Murder and Manslaughter Victims a Say in Criminal Proceedings* (2005) 14.

restorative aims can be achieved: catharsis for victims, taking victims' interests into account, and achieving reintegration of offenders.³⁸

The 2005 consultation paper issued by Lord Falconer, Secretary of State for Constitutional Affairs and Lord Chancellor, squarely raised the intention of the United Kingdom government to provide family victims in homicide cases an opportunity to be heard before sentence is pronounced. Flowing from the restorative framework developed out of *Perks* and *Nunn*, the 2005 proposal to provide victims a direct voice in sentencing homicide offenders has since moved to a pilot phase with the introduction of a scheme to provide victims the option to instruct private counsel, known as a Victims' Advocate, of the harms they have suffered. The Victims' Advocate, a publicly funded lawyer of the victim's choosing, is available to family victims to represent their interests to the bench during sentencing hearings. The Victims' Advocate would assist with the drafting of the personal statement and, with a right of audience before the court, would be able to bring the existence of the statement to the court's attention, making submissions as to the relevant impacts and injuries occasioned to the victims they represent. The victim themselves would also be able to address the court. Significantly, the Victims' Advocate is independent of the prosecution and would only seek to represent victim's interests, doing so along side the prosecutor, representing the public interest. The Victim's Advocate would not play a part in the trial of the offender, however, the proposal extends to bail hearings following charge by the police, plea deals or the downgrading of charges, withdrawal of charges by the prosecution, and discontinuance of proceedings.

The response to the 2005 consultation paper indicated that most were in favour of the move toward Victims' Advocates, and the piloting of the scheme in particular, with victims groups showing strong support. Of issue was the possibility that such a scheme would have little effect in practice, merely raising victim's hopes that their statement would somehow impact sentence. The reality may well be that many sentencing judges determine sentence long before the Victims' Advocate addresses them as to the impacts of an offence, or may otherwise deem the perspective of the victim as less relevant or irrelevant to the final sentence to be determined.³⁹ To this end, the President of the Queen's Bench Division released a protocol following the start of the pilot scheme indicating the role of the Victim's Advocate in the sentencing process.⁴⁰ This direction appeared to limit the formal role of the Victims' Advocate to the sentencing hearing only, excluding bail applications and other pre-trial proceedings, despite being available to advise family victims following charge of the offender by the police. In any event, contact between the Crown Prosecution Service is emphasised consistent with new duties of prosecutors requiring them to consult with victims following an offence.⁴¹

³⁸ Edwards, above n 36, 694.

³⁹ See Secretary of State for Constitutional Affairs and Lord Chancellor, *Hearing the Relatives of Murder and Manslaughter Victims: The Government's Plans to Give the Bereaved Relatives of Murder and Manslaughter Victims a Say in Criminal Proceeding - Summary of Responses to the Consultation Paper* (2006) 6. Of the 83 responses to the general aims of the scheme as outlined in the consultation paper, 47 were in favour of the scheme, 19 were against, and 17 supported family victims generally but did not support the proposal establishing Victims' Advocates.

⁴⁰ President of the Queen's Bench Division, *A Protocol Issued By The President Of The Queen's Bench Division Setting Out The Procedure To Be Followed In The Victims' Advocate Pilot Areas* (2006).

⁴¹ Crown Prosecution Service, *The Prosecutors' Pledge* (2005).

News of the scheme, which was piloted for one year from 24 April 2006 in the Old Bailey in London and the Crown Courts in Birmingham, Cardiff, Manchester (Crown Square) and Winchester, indicates that the availability of Victims' Advocates was well received by family victims. Notably, most victims chose to proceed through the prosecutor than an independent advocate, leading the Attorney-General Lord Goldsmith to announce in June 2007 that a variation of the pilot will be made available to all England.⁴² The new scheme, titled 'Victim Focus', does not provide for the appointment of private counsel and is limited to the sentencing phase following conviction, narrowing the focus to prosecutors who deliver the victim's personal statement at the sentencing hearing.⁴³ The success of this new variation of the pilot scheme, specifically whether it provides an enhanced experience for family victims through the inclusion of their perspectives on the harms occasioned as a result of the offence, will need to be evaluated in due course.

