

# Dealing with the victims of crime – the role of the legal profession



*Professor Beaty Naudé*

## Introduction

**S**OUTH Africa has been in a state of transformation since its first all inclusive democratic elections in April 1994 and this also includes the administration of justice as is evident by the Bill of Rights entrenched in the Constitution and the draft strategic plan, Vision 2000, recently released by the Ministry of Justice.

One aspect of concern, however, is the almost total neglect of the rights and needs of crime victims during this transformation process. The United Nations define victims as 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 operative within a specific country including laws proscribing criminal abuse of power.

The South African Bill of Rights, for example, accords numerous rights to arrested, detained and accused persons such as the right to remain silent, not to be compelled to make any confession, the right to legal assistance, the right to a fair trial, to be pre-

sumed innocent and to challenge evidence. Yet no victim rights are enshrined in the Constitution neither is there any indication in the Justice Vision 2000 to implement a Victims Bill of Rights as is currently the custom internationally. Victim rights refer to a variety of rights and needs of crime victims, such as the right to be treated with dignity and respect, the right to oppose bail, information on case progress, provision of reasons when a decision is made not to prosecute, protection from harassment and intimidation, separate court waiting rooms, speedy return of property, the right to legal services, information regarding available financial and social services, the right to restitution and compensation, etc. Moves are, however, afoot to promulgate the Witness Protection Programme Bill in Parliament in 1997 which will provide more adequate protection for witnesses as well as the Crime Fund Bill which will make provision for compensation to crime victims for injuries sustained as well as compensation to the families of victims who were killed.

## The rights of the accused are the main focus

The rights of the accused have always been a major concern in modern criminal jurisprudence as an important purpose of the criminal justice system is to balance the interests of the state against the interests of the accused (Douglas 1993:283). It is even maintained by some experts that the protections afforded the accused have become a sword rather than a shield in the hands of the defendant.

CMB (Beaty) Naudé  
*Professor of Criminology*  
University of South Africa

There is currently a global public perception that the criminal justice system ignores victims' interests, treats them unfairly and that the system is unequal as more rights are granted to the accused despite the fact that studies show that the input of the victim is crucial to have crimes solved and to sustain a conviction (Hudson 1984:29ff).

In many Western countries the omission of the criminal justice system to provide justice to victims of crime has been challenged and there is a decline in society's tolerance level for the attitude that an accused's rights are superior to the victim's rights (Hoffman 1983:227). In South Africa too there are lately many voices of dissent about the adverse position of crime victims. In the interests of a credible and democratic criminal justice system it is important that the judiciary and the legal profession take note of these negative public perceptions.

It is perhaps of interest to note that precolonial African societies mostly focused on the victim of crime rather than the offender and reconciliation and restitution was regarded as important to restore the harm caused by crime (Nsereko 1992:21).

The acceptance of European law which largely repressed the customary laws resulted in victims being neglected and alienated from the criminal justice process with the result that many Africans regard the criminal justice system with suspicion resulting in few benefits for the individual. This negative perception is even more prevalent in South Africa with our apartheid history of discrimination, oppression and unjust laws. >

## The need for restorative justice

More emphasis on restorative justice will probably go a long way towards making the South African criminal justice system more democratic and credible to all its people while at the same time recognising the individual dignity of the victim. The legal profession can play a crucial role in this regard by focussing more on the rights and needs of crime victims, as set out here under, to ensure a more just and balanced legal system.

## Improving legal services to crime victims

It is untenable that legal aid bodies only serve the needs of accused and detained persons and this service should also be extended to the victims of crime.

## Campaigning actively for more legal rights for crime victims

The legal profession can campaign actively to improve legislation and to encourage the courts to be more geared to the rights and needs of crime victims as South Africa is lagging far behind Western countries in this regard. A Victims Bill of Rights should be promoted as a priority.

## Educating victims with regard to their legal rights

The legal profession and their associated bodies can play an important role in educating and informing victims of their legal rights, especially with regard to restitution as set out in section 300 of the Criminal Procedure Act. Nothing prevents the victim from requesting the court to consider restitution as part of the sentencing option.

## Adequate utilisation of existing legislation to improve the victim's situation

Victims of serious crimes should be encouraged and assisted to approach the prosecutor with a request to address the court after conviction in order to plead for aggravating circumstances by bringing to the court's attention the

harm suffered as a result of the crime.

