

Victim impact statements

Victims' rights wronged

Chris Richards

There are clear dangers and disadvantages in seeking to support victims of crime by piecemeal low cost measures

Few would disagree that victims of offences should get a better deal from the legal system. Reform proposals in this area focus unduly on including statements about the effect of the offence on the victim at the time a convicted offender is being sentenced. By contrast, wider administrative and legal reform, designed to provide victims with more support, proper compensation and a more sensitive reception from police, prosecutors and courts, is neglected. This article looks at a proposal to introduce victim impact statements in Queensland, and concludes that its introduction could exacerbate, rather than relieve, the trauma and frustration felt by victims in their passage through the legal system.

On 10 February 1992, the Victims of Crime Association Incorporated (Queensland) held a meeting at Police Service Headquarters. Approximately 20 people, drawn mainly from community organisations, had been invited to discuss the establishment of a register to enable victims of violent crimes to find out when perpetrators of the crimes against them would be released from gaol. The benefits of such a register would include providing victims with access to information which would allow them to mentally prepare themselves for the release from gaol of the perpetrators of crimes against them.

While the establishment of this register was discussed at the meeting, it was not the sole focus. Meeting participants were also asked to consider three proposals given by the Victims of Crime Association (VOCA) to the Queensland Government:

- recommending that the government, as a matter of urgency, give legislative effect to a charter of rights for victims of crime based on the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;
- supporting the introduction of victim impact statements, provided that vic-

tims can choose not to have a statement prepared without suffering any detriment in the judicial process; and giving qualified endorsement to the preparation of preliminary victim impact statements by police. The endorsement was contingent on proper training and adequate resources being given to the police.

At the meeting, VOCA representatives explained that they had held recent meetings with the Attorney-General's personal staff to discuss the efficacy of both victim impact statements and a charter of rights (based on the United Nations Declaration) for victims. They also explained that the Attorney-General was keen to ascertain the support for these proposals from community organisations. VOCA consequently utilised its meeting to ascertain whether, and what, compromises could be made amongst meeting participants to enable the meeting to support the proposals. Members of the meeting declined their support.

The UN Charter of Victims' Rights

The seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan in 1985, dealt with justice issues for victims of crime and abuse of power. A declaration of basic principles was approved by the UN General Assembly in December 1985. The preamble to the declaration affirms the necessity for adopting international and national measures to secure the effective recognition of and respect for the rights of victims of crime and abuse of power without prejudicing the rights of suspects or offenders.

Part A of the declaration deals with victims of crime, people who:

have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States . . .

Declarations 4 to 17 deal with the need to:

- treat victims with compassion and respect;
- ensure prompt redress to the victim for the crimes that they have suffered. Offenders should be required to make fair restitution to the victims or their families. Consideration should be given to making restitution a sentencing option. Where compensation is not fully available from the

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offender, member states should endeavour to provide financial compensation to families of victims who have died as a result of the offence and to victims of serious crimes who have sustained significant physical or mental injury or impairment;

inform victims of the nature and progress of the criminal proceedings in which they are involved and of available health and social support services that could give them relevant assistance;

train police, justice, health and social service workers to sensitise them to the needs of the victim; and

- provide proper assistance to victims throughout the legal process.

Declaration 6 says that the responsiveness of judicial and administrative processes to the needs of victims should be facilitated by a range of measures which include:

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.

The passage of Declaration 6(b) through the UN Congress was contentious. The United Kingdom delegation made an explicit reservation when the Declaration was adopted by Congress that:

in the view of this delegation, the rights of victims should not extend in any way to sentencing, case disposal or course of trial.

It is Declaration 6(b) which is said to justify the introduction of victim impact statements.

The Queensland proposal

As a charter of rights for victims, the United Nations Declaration appears laudable. It highlights the need to improve the way in which the criminal justice system deals with victims without prejudicing the rights of suspects. Its concern is to achieve this balance through improving support services for victims; sensitising the approach of police, prosecutors and judges to victims; helping the victim to understand the nature and effect of the steps involved in the criminal justice system; and providing adequate compensation to victims for the trauma they have experienced.

Unlike victim impact statements, these proposals are ancillary to the trial process: they do not either directly or

indirectly affect the way in which a court will deal with a person who has been accused of an offence against a victim.

With the exception of victim impact statements, these proposals are likely to attract the support of both those who represent victims and defence lawyers.

