

NOTES AND COMMENTS

RECOGNISING THE VICTIM IN THE SENTENCING PHASE: THE USE OF VICTIM IMPACT STATEMENTS IN COURT

I INTRODUCTION

South African victim empowerment is based on the concept of restorative justice, which advocates a victim-centred approach to criminal justice.¹ This follows an international trend over the past decade to promote a victim-centred approach to criminal justice.² The focus on a victim-centred approach arose in response to a number of issues raised by victims themselves, who questioned their neglected position in the criminal justice system. Issues included, amongst others, a lack of support, the absence of compensation for harm, the diminished role of the victim in criminal proceedings which are orientated toward the offender, and the absence of any constitutional rights for victims.³

Internationally the concerns of victims were recognised and addressed through a number of declarations, the most important of which was the adoption of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power by the General Assembly of the United Nations on 29 November 1985.⁴ The Declaration is based on the philosophy that adequate recognition should be given to victims and that they should be treated with respect in the criminal justice process.⁵ With the focus on restorative justice in South Africa, numerous reforms have been introduced to accommodate victims more effectively in the criminal justice process,⁶ and it is these reforms which the recent Service Charter for Victims of Crime in South Africa (hereafter referred to as the Victims' Charter) aims to consolidate and elaborate upon.⁷

1 Department of Social Development *Integrated Victim Empowerment Policy: Fourth Draft* (August 2004) 3.

2 United Nations Office for Drug Control and Crime Prevention *Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999) 3.

3 SA Law Commission Discussion Paper 102 *Sexual Offences: Process and Procedure* (December 2001) 647 (hereafter referred to as Sexual Offences Process and Procedure Discussion Paper).

4 GA/RES/40/34.

5 *Ibid.*

6 Victims of sexual offences are now, amongst others, involved in bail and parole proceedings and must be informed of their rights and of the procedures in the criminal justice system that affect them (see the non-legislative recommendations in SA Law Commission *Report on Sexual Offences* (2002) 355, 375; Schedule 1 and guiding principle (d) of the Criminal Law (Sexual Offences) Amendment Bill 2003 (published in GG 25282 of 30 July 2003); and s 2(c) of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill 2006.

Although there are a number of ways in which victims can be integrated into the criminal justice system, the purpose of this article is to focus exclusively on the use of victim impact statements as a method of accommodating victims of crime in the sentencing process, with the focus on victims of sexual abuse. In its Issue Paper on restorative justice, the South African Law Commission defined restorative justice as a process which seeks to redefine crime by interpreting it, not only as breaking the law or offending against the state, but also as an injury or a wrong done to another person.⁸ Proposals recommended the enactment of legislation which would recognise victim impact statements as a method of impressing upon the court the seriousness of the offence.

The draft Sentencing Framework Bill 2000 provided the first statutory platform for the introduction of the concept of a formal victim impact statement. In terms of the Bill, the prosecutor must tender evidence of a victim impact statement where the victim is not called as a witness and such a statement is available.⁹

In terms of the Criminal Law (Sexual Offences) Amendment Bill 2003,¹⁰ evidence of the impact of any sexual offence upon the complainant may, for purposes of imposing an appropriate sentence, be adduced in order to prove the extent of the harm suffered by the victim.¹¹ The most recent platform for victim participation in sentencing procedures is to be found in the Victims' Charter. This includes the right to participate in, and offer information during, sentencing proceedings in order to bring the impact of the crime to the court's attention.¹² A prosecutor may submit a victim impact statement, or may lead further evidence in support of an appropriate sentence.¹³

There are a number of ways in which victims can be integrated into the sentencing process: they can testify as a witness with regard to sentence;

7 Department of Justice and Constitutional Development *Service Charter for Victims of Crime in South Africa* (2004) <<http://www.doj.gov.za/2004.dojsite/policy/vc/2004.vc.pdf>>. The Victims' Charter was approved by Cabinet on 2 December 2004. See Ministry for Justice and Constitutional Development 'Cabinet approves the South African Charter for Victims of Crime' Press statement of 2/12/2004, <http://www.doj.gov.za/2004dojsite/m_statements>.

8 SA Law Commission Discussion Paper 7 *Sentencing Restorative Justice (Compensation for Victims of Crime and Victim Empowerment)* (1997) 5.

9 Clause 47(3) of the Draft Sentencing Framework Bill 2000 in SA Law Commission *Report on a New Sentencing Framework* (2000) 100 (hereafter referred to as Sentencing Framework Report).

10 Note 6 above.

11 Section 17(b). Compare s 61(2)(a)(vii) of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill (note 6 above) which places a duty on the National Director of Public Prosecutions to issue directives with regard, amongst other matters, to the information to be placed before a court during sentencing, including impact evidence of the sexual offence on the complainant.

