ARCHIVES OF CRIMINOLOGY, VOL. XXIX–XXX, 2007–2008
PL ISSN 0066-6890

David Miers

Victims, Criminal Justice and the Law: European Standards and the Law of England and Wales

1. INTRODUCTION

This chapter evaluates the extent to which the criminal justice system of England and Wales meets the expectations for the treatment of crime victims that are contained in the European Union Council's Framework Decision of March 2001 on the *Standing of Victims in Criminal Proceedings*[1] and in two Council of Europe Recommendations, R(85)11: *on the position of victims in criminal procedure*[2] and R(2006)8: *assistance to victims*[3]. There are other relevant documents to which reference will be made, notably the European Union's 2004 Directive *relating to compensation to crime victims*[4] and the Council of Europe's Recommendation R(99)19 on *mediation in penal matters*[5].

None of the Council of Europe's Recommendations is binding in law. Their normative force derives from the fact of its Member States' collective wish to establish minimum standards for the design and delivery of their individual criminal justice systems. The legal force of the European Union's expectations varies according to which of the three "pillars" provides the authority for the Council to act. The 2004 Directive relating to compensation to crime victims was made under the first pillar, as an aspect of the free movement of persons within the Union[6]. Like any other, this Directive requires Member States to establish arrangements to meet its purposes by a specified date. The 2001 Framework Decision on the standing of victims was made under the third pillar of the Treaty on European Union (TEU), Freedom, Security and Justice[7]. Third-pillar matters have traditionally fallen outside the jurisdiction of the

[1] European Union (2001), *Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings*, OJ L 082/1, 22 March 2001.

[2] Council of Europe (1985), *Recommendation No. R (85) 11 of the Committee of Ministers to member states on the Position of the Victim in the Framework of Criminal Law and Procedure*, 28 June 1985.

[3] Council of Europe (2006), *Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims,* 14 June 2006, 2.1.

[4] European Union (2004), *Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims*, OJ L 262, 6 August 2004.

[5] Council of Europe (1999), *Recommendation No. R (99) 19 of the Committee of Ministers to member states concerning mediation in penal matters*, 15 September 1999. The relevant CoE instruments are conveniently collected in the Council of Europe, 2007.

[6] *Cowan v. Le Tresoir Public*, Case C-186/87, [1989] ECR 195.

[7] Justice and Home Affairs under the Treaty of Maastricht, renamed under the Treaty of Amsterdam.

European Court of Justice, but in the preliminary ruling in the *Pupino* Case, the Court held that it was "perfectly comprehensible" that the TEU should extend its remit to Title VI[8]. The particular matter (assisting child witnesses to give evidence in criminal matters) is considered later in the context of the law of England and Wales. For the moment, we may note that the Court said that it would be difficult for the EU to achieve its objectives if the principle of Member States' "loyal co-operation" to take appropriate measures to meet the obligations of membership did not also extend to Title VI[9].

The normative expectations contained in the EU and CoE agreements fall under four broad headings: reporting, responding to, investigating and prosecuting offences, the conduct of the trial, sentencing, and remedies. I deal in detail with each one following a brief overview of some of the main themes that are associated with the design and delivery of victim services in England and Wales over the past two decades.

2. VICTIMS AND CRIMINAL JUSTICE SERVICES

2.1. Design

The massive changes that have taken place in England and Wales over the past twenty years or so in the relationship between victims of crime and the criminal justice system have been extensively documented[10]. That relationship casts the victim variously as a *supplier* and a *recipient* of information about crime, the *beneficiary* of state-funded compensation and other remedial arrangements concerning such matters as the giving of evidence, a *partner* in crime prevention. More recently, via new youth justice initiatives, the victim is engaged as a *participant* in the system. These changes also imply an increasing degree of inclusiveness in which victims have, in a further extension of the marketplace analysis of the criminal justice system[11], become *consumers* of its services. Many of the initiatives that were repackaged as the *Victim's Charter* in the early 1990s comprised public measures of the criminal justice system's effectiveness, generating the same controversial issues as attend league tables for schools or waiting times in the National Health Service. The "New Labour" government that took office in 1997 emphatically shifted the criminal justice debate from the earlier liberal consensus on law and order to a more populist style that placed the law-abiding majority at the centre of criminal justice policy[12].

---

[8] Provisions on police and judicial co-operation in criminal matters.

[9] Case C-105/03; [2005] ECR I-5285.

[10] A. Sanders, *Taking Account of Victims in the Criminal Justice System: A Review of the Literature*, Scottish Office Central Research Unit, Social Work Research Findings, Edinburgh 1999, No. 32; C. Hoyle, L. Zedner, "Victims, Victimisation and Criminal Justice", in: M. Maguire, R. Morgan, R. Reiner (eds.), *The Oxford Handbook of Criminology*, pp. 461–495, Oxford University Press, Oxford 2007; J. Doak, *Victims' Rights, Human Rights and Criminal Justice*, Hart Publishing, Oxford 2008.

[11] J. Raine, M. Wilson, *The New Politics of Criminal Justice*, Longman, London 1998.

[12] T. Newburn, "Tackling Youth Crime and Reforming Youth Justice: The Origins and Nature of 'New Labour' Policy", *Policy Studies* 1998, No. 19, p. 199–211; G. Johnstone, "Penal Policy Making: Elitist, Populist, or Participatory?", *Punishment and Society* 2000, No. 2, p. 161–180; R. Morgan, "With respect to Order, the Rules of the Game Have Changed: New Labour's Dominance of the 'Law and Order'

Like the consumers of health care, financial, local authority or legal services, the Government's 2001 White Paper, *Criminal Justice: The Way Ahead* proposed that victims of crime be allocated their own Ombudsman[13]. Two consultation papers, *Justice for All* and *A New Deal for Victims and Witnesses* were published respectively in 2002 and 2003. They proposed a Commissioner for Victims whose task would be to ensure that there is an "informed, coherent and effective voice for victims and witnesses at a national level"[14]. The 2003 White Paper additionally promised more effective funding of victim and witness groups through the Local Criminal Justice Boards. These proposals were enacted by the Domestic Violence, Crime and Victims Act 2004 (hereafter, DVCV 2004). In addition to a new statutory code of practice covering the way in which criminal justice agencies should deal with victims, the Act also created a Victims' Advisory Panel and a Commissioner for Victims and Witnesses. These new institutional arrangements, described in section 7 of this chapter, are intended to "make sure that the victim's voice is heard at the heart of Government," an oft-repeated government policy[15].

