



European Network of Councils
for the Judiciary (ENCJ)

Réseau européen des Conseils
de la Justice (RECJ)

RESPONSE OF ENCJ TO THE EUROPEAN COMMISSION'S VICTIM PACKAGE CONSULTATION:

TAKING ACTION ON RIGHTS, SUPPORT AND PROTECTION OF VICTIMS OF CRIME AND VIOLENCE

STRUCTURE OF RESPONSE

The ENCJ sets out its response to the general and specific questions raised. In preparing the response the public consultation paper was sent to the ENCJ Members to collect information. An ENCJ specialist group prepared the draft of this response on the basis of these responses. The group was comprised of representatives of the Councils of England and Wales, Spain, Italy, Denmark, Romania and Bulgaria.

INTRODUCTION: RIGHTS OF DEFENDANTS, VICTIMS AND THE STRENGTHENING OF MUTUAL CONFIDENCE

The ENCJ welcomes the initiative of the Commission to ensure that victims are accorded better recognition and status in criminal proceedings. The rights accorded to them should be developed in consideration of the development of the defendant's procedural rights under the Road Map to ensure the progress in this area is made recognising the rights of the victim as well as the rights of the defendant, as often the rights of the defendant and the victim require to be considered together along with the interests of the State. The rights of victims are important and together with the rights of a defendant ensure a fair trial in an open court, but they have not had the status or clarity of defence rights which are embodied in International Conventions such as the ECHR and in constitutions.

An important parallel between the victims' rights and procedural rights for defendants can be drawn as there is now a clear indication that it will become increasingly difficult to make real progress towards a common area for justice in this area of criminal justice without developing common procedural rights for those accused of crime. As there is a growing strong lobby group from defence lawyers to ensure the rights of defendants are given proper attention, so too must there be a clear recognition that this needs to be carried out along side consideration of the rights of victims to ensure a proper balance is maintained and to strengthen public confidence in the common area for justice.

One of the key challenges ahead will be to raise public awareness and support for the common area for justice. There has, in the past been a gap and less of a tradition in recognising and protecting the rights of victims; the proposal to change this can be seen as playing a vital role in developing public confidence.

Careful consideration needs to be given to a number of factors in taking this work forward.

- (1) The need in the current fiscal climate to look at cost effectiveness;
- (2) To continue moving forward whilst the final proposals for a new Directive are formulated.
- (3) To work out the best means of changing the culture in relation to victims as quickly and as effectively as possible.
- (4) To ensure people are better educated so they have a greater understanding of why common standards are necessary to support victims through the criminal justice process.
- (5) Concrete initiatives should be followed up in key areas such as support services, health care, work & benefits, protection from further harm and needs assessments.

CULTURE CHANGE

In taking forward work on victims progress must be made on the cultural change front. There are many ways this can be achieved but, at its heart, a key factor will be to ensure that all of the actors in the criminal justice system have the victim as much in mind as the defendant.

To this end earlier this year the ENCJ set up a small expert group to develop some practical guidance; a draft has been widely circulated. Despite the view that our criminal justice systems are too diverse to achieve such guidance there is common ground as to the way victims should be treated. By developing such guidance and encouraging its adoption in member states, in parallel with the development of the new directive, real progress can be made in changing the position of victims.

GENERAL QUESTIONS

1. What are the main obstacles and problems faced by victims of crime or violence in relation to the five categories of needs (Recognition, Protection, Support, Access to Justice, Compensation and Restoration)?

