

Access to justice: Victims' rights in South Australia



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Crime, says van Ness (1986, p3),

... is not simply an incident which begins a contest between the State and a defendant, between a prosecutor and a [defence counsel]

... Crime is first of all an encounter between a victim and an offender. It is an unexpected personal crisis in the life of one person brought on by another ...

Definition to victim

- ▶ The word victim is “lacking descriptive precision” (Anand CJ 1997 in Ramasubramanian J 2015)
- ▶ Macquarie Dictionary (2018) defines victim as “a sufferer from any destructive, injurious, or adverse action or agency.”
- ▶ Karmen (2004) in his text on Victimology defines victims as people who are beset by loss, injury or hardship from any cause

Definition of victim

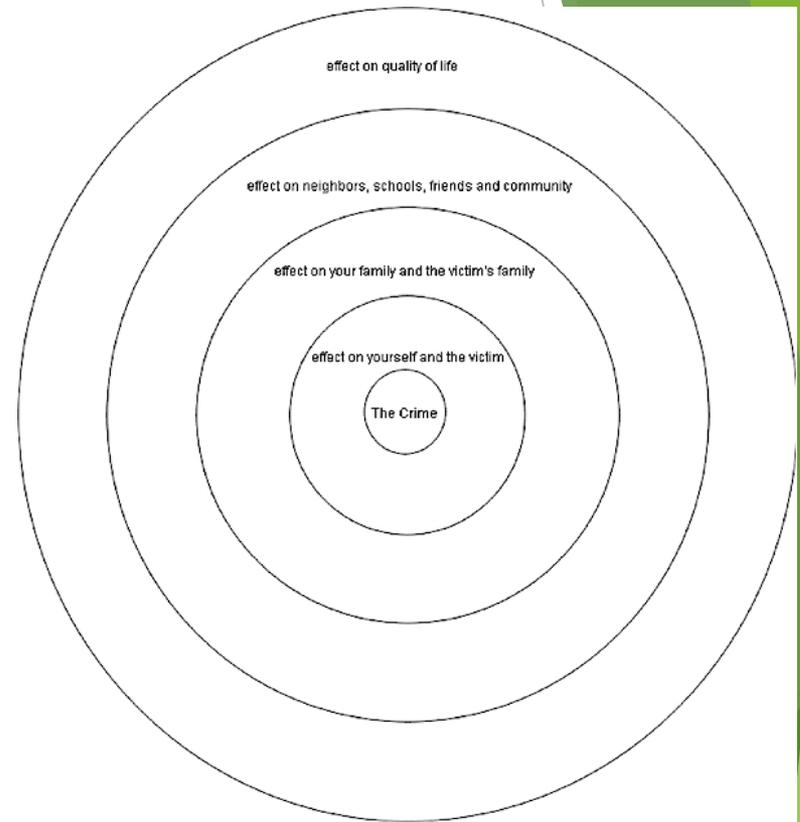
- ▶ Christie (1986) identified the ideal victim as ‘a person or category of individuals, who, when hit by crime, most readily are given the complete and legitimate status of being a victim’. They are considered more deserving of victimhood than others.
- ▶ Bayley (1991, p. 53) says a person is a victim only if:
 - ▶ (1) they have suffered a loss or some significant decrease in well-being unfairly or undeservedly and in such manner that they were helpless to prevent the loss;
 - ▶ (2) the loss has an identifiable cause; and
 - ▶ (3) the legal or moral context of the loss entitles the sufferer of the loss to social concern

Definition of VICTIM

Primary – those who directly suffer harm from the criminal act or omission

Secondary – dependants or relatives of the primary victims (especially the deceased) and first responders

Tertiary – vicarious victims, for instance, those in the wider population in whom fear is stimulated by the threats or acts of violence (Letschert et al 2010)



Who is a victim of crime - internationally?

- ▶ ... “persons who, individually or collectively, 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”
- ▶ A person may be a victim, regardless of whether the perpetrator is:
 - ▶ Identified,
 - ▶ Apprehended,
 - ▶ Prosecuted, or;
 - ▶ Convicted.

Who is a Victim in South Australia law?

s3 Victims of Crime Act 2001 -

In relation to an offence, means a person who suffers harm as a result of the commission of the offence.

