



IPRT Submission on Heads of Criminal Justice (Victims of Crime) Bill 2015

The Irish Penal Reform Trust (IPRT) is Ireland's leading non-governmental organisation campaigning for the rights of everyone in the penal system, with prison as a last resort. IPRT is committed to reducing imprisonment and the progressive reform of the penal system based on evidence-led policies. IPRT works to achieve its goals through research, raising awareness, building alliances and growing our organisation.

Introduction:

IPRT welcomes the invitation from the Joint Committee on Justice, Defence and Equality for written submissions in relation to General Scheme of the Criminal Justice (Victims of Crime) Bill 2015. We broadly welcome the implementation of the EU Victim's Rights Directive as a positive step forward for reform of Irish law¹. Recognising the harm caused to victims of crime is a central function of the criminal justice system. IPRT believes that it is necessary to protect and promote the human rights of everyone within the penal system, and that this is possible through careful scrutiny and implementation of the proposed Directive. **IPRT believes the protection of victims' rights is not incompatible with, nor detrimental to the rights of sentenced persons provided the general principles of equality and non-discrimination, access to justice and due process are respected.**

Key Issues:

The transposition of the Directive² must take into account all the requirements of the Directive, including Recital 12 which sets out that:

The rights set out in this Directive are without prejudice to the rights of the offender. The term 'offender' refers to a person who has been convicted of a crime. However, for the purposes of this Directive, it also refers to a suspected or accused person before any acknowledgement of guilt or conviction, and it is without prejudice to the presumption of innocence.

¹ The Report of the Strategic Review Group on Penal Policy recommended that "the role of the victim in the criminal justice system be fully acknowledged and looks forward to the full implementation of the EU Directive (2012/29/EU) establishing minimum standards on the rights, supports and protection of victims of crime"
<http://www.justice.ie/en/JELR/Strategic%20Review%20of%20Penal%20Policy.pdf/Files/Strategic%20Review%20of%20Penal%20Policy.pdf>

² <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1421925131614&uri=CELEX:32012L0029>

Likewise Recital 2 of the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*³ stresses ‘the need to promote progress in this area without prejudice to the rights of suspects and offenders’. This safeguard is a clear requirement of the Directive and, in the implementation of the Directive, procedures must be put in place to ensure that this safeguard can be implemented in an effective manner, on a case-by-case basis.

While it is open to Irish legislators to go beyond the minimum requirements of the Directive and to provide more extensive rights to information to the victims, any extension to the provisions of the Directive must be compatible with the rights of the offender and the offender’s family pursuant to the Constitution, the European Convention on Human Rights (ECHR) and the European Social Charter. A convicted person serving a sentence of imprisonment is deprived of his/her constitutional right to personal liberty. Nonetheless, prisoners and offenders continue to be entitled to exercise constitutional, ECHR and Charter rights that do not depend on the continuance of personal liberty, such as personal autonomy, bodily integrity and privacy⁴. Our obligations under the ECHR require that where we legislate for measures that may constitute an interference with the right to privacy, such measures must be properly assessed as to whether they are proportionate and necessary for the prevention of crime or to protect the rights and freedoms of others.

IPRT believes that it is possible to strike the appropriate balance between creating new rights for victims, while also protecting the rights of offenders.

Analysis of Draft Heads

1) Head 2: Interpretation

“Victim” is currently defined in the General Scheme as “a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence perpetrated against him or her” or “a family member of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person’s death”.

IPRT notes that prisoners who have been subject to violent attacks within the prison estate fall within this definition, as will the families of prisoners whose death was directly caused by a criminal offence in prison (for example in the case of Gary Douch, who died as a result of a brutal attack in Mountjoy Prison in August 2006). The Inspector of Prisons’ report on St Patrick’s Institution found that there had been 28 complaints made by prisoners over a 12-month period up to March 2012, 13 of which related to alleged assaults by officers or serious inappropriate action taken by officers⁵. Due to the nature of their confined circumstances, prisoners are also particularly at risk of secondary and repeat victimisation, of intimidation and of retaliation.