12 Clause 2, Victims' Charter (note 7 above). Other rights available to victims relate to fair and dignified treatment, receipt of information, protection, assistance, compensation and restitution.

13 Department of Justice and Constitutional Development *Minimum Standards on Services for Victims of Crime* (2004) para 20, <<http://www.doj.gov.za/2004dojsite/policy/vc/2004vc.pdf>>.

they can provide information for a victim impact statement; or they can receive compensation from the offender.¹⁴ The victim impact statement is thus one way of accommodating victims more effectively in the sentencing phase. In addition, presiding officers have themselves expressed a need to be better informed before sentencing about the after-effects of the crime, especially where child victims are concerned.¹⁵ The purpose of this article is to investigate the formal victim impact statement as a method, not only for affording the victim a more prominent role in the sentencing process, but also for providing the sentencing officer with more relevant information. In this way, a more balanced approach to sentencing may be achieved in that presiding officers will have information relating to the both the accused and the victim. A comparative study is undertaken of definitions, rationales and practices with regard to the use of victim impact statements in some Anglo-American countries. Developments in England, which has been active with regard to victims' matters over the past years, have proven to be a valuable source. Australia, the United States of America and Canada were selected based on their successful implementation of approaches that would be suitable to the legal tradition in South Africa.

II DEFINING 'VICTIM IMPACT STATEMENT' AND 'VICTIM'

The formal use of victim impact statements can be authorised either by legislation¹⁶ or via a victims' charter,¹⁷ which will, in turn, determine the definition of both 'victim impact statement' and 'victim'. In South Africa, as noted above, only draft legislation and the Victims' Charter are presently on the table.

According to Erez,¹⁸ a victim impact statement is defined as a statement which would 'address the effects of the crime on the victim, in terms of the victim's perceptions and expressions of the emotional, physical or economic harm he or she sustained as a result of the crime'.¹⁹ Schmallegger defines such a statement as 'the in-court use of victim or survivor-supplied information by sentencing authorities wishing to make

14 *Sexual Offences Process and Procedure* Discussion Paper (note 3 above) 668-689.

15 *Rammoko v Director of Public Prosecutors* 2003 (1) SACR 200 (SCA), 205E.

16 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.

17 In England, Wales and Scotland victim impact statements are authorised in terms of a Victims' Charter.

18 E Erez 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice' (1999) *Criminal LR* 545.

19 *Ibid* 546.

an informed sentencing decision'.²⁰ The latter definition is very wide and does not describe what information would form part of such a statement, whereas the former definition focusses specifically on the victim's feelings with regard to the emotional, physical and economic harm that has been suffered.

A victim impact statement was first defined within the South African context in the SA Law Commission's Discussion Paper on Restorative Justice:

The victim impact statement is a statement made by a victim and addressed to the presiding officer to be considered in the sentencing decisions. The victim impact statement consists of a description of harm, in terms of the physical, psychological, social and economic effect that the crime had, and will have in future, on the victim. Sometimes this statement may include the victim's statement of opinion on his feelings about the crime, the offender and the sentence that he feels is appropriate.²¹

The Project Committee on Sentencing later proposed another definition, which was more concise and which specifically defined the victim impact statement as a written statement:

Victim impact statement means a written statement by the victim or someone authorised by this 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.²²

Although the new Victims' Charter does not provide a definition of a victim impact statement, it impliedly includes both written and oral forms.²³ From the above definitions it would appear that victim impact statements generally include a description of the harm suffered by the victim where harm is seen to include the emotional, physical and financial consequences of the crime.

As far as the definition of the term 'victim' is concerned, the Project Committee on Sentencing suggested that the term be defined as: 'the person against whom the offence was committed or who was a witness to the act of actual or threatened violence and who suffers injuries as a result of the offence'.²⁴ Here the definition of victim has been extended to include an eye-witness who experiences harm as a result of witnessing the offence. This would cover, for instance, the trauma experienced by a child who has witnessed the assault or murder of a parent. It also extends the

20 F Schmallegger *Criminal Justice Today: An Introductory Text for the 21st Century* 4 ed (1997) 718.

21 M Hinton 'Valuing the Victim: The Use of Victim Impact Statements in Sentencing'. Unpublished paper. 8th International Symposium on Victimology, held from 22-26 August 1994 in Adelaide Australia as referred to by SA Law Commission Issue Paper 7 *Sentencing: Restorative Justice (Compensation for Victims of Crime and Victim Empowerment)* (December 1997) para 2.30 (hereafter referred to as Sentencing Issue Paper).

