

VICTIM IMPACT STATEMENTS

Submitted by the Child Witness Institute

KEY CONCEPTS	
Victim impact statements	Sentencing
Rationale for victim impact statement	Concept of harm
Victims' rights	

Restorative Justice

The concept of restorative justice refers to a manner of dealing with victims and offenders which focuses on settling the conflicts arising from crime and resolving the underlying problems that caused it.¹ Restorative justice is a form of criminal justice based on reparation.² The focus is on repairing the damage that has been caused by the crime, either materially or symbolically.³ When someone commits a wrong against another, that person has an obligation to make things right.⁴ The goal of the restorative process, therefore, is to heal the wounds of everyone affected by the crime.

Central to the philosophy of restorative justice is the belief that crime results in harm to victims, offenders and the community at large. It encourages the victim and the offender to be directly involved in resolving conflict and thereby becoming central to the criminal justice process by full participation therein.⁵ In implementing this philosophy, restorative justice strives to empower victims to become involved in the criminal justice process and seeks to assist victims to regain a sense of control in the areas of their lives affected by the offence.⁶ One method of achieving these aims is to involve victims in the sentencing process. This can be done in a number of ways, including the introduction of victim compensation, victim impact statements, victim offender mediation and greater consultation between victims of crime and public prosecutors.⁷

The South African Law Commission made the following proposals with regard to victim impact statements⁸:

- Victim impact statements ought to be generally admissible at the sentencing phase of procedures.

¹ South African Law Commission. 1997. Sentencing: Restorative Justice. Issue Paper 7. Project 82. 8.

² *Ibid.* 8.

³ *Ibid.* 8.

⁴ *Ibid.* 8.

⁵ *Ibid.* 9

⁶ *Ibid.* 9.

⁷ *Ibid.* 5.

⁸ *Ibid.* 42.

- The purpose of the statement should be to provide the court with an understanding of the seriousness of the offence, and this should be included in legislation.
- Victim impact statements should only be admissible where they provide information that is not already before the court.
- The term `victim' should be defined as the person against whom the offence has been committed or who was a witness to the act and who suffers injury as a result of the offence.
- Victims should have the option to tender such a statement and also the right to request the prosecutor to present the details of the injury to the court.
- Victim impact statements should be signed or otherwise acknowledged as accurate by the victim before they are received by the court.
- Victim impact statements, which are in sworn form, should be tendered by the prosecution at the sentencing stage.
- The statements should address the physical, psychological, social and financial consequences of the crime on the victim and not the question of an appropriate sentence to be imposed.
- The court should have the discretion to disallow a statement.
- The author of the statement should always be subject to cross-examination on the contents of the statement.

SA Victims' Charter of Rights

The SA Victims' Charter sets out the rights of victims of crime. For the purposes of the Charter, victims are defined as persons that have suffered harm (physical, mental, emotional or economic) through acts that are a violation of criminal law. The term `victim' includes the immediate family or dependents of the victim.⁹ The Charter includes seven rights that will be upheld in a victim's contact with the criminal justice system, one of which has particular application to the use of victim impact statements. The Charter provides that a victim has the right to offer information:

“As an important part of the criminal investigation, you need to be heard and allowed to offer information as a valuable contribution to the investigation and prosecution of the case. You can participate (where necessary and where possible) in criminal justice proceedings, through attending the bail hearing, the trial, sentencing proceedings and/or parole board hearings. You will have the opportunity to make a statement to the court to bring the impact of the crime to the attention of the court.”¹⁰

Definitions of victim and victim impact statement

⁹ *Ibid.* 4.

¹⁰ *Ibid.* 5.

The formal use of victim impact statements may be authorised either by way of a statutory enactment¹¹ or via a victims' charter.¹² This will, in turn, determine the definitions of both 'victim impact statement' and 'victim'. At its narrowest, the term 'victim' refers to the person against whom the offence was committed and who suffers the injury. At its broadest, it includes any person who suffers loss or harm as a result of the offence committed even where the offence was not committed directly against him or her.¹³

The definition proposed by the Project Committee on Sentencing specifically restricted the victim impact statement to the victim's written presentation.

'Victim impact statement means a written statement by the victim or someone authorised by the Act to make a statement on behalf of the victim which reflects the impact of the offence, including the physical, psychological, social and financial consequences of the offence for the victim.'¹⁴

It is, however, important to note that the victim impact statement is not always confined only to written documents.¹⁵ Although the Victims' Charter does not provide a definition of a victim impact statement, the Charter impliedly includes both written and oral forms.¹⁶

Erez simply describes a victim impact statement as a statement addressing 'the effects of the crime on the victim, in terms of the victim's perceptions and expressions of the emotional, physical and economic harm he or she sustained as a result of the crime'.¹⁷ Schmallegger¹⁸ defines such a statement as 'the in-court use of victim or survivor-supplied information by sentencing authorities wishing to make an informed sentencing decision'.

