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# Consultation Response

Widening the scope of the current victim statement scheme

22 November 2019



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee welcome the opportunity to consider and respond to the Scottish Government consultation: Widening the scope of the current victim statement (the consultation). The committee has the following comments to put forward for consideration.

## General

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Victim statements were introduced by section 14 of the Criminal Justice (Scotland) Act 2003 (2003 Act).<sup>1</sup> In giving any statement, this provides the victim with an opportunity to state the way in which, and the degree to which, the offence has affected and as the case may be continues to affect them.<sup>2</sup> Section 14(13)<sup>3</sup> of the 2003 Act allows for a victim statement to be made in such form and manner as may be prescribed. Under The Victim Statements (Prescribed Courts) (Scotland) Order 2009, the provision of victim statements is limited to solemn proceedings as specified under section 14(1) of the 2003 Act being (a) the High Court and (b) all sheriff courts sitting as courts of solemn criminal jurisdiction.

Inevitably, that restricts their provisions to the more serious cases. That means the effect of being able to give a victim statement is restricted by the original decision made by the Crown Office and Procurator Fiscal Service as to the forum in which the case is to be prosecuted. We note that a number of the offences listed under the Victim Statements Prescribed Offences) (No 2) (Scotland) Order 2009 are capable of being tried on summary proceeding. These include theft by housebreaking and indecent assault.

<sup>1</sup> <http://www.legislation.gov.uk/asp/2003/7/section/14>

<sup>2</sup> Section 14(2) of the Criminal Justice (Scotland) Act 2003.

<sup>3</sup> Amended by section 14(7) of the Victims & Witnesses (Scotland) Act 2014. This seems to provide for circumstances unspecified as to other ways to provide a victim statement.

Such a restriction as to the decision made on the prosecution forum may appear to us and indeed to the public to be somewhat arbitrary.<sup>4</sup> This is compounded by the fact that it is for the judge/sheriff to take the victim statement into account which applies irrespective of the forum in which the prosecution/conviction is obtained.

To this extent, the Scottish Government website<sup>5</sup> may be somewhat confusing as it refers to:

“if If you're a victim of a serious crime, you may be eligible to make a victim statement.”

Firstly, the public will perceive any crime in which they have been a victim to be serious. That is totally subjective. Secondly, crimes that are serious still fall to be prosecuted in the Sheriff Court under summary proceedings but as the legislation stands, those affected cannot provide a victim statement.

### **Question 1: Do you have a favoured option for how we could extend eligibility to make a victim statement?**

We on balance support Option C.

Our main basis for supporting that Option C is in referring to our comments above, we do not consider that the eligibility of being able to provide a victim statement should be fettered by means of decisions made by COPFS as to which forum the offence(s) should be prosecuted. There is an argument if victims' statements are important for sentencing purposes, then victims' statements should be required/provided in all cases, since the impact or effect of crimes affect people differently. No financial information has accompanied the consultation nor has that option been offered.

Presumably, the resource implications of that option would be considerable in supporting all of those who chose to provide such statements. Quite how many would avail themselves of that opportunity is not known.

Option C has the advantages as to:

- Future proofing the legislation by not setting a limit on the offences that qualify now so where new offences are to be included, there will not need to be an update with amendments whenever new legislation introduces new offences.
- Provides that the prosecution forum is not the determining factor as far as cases in which victim statements can be given as a number of offences would apply even if tried in the sheriff court. Restricting the categories in which victim statements can be provided seems to impose an arbitrary

<sup>4</sup> Though of course the Lord Advocate has the discretion as to where prosecution is merited in the public interest

<sup>5</sup> <https://www.mygov.scot/victim-statement/>

division. Why would a victim of domestic abuse be worse off necessarily than the victim of an assault? The level of injury in summary proceedings can be quite significant.<sup>6</sup>

If Option C is accepted, the gaps in the prescribed offences that currently exist would become obsolete.

There are gaps in the Victim Statements (Prescribed Offences) (No 2) (Scotland) Order 2009 if this were to be adopted for the purposes of specifying for which offences victim statements could be given in summary proceedings. These should extend to include fraud, embezzlement and bogus workman fraud cases. These offences may be tried at sheriff court level on summary complaint. These cases may target certain types of vulnerable victims on account of their age or disability.<sup>7</sup> These may be factors to consider in respect of Question 8 when considering equality issues as an aggravation to the basic offence.

Regarding Option C, the offences would presumably fall to be determined by those offences who have a victim. In addition to our comments above, we would include vandalism.

**Question 2. To help us decide how to extend the list of current offences for which a victim statement can be made we need to identify any potential impacts that the changes may have.**

**Do you envisage any potential implications for you/your organisations if the list of current offences that are eligible to make a victim statement was extended?**

Our members include Crown and defence solicitors as well as member of academia. The defence will be involved in providing legal advice when appropriate. The Crown will be involved with victim statements when required.

