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Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
George Street
Brisbane Qld 4000

Dear Sir/Madam

SUBMISSION ON THE QUEENSLAND HUMAN RIGHTS BILL

I am pleased to enclose my submission on the Queensland Human Rights Bill.

The submission also includes a book chapter as background to the submission. The chapter discusses how human rights framework applies to persons as crime victim in the administration of justice.

Please do not hesitate to contact me if you have any questions on this submission.

Best wishes

A handwritten signature in black ink, appearing to read "Robyn Holder", written over a horizontal line.

Dr Robyn Holder

26/11/2018

SUBMISSION ON THE QUEENSLAND HUMAN RIGHTS BILL

November 2018

INTRODUCTION

I make this submission from the following experience:

Consultation on and experience of the ACT Human Rights Act

From 1996-2011 I performed the statutory role of ACT Victims of Crime coordinator (now Commissioner) under the *Victims of Crime Act 1994*. My statutory responsibilities were to protect and promote the rights of people as crime victims. I received and investigated allegations of breaches of these rights. In the main, the allegations were resolved by intervention from my office to resolve the concern. It was also open to me to undertake a formal investigation, make findings and report these to the entity and to the Attorney General; and also to conduct research into the concerns raised by crime victims.

In this role I provided submissions to the various consultations into the possibility of human rights legislation and, as an independent statutory officer, commented on the Bill, the review of the Act and various amendments. I engaged with the Human Rights Commissioner in co-sponsoring a forum on *Victims' Rights in a Human Rights Framework* (2005), participated in an Expert Group reviewing the Human Rights Act, delivered policy change and human rights training for my own staff as a public authority, organised public seminars with European human rights experts, and raised with the Human Rights Commissioner certain cases involving victims in the criminal justice process that I believed involved human rights concerns. These activities are reported in my Annual Reports tabled from 2004 to 2010.

Expert on victims, justice and the law

Building on my professional experience, I am a recognised expert on victims, justice and the law. I have written extensively on the experience of victims of domestic violence and sexual violence with criminal justice, and victims generally. Current work explores the justice goals of child victims of sexual victimisation.

I have also written on victims and human rights (attached) and the role of the public prosecutor in contemporary adversarial systems.

THE HUMAN RIGHTS BILL

I welcome the introduction of the Queensland Human Rights Bill. It's inclusion of Indigenous cultural rights (s28) are particularly welcome. This inclusion is not only right in itself, but also

suggests that policy-makers have looked to international instruments for contemporary human rights concerns.

Since the International Covenant of Civil and Political Rights (ICCPR) on which the Queensland Bill is primarily based, there have been a number of advances especially as regards Economic, Social and Cultural Rights, the Covenant on the Rights of the Child, the Convention on the Elimination of all Forms of Discrimination Against Women, Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Rights of Persons with Disabilities, Declaration on the Rights of Indigenous Peoples, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. These instruments show that human rights are not static but are progressive.

My submission recommending greater and express recognition of rights of persons as victim in criminal proceedings – whether adult or child, male or female, regardless of racial or ethnic identity, level of ability, age or sexuality – is founded on this assumption of progressive realisation of rights.

HUMAN RIGHTS AND VICTIMS

Human rights are held by all by virtue of our shared humanity. I support the introduction of a Human Rights Bill for Queensland. I support the intention to build a human rights culture for all Queenslanders and to ensure the Queensland public sector perform their functions “in a principled way that is compatible with human rights” (DJAG Briefing Note, ud).

However, in my experience, the human rights of persons as victim whose matter proceeds into the criminal justice system tend to be overlooked. The reasons for this include that:

- Criminal justice entities have legislated duties to persons who are accused of offences but have no legislated duties to persons as victim (and witness).
- Criminal justice is conceived as a contest between the state and the accused and the civilian as victim has no role other than Crown witness. In this role they are simply an instrument for another purpose.
- Persons as victims of crime have no legally enforceable rights in criminal justice. The Queensland Victims of Crime Charter is, like in other Australian jurisdictions, largely a statement of standards of service.
- Persons as victims of crime have no independent statutory commissioner or body to protect and promote what are presently described as ‘victims’ rights’. Therefore, there is no readily identifiable entity with authority to protect victims’ rights. The current complaints process within Victim Assist Queensland has not, to my knowledge, reported publicly on the complaints received, their nature and manner of their resolution.