The use of the rebalancing metaphor is a contentious matter, implying an increase in concern for the victim accompanied by a reduction in that for the offender. But it need not be a zero-sum game[16]. Better serving the interests of victims is as much in the public interest as is the need to safeguard offenders' interests, for example, under Article 6 of the European Convention on Human Rights (ECHR). The CoE Recommendation on the position of the victim in the framework of criminal law and procedure itself recognises the potential for both victims and offenders to benefit from innovation, in particular through mediation and conciliation schemes. Measures to improve the position of the victim "need not necessarily conflict with other objectives of criminal law and procedure, such as the reinforcement of social norms and the rehabilitation of offenders, but may in fact assist in their achievement and in an eventual reconciliation between the victim and the offender"[17]. As we shall see, there are occasions when the reconciliation of these interests provokes the most acute of legal dilemmas. And since 2 October 2000 when the Human Rights Act 1998 came

---

Agenda", in: T. Newburn, P. Rock, *The Politics of Crime Control*, Oxford University Press, Oxford 2006, p. 91–115; Home Office, *Rebalancing the Criminal Justice System in Favour of the Law-Abiding Majority*, Home Office, London 2006, http://www.homeoffice.gov.uk/documents/CJS-review.pdf.

[13] Home Office, *Criminal Justice: The Way Ahead*, The Stationery Office, London 2001, Cm 5074, para 20.

[14] Home Office, *Justice for All*, The Stationery Office, London 2002, Cm 5563, para 2.45; Home Office (2003), *A New Deal for Victims and Witnesses*, Home Office Communication Directorate, London 2003, www.crimereduction.homeoffice.gov.uk/victims/victims24.htm, para 6.2.

[15] P. Rock, *Constructing Victims' Rights*, Oxford University Press, Oxford 2004, ch. 10; Home Office, *The Code of Practice for Victims of Crime,* London 2005, www.homeoffice.gov.uk/documents/victims-code-of-practice, 3.10-3.11 and Annex A; Office for Criminal Justice Reform, *Working Together to Cut Crime and Deliver Justice*, London 2007, http://www.official-documents.gov.uk/document/cm72/7247/7247.asp, ch. 4. See: J. Jackson, "Justice for All: Putting Victims at the Heart of Criminal Justice?", *Journal of Law and Society* 2003, No. 30, p. 309–326 for a useful summary of these developments. These developments should also be set in the context of more general changes in substantive and adjectival law designed to secure more convictions in the particular case of sexual offences and more generally for other offences via new rules on the admissibility of hearsay and bad character evidence. See: the Sexual Offences Act 2003 and Part 11 of the Criminal Justice Act 2003.

[16] R. Morgan, op. cit., p. 112.

[17] Council of Europe, *Recommendation No. R (85)...*, op. cit., para. 6.

fully into force, enacting the ECHR into the law of England and Wales, new actionable possibilities arise for victims of crime.

2.2. Delivery

England and Wales comprise a single jurisdiction whose criminal justice policy was for over two centuries the responsibility of the Home Office. On 9 May 2007, its responsibilities for sentencing, prisons and rehabilitation were allocated to a new Department of State, the Ministry of Justice, which also replaces the Department for Constitutional Affairs (DCA) (formerly the Lord Chancellor's Department)[18]. This Ministry thereby assumes the DCA's responsibilities for the courts, which includes all the civil courts and civil justice. The Home Office's principal retained functions concern policing, criminal justice policy, terrorism, immigration and asylum[19]. Services for victims of crime are divided between the two Departments. The Ministry of Justice has responsibility, for example, for victim advocacy in court. The Home Office retains responsibility for the development of restorative justice and other victim policies throughout England and Wales.

For the purposes of the organisational arrangements for policing and criminal justice decisions, England and Wales are divided into 42 Local Criminal Justice Board (LCJB) Areas. A National LCJB exists to provide policy guidance on their implementation. Another example of this cross-agency arrangement is the Office of Criminal Justice Reform (OCJR), established to develop "joined up" criminal justice policy across government departments[20]. The OCJR supports an informative website that contains, for example, "the victim's virtual walk through"[21].

The administration of the victim-focused initiatives in criminal justice continues to be dispersed across both the public sector (the police, Crown Prosecution Service, Her Majesty's Court Service, Probation Service and the Youth Justice Board), and the private, notably Victim Support. The normative expectations that victims may have of the public bodies are likewise to be found among statutory and soft law guidelines (Codes of Practice), with little effort until recently to bring these to any degree of coherence. Moreover, their enforcement has in the past been patchy, at risk of local budgets and priorities. One of the functions of the Commissioner for Victims and Witnesses is to bring coherence to this patchwork. For this purpose, the *Code of Practice for Victims of Crime* (the Victim's Code) made under section 32 of DVCV 2004 brings all of these expectations into a single document[22]. The Victim's Code came into force on 3 April 2006. Within government, these and the wider issues affecting both victims and witnesses are the subject matter of the Victims and Confidence Unit, a unit within the OCJR.

---

[18] www.justice.gov.uk.

[19] www.homeoffice.gov.uk.

[20] Office for Criminal Justice Reform, *Cutting Crime, Delivering Justice: A Strategic Plan for Criminal Justice 2004–08,* London 2004, Cm 6288, http://www.cjsonline.gov.uk/the_cjs/aims_and_objectives. It reports to the Home Office, the Ministry of Justice, and the Office of the Attorney-General.

[21] www.cjsonline.gov.uk/victim/walkthrough.

[22] Home Office, *The Code of Practice*..., op. cit.

Despite these efforts, the public's confidence in the system's capacity to cope with and combat violent crime has fallen, even though reported offences overall have themselves declined[23]. Home Office figures for crime in England and Wales in 2006/2007 showed that a high proportion of people continue to believe that crime is rising. This belief is strongly held by the elderly, readers of "tabloid" newspapers (which have during 2008 prominently reported the increase incidence of knife crime among and between teenagers), and those who had been witnesses or victims. About a third of those interviewed by the British Crime Survey believed that the system meets crime victims' needs, while victims' satisfaction with the police has remained broadly stable over a decade at 58–60% of those interviewed[24]. A government report published in June 2008 confirmed the decreasing public confidence in the criminal justice system[25], in part fuelled by its mistrust that the published criminal statistics do not properly reflect the impact of crime upon its victims[26].

3. REPORTING, INVESTIGATING AND PROSECUTING OFFENCES

Both the EU and the CoE speak to these initial phases. Article 2 of the EU Framework Decision provides that each Member State "shall ensure that victims have a real and appropriate role in its criminal legal system. It shall continue to take every effort to ensure that victims are treated with due respect for the dignity of the individual during proceedings and shall recognise the rights and legitimate interests of victims with particular reference to criminal proceedings"[27]. The values of respect and dignity are explicit also in the Council of Europe's 2006 Recommendation on assistance to victims[28], which identifies the role of the public sector in giving support and information.

3.1. Reporting, and responding to offences

Being taken seriously by the police when reporting an offence is a commonly held and legitimate expectation, but the experience of some victims, notably of sexual offences often fails to meet that expectation. The *Victim's Code* places a series of obligations on the police to respond to victims who have reported an offence. They, like all 11 of the service agencies subject to the Code, are required first to decide whether a person is entitled to receive services under it. For this purpose, it does not matter

[23] C. Kershaw, S. Nicholas, A. Walker, *Crime in England and Wales 2007/08: Findings from the British Crime Survey and Police Recorded Crime*, Home Office Statistical Bulletin, London, July 2008.