- (1) Most states have legislation that provides for a number of rights and protections for victims; however this is not the case in all states. There is therefore a need for common minimum standards. It is often of advantage to victims for states to set out the rights in a Victims Charter or similar document.
- (2) The real need is for the rights and protections to be applied in practice. Consideration of legislation on its own is not enough there has to be a clear system for monitoring what actually happens. Consideration should be given to the establishment in Member States of a body with such responsibility.
- (3) The needs of victims differ very considerably; the concentration should be on meeting those individual needs rather than on process. A single point of contact for victims is often the best way of achieving this; a help line can also be very useful.
- (4) Although many victims are concerned as to the delays in the criminal justice systems of some states, it is important that victims are made aware of the reasons and that in some circumstances, time is necessary to ensure that the case is properly investigated and the evidence against the defendant strong.
- (5) Victims should be made aware of their duties as citizens and of the state's rights to expect the reasonable cooperation of victims in the investigation and prosecution of crime and where necessary, to compel their testimony.

2. What concrete initiatives would you suggest to ensure the five categories of victims' needs are met? Do you think the EU can contribute to these initiatives and if so how?

- (1) The essential task for the EU is to set minimum standards, to assist in establishing mechanisms for their application in practice and to provide assistance in training.
- (2) In most member states, it is not the formulation or extent of legal rights that is the problem; it is the adoption of good practice. The EU can greatly assist in collating this and assisting in its adoption.

(3) The answers to the detailed questions set out our views on particular matters.

3. Are you aware of good practices, initiatives, programmes (including training programmes) or tools that contribute to meeting the needs of victims?

(1) The answers to the detailed questions deal largely with our views.

(2) As there is no ready mechanism for the self enforcement of victim's rights (in contradistinction to defence rights), it is essential that victims are always made aware of their rights at the outset. We would welcome the universal adoption of a letter of rights [and duties] so that victims can see they obtain that to which they are entitled.

(3) The court should always be made aware of the impact of the crime on the victim; this is the position in most, but not all Member States. There are many means through which this can be done, including the use of statements setting out the specific impact of the crime in a manner regulated so as to ensure fairness to both victim and defendant.

(4) Some states provide legal assistance for all victims; The legal assistance for victims, that is provided by the danish state, is for victims of violence and violence related crime such as illegal force, robbery (in Denmark defined as theft by use of violence), and sexual assault. There is no free legal aid for the victims of minor offences like ordinary theft or shoplifting.

4. How could existing EU legislation on victims be improved to meet the needs of victims?

(1) The answers to this are set out in the detailed questions; there is a real need for improvement in cross boarder enforcement and the protection of the rights of women

5. Is sufficient information and data collected on victims' policies and needs? How do you think such information should be collected (e.g. specific studies and research, national or EU wide victim satisfaction surveys)?

(1) More information is needed, particularly as to the application in practice rather than the structure of the legislation.

(2) However, it is very important that in any such collection the right of the victim to privacy is respected.

II. SPECIFIC QUESTIONS BASED ON THE NEEDS OF VICTIMS

RECOGNITION

6. Do you think victim's related training should be compulsory for practitioners? How do you think the quality of training programmes can be improved?

- (1) Training for judges in relation to victims is highly desirable.
- (2) The specific training in each Member State should be the subject of a needs analysis to ensure it is properly targeted. Subject to such an analysis, it is considered that training should not concentrate on legal rights but on practical questions; it would therefore be useful to involve Victim Support Organizations in training; modules might include the special needs of the victims of sexual, physical or psychological violence, and aspects regarding the treatment of children and specific types of case and control over questioning of victims. Judges also need to be trained in understanding the issues that arise when the victim cannot understand the language of the court and how translation is best provided.
- (3) Training on victims is generally compulsory for all new judges; however, it is generally not compulsory after the initial training, because most states do not make training for judges compulsory on any matters after initial training has been completed. The issue of compulsory training is a complex issue and needs to be looked at on a broader basis. In the interim, the strongest encouragement should be given to all judges to undertake training in relation to victims.

7. How should it be ensured that the individual needs of victims are properly assessed (e.g. individual needs assessment when reporting crime)?

