

Victim personal statements: should they affect the sentencing process?

Peter Hungerford-Welch, Mike Guilfoyle, Robert Shaw and Javed Khan offer their views on whether courts should take statements into account.

Peter Hungerford-Welch: 'there is a risk that victim personal statements will raise expectations that cannot be delivered'.

Questioning the appropriateness of victim personal statements (VPS) is not the same as saying that victims should be without a voice in the criminal justice system; rather it is asking whether VPSs are the best way of giving victims that voice. Assessing the effectiveness of VPSs requires us to address a number of questions:

How many victims make a VPS?

There is a dearth of recent research on this, but anecdotal evidence suggests that only a minority of victims produce a VPS.

Do victims feel better about their experience of the criminal justice system because they have made a VPS?

Again, there is a need for more research on victim satisfaction in the context of VPSs. Some may find setting out their feelings a cathartic experience, but others may be unhappy at having to make a second witness statement. Some may feel more 'valued' if their VPS is referred to when sentence is passed, but anecdotal evidence suggests that VPSs are referred to in comparatively few cases.

Do VPSs actually make a difference to sentencing outcomes?

The short answer is almost certainly 'no'. In most cases, the effect on the victim will be much as expected, and will add little or nothing to the existing evidence (the victim's witness statement, any medical evidence etc.). So, in most cases, the VPS will not provide any information that will change the sentence. If the VPS does suggest an unusually high level of harm, fairness to the defendant would usually require this harm to be

established by independent evidence (such as a medical report).

Moreover, as the Consolidated Criminal Practice Direction makes clear, the opinions of the victim as to what the sentence should be are 'not relevant'. This means that there is a risk that VPSs will raise expectations that cannot be delivered.

So what would be a better way of giving victims a voice?

Some inquisitorial jurisdictions allow greater victim participation in the trial process, even allowing victims to be represented separately from the prosecution. However, that would raise problems for our adversarial system, and would have major cost implications.

A simple answer might be for sentencers to ensure (where this is not already being done) that they always give as much detail as possible when explaining why a particular sentence has been passed, so that it is clear to everyone, including the victim, that the effect on the victim was taken into account.

A more effective way of involving victims in the criminal justice system, and giving them more of a say about what the offender is required to do as a result of the offence, would be to make more extensive use of Restorative Justice (RJ). RJ already features in youth justice (e.g. referral orders), but is used only to a limited extent in adult sentencing. Where the victim is willing to meet with the offender, their involvement is much more direct than speaking via a VPS. Moreover, RJ can be used where there are several victims (as where several members of a community are affected, e.g. by anti-social behaviour). ■

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Mike Guilfoyle: 'enable defendants to better see the harms that their crimes have occasioned'.

I have prepared innumerable pre-sentence reports for courts over many years when working as a probation officer. I vividly recall one particular occasion, having submitted such a report for a Crown Court sentencing hearing, fully believing that my professional mindset was sensitively attuned to the impact on a victim of a specific crime (in this instance aggravated burglary). The sentencing judge took exception to the fact that I had not addressed in sufficient detail this section of the report and in a fit of judicial pique requested its re-submission! I have to admit to feeling aghast at what I believed at the time to be his presumptive arrogance. On rethinking I recognised the need to better communicate to the court the impact on the victim of the assault that informed the prosecution. I began to muse more thoughtfully on the wider issue of the role of the victim personal statement, and as such, this brief article summarises my preliminary thoughts based on having worked for nearly 20 years as a frontline probation officer.

In drafting reports for the courts, I was always aware of the tensions and competing concerns that informed the process of sentencing and the requirements for due procedural proprieties. Consequently, reference to the harm occasioned, particularly in violent or sexual offences, should be somewhere at the foreground of judicial consideration. I was equally unsettled at drafting reports against pressured deadlines, and how too often the role of the victim could easily become that of a shadowy abstraction rather than the unique experience of a human being, whose victimisation was

filtered through the leaden language of copious prosecution statements. However, the difficulties of measuring the extent of any harm could also be occluded by the sometimes case-hardened attitudes that permeated those reports, in which the harm inflicted on the victim was in part meted out to the defendant whose misfortune it was to be seen by arresting police officers aiming another haymaker after a drunken brawl. For some reason I always had in mind, having spent eight of my years in probation in the London borough of Brent, what became known colloquially as the 'Typical Harlesden Job'. This was typically a crime of a sort that occurs mostly at weekends, where contested versions of blame and responsibility were regurgitated in, at times, an emotionally charged manner at the Probation Office, with worried colleagues listening at the door lest another scene of crime arose! This issue of culpability is alluded to in the Judiciary's measured response to the Breaking the Cycle Green Paper (paragraphs 75–77, Victim Personal Statements), which captures, albeit in summary form, the nub of my own perception of how far the need to offer a voice to victims in sentencing at the court has to go in answering the proper and rightful need to demand justice and condemn the crime.

