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A Survey of Crown Counsel in Ontario

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Perceptions of the Use of Victim Impact Statements in Canada:

A Survey of Crown Counsel in Ontario

Mihael Ami Cole

Submitted to the Department of Criminology, University of Ottawa, In Partial
Fulfillment of the Requirements for the Degree of Master of Criminology (M.A.)

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Abstract

This thesis examines the use of victim impact statements (VIS) in Canada by means of a questionnaire completed by Crown Attorneys in the province of Ontario. The thesis begins with a brief historical overview of the emergence of this sentencing tool, followed by a detailed examination of the current victim impact statement provisions in the Criminal Code. The paper then moves towards identifying areas of consensus in the research literature surrounding victim impact statements (such as the infrequency of their use and the degree of public and judicial support for them). The thesis then identifies areas of conflict surrounding victim impact statements (such as whether they are worth the time and expense to the criminal justice system and the victim, and what ways they might infringe on the rights of the offender). It then outlines the methodology used in the construction of the survey and describes the sample of Crown Counsel participating in this study. The thesis then summarizes the results of the questionnaire. Some of the findings include: a notable increase in the use of victim impact statements in trials as opposed to cases with guilty pleas; that plea bargaining and informal contact with the victim do not eliminate the need for victim impact statements; that the most important purposes of victim impact statements are to provide information about the impact of the crime on the victim and to provide the victim with an opportunity to participate in sentencing; that the most common reasons victims choose not to make a victim impact statement is because they do not want to get involved in sentencing and they do not think it will make any difference; and that victim impact statements can and often do have new or different information relevant to sentence. The paper then explores the significance of

the results of the survey for future research and judicial practice. The thesis concludes with a brief summary of the findings.

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Chapter One - Introduction

Over the past three decades, a renewed interest in victims of crime has surfaced, and we have seen "various reforms designed to alleviate the problems for victims resulting from crime and from encounters with the criminal justice system" (Erez, 1990:19). These initiatives have emphasized the need for victims to play a more important role in the judicial process and have focused on mechanisms that allow them to express their concerns and have these concerns taken into account. One such initiative, first introduced in the United States in 1976, is the Victim Impact Statement (VIS) scheme, which seeks to give victims a greater voice in the sentencing process by allowing them to describe the effects of the crime upon their lives and "to ensure that a sentencing judge is informed of those effects" (Ashworth, 1993:499-500). In Canada, legislative amendments (1988) pertaining to victim impact statements were designed to improve victim satisfaction with the justice system by acting as "a cathartic process, assisting in bringing some degree of closure", as well as giving victims "a sense of participation, some small space within which to inject themselves into what is otherwise an impersonal process" (Paciocco, 1999:371-372).

However, despite this attempt to improve upon and expand the role of the victim within sentencing proceedings, research suggests that victim impact statements are rarely submitted by crime victims, and seldom have an effect on sentencing patterns. In an attempt to address concerns that some victims have with the way the statements are used and to stimulate an increase in victim participation, in 1999, the Canadian Federal Parliament introduced amendments to previous (1988) victim impact statement legislation which included, among other things, the right to present a victim impact

statement orally before the court at the time of sentencing. This thesis seeks to assess and explore three core issues surrounding the current use of victim impact statements.

Specifically it aims:

- 1) To explore the perceptions and experiences of a key group of criminal justice professionals (Crown Counsel) with respect to the nature and use of victim impact statements;
- 2) To explore the perceptions of Crown Counsel regarding the effectiveness of the 1999 legislative amendments; and
- 3) To help explain why victim impact statements are not submitted more often by victims of crime at sentencing.

Chapter two of this thesis will provide a brief overview of the history of the role of the victim in the criminal justice system. It will also examine the origins of victim impact statement legislation in Canada and in other jurisdictions. It will then analyze the legislation as it is currently constructed. **Chapter three** will showcase areas of consensus surrounding research into victim impact statements, including differentiating all victim participation from victim impact statements in particular, the public and judicial support for victim impact statements, the effect of victim impact statements on sentencing, and the frequency of their use. It will also focus on areas of conflict in victim impact statement practice and research, including the balance between victim and offender rights, whether victim impact statements increase victim satisfaction, and whether victim impact statements are worth the time and expense involved. **Chapter**

four will describe the methodology of the research, the response rate of the survey, and will present the findings from the survey. **Chapter five** will focus on the implications of the study's findings and their implications for both research and practice. Finally, **chapter six** will conclude with a brief overview of all issues raised in this paper.

Chapter 2 - History and Legislation

2.0 Role of the Victim in the Criminal Justice System

In early colonial times, North American criminal justice systems functioned "without effective police forces or prosecutors", and victims "did their own investigation, paid for arrest warrants, and then paid an attorney to prosecute the case" (Finn-DeLuca, 1994:403). Victims were the central and driving force behind most prosecutions and their role could be described as extremely active. They made the majority of crucial decisions and often emphasized the importance of restitution for themselves and punishment for offenders over other rationales for prosecution and sentencing.

By the 19th century, however, public prosecutors began to take over the victim's responsibilities with respect to the presentation of offences. Prosecutors became society's advocates, and shifted the focus of the criminal justice system away from restitution for the victim to other purposes that had a greater societal interest such as punishment for the offender and denunciation of the offence. The participation of victims in the crime process was significantly reduced, to the point where their only substantial purpose in a criminal justice proceeding was to testify for the prosecution as a witness against the accused. The role of the victim was undermined still further with the advent of plea bargaining, a process which, in many cases, eliminated the need for any substantive victim input. Plea bargaining allowed prosecutors, offenders and their counsel to arrange a plea to submit before the court, in some cases even without communication with the victim.

Increasing recognition of the devaluation of the victim's role in the criminal justice process has, in large part, led to the rise of the victims' rights movement (Rubel,

1986:226). The victims' rights movement seeks to increase the influence of the victim by returning to the era in which victims had a variety of mechanisms at their disposal to provide input on proceedings and to emphasize the need for restitution to compensate for their own victimizations. Victim rights' advocates argue that victims must go beyond merely testifying at trial, and insist that they should "actually participate in or influence the disposition itself" (Ibid) through various mechanisms. Foremost among these means of participating is the advent of the victim impact statement, a tool which enables victims to submit a statement to a sentencing court, after a finding of guilt, regarding the effects of the crime upon their lives.

2.1 Origins of Victim Impact Statement Legislation in Canada:

2.1.1 Case Law History & Commission Recommendations:

Why was victim impact statement legislation enacted in Canada? In *R v. Antler* (1982), a child sex-abuse case, Madam Justice McLachlin considered an application by counsel to allow the victim to make a submission regarding the emotional and physical effects that the crime had had upon her. The judge responded by stating that "*the petitioner has no locus standi which would authorize her to invoke this court's jurisdiction to compel the Provincial Judge to receive her submission.*" and that "*the Criminal Code contemplates prosecution of the accused by the Crown. It does not accord to persons affected by an offence status as parties to the proceeding against the accused...nor does it grant to them the right to make representations against the accused independent of those which the Crown chooses to put forward. This court cannot accord status which the Criminal Code does not accord; that must be left to Parliament*".

Similarly, in *R. v. Robinson (1983)*, a case involving a stabbing death, the judge declined to hear statements from the parents of the victim because he reasoned that:

...I must, as the judge, confine myself to what is relevant to the decision that I face. My sympathy for the parents must be obvious. The consequences for them, I accept, must be and have been dreadful, but I must be concerned more with the nature and quality of the act which caused the death than with its consequences for those who are left behind to grieve. My decision must be the same whether the victim was, as I have suggested here, a beloved daughter whose death is a tragedy that time alone can diminish or if she was alone and friendless with no one to mourn her loss. I must be concerned principally with other things than the effect upon those who remain.

Both of these decisions followed the strict letter of the law which saw prosecutions as bipartite proceedings exclusively between the accused and the state. The conventional mid-twentieth century approach saw criminal offences as "offences against the state, that they should be prosecuted to the extent that the public interest requires it, and that the sentence should be passed in the public interest" (Ashworth, 1993:503). Victims had no standing in the determination of sanctions because they were seen as likely to be "too emotional and irrational to be involved in their offender's punishment" (Roach, 1999:290). Similarly, their input with regard to restitution was also significantly muted.

This line of thinking however, eventually began to change. In the United States in 1982, President Reagan established the President's Task Force on Victims of Crime

which recommended the establishment of victim impact statement schemes and concluded that:

Victims, no less than defendants, are entitled to their day in court. Victims, no less than defendants, are entitled to have their views considered. A judge cannot evaluate the seriousness of a defendant's conduct without knowing how the crime has burdened the victim. A judge cannot reach an informed determination of the danger posed by the defendant without hearing from the person he has victimized. (Finn-Deluca citing President's Task Force on Victims of Crime, 1982:76-77).

Similarly, in Canada in 1983, the Federal-Provincial Task Force on Justice for Victims of Crime recommended that:

The Criminal Code (s.653) be amended to require judges to consider restitution in all appropriate cases and to provide an opportunity to victims to make representations to the court regarding their ascertainable losses (Recommendation 8, 1983:156)

and that:

The Criminal Code be amended to permit the introduction of a victim impact statement to be considered at the time of sentencing (Recommendation 21, 1983:157).

In November 1985, the United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power which Canada, among many nations, sponsored (Cohen, 1998:9). This declaration "called upon Member States

to implement the philosophy underlying it through the establishment of policies, programs and legislation" (Ibid).

As well, in 1987, the Canadian Sentencing Commission recommended that:

Where possible, prior to the acceptance of a plea negotiation, crown counsel be required to receive and consider a statement of the facts of the offence and its impact upon the victim (Canadian Sentencing Commission, Recommendation 13.2, 1987:32)

Finally, in 1988, the report of the Standing Committee on Justice and Solicitor General in its review of sentencing, conditional release and related aspects of corrections recommended that, at a minimum, victims should have the:

...right to seek compensation and restitution, the right to submit a victim impact statement and the right to be kept informed about various pre-trial, trial, and post-trial proceedings. Basic information should identify who is responsible for providing it and where further information may be obtained (Recommendation 3, 1988:245).

As well, with respect to restitution:

The Committee recommends that section 653(b) of the Criminal Code (contained in Bill-C89) be clarified to ensure that restitution for bodily injuries may be ordered in an amount up to the value of all pecuniary damages (Recommendation 20).

The Committee recommends that the federal government enact legislation, and/or contribute support to provincial/territorial governments, to

enhance civil enforcement of restitution orders with a view to relieving individual victims of this burden (Recommendation 21).

... that a restitution order be imposed when the offence involves loss or damage to an individual victim... (Recommendation 22(a), 1988:252)

2.1.2 Legislation:

By 1988, based on these recommendations and as a result of pressure from victim advocacy groups, some members of the judiciary, and the media, *An Act To Amend the Criminal Code (Victims of Crime)*, RSC 1985, c.23 (4th Supp.), s.7 was passed by the Canadian Parliament. This Act, and subsequent amendments to it, gave victims the right to submit Victim Impact Statements at a sentencing hearing as described under section **722 of the Criminal Code:**

722. (1) For the purpose of determining the sentence to be imposed on an offender or whether the offender should be charged pursuant to section 730 in respect of any offence, the court shall consider any statement that may have been prepared in accordance with subsection (2) of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence.

(2) A statement referred to in subsection (1) must be

- (a) prepared in writing in the form and in accordance with the procedures established by a program designated for that purpose by the lieutenant governor in council of the province in which the court is exercising its jurisdiction; and
- (b) filed with the court.

(2.1) The court shall, on the request of a victim, permit the victim to read a statement prepared and filed in accordance with subsection (2), or to present the statement in any other manner that the court considers appropriate.

(3) Whether or not a statement has been prepared and filed in accordance with subsection (2), the court may consider any other evidence concerning any victim of the offence for the purpose of determining the sentence to be imposed on the offender or whether the offender should be discharged under section 730.

(4) For the purposes of this section and section 722.2, "victim", in relation to an offence,

- (a) means a person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence; and
- (b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement referred to in subsection (1), includes the spouse or any relative of that person, anyone who has in law or fact the custody of that person or is responsible for the care or support of that person or any dependant of that person. 1995, c.22, s.6; 1999, c.25, s.17.