22 Clause 1 Draft Sentencing Framework Bill in Sentencing Framework Report (note 9 above).

23 Sentencing Framework Report (note 9 above) para 2.11.

24 Sentencing Issue Paper (note 21 above) 38.

definition to indirect victims, such as family and dependents. South African courts have received impact evidence from immediate family in murder cases. For example, in *S v Vilakazi*²⁵ the mother of the murder victim gave a short description of her son, Peter, showed some photographs of him to the court and informed the court about the impact of his murder on herself and her family:

On a personal note I need to let you know how this callous act has impacted on me and my family. It has severely traumatised all of us. The hell and despair we feel cannot ever be imagined by you. You killed Peter physically and us emotionally. The brutal murder of my only biological child will haunt us every day of our lives. My husband and I have become victims. My father who lived with us died soon after Peter's murder. He was devastated after his only grandson was so brutally killed. I have no doubt that my father's death was greatly accelerated by Peter's murder. Peter's wife remarried after his death and I no longer have the same access to seeing my only grandson, Peter's child, whom I used to see frequently. We have all thus suffered three major losses within this short period of time, All precipitated by Peter's having been murdered. Our lives have been destroyed by a mindless and senseless act. You took our future away.²⁶

There is no provision made in these definitions for representatives of local communities and organisations to participate in sentencing procedures, but it is submitted that the local practice of *amicus curiae* in sentencing procedures makes provision for the participation of interested groups. In *S v Abrahams*²⁷ the Women's Legal Centre entered as *amicus curiae* amidst public outcry about the lenient sentence imposed by the trial court in an incestuous rape case.

III RATIONALE FOR VICTIM IMPACT STATEMENTS

A number of reasons have been put forward for the use of formal victim impact statements. Edwards²⁸ categorises these into four different theories. The first three are viewed as instrumentalist in nature and comprise the following:

- The improvement of sentencing outcomes, which includes both retributive-proportionate as well as restorative justice (reparation and compensation) arguments.
- The enhancement of system efficiency and service quality in that the criminal justice system may become more sensitive to the needs of victims, and, in turn, victims are more satisfied with the system because of their participation.
- The benefit for victims in that their contribution will be of therapeutic and cathartic value for themselves.

25 *S v Vilakazi* (WLD case no 81/104/97 (unreported)).

26 Transcript of *S v Vilakazi* (note 25 above).

27 2002 (1) SACR 116 (SCA), 127F.

28 I Edwards 'Victim Participation in Sentencing: The Problem of Incoherence' (2001) 40 *The Howard Journal* 39, 41.

The fourth theory focusses on process values, citizenship and victims' rights, based on participatory democracy and respect for individual dignity and humaneness. Roberts²⁹ identifies nine purposes observed in international literature, for which victim impact statements can be used. 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 victims' needs which may assist in the determination of a more appropriate, reparative sanction.
- 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.
- 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.
- Providing the idea that, although crimes are committed against the state, crimes are also committed against individuals.

He further suggests,³⁰ as secondary purposes derived from the above, 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 of the after-effects of crime. Lastly, there may be an increase in awareness by offenders of the harm caused, while the possibility of reconciliation between victim and offender is promoted by encouraging offender empathy.

Roberts³¹ emphasises that the potential of the victim impact statement to serve as an additional communication between victim and offender should not be overlooked. In the light of the fact that there is a pre-existing relationship between the victim and the offender, the purpose

29 JV Roberts 'Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings' (2003) 47 *Criminal LQ* 365, 371-372.

30 Ibid.

31 Ibid 376-377.

would be to elicit remorse after a message of sensitisation. Research, however, indicates that imprisoned offenders generally have a very low capacity for showing empathy, which would appear to make the achievement of offender empathy largely an ideal.³²

In its report on sentencing, the SA Law Commission initially viewed the victim impact statement as an indirect way of giving the victim a voice during the sentencing stage.³³ Although the South African Victims' Charter appears to follow the same multi-purpose approach as that adopted in England, with the focus being on both the rights of, and services provided to, victims of crime, the victim's procedural right to provide information in the form of a victim impact statement is clear. Thus, in addition to providing the victim with a voice, the victim impact statement in South Africa is also used by the court for consideration in sentencing decisions and, therefore, also serves as a source of information for the court.³⁴ 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.³⁵

A sentencing discretion can only be exercised properly if all the facts relevant to a matter are presented to the court. The necessary information required by the court embraces much more than information on the elements of the case and the visible injuries. If a court is to exercise its sentencing discretion properly, it is necessary for the presiding officer to have access to the victim's version as well. This is illustrated in the approach the courts have adopted towards cases involving sexual violence, where the courts have accepted that they do not have the necessary expertise to draw conclusions about the effect of an indecent assault or rape on a child victim. As Cloete J noted in *S v Gerber*³⁶ '[a] court does not have the necessary expertise to generalise about the consequences, if any, for the victim in a case like the present.'

