Victims' Rights or Human Rights?

TIM ANDERSON*

Criminal justice debates in New South Wales in recent years have seen three-way tensions between an increasingly "law and order" oriented state, groups advocating the newer concept of victims' rights, and groups defending the rights of those confronted by the state in the criminal process.

Older alliances, between groups representing the rights of the largely male prison population, and women's groups outside the bureaucracy representing women's rights as defendants within the criminal system, have been replaced in many instances by alliances between an increasingly penal state and some women's groups within the bureaucracy, advocating the rights of women as victims as against individual male offenders.

The aim of this article is

- to outline some of these tensions in the context of a broader concern for human rights within the criminal justice system,
- to indicate how concern for "victims' rights" has in many instances been harnessed for repressive "law and order" purposes, which contradict traditional human rights, and
- to outline a process of dialogue which has begun between victims' rights and prisoners rights groups, and to indicate some common concerns which have been identified.

In the course of this discussion I will suggest that the legitimate goals of victims' advocates, that is:

- ensuring the state recognises and takes up complaints which have previously been ignored, and
- ensuring that victims needs are fully and independently addressed by the state,

have been extended to include illegitimate goals, namely:

- suggesting that victim status merits a special say in the penalty given to offenders, either generally or in any particular case, and
- seeking to meet victims' needs by extending state penal powers.

This illegitimate extension of victims' advocacy, having linked up with older law and order traditions, has assisted in developing a harsher penal regime with higher prison rates, greater human rights abuses and more deaths in custody.

Justice and revenge have traditionally been discrete concepts; you might have one or the other, but not both. However *institutionalising revenge* within the justice system has contributed to a serious degrading of human rights within the criminal justice system.

* Lecturer in Politics, University of Technology Sydney.

Nevertheless, recent dialogue between prisoners' rights and victims' rights groups has established that there is a basis for dialogue and agreement on issues of mutual concern. In particular, there is support for the notion of using the resources presently marked to expand the prison system, on victims' services. This also fits with the expressed, but unrealised, policy of all major parties, to only use prison as a sanction of last resort.

Human Rights

The formulation of codes of human rights internationally has recognised the centrality of the state as the prime human rights abuser. The vast majority of the genocide, massacre, torture, murder and other abuses in human history has been carried out by states. As a result, and as weak as the codes are, human rights instruments have identified state actions as their main targets. So for instance the *International Covenant on Civil and Political Rights* (1966) promotes rights which are mainly protections for individual or groups as against state power:

- advocacy of self-determination of peoples, and protection against discrimination
- measures to prevent the death penalty, genocide and torture
- abolition of slavery and forced labour (except for sentenced prisoners)
- rights to freedom of assembly, speech and religion
- a range of guarantees to people held by the state for criminal process.

These latter guarantees include, in Articles 9 to 17:

- freedom from arbitrary arrest and the right to be informed of the charge on arrest
- the right to compensation in the event of unlawful arrest
- the aim of prisons being reformation and social rehabilitation
- equality before the law and public hearings in the courts
- persons to be presumed innocent until proven guilty
- adequate time and facilities to prepare a defence
- the ability to examine witnesses against oneself
- not to be compelled to confess or testify against oneself
- the right to appeal to a higher court
- not to be tried or punished a second time for the same offence
- no retrospective penalties or retrospective crimes

These criminal justice rights stand in recognition of the particularly vulnerable position of an individual held to face a charge by the state, which regards crimes as offences against society, rather than as civil disputes between individuals. The state in the vast majority of prosecutions has far more resources at its disposal than does the defendant. Further, where the state convicts an individual for a crime, the penalty is given as a measure for offence against the whole community, and not as some form of compensation (as in the civil law) to the victim, or person aggrieved.

These are some of the reasons why it has always been important to maintain the focus of "rights", in criminal law, on the actions of the state. The newly expressed concern for victims' rights has tended to shift that focus towards individual offenders.

Victims' Rights

The strength of the move towards victims' rights in recent years has come from the women's movement: in particular the campaigns to force the state to seriously address sexual assault and domestic violence against women.