722.1 The clerk of the court shall provide a copy of a statement referred to in subsection 722(1), as soon as practicable after a finding of guilt, to the offender or counsel for the offender, and to the prosecutor. 1995, c. 22, s. 6; 1999, c. 25, s. 18

722.2 (1) As soon as practicable after a finding of guilt and in any event before imposing sentence, the court shall inquire of the prosecutor or a victim of the offence, or any person representing a victim of the offence, whether the victim or victims have been advised of the opportunity to prepare a statement referred to in subsection 722(1).

(2) On application of the prosecutor or a victim or on its own motion, the court may adjourn the proceedings to permit the victim to prepare a statement referred to in subsection 722(1) or to present evidence in accordance with subsection 722(3), if the court is satisfied that the adjournment would not interfere with the proper administration of justice. 1999, c. 25, s. 18

2.1.3 Omissions in Legislation:

In the above section, three omissions in the movement to empower victims are of note. First, while victims can address the physical and emotional effects that the offence had upon them, they may not:

- "1) [make] reference to the offender's previous criminal record, or criminal behaviour for which charges were either laid or pursued;
- 2) [provide] information on the case that might be regarded as evidence
- 3) [make] responses to statements made by the Defense during the trial which the victim regards as inaccurate and/or offensive; and,
- 4) [make] suggestions for specific conditions of sentence" (Meredith & Paquette, 2001:7)

Second, while judges must consider victim impact statements in the determination of sentence, they are not bound to change the quantum or the nature of the sanction imposed. While victim impact statements do provide a mechanism for victims to describe the emotional and physical damage they have experienced, the ultimate authority with respect to determining sentence still rests with judges.

The third omission focuses on the question of which victims may submit a victim impact statement. In *R. v. Curtis (1992)*, an assault case, the victim's wife wanted to testify as to her emotional stress arising from the crime committed against her husband. The court ruled that she could not testify because she was not directly affected by the offense itself. This legal precedent, among others, led to section 722 being amended (in 1999) to also include subsection (4). As a result, 722(4) does not provide for all those affected to provide victim impact statements, but rather only those individuals immediately affected by the act itself, or in their absence due to death or incapacitation, a

relative or spouse. Families of victims and other indirectly affected parties cannot provide victim impact statements when the victims are capable of providing victim impact statement themselves.

Chapter 3 - Areas of Consensus and Conflict

3.0 Areas of Consensus:

3.0.1 Differentiating Victim Participation from Victim Impact Statements:

In assessing the points of consensus in this area it is first important to note the distinction between victim participation in the justice system in general and the areas of consensus that have been reached about victim impact statements in particular.

Sanders, Hoyle, Morgan, & Cape (2001), have identified six areas of general consensus regarding victim participation in the criminal justice system. They suggest that the following purposes of victim participation are accepted by commentators on all sides of the debate:

- 1) giving victims a "voice for therapeutic purposes";
- 2) enabling their interests and/or views to be taken into account in decision making;
- 3) ensuring that victims are treated with respect by criminal justice agencies;
- 4) reducing stress for victims of criminal proceedings;
- 5) increasing victim satisfaction with the criminal justice system;
- 6) increasing victim co-operation, as a result of any of the above objectives being fulfilled (Sanders et al., 2001:448-449).

These purposes all reflect a common theme of a need to expand the role of victims in the justice system and the belief that this expansion will ultimately lead to increased victim satisfaction with the criminal justice system. In other words, "when we talk about victim participation, we must recognize that we can mean victims being encouraged, facilitated, entitled, or even required to become involved. It is not a unitary phenomenon" (Edwards, 2001:44).

However, examining a specific victim participation initiative such as victim impact statements, is much more problematic. Problems arise with respect to the potential sacrificing of offender rights, economic costs, sentencing disparities, and retributive sentences. Consequently, areas of consensus surrounding victim impact statements are generally focused on outcomes and experiences for victims, rather than reasons for their implementation.

3.0.2 *Public & Judicial Support:*

In nearly every study conducted on victim impact statements to date, the majority of legal practitioners and members of the judiciary, at least publicly, support their existence in some form. They believe that "victims suffer as a result of crime. They are a reason for the existence and effectiveness of criminal justice. Their personal interests are affected by sentencing and related decisions. For these reasons increasingly it is realized that their views must be considered" (Waller, 1988:1). Therefore, "by allowing victims to participate, the criminal justice system hopes to increase its 'consumers' satisfaction and to encourage involvement and cooperation, thereby enhancing the efficiency of the system" (Erez & Tontodonato, 1992:394). In a Toronto study, 93% of the sixty prosecutors interviewed saw a useful role for victim impact statements in the criminal justice system (Giliberti, 1990:26). In a similar New York study (Henley, Davis & Smith, 1994), 8 judges and 44 prosecutors were asked for their opinions about the *principle* of considering victim impact statements at sentencing. Most of the judges and all but one of the prosecutors favoured the use of these statements in sentencing. As one judge remarked, victim impact statements are important because "judges sometimes lose

sight of humanitarian aspects of defendants and victims. Both should be treated like human beings and not just cases" (cited in Henley, Davis & Smith, 1994:90).

3.0.3 *Effect on Sentencing:*

Victim impact statements have the potential to be an extremely powerful medium through which a victim can describe the impact of the crime against them. Despite this potential, as well as significant public and legal support for victim impact statements, there is little evidence to suggest that they have much of an effect on sentencing patterns. While there has not been a lot of research in this area, of the data collected, the effect of "victims' input on sentence outcome is inconclusive. At best it suggests that victim input has only a limited effect" (Erez, 1994:22). Furthermore, the lack of impact of victim impact statements on sentencing patterns has also been demonstrated by the literature. Prosecutors in the New York study were skeptical about the degree to which judges actually considered victim impact in sentencing decisions. Two judges stated that "there was not much in the impact statements they had seen", and another judge said that "the impact statements were unlikely to affect the routine dispositions in his court" (Henley, Davis & Smith, 1994:90). Prosecutors in other studies have also "expressed skepticism about judges' interest in the impact of crime on victims, and whether judges actually consider victim impact statements in sentencing decisions" (Erez, 1994:24). As well, as Sanders et al. suggest, it is clear that defense lawyers seldom challenge the factual basis of victim impact statements because they rarely feel that the contents of these statements will have an adverse effect on the sentence eventually imposed on their clients (Sanders et al., 2001:454).

Why do criminal justice decision makers (and victims' advocates) support the use of victim impact statements if they do not affect sentencing? Three distinct rationales exist. First, "despite their infrequent use, victim impact statements are politically popular" (Roach, 1999:291). A South Australia study found that 96% of victims wanted their victim impact statements to be used in sentencing (Erez, Roeger & Morgan, 1997:49), while victims participating in five separate Canadian studies "reported a high level of satisfaction with the victim impact statement programs" (Giliberti, 1990:17). Accordingly, dismissing the value of victim impact statements may attract criticisms from victims' rights advocacy groups and the media. In countries where the judiciary is elected (e.g. the United States), avoiding this pressure is essential for political and professional advancement.

Second, victim impact statements have "rhetorical and political appeal" (Edwards, 2001:44) and that "the rhetoric seems worthy... and there is little desire to let rhetoric interfere with reality" (Sanders et al., 2001:454). If there is a common understanding that greater victim participation in the criminal justice system is a good thing, then any mechanism such as victim impact statements that allows victims to participate must also be good. Third, the most common reason for support is that "most cases are typical cases, that is the impact of the crime on the victim is as one would expect given the nature and seriousness of the crime" (Sanders et al., 2001:454). Hence, victim impact statements are important because they reinforce judges' expectations of the degree to which victims have mentally and physically suffered. Accordingly, sentence lengths in cases in which where a victim impact statement was presented to the court do not differ from cases where they were not submitted.

3.0.4 *Frequency of Use:*

The final area of consensus among legal scholars concerns the frequency of victim impact statement use. In a survey conducted in South Australia, researchers found that only 36% of the sampled victims had provided information for a victim impact statement and that 68% of the victims who had provided new material for the victim impact statement reported that it had never been updated (Erez, Roeger & Morgan, 1997:49). Other studies indicate that only "about 30% [of victims] make a victim impact statement" (Sanders et al., 2001:450) and that "very few statements are used in court" (Giliberti, 1990:23), while still other studies have found that "less than 18% of victims or families attend sentencing, only 15% submit written statements, and only 9% present oral statements where permitted" (Finn-Deluca, 1994:423). If "non co-operation by victims has long been identified as an obstacle to efficient processing of offenders" (Erez, Roeger & Morgan, 1997:41), why is victim participation not a more prevalent part of the criminal justice system? Sanders et al., (2001) suggest that low victim participation rates are a direct result of the structure of the criminal justice system. In addition to coping with their victimization(s), in many criminal proceedings victims are asked to perform a multitude of tasks, including making statements to police, statements to crown attorneys, testifying at preliminary hearings, and testifying at trials. These tasks, along with an absence of effective systemic support mechanisms, often lead victims to feel isolated and alienated from the criminal justice system. This is why most feel that "the best way forward is to improve victim services rather than rely on new procedural rights for victims" (Sanders et al., 2001:449).

Some attempts have been made to address these concerns, including the creation of victim services which were "designed to minimize the administrative inconveniences associated with participation in the criminal proceedings" (McLeod, 1986:501) and the so-called *One Stop Shop (OSS)* scheme which "committed the police to providing information to victims regarding the progress of their cases" (Sanders et al., 2001:449). Yet, even in these attempts to assist victims with the procedural nuances of court proceedings, more than half of all victims who sought information wanted to discuss what they had been told, but less than 20% were actually given the opportunity to do so (Sanders et al., 2001:452). These findings become even more disturbing when one considers that victims often indicate that the most important aspects of participating in judicial proceedings are the following: to "be given the opportunity to talk with someone about the offence and its effects; the provision of useful information about the case; the opportunity to explain to the court the effects of the crime; and the opportunity to contact someone in the event of a problem arising" (Giliberti, 1990:17). The relative lack of success of these and other initiatives suggests that the absence of an effective way to assist victims in coping with judicial proceedings still constitutes one of the most important hurdles that progressive and evolving justice systems must seek to overcome.

3.1 Areas of Conflict:

3.1.1 Victim Needs vs. Offender Rights:

Perhaps the foremost point of conflict surrounding victim impact statements is focused on the issue of satisfying victim needs without sacrificing offender rights and undermining traditional sentencing goals. As Justice Wood articulated:

The dilemma facing the sentencing court [that is presented with a victim impact statement] is to balance a proper consideration of the consequences of the criminal act against the reality that the criminal justice system was never designed or intended to heal the suffering of the victims of crime. (cited in Paciocco, 1999:372)

It is clear that by enacting victim impact statement legislation and other victims' rights legislation, the federal government has sought to bridge the gap between the objectives of sentencing identified in Sections 718¹ and 718.2² of the Criminal Code, and victim suffering. Consequently, criminal justice has made a move from "individualization of the offender to individualization of the victim" (Erez citing Wolfgang, 1982:165) so that "the harm suffered by the particular victim would be reflected in the severity of sentence" (Edwards, 2001:41). But is this move in the best interests of justice?

Victims' rights advocates argue that by providing victims with greater influence and an opportunity for their issues to be addressed, we see that "for the first time, victims and witnesses are genuinely central to people's thinking on criminal justice. Victims are now not merely regarded as a source of evidence, but are seen as having a legitimate interest with needs and rights of their own" (Reeves & Mulley, 2000:125). Thus one rape victim argued that "prosecutors should pay more attention to the victim's opinion" (McLeod, 1986:505). Victim impact statements, then, are intended to provide

¹ These include: rehabilitation, denunciation, deterrence, separation of offenders from society when necessary, reparation, and promotion of responsibility.

² The sentencing principles in this section are: to account for aggravating or mitigating factors relative to the offense, to consider if the offence was motivated by bias, to consider if the offender abused the spouse, child or trust of the victim, to ensure similar sentences for similar offenders and similar crimes, no unduly harsh consecutive sentences, an offender should not be deprived of liberty, and all other sanctions other than imprisonment should be considered especially with respect to aboriginal offenders

victims with a voice that "not only has many therapeutic advantages and related fairness considerations, [but] also ensures that sentencing judges become aware of the extent of harm suffered by victims" (Erez, 1999:555). As well, there is a claim that the presence of victim impact statements allows for greater recognition of reparative rationales which posit "that information about the harm resulting from an offender's actions needs to be available at sentencing to enable appropriate compensation awards to be made or the repair of physical harm or damaged caused" (Edwards, 2001:42).