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.³⁷ Each individual brings with himself or herself a different background, a different support system and, therefore, a different

32 CSL Delpont and A Vermeulen 'Convicted Male Sexual Offenders: A Social Work Perspective' (2004) 5 *Child Abuse Research in South Africa* 41.

33 Sentencing Framework Report (note 9 above) 88.

34 Paragraph 2 of the Victims' Charter (note 7 above) 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'.

35 Clause 47(1)(a) Draft Sentencing Framework Bill in Sentencing Framework Report (note 9 above).

36 2001(1) SACR 621 (WLD) 624. The same finding was made by the Appeal Court in *S v R* 1993(1) SACR 209 (A) 219.

37 Sexual Offences Process and Procedure Discussion Paper (note 3 above) 646.

manner of coping with the trauma flowing from the abuse. This was emphasised by the court in *Holtzhausen v Roodt*:³⁸

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, both of rapist and rape survivor is extremely limited.

The presentation of a victim impact statement, in addition to contributing to fairness and offering certain therapeutic advantages,³⁹ 'enhances proportionality rather than harshness'.⁴⁰ In order that judicial officers may exercise their sentencing discretion properly, it is 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.⁴¹ 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.

IV THE PRACTICE OF USING VICTIM IMPACT STATEMENTS

(a) Current position in South Africa

Despite the absence of any statutory obligation requiring the use of victim impact statements in South Africa and the recent introduction of a Victims' Charter, presentations on harm have already been made in a number of sexual abuse cases. Impact evidence has been provided in the following ways:

- Evidence on the impact of a crime has been given by experts, either after personal assessment of the victim or based on experience of similar cases.
- It has been held⁴² that it is possible for a mother or teacher to testify about the symptoms of trauma displayed in the child's daily life, for

38 1997 (4) SA 766 (W) 778 G-H.

39 See R Burr 'Litigating with Victim Impact Testimony: The Serendipity That Has Come From *Payne v Tennessee*' (2003) 88 *Cornell LR* 529. Burr presents evidence on the healing effect of victim impact statements for a murdered victim's mother and daughter after defence-based outreach to the survivor. Bandes however, emphasises that, despite the fact that victims sometimes obtain closure from the legal system, the legal system in fact has goals and purposes that are necessarily distinct from meeting the needs of the victim. See S Bandes 'When Victims Seek Closure: Forgiveness, Vengeance and the Role of the Government' (2000) 27 *Fordham Urb LJ* 1605-6. Notwithstanding this, victims and their responses are unique and it would be wrong to assume that all victims will benefit equally from the same kind of post-crime treatment.

40 Erez (note 18 above) 548.

41 *Rammoko v Director of Public Prosecutors* (note 15 above) 205E-F.

42 *S v Abrahams* 2002(1) SACR 116 (SCA), 124C.

example with regard to sleeping patterns, eating or socialising patterns, standard of schoolwork, ability to concentrate, attitude to discipline and a nervous or fearful state of mind.

- It has been possible for the victim to give evidence on harm by testifying in person during the sentencing phase.⁴³
- Where personal appearance is not possible or desirable, letters or poems written by the victim after the assault have also been used. In *S v Van Wyk*,⁴⁴ the court found a poem, written by the victim, to be very enlightening about the effect which the assault had upon her.

However, the courts have approached pre-sentence presentation of harm experienced by victims in a haphazard way. This has given rise to a situation where, in the absence of any evidence on harm, the court is exposed to only half of the information necessary for sentencing.

As a possible solution to the difficulties which arise from the lack of a uniform approach to the presentation of evidence on harm, the form and content of victim impact statements are examined below. Victims of crime will have a formal procedural right to make a victim impact statement in terms of the new Victims' Charter. The present discussion will thus focus on this formal statement which can be used to place the victim's version before court, thereby extending the traditional methods of introducing evidence to the court in sentencing.

(b) Content of victim impact statements

The content of a victim impact statement will be prescribed by the purpose assigned to such a statement, as well as by the definition of harm.⁴⁵ By defining the concept of harm in detail, courts are not only made aware of the potential impact that of sexual offences, but compilers of these statements are also guided as to the factors that should be included in the victim impact statement.

In Australia, harm is defined as including physical and mental injury or emotion; suffering, including grief; pregnancy; economic loss; and substantial impairment of rights accorded by law.⁴⁶ In the United Kingdom, the concept of harm includes the fear of further victimisation,⁴⁷ while the American state of Florida provides for social harm as an

43 *Rammoko v Director of Public Prosecutors* (note 15 above).