The South African Law Commission¹⁹ in their Discussion Document on Sexual Offences recommended that the definition of the term 'victim' should not only include direct and indirect victims such as family, but be extended to include the following:

¹¹ Examples of countries with a legislative basis for victim impact statements include Canada, the United States of America, and the Australian states of Southern Australia and New South Wales.

¹² Examples of countries where victim impact statements are authorised in terms of a Victims' Charter include England, Wales and Scotland.

¹³ SA Law Commission. *op cit* (11). 15.

¹⁴ Clause 1 of the draft Sentencing Framework Bill 2000.

¹⁵ South African Law Commission. **Report on Sexual Offences** Project 107 (2002).

¹⁶ Par 2.11.

¹⁷ Erez. 1999. 'Who's afraid of the big bad victim? Victim impact statements as victim empowerment and enhancement of justice' **Crim L R** 546.

¹⁸ Schmallegger. 1997. **Criminal Justice Today: An Introductory Text for the 21st Century** 4 ed. 718.

¹⁹ SA Law Commission. *op cit* (n11) 20.

“A person who has suffered direct, or threatened, physical, emotional or pecuniary harm as a result of the commission of a crime, including, in the case of a victim who is under 18 years of age, or incompetent, or incapacitated, or deceased, or one of the following: a spouse; a legal guardian; a parent; a child; a sibling; another family member; or another person designated by the court; and in the case of a victim that is an institutional entity, or an authorized representative of the entity, that entity.”²⁰

Rationale of victim impact statements

An examination of international literature indicates that there is no agreement as to the reasons for formal victim impact statement practice. Edwards²¹ highlights the following as being some of the reasons for the use of these statements:

- Improving sentencing outcomes – this includes both retributive-proportionate as well as restorative justice (reparation and compensation) arguments.
- Enhancing system efficiency and service quality – criminal justice may become more sensitive to the need of victims, and, in turn, victims are more satisfied with the system because of their participation.
- Benefiting victims – this will be of therapeutic and cathartic value for the victims themselves.

Notwithstanding the assertion that, internationally, there is no clarity about the precise rationale for a victim impact statement,²² Roberts notes nine purposes observed in the international literature.²³ These include the following:

- providing the prosecution with information about the offence;
- providing presiding officers with information about the seriousness of the crime and, to a lesser extent, about the culpability of the offender in order to assist the court in imposing a sentence consistent with sentencing principles;
- providing the court with a direct source of information about the victim’s needs which may assist in determining more appropriate, reparative sanctions;
- providing the court with information about the appropriate conditions that might be imposed on the offender;
- providing the victim with a public forum in which to make a statement reflecting his or her suffering;
- providing the court with an opportunity to recognise the wrong committed against an individual victim;

²⁰ *Ibid.* 19.

²¹ Edwards *op cit* (n26) 41-44.

²² Hoyle et al. 1999. **The Use of Victim Statements** Home Office Research Development Statistics Directorate (1999) 25.

²³ Roberts, JV. 2003. ‘Victim impact statements and the sentencing process: Recent developments and research findings’ 47 **Criminal Law Quarterly**. 371-372.

- providing the victim with an opportunity to communicate the effects of the crime to the offender;
- allowing victims to participate in sentencing, albeit in a non-determinative way; and
- promoting the idea that, although crimes are committed against the state, and the judicial process involves bipartite proceedings, crimes are also committed against individuals.

As secondary purposes derived from the above, he suggests that victims will not only be more satisfied with the judicial process, but will also be able to reach some form of closure, thus facilitating psychological healing. Further, public confidence in sentencing may increase, as well as the awareness by criminal justice professionals regarding the after-effects of crime. Lastly, awareness by offenders of the harm caused may increase, while the possibility of reconciliation between victim and offender is promoted by encouraging offender empathy.

According to Erez, the purpose of introducing victim impact statements was to provide victims with a voice.²⁴ Similarly, the Law Commission initially viewed the victim impact statement as an indirect way of giving the victim a voice during the sentencing stage.²⁵ Thus, in addition to providing the victim with a voice, the victim impact statement in South Africa is further addressed to the court for consideration in sentencing decisions and therefore also serves as a source of information for the court.²⁶ It informs the court about the impact of the crime on the victim and requires the victim to give particulars of any harm, including physical or mental injury, emotional suffering and economic loss resulting from the offence.²⁷ The sentencing discretion can only be exercised properly if all the facts relevant to the matter are presented. As argued above, the necessary information required by the court embraces much more than merely information on the elements of the case and the visible injuries. Thus, if a court is to exercise its sentencing discretion properly in child sexual abuse cases, it is necessary for the presiding officer to have access to the victim's version.