Proponents also reject arguments that increasing victims' rights limits state goals because "while theories of legal rights may be countered by concepts of the 'greater' right of the state to act in the best interest of society as a whole, such logic is less effective if victim participation is rooted in a function of the society as a whole" (Rubel, 1986:230). This is particularly evident when estrangement from victims and the community prevents the sentencing process from truly fulfilling the goal of the denunciatory theory of punishment (Rubel, 1986:232). Further, "the purpose of instituting victim impact statements was to provide victims with a voice, not to restructure sentencing priorities" (Erez, 1999:555).

Finally, arguments that suggest that victim impact statements will result in the imposition of disproportionate and unfair sentences are dismissed by victims' rights advocates since studies reveal that "the introduction of such statements has not had a significant effect upon sentencing patterns" (Hinton, 1995:83) and that "victim requests for a particular sentence do not influence the choice of sentence" (Erez & Tontodonato, 1990:451). A similar Canadian study also found that "victims do not seem to use the statements as a retributive tool, and there is no evidence to suggest that the statements are

vengeful in nature" (Giliberti, 1990:29). Hence, fears that judges will be unduly influenced by the emotion and content of victim impact statements rather than consideration of justice and the application of precedents are rejected due to the limited impact that victim impact statements have had on sentencing patterns.

There is no doubt that some victim rights, "such as the right to information, are universally acknowledged as matters of good practice" (Shapland, 2000:151). However, opponents of the victims' rights movement point to a number of problems with the structure and implementation of other victim's rights such as victim impact statements. Foremost among these, is the concern that the victims' movement has coincided with "the rise of the 'desert' or 'justice' model... [and that] the just deserts model is clearly of a retributivist character" (Sebba, 1994:146). Accordingly, some believe that victim impact statements allow "the survivors to theoretically 'have a crack at' the defendant. This opportunity serves as a sort of 'payment' for the suffering they have endured as a result of the defendants actions" (Dugger, 1996:399). Punishment, then, is based on particular victim characteristics and the extent of harm to the victim, rather than on the actions and intentions of the offender and the seriousness of the crime (Hills & Thomson, 1999:661). Victim impact statements do not advance the goal of furthering justice but rather raise "the risk that prosecutions that may be in the interests of the victim, but not the public interest, will be brought so as to facilitate recovery. Where this happens, the criminal process becomes a publicly funded private collection service in which the debtor is needlessly stigmatized by the use of the criminal process" (Paciocco, 1999:374).

Another concern with victim impact statements is the issue of victim precipitation, whereby the victim's actions were at least partly responsible for provoking

the offender's criminal behaviour. Here, the traditional roles of victim and offender are "reversed and in the long chain of causative forces the victim assumes the role of the determinant" (von Hentig, cited in Radzinowicz & Wolfgang, 1971:291). When applied to victim impact statements, detractors question the validity of a victim providing a victim impact statement if they are "a direct, positive precipitator of crime" (Radzinowicz & Wolfgang, 1971:281). It is for this reason why some feel that "there has rightly been concern over the allegations about victims and their conduct that are sometimes made in defence speeches in mitigation" (Ashworth, 1993:507).

3.1.2 Do Victim Impact Statements Increase Victim Satisfaction?:

Do victim impact statements actually satisfy victims' desires to provide input and be a part of judicial decision making? Research on "the effect of victims' participation via the victim impact statement on their satisfaction with justice is inconclusive" (Erez, 1994:24). A study of victims who had submitted victim impact statements found that 52% expressed satisfaction with the sentence imposed on the offender and more than half (55%) were satisfied with the way that the criminal justice system had handled their case (Erez & Tontodonato, 1992:401). Further, other research "has indicated that most victims think the existence of the participatory right is important. By exercising their rights, victims can satisfy their desire to express their feelings to the judge, to perform their 'duty', and to achieve a sense of justice - all of which were reasons frequently cited for exercising the allocution right" (Villmoare and Neto, cited in Erez, 1990:27).

In contrast, some Canadian research has found "that completing a victim impact statement does not, of itself, increase victims' satisfaction with the system or their

willingness to co-operate with the system in the future" (Ashworth, 1993:501). An American study also found that victim impact statements are not an effective means to promote victim satisfaction with the justice system (Davis & Smith, 1994:10). Finally, a South Australia study found that "the results confirm the importance of outcome to victim satisfaction with justice but do not suggest a clear or a strong effect of process control or representation - as embodied in the victim impact statement - on victim satisfaction" (Erez, Roeger & Morgan, 1997:55). The diversity of these and other results implies that more research would be required to ascertain whether the use of victim impact statements promotes victim satisfaction with the sentencing process.

3.1.3 *Time & Expense:*

A final point of conflict surrounding victim impact statements is the justification of time and expense associated with a criminal justice initiative that has no substantial effect on sentencing patterns. Some commentators believe that if victim impact statements do not affect sentencing patterns, then the criminal justice system should explore other, less costly ways of improving victim satisfaction with the criminal justice process. Indeed, providing victim impact statements that do not have an effect on sentencing patterns can be regarded as an exercise in economic futility because "the operation of the administration of justice, as it is currently constituted, is dependent on guilty pleas. A significant impediment to the efficient processing of these pleas would rapidly bring the provincial courts to a slow crawl" (Edgar, 2000:4). If the efficiency of the criminal justice system is predicated on processing a high number of cases with

minimal resistance, efficiency is then facilitated through the absence of resistance in the form of the participation of key actors such as police, victims, and witnesses.

Conversely, other writers (e.g. Erez, 1994:22) assert that in jurisdictions that allow victim participation at sentencing, the criminal justice process does not incur additional delay or expense and even if victim impact statements do cause some delay, these writers argue that "any legal mechanism has its costs and benefits" (Joutsen, 1994:63). As well, some suggest that system efficiency is even enhanced when "victims, faced with the decision to report an offence, perceive the criminal justice system as being more responsible and sensitive to their needs" (Edwards, 2001:43). They view justice systems as analogous to "consumer oriented organizations" that rely "on continued client cooperation to function smoothly. By inviting victim participation in criminal proceedings [through victim impact statements and other initiatives], the criminal justice system hopes to increase victim satisfaction, encourage future victim involvement and thereby, enhance system efficiency" (McLeod, 1986:506). To that end, they see economic cost as a relatively unimportant factor in determining whether victim impact statements should remain a part of the sentencing process.

3.2 Conclusion:

To date, commentary and research on victim impact statements has focused mainly on two areas. First, theoretical analyses have examined the potential benefits and pitfalls of the victim impact scheme as it is currently constructed, and the consequences of any adjustments that may be made to it in the future. Second, statistical studies focused on the outcomes and effects of victim impact statements as they relate to

sentencing and victim satisfaction. Both approaches provide valuable insight into the role of victim impact statements within the criminal justice process but do not address the roles of criminal justice professionals in this context.

This thesis seeks to examine a third area surrounding the use of victim impact statements, namely the experiences of key actors within the criminal justice system. These individuals and groups are an important resource in understanding the value of victim impact statements because they are in close contact with victims and also apply, assess, and judge victim impact statement information.

More specifically, this thesis sought to examine the opinions of Crown Counsel. Crown Attorneys are in the unique position of representing societal interest as well as prosecuting offenders on behalf of the victim. They are also, perhaps, the criminal justice professionals who are best placed to influence a victim's decision on whether or not to submit a victim impact statement. To date, no Canadian studies (and only one study in another jurisdiction, see Henley, Davis & Smith, 1994) have been conducted on the role that prosecutors play and the experiences they have in relation to victim impact statements. The absence of research in this area has led the author to attempt to bridge this knowledge gap by conducting a survey of Crown Counsel in Ontario.

Chapter 4 - Methodology and Results

4.0 Methodology

4.0.1 Overview:

As the literature reviewed in this thesis suggests, previous research on victim impact statements has examined a wide variety of themes. One important issue concerns the question of why victim impact statements are not submitted more often by victims of crime. This study attempts to address the knowledge gap in this area by empirically examining the perceptions and experiences of Crown Attorneys with respect to victim impact statements, namely in procuring and accepting victim impact statements from victims of crime. Additionally, this study focuses on several related issues which include a) the perceived effects of victim impact statements on sentencing patterns; b) victim fears and problems with victim impact statements; c) the effect of plea bargaining on victim impact statements; d) informal input from victims of crime; e) the structure of the victim impact statement form; f) negative consequences resulting from submission of a victim impact statement; and g) the role that victim impact statements play in helping victims to cope with their victimization.

4.0.2 Method:

For this study, I decided that the best approach to understanding the reason that victim impact statements are not submitted more often by victims of crime would be to survey the opinions of Crown Attorneys. Crown Attorneys play a crucial role in criminal court proceedings and, for this study, were not constricted by the same ethical hurdles that a victim survey may have been subject to. As a result, respondents provided

valuable feedback on their own perceptions, experiences as well as victim needs, albeit the latter as a indirect source.

Further, in order to assure the most honest and unbiased responses to my questions, I decided that an anonymous questionnaire would generate the most useful information. Accordingly, on June 3rd, 2002, I met with Paul Culver who has been the Crown Attorney for the City of Toronto since 1989, to obtain approval for this project.

After receiving Mr. Culver's permission, I sent him a questionnaire³ accompanied by a cover letter detailing the goals and objectives of this study⁴. On June 12th, 2002, he then sent out the questionnaire and cover letter, via email, together with a note requesting respondents to fill out the questionnaire. This email message was sent to 102 Assistant Crown Attorneys. Each Assistant Crown Attorney works on a rotational basis in four courts in Toronto, Ontario, Canada. Two of the courts, Old City Hall and College Park, are Provincial Courts. A third court, 311 Jarvis Street, is also a Provincial court, but is used primarily as a Youth Court. The final court, 361 University Avenue, is a Superior Court⁵. Respondents were given the choice of either emailing their completed questionnaires directly to me, or printing out and completing the questionnaire, and dropping it in Mr. Culver's box who would then send it to me at a later date.

4.0.3 *Response Rate:*

Of the 102 questionnaires emailed, 34 were completed and returned (29 via email and 5 through regular mail via Mr. Culver), a response rate of 33.3%. All of the

³ See Appendix A for copy of questionnaire

⁴ See Appendix B for a copy of the cover letter

⁵ For a definition of the difference between Provincial and Superior Courts see Section 2 of the Criminal Code.

questionnaires were received by June 27th, 2002. However, it should be noted that the summer months are usually the time of the year when many criminal justice professionals take their annual vacation. As well, a few of the Assistant Crown Attorneys to whom the questionnaire had been sent were on maternity leave at the time the questionnaires were mailed to them. Thus, on August 13th, 2002, the number of Assistant Crown Attorneys working on a rotational basis in these courts had been reduced to 93. The response rate of 33% therefore, underestimates the true response rate, since an undetermined number of potential respondents did not actually receive a questionnaire. It is reasonable to conclude then, that the actual response rate was most likely closer to 50%, a relatively high percentage considering the workload and busy schedules of Attorneys. It is consistent with, or higher than other surveys of criminal justice practitioners, such as judges (e.g., Roberts, Doob and Marinos, 2000).

4.1 Results

"Sentencing is always about the accused when that is only half of the story. The victim impact statement not only furnishes a small space for victims in the criminal process but it also provides a small measure of empowerment in a system which utterly denies the victim any real say."

(Respondent #13)

4.1.1 Usage of Victim Impact Statements:

4.1.1.a *Victim impact statements are more likely to be used in cases that go to trial than in cases with guilty pleas*

The nature of the plea has often been recognized as a predictor of whether a victim submits a victim impact statement to the court. Previous studies in other jurisdictions have demonstrated that when an accused has entered a plea of not guilty, victims are more likely to submit a victim impact statement than in cases where a guilty plea has been entered (see Henley, Davis & Smith, 1994).

