



29 March 2010

A Focus on Victims of Crime
Ministry of Justice
PO Box 180
Wellington 6140

By email: VictimsRightsReview@justice.govt.nz

A Focus on Victims of Crime – A review of victims' rights

The Society is grateful for the opportunity to comment on the Ministry of Justice's consultation document. Its response to the preliminary proposals is set out below:

Chapter 2 - Victims' Services Centre

Preliminary proposal 1: Victims' Services Centre

There is value in the proposal to establish a centrally based Victim' Services Centre in the Ministry of Justice to ensure the delivery of consistent and comprehensive information and support services to victims.

It should be made clear that the existence of such a Centre will not prevent direct communication between the victim and those involved in handling the case in which they are involved.

Chapter 3 - Accountability

Preliminary proposal 2: Code of Practice

We support this proposal, given that there is currently no efficient way to ensure accountability from the criminal justice agencies for the effectiveness or quality of the information and services they deliver to victims.

The Accident Compensation Corporation, the NZ Police, the Department of Corrections, the Ministry of Justice (including the courts and the Victims' Services Centre), the Parole Board, and possibly the Ministry of Health and the Department of Labour should be required to contribute to an overarching Code of Practice.

The Code of Practice should be aligned with the Victims' Charter that the Ministry of Justice developed for victims in 2008. It would be appropriate for the Ministry of Justice to develop the principles and framework of the Code of Practice. The Code of Practice could include consideration of Maori victims, and applicants of protection orders made in the Family Court.

Preliminary proposal 3: Complaints Officer

The proposal to amend the Victims' Rights Act to revise the complaints process and establish a Victims of Crime Complaints Officer may well have merit and should be further investigated.

If the Complaints Officer is not satisfied that the complaint was appropriately addressed by an agency then he or she could mediate a prompt solution and where appropriate award costs against the agency.

However, it will be necessary to guard against a complaint procedure that could become the venue for victims of offending who are dissatisfied with the outcome of the criminal justice process in relation to the acquittal or conviction of offenders.

Preliminary proposal 4: Annual Report to Parliament

We support this proposal. Statistical information of complaints received and upheld (assuming there will be a Complaints Officer) should be included in the Annual Report to Parliament.

Chapter 4 - Improving victims' role in the Criminal Court

Preliminary proposal 5: Prosecutors to meet with (or otherwise contact) victims of serious offences

Paragraph 86 states that the purpose of the meeting between the prosecutor and victim is to familiarise the victim with the general court processes and procedures, and to outline the role of the prosecutor and what they (the victim) can expect from the case.

We do not object to victims being provided with this information, but we query whether the prosecutor is the most appropriate person for this role. We would prefer to see the Police Officer in Charge (O/C) or Victim Advisers to perform this function, which many do, as a matter of routine under our current regime.

Paragraph 86 also states that prosecutors should meet with victims before the first court hearing. This is problematic. It would be more appropriate for prosecutors to meet with victims prior to the trial. There is little point in requiring an earlier meeting, as the defendant may plead guilty.

We note that this consultation document was published in December 2009 before the Prosecution Guidelines, *Victims of Crime – Guidance for Prosecutors*, was issued by the Solicitor-General in January 2010. Please refer to paragraphs 11 to 16 of the Prosecution Guidelines that already specifically provides:

“Prosecutors should ensure that victims have been referred to Court Services for Victims. Victim Advisers can assist by explaining the Court process, showing the victim the courtroom and ascertaining and communicating the views of victims. They can also ensure that victims with special needs have an appropriate support person organised in the courtroom if required and ensure that any other special arrangements of the trial are made.

Certain victims of crime have special requirements. Examples include children, those with disabilities which hamper their ability to participate and those who do not speak English. Prosecutors must be particularly mindful of the needs of these groups. Those who have been the victims of particularly serious crime such as homicide or sexual offending also have special requirements.

In cases involving sexual offending the prosecutor should ensure that arrangements have been made for the victim to meet with a Victim Adviser or a specialist support worker where available, before the hearing or trial, to explain the Court process and show the victim the Courtroom. Any alternative means of giving evidence (e.g. behind a screen) should be shown to the victim and explained.

The prosecutor should meet with the victim before trial to discuss the giving of evidence and any issues which are likely to arise.

In conjunction with the Victim Adviser special arrangements for the trial may be appropriate, including the setting aside of an allocated room to wait in before giving evidence.