³ A/Res/40/34, July 2014, p42 <http://www.un.org/documents/ga/res/40/a40r034.htm>

⁴ See, e.g., *Murray v Ireland* [1985] IR 532, *Creighton v Ireland & Ors* [201] IESC 50, *McDonnell v Governor of Wheatfield Prison & Ors* [2015] IEHC 112)

⁵ He said that “in the majority of these cases I am satisfied that the investigations carried out were flawed, were incomplete and could not be said to accord with best practice”. **NEED PAGE NO. AND DOC TITLE**

In this regard we note Recital 38 of the Directive which recognises that there will be victims who find themselves in special situations of vulnerability:

Persons who are particularly vulnerable or who find themselves in situations that expose them to a particularly high risk of harm, such as persons subjected to repeat violence in close relationships, victims of gender-based violence, or persons who fall victim to other types of crime in a Member State of which they are not nationals or residents, should be provided with specialist support and legal protection. Specialist support services should be based on an integrated and targeted approach which should, in particular, take into account the specific needs of victims, the severity of the harm suffered as a result of a criminal offence, as well as the relationship between victims, offenders, children and their wider social environment. [Emphasis added]

The operationalisation of these requirements of the Bill may require specific procedures adapted to ensure that victims who also happen to be in secure settings (including prisons, child detention schools and other places of detention), and who are therefore exposed to particularly high risk of harm, receive equivalent protection, support and information as victims in the community, and to ensure appropriate measures to prevent secondary victimisation, retaliation or intimidation.

IPRT recommends that victims who also happen to be in secure settings including prisoners receive specialist support and legal protection to ensure appropriate measures to prevent secondary victimisation, retaliation or intimidation.

2) Head 9: Victim Personal Statement

We note that the Bill currently provides for a procedure whereby any victim may provide a written statement setting out how they have been affected by the offence and that the court “shall” take into account the Victim Personal Statement in arriving at sentence. This makes clear that the provisions on Victim Personal Statements as currently drafted in the Bill are intended to create something more than a declaratory mechanism, and will instead constitute a mechanism whereby victim evidence must be taken into account by the sentencing court in coming to their decision as to the appropriate sentence.

Judges already currently weigh the harm done to victims in their sentencing deliberations, and s.5 of the Criminal Justice Act 1993 already provides for “victim impact statements” in appropriate cases. In the absence of broad Sentencing Guidelines, or further guidance on the weight to be attributed to the ‘Victim Personal Statement’, highlighting certain sentencing principles over others may inadvertently give rise to a perception that greater weight ought to be attributed to the consideration of harm to the victim over other important sentencing considerations including proportionality, the circumstances of the offender and the offence, aggravating and mitigating factors, reintegration and rehabilitation.

IPRT recommends inserting the words “in accordance with the ordinary principles of sentencing” in Head 9(5)

IPRT believes that it is vital that the current express procedural protections set out in this Head (namely the exclusion of any prejudicial comment on the offender or comment on the appropriate sentence to be imposed and the service of the statement in advance of sentence to both the court of trial and defence counsel) are preserved in future iterations of the legislation. It is helpful to note that In Western Australia, where Victim Impact Statements have been put on a statutory footing, the relevant legislation contains an express provision⁶ recognising the discretion of the Court to rule the whole or any part of the Victim Impact Statement inadmissible.

Further, the existing provision on the receipt of “*victim impact evidence*” (contained in s.5 Criminal Justice Act 1993) has been criticised for its failure to specify clearly who is responsible for the preparation of the report. While Head 9 does specify that the victim shall prepare the statement and it will be the responsibility of Gardaí to forward it to the member having charge of the prosecution or the DPP, we consider that the view of Tom O’Malley on s.5 evidence equally applies to the proposed “*victim personal statement evidence*” - namely that “*it would be preferable to have it assigned to an independent agency not otherwise associated with the prosecution or defence*”.⁷

IPRT recommends the inclusion of a provision that the court shall rule “all or part of the Victim Impact Statement inadmissible where the content contains comment prejudicial to the offender or any comment or opinion on appropriate sentence to be imposed”.

