

Conference Report

Getting the Bill Right – An Update Panel 4: Criminal Justice & Victims

Rev Samuel Hutchinson: We started with work already done for the former Human Rights Commission. Next, we invited two experts who were involved in that time, Mr. Paul McGeehan and Mr. Brian Gormley, to come and to give us presentations.

We considered the whole criminal justice process, policing, detention and custody, restorative justice procedures, fair trials, the protection of vulnerable witnesses and victims, post-custody provision, hate crimes and violence against women. We drew on the ECHR material from the European Court of Human Rights, the European Convention on the Prevention of Torture and the UN's Special Rapporteur on the independence of the Judiciary. We also looked at the Canadian Charter of Rights and the Constitution of South Africa.

On juvenile justice, we liaised with the Working Group on Children and Young People considering the prevention of criminality among the young, cost effectiveness in the current system, anti-social behaviour and ASBOs, and children going through the criminal justice system.

We debated raising the age of criminal responsibility from the present level of ten and drew on international standards like the UN Convention on the Rights of the Child, the Beijing Rules, etc. Some public reaction to that was misinformed e.g. they said that we wanted juvenile offenders, quite literally to get away with murder, but we said nothing of the kind. We did argue that offenders must be accountable for their actions but must be treated in an age-appropriate manner. Do we really want to give a lad a criminal record because of some stupid prank when he was ten year old? Chris Sidoti's personal opinion was that fixing the age of criminal responsibility at ten, or maintaining

it there, is ridiculous. But, there was and is significant resistance to raising it. Be that to 12, 14, 16 or 18. There may be a case, as in Scotland, for separating serious offences from the rest.

We included some general recommendations such as the rights to dignity and physical and psychological integrity. We dealt with topics like harassment, non-discrimination and equality.

Our second remit was on victims. If any topic relates to the particular circumstances of Northern Ireland, that surely is one. Defining victims, be it victims of the conflict or otherwise, was not easy. In the end, we distinguished two categories, victims of crime or human rights violations and victims of the conflict. For that latter category we used the ready made definition supplied by OFMDFM. Not everybody was happy with that but it was the best we could do in the time.

Unfortunately, the Forum and its Working Parties did not include a representative of any victims' organisation, though one from WAVE did attend as an observer. We contacted about 100 victims' groups of various kinds and invited them to send in a written submission and/or to come and speak to us. Only a few groups responded but they were a fairly representative sample.

Our Working Group aimed at consensus. We did not entirely succeed nor did we entirely fail. Like other group, we had some differences of opinion. Some representatives, while not disagreeing with certain proposals is commendable, felt that a local Bill of Rights for Northern Ireland was not the appropriate place for them. Or that existing provisions were already adequate. Other representatives were enthusiastic. I personally felt that if there had been a modern, up-to-date UK Bill of Rights in place, then our task would have been much easier. We could have then concentrated on special measures for our particular circumstances but there is no such UK Bill in place.

In order to lose nothing, we were as generous and comprehensive as possible, recording all viewpoints, majority and minority as fully and fairly as possible. The result was that we produced a report much longer and more detailed than a Bill of Rights would normally be. The Working Group's report was of course consolidated for inclusion in the official report of the Forum where the final discussions took place.

John Jackson, Queen's University Dublin:

The concept of victims' rights within criminal justice is relatively new. It only really surfaced in the last quarter of the last century. Until then, the idea of victims having rights in the context of criminal justice was not really considered to be very significant. There are many reasons for this, but one of the major ones seems to be the view that criminal justice was about the state and the accused - two parties. Victims were merely an appendage of the state's case. Prosecution representing the Crown in the UK or People in Ireland would take their case against the accused. Victims would come on and give evidence for the state but did not really get any recognition of their own right.

Within human rights discourses, another problem for victims of crime is that generally victims of human rights were considered victims of state abuse. Whereas, victims of crime are not, per se, victims of state abuse but obviously they are victims, non-state actors. So, human rights and victims of crime did not seem to go together.

Many human rights activists were rather concerned in early days about giving rights to victims of crime because they saw that as confronting and contradicting perhaps some of the important rights for the accused that had been hard fought over the years. There was a danger that if you focus on victims, then those rights for the accused would be diminished and that is always been an issue in this whole debate about the balance between the rights of the victim and the rights of the accused.