This survey explored the Canadian Crown perspective on this issue. Survey respondents were asked: **In your experience, how often do victims submit a VIS in cases with guilty pleas?** The following question then asked: **Based on your experience, how often do victims submit a VIS in cases that go to trial?** While the majority of respondents stated that in both circumstances victim impact statements were used *in some cases*, 35.3% more respondents suggested that victim impact statements were submitted in trials than in cases with guilty pleas *in most cases* or *almost every time*.

Table 1 - Victim Impact Statements - Guilty Pleas vs. Trials⁶

	Guilty Pleas N=34	Trials N=34
Never	0.0%	0.0%
Almost Never	26.5%	5.9%
In Some Cases	70.6%	55.9%
In Most Cases	2.9%	29.4%
Almost Every Time	0.0%	8.8%
Total	100.0%	100.0%

There are a number of explanations for this finding. First, in many cases involving a guilty plea, the victim is either absent from the proceedings, or unable to be

⁶ Please note that all tables and headings represent Crown Counsel perspectives derived from responses to the questionnaire.

contacted. In the absence of a trial, victims do not testify and as such may not feel the need to be present or available to the court. As one crown noted "*most pleas take place when [the] victim [is] not around and [it is] not practical to wait for victim impact statements in plea court where there are dozens of cases on list*". A second respondent concurred, stating that "*for many less serious cases we have no prior notice of a guilty plea, and I find that the courts are less likely to want to adjourn sentencing to get the victim impact statement in these circumstances*". Alternatively, "*the serious case will usually lumber along slowly enough, the judge will be more willing to give sufficient time to prepare materials for sentencing, and the victims will more likely to stay interested enough in the case to keep in touch with the officer in charge, the crown, Victim/Witness people, or all three*". This reality in the Canadian criminal justice system may explain the increase in the number of victim impact statement submissions in cases that proceed to trial.

A second explanation for the increased volume of victim impact statement submissions in trials relates to the particular type of criminal offence that is more likely to be present in cases with guilty pleas than in cases that go to trial. The type of offence, its seriousness and the probable sanction that accompanies it, is a clear indicator of whether an accused will plead guilty to a crime. For example, an accused is more likely to plead guilty to a property crime than that of a sexual assault because the sentence imposed for the latter is significantly more severe than the usual sentence for the former.

Similarly, both the seriousness of the offence and its effect on the victim are likely to influence the victim's involvement in the case. Victims are more likely to submit a victim impact statement in more serious cases, particularly those involving

personal injury. If these happen to be cases that go to trial, this may explain the increase in submission of victim impact statements. In this study, one Crown attorney went so far to suggest that *"the importance of a victim impact statement varies with the nature of the offence. A Theft Under/Shoptlifting produces a victim but a victim impact statement may not be as important as a victim impact statement from the victim of a domestic Assault. For Theft Under/Shoptlifting, I never recommend a victim impact statement. For domestic Assault, I always recommend a victim impact statement"*. A second Crown added that *"victim impact statements are most relevant and useful when dealing with crimes of violence/breaches of trust. It is impractical to try and seek them out and submit them for many minor property offences, i.e. shoptlifting"*.

The final explanation for the fact that there are more submissions in cases that go to trial is that prosecutors have more time to encourage submissions of victim impact statements in trials than in cases with guilty pleas. While this issue is addressed later in this section (see Table 6), it is clear that when Crown Counsel have more time to prepare their case, victim impact statements are more likely to be submitted.

4.1.1.b *Plea bargaining does not eliminate the need for victim impact statements*

Another reason why victim impact statements may be rarer in cases with guilty pleas results from the practice of plea bargaining. Under the current system of plea bargaining, the Crown and the defense agree upon a joint submission to be placed before the court. While informal contact with the victim is often solicited by Crown Attorneys, this system may eliminate the need for formal victim input, especially participation via legislated mechanisms such as the victim impact statement.

This study asked respondents specifically: **Do you think that the current system, in which plea bargaining allows both the Crown and the defense to agree upon a joint submission to place before the court, eliminates the need for victim impact statements?**

Table 2 - Plea Bargaining and Victim Impact Statements

	Plea Bargaining Eliminates the Need For VIS
Definitely Yes	0.0%
Probably	8.8%
Probably Not	32.4%
Definitely Not	58.8%
Total	100.0%

As can be seen from Table 2, respondents overwhelmingly indicated that plea bargaining does not eliminate the need for victim impact statements. These results are significant because they demonstrate that prosecutors see value in the submission of victim impact statements even if they do not have any bearing on the type or length of sentence imposed. Since judges almost always concur with sentence recommendations resulting from joint submissions, it would be extremely unlikely that victim impact statements would have any effect on sentences. Therefore, by asserting that victim impact statements should not be eliminated in cases with plea bargaining, respondents to this survey are reinforcing the notion that they have additional value to both the court and the victim.

4.1.1.c *Informal victim input probably cannot replace victim impact statements*

In the course of any case, informal dialogue outside the courtroom between the victim and Crown Counsel may allow prosecutors to more fully understand the impact

that the crime had on the victim. This process may not only save both time and expense through a reduction in costly formal court proceedings but, as one Crown pointed out:

In these situations the victims prefer to tell the Crown, and have the Crown tell the court. My impression is that many people feel a great deal of pressure to formulate an appropriate statement and that the pressure is too much. Many people are not good writers and this is difficult for them. Also, I find many prefer to tell the judge directly, from the witness stand.

A question posed in this survey asked: **In your view, is obtaining informal victim input an adequate replacement for VIS?**

Table 3 - Informal Victim Input

	Informal Victim Input Should Replace VIS
Definitely Yes	12.1%
Probably	24.2%
Probably Not	46.5%
Definitely Not	15.2%
Total	100.0%

As can be seen in Table 3, almost two thirds of respondents (61.7%) indicated that informal victim contact probably or definitely does not eliminate the need for victim impact statements. These findings reinforce the decision made by legislators to formally include victim impact legislation in the Criminal Code. Prior to the enactment of Section 722, victims had the same opportunity to informally contact prosecutors to give their input. According to the responses received, a formalized right to make a statement is a necessary and valuable addition for victims and criminal court proceedings.

It should also be noted that some of the Crowns who responded to this question indicated that their responses were dependent on the type of case that was before the

court. In less serious cases, informal victim input was an adequate replacement for victim impact statements, and in more serious cases it was not.

4.1.2 Informing and Influencing Submission of Victim Impact Statements:

4.1.2.a *There is no one agency that should solely be responsible for informing victims of their right to submit a victim impact statement*

Past studies have demonstrated that victim impact statements are rarely submitted to the court in part because in many cases victims do not know of their right to submit one. From their first contact with police to their final opportunity to submit a victim impact statement to the court, victims encounter numerous criminal justice professionals in a system they may know little about. Survey respondents were asked: **Who should be responsible for informing victims of their right to make a VIS?** They were given four choices; *Police, Crown Counsel, Victim\Witness Services, and Other.*

Table 4 - Who Should Inform Victims About Victim Impact Statements

Agency	Percent
Crown Counsel	2.9%
Police	29.4%
Victim\Witness Services (VWAP)	20.6%
Crown Counsel & VWAP	2.9%
Police & VWAP	11.8%
All	32.4%
Other	0.0%
Total	100.0%

In its initial construction this question was designed to elicit responses that indicated only one of the three choices (or in the alternative "other") provided. It was expected that they would choose Crown Counsel, or Police, or VWAP. However, almost half of those surveyed (47.1%) indicated that two, and sometimes all three, agencies should inform victims of their right to make a victim impact statement. As one crown

pointed out, "*while Victim\Witness Services should be responsible for informing victims of their right to make a victim impact statement, they are far too short-staffed to do so. Where a victim impact statement is highly recommended, then Crown Counsel and Police will, and should, also be responsible*".

The varying nature of these responses indicate that perhaps the absence of all justice agencies taking the responsibility for informing victims of their right to submit a victim impact statement may be the cause of fewer submissions. A second respondent perhaps summed it up best stating that "*all in the system have a role to play in ensuring that the victim is aware -and the victim has to take some responsibility for letting people know that he is interested in the case*".

4.1.2.b *Crown Attorneys recommend that victims make a victim impact statement in the majority of cases*

By legislating the victim impact statement provisions, the Canadian Parliament has mandated that all victims have the right to submit a victim impact statement, and also to deliver the statement orally. However, the question of whether prosecutors should and do recommend to victims that they submit a victim impact statement is as yet unanswered. Crown attorneys may feel a moral obligation to inform victims of their *right* to make a victim impact statement, but whether they should and how often they recommend that victims submit a statement is still at issue. Respondents in this survey were asked: **How often do you recommend to victims that they should submit a VIS?**

Table 5 - Crown Attorney Recommendations

	How Often Crown Attorneys Recommend to Victims That They Submit a VIS
Never	0.0%
Almost Never	0.0%
In Some Cases	32.4%
In Most Cases	52.9%
Almost Every Time	14.7%
Total	100.0%

As can be seen by these findings, prosecutors place a high value on victim impact statements. More than two thirds (67.6%) of respondents indicated that they would recommend that victims submit a victim impact statement *in most cases* or *almost every time*. It should also be noted that the recommendation of a Crown Attorney should not be confused with a formal request to submit a victim impact statement. As one Crown strongly put it, "*Crowns should never tell a victim that they should provide a victim impact statement; the victim should be advised of his or her right to do so and the possible ramifications, so that he or she can make an informed decision*".

4.1.2.c *If Crown Attorneys had more time, they would be more likely to encourage victims to submit a victim impact statement*

The current reality of the case workload in the Canadian justice system is that there is a huge backlog in the system. In an effort to reduce this backlog, a variety of different mechanisms is used to speed up courtroom proceedings and reduce caseloads. These include practices such as plea bargaining and the use of pre-sentence reports. It is possible that the pressure to resolve cases rapidly may undermine the victim impact statement regime. Accordingly, Crown attorneys responding to this survey were asked:

If you had more time per case, would you be more likely to encourage victims to submit a VIS?

Table 6 - Increased Crown Time and Victim Impact Statement Encouragement

	Increased Time Given to Crown Attorneys Will Lead to More Encouragement
Definitely Yes	38.2%
Probably	29.4%
Probably Not	32.4%
Definitely Not	0.0%
Total	100.0%

As can be seen in Table 6, prosecutors in this survey found the amount of time they had to prepare a case to have a significant effect on the number of victim impact statement submissions. One respondent in particular was emphatic about the need for more time to accommodate submission of victim impact statements:

It should be more clear that a sentencing can, and should go over in order to obtain a victim impact statement even if and particularly if the accused is in custody. It appears that accused persons go into plea court unexpectedly, want to plea and be sentenced immediately and the notion that they have the right to do so impedes the crown's ability to obtain a victim impact statement. It is inappropriate to pressure the crown and the police system to contact the victim, provide the victim impact statement document to them, demand it back immediately and have it in court within days. The fact is that in a jurisdiction such as Toronto, with the volume of cases our courts deal with, neither the crown nor the police can get this done that fast. Period. Therefore, an accused who "knows" the system or has counsel pressuring the system, can and does circumvent the victim's right to provide a victim impact statement by unexpectedly traversing the matter to a plea court, putting in a plea and then insisting the matter go

over only a day or two to get the victim impact statement. The result is that the sentencing goes through with only a façade of victim input opportunity.

These findings are significant because they demonstrate both the important role that prosecutors play in the administration of justice and also the need to provide them with the necessary time and resources to facilitate this process. Without additional time given to Crown Counsel, fewer victim impact statements are submitted to the court, and as a result victims are less satisfied with the criminal justice system.

4.1.3 Changes to the Victim Impact Statement:

4.1.3.a *Respondents feel that no changes need to be made to the current victim impact statement form*

One reason why more victims do not submit a victim impact statement may result from the nature of the victim impact statement forms currently employed by various courts. Some victims may find these forms confusing, intrusive, or intimidating. Accordingly, to address this issue respondents were asked: **Do you believe that any changes need to be made to the VIS form currently used?** Approximately three quarters of respondents (73.5%) answered that no changes needed to be made to the current victim impact statement form.