44 2000(1) SACR 45 (C), 51.

45 The definition of 'victim' in the Victims' Charter (note 7 above), describes a victim as a person who has suffered harm. Victim impact statements are defined as a description of the harm suffered by the victim.

46 Australian Crimes Act 1994.

47 In the United Kingdom, the victim can expect 'the chance to explain how the crime has affected him' and that his interests will be taken into account; 'the police will ask him about his fears about further victimisation and details of loss, damage or injury; the police, Crown Prosecutor, magistrates and judges will take this information into account when making their decisions'. See Inns of Court School of Law *Criminal Litigations and Sentencing* (2003/2004) 308.

element to be added.⁴⁸ Provision can also be made in the definition of harm for an open clause such as contained in the Florida statute, namely ‘and any matter relevant to an appropriate disposition and sentence’, thus covering any matter relevant to the imposition of an appropriate sentence.⁴⁹

Reference to future psychological harm seems to be contentious, and concern appears to revolve around the expert’s own training, knowledge and expertise, and the ongoing life experiences of the victim.⁵⁰ It seems to be clear though, that the victim impact statement should be updated prior to sentencing in order to describe the physical and emotional state of the victim at the time of sentencing.⁵¹ In England and South Africa, the victim has the opportunity to update his or her victim impact statement⁵² by making a second statement describing the medium and/or long term effects of the crime.⁵³ In the absence of such an update, the court will be left with an incomplete account of harm.

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 victims’ fundamental rights.

Notwithstanding the contents of the definition of harm, the definition appears to be wide enough to include a unique consequence, relevant to a particular victim, in his or her victim impact statement.

(c) Opinion as to sentence

Whether a victim impact statement should include the victim’s opinion as to sentence appears to be a thorny issue, and there is no consensus on the matter.⁵⁴ In the United Kingdom, this practice is prohibited, and the position is clarified as follows in the applicable guidelines:

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.⁵⁵

A number of arguments have been forwarded against the practice of

48 Florida per Fla.Stat. Ann. 921. 143 (2000) as referred to by NN Kittrie, EH Zenoff & VA Eng *Sentencing, Sanctions and Corrections* 2ed (2002) 292.

49 Ibid.

50 Sexual Offences: Process and Procedure Discussion Paper (note 3 above) 672.

51 Erez (note 18 above) 546.

52 Referred to as a victim personal statement in the United Kingdom.

53 United Kingdom Home Office *Making a Victim Personal Statement* (26 July 2001) para 15.

54 Sexual Offences Process and Procedure Discussion Paper (note 3 above) 682. In contrast with the Project Committee on the draft sentencing framework (note 9 above) which opposes the victim’s opinion as to sentence, the Project Committee on Sexual Offences supports it.

55 Home Office (note 53 above) para 15.

including a victim's opinion about sentence in a victim impact statement. Firstly, it is argued that sexual offence cases, unlike civil cases, are public cases that are dealt with in the name of the state.⁵⁶ Hoffmann, however, points out that victims now rightfully occupy a special place within the criminal justice system.⁵⁷

Secondly, it has been argued that victims may find it distressing to have their recommendations ignored by the presiding officer.⁵⁸ Finally, recommendations regarding a specific sentence may be seen by a presiding officer to be inappropriate, because the victim has no legal background and may simply be seeking revenge.⁵⁹

In response to the above, it should be noted that, as a result of the sexual assault, victims often experience a severe and ongoing sense of loss of control.⁶⁰ By providing them with even a small degree of control over the accused's fate 'it may be possible to help them to regain their sense of agency in general'.⁶¹ In fact, research has shown that a victim's need may relate mainly to telling the offender that what he did was wrong⁶² or asking for assistance for counselling and therapy, rather than prescribing what his punishment should be. It may also be that, through the recommendation of a lenient sentence, the victim is afforded an opportunity of showing mercy to the perpetrator.

It is submitted that the practice of allowing a victim to make recommendations to the presiding officer regarding an appropriate sentence should only be considered if such a practice is qualified by the provision that the presiding officer is under no obligation to follow the recommendation.⁶³ This will make the victim aware that it is the responsibility of the court to decide on sentence, as well as contribute towards minimising the perception that there is interference in the presiding officers' sentencing discretion.

The Victims' Charter does not make explicit provision for the victim to comment on a specific sentence. Rather, in outlining the prosecution's option to submit a victim impact statement, the phrase 'in support of an

56 SA Law Commission *Report on Sexual Offences* (2002) 347 (hereafter referred to as Sexual Offences Report).

57 JL Hoffmann 'Revenge or Mercy? Some Thoughts about Survivor Opinion Evidence in Death Penalty Cases' (2003) 88 *Cornell LR* 541.

