Justice Committee

Victims and Witnesses (Scotland) Bill

Written submission from the Scottish Human Rights Commission

The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is a public body and is entirely independent in the exercise of its functions. The Commission is the national human rights institution (NHRI) for Scotland with a mandate to promote and protect human rights for everyone in Scotland. The Commission is one of three NRIs in the UK, along with the Northern Ireland Human Rights Commission and the Equality and Human Rights Commission. In June 2010 the Commission was accredited with “A” status by the International Coordinating Committee of NRIs and in May 2011 the Commission was elected to chair the European Group of NRIs.

Introduction

The Scottish Human Rights Commission (the Commission) welcomes the opportunity to submit comments to the Justice Committee on the Victims and Witnesses (Scotland) Bill. As stated in previous submissions, the Commission wishes to highlight the importance of human rights for everyone involved in the criminal justice system, in particular victims of crime and witnesses.

The Commission broadly welcomes the Bill as an important step towards implementing the EU Directive and achieving the goals of international human rights standards in this area, but it believes the Bill could go further. The Commission advises that the Justice Committee consider whether the definition of victim included in the Bill fully reflects international human rights standards and is a sufficient basis on which to take steps to ensure the criminal justice system works effectively for all victims of crime in Scotland. The Commission further considers that additional steps could be taken to address the rights of victims of human rights violations, some of whom may also be victims of crime.

The Commission wishes to address the general human rights issues arising from the Bill first (question 6 of the Call for Evidence) and subsequently it will answer questions 2, 3, 4, and 5 put forward by the Committee.

(6) Any human rights implications arising from the victims and witnesses provisions in the Bill

Internationally agreed definitions of victims are broad ranging.

According to the UN Victims Declaration, the term “victims” means:

1 SHRC response to the Scottish Government consultation on Victims and Witnesses Bill July 2012. Available at www.scottishhumanrights.com
2 2012/29/EU
“persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power”.

The Declaration also clarifies that a person may be a victim, irrespective of whether the perpetrator is identified, apprehended or prosecuted, and will extend, where appropriate, to family members of the direct victim.\(^4\) That declaration also includes a separate definition of victims of human rights violations which may not amount to breaches of the criminal law.\(^5\) International human rights law also includes well developed provisions on the right to an effective remedy for victims of violations of human rights.\(^6\)

The Council of Europe Committee of Ministers’ Recommendation on assistance to victims of crime defines victims in similar terms:\(^7\)

> **“Victim means a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, caused by acts or omissions that are in violation of the criminal law of a member state. The term victim also includes, where appropriate, the immediate family or dependants of the direct victim.”**

The Commission invites the Justice Committee to consider whether the definition of “victim” in the present Bill fully reflects international human rights standards.

From 2008 to 2012 the Commission reviewed research on the realisation of internationally recognised human rights in Scotland. The evidence gathered during this period in relation to ‘Access to Justice’ shows that additional steps are required to ensure effective access to the justice system for victims in different circumstances.\(^8\) This extends to both civil and criminal justice. The Commission believes that the justice system should adapt to individual victims rather than requiring that all victims adapt to the system. The present Bill represents an important opportunity to make the criminal justice system work more effectively for all victims of crime in Scotland.

In addition, the Commission has been working since 2009 to promote effective access to justice and remedies for survivors of historic child abuse. The Commission and the Centre for Excellence in Looked After Children in Scotland (CELCIS) are

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\(^4\) Ibid, para. 2.  
\(^5\) Ibid, para 18.  
\(^6\) See for example Article 13, European Convention on Human Rights; UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly Resolution 60/147, 16 December 2005; SHRC and Susan Kemp, A Review of International Human Rights Law Relevant to the proposed Acknowledgement & Accountability Forum For Adult Survivors of Childhood Abuse, February 2010.  
\(^7\) Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims  
currently overseeing a series of InterActions to develop an Action Plan on Justice and Remedies in this context. During the InterActions survivors have raised concerns, not only about civil justice and remedies but also, about the current accessibility and effectiveness of the criminal justice system from the moment of reporting criminal abuse to investigation and prosecution. They referred specifically to barriers they have faced in securing investigation of historic crimes and a lack of support during the criminal process.

