Chapter 1: Introduction

The inclusion of the voices of victims within the adversarial system now practised in most English-speaking common-law nations has caused rancour in many criminal justice systems (Erez 2004; Garkawe 2006; Strang 2002; Walklate 2012). The argument against it, put simply, is that the adversarial system was developed to take the power of retribution out of the hands of vengeful victims, instead placing those accused of crimes under the jurisdiction of the State. The system was to mete out justice in accordance with what was deemed fair and just on behalf of the State to protect and advance its aims. While sparing victims the burden of prosecution, this process effectively relegated them to the status of witness, representing the State on behalf of society regarding a crime committed against one of its members, namely (and ironically) themselves (Wenzel & Thielman 2006).

Despite considerable resistance, over the past 30 years there has been a concerted global push by victim support and advocacy groups (see Van Ness 2005), aligning with politicians and the media, to press the case for the individual victim, who had become so marginalised within the criminal justice process as to have become largely 'invisible' (Erez, Ibarra & Downs 2011:36). The realisation that dissatisfaction with the criminal justice system (CJS) among vocal victims leads to systemic societal mistrust towards lawmakers, with subsequent negative consequences for the government, did not go unnoticed by those in politics and public policy. Mistrust towards the law aids criminal behaviour, in that it begins to go unreported (Strang 2002), resulting in some levels of criminal activity becoming, if grudgingly, accepted by society and ignored by authorities (Hendershott 2004; Moynihan 1993).

The systemic dismissive treatment towards victims, decried by vocal victims' rights movements operating within an increasingly conservative global Western political environment, became a burgeoning focus of government policymakers keen to engage grassroots support by promoting the legitimacy of the CJS. Procedural justice, an area of research developing concurrently, showed how

criminal justice processes that are experienced as inequitable, unjust, exclusive, morally questionable, non-transparent and disrespectful weaken communal trust in legal authorities (see Thibaut & Walker 1975, 1978). Anxious to lessen the cacophony of voices crying for improved rights for victims in general, the introduction of participatory rights for victims in the criminal justice process were intended to raise levels of victim satisfaction to ensure victims/witnesses would continue to engage. Importantly, in 1985 the United Nations put forward basic principles for governments to support victims of crime (VOC) whose rights had 'not been adequately recognised' (United Nations 1985), giving a strong directive to First World nations to reassess their treatment of victims within their judicial processes.

With this in mind, many common-law jurisdictions started enacting provisions for a victim impact statement (VIS), or victim personal statement (UK), offering victims a voice in sentencing proceedings. While the parameters for this voice were legislated differently depending on jurisdiction, the central tenet was the same—namely, that VOC be allowed to reveal to the court the impact the crime against them had on them personally.

From 1996, New South Wales (NSW), following similar legislation in other jurisdictions, passed a number of acts focusing on the rights of the victim (Johns 2002). The *Victims Rights Act 1996* (NSW) concerned itself with the provision of rights and services for VOC, introducing the VIS within The Charter of Rights for Victims of Crime s 6(14). The *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g) recognised 'the harm done to the victim of the crime and the community' as one of the purposes for which a court may impose sentence on an offender.

Changes to legislation[1] then extended the scope of the VIS to include a widening of the definition of *personal harm* to include psychological or psychiatric harm, also allowing for vulnerable victims to present their VIS to court via closed circuit television and for pictorial images such as photographs, drawings and other relevant images to be included within the VIS. During its

[1] See the Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2008 at <http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20080829006>.

second reading in the NSW Parliament, Greens member Ms Lee Rhiannon (NSW Parliament 29.10.08) stated that although the Greens supported the amendments, they were:

> concerned about the creeping use of victim impact statements in New South Wales. The Labor Government has … had a clear agenda to increase the role of victim impact statements in the New South Wales court system. This increase is occurring despite any evidence that victim impact statements have any impact on sentencing, crime rates or indeed the wellbeing of victims.[2]

Although not enacted prior to data collection for this study, most recently in 2014, the *Crimes (Sentencing Procedure) Amendment (Family Member Victim Impact Statement) Act 2014* (NSW) passed into NSW law, with s 28(4) amended to state:

> A victim impact statement given by a family victim may, on the application of the prosecutor and if the court considers it appropriate to do so, be considered and taken into account by a court in connection with the determination of the punishment for the offence on the basis that the harmful impact of the primary victim's death on the members of the primary victim's immediate family is an aspect of harm done to the community.

