

CHAPTER EIGHT

LEGAL REPRESENTATION FOR VICTIMS OF SEXUAL OFFENCES

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1. INTRODUCTION

The Law Commission addresses the question of legal representation for victims of sexual offences in Chapter 16 of its Discussion Paper, under the general heading of Legal Representation. It makes short work of the issue, emphatically rejecting the 'introduction of complainants as ancillary prosecutors' (16.11.1). It is our opinion that this matter requires revisiting. We are not recommending the introduction of the victim as an 'ancillary prosecutor', a term which may serve to cloud the issue. In this submission we refer to a victim's lawyer or legal representative. This is not a question of semantics, but rather an indication of the substance of the role that such a person can be envisaged as fulfilling. We believe that the introduction of legal representation for rape victims, within clearly defined parameters, will not only serve to strengthen victims' rights, by substantially addressing a number of the inequities raised in the Discussion Paper, but will serve to improve efficient and effective management of cases throughout the criminal justice process. It will also serve to further recognise that although rape is a crime against society, it is uniquely personal in nature, placing victims as witnesses in a particularly vulnerable position.

2. THE RIGHT TO LEGAL REPRESENTATION

The Commission notes (at 16.1.1) the importance of legal representation as a means of enforcing rights. Quoting from Robertson *et al* the Commission points out that 'rights are useless unless the people who have those rights are aware of them, their significance, and how to use them effectively'.¹ We would suggest that this view applies equally to the victim and the accused. The Commission further recognises that it is not the primary function of either the presiding officer or the prosecutor to act as protector of the victim's rights (at 16.3.1.1, 12.7.1 and 16.3.1.2). Indeed, it is explicitly noted (at 16.9.2) that there are times when the victim's interests and those of the prosecution may substantially diverge, with the Commission stating that 'the role of the prosecutor is not that of a legal representative for the victim' (12.7.1). Furthermore, the adversarial nature of our trial process means that victims, as main state witness are often subject to gruelling cross-examination by defence attorneys, charged with protecting the interests of *their* clients. Given that sexual offences are treated as a crime against the State and that neither the prosecutor nor the presiding officer carries any responsibility for protecting the rights and interests of the victim, it is not surprising that we see the levels of secondary victimisation that we do.

In this vein the Commission points to a number of instances where the victim's rights or interests may be infringed upon throughout the criminal justice process. These include limited access to information from the time that the victim reports the crime through to sentencing, parole and release; inappropriate questioning (both in terms of content and manner) during the trial; and limited input at crucial stages of the proceedings, such as bail and sentencing. We have, throughout our submission made a number of recommendations for improving the victim's position. We believe that the presence of a legal representative charged with protecting the victim's interests will substantially bolster the effect of both our recommendations and the many positive changes recommended by the Commission.

¹ Robertson M and Seneque M (eds) (1991) *Human Rights for South Africans* Cape Town: OUP at p75 quoted in the SALC Discussion Paper 102 at 16.1.1.

We recommend therefore that a legal representative for the victim be present throughout the pre-trial process, at the trial (where necessary and appropriate) and at sentencing.

3. ANCILLARY PROSECUTOR VS VICTIMS' LAWYER

Legal representation for victims of sexual offences is found in a number of jurisdictions.² The extent to which the victim may, through her legal representative, participate in a trial also varies between jurisdictions. The Commission has examined the *Nebenklager* procedure applied in Germany. This procedure allows the victim to join the action against the accused, allowing her to call and examine witnesses and otherwise participate directly in most aspects of the trial. Similar provision is made in Belgium and France through the *parte civile* process.³ These jurisdictions are clearly distinguishable from our own by their inquisitorial nature. Furthermore, in the case of Belgium and France participation by the victim is substantially aimed at the question of civil compensation which is decided alongside that of criminal liability. We do not recommend that the Commission follow this model.

We would suggest however that there are appropriate models that may be followed and would draw the Commission's attention to the approach taken in Denmark, Norway and Ireland.

4. ALTERNATIVE MODELS: DENMARK, NORWAY AND IRELAND

Denmark

Although the Danish criminal justice model contains a number of inquisitorial elements, it is essentially adversarial in nature. Section 171 of the Danish

² Spain, the Netherlands, Luxembourg, Finland, Italy, Austria, Sweden, Norway, Germany, Ireland, France and Belgium all allow for some level of legal representation to be afforded to rape victims.