To address these problems (in part), it is necessary to make a clear statement that human rights are carried by all persons [civilian accused and victim] in the administration of justice. Failure to do so will simply affirm for many in the community a perception that accused people have rights and victims do not.

Structural reform to protect the rights of crime victims

In my experience, because of these structural and conceptual problems, criminal justice public authorities (police, prosecution, court administration, corrections) turn first and almost exclusively to consider the duties they have to the accused.

My submission does not criticise the duties of authorities to the accused. This is right. However, my submission is that criminal justice authorities have no duties to the civilian victim, do not act as if they have duties to the civilian victim and, even with human rights legislation, do not extend the application of duty to those persons. They do not unless there is express requirement and means to encourage them to do so.

1. My first **recommendation** therefore, is that Queensland includes within the Human Rights Commission a Victims Rights Commissioner with delegated authority to protect and promote the human rights of crime victims.
2. I further **recommend** that there be express recognition that “all persons are equal in dignity and rights”.

In sections 50 and 51, the Attorney-General and/or the Human Rights Commission may intervene and be joined as parties in proceedings that raise an issue of human rights. I expect public entities within the Queensland justice system (police, prosecutors, court and tribunal officials and victim support staff) to act as duty-bearers to protect and uphold the human rights of crime victims. In the event that these fail, my recommendation for a Victims of Crime Commissioner creates a mechanism to enable this to happen effectively and efficiently. The commissioner will maintain active engagement with community victim and legal services to receive information about cases involving victims where their human rights are at issue.

Express inclusion of victims' human rights

In their examination of the role of the victim in the criminal trial, the Victorian Law Reform Commission recognised the problems that accrued on the structural and conceptual issues I have listed. It made a number of recommendations relating to the *Charter of Human Rights and Responsibilities*.

- The civilian victim/witness should be conceived as a ‘participant’ in criminal justice and that this should be expressly recognised within the Charter (Rec 30)

A current review of the ACT *Victims of Crime Act* is similarly progressing a stronger and express links between this and the *Human Rights Act*.

3. My submission **recommends** the Queensland Human Rights Bill include in s15 that “persons accused of crime and persons directly affected by that crime are afforded human rights”.

Other express recognition could be included in Notes in the body of the legislation. For example, a Note to s25 may state that “the personal records of a person who allege sexual assault and which is subject to criminal proceedings are private unless a court directs otherwise”.

Specification of victims' human rights

My primary concern is that Parliament recognise that Queenslanders who are victims, complainants, witnesses or litigants in justice proceedings (especially criminal justice proceedings) have human rights. I recommend further specification of these rights as follows.

4. I **recommend** that the liberty and security of persons as victim be expressly recognised in s29 in a manner similar to the accused. That is, where a person's criminal victimisation is subject to criminal proceedings she must be informed about her rights and responsibilities and must be promptly informed about any proceedings that directly affect her including applications by a person deprived of liberty by arrest or detention regarding the lawfulness of their detention. Victimised persons shall be heard on such applications by the accused.
5. I **recommend** s31 is titled *Fair Hearing for All*. I further recommend that s31(1) be amended to refer to *any person* (accused or victim) directly affected by criminal offence or a party to civil proceedings has the right to a fair hearing.
6. It is extremely important for people's confidence in the equal application of human rights and the fair administration of justice that *Rights in Criminal Proceedings* are understood to apply to all. I therefore **Recommend** that s32 be amended with additional provisions that expressly recognise the rights of crime victims *as participant* in criminal proceedings and as (minimally) set out in the Queensland Charter of Victims' Rights (accepting that presently these do not actually constitute “rights”). In particular that persons as victims involved in criminal proceedings **have a right to:**
- Information about their rights and responsibilities and including information about the status and progression of the case.
 - Protection from unnecessary contact with the accused and protection generally.
 - Privacy of personal records including medical, counselling, education and employment records unless otherwise directed by a court
 - To participation including to contribute, to consultation by authorities on key decisions, to be heard and to have their views and concerns considered at all stages of proceedings
 - Proper assistance to enable effective participation in criminal proceedings including interpretation and translation and protective measures.
 - Equal access to, equal treatment by and equal protection of the law

- Restitution [reparation] from the offender as directed by a court

The rights of children in criminal proceedings are of particular concern and I applaud those provisions protecting children accused of crime. However, these special concerns should extend to children as victims and witnesses in criminal proceedings.

