

## THE VICTIMS' DIRECTIVE AND THE PROSECUTOR

### Directive 2012/29/EU establishing Minimum Standards on the Rights, Supports and Protections of Victims of Crime

The purpose of the Directive is to improve the rights, support, protection and participation of victims in criminal proceedings. It is an essential part of a package of measures which aims to strengthen the rights of victims of crime so that any victim can rely on the same basic level of rights whatever their nationality and wherever in the EU the crime takes place. The Commission have stated:

*“The goal is to improve the real, day-to-day situation of millions of victims of crime across Europe to the greatest extent possible”*

The core principle of the Directive is the *“role of the victim of the in the relevant criminal justice system”*. The victim's formal role in national systems will determine the approach taken in implementing some of the key rights. Since this role varies significantly between Member States the implementation will be different to some extent in each Member State. Member States are urged to establish this precise role (e.g. civil party, witness, private prosecutor, no formal role) in drafting the implementing legislation.

This paper looks at the following issues in relation to the Directive:

- 1) The core aim of the Directive: it places victims at the centre of the criminal process.
- 2) The consequences for Irish law in relation to the implementation of the Directive.

The Directive sets out minimum standards only and Member States may provide for enhanced rights for victims under their own national law. The Directive is required by its own terms to be transposed into Irish Law by 16 November 2015. This includes any relevant laws, regulations and administrative provisions through which it is to be implemented. The Heads of Bill have been published and it must be doubtful whether the legislation will be in place by the due date. DG Justice of the Commission have produced a Guide to the Directive which is not legally binding in its interpretations.

- 3) The Directive guarantees rights to victims throughout the course of the criminal investigation and criminal process and this paper will look at the principal rights involved.

### **Placing victims at the centre of the criminal justice system**

The Directive applies to victims of crime who are defined as being:-

- (1) A natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence and

- (2) Family members 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.

Article 1(1) of the Directive is in the following terms and sets out the core objectives:

*"The purpose of this directive is to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings."*

*"Member States shall ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with victims' support or restorative justice services or a competent authority, operating within the context of criminal proceedings. The rights set out in this directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status."*

Victims will be placed at the centre of the criminal process by relevance to the following principles:

- (a) There will be a tailored approach to victims in order to identify specific protection needs. This is guaranteed by Article 22. The approach envisaged is as follows: A timely and individual assessment will be made to identify specific protection needs. The purpose of this is to determine and to what extent victims would benefit from special measures due to their particular vulnerability to secondary and repeat victimisation who come in contact with the criminal justice system or victims of specific gender or sex-related crimes where victims are subject to repeat victimisation by the criminal process. Thus the first step is whether special measures are required. The second step is to consider what these needs should be.

It is to be noted that migrants and non-citizens are not to be discriminated against in the criminal justice system with respect to their residence status. Rights are not conditional on legal residence status. In relation to children, a child sensitive approach is mandated: A child's best interests are the primary considerations and children are presumed to require special measures.

### **The Victims Directive as a provision of EU law**

It is important to consider the consequences of the Directive being a provision of EU law.

- a) If national law is in conflict with EU law, national law should be dis-applied. In this regard, EU law can be contrasted with the ECHR jurisprudence which has been incorporated into Irish law at a sub-constitutional level. ECHR rights cannot be directly relied upon in the Irish courts.
- b) The matters coming within the scope of the Directive are now matters of EU law. The Charter of Fundamental Rights of the European Union applies to Member

States when implementing EU law. So do the other fundamental rights guaranteed by EU law such as principles of equivalence and effectiveness and other fundamental rights guaranteed by constitutional traditions of other Member States.

- c) The interpretation of the Directive and scope of rights guaranteed by it will ultimately be a matter for the Court of Justice of the European Union. As will questions as to whether Ireland has properly transposed the provisions of the Directive into Irish law.
- d) Scope of Right to Privacy in Criminal Process.

As an example of the potential importance of the victim gaining EU rights in the criminal process, it is interesting to look at the Right to Privacy.