International human rights law places a number of specific obligations on States to safeguard the rights of victims of crime and witnesses in criminal proceedings. These international standards precede the EU Directive and should be read together with it. Furthermore, both the rights of the victim and the rights of the accused must be respected. Therefore, pursuant to international human rights standards, the Bill should be implemented without prejudice to the rights of the accused. In particular, the Committee should ensure that the right to a fair trial (Article 6 of the European Convention on Human Rights, ECHR) and the right to respect for private, family and home life (Article 8, ECHR) are respected.

As the Council of Europe Committee of Ministers has said, measures to help the victims

“need not necessarily conflict with other objectives of criminal law... such as the reinforcement of social norms and the rehabilitation of offenders, but may in fact assist in their achievement and in an eventual reconciliation between the victim and the offender”.¹⁰

Similarly, the UN Declaration envisages:

“Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.”¹¹

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⁹ See for example:
- COUNCIL of the EU FRAMEWORK DECISION on the standing of victims in criminal proceedings (2001/220/JHA)
- The European Convention on the Compensation of Victims of Violent Crimes [UK ratification 1990]
- Council of Europe Convention on Action against Trafficking in Human Beings ('Convention against Trafficking') [UK ratification 2008]
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, supplementing the UN Convention Against Transnational Organised Crime ('UN Trafficking Protocol') [UK ratification 2006]
- United Nations Convention against Corruption ('Convention against Corruption') [UK ratification 2006]
- Convention on the Rights of Persons with Disabilities ('CRPD') [UK ratification 2009]


¹¹ UN Declaration, para. 6(b).
Notwithstanding this principle, the Commission recommends that the Committee give careful consideration to the proposal to give victims the right to make written representations when prisoners are first eligible for temporary release, and enable victims to raise concerns about conditions placed on release. Amongst other questions to consider are: will all victims be able to make representations? Will this extend to relatives, carers, friends? What is the nature of these representations? What weight is given to this type of evidence and its relevance? Similarly, consideration needs to be given to data protection, confidentiality and privacy rights as a consequence of disclosure of sensitive information. Furthermore, will there be adequate means for the prisoner to respond to any such representations by victims?

In relation to oral representations, the Commission notes that any move to amend the current practice to allow representations to be made by victims or relatives to a member of the Parole Board should also allow for proper opportunity for those representations to be challenged by the prisoner in order to avoid the potential for non-compliance with the Convention (i.e. Articles 5 and 6).

(2) The proposal to give victims and witnesses a right to certain information about their case

The UN Declaration provides in para 6:

“The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;”

The Commission considers that victims should be fully informed of their role, scope and timing in the proceedings and outcome of the police investigation and/or prosecution. It is equally important for the proposed scheme to be compatible with human rights in order to consider and protect the victims, witnesses’ and accused’s right to respect for private and family life, in particular Article 8 of the ECHR.

Article 8 (1) of the Convention provides that:

“everyone has the right to respect for their private life, family life, home and correspondence”.

Article 8(2) of the ECHR allows the State to justify interference with these rights where such interference is in accordance with the law, pursues one of the legitimate aims identified in Article 8(2)\textsuperscript{12}, and is necessary in a democratic society. An interference will be considered “necessary in a democratic society” for a legitimate aim if it answers a “pressing social need” and is a proportionate means to address

\textsuperscript{12} Including ‘the prevention of disorder or crime’ and ‘the protection of the rights and freedoms of others’.
that aim. In consequence, any decision that impacts on Article 8 should be guided by the Convention test.

Article 8 should be considered with Article 6 to guarantee fairness to the accused. It is important that the proposal to give victims and witnesses a right to certain information about their case does not impair the right to a fair trial and a fair hearing. Article 6 contains a series of procedural guarantees in relation to decisions which determine a person's civil rights or obligations, or a criminal charge and “a restrictive interpretation of Article 6 (1) would not correspond to the aim and purpose of that provision”.13

The Commission considers that this provision in the Bill should be as clear and specific as possible to ensure its application is limited by the principle of legal certainty and to avoid any risk of arbitrariness.

