

THE ENGLISH AND WELSH PERSPECTIVE ON LEGAL AID FOR CRIME VICTIMS

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1. Introduction

It should be explained at the outset that in spite of the growing commitment to improving the plight of crime victims in England and Wales, victims in this jurisdiction do not have any right to access legal aid in order to protect their interests in the context of criminal proceedings. That this state of affairs could be possible whilst the UK is also a signatory to Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (the 'Directive') might seem unusual to some of our continental counterparts, but this situation was clearly envisaged when Article 13 was drafted in that the protection of the right to access legal aid was specifically restricted to those member states who recognise victims as parties to proceedings. As a result of the common law bipartisan adversarial system of justice that operates in England and Wales, victims are not recognised as parties to criminal proceedings and therefore the obligation to ensure access to legal aid does not apply.

The purpose of this paper is to give a brief overview of the English and Welsh Criminal Justice System and to explain the role of crime victims within it; to offer an insight into some of the soft law provisions that have been developed in England and Wales as alternatives to more formal provisions such as legal aid in offering protection and support to crime victims; and to question whether a right to legal aid to provide independent legal representation (ILR) for victims should and could be developed in this jurisdiction.

2. The role of crime victims within the English and Welsh Criminal Justice System.

In England and Wales criminal cases usually begin with a complaint of criminal wrongdoing being made to a relevant state authority, normally the police. If there is thought to be merit in the complaint it is then for the police to investigate the crime and if an alleged perpetrator is apprehended, for the Crown Prosecution Service (CPS) to select the relevant charges and initiate criminal proceedings. Throughout this process there are numerous decisions taken by criminal justice personnel without any direct input from the victim. For example, while the Code for Crown Prosecutors (governing the decision-making processes of the CPS) indicates that the victim's views should be considered when reaching a decision whether or not to prosecute, it is made clear that this decision is ultimately for the CPS to take regardless of any

opinion that the victim may have on the matter.²⁴ This is so because the English and Welsh criminal justice system has developed to prosecute crimes on behalf of the state and in order to protect wider public interests beyond those solely relevant to the victim.

A rarely used exception to this approach is the possibility that a victim may raise a private prosecution, however the financial and other resources required to pursue such an action make the availability of this procedure limited in practice. Even in those rare cases where a private prosecution does get off the ground, the extent of this right in real terms is again limited because the CPS will usually take over the case in order to discontinue it or to take control of the decision-making processes if they determine that the prosecution should proceed. It is also notable that victims who choose to pursue a private prosecution are not entitled to legal aid in order to do so.

So then, in the initial stages of a victim's case they are likely to feel largely excluded from the process, but what of their status within the criminal proceedings themselves, presuming of course that their case ever gets that far? Jonathan Doak explains that: 'Conceptually, victims have no role to play in the modern criminal justice system other than to act as 'evidentiary cannon fodder'. In contrast to many continental systems, they have no 'right to be heard' or give a narrative account, and they are denied any form of proactive participation in the trial, since their interests are deemed to fall outside the remit of the criminal trial as a forum for the resolution of the dispute between the state and the accused.'²⁵

Thus as a result of the nature of the system of justice operating in England and Wales a defined role for victims within criminal proceedings has not developed. At best, victims are passive participants in that they are restricted in the narrative they can put before the court, being able only to answer questions as put to them by counsel for the state or counsel for the defendant. They are powerless to influence the course of proceedings or direct questions to witnesses, and are ultimately excluded from the various decision-making processes involved in shaping their cases.

3. The development of soft law provisions to protect and support crime victims.

But things are not at all as bleak as the account above might suggest. While a defined role for crime victims has not developed in this jurisdiction that is not to say that the protection of victims' interests in England and Wales has been overlooked. Indeed, since the mid-1990s there has been a growing awareness of the plight of crime victims throughout the UK and this has been addressed in England and Wales through the introduction of soft law enactments designed to provide victims with a range of service standards to be met by the criminal justice agencies dealing with their cases.

²⁴ CPS, 'The Code for Crown Prosecutors', 2013, p. 8-9.

²⁵ Jonathan Doak, 'Victims Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties', Hart: Oxford, 2008, p 35.