The passing of this amendment, first tabled but not pursued by NSW Liberal Attorney-General Greg Smith in 2011, resulted from public pressure to allow the impact on families to be considered in sentencing death matters following the tragic, random, fatal attack on Sydney teenager Thomas Kelly.[3] However, as the Judicial Commission of NSW (2014:12–838) cautions, it will be a question for the courts to consider the level of recognition of the harm caused to the victim and the community, cognisant of the fact that consideration 'is limited by the common law rule that a court can only have regard to the consequences of an

[2] See Hansard 29 October 2008 3:45 at: <www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LC20081029034>.
[3] See: Hall, L and Whitbourn, M (2014) 'NSW Cabinet Backs Laws to Allow Family of Homicide Victims to Have Say in Killer's Sentencing', *The Sydney Morning Herald,* 13 March 2014 <www.smh.com.au/nsw-cabinet-backs-laws-to-allow-family-of-homicide-victims-to-have-say-in-killers-sentencing-20140313-34p3w.html>.

offence that were intended or could reasonably have been foreseen' (see Appendix 8 for a detailed description of the VIS provision in NSW.)[4]

It was initially argued that the purpose of the VIS was threefold: (1) to provide VOC with a participatory voice in the legal proceedings in order for them to express to the court the impact of the crime against them, (2) to allow a focus on the victim rather than on the defendant and (3) to provide a therapeutic aid to victim recovery (Erez 1999). However, this victim-centric position is not reflected in the wording of current NSW legislation, which simply offers VOC the opportunity to provide the court with information regarding the crime's impact. This is made clear in instructions given to VOC in the NSW Victim Impact Statement Information Package (VISIP 2013/1998):

> A victim impact statement is a written statement about the impact that a crime has had on the victim … A victim impact statement can provide the victim with an opportunity to participate in the criminal justice process by informing the court about the effects of the crime on them. (VISIP 2013:3)

VOC are told in the VISIP that the content of their VIS can reflect their 'thoughts, feelings and experiences' to include 'any ongoing effects' in their lives (VISIP 2013:6). However, within the legislation, as victim-centric goals are not mentioned, it appears that the purpose of the VIS remains instrumental—namely, to enhance particular aims of sentencing, retribution and rehabilitation and to serve public policy concerns aimed at alleviating victim—and greater public—dissatisfaction with the CJS (Booth 2005). That is to say, victim recovery is not a legitimate concern of the VIS, nor the focus of the police or the Office of the Director of Public Prosecutions (ODPP) when prosecuting matters.

Brennan (2001:11) more cynically suggests the concept of the victim's voice is merely a diversionary tactic to make the public 'ignore or forget' the State's inability to provide security for its people, by giving them a more active role in the prosecution process. Pollard (2000) also sees the VIS as political

[4] See 'Special Bulletin 7 - Crimes (Sentencing Procedure) Amendment (Family Member Victim Impact Statement) Act 2014' for full explanation of the advice pertaining to the execution of the new provisions (May 2015) <www.judcom.nsw.gov.au/publications/benchbks/sentencing/special_bulletin_07.html>.

management of public frustration and as merely adding to the burden of responsibilities already shouldered by the victim. Walklate (2012:109) suggests that although policy directives that 'court compassion' may appear to serve the interests of the victim, in real terms rebalancing the CJS with the victim in mind has produced little practical improvement. She attests that the adversarial system is institutionally bound to consider the case made against the offender by the State, not by the victim; thus, attempts to graft on victim-centric measures reveal a conceptual failure on the part of victim-oriented policymakers to recognise the incompatibility of purpose.