The remaining respondents, who indicated that changes need to be made, were then asked: **If yes, what changes should be made?** Their responses are summarized in Box 1:

Box 1 - Changes to Victim Impact Statement Forms Suggested by Respondents

Changes to the VIS form	Number of Respondents
Must have better clarification for what information is helpful and useful	5
Must emphasize that the victim should not comment on the type of sentence to be imposed	3
Must emphasize the need to discuss only impact of the sentence rather than other factors	4
Must avoid highlighting the specific facts of the case	3
Must avoid views on financial compensation for the victim	2
That the form should be dispensed with in the case of young children and that they should be able to write in their own format	1
Must avoid inviting the victim to reveal personal information such as psychological counseling	1
The form "takes the personal touch out of victim impact statement"	2
Must not emphasize economic loss over other impacts of the crime	1
Must assure that victim impact statements are used even if the accused is in custody and wants to plead guilty	1
Must ensure that in cases with guilty pleas, the VIS form is not expected immediately	4

4.1.3.b *The 1999 amendments have not increased the number of victims who want to deliver an oral victim impact statement*

As noted earlier, in 1999 amendments to the victim impact statement provisions in the *Criminal Code* were introduced in an attempt to increase the number of victims submitting a statement. These changes follow a pattern of revising and refining legislation in order to assist victims without sacrificing the rights of offenders. In this survey, respondents were asked: **Since the 1999 amendments, have you noticed any increase in the number of victims who want to deliver their statements orally?**

As can be seen in Table 7, the 1999 amendments seem to have little effect on the number of victims wishing to make oral presentations of their victim impact statement, at least in the experience of Crown Counsel. More than two thirds of respondents (68.8%) indicated that they had noticed no change, while more than three quarters (81.3%) indicated they noticed at most a slight increase.

Table 7 - Increase in Number of Victims Wishing to Make Oral VIS Presentations

	Increase of Oral Statements Since 1999 Amendments
A Significant Increase	3.1%
A Moderate Increase	15.6%
A Slight Increase	12.5%
No Change	68.8%
Total	100.0%

These results are similar to those of a recent survey of the Canadian Judiciary which also found that "*most judges report no change in the number of victims wishing to make an oral presentation of their victim impact statement*" (Roberts and Edgar, 2002). Results from that study indicate that exactly two thirds of respondents found no change, and only 8% had noted a moderate increase.

To many of the respondents in the present survey, the lack of an increase in the volume of oral victim impact statement submissions since the 1999 amendments is characteristic of many victim-oriented legislative changes. One prosecutor stated "*It should not be forgotten that victim impact information has been available to the court for many years. What is new is the insertion in the Criminal Code which creates [sic] a formal mechanism for placing this information before the court. It is far from obvious that these provisions have accomplished anything of significance.*"

This Crown's conclusion differs from the Roberts and Edgar survey of the judiciary in Ontario (2002). Judges in this survey were similarly asked *Have you noticed any change in the number of Victim impact statements submitted since the 1999 amendments?* Roberts and Edgar (2002) found that *"less than one-third of the sample responded negatively. Just over one-third responded that there had been a slight increase. One third responded that there had been a moderate or significant increase in the number of Victim impact statements submitted"*. This discrepancy will be explored further in the implications section of the thesis.

4.1.3.c *Oral submissions of victim impact statements can affect the time required to conduct a hearing*

One potential problem with the opportunity to present oral victim impact statements is that they may cause delays in the time it takes to conduct a sentencing hearing. Those respondents who indicated that they had noticed an increase in the volume of oral statements since the 1999 amendments, were asked: **If there has been an increase, has this affected the time it takes to conduct the hearing?**

Table 8 - Increase in Court Time For Oral Victim Impact Statements

	Oral Statements Affected Time to Conduct Hearing
Definitely Yes	31.3%
Probably	25.0%
Probably Not	31.3%
Definitely Not	12.5%
Total (+\ - 0.1%)	100.1%

The results from this question which indicate that oral submissions likely increase court time, are not necessarily unexpected. The logistics of arranging for the presence of the victim in court, budgeting court time for the victim to be heard, and the occasional

need to explain to the victim what is and what is not appropriate to provide in a victim impact statement, may all result in delays in what otherwise might be a more fluid process. Hence, this may explain why 56.3% of Crown Counsel identified a definite or probable delay since the 1999 amendments.

4.1.4 Outcomes and Effects of Victim Impact Statements:

4.1.4.a *Victim impact statements can contain new or different information relevant to sentencing*

In some instances, victim impact statements may provide the court with information relevant to sentencing that may not have arisen in their testimony. This information may prove to be especially relevant if the impact of the crime on the victim has not become evident or even presented to the court. Survey respondents were asked: **How often do VIS contain information relevant to sentencing that did not emerge during the trial or in the Crown's sentencing submissions?**

Table 9 - New Information From Victim Impact Statements

	VIS Contain New or Different Information Relevant to Sentencing
Never	0.0%
Almost Never	14.7%
In Some Cases	52.9%
In Most Cases	23.5%
Almost Every Time	8.8%
Total (+\ - 0.1%)	99.9%

As can be seen in Table 9, the majority of respondents indicated that they noticed new or different information relevant to sentencing in victim impact statements only *in some cases*. These results are similar to findings in Roberts' and Edgar's survey of judges (2002) which found that "*only 13% of the judges responded that victim impact statements never or almost never contained unique, relevant information. Half (51%) stated that*

Victim impact statements sometimes contained unique relevant information, 27% chose often and 10% reported that the Victim impact statements always contained unique relevant information". This result is significant as it shows an important value of victim impact statements not only for victims, but also for judges and Crown Attorneys alike. In the absence of victim impact statements, as was the case prior to 1988, this information may have been missed or not as strongly considered.

One other important conclusion can be drawn from this study of prosecutors. Respondents repeatedly commented that it was "*much more common for [victim impact statements] to contain information that is irrelevant to the sentencing proceeding and causes concern and argument from defense counsel and/or the judge*". Accordingly, part of their hesitation to fully endorse the use of victim impact statements at sentencing was not whether it did or did not contain new information, but rather that the type of information provided may not match its intended purpose.

4.1.4.b *In some cases victim impact statements affect the sentence imposed*

As previously indicated in this thesis, studies of victim impact statements in other jurisdictions indicate they have little if any effect on the nature or quantum of sentence imposed on the offender (Erez 1994; Henley, Davis, & Smith 1994). Critics of victim impact statements have suggested that since they do not affect sentencing patterns, there may be better uses of the court's time. This survey sought the perspective of Crown Counsel on this issue. Respondents were asked: **In your experience, how often do VIS affect the sentence imposed?**

Table 10 - Effect of Victim Impact Statements on Sentence

	VIS Affect the Sentence Imposed
Never	0.0%
Almost Never	23.5%
In Some Cases	61.8%
In Most Cases	14.7%
Almost Every Time	0.0%
Total	100.0%

As can be seen in Table 10, the majority of prosecutors in this study suggested that victim impact statements may affect sentencing only *in some cases*. These results are significant because they reinforce previous findings (see Erez, 1994; Henley, David & Smith, 1994) on this issue which may support the view that victim impact statements are unnecessary because they have relatively no effect on the sentence imposed.

Conversely, others suggest that even if victim impact statements do not affect sentences generally, they may still be important because they affect certain sentences specifically. For example, one respondent in particular clarified what she saw as a noticeable effect. *"Used properly, the victim impact statement has a profound impact on the sentencing process. I have done two murder trials in the past year where the victim's relatives testified and it had a tremendous effect for all the generally accepted rationales (i.e. information for the judge, expression and involvement for the victim, acknowledgement of the victim in the criminal process, and maybe even (one hopes) an indication to the offender about the consequences of their actions)."*

4.1.4.c *Victim impact statements are useful to the court*

There is no consensus on the specific ways in which victim impact statements may be of use to victims and to courts. Some suggest that the purpose of victim impact statements lies solely in promoting the recovery of the victim, a cathartic tool that only

the victim can use. Others have found that the usefulness of victim impact statements to the court is that they can reaffirm the impact that the crime had on the victim, they can provide new information to the court, or they can ensure that the victim and the harm done to them is not forgotten. In this survey, respondents were simply asked: **In general, are victim impact statements useful to the court?**

Table 11 - Usefulness of Victim Impact Statements to the Court

	VIS Are Useful to the Court
Never	0.0%
Almost Never	0.0%
In Some Cases	29.4%
In Most Cases	61.8%
Almost Every Time	8.8%
Total	100.0%

As can be seen in Table 11, the large majority of respondents indicated that victim impact statements are useful to the court *in most cases* or *almost every time*. This pattern of findings indicates that victim impact statements serve a purpose for criminal justice professionals in a sentencing hearing, as well as for victims. One Crown noted that he found "*victim impact statements very useful from a crown perspective in understanding the victim's side of the story and conveying that to the court.*"

These results are also similar to the Roberts' and Edgar's survey of the judiciary in Ontario (2002). They found that 16% responded that victim impact statements "*were never or almost never useful. Over one-third (37%) stated that they were often useful, six percent responded "always or almost always" useful, and 41% stated that they were sometimes useful*".

A secondary issue raised by Crown respondents again focused on the issue of the type of case being a key determinant of the usefulness of victim impact statements. One

Crown suggested that victim impact statements "*are useful because they are mostly done in the more serious or more difficult case, in those cases where there has been particular injury or violation. They are not so common in the cases where the victim or witness is less personally affected, and I don't know that they would be useful anyway*".

In the survey of judges (Roberts & Edgar, 2002), additional questions were asked about "*the kinds of offences for which victim impact information is particularly useful*". Respondents were asked "*if there were certain offences for which a victim impact statement is a particularly useful source of information*". More than three quarters (84%) agreed that there were. Judges were then asked to identify which category of offence they had in mind. "*Fully 70% identified crimes of violence, and 43% identified domestic assaults. Almost as many (44%) identified sexual offences*". These results are strikingly similar to the comments of respondents to the Crown survey conducted for this thesis.

4.1.4.d *The most important purposes of a victim impact statement are to provide information about the impact of the crime on the victim, and to provide the victim with an opportunity to participate in sentencing*

Victim impact statements legislation has been enacted for many different reasons. Which of the reasons are important? How important are they? In this survey, respondents were asked to **rank four purposes of victim impact statements in terms of their importance** using a ten point scale, where 1 represented not at all important and 10 represented very important. The four purposes of victim impact statements listed in this survey were:

- *to provide the court with information about the impact of the crime on the victim;*
- *to provide the victim with an opportunity to participate in sentencing;*
- *to provide the Crown with information about the seriousness of the crime; and*

- *to provide the victim with an opportunity to communicate a message to the offender.*

Table 12 - Purposes of Victim Impact Statements

	Information About Impact of the Crime	Victim Participation	Crime Seriousness	Message Communication
1 (not at all important)	0.0%	0.0%	9.1%	2.9%
2	0.0%	0.0%	0.0%	8.8%
3	2.9%	2.9%	3.0%	8.8%
4	2.9%	0.0%	0.0%	5.9%
5	2.9%	2.9%	24.2%	17.6%
6	0.0%	2.9%	9.1%	14.7%
7	2.9%	11.8%	24.2%	14.7%
8	14.7%	8.8%	15.2%	14.7%
9	8.8%	20.6%	3.0%	2.9%
10 (very important)	64.7%	50.0%	12.1%	8.8%

As can be seen in Table 12, respondents found *providing information about the impact of the crime on the victim*, and *providing the victim with an opportunity to participate in sentencing* to be the most important purposes of victim impact statements.

These findings indicate that prosecutors favour victim impact statements in areas that affect sentencing over other purposes. The favoured responses for both *providing the court with information about the impact of the crime* and *giving the opportunity for victims to participate in sentencing* are strongly tied to the actual administration of sentence. Conversely, the two other possible choices which scored significantly lower, have more to do with other areas of justice such as Crown preparation and victim appeasement.