Compared to the United Kingdom approach, NSW procedure not only fails to allow victim input into choice of sentence but rejects the notion that the trauma caused to family members, as indicated by way of family impact statement, is something potentially relevant to a proportionate sentence. The extent of the difference is evidenced by the contrasting approach taken to the valuing of family victim input into sentence as indicated through a comparison of those reforms proposed with the introduction of Victims' Advocates in 2005 and the Family Focus scheme in 2007, and the current NSW situation. Clearly, NSW is some way off recognising victim input into choice of sentence. However, the issue of whether family victims ought to be afforded voice in the determination of sentence in a homicide matter begs consideration as the NSWCCA continues to reiterate the principles of *Previtera* which identify family perspectives as inherently subjective, irrelevant and potentially repugnant to the ends of justice.

II COMPLETING THE PROJECT: INCLUDING FAMILY PERSPECTIVES AS PUBLIC POLICY REFORM

The opportunity to include family victims in accordance with the 1996 changes to victim rights may be founded on the availability of a doctrinal basis for the inclusion of family perspectives as a representation of community sentiment. In short, current sentencing law may accommodate family perspectives on the impact of the death of a loved one not out of the need to value one life as greater than another but out of the need to construe a sentence which is objectively proportionate to all aspects of the offence and offender. This will necessarily include the weighing up of the seriousness of the offence against community expectations and attitudes, of which family victims may be included as a constitutive part.

This rationale provides a solid basis to include the perspectives of family members consistent with the 1996 reforms that sought a clearer, and more involved and integrated

⁴² Office for Criminal Justice Reform, *Working Together to Cut Crime and Deliver Justice: A Strategic Plan for 2008-2001* (2007) 42.

⁴³ The 'Victim Focus' scheme is available to family victims where the offender has been charged with murder; manslaughter; corporate manslaughter; familial homicide; causing death by dangerous driving; causing death by careless driving while unfit through drink or drugs; aggravated vehicle taking where death is caused.

role for crime victims in the NSW justice system. Room for the potential inclusion of family perspectives as indicated above has been commented on by Rowena Johns, Legal Officer of the NSW parliament, in the following terms:

There seems to be a fine line for sentencing judges between correctly acknowledging a victim impact statement and incorrectly giving it weight. In *R v Dang* (supra), the Court of Criminal Appeal (Abadee J with whom Barr J agreed; Adams J agreed with additional remarks) found that the sentencing judge took into account irrelevant material and fell into appellable error 'when he referred to the objective fact that the husband of the deceased and other relatives of the deceased had suffered grief as a result of the death of the deceased': para 15. Yet in *R v Mansour* (unreported) [1999] NSWCCA 180, the Court of Criminal Appeal (Spigelman CJ with whom Studdert J and Adams J agreed) held that the judge had not erred by stating in the remarks on sentence that the material in the victim impact statements indicated the 'immeasurable grief' that the death of the victim had caused to her family. Spigelman CJ found there was nothing to suggest that the sentencing judge had given weight to the impact of the offence on the victim's family in determining the sentence imposed.⁴⁴

Johns, in her analysis of the reception of the 1996 reforms as at 2002, identifies that some disparity exists between the ambit of the provisions for the tenure and consideration of family impact statements and the rule espoused in *Previtera* prohibiting any consideration of their content. This disparity consists of the nature and scope of the enabling legislation allowing for their potential consideration where appropriate, and the fact that, as Spigelman CJ notes in *Mansour*, a sentencing court may indicate the grief felt by family victims so long as the sentencing judge does not give weight to the impact of the death on family victims. This opens up the possibility that sentencing courts could, at least notionally, refer to the grief and trauma experienced by family victims without offending the rule established under *Previtera*. However, as Johns notes, the enabling legislation provides more scope than has otherwise been taken by the NSWCCA in its interpretation of s 28(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). In fact, the explanatory memorandum in support of the *Victim Rights Act 1996* (NSW) clearly provides that family victims ought to be given the right to act in the interests of the primary victim where they have died or are incapacitated as a result of an offence, thus 'to enable family representatives of victims who are dead or incapacitated to act for the victim in connection with giving or objecting to victim impact statements'.⁴⁵

In exploring the nature of the disparity between the enabling legislation and the narrow interpretation of it by the NSWCCA, Johns notes a further disparity that the NSWCCA may not be fairly balancing the rights of victims against the rights of the accused in the sentencing process:

[I]t can also be argued that there seems to be an element of disparity between the latitude given to defendants in the sentencing process, and the belief of many judges that to take victim impact statements into account at sentence would grant some victims' lives more worth than others. Defendants are free to submit the most favourable testimonials they can marshal for the sentence hearing. Those defendants who are wealthy or prominent

⁴⁴ R Johns, 'Victims of Crime: Plea Bargaining, Compensation, Victim Impact Statements and Support Services' (Briefing Paper 10/02, NSW Parliamentary Library Research Service, 2002) 18.

