

## **Victims' Bill of Rights – Bill C-32**

### **Addressing the Needs of Victims through the Criminal Justice System**

We all agree that both the direct and indirect victims of crime deserve society's help and support. Victims want services to help them come to terms with their trauma, loss, and grief so they can move on. Government supported services, compensation for their injuries, and measures to prevent both the occurrence and reoccurrence of crime are important to victims of illegal action. Recently, the Victims Bill of Rights has proposed to provide this support not by establishing government programs for victims' assistance but instead by giving victims legal rights and a role at the heart of the justice system. But this role for victims represents a departure from the principles of criminal justice embedded in our legal tradition and protected by the Charter of Rights and Freedoms.

Progress in the development of criminal law was marked by an evolution away from private disputes between victims and alleged wrongdoers and toward the administration of justice by the state. As mentioned in October 27, 2013 opinion piece in the Star ([http://www.thestar.com/opinion/commentary/2013/10/27/conservative\\_victims\\_bill\\_of\\_rights\\_smacks\\_of\\_medieval\\_justice.html](http://www.thestar.com/opinion/commentary/2013/10/27/conservative_victims_bill_of_rights_smacks_of_medieval_justice.html)) "one of the greatest innovations of the criminal justice system was the realization that the wrongful injuries people inflict are primarily offences against the public moral order represented by the Queen, not just particular harms to individuals in a given situation." While individuals could sue in civil cases to recover for losses resulting from wrongdoing, it was the state that ensured that punishments for wrongdoing responded to criminal harm as an injury to the values of a stable, secure society. In this role, the duty of the state was to punish the criminal harm to the victim while still respecting the basic humanity of the criminal. This second branch of the state's duty secured the rights to fair trial and appropriate punishment on conviction for the accused, which are the hallmark of the just society. The era of the blood feud and the personal vendetta was over.

The extent to which the present Victims Bill's 'rights' will in fact put victims at the heart of the criminal justice system may be illusory. Bill C-32 is clear that the only parties in the criminal justice system will continue to be the accused and the Queen. The Bill also provides that the rights of victims will be applied in a reasonable manner so as not to disrupt the "proper administration of justice" by causing delay or interfering with the discretion of the criminal justice system decision makers. Victims are expressly not made parties, interveners, or even observers in any criminal justice proceedings. No right to seek a judicial remedy, no claim for

damages, and no appeal arises if victims' rights are infringed. Expectations by victims about their entitlements from the justice and corrections system may well exceed what already overburdened justice and correction officials are able to provide and victims may well feel disappointed by their newly acquired rights. The only remedy provided in the Bill for that disappointment is the capacity to file a complaint. In view of all these limitations, victims may well come to question whether they received a Bill of Rights or a Bill of Goods.

### Definition of Victim

'Victim' is defined broadly in the Bill as an "individual who has suffered physical or emotional harm, property damage or economic loss as a result of the commission or alleged commission of an offence". The offender is expressly excluded but his or her family members who may have incurred harm or damage as a result of the crime are not. If the victim is deceased or incapacitated, the Bill specifies the next of kin or care provider who may exercise the victim's rights. While the definition of victims refers to 'individuals', 'communities' are also authorized to make victim impact statements. It is unclear what collection of interests will constitute a 'community' and whether community victim impact statements will be considered at all stages of the criminal justice process or just at sentencing.

### Rights for Victims

Bill C-32 includes four categories of rights for victims relating to information, protection, participation, and restitution. Generally, providing information about the criminal justice and corrections system and ensuring adequate protection for victims in the criminal justice system is desirable as long as they do not infringe the accused's ability to make full answer and defense or privacy rights. Since it is the proposed rights to participation and to restitution that pose the most significant challenges to maintaining a fair and effective justice and corrections system, we will concentrate on those.

#### Participation Rights

The victim's participation rights include the right to convey and have considered his or her views about decisions to be made relating to the investigation, prosecution, and adjudication of the alleged offence and also regarding the corrections and conditional release process. As written, this appears to include the right to provide victim impact statements at each stage which will have to be taken into account.

