



World Society of Victimology

In Consultative Status with the
United Nations ECOSOC and Council of Europe
The Office of the Secretary General

Your Reference: www.ohchr.org/EN/HRBodies/CCPR/Pages/DGCArticle9.aspx

30 May 2014

Office of the United Nations High Commissioner for Human Rights
Geneva, Switzerland

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Dear Sir(s) / Madam(s),

Consultation - UN Human Rights Committee — Draft General Comment — Liberty and Security of the Person

I make this submission as Secretary-General for the World Society of Victimology and as Commissioner for Victims' Rights, South Australia in reply to the 'Consultation – UN Human Rights Committee – Draft General Comment: Liberty and Security of the Person'. Nothing in this submission should be taken to be the opinion or perspective of any Government of Australia.

Please note this submission is premised on our assertion that victims' rights are human rights¹. In *RK v Mirik & Mirik*, for instance, Bell J outlined the association between human rights and victims' rights.

¹ *R K v Mirik & Mirik [2009] VSC 14 (2 February 2009)* See also: *Knight v Corrections Victoria*;

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He said,

“The bedrock value is that every person without exception has a unique dignity which is the common concern of humanity and the general function of the law to respect and protect. As Brennan J said in *Marion’s Case*,² “[h]uman dignity is a value common to our municipal law and to international instruments relating to human rights”, to which I would add certain pertinent legislation. It finds common law expression in the “fundamental right to personal inviolability ... which underscores the principles of assault, both criminal and civil”.³ It finds international law expression in the International Covenant on Civil and Political Rights⁴ which (among other things) protects “the right to ... security of the person”.⁵ It finds legislative expression in (for example) the Crimes Act 1958 and now also in the Charter of Human Rights and Responsibilities Act 2006, which gives several recognition to the human right to personal integrity.⁶ More and more it has found expression in legislation allowing criminal courts to order offenders to pay civil compensation to victims of crime.”⁷

Human rights are those basic rights and freedoms to which all people are entitled⁸, so it follows that victims’ rights are fundamental entitlements for all victims of crime. Further, under

Knigh t v Anderson [2009] VSC 607 (18 December 2009)

² *Secretary, Department of Health and Community Services v JWB and SMB (Marion’s Case)* (1991-1992) 175 CLR 218, 266 per Brennan J.

³ *Ibid*, 253 per Mason CJ, Dawson, Toohey and Gaudron JJ; see also *Collins v Wilcock* [1984] 1 WLR 1172, 1177 per Robert Goff LJ: “The fundamental principle, plain and incontestable, is that every person’s body is inviolate”.

⁴ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁵ Article 9.

⁶ See, for example, the right not to be treated in a degrading way (s 10(b)), the right not to be subjected to medical treatment without full, free and informed consent (s 19(c)), the right not to have your privacy unlawfully or arbitrarily interfered with (s 13(a)) and the right of every person to security (s 21(1)).

⁷ *R K v Mirik & Mirik [2009] VSC 14 (2 February 2009) @ para5*

⁸ Human Rights instruments include:

- *Universal Declaration of Human Rights (1948)*
- *International Covenant on Civil and Political Rights (1966)*
- *International Covenant on Economic, Social and Cultural Rights (1966)*
- *Optional Protocol to the International Covenant on Civil and Political Rights*

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international law a person's status as a victim is not determined by whether the suspect is known, apprehended, prosecuted, convicted or acquitted.

In 1985, the United Nations General Assembly adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. As Justice Bell commented, "A declaration is not domestic law. But a declaration can assist the courts to appreciate the significance of fundamental values,⁹ especially the unique dignity of every individual inherent in the human rights of victims of crime."¹⁰

The declaration states that victims are entitled to fair treatment and access to the mechanisms of justice, and generally draws attention to the need for victims' rights in the criminal justice process¹¹. It also indicates that victims should be entitled to legal representation, which is a principle of justice reiterated by the General Assembly in late December 2012 when the Assembly endorsed the Principles and Guidelines on Access to Legal Aid in the Criminal Justice System.