⁴⁵ Explanatory Memorandum, *Victim Rights Act 1996* (NSW) 3.

are often better placed to produce impressive character references than homeless, unemployed or unrepresented defendants. These references are explicitly taken into account by sentencing judges. In other words, defendants are not all treated the same, as if their lives are of equal importance. Therefore, it could be seen as inconsistent to impose such a standard on victims.⁴⁶

Against the intent of the 1996 reforms providing victims greater access to justice, Johns argues the issues not from the perspective of proportionality as above, but through a comparison of the rights of the accused against the limitations placed on the valuing of the victim through the restrictions in place by *Previtera*. Such arguments between victim and defendant rights are beyond the scope of this article, but this comment does indicate that the rights agenda put into place in 1996 may be seen to remain, from the perspective of those administering such arrangements, as incomplete. This is summarised by Johns in the following terms:

In the future, it can be expected that the recognition of victims rights will continue to grow. However, there is strong resistance from sections of the legal profession and the judiciary to victims playing an active role in criminal proceedings beyond giving evidence as witnesses.⁴⁷

III ARGUING FOR REFORM IN NSW: PERSPECTIVES ON THE ROLE OF FAMILY VICTIMS

Section 3A(g) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides a new context of sentencing in NSW. As indicated in *Attorney General's Application Under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 2 of 2002)*⁴⁸ certain prior sentencing principles may need to be reviewed in light of the argument that s 3A(g) requires a sentencing court to consider *inter alia* the harm done to the community. Connecting this directly to victims, as demonstrated through the Australian and international cases, suggests that victim and community interests need not be defined as separate nor opposed. Further, this reasoning allows for the consideration of family statements under the broad discretion of s 28(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), enabling the integration of family victims into a justice system that has increasingly emphasised the importance of victim participation.

As demonstrated in *Willis and Miller*, the need to ensure sentencing is proportionate to the seriousness of the offence may thus give reason to include, rather than exclude, family perspectives. Albeit in a limited way, family statements on the impact of the offence upon them will be of use to a sentencing court to further and better inform the objective assessment of an offence. Family statements, in this way, could not form the primary or singular point of reference for the objective assessment of offence seriousness but would support, where relevant, the court's determination that offences come with real consequences, as indicated in the impacts of harms indicated in a family statement.

In the context of such a reform, courts sentencing homicide offenders will be able to freely refer to family statements without the need to currently acknowledge receipt of

⁴⁶ Johns, above n 44, 19.

⁴⁷ *Ibid* 84.

⁴⁸ [2002] NSWCCA 515, [57]-[9].

such evidence, only to then state that the court is unable to take such information into account. It is only where courts inform themselves as to objective seriousness from the contents of a family statement exclusively, or where impacts are considered as relevant to sentence that are in fact out of step with community sentiment, that interference from the NSWCCA would be expected and warranted. This would substantially reduce the number of grounds of appeal currently raised in sentencing appeals. Further, this would see the meting out of the 1996 reforms as intended by parliament. As indicated by Johns, this may reduce the disparity currently in play between the enabling provisions of the *Crimes (Sentencing Procedure) Act 1999* (NSW), and the rights of family victims in NSW.