³ Bacik, Maunsell and Gogan (1998) *The Legal Process and Victims of Rape* Dublin: Dublin Rape Crisis Centre and School of Law, Trinity College p175 and 210.

Administration of Procedure Act of 1980 introduced legal representation for rape victims, a provision considered so successful that it has since been extended to cover victims of other crimes. Broadly speaking, this system of legal representation works as follows:

There is a duty on the police to inform the victim when she first reports the rape and before she makes a statement that she has a right to legal representation. The police are under a duty to keep the victim informed of the investigation and of the process which will be followed. Her lawyer ensures that, in practice, this occurs. The lawyer has access to the police investigation and all evidence prior to an arrest and may discuss these with the victim.

At trial, the victim's lawyer may only be heard on matters directly affecting the victim. Thus, she may not ask for additional witnesses to be called, nor cross-examine the accused or any of the witnesses. Nor may the victim's lawyer make submissions to the court on points of law. She only has the right to be present at the trial while the victim is giving evidence. At this stage she may object to questions put to the victim by both the defence and the prosecution. She may also ask that the victim give evidence behind closed doors or be cross-examined without the defendant being present.

At sentencing, the victim's lawyer may call witnesses and lead evidence in respect of the impact that the crime has had on the victim and the issue of compensation, but may not address the court on the question of sentence.

That the victim's lawyer may not act as a second prosecutor is emphasised in the memo accompanying the original Bill that introduced this concept. This means, it is suggested, that she may not concern herself with 'questions of guilt, innocence or sentence'.⁴ Rather, the lawyer acts only to protect the interests of the victim.

⁴ Bacik *et al* note 3 above p199

We strongly recommend that the South African Law Commission consider the introduction of a system of legal representation for rape victims based on this model.

Norway

As in the example of Denmark, victims must be informed of their right to legal representation at the time a rape is reported and are entitled to have their legal representative present at the police interview. Again, the lawyer serves to ensure that necessary information reaches the victim and prepares her for the court case. The legal representative may appeal against a decision by the police or prosecution to drop a case.

At trial the lawyer has the right to be present whenever her presence is necessary to offer support and assistance to the victim. She may intervene in respect of procedural issues affecting her client and ensure that questioning is not improper or irrelevant. She also has the right to appear at sentencing along similar lines to the Danish model.

Ireland

Section 26(3) of the Civil Legal Aid Act 1995 gives rape victims the right to obtain legal advice. This was extended in 2001 by means of the Sex Offenders Act which provides, in s34, for an amendment to the Criminal Law (Rape) Act of 1981. By means of this amendment the legislature has introduced legal representation for complainants in cases where the defence seeks to adduce evidence about the sexual experience of the complainant. Although limited we believe that this represents an important recognition that there are times during the trial process where the victim must be allowed, in order to protect her own rights and interests, to participate in the trial as something more than a witness. The Commission will note that this is similar in effect to the Ohio model considered briefly in Discussion Paper 102. That model provides for legal representation for the victim where the admissibility of evidence is in question (16.8.1).

5. THE SOUTH AFRICAN CONTEXT

Many points in the process through which a rape victim travels, from first reporting the offence to the police to sentencing of the perpetrator, are considered necessary and appropriate times for her voice to be heard. Where this is so, it follows that legal representation is appropriate. Furthermore, there are additional functions which might conceivably be fulfilled by such a representative, thereby relieving some of the load which currently rests on the shoulders of police and prosecutors. Indeed, we believe that a victim's lawyer will often complement the roles of other criminal justice personnel and can only be of assistance to the court. Below we discuss briefly aspects of the process at which legal representation might be appropriate:

Pre-trial

The pre-trial stage includes reporting the offence to the police and making a statement, trial preparation, plea bargaining and bail hearings. At this stage lack of information and general communication with the victim throughout the process has been identified as particularly problematic.