Prosecutors will on request meet the family of someone killed as a result of a crime and explain a decision on prosecution. In any case involving a death a prosecutor has a role to play in minimising the additional distress criminal proceedings are likely to cause to a victim's family and friends. The bereaved family are likely to be acutely concerned about any major decision taken in the case, e.g. to change the charge or accept a plea to an alternative or lesser charge, or to terminate the proceedings."

Preliminary proposal 6: Prosecutors to tell victims why it is necessary to change the charges laid

Paragraph 16.6 of the same Prosecution Guidelines requires that:

"The victim or complainant must be informed of any plea discussions and given sufficient opportunity to make his or her position as to any proposed plea arrangement known to the prosecutor."

We would prefer to see the Police Officer in Charge conveying this information (which they often do currently).

Preliminary proposal 7: Support persons

We support the proposal to amend s14 of the Victims' Rights Act to allow a support person to be given information on the victim's behalf, if the victim requests the court to do so. Many victims find the criminal court process stressful and support persons could assist victims to present information effectively. In some cases the risk of adverse effects on victims would also properly be avoided.

Preliminary proposal 8: Support persons

We support the proposal to extend the definition of support person as it applies to s14 of the Victims' Rights Act. The proposal could be implemented to include counsellors, close friends or extended family as within "support persons".

Preliminary proposal 9: Name suppression

The proposal to amend s12 of the Victims' Rights Act to require that victims be given information by the Police about their entitlement to apply for name suppression would be difficult to implement. Victim Advisers or specialist support workers could assist with providing this information.

It would also add to the workload of Police prosecutors (when they are already at full capacity) if they were expected to advance arguments for name suppression on behalf of the victim. Perhaps it could be

clarified whether or not the prosecutor is expected to advance arguments for name suppression on behalf of the victim.

Preliminary proposal 10: Referral's for restorative justice

We do not support the proposal to extend restorative justice services to all District Courts. The District Courts should also not be required to refer every eligible case for investigation of restorative justice (where the offender has pleaded guilty and before sentencing) unless there are specific reasons not to. There is a considerable body of literature suggesting that restorative justice is inappropriate in cases of sexual offending, and may even be inappropriate in cases of violent offending.

Preliminary proposal 11: Access to other programmes and services

We have reservations about the proposal that restorative justice should be used to assist victims in accessing social services and programmes in the community. Many victims, including some of the most traumatised, do not wish to involve themselves in restorative justice processes. It is possible that, for those who do become involved, there will be scope for assisting them. But those who do not wish to become involved will also need the same sort of assistance.

Preliminary proposal 12: The use of restorative justice in other settings

We do not support this proposal. Victims who do not wish to involve themselves in restorative justice processes will find themselves subject to pressure, or believe they are under pressure, to involve themselves in restorative justice processes. There is a very real risk of revictimisation and this is a risk that must be avoided.

Chapter 5 - Providing victims' information to the Court

Preliminary proposal 13: Freedom to say more in a Victim Impact Statement (VIS)

We have no objection in principle to this proposal. However, the purpose of a VIS is to inform the Judge about the effects of the offence upon the victim along with any other effects of the offence.

It is one matter to permit the effects of the offending to be outlined in a VIS, but quite another to permit victims (or their relatives) to incorporate into a VIS comments which amount to nothing more than abuse and/or criticism of an offender. This latter scenario must be guarded against and victims should not be permitted to grandstand or dominate sentencing hearings with criticism of an offender.

We support the proposal to develop guidelines for all the agencies or persons who assist victims in preparing a VIS. The existing law is well settled in *R v Burns* [2001] 2NZLR 464 and *R v Patterson* [2008] NZCA 75. These cases provide clear guidelines as to the permissible content of a VIS, and how inadmissible evidence should be inserted in a summary of facts, and if disputed, be made the subject of a disputed facts hearing.

Preliminary Proposal 14: Reading the Victim Impact Statement (VIS) out to the Court

We support such a procedure as long as the content is permissible.

Preliminary proposal 15: Including harm to the victim's dependent family members or whānau in a Victim Impact Statement (VIS)

The present definition of "immediate family" in relation to a victim set out in s4 of the Victim's Rights Act 2002 is perfectly adequate. There is no need to extend the definition to persons who were not in "a close relationship with the victim at the time of the offence". Such persons would provide limited assistance in the sentencing process.