4.1.5 Victims and Victim Impact Statements:

4.1.5.a *Victims understand the role of the victim impact statement in the sentencing process*

In their current form, victim impact statements are intended solely for victims to present information pertaining to the impact that the crime had on their lives. Victims are not permitted to discuss other issues such as the appropriate sentence that should be imposed or any evidence that has been presented before the court. Many victims become frustrated by these limits because they feel that only they themselves can accurately assess the appropriate sanction relative to the impact the crime had on them⁷. As well, they often ignore these limits and end up suggesting what they feel is the appropriate sentence on the victim impact statement form (Roberts and Edgar, 2002). This suggests that many victims do not have an adequate understanding of the nature and purpose of victim impact statements in Canada. To assess the Crown experience, survey respondents were asked: **How well do victims understand the proper role of the VIS in sentencing?**

Table 13 - Victims' Understanding of Role of Victim Impact Statements

	Victims Understand Role of VIS in Sentencing
Never	0.0%
Almost Never	18.2%
In Some Cases	54.5%
In Most Cases	24.2%
Almost Every Time	3.0%
Total (+\ - 0.1%)	99.9%

Canadian victim impact legislation has been enacted, in part, to increase victim satisfaction with the justice system. However, with this imposed measure some clear

⁷ This conclusion is based on informal personal communication with victims, Crown Attorneys, Judges, and members of Victim\Witness Services.

limits have been established. As can be seen in Table 13, respondents indicated that victims understand the role of victim impact statements only *in some cases*. These results suggest that victims' understanding of these limits may not be as high as it should be. If victims only understand the proper use and limits of victim impact statements in *some cases* any satisfaction or expectation they may have had by submitting a statement is significantly diminished.

To combat this perception, a number of respondents indicated that other tools need to be used to ensure that victims understand the role of victim impact statements. As one Crown stated "*victims have to be counseled not on what to say but what not to say. An agreed statement of fact or a finding after trial may only include some of the facts the victim believes. They have to talk about the impact only of those proven events, or else the whole victim impact statement gets challenged by defense.*" Another respondent wrote that "*a good victim impact statement requires that the victim be advised of the purpose of the victim impact statement- many victims end up reciting what happened to them instead of reviewing the emotional impact*".

4.1.5.b *Victim impact statements can increase victim satisfaction with the criminal justice system*

One principal justification for any victim impact statement legislation is to increase victim satisfaction with the justice system as a whole. However, there has been some debate as to whether victim impact statements in and of themselves increase victim satisfaction with the justice system (see Erez, 1994). In this survey, Crown Counsel were asked: **Do victim impact statements increase victim satisfaction with the criminal justice system?**

Table 14 - Victim Impact Statements & Victim Satisfaction With CJS

	VIS Increase Victim Satisfaction With the Criminal Justice System
Never	0.0%
Almost Never	0.0%
In Some Cases	50.0%
In Most Cases	43.8%
Almost Every Time	6.3%
Total (+/- 0.1%)	100.1%

As can be seen from Table 14, prosecutors in this study felt that victim impact statements do indeed promote victim satisfaction with the criminal justice system as a whole. Every single respondent indicated that victim impact statements increase victim satisfaction at least in *some cases*. These results help to reinforce the notion that the employment of victim impact statements supports the original intent of the legislation and that statements have value even if they do not have any effect on the sentence itself.

It should also be noted that some of the respondents indicated in their answers that they were uncomfortable commenting on victim feelings with victim impact statements because they did not want to speculate on someone else's feelings. Additionally, some Crowns said that they would have responded but that there was no way for them to know whether victim impact statements do indeed increase victim satisfaction.

4.1.5.c *Victim impact statements assist victims in coping with their own victimization in many cases*

In its initial implementation, legislation surrounding the right to submit a victim impact statement justified this practice in part because it could assist victims in coping with their own victimization. Legislators reasoned that giving victims a voice in the sentencing process would allow them to confront the experience of being victimized and also assume a positive role within the criminal justice process. In this survey respondents

were asked: **Does submitting a victim impact statement assist victims in coping with their own victimization?**

Table 15 - Victim Impact Statements as a Coping Mechanism for Victims

	VIS Assist Victims Cope With Their Own Victimization
Never	0.0%
Almost Never	3.0%
In Some Cases	54.5%
In Most Cases	36.4%
Almost Every Time	6.1%
Total	100.0%

Similar to the previous results on perceptions of victim satisfaction, some respondents questioned how they could comment on another person's feelings. As one Crown noted, *"Who can know? It has been the result of one study I have heard of that those who coped best after the Holocaust were those who did not dwell on their experiences, who declined to talk about it. I have dealt with some horrible cases of parental sexual and physical abuse - many times they cannot tell the judge what happened, let alone how it affected them. And in the cases of lesser traumas, would the victim who is proactive enough, emotionally healthy enough, possessing of a sufficient sense of boundaries and articulate enough to write a victim impact statement, already be the person who is going to be able to deal with it better by those reasons, not for the reasons that they wrote a victim impact statement?"*

4.1.5.d *Victims choose not to make a victim impact statement because they don't want to get involved in sentencing and they do not think it will make any difference*

A repeated query raised in this paper is why victims do not submit victim impact statements more often. While other questions have identified possible reasons for this

pattern of low rates of submission, one question on the survey focused specifically on six options. Survey respondents were given six possible explanations **why victims may elect not to submit a victim impact statement**. These explanations were:

- *They simply don't want to get involved with the sentencing process;*
- *They fear retaliation from the offender;*
- *They do not want to be cross-examined by defense counsel;*
- *They do not think that submitting a statement will make any difference;*
- *They do not want to give up their privacy; and*
- *other, where they were asked to specify the reason.*

Table 16 - Why Victims Choose Not to Submit a Victim Impact Statement

	Don't Want Involvement	Fear of Retaliation	To Avoid Cross Examination	Victims Believe VIS Make No Difference	Maintain Privacy	Other
Yes	76.5%	47.1%	41.2%	61.8%	29.4%	32.4%
No	23.5%	52.9%	58.8%	38.2%	70.6%	67.6%
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

As can be seen in Table 16, respondents indicated that there are a number of reasons why victims do not submit a victim impact statement to the court. The variety of responses demonstrates that this is truly a complex problem devoid of any simple answers or approaches. Even in the option of *other* (see Box 2 below) many different alternatives were given. However, one trend that does emerge in this survey is that victim inaction is a primary contributor to this phenomenon. Either because they do not want to get involved, or because they do not think it will make a difference, victims choose not to submit a victim impact statement.

Box 2 - Other Reasons Why Victims Choose Not to Submit a VIS

"Other" Responses	Number of Respondents
There is too little time and they feel rushed	1
They are sympathetic towards the accused and do not want to say anything negative (e.g. domestic disputes)	1
It is too much work	3
They do not want to relive the events again	3
Victims often cannot be located in cases with guilty pleas	1
They no longer care	2
They feel that they had their say during the trial	1
They have lost contact with the police and VWAP	1
They have not been informed of their right to make a victim impact statement	1
They don't know what to say	1
They may be illiterate and do not wish to admit it	1

4.2 Conclusions:

The results emerging from this survey of prosecutors in Ontario have demonstrated the importance of victim impact statements in the Canadian sentencing system. It is notable that despite having a quantitative emphasis, respondents repeatedly expanded upon their answers providing a qualitative set of replies as well. This signifies not only the complexity of the issues involved, but also the keen interest that many Crown Attorneys have in victims and the impact statements that they provide.

In this survey, Crown Counsel identified a number of victim impact statement benefits and characteristics. These included:

- that victim impact statements often contain new or different information relevant to sentencing
- that they increase victim satisfaction with the justice system
- that they assist victims in coping with their own victimization

- that in some case they affected the sentence imposed
- that in most cases they are useful to the court, and
- that they provide the victim with an opportunity to participate in sentencing.

Similarly, prosecutors rejected the notion that practices such as plea bargaining and informal victim contact eliminate the need for victim impact statements. Some significant problems with victim impact statements were also identified, including:

- victims can be ignorant of their right to make a statement
- victims don't want to get involved or don't think their statement will make a difference
- victims may not understand what is appropriate to include in a victim impact statement, and
- that victim impact statements may put undue pressure on the victim.

On the whole however, the results suggest that despite being in their infancy as a legislated right, victim impact statements serve a useful and legitimate purpose in the Canadian Criminal Justice system, and constitute a useful tool for sentencing judges.

Chapter 5 - Discussion

5.0 Policy Implications:

A utopian view of victim impact statements leaves little doubt that they have a legitimate place in the criminal justice system. Yet, despite their rhetorical appeal, the application of victim impact statements has been fraught with a number of difficulties in their application. The information gathered in this survey provides a variety of different policy implications for further victim impact statement usage. What follows are five policy implications identified by the author:

5.0.1 *Importance of Crown and Victim Time*

If a goal of the criminal justice system is to increase the number of victim impact statements submitted to the court, thereby giving the victim a greater voice in criminal proceedings, it is necessary to give adequate time for Crown Attorneys to encourage victim impact statements and victims more time to fill them out. As one Crown put it "*we need way more time to be able to effectively give meaning to this right. It is currently not possible to get a victim impact statement every time you should in the plea and trial courts of the Ontario Court of Justice in the jurisdiction of Toronto*". Similarly, another Crown asserted that:

It should be more clear that a sentencing can, and should go over in order to obtain a victim impact statement even if and particularly if the Accused is in custody. It appears that accused persons go into plea court unexpectedly, want to plea and be sentenced immediately and the notion that they have the right to do so impedes the crown's ability to obtain a

victim impact statement. It is inappropriate to pressure the crown and the police system to contact the victim, provide the victim impact statement document to them, demand it back immediately and have it in court within days. The fact is that in a jurisdiction such as Toronto, with the volume of cases our courts deal with, neither the crown nor the police can get this done that fast. Period. Therefore, an accused who "knows" the system or has counsel pressuring the system, can and does circumvent the victim's right to provide a victim impact statement by unexpectedly traversing the matter to a plea court, putting in a plea and then insisting the matter go over only a day or two to get the victim impact statement. The result is that the sentencing goes through with only a façade of victim input opportunity.

In this survey, 38.2% of respondents indicated that they would *definitely* encourage victims to submit a victim impact statement if they had more time, and a further quarter more of respondents (29.4%) believed that they would *probably* do so. Not a single respondent indicated that this measure would *definitely not* make them more likely to encourage victims to submit a victim impact statement.

Similarly, respondents were asked why some victims choose not to submit a victim impact statement. None of the five possible responses in the questionnaire referred specifically to the time available for a victim to complete a victim impact statement. However, some Crowns indicated in the *other* response, that in their view there is too little time for the victim to complete an impact statement and that victims often feel rushed. Accordingly, if victims were given more time they would be more

likely to submit a victim impact statement. Further, insufficient time not only limits the number of victim impact statement submissions, but also results in victim impact statements having an iatrogenic effect inasmuch as victim impact statement legislation designed to give victims a voice ends up frustrating and pressuring them instead.

Both of these survey results indicate that time is indeed an important component of the submission of victim impact statements. While it is salutary practice to expedite costly court proceedings, especially in lieu of the huge backlogs currently seen in the system, it is equally important to ensure that victims are given an appropriate amount of time to complete victim impact statements. By providing both victims and Crowns with more time to complete their tasks, this process would be better facilitated.

5.0.2 *Plea Bargaining and Informal Victim Contact*

Plea bargaining is a process which allows the defendant and the Crown to place a joint submission before the court as to the length or type of sanction the accused should receive. One question asked of respondents was, if the length and type of sentence is already agreed upon, does plea bargaining eliminate the need for victim impact statements? Overwhelmingly, 91.2% of Crowns indicated either "*probably not*" or "*definitely not*" and not a single respondent indicated "*definitely yes*".

Similarly, although contact between a Crown and the victim outside the courtroom might be assumed to be a sufficient way for the victim to convey the impact of the crime, this survey asked whether this informal contact was an adequate replacement for the formal submission of a victim impact statement. Again, the majority of Crowns responded negatively. Close to half of respondents (46.5%) indicated "*probably not*" and another 15.2% indicated "*definitely not*".

Both of these results indicate that the option to formally submit a victim impact statement is a necessary and vital legislated right. Attempts to circumvent its implementation either through plea bargaining or informal victim contact should not be used in the majority of circumstances.