As I suggested above, there can be little dispute that this movement has been timely, legitimate and valuable in seeking to ensure that the state recognises and takes up complaints which have previously been ignored, and to ensure that victims' needs are fully and independently addressed. These demands are based on the right to freedom from discrimination, and the democratic principle that citizens from whom responsibilities are demanded must also share equally in the guarantee of rights.

Feminist theorists have commented on the selectivity of state intervention, pointing out that the state has defined private boundaries beyond which policing would not (or would rarely) extend. Women's interactions with men, being seen as personal and private, were not to be subject to state intervention, and this left women exposed to domestic violence and sexual abuse.[1]

It is clear, also, despite some suggestions to the contrary,[2] that it is women who are subject to the overwhelming bulk of domestic violence and sexual violation. New South Wales statistics for the period 1968 to 1986 show that, while there were more male homicide victims than female:

- three times as many women as men were killed by a partner,
- 99 per cent of those seeking apprehended violence orders (AVOs) against a partner were women,[3]
- and while it has been said for some time that domestic violence occurs throughout all sectors of society[4] the rates of AVOs sought in New South Wales in the late 1980s were far higher in poorer, working class areas.[5]

Similarly, sexual assault victims were overwhelmingly female and the perpetrators even more overwhelmingly male:

- of the 5,203 cases of sexual assault reported to New South Wales police in 1989-91, 90.2 per cent of the victims were female,
- only one of the 311 proven offenders was female.[6]

These figures have to be read with some understanding of the high rates of under-reporting. A 1992 victim survey by the Australian Bureau of Statistics suggested that sexual assault was reported in only 25 per cent of cases; however a 1989 International Crime Survey suggested only 5.4 per cent of sexual offences against women in Australia were reported to police.[7] There is also some reason to believe that there may be greater under-reporting of

---

1 Burton, C, *Subordination: Feminism and Social Theory* (1985) at 107.
2 Dunn, K, "Media Beat-Ups Conceal Truth on Female Violence", *The Australian*, 21 July 1994.
3 Matka, E, "Domestic Violence in NSW" (1991) 12 *Crime & Just Bull* 2.
4 O'Donnell, C and Saville, H, (1982) in O'Donnell, C and Craney, J (eds), *Family Violence in Australia* at 63.
5 Above n3.
6 Salmelainen, P and Coumarelos, C, "Adult Sexual Assault in NSW" (1993) 20 *Crime & Just Bull* at 2-7.
7 Ibid.

sexual assault on males, and it has also been noted that there is a high rate (24 per cent) of sexual assault on young males in state institutions.[8]

Taking all these qualifications into account, however, we can still *conservatively* say that a year in New South Wales is likely to see at least ten thousand sexual assaults, with at least 85 per cent of the victims female and well over 95 per cent of the offenders male. From these ten thousand incidents only about 150 offenders — or 1.5 per cent — are likely to be convicted of sexual assault.

It is against this background, and against the background of an unwillingness by police to intervene in domestic violence and sexual assault cases, and against the background of a judicial sexism which has often blamed women for or diminished the seriousness of rape, that the rights of women victims to be heard has been asserted.

Some progress has been made. Reporting of sexual assault has risen. Sexual assault laws were changed in the early 1980s to limit the use that could be made of a victim's prior sexual history, and in the mid 1980s victims' compensation was introduced. These were significant advances.

However, there are still difficulties with police culture, difficulties with having charges laid and difficulties in securing convictions. It is, for instance, more difficult to secure a conviction for sexual assault than for most other categories of assault, with one exception: assault by police. Table 1 shows the acquittal rates for several categories of assault (or non-substantiation in the case of police complaints, which pass through the Office of the Ombudsman).

Table 1: Substantiation of assault charges

	Acquittal Not Substantiated
Assaults on Police (1)	5–8 per cent
General Assaults (1)	9–11 per cent
Sexual Assault (1)	15–30 per cent
Assaults by Police (2)	96 per cent

Sources: (1) Bureau of Crime Statistics and Research, *Court Statistics* 1984-1991, Attorney-General's Department, Sydney; (2) NSW Ombudsman, *Seventeenth Annual Report*, 1991-1992, Sydney

Of 1092 complaints of police assault and harassment in New South Wales over 1991-92, only 4.4 per cent were sustained. Of these