- (1) The needs of the victim need analysis at two stages
 - (1) At the time the crime is reported or the investigation begins; this should be done using a protocol/ check list so that the analysis is complete. There can be an initial assessment and then a more detailed assessment or it can be done in one process.
 - (2) During the pre-trial and trial process the needs and rights of the victim have to be balanced against the needs and rights of the accused and those of the State

as the prosecutor. This must be the duty and obligation of the judge in the context of the framework set by the ECHR, legislation and case law.

- (2) All those responsible for the conduct of the case for the investigation and prosecution including the police, the investigating judge and prosecutor should have a legal responsibility for identifying needs and working together; where the victim is supported by a VSO or has his own lawyer, the VSO and lawyer should share the responsibility. In countries where judges are not involved in the investigation and prosecution of the accused, judges should take account of the rights of the victim during the pre-trial and trial proceedings.
- (3) The approach of the court should be based on equal rights of the victim as well as the rights of the accused.
- (4) The family of a deceased victim is entitled to have its needs assessed and to be accorded appropriate treatment.

8. How do you think vulnerable victims should be identified? What special measures should be available to them (e.g. provide testimony only once, legal assistance always available, specially trained professionals carry out questioning)?

- (1) A definition is needed to establish a legal framework for the rights to be accorded to vulnerable victims. The definition cannot be an exhaustive one, but should be an inclusive one. A suggestion derived from the Brasilia Regulations approved by the Ibero-American Judicial Summit is:

Vulnerable people are defined here as those who, due to reasons of age, gender, physical or mental state, or due to social, economic, ethnic and/or cultural circumstances, find it especially difficult to fully exercise their rights before the justice system as recognised to them by law.

Another definition is contained in the response of the Judicial Council for Bulgaria annexed to this response.

- (2) Some member states provide lawyers for all victims; some only provide lawyers for some categories of victim. Some do not provide lawyers. What is essential is that the victim has proper support and advice. Much can be done by the police, prosecutors and judges to ensure that victims better understand the way in which the procedure operates, have a better perception of the way their position is taken into account and can see that justice is delivered for the State, the accused and the victim. The benefits will include witnesses feeling encouraged to attend court, a perception by the victim that justice is being done for the victim as well as the accused, greater public confidence in the administration of criminal justice and reduced trauma for victims and speedier recovery from the effects of the crime.

- (3) Children and other categories of vulnerable victim need special rules for questioning during the investigation and trial; there should be minimum standards to ensure that such victims understand the questions and can give their answers without pressure. The rules can provide for different methods including:
 - (1) Special interviewing rooms
 - (2) Recording the evidence including evidence elicited by questions from the accused in advance of the trial and using it at the trial
 - (3) Having a psychologist or intermediary present to assist with the questioning
 - (4) Taking the evidence during the trial by video or audio link
 - (5) Putting questions to the victim only through the judge
 - (6) Permitting questioning only with a parent or responsible adult present
- (4) A study and analysis of best practice is desirable.
- (5) Other categories of victim should be permitted, on the decision of the judge, to give evidence through video link or behind a screen or one way mirror or in the absence of the press or the accused (but not the defence lawyer) where this is necessary (for example where the witness is frightened) and it is consistent with the rights of the accused.
- (6) The judge should always exercise control over the questioning of victims consistent with the rights of the accused; an example where restrictions may be legitimate is the questioning of victims of sexual offences.
- (7) Consideration should be given to the use of specialist judges for certain categories of vulnerable victim such a children or women subjected to domestic violence.
- (8) Visits to the courtroom in advance of a hearing are desirable if a victim is to give evidence at trial.

PROTECTION

9. Do you think measures are needed to protect a victim's privacy and if so how (e.g. court orders, code of conduct)?

- (1) There should be a uniform general obligation that requires the rights of the victim to privacy and confidentiality to be balanced by the judge against the rights of the defendant and the state. Such an express obligation is necessary to ensure a proper balance with the rights of the defendant which are so well protected under Article 6 and the developing common procedural standards for the defendant. The rights will

generally include a right to withhold the victim's home address and in some cases (such as children or the victims of sexual assaults) the right to prevent publication of his identity in the press.