The current emanation of these service standards, the Code of Practice for Victims of Crime (the 'Code'),²⁶ was placed on a statutory footing under the Domestic Violence, Crime and Victims Act 2004 (the '2004 Act') and was first issued in 2006. This was subsequently revised and reissued in October 2013 to make the Code more user-friendly for victims, to make it more outcome-focussed rather than process-orientated, and to give good effect to the requirements of the Directive.

The Code defines a victim as: a person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by criminal conduct; or a close relative of a person whose death was directly caused by criminal conduct.²⁷ This is a relatively wide definition and takes significant steps in meeting the broad definition of victim provided under the Directive.²⁸

The Code outlines a whole host of services to which victims are entitled, and identifies a range of criminal justice agencies that are obligated to deliver these.²⁹ Of particular interest in the context of the current analysis is the entitlement under the Code to criminal injuries compensation, the availability of victim support services, and the right to participate in criminal proceedings. These aspects are worthy of a brief further exploration here because they are markers which allow others to compare the support and protection afforded to victims in those jurisdictions where a right to access legal aid is provided, and the support and protection afforded in jurisdictions, such as England and Wales, where it is not.

I. Criminal Injuries Compensation.

Access to compensation is likely to be an issue of concern for victims under both types of system, and something that victims will seek advice about regardless of a right of access to legal aid. In England and Wales criminal injuries compensation is available under the government funded Criminal Injuries Compensation Scheme (CICS) which seeks to financially compensate blameless and law-abiding victims of violent crime as a demonstration of public sympathy for their suffering.³⁰

While the Code requires that the Criminal Injuries Compensation Authority (CICA) operating the CICS, advises victims about the scheme's eligibility criteria and the progress of their claim,³¹ the CICA is not required to offer much in the way of additional assistance to victims who apply for

²⁶ Ministry of Justice, 'The Code of Practice for Victims of Crime', HMSO: London, 2013.

²⁷ *Ibid.* para 4.

²⁸ The Directive, Art 2(1).

²⁹ Amongst other, services outlined within the Code include: to be kept informed about the progress of their case, to be referred to victim support organisations, to make a Victim Personal Statement, to visit the court prior to criminal proceedings and to apply for compensation.

³⁰ Criminal Injuries Compensation Authority; Ministry of Justice, 'Criminal Injuries Compensation: A Guide' 2012. Available at: <https://www.gov.uk/criminal-injuries-compensation-a-guide#how-to-use-this-guide> [accessed 15/06/2014].

³¹ *Op. cit.*, n 3 Chapt 2, Part A, Section 8.4.

compensation. A notable exception to this is the enhanced service required from the CICA in cases involving victims identified as being in need of special measures of protection. For those victims the Code requires that the CICA assists victims in obtaining evidence in support of their application and in completing the CICS application process.³² This means that for the majority of victims who seek compensation through the CICS they will be faced with an application process which they are expected to negotiate in the absence of any assistance from the CICA. It is again also notable here that legal aid is not available to provide victims with free legal advice and representation in connection with their compensation application or to assist in seeking review of a CICA decision where an application has been unsuccessful.

II. Victim Support Services.

Access to victim support services is another important marker in comparing England and Wales against those jurisdiction where victims are afforded legal aid. This is so for a variety of reasons, but most significantly in this context because victims in this jurisdiction are likely to seek out some of the advice and support from victim support personnel that victims in jurisdictions where legal aid is provided may otherwise seek from their legal representative.

In spite of the comprehensive victim support services that are available in this jurisdiction, victims have no particular entitlement to support services protected under the Code and similarly victim support service providers are not listed within the Code as being agencies with any particular obligations towards victims in the range of quality of services that they should provide. Instead the Code entitles victims to information provided from the police about the services that may be available to them and entitles them to receive contact details for relevant victim support providers. Victims are also entitled to have their information referred to a relevant support service within two days of making a complaint to the police, but can alternatively request for their information not to be shared with support agencies where they do not wish to pursue support.³³

III. Victim Participation in Criminal Proceedings.

The final marker to be considered here is the ability of victims to participate within criminal proceedings. As already stressed, victims in England and Wales are not regarded as parties to proceedings but the Code does allow for limited participation in the criminal process through a scheme known as the Victim Personal Statement Scheme.³⁴ Under the Scheme victims are entitled to provide an impact statement to police in addition to their evidential statement in which they can outline the effect that the crime has had upon their lives. This statement then becomes part of the case papers which can be considered by the various criminal justice personnel involved in the case and can be taken into account in appropriate decision-making processes. The statement is also available to the sentencing court and through this mechanism

³² *Op. cit.*, n 3 Chapt 2, Part A, Section 8.6.