[24] S. Nicholas, C. Kershaw, A. Walker, *Crime in England and Wales 2006/07*, Home Office Statistical Bulletin, London 2007, http://www.homeoffice.gov.uk/rds, part 5.

[25] Cabinet Office, *Engaging Communities in Fighting Crime: Review by Louise Casey: Summary*, London 2008, Crime and Communities Review, http://www.cabinetoffice.gov.uk/crime.aspx. Compare a similar exercise conducted across Europe (S. van de Walle, J. Raine, *Explaining Attitudes towards the Justice System in the UK and Europe*, Ministry of Justice Research Series, 9/08, London, June 2008).

[26] See: the Home Office's review that sought to identify factors that would "weight" a crime's impact in numerical terms, to produce a "weighted crime index" (S. Nicholas et al., op. cit., part 2).

[27] European Union Council Framework Decision 2001/220/JHA, op. cit.

[28] Council of Europe, *Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims*, 14 June 2006, 2.1.

whether the police (or other service provider) believes the allegation of criminal conduct that the person has made[29]. It should be noted that throughout the Code vulnerable and intimidated victims are entitled to an "enhanced service", which frequently means that the time limits for responding to or informing them of the conduct of the case are much shorter. For example, if the police arrest a suspect they must inform the victim within five working days or one working day if the victim falls into the special categories.

One of the main points of potential tension between these expectations and victims' experience of the criminal justice system is how it responds to their reported offences. Of central importance are the immediacy, sensitivity and appropriateness of that response. For many years, the now national and Home Office part-funded charity[30], Victim Support, provided "front line" support in the form of its volunteers contacting victims to offer non-specialist counselling[31]. In 2005, the Home Office proposed the creation of Victim Care Units that would provide a "menu" of services, comprising two elements. The first would be emotional support and the second – practical support, addressing immediate needs such as including hardship payments, vouchers for taxis to work where the injury leaves the victim unable to drive, personal alarms and target hardening the victim's house following a burglary[32].

Of especial importance is the system's response to sexual offences; here rape victims in particular have for some time been critical of what they regard as the police's insensitive and questioning response to their offence. Over the years, a number of voluntary organisations have sought to provide support to rape victims. Under an umbrella NGO, Rape Crisis England and Wales, they have always been vulnerable to funding uncertainties. In 2006, the Home Office established 20 Sexual Assault Referral Centres across England and Wales, whose primary function is to provide a safe location were victims of sexual assault can receive medical care and counselling, quickly and sympathetically[33]. They are funded in part from the Victim's Fund, which was introduced by section 14 of DVCV 2004[34], comprising the proceeds of the surcharge applicable to almost all convictions[35].

---

[29] See: section 3 of the Introduction to the Code (Home Office, *The Code of Practice…*, op. cit.).

[30] www.victimsupport.org.uk. Victim Support receives government funding of over £30M a year.

[31] The Code requires the police to notify the local VS office of victims' names and addresses (unless the victims refuse) within two working days. Local authorities will contact victims of domestic burglary to provide (free) new door and window locks.

[32] Home Office, *Rebuilding Lives: Supporting Victims of Crime*, The Stationery Office, London 2005, Cm 6705, paras 27–28. In 2006, the Home Office announced pilot schemes to be run by Victim Support in three areas of England. *Government and Victim Support Pilot Improved Services for Victims of Crime*, www.cjsonline.gov.uk, 3 August 2006.

[33] See: "sexual assault referral centres", www.homeoffice.gov.uk. In 2007, the Home Office announced an investment of £2M in a sexual violence and abuse plan, which seeks to co-ordinate a range of services for victims of sexual abuse, *Sexual Violence & Abuse Action Plan,* www.cjsonline.gov.uk, 2 April 2007.

[34] *Victims Fund: Provision for Victims of Sexual Offending*, www.cjsonline.gov.uk, 24 November 2004. The Home Office continues to provide financial support for NGOs offering support to victims of sexual offences.

[35] A connected area of longstanding difficulty is the state's response to domestic violence. One major issue is constructing a legal response with which (typically female) victims feel comfortable. The apparently laudable aim of the Domestic Violence Act 2007 to signal the severity of a breach of a non-molestation order by imposing a criminal rather than a civil sanction has, it seems, backfired. Victims are

3.2. Investigating offences

As important as being taken seriously, victims need to know that the police are investigating "their" offence diligently, and expect that they will be informed of the outcome. Generally speaking, victims' expectations are not high, but this does not soften the anger that some feel when perceive (the reality may be different) the police to be less than industrious in their pursuit of witnesses or other evidence. This has been a particularly contentious matter where the victims of serious offending have come from ethnic minority groups, prompting accusations of institutionalised racism within, for example, the Metropolitan Police[36]. It has long been the case that victims of serious sexual offences often feel that the conduct of an investigation is, for them, as traumatising as the event itself, a perception that the government has sought to remedy (sections 3.1 and 4.2.2).

The *Victim's Code* obliges the police to inform victims of the progress of their investigation: whether a suspect has been arrested and the outcome of that arrest. At the least, the police must update the victim on their progress monthly, until a decision to discontinue or take some positive action such as referring the file to the CPS is made. Whenever such a decision is made, the standard five day and one day notification periods apply.

Whatever the popular demands for "more bobbies on the beat" or for the reduction in police officers' paperwork so as to release them to crime prevention and investigation, a demand shared by the police, the law recognises that the police work within limited resources. For the most part, the courts have resisted legal challenges to what a victim perceives to be a failure to investigate a crime more fully than was the case, even where this meant that an offender went undetected and other offences committed. Only where there is "a special and distinctive risk" to a victim whose full circumstances concerning an offender are known to the police who then fail to protect him, is civil liability a likely finding. The House of Lords has repeatedly held that in the absence of such a risk, considerations of public policy preclude the imposition of a common law duty of care on the police, even where the identity and whereabouts of the victim's likely attacker were known[37]. It is in this context that the ECHR may give victims a stronger claim. In a case decided before the Human Rights Act 1998 came into force, the Strasbourg court found the United Kingdom to be in breach of a deceased victim's Article 2 and 8 rights. But in 2006, the Court of Appeal was able to base its decision in a similar case on what now amounts to a breach of domestic law[38].

---

reluctant to give evidence, not because they believe that they will be at risk, but because, notwithstanding their partners' abuse, they do not wish them to have a criminal record.

[36] W. MacPherson, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William MacPherson of Cluny*, HMSO, London 1999, Cm 4262.