Article 7 of the Charter of Fundamental Rights guarantees the right to privacy. (This is equivalent in terms to Article 8 of the ECHR). Thus in the trial process, Member States must ensure not only that an individual's constitutional rights but also that an individual's EU rights are protected in the trial process. Courts will be bound to ensure there is no breach of an individual's rights including their rights under the Charter. It is a matter for national courts to give effect to EU rights and may do so in various ways under their own constitutional traditions and in that manner vindicate EU rights. However a recent ECHR case may be of interest.

Y v. Slovenia (application no. 41107/10, judgment of the Fifth Chamber of European Court of Human Rights of the 28<sup>th</sup> August 2014. (Judges from Liechtenstein, Germany, Slovenia, Ukraine, France, Sweden and the Czech Republic).

The case originated in Slovenia. The applicant alleges that at the age of 14 she was repeatedly sexually assaulted by a family friend who was 55 years of age at the time. She was subjected to an extremely robust cross-examination by the accused personally. The relevant part of the judgment concerns the manner in which the European Court of Human Rights intervened to hold that the cross-examination was in breach of the applicant's right to privacy under Article 8 of the Convention. The court referred to the Victims' Directive during the course of the judgment. The court indicated the need to strike a balance between the defence rights and the rights of the applicant who was the complainant:

*"In this light, it must be reiterated that the interests of a fair trial require the defence to be provided an opportunity to cross-examine the applicant, who by that time was no longer a minor. Nevertheless, it needs to be determined whether the manner in which the applicant was questioned struck a fair balance between her personal integrity and X's rights of defence." (paragraph 105)*

*“The court considers that cross-examination should not be used as a means of intimidating or humiliating witnesses. In this connection, the court is of the view that some of X’s questions and remarks suggesting, without any evidentiary basis, that the applicant could cry on cue in order to manipulate people, that her distress might be eased by having dinner with him or that she had confided in him her desire to dominate men were not aimed only at attacking the applicant’s credibility, but were also meant to degrade her character.”*

The Court held by six votes to one that there had been a violation of Article 8.

Of course Judges presiding at Irish criminal trials are under a constitutional obligation to ensure a fair trial and excessively oppressive or irrelevant cross-examination will not be permitted. Irish Courts will continue to observe fairness in Irish trials and perhaps will be more mindful that this fairness is grounded not merely in the trial process itself but also in the rights of victims. It should also be stressed that the decision was not one of the Grand Chamber of the ECHR and might not be followed by the Court of Justice of the European Union. It is also useful to look at the partly dissenting opinion of Judge Yudkivska of Ukraine. She referred to the origins of cross-examination and stated:

*“The right to confrontation has a long and rich history dating back to Roman law and has become widely developed in common law systems where its crux lies in a belief that ‘it is always more difficult to tell a lie about a person ‘to his face’ than behind his back’ and ‘even if the lie is told it will often be told less convincingly’.*

She went on to say that this right was explained by Justice Antonin Scalia in the US Supreme Court’s landmark judgment of **Coy v. Iowa** 487 US 1012 (1988). In that judgment Justice Scalia traced the history of the right to confront as a “*face to face encounter*” illustrated in Shakespeare’s Richard II. Justice Scalia indicated that Shakespeare was describing the root meaning of confrontation when he had Richard II say:

*“Then call them to our presence – face to face, and  
frowning brow to brow, ourselves will hear the accuser  
and the accused freely speak.”*

Judge Yudkivska believed that the aim of the “*offensive insinuations*” was to challenge the applicant’s credibility and to enable the judge to observe her demeanour under this provocative questioning which in her view was the crux of any confrontation in the courtroom.

The court acknowledged that it was first and foremost the responsibility of the presiding judge to ensure that the respect for the applicant’s personal integrity was adequate to protect it at the trial.

Whatever significance this case may or may not have in the Irish context, it is certainly the case that the CJEU will now be tasked with the ultimate interpretation of the scope of the privacy rights guaranteed by EU law. It may also be relevant to note that the Criminal Justice (Sexual Offences) Bill 2015 restricts accused's right to personally cross-examine minor complainants (S.14).