We now have a lot of talk about rights of victims of crime, both in domestic systems in UK, Ireland etc, but also within international human rights standards. The mood has changed quite considerably. Within human rights discourse, one of the realisations has been that when you are a victim of human rights and you are a victim of crime, you often share the same problems — despair, outrage, humiliation. Those sort of things that need to be taken into account are there for victims of crime just as much as for victims of human rights and there is a kind of realisation now that that is the case.

There has also been a shift in attitude towards crime. Crime is not just action against the state anymore. We realise that crime actually affects individuals and effects communities. We expect now our prosecutors when they stand up for the states, to also represent victims because they are the people that have really suffered in the course of a crime.

Human rights standards have developed. We have a UN Declaration of the rights of victims of crime and abuse of power, both being put together. Those rights recognise important things like victims being given information about their case, being told if it is not going to run, why it is not going to run, being given support, being asked to give their views about things. In the course of proceedings, support for giving evidence and ultimately compensation for the loss that they've suffered. All those things are in this UN Declaration and a number of other human rights standards as well.

Do we want to put all those things into our local Bill of Rights? Some will say no. Those rights are fairly now uncontroversial. Many countries have signed up to them, not just the UK and Ireland but across the globe.

We talk of the service rights for victims. We must assist them where we can within the criminal justice process. Do you really want to put that in to a Bill of Rights? If you actually look on the ground at what is happening, victims still feel very neglected by what happened to them in the criminal justice process. Their concerns are just as vivid, research shows, now as 30 years ago, whenever there was not supposed to be any concern about them at all. So, there is a gap here between aspiring to these great things for helping victims but on the ground it does not seem to actually help. Is there a case for expressing these rights more explicitly giving them a kind of expressive aim in our Bill?

It is also the case though that some state agencies are really rather reluctant about giving victims some of these rights. To say that they are in the books is one thing, on the ground it is another thing because the attitudes of some of our state agencies are not terribly friendly towards victims. Our prosecution service, very newly created, has moved in this direction towards helping to represent victims but they still do not fully give detailed reasons to people whenever their case is decided not to be prosecuted upon. Now, the criminal justice review some years ago said that should happen. It still hasn't actually been endorsed by our prosecution service.

Regarding the right of victims and witnesses to be given support and assistance to give their best evidence free from intimidation, harassment and victimisation, this is a worthy right that victims should have.

It goes somewhat further than that UN Declaration because it does not just talk about assisting victims in terms of giving them help and services, although

it does mention that important training, particularly for victims of sexual abuse and child victims. It also seems to impact if you are going to give people their opportunity to give evidence that does infringe on the criminal trial process that the rights at trial. That is taking things a step forward but it does not really conflict at all with the way in which international standards are evolving.

Even the European Court of Human Rights, which safeguards the European Convention on Human Rights, has no mention of victims' rights, but the court has to, in individual cases that are brought before it, take regard of the rights of victims. They have a right to security of person, a right to privacy, a right to protection. When we balance the rights of the accused against other things, one of those has to be the rights of victims and that includes the right to give your evidence, if needs be, anonymously, if it is absolutely necessary and there are no other ways of doing it, in order to protect the individual victim who may fear all sorts of retaliation if his or her identity gets out after the trial.

This first right is important and significant. Do we want it in a local bill? The argument goes back to whether we are trying to develop rights in a kind of comprehensive way, or do we just simply look for rights that have a kind of local character because of the particular circumstances of Northern Ireland?

The second right that the Forum have come up with is actually a very specific one but one that has caused quite a lot of controversy in a number of countries, maybe surprisingly so. This right says that after someone has been convicted of an offence, you as a victim, have a right to make a statement in court orally or read out for the court about the impact that the crime has had on you before the judge gives sentence. The idea being the judge will take this into account, this impact that the crime has had on the individual.

What is perhaps controversial about this is that it is not a question of a statement being made, maybe given to a prosecutor or a police officer and handed to the court. It is actually the victim in the trial, in court making a statement orally to the court saying this is what happened to me, this is how I have suffered or my relatives have suffered or it is actually a written statement that you can read out for yourself. I presume a representative could maybe do that for you though that is not actually mentioned in the text.