58 DJ Hall 'Victims' Voices in Criminal Court: The Need for Restraint' in M Wasik *The Sentencing Process* (1977) 266.

59 Hoffmann (note 57 above) 530.

60 N Henderson 'The Wrongs of Victim's Rights' (1985) 37 *Stanford LR* 937 as referred to by Hoffmann (note 57 above) 358.

61 Hoffmann (note 57 above) 541. Although this argument is presented with regard to survivor impact evidence in capital cases in the United States of America, it is also applicable to victims of sexual offences. See also Erez (note 18 above) 551 who argues that one of the major driving forces behind the victim movement was the aim of helping them overcome their sense of powerlessness and reducing the feeling that the system is uncaring.

62 As in *Rammoko v Director of Public Prosecutors* (note 15 above),

63 Sexual Offences Process and Procedure Discussion Paper (note 3 above) 682.

appropriate sentence' is used to describe the evidence that can be led. This could be interpreted to include a suggestion by the victim regarding sentence.⁶⁴

The Charter also informs victims of the steps that can be taken where a sentence is too lenient, thereby illustrating that a court need not follow a sentence recommendation. However, it is submitted that the position is formulated too vaguely in the Charter and should have been addressed more directly. It is further submitted that a victim impact statement should preferably not include a reference to the victim's sentence recommendation, as this may tend to tarnish or neutralise the value of the victim impact statement, should the recommendation be overly emotional.

(d) The preparation and submission of victim impact statements

Internationally the position with regard to the collection of information for the compilation of victim impact statements does not appear to be uniform. Depending on the country concerned, such collection is carried out either by justice agents, such as the police (in England, Wales, Scotland, Canada and Australia) or by probation officers, victim assistance staff or prosecution staff (in the United States of America and New Zealand).⁶⁵

The SA Law Commission initially opted to follow the latter course and proposed that the responsibility fall on the prosecution, who would have the ultimate duty of ensuring that the victim impact statement be available for submission to court.⁶⁶ Edwards,⁶⁷ however, warns that by placing the responsibility on the prosecution, the roles of victim advocacy, on the one hand, and prosecution in the name of the state, on the other, are confused. The Victims' Charter⁶⁸ seems to follow a hybrid approach and refers, in addition to the victim's statement to the police, to the possibility that either the presiding officer or prosecutor, or even the defence, may request that a probation officer or other expert prepare a report that may include an assessment of the effect of the crime on the victim.

According to Edwards, the involvement of the probation in services 'liasing with victims and detailing the effects of offences, is possibly at

64 Department of Justice (note 7 above) para 19. The Law Commission earlier recommended that victims should be allowed to give their opinions on the appropriate sentence, provided that it is well understood that the court is under no obligation to follow such opinions. See SA Law Commission (note 56 above) 372.

65 Erez (note 18 above) 546.

66 Sexual Offences Report (note 56 above) 372.

67 Note 28 above 49.

68 Note 7 above, para 20.

odds with its history and ethos'.⁶⁹ Internationally there would also appear to be agreement that the preparation of victim impact statements should not be performed by agencies associated with offenders.⁷⁰ The practice in South Africa has, however, always been that the same probation officer often compiles a report on both the offender and the impact of the crime on the victim. Nevertheless, the ideal is that prosecutors should, as a matter of principle, be assisted by NGOs which provide specialised services for victims of sexual assault.⁷¹

Where the victim is a young child, any party to the proceedings or even the court itself may, and where possible should, request the services of a child psychologist or other relevant expert to assist in explaining and describing the impact of the harm and trauma experienced by the child as a result of the offence.⁷² The reason it is considered inappropriate for parents or family members to assist the child in making the victim impact statement, relates to the fact that a crime of a sexual nature perpetrated against a child has a traumatising effect on the parents or family members as well. Owing to their emotional involvement with the child and also the fact that they do not have any professional training, parents are not able to explain comprehensively the extent of harm suffered by the child. However, financial constraints may also make the employment of a child psychologist more of an ideal than a reality.

(e) Evidentiary aspects of victim impact statements

Although there seems to be agreement that victim impact statements should always be voluntary, victims can be encouraged, facilitated, entitled or even required to participate in this process.⁷³ However, it appears that, where the victim objects to making a victim impact statement, nobody should be allowed to make a statement on his or her behalf.⁷⁴ In most jurisdictions, the victim impact statement must be made under oath⁷⁵ and a copy must be given to the defence.⁷⁶

Despite proposals to the effect that the absence of a victim impact statement should not lead to any negative inference being drawn or to the

⁶⁹ Note 28 above, 49.