- 313 complainants said they sustained serious injury outside a police station — 17 complaints (5.4 per cent) were sustained
- 247 said they sustained serious injury inside a police station — 13 complaints (5.3 per cent) were sustained
- of the 30 complaints of sexual assault by police, only one complaint was sustained, while of nine complaints of murder or manslaughter, no complaints were sustained.[9]

8 Heilpern, D, "Victims Behind Bars Also Need Protection", *The Sydney Morning Herald*, 29 Sept 1994.
9 NSW Ombudsman, *Seventeenth Annual Report 1991–1992* (1992)

These figures remind us of the extent and formidable unaccountability of state violence. Moves to give the state more law enforcement power must therefore be regarded with extreme caution, on human rights grounds, and moves to identify as "victims" only those abused by individuals (and not by state officials) must be regarded with scepticism.

Equally importantly, the enthusiasm to promote "victims' rights" must maintain regard for the human rights of alleged offenders. First, any sectional concept of justice must be hollow: justice is universal. Second, it is well known and well documented that those who enter the criminal courts as defendants are overwhelmingly poor, unemployed and uneducated; and disproportionately institutionalised and Aboriginal.[10] Are the minimal rights of these disadvantaged sections of the community to be diminished yet further in the name of victims' rights? Surely not.

Unfortunately, some victims advocates have promoted an essentialist view of the victim/perpetrator dichotomy, which can lead to just this effect. This view seeks to create set identities determined, as David Brown says, by:

> A universal and totalising patriarchy ... [which] brooks "no excuses" in the form of the distortions wreaked by unemployment, cultural, racial and religious practice, drunkenness, addiction, histories of abuse, relative marginality and so on.[11]

This is sadly ironic, in view of the women's groups which fought to redefine women offenders as victims, particularly women who killed their partners after years of abuse.[12]

Brown notes however that status in the victim/offender dichotomy is not fixed, but rather ambiguous and interchangeable and that this fluidity is most apparent "in the trials of women who have killed abusive spouses" but also in a wider range of cases.[13]

Law and Order

Co-option of moves for victims' rights by the law and order lobby was predictable, and has occurred. Some former magistrates, judges and police have helped create some victims' groups, to further their own ideas as to how the criminal justice system should be reformed and administered. These have often been the views which have gained publicity on such issues as sentencing reform and abolition of the dock statement.[14] However there has been no systematic attempt by government to consult with community based victims' groups, such as sexual assault services or women's refuges. And at the same time as moves have been made to actually *reduce* victims' access to victims' compensation,[15] most of the regressive law and order initiatives in recent years have been justified in the name of victims' rights.

---

10 Walker, J, *Australian Prisoners* (1992) Australian Institute of Criminology, Canberra.

11 Brown, D, "Transcending Dichotomies: The Criminal Jusice Network and a Dialogue Concerning Prisoners and Victims" (1994) 6(1) *Curr Iss Crim Just* 2.

12 Bacon, W and Landsdowne, R, "Women Who Kill Husbands: the Battered Wife on Trial", in O'Donnell and Craney, above n4.

13 Above n11.

14 See Gee, K, "Abolish the Dock Statement", *SMH*, 2 May 1994; Meares, C L D, Woodward P M, Lee, J A, Reynolds, R G, Slattery, J P, Cripps, J S, Moffitt, A R, Yeldham, D A, Holland, K J, and Allen P H, (all retired NSW Supreme Court Judges) Letters to the Editor, *SMH* 2 May 1994.

15 Murphy, C, "Smell of Democracy", *The Sun-Herald*, 8 May 1994.

The New South Wales government has attempted to present a progressive face to its very traditional law and order platform by prefacing it with expressions of concern over victims; it has not missed the opportunity to incorporate symbolic reference to those previously hidden victims:

> Law and order policy in New South Wales is all about making people feel safe in the streets and in their homes. It is about defending those among us least able to protect themselves — the elderly and those threatened by domestic violence and child abuse.[16]

These ideas were also used to support New South Wales' *Sentencing Act* 1989, which played a major role in increasing the prison population and deaths in custody, even while a Royal Commission was urging reduced use of imprisonment to curb the deaths.[17] On the second reading speech, Minister for Corrective Services Michael Yabsley suggested that by abolishing prison remissions, the Bill would help victims of crime:

> There has been outrage when offenders have been released well before the time set by the courts. Previously the victims of the crimes were largely forgotten. Those innocent people, whose lives have been destroyed, have seen the sentences handed down slashed as a result of the remission system ... the interests of the community, and the interests of the victims of crime should be given primary consideration when a prisoner is being considered for parole.[18]

The suggestion here is one that has assumed significance and deserves some special attention: a victim's rights may somehow be furthered by longer or more severe penalties, by way of imprisonment, for the offender. Exactly what benefit the victim (let alone the state, or the offender) may derive from seven years gaol instead of six, for example, is not explained.

This theme has been developed further in New South Wales, with attempts to reassure victims by the promise of more severe penalties (as though this may make them safer), and by the promise of a specially instituted place in the setting of that more severe penalty. However this is the point at which the state has begun to institutionalise revenge within the justice system.

The process has been sought and applauded by some victims' groups. Two small groups, the Victims of Organised Crime Assistance League (VOCAL) and the Victims of Homicide Support Group, which represent relatives of homicide victims, have sought intervention in the sentencing and parole process, with the help of police and members of parliament.[19]

The New South Wales government has now moved to give victims official standing in the penal process. Victims would soon be able to make written and verbal representations to the Offenders Review Board (the parole authority) concerning "their" offender's release, New South Wales Attorney General John Hannaford told the National Victims of Crime Conference in Sydney.[20] The Labor opposition has joined in the trend to incorporate revenge into the justice system, by proposing that community service orders (the most

---

16 NSW Government, *Building a Safer State* (The Law and Order Policy of the NSW Liberal-National Government) (1994) at 2.

17 See Johnson, E, *National Report: Overview and Recommendations* (1991) Royal Commission into Aboriginal Deaths in Custody.

18 Yabsley, M, *Hansard*, New South Wales Legislative Assembly, 10 May 1989 at 7906-8.

19 Tuziak, P, "Survivors Unite in Full Voice", *The Sun-Herald*, 31 July 1994.

20 Voumard, S, "Victims to Be Told if Offenders in Jail or Out", *SMH*, 20 August 1994.

effective and valuable corrective measures) be extended to include "victim restitution programs in which offenders undertake work for the victims of their crimes".[21]

Crimes of violence and sex crimes having greater media visibility, the politics of sentencing in general has been heavily influenced by attitudes to these crimes. Moves towards the harsher penal regime have made use of arguments that crimes against women should be treated more severely.

Reports to the New South Wales Domestic Violence Committee and as part of the New South Wales Domestic Violence Strategic Plan have recommended great caution with the introduction of counselling (that is, non-prison) programs for perpetrators of domestic violence,[22] or alternatively a "user pays" approach to perpetrator counselling, greater emphasis on penal sanctions and "increasingly harsher penalties" within the criminal justice system.[23] These recommendations represent both a perceived competition for community service funding, as between victims and offenders services, and a broader pressure for domestic violence to be taken as seriously as other crimes. An important effect of this pressure, however, has been to contribute to generally harsher and more penal policies.

Another law and order initiative which co-opted victims' groups support was the recent abolition of the dock statement (in both New South Wales and Victoria). The dock statement was a process by which an accused person could make a statement to his or her jury without fear of cross-examination or intimidation. This was long supported as a means by which the less articulate, or those who might be disadvantaged or prejudiced by giving evidence, could still make a final statement in their case. The abolition of the dock statement had long been sought by those who saw in it an obstruction to efficient prosecutions, those who preferred accused persons to be silenced, or those who felt the credibility of accused persons might be better demolished if they were forced to give evidence.

However the final debate over abolition incorporated strong arguments on behalf of victims, especially rape victims. It was unjust, it was put, for rape victims to be mercilessly cross-examined when alleged offenders could respond by a cowardly attack on a woman's character from the dock, which was not subject to cross examination.