The victim personal statement may not only provide information for judges, provide some therapeutic benefits to victims and come to be viewed by a wider public as fair, if used wisely in sentencing, but also enable defendants to better see the harms that their crimes have occasioned. For that it has my support. ■

Mike Guilfoyle is a former probation officer and associate member of NAPO.

Robert Shaw: 'they have done nothing about victims' real desires to be treated with respect'.

The gradual exclusion of victims from court processes began in the twelfth century when Henry II nationalised the existing Saxon scheme administered by local lords and bishops and converted compensation paid to the victim into fines paid to the state. Victims were fully excluded from court processes in 1879 by the appointment of the Director of Public Prosecutions.

With pressure since the 1980s, in part inspired by the feminist movement, for victims to be given a greater role in criminal justice processes, politicians have responded by pushing their own punitive agendas on the pretext of taking the victim's side. In actual fact they have done nothing about victims' real desires to be treated with respect throughout the entire process, to get answers to their questions, to be told the truth and to obtain emotional and sometimes material restoration.

Indeed, victim studies demonstrate that most victims do not want their statements to influence the disposal.

Moreover, the experiences of victims of the same offence vary widely, with some forgetting even very serious offences, some rising above the offence, some recovering in due course and only a small minority remaining permanently 'scarred'. However, there is no evidence that the nature of the actual offence is relevant to whether a victim remains permanently 'scarred'. Rather those who do so have not experienced a sufficiently benign environment for long enough after the offence to recover from it.

Victim personal statements would therefore introduce an injustice into the process because they would be a function, not of the offence, but of the victim's own circumstances and the level of support

available to them. They would do nothing to address the need for victims to be involved in the process throughout. Meanwhile politicians continue to drag their feet on implementing forms of restorative justice

that would give victims what they really want – including the material compensation which successive governments continue to siphon off into fines. ■

Robert Shaw is a management consultant who was a victim of a miscarriage of justice.

Javed Khan: 'We believe that all victims should be able to make a VPS'.

The only way victims of crime can tell magistrates or judges about the full effects of a crime is through a VPS. Yet too often their voices go unheard. Nearly half (44 per cent) of victims in England and Wales do not recall being given the opportunity to make a VPS, despite being entitled to do so; and only 16 per cent of victims who do recall being invited to make a VPS felt that their views were taken into account.

Where you live can also determine whether you get the chance to make a statement. In London, for example, only 29 per cent of victims remember being given the opportunity to tell magistrates or judges what effect a crime had on them.

These figures are too low. We believe that all victims should be able to make a VPS and that their statements should be taken into account by the courts. Victims should be allowed to make a statement at any point in the criminal justice process, from when they give a statement to the police to just before sentencing.

Victims are also supposed to be able to update their VPS at any point and should be actively encouraged to do so, because the impact of a crime can change with time. For instance, while the shock and immediate pain of an assault may be uppermost in a victim's mind in the days after the crime, the most devastating impact may be the subsequent sleepless nights and anxiety attacks that affect their family life and ability to work.

Many victims are surprised and disappointed to find that they actually have few, if any, opportunities to

describe how they have been affected when the case goes to court.

We are not advocating that judges should be bound by the VPS. Judges rightly have a wide discretion to do what is just, but we firmly believe that this very concept of justice means that including information about the impact of a crime on the victims help judges to make intelligent sentencing decisions.

Courts can listen intently to how hard a blow was, in order to decide legally how serious the assault was, but they do not routinely take into account the impact the same assault may have had on a particular victim's life.

Magistrates may also underestimate, for example, what having a wallet stolen means to a victim if they are not told that it contained photos of the victim's dead mother. Magistrates also tell us that they want to have this information to help inform their decisions.

This is why we welcome Ken Clarke's commitment to VPSs, and will work closely with criminal justice agencies to ensure their greater use across England and Wales. We are also helping MPs to set up a new all-party parliamentary group for victims and witnesses of crime to strengthen their voices and address key issues.

We believe that voluntary sector organisations like ours have a much larger role to play in collecting statements, particularly from vulnerable and disadvantaged victims. Not only could it save money and free up valuable police time, but it could also increase the voice of victims in the justice system. ■

Javed Khan is Chief Executive of Victim Support.