Information And Communication

Lack of access to information on the legal process, the role players involved, the conduct of the trial and the investigation acts to substantially add to the trauma that victim's experience. Our research on the DVA⁵ points to the chronic capacity problems within the SAPS. Likewise, prosecutors often do not have the time to meet with complainants for any length of time prior to the trial. Staff turnover means that often the same prosecutor will not even be present for the duration of the trial. One of the primary functions of a victim's lawyer would be, following the lead of numerous other jurisdictions,⁶ to act as an information source for the victim from the time that the offence is reported, through the trial process. This in no way detracts from the duty which we propose to impose on investigating officers and prosecutors to ensure that victims are fully informed throughout the process and properly prepared for trial. Rather, we believe that a victim's lawyer would complement that duty. As a legally trained person she would bring an understanding of the process to interactions with the criminal justice system, greatly facilitating the flow of information to the victim, whose interests she served.

Furthermore, the presence of a victim's lawyer at the time that a statement is taken would help to ensure that the victim is properly and appropriately interviewed, serving to address, in a small measure, the difficulties identified in respect of the quality of statements taken by investigating officers (3.2.6.1), that medico-legal services are made available and provide the victim with a measure of support. The presence of a legally trained person may also serve to ameliorate some of the difficulties that we identify in Chapter 4 of our submission around the unfounding of cases, balancing the potential vagaries of police and prosecutorial discretion.

As such, we would recommend that the victim be informed by the police, at the time that she first reports the offence, of the right to have an attorney present when she makes her statement. To this end the police should keep a list of attorneys who are prepared to function as victim's lawyers. Although legal

⁵ Parenzee, Artz and Moulton (2001) *Monitoring the Implementation of the Domestic Violence Act* Cape Town: Institute of Criminology (UCT)

⁶ See note 2 above.

representation in such as case should ideally be state-funded, we are cognisant of the difficulties faced by the Legal Aid Board. We would suggest that in addition to the option of state-funding, the possibility of *pro deo* representation be canvassed with the profession.

Plea Bargaining

The Commission recognises (at 17.2.7) that plea bargaining may be problematic in respect of victims' rights. It recommends that a prosecutor only be permitted to enter into a plea bargain agreement after consultation with the investigating officer and after considering, 'circumstances permitting', representation from the victim or her representative (17.2.4).

We are of the opinion that legal representation for the victim when a plea bargain is being considered will substantially improve the quality of that interaction and the subsequent decision on the matter. Likewise, we believe that the presiding officer can only be placed in a position to make a full and proper assessment of the appropriateness of the agreement (17.2.5) if she has access to the views of the victim. All the better if these are presented in a cogent and accessible way.

Bail Hearings

The problematic nature of bail in respect of sexual offences is dealt with in Chapter 5 of this submission. In a large measure these problems go to inadequate protection of the victim's rights and interests. Legal representation for the victim will ensure that the victim is informed, in the first place, of the hearing and that, at that at those hearings, the victim's fears and concerns are voiced. Such a representative would also complement the prosecutor in ensuring that all relevant facts are placed before

the court, a prosecutorial duty the importance of which was recently affirmed in both the facts presented and judgement handed down in the *Carmichele* case.⁷

Trial

Courts are, for numerous and varied reasons, intimidating spaces. Testifying in a court is often therefore a frightening experience. This even more so when the witness has been victim to and is required to recount details of an offence of a deeply personal nature. In this respect research conducted in the European Union has found that

The presence of a victim's lawyer....had a highly significant effect on a victim's level of confidence when giving evidence, and meant that the hostility rating for the defence lawyer was much lower.⁸

In other words, the quality of testimony improves and the adversarial nature of the process is mitigated.

It is emphasised again that the victim's lawyer is not a second prosecutor. As such, their concern during the trial process should not be around questions of innocence, guilt or sentence, but rather to ensure that the victim's 'story' is properly told and that procedural and evidentiary rules as they pertain to the victim are properly enforced. That is, the victim's lawyer is there to help *the victim* in court. Cases in which this might be appropriate in terms of the proposed Bill would include deliberations as to whether the victim should be declared a vulnerable witness (s13) and applications by the accused for disclosure of the victim's personal records (s15(3)). The victim's lawyer might also appropriately apply for the victim's evidence to be heard in camera or in the absence of the defendant.

That this assistance can be very narrowly circumscribed, but nonetheless effective, may be seen from the Danish, Norwegian and Irish models discussed above.