According to David Brown, debate over the abolition of the dock statement was characterised by a "ritualistic debate" over competing notions of justice.[24] In Letters to The Editor of *The Sydney Morning Herald,* Marion Brown from the Women's Legal Resources Centre, and community representative on the New South Wales Sexual Assault Committee, congratulated the Attorney General on the abolition.[25] Michael Green, Deputy Senior Public Defender, opposed it.[26]

There are however problems with "victims" arguments over abolition: (i) sexual assault charges represent only 16 per cent of charges in the higher courts,[27] and so abolition mainly affects cases which do *not* involve sexual assault, and (ii) there were methods, less

---

21 Australian Labor Party (NSW), "Draft Corrections Policy" (1994), unfinished policy statement at 3, 5.

22 McFerran, L, *Report on Batterers' Programmes to the NSW Domestic Violence Committee* (1989).

23 Townsend, L, *Programs for Perpetrators of Domestic Violence* (1991) NSW Domestic Violence Strategic Plan.

24 Brown, D, "Silencing in Court: The Abolition of the Dock Statement in NSW" (1994) 6 (1) *Curr Iss Crim Just* 2.

25 Brown, M, Letters to the Editor, *SMH*, 26 August 1994.

26 Green, M, Letters to the Editor, *SMH*, 26 August 1994.

27 Bureau of Crime Statistics and Research, *Court Statistics and Criminal Courts Statistics,* 1984-1991 (1992).

generally destructive of civil rights, to deal with the suggested abuses. For instance, according to barrister Jocelyn Scutt:

> Why doesn't New South Wales amend the law so that: a dock statement must be given on affirmation or oath; an accused is open to perjury charges in relation to any statement so made; rules of evidence as to admissibility apply to dock statements; and an accused's character is put into evidence [ie his criminal record will be disclosed to the jury] if the complainant's character is challenged.[28]

These sorts of changes were not seriously considered by the New South Wales government, which chose instead to wipe out a traditional civil right, at the prompting of a conservative judges and prosecutors' lobby and in the name of victims' rights.

At least one measure of the harsher penal regime in New South Wales in recent years was and is clearly in breach of international human rights law. This is section 13A(8) of the *Sentencing Act* 1989, an amendment passed in 1994 with the support of most of the state Labor opposition. This section, aimed at a small group of notorious prisoners gaoled for murder, provides for "natural life" sentences for some cases of murder, to be substituted for the older "indeterminate" life sentences. These older "life" sentences allowed the possibility of eventual release on license. The *Sentencing Act* now requires definite sentences to be fixed, all those sentenced to indeterminate life sentences under the old system must be re-sentenced; however there is now the possibility of the new penalty being far more severe than the old. Under section 13A(8):

> If the Supreme Court declines to determine a minimum term and an additional term, the court may direct that the person who made this application: (a) never reapply to the court under this section ... [and that this] person is to serve the existing life sentence for the term of the person's natural life.[29]

However Article 51.1 of the *International Covenant on Civil and Political Rights* (1966) (to which Australia is a signatory, and by which individuals may now make complaints to the United Nations Human Rights Committee) provides:

> No one shall be held guilty of any criminal offence ... which did not constitute a criminal offence under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.[30]

Not every New South Wales initiative on criminal justice has been regressive, in human rights terms. The move to establish three "Transitional Centres" for women inmates, in place of prison capacity, has been widely accepted as progressive. More controversially but equally importantly, a pre-trial diversion scheme for incest offenders has been in place since 1991. This program replaces prison terms, for those that plead guilty, with a two-year program of mandatory counselling. It has been given a positive evaluation, and is well regarded by both victims and offenders. This program is likely to expand.[31]

---

28 Scutt, J, "Retain it, But Rules of Evidence Must Apply", *SMH*, 2 May 1994.

29 *Sentencing Act* 1989 (NSW), s13A(8).

30 *International Covenent on Civil and Political Rights* (1966) Art51.1.

31 Vinson, T, *An Evaluation of the NSW Pre-Trial Diversion of Offenders Program (Child Sexual Assault)* (1992).

A Dialogue

In 1993 the *Criminal Justice Network* was set up to build an extra-parliamentary consensus on principles of sentencing and criminal justice. One of its original principles was to integrate victims' concerns into those of the penal reformers. To this end the group has attempted to develop a dialogue between those working for civil rights within the criminal justice system and those working with community groups representing the victims of crime. It was felt that there *need not be* an essential conflict of interest between these groups, as many people had worked for some time in both areas, and it was felt that it would be valuable to map out some areas of common concern.