Since the inception of VIS schemes, a stream of literature has discussed the constitutional and philosophical complexities of giving the victim a voice, which, though seeming sensible as a concept and morally fair, becomes far more complex in practice (Shapland & Hall 2010). The victim's voice is subjective, describing personal experience. How is a court to evaluate and process such information (see Kirchengast 2009; Sanders et al 2001; Sankoff & Wansbrough 2006)? To restrain it or ignore it might be seen to be cruel, even immoral, but to accept it and give it credence in determining sentence is potentially dangerous to proportionality.

Working on the assumption that it is highly unlikely VIS legislation will be repealed, some legal scholars, attempting to forward debates about the probative function of the VIS, have sought to address the practicalities of courts incorporating VIS in a more uniform, less idiosyncratic fashion. Kirchengast (2009:18) in his 'restorative model of proportionality' suggests the VIS should be sworn in, and, as sworn testimony, should then be treated as any other evidence, also argued by Garkawe (2007). In NSW, the VIS remains unsworn.

Various scholars have addressed the ambiguity of VIS purpose (Hoyle 2011; Lens, Pemberton & Bogaerts 2013; Rock 2010). Procedural justice (Tyler 2006a) describes the victim's voice as a mechanism of process control, where the victim is afforded some input in the sentencing process. What it does not provide victims, however, is decision control, in that the final decision regarding the offender remains with the State and the responsibility for sentencing

judgement with its officials (Thibaut & Walker 1975). Despite clear intentions to address a particular and identified need—namely, the lack of focus on the victim in the CJS (Sankoff & Wansbrough 2006), the nature of the intended gains of the VIS remain less defined. The opportunity for VOC to be part of the sentencing process for ill-defined and nebulous outcomes remains a concern (Bandes 2009; Hoyle 2011; Wemmers 2011).

The VIS is not evidence. It is not a statement of facts about the crime as it occurred. Rather, it is a personal reflection on the consequential damage caused by the crime. It is a retrospective, subjective document, written after events have been processed through the victim's filters, fashioned by all prior life experiences and understandings. The VIS documents a transformation from existence pre-crime to post-crime. For each VOC, this experience is unique, for although some may share similarities of experiences and impacts suffered, the degree of effect will be individual based on multivariate factors.

The two accepted purposes of the VIS have been described as *informative* in that it provides useful information to the sentencing court for assessment when determining judgement (Roberts & Edgar 2006; Shackel 2011; VSA 2009) and as *expressive* in that the VIS allows VOC to share the personal consequences of the impact of the crime with both the State and the offender (Roberts & Erez 2004). The ongoing concern dogging the VIS is its duality of purpose in the minds of VOC and those in the CJS; the VIS attempts to serve opposing masters, one operating within the paradigm of procedural and therapeutic justice to enhance victim wellbeing, the other retributive justice to enhance sentencing aims (Erez 2004).

Its expressive function, described by Erez (2004), comprises two elements:

- to inform the court of the objective seriousness of the crime in order for it to pass judgement with regard to, in limited circumstances (see Garkawe 2007), the personal consequences of the crime on the victim—functional element

- to allow victims the opportunity to participate and for their suffering to be acknowledged and validated within sentencing proceedings—therapeutic element.

The potential probative value of the VIS to inform sentencing decisions is perhaps its poisoned chalice. It is understandable that VOC, whose lives have been changed forever, would wish the VIS to be taken into account at sentencing. However, if the purpose of the VIS is to inform the court of the consequences of the crime in order to affect sentencing, the subjective content of the VIS becomes open to challenge and drags the VIS and the victim's experience into a realm of truth against which the prosecution and defence can take arms, negating any therapeutic benefit it might provide.

Although the therapeutic aim of the VIS is not tangible, it is implied, built on notions of redressing the balance, shifting the focus from the offender, giving something to the victim (Walklate 2007a). If this cannot be fully achieved through convicting and sentencing the offender, then to symbolically satisfy these public needs, the victim must be offered something more, something to fortify them, a recognition that they matter.