We are unaware of the frequency when victims may seek legal advice regarding providing victim statements. We would anticipate that solicitors may well provide that kind of advice as part of other proceedings such as a civil action, potentially divorce proceedings (domestic abuse cases) or in connection with a Criminal Injuries Compensation Claim. If any of the options are adopted as a result of the consultation, we would anticipate that there may be an increase in the number of victims seeking legal advice.

<sup>6</sup> Cases can be reduced from petition or solemn proceedings so victims in these cases would lose their right for factors outwith their control and will not affect the information that the victim may wish to bring to the court.

<sup>7</sup> Which form part of the “protected characteristics” under the Equality Act 2010.

We note though the intention is for victim statements to be used by judges/ sheriff in connection with sentencing, there are occasions when these may be produced during the currency of a case:

“The accused will be allowed to read your victim statement – normally this will only happen after they've pleaded or been found guilty. The accused will be allowed to read all or parts of the victim statement at an earlier stage if it's been passed on to the defence to help ensure a fair trial (our emphasis)”<sup>8</sup>

If there are more victim statements to be obtained because the scheme is widened as a result of the consultation, that will impact on the Crown and the defence as they both have roles to play. Just how significant that increase in work will be is not possible for us to quantify.

There may be legal aid implications too arising from the defence scrutiny of such statements.

We consider that as part of the consultation, it would be appropriate to consider how best to ensure that the victim understands why and when such victim statements would be passed onto the defence.

### **Question 3. Victim statements must currently be made in writing by the victim. Do you think we should look at piloting new ways for victim statements to be made?**

Yes. Technology moves on. If the purpose of victim statements is to allow the process to be as simple for the victim as possible, there seems every reason to allow them to adopt such formats as may suit. That would include:

- victims reading their statement in court: That would require to subject to some rules on what is acceptable and permissible as otherwise we can envisage control being required from the sheriff/judge if inadmissible content or material were read out. There would also require to be measures in place to support any emotional impact from giving such a statement. Would this provision be permitted by special measures such as the use of screens or remote video link?
- Pre-recording their statement on video or audio: This would be a matter of individual choice.

What about a family or specified member of the public reading the statement? That would be subject to the same provisos as indicated above. That could consider what happens in serious cases where outside a court, a police officer, family member or solicitor may read a prepared statement. Would these be appropriate persons to read a statement in court?

It depends on the purpose of a victim statement which is stated to consider how a crime has affected them physically, emotionally and financially<sup>9</sup> and would include:

- you now feel fearful

<sup>8</sup> <https://www.mygov.scot/victim-statement/>

<sup>9</sup> Paragraph 1 of the Consultation

- you've been left with physical injuries
- you feel depressed, disorientated, or lacking in confidence
- you've lost money or property as a direct result of the crime, or because you've been unable to work
- your social life and personal relationships have suffered<sup>10</sup>

Though some of the impact of a victim statement may be lost if the victim does not read it, we would refer to Question 8 as for some victims, there may be reasons why they cannot undertake this role so a substitute person may be appropriate.

We would not consider that the judge/sheriff should read the statement to the court. If it is a production in court, it is possible that it would be read by the clerk or sheriff clerk. The time needed to hear victims or for their representatives to read out the victim statement could put undue pressure on the efficient administration of the Courts, standing the volume of business across Scotland. (See too our comments at Question 5 about partial pleas and convictions).

We do consider that there is a point of which sheriff/judges should be aware. The judge/sheriff is not obliged to consider any victim statement in delivering any sentence. Indeed, it may not be relevant to any sentencing considerations.

However, for the purpose of those who have provided a victim statement, it is important that its giving is acknowledged in open court, if in fact it is not to be specifically mentioned in the sentencing statement. Otherwise the victim is not to know that it has been received and read. That seems quite an important omission that arises meantime and should be stressed to sheriffs/judges and form part of their awareness and training functions.

There may also be a role for the Scottish Sentencing Council<sup>11</sup> who are tasked as one of their aims with:

“promo[tion of] greater awareness and understanding of sentencing.

That would ensure that the public are aware of the purpose of such statements in relation to sentencing. There is also the question of making it clear to the public what significance could or should be made or placed on any victim statement provided in court.

**Question 4. To help us decide whether we should pilot new ways for victim statements to be made, we need to identify any potential impacts that any changes may have,**

<sup>10</sup> <https://www.mygov.scot/victim-statement/>

<sup>11</sup> <https://www.scottishsentencingcouncil.org.uk/>

## **Do you envisage any potential impacts for you/your organisation if we were to pilot different ways of victim statements being made?**

We refer to our answer to Question 2 as we would anticipate that the same issues would arise for the legal profession.