5.0.3 *Informing Victims of Their Right to Submit a Victim Impact Statements*

From the time of their victimization, to the time when they have an opportunity to submit a victim impact statement, victims come into contact with many different phases of the criminal justice system and many different criminal justice professionals. Each professional or agency has the opportunity to inform the victim of their right to submit a victim impact statement. This survey asked respondents which one of these agencies should be responsible for informing victims of their right to submit a victim impact statement. Of the four choices given to respondents (*Police, Crown Counsel, Victim\Witness Services* and *other*) results varied significantly. Further, while respondents were prompted to select only one answer, almost one third (32.4%) indicated that all three named agencies should be responsible for informing victims.

These results point out that the criminal justice system needs to be more proactive in soliciting victim impact statements by involving all criminal justice agencies. If our true goal is to ensure that victims submit statements on a more regular basis, then perhaps a Fordist approach, where every member of the criminal justice assembly line has the duty to inform victims of their right to make an impact statement, would lead to increased rates of submission and the positive outcomes that accompany victim impact statements.

5.0.4 *Publicizing Information About Victim Impact Statements*

Similar to the need of criminal justice agencies to inform victims of their right to submit a victim impact statement, effective public information campaigns about victim impact statement legislation could lead to an increase in submissions. A repeated theme in the comments respondents provided is that victims enter criminal justice proceedings without an understanding of their right to make a victim impact statement. Accordingly, victims require advice and guidance from criminal justice professionals about what they can and cannot do in order to become active and successful participants in the criminal justice process. This reality, in fact, is one of the primary reasons that Victim\Witness services was designed and implemented.

Further, Crowns suggested that while victims generally understand the purpose of a victim impact statement (54.5% responded "in some cases"), they do not necessarily understand which comments are appropriate to make unless it is explained to them. As one Crown noted "*many victims end up reciting what happened to them instead of reviewing the emotional impact*" and "*sometimes the victims go overboard and appear to be exaggerating and overstating what happened to them such that they lose credibility with the court*". For this reason, "*victims have to be counseled not on what to say but what not to say*".

It is apparent that greater publicity of victims' rights in the criminal justice process, both generally and specifically for victim impact statements, would be beneficial to the criminal justice system. Greater publicity would lead not only to more victim impact statement submissions, but might also decrease the time and expense spent by professionals explaining basic rights to the victim. An informed participant is an

effective one and providing information through mainstream media would no doubt result in more informed victims.

5.0.5 *Effect of 1999 Amendments*

In its original implementation, victim impact statement legislation did not include the right to make an oral presentation of a victim impact statement. However, in 1999 amendments to the Criminal Code and specifically to victim impact statement legislation afforded victims this right based on the belief that it would increase the number of victim impact statements submitted.

The results from this, as well as the Roberts and Edgar survey of judges (2002), suggest that simply allowing for the use of victim impact statements to include oral presentations is insufficient to increase the number of victim impact statements. It seems that problems lie, not with the mechanism for delivery, but rather with other areas of concern surrounding victim impact statements. Prosecutors in this survey were asked what these areas were. The most common answers included: *they do not want to get involved* (76.5%), *they fear retaliation from the offender* (47.1%) and *a victim impact statement will make no difference to the outcome* (61.8%). Future amendments may want to address these areas of concern instead of focusing solely on the method of presentation.

5.0.6 *Proposed Amendments to the Criminal Code*

While the enactment of victim impact legislation in Section 722 of the Criminal Code is a relatively new provision, it is both well reasoned and well written. Two changes, however, may be appropriate based on information gathered in this survey.

The first amendment focuses on changes to S. 722.2 (1) which currently reads as follows:

722.2 (1) As soon as practicable after a finding of guilt and in any event before imposing sentence, the court shall inquire of the prosecutor or a victim of the offence, or any person representing a victim of the offence, whether the victim or victims have been advised of the opportunity to prepare a statement referred to in subsection 722(1).

In assessing Crown Counsel responses to this survey it seems apparent that an expansion of this section may be in order. Prosecutors responded positively to the use of victim impact statements even in cases with plea bargains, where the sentence has been agreed upon by both the Crown and the defense. In addition, they repeatedly emphasized the need for victims to understand what is and is not appropriate to include in their impact statement. An inclusion of both of these recognitions in S.722.2 (1) may be prudent.

Following these recommendations the amended section might read as follows:

722.2 (1) As soon as practicable after a finding of guilt and in any event before imposing sentence **including a plea bargain submitted to the court**, the court shall inquire of the prosecutor or a victim of the offence, or any person representing a victim of the offence, whether the victim or victims have been advised of the opportunity to prepare a statement **and what specifically can and cannot be included in said statement** referred to in subsection 722(1).

The second proposed amendment to the Criminal Code by the author focuses not on S.722 of the Criminal Code but rather on S.726.2. This section reads as follows:

726.2 Reasons for Sentence - When imposing a sentence, a court shall state the terms of the sentence imposed, and the reasons for it, and enter those terms and reasons into the record of the proceedings.

From the comments provided in this survey, as well as previous research conducted on the use of victim impact statements, it is apparent that victims who submit statements often question whether they have been seriously considered by the court. An

expansion of S.726.2 mandating judges to also specifically address any victim impact statement that has been presented, may increase victim satisfaction with the criminal justice system by re-enforcing the notion that their voice has been heard.

This practice is not without precedent. As Justice Hill in R. v. Gabriel noted: The statements were helpful to me in providing a very clear picture as to who Samantha Hunt was, to the extent that written documentation can do so, and the very real effects her loss had upon so many people. (Refer to paragraph 64)

Similarly in R. v. Daniels, the judge in his summation recognized the important role of victim impact statements stating:

The offences in question were very serious. They resulted in grave and tragic consequences. Three pedestrians were seriously injured and a young woman with great promise was killed. Victim impact statements from family members of the deceased, filed on the sentence hearing, attest to the enormity of the tragedy. (Refer to paragraph 13)

In both of these instances, judges chose to orally recognize victim impact statements in their submission, thereby strengthening the reason for judgment and acknowledging the victims' roles in the criminal justice process. Changing S.726.2 to make this recognition mandatory would only serve to repeat the positive outcomes to victims that occurred in R. v. Gabriel and R. v. Daniels.

Finally, it is also important to recognize that even if these or other amendments are enacted to increase the use and effectiveness of victim impact statements, only through a stricter application of Criminal Code provisions can real improvements take

place. For example, Section 722.2 (2) provides for an application for an adjournment of court proceedings in order to obtain a victim impact statement. However, this legislated provision is rarely enforced⁸, especially in cases with less serious criminal acts. While providing judges with the flexibility to run their courtroom with some discretion is important, it is equally important that they do not veer too far from legislated rights provided in the Criminal Code. Victim impact legislation was enacted to increase victim satisfaction with the criminal justice system and to act as a cathartic tool to assist victims in overcoming their own victimization. Only through a more concerted effort by judges and Crown Counsel to follow these provisions, can these goals be achieved.

5.1 Future Research Implications:

In addition to policy implications, many different research implications have also arisen from the results of this survey. Researchers should consider the following areas before conducting future studies on victim impact statements.

5.1.1 *The Significance of The Type of Crime*

In reading the responses provided to the questionnaires for this study, a repeated theme that arose was the need to differentiate between different types of crimes when attempting to draw conclusions from victim impact statement experiences. Respondents repeatedly indicated that their answers would have been more detailed and more focused if the questions had also differentiated between different types of crimes for which issues surrounding victim impact statements have arisen. Crimes of a less serious nature may

⁸ This conclusion is based on informal personal communication with victims, Crown Attorneys, Judges, and members of Victim\Witness Services.

not receive much support for victim impact statements, because victimization is considered minimal and expediency of court proceedings is valued. More serious crimes may garner more support because victimization can be severe and a greater emphasis is placed on understanding the impact that the crime had on the victim.

Respondents repeatedly tried to stress this distinction throughout their completed questionnaires. For example, one Crown emphasized that "*The importance of a victim impact statement varies with the nature of the offence. A Theft Under/Shoplifting produces a victim but a victim impact statement may not be as important as a victim impact statement from the victim of a domestic Assault. For Theft Under/Shoplifting, I never recommend a victim impact statement. For domestic Assault, I always recommend a victim impact statement*".

Such crime distinctions are key because any attempt to generalize about victim impact statements as a whole may lead to inconsistencies when quantitative measures are examined on more micro levels as more variables are introduced. Accordingly, it would be prudent for future research to account not only for these distinctions, but to structure surveys to specifically address this issue.

5.1.2 *The Significance of The Type of Crimes That Crowns Prosecute*

The sample of respondents in this study was taken from Crown Attorneys who rotated between four different courts which included Provincial, Young Offender, and Superior courts. Recognition of this phenomenon represents a new direction within the study of victim impact statements, namely that the type of court in which prosecutors appear may affect their experiences with victim impact statements.

Attorneys in this survey were asked to differentiate between cases with guilty pleas (predominantly Provincial courts) and cases involving sentencing hearings after trial (predominantly Superior courts) and how often they see victim impact statements. A clear difference arose, with 35.3 % more victim impact statements found to be present in cases that went to trial over cases with guilty pleas. Further, when given open ended questions, respondents repeatedly indicated that they were more likely to expect, solicit and value victim impact statements in the more serious types of cases which are assumed to be associated with Superior courts rather than Provincial ones.

As well, it should be noted that when assessing the results of this survey generally, the presence, effect, and support for victim impact statements seem inflated when compared to other studies. While previous studies have indicated that victim impact statements are rarely submitted (see Giliberti, 1990; Finn-Deluca, 1994; Erez, Roeger & Morgan, 1997; Sanders et al., 2001), respondents to this survey suggested that submission was more frequent. While other studies have found that victim impact statements have little if any effect on sentence (see Erez, 1994; Henley, Davis & Smith, 1994), 61.8% of prosecutors in this survey suggested that victim impact statements had an effect on sentence at least *in some cases*. It seems apparent that both of these increases in the use and effect of victim impact statements result from the experiences that the respondents had in prosecuting more serious crimes with greater victim involvement. Accordingly, future research on victim impact statements may benefit from accounting for this variable.

5.1.3 *The Effect of Time Available to the Crown on Victim Impact Statements*

This study was conducted not only to get the prosecutorial perspective on issues surrounding victim impact statements but also to recognize and account for other variables that affect the likelihood of their submission. One of the variables that can affect the number of victim impact statements submitted to the court, found in this study, was the length of time a Crown Attorney has to prepare their case. Respondents were asked directly, "If you had more time per case, would you be more likely to encourage victims to submit a victim impact statement?". More than two thirds of respondents (67.6%) answered either *probably* or *definitely yes*. Also, respondents indicated that victim impact statements were more likely to be submitted in cases that go to trial where Crowns do have more time to prepare their cases. Both of these results point to the importance of accounting for the amount of time a prosecutor has to prepare their case as an indicator of whether or not a victim impact statement will be submitted to the court. Research on victim impact statements will benefit from the inclusion of this variable in future studies that attempt to explain why victim impact statements are not submitted more often to the court.

5.1.4 *Effect of Victim Impact Statements on Sentencing*

Two questions posed in this survey resulted in what may at first seem to be strangely divergent results. When respondents were asked if victim impact statements had an effect on the sentence imposed, only 14.7% of respondents indicated that victim impact statements had an effect "in most cases" or "almost every time". Conversely, when asked if victim impact statements were useful to the court, **every** respondent indicated that this was true at least "in some cases", and 70.6% of Crowns responded that

this was true "in most cases" or almost every time". These results beg the question, beyond acting as an aid to the victim, if victim impact statements do not affect sentence then how are they useful to the court? Would the sanction not be the same regardless of whether a victim impact statement was submitted or not?

Perhaps an alternative explanation is that victim impact statements do affect sentence, not through an identifiable change in the length of sentence, but rather through the message the sentence conveys with regard to the impact that a particular crime has on a particular victim. In this way, justice seems better served and judges can have even more confidence in the sentences they impose.

Chapter 6 - Conclusion

Since their introduction, victim impact statements have focused on providing victims with a voice in the criminal justice process, while assisting them in ameliorating their own experiences of being victimized. However, victim impact statement legislation has met with some difficulties in its practical application to the criminal justice system. This thesis has examined three of these applications and an attempt has been made to offer solutions to problems within the Canadian context.