It is ironic that the Government's initial response to the implementation of a Charter of Victims' Rights focuses on that component of the UN Charter which is the most contentious: the victim impact statement.

Material circulated by a government department to community organisations for comment in February 1992 describes a proposal 'to give legislative force to a charter of victims' rights based on the United Nations Charter'. The document then concentrates solely on the rationale for and a description of victim impact statements and emphasises that the proposal has not been settled and will 'depend upon the results of consultation'. It outlines a procedure for placing before a sentencing court summaries of victim impact statements prepared by victims of defendants convicted of either sexual assault or an offence against the person dealt with on indictment:

Summaries of victim impact would be prepared by the victim for use by the prosecutor at the time of sentencing. They should not be tendered but would form the basis of oral submissions. Should they wish to do so, victims would be able to obtain reports to be tendered to the court by the prosecutor.

There would be an overriding discretion vested in the prosecutor, in the interests of justice, to determine whether any or all of the information contained in the summary is to be provided to the court. This may depend on, e.g. whether the information in the summary was contrary to the evidence in the prosecutor's possession, whether a plea to a lesser charge had been accepted, whether some of the material contained in the summary was objectionable, etc.

It is proposed that the contents of the summary of victim impact will be subject to testing by the offender by way of cross-examination of the victim or the author of any medical or other report about the victim. Should the victim not wish to be cross-examined or, where the victim is a child, the guardian not wish the child to be cross-examined on any material contained in the summary of victim impact, that should be the end of the matter. Any disputed material upon which the victim does not wish to be cross-examined should not be put to the sentencing court.

A draft victim impact statement, also circulated to community organisations for comment, asks the victim to complete details about:

- medical treatment for injuries sustained;
- whether the victim wishes to provide a report for presentation to the court from a doctor, psychiatrist, psychologist, or health worker consulted by the victim;
- amounts of actual and anticipated medical and treatment expenses;
- inconvenience suffered;
- the way in which the ability of the victim to earn a living has been impaired (if any); and
- other expense or loss as a result of the offence.

At present, this information should be presented to a sentencing court in Queensland by the prosecutor when the victim seeks compensation from a defendant following conviction. There are two major problems with this present practice.

First, many defendants who could be ordered to pay compensation will not have the ability to make such a payment. There is no state fund to which the victim can look to seek compensation if the offender is impecunious. Although the Governor-in-Council can approve the making of an *ex gratia* payment to the victim, there is no compulsion placed on the Governor-in-Council to make such a payment if the defendant cannot pay the compensation ordered by the court (ss 663C and D, Criminal Code Queensland). The *ex gratia* payment process involves an application by the victim to the Attorney-General following the making of a court order. For the victim, this protracted means of obtaining compensation carries no guarantee of success even after a court order for the compensation of the victim has been made.

Second, it is not widely advertised to victims that they can seek a compensation order from the sentencing court.

The victim impact statement proposal would help to address the second problem. The draft statement being circulated at present asks the victim whether compensation is sought. In addition, draft penalties and sentences legislation being circulated at present to community and interest groups would, if enacted, provide a supplementary solution to the problem that many victims do not seek compensation because of ignorance. This draft legislation pro-

poses that sentencing courts be required to consider whether a compensation or restitution order should be made in every relevant case.

The victim impact statement proposal would not address the first problem: why victims may think there is little practical benefit in making a compensation application.

Criticisms of victim impact statements

Defence lawyers criticise victim impact statements as an inappropriate intervention into the criminal justice sentencing process. The type of information proposed for a victim impact statement is relevant to victims' compensation entitlements, not the punishment that should be given to an offender. The question of victim compensation should be civil, not criminal.

The provision of victim impact summaries confuses the purpose of the criminal justice process. Through a criminal proceeding, the community brings an offender to account for breaching the laws of the community. Through a civil proceeding an individual can bring to account another individual whose conduct has harmed that first individual.

The impact on the victim is relevant to the civil process. It should not be relevant to the criminal process. An offender is punished because he or she has broken a law. There should be conformity in the degrees of punishment that are imposed on offenders: a person who has committed a particular crime should receive a punishment equivalent to that imposed on other offenders who have committed the same crimes in similar circumstances.