³³ *Op. cit.*, n 3 Chapt 2, Part A, Section 1.

³⁴ *Op. cit.*, n 3 Chapter 2, Part A, Sections 1.11-1.21.

the victim is facilitated in participating in criminal proceedings in a way that was previously impossible. Even although the Scheme was rolled out nationally in 2001 it was only protected under the Code for the first time in 2013. The added protection afforded to the Scheme by its inclusion in the Code indicates the willingness of our government to protect the limited participatory rights that victims currently have in this jurisdiction, and to give better effect to the participatory ethos which is apparent in the Directive.

IV. Problems with the Code.

While the latest version of the Code looks to have put in place significant improvements for crime victims, and makes real strides in giving effect to the intentions of the Directive, the level of provision it provides for victims continues to prove problematic for a variety of reasons. In particular, the availability of services under the Code is restricted in that only those direct victims who have made a formal allegation of criminal conduct to the police are entitled to access services. Furthermore, while the Code does provide services to secondary victims of crime, this is restricted to only those secondary victims who are the close relatives of a person who has died as a result of criminal conduct. This can prove problematic in cases where the criminal nature of the victim's death is yet to be determined, and also in cases where the close family members of the deceased are at odds in respect of the services which they wish to access under the Code or in respect of the representations that they wish to make to the criminal justice agencies dealing with their case.

Beyond these restrictions an additional problem inherent in providing services for victims via such soft law enactments is that the Code does not provide victims with an effective mechanism through which they can seek legal redress if its terms are not met. Section 34 of the 2004 Act specifically states that a breach of the Code cannot give rise to criminal or civil liability and this, in addition to the Code's complicated and relatively ineffectual complaints mechanism, has the result that victims have no real means of ensuring that they receive the level and range of services which the Code leads them to expect.³⁵ The very apparent danger in this approach is that improvements for victims are secured on paper but not in practice. It is against such a backdrop that the call for the introduction of a right to access legal aid in order to secure independent legal representation (ILR) for crime victims has gathered weight.

4. Developing Legal Aid for Crime Victims in England and Wales.

There are various points throughout the English and Welsh criminal justice process where victims would benefit from the provision of ILR provided through the state-funded legal aid system. Such a development would be of particular benefit to victims in reducing the secondary

³⁵ Marie Manikis, 'Navigating through an Obstacle Course: The Complaints Mechanism for Victims of Crime in England and Wales' (2012) 12(2) *Criminology and Criminal Justice* 149.

victimisation that many experience as a result of their interactions with the Criminal Justice System.

Victim dissatisfaction and secondary victimisation can result from the lonely and sometimes hostile environment that victims are required to navigate in their pursuit of justice. This could be greatly ameliorated if victims were able to access free legal representation from an adviser who represented only the interests of the victim and who was experienced in the language and procedures of the criminal justice system. Access to ILR would also be of benefit to victims in ensuring that the agencies dealing with their cases were held to account in meeting the standards of support and protection required under the Code. The victim's legal representative would be a 'single adviser with the specialist knowledge and legal authority to access information'³⁶ on the victim's behalf and this would prove particularly useful for those victims who wished to challenge the decisions of criminal justice agencies or utilise the Code's complaints mechanisms.

