

VICTIMS' RIGHTS ARE TOO OFTEN OVERLOOKED AS HUMAN RIGHTS

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Arguments about justice and injustice are central in the debate on whether Australia needs a Charter on Human Rights. Much has been, and will be said, about inequalities and deprivations, as well as on constraints imposed on cherished freedoms and liberties. I do not want you to forget these things.

I do now, however, want you to think specifically about the millions of people who suffer harm as a result of crime.

Crime hurts individuals and groups of people. Crime also said Charles Silberman (cited by Elias 1986), "threatens the social order in the same way as totalitarianism".

Until the 1980s, victims were the 'forgotten party' in criminal justice (Schafer 1968). Today, all but one Australian States and both self-governing Territories have a declaration or charter on victims' rights. Most have enshrined those rights in law. Ministers for the Australian

Government have announced that a Federal Charter is being considered. Victims' rights are intended to make victims integral players in criminal justice, rather than mere bystanders. Alas, victims' rights are not readily seen as human rights. In Australia generally there has been disconnect between debate on victims' rights and on human rights; most probably because some believe that victims' rights "will interfere with the human rights of accused persons."
(Garkawe 2004)

Certainly, balancing some victims' rights with the rights of accused persons is a recurring and contentious matter, but not always. Over a decade ago, for example, the Queensland Electoral and Administrative Review Commission proposed a Bill of Rights for that State, which incorporated a specific clause on the rights of the victim of crime or abuse of power.

Historically, several of the fundamental rights of accused persons are traced to *Magna Carta*. *Magna Carta* also provided that, "To none will we deny or delay right or justice"¹. Thus, it is a long-standing right that the State is bound neither to deny justice to anybody – victims included, nor to delay anybody – victims included - in obtaining justice. *Magna Carta* also set the foundation for an essential principle that if a presumed right is ignored or dispensed with; the appropriate action should be taken to restore it.

¹ *Nos non faciemus insticiarios, constabularios, vicecomites, vel ballvos, nisi de talibus qui sciant legem regni et eam bene velint observare* clause 40

Crime is an infringement of a human right (Elias 1986). By virtue of becoming a victim, individuals' human rights have been violated. Accordingly, steps should be taken to ensure a victim has access to justice. For that purpose, victims want, amongst other things, the state to provide and maintain equal justice and reasonable redress (Danieli 2005)².

Human rights dialogue is clear that there can be no justice, however, where humans prey on other humans. Just as we should not allow the guilty to control the victim, so too should we not allow a charter on human rights to maintain inequity in the administration of criminal justice.

Victims' rights as human rights are already recognised internationally. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power follows the typical form of other human rights instruments. It has been adopted by the United Nations High Commissioner for Human Rights, and it is also found in many human rights compilations. The declaration provides standards and norms that countries, such as Australia, should follow. These relate to the recognition of, and respect for, the rights of victims of crime and abuse of power, in terms of access to justice and fair treatment, restitution, compensation and assistance.

² Danieli (2005) says victims want:

- Re-establishment of their esteem, dignity and equality of power and value as people
- Relief from the effects and from the stigmatisation, as well as acknowledgement
- Equal rights under law and the provision of justice; and prevention of further victimisation
- The state to combat impunity and provide and maintain equal justice and reasonable redress

The International Criminal Court is based, amongst other things, on the United Nations Declaration on victims' rights. In the context of human rights, the ICC existence is also consistent with the Basic Principles and Guidelines on the Right to a Remedy and Preparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law that were adopted by the U.N. Human Rights Commission in 2005. This latter Declaration includes the right to justice and the right to reparations for victims.

In the ICC, victims³ (or their legal representatives⁴ where the Court thinks it is appropriate) can actively participate (in-person or through legal representation) at all stages of the proceedings as determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. In this respect says Jo-Anne Wemmers, "victim participation in the ICC is the start of a transformation in how we think about criminal justice." It is a transformation that two countries with adversarial criminal justice systems - the United States (which has a Bill of Rights) and Japan - have embraced. It is also a transformation acknowledged by the New Zealand Human

³ Under the Rome Statute, a 'victim'

- a person who has suffered harm as a result of the commission of a crime within the jurisdiction of the ICC
- may include organisations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

⁴ Victims are free to choose their own legal representation but if there are a number of victims, the Chamber may request that the victims choose a common legal representative.

Rights Commission that recommended that victims should have the opportunity to be legally represented in court proceedings if they wish, but also emphasised that this can and must be done in a way that reinforces the fundamental right of the offender to a fair trial.

I hasten to add that victims are largely in favour of state-run criminal justice. They also largely favour courts maintaining control over sentencing offenders.

The critical point is that there is a new human rights benchmark that Australia should embrace if we are to ensure that justice is not denied to victims of crime.

Victims of crime have also utilised general human rights provisions to gain greater recognition of their rights as human rights⁵. Their successes have meant that rights traditionally constructed to protect accused persons' rights to due process and a fair trial are gaining increasing prominence as "human rights' that encompass both offenders *and* victims" (Goodey 2004, p35).

Human rights organisations including Amnesty, Liberty and JUSTICE have acknowledged that the rights of victims and accused persons can overlap but that can be accommodated. Indeed, a clash of rights is not unusual in human rights jurisprudence. These organisations are, therefore, calling for balanced approaches to criminal justice, which incorporates victims' rights.

⁵ For example, victims have taken action pursuant to the European Convention for the Protection of Human Rights and Fundamental Freedoms and complementary British Human Rights Act.

In conclusion, a clash of rights is not unusual in human rights jurisprudence or policy and does not invalidate each of the rights involved. Such clashes occur for many human rights. One prominent example is the clash between right to freedom of speech and the right of people from minority groups not to be racially vilified. The fact that victims' rights and rights of accused persons will sometimes clash, therefore, is not a sound reason for excluding victims' rights from a Charter on Human Rights, if Australia is to have one.

If a Charter is enacted it must act as a counter-weight to the preparedness of Australian Parliaments to abrogate or ignore the rights of both individual victims and accused persons.

If a Charter is enacted it must also be more than pious platitudes. Rather, it should be mandatory guidelines for State institutions, including courts, to ensure just treatment, but also outlaw unjust treatment, of both victims and accused.

My time has expired. I will leave you on this point – if Australia is to have a charter on human rights, it should advance, not diminish, victims' rights; and it should not threaten victims existing rights. Moreover, we should not forget that victims' rights are human rights, but so to are the rights of the accused.