The punishment should not increase or decrease because of the effect that the offence has on the victim. If it did, an offender who committed a crime on a victim who was not markedly affected by the offence would be given a lesser punishment than an offender who committed a similar crime on a victim who suffered severe emotional trauma as a result of the offence. The punishments imposed on offenders would be linked to the emotional susceptibility of their victims.

In addition, an offender whose victim experienced delayed injury — psychological or physical injury where the full impact did not develop until after the offender had been tried — could receive a less severe penalty than an offender whose victim experienced immediate signs of trauma.

Defence lawyers also would argue that, as the views and concerns of the victim are not appropriate at the court sentencing stage, victim impact statements should not be condoned under Declaration 6(b) of the UN Charter.

Instead, a court separate from the criminal law processes should receive victim impact information and assess compensation. Consideration should therefore be given to the Victorian system of assessing victim compensation through a civil crimes compensation process. As this forum focuses on the victim, the emotional susceptibility of the victim can properly be taken into account. A victim who experienced greater emotional distress than another victim of a similar crime should be given greater compensation. If the injury done to the victim develops over time, compensation need not be considered until the full impact of the crime on the victim had become apparent.

The proposal's critics may not be confined to defence lawyers. Advocates for victims could also express concerns about the proposal. In the absence of other measures set out in the UN Charter, the victim impact statement proposal could accelerate the trauma and frustration at present experienced by victims in their passage through the criminal justice process. Thus the very reason for the introduction of the proposal would be defeated.

One of the purposes of the victim impact statement is to provide an opportunity for victims to present the effect of the offence on them to a court. It assumes vindication of the victim's experience. It allows victims to purge their anxiety and suffering in an official public forum.

This purpose can be achieved in a civil case, which focuses on a victim's claim against an offender. The extent to which this purpose can be achieved through criminal law processes may in many cases be limited. Any victim impact statement proposal must allow defence lawyers to cross-examine the victim on the statement. As framed at present, it would also vest in the prosecutor discretion to use or discard any parts of the statement provided by the victim. After deciding that they wished to present information to the court about an offence, victims may find that this information is challenged or discarded. The outcome for victims of a victim impact statement may therefore be demeaning, rather than legitimising, of their experiences during and following the offence.

Who would use the process?

Class, gender and ethnic differences mean that the victim impact statement process may be utilised selectively. The process of presenting to a court the impact of an offence is more likely to appeal to a middle-class Anglo-Saxon male than it is to a Vietnamese woman who has recently arrived in Australia. It is the victim who can choose whether a victim impact statement will be presented to a sentencing court after an offender has been convicted. Therefore, a defendant who commits a crime against one victim could be dealt with differently from a defendant whose victim falls within income, sex or race categories less likely to wish to undertake the victim impact statement procedure.

The proposal requires victims to prepare and submit the details required in the statement. Literacy will present an obstacle in some cases, especially for those who do not speak English. Many victims would need advice or assistance before completing questions about projected loss of earnings or details of inconvenience suffered. Few victims will be able to pay for treatment, let alone medical reports from specialist doctors, psychiatrists or psychologists. In the absence of support and information services for victims, the procedure entailed in completing victim impact statements could exacerbate the frustration and powerlessness at present experienced by victims.

The proposal may make prosecutors more responsive to victims. It may encourage more contact between prosecutors and victims. These results would be desirable. One of the primary problems experienced by victims in their journey through the criminal justice process is their lack of contact with someone who can inform them of the progress of a criminal proceeding, the meaning of various processes, and the importance that will be or has been placed on certain pieces of evidence. The UN Charter declares that mechanisms to inform victims of the nature and progress of criminal proceedings should be instituted by member states. To achieve this, direction and training should be provided to police and prosecutors. The establishment of a proposal, the operation of which may, in some cases, allow the victim access to better information provides an inadequate substitute.

The absence of discussion about the implementation of other measures declared under the UN Charter in mate-

rials about victims' rights, which have been circulated to community organisations, is significant.

South Australia, at present the only State which gives legislative force to the presentation of information about injury, loss or damage suffered by a victim of an offence to a sentencing court (s.7, *Criminal Law (Sentencing) Act 1988 (SA)*) has also improved its victim compensation system and given administrative directions to criminal justice agencies to facilitate the giving of better information to and protection of victims. Its victim reform process appears to have been driven by parts of the UN Charter.