In correspondence with 80 sexual assault groups, incest groups and refuges over 1993-1994, the Network argued that gaoling more people had not been shown to have any effect on crime levels (property, driving, drug, assault or sexual assault), while on the other hand the hundreds of millions of dollars spent each year on prisons did mean fewer resources for support to the homeless, abused and raped. Since 1989 New South Wales has spent more than $100 million per year simply on building new prison capacity.

The vast majority of those gaoled — mainly for property, driving and drug-related crimes — came from disadvantaged backgrounds: Aboriginal people were grossly (20 times) over-represented, and most prisoners were also uneducated, unemployed and had been institutionalised as juveniles. These people were largely singled out, the Network argued, for severe punishment *in place of* a real addressing of wider socio-economic problems and a real addressing of the needs of the victims of crime. Social anger was vented on these unfortunate few, as though that would make the wider problems disappear.

The Network stated its belief that the needs and concerns of victims of crime encompassed issues such as these:

- to feel safe and that any threat has been removed,
- to be heard and have their concerns recognised by society,
- to feel supported and not blamed for what has happened to them,
- to have material social support so they can heal and not be in any way disadvantaged, and
- to gain strength through state funded mutual support groups.[32]

These were a range of concerns, which the "law and order" agenda (which has caused so much damage to the disadvantaged groups mentioned above) had not properly addressed. The "law and order" agenda mostly telescoped victims' concerns down into the one concern, the length of a gaol sentence for the offender. The Network asserted that this in itself would never be satisfying for victims and, on the other hand, would cause great harm to the institutionalised and impose a great cost on society.

The Network argued that there were great dangers in attempting to link sanctions against offenders with meeting the needs of the victims of crime. First, victims whose needs had not been met would often never be satisfied with any length of gaol sentence imposed, especially when their loss could not be compensated and/or their own legitimate

32 Criminal Justice Network, *Letter to Victims*, 4 August 1994.

and independent concerns and needs had not been met. Second, the resulting escalation of the prison population would serve no useful purpose but would, on the other hand:

- cost the community dearly in financial terms,
- create an embittered, institutionalised minority who have become community scapegoats,
- add to the Aboriginal imprisonment rate,
- add to deaths in custody, and
- add to a rise in violent robbery, a category of crime largely created by institutionalisation.[33]

In place of this, the Network argued, there should be a broad based campaign to pressure the state to independently address the needs of victims, and not use gaol sentences as a substitute for this. To this end, the Network began to ask the victims' groups to indicate their support for some suggested common principles, with the idea of building a charter of agreed principles.

The Criminal Justice Network wrote to 80 victims' groups in October 1993, suggesting three principles which groups concerned for prisoners rights and victims' rights might agree on:

(a) would you prefer to see state government funds spent on victims' services, rather than expanding the capacity of the prison system?

(b) do you support the use of community-based sanctions for non-violent offenders?

(c) is your group interested in a dialogue between groups advocating prisoners' rights and those advocating victims' rights?[34]

There was an encouraging response to these initial proposals: two sexual assault centres, three women's refuges, an incest group and a children's welfare agency immediately responded positively to all these ideas. In addition, some Aboriginal groups and groups working with families of prisoners are supportive of the process.

Currently, after a process of consultation, the Network is asking the same groups to put their names to a revised set of common principles. Support has now just begun to trickle in for these principles:

- that there be independent support for the victims of crime, not support that is conditional on, or expressed through, the penalties given to offenders,
- that victims' compensation procedures be strengthened, rather than watered down,
- that an independent agency be resourced to intervene and immediately offer support to the victims of violent crime,
- that no new gaols be built, and that the money currently spent on building new prisons be used to directly fund victims' services,

---

33 Criminal Justice Network, *Letter to Victims*, 28 October 1993.
34 Ibid.

- that community justice programs, which avoid prison so far as possible, be developed, with priority given to those which demonstrate some success in helping offenders take responsibility for their actions.[35]

The aim in this process is to cut across traditional boundaries, to challenge the notion of a fixed victim/offender dichotomy, and to assert the primacy of human rights within the criminal justice system.

35 Above at n32.