Despite room for reform of the holding of *Previtera*, various perspectives present advocating continuity of the current arrangements concerning family victims. Indeed, the NSW Attorney-General has indicated that Hunt CJ at CL was correct to indicate that a sentencing court ought not value one life as greater than another. However, the Attorney-General also recognises that:

In cases involving death, the impact is plain and clearly tragic. In practice, when a victim has died, the court acknowledges that a victim impact statement cannot affect the sentence. However, the court also acknowledges that the victim impact statement plays a broader role. It provides a public forum for family victims to have their pain and suffering acknowledged and put on the record. The presiding judge will often state this in open court or in his or her decision. I feel entitled to point out that this Government has done far more than any previous government to ensure that the rights of victims of crime are acknowledged by society and that victims are given a greater say.⁴⁹

This perspective of government thus recognises the significant role of the continued recognition of victim rights despite acknowledging that principles of fairness necessitate the current restrictions put in place by *Previtera*. The case advocating the continued restricted use of victim impact statements in NSW, particularly when read in connection with current limitations, has been recently emphasised in *R v FD; R v FD; R v JD*.⁵⁰ In this matter, Sully J raises four points that summarise the controversial ways in which victim impact statements seek to ‘balance interests that are not easily balanced’.⁵¹ These points, while conceded in terms of non-fatal offences for which no prohibition exists as to their use in sentencing, extends upon those reasons elicited by Hunt CJ at CL in *Previtera* that explain why the introduction of family impact evidence may be seen to impact disproportionately on an offender’s sentence in a homicide matter, where harm is primarily identified in the immediate context of the death of the victim.

The four points raised by Sully J in *R v FD; R v FD; R v JD* will thus appeal to those seeking to maintain the current restrictions of *Previtera* and include: the need to prevent offenders being sentenced under a ‘lynch mentality’; that it is imperative to not allow the offender to be sentenced in a manner that is dictated by the victim; that the victim still deserves, no less under the current provisions of the *Crimes (Sentencing Procedure) Act 1999* (NSW) providing for the tenure of victim impact statements during

⁴⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 May 2003, 926 (Hon Bob Debus, Attorney-General).

⁵⁰ (2006) 106 A Crim R 392.

⁵¹ *R v FD; R v FD; R v JD* (2006) 106 A Crim R 392, 414.

sentencing, a means by which they are able to provide a public statement facilitating an 'emotional catharsis' in which the understandable trauma, grief and loss of the offence can be expressed; and to provide for the meting out of a political imperative seeking to respond to the perceived lack of trust voters have in the sentencing process, particularly regarding matters of serious personal violence.⁵² It is this last point, on the political imperative of the integration of victim rights in sentencing, which, as Sully J points out, may conflict with the 'accumulated wisdom of the common law of crime and punishment'.⁵³

The important point upon which Sully J's four points rest is the recognition of the victim as provided by an impact statement in a limited and non-justiciable form. Despite not being able to impact on sentence, the provision of a vehicle through which family victims may express the grief and loss of the traumatic event of the offence continues to legitimate the use of impact statements in homicide cases because they provide a means by which victims are not altogether removed from criminal proceedings. The issue here is whether this is in fact fair to family victims, persons intimately connected to the primary victim and the consequences of the offence. Further, a question need be asked of whether family victims may indeed be able to contribute to sentencing in a justiciable sense by raising impacts that can be characterised, as they have been in *Willis*, as a particular representation of community sentiment. It is this latter approach which has found favour in jurisdictions other than NSW, enabling closer connections between family victims, the justice system and the community – all important potential contributors to the requisite need to pass a sentence proportionate to all circumstances of the offence and offender. As the United Kingdom approach demonstrates, family victim input may be valued to the extent that it is not only considered significant to the passing of a proportionate sentence but vital to the ends of an inclusive, representative justice system. In this context, room exists for greater scope in the interpretation of s 28(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) than is currently the case. Such a reading, consistent with *Willis* and *Miller*, would likely satisfy the concerns of the Attorney-General that one life is not valued above another, while fulfilling the ambit of the 1996 reforms to the aid of victim rights in NSW.

The status of family impact statements in homicide cases has clearly emerged as an issue of particular significance to various stakeholders in the NSW justice system. Whether sentencing can continue to be seen as an exclusive process between state and offender will continue to be tested as the need to take victim interests into account continues to be raised before the NSWCCA. As indicated in *Berg* and *Tzanis*, where the issue is squarely raised in an appeal, the NSWCCA will have to weigh the need to recognise family statements as presenting issues relevant to the actual determination of sentence against sentencing principles that, at least currently, have been interpreted as excluding such perspectives, to the demise of the full and complete recognition of the 1996 reforms to victim rights generally.

⁵² Ibid.

⁵³ Ibid.