A court does not have the necessary expertise to draw conclusions about the effect of an indecent assault or rape on a child victim. In *S v Gerber*,²⁸ the court in fact accepted that it did not have such expertise:

²⁴ *Op cit* (n 19) 555.

²⁵ South African Law Commission. 2000. **Report on Sentencing (A New Sentencing Framework)** Project 82 at 88.

²⁶ Par 2 of the Victims' Charter reads: 'you may also, where appropriate, make a statement to the court or give evidence during sentencing proceedings to bring the impact of the crime to the court's attention'.

²⁷ Draft Sentencing Framework Bill 2000 clause 47 (1) (a).

²⁸ 2001(1) SACR 621 (WLD) at 624. The same finding was made by the Appeal Court in *S v R* 1993 (1) SACR 209 (A).

'A court does not have the necessary expertise to generalise about the consequences, *if any*, for the victim in a case like the present.' (Unofficial translation and the author's emphasis)

It is extremely difficult for any individual, even a highly trained person such as a magistrate or a judge, to comprehend fully the range of emotions and suffering a particular victim of sexual violence may have experienced.²⁹ Each individual will have a different background, a different support system and, therefore, a different manner of dealing with the trauma flowing from the abuse. This was emphasised by the court in **Holtzhausen v Roodt**.³⁰

'Rape is an experience so devastating in its consequences that it is rightly perceived as striking at the very fundament of human, particularly female, privacy, dignity and personhood. Yet, I acknowledge that the ability of a judicial officer such as myself to fully comprehend the kaleidoscope of emotion and experience, of both rapist and rape survivor is extremely limited.'³¹

In the light of South African case law, it is clear that speculation about harm will also not be of any help and that a finding of harm without a factual basis will not pass muster on appeal. It has been held that the long-term effect of child sexual abuse is a generally known fact of which a court can take judicial notice, but evidence is necessary for an inference of grievous harm to be made in a specific case.³²

Despite some initial scepticism about the right of victims to submit impact statements because such statements were a foreign trend demanding circumspection,³³ the reaction experienced by the Law Commission has been positive, in that, the usefulness of victim impact statements in the sentencing process is indeed recognised. In order that judicial officers may exercise their sentencing discretion properly, it is therefore necessary for them to have information placed before them, not only regarding the objective gravity of the crime, but also in respect of the present and future impact of the crime on the victim.³⁴ It is submitted that South Africa ascribes to the main rationale underlying victim impact statements, that is, they are seen as a means of achieving proportionality in sentencing, thereby taking the degree of harm inflicted into consideration in order to achieve a sense of balance.

The practice of using victim impact statements

In South Africa impact evidence has been provided in the following ways:

²⁹ South African Law Commission. 2002. **Report on Sexual Offences** Project 107 (2002) 646.

³⁰ 1997 (4) SA 766 (W).

³¹ *Supra* (n 46) at 778g-h.

³² *S v V* 1994 (1) SACR 598 (A) at 600j.

³³ L Meintjes-van der Walt . 1998. *Towards victims' empowerment strategies in the criminal justice process*. 11. **SACJ**. 157.

³⁴ *Rammokko v Director of Public Prosecutions supra* (n50) at 205e-f.

- Experts have given evidence on the impact of a crime, either after personal assessment of the victim or based on experience of similar cases.³⁵ An expert can be a psychiatrist, psychologist, criminologist, medical doctor or social worker.
- Secondly, it has been held that it is possible for a mother or teacher to testify about the symptoms of trauma displayed in the child's daily life, for example as regards sleeping patterns, eating or socialising patterns, standard of schoolwork, ability to concentrate, attitude to discipline and a nervous or fearful state of mind. In fact, where this evidence is unchallenged, it is not necessary to lead psychiatric evidence to prove harm.³⁶
- Further, it has been possible for the complainant to give evidence on harm by appearing in person and testifying during the sentencing phase. Such an appearance will however have to be considered carefully and will depend to a large extent on the victim's ability and desire to relive the trauma.³⁷
- Where a personal appearance is not possible or desirable, letters or poems written by the victim after the assault have also been used.

Content of victim impact statements

The focus of the statement is to make the court aware of what the victim has experienced emotionally and what they think about what has happened. The key issues relate to the harm suffered and their opinion as to sentence.