(3) The proposal to give vulnerable witnesses a right to access certain special measures when giving evidence

The Commission welcomes the proposal as it ensures that vulnerable witnesses in Scotland are entitled to the same support as elsewhere in the UK and EU. Furthermore, the Commission considers that it is important to give further consideration to other areas of Scots law which apply the principles of dignity, respect for private life and the right to presumption of legal capacity as given effect in the Adults with Incapacity Act 2000 and the UN Convention on the Rights of Persons with Disabilities (Article 12).

In addition, it is vital to ensure that the accused's right to challenge witnesses in cross-examination is not unduly or unnecessarily impaired by the proposal.

(4) The proposal to require the court to consider compensation to victims in certain cases

International standards on victims of crime recommend a series of reparations elements, including treatment and rehabilitation for physical and psychological injuries, which go beyond reparation and restitution orders included in the Bill.14

International human rights standards contain specific requirements regarding assistance to, and rehabilitation of, victims.15 The Committee of Ministers’ Recommendation on assistance to crime victims recommends that

“States should identify and support measures to alleviate the negative effects of crime and to undertake that victims are assisted in all aspects of their rehabilitation, in the community, at home and in the workplace.”

13 Delcourt v Belgium, Application No: 2689/65. See also Golder v United Kingdom, Application No: 4451/70.
14 CoE Recommendation Rec(2006)8; UN Declaration, paras 8-17.
15 See for example: Committee of Ministers’ Recommendation on Intimidation of Witnesses; Yogakarta Principles; CRPD, Art. 16(4); COE Guidelines on the protection of victims of terrorist acts; Convention against Trafficking; CAT and CRC.
The assistance available should include the provision of medical care, material support and psychological health services as well as social care and counselling. This obligation is particularly relevant with respect to children, women in special circumstances and refugees.

A range of victims of crime may also be victims of human rights violations. In this case there is an obligation to comply with the right to an effective remedy as guarantee in Article 13 of the ECHR.

It is important to note that in many cases compensation does not in itself constitute an effective remedy for human rights violations or crimes. International human rights standards on the right to an effective remedy clarify that that right extends to access to justice, investigations and reparations. Reparations should include opportunities for restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Reparations should be proportionate to the harm and guided by the views and wishes of individual victims.

i) Restitution of rights
Restitution of rights means restoring victims to their original situation where this is possible. This may include supporting victims to realise their rights which have been violated and affected by the crime or human rights violation.

ii) Adequate compensation
Compensation is one of the principal forms of reparation and often an essential part of a victim’s remedy. The Commission therefore agrees that Courts should be required to consider the issue in all cases where an identifiable victim has suffered injury, loss or distress. Compensation should be available for human rights violations, not only criminal conduct, particularly where restitution is not possible. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Compensation does not have to be linked to prosecution or legal procedures and separate mechanisms can be created to receive, adjudicate and respond to claims for compensation.

iii) Rehabilitation
Rehabilitation measures such as therapy, counselling, education and training should also be provided where appropriate. Other forms of rehabilitation may also be appropriate.

iv) Satisfaction
Satisfaction relates to declaratory forms of reparation, whereby a public record of the truth or acknowledgement of suffering is made (e.g. an effective apology). While having the ability to tell one’s story publicly or attribute blame for a violation of rights is a positive outcome it is not usually a sufficient remedy in Convention terms.

v) Guarantees of non-repetition
The right to guarantees of non-repetition is not only in relation to the violation against the individual, but of that type of violation, including through changes in law and practice.\textsuperscript{17}

5) The proposal to introduce a victim surcharge and restitution orders, so that offenders contribute to the cost of supporting victims

The Commission considers that ensuring adequate, effective and prompt reparation is an obligation of the State and yet in cases a (legal/natural) person could be directly liable for reparation to a victim. In those cases, this measure may strengthen the direct compensation provided by offenders to victims. Compensation orders may not always practicable or recommendable as there will be many cases where the offender lacks the ability to pay any meaningful level of direct compensation or there is no identifiable victim.

The Commission invites the Justice Committee to consider also the financial impact that a victim surcharge scheme could have on the offender’s family which may have financial problems, ensuring for example that the best interests of the child is a primary consideration, as required by the UN Convention on the Rights of the Child.\textsuperscript{18}

Scottish Human Rights Commission
8 April 2013

\textsuperscript{17} UN Human Rights Committee, General Comment no. 31, para. 17.
\textsuperscript{18} Article 3, UN Convention on the Rights of the Child.