3) Heads 10, 18 & 25: Provision of Information to Victims and Families concerning release, escape etc.

We note that Article 6(5) of the Directive provides that victims shall be notified in the event of the offender’s release or escape from detention, and notification should occur with no unnecessary delay. Article 6(6) of the Directive provides that on request this information ought to be provided “*at least in cases where there is a danger or an identified risk of harm to [victims], unless there is an identified risk of harm to the offender which would result from the notification*”.

This is expanded in Paragraph 32 of the Preamble which provides “*The reference to ‘identified risk of harm to the victims’ should cover such factors as the nature and severity of the crime and the risk of retaliation. Therefore, it should not be applied to those situations where minor offences were committed and thus where there is only a slight risk of harm to the victim.*”

⁶ Sentencing Act 1995 (W Australia) s.26(2)

⁷ O’Malley, Sentencing Law and Practice, 2000 at page 357

Page 19 of the *DG Justice Guidance Document related to the transposition and implementation of Directive*⁸ provides further guidance on Member States' obligations when determining whether to disclose the offender's release:

*"As the offender may be at risk of reprisal (and may thus also need protection), the authorities must, on a case-by-case basis, strike a proper balance between the safety of both the offender and the victim when applying this provision."*⁹

Paragraph 68 of the Preamble to the Directive provides that:

Personal data processed when implementing this Directive should be protected in accordance with Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (14) and in accordance with the principles laid down in the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which all Member States have ratified.

Or in simpler terms

*"When providing information to victims, there must be compliance with data protection rules."*¹⁰

As such, there is a clear obligation on Member States to put in place procedures whereby, at least in cases where there is a danger or identifiable risk to the victim, the victim is offered the opportunity to be notified, without unnecessary delay, when the offender is released or escapes from detention. Equally, there is a clear obligation on Member States to consider the rights of the offender when deciding whether to disclose this information, and, in particular, there is an obligation to not disclose information on the release or escape of an offender where such disclosure constitutes an identifiable risk to the offender. In our view, disclosure will only be deemed necessary where an identifiable risk to the victim exists, and that risk may be mitigated by the provision of the information. The current provisions in Head 18(1)(a) (b) and (e) provide for a limited disclosure of information to the victim and their family insofar as they provide for disclosure of the expected release date (or any escape) of an offender on request.

In respect of provision of information on the issues of (c) transfer of the prisoner to another prison and (d) *"Parole Board hearings and related decisions"* IPRT queries the nature and extent of the information to be provided. At present, family members of prisoners are not consistently notified on transfer of their own family members between prisons.

⁸ *DG Justice Guidance Document related to the transposition and implementation of Directive*
http://ec.europa.eu/justice/criminal/files/victims/guidance_victims_rights_directive_en.pdf

⁹ Ibid. at page 19

¹⁰ Ibid page 20

Information related to Parole Board hearings and sentence progression can be extremely sensitive and may include medical, psychological and personal matters. It is unclear for what purpose such information would be disclosed. If the disclosure were limited to the date, time and outcome of the hearing, that may be proportionate in appropriate cases.

IPRT considers that the disclosure of more detailed information on the progress of the offender in prison, etc. would be disproportionate in the absence of a prisoner's consent for such information to be disclosed, and may amount to a breach of rights to privacy.

Rehabilitation & Reintegration

The importance of successful reintegration post imprisonment to prevent recidivism is outlined in the Irish Prison Service study on recidivism (2013).¹ The Prison Service Three Year Strategic Plan (2012-2015)² includes a clear commitment to the management of prisoner sentences to facilitate improved resettlement and reintegration outcomes for prisoners. IPRT is therefore concerned that the right of offenders and their families to privacy in their rehabilitation and reintegration must be upheld. Any provisions that allow for disclosure of personal information about an offender post-release must be carefully assessed to ensure that it does not facilitate harassment, retaliation or intimidation of those who have served their sentence, or of their families, or interfere with an offender's efforts to continue their rehabilitation in the community.