Over the past 150 years, the adversarial process has developed into a binary conflict between the State (acting on behalf of the community) and the defendant.[5] As such, both prosecution and defence can legitimately present any information that might assist their case (see Kirchengast 2011). For the prosecution, the victim is only necessary if required to establish its case (Hoyle 2011). The defence's task is to disprove, minimise or cast doubt on the crime charged, often by challenging the victim's account. Thus, the overarching focus of the prosecution and defence remain on the offender, with the victim merely a potential tool of both (Sankoff & Wansbrough 2006). This attitude towards the victim's status continues into sentencing proceedings, where participatory rights afforded the victim still preclude their input in decision-making and affirm their

[5] Garkawe (2007:114) suggests that prior to the mid-nineteenth century, the criminal justice system, although still adversarial in nature, 'consisted primarily of private prosecutions by victims of defendants'.

status as outside the main business of the sentencing court (Booth 2013a; Englebrecht 2012).

The desire of victims to participate in the CJS has been well documented (Erez, Kichling & Wemmers 2011; Wemmers & Cyr 2006), and the frustrations with the seeming inequity and negative psychological and emotional consequences of victim exclusion from court matters regarding crimes they have personally suffered are a potent driver for the victims' rights movement to demand further victim inclusion. Concurrent expansion of research in solution-focused emotional and psychological therapeutic theory (Erez, Kichling & Wemmers 2011), influencing law, social understanding and political policy, has affected law processes, which have consequently adapted to accommodate theories of therapeutic jurisprudence (see Wexler & Winick 1996) and to include provisions designed to provide restorative and therapeutic opportunities for both victims and offenders (Walklate 2007a). However, it is one thing to provide a therapeutic opportunity, another to ensure its therapeutic consequences.

The literature remains divided regarding whether therapeutic benefits can be attributed to the VIS. Erez, Roeger and Morgan (1994) were the first to point to the personal therapeutic benefits for the victim. This expressive therapeutic benefit continues to be a theme in much VIS literature (Cassell 2009; Erez 2004; Giannini 2008). However, other scholars suggest that engagement in the VIS process can be antitherapeutic, putting VOC at risk of being revictimised if their voices are curtailed or the extent of their harms minimised or discounted (Bandes 2009; de Mesmaecker 2012; Herman 2003; Hinton 1995). Despite this ongoing argument, the actual therapeutic benefits of the VIS are rarely described beyond vague terms of making victims feel better (Leverick, Chalmers & Duff 2007) or of being cathartic (Bandes 2009; Kirchengast 2008). It has been suggested that using psychological testing to measure the therapeutic benefits of the VIS against states of anxiety or levels of anger (Pemberton & Raynaers 2011; Wemmers 2011) could serve to counter arguments that the VIS has little restorative or healing value for the victim (Hoyle 2011; Lens 2014). Whether the experience of making a VIS ameliorates the victim's level of psychological distress post-sentencing proceedings was of

interest in this study. As already noted, whether legal processes can be deemed valid on the basis that they provide the potential for a therapeutic outcome remains contentious. More-recent literature is critical of the development of therapeutic processes within legal settings where they appear to carry little weight in the decisions being made (Kirchengast 2014, Wexler 2008, Erez, Kichling & Wemmers 2011). As the present study was interested in the therapeutic consequences of the VIS, it is necessary to define the term *therapeutic* as understood by the study. Therapeutic jurisprudence (Wexler & Winnick 1996) focuses on the impact of legal processes and sociolegal interactions on the emotional life and psychological wellbeing of all those engaged with the law, and recognises the law as a social force that can produce therapeutic or antitherapeutic consequences. In this study, the therapeutic consequence of the VIS is measured by VOC perceptions of the effect on their emotional life and psychological wellbeing (and for VSP on that of their clients) of the opportunity to make a VIS.