Unavoidably, these new procedures will cause delays. Despite falling crime rates, the criminal justice system is already overburdened and slow. Long waiting times are not only difficult for those awaiting trial, particularly if they are in detained in remand facilities, but they can violate rights to a speedy trial resulting in an inability to bring an accused to justice. Decision makers in

the justice system try to move cases toward resolution as efficiently and fairly as possible. Not only will these decision makers be required to provide information to victims who request it, but they will now be asked to consider the views of the victims about the decisions they are required to make. The decision maker will also be compelled to receive and consider a victim impact statement. While this would take time even if there were only one victim, it would become quickly unmanageable with complex cases involving multiple victims, such as a sophisticated fraud or terrorist incidents. If the stated participation rights of victims lead to costly delays or result in prosecutions having to be dropped due to violations of the Charter right to a speedy trial, is justice served?

Further, victims' participation rights could conflict with justice officials' obligations to make impartial decisions when exercising their discretion. For example, a prosecutor may decide whether to proceed to trial with charges based on the public interest and the likelihood of a conviction. A victim impact statement reflecting the trauma experienced by the individual may not be relevant to the determination facing the prosecutor yet he or she would be required to consider it. It is not in the public interest to proceed to trial if there is no chance of a conviction despite a prosecutor's sympathy for the plight of the victim.

#### Restitution Rights

Bill C-32 provides that every victim has the right to have the court consider making a restitution order against the offender and have it enforced as a civil court judgment. The introduction of a right to have monetary order for the victims considered by the court skews both the principles and practices of the criminal justice system. As already discussed, most modern criminal justice systems have evolved away from a system of monetary penalties paid by the criminal or the criminal's family to the victim. Some countries still have criminal justice systems that include 'blood money' -- a pay out to victims in satisfaction of a crime. With the proposed Victims Bill of Rights, this outdated practice could be revived in Canada.

While empowering judges to consider 'restitution' and even 'compensation' is not new, these concepts have been embedded in criminal justice principles. 'Restitution' historically had been based on principles of precluding unjust enrichment and benefitting from one's crime. If a person had stolen property or had sold it, the court could order the property or proceeds of the sale be returned. Over time, the understanding of 'restitution' changed to include damages for harm caused to the victims. Orders for restitution or compensation became sentencing options for the judge to consider in assessing the totality of the punishment. In this way, the monetary award is limited by what was a fair and proportionate penalty for the offence. If the offender paid a monetary award, this would discharge some of all of his or her punishment for the crime. Nothing precluded the victim from seeking further damages through a civil court process.

Fines and other punishments involving monetary payment by the offender raise some profound fairness issues in the criminal justice system. Simply put, it is much less onerous for a wealthy person to pay a fine than a poor one. Unless something like a day-fine system is adopted where the fine is based on percentage of income, then this type of sentence violates the equality of punishment essential to a fair criminal justice system. Accordingly, judges have imposed fines, surcharges, restitution and compensation orders with restraint.

While normally judges are required to assure themselves that the offender is capable of paying a fine before imposing it, the Victims Bill of Rights specifically provides that the offender's financial means or ability to pay does not prevent the court from ordering restitution. Far too many accused are poor, marginalized, battling mental health and addictions and without the lawful means to provide financial compensation to others. If a judge does not impose restitution as part of the sentence, he or she will have to explain why. Judges will likely feel more pressure to make these awards.

The preference for restitution orders also builds an undesirable incentive into the system. With the possibility of having damages covered by just filing a form with the courts, how many more people will identify themselves as victims? How many victims will forego the possibility of an easy recovery of losses to participate in restorative justice practices or other measures that might resolve the issue outside of the formal justice system?

The rights to restitution run the risk of inappropriately importing civil justice concepts into the criminal justice system and undermining core principles of fairness.

## Conclusion

The Victims Bill of Rights creates a tension: If the victims' rights as set out in the Bill are applied, they threaten to undermine principles of criminal justice by placing victims at the heart of the criminal justice. This would erode core principles by slowing down an already overburdened system and skewing it toward a tool for personal vengeance and away from objectivity. If the victims' rights as set out in the Bill are not applied, then victims will be disappointed and their confidence in the criminal justice system will be further reduced. And there is every reason to believe that the promised rights for victims will fall short of expectations. The Bill provides victims with no standing in the proceedings, a complaint mechanism as a remedy for breached rights, and requires that the Bill be interpreted reasonably so as not to delay proceedings or interfere with the discretion of justice system officials. Rather than create a tension between justice principles and victims' rights that will be felt by victims and justice and corrections officials at every stage of the system, it would have been better to focus on rights to victims' services, state-guaranteed compensation, and victim

prevention measures. These would have addressed some of the real needs of victims without creating likely harmful pressures and unrealistic expectations of the criminal justice system.

*Catherine Latimer,*

*Executive Director*

*The John Howard Society of Canada*