Unfortunately South African legislation does not make provision for victim impact statements as is the custom in countries such as Australia, New Zealand and most American states. A victim impact statement is a document that is intended to provide information to the court concerning the physical, financial, emotional and psychological effects on a crime victim, and, where relevant, his or her family. The purpose of victim impact statements is to reintegrate the victim into the court process and to improve the quality of sentencing by balancing the rights of the accused and the victim. Victim impact statements can be introduced –

- as an attachment or part of the presentence report (it is heartening to know that some probation officers in Pretoria are now doing this on a limited scale);
- as a separate written statement at the sentencing hearing; or
- as a separate oral statement at the sentencing hearing.

In particular South African victims of violent crimes should be made aware of the fact that they or their legal counsel can approach the prosecutor with a request to address the court on the harm they have suffered. This option is unfortunately seldom used in our courts. It is conceded that many victims do not want to be actively involved in the sentencing of the offender but there is no reason to deny this opportunity to those who desire it. In fact, research shows that only a small number of victims wish to exercise this option rather as part of the healing process than out of vindictiveness (McCleod 1986:503). Research further indicates that this process does not cause undue delay or have a negative influence on the sentencing process as is so often the expressed fear of the legal fraternity (Brammer 1992:288). It must further be pointed out that convicted offenders have the right to address the court in mitigation of sentence and in the interest of fairness there is no reason why the victim should not be afforded the same right.

Victims who wish to bring to the

courts' attention the harm they suffered as a result of the crime should be adequately assisted in this regard. The same applies to victims who institute private actions for compensation resulting from any delict and their legal counsel have an important duty to supply the courts with all the relevant information to ensure justice for all concerned. Obviously the specific criminal experience will determine the harm suffered by the victim.

## Factors that should be presented to court

### *Personal characteristics of the victim*

The career and employment status of the victim as well as aspects such as age, gender or personal factors relating to the victim's status in the community should be brought to the court's attention as they may have been aggravating factors. The identity of the victim is particularly relevant in cases where there is a specific intent by the offender to harm a particular victim as opposed to crimes where the victim was randomly selected.

### *Emotional and psychological effects*

The court should be informed of the emotions and reactions of the victim and, where applicable, the family as a result of the offence. The following factors should be dealt with:

- Emotional reactions such as anxiety and depression, lack of concentration, feelings of futility;
- Any behavioural changes such as aggressiveness, hostility or destructive behaviour;
- Disturbances in sleep or eating patterns (sleeping or eating too much or too little);
- Changes in lifestyle and behaviour (eg fear to go out after dark, fear of strangers or objects, inability to go out shopping alone (after a robbery), inability to drive a car (after a high-jacking incident);
- Influence on ability to work or study;
- Effect on interpersonal relations with family and friends (eg overdue dependence on family and friends,

general aloofness, distrust and suspicion, impaired communication);

- Details of any psychological counselling or therapy received which should be supported with written or oral expert evidence.

### **Physical injuries or disabilities suffered**

Information should include:

- Any ongoing physical discomfort;
- An accurate account of all treatment received to date (dates and type of treatment received to be supplied by medical care giver);
- Any treatment required in future in terms of medical advice;
- Effects of injuries or disabilities on future quality of life;
- Effects on life expectancy.

### **Financial or property losses that resulted from the offence**

Information should be supplied on:

- The value of the property damaged, lost or destroyed;
- Whether the losses were covered by insurance;
- Medical or psychological counselling expenses (copies of receipts should be made available);
- Losses as a result of time missed from work due to incapacity resulting from the incident, treatment, etc.

### **Any other life changes or concerns as a result of the incident**

Details of any specific life changes or concerns such as:

- Having moved house, work or area as a result of the incident;
- Victim's concerns about future contact with the offender or his/her family or friends;
- Fear of harassment and intimidation by offender or his/her family or friends;
- Any concerns with regard to the effect of the offender's release on parole or a suspended sentence (the last three aspects are often a concern of victims of domestic violence, sexual abuse or gang and drug-related violence).

### **Conclusion**

If the needs of the crime victim are made a focal point in our criminal justice system it will go a long way towards improving the public's negative perceptions of the judicial system which is currently regarded as heavily biased in favour of offenders. The legal profession can play a substantial role in this regard –

- by actively promoting the rights and needs of crime victims;
- by campaigning for improved legislation for victims of crime; and

- by assisting them to bring to the attention of the court the harm they suffered as a result of the crime or delict.

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Skakel **Regter Lombard** by:

Tel: (051) 4474006 of faks: (051) 4307041