Also of interest, from the perspective of procedural justice, was the level of access, information, support, equity and respect the VIS process affords victims. Previous studies seeking to evaluate VIS efficacy have often been skewed towards evidence supplied by court workers, police, prosecution, defence and judiciary (Baptiste 2004; Department of Justice Canada 2005; Erez & Rogers 1999a). Perhaps in an effort to shield VOC from further harm, their firsthand experiences have either been ignored or examined in terms of logistical process rather than therapeutic outcome (Erez, Kichling & Wemmers 2011). Previous VIS studies have often looked at particular victim groups, such as family victims (Englebrecht 2014; Booth 2013a; Rock 2010), female victims of sexual assault (Miller 2007 & 2013; Konradi & Burger 2000), victims of sexual assault and domestic violence (Schuster & Propen 2006) or child sexual assault victims (Shackel 2011). Large-scale studies of VIS across the wider VOC population have tended to favour survey data-collection techniques with far fewer numbers of VOC participating in in-depth interviews (Leverick, Chalmers & Duff 2007; VSA 2009). Although Lens et al's (2014) study, which was interested in which factors contribute to VIS take-up and which included victims' perspectives of the purpose of the VIS, used a broad-based sample of 170

VOC, data was gathered using structured survey questionnaires. Further analysis and consideration of existing VIS literature is presented in Chapters 4 and 5; however, to date there have been few qualitative research studies featuring in-depth interviews performed with large, broad-based samples of VOC with the sole interest being their personal experience of the VIS process. Despite regular claims that the VIS is therapeutic and helps the victim 'recover from the crime' (NCVOC 2008:1), little research has assessed victims' perceptions of these claims. And while some practitioners point to potential emotional damage caused to victims mismanaged by the CJS due to inconsistencies in VIS handling (de Mesmaecker 2013; Herman 2005; Nunn 2007), this too has been little explored from the victim's perspective. A more detailed analysis and consideration of VIS literature is presented in Chapters 4 and 5.

With this study, I aimed to address such gaps in current VIS research and knowledge. In particular, I wished to know whether some VOC community are better, or more poorly, served by the VIS process (Brennan 2001). Although it is important to know how well the provision of the VIS is working, it is also important to understand who uses it, who does not and why, if the needs of all VOC are to be equally supported. As the VIS is a document charting not only physical wounds but also the deeper psychological damage and ongoing hurts experienced by VOC, any evaluation of the efficacy of the VIS must reflect the complexity of all the issues brought into play.

In sum, this study sought to understand the subtleties of the VIS experience for VOC, based on an understanding that experience of the VIS may differ due to interpersonal relationships, internal understandings, procedural experience and socio-economic and cultural backgrounds (Inglis 2005; Ivey, D'Andrea & Ivey 2011). Through this study, I aimed to understand the nature of any benefits or harms of the VIS for the victim, not its effect on the court or the offender. I maintained a victim-centric focus, exploring the victim's holistic understanding of

the VIS experience, rather than exploring how victim participation affects the criminal justice process, sentencing and their integrity.[6]

The five main research questions were as follows:

1. What motivates victims to make a VIS or inhibits them from doing so?
2. What is the experience of writing and presenting a VIS from the victim's perspective?
3. Do legal processes affect the victim's experience of the VIS?
4. Do the personal characteristics of the victim and the nature of their personal relationships affect the VIS process and experience?
5. Does the VIS provide any therapeutic benefits for the victim and, if so, what is the nature of those benefits?

This chapter has provided a general background to the study. Chapter 2 presents the research questions, study aims and methodology. Chapter 3 presents the quantitative findings. Chapters 4 and 5 present the qualitative findings, and Chapter 6 concludes the thesis with a discussion of the results, concerns and recommendations for future research and future practice.

[6] Erez (2004) suggests that the emphasis on the VIS as an instrumental tool for providing information to judges in sentencing has derailed the original purpose of VIS as a vehicle for victim voice and redirected research to focus on whether the VIS meets the needs of the court or whether its inclusion affects sentencing judgements. She argues that this shift in the academic debate ignores the expressive purpose of the VIS as a tool for victims to express to the court the harms done to them and thus 'the therapeutic value of such expression has been forgotten'.