The first practical concern focuses on why victim impact statements are not submitted more frequently by victims of crime. From the results of this survey, it is clear that a number of factors are involved. First, many victims are unaware of their legislated right to submit a victim impact statement. If they do not know about the existence of victim impact statements they are highly unlikely to prepare a submission. Second, it is unclear who should be responsible for informing victims of this right. While many different criminal justice professionals communicate with victims, no one group has mandated itself to be principally responsible for this task. The third explanation why victim impact statements are not submitted more frequently, is that even when victims are aware of their right to submit a victim impact statement, they are simply not given enough time to complete them. The Canadian system, which values expediency and uses time saving mechanisms such as plea bargaining, may not allow a victim the time necessary to complete a victim impact statement. Fourth, in many cases, especially with less severe crimes such as property offences, victims do not believe that their input will be considered or will affect the sentence ultimately imposed. Accordingly, they may choose not to submit a victim impact statement. Finally, some victims simply do not

want further involvement in the criminal process. They may fear retaliation from the offender, they may fear being cross examined on the contents of their victim impact statement, or they may want to maintain their privacy regarding their thoughts and feelings surrounding their own victimization. All of these obstacles to the submission of victim impact statements must be addressed by legislators and the criminal justice system. Otherwise, low rates of victim impact statement submission will continue.

A second practical examination of this thesis concerns the experiences and perceptions of Crown Attorneys with victim impact statements in Canada. Respondents to this survey indicated strong general support for victim impact statements. They indicated that they encourage and support the submission of victim impact statements in most cases especially those of a serious nature, where the value of the victim impact statement to both the victim and the court is enhanced. They felt that victim impact statements are useful to the court, that they can include new or different information relevant to sentencing, and in some cases, may even affect the sentence imposed. Crowns also suggested that in many cases victims understand the purpose of victim impact statements and that submission of them may assist victims in coping with their own victimization and improve satisfaction with the criminal justice system as a whole.

When asked about potential obstacles to the submission of victim impact statements, respondents contended that neither plea bargaining nor informal victim contact outside of the courtroom is a suitable replacement for victim impact statements. They also strongly and repeatedly asserted that a major limitation is that they too simply do not have enough time to explain victim impact statements to victims or to encourage

them to submit a victim impact statement. As well, they suggested that all criminal justice agencies should be responsible for informing victims of this right.

The final examined application deals with the effects of the 1999 amendments to victim impact statement legislation and specifically with the right to present victim impact statements orally to the court. Respondents to this survey indicated that these amendments had little effect on the number of victims who want to deliver their victim impact statement orally. Crowns did suggest, however, that orally submitted statements might increase the time required to conduct a sentencing hearing. It is also noteworthy that while respondents in this survey routinely provided detailed answers on a number of topics, they did not expand on these amendments even when prompted to do so. Perhaps more experience is needed with these legislative changes to accurately assess these new directions in the use of victim impact statements in Canada.

The results of this survey provide valuable insight into the experiences and perceptions of Crown Attorneys and victim impact statements in Canada. However, before applying these results generally to Canada and abroad, it would be useful to replicate this study in other cities, provinces, or countries to ensure that the conclusions are valid beyond the confines of a single profession in a single Canadian jurisdiction.

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Appendix A:**Victim Impact Statement Questionnaire**

Thank you for taking a few minutes to complete this questionnaire on Victim Impact Statements (VIS).

1) In your experience, how often do victims submit a VIS in cases with guilty pleas?

Never Almost never In some cases In most cases Almost every time

1-----2-----3-----4-----5-----

Please write in answer here: _____

2) Based on your experience, how often do victims submit a VIS in cases that go to trial?

Never Almost never In some cases In most cases Almost every time

1-----2-----3-----4-----5-----

Please write in answer here: _____

3) How often do you recommend to victims that they should submit a VIS?

Never Almost never In some cases In most cases Almost every time

1-----2-----3-----4-----5-----

Please write in answer here: _____

4) If you had more time per case, would you be more likely to encourage victims to submit a VIS?

Definitely Yes Probably Probably Not Definitely No

1-----2-----3-----4-----

Please write in answer here: _____

5) Who should be responsible for informing victims of their right to make a VIS?

Police Crown Counsel Victim\Witness Services Other (Please Specify)

Please write in answer here: _____

6) In your experience, how often do VIS affect the sentence imposed?

Never Almost never In some cases In most cases Almost every time

1-----2-----3-----4-----5-----

Please write in answer here: _____

7) Does submitting a VIS assist victims in coping with their own victimization?

Never Almost never In some cases In most cases Almost every time

1-----2-----3-----4-----5-----

Please write in answer here: _____

8) Do you think that the current system, in which plea bargaining allows both the Crown and the defense to agree upon a joint submission to place before the court, eliminates the need for VIS?

Definitely Yes Probably Probably Not Definitely No

1-----2-----3-----4-----

Please write in answer here: _____

9) Do VIS increase victim satisfaction with the criminal justice system?

Never Almost never In some cases In most cases Almost every time

1-----2-----3-----4-----5-----

Please write in answer here: _____

10) Since the 1999 amendments, have you noticed any increase in the number of victims who want to deliver their statements orally?

a significant increase a moderate increase a slight increase no change

-----1-----2-----3-----4-----

Please write in answer here: _____

10a) If there has been an increase, has this affected the time it takes to conduct the hearing?

Definitely Yes Probably Probably Not Definitely No
-----1-----2-----3-----4-----

Please write in answer here: _____

11) In general, are VIS useful to the court?

Never Almost never In some cases In most cases Almost every time
1-----2-----3-----4-----5-----

Please write in answer here: _____

12) How often do VIS contain information relevant to sentencing that did not emerge during the trial or in the Crown's sentencing submissions?

Never Almost never In some cases In most cases Almost every time
1-----2-----3-----4-----5-----

Please write in answer here: _____

13) How well do victims understand the proper role of the VIS in sentencing?

Never Almost never In some cases In most cases Almost every time
1-----2-----3-----4-----5-----

Please write in answer here: _____

14) Please rate the following purposes of VIS in terms of their importance, using a scale where 1= not at all important 10= very important

- ___ To provide the court with information about the impact of the crime on the victim
- ___ To provide the victim with an opportunity to participate in sentencing
- ___ To provide the Crown with information about the seriousness of the crime
- ___ To provide the victim with an opportunity to communicate a message to the offender

15) In your view, is obtaining informal victim input an adequate replacement for VIS?

Definitely Yes Probably Probably Not Definitely No

1-----2-----3-----4-----

Please write in answer here: _____

16) Do you believe that any changes need to be made to the VIS form currently used?

Yes _____

No _____

16a) If yes, what changes should be made? (please write answer in space that follows)

17) In your view, why do some victims choose not to make a VIS?
(please check all that apply)

- They simply don't want to get involved with the sentencing process _____
- They fear retaliation from the offender _____
- They do not want to be cross-examined by defence counsel _____
- They do not think that submitting a statement will make any difference _____
- They do not want to give up their privacy _____
- Other (please specify in space that follows) _____

18) Finally, we would like to invite you to add any other comments you may have with respect to the use of VIS in sentencing.

Appendix B:

To whom it may concern,

I am a Master's criminology student conducting a small investigation into the use of Victim Impact Statements (VIS). I am hoping to obtain information from Crown Attorneys with respect to the use of VIS, specifically in understanding why VIS are not submitted more frequently by victims of crime. This project is being carried out as part of a M.A. thesis at the University of Ottawa under the direction of Professor Julian Roberts.

This project is being done with the approval of Crown Attorney **Paul Culver** and with the support of the **Department of Justice's Policy Centre for Victim Issues**. I am asking Crown Attorneys to please fill out the following questionnaire on VIS. Filling out this questionnaire is a completely **voluntary** and **anonymous** process. I am not asking for any personal information, up to and including your name, offender\victim names, addresses and specific information pertaining to cases or victimizations. As well, none of the information gathered will be viewed by anyone except my thesis advisor and myself and all questionnaires will be stored solely by me for a period of five years after the submission of my thesis.

The potential benefit of this project is to increase understanding of why VIS are not submitted more often by victims of crime. With victim's issues playing a larger role in political, economic and justice issues their greater participation through VIS may increase their satisfaction with the judicial process. In turn, with greater victim satisfaction, Crown Attorneys can better concentrate on other tasks, namely the prosecution of accused. As this questionnaire is both voluntary and anonymous the potential harms are nil.

The questionnaire will take 5 minutes to complete. Please open the attachment, fill out the questionnaire and send it to mihaelcole@hotmail.com (please note there is no "c" in my name).

If you have any questions or concerns about this project please do not hesitate to contact:

Professor Roberts
(613) 562-5800 ext. 1805
email: jroberts@uottawa.ca

Catherine Lesage
Protocol Officer for Ethics in Research
(613) 562-5387
email: clesage@uottawa.ca

Myself
(613) 744-7940
email: mihaelcole@hotmail.com (please note there is no "c" in my name)

Sincerely,

Mihael Cole



VICTIM IMPACT STATEMENT/DÉCLARATION DE LA VICTIME

Original/Originale [] Update/Mise à jour []

Please return this form as soon as possible, upon request by police. Veuillez retourner la présente formule dès que possible sur demande de la police.

TO BE COMPLETED BY POLICE/À REMPLIR PAR LA POLICE

Date

Victim's Name/Nom de la victime Family Name/Nom de famille First Name/Prénom

Accused's Name/Nom de l'accusé Family Name/Nom de famille First Name/Prénom

D.O.B./Date de naissance

Investigating Officer/Agent enquêteur (Family Name, Rank, Badge Number / Nom de famille, grade, n° de matricule) Tel./N° de télé.

Local Services for Victims of Crime (To be completed by local police agency before distribution) Any local instructions about delivery and returns of forms, as well as local victims' services (eg. counselling, women's crisis centres etc.), should be included here.

Services locaux à l'intention des victimes d'actes criminels (à remplir par le corps policier local avant distribution). Toutes les consignes locales concernant la livraison et le retour des formules, ainsi que les services locaux aux victimes (consultations professionnelles, centres pour femmes en détresse, par exemple) devraient figurer ici.

(POLICE ADDRESS/DATE/ STAMP)(ADRESSE DE LA POLICE/DATE/TAMPON)

Name of Victim (please print)
Nom de la victime (en caractères d'imprimerie)

Name of Accused (please print)
Nom de l'accusé (en caractères d'imprimerie)

1. PERSONAL REACTION –

Please describe how this offence has affected you? (Please attach extra sheets, if needed)

1. RÉACTION PERSONNELLE –

Comment l'infraction vous a-t-elle affecté? (Vous pouvez utiliser d'autres feuilles au besoin.)

.....
Signature of Victim/*Signature de la victime*

Name of Victim (please print)
Nom de la victime (en caractères d'imprimerie)

Name of Accused (please print)
Nom de l'accusé (en caractères d'imprimerie)

3. FINANCIAL IMPACT – Please list any financial loss you may have suffered as a result of this incident. For example, medical expenses not covered by insurance, lost wages, any property that was damaged, destroyed or lost and the value of that property. Please attach copies of all bills, receipts or estimates you may have. (Please attach extra sheets, if needed.)

3. CONSÉQUENCES FINANCIÈRES – Veuillez énumérer les pertes financières que vous auriez subies par suite de cet incident. Par exemple, frais de soins médicaux non couverts par l'assurance, perte de salaire, bien endommagé, détruit ou perdu et valeur de ce bien. Veuillez joindre les copies de factures, reçus ou estimations dont vous disposez. (Vous pouvez utiliser d'autres feuilles au besoin.)

OTHER COMMENTS –
(Please attach extra sheets, if needed)

AUTRES REMARQUES –
(Vous pouvez utiliser d'autres feuilles au besoin)

If you have completed this statement on behalf of the victim, please indicate why, and what your relationship is to the victim.

Si vous avez rempli la présente formule au nom de la victime, veuillez en indiquer la raison ainsi que votre lien avec la victime.

(PLEASE PRINT/EN CARACTÈRES D'IMPRIMERIE)

Family Name/Nom de famille

First Name/Prénom

Relationship/Lien avec la victim

Reason:/Raison:

The statements I have made are true to the best of my knowledge

Autant que je sache, les déclarations que j'ai faites sont exactes

Date 19

(Signature of Victim or of Person Completing this Form)

(Signature de la victime ou de la personne qui remplit la formule)