⁷⁰ Erez (note 18 above) 546.

⁷¹ *Sexual Offences Process and Procedure* Discussion Paper (note 3 above) 683.

⁷² *Sexual Offences Report* (note 56 above) 372, 378.

⁷³ Edwards (note 28 above) 44.

⁷⁴ AE van der Hoven 'Forensic Criminology (Tutorial Letter 501/2004)' Department of Criminology Unisa (2004) 202. Section 29(b) of the New South Wales Crimes (Sentencing Procedure) Act 1999 provides, for example, that a victim impact statement may not be received or considered by a court if the victim, or any of the victims to whom the statement relates, objects to the statement being given to the court.

⁷⁵ *Sexual Offences Report* (note 56 above) 348.

⁷⁶ *R v Hobstaff* (1993) 14 CR AppR (S) 60. Section 28 (5) of the New South Wales Crimes (Sentencing) Procedure Act 1999 provides, however, that care must be taken to ensure that the offender does not retain a copy for himself.

conclusion that no harm, loss or emotional suffering has been caused by the crime, the contrary approach was adopted in *S v O*.⁷⁷ Here, a finding of no harm was made by the court in the absence of any evidence on the impact of the indecent assault on the boys concerned.⁷⁸

Uncontested victim impact statements should be admissible evidence on production thereof. If the contents of a victim impact statement are disputed, the author and/or the victim must unfortunately be called as a witness. It is submitted that the witness should then be given the choice whether or not to withdraw the statement.⁷⁹

There are no guidelines as to how victim impact statements should be incorporated by sentencing courts 'into the complex determination of sentence'.⁸⁰ According to Roberts,⁸¹ statutory statements of purpose and principle appear to be of little use, and greater direction is needed without infringing upon the courts' discretion. Guidelines from superior courts would be required in this regard in order to provide clarity about the weight that should be accorded to the victim impact statement. In this regard, the Supreme Court of Appeal has indicated that a finding of serious harm should be given substantial weight.⁸² There is, however, always the reality of prevailing perceptions amongst judicial officers about harm and the use of victim impact statements that will influence their understanding and interpretation of evidence in this regard.⁸³

The position in England is that a judicial officer would require supporting evidence before an assumption could be made regarding the effect of the offence on the victim,⁸⁴ unless the surrounding circumstances warrant an inference being properly drawn.⁸⁵ The evidence of the victim alone should further be approached with care⁸⁶ and only particularly damaging or distressing effects of the crime upon the victim should be taken into account by the court when passing sentence.⁸⁷

77 2003(2) SACR 147 (C).

78 Ibid 162A-C.

79 It should be noted that research has shown that, for various reasons, defence counsel very seldom embark on cross-examination of the victim. See Erez (note 18 above) 549.

80 Note 29 above, 370.

81 Ibid.

82 *S v Abrahams* (note 42 above) 142D. In this case the sentence was, based inter alia on a finding of grievous harm, increased from 7 to 12 years. This finding was in contrast with the trial court's finding that the trauma symptoms simply indicated normal teenage rebelliousness.

83 See A Van der Merwe *Aspects of the Sentencing Process in Child Sexual Abuse Cases* (2005) Unpublished doctoral thesis (Rhodes), 256-273 for an investigation into prevailing perceptions about when, and what kind of harm is caused by sexual offences against children and a warning that biased perceptions will simply continue to negate any recognition of the victim.

84 *R v Perks* [2000] *Crim LR* 606, proposition 1.

85 Lord Chief Justice (16/10/01) *Practice Direction (Victim Impact Statements)* par 3(b), <<http://www.courtservice.gov.uk/cms/7900.htm>>.

86 *R v Perks* (note 84 above), proposition 4.

87 Ibid, proposition 2. Similarly, only substantial emotional harm can be taken into account as an aggravating factor in New South Wales in terms of s 21A(2) of the Crimes (Sentencing Procedure) Act 1999.