[37] See: *Hill v. Chief Constable for West Yorkshire* [1989] A.C. 53, *Brooks v. Commissioner of Police for the Metropolis* [2005] UKHL 24, and *Smith v. Chief Constable of Sussex Police* [2008] EWCA Civ 39.

[38] See: *Osman v. Ferguson* [1994] 4 All E.R. 344. Here the Court of Appeal rejected the claim brought against the Metropolitan Police by the parents of Ahmet Osman, who had been killed by his teacher following a lengthy sequence of violent incidents of which the police were fully aware but took no action. The teacher was later convicted of manslaughter on the ground of diminished responsibility. The ECHR held that the police had owed a duty to their son, in respect of which they had been negligent. This decision prompted the police in England and Wales to introduce "Osman warnings" to persons in respect of

3.3. Prosecuting offences

Until recently, it was the function of the police in England and Wales to decide whether to charge a suspect with an offence. Once charged, the police then referred the case to the Crown Prosecution Service (CPS), who decided whether to prosecute. This longstanding arrangement was fundamentally altered by the Criminal Justice Act 2003. Under that Act, all charging decisions, save in the case of non-serious road traffic offences and a number of other minor offences where the police retain their charging function, all charging decisions are now taken by the CPS.

When the police refer a case to the CPS, the prosecutor applies a two-stage test, the first of which is evidential, whether there is a realistic prospect of conviction. This test must be passed: it is an essential condition of a prosecution. But it is not sufficient: it must also, secondly, be in the public interest to prosecute. The factors that are relevant to the public interest are set out in the Code for Crown Prosecutors, which is issued from time to time by the Director of Public Prosecutions (DPP). These include a number of factors concerning the victim of the offence: age, sex, vulnerability, and (minority) ethnic origin[39]. These factors are repeated in *The Prosecutors' Pledge,* published in 2005, the first of which is that the victim or a member of the victim's family can expect the CPS to "take into account the impact on the victim or their family when making a charging decision"[40].

It should be stressed that the prosecutor's decision is a matter of discretion. A decision not to prosecute in some cases inevitably generates anger on the victim's part[41]. The decision not to prosecute is open to judicial review, but the courts have generally been very reluctant to intervene[42]. Neither does the *Victim's Code* alter this: section 32(5)(b) of DVCV 2004 provides that the Code may not require anything to be done by a person "acting in the discharge of a function of a member of the Crown Prosecution Service which involves the exercise of a discretion". In common with the obligations on the police, it does however require the prosecutor to inform the victim

---

whom they have received specific intelligence that they are in serious risk of being killed. In 2007, the police issued 1,028 such warnings (*The Times*, 9 June 2008). A more recent (similar) case is *Van Collee v. Chief Constable of the Hertfordshire Police* [2008] UKHL 50. This was an action under section 7 of the Human Rights Act 1998 for breach of the victim's Article 2 and 8 Convention rights, arising from circumstances similar but not identical to those in *Osman*. The Court of Appeal had held that where the state authorities knew or ought to have known of the existence of an immediate risk to the life of an individual as a result of the criminal acts of a third party, they owed a positive duty to protect the individual. The risk that existed arose because the police had failed to protect a witness who was murdered by the man against whom he was to give evidence. The House of Lords reversed this decision. On the central question formulated by the ECHR in the Osman case, the police officer could not, on the facts, have appreciated that there was a "real and immediate" risk to Van Collee's life.

[39] The latest Code for Crown Prosecutors was issued in 2004. See: www.cps.gov.uk.

[40] See: www.cps.gov.uk.

[41] Although it is difficult and rare, it is usually open to a victim to bring a private prosecution.

[42] *Brooks v. Commissioner of Police for the Metropolis* [2005] UKHL 24. In *Vicario v. Commissioner of the Police for the Metropolis* (*The Times*, 4 January 2008), the Court of Appeal held that the police owed the victim no duty of care when deciding whether or not to prosecute, even where the decision took into account the victim's interests. It would not be reasonable to impose such a duty, which might require prosecutors to weigh the private interests of the victim against their general public duties.

of the decision, subject to the standard five day and one day regime, including any change in the offence with which the offender is to be prosecuted[43].

In 1985, the CoE's recommended that "a discretionary decision whether to prosecute the offender should not be taken without due consideration of the question of compensation of the victim, including any serious effort made to that end by the offender"[44]. Over the past few years, the Home Office has been responsible for a number of new statutory initiatives designed to divert both young and adult offenders from prosecution, such diversion carrying the possibility of reparation or compensation to the victim. In the case of young offenders who have committed two offences, this comprises the mandatory diversion to a local authority Youth Offending Team for the purpose of arranging a "change" programme, which may include an element of direct reparation to the victim or community. In the case of adults, this comprises the discretionary conditional caution, which likewise may carry with it an obligation to make amends to the victim[45]. Here again, the police have a duty under the *Victim's Code* to inform the victim.

4. THE CONDUCT OF THE TRIAL: VICTIMS AND WITNESSES

The manner in which the criminal justice system treats victims, and in particular the victims of sexual offences continues to be a contentious matter in the law of England and Wales. In sexual offences, the victim is likely to be the only Crown witness, which places a special premium on the conduct of the trial and on the rules of evidence. And these are of more general relevance for any witness, where child or vulnerable witnesses may also require special concern. As noted, Article 2.1 of the EU Framework Decision speaks in general terms of the desirability of criminal legal systems treating victims with dignity and respect. Of more specific relevance, Article 2.2 provides that Member States "shall ensure that victims who are particularly vulnerable can benefit from specific treatment best suited to their circumstances". Similarly, the Council of Europe's Recommendations of 1985 and 2006 both state that criminal proceedings should respect the victim's privacy and dignity, reinforced by ECHR in the case of sexual abuse[46]. I deal here with the extensive arrangements that have been devised firstly to assist witnesses in general and, secondly, to assist child victims and victims of sexual offences.

4.1. Witnesses and victims: general

Article 8 of the EU Framework Decision provides that where there is a need to protect victims from the effects of giving evidence in open court, victims may be en-

[43] There are additional obligations in cases of homicide (including road traffic fatalities), sexual, racial and religiously-motivated offences; see: *Victims' Code*, section 7.

[44] Council of Europe, *Recommendation No. R (85)*..., op. cit., I.B.5.

[45] Sections 65–68 of the Crime and Disorder Act 1998 and sections 22–27 of the Criminal Justice Act 2003, respectively; see generally: D. Miers, "Restorative Justice and Victim–Offender Mediation in the United Kingdom", in: D. Miers, I. Aertsen (eds.), *Regulating Restorative Justice. A Comparative Study of Legislative Provision in European Countries*, Verlag für Polizeiwissenschaft, Frankfurt am Main 2008.

[46] *Stubbings v. United Kingdom* (1996) 23 EHRR 213.

titled to testify in a manner that will achieve this objective, "by any appropriate means compatible with its basic legal principles". Broadly speaking, it is fair to say that the criminal justice system in England and Wales, at least in terms of the formal law and the making of jurisdiction-wide arrangements to assist all witnesses (whether or not they are also victims), substantially and comprehensively meets these objectives.