⁷ <http://www.concourt.gov.za/cases/2001/carmichelesum.shtml>

⁸ Bacik *et al* note 3 above p17

Sentencing

It is suggested that, following the Danish model described below, the victim's lawyer be permitted to address the court in respect of victim impact and compensation. This model does not allow such a representative to speak directly to the issue of sentencing, an approach with which we agree. Legal representation for the victim would substantially complement not only the existing compensation regime (as limited as it is), but also that proposed by the Commission's Project on Sentencing. Likewise, in respect of the Commission's recommendation (at 40.16.6) that the court be obliged to consider victim impact statements when determining sentences, a position we strongly endorse.

Parole

We endorse the Commission's recommendation that the victim's input be used to determine parole conditions (40.16.16). It should be noted that the arguments made above in respect of the role that a legal representative can play in providing access to information, victim support and facilitating the victim's participation and testimony apply equally in respect of parole hearings.

6. EVALUATION

In 1998 a research report entitled *The Legal Process and Victims of Rape* was jointly published by Trinity College, Dublin and Dublin Rape Crisis.⁹ This research documents the rape law process in 15 European Union countries. A statistical analysis to determine the effect on the victim of having legal representation at pre-trial and trial stages revealed the following:¹⁰

- (i) participants experienced significantly fewer difficulties in obtaining information about case developments;
- (ii) participants had a significantly clearer understanding in relation to their role at trial;

⁹Bacik *et al* note 3 above p17

¹⁰ Bacik *et al* note 3 above p151

- (iii) participants reported higher levels of confidence and articulateness when testifying;
- (iv) participants rated the attitude of the accused's lawyer as significantly less hostile;
- (v) the impact of the trial process on the participant's family was considered to be significantly less negative;
- (vi) participants were overall significantly more satisfied with the legal process than were participants who did not have their own legal representative during the trial process.

As such, the researchers strongly recommend the introduction of victim's lawyers in all jurisdictions, both adversarial and inquisitorial. This view is endorsed by UN High Commissioner for Human Rights, Mary Robinson, in her forward to the report.¹¹

In relation to sexual offences cases victim's lawyers have the potential to fill a substantial gap created by the reality that existing role-players fulfil pre-allocated roles within the process and that our criminal justice system suffers from chronic under-resourcing and often serious attitudinal problems. If narrowly and clearly circumscribed we believe that legal representation for the victim of sexual offences would withstand constitutional scrutiny. This is not least because providing support to the victim and assisting her in a way that ensures that she testifies cogently and coherently can only serve to benefit the process. Likewise, reducing delays which, as noted by the Commission (at 2.6), impact substantially on both victim and accused, reduces potential prejudice to both. It will also go to improving efficiency and decreasing postponements, by allowing the victim to question unjustified delays on the part of either the prosecution or defence. Furthermore, we would suggest that improved efficiency and victim participation may serve to improve prosecution of sexual offences trials, increasing their deterrent effect. We are of the firm opinion that our recommendation does not in any way infringe on the due process rights of the accused.¹² It would be ludicrous to base a defendant's right to due process or a fair trial on a victim's incoherence, disempowerment and alienation from the process.

¹¹ Bacik *et al* pxii

¹² Any infringement would, in any event, be open to justification under s36(1) of the Constitution.

Qualified assistance to the victim can only assist the court in its quest for the truth, to the benefit of both the victim and the accused.

7. RECOMMENDATION

In addition to general recommendations made above, we recommend that the Law Commission further considers this matter and, in particular, makes provision in the Sexual Offences Bill as follows:

- **That a positive duty should be placed on any member of the SAPS taking down a rape complaint to inform the victim before she makes a statement or before the initial interview that she has the right to legal representation.**
- **That a provision be placed in the Bill specifying that:**
 - 1. A victim of a sexual offence shall have a right to obtain legal representation.**
 - 2. Such a legal representative may represent the client:-**
 - (a) in all dealings with the SAPS and NDPP;**
 - (b) in respect of bail hearings;**
 - (c) at the time that the victim is giving evidence and whenever appropriate and reasonable during the trial process to directly protect the rights or interests of the victim; *(these circumstances may be clearly defined and circumscribed in the legislation itself)***
 - (d) at sentencing in respect of the impact that the crime has had on the victim and when speaking to the issue of compensation;**
 - (e) at parole hearings in respect of the conditions to be attached to an offender's release;**
 - (f) at any other time during the process where appropriate and reasonable to directly protect the rights and interests of the victim.**