Judicial training is further envisaged with regard to the potential impact of sexual crimes on victims generally as well as with regard to the offender's knowledge, use and manipulation of the child's vulnerability as factors to be considered in sentencing.⁸⁸

(f) Forms and guidelines

The victim impact statement may be presented to the court in various formats, depending on the underlying rationale for victim participation in sentencing.⁸⁹ The victim impact statement will normally be made in addition to the witness' statement with regard to the offence, and it must at least be signed. In England, the document is presently called a victim personal statement, and is made in addition to the witness' normal statement regarding the crime. The victim is allowed to say whatever he or she wants to say, with the emphasis being on the fact that the statement is made in his or her own words. The statement is, however, attached to the police docket as an affidavit and is made available to the court only in its written format before sentencing, or forms part of a pre-sentence report.⁹⁰

On the other hand, both Southern Australia⁹¹ and Canada⁹² gives victims the right to read the previously prepared victim impact statement aloud in court if they want to. The interpretation of the Canadian section has, however, given rise to conflicting decisions, in that some judges have refused an oral victim impact statement in order to prevent victims from departing from the prepared victim impact statement and extemporising about the offender and the offence.⁹³ The position as to whether judicial officers are permitted or obliged to allow the oral presentation of previously prepared victim impact statements has still not been clarified.⁹⁴ In addition to the possibility of reading out a written statement, the American option of making an oral statement can be offered to victims, thereby allowing them to speak directly to the court.⁹⁵ It would thus appear that some jurisdictions prefer a previously prepared, written format, either just attached to the record or with a possibility of

88 Sexual Offences Report (note 56 above) 372.

89 Edwards (note 28 above) 48.

90 Ibid.

91 Supreme Court Criminal Rules 1992 Amendment 8. Also note that s 7A(1) of the Criminal Law (Sentencing) (Victim Impact Statements) Amendment Act 1998 precludes victims from reading out their statements in magistrates' courts.

92 Roberts (note 29 above) 367-369.

93 Ibid.

94 Ibid.

95 Section 4(a)(1)(a) Fla. Stat. Ann. 921. 143 (2000) as referred to by Kittrie et al (note 48 above) 292. Edwards (note 29 above, 48) points out that the rights discourse in America and the belief in the cathartic value of expression leads courts to allow victims to express to the court anything they wish.

being read out by the victim. Others allow the victim to make an oral presentation in court, guided by provisions such as that the presentation should relate only to the case and should explain the various forms of harm.

With regard to children, it would appear that in England children's statements could be made by means of a video recording, as this is the accepted manner for dealing with witness statements.⁹⁶ In the Canadian province of Saskatchewan, the victim impact statements of children below the age of 13 are made on a form that differs from that provided for adults. Depending on their developmental age, children over 13 can choose which form they want to complete.⁹⁷ Recent Scottish developments allow children over 14 years to make a victim impact statement, while children below that age are entitled to have another person make a statement on their behalf.⁹⁸ In contrast, the state of New Jersey in the United States of America prohibits children from testifying about harm.⁹⁹

According to the South African Victims' Charter, the court may be informed about the effect of the crime on the victim either by way of a report prepared by a probation officer, or by an expert, compiled from the information in the police docket, or by way of an interview with the victim, or the victim himself or herself may testify.¹⁰⁰

V CONCLUSION

Only a draft statutory platform for victim impact statements exists in South Africa.¹⁰¹ However, the recent, final Victims' Charter, which consolidated the legislative framework with regard to existing victim rights in South Africa, provides some clarity as to the platform for formal victim impact statements in South Africa. In line with the victim-centred, restorative justice movement that has led to the paradigm shift, victims are now more formally acknowledged as unique and have the right, at least in theory, to offer or present information to professionals involved in the case and to participate in criminal justice proceedings.¹⁰²

In addition, statements on the after-effects of a crime have also been

96 Home Office *The Victim Personal Statement Scheme: A Guide for Investigators* (undated) 10, <<http://www.homeoffice.gov.uk/docs/guideforinvestigators.pdf>> .

97 Saskatchewan Justice 'Victim Impact Statement Program Guidelines Manual' (2002) Victim Services Branch para B3-4.

98 C Boyd 'Youth Justice and the Protection of Children and Youth' Electronic Conference Proceedings 18th International Conference of the International Society for the Reform of Criminal Law (Keeping Justice Systems Just and Accountable: A Principled Approach in Challenging Times) held from 8-12 August 2004 in Montreal.

99 *State v Muhammed* 678 A2d 164 (1996).

100 Department of Justice and Constitutional Development (note 7 above) para 20.

101 Clause 47 of the Draft Sentencing Framework Bill in *Sentencing Framework Report* (note 9 above) and s 17(b) of the Criminal Law (Sexual Offences) Amendment Bill (note 6 above).

102 B Naude, J Prinsloo and A Ladikas 'Restorative Justice: A Global Overview of its Functioning and Effectiveness' (2003) 16 *Acta Criminologica* 7.

found to be essential in arriving at a decision that is fair both to the offender and the public. Victim impact statements thus serve a greater purpose than contributing only to the determination of quantum of punishment.¹⁰³ They provide the judicial officer with the other side of the story in order that a balanced approach to sentencing may be adopted.

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103 Roberts (note 29 above) 396.