Preliminary proposal 16: Reformatting the Victim Impact Statement (VIS)

This is an excellent proposal and should provide consistency.

However, it is the role of the Crown to filter the content of the VIS to make sure the content is appropriate. It seems desirable to have a statutory process to expeditiously settle disputes about the content of a VIS.

In terms of the statutory process set out in ss17-21 of the Victim's Rights Act 2002, this could be achieved by inserting statutory steps requiring:

- the VIS to be provided to Counsel for the offender 10 days prior to sentencing;
- Counsel for the offender to advise whether there is any objection to content (and if so, provide detail and grounds of objection) within 5 days prior to sentencing; and
- Resolution of dispute prior to sentencing by sentencing Judge (or other Judge if appropriate) either on papers or with telephone conference hearing (as appropriate in circumstances).

Preliminary proposal 17: Referring additional victim information to the Judge

Additional information from non-government organisations should only go before the Judge via the VIS process outlined above which provides for the appropriate checks and balances.

Chapter 6 - Improving the Victim Notification System***Preliminary proposals 18 – 20 Registration and structure of the Victim Notification System (VNS)***

We support the proposal that the VNS be tailored so that victims on the VNS can choose whether to receive one certain notification, all notifications, or just pre-sentence notifications, or just post-sentence notifications. Criminal justice sector officials should be required to advise victims that if they want to receive notifications they must ensure that their details on the VNS are up to date. Court staff, in addition to the Police, should be required to check with eligible victims whether they are or want to be on the VNS.

Preliminary proposal 21: Scope of the Victim Notification System (VNS)

We support the proposal to include in the VNS victims of certain offences under s29 of the Victims' Rights Act where the offender is sentenced to home detention.

Preliminary proposals 22 - 23: Operational issues

It should be ensured that victims who were too young to be registered in the VNS in their own right should become registered once they turn 17.

We support the proposal that victims should retain all their rights until the offender completes the longest sentence to which they were sentenced for the offence against the victim, even though the sentence for the offence against the victim has expired.

Chapter 7 - Victims of child and youth offenders

Preliminary proposal 24: Victims of child and youth offenders

Conflict between the interests of the young person and those of the victim

It seems logical that the protections and assistance of the Victims Rights Act 2002 (“VRA”) should be afforded to a victim regardless of the age of the offender. However, in the Youth Court a victim’s interests must be balanced against principles promoting the development of the offender within their family and strengthening the offender’s family.

The principle relating to victims in the Youth Court requires only that “due regard” be had to the interests of any victims of the offending, see Children, Young Persons and Their Families Act 1989 (“CYPFA”), s208(g). If victims’ rights are enhanced, there is a danger that young persons’ interests could be compromised. For example, a victim may be opposed to bail but, in certain circumstances, bail accords with the principle that a young person “should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public”, see s208(d).

The rehabilitative goals of the CYPF Act could also be hampered if too much weight is given to a victim’s views as to what should happen to the young person.

Language of the VRA

The consultation document seeks, in part, to clarify the rights of victims of child and youth offenders by ensuring the VRA is more explicit as to how it applies to cases in the youth jurisdiction.

The Youth Court process is victim-centered as it is based on a restorative justice model. It operates subject to directions by the Court as a closed Court and issues of victim privacy do not ordinarily arise. As outlined in the consultation document, victims are central to the operation of the FGC process and so have **direct** input into Youth Court outcomes. As such they are advised of progress by Youth Aid officers and the Youth Justice Co-ordinators. When purely indictable charges progress onto higher Courts (either for trial or sentence) the VRA involving victim impact statements and notifications would more readily apply.

A current impediment to the VRA applying in the Youth Court is its language. The VRA uses the language of the adult criminal justice system, which is not directly applicable to the youth justice jurisdiction (a system that has adopted unique processes under the CYPF Act). Words such as “conviction” and references to entering a plea and a finding of guilt are used in the VRA when in the Youth Court, there is only limited scope for entering a conviction. A defendant usually “denies” or “does not deny” a charge, and an offence is “proven”.

Of particular note is the definition of “offender” in the VRA, which suggests that the legislation only applies to victims of convicted persons. This follows from the definition of “offender” in s4 of the Act:

Offender, in relation to a victim -

- (a) means a person *convicted* of the crime or offence that affected the victim; and
- (b) in ss17 to 27 (which relate to victim impact statements), includes a person *found guilty of*, or *who pleads guilty to*, that crime or offence.