### **Specific rights guaranteed to victims by Directive**

#### **Article 6: The victim's right to receive information about the case**

- (1) Victims must be notified "*without any unnecessary delay*" that they have the right to receive the following information on request:-
- (i) Any decision not to proceed with or to end an investigation or not to prosecute the offender and
  - (ii) The time and place of the trial, and the nature of the charges against the offender.

The information they are entitled to receive includes "*reasons or a brief summary of reasons*" for the decision not to prosecute. In relation to reasons, transparency in matters of public law is generally to be welcomed. The decision not to prosecute requires the decision maker to take account of and weigh up a number of factors set out in the Prosecutors' Guidelines to be found on the DPP's website. Thus if a decision maker has reasons for a decision it may not be a great leap to suggest that reasons should be furnished. However it is a delicate task: regard has to be had to the rights of the accused to the presumption of innocence and his good name and the right of complainants to their good names. A complainant may put forward a *prima facie* case which falls short of the requirement that the prosecutor be satisfied that the evidence is sufficiently strong to justify prosecuting. Thus there is a gap between a *prima facie* case and a case where the evidence is sufficient to justify a prosecution. Even if this gap is overcome, the decision maker must consider whether the public interest favours a prosecution which victims may find hard to fathom. It may be particularly hard to give reasons where victims are vulnerable without the suggestion that they might not be believed by the jury, and thus potentially impugn their credibility.

#### **Article 7: The right to interpretation and translation**

The victim has the right on request to an interpreter in accordance with their role in the relevant criminal justice system including during police questioning and their active participation in court hearings. Modern technology can be used (e.g. interpretation by telephone in an urgent situation such as a Garda station) unless that is in breach of the accused's rights.

Also on request victims are entitled to:

*“translations of information essential to the exercise of their rights in criminal proceedings in a language they understand, free of charge, to the extent that such information is made available to victims. Translations of such information shall include at least any decision ending the criminal proceedings related to the criminal offence ... and on request, reasons or a brief summary of reasons for such decision (except in the case of a jury decision).*”

*7(7) Member States shall ensure that the competent authority assesses whether victims need interpretation or translation. Victims may challenge a decision not to provide interpretation or translation - the procedural rules for such a challenge shall be determined by national law.”*

Head 19 of the Heads of Bill currently propose to transpose this right in the following manner:

*“The Minister may, by regulation made under this Act, prescribe interpretation, translation or other linguistic assistance to be provided to victims which is necessary to enable victims to understand and be understood in their participation in the criminal justice process”.*

It will be seen that under Head 19 the Minister is not obliged to provide for the right to an interpreter which may not fully respect the scope of the guaranteed right.

**Article 10; The right to be heard.**

*“Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence. ... The procedural rules under which victims may be heard during criminal proceedings and may provide evidence shall be determined by national law.”*

Victim Impact Statements already exist in cases specified in Section 5 of the Criminal Justice Act 1993 and extended by the Criminal Procedure Act 2010.

The proposed manner of transposing this provision is to allow for a Victim Personal Statement which may be made any time after the making of a complaint. Head 9 provides that in all cases not covered by the Victim Impact Statement procedure, a victim may provide a statement in writing known as a Victim Personal Statement.

This statement may be given at any time after a complaint has been made. There does not appear to be any requirement to await a decision as to whether or not a prosecution will be brought. The Heads of Bill provide that in determining the sentence the court shall take this victim personal statement into account. Thus there may in the future be two parallel procedures depending on whether the crime is one where a Victim Impact Statement is provided for or where a Victim Personal Statement is provided for.

### **Article 11: Rights in the event of a decision not to prosecute**

Victims will now have the right to a review of the decision not to prosecute. This will be carried out by a person other than the person who made the first decision. There is a current policy in that regard set out in the DPP's website which is framed in discretionary terms. It will now be mandatory.

Head 14 of the Bill proposes that Article 11 will apply to all offences Head 14(3) states:

*“Where the decision not to prosecute is made by the Director of Public Prosecutions or by one of the Director’s professional officers, the review may be carried out by the Director or by one of the Director’s professional officers nominated by the Director, and who is independent of the original decision not to prosecute.”*

This paper has outlined some of the challenges Ireland faces in implementing the Directive. No doubt other challenges remain.

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