
Book reviews

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ACCOMMODATING JUSTICE: VICTIM IMPACT STATEMENTS IN THE SENTENCING PROCESS

Accommodating Justice: Victim Impact Statements in the Sentencing Process, by Tracey Booth, Federation Press, Australia, 2016, 208 pages: ISBN 9781760020484. Softcover \$85.00.

This book occupies a vital place in the developing story of victim impact statements (VISs) in Australia and elsewhere, adding to the existing literature in new, informative and challenging ways. On this important subject it will be an essential reference for criminal justice academics, practitioners, policy makers and legislators.

The author is an Associate Professor in the Faculty of Law, UTS and she writes of the development and current status of VISs on the basis of a careful and thorough analysis of the evolution of the law and its application and with appropriate reference to contemporaneous commentary.

Before the UN Declaration on the Rights of Victims of Crime and Abuse of Power in 1985 (to which Australia contributed greatly), victims of crime – people harmed by crime, directly and indirectly – had very limited roles to play in the criminal justice process. Even if they were witnesses, they were given short shrift and expected, once their evidence was given and expenses paid, to get on with life as best they could. That instrument and legislation that followed in many common law jurisdictions gave them rights that are still being developed, often at the urging of organised victims' groups. The VIS is one manifestation of that process.

VISs (known in England and Wales as Victim Personal Statements – VPSs) are statements delivered in writing, orally or electronically (for example, in the United States, Canada and Victoria) in which the victims or family members of deceased direct victims of crime describe the impact upon them of the crime(s) for which sentence is about to be imposed.

An English article from 2001 was briefly referenced in the book (Sanders, Hoyle, Morgan and Cape, "Victim Impact Statements: Don't Work, Can't Work" [2001] Crim LR 447). The authors opined that no VIS scheme could solve the problem of the "marginalised" victim and that victim-triggered VIS schemes are "irretrievably flawed both in principle and practice". They concluded that "[o]nly a genuinely participative system can treat victims with the respect they deserve without giving them the power to influence decisions that are not appropriately theirs". Therein lies the rub.

After 15 more years of development, VISs still create problems of principle and in practice and reading this book demonstrates abundantly why that is so. In the common law adversarial system the author describes the bases for the "disjuncture" between the "rationalist legal framework of the sentencing hearing" and the "subjective interests and concerns of victims" as being the physical and practical exclusion of victims from the process, the narrow legal focus of the sentencing hearing and the emotionality and subjective nature of VISs. The impacts are felt in different ways by the offender, the victim and the court; but there are mechanisms in place to seek to have the VISs work for all.

The book develops the story logically and in an orderly fashion. It is well constructed and contains helpful detail and references. It is organised in two parts. Chapters 1, 2 and 3 explore the nature and uses of VISs in the sentencing process: "A Victim Impact Statement", "The Use of Victim Impact Statements in the Determination of Penalty" and "The Expressive Function of Victim Impact Statements". Chapters 4, 5 and 6 examine the contentious aspects of VISs from the points of view of the court, the offender and the victim: "Victim Impact Statements and the Integrity of the Legal Proceedings", "Victim Impact Statements and the Offender's Entitlement to a Fair Hearing" and "Victims and the Contentious Nature of Victim Impact Statements".

Under these headings there is much exploration of competing views set against the legislative background of Australian and other jurisdictions and using, by way of illustration, the author's

observations of a number of homicide sentencing cases in the Supreme Court of New South Wales in 2007-2008. “The NSW study” (as she calls it) serves usefully to connect the theoretical and the practical in salutary ways. Each chapter concludes with a very useful short summary. There is a very comprehensive Bibliography and a helpful Index.

The book demonstrates that there are many shades of difference in both the conceptual approach to VISs and their practical application among the various jurisdictions discussed – principally the Australian Commonwealth and States and Territories, New Zealand, Canada and England and Wales, but with references to others.

Emeritus Professor David Brown of UNSW, in his Foreword, identifies the challenges that the development of VISs has thrown up, especially for the judiciary, and the ways in which they have been handled. This seems to be an inevitable consequence of having an as yet only partially resolved conflict between, on the one hand, the idea that the application of sentencing principles should not be influenced by personal emotional factors or the status and relationships of the victim (the “marginalisation” of victims mentioned by the author) and, on the other hand, the idea that a victim’s rights should include the ability to influence the sentencing outcome (beyond being a means of validating the victim’s experience and introducing restorative elements and therapeutic benefits).

Should VISs be subject to the rules of evidence – or at least the test of relevance? What is relevant for inclusion? Should the maker be subject to cross-examination or the contents of a VIS testable in other ways? Should there be constraints upon the emotional content and impact of a VIS? To what extent, if at all, should a VIS be permitted to affect the sentence to be imposed?

Perhaps the answer to the last question lies (as in New South Wales) in regarding the VIS as identifying the harm done by the offender to the community through the impact on a member or members of it. But it is clear, as this book shows, that there are still many difficult and unanswered questions about VISs for the practitioners of today and the policy makers of tomorrow.

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