(It does not include a person who was a party to the commission of the offence)

- ▶ Narrower definitions apply in 'specific' sections of law (e.g. victim & next-of-kin in Part 8A Criminal Law Consolidation Act 1935)
- ▶ No definition of victim in relation to 'statements' on the effects of crime (see sections 13, 14, 15 & 16 of the Sentencing) Act 2017

1960: Statutory, state-funded victim compensation

- ▶ Margaret Fry - most offenders impecunious
- ▶ Nils Christie - ideal victim
- ▶ Rationales - social contract, humanitarian, crime prevention
- ▶ Research - mixed results
- ▶ Crime / victim surveys - growth of statistics to inform

1970: Advent of the victims' movement & growth of victim assistance

- ▶ Civil rights - spurred on other causes
- ▶ Women's movement - unenviable & powerless position - crisis centres & shelters
- ▶ Victim activism - self-help organisations
- ▶ Professionalisation - social work paradigm
- ▶ Government intervention - funding
- ▶ Research - mismatch: victims' needs v victim services

1980: Promulgation of victims' rights

- ▶ Inquiry into victims of crime - South Australia
- ▶ President's Task Force - USA
- ▶ Victim activism - Victimological scholarship
- ▶ United Nations - Declaration of Basic Principles of Justice for Victims of Crime and Victims of Abuse of Power
- ▶ Regional victims' rights instruments
- ▶ Domestic victims' rights instruments

Victims' Rights Instruments

International -

- ▶ United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)
- ▶ Commonwealth Statement of Basic Principles of Justice for Victims of Crime (endorsed by Senior Law Officers for the Commonwealth 2005).

National -

- ▶ National Charter on Victims' Rights (endorsed by the Standing Committee of Attorneys-General, Australia 1993)

South Australia's Declarations:

- ▶ Declaration on Victims' Rights (1985):
 - ▶ Administrative Direction.
- ▶ Declaration of Principles Governing Treatment of Victims in the Criminal Justice System (2000):
 - ▶ Endorsed by the Attorney-General, then Cabinet
- ▶ Declaration of Principles Governing Treatment of Victims in the Criminal Justice System (2001):
 - ▶ Enshrined in the Victims of Crime Act 2001 (SA)
 - ▶ Amended by inserting new 'rights' 2008 & 2010

1990: Consolidating victims' rights yet contracting victim compensation

- ▶ National Charter on Victims' Rights
- ▶ Government 'intrusion' into victim assistance
 - ▶ efficiency, effectiveness, efficacy
- ▶ Victim compensation - contracting as financial assistance schemes evolve

2000: The promise of better justice by giving victims stronger rights

- ▶ Victims' views on criminal justice
 - ▶ On sentencing
- ▶ Alternative approaches to criminal justice
 - ▶ Restorative justice
 - ▶ Therapeutic jurisprudence
- ▶ Research - shortcomings in implementation of victims' rights declarations
- ▶ Political response - independent statutory officers

2010: A fundamental shift towards collaboration and cooperation

- ▶ National Victims of Crime Working Group
- ▶ National Framework on Victims' Rights & Victim Assistance
- ▶ National Implementation Plan
- ▶ Victims' participatory rights - using the law and practice to strengthen the victim's position in criminal justice

Principles Governing Treatment of Victims of Crime

1. A victim should be treated with kindness and respect.
2. Right to be told about services that can help the victim (and how to contact them).
3. Right to be told about the progress of the investigation.
4. Right to have perceived safety concerns presented to a bail authority.
5. Right to know what is happening to the suspect (including his or her name) and/or personal property taken as evidence.
6. Right to know if the accused person is not charged or charged with a less serious offence.
7. Right to be present in court, unless the court orders otherwise.
8. Right to be informed on role and responsibilities as a witness.
9. Right to be protected from unnecessary contact with offender / offender's family.

Principles Governing Treatment of Victims of Crime

10. Right to privacy (e.g. residential address not disclosed).
11. Right to have property returned as soon as practical.
12. Right to make a VIS
13. Right to information about restitution and compensation.
14. Right to be informed on court outcome (e.g. details of sentence) and have such explained.
15. Right to ask for a review for purpose of determining whether an appeal is appropriate.
16. Right to notification about release / escape and return to custody of offender.
17. Right to make submission to Parole Board
18. Right to be informed on parole conditions or licence conditions if mentally ill offender
19. Right to be informed if prisoner absconds
20. Right to information on how to make a complaint

Victim may exercise rights through an appropriate representative

- ▶ 32A(1) Rights granted to a victim under this, or any other, Act may be exercised on behalf of the victim by an appropriate representative chosen by the victim for that purpose.
 - ▶ Note— Such rights would include (without limitation) the right to request information under this or any other Act, the right to make a claim for compensation under this or any other Act and the right to furnish a victim impact statement under the Sentencing Act 2017 .
 - ▶ (a) an officer of the court;
 - ▶ (b) the Commissioner for Victims' Rights or a person acting on behalf of the Commissioner for Victims' Rights;
 - ▶ (c) an officer or employee of an organisation whose functions consist of, or include, the provision of support or services to victims of crime;
 - ▶ (d) a relative of the victim;
 - ▶ (e) another person who, in the opinion of the Commissioner for Victims' Rights, would be suitable to act as an appropriate representative.