There are only limited grounds under which the Youth Court may enter a conviction against a young person, and generally only under s283(o) of the CYPF Act. And similarly, there are only limited circumstances in which a finding of guilt or a plea of guilty would be relevant to the Youth Court. Thus, the language of the VRA would need to be addressed if all or part of it was to be applied to the

Youth Court. Despite this general inapplicability of the language to the Youth Court, we note that s35(3) of the VRA includes a reference to s238(1)(d) and (e) of the CYPF Act.

Section 321(1) and Schedule 1 of the CYPF Act state that certain provisions of the District Courts Act 1947, the Summary Proceedings Act 1957 and the Bail Act 2000 apply in the Youth Court. Section 321(1) states that these provisions will apply “with such modifications as are indicated in that schedule or are necessary”. If the VRA or parts of it were included in this list, the difficulty around words such as “offender” may be overcome as being such “modifications” as are necessary.

Changes to the current system must take account of protections for victims already in the CYPF Act. For example, the consultation document talks about access to restorative justice but, of course, this is a central feature of the Youth Court system. Under the CYPF Act victims are entitled to attend family group conferences (FGC’s) and a Youth Justice Co-ordinator must make all reasonable endeavours to consult with a victim of an offence as to the date, time and place of the relevant FGC. Victims attending a FGC personally may take a reasonable number of support people and a FGC may recommend that a young person make reparation to a victim, see CYPF Act s260(3)(e). As a FGC attendee, a victim may learn information about the young person, their family and their offending that is privileged and that may not be published, see CYPF Act, s37, s38 and s271.

Child Offenders

We note that the principle requiring “due regard” be had to victims under the CYPF Act is the only youth justice principle that applies to child offenders for whom a declaration for care and protection on s14(1)(e) grounds is sought, see CYPF Act s13(i).

Orders under the CYPF Act may follow on from a declaration including an order that the child, or any parent or guardian of the child, pay to the person who suffered the emotional harm or the loss of or damage to property such sum as it thinks fit by way of reparations, see CYPF Act s84(1)(b)(ii). However, the focus of the process is the care and protection of the child and there are a number of obstacles to obtaining such a declaration. For example, there must be “serious concerns” for the wellbeing of the child under s14(1)(e) and s73 CYPF Act requires that the Court must not make a declaration if there are alternatives including a FGC plan. An FGC plan may include consideration of victims but there is no requirement for this. It is likely that the child offending system provides poorly for victims.

Information to Victims

Section 438(3) of the CYPFA prohibits, in all cases, publication of the name and identifying particulars of the offender in Youth Court proceedings. This section, and other similar prohibitions under ss37, 38 and 271, should be considered if the intention is to provide information to a victim under s11 or s12.

Victim Impact Statements

It would be useful if some form of victim impact statement process was made available to the Youth Court.

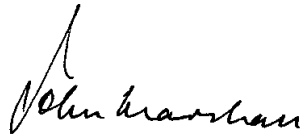
Youth Court Judges have a duty to take “the effect of the offence on any victim of the offence, and the need for reparation to be made to that victim” into account in sentencing and a victim impact statement would be useful for this, see CYPFA s284(1)(f). The kind of information likely to be found in a victim impact statement may currently be divulged by a victim at FGC, but the proceedings of these conferences are privileged and confidential and reports back to the Youth Court are only of decisions, recommendations and plans made. A victim is not automatically entitled to attend Youth Court, but may do so with leave of the Judge. Thus, a Judge may request that a victim attend Youth Court and

give an account of the effects of the offending to ensure that s284(1)(f) is complied with, but there is no requirement for this.

However, if victims were regularly to present a victim impact statement in the Youth Court, and their supporters were able to attend, care would need to be taken to ensure that the focus did not shift entirely from the needs of the young person to that of the victim.

The Society hopes that the above comments are of assistance to the Ministry of Justice. If you wish to discuss any matters raised in this letter please contact me, or the Criminal Law Committee secretary, Rhyn Visser by phone (04) 472 7837 or email rhyn.visser@lawsociety.org.nz.

Yours sincerely

A handwritten signature in black ink, appearing to read "John Marshall". The signature is written in a cursive style with a large initial 'J'.

John Marshall QC
President