

Using impact statements for business in corporate crime cases

26/04/2019

Corporate Crime analysis: Following the publication of new Ministry of Justice (MOJ) guidance that assists with the creation of impact statements for business (ISB), Nicholas Griffin QC, barrister and Kyan Pucks, junior, both at QEB Hollis Whiteman, outline the benefits of corporate crime practitioners utilising ISBs in the interest of their clients.

Original news

New guidance on impact statements for business, LNB News 05/04/2019 72

MOJ has released new guidance on how to create an ISB. An ISB outlines how criminal offences have affected a business.

What are ISBs?

An ISB is a written statement setting out the effect that an offence has had on a particular business. Where a business is the victim of a crime, it is intended to give them a voice in the criminal justice process, and to provide the court with a formal opportunity to be informed of the effect of a crime on the business. ISBs are different to ordinary witness statements because they set out the effect and impact of a crime, as opposed to providing factual evidence about it. They work in parallel with victim personal statements (VPS), setting out the impact on an organisation, where the VPS is used to explain the effect a crime has had on an individual.

While the ISB is not new, there have been developments in April 2019, about which practitioners should be aware.

By way of background, the [Code of Practice for Victims of Crime](#) (the Code), which was introduced in 2006, sets out minimum levels of service which victims could expect from relevant agencies. The original focus was on individual, as opposed to business, victims of crime. However, in its response to a consultation on the Code in 2013, the government gave more recognition to businesses, noting that:

‘Crimes such as theft and neighbourhood violence can be the difference between a business generating a profit or struggling for survival. From now on all businesses will have their voices heard and will be able to submit an ‘impact statement’ to allow them to explain [the effect of] a crime upon them.’

In the most recent version of the Code (2015), although businesses are not included in the definition of ‘victim’, they are nevertheless ‘eligible for services’ under the Code in accordance with Chapter 4. In particular, this includes the entitlement to write an impact statement to be considered by courts. Separately, an ISB form, together with short guidance have been available via the police.uk [website](#).

The April 2019 developments include:

- the publication by the MOJ of additional guidance for businesses wishing to make an ISB (the guidance), which can be found [here](#)
- an updated Criminal Practice Direction (PD) on ISBs. In 2013, a new PD was included in the Criminal PD addressing ISBs (CPD VII Sentencing I: Impact Statements for Business, updated in line with Criminal Practice Directions 2015 Amendment No 8 [2019] EWCA Crim 495, [2019] All ER (D) 149 (Mar)). It has now been updated to clarify which bodies are entitled to nominate a representative to make an ISB, they include ‘a business, enterprise or other body (including a charity or public body, for example a school or hospital), of any size.’ Therefore, according to the PD, ‘business’ is now intended to cover a wide range of bodies, from the purely commercial to the public sector.

How are business impact statements currently being used and why?

As with the VPS, the ultimate purpose of an ISB is to assist the court in assessing the impact of an offence. The ISB is therefore primarily used at the sentencing stage of the criminal justice process. As set out in the guidance, it is for the court to exercise its discretion to determine what impact, if any, the ISB will have on the ultimate sentence passed.

The ISB and VPS are not mutually exclusive—they can be provided alongside each other where a crime has affected both an individual and a business.

How can corporate crime lawyers make best use of impact statements for businesses on behalf of their clients?

According to the guidance:

‘Any business or enterprise, irrespective of its size or structure, can make an ISB.’

It is therefore available for all businesses, from the very small to the very large. It is the way in which the business can communicate to the court the effect a crime has had on it and, importantly, the loss (direct and indirect, financial and non-financial, short or longer-term) it has suffered, or continues to suffer, as a result.

The police.uk form helpfully includes relevant categories of loss to consider, for example, the more obvious direct financial loss arising from assets lost or stolen or damage to buildings and property, but also indirect financial loss such as loss of custom, impact on consumer confidence, expenditure on physical infrastructure and IT and other security measures, medical expenses and the costs of contractual staff.

What issues should lawyers consider when advising their clients in relation to drafting, or being on the receiving end, of a business impact statement?

The formalities of writing an ISB are clearly set out in the guidance and PD. They include that:

- the statement must be made by a natural person, the ‘nominated representative’

- the nominated representative must be authorised to make the statement on behalf of the business, by nature of their position (eg director, manager, owner of the business) or by having been suitably authorised to do so (eg by the owner or board of directors)
- the nominated representative must be in a position to give admissible evidence about the impact of the crime on the business, either through first hand personal knowledge or using business documents (as defined in section 117 of the Criminal Justice Act 2003). The ISB does not have to be by someone who witnessed the crime
- the statement should be in the appropriate format (ie in accordance with section 9 of the Criminal Justice Act 1967), which sets out a number of conditions including that the statement has to be signed by the person who made it and contain a declaration of truth. Alternatively, it could be in the form of an expert's report, according to the PD
- an ISB may be made at any point. However, in cases where the level of offending is low, the case may move quickly. If the business does not make an ISB when initially offered, it may not get the opportunity to make one later on as the case will already have been dealt with. In bigger, more complex cases it may make sense to take time over the ISB, to ensure that relevant supporting evidence has been obtained and presented appropriately. Where necessary, an additional statement may be provided with further or updated information. Generally, it will be important to keep in touch with the police and the Criminal Prosecution Service to ensure the business is updated as to the timing of the criminal proceedings
- the ISB should not include opinions as to what the sentence or punishment ought to be—these are matters for the court, not the business
- the statement may be disclosed to the defence and therefore the defendant. It may be read out in open court and subsequently published (indeed, the business should be given the opportunity to say whether it would like to have relevant parts read aloud in court, although the ultimate decision will be for the prosecution and the court)
- it is also possible that the nominated representative is required to attend a court hearing to be questioned about the statement

Finally, it should be noted that there is no obligation to provide an ISB. Lawyers advising individuals in these circumstances will need to ascertain first of all whether a business wishes to make an ISB at all. It may not wish to advertise the fact that it has been the victim of a crime, for example out of concern about the loss of a reputation for reliability, however unfair this may seem. Where an ISB is to be completed, it will be important to have in mind the need to balance the provision of sufficiently detailed information, without unnecessarily including any commercially sensitive information.

With the above in mind, where on the 'receiving end' of an ISB (ie where advising a defendant who stands to be sentenced in a case where there is an ISB), it will be important to consider whether the statement has been provided by an appropriately authorised individual in the appropriate format, whether the information it contains is admissible and whether any aspect of it needs to be challenged.

Interviewed by Devon Marshall.

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