The participation of crime victims in sentencing proceedings through victim impact statements (VIS) is a prominent and contentious feature of criminal justice policy in most common law jurisdictions where the legal proceedings are of an adversarial nature. While of course no one is ‘anti-victim’, incorporating a subjective victim voice in the legal proceedings, particularly through VIS read aloud to the court by victims (oral VIS), has proved controversial for many commentators and legal practitioners (Ashworth 1993; Bandes 1996; Booth 2007a, 2012; Edwards 2004; Erez 2000; Erez et al. 2014; Hall 1991; Henderson 1985; Hoyle et al. 1998; Kirchengast 2010; Logan 2008; Rock 2010; Sanders et al. 2001; Sarat 1997).

It seems obvious that incorporating victims and their oral statements in the sentencing process will be challenging for sentencing judges trained in adversarial traditions in common law jurisdictions. Victims are both physically and practically excluded from the adversarial sentencing hearing. Only the prosecution and the defendant are parties to the legal proceedings and party status gives these participants power to identify the issues, present the evidence, test the evidence and make submissions as to penalty. An independent and impartial judge manages the proceedings and determines the penalty. Victims are not parties; they are not represented; they are confined to the rear of the courtroom in the public gallery as bystanders; and they have no power in the sentencing hearing.
Legislation has introduced VIS to this established model, and their role is far from clear. The functions of VIS are generally articulated in instrumental and/or expressive terms (Cassell 2009; Erez, 2004; Garland 2001; NSW LRC 1996; Roberts and Manikis 2010). From an instrumental perspective, VIS are said to be useful sentencing tools that provide information to assist judges to formulate more proportionate and accurate sentences. But many commentators are concerned that using the highly subjective and emotional VIS for this purpose could be inconsistent with the legal goals of sentencing and the values of objectivity and formality that underpin law and the legal proceedings (Ashworth 1993; Booth 2007a; Henderson 1985).

In addition or alternatively, the role of VIS is said to be expressive or communicative. Through VIS victims can recount their experiences and express their feelings about the crime to the court, the offender and the wider community (Cassell 2009; Roberts and Erez 2004, 2011; Szmania and Gracyalny 2006). According to Erez (2004), the expressive function of VIS is designed to redress the exclusion and marginalisation of victims in the sentencing hearing as well as improve their courtroom experiences. Opponents argue that the inclusion of VIS in the proceedings, especially oral VIS, is likely to generate inappropriate emotional displays, embarrassment and confrontation in legal proceedings; present an onerous management task for the sentencing judge; and be detrimental to the offender’s entitlement to a fair hearing and the integrity of the proceedings more generally (Abromovsky 1992; Arrigo and Williams 2003; Bandes 1996, 2009; Gewitz 1996; Rock 2010; Sarat 1997; Schuster and Propen 2010).

Shifts in community sensibilities, however, have generated changes to community standards and expectations of fairness in the courtroom (Spigelman 2004; R v Dietrich (1992) 177 CLR 292). Shapland argues that failure to accommodate the interests and concerns of victims in a manner that maintains public confidence in the administration of justice can threaten the integrity of the legal proceedings (Shapland 2010; see also Garkawe 1994; Shapland and Hall 2010). A significant factor said to be undermining public confidence in the current criminal justice system is the poor treatment of victims and their exclusion from criminal justice processes (Shapland and Hall 2010, p. 188). In the context of sentencing, poor treatment of victims could compromise the legitimacy of the process and generate public disorder (Shapland 2010, p. 365). Research indicates that the way victims are treated in the courtroom and especially their experience of presenting their VIS to the court has a significant bearing on the perceived fairness.