Impact on Family

Children and families coping with imprisonment are often described as the 'hidden' victims of the penal system because they must endure their own sentence, despite not having perpetrated any crime¹¹. Paragraph 20 of the Preamble states that Member States should not be obliged to provide information where disclosure of that information could "harm a given ... person". A "given ... person" includes the offender and the offender's family. It is further confirmed at paragraph 66 of the Preamble that the Directive respects fundamental human rights and observes the principles of the Charter. It is further noted that the European Court of Justice¹² held that the provisions of the Framework Decision (the precursor to the Directive) "must be interpreted in such a way that fundamental rights, including in particular the right to respect for family and private life, as stated in Article 7 of the Charter of Fundamental Rights of the European Union, are respected". Finally, the DG Justice Guidance Document related to the transposition and implementation of the Directive further confirms that fundamental rights and the Charter must be respected when implementing the Directive.

¹¹ See Further, *Picking Up the Pieces: The Rights and Needs of Children and Families Affected by Imprisonment*, IPRT, 2012 http://www.iprt.ie/files/IPRT_Children_of_Imprisoned_Parents2.pdf

¹² In Joined Cases C-483/09 and C-1/10 Magette Gueye and Valentin Salmeron Sanchez (CJEU, Judgment 6 June 2013, at 54-55,

Influence on Decision Making

The Parole Board make decisions in respect of transfer, temporary release and conditions attached to release, as well as early release. Temporary release is intended as a tool to aid the rehabilitation of offenders back into the community, and has been proven to aid the desistance process post-release. IPRT believes that a more transparent and structured system of temporary release for prisoners will incentivise meaningful engagement with services and regimes inside prison and support more successful reintegration of prisoners back into the community. Alongside our concerns about the sharing of offender's personal information as detailed above, IPRT would welcome confirmation that the Bill does not propose consultation with victims in respect of individual release decisions – it is vital that the discretion exercised by any person or body authorized to release an offender into the community is exercised independently.

IPRT also notes that the Canadian Victims Bill of Rights expressly provides that the provisions of the Bill will not “*interfere with the discretion that may be exercised by any person or body authorized to release an offender into the community*”. This is an important and appropriate provision which would clarify the limits of victim input into decisions on parole, temporary release, transfer or community return. Whilst acknowledging the impact of serious crime, which may be highly distressing and upsetting or even devastating for a victim or their family, it is important that those agencies tasked with making decisions on prisoner release are independent in their assessment of rehabilitation, risk and timing of release.

IPRT recommends that a clear definition of ‘identifiable risk’ be put in place, as well as a clear process and criteria by which such risk is to be assessed. Ideally, this would involve the victim and/or offender being notified of the process and being invited to make a submission on whether there is an identifiable risk to them that may be presented by the release of the prisoner and/or the disclosure of the information, as appropriate. The assessment can then be carried out on foot of that information.

IPRT strongly cautions against any proposed expansion of the categories of information listed under Head 18. To this end we welcome the provision contained in Head 25 which makes clear that “nothing in this Act shall be construed as requiring any person, body or agency to disclose any information the disclosure of which could....endanger the personal safety of any person”. We recommend that a provision be added at Head 25(1)(e):

(e) prejudice the reintegration and rehabilitation of any offender or their family members

IPRT believes that the transposition of the Directive should be informed by evidence based on best practice of what works to support victims while also supporting the rehabilitation and re-integration of offenders.

IPRT believes that this process requires further clarity in relation to how the victim inclusion will impact on temporary release decisions with regard to the weighting of the victim's input.

4) Head 20: Training

We welcome the inclusion of the Irish Prison Service as a body required to provide training to staff members who have contacts with victims in the course of their official duties.

5) Head (28) Restorative Justice Schemes:

Restorative Justice is defined as a “*victim sensitive approach to criminal offending*”¹³. In order for restorative justice to have an effective impact at a localised level, IPRT believes that it is fundamental that quality control is implemented and sustained throughout the entire process, ensuring the protection of all involved. Le Chéile Mentoring Youth Justice Support Services is a strong example of a restorative justice scheme which facilitates victim-offender mediation programmes along with restorative justice practices at a localised level.