A key consultation document that led to the creation of 165 Witness Care Units, available in all 42 Local Criminal Justice Areas was *No Witness, No Justice*, published in 2004[47]. Witness Care Units are run jointly with the police and the CPS. They are a single point of contact for witnesses once a suspect is charged; they must conduct a needs assessment of any witnesses (for example, transport to the court), and assist them throughout the trial. Like other criminal justice services, the *Victim's Code* places strict obligations on these Units, in particular where the witness falls within the extensive provisions of the Youth Justice and Criminal Evidence Act 1999 (YJCE) that apply to vulnerable and intimidated witnesses (see further section 4.2.1). Her Majesty's Court Service (HMCS), the agency responsible for the administration of all the courts in England and Wales likewise has a range of general obligations concerning the treatment of witnesses[48].

These and many other developments flowed from the two major consultation papers of 2002 and 2003 noted above, *Justice for All* and *A New Deal for Victims and Witnesses*. A principal theme, explicit in their titles, was the centrality to the rebalancing exercise of witnesses willing and able to give evidence. The Home Office's national Witness and Victim Experience Survey was an initiative designed to identify and emulate best practice across the country in the delivery of services to witnesses[49]. Another important initiative was the consultation that took place during 2005/06 to create the *Witness Charter*[50], whose purpose is to complement the *Victim's Code*. It requires HMCS to give witnesses information about the progress of the case, give them support based on a needs assessment, and minimise unnecessary waiting time[51]. Witnesses are also able to visit the courtroom before the trial, and special provision must be made for vulnerable or intimidated witnesses[52].

---

[47] Home Office, *No Witness, No Justice*, London, 2004, http://archive.cabinetoffice.gov.uk/opsr/local_service_projects/criminal_justice/no_witness/index.asp.

[48] Section 8.4 of the *Victims' Code* provides that victims should have a waiting room separate from the defendant's family and friends. This does not extend to the victim's family in the public gallery of the court. See the evidence given by some victims' families to the Home Affairs Select Committee's inquiry into Policing in the 21st Century (22 April 2008; to be published as HC 364–iii).

[49] Office for Criminal Justice Reform, *Victim and Witness Delivery: Local Criminal Justice Board, Toolkit 2*, 2005, http://frontline.cjsonline.gov.uk/guidance/victims-and-witnesses; http://www.justice.gov.uk/publications/witness-victim-experience-survey.

[50] OCJR, *The Witness Charter: New Standards of Care for Witnesses in the Criminal Justice System*, November 2005; *Government Publishes Responses to Witness Charter Consultation*, www.cjsonline.gov.uk, 4 July 2007.

[51] One of the objectives of the Criminal Case Management Framework, introduced in 2004, is to bring offenders to trial more speedily and to reduce trial times; see for example: *Improving Justice Delivery for Victims and Witnesses*, www.cjsonline.gov.uk, 26 July 2007.

[52] In June 2007, the OCJR issued a consultation paper on how it might further improve the support given to young witnesses in court, *Improving the Criminal Trial Process for Young Witnesses*, www.cjsonline.gov.uk, 22 June 2007.

4.2. "Vulnerable" and intimidated witnesses

For the purpose of the main statutory provisions in YJCE 1999, "vulnerable" witnesses include children, victims of sexual offences, the mentally ill and others whose quality of evidence could be enhanced by the use of specified "special measures". By section 16(5) of the 1999 Act, this means its quality "in terms of completeness, coherence and accuracy" of the evidence given; this might include, for example, an interpreter for a witness whose first language is not English.

The "special measures" are contained in sections 16–33 of YJCE 1999, and are too detailed to recount here in full[53]. They provide, for example, that children and other vulnerable witnesses may give their evidence by video-link, by pre-recorded examination in chief or from behind a screen. But these and similar provisions also have the potential to challenge the "basic legal principles" of the legal system, most notably the defendant's right to a fair trial under Article 6 of ECHR[54]. The following two sections consider this challenge in two areas that raise highly charged public policy dilemmas.

4.2.1. Intimidated witnesses: anonymity

The threat to individuals' safety and the inevitable dislocation to criminal trials implicit in the intimidation of witnesses has long been recognised both at the European and domestic levels, though it has lately assumed much greater salience in England and Wales[55]. Article 8 of the EU Framework calls upon Member States to ensure "a suitable level of protection" where "there is a serious risk of reprisals". The CoE 1985 Recommendation cautions that care should be taken where the type of offence or "the personal situation and safety of the victim" make some restrictions on the public conduct of the proceedings appropriate (Council of Europe 1985, Guideline F.15). The Council of Europe has also addressed witness intimidation directly; its Recommendation (97)13 contains the general principle that Member States should establish appropriate procedures "to ensure that witnesses may testify freely and without intimidation"[56].

Alongside (and indeed prior to) the statutory provisions in YJCE 1999, trial judges in England and Wales have themselves been responsible for the introduction of devices intended to assist intimidated witnesses to give evidence. Such measures as voice modulation, screening and anonymity in cases where witnesses to gang murders would otherwise have refused to give evidence for fear of violent retaliation have recently been challenged as being in conflict with the "birthright" of every British citizen, the right to a fair trial. In a landmark decision in June 2008[57], the Appellate

[53] See any standard textbook on the law of evidence such as: I. Dennis, *The Law of Evidence*, Sweet and Maxwell, London 2007; *Blackstone's Criminal Practice*, Oxford University Press, London 2008.

[54] These have been before the House and found to be Article 6 compliant.

[55] Home Office, *Working with Intimidated Witnesses*, The Home Office, London 2006, http://www.respect.gov.uk/members/news/article.aspx?id=9182&ContextId=7532.

[56] Council of Europe, *Victims – Support and Assistance*, Council of Europe Publishing, Strasbourg 2007, Principle 1.

[57] *R v. Davis, Ellis and others* [2008] UKHL 36, reversing the decision of the Court of Appeal, [2006] EWCA Crim 1155, which had held that anonymity was in such cases as the present consistent with the

Committee of the House of Lords held that such measures were unlawful where the defendant could not have been convicted without the evidence of the anonymous witnesses[58]. The House held that anonymity conflicted with the long-established common law principle that an accused has the right to know and to confront his accusers in person so that he can cross-examine them and challenge their evidence, in particular their credibility[59]. In the present case, it was impossible for the defendant to test his belief that a key prosecution witness was his former girlfriend from whom he had parted acrimoniously, and who was therefore likely to give biased or false evidence. A trial so conducted, said Lord Bingham, could not be regarded as meeting the ordinary standards of fairness.

