

***Section Three:
Victims, Offenders
and the Criminal
Justice System***

A constant theme since the emergence of the victims' movement has been the extent to which victims should be involved in the criminal process beyond being a witness for the prosecution. A welfare approach to this issue has seen broad agreement in the need for victims to be treated with compassion and respect for their dignity, to be informed and to receive appropriate services and compensation for the injury or loss sustained. More controversial is what legal rights should be accorded to a victim to intervene or be separately represented in the criminal trial. This issue occupied much of the time of the United Nations Congress on the Prevention of Crime and Treatment of Offenders in Milan in 1985 which prepared the draft Declaration on the Rights of Victims of Crime and Abuse of Power. In the end the Congress agreed on a heavily qualified provision, [Para 6(b)]—'Allowing the views and concerns of the victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant criminal justice system'. Even then, the British delegation made an explicit reservation, arguing that it went too far in claiming rights for victims and that the rights of victims should not extend in any way to sentencing, case disposal or the course of trial. This view is still reflected in the reluctance of the United Kingdom to support Victim Impact Statements as an aid to sentencing. The debate is always complicated by the approach of different legal systems and universal agreement on the exact role of the victim in the criminal trial is not possible.

Nevertheless, the 8th Symposium once again saw considerable attention given to this issue. This was in the context of renewed criticism of the role of the victims' movement in the law and order debate. Elias in his keynote address refers to some victim advocates arguing for tougher penalties and claiming that victims can gain only if offenders lose: the so-called zero-sum game.

Marc Groenhuijsen describes the proceedings of the European Forum for Victims Services at Falkirk in Scotland in 1994 where an attempt was made to define victims' rights in the context of those of the offender. This issue will be further developed by the Forum. He makes it clear that the European Forum agreed that the emancipation of the victim is not intended to be at the expense of the rights of the offender in the penal process. He specifically refutes the notion of a zero-sum game and argues that in some cases the rights of offenders and victims may coincide. He opposes changes to the criminal trial to make the victim a third party and a direct adversary of the defendant. This view is supported by some other victims' organisations (for example, the Victims of Crime Service in South Australia) while support was also found for more anti-offender views. Tricia Rhodes of the Victims of Crime Assistance League (VOCAL) in Victoria made no apology for asserting that victims saw an appropriately severe sentence as serving the interests of justice. She was impatient with those victims surveys which tended to show that victims were not so concerned about heavier sentences. Melvyn Barnett of VOCAL argued for more direct victim involvement in the trial through an Office of Victims Advocate and a Victims Ombudsman. This direct representation was supported by Ruth Wilkie of New Zealand who argued that New Zealand reforms should

now be taken a step further to encompass direct victim representation in Court. Clearly those representing the victims' movements differ on this issue.

Despite the arguments against a zero-sum approach, there have been a number of recent initiatives which have impacted on offenders' rights. The question is whether these have been justified. For instance, until recently in most Australian States, an accused person was able to make an unsworn statement without being cross-examined. This was rightly seen by most victims and particularly women in rape cases as unfair, when their own actions were subject to often aggressive questioning about intimate and sensitive personal sexual matters. Women victims often left court with a strong sense of injustice. In most Australian States this right to give an unsworn statement has been abolished and the accused now only has two options, to remain silent or give sworn evidence and be cross-examined.

Offenders' rights have also been modified in other ways as **Kate Warner** outlines. Joining the debate from a feminist perspective, Warner describes several victim-oriented developments which have impacted on women. Changes to the law and procedure in the area of rape, domestic violence and homicide have modified rules in such a way as to minimise the chance of guilty parties being acquitted. Offenders' rights have probably been adversely affected by these changes, but desirably so, as the old rules provided too many opportunities for injustice to occur to assaulted women.

The approach to victims in different legal systems was always evident in discussions. Melvyn Barnett in quoting the Australian Director of Public Prosecutions, Michael Rozenes QC, refers to the fact that British and Australian courts in a criminal trial do not see their goal as a search for truth but rather as a 'proceeding structured by rules that are designed as well as possible to guarantee that accused persons are not deprived of their liberty without the most stringent examination'.