- (2) The reports by the media of investigations and court proceedings should respect the rights of victims to privacy; in appropriate cases where there is a risk of sensational reporting the judge should be required to balance these rights against the Article 10 rights of the media. Some Member States permit the exclusion of the press in certain types of case. Ethical codes for media can be helpful, but they are often not effective.
- (3) Ethical codes for lawyers should cover the types of questions which should not be asked of vulnerable victims, but it is for the judge to make the final decision.

10. How do you think the victim should be protected from an offender/ potential offender in particular in relation to:

a) Intimidation/ further harm (e.g. separation of offender and victim in court/police station through protocols)? The use of protective bail conditions.

- (1) Protective bail conditions can be used effectively to protect victims from out of court intimidation in many cases; however, these are not effective where the defendant's supporters can threaten the witness.
- (2) In cases of serious organized crime, it may be necessary to take more extensive measures; this is the responsibility of the police and the prosecutor.
- (3) Victims where they are witnesses should be in court to give evidence. However, in court special measures of the type set out above should be available under the control of the judge where a judge is satisfied that a witness is frightened to give evidence in the presence of a defendant. Such special measures can include the exclusion of the defendant from the court room or putting the witness into a separate room connected by audio or visual links to the court, whilst the evidence is given.

b) As regards protection orders, what do you think is the most feasible and effective option to achieve EU wide protection?

- (1) An effective system of EU wide protection orders is necessary given the extent of free movement of EU citizens and their frequent change of location. The proposed EPO is a workable model provided that it can be made to work without disproportionate complexity under the control of the judiciaries of the EU.
- (2) Protection orders should be recorded on an EU wide database of information.

SUPPORT

11. How do you think victim support organisations can be assisted to provide effective services to victims?

- (1) It is the responsibility of each Member State to provide for proper support for victims. As we have set out, this can be done through the provision of a lawyer for the victim or, as is more common, through the provision of a VSO.
- (2) It is generally desirable that a VSO is an NGO, but it must be for each Member State to decide how to provide such services, provided there are common minimum standards which are monitored and enforced.
- (3) A mechanism for monitoring compliance needs to be established; those who see how effective the services in fact are (such as prosecutors and judges) may have a role in the monitoring processes. External monitoring by a supra national body is an option that should be considered.
- (4) If an NGO provides such services, it is essential that the provider is a fit and proper person and registered; it must comply with the minimum standards and be monitored. Those who carry out day to day functions must be properly trained and be able to explain to victims the process of the criminal justice system and the role of each of the participants.
- (5) VSE should be encouraged to continue to develop an effective mechanism for the exchange of best practice on a systematic basis.

12. What services do you think they should provide?

- (1) The response from Ireland annexed to this response sets out a comprehensive list.
- (2) We would emphasize:
 - (a) Information on the rights of the victim at the investigation, criminal procedure and other support
 - (b) Assistance to the victim before the trial
 - (c) Assistance in the identification of special needs
 - (d) Assistance to the victim at court, including explanations of what is happening and the result
 - (e) Assistance on appeals

- (3) It is necessary to provide emergency assistance in certain situations, such as medical examinations after a sexual assault or interviews; VSOs play a vital role
- (4) We discuss later the position of victims from other member states and mediation

13. Do you think foreign and/or domestic victims should be provided immediate basic assistance (e.g. hotel accommodation, food vouchers, phone calls)? If so, who should provide such assistance (e.g. consular authorities, other government agencies, victim support organisations, tourist industry)?

- (1) The basic principle should be that victims should be treated equally whether they are in the state of their nationality or a different member state.
- (2) The level of service for emergency assistance must be dependent on a political decision as to the amount of funds available for emergency assistance and who is going to pay for it ; this is not a matter on which the Councils for the Judiciary wish to comment.
- (3) Very careful consideration should be given to the level of provision in the light of the potential for abuse.