The House was at pains to say that their decision did not call in question any of the safeguards under YJCE 1999, but it immediately created havoc for a number of current trials proceeding primarily on the basis of the evidence of anonymous witnesses. The decision came at a particularly bad time for the government, which has been heavily criticised for its failure to address gang violence in particular and, as noted in section 2.2, to heed the concerns of the law abiding majority (and of victims) in general. The government had indicated that it was intending to introduce statutory provisions guaranteeing witnesses anonymity from the moment they came forward to the police. But such were the implications of the Lords' decision that it enacted emergency legislation in July 2008 in order to prevent the collapse of a number of other trials, and to forestall appeals from earlier convictions based on such evidence[60]. Abolishing the common law rules, the Criminal Evidence (Witness Anonymity) Act 2008 provides for the trial judge to make a "witness anonymity order" by which a witness's identity is not to be disclosed if three conditions are met. These are, in brief, to protect an individual's safety, to ensure in making the order that the defendant will receive a fair trial, and to be satisfied that it is in the interests of justice to make the order[61].

4.2.2. Victims of sexual offences: sexual history

As noted above, as is the case with witnesses in general, there is a range of non-statutory support for the victims of sexual offences. When giving evidence, they are eligible for the same range of "special measures" as are other vulnerable witnesses. But they have additional statutory protection. These are, most notably, that they cannot be cross-examined in person by the defendant and that under section 41 of YJCE

Strasbourg Court's jurisprudence, specifically Article 6(3)(d). See: *Doorson v. Netherlands* (1996) 22 EHRR 330 and *Van Mechelen v. Netherlands* (1998) 25 EHRR 657.

[58] The Appellate Committee of the House of Lords has historically been the United Kingdom's Supreme Court; under section 23 of the Constitutional Reform Act 2005 the Supreme Court of the United Kingdom is constituted as a statutory body.

[59] The common law principle is celebrated by William Shakespeare in his play, *Richard II*: "Then call them to our presence; face to face, and frowning brow to brow, ourselves will hear accused and accuser freely speak" (*Richard II, I, i*).

[60] *The Times*, 25 June 2008; see the proposed Law Reform, Victims and Witnesses Bill in the draft legislative programme for 2008/09.

[61] The "relevant considerations" that the court must take into account when considering an application for an order include a clear reference to Article 6(3)(d).

1999, a defendant's opportunity to adduce evidence about the victim's sexual history (with him or others) is limited and subject to judicial leave. This is an area of law that continues to be contentious. On the one hand, victims of rape have long argued that the possibility that the defendant might use their sexual history in his defence is humiliating, intrusive and does not mean that on the occasion in question, intercourse was consensual. It is generally acknowledged that rape has the lowest clear-up rate of any serious offence against the person, with a conviction rate at about 5% of reported offences, though the conduct of the trial is not the only contributing factor. On the other, a defendant will argue that his fair trial right is comprised if he cannot adduce evidence that the victim is in the habit (possibly with him) of having consensual sex, and therefore that she did, on this occasion, also consent[62].

As with "special measures", this "rape shield" section has inevitably been challenged under Article 6. In the leading case, the Judicial Committee of the House of Lords held that having "due regard" to the importance of protecting the victim "from indignity and from humiliating questions", the test is whether the exclusion of the evidence would endanger the fairness of the trial[63]. Despite the echo of Article 2.1 of the Framework Decision, the essence of this decision, as it was for the Court of Appeal noted in section 4.1, is that it is a matter for the trial judge. In all matters concerning the conduct of the trial, including the exclusion of unfairly prejudicial evidence against a defendant, the judge is best placed to determine the relevance of the evidence. In any event, it would be impossible to prescribe whether any item of evidence, including the victim's sexual history, should be admitted or excluded, beyond the already complex statutory framework of section 41.

This area of law remains both difficult and highly contentious. Despite changes in the substantive law of rape introduced in the Sexual Offences Act 2003, in particular concerning the relevance of intoxication to a victim's consent, the law in practice is still seen as being too heavily weighted in favour of the defendant. The matter is exacerbated by the general damage that is done by false allegations of rape. In late 2007, the government announced further reforms to the law of evidence that are designed to produce a higher conviction rate[64].

5. SENTENCING

5.1. Statutory and judicial guidelines

All statutory offences specify the maximum sentence that may be imposed on a convicted offender. The sentence to be imposed in any case is a matter for the court, guided by the four overarching sentencing principles laid down in section 142 of

[62] Prior to the Criminal Justice Act 2003 rape could only be committed against a female victim; under section 1 of that Act the offence can now be committed against a male victim.

[63] *R v. A (No 2)* [2001] UKHL 25. The Judicial Committee is the highest court in the land, but being a Committee of the House of Lords, which is part of the legislature, compromises the Article 6 requirement that tribunals be independent. The Constitutional Reform Act 2005 establishes for the first time a statutory Supreme Court.

[64] *Convicting Rapists and Protecting Victims: Government Announces New Measures*, www.cjsonline.gov.uk, 28 November 2007.

the Criminal Justice Act 2003[65]. The principal sentencing guidance for trial judges is to be found in decisions of the Court of Appeal (Criminal Division) and in the advice provided by the Sentencing Guidelines Council[66]. It has long been accepted that a sentence should reflect an injury or loss to victims who are young, elderly or present circumstances or characteristics that make them particularly vulnerable; for example, mental disorder. Sexual offences against children (in particular where they involve a breach of family trust) and rape attract an immediate (substantial) custodial sentence. Reflecting an increase in violence against ethnic minority groups, offences that are racially aggravated attract more serious sentences[67].

5.2. The victim's views on the sentence

The *Victim's Code* requires the court to tell the victim of the outcome of the case and of the sentence imposed; here the "normal" response is reduced to three working days, while the "enhanced service" remains one day. But a long-standing contentious issue has been the whether the victim (or, in homicide, the victim's dependants) may make a statement to the court prior to sentence concerning the impact of the offence. This has attracted a literature that is far too substantial to discuss here[68]. Within the criminal trial in England and Wales, the victim has historically played no part in sentencing; indeed, where the offender pleads guilty the victim will not be required to give evidence. Where the victim does give evidence, for example in an offence against the person, the description of what the offender did, and the resulting injury, while elicited as relevant to guilt, will inform the court of its impact. But that is not its purpose; and in the case of homicide, no one speaks directly for the victim.

It is clear that as a matter of law the victim's family has no standing to challenge a sentencing decision[69], a position that the ECHR considers consistent with Article 8 of the Convention[70]. After consultation and a series of pilot schemes, a national scheme in which victims may make Victim Personal Statements (VPS) was introduced in all Crown Courts in 2001 (thus, in cases other than homicide). The *Victim's Code* requires the police to inform victims when they report offences of their right to make a VPS. Thereafter, assuming the case goes to trial, it is the CPS' responsibility

[65] Judges have historically been jealous of their freedom to sentence as the offender and the offence warrant; statutory statements of this kind are controversial. In addition there are statutory provisions dealing with specific offenders. For example, under Part 12 of the Criminal Justice Act 2003 convictions for drug trafficking or domestic burglary and of "dangerous offenders" attract fixed or minimum custodial sentences.