We have to be careful about distinguishing what exactly victims should be saying in this kind of situation. Are we saying that victims should tell the court what he or she thinks the sentence should be? Are we effectively substituting

the prosecution all together for a victim view of what the crime that has occurred - what the offender should get in terms of sentence for that? I would suggest that that is going a step too far because when you are talking about rights of victims, you do have to, on occasions, balance rights of accused. If you are an accused person, what your sentence should be, should not depend really on the whim of a victim as to whether the victim is forgiving or unforgiving, that really should not come into the complex issue of what the sentence should be.

When it comes to the matter of describing the impact of the offence to the court, what is really wrong with that? How could that prejudice the accused? Surely the court, in giving sentence, does need to know the full circumstances of the crime, not just the offence but the after-effects of the crime in terms of the impact it has had on a victim and the victim's family. I do not think really that is controversial. I do not think that does prejudice the accused. And, that is not really what the controversy is about.

The controversy is about whether we are raising expectations of victims too far. Are we saying to victims that they will be able to have their day in court, and lo and behold, the judge is going to come up go along very much with what you are suggesting or go along and give the kind of sentence that you have in mind? When you look at some of the research in other countries where we have had these statements, there is really no link at all between whether people give statements or not and the severity of the sentence that is passed at the end of the day.

There is a danger that victims will feel let down, when having been given this opportunity to speak to the court, the sentence turns out to be something that they find very derisory.

Some research shows victims like this idea. Others feel let down. The English experience where they have done this, and particularly for victims in murder cases where you are allowed to be represented by a supporter to say what happened to you, people go out of the court room amazed at the lenient sentencing that they are still be given. What this right is doing, it is not really giving victims the right to have a say in sentence, it is giving victims a voice but is that voice being heard? And are we not in danger of raising expectations here?

There is a strong case for putting a lot of these service rights in a Bill of Rights if we feel we want to be comprehensive in our local bill. But, let's not go beyond the international standard in terms of maybe allowing victims to read out in court things or to say things that do not happen in other jurisdictions, are not part of international human rights standards and have not really been piloted in terms of whether victims will be satisfied with this at the end of the day?

If after a pilot, it is found that this is very helpful to victims, yes, by all means, let's debate it. But, I would think we are jumping the gun somewhat by putting this particular right into our Bill of Rights and excluding a number of other rights which are just as important or more important, because research has shown that they do benefit victims at the end of the day.

Rev Samuel Hutchinson: There are the rights of victims within the criminal justice process - the right to have the bereaved widow to be told what is going on, if the case is not proceeding, why not etc. But there are other rights for victims that really are quite separate from the criminal justice process. Public authorities should ensure that victims of the conflict have access to necessary care and support that is gender appropriate, including personal security and access to health and mental health care, income support, employment training and education. In many cases, there may never be a prosecution, maybe nobody is even questioned let alone charged to convict as an offence, but even if that happens, there are still victims rights, we suggest, in those areas.

QUESTIONS

Alan McBride, WAVE Trauma Centre: When I was listening to both contributions, one of the things that really struck me was this whole notion of silence. One of the readings of the particular circumstances of Northern Ireland must be around the conflict and the fact that so many people were victimised. And, if that is the case, then why was there not a victims' representative on the Forum? It seems to me that that should automatically have been the case, because of the situation we have been in.

The fact that there were not a victims' representative on the Forum, within the victims' sector, this feeds into this growing concern that victims are being silenced. If you take, for example, the very recent interim report of the Bradley/Eames Consultative Group on dealing with the past where there was not one victims representative actually at the giving of that report. Also the fact that there is not one representative from the victim's community actually

on the panel as it sits anyway. It does feed into this whole notion of being silenced. I haven't really thought an awful lot about the proposal about having, victims giving a statement at trial. But, there is something for me which is appealing about victims having some sort of a voice in that process. Whether that is the right place or not, I am not quite sure. But I do think that victims need to find a voice and at the moment I do not think they are finding that voice.

Richard Heaslip, Office of the First Minister and the Deputy First Minister:

How would you deal as someone's pressured into given a victim's statement and then given a lenient sentence is passed?