Barnett argues that if these rules lead to the guilty being acquitted then justice is not achieved and asks the question of whether 'the inquisitorial system favoured by many countries with its emphasis on the search for the truth may not lead to a more just legal system'. It is highly unlikely that such a revolutionary change in the basic legal structure of common law countries will occur. Nevertheless, it would be possible for judges in these countries to modify practices and procedures, to be more interventionist in the conduct of trials, thus improving the perception of justice by emphasising the importance of the quest for the truth and minimising the perception of the trial as an adversarial game.

Matthew Goode summarises the legislative history of the criminal law dealing with stalking, particularly in the United States of America, and the recent introduction of offences to combat it in a number of Australian States. This behaviour is becoming an increasing social problem involving victims in a wider range of circumstances than previously. His paper provides a useful case study of the difficulties in creating criminal offences which are effective in reducing victimisation while at the same time ensuring that basic principles of criminal responsibility based on intent remain in tact.

Victim Impact Statements (VIS)

The desirability or otherwise of victim impact statements still provokes controversy and much academic and research attention (Erez 1994). They are central to the debate about the balance of rights in the criminal justice system and the zero-sum game. The 8th Symposium reflected this. **Edna Erez, Leigh Roeger** and **Michael O'Connell** present the results of South Australian research projects which have been consolidated into one paper for this volume. Aggregate sentences were not increased by the introduction of VIS. The research confirmed findings from other studies, namely that for effective law reform the support of all organisations involved is necessary. Legislation and government backing is not always sufficient to ensure effective implementation of reform. This conclusion is not surprising given the widely differing views about the role of the victim in the criminal justice system and particularly in the sentencing process. Despite the importance of empirical research, support or otherwise for VIS depends heavily on 'one's philosophical stance or moral conviction' (Erez, Roeger & O'Connell 1995) or 'on a moral/humanistic conviction about the victim's right to participate' (Erez (*International Review of Victimology*) 1994, p. 29).

Martin Hinton uses the example of a VIS presented in a murder case in South Australia to criticise the process and concludes that subjective statements from the deceased victim's family and information about the victim's character, were not matters that should be considered in sentencing. In this he reflects the controversy in the USA, and argues against the most recent US Supreme Court decision in *Payne v. Tennessee* (115 LEd/ 2d 720), where the majority held that evidence regarding the emotional impact of the crime on victims and their family as well as evidence relating to the personal characteristics of the victim was admissible at sentencing (*see further* Sebba 1994, p. 141).

Other papers were critical of VIS. Therese McCarthy argues that VIS did not effectively fulfil their claimed objectives of providing women with their 'day in court', of educating the judiciary, and as a sentencing tool. Using the examples of sexual assault, she suggests that VIS are a means of dividing victims, by implying that some rapes are worse than others and some women more deserving of recognition. VIS are a poor tool in the education of judges, a process which should be undertaken comprehensively across the whole system. In assessing their worth, great weight must be given to their damaging potential to revictimise victims. 'If you decide that the legal system is a service, you will reject VIS as a placebo'—she argues. Carmel Benjamin argues that VIS, plea bargaining, information systems, comfortable and private waiting areas may all be useful and civilised additions to the process but do not change it. The VIS gives the appearance of involving victims in the trial process but does not do so in reality. The victim is not included in a real and meaningful way. She too is critical of the British and Australian view of the prosecution process as expressed by Australian DPP Michael Rozenes QC referred to above, and calls for a fundamental rethink of the British system of justice and whether it serves the needs of contemporary society.

Kathy Laster and Roger Douglas, using research from Victoria partly published elsewhere (Erez 1994, p. 95), note that information about victimisation

tends to 'get lost' and that this is particularly so with the criminal justice system's recent commitment to efficiency. They argue that simple measures, such as changing the form on which details of victimisation are recorded, may be more effective than elaborate procedures such as VIS in providing comprehensive information about victimisation to the courts.

Despite these criticisms, it is worth noting that victim support agencies and the police support VIS, a majority of the judiciary found them useful in at least some cases and the families of murder victims who had used VIS in the case referred to by Hinton strongly supported the process. 'They do not make any difference to sentences, so please don't take them away from us' was one victim's plea.

References

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