



Joint Response of the Criminal Bar Association and Justice to the Consultation on
European Directive on Victims Rights

The Criminal Bar Association (“CBA”) represents about 3,600 employed and self-employed members of the Bar who appear to prosecute and defend the most serious criminal cases across the whole of England and Wales. It is the largest specialist bar association. The high international reputation enjoyed by our criminal justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy guarantee the delivery of justice in our courts, ensuring on our part that all persons enjoy a fair trial and that the adversarial system, which is at the heart of criminal justice, is maintained.

JUSTICE is a British-based human rights and law reform organisation, whose mission is to advance justice, human rights and the rule of law. JUSTICE is regularly consulted upon the policy and human rights implications of, amongst other areas, policing, criminal law and criminal justice reform. It is also the British section of the International Commission of Jurists.

Introduction

1. The Ministry of Justice is inviting views on the European Commission’s proposal for a Directive establishing minimum standards on the rights, support and protection of victims of crime. The draft Directive, published on 18th May, is part of a Victims’ Package that also contains a communication on the Commission’s ambition in the area of support for victims and a proposal for a Regulation on mutual recognition of protection measures in

civil matters (also known as the European Protection Order.) The closing date for the response is 19th July.

2. The European Commission has presented a proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime¹ (the Proposal). The proposal replaces the Framework Decision on the standing of victims in criminal proceedings (the Framework Decision)² That instrument has not been implemented successfully throughout the member states according to the Commission's evaluation and needed to be reviewed. This process has taken place over the last year through wide ranging consultation to which the CBA and JUSTICE has contributed.
3. In our view, the measure successfully builds upon the Framework Decision by introducing concrete requirements to ensure victims are safeguarded. We are pleased to see the definition of victim widened to include family members and partners. The proposal creates many obligations to ensure that victims are effectively safeguarded and we welcome all of these measures. We support the further action in this area. Whilst there will be little need for the UK to change its approach to witness care as a result of this proposal, since it already provides the measures suggested, once enacted it can be relied upon when UK nationals and residents travel abroad to ensure that they receive the assistance they need in reporting crime and contributing to the criminal justice system. We would encourage the United Kingdom government to opt-in to the proposals.
4. Whilst we support and endorse safeguards proposed for victims of crime, we are concerned to ensure the rights of defendants are protected too. We would welcome the opportunity to comment on any initiatives and/or measures designed to provide safeguards for defendants across all Member States.

¹ COM(2011) 275/2 (Brussels)

² Council Framework Decision 2001/22-/JHA of 15th March 2001 on the standing of victims in criminal proceedings, OJ (2001) L 82

5. It is noted that no decision as to culpability will have taken place for the majority of these measures and therefore the complainant is not a ‘victim of crime’ until a finding of guilt. However, the title of victim is clear for these purposes and in order to respond clearly and uniformly to the Proposal, we will adopt the term ‘victim’ in our comments. We do not comment on every Article drafted as many are clear, already adopted in United Kingdom policy and procedures and do not need any further explanation.

Article 2 Definitions

6. Whilst the expanded definition ensures that a greater number of affected people will benefit from safeguards, the continued reference to ‘victim’ results in only ‘a natural person who has suffered harm’ having protection. As we observe above, for most of the areas of protection in this measure, there will have been no finding about whether a crime has been committed. Whilst in many instances there will be clear harm, through injury or loss, and the conclusion of the case may turn on identifying the correct perpetrator or sufficient evidence to prove the crime, there are also cases where there will be no conviction. These people will still require support and protection through the process.

Article 3 Right to receive information

7. The detailed categories of information to be provided by member states that are set out in this article are to be welcomed. However, it does not specify how that information should be provided. In article 4(1) of the Framework Decision ‘by any means it deems appropriate’ was provided. In our view all information should be provided in writing, by way of an information leaflet, so that victims understand fully what services are available and how they can follow proceedings. This leaflet can then be consulted by the victim as proceedings progress. It has been accepted in negotiations on the proposal for a directive on the right to information in criminal proceedings³ that a letter of rights is necessary to

³ COM(2010) 392 final (Brussels, 20 July 2010)

ensure that suspects fully understand what their rights are. The same provision for victims should be made.

Article 9 Right to be heard

8. There is no definition of “being heard” which allows for individual member states to implement their own measures. In some states a victim is a party to the proceedings and different measures may be appropriate than in the United Kingdom where those rights are already incorporated into the process.

Article 14 Right to return of property

9. This measure aims to ensure that property rights of victims are maintained. In our view it falls short by only requiring return of property which is not required for the purpose of criminal proceedings. Whilst property may be required as an exhibit, it should still be returned once proceedings have concluded where this is possible.

Article 19 Right to avoidance of contact

10. The measure obliges member states ‘progressively’ to establish the necessary conditions to enable avoidance. We wonder why there is a need for progression. Article 8(3) of the Framework Decision allowed a ‘progressive’ response and member states have had ten years to ensure the infrastructure to avoid contact is in place. In continuing to allow progressive establishment of such infrastructure, member states will necessarily take their time to do so. The directive will not come into force until two years following the date of adoption in any event. In our view the measure should provide the strongest obligation to establish conditions to enable avoidance of contact.

Article 21 Right to protection of vulnerable victims

11. The rights which are specified here are very positive. We would observe in relation to article 21(2)(d) that whilst the measure aims to ensure that victims are not re-victimised by the experience of being interviewed, this may occur with the current drafting. We would ask that the measures should be extended to allow for interview by a person of a sex of the victims' choice rather than the wording "all interviews with victims of sexual violence are conducted by a person of the same sex" which presupposes perpetrators are of a different sex to the victim.

12. Article 21(3)(a) refers to measures to avoid visual contact and suggests use of communication technologies. The article could also suggest using screens which is the simplest mechanism and most easy to provide for member states where technologies are not yet available to avoid visual contact. Moreover we would be concerned if the technologies mentioned were to include a telephone conference facility as this would mask body language and visual cues in the evidence being given. The measure should make reference to video communication technology only.

Article 22 Right to protection of child victims

13. Article 22(a) allows for video recorded interviews to be used 'as evidence' in criminal proceedings. The evidence recorded in interview must be open to challenge, either by way of a pre-recorded cross-examination which can also be used as evidence in proceedings, or through necessary special measures at trial to enable proper challenge.

Article 24: Training of practitioners

14. The article refers to prosecutors but not defence advocates. It also refers to training "to a level appropriate with their contact with victims". There is no requirement for basic training before being able to undertake cases involving children and vulnerable victims. We think it is unhelpful to have training dependent upon the level of contact with victims. Only the judiciary fall into the "general and specialist training to deal with [victims] in an

impartial, respectful and professional manner" category. We believe that all advocates, including those for the defence, require this training as they interact with victims through examination of them in court proceedings. The Directive provides minimum rights, but further guidance on best practice will be required.

Rosina Cottage QC

Jodie Blackstock, Senior Legal Officer JUSTICE

Lesley Bates

July 2011