Rev Sam Hutchinson: The Forum did not determine its own membership. That was handed down to us from the Northern Ireland Office in London or from the Government. They defined the constituencies. There would be church representatives, trade union representatives, political representatives, etc. Now, we could decide who our representative was for the churches, the trade unions, whatever, but we could not bring in other categories. I regret that and that question should really be addressed to somebody at Westminster.

The best thing we could do was to consult as many as possible. We wrote to about 100 groups and some sent submissions, some came in person, some did both, many did neither. We tried to ensure that their voice was heard, if not directly at the Forum table.

On the question of lenient sentences, I think that sentencing is usually determined by law and the judges have to implement that. Whether the law should be amended to increase or decrease sentences is a matter for Parliament.

John Jackson, Queen's University Belfast:

Specifically on the point about leniency, one of the interesting findings about the system in Scotland is that victims there actually were not really that bothered unnecessarily about the fact that the sentence was lenient at the end of the day. That may be surprising. But they thought just the very opportunity of giving their views to the court, albeit through a written statement, which is the system in Scotland, was valuable. And, something like 90% of people said at the end of the day they really did welcome that opportunity, whatever the sentence was at the end of the day.

Geraldine Alexander, NIPSA: In terms of the presentation of a statement at court and given that the conviction rates against perpetrators of domestic violence is extremely low, we felt that this right for victims of domestic violence was extremely important. Given this right, would it increase or at least influence the court in terms convicting the perpetrators of domestic violence? Are we raising expectation of victims in terms of allowing them to present statements in court?

Dervla Tumelty, NIHRC: Currently the conviction rate in rape crime is incredibly low in Northern Ireland. I know the controversy surrounding taking into consideration that a victims previous sexual history etc, and how sometimes that can act very much against a victim. Was there any discussion in the Working Group with regard to provisions for that in the Bill of Rights or trying to increase the conviction rates? Quite frankly right now they are ridiculous—as low as 8% for rapes in Northern Ireland.

John Jackson: We have to distinguish this proposal from the issue of convictions. Domestic violence convictions are very low rate convictions, the proposal of victim's statements is after someone has been convicted. So, obviously, the vast majority of victims actually are not going to be affected by this proposal because it is only really effecting a situation where someone has been convicted. So I think there is an argument here that maybe it is slightly wrong focused to talk about victim's statements in this context.

Where we should be concentrating in terms of convictions, is this issue that does come up in the proposal about giving victims a chance to give their best possible evidence. We now do have alternative means of giving evidence in courts. Children are now, finally, being allowed to give their evidence out of court and even in other rooms sometimes before the trial altogether. And, the legal system is accepting that. What it has not accepted and what the evidence shows quite strongly, is that when it comes to women victims, adult victims of crime, like rape, domestic violence—the courts are still very reluctant to allow witnesses to give evidence other than in the conventional way which is in open trial where, of course, you then face a very difficult and often humiliating experience. The evidence shows that despite reforms and all the rest of it that still goes on.

As to how you do this in terms of a local Bill of Rights, again I think you are back to the question of whether you want to go into this level of detail for our local Bill or not?

Elizabeth Zammit, REAL Network: Mental health and learning difficulties may affect both the victim and the accused. Currently, the appropriate adult is either a social worker, a minister, a priest or a GP, if there is one, but we would like to see A Bill of Rights that would contain advice that an appropriate adult in the situation with mental health and learning difficulties would actually be someone has a specialty in that area. We have seen in the past the travesties that have happened because the victim or the accused is unable to actually put across what they need to say in the proper manner. Therefore, if an appropriate adult is going to be brought in, that adult is appropriate in the knowledge that would be required to protect either the victim or the accused.

Derek Hanway, An Munia Tober: Where did the Working Group leave off with the debate around different types of victims from the conflict and the OFMDFM language and in terms of the tension within the group around adopting a definition of victim? Also, John, whether we were looking at the term 'victim' in terms of the conflict, rather than victims' rights from crimes committed in the present day. Surely sectarian motivated crime is more a particular circumstance to Northern Ireland than any of the other jurisdictions? We would like some comment on that.

Sam Hutchinson: We talked certainly about of having an appropriate adult present. They may also be a responsible adult. The Headmaster maybe a responsible individual but someone appropriated is also necessary. I do not think we would want to be more specific than that in a Bill of Rights.