ACCESS TO JUSTICE

14. How should we ensure that victims fully understand their rights and the information they are given (e.g. Translation and interpretation available to all victims who don't understand, legal assistance, simplification of forms and documents, information provided through different media)?

- (1) The victim must be provided with interpretation so that he can follow the procedure during the investigation, pre-trial and at trial and give his evidence in a way in which it can be understood by the court. It is important that there be proper quality control over the provision of interpretation and that there are proper glossaries of translations of technical terms. The service provided should be no less than that provided to the defendant.
- (2) Leaflets to inform victims of their rights should be produced in a way which is equivalent to the letter of rights. All documentation should be in a clear language.
- (3) The benchmark for the provision of information to the victim should be the amount of information that enables the victim to understand the proceedings and make decisions that the victim is required to make.

15. Should victims have a right to provide information before key decisions are made, such as decisions to stop an investigation or prosecution, and to seek the review of such decisions afterwards (e.g. through a senior official, ombudsman, court).

- (1) Yes, the victim should have that right.
- (2) Some member states provide for a review of decision to stop an investigation or prosecution or an appeal to the court. There ought to be at least a right to have the decision reviewed by a more senior investigator or prosecutor, if not a right of appeal to the court.

COMPENSATION AND RESTORATION

16. How do you think victims should be assisted when making compensation claims and when seeking to enforce compensation orders (e.g. State assistance in recovery, State payment in advance, simplification of forms)?

- (1) Where a lawyer is provided for victims, then the lawyer can help in making the claim; if no lawyer is provided, then a VSO should help.
- (2) There should be a general obligation on a court to order the payment of compensation or there should be in place a state criminal compensation scheme for the victims of crime.
- (3) Where an order is made by a court for the payment of compensation by a defendant, then the state should fund the payment to the victim and itself recover what it can from the defendant.
- (4) The cross border mechanisms are always effective; there is one difficulty that must be addressed. Where an order is made by a criminal court for compensation in favour of a victim who is a *partie civile*, then the award is not a penalty and cannot be enforced under the framework decision on financial penalties, but only under the less effective mechanisms for the enforcement of civil judgments.

17. Should restorative justice practices such as mediation be available to all victims? Should minimum standards be applied to organisations providing such services?

- (1) Restorative justice should be available, but the victim must be made aware of the interest of the state in the prosecution of crimes (which may not make restorative justice appropriate for more serious crimes) and the respective advantages and disadvantages of restorative justice and other forms of proceedings.

- (2) It is essential that those who provide such services are fit and proper persons, registered, subject to minimum standards and monitoring.

Annex I

GUIDANCE ON VICTIMS

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Introduction

Persons who allege that they are victims of crime (victims) will often be those who have never had the experience of being involved in a criminal investigation or a trial. Research has shown that many victims do not understand the procedures of the criminal justice system and insufficient explanation is given to them. For example:

- Some consider that their interests are not adequately taken into account.
- Some feel that they are not properly or speedily informed of the progress or lack of progress on their case.
- Some feel that the legal process has made them a victim all over again by ignoring their needs or feelings (often referred to as *secondary victimisation*)
- Some fear intimidation or reprisals, whilst many may simply fear having to attend a court.

Much can be done by the police, prosecutors, court staff and judges to ensure that victims better understand the way in which the procedure operates, have a better perception of the way their position is taken into account and can see that justice is delivered for the State, the accused and the victim. The benefits will include:

- A perception by the victim that justice is being done for the victim as well as the accused
- Reduced trauma for victims and speedier recovery from the effects of the crime
- Encouragement of witnesses to attend court
- Greater public confidence in the administration of criminal justice and a willingness to help in the future

This paper sets out some short practical guidance which it is hoped will improve the way in which victims are treated within the criminal justice system and show that there is real consideration and respect for their rights.