Harm

In Australia harm includes:

- physical and mental injury or emotion;
- suffering, including grief;
- pregnancy;
- economic loss; and
- substantial impairment of rights accorded by law.³⁸

In the United Kingdom, the concept of harm is extended to make explicit provision for any reference to a fear of further victimisation, while the American state of Florida provides for social harm as an element to be added.³⁹

The South African definition of harm does not introduce anything new. The definition of harm in the Victims' Charter includes physical or mental injury; emotional suffering; economic loss; or substantial impairment of the victim's fundamental rights.

³⁵ *Holtzhausen v Roodt supra* (n47) at 772e-f.

³⁶ *S v Abrahams* 2002 (1) SACR 116 (SCA) at 124c.

³⁷ *Rammoko v Director of Public Prosecutions supra* (n 50).

³⁸ Australian Crimes Act 1994.

³⁹ Florida per Fla.Stat. Ann. 921.143 (2000).

Opinion as to sentence

A thorny issue relates to whether the victim impact statement should include the victim's opinion regarding sentence, and there appears to be no consensus on this point.⁴⁰ In the United Kingdom, such a practice is prohibited and the following guideline serves to clarify the position for victims:

'The judges and magistrates decide how an offender is punished when they pass sentence. You should not offer any opinion as to how the court should punish the offender. The court will not consider your opinion when they make a decision, but will take account of how the offence has affected you.'⁴¹

There are three arguments against including the victim's opinion about sentence. First, it is argued that sexual offence cases, unlike civil cases, are public cases that are dealt with in the name of the state. Hoffmann, however, rejects this argument by pointing out that victims now rightfully occupy a special place within the criminal justice system.⁴² Secondly, it is argued that it may be distressing for a victim to have his or her recommendations ignored by the presiding officer.⁴³ Furthermore, recommendations regarding a specific sentence may also be seen by the presiding officer to be inappropriate, because the victim has no legal background and might simply be seeking revenge.⁴⁴

In response to the above objections against sentence recommendations from the victim, it should be noted that research has shown that a victim's need may relate mainly to telling the offender that what he did was wrong⁴⁵ or asking for payment for counselling and therapy.⁴⁶ Further, as a result of the sexual assault, victims often experience a severe and ongoing sense of loss of control.⁴⁷ By providing them with 'even a small degree of control over the defendant's fate, it may be possible to help them to regain their sense of agency in general'.⁴⁸ Through the recommendation of a lenient sentence, the victim is also afforded the opportunity of showing mercy to the perpetrator. The argument in favour of allowing a victim to make recommendations to the presiding officer regarding

⁴⁰ Law Commission *op cit* (n 46) 682. In contrast to the draft Sentencing Framework Bill 2000, which opposes the idea, the Project Committee on Sexual Offences supports it.

⁴¹ Home Office *op cit* (n 69) par 7.

⁴² Hoffmann, JL. 2003. *Revenge or mercy? Some thoughts about survivor opinion evidence in death penalty cases*. 88. **Cornell Law Review**. 541.

⁴³ Hall, DJ. 1997. *Victims' voices in criminal court: The need for restraint in M Wasik* **The Sentencing Process** (1997) 266.

⁴⁴ Hoffmann *op cit* (n 72) 530.

⁴⁵ *Rammoko v Director of Public Prosecutions supra* (n 50).

⁴⁶ Personal communication with an adult male survivor in May 2004, Pretoria.

⁴⁷ Henderson, N. 1985. *The wrongs of victim's rights*. 37 **Stan L Rev** 937 as referred to by Hoffmann *op cit* (n72) 358.

⁴⁸ Hoffmann *op cit* (n72) 538.

an appropriate sentence should, however, only be considered if such a practice is indeed qualified by the provision that the presiding officer is under no obligation to follow the recommendation.⁴⁹ Apart from providing clarity for the victim that it is the court's responsibility to decide on sentence, this provision also contributes to minimising the perception that there is interference in the presiding officers' sentencing discretion.

The South African Victims' Charter does not make explicit provision for the victim to comment on a specific sentence. However, the phrase referring to the prosecutor's option to submit a victim impact statement or lead further evidence 'in support of an appropriate sentence' may be interpreted as including a suggestion by the victim regarding sentence.⁵⁰ The Project Committee on Sexual Offences was of the opinion that complainants should be allowed an opportunity to express their opinion in the victim impact statement on the question of an appropriate sentence.⁵¹ They saw no harm in allowing a victim to make recommendations regarding an appropriate sentence provided that it was understood that the presiding officer was under no obligation to follow this recommendation.⁵²

⁴⁹ Law Commission *op cit* (n 46) 682.

⁵⁰ Part 2 par 19 of the *Minimum Standards on Services for Victims of Crime* (2004).

⁵¹ SA Law Commission. *op cit* (11). 36.

⁵² *Ibid.* 36.