[66] http://www.sentencing-guidelines.gov.uk/guidelines/council/final.html.

[67] Crime and Disorder Act 1998, sections 29–32.

[68] For example, L. Sebba, *Third Parties*, Ohio State University Press, Columbus 1996, ch. 8; E. Erez, "Integrating a Victim Perspective in Criminal Justice through Victim Impact Statements", in: A. Crawford, J. Goodey (eds.), *Integrating a Victim Perspective*, Dartmouth 2000, p. 165–184; J. Doak, op. cit., p. 151–156.

[69] *R (on the application of Bulger) v. Secretary of State for the Home Department* [2001] 3 All E.R. 449.

[70] In *McCourt v. UK* (1993) 15 EHRR CD 110, the Court refused a dependant's argument that she had a right to participate in the sentencing of her daughter's murderer, noting that the Home Office had procedures whereby victims' views could be placed before the Parole Board. In any event, their views could not influence the setting of the sentence tariff as they would not be impartial.

to ensure that the victim meets the prosecuting lawyer, who will draw the VPS to the court's attention. It is the court's responsibility to consider the VPS and "to pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender taking into account, so far as the court considers it appropriate, the consequences to the victim". Unlike many other jurisdictions, this does *not* mean that the victim's views on the appropriate sentence is relevant to the sentence to be imposed, as opposed to the impact of the offence upon him or her[71].

Following this, the Home Office issued a consultation paper, *Hearing the Relatives of Murder and Manslaughter Victims*, which proposed that following conviction these relatives would be permitted to speak in person or through a representative known as a "victim's advocate". Senior judges, including Lord Woolf, recently retired as Lord Chief Justice, were wary, not wishing the court to become an "emotional arena". Their more pragmatic concerns were such as whether the families of every victim of a serial killer could speak, and whether a family's expectations about the length of the custodial sentence would be disappointed. By contrast, many victims' families are highly critical of a justice system that they see as aloof and uncaring[72]. Following the consultation, five pilot schemes were run during 2006 to run until April 2007; the evaluation is not yet complete[73].

5.3. Release from custody

It has in the past been a matter of regular concern to victims and their families that they would not know when or where their offender had been released from custody, a concern that is exacerbated in cases of sexual offences, in particular against children. These offenders are on conviction placed on the Sex Offenders Register, established by the Sex Offenders Act 1997; they are required to notify the local police of their address, employment arrangements and the like. But the Home Office has consistently refused to implement in England and Wales an exact equivalent to the requirements of "Megan's Law" to be found in some United States' jurisdictions. Persuaded by concerns about vigilantism and driving paedophile offenders into anonymity, the new arrangements inform victims and their families in confidence of the whereabouts of their offenders[74].

Of more general application are sections 35-45 of DVCV 2004, repeated in part 10 of the *Victim's Code*. In essence, these require a local probation board to take "all reasonable steps" to identify the victim of a sexual or violent offence for which an offender is to be sentenced, where the court is considering imposing conditions should he later be released on licence. Under section 35 the victim has a right to make re-

[71] See: Practice Direction (Victim Personal Statements) [2002] 1 Cr App Rep (S) 482, and generally: A. Ashworth, *Sentencing and Criminal Justice*, Cambridge University Press, Cambridge 2005, p. 353–358.

[72] See: *The Times*, 24 December 2005 and 22 February 2006.

[73] *Victims' Voices Get Go-Ahead; Ministers and Judiciary Agree Pilot Courts*, www.cjsonline.gov.uk (23 February 2006). See: the Protocol setting out the procedure to be followed in the pilot areas; www.judiciary.gov.uk.

[74] Home Office, *Child Sex Offender Review*, Home Office, London 2007, http://www.homeoffice.gov.uk/documents/CSOR.

presentations to the court and to receive information about any conditions[75]. A similar obligation lies on the Parole Board to "reflect these considerations" when it is deciding whether to release an offender on licence and subject to what conditions.

5.4. Mediation, reparation and compensation

In the Preamble to its 1985 Recommendation on the position of victims in criminal procedure, the CoE recommended that Member States examine the possible advantages of mediation and conciliation schemes. More specifically, it provided that "the police should inform the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and state compensation"[76]. Of much greater significance in this context is its 1999 Recommendation on mediation in penal matters[77], which sets out in considerable detail how Member States might design and deliver victim offender mediation. This is also the subject of the much less detailed Article 10 of the European Union's 2001 Framework Decision, which requires the promotion of penal mediation in appropriate cases and recommends that the result of that mediation be available to the court.

Mediation does not form as distinct a modality in the law of England and Wales as it does in other EU countries. The law places greater emphasis on reparation and restorative justice, and in this regard it is fair to say as it is the case that for both adult and young offenders that so far as they contemplate reparative action these obligations are met. In the case of young offenders recently enacted measures authorise, or in some cases, require, the court to order them to make reparation to their victims or to their community[78]. Adult offenders likewise may be required to make reparation to their victims, and a court may defer sentence in order that an offender may do so, which the court will in turn take into account when sentencing[79].

One sentencing option that has been available to criminal courts for over 30 years is the compensation order, available for offences against property and the person. The court is obliged to consider such an order in a case in which it has power to make one, and where it does, must do so in preference to a fine. For this purpose, the police must, at the reporting stage, ask victims whether, if there is a conviction, they would wish the offender to compensate them. The details of loss are recorded and become part of the case file that the prosecutor ultimately presents at the sentencing stage. As criminal courts are not well equipped to assess compensation in complex cases, orders are typically made where the loss is simple to calculate. As the majority of offenders are not wealthy, payments tend to be much lower than would be available under the Scheme or in a civil action against the offender, less than £300 on average. These orders are not available for road traffic offences or for homicide. In the

[75] Sections 36–45 extend these rights to the making of hospital orders and hospital directions in the case of mentally disordered offenders who have committed sexual or violent offences.

[76] Council of Europe 1985, *Recommendation No. R (85)…*, op. cit., point I.A.2.

[77] Council of Europe (1999), *Recommendation No. R (99) 19*…, op. cit.

[78] See: sections 16–30 (referral orders: a mandatory sentence) and sections 63–75 (reparation and other orders: discretionary sentences) of the Powers of Criminal Courts (Sentencing) Act 2000. See also: chapter 3.3 on reparative conditions attached to a final warning.

[79] See: section 278 (deferred sentence) of the Powers of Criminal Courts (Sentencing) Act 2000 and section 200 (community sentences) of the Criminal Justice Act 2003.

latter case, the victim's relatives will usually be eligible under the Criminal Injuries Compensation Scheme (see section 6.2). In these respects, the law of England and Wales clearly meets the CoE Recommendation (06)8 that Member States should assist victims to obtain compensation from the offender via criminal proceedings as well as the specific procedures for achieving this set out in 1985. These are that "all relevant information concerning the injuries and losses suffered by the victim should be made available to the court" and that compensation should "take priority over any other financial sanction imposed on the offender"[80].