In the context of our adversarial system of justice the most controversial aspect of ILR relates to the provision of legal representation for victims during the trial process. Sam Garkawe advocates that 'given [the] specific interest of the victim, the laws of procedural fairness seem to suggest that victims should receive consideration throughout the proceedings on the basis that they are substantially affected'.³⁷ Arguably the best way of protecting these specific interests is to provide victims with legal aid in order that they can secure their own legal representation. Not only would this allow victims to be better supported to give their best evidence in court, but this would also provide victims with much more robust protection from over-zealous questioning by defence counsel than could ever be achieved under our current arrangements.³⁸

However, opponents of ILR contend that such a development would interfere with the defendant's right to receive a fair trial, and more particularly, that the introduction of a third party to proceedings who would stand in opposition to the defendant's position would undermine the central tenet of equity of arms which underpins our bipartisan adversarial tradition. This may be so if an ILR approach was adopted which put victims on an equal footing with the defendant, but there are clearly approaches that could be adopted that would fall short of that, allowing for the observance of the defendant's rights while offering increased support and protection to victims. Other common law jurisdictions have been successful in doing so and there is no reason to think that this could not be similarly achieved in this jurisdiction:

³⁶ Fiona E. Raitt, 'Independent Legal Representation for Complainers in Sexual Offence Trials' Rape Crisis Scotland, 2010, para 8.05.

³⁷ Sam Garkawe, 'The Role of the Victim During Criminal Court Proceedings' (1994) 17 UNSWLJ 595, p 630.

³⁸ For a discussion of the difficulty faced by prosecutors and judges in trying to protect victims' interests while observing their other obligations during criminal proceedings see: Fiona E. Raitt, 'Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings' 2013 9 Criminal Law Review 729-749, p 734-738, and Jonathan Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' 2005 32(2) Journal of Law and Society 294, p 305-6.

'Several common law jurisdictions, e.g. Ireland and Canada, have introduced specialised procedures for legal representation at specific procedural stages, or, as in the US, promote a far more robust, prosecutorial-driven case-building approach linked to more direct access by complainants to prosecutors.'³⁹

If one of these compromise approaches could be adopted in England and Wales then the adversarial nature of our system should not, in itself, constitute an insurmountable barrier preventing the provision of ILR through legal aid for crime victims.⁴⁰ A much more real and present threat is however presented by the extensive austerity measures that were introduced to this jurisdiction in 2013 under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. In a climate where the government are seeking to save £220 million from the £1 billion annual criminal legal aid budget⁴¹ it is unlikely to prove politically and economically viable for the government to support the introduction of ILR for victims funded by the public purse.

During such challenging times it is also likely that the legal profession would be reluctant to support such a development. Where would the legal representatives for victims come from if not from the existing pool of criminal solicitors and barristers who may be understandably reluctant to become further embroiled in the uncertain and challenging legal aid market? Many of these potential advisers may also feel precluded from supporting ILR for victims at a point when many consider that the interests of defendants have been significantly and inappropriately undermined by the government's cuts to the legal aid budget.

5. Conclusion.

The position of victims in England and Wales has improved enormously in recent years but they continue to be denied any defined role within criminal proceedings. In spite of this, victims within our jurisdiction are supported and protected by dedicated professionals working hard to provide services to victims which meet the requirements of the Code of Practice for Victims of Crime. Unfortunately, on the occasions where these standards are not met there is no adequate way of calling agencies to account and this represents one of the main problems in our approach to providing services to victims via soft law enactments. This, in addition to the growing awareness that current arrangements within the criminal trial process are inadequate in protecting victims' specific interests, has given rise to calls for the introduction of publicly funded independent legal representation for crime victims. Such proposals are likely to be met with scepticism and occasional hostility,⁴² particularly from the stalwarts of the legal profession, but that does not mean that there is no value in working towards the development of

³⁹ *Op. cit.*, n 13, para 8.01.

⁴⁰ *Op. cit.*, n 13, para 8.02.

⁴¹ Owen Bowcott, 'Legal Aid Overhaul – What the changes will mean for you.' Available at: <http://www.theguardian.com/law/2013/jun/04/legal-aid-overhaul-changes-cuts> [accessed 01/07/2014].

⁴² *Op. cit.*, n 13, para 8.10.

appropriate legal aid funded ILR provision for the benefit of victims within our adversarial system. How this can be successfully achieved in the current climate of hostility towards cuts to the legal aid budget is problematic however, and may just prove one hurdle too far for the proponents of legal aid for victims to be able to take a workable solution forward at the present time.