As the persons who are responsible for the different stages of criminal proceedings (investigation, prosecution, trial and appeal) differ from state to state, suggestions are made for guidance that covers the all functions within the process. The guidance set out below will need adaptation and casting in language suitable to the particular professionals who are engaged at the different stages; it will be important to make clear who is responsible for carrying out the duties and functions set out.

The Guidance

1. Each victim has his or her own needs. Some may wish to be involved in the proceedings more than others. Therefore the wish of each individual must be taken into account. Child victims and victims of sexual offences need special consideration.
2. A leaflet setting out the rights of the victim and the obligations owed to the victim should be provided to the victim on the first contact with or visit to the police or the prosecutor. It is good practice to ensure that the victim fully understands his rights and for the court at its first hearing to check that the victim has been fully informed. Copies of the leaflet should be available at the court for any victim who has not received it.
3. During the investigative stage, the victim should be informed about the steps in the investigation and in any proceedings which follow the investigation and the role, rights and obligations of the victim during the investigation and the proceedings. The victim should be informed regularly about what is happening and the progress being made. This should be done by the prosecutor or person in charge of the investigation or by a person specifically appointed to do this.
4. Before a decision is made (by the person in charge of the investigation or the prosecutor or the investigating judge) to stop the investigation or to decline to take court proceedings, the victim should be given the opportunity to comment. If the decision is made to stop or not proceed any further, then the victim should be notified in person. The reasons for the decision should be explained in terms the victim can understand; the options available to the victim, such as a right of appeal or a right to a review, should also be explained. In Member States where there is no right of appeal against the decision, it is good practice to provide an opportunity for review of the decision by another officer or prosecutor.
5. During the pre-trial proceedings, the victim should be informed of the progress being made. When a date is being fixed for a trial, the need of the victim for the speedy trial of the case and his availability to attend the trial (either to observe it or to attend as a witness) should be taken into account along with the representations made by the accused.
6. If an application is made to adjourn the date for the trial or appeal, the position of the victim should be taken into account along with the representations made by the accused. If an adjournment is granted, the victim should be informed of the decision and the reasons for it.
7. Explanations given to the victim, whether outside court or in court, should always be given in language which is easy to understand without the need for explanation by a lawyer or victim support, though it is always important that victim support is available to help the victim. It is always essential, when giving an explanation, to have in mind the impact it can have on the person to whom it is addressed.

8. A system at each court centre should be in place to provide to any victim who attends the trial a proper explanation of what is to happen at a trial and the layout of the court room. This can often be done by the provision of a video or arrangements for a court visit prior to the trial. It is good practice to make arrangements for questions by the victim about the procedure to be answered. In some cases it may be appropriate for the judge to provide a short explanation of the process to the victim on the day of the trial before the trial commences.
9. Arrangements should, wherever possible, be made in each court centre for facilities for the victim to be able to enter the court, wait and access toilet facilities and refreshments without meeting the accused or his relatives or associates.
10. The judge should make arrangements to ensure that the reasons for any delays are explained to the victim as soon as possible; victims should not be left without information as to what is happening.
11. If there is an occasion when the feelings of the victim or the accused are high (as for example after the reading of a victim impact statement), the judge should recognise this by, for example, allowing a break of a few minutes.
12. When a judge makes a decision in the course of the hearing which affects the victim (such as an adjournment) and when the decision on the case and penalty is made, the judge should set out in his reasons an explanation of how the interests of both the victim and the accused have been taken into account. This should be done in everyday language, taking into account the respective nationality and background, which can be understood without the need for explanation by a lawyer or victim support, though it is always important that victim support is available to help the victim.
13. If a victim attends court to give evidence, but the evidence is not required (where for example the accused pleads guilty), an explanation should always be given to the victim.
14. If the accused is acquitted, then the prosecutor or victim support or both should explain to the victim the reasons for the decision and what options (if any) are open to the victim.
15. If there is an appeal, then the victim should be informed of that fact. When the date of the hearing of the appeal is fixed, the victim should be informed and what arrangements are available for attendance. The decision on the appeal should be provided to the victim.