Multi-Site Survey of Victims of Crime and Criminal Justice Professionals across Canada:

Summary of Defence Counsel Respondents

Department of Justice Canada
Ministère de la Justice Canada
Canada

Policy Centre for Victim Issues

Research and Statistics Division

rr05vic-1-sum6e
2005

These summaries are extracted from the *Multi-Site Survey of Victims of Crime and Criminal Justice Professionals across Canada*, completed by Prairie Research Associates Inc. on behalf of the Department of Justice Canada.

Multi-Site Survey of Victims of Crime and Criminal Justice Professionals across Canada:

Summary of Defence Counsel Respondents

Table of Contents

Introduction

The *Multi-Site Survey of Victims of Crime and Criminal Justice Professionals* was conducted in 2002 under the direction of the Policy Centre for Victim Issues (PCVI) of the Department of Justice Canada in collaboration with the Research and Statistics Division. The PCVI implements the Victims of Crime Initiative which, through the Victims Fund, legislative reform, research, consultations and co1mmunication activities, works to increase the confidence of victims in the criminal justice system and responds to the needs of victims of crime as they relate to the Department of Justice.

The purpose of the *Multi-Site Survey of Victims of Crime and Criminal Justice Professionals* is to gather information on a wide range of issues concerning the criminal justice system as it pertains to victims and criminal justice professionals, with a particular emphasis on recent *Criminal Code* provisions, specifically Bill C-79, which was introduced in 1999. This legislation amended the *Criminal Code* in several areas, such as:

- giving victims the right to read their victim impact statements at the time of sentencing if they wish to do so;
- requiring the judge to inquire before sentencing whether the victim has been informed of the opportunity to give a victim impact statement;
- requiring that all offenders pay a victim surcharge of 15% where a fine is imposed or a fixed amount of $50 or $100 for summary or indictable offences, respectively, and can be increased by the judge (except where the offender can demonstrate undue hardship);
- clarifying the application of publication bans and provide a discretion to order, in appropriate circumstances, a publication ban on information that could disclose the identity of any victims as witnesses;
- expanding the protection of victims and witnesses under the age of 18 years from cross-examination by a self-represented accused in sexual and personal violence offences;
- allowing any victim or witness with a mental or physical disability to be accompanied by a support person while giving evidence;
- ensuring that the safety of victims and witnesses are taken into consideration in judicial interim release determinations.

To a more limited extent, the survey also explored perceptions regarding amendments recently made to the *Corrections and Conditional Release Act* to provide victims with the opportunity to present prepared victim statements at parole board hearings.

Findings from this study will generate evidence to inform future legislative reforms and policy changes by providing insight on the use and awareness of recent reforms by criminal justice professionals as they pertain to victims of crime, the nature of information provided to victims during the criminal justice process, victims' experiences with the legal provisions and other services that are intended to benefit them throughout the criminal justice process, and barriers to the implementation of recent reforms for criminal justice professionals.

Given the breadth of findings in the final report[1] the PCVI has prepared seven summary reports based on respondent groups in the survey. This report is a summary of the findings from defence counsel who participated in the study. Additional summaries are available that speak to the findings of Police respondents, Crown Attorney respondents, Judiciary respondents, Probation Officers and Parole Officer respondents, Victim Services Providers respondents, Victim Advocacy Group respondents and Victims of Crime.

[1] The full report and copies of the other summaries are available at: http://canada.justice.gc.ca/en/ps/voc/pub.html. For copies contact the Policy Centre for Victim Issues, 284 Wellington Street, Ottawa, Ontario, K1A 0H8.

Methodology

The multi-site survey was conducted in 16 sites within the 10 provinces in Canada; the territories were not included in this study. The 16 sites represent five regions: Atlantic (Nova Scotia, Prince Edward Island, New Brunswick, and Newfoundland and Labrador), Quebec, Ontario, Prairie (Saskatchewan and Manitoba), and Western (British Columbia and Alberta). Each region included at least three sites of varying size (small, medium, and large), with consideration of diversity in geography (rural, urban, northern) and population (especially cultural and linguistic). A subcommittee of the Federal Provincial Territorial Working Group (FPTWG) on Victims of Crime guided the research team and recommended some of the locations selected for site visits.

Data for this study came from criminal justice professionals and victims of crime. A total of 112 victims of crime participated in in-depth interviews, which were conducted in order to obtain detailed data on each individual victim's experience in the criminal justice system. Victim services providers assisted in contacting victims and obtaining their consent to participate in the study, which may have introduced selection bias into the research.

Criminal justice professionals who participated in the study were from 10 different groups: judges, Crown Attorneys, defence counsel, police, victim services providers, victim advocacy groups, probation officers, and three types of parole representatives (from the National Parole Board [NPB], Correctional Service Canada [CSC], and the provincial parole boards in Quebec, Ontario, and British Columbia). They participated through either self-administered questionnaires or interviews. Relying on two forms of data collection allowed for the most complete method of gathering information on the research questions. The use of self-administered questionnaires ensured that a large proportion of the criminal justice professionals in each site could participate, while the use of interviews meant that more in-depth, qualitative data could also be obtained.

TABLE 1:
INTERVIEWS WITH CRIMINAL JUSTICE PROFESSIONALS

Respondent group	Large sites	Medium sites	Small sites	Total
Victim services	43	19	7	69
Police	18	8	12	38
Crown Attorneys	18	8	11	37
Judiciary	17	6	8	31
Defence counsel	20	4	15	39
Total	116	45	53	214

As Table 1 above shows, interviews were conducted with 214 criminal justice professionals from five respondent groups: victim services providers; police; Crown Attorneys; judiciary; and defence counsel. Table 1 above indicates the number of interviews completed in each respondent group. Interview results were captured as part of the quantitative data corresponding to that generated by the self-administered surveys. Self-administered questionnaires were also

distributed to all 10 respondent groups. A total of 1,664 criminal justice professionals completed the self-administered questionnaire. Overall (in interviews and self-administered questionnaires), a total of 1,878 criminal justice professionals participated in this survey. Please see Tables 2 and 3 below.

TABLE 2:
RESPONDENTS WHO COMPLETED SELF-ADMINISTERED QUESTIONNAIRES BY SITE SIZE

Respondent group	Large sites	Medium sites	Small sites	Total Self-completed questionnaires
Victim services	180	39	30	249
Police	393	141	114	648
Crown Attorney	123	25	3	151
Judiciary	58	13	8	79
Defence Counsel	122	15	9	146
Advocacy Groups	37	4	6	47
Probation	161	26	19	206
Total	1,074	263	189	1,526

TABLE 3:
PROBATION AND PAROLE RESPONDENTS WHO COMPLETED SELF-ADMINISTERED QUESTIONNAIRES

Respondent group	Total number of respondents
National Parole Board	85
Provincial Parole Board	22
Correctional Service Canada	29
Total	136

Thirty-nine defence counsel completed interviews and 146 completed self-administered questionnaires for a total of 185 defence counsel respondents. The results from their interviews and questionnaires are presented below (see appendix a for interview guides).

Findings from Defence Counsel Respondents

1. The Role of the Victim in the Criminal Justice Process

Criminal justice professional were asked, "What role should victims have in the following stages of the criminal justice process, i.e. should victims be informed, consulted, or have no role?" There was considerable agreement among all respondent groups that victims of crime have a legitimate role to play in the criminal justice process.

Defence counsel regards the victim primarily as a witness and a source of information. Some of them believe that victims are entitled to be consulted to some extent, especially before irrevocable steps are taken (34%).

Defence counsel cautioned that the criminal justice system must deal with the accused in a manner that serves the public interest and protects society. They emphasized that decision-making ultimately must remain with the court and the Crown Attorney, who are more knowledgeable about the law and can be more objective. Concern was expressed that allowing too large a role for victims would erode the principle of innocent until proven guilty and thereby distort the criminal justice process. However, as Table 4 indicates, a sizeable minority (ranging from 34% to 23%) of defence counsel think the victim should be consulted at bail decisions, plea negotiations and sentencing.

TABLE 4:
WHAT ROLE SHOULD VICTIMS HAVE IN THE FOLLOWING STAGES OF THE CRIMINAL JUSTICE PROCESS, I.E., SHOULD VICTIMS BE INFORMED, CONSULTED OR HAVE NO ROLE?

	Victim Services (N=318)	Crown Attorneys (N=188)	Defence Counsel (N=185)	Judiciary (N=110)	Police (N=686)	Advocacy Groups (N=47)
Bail decisions						
Victim should be consulted	64%	48%	34%	46%	59%	70%
Victim should be informed only	32%	42%	49%	40%	35%	30%
Victim should not have any role	2%	4%	17%	9%	4%	--
No response	3%	6%	0%	4%	3%	--
Totals	101%	100%	100%	99%	101%	100%
Plea negotiations						
Victim should be consulted	61%	44%	25%	N/A	N/A	81%
Victim should be informed only	32%	35%	38%	N/A	N/A	13%
Victim should not have any role	3%	14%	37%	N/A	N/A	2%
No response	4%	6%	1%	N/A	N/A	4%
Totals	100%	99%	101%	N/A	N/A	100%
Sentencing						
Victim should be consulted	64%	49%	23%	56%	N/A	75%
Victim should be informed only	31%	36%	54%	33%	N/A	21%
Victim should not have any role	2%	9%	23%	8%	N/A	--
No response	3%	6%	1%	3%	N/A	4%
Totals	100%	100%	101%	100%	N/A	100%

* Respondents could give only one response. Totals that do not always sum to 100% due to rounding.

Bail Decisions

Among the criminal justice professionals surveyed in this research, a substantial proportion in all categories believes that victims should be consulted in bail decisions. Defence counsel were the least likely among all respondent groups to support a consultative role for victims at bail.

Among defence counsel surveyed, one-third believe that victims should be consulted, while about half believe that they should simply be informed, and one-fifth believe that they should have no role at all. In interviews, defence counsel expressed their conviction that the victim's input should never be determinative, although they acknowledged the Crown Attorney's need to get information from the victim about safety issues and the desirability for some amount of victim input about conditions. A few of those interviewed said that any victim involvement in bail determinations erodes the presumption of innocence and should, therefore, be very limited.

Plea Negotiations

Defence counsel are the least prepared of the respondent groups to accept a prominent role for victims in plea negotiations. One-quarter of those surveyed approve of consulting the victim, whereas almost 40% support keeping the victim informed, and the same proportion believes that the victim should have no role whatsoever. In interviews, defence counsel who favoured no role for the victim pointed out that the decision whether to accept a plea must be based on the

evidence, which is a legal issue that the victim cannot evaluate. Similarly, those who approved of consulting the victim during negotiations did so with the proviso that the Crown Attorney's discretion should remain unfettered.

Sentencing

Although there is considerable support among most respondent groups for consulting victims at sentencing, defence counsel were the least likely of all respondent groups surveyed to approve of consulting the victim at this stage.

In interviews, a few defence counsel supported consulting victims for sentences served in the community, and a few judges noted that victims have the opportunity to contribute to crafting a sentence when restorative approaches are used. However, there is also general agreement that victims should not have any say regarding the length or severity of sentences. Defence counsel believe that it is inappropriate for victims to suggest or determine a sentence, since the court is obligated to consider society's interests in sentencing, which may differ from those of the individual victim. From their perspective, introducing a personal or emotional element into sentencing would result in dissimilar sentences for similar crimes based on individual victims' characteristics. Such a practice would threaten the credibility of the criminal justice system.

2. Bail Determinations

The 1999 amendments to the *Criminal Code* include several provisions to protect the safety of victims of crime in bail determinations. The provisions direct police officers, judges, and justices of the peace to consider the safety and security of the victim in decisions to release the accused pending the first court appearance; require judges to consider no-contact conditions and any other conditions necessary to ensure the safety and security of the victim; and ensure that the particular concerns of the victim are considered and highlighted in decisions on the imposition of special bail conditions. This section describes defence counsel practices with respect to victim protection in bail determinations.

Defence Counsel and Judicial Practices at Bail

In surveys and interviews, defence counsel were asked, "In bail determinations, do you generally agree to conditions that address complainant safety? If no, for what reasons do you object? Almost all defence counsel surveyed (95%) usually agree to such requests.

In interviews, defence counsel observed that they have no reason to object to reasonable conditions. They defined conditions as reasonable if there is a nexus between the conditions requested, the victim, and the crime, and if the conditions are not too restrictive on their client. Examples given of unreasonable conditions included orders not to attend the residence when the accused works out of the home or not to attend the victim's workplace when the accused also works there. Defence counsel also noted that the accused can benefit from properly framed conditions, not only because conditions improve the chance that the accused will be released on bail, but also because conditions can ensure that there is no repeat offence.

In interviews, defence counsel also commented extensively on bail determinations in domestic violence cases. In these cases, counsel said that the determination of reasonable conditions is more difficult. Many noted that the application of blanket no contact orders is often detrimental to both their client and the victim. Often the victim wants the accused home because of financial, emotional, or family reasons. Especially if children are involved, defence counsel find that no contact orders harm the family unit and almost ensure that their client will violate the order.

Virtually all defence counsel surveyed in this research (97%) reported that judges typically grant requests for conditions to address the victim's safety in bail determinations.

3. Provisions to Facilitate Testimony

Recognizing that testifying in court can be especially traumatizing for young victims or those with disabilities or victims of sexual or violent offences, the 1999 amendments to the *Criminal Code* included several provisions to facilitate testimony on the part of such witnesses. Publication bans on the identity of sexual assault victims have been clarified to protect their identity as victims of sexual assault offences as well other offences committed against them by the accused. The new provisions also permit judges to impose publication bans on the identity of a wider range of witnesses, where the witness has established a need and where the judge considers it necessary for the proper administration of justice. Other amendments restrict cross-examination by a self-represented accused of child victims of sexual or violent crime; and permit victims or witnesses with a mental or physical disability to have a support person present while testifying. The following sections describe the use of these provisions and other testimonial aids such as screens, closed-circuit television, and videotape.

Publication Bans

The 1999 amendments clarified that publication bans on the identity of sexual assault victims protect their identity as victims of other offences committed against them by the accused. For example, if the victim is robbed and sexually assaulted, her identity as a victim of robbery could not be disclosed. In addition, the amendments provided for a discretionary publication ban for any victim or witness where necessary for the proper administration of justice.

Defence counsel explained in interviews that while publication bans are essentially automatic at the preliminary hearing, requests for a ban in later stages in non-sexual offences are extremely rare and are only made when there is an extremely compelling reason to do so. In interviews defence counsel gave several examples of instances where publication bans are most likely to be granted.

Defence counsel surveyed are evenly split between those that usually agree to requests for publication bans in non-sexual offences and those who object (47% and 48%, respectively). Two-thirds of those who object argued that publication bans violate the principle of an open court system. In interviews, those who generally agree to the requests most often explained that publication bans benefit the accused. A few defence counsel indicated in interviews that they would agree to publication bans in non-sexual offences involving children or in cases with police informants as witnesses.

TABLE 5: USE OF PUBLICATION BANS ON NON-SEXUAL OFFENCES		
	Crown Attorneys (N=188) *Do you generally request publication bans in non-sexual offences?*	Defence Counsel (N=185) *Do you generally agree to publication bans in non-sexual offences?*
Yes	32%	47%
No	67%	48%
No response	1%	5%

Defence counsel surveyed noted that publication bans in non-sexual assault offences are uncommon. About one quarter of the defence counsel surveyed believe that judges usually grant these requests where they are made.

Exclusion of the Public

A large majority of the defence counsel surveyed (70%) do not generally agree to requests to exclude the public from a trial, primarily on the grounds that these requests, like publication bans, violate the principle of open court proceedings. Less than one-quarter of defence counsel generally agree to requests to exclude the public. They noted in interviews that the requests are usually made in cases where the need is clear: serious sexual assaults, especially those involving young children, and young witnesses who are incapable of providing their testimony in open court. Other situations where defence counsel said they would agree are those where the exclusion of the public benefits their client or where it is necessary for the proper administration of justice (e.g., the public is interrupting the proceedings).

Defence counsel surveyed agreed that requests to exclude the public are extremely rare. Fifteen percent of defence counsel said that judges generally grant requests to exclude the public.

Screens, Closed-circuit Television, and Videotaped Testimony

There are three testimonial aids designed to assist young witnesses or those with a mental or physical disability, namely the use of screens, closed circuit television, or videotape. Of these three aids, screens appear to be the most popular while videotaped testimony is the least popular among defence counsel. Please refer to Table 6.

TABLE 6:
USE OF SCREENS, CLOSED-CIRCUIT TELEVISION, AND VIDEO-TAPED TESTIMONY IN ELIGIBLE CASES

	Judges (N=110) *Do you generally grant the use of…*	Defence Counsel (N=185) *Do you generally agree to the use of…*	Crown Attorneys (N=188) *Do you generally request the use of…*
Screens			
Yes	83%	57%	61%
No	6%	39%	32%
No response	12%	4%	7%
Closed-circuit television			
Yes	61%	44%	38%
No	20%	50%	51%
No response	19%	7%	11%
Videotaped testimony			
Yes	60%	24%	56%
No	20%	69%	33%
No response	20%	7%	11%
Note: Responses are not inter-related across groups			

Screens

About 60% of defence counsel surveyed usually agrees to requests for the use of a screen in appropriate cases. In interviews, defence counsel said that they are prepared to accept the use of screens however, several reported no observable differences in the ability of witnesses to testify with or without the screen, which they attributed in part to defence counsel's care when cross-examining young witnesses. Furthermore, the fact that the witness is physically present in the courtroom and visible to defence counsel when screens are used makes screens less objectionable than the other aids for some defence counsel. Nevertheless, about 40% of defence counsel surveyed do object to screens on the grounds that their use undermines the right of the accused to face the victim; presupposes guilt by giving the impression that the witness needs to be protected from the accused; interferes with cross-examination; and makes it difficult to assess the credibility of the witness.

Three-quarters of defence counsel surveyed believe that judges usually grant the use of screens.

Closed-circuit Television

Over 40% of defence counsel surveyed reported that they generally agree to the use of closed-circuit television. In interviews, defence counsel commented that this testimonial aid has proven useful for very young witnesses (those under 10 years of age); it was even suggested that closed-circuit television is an advantage to the defence counsel because it enables them to gain the young person's trust, making the testimony easier for all involved. Defence counsel surveyed who object to closed-circuit television argued that it interferes with full defence; conflicts with the right of the accused to face the victim; makes it more difficult to assess the credibility of the witness; and erodes the presumption of innocence by creating the impression that the accused is guilty.

Forty-five percent of defence counsel surveyed believe that judges usually grant requests for closed-circuit television.

Videotaped Testimony

Videotaped testimony received the least support from defence counsel; less than one-quarter of defence counsel surveyed generally agree to its use. The most common objection, mentioned by almost half of defence counsel who usually object concerns the difficulties that videotape presents for cross-examination. Defence counsel believe that the effectiveness of cross-examination is reduced because it does not occur contemporaneously with the direct examination of the witness. Another reason for defence counsel objections is the difficulty that videotaped testimony poses in assessing the credibility of the witness and the evidence, since it is impossible to assess the method used to elicit the videotaped testimony. Defence counsel see this as particularly problematic because this testimonial aid is used for vulnerable witnesses who are more impressionable and can more easily be led, even if that is not the interviewer's intention. Other objections include the inability of the accused to confront his or her accuser when videotape is used and the impression it leaves that the accused is guilty.

Many defence counsel expressed serious reservations about the use of testimonial aids. The major concern involved the perception that these aids violate principles of the criminal justice system intended to protect the accused, such as the presumption of innocence and the right of the accused to face his or her accuser. Defence counsel also believe that these aids can make mounting a defence more difficult by undermining counsel's ability to effectively cross-examine the witness, making it more difficult to assess the witness's credibility and lessening the pressure on the witness to be truthful because he or she is not on the witness stand facing the accused.

About half of defence counsel surveyed believe that judges usually grant requests for videotaped testimony.

Support Persons

The 1999 amendments to the *Criminal Code* permit victims or witnesses with a mental or physical disability to have a support person present while testifying. Of the various provisions to facilitate testimony, the use of support persons to accompany a young witness or witnesses with a physical or mental disability appears to be the least controversial and the most widely used. Two-thirds of defence counsel surveyed usually agree to such requests. In interviews, a few defence counsel commented that the use of a support person can be positive for the defence. They noted that when the witness is at ease and not crying, cross-examination goes better because the witness requires fewer breaks.

TABLE 7: USE OF SUPPORT PERSONS IN ELIGIBLE CASES			
	Crown Attorneys (N=188) *Do you generally request the use of a support person?*	Defence Counsel (N=185) *Do you generally agree to the use of a support person?*	Judiciary (N=110) *Do you generally grant the use of a support person?*
Yes	76%	66%	82%
No	16%	30%	6%
No response	8%	4%	13%
Note: Totals may not sum to 100% due to rounding. Responses are not inter-related across groups			

Defence counsel surveyed who usually do not agree to support persons based their objection primarily on the risk that the testimony might be influenced. In interviews, defence counsel explained that they have no problem with a support person as long as the individual remains neutral and does not attempt to influence the witness's testimony, although they disagreed over who are suitable support persons. A few found relatives of the witness acceptable, while others expressed concern about support persons with a close relationship to the witness; the latter group prefers support persons with some awareness of legal issues, such as victim services workers.

Just over two-thirds of defence counsel respondents surveyed said that judges usually grant the use of support persons when such requests are made. This compares with more than 80% of judges surveyed who reported usually granting these requests.

Section 486 (2.3)

The 1999 amendments to the *Criminal Code* include the provisions in section 486 (2.3), which restrict cross-examination by a self-represented accused of child victims of sexual or violent crime. This section reports on the use of this provision by defence counsel and the extent to which they support expanding the section to other types of witnesses or other types of offences.

Use of Section 486 (2.3)

Among defence counsel surveyed, 6% reported having been appointed to act for the accused pursuant to the section.

Expansion of Section 486 (2.3)

As Table 8 shows that defence counsel were least likely among all respondent groups to favour expansion of section 486 (2.3) to other offences and/or other victims or witnesses.

TABLE 8:
SHOULD S. 486 (2.3) OF THE *CRIMINAL CODE* BE EXPANDED TO OTHER VICTIMS OR WITNESSES OR OTHER OFFENCES?
(NOTE: S. 486 [2.3] PLACES RESTRICTIONS ON CROSS-EXAMINATION BY A SELF-REPRESENTED ACCUSED OF CHILD VICTIMS OF SEXUAL OR VIOLENT CRIME.)

	Victim Services (N=318)	Crown Attorneys (N=188)	Defence Counsel (N=185)	Advocacy Groups (N=47)
Yes	73%	52%	27%	77%
No	14%	15%	70%	19%
Don't know	--	25%	--	--
No response	13%	9%	3%	4%
Note: Totals may not sum to 100% due to rounding.				

Table 9 shows respondents' opinions on how section 486 (2.3) should be expanded. Among defence counsel support was most widespread for expanding the section to adult witnesses in the category of offences to which it currently applies (45%). There was also considerable support for expanding the section to any case where the witness is vulnerable or intimidated by the accused or where there is a power imbalance between victim and accused (22%). Some defence counsel support expanding the section to domestic violence cases in particular (10%) and to all crimes of violence (10%). In interviews, many defence counsel argued simply that the protection should be available any time the proper administration of justice requires it and that this determination should be left to judicial discretion.

TABLE 9:
HOW SHOULD S. 486 (2.3) BE EXPANDED?
BASE: RESPONDENTS WHO BELIEVE S. 486 (2.3) SHOULD BE EXPANDED.

	Victim Services (n=233)	Crown Attorneys (n=97)	Defence Counsel (n=49)	Advocacy Groups (n=36)
Expand to adults	28%	40%	45%	31%
Domestic violence	21%	33%	10%	17%
All crimes of violence	19%	33%	10%	28%
Vulnerable or intimidated witnesses	12%	23%	22%	17%
Criminal harassment	6%	14%	8%	--
All child witnesses regardless of offence	8%	11%	--	--
Whenever accused is self-represented	25%	9%	--	19%
Certain property crimes	2%	5%	--	--
Other	6%	10%	6%	17%
No response	11%	7%	12%	8%
Note: Respondents could provide more than one response; totals sum to more than 100%.				

Among defence counsel surveyed, those who advised against expansion of the section were primarily concerned about protecting the right of the accused to self-represent and the right of the accused to face the complainant (mentioned by 47% and 9%, respectively). According to them, the current section already represents a significant deviation from the accused's right of confrontation, which is a basic tenet of criminal law. Several others argued that judges can and do intervene to protect the victim and prevent the accused from engaging in abusive or excessive cross-examination. A few simply said that a change in law is not needed, and a few pointed to the growing number of self-represented accused as a reason for not expanding the section. In

interviews, several defence counsel (both those who support expansion and those who do not) noted that any expansion would put resource strains on the system. They believe that many accused have no choice but to self-represent because they fail to qualify for legal aid. Providing these accused with counsel would require significant additional funding to expand legal aid. A few defence counsel were of the view that self-representation in general should be eliminated entirely or at least reduced.

4. Victim Impact Statements

Victim impact statements (VIS) are written statements in which victims can describe the effect of the crime on them and any harm or loss suffered as a result of the crime. The 1999 amendments to the *Criminal Code* allow victims to read their statements aloud during sentencing, require the judge to ask before sentencing whether the victim has been informed of the opportunity to complete a VIS and permit the judge to adjourn the sentencing, to give the victim time to prepare the statement.

Victims of crime can submit victim impact statements at sentencing and at parole. At parole, the victim can rely on the victim impact statement from sentencing and/or provide another statement to the parole board. The following discussion considers victim impact statements at sentencing.

At Sentencing

Frequency of Submission

Survey respondents were asked whether, based on their experience, victims generally submit victim impact statements to the court. Table 10 below provides the respondents answers to this question.

TABLE 10:
DO VICTIMS USUALLY SUBMIT VICTIM IMPACT STATEMENTS AT SENTENCING?
BASE: RESPONDENTS WHO PROVIDED A RESPONSE (DON'T KNOW AND NO RESPONSE EXCLUDED).

	Victim Services (n=195)	Crown Attorneys (n=183)	Defence Counsel (n=174)	Judiciary (n=101)	Police (n=547)	Advocacy Groups (n=38)	Probation (n=88)
Yes, in most cases	48%	32%	38%	33%	34%	42%	34%
Yes, only in serious cases	32%	50%	45%	52%	46%	37%	41%
No	20%	18%	17%	16%	20%	21%	25%
Note: Some column totals do not sum to 100% due to rounding.							

Defence counsel are divided about the frequency with which victim impact statements are submitted. Forty-five percent of defence counsel believe that victims generally submit victim impact statements only in serious cases, such as sexual assault, other violent offences, and certain property crimes. About 40% think that victim impact statements are submitted in most cases, and about one-fifth reported that in their experience, victims usually do not submit victim impact statements, regardless of the severity of the offence.

Providing Information on Impact Statements

Related to the issue of whether victims submit victim impact statements is the provision of information to victims about the statements. If awareness is low, submission rates will be correspondingly low. In interviews, a few defence counsel questioned whether criminal justice professionals are completely fulfilling their roles concerning victim impact statements when discussing the frequency of submission of these statements.

In contrast, a few defence counsel who were interviewed ascribe the submission rate to lack of Crown Attorney diligence. According to these defence counsel Crown Attorneys either do not pursue getting victim impact statements or they receive the statements but do not submit them to the court. The perception among these defence counsel is that Crown Attorneys believe they can more effectively present the victim's interest in sentencing or that they view the victim impact statement as redundant because the judge has already heard the victim's testimony. Statements made by Crown Attorneys at one site support this perception; they reported not always submitting the victim impact statement to the court and, instead, simply telling the court what the victim has experienced.[2]

Method of Submission

Of the 180 defence counsel respondents with sufficient experience to respond, close to 80% of defence counsel agreed that victim impact statements are usually submitted in writing only. About one-fifth of survey respondents reported that Crown Attorneys read the statement. Two percent of defence counsel believe that the victim reads their statement. Table 11 provides the survey results of those respondents who were able to answer this question.

TABLE 11:
WHAT ARE THE MOST COMMON METHODS OF SUBMITTING A VICTIM IMPACT STATEMENT AT SENTENCING?
BASE: RESPONDENTS WHO PROVIDED A RESPONSE (DON'T KNOW AND NO RESPONSE EXCLUDED).

	Victim Services (n=194)	Crown Attorneys (n=184)	Defence Counsel (n=180)	Judiciary (n=108)
Written statement only	82%	90%	79%	87%
Victim reads statement	18%	5%	2%	7%
Crown Attorney reads statement	16%	21%	18%	16%
Other	2%	3%	4%	--
Note: Respondents could provide more than one response; totals sum to more than 100%.				

Cross-examination of Victim

Defence counsel can cross-examine victims on their victim impact statements both at trial (if the statement is received before a finding of guilt) and at sentencing. The survey results in Table 12 show that about one-fifth of defence counsel have been involved in a case where the victim was cross-examined on his or her impact statement at trial or at sentencing. In some sites, the

[2] The procedure for victim impact statements is governed by a provincially designated program, and there are some variations in the procedure among provinces.

possibility of cross-examining the victim on the victim impact statement at trial is forestalled because the Crown Attorney, court, and defence counsel only receive the statement after a finding of guilt.

TABLE 12:
HAVE YOU EVER HAD A CASE WHERE THE DEFENCE COUNSEL OR THE ACCUSED CROSS-EXAMINED THE VICTIM ON THEIR VICTIM IMPACT STATEMENT?

	Crown Attorneys (N=188)	Defence Counsel (N=185)	Judiciary (N=110)
At trial			
Yes	24%	20%	12%
No	71%	71%	80%
Don't know	3%	4%	3%
No response	3%	5%	6%
At sentencing			
Yes	26%	23%	10%
No	65%	70%	80%
Don't know	6%	3%	5%
No response	3%	5%	6%

Note: Respondents could provide only one response. Some totals sum to more than 100% due to rounding.

In interviews, Crown Attorneys commented that cross-examination on victim impact statements is quite rare. It occurs because the contents of the statement differ from the evidence presented at trial or because the defence counsel is sceptical about a victim's claims of ongoing effects or injuries. Surveyed defence counsel and judges concurred. The few defence counsel who reported cross-examining the victim said that they did so either to contest inappropriate or irrelevant material (e.g., prior, unrelated history with the accused) or to test the victim's credibility, in part because of inconsistencies between the victim impact statement and the victim's earlier statements.

In interviews, defence counsel said that cross-examination of the victim is so infrequent because they usually can agree to excise prejudicial information or other inadmissible material before submitting the victim impact statement to the court. Several defence counsel also said that they rely on the judge either to intervene and refuse the victim impact statement or to disregard the irrelevant portions. A few defence counsel mentioned that while they had not cross-examined the victim on the impact statement, they did argue the impact statement during sentencing and question its claims.

Obstacles to Use of Victim Impact Statements

In surveys, defence counsel were asked, "Are there any obstacles to the use of victim impact statements?" Most defence counsel (80%) reported problems with impact statements. Table 13 below shows the results for all relevant respondents.

TABLE 13: ARE THERE OBSTACLES OR PROBLEMS WITH THE USE OF VICTIM IMPACT STATEMENTS?				
	Victim Services (N=318)	Crown Attorneys (N=188)	Defence Counsel (N=185)	Police (N=686)
Yes	30%	48%	80%	19%
No	22%	43%	14%	45%
Don't know	43%	6%	6%	36%
No response	5%	3%	1%	1%
Note: Respondents could provide more than one response; totals sum to more than 100%.				

When asked to explain why they believe there are obstacles to or problems with the use of victim impact statements, defence counsel reported that the biggest obstacle or problem is the Inclusion of inappropriate or irrelevant material (80%). Table 14 shows the main reasons cited for all respondent groups; the results are discussed in more detail below.

TABLE 14: OBSTACLES OR PROBLEMS WITH VICTIM IMPACT STATEMENTS BASE: RESPONDENTS WHO BELIEVE THERE ARE OBSTACLES OR PROBLEMS WITH VICTIM IMPACT STATEMENTS.				
	Victim Services (n=105)	Crown Attorneys (n=90)	Defence Counsel (n=147)	Police (n=128)
Inappropriate or irrelevant material	--	43%	31%	--
Contain inflammatory or prejudicial claims	--	--	18%	--
Inject emotion into the process	--	--	13%	--
Difficulties preparing statement or insufficient assistance	32%	--	--	--
Lack of awareness or information	17%	--	--	2%
Defence counsel objections or cross-examination	16%	18%	--	21%
Difficult to challenge	--	--	10%	--
Contradict previous statement	--	--	8%	--
Delays in court proceedings	--	11%	3%	--
Literacy or language barriers	30%	10%	--	16%
Victim disinterest or fear or reluctance on part of victim	5%	6%	--	13%
Time constraints	16%	7%	--	21%
Detracts from sentencing guidelines	--	--	14%	--
Victims are coached	--	--	5%	--
Are given too much weight in sentencing	--	--	3%	--
Perception that is not considered	8%	--	--	12%
Crown Attorney or judicial reluctance	10%	--	--	8%
Lack of awareness by criminal justice professionals	--	--	--	4%
Other	12%	13%	13%	6%
No response	--	4%	5%	9%

In interviews, several defence counsel observed that rather than restricting themselves to a description of the impact of the crime, victims frequently include a recitation of the facts of the case, refer to the offender's alleged involvement in other criminal activities, or offer their views on sentencing. In their survey responses, defence counsel also mentioned several other concerns involving the information contained in victim impact statements. According to one-fifth of defence counsel, victim impact statements can contain inflammatory claims that introduce bias into the process (18%). One-tenth of defence counsel also noted that victim impact statements

sometimes contain new information or information that contradicts the evidence presented in court.

An issue related to the inclusion of inappropriate information is the need to disclose the victim impact statement to defence counsel. This creates the possibility of defence counsel objections to the victim impact statement or cross-examination on the statement either at trial or sentencing. For Crown Attorneys (18%), victim services providers (16%), and police (21%) this was an important obstacle, leading to victims or Crown Attorneys not submitting victim impact statements. In interviews, Crown Attorneys said that the victim impact statement can be detrimental to the Crown Attorney's case; it can make the victim more vulnerable and strengthen the defence.

Defence counsel do not object to the use of victim impact statements. Rather, they reported feeling limited in the action they can take because challenging victim impact statements is viewed so negatively.

A few defence counsel commented in their interviews that some victims do not appear to understand the purpose of the victim impact statements. They attribute this to the lack of assistance in explaining and reviewing the statements. Other difficulties, in the opinion of defence counsel, are that victim impact statements may cause judges to deviate from sentencing guidelines (14%), that the impact statements inappropriately inject emotions into the criminal justice process (13%), and that they are difficult to challenge (10%).

5. Restitution

Restitution requires the offender to compensate the victim for any monetary loss or any quantifiable damage to, or loss, of property. The court can order restitution as a condition of probation, where probation is the appropriate sentence, or as an additional sentence (a stand-alone restitution order), which allows the victim to file the order in civil court and enforce it civilly if not paid. The following discussion of restitution considers the current use of restitution from the perspective defence counsel, difficulties with enforcement, and obstacles to requesting restitution.

Use of Restitution

In interviews, defence counsel said that requests for restitution are rarely contentious when they are reasonable (i.e., the amount of loss is determinable, and the offender caused the loss and has the means to pay). Over three-quarters of defence counsel surveyed reported that they agree to reasonable requests for restitution (78%) and that judges also generally grant them (80%). In interviews, those defence counsel who generally object to requests for restitution listed the following reasons: the role of the criminal justice system is not to compensate victims; restitution is easily abused; offenders often do not have the ability to pay; and it is difficult to assess the value of claimed damages. When asked if they generally offer restitution to mitigate the sentence, three-quarters (76%) of defence counsel surveyed said that they do, with 15% reporting that they do not usually make this offer.

The use of restitution among Crown Attorneys and defence counsel is shown in Table 15.

TABLE 15: USE OF RESTITUTION		
	Crown Attorneys (N=188) *Do you generally request, when appropriate, that restitution be paid?*	Defence Counsel (N=185) *Do you generally agree to requests for restitution?*
Yes	89%	78%
No	9%	20%
No response	2%	2%

Problems with Enforcement

Probation officers, defence counsel and Crown Attorneys were asked if they think that restitution enforcement is a concern or a problem. One-third (34%) of defence counsel reported that they do. A sizeable proportion of defence counsel (30%) could not comment because they are not involved in enforcement of restitution orders.

The survey asked respondents to explain why they consider restitution enforcement to be a concern or a problem. The results are presented in Table 16 below. Defence counsel gave several reasons for the difficulties with enforcement. The most common reason given by one-half of defence counsel is that restitution orders are made in cases where the accused is not able to pay.

About 15% of defence counsel also pointed to insufficient resources for enforcement, although no probation officers noted a lack of resources. This was further commented on in interviews. Defence counsel said that when restitution is part of probation orders, enforcement is not given priority because it is simply not worth it; enforcement requires a significant expenditure of resources to collect relatively small amounts of money.

The option of using a stand-alone restitution order, where the victim has recourse to the civil courts to enforce payment was also discussed. A small number of defence counsel (8%) noted that the problem with this method of enforcement is that it requires the victim to engage in a difficult legal process and bear all the costs of enforcement.

TABLE 16:
WHY IS RESTITUTION ENFORCEMENT A CONCERN OR A PROBLEM?
BASE: RESPONDENTS WHO BELIEVE THAT RESTITUTION ENFORCEMENT IS A PROBLEM.

Reasons	Crown Attorneys (n=100)	Defence Counsel (n=62)	Probation (n=128)
Accused are unable to pay	22%	47%	30%
Insufficient resources for enforcement	20%	16%	--
Civil enforcement difficult or victim responsibility	19%	8%	4%
Difficult to convict on breach of order	13%	--	18%
No penalty for failure to pay	6%	--	9%
Restitution usually not made unless paid at sentencing	--	13%	--
Probation is not involved	--	--	26%
Other	6%	11%	7%
No response	22%	10%	--
Note: Respondents could provide more than one response; totals sum to more than 100%.			

6. Victim Surcharge

The victim surcharge is a penalty of 15% where a fine is imposed or a fixed amount of $50 or $100 for summary or indictable offences, respectively, and can be increased by the judge. It is imposed on the offender at sentencing and used by provincial and territorial governments to fund services for victims of crime. The 1999 amendments to the *Criminal Code* made the surcharge automatic in all cases except where the offender has requested a waiver and demonstrated that paying the surcharge would cause undue hardship.

The following discussion considers the issue of waiving the surcharge - both the frequency of waiver and whether waivers generally occur without an application by the defence.

Frequency of Waiver

While over half (58%) of judges surveyed reported that they generally apply the victim surcharge, over a third do not (37%).[3]

When asked if the victim surcharge was waived more often than it should be, 11% of defence counsel believe that the surcharge is waived too often. Table 17 provides the results for those who could respond to this issue. Respondents who did not answer were excluded from the results for reasons of consistency in handling the data.

[3] The remaining 5% did not respond to the question.

TABLE 17: IS THE VICTIM SURCHARGE WAIVED MORE OFTEN THAN IT SHOULD BE? BASE: RESPONDENTS WHO PROVIDED A RESPONSE (DON'T KNOW AND NO RESPONSE EXCLUDED).				
	Victim Services (n=82)	Crown Attorneys (n=161)	Defence Counsel (n=170)	Advocacy Groups (n=15)
Yes	66%	70%	11%	47%
No	34%	30%	89%	53%

Defence counsel who were interviewed attributed the frequent waiver of the surcharge to a judicial reluctance to place too high a monetary penalty on offenders.[4]

In contrast, those interviewed who believe that judges waive the surcharge appropriately said that waivers occur when its imposition would cause the offender undue hardship, such as when the offender has no independent means of financial support, when the victim and the offender are in the same family unit, or when the offender is going to be incarcerated. They believe that judges appropriately consider the circumstances of the offender in their decision to waive the surcharge, and they do not see judicial attitudes or judicial dislike of the surcharge as an issue.

Application for Waiver

Section 737(5) of the *Criminal Code* requires an application from the offender to waive the surcharge. Most defence counsel surveyed (59%) reported that they do not generally request a waiver, while about one-third (35%) said that they do. In interviews, those who request waivers said that they do so when the offender has no ability to pay (e.g., does not have a job, is on social assistance, is being incarcerated for a long period of time). A majority of defence counsel surveyed (59%) reported that most of the time, judges grant their requests for a waiver.

Crown Attorneys who were interviewed noted that there is frequently no application to challenge because the judge has waived the surcharge on his or her own initiative. Survey results support this, with a majority of Crown Attorneys (54%) reporting that judges generally waive the surcharge without a defence counsel request. However, only one-quarter of defence counsel (24%) believe that judges waive the surcharge without a request. In interviews, they commented that judges diligently inquire about whether the surcharge should be imposed and generally impose the surcharge automatically unless there is a legitimate request to waive it. A few did note that when judicial waivers occur without explicit defence counsel requests, the judge has already received information about the accused's financial situation and other relevant personal circumstances.

Table 18 provides the survey results on whether judges generally waive the surcharge without a defence counsel request.

[4] A few noted that when a fine is imposed, the victim surcharge is more likely to be waived.

TABLE 18: DO JUDGES GENERALLY WAIVE THE SURCHARGE WITHOUT A DEFENCE COUNSEL REQUEST?		
	Crown Attorneys (N=188)	Defence Counsel (N=185)
Yes	54%	24%
No	33%	64%
Don't know	4%	8%
No response	10%	4%
Note: One column does not sum to 100% due to rounding.		

7. Conditional Sentences

The *Criminal Code* permits judges to order that sentences of less than two years' imprisonment be served in the community instead of in jail. Conditional sentences may be imposed only when the court is convinced that the offender poses no threat to public safety. They are accompanied by restrictive conditions that govern the behaviour of the offender and strictly curtail his or her freedom. The following sections describe the perspectives of criminal justice professionals on the appropriateness and use of conditional sentences.

Cases Appropriate for Conditional Sentences

Across all respondent categories, there is widespread agreement that conditional sentences are appropriate in non-violent offences. Defence counsel are much more likely than the other respondent groups to think that conditional sentences are appropriate in all offences, in family violence offences, and in offences against the person. See Table 19 for the details.

Defence counsel explained in interviews that conditional sentences are appropriate in eligible cases, that is, in all cases except those where the minimum sentence is more than two years, and where it has been established that the offender is not a threat to public safety.

It was suggested by several defence counsel that conditional sentences are appropriate where the risk of recidivism is zero and where there is good reason to believe that the offender is able and motivated to rehabilitate.

TABLE 19: IN WHAT CIRCUMSTANCES IS A CONDITIONAL SENTENCE APPROPRIATE?				
	Victim Services (N=318)	Crown Attorneys (N=188)	Defence Counsel (N=185)	Advocacy Groups (N=47)
All offences	6%	4%	29%	--
Non-violent offences	65%	62%	44%	72%
Family violence offences	5%	16%	32%	17%
Offences against the person	6%	15%	34%	15%
Where offender is eligible	--	11%	12%	--
Depends on case or circumstances	3%	11%	13%	9%
Minor offences	4%	6%	--	6%
No prior record or good rehabilitation prospects	6%	6%	4%	--
All offences except most serious	--	--	11%	--
Less serious violent offences	--	--	2%	--
If victim is comfortable with sentence	3%	--	--	--
Never or rarely	2%	7%	--	6%
Other	3%	3%	3%	11%
No response	12%	3%	1%	9%
Note: Respondents could provide more than one response; totals sum to more than 100%.				

Consideration of Victim Safety in Conditional Sentences

As Table 20 shows, the vast majority (93%) of Crown Attorneys surveyed usually request conditions for the victim's safety in conditional sentences. Similar proportions of defence counsel and judges surveyed usually agree to and grant such requests. Almost all defence counsel explained that they agree to conditions because the protection of victim safety is a valid sentencing principle. In interviews, they expanded on this idea, citing the legal requirement to consider the public safety and the fact that the presumption of innocence no longer applies. However, several defence counsel reported that they usually agree to conditions because they will not receive a conditional sentence without them, and several said that they agree if the conditions are requested by or are in the best interests of the client, do not unduly restrict the offender (e.g., from access to his belongings or home), and are legitimately connected to the offence and the victim.

TABLE 20: USE OF CONDITIONS FOR VICTIM'S SAFETY IN CONDITIONAL SENTENCES			
	Crown Attorneys (N=188) *Do you generally request conditions for the victim's safety?*	Defence Counsel (N=185) *Do you generally agree to conditions for the victim's safety?*	Judiciary (N=110) *Do you generally grant conditions for the victim's safety?*
Yes	93%	94%	94%
No	1%	2%	4%
Don't know	2%	3%	2%
No response	4%	1%	1%
Note: Totals may not sum t 100% due to rounding.			

8. Restorative Justice

In recent years, restorative justice approaches have become more widely used at all stages of criminal proceedings. Restorative justice considers the wrong done the person as well as the wrong done to the community. Restorative justice programs involve the victim(s) or a representative, the offender(s), and community representatives. The offender is required to accept responsibility for the crime and take steps to repair the harm he or she has caused. In this way restorative approaches can restore peace and equilibrium within a community and can afford victims of crime greater opportunities to participate actively in decision-making. However, concerns have been raised about victim participation and voluntary consent, and support to victims in a restorative process. This study included several exploratory questions to discover the extent to which criminal justice professionals have participated in restorative justice approaches and their views on the appropriateness and effectiveness of these approaches.

Participation in Restorative Justice Approaches

Of the various respondent groups, defence counsel are most likely to have participated in a restorative justice approach; close to 60% of defence counsel surveyed indicated having ever participated in a restorative justice process. Please refer to Table 21.

TABLE 21:
HAVE YOU EVER PARTICIPATED IN A RESTORATIVE JUSTICE APPROACH?

	Victim Services (N=318)	Crown Attorney (N=188)	Defence Counsel (N=185)	Judiciary (N=110)	Police (N=686)	Advocacy Groups (N=47)	Probation (N=206)
Yes	12%	43%	58%	26%	17%	36%	15%
No	80%	52%	34%	74%	80%	64%	84%
Don't know	5%	4%	5%	--	2%	--	1%
No response	3%	1%	3%	--	1%	--	1%

Note: Some column totals do not sum to 100% due to rounding.

Respondents reported having been involved in various restorative approaches, including sentencing and healing circles, diversion, mediation, and community and youth justice forums. As Table 22 below shows, defence counsel are slightly more likely to have participated at the sentencing stage. A significant proportion of defence counsel who have participated also indicated having taken part in restorative processes after charges had been laid but before sentencing.

TABLE 22: AT WHAT STAGE IN THE PROCESS HAVE YOU PARTICIPATED IN RESTORATIVE JUSTICE? BASE: RESPONDENTS WHO HAVE PARTICIPATED IN RESTORATIVE JUSTICE PROCESSES.					
	Victim Services (n=38)	Crown Attorneys (n=81)	Defence Counsel (n=107)	Police (n= 118)	Advocacy Groups (n=17)
Pre-charge	42%	52%	64%	74%	47%
Sentencing	37%	61%	66%	25%	29%
Post-charge, pre-sentencing	8%	32%	19%	--	24%
Other	18%	6%	8%	20%	29%
No response	16%	6%	2%	1%	--
Note: Respondents could provide more than one response; totals sum to more than 100%.					

Table 23 below shows the most common explanations for respondents' lack of involvement in restorative justice. Across all respondent groups except victim services, the most common reason is that restorative approaches are not available or not yet widely used in their province. Several defence counsel pointed out in interviews that restorative justice tends to be used primarily in rural, northern, or remote Aboriginal communities. It was even suggested that there may be a perception among some members of the police, the Crown Attorney, and the bench that restorative justice is only to be applied in cases involving Aboriginal people. A few respondents said that restorative justice is only used for young offenders.

A sizeable proportion of respondents in all groups explained that restorative justice had never come up as an option or that they had never had a case suitable for restorative justice. Other common explanations for respondents' non-participation in restorative justice were that such approaches do not protect the victim adequately (a particular concern for advocacy organizations and Crown Attorneys) and that such approaches do not act as a deterrent.

Among defence counsel, 5% expressed concern that restorative justice approaches do not adequately protect the accused, and the same proportion reported that such options are only available for youth. Twenty percent of judges explained that restorative justice had never been presented to them as an option by the Crown Attorney or by defence counsel.

TABLE 23: WHY HAVE YOU NOT USED OR PARTICIPATED IN A RESTORATIVE JUSTICE APPROACH? BASE: RESPONDENTS WHO HAVE NOT PARTICIPATED IN RESTORATIVE JUSTICE PROCESSES.							
	Victim Services (n=253)	Crown Attorneys (n=98)	Defence Counsel (n=62)	Judiciary (n=81)	Police (n=549)	Advocacy Groups (n=30)	Probation (n= 172)
Not available	19%	57%	61%	43%	29%	40%	59%
No opportunity or no suitable case	21%	10%	15%	26%	24%	20%	22%
Do not adequately protect victim	10%	18%	--	5%	11%	23%	4%
Do not act as a deterrent	5%	10%	--	6%	13%	13%	3%
Don't know or No response	20%	14%	18%	6%	14%	10%	4%
Note: Respondents could provide more than one response, but not all responses have been included in this table; totals sum to more than 100%.							

Victim Involvement in Restorative Justice

There was disagreement both within and across the survey respondent categories on the extent to which victims are involved in the decision to use restorative justice approaches, as Table 24 demonstrates.

TABLE 24:
WHAT BEST DESCRIBES THE VICTIM'S INVOLVEMENT IN THE DECISION TO USE RESTORATIVE JUSTICE?
BASE: RESPONDENTS WHO HAVE PARTICIPATED IN RESTORATIVE JUSTICE PROCESSES.

	Victim Services (n=38)	Crown Attorneys (n=81)	Defence Counsel (n=107)	Police (n=118)	Advocacy Groups (n=17)
Victim is always involved	32%	52%	44%	80%	59%
Victim is sometimes involved	45%	38%	43%	14%	24%
Victim is seldom involved	8%	5%	9%	6%	12%
No response	16%	5%	4%	--	6%
Note: Totals do not sum to 100% due to rounding.					

Defence counsel are evenly split between those who think that victims are always involved and those who believe that they are only sometimes involved. Similar disagreement was evident among defence counsel interviewees. Small numbers of defence counsel who were interviewed reported that cases do not proceed through restorative justice unless the victim approves it. They also said that restorative approaches are sometimes used even without the victim's consent simply because these cases are not worth going to court (in these instances, however, the victim is always informed of the decisions). Small numbers of defence counsel added that victims always have the opportunity to participate in restorative justice beyond the initial decision to use the approach but that many victims do not wish to participate.

Cases where Restorative Justice would be most Effective

Crown Attorneys, victim services providers, and judges were asked to comment in interviews on when they believe that restorative justice approaches would be most effective.

Although defence counsel did not comment extensively on restorative justice, a few offered some general remarks in favour of such approaches. They commented that restorative justice can provide an economical option for keeping cases out of court and that they work well if there is a desire to repair personal or community relationships.

9. Information for Criminal Justice Professionals

Defence counsel and other respondents were asked whether they are adequately informed of the *Criminal Code* provisions intended to benefit victims. As shown in Table 25, 40% of defence counsel believe that they are adequately informed.

Defence counsel who were interviewed also consider it their professional responsibility to remain current with legislative change. Among those surveyed who believe that they are not adequately informed, one-third said that professional organizations like the Canadian Bar Association and provincial law societies are the appropriate entities to provide them with

information about changes to legislation. Other suggestions included information sessions or seminars, e-mail updates, and bulletins and briefs from the federal Department of Justice.

TABLE 25:
ARE CRIMINAL JUSTICE PROFESSIONALS ADEQUATELY INFORMED OF PROVISIONS TO BENEFIT VICTIMS?

	Victim Services (N=318)	Crown Attorneys (N=188)	Defence Counsel (N=185)	Police (N=686)
Yes	32%	71%	40%	40%
No	40%	20%	49%	46%
Don't know	25%	9%	11%	13%
No response	3%	1%	1%	1%
Note: Some column totals do not sum to 100% due to rounding.				

10. Impact of *Criminal Code* Provisions

All respondent groups, except for probation and parole, were asked what, in their opinion, has been accomplished by the *Criminal Code* provisions intended to benefit victims. Respondents identified numerous outcomes that they believe have resulted from the *Criminal Code* provisions. However, a large proportion of each respondent group did not answer the question. Many defence counsel noted on the questionnaire that they did not know enough about the *Criminal Code* provisions to comment. As a result one quarter of defence counsel did not answer this question.

A number of respondents from all groups who were asked about the impact of the provisions said that they have provided a more balanced criminal justice system. About one-tenth of defence counsel noted a positive impact of the provisions for victims. The results discussed above are shown in Table 26.

TABLE 26:
POSITIVE IMPACTS OF *CRIMINAL CODE* PROVISIONS TO BENEFIT VICTIMS

	Victim Services (N=318)	Crown Attorney (N=188)	Defence Counsel (N=185)	Judiciary (N=110)	Police (N=686)	Advocacy Groups (N=47)
Gives victims a voice or opportunity for input	11%	25%	12%	27%	9%	15%
More balanced criminal justice system	13%	19%	10%	24%	7%	4%
Victims more satisfied or informed	11%	11%	5%	16%	3%	
Victim testimony or experience easier	--	9%			1%	
Better protection of victims	3%	7%		12%	5%	11%
Victim impact statement positive	5%	3%		8%	2%	
More restitution	--	2%		6%		6%
Don't know or No response	52%	28%	25%	23%	47%	35%
Note: Respondents could give more than one answer; some totals sum to more than 100%.						

However, there was considerable concern among defence counsel that the provisions have inadvertently created unrealistic expectations on the part of some victims about both the level of their involvement and how that involvement might affect any decisions made. These respondents (15%) worried that if expectations are not met, this could cause disappointment or resentment. Please see Table 27.

TABLE 27:
NEGATIVE IMPACTS OF *CRIMINAL CODE* PROVISIONS TO BENEFIT VICTIMS

	Victim Services (N=318)	Crown Attorneys (N=188)	Defence Counsel (N=185)	Judiciary (N=110)	Police (N=686)	Advocacy Groups (N=47)
Delays criminal justice process	--	9%	11%	6%		
Unrealistic expectations on part of victims	--	9%	15%	16%		
Victim impact statement negative	1%	5%			<1%	
Curtails Crown Attorney discretion	--	3%	17%	2%		
Erosion of accused rights	--	--	10%			
Has achieved mainly political objectives	--	--	9%			
Reduces judicial independence	--	--	7%			
Nothing or little has been accomplished	12%	12%	13%	11%	27%	15%
Don't know or No response	52%	28%	25%	23%	47%	35%

Note: Respondents could give more than one answer; some totals sum to more than 100%.

Another concern was the effect of the provisions on the ability of Crown Attorneys to make independent legal decisions in their capacity as representatives of the state. This possible curtailment of Crown Attorney discretion is an issue for defence counsel (17%). In interviews, several defence counsel expressed the concern that criminal justice professionals, particularly Crown Attorneys, have deviated from or abandoned their professional roles because of pressures to include the victim in the process.

Defence counsel also identified other concerns. Eleven percent commented on the delays in the process caused by the provisions (e.g., the time required to consult with victims or the adjournments needed to inform victims of victim impact statements). Defence counsel also believe that the provisions have eroded accused rights (10%), have achieved mainly political objectives (9%), and have reduced judicial independence (7%).

Some respondents in all categories said they believe that the Criminal Code provisions have accomplished little or nothing. Thirteen percent of defence counsel expressed this belief.

In summary, while all respondent groups included some comments on the limitations of the impact of the *Criminal Code* provisions, most reflections on the provisions revealed positive accomplishments. The two biggest accomplishments are the creation of a more balanced criminal justice system through increased awareness of the concerns and interests of victims and the provision of more formal mechanisms to ensure that the victims have opportunities to participate and have a voice in the system.

Appendix A:

Interview Guide and Self-Administered Questionnaire for Survey of Defence Counsel

KEY INFORMANT INTERVIEW GUIDE FOR DEFENCE COUNSEL

The Department of Justice Canada has recently launched a multi-site study of victims of crime and criminal justice professionals. The main objectives of this study are:

- To provide information on the use and awareness of recent reforms with respect to victims of crime in the criminal justice system
- To identify any impediments to the implementation of recent reforms by criminal justice professionals
- To learn what information is provided to victims throughout the criminal justice process
- To gain a better understanding of the experiences of victims of crime in the criminal justice system and with various victim services;
- To generate research-based evidence that will inform future legislative reforms and policy changes.

The following questions address issues relating to the role of victims in the criminal justice system and the implementation of recent reforms to assist victims of crime through the criminal justice process.

Role of the complainant in the criminal justice process

1. In your opinion, what role should the complainant have in the criminal justice system? In particular, please consider bail decisions, plea negotiations, and sentencing.

Recent reforms relating to victims of crime

As you may know, a number of legislative changes, at the federal level, have been made relating to victims of crime and their participation in the criminal justice system (victim surcharge, victim impact statements, consideration of victim safety in bail decisions, assistance to victims testifying at trial, publication bans, etc.). The following questions address issues relating to the implementation of these provisions.

2. In bail determinations, do you generally agree to conditions that address complainant safety? If no, for what reasons do you object? Do judges or justices of the peace usually place conditions for the complainant's safety on the accused?

3. Do you generally agree to requests for a publication ban in non-sexual offence cases? If no, for what reasons do you object? Based on your experience, do judges usually grant publication bans in cases involving non-sexual offences?

4. Do you generally agree to requests for exclusion of the public? If no, for what reasons do you object? Based on your experience, do judges generally grant requests to exclude the public from a trial?

5. Do you generally agree to the use of a screen, closed-circuit television, or video-tape for testimony of a young complainant/witness or a complainant/witness with a mental or physical disability? If no, for what reasons do you object? Do courts usually grant requests for these testimonial aids? What has been your experience when such testimonial aids have been used?

6. Do you generally agree to requests for a support person to accompany a young complainant/witness or a complainant/witness with a mental or physical disability? If no, for what reasons do you object? Do courts usually grant requests for a support person?

Section 486 (2.3) of the *Criminal Code* states that, unless required by *"the proper administration of justice"* a self-represented accused cannot cross-examine a child witness (under 18 years of age). This section is applicable to proceedings where an accused is charged with a sexual offence, a sexual assault under sections 271, 272, and 273, or where violence against the victim is *"alleged to have been used, threatened, or attempted."*

7. Have you ever been appointed to act for the accused pursuant to s. 486(2.3)?

8. Do you feel that s. 486 (2.3) of the *Criminal Code* should be expanded to include other complainant/witnesses and/or other types of cases? Please explain.

9. To your knowledge, are victim impact statements usually submitted? What about in serious cases? What are the most common methods for submitting? (e.g., written only, read by victim, read by Crown, other)

10. Have you ever had a case where you cross-examined the complainant on their victim impact statement? Please describe (e.g., was it during trial or sentencing, what were your reasons for needing to cross-examine the complainant, did the Crown object, why did the judge permit the cross-examination).

11. Are there any problems with the use of victim impact statements?

12. Do courts usually grant requests for restitution? Do you generally agree to requests for restitution? If no, for what reasons do you object? Do you generally offer restitution to mitigate the sentence?

13. Is restitution enforcement a concern or problem?

14. Based on your experience, is the victim surcharge waived more often than it should be? Do you generally request a waiver of a victim surcharge? Are these requests usually granted? Do judges generally waive the surcharge without a defence request to do so?

15. In what types of cases do you think a conditional sentence is appropriate? Do you usually agree to conditions in the sentence for the victim's safety? Please explain.

Restorative justice

Restorative justice considers the wrong done to a person as well as the wrong done to the community. Restorative justice programs involve the victim(s) or a representative, the offender(s), and community representatives. The offender is required to accept responsibility for the crime and take steps to repair the harm he or she has caused.

16. Have you used a restorative justice approach? Why or why not? At what stage of the process have you used restorative justice? (e.g., pre-charge, sentencing, other)

17. How are victims involved in the process?

Conclusion

18. Do you believe that information on these changes in the *Criminal Code* is adequately communicated to defence counsel? If not, what could be done to address the lack of information regarding these legal provisions?

19. What has been accomplished by the *Criminal* Code provisions intended to benefit victims? Have there been any unintended consequences to these provisions? Please explain.

20. Do you have any other comments?

Thank you for your participation

Self-Administered Questionnaire for Survey of Defence Counsel

1. What role do you believe complainants should have in the following stages of the criminal justice process?

	Complainants should be Informed	Consulted	Other (specify)	Complainants should not have any role
Bail decisions	1	2	3 _____	00
Plea negotiations	1	2	3 _____	00
Sentencing decisions	1	2	3 _____	00

As you may know, a number of legislative changes, at the federal level, have been made relating to victims of crime and their participation in the criminal justice system (victim surcharge, victim impact statements, consideration of victim safety in bail decisions, assistance to victims testifying at trial, publication bans, etc.). The following questions address issues relating to the implementation of these provisions.

2. Do you generally agree to the following: (*Check "Yes" or "No" for each of the following.*)

	Yes	No
Requests for conditions that address a complainant's safety made in bail determinations	1	2
Requests for publication bans in non-sexual offence cases	1	2
Requests to exclude the public from a trial	1	2
Requests for the use of a screen for the testimony of a young complainant/witness or a complainant/witness with a mental or physical disability	1	2
Requests for the use of closed-circuit television for the testimony of a young complainant/witness or a complainant/witness with a mental or physical disability	1	2
Requests for the use of video-tape testimony of a young complainant/witness or a complainant/witness with a mental or physical disability	1	2
Requests for the use of a support person to accompany a young complainant/witness or a complainant/witness with a mental or physical disability	1	2
Requests for restitution	1	2

2a. If you answered no to any part of question 2 above, please explain the reasons why you object.

Requests for specific conditions that address a complainant's safety in bail determinations _____

Requests for publication bans in non-sexual offence cases _____

Requests to exclude the public from a trial _____

Requests for the use of a screen for the testimony of a young complainant/witness or a complainant/witness with a mental or physical disability _____

Requests for the use of closed-circuit television for the testimony of a young complainant/witness or a complainant/witness with a mental or physical disability _____

Requests for the use of video-tape testimony of a young complainant/witness or a complainant/witness with a mental or physical disability _____

Requests for the use of a support person to accompany a young complainant/witness or a complainant/witness with a mental or physical disability _____

Request for restitution _____

3. In general, do judges usually grant the following requests?

	Yes	No	Don't know
Request for specific conditions to address the complainant's safety in bail determinations	1	2	8
Request for a publication ban in cases other than sexual offences	1	2	8
Request to exclude the public from a trial	1	2	8
Request the use of a screen for young witnesses or witnesses with a mental or physical disability	1	2	8
Request the use of closed-circuit television for young witnesses or witnesses with a mental or physical disability	1	2	8
Request the use of pre-trial videotaped testimony for young witnesses or witnesses with a mental or physical disability	1	2	8
Request that a support person accompany a young witness under the age of 14 or witnesses with a mental or physical disability	1	2	8
Request for restitution	1	2	8

Section 486 (2.3) of the *Criminal Code* states that, unless required by *"the proper administration of justice"* a self-represented accused cannot cross-examine a child witness (under 18 years of age). This section is applicable to proceedings where an accused is charged with a sexual offence, a sexual assault under sections 271, 272, and 273, or where violence against the complainant is *"alleged to have been used, threatened, or attempted."*

4. Have you ever been appointed to act for the accused pursuant to Section 486 (2.3)?

1 Yes 2 No 8 Don't know

5. Should Section 486 (2.3) be expanded to other complainant/witnesses or offences?

1 Yes 2 No

5a. If yes, please describe how the provision should be expanded.

5b. If no, please explain.

6. Based on your experience, do complainants usually submit victim impact statements? *(Check one only)*

1 Yes 2 Yes, in serious cases 3 No 8 Don't know

7. What are the most common methods for submitting a victim impact statement? (*Check all that apply*)

1 Written statement only 2 Victim reads statement
3 Crown reads statement

66 Other (Specify) _____

8. Have you ever had a case where you cross-examined the complainant on their victim impact statement?

	Yes	No	Don't know/ recall
During trial	1	2	8
During sentencing	1	2	8
Other (*Specify*) _____	1	2	8

8a. If you answered yes to any part of question 8, why did you cross-examine the complainant?

_____

_____

_____

9. Are there any problems with the use of the victim impact statement?

1 Yes 2 No 8 Don't know

9a. Please explain.

_____

_____

_____

10. Do you generally offer restitution to mitigate the sentence?

1 Yes 2 No 8 Don't know

11. Is restitution enforcement a concern or problem?

1 Yes 2 No 8 Don't know

11a. Please explain.

_____

_____

_____

12. In what types of cases do you think a conditional sentence is appropriate? (*Check all that apply*)

1 All offences
2 Non-violent offences
3 Offences against the person
4 Family violence offences
5 Murder
66 Other (*Specify)* _____

_____

13. In conditional sentences, do you usually agree to conditions in the sentence for the victim's safety?

1 Yes 2 No 8 Don't know

13a. Please explain.

_____

_____

_____

14. Have you used a restorative justice approach?

1 Yes 2 No 8 Don't know

14a. If yes to question 14, at what stage in the process have you used restorative justice? (*Check all that apply*)

1 Pre-charge
2 Sentencing
66 Other (Specify) _____

14b. If yes to question 14, in your experience, which statement best describes the complainant's involvement in the decision to use restorative justice?

1 The complainant is always involved
2 The complainant is sometimes involved
3 The complainant is seldom involved

14c. If no to question 14, why have you **not used** a restorative justice approach? (*Check all that apply*)

1 Restorative justice approaches are not available
2 Restorative justice approaches do not protect the defendant adequately
66 Other (Specify) _____

15. Based on your experience, is the victim surcharge waived more often than it should be?

1 Yes 2 No 8 Don't know

16. Do you generally request a waiver of a victim surcharge?

1 Yes 2 No 8 Don't know

17. Are defence requests to waive the surcharge usually granted?

1 Yes 2 No 8 Don't know

18. Do judges generally waive the surcharge without a defence request to do so?

1 Yes 2 No 8 Don't know

19. Do you believe that information on these changes to the *Criminal Code* is adequately communicated to defence counsel?

1 Yes 2 No 8 Don't know

19a. If not, what could be done to address this lack of information?

20. In your opinion, what has been accomplished by the *Criminal Code* provisions intended to benefit victims?

21. Have there been any unintended or unexpected consequences to these provisions?

1 Yes 2 No 8 Don't know

21a. What are they?

22. Do you have any other comments?

For More Information

The complete *Multi-Site Survey of Victims of Crime and Criminal Justice Professionals* report and the summary reports in this series can be ordered from the Policy Centre for Victim Issues, via mail or fax (see below).

These reports will be available online at http://canada.justice.gc.ca/en/ps/voc/pub.html

Summaries Available

Multi-Site Survey of Victims of Crime and Criminal Justice Professionals: Executive Summary

Multi-Site Survey of Victims of Crime and Criminal Justice Professionals: Summary of Victims of Crime Respondents

Multi-Site Survey of Victims of Crime and Criminal Justice Professionals: Summary of Victim Services Providers and Victim Advocacy Group Respondents

Multi-Site Survey of Victims of Crime and Criminal Justice Professionals: Summary of Judiciary Respondents

Multi-Site Survey of Victims of Crime and Criminal Justice Professionals: Summary of Crown Attorney Respondents

Multi-Site Survey of Victims of Crime and Criminal Justice Professionals: Summary of Defence Counsel Respondents

Multi-Site Survey of Victims of Crime and Criminal Justice Professionals: Summary of Police Respondents

Multi-Site Survey of Victims of Crime and Criminal Justice Professionals: Summary of Probation Officer, Corrections, and Parole Board Respondents

Policy Centre for Victim Issues
Department of Justice Canada
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Fax: (613) 952-1110

Research and Statistics Division
Department of Justice Canada
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Fax (613) 941-1845