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## **Impact of Victim Personal Statement in Northern Ireland and Potential for Further Reform\***

Since the 1980s Northern Irish judges have been proactive in seeking the impact of crimes on victims through statements (Victim Impact Statements) and impact reports to inform sentencing decisions. In England and Wales, victim personal statements (VPS) were only introduced in 2001 as part of the Victims' Charter. The current changes in Northern Ireland mirror that occurring in England and Wales following *Perkins and Others v R*,<sup>1</sup> which found VPS are a 'right' and a form of evidence to be heard in open court, but exclude victims' opinion on the sentence. Following this judgment and consultation by the Department of Justice resulting in Part 4 of the Northern Ireland Justice Act 2015, impact statements in Northern Ireland will now be termed 'victim personal statements' (VPS), adopting the points in the *Perkins* case, i.e. victims can now personally present their views in open court, but can also be cross-examined. Northern Ireland is an important case study, given its thirty years of experience in using victim impact statements in the common law, and allows consideration of whether the move to VPS on a statutory footing will substantively change victims' role in criminal proceedings. Of particular interest to this project is the socio-legal context in Northern Ireland, where a Victim Charter has been introduced as part of the Justice Act 2015, almost a reverse engineering of the England and Wales experience.

This short brief will outline some of the findings from research conducted over the past six months with 24 respondents in the support sector, policing, Department of Justice staff, lawyers and judges. This brief highlights the value of VPS in sentencing for judges, but notes the lack of understanding of the impact of VPS on sentences and the absence of uniformity in which VPS are acknowledged in judges' sentencing remarks. This brief begins by highlighting the effect of reform of