## **Question 5. Are there any other aspects of the current victim statement scheme which you consider could be improved?**

This question is best addressed by those organisations who are tasked with assisting victims with providing such statements.

We would consider that there are improvements which can be made by revising the information which is available on the public facing websites produced such as the gov.scot and COPFS. Our suggestions would include:

- a link to the Scottish Legal Aid Board about the availability of legal aid if appropriate to support victims
- help or support groups
- clarification of COPFS Victim Statement Scheme's letter which states:

"I will ensure that your completed victim statement is given to the court if the accused is convicted of the crime"

This seems unclear and at variance with what appears on the scot.gov website quoted in our answer to Question 2.

This presents difficulties when balancing the interests of the victim and the accused which we would call upon the Scottish Government to resolve as a result of this consultation. These issues principally relate to the status of any victim statement and with whom the responsibility for advising and holding such a statement is prior to any conviction and sentence.

The victim statement should not be part of the evidence in the case.

It would therefore not be disclosed to the defence in advance of the trial. Notwithstanding the advice which will be tendered to those seeking to provide a victim statement, if it is provided by means of the Victim Information and Advice Service, that advice is not legal and is provided by COPFS's own staff. There is no control on the victim putting into their statements such information as they consider is important, irrespective of any advice provided.

That has consequences if once that information is within the COPFS's control (and known about) and assessed as relevant (and their Depute staff have that responsibility), it would require to be disclosed to the defence. The guidance given to victims is that the statement should not contain material about the

circumstances of the incident but should be limited to information about the impact the crime has had. At a minimum, that qualification should be included in all aspects of the information relating to victim statement.

However, infrequently that possibility may arise, it will adversely affect the confidence of any victim in providing a victim statement. That is going to be an issue of grave concern to many victims as they could potentially face cross-examination about what they have written which is going potentially to adversely affect their attitude in providing a victim statement.

Ideally, the information contained in any victim statement should be excluded from court but that is not practical evidentially given that there may be circumstances where it would require to be disclosed by the Crown.

Would there be means to have the victim statement provided direct to the Court which remains unread until such time as a guilty plea is tendered or conviction obtained? That would resolve any issue about requiring disclosure. It is outside of the Crown's control and knowledge. There remains otherwise the risk that the victim statement includes information that would have been relevant to the trial that has been available but not known.

There are also issues where the victim statement has referred to the original charges on the indictment, but the plea or conviction includes deletions or charges that were not proved. How does the judge/sheriff factor that into the sentence? How is that explained to the victim?

We are not sure that the public understand the reference in the letter to the court. There is a need to ensure that not only the statement is provided to the court but that the judge/sheriff acknowledge its receipt in open court. That completes the loop which seems essential for the victim, to aid with the impact and the emotional consequences of giving evidence.

**Question 6. Do you have any views on whether we could consider amending the definition of who is eligible to make a victim statement to help ensure all relevant victims are able to make a statement if they wish?**

We refer to our answer to Question 1.

**Question 7. Are there any data protection related issues that you feel could arise from the proposals set out in this paper?**

We have no comment to make.

**Question 8. Are there any equality related issues that you feel could arise from the**

## proposals set out in this paper?

We refer to our answers to Questions 1 and 3 above. We note that there is an intention to carry out an Equality Impact Assessment which is essential as there may be implications for those falling within the groups of “protected characteristics.”

The third sector organisations may be best placed to respond fully on the implications arising from their representation of those groups with “protected characteristics”.

However, we would highlight our work where we have been working on the issues with the definition of vulnerable<sup>12</sup> within the Scottish criminal justice system. Following the publication of our Report<sup>13</sup> in April 2019, the Convenor of the Criminal Law Committee recognised the issues that arise in stating:

“... person(s) unfamiliar with the justice system can find it hard to understand the processes, procedures and language involved, so for people with vulnerabilities this can present an even greater challenge. Our population is ageing and becoming more diverse, so different groups are increasingly coming into contact with the criminal justice system. By creating a central knowledge portal to share best practice and carrying out proper research into which vulnerabilities need greater support we can make sure the system works for everyone.”

This is relevant to understanding the scope of those that may be deemed to be vulnerable, no matter their capacity, whether as a victim, accused or witness. Care needs to be taken to ensure that they understand the implications of and are supported where a victim statement is to be given. That need for vulnerable groups may be wider than merely the group of “protected characteristics” as that does not seem to be fully met at present.

<sup>12</sup> <https://www.lawscot.org.uk/news-and-events/law-society-news/greater-consistency-needed-for-vulnerable-accused-people/>

<sup>13</sup> <https://www.lawscot.org.uk/media/362501/vulnerable-accused-persons-report-final.pdf>



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