Up until now, sectarian attacks have been very much part of the particular circumstances of Northern Ireland and it is also true that we are now getting other attacks, racially motivated, gender motivated, etc, which I think are common to other parts of the jurisdiction.

Derek Hanway, An Munia Tober: Where did the Working Group stop regarding the definition of a victim?

Sam Hutchinson: Well, first of all the OFMDFM one was this, victims of 'the conflict' (in inverted commas) are the surviving physically and psychologically injured of violent conflict related incidents and those close relatives or

partners that care for them, along with close relatives or partners who mourn their dead.

Given the makeup of the Working Group, I think there was never going to be perfect agreement on exactly who is a victim of the conflict. Of course there have been many cases where it may be difficult to establish the circumstances. E.g. someone is knocked down by a speeding car, if it is a paramilitary getaway car, is the victim a victim of the conflict? If it was just an ordinary motoring accident, he is not. And, in some cases we may never find out who the driver of the car was. That was not perfect. There were people who were not happy with the OFMDFM definition but it was the best we could do in the time, recognising that not everybody was satisfied with it. But, we could not find and I do not think we ever would find a definition that everybody would be happy with, particularly across the political representation.

John Jackson: Just to me to pick up the point about mental health in and people with learning difficulties. I think we have to distinguish here between defendants and victims. When it comes to defendants, there is provision for appropriate adults but the difficulty is that they do not tend to be appropriate. That is a question of resources. Whether it is a question for the Bill of Rights, again, we come back to that general issue. But, it seems to me it is a question of resources.

The same goes for children as well. We still have a situation where appropriate adults tend to be parents. Is that really appropriate? Should we not be thinking more about trained appropriate adults in those circumstances? When it comes to victims, there is not any right at all for people in this category to have appropriate adult support.

The proposal from the Working Group talks about victims of sexual crime abuse and that is child abuse and domestic violence. We do need to extend that definition somewhat if we are going to have appropriately trained officials helping them. That should go for all victims who are vulnerable in one way or another in the manner that you describe.

Elizabeth Zammit, REAL Network: Should resources be allowed to infringe on a right? It should not be. If we are going to give people a right to something that they should automatically have, then resources should never come up as an offence to that. It is either a right or it is not a right and if you have a right

to an appropriate adult and an expert, then the resources have to come from somewhere.

John Jackson: That is a very fair point indeed and the argument for putting this in a Bill is that it would force the authorities to come together and think about resources more. The problem at the moment in this area is that there is an awful lot of squabbling that comes on between the budgets of the police and the social services and neither want to give proper resources to appropriate adults - both sides saying it is not really their responsibility. At the end of the day, I think there has to be some responsibility here and a Bill or Rights may have a role to play in terms of expressing that.

I hope I did not give the impression that victims are necessarily all the same as in other countries. When it comes to specifically how you treat victims of crime, it does not seem to me to be appropriate to say that victims of sectarian abuse are going to be treated one way and victims of non-sectarian abuse are going to be treated another. For one thing, the evidence at that point in time will not be clear as to whether that person was a victim of the conflict or not.

Samuel Hutchinson: In an ideal world, we would agree with you absolutely. In the real world I personally would have to be satisfied with what is reasonable.

Nicola Browne, PPR Project: There are some core victims' rights in international standards that are not reflected in the Bill of Rights. Can you provide more information on that?

John Jackson: What I was referring to, was those kinds of service rights that are in the UN Declaration and in other declarations, specifically, the right to information, the right to participation, support and protection. These are uncontroversial because you will find them scattered in various statute books and doctrines around different countries. The question is whether you bring them all together in a Bill of Rights like this. To cherry pick them somewhat is not going to be very satisfactory.

Regarding giving a statement in open court, this was my concern to some extent. We have to be careful of the proposal here, it is not suggesting that victims, or even those who are speaking on their behalf, are really going to be allowed to speculate as to motivation for the offence or indeed what the sentence should be. It is really restricted to describing personally what the impact was for the victim of the crime and the day-to-day reality of what the

effect of the crime was, not speculating about motivations and all of that. I think that would be out of order even on this proposal.