6. REMEDIES

6.1. Procedural

As noted earlier, while a Ministerial or statutory agency exercise of discretion is subject to procedural correction by way of judicial review, the courts have placed substantial limits on its application to criminal justice decisions. Neither does any failure to perform a duty under the *Victim's Code* give rise to any criminal or civil liability[81]. In the event of such failure, the victim may make a complaint, initially to the agency concerned and if not satisfied, to the Parliamentary Commissioner for Administration[82]. This Commissioner ("the Ombudsman") has a wide remit to consider deficiency or maladministration on the part of statutory bodies and government agencies. It may recommend that the service makes an apology, and it can recommend but not compel the payment of compensation for administrative failings.

6.2. Substantive

The commission of a crime does of course create for the victim a civil cause of action for damages against the offender. The CoE Recommendation (06)8 also provides that Member States should assist victims to obtain compensation from the offender via civil proceedings. Such actions are rare, not least for the reason that offenders typically have insufficient funds, and unlike negligence actions against, for example, medical services, cannot insure themselves against their crimes[83].

For victims of offences against the person, the long-standing remedy is an application to the Criminal Injuries Compensation Authority (CICA) for an award of compensation under the scheme that it administers, funded from general taxation. The European Union Directive of 2004 relating to compensation to crime victims imposed two obligations on Member States. Article 1 of Chapter I requires them to ensure that the victim of a violent intentional crime committed in a Member State in which the victim is not habitually resident has the right to submit an application for compensation in that State. That application will be made with the assistance of the

[80] Council of Europe 1985, *Recommendation No. R (85)...*, op. cit., points I.D.12 and I.E.14.

[81] Section 34(1) of DVCV 2004.

[82] The Victims' Commissioner (see: section 7 below) is precluded by section 51 of the DVCV 2004 from exercising any of his functions in relation to "a particular victim or witness".

[83] See: the successful claim against her offender by the victim of a kidnap and rape; *The Times*, 15 November 2006.

Member State in which the applicant is now residing ("the assisting authority") whose obligations to the victim are set out in Articles 4–11. As some Member States might not have such a scheme in operation at the date of the Directive, Article 12.2 in effect requires them to create one. In 2007, the Commission implemented Article 19, which requires it to report by January 2009 on the application of the Directive.

The Scheme operating in England and Wales (which also extends to Scotland) has been in existence since 1964, though its current structure and assessment arrangements were substantially revised in the mid 1990s. In essence, it provides compensation for the actual injury sustained that is based on a tariff that valorises injuries from £1,000 to £250,000[84]. Most awards fall within the lower ranges; the vast majority (90%) of successful applicants (32,000 in 2006/07) receives awards no higher than level 10 (£5,500)[85]. It is also possible to be awarded compensation for long-term care and for future loss of earnings or earning capacity. In these matters, the Scheme comfortably exceeds European expectations.

In part because of its similarity to aspects of a normal civil action for damages, the Scheme has always suffered from a number of systemic problems. These include delay, complexity in the calculation of awards, and the generation of unrealistic expectations about their amount, all of which encourages public criticism[86]. In 2005, the Home Office issued a consultation paper that made radical reform proposals. Given the inherent sensitivities that were greatly exacerbated by the terrorist bombings in London on 7 July 2005, any reform of the Scheme would always be politically hazardous[87]. This would be particularly so where, as was proposed, many less serious injuries would be excluded from the Scheme. To ask, as *Rebuilding Lives* invites, "tough questions" about its justification or scope can readily be interpreted as a denial of the reality and the intensity of the victim's experience[88]. In the event there was, unsurprisingly, little public support for any changes to the Scheme. In June 2008, the government introduced some modest amendments of an administrative nature and, substantively, updated the compensation tariff[89].

---

[84] On valorising intangible injuries see: P. Dolan, G. Loomes, T. Peasgood, A. Tsuchiya, "Estimating the Intangible Victim Costs of Violent Crime", *British Journal of Criminology* 2005, No. 45, p. 958–976.

[85] Criminal Injuries Compensation Authority, *Annual Report and Accounts 2005/06* (2007, HC 214), The Stationery Office, London 2007, www.cica.gov.uk; Criminal Injuries Compensation Authority, *Annual Report and Accounts 2006/07* (HC 950), The Stationery Office, London 2007, www.cica.gov.uk.

[86] Delay in resolving claims is a chronic problem (National Audit Office, *Compensating Victims of Violent Crime*, London, HC Paper 100, 14 December 2007). *The Victim's Code* recognises that it would be unhelpful to impose on the CICA time limits similar to those applying to other criminal justice decisions. But it does require the CICA to notify the victim of the status of the claim if it is not resolved within 12 months (section 13).

[87] Home Office, *Rebuilding Lives…*, op. cit.; D. Miers, "Rebuilding Lives: Operational and Policy Issues in the Compensation of Victims of Violent and Terrorist Crimes", *Criminal Law Review* 2006, p. 695–721.

[88] In the particular case of its response to homicide, Paul Rock ("Murderers, Victims and Survivors", *British Journal of Criminology* 1998, No. 10, p. 185–200) has compellingly shown how difficult it is to engage in a reasoned critique, in part because the critic (typically) can never personally share the experience of being a survivor.

[89] See: *Improving the Compensation Service for Victims of Violent Crime*, www.cjsonline.gov.uk, 18 June 2008.

7. CONCLUSIONS

All of the matters described above are subject to the overall scrutiny of the Commissioner for Victims and Witnesses. By section 49 of DVCV 2004, the Commissioner's general functions are to promote the interests of victims and witnesses, to take appropriate steps to encourage good practice in their treatment, and to keep the operation of the *Victim's Code* under review. The first Commissioner took office on 1 April 2006. Also established by DVCV 2004 (section 55) and replacing an earlier non-statutory model of the same name[90], the Victims Advisory Panel comprises persons who have direct experience of victimisation and of the criminal justice system. Its purpose is to bring that experience to the government's attention, via the Commissioner for Victims and the Ministers who attend its meetings.

These relatively new institutional arrangements form part of the array of agencies whose responsibilities speak to the implementation of the government's vision for victims of crime. The Victims and Confidence Unit aims to synthesise three themes: information to and from victims, the provision of services to victims, and, in the words of the government's Strategic Plan for the criminal justice system, "to put the needs of victims at its heart"[91].

[90] See: *Listening to Victims: The First Year of the Victims' Advisory Panel*, which is a report of the non-statutory Panel, www.homeoffice.gov.uk.

[91] Office for Criminal Justice Reform, *Working together*..., op. cit.