Other United Nations instruments on victims' rights include:

- The International Covenant on Civil and Political Rights (ICCPR);
- The Convention on the Elimination of Discrimination of Women (CEDAW);
- The Convention on the Rights of the Child (CRC).¹²

The ICCPR, for example, incorporates the following provisions related to victims' rights:

- Rights to be protected from harm, which impose obligations on governments to have effective criminal justice systems (Article 6.1, Article 7, and Article 17)

• *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*

⁹ *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1991-1992) 175 CLR 218, 266 per Brennan J.

¹⁰ *R K v Mirik & Mirik [2009] VSC 14 (2 February 2009) @ para 6*. On implementation of the declaration see UN ODCPP *Handbook on Justice for Victims* (1999) and *Guide for Policy Makers in the implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999).

¹¹ A declaration is not legally binding but carries moral weight because it is adopted by the international community.

¹² A convention (sometimes called a covenant) is a binding treaty, coming into force upon ratification by a certain number of States. Article 26 of the *Vienna Convention on the Law of Treaties* provides that: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

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- Rights to be recognised by and treated equally before the law (Articles 2, 3, 16, and 26)
- A right of non-discrimination (Article 2)
- Rights to a remedy and to access to justice (Articles 2 and 14)
- Due process rights (Articles 9, 10, 14, and 15)

Mindful of the pointers above, the World Society of Victimology and I assert that victims' rights are not always respected and victims are still not considered properly as an equal in the criminal justice process; especially in those nations that have inherited the adversarial process. As Justice Cummins of the Victoria Supreme Court (Australia) said in sentencing the convicted murderer *Dupas*, "I do not think the law has given sufficient attention to the rights of victims". He added that there should be a fairer balance between the rights of offenders and the rights of victims.

Regarding such balance British Lord Steyn (Attorney-General's Reference (No 3 of 1999) [2001] 2 AC 91) referred to the triangulation of interests that now exist in criminal proceedings: the victim, the defendant and the state.

Lord Steyn stated,

"It must be borne in mind that respect for the privacy of the defendants is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public."

Thus, there is strong obligation to balance these interests in pursuit of a just criminal justice system.

Although much has been achieved since proclamation universal human rights and fundamental freedoms, the even more difficult task is transforming these into action, including establishing legal obligations on the part of all nation-states. A considerable volume of literature on the operation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, for example, highlights the patchy implementation of that Declaration throughout the world and that too many victims are still denied their rights. With this in mind, the World Society of Victimology and its partners (including Tilburg University's International Victimology Research Centre (INTERVICT); Tokiwa University's

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International Victimology Institute (TIVI) and me as Commissioner for Victims' Rights) drafted a model 'Convention on Basic Principles of Justice for Victims of Crime and Abuse of Power' (see enclosed), which has been the subject of an expert meeting, a symposium and an ancillary meeting at the Crime Congress in 2010. The draft 'Convention' draws from human rights instruments both language and the necessity to have a mechanism to monitor implementation and compliance, as well as to hold nation-states accountable for acts and omissions. Unfortunately, the draft 'Convention' has not attracted keen support in either the Commission or Congress on Crime and Criminal Justice. Conversely, ongoing discussion of the implementation of the existing Declaration augmented by debate on the draft model 'Convention' have contributed to keeping victims' rights foremost on the agendas of the UNODC — for which victims have benefitted and I am thankful.

Promotion of human rights and fundamental freedoms for all is a paramount concern. Everyone has the right to life, liberty and security of person. Yet annually millions of people have their blood shed, their property taken and too often their dignity left in tatters . The plight of victims should not be overlooked in the deliberations of the Human Rights Committee on Article 9. Rather, victims should be at "the centre of human rights thinking. No other group of individuals has a more sacred place in human rights law" . Thus, any comment emanating from such deliberations should be fair and just for 'everyone': the wronged and the suspected wrong-doer, as well as the guilty wrong-doer.

Should you require more further information of me as Secretary-General or as Commissioner for Victims' Rights, my email address is voc@agd.sa.gov.au, P +61-8-82071969 (Australian Central Standard Time).

Thank you for your assistance.

Yours faithfully,

A handwritten signature in black ink that reads "Michael O'Connell". The signature is written in a cursive style with a long, sweeping underline that extends to the left.

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WSV Secretary General

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