Commissioner for Victims' Rights

- (a) to marshal available government resources so they can be applied for the benefit of victims in the most efficient and effective way;
- (b) to assist victims in their dealings with prosecution authorities and other government agencies;
- (c) to monitor and review the effect of the law and of court practices and procedures on victims;
- (d) to carry out other functions related to the objects of this Act assigned by the Attorney-General;
- (e) if another Act authorises or requires the Commissioner to make submissions in any proceedings—to make such submissions (either personally or through counsel);
- (f) to carry out any other functions assigned under other Acts.

Should victims have a role in sentencing?

Karmen (1996) asks:

- ▶ If the appropriate offence is charged, is not the effect or impact taken into account?
- ▶ If the victim gives evidence, will not the effect or impact be evident?
- ▶ To what extent should the prosecutor advance the victim's point of view?
- ▶ How relevant is the victim's point of view given crime is an offence against the state?

What role do victims seek in sentencing?

Deciding on sentence (Gardner 1990)

No involvement	22.2%
Informed on	48.6%
Consulted on	21.5%
Actively involved	7.7%

Suggestions to improve the criminal justice system

(Erez et al 1994)

About 13% of victim-respondents desired harsher penalties and sentences to be served in full

A greater emphasis on compensation

Victims' views on sentences imposed on offenders

(JSU 2000)

64% (of 61) victim-respondents who knew the sentence were dissatisfied

What is the law on Victim Impact Statements in South Australia?

Victim entitled to have impact of offence considered by sentencing court (s10 Victims of Crime Act 2001)

- (1) A victim is entitled to have any injury, loss or damage suffered as a result of the offence considered by the sentencing court before it passes sentence.

What is the law on VISs in South Australia?

Section 13 Sentencing Act 2017 imposes a legal obligation upon a prosecutor to furnish particulars of injury, loss or damage.

- ... the court must still allow particulars provided under this section to include a victim impact statement unless the court determines that it would not be appropriate in the circumstances of the case (and the other provisions of this Division relating to victim impact statements apply to such a statement as if it were provided under section 14)

What is the law on VISs in South Australia?

- ▶ *Section 14 Sentencing Act 2017* - A **person** who has suffered injury, loss or damage resulting from an indictable offence or a prescribed summary offence committed by another may provide the sentencing court with a written personal statement (a "victim impact statement") about the impact of that injury, loss or damage on the person and the person's family

What is the law on VISs in South Australia?

s15 - Provides for community impact statements:

- ▶ Neighbourhood Impact Statement
- ▶ Social Impact Statement

R v MALCOLM KYM VAWSER, DCCRM-14-1255 -- Arson -- After quoting extensively the community impact statement, His Honour Judge Muscat said, “Mr Vawser, there is really nothing to mitigate the seriousness of your crime.”

R v BRENDEN CLYDE STEERS, DCCRM-15-1498 - Child pornography (cite in 3 separate cases by the then Chief Judge)

R v A. MACCHIAVELLI, A. GERARDIS & OTHER, DCCRM-15-1821 - Drug Manufacture (include. clandestine laboratory)

R v MICHAEL SUVE MCDONALD, SCCRM-14-69 -- Murder -- Paraphrasing Honourable Justice Stanley said, “Domestic violence results in the death of, on average, one woman per week in Australia. It leaves many women and children terrorised. ... It is an insidious and pervasive crime that is unacceptable in all of its various forms.” He referred to the ‘social impact statement’ in the context of a Western Australia case (Munda v Western Australia [2013] HCA 38) then stated that domestic violence must be taken as an offence against human dignity.

R v LEAN [2017] SASFC 101 - Fraud - Honourable Justice Hinton, quoting the sentencing judgement on appeal said, “The Commissioner for Victim’s Rights provided a community victim impact statement pursuant to s 7B(2) of the Sentencing Act. That statement describes the significant impact upon those members of the Aboriginal Health Service; those who worked directly with you; the Aboriginal community as a whole, as well as the broader community. “

What is the law on VISs in South Australia?

s16 - Provides for:

- Compliance with rules of court
- Comment on sentence
- Copy for the defendant to inspect

What is known about the ‘impact’ of VISs on justice administration?

- VIS do not cause delays or significant additional expenses (Erez et al 1994; JSU 1999, 2000; Garkawe 2007; O’Connell 2009)
- “voice of the family victims can be included in the assessment of harm without jeopardising the court's objectivity towards the offender” (Kirchengast 2008)
- VIS do not exacerbate existing problems within the criminal-justice system (Erez et al 1994; Erez et al 1996; JSU 1999, 2000; O’Connell 2009)
- VIS have improved the quality of justice (or at least victims’ perception of justice) (Kirchengast 2008; Booth 2011; Department of Justice 2014)
- VIS do assist the court and prosecutors to resolve compensation (JSU 1999)
- VIS do not appear to influence the court’s choice of sentence (Garkawe 2007; O’Connell 2009), although in some cases VIS appear to increase the likelihood of a prison sentence being served (JSU 1999)

Why do victims make VISs?