7. I **recommend** that s32(3) be amended to specify *any child* charged with or a victim of a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation, both child accused and child victim. Further, s32(3) be amended to refer to *any child* charged with or a victim of a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation, both child accused and child victim. And s33(2) be amended that 'a child accused of and a child victimised by a criminal offence must have trial proceedings brought as quickly as possible.' And s33(3) be amended that 'a child who has been convicted of an offence and a child victimised by a criminal offence must be treated in a way that is appropriate for the child's age.'

I am pleased to see sections 36 and 37 recognising Queenslanders rights to education and to health. These are particularly important to persons victimised by crime and violence, especially to child victims.

HUMAN RIGHTS AND FAIRNESS FOR ALL

The justice system is about fairness to all. Public entities within the justice system must have regard to and uphold the human rights of all civilians in those processes (accused and victim). A duty to one does not cancel out a duty to the other.

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*Edited by Leanne Weber, Elaine Fishwick
and Marinella Marmo*

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Seeing the state

Human rights violations of victims of crime and abuse of power

Robyn Holder

There is a deeply held view within criminology that victims' rights 'movements' are to be resisted. There is equally entrenched opinion amongst victim advocates that persons accused of offences have rights including human rights but persons as victims do not.¹ Both perspectives are fixated on the relationship between victim and accused. Both fail to 'see' the state in relation to persons as victims of crime and abuse of power.² This chapter considers how, through the lens of human rights, it may come more clearly into view.

In post-conflict and international justice settings and using human rights arguments, advances for victims have been considerable (Bassiouni 2006). Yet in the parallel universe of domestic adversarial justice systems, rights recognition remains both ambiguous and contested. Two basic approaches to victims are identified. One places responses to victims in a service sphere; another is a containment strategy providing for circumscribed participation. This chapter argues a different approach that re-centres the state as duty bearer to both victim and accused. People are 'citizens first' before, during and after their encounters with criminal justice (Holder 2013, p. 217). The proposition rests not only on the ideal of persons as equal before the law, but also on assumptions that states are obliged to treat citizens equally. These are classical liberal promises but powerful nonetheless.

The chapter explores definitional connections between victims of crime, of abuse of power and of human rights violations. It then focuses attention on the nature of rights and what we see of the state through its agents in criminal justice. Through a composite case the chapter then asks what human rights, relevant to victims of crime within domestic adversarial criminal procedure, are 'in the books' and what these look like 'in action'. The chapter concludes with brief discussion on how the human rights of victims may be progressively realized. A brief sketch of debate about victims in criminal justice sets the scene.

Crime victims and criminal justice

Much has been written about crime victims and criminal justice; their subsidiary even marginal role.³ Research has particularly explored the negative experiences with justice processes of victims in general (Shapland et al. 1985), and for different groups of victims.⁴ The sheer diversity of people and populations victimized in different circumstances by a wide range of offences

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means victims are a political subject that, chameleon-like, reflect and absorb the competing and contradictory claims of others.

As a constituency, victims are not easily united (Bumiller 1988). The categorization of and boundaries to recognition of victim status are at once narrow and broad. They are narrowly cast as those victimized by offences specified in criminal codes, or as innocent and ideal (Christie 1986). More broadly there are victims of large-scale atrocity, of environmental degradation, of consumer capitalism and authoritarianism (White 2015, Garkawe 2004). Others now argue for victim-status for the non-human and of the natural world (Nussbaum 2006).

Of interest, however, is the rhetoric with which victims are swept into service for institutional ends. They have been cast as the battering ram of 'the law and order lobby' (Simon 2007) and as the powerless in need of the state's protection (Rock 2004). In post-conflict and international justice settings, it is in the interests of victims that justice organizations stake their legitimacy and purpose (Kendall and Nouwen 2014). Across every justice domain, however, has been heard the assertion that, in comparison with the accused, victims have no rights. Some say this is as it should be (Matravers 2010). From this perspective, criminal justice is a contest between the accused and the State in which the latter wields enormous and unequal power. Others have pressed for greater victim recognition and decried a fundamental unfairness to rules that see people used as expendable evidence.⁵

In response, one approach is to create a 'victim sector' that is parallel to though linked with criminal justice. Within the victim sector are reparation, criminal injuries compensation or financial assistance schemes plus various support and therapeutic services (Dunn 2007). Some are generic to any victim of crime and others for specific categories of victim such as of homicide or sexual assault. Service responses also include access to universal medical, welfare, housing and social support schemes. Arguably this assistance falls under state obligations pursuant to the *UN Covenant on Economic, Social and Cultural Rights* (1966).⁶ Through such investment governments can say that they are even-handed in the allocation of public resources between populations of victims and of offenders.⁷ The constituencies are separate but equal.

A second approach locates in the juridical domain. It delineates agency standards that victims may anticipate and provides circumscribed participatory opportunities. Charter documents specify items such as access to information and respectful treatment. These are 'legitimate expectations' of citizens⁸ but, in public policy discourse, are presented as 'rights'. Also in this approach is an array of legislative provisions providing protections for witnesses⁹ and occasions for involvement such as victim impact statements and submissions to parole boards.¹⁰ The containment strategy recognizes the logic of victims as essential actors to the operation of criminal justice.

The achievements contained in these approaches have been hard won. In the main they are also valued by victims (Dunn 2007). The approaches reflect both humanitarian regard for the consequences of victimization, and legal recognition (in particular circumstances) of persons as victims. Yet both approaches work to divert attention from claims for substantive and procedural rights and also do not unduly upset the priorities and arrangements of justice institutions themselves. How then does a rights lens reveal different arrangements?

Special rights for victims of crime?

Some argue that the 1985 United Nations *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* constitute special rights for an identifiable disadvantaged group (Doak 2008, Garkawe 2005, Wemmers 2012). The instrument¹¹ sets out provisions for fair and respectful treatment, for access to justice and redress, to information and opportunities to put

Seeing the state

their views and have these considered, measures for protection of safety and privacy, for restitution and compensation, and for informal dispute resolution. It also specifies that there be 'proper assistance' for victims 'throughout the legal process' and for access to 'the necessary material, medical, psychological and social assistance'.

Like other similar guideline instruments of the UN, the 1985 Declaration is 'soft'.¹² To differing degrees, its provisions have been incorporated into the legal framework of nations as legislated or administrative charters. These are, however, highly contingent and not enforceable (Groenhuijsen 2014). Despite argument that victim charters impinge on fair trial rights of the accused (Sanders 2004), provisions fall largely outside trial parameters and do little than position the victim as a consumer of agency kindness (Shapland 2000). Observers point not only to the hard law gap between what victims can rely on and actionable rights of an accused, but also to a normative gap. They perceive that one carries more legitimacy, even more *value* than the other. From this perspective, it is a logical next step to strengthen and extend rights specific to the interests of victims of crime. Examples of this approach are the 2012 European Directive specifying minimum standards on the rights, support and protection of victims of crime,¹³ and moves to secure binding Convention status for the 1985 Declaration (Garkawe 2009, Groenhuijsen 2014).

Victims of abuse of power

However, victims of crime are not as marginal to human rights principles and standards as some would have us believe. The specification of victim interests has progressed in regional jurisprudence,¹⁴ various international instruments,¹⁵ in Articles establishing the International Criminal Court,¹⁶ and Guidelines on the Right to a Remedy and Reparation.¹⁷ Indeed, drafters of this latter instrument have called it 'an international bill of rights of victims' (Bassiouni 2006, p. 203).

Substantively, the connecting idea within this human rights canon is that victims are persons who have suffered not just 'harm' but 'substantial impairment of their fundamental rights'. Whether victims of crime, of violation of human rights or of 'abuse of power', this core definition is shared (McGonigle Lehy 2011, p. 232, Lamborn 1987, van Boven 2010). Often overlooked by scholars and legislators alike, the 'substantial impairment of their fundamental rights' may arise from 'violation of criminal laws' or of 'internationally recognized norms relating to human rights' (1985 Declaration, paras 3 and 18). The application of the 1985 Victims Declaration to victims of abuse of power as well as of crime binds it to human rights law; and human rights law to it.

From this perspective human rights scholar Francesca Klug writes that 'victims are at the centre of human rights thinking' (Klug 2004, p. 117). They are central, she says, by virtue of a violation of their human rights *and* their individual standing to claim in consequence. In essence, they are human before they are victim.

Of rights and the state

Klug's assertion has been obscured by two issues. One is the nature of the rights at issue and the other is 'the state' and how we think of it in relation to rights and to victims. On the first, attention has tended to focus on victim charters – arguably second tier documents. In contrast human rights as norms and as laws are treaty based and carry enormous moral appeal. They are radical by virtue of their universality. Human rights 'by definition, apply to all people: from old to young, from rich to poor, from virtuous to corrupt, to female, male and other sexual identities' (Charlesworth 2014, p. 560). And from accused to victim. Thus, the forensic

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question is what human right(s) of the victim may be at issue in criminal proceedings and how these are recognized and enabled.

Second, the state has a dual role to all its citizens. It is the principal *duty bearer* and must refrain from actions that violate human rights and, for certain human rights, act positively to protect. It is also the body against which breaches of human rights are made (whether the original conduct was of a private or public actor) (Klug 2004, p. 117). The state is both 'goody' and 'baddy'.

Hidden behind a group of everyday institutions, the state in criminal justice is at its most powerful. This power is deployed for the individual and public good; *and* can be used in arbitrary and repressive ways. Thus, constraining what is most obvious of the state's power, specific protections vest in persons accused of a criminal conduct: the presumption of innocence, and rights to be heard by a competent, independent and impartial tribunal, to a public hearing, to be heard within a reasonable time, to legal representation and to interpretation.¹⁸ These rights constitute very specific and concrete obligations. Yet the state's power over and duties to persons as victims (and witnesses) are less in view. Because, says Edwards, victims are not 'in a position of inequality vis-à-vis the state' as is the accused (Edwards 2004, p. 972). But are they?

Agents of states

Justice institutions such as prosecution are 'agents of States' (Myjer et al. 2003, p. vii). They are also hegemonic (Sarat and Clarke 2008). For individuals seeking formal adjudication on an allegation of crime there is no way around the public prosecutor. It is a monopoly institution¹⁹ that is substantively without review.²⁰ They are 'a representation of the State which has the power to interfere with the life, liberty and property of the citizen' (Refsauge 2005, p. 3). As such – as goodies – they are required to 'perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights' (*Guidelines on the Role of Prosecutors 1990*, para. 12).²¹ Under various national and state-based human rights legislation, prosecution are also 'public authorities' and must act in accordance with and 'give proper consideration' to human rights.²²

Prosecutors assert their purpose in 'the public interest' and commonly fold the victim into a baggy notion of 'the public' or place them into a box marked 'private interests'. In either space, the victim has no autonomy from prosecution (Mouthaan 2012). This smudging of victims' independent interests fosters a perspective that they and prosecution are one and the same. They are not. Equating the interests and power of the prosecution with the member of the public fosters a notion that victims, under the prosecution cloak, have 'equality of arms' with the accused (McGonigle Lehy 2011).²³ It is convenient for the state to allow this fiction to continue; that nestled under the benevolent wing of the public prosecutor the human rights of the victim of crime are robustly or even adequately protected. By not 'seeing' the individual crime victim as a rights-bearing citizen in the same way they see the individual accused, prosecuting authorities shift to a place where routine abuse of state power becomes possible.²⁴

The human rights of crime victims

It is easy to avoid understanding the state as both goody and baddy in its various relationships to victims and witnesses. A composite case (see Box below) can illustrate the human rights of crime victims, the abuse of power (the human rights violation) and the state's duties. The case study is a rudimentary analysis of various violations (abuse) of state power and the obligations of the duty-bearing prosecution to Jane.

A composite victim of crime case

Jane is a victim of a sexual assault and a criminal charge is brought against the alleged assailant. After a committal in the lower court, the matter is listed for trial. With numerous adjournments it takes five years for the trial to commence.²³ Over this time, Jane has commenced a new career and is afraid her colleagues will learn about her involvement with the case. She asks for a closed court and for suppression of her identity and her testimony. During the trial she is inadvertently made aware that defence have secured access to all her medical records. At trial the assailant is determined unfit to plead. At a special hearing he was found to have engaged in the conduct alleged and not acquitted and directed to be subject to the jurisdiction of the Mental Health Tribunal. The Court's judgement, including identifying information, is posted on the court website. The Mental Health Tribunal makes orders for the person.

Table 39.1 Human rights application to victims/witnesses (Jane's case)

<i>The violation of state power</i>	<i>Human Right¹</i>	<i>Application to victim/witness</i>
Women uniquely subject to sexual victimization inadequately protected	Equality before the law and to equal protection of the law	Ensure non-discrimination, provision and implementation of effective remedies and operational measures ²
Failure to mount an effective investigation and failure to provide an effective remedy	Life, liberty and security of person	Positive obligation to provide adequate protection / preventive measures ³ Ensure provision and implementation of effective remedies Exercise due diligence ⁴
Failure to consider individual privacy and reputation rights, and failure to intervene positively to protect those rights	Right to private life/reputation	Protect privacy as a witness and as victim ⁵ Privacy of medical records ⁶ Special protections and provisions for victim / witnesses ⁷
Failure to consider and intervene to protect human dignity		Covers 'physical and moral integrity of the person' ⁸
Failure to consider and to provide for protection of vulnerable witness	Right to fair trial	Undue delay is significant for all parties ⁹ Organise criminal proceedings such that victim / witness human rights are 'not imperilled' ^{10,11}
Failure to employ an assessment framework for 'just and proportionate balance' in rights protection		May exclude press and public 'if interests of private lives of parties require' ¹² Witness protections (screens, CCTV, pre-record evidence, closed court) not necessarily violation of 'right to confront' ¹³
Failure to ensure that victim 'informed of their rights'		Fair trial principles apply whether criminal, civil or other proceedings ^{14,15}

Notes:

¹ Whether the original conduct and the violation is by public or private act. That is, human rights law is NOT solely concerned with violations by the state but also of violations by 'non-state actors' (Klug 2004: 112);

² Expected to be provided through criminal & domestic law. When the state fails to provide such remedies that it may be in breach of HR (*X&Y v Netherlands* 1985). Legislation is insufficient, preventive 'operational measures' may

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be necessary (*Osmon v UK* 1999), Inhuman and degrading treatment (*A v UK* 1998). Duty on state to respond promptly, diligently and effectively in investigations and backed by prosecutions (various Turkish cases). And Gonzales (IACHR 2011) and *Vertido v The Philippines*. See also Human Rights Committee General Comment No. 28 (2000) para. 18, General Comment 18 (1989) para. 4.

³ Human Rights Committee General Comment 35 (2014) para. 9. *Whiteside v UK* (1992). This protection cannot necessarily be provided by civil remedies (*X&Y v Netherlands* 1985), and Gonzales (IACHR 2011).

⁴ A positive standard – Velasquez Rodríguez (IACHR 1988) and Gonzales (IACHR 2011) – the latter judgement noting that the effect of US Supreme Court case law is that ‘there is no constitutional or statutory remedy at the federal level’ (p. 55). The Declaration on the Elimination of all Forms of Violence against Women (1993) requires governments to exercise due diligence to prevent and punish violence against women committed by state agents or private persons (Article 4c).

⁵ Balanced for rape victim alongside accused right to fair trial (*Baegen v Netherlands* 1995 and *X&Y v Netherlands*) – positive obligation to protect against arbitrary interference by public authorities. And see Human Rights Committee General Comment No. 16 (1988) paras 7, 8, 11. Relevant also is the discussion seeking a ‘just and proportionate balance’ between two fundamental rights in the Canadian Supreme Court in *R v NS* 2012 SCC 72.

⁶ *Z v Finland* – ruling that medical records could be disclosed but confidential for 10 years, but named in judgement, ECtHR – breach privacy but necessary to prevent and protect others (HIV) BUT breached on website. UK HMCPSI 2013 report reviewing prosecution protections on disclosures of medical records and counselling notes.

⁷ ICC Rome Statute Article 68 (exception for public hearing), Articles 67 and 69 (oral or recorded testimony). *Stubbings v UK*.

⁸ *X&Y v Netherlands*.

⁹ UN Human Rights Committee General Comment No. 32 (2007) (replacing No. 13, 1984) paras 27, 35; and para. 6(e) 1985 Victims Declaration.

¹⁰ *Doorson v Netherlands* (1996). Screens and other equipment to protect vulnerable witnesses (*X v UK* 1992). Not necessarily unfair to prevent cross-examination of vulnerable witnesses (*HM Advocate v Nully* 2000). ECtHR – concerned that ‘proceedings as a whole are fair’ (Klug 2004: 118) (emphasis in original).

¹¹ Right to Information, e.g. about subpoenas for records.

¹² The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

¹³ *R v Zuber* (2010 ACTSC 107) and *X v Austria* (1965) (closed court). And Convention Against Transnational Organized Crime & Convention Against Torture.

¹⁴ Article 14(1) and in General Comment 13.

¹⁵ The Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (1990).

What of Jane’s human rights might be engaged is drawn from case law, jurisprudence and provisions from regional and national jurisdictions (see Table 39.1). The referencing draws from Jonathan Doak’s extensive analysis of decisions of the European Court of Human Rights and the human rights jurisdiction of the UK (Doak 2008).

Two issues are important to note. First, raising the human right of a victim at issue does not mean that person directs prosecution. As the European Court of Human Rights stated in *Finu-cane*, ‘the duty to investigate under Article 2 is “not an obligation of result but of means”’.²⁶ Second, Jane’s case reveals that different human rights for both civilian parties may be engaged – for example, her right to privacy and reputation in seeking a closed court and orders, and the accused person’s right to (a public) fair trial. The point is that the state’s agent, here the prosecution, must deliberately consider and seek ways to reconcile the rights. As the Canadian Supreme Court stated in considering a clash of two different human rights, the obligation is to find ‘reasonably available alternative measures’ that may reconcile the tension.²⁷

Progressive realization of the human rights of victims of crime

Jane’s case reveals precisely this structural tension for the state’s agent in ‘everyday’ justice processing. States are routinely confronted by different interests of different individuals and different groups. On one level, the rights claim of any given citizen is of no less or greater strength

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than another; and has no less or greater call on the state than another. Human rights provide an 'interest-balancing' framework through which the state's agents must work (Doak 2003, p. 32); and one through which citizens themselves assess the state's fair treatment of and between them.

The view that accused persons have human rights and victims don't has been allowed to fester in part because justice institutions have not 'seen' their obligations to the human rights of victims. But it has also been because citizens who have been victims of crime have been left to flounder without representation of their independent interests in a space where the state holds all the cards. Victim advocates have failed to bring human rights home (Bettinger-López 2008). Learning the language of human rights, building alliances, implementing due diligence audits,²⁸ submitting amicus briefs,²⁹ and speaking victims' human rights to the state form the beginning of a strategy to check abuse of power.

Notes

- 1 Braithwaite and Pettit discuss their presumption that victim social movements should be resisted but then qualify this by highlighting circumstances where there might be 'power imbalance' between victims and offenders (1994, pp. 773–4). For references on debates about victims and offenders rights, see note 3.
- 2 James Scott was interested in the ways the state 'sees' citizens. Here I am concerned with bringing the state into the view of citizens (see Scott 1998).
- 3 For Australia, see O'Connell (2015), the US see Beloof (2005) and Davis and Mulford (2008), and in the United Kingdom (UK) see Hall (2009, Chapter 2).
- 4 For seminal texts on the experience of domestic violence victims see Buzawa and Buzawa (2003), Temkin and Krahe (2008) on sexual assault, Morgan and Zedner (1992) on child victims, Maguire and Bennett (1982) on residential burglary, and Rock (1994) on homicide. For work on crimes against minorities and hate crimes see Jacobs and Potter (2000) and Memmot et al. (2001).
- 5 See note 3.
- 6 Retrieved on 30 July 2015 from: www.ohchr.org/EN/ProfessionalInterest/Pages/CBSCR.aspx.
- 7 Notwithstanding that there is a wide disparity between the quanta of public funds going specifically to offenders as to victims. An Australian costs of crime report estimated that direct assistance to victims of crime was \$880 m/year and for adult and juvenile offenders was \$1,940 m/year (Mayhew 2003, pp. 69–74).
- 8 The principle of 'legitimate expectations' is used in public and administrative law in order 'to strike a fair balance between the exercise of public functions and the protection of private interests' (Thomas 2000, p. 1). See also Shapland (2000, pp. 147–64).
- 9 See Doak (2003).
- 10 For an overview, see Roberts (2009).
- 11 Retrieved on 30 July 2015 from: www.un.org/documents/ga/res/40/a40r034.htm.
- 12 'Soft laws' are not legally binding on states. However, they can be said to 'reflect the intention of states [and] can be regarded as obligations of cooperation and good faith' (Myjer et al. 2003, pp. 6–7).
- 13 Retrieved on 30 July 2015 from: <http://eur-lex.europa.eu/legal-content/BN/TXT/PDF/?uri=CELEX:32012L0029&from=EN>.
- 14 For example, Doak (2008) and Leverick (2004) discuss case law relevant to victims of crime at the European Court of Human Rights; and Bettinger-López (2008) discusses case law and the Gonzales case at the Inter-American Court of Human Rights.
- 15 Notably a whole instrument for victims of human trafficking, sections within instruments on organized crime, atrocity and slavery as well as provisions within conventions on women, children, persons with a disability and so forth.
- 16 In particular, Articles 64 (protection of witnesses), Article 68 (information), Articles 75, 81 and 82 (assistance, reparations), and Regulations 80 and 81 (OPVC) (Greco 2007).
- 17 *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* (2006). However, the Preamble states that the Guidelines 'do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though

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- different as to their norms'. There does not appear to be a firm agreed definition of a 'gross' violation. It does not assume large-scale and can be systematic, with an element of planning and be of inhumane and degrading character (Geneva Academy 2014, p. 15). Van Boven (2010, p. 2) discusses the meaning of 'gross' as connected to the serious character of the violations and their nature.
- 18 *International Covenant on Civil and Political Rights* (1966) Articles 9 and 14.
- 19 The existence of a right to private prosecution in common law countries is tenuous at best.
- 20 Scope for review of prosecution decisions is extremely narrow. In Australia, see *Maxwell v R* [1996] HCA 46; (1996) 184 CLR 501 (15 March 1996). In contra for the UK, see Spencer (2010, pp. 148–51). Note also a new initiative of the UK CPS on victims' right of review, retrieved on 3 July 2015 from: www.cps.gov.uk/victims_witnesses/victims_right_to_review/index.html.
- 21 The *Human Rights Manual for Prosecutors* produced by the International Association of Prosecutors (IAP) (the 'Prosecutors' Human Rights Manual') specifies that 'on behalf of society' the prosecutor must observe 'the rights of the individual'. In Recommendation (2000) 19 of the Committee of Ministers on the Role of Public Prosecution in the Criminal Justice System, prosecutors 'should take or promote actions to protect their life, safety and privacy' (para. 32) (Myjer et al. 2003).
- 22 In Australia, s. 38 *Charter of Human Rights and Responsibilities* (Victoria 2006) stipulates that public authorities must perform their functions in a manner that is not incompatible with the charter rights. In s. 40B of the *Human Rights Act* (ACT 2004), and in the UK *Human Rights Act* 1998 (s. 6) it is unlawful for a public authority to act in a way which is incompatible with Charter rights.
- 23 McGonigle Lehy cites the European Court of Human Rights judgement in *Foucher v France* (1997) as providing substantive definition to the concept of 'equality of arms' (2011, p. 15). She uses the concept to argue against victim participation in international criminal proceedings (2011, pp. 354–6). In the domestic criminal jurisdiction, see also Hudson (2004, p. 126).
- 24 The 'Prosecutors' Human Rights Manual' does not reference or include the 1985 UN Victims Declaration. The Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (1990) specifies that they 'shall . . . safeguard the rights of the accused' whereas prosecutors 'shall . . . seek to ensure that victims and witnesses are informed of their rights' (s. 4.3) (emphasis added) (Myjer et al. 2003). Sarat and Clarke claim that the exercise of prosecution discretion is 'the language of administration' disguising the logic of power (2008, p. 387).
- 25 Delays in a matter coming to trial are not confined to sexual offences.
- 26 Cited in Leverick (2004, p. 189).
- 27 In *R v NS* (2012 SCC 72) the Canadian Supreme Court had to decide between two sets of Charter rights – a right to religious freedom of a victim witness to wear a *niqab* while testifying and the right of those accused of sexual offences to a fair trial. The Court found in favour of the accused. The dissenting judgement of Abella J. traverses a wider set of questions of relevance to the witness as well as to the wider interests of justice. See <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/12779/index.do> (accessed 11 April 2016).
- 28 For some examples, see UK Equalities and Human Rights Commission (2014).
- 29 The National Crime Victim Law Institute in the United States has developed expertise in this area. Related are 'position papers' on specific rights issues. See, for example, ACT Victims of Crime Commissioner (2015).

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