The Report of the Strategic Review Group on Penal Policy 2014, the Oireachtas Joint Committee on Justice, Equality, Defence and Women’s Rights Report on Restorative Justice 2007 and the National Commission on Restorative Justice 2009 all recognise the positive impact which restorative justice can have for appropriate participants. In their recent study ‘*Building Bridges*’¹⁴, the Le Chéile Annual Report 2013² notes that an evaluation of pre and post victim empathy scales showed an average of 22% increase in victim empathy levels post restorative justice intervention with 100% of victims and offenders feeling that their voices were heard throughout the process.

Le Chéile also examined the economic benefits of restorative justice practices by conducting a social return on investment analysis which found that every €1 invested in the Le Chéile restorative justice programme returned approximately €2.92 in social value¹⁵.

The National Commission on Restorative Justice found that

“Legislation can also specify the standing of a restorative programme within the larger criminal justice system, defining links with the key elements of the criminal justice process. This should ensure the necessary legitimacy to operate effectively. It can provide a framework in which the programme can operate in a predictable manner, so decisions are not open to arbitrary considerations. Furthermore, legislation can be used to secure certainty in the way cases are

¹³ National Commission on Restorative Justice, Final Report, 2009

<http://www.justice.ie/en/JELR/NCRJ%20Final%20Report.pdf/Files/NCRJ%20Final%20Report.pdf>

⁴ Le Cheile: Mentoring Youth Annual Report (2013) <http://www.lecheile.ie/wp-content/uploads/2014/08/Le-Ch%C3%A9ile-Mentoring-Youth-Justice-Support-Services-Annual-Report-2013-web-version.pdf> (at p 11)

⁵ IPRT Position Paper 9: Reform of Remission, Temporary Release and Parole, 2012.

http://www.iprt.ie/files/IPRT_Position_Paper_Reform_of_Remision_TR_Parole_Oct_2012.pdf

¹⁵ <http://www.lecheile.ie/wp-content/uploads/2015/05/Le-Cheile-Web.pdf> (at p 17)

referred for restorative interventions, so they are appropriate and well-targeted. It also can serve as an essential mechanism to ensure that all of the necessary legal safeguards are in place throughout the process for all of those concerned.”

IPRT welcomes Head 28 as a starting point for placing adult restorative justice practices on a statutory footing. IPRT recommends that the committee consult with organisations with practical expertise in the area of restorative justice with a view to incorporating further safeguards into the legislation which may include quality control, adherence to best practice in restorative process, core values of respect and fairness, balance of participation and impartiality of facilitators. IPRT believes that the legislation should be strengthened by incorporating suggestions for restorative justice practices at a localised level in order to reach more victims of crime

Conclusions and Recommendations:

- IPRT believes that the Victims’ Rights Directive is a positive move in the development of victims’ rights in Ireland. Domestic legislation on victims’ rights and entitlements is urgently needed, considering there is currently no binding legislation in regards to victims’ entitlements in Ireland.
- IPRT believes the protection of victims’ rights is neither incompatible nor detrimental to the rights of sentenced persons.
- In the transposition of the Directive into Irish law, the general principles of equality and non-discrimination, access to justice and due process must be respected.
- The transposition must take into account all the requirements of the Directive, including paragraph 12 which sets out that the rights set out in the Directive are without prejudice to the rights of the offender.
- Despite IPRT’s strong endorsement of the Directive, we recommend Government take a cautious approach to any proposals to extend provisions *beyond* those laid out in the Directive.
- A detailed human rights impact assessment should be carried out in advance of the extension of any such proposals in order to avoid potential breaches of Ireland’s national and international human rights obligations.
- As recommended by the Commission, implementation of the Directive will benefit from involving all relevant stakeholders, including civil society.
- The transposition of the Directive should be informed by international evidence and best practice of what works to support victims while also supporting rehabilitation and reduction in reoffending.