- ▶ Most victims gave an impact statement to ensure justice was done.
- ▶ Only 5% of the victims gave an impact statement to actually influence the sentence.
- ▶ The majority of victims (71%) wanted their impact statement to be used in sentencing.
- ▶ About half (45%) of victims who gave an impact statement felt relieved or satisfied afterwards.
- ▶ Only 6% of victims who gave an impact statement felt worse afterwards.

(Erez et al 1994)

Why do victims make VISs?



▶ To ensure justice was done	24.5%
▶ It seemed like a good idea / was my civic duty	6.1%
▶ To communicate the impact of the crime to the offender	22.4%
▶ To influence the sentence of the offender	12.2%
▶ Other	24.5%
▶ Don't know	10.2%

(JSU 2000)

How do justices, judges & magistrates view VISs?

- ▶ Most justices, judges and magistrates felt that impact statements sometimes or often contained useful information that would not otherwise be available to them.
- ▶ No justice, judge or magistrate found impact statement “never useful” when sentencing offenders.
 - Three quarters of justices said impact statements were useful in most cases, and about two thirds of judges said impact statements were useful in most cases;
 - About two thirds of judges said impact statements were useful in all cases where they are submitted.”

▶ (O’Connell 2006)

How do justices, judges & magistrates view VISs?

- ▶ “When presented with a list of reasons for victim impact statements and asked to rank them, justices, judges and magistrates gave diverse views:
 - Giving victims an opportunity to participate in sentencing and giving courts information on the effects of crime were most often ranked as important or more important.
 - Giving victims an opportunity to tell offenders about the impact and effects of crime was also ranked as important. Only one justice felt that it was inappropriate to answer this question.”

▶ (O’Connell 2009)

How often does the defence cross-examine victims on the content of the VIS?

	Magistrates	DC Judges	SC Justices	Total
Often	0	0	0	0
Occasionally	0	0	0	0
Almost never	2	0	0	2
Never	8	7	4	19
Total	10	7	4	21

(O'Connell 2009)

How often does a VIS contain the victim's wishes regarding the sentence?

	Magistrates	DC Judges	SC Justices	Total
Always or almost always	0	0	0	0
Often	0	0	0	0
Sometimes	6	2	0	8
Almost never	2	4	2	8
Never	2	1	2	5
Total*	10	7	4	21

(O'Connell 2009)

Is validation & acknowledgment of the impact of the crime on victims important?

A positive judicial response to a victim's VIS (i.e. acknowledgment of the VIS and its contents) is important to victims' satisfaction with the broader VIS process (Schuster & Propen 2010).

The importance of validation & acknowledgement of the impact of the crime is consistent with findings of research on procedural justice, which demonstrate “being treated with dignity and respect is more important to victims than ‘results’ such as a particular sentence or punishment” (Department of Justice 2014; see also Booth 2011).

What is the benefit of allowing the victim to read his/her VIS in court?

- ▶ ‘...if victims are allowed to confront the offender in court...[they] are able to regain a sense of control and feel a sense of resolution’ (Trueblood 2010).
- ▶ ... [strengthens a victim’s] ‘sense of self’ (Cassell 2009).
- ▶ Procedural justice “in terms of voice” among other factors, impact the psychological effects of criminal proceedings and was also an important determinant of victims’ perceptions of “outcome favourability” (Laxminarayan 2012 in O’Connell 2015)
- ▶ In another study, procedural justice (including having a voice on decisions that affected victims) was helpful in recovery, however, procedure and outcome both influence victim satisfaction (Kelly 1984 in O’Connell 2015)

Restitution - Offender-paid compensation

- ▶ *Section 13 Victims of Crime Act 2001 - Rights in relation to compensation and restitution*
- ▶ *Section 123 Sentencing Act 2017* refers to the restitution of property.
- ▶ *Section 124 Sentencing Act 2017* addresses the issue of compensation for injury, loss or damage resulting from the offence.
- ▶ *Section 125 - Certificate for victims of identity theft*

Statutory compensation - VOC Act

▶ State-funded victim compensation for personal injury

- ▶ Compensation
- ▶ *Ex gratia* payments

▶ Discretionary payments

- ▶ Personal security - CCTV / Security screens & doors
- ▶ Emergency accommodation
- ▶ Attendance at funerals

Victims' Rights - Parallel 'Procedural' Rights



Victims Rights - Right for South Australia

*Justice denied anywhere diminishes justice
everywhere.*

Martin Luther King Jr

<https://consultingvictimologist.com>

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