Like all Australian governments, the Queensland Government is geared towards low or no-cost reform. This may explain why the initial draft proposal does not require police resources to be used to provide assistance to victims in completing the statement. It may also explain the absence of discussions about a Charter of Victims' Rights package. For there is no doubt that, if the UN Charter is to be given effect in Queensland, significant calls on consoli-

dated revenue would be required for the establishment of advice and support services for victims, adequate victim compensation schemes (including the establishment of a state fund upon which victims could claim), and training to sensitise police, prosecutors and courts to the needs of victims.

Conclusion

The victim impact statement proposal confuses the proper place of victim impact assessment within legal processes. The assessment is appropriate to a claim in tort where a civil court can order one individual who has wronged another to pay appropriate compensation to that other. It is not appropriate to an assessment of the penalty that should be given to a person whose wrong action is also a crime.

This confusion underpins the fatal flaw in the present proposal. The role for victims within legal processes should not be retributive or punitive. Their statements should not be given when the punishment of offenders is being calculated. Criminal proceedings focus on the defendant. By contrast,

civil proceedings focus on victims and their claims. For as long as victims are valued within criminal, rather than civil, proceedings, the importance of providing them with proper support, sensitivity, and compensation is undermined.

Information obtained from the Attorney-General's Department indicates that, following community consultations, the issue of victims of crime, their rights and the issue of compensation are now the subject of serious reconsideration by the Attorney-General. Therefore any final conclusion about a government response designed to give effect to the UN Charter would be premature. If the Queensland Government does not address the problems at present experienced by victims in the criminal justice system in a context wider than victim impact statements, then it will leave itself open to the accusation that it has provided for itself a no-cost political protection against law and order lobbies which lacks any substantive benefit to those victims it is said to assist.

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The value of citizenship

How has it changed my relationship with the state? My affirmation committed me to 'faithfully observe the laws of Australia and fulfil my duties as an Australian citizen'. The duties in question are the Big Three; as for observing the laws, I was under that obligation anyway, as a mere resident or even as a visitor. The Immigration Department says I'm now entitled to the same rights as people born here. (That's shorthand for the same rights as people of my own sex and race born here.) As a permanent resident, I already was entitled to the same services and protections (sickness benefits, trial by jury) as citizens of Australia (as opposed to being in the hands of kidnappers overseas). But there are some jobs open only to citizens in the federal public service, and only citizens can stand for elected office.

One way to make citizenship more valuable could be to attach extra privileges to it that non-citizens are denied. Since we are unlikely to invent any new

rights or privileges to bestow on citizens, we could bump up the value of citizenship by denying more to non-citizens. We could also bring back child labour in mines.

Why shouldn't citizenship be easy to obtain? It's hard enough (and getting harder every year) to qualify to get in here in the first place. Unlike residency, citizenship is not a prize awarded in a competition. Like a law degree: the tough part is squeezing in through the doors of the law school in the first place. I agree with George Papadopoulos from the Victorian Ethnic Affairs Commission, whose reply to Professor Blainey said citizenship is a right in itself, freely offered to people born in Australia and those accepted as settlers here.⁷

What I want to know is, who do I lobby about parking in those loading zones?

References

1. Sanford Levinson, 'Constituting Communities through Words that Bind: Reflections on Loyalty Oaths', (1986) 84 *Michigan Law Review* 1440.

2. (1608) 2 St Trials 559. cited in Wishart, David A., 'Allegiance and Citizenship as Concepts in Constitutional Law', 15 *Melbourne University Law Review* 662.
3. (1886) 17 QBD 54. Cited in Wishart, above, at 697.
4. Wishart, above, at 680.
5. *Schneiderman v United States*, 320 US 118 (1943). Cited in Levinson, above, at 1441.
6. Blainey, Geoffrey, 'Too Few True Blue', *Weekend Australian*, 27-28 May 1989, p.1.
7. Papadopoulos, George, 'Blainey on Citizenship', (1989) *Victorian Ethnic Affairs Commission Newsletter*, July, 3-5, at 5.

OPEN DAY

Family and Friends Centre, Long Bay Prison Complex

New trends in training prison officers and how to deal with the 'old guard' officer is the title of a talk at the Family and Friends Centre, Long Bay Prison Complex, on 19 July, 1992.

The talk by Senior Assistant Superintendent Jules Dinsdale from the Department of Corrective Services Training Academy, will begin at 1.30 p.m.

Jules Dinsdale is a senior lecturer and the talk is part of a series of open days at the centre.

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