



# Enforcement of the Rights of Crime Victims

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The efforts of victims' rights organizations have led every state to adopt constitutional and/or statutory rights for crime victims. As the participation of victims has been increasingly acknowledged to be important in the criminal justice process, a need has arisen to provide ways to enforce those rights. This Legislative Brief provides an overview of what some states have done to provide for the enforcement of victims' rights. Similarities and differences will be noted among the states reviewed, and suggestions will be made for creating a victims' rights enforcement entity in the state of Texas.

There are three obstacles in the way of turning victims' rights into mandatory practices: (1) government discretion to deny rights, (2) lack of a meaningful remedy to enforce rights, and (3) appellate court discretion to deny review.<sup>1</sup> Some victims' constitutional rights are cast in discretionary language, which can result in victims having no standing to obtain a review of those rights when the government disregards them. Legal standing gives victims the right to ask the court to rule on an issue of victims' rights. For example, if a court accepts a negotiated plea without permitting the victim to offer testimony, the crime victim must have "legal standing" in order to ask the court to reconsider its ruling. Without legal standing to enforce rights, there is no effective means for a victim to assert his or her rights during the criminal justice process, when time is of the essence. In contrast to what occurs in some states, crime victims in Texas are granted standing to enforce their rights through a review procedure. In practice, however, that review process is often seen as discretionary by the courts.

Victims' rights are illusory if there is no redress for victims when prosecutors or trial courts deny those rights. Some courts have held that victims' rights are discretionary. This view effectively forecloses on victims asserting their rights. Some states deny the courts any authority to stay proceedings while a rights violation is on review. This practice tends to render victims' rights moot. Some state constitutions severely curtail the remedy of voiding pleas and sentences when rights have been violated. Until such provisions are changed to allow voiding, victims will be without remedy, and as a result, without standing to obtain review.

The third obstacle to turning victims' rights into guaranteed rights is the absence of a nondiscretionary review mechanism. All state constitutional provisions for victims' rights provide for a review by writ when a violation of rights is alleged. However, writ review is discretionary, and it is improbable that courts will routinely review individual victims' rights violations. The solution to this problem is to provide for nondiscretionary review of victims' rights violations. In the same way that a defendant's constitutional rights are mandatory (i.e., nondiscretionary), so should be the constitutional rights of crime victims.

There are three legal mechanisms for insuring victim standing, adequate remedy, and review. The first is a federal constitutional amendment to the Bill of Rights. This would ensure that courts view victims' rights as mandatory. Such a measure would also improve the chances that state courts would interpret and enforce the rights in a consistent manner. Unfortunately, this option is the most difficult to

## *...from the Director*

The crime victims' movement has been instrumental in making the rights of crime victims an increasingly central consideration in the administration of justice. Initially, an effort was made to enact statutory rights for crime victims. However, the response to those laws was less than what had been hoped, due at least in part to an entrenched legal culture that was slow to make victims' considerations a priority. As a result, 33 states have now passed constitutional amendments that contain some kind of victims' rights provision. Despite these gains, victims are left with few options when they are not afforded those rights. The next step of insuring that victims' rights are granted is to provide them with a means of redress when those constitutional rights are denied.

This Research Brief is presented to summarize the issues and concerns crime victims have when their rights are denied. It is hoped that this information will be helpful in developing public policy that encourages participation of victims in the criminal justice system.

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attain. Nevertheless, an effort is currently underway to refer the Crime Victims' Rights Amendment to the United States Constitution to the states for ratification and, ultimately, incorporation into the Bill of Rights.

A second solution would be to amend state constitutions to provide explicit protection of victims' rights. This would involve, among other things, the elimination of judicial discretion in enforcing victims' rights except in very limited circumstances.

The third solution may be the easiest to achieve: enact legislation that would enable the victims' rights already provided in state constitutions. Such legislation would provide for and clarify victims' standing, meaningful remedy, and review of alleged violations.

### Similarities among victims' rights enforcement agencies

Several states including Colorado, Connecticut, South Carolina, Wisconsin, Minnesota, Alaska, and Arizona have established some form of victims' rights enforcement entity (the present analysis will be limited to agencies in these states). While no two agencies are exactly alike, they all have the responsibility of making sure victims of crimes are afforded their legal rights. Some broad similarities are present within each organization: All agencies take complaints from crime victims who think their rights may have been violated, although each state deals with complaints in a different way. Also, each state has a mechanism to refer victims to an appropriate agency if necessary. Often, a crime victim will call a rights enforcement agency merely to seek information. A staff member will give the caller contact information to a more appropriate agency. Finally, with the exception of Alaska, each state's victims' rights enforcement entity acts as an impartial liaison between victims and victims' advocates and the criminal justice system.<sup>2</sup> In contrast to being impartial, Alaska's Office of Victims' Rights is an advocate for the victim and places less emphasis on working as a mediator between the victim and the criminal justice system.<sup>3</sup> It should also be noted that Wisconsin's Victim Resource Center is defined by statute as a mediator between the criminal justice system and victim; however, in practice it typically serves as an advocate for victims.<sup>4</sup>

### Differences among victims' rights enforcement agencies

Although each state's victims' rights enforcement agency was established to ensure victims of crimes are given their legal rights, their methods vary from state to state. Some of the more important distinctions include:

- whether the agency serves under the executive or legislative branch of state government,
- whether the agency is primarily led by one person such as an ombudsman, or by a committee, and

- the type and level of power the agency holds to enforce victims' rights.

These and other smaller distinctions reveal the many differences, and to be sure, the varying levels of success for each state in their efforts to enforce victims' rights.

**Branch of government.** One important distinction among the approaches states have taken to enforce victim rights relates to the branch of government under which the enforcement agency is created. Some states' agencies work under the executive branch, while others work under the auspices of the legislative branch. For example, in South Carolina the Office of the Crime Victims' Ombudsman (OCVO) works under the office of, and is appointed by the governor.<sup>5</sup> Agencies in Colorado, Connecticut, and Arizona also work under their states' executive branch. In contrast, Alaska's Office of Victims' Rights (OVR) was created by the state legislation in order to prevent conflicts with state government and to allow for proper investigations of the executive and judicial branches of government.<sup>6</sup> It, along with programs in Wisconsin and Minnesota, operate under the auspices of the legislative branch of state government.<sup>7</sup>

**Investigations.** Another important difference among victims' enforcement agencies is the manner in which they investigate victims' complaints. Some states give substantial power to an appointed individual such as an ombudsman and that person's investigators (these are often attorneys), while other states have committees that collaborate during investigations. Minnesota's Office of the Crime Victims' Ombudsman (OCVO) utilizes the relatively autonomous ombudsman to conduct nonpartisan investigations of complaints made by victims.<sup>8</sup> The idea behind having an ombudsman is to reduce the level of bureaucracy and allow for a less hindered investigation. Other agencies with similar investigative styles are in Alaska, South Carolina, and Arizona. Another method of conducting investigations is by a committee, which is how they are performed in Colorado. The Victims' Rights Act (VRA) subcommittee is responsible for conducting investigations into possible victims' rights violations.<sup>9</sup>

**Means of enforcement.** Possibly the most important differences among agencies to consider is the nature of their investigative and sanctioning powers. To what extent is an agency's power to investigate claims of victims' rights violations, and when violations are found, what authority does the agency have to correct the problem? For instance, the VRA subcommittee of Colorado has relatively limited investigative powers, restricted to only looking into alleged illegal actions of criminal justice agencies regarding victims of specific crimes. However, the subcommittee does have significant enforcement powers, including the ability to require broad changes in violating agencies, and if the agency does not comply with requirements, the case can be referred to the governor's office.<sup>10</sup>

In contrast, Minnesota's OCVO has much more investigative discretion. Minnesota's ombudsman has the power to investigate possible illegal actions by the criminal justice system and/or a victims' assistance program, even if the alleged actions are merely considered inappropriate and not illegal. The Victim Resource Center in Wisconsin also holds relatively broad investigative powers to help ensure victims' rights. Although the agencies in Minnesota and Wisconsin enjoy more investigative discretion compared to Colorado, their ability to impose sanctions on violating agencies is lacking.<sup>11</sup> Minnesota's current compliance agency may only make recommendations to the agency found to be in violation, without any legal power to impose the recommended changes.<sup>12</sup> Wisconsin may only encourage an agency to make changes when violations are found, but may not recommend any systemic changes in policy.<sup>13</sup>

The Crime Victims' Ombudsman of South Carolina is authorized to obtain any information from any agency that is pertinent to an investigation only when a victim makes a formal complaint, and does not have the authority to impose changes on an agency when violations are found.<sup>14</sup>

The Office of Victims' Rights in Alaska<sup>15</sup> has the power to obtain any "necessary" information from agencies and the courts during an investigation. It has the authority to compel accountability by subpoena. The agency statute criminalizes two kinds of conduct:

- a person who knowingly hinders the lawful actions of the victim's advocate, and
- a person who knowingly refuses to comply with the victim advocate's lawful demands.

No judicial review is provided for the decisions of the advocate. The staff of the agency is immune from civil actions brought against them in the conduct of their duties. The victims' advocate presents investigative reports along with opinions and recommendations to the justice agency, the governor, the legislature, a grand jury, the public, or any of these.<sup>16</sup> The advocate is authorized by statute to address the sentencing judge on the victim's behalf when the victim does not personally make a victim impact statement. The advocate is authorized to represent crime victims before all state tribunals, at any stage of the proceedings in criminal cases, in order to ensure that their statutory and constitutional rights are protected and enforced.<sup>17</sup>

Another important issue in devising a method to enforce victims' rights is insuring the independence of the victim advocate from political pressures. The Office of the Victims' Advocate in the state of Connecticut, for example, was established as an independent state agency but is dependent upon legislative appropriations to operate. Given the political nature of the advocate's job, there can be conflicts between the duties to enforce victims' rights and working with lawmakers who vote for appropriations. In Alaska, the advocate's office is funded by forfeited PDF funds. Citizens

receive a payment from the government based on petroleum profits. Persons convicted of a crime are not entitled to receive these funds, so that forfeited money is used to fund the advocate's office. This procedure helps to insure the advocate's independence.

Related to the issue of victim advocate independence is how the advocate is appointed and the relative immunity given his or her position from political pressures. In Alaska the advocate is nominated by a bipartisan committee of the state senate president, house speaker, and both the majority and minority party legislators. That nomination must be approved by a two-thirds majority of both houses in joint session. The advocate can be removed from office only for neglect of duty, misconduct or disability, and then only upon a two-third's vote of both houses of the legislature.

An evaluation of the above states' investigation and compliance powers reveals a possible pattern where states with broad investigative powers have relatively limited means to enforce recommended sanctions. States that have more power to enforce the compliance of agencies have more limited resources for investigation. Colorado's ability to require a violating agency to correct its policies may exist because they are limited to investigating only specific violations of a victim's constitutional rights. Minnesota's ombudsman may be able to investigate agencies, without specific complaints, for illegal and merely inappropriate actions because the OCVO is limited to suggesting change by an agency without enforcement powers.

### **Other notable aspects of agencies**

In addition to the differences between agencies mentioned above, there are other characteristics worth noting. In Colorado, due to the more bureaucratic nature of the VRA subcommittee, the investigation process is significantly more time intensive than other agencies and the subcommittee only meets on a monthly basis.<sup>18</sup> Another difference among agencies is the annual caseload. For example, there were approximately 1,500 inquiries to Minnesota's Crime Victims' Ombudsman in 1994, but there were only 40 inquiries made by Colorado's VRA subcommittee in 1996.<sup>19</sup> In South Carolina, victims made 64 complaints to the ombudsman in fiscal year 2003-2004, and in Alaska, the OVR opened 240 "cases" between July 1, 2003, and June 30, 2004.<sup>20</sup> It should be noted that each state keeps statistics differently, and caution should be used when making comparisons across agencies. For example, complaints made in South Carolina are more substantial than inquiries made in Colorado or Minnesota.

### **Establishing a victims' rights enforcement agency in Texas**

Texas should consider creating a victims' rights enforcement entity. In doing so, the following points should be

considered in order to best serve the interests of crime victims and to make good use of taxpayers' money:

- 1) The agency should have broad investigative authority to make inquiries and obtain information considered necessary to an investigation. Legal sanctions against persons who hinder the lawful actions of the victims' advocate should be available. The agency should have the power to compel by subpoena the appearance and sworn testimony of persons it believes may be able to give information about the matter under investigation.
- 2) When sanctions and/or reforms are needed, the victims' rights agency should be given the authority to enforce the sanctions and/or reforms. A decision by an ombudsman should be immune to judicial review except to determine if it is contrary to the enabling legislation.
- 3) An agency with an ombudsman to address victim complaints seems to lend itself to greater autonomy, efficiency, and timeliness than one does with a committee structure. An agency with a governor appointed director seems to be more efficient and able to act more immediately to complaints filed by victims.
- 4) An agency serving under the legislative branch of government may be the most practical way to ensure proper investigations of cases involving executive or judicial branches of government.
- 5) Ways should be found to fund such an organization from dedicated funds such as court fees to insure the independence of the agency from external pressures.

## Conclusion

An effective way to provide crime victims with consistent rights of standing, adequate remedy, and review is to adopt a federal constitutional amendment to the Bill of Rights. Toward this end, an effort should be made to encourage the people of Texas to ratify the Crime Victims' Rights Amendment to the United States Constitution.

Victims' rights are meaningless when they depend on judicial discretion. Consideration should be given to amending the Texas Constitution to eliminate judicial discretion in rights, except in very limited circumstances.

Until constitutional remedies are in place, the enforcement of victim rights may be best guaranteed by establishing an ombudsman program to specifically address instances where those rights have not been honored. If properly created and utilized, an agency designed to enforce the rights of crime victims in Texas is an important way to improve service to crime victims. Crime victimization is traumatic enough without the additional stress of errors or indifference within the criminal justice system preventing the full attainment of victims' rights.

## Notes

- 1 Beloof, D.E. (2005). The third wave of crime victims' rights: Standing, remedy, and review. *Brigham Young University Law Review*, 258-260.
- 2 U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime, *Victims' Rights Compliance Efforts: Experiences in*

*Three States*, (1997), [www.ojp.usdoj.gov/ovc/publications/infores/vrce.pdf](http://www.ojp.usdoj.gov/ovc/publications/infores/vrce.pdf). (Summary of victims' rights enforcement agencies in Colorado, Minnesota, and Wisconsin) [hereinafter Compliance]; State of South Carolina Office of the Governor, *Crime Victims' Ombudsman Annual Report Fiscal Year 2003-2004* (2005). (Explanation of agency in South Carolina) [hereinafter South Carolina]; Arizona Attorney General Office, *Victims' Rights Enforcement Officer*, available at <[http://www.azag.gov/victims\\_rights/enforcement.html](http://www.azag.gov/victims_rights/enforcement.html)> (last visited June 6, 2005). (Overview of agency for Arizona) [hereinafter Arizona]; Alaska Office of Victims' Rights, *About the Office of Victims' Rights*, available at <http://www.officeofvictimsrights.legis.state.ak.us/aboutovr.htm> (last visited June 6, 2005). (Overview of agency in Alaska) [hereinafter Alaska].

3 Alaska, *supra* note 1.

4 Compliance, *supra* note 1.

5 South Carolina, *supra* note 1.

6 Alaska, *supra* note 1.

7 Compliance, *supra* note 1.

8 Compliance, *supra* note 1.

9 Compliance, *supra* note 1.

10 Compliance, *supra* note 1.

11 Note that as of 2003, the OCVO was dissolved and moved under the Minnesota Department of Public Safety, where it is now called the Crime Victim Justice Unit (CVJU). The bulk of research on Minnesota's victims' rights enforcement comes before this change.

12 Minnesota Department of Public Safety Crime Victim Justice Unit, *2003-04 Biennial Report*, Jan. 2005.

13 Compliance, *supra* note 1.

14 South Carolina, *supra* note 1.

15 Branchflower, S. E. (2004). The Alaska Office of Victims' Rights: A model for America. *Alaska Law Review*, 21, 2, 259-288 [hereinafter AOVR].

16 Alaska, *supra* note 1.

17 AOVR, *supra* note 1, page 280.

18 Compliance, *supra* note 1.

19 Compliance, *supra* note 1.

20 South Carolina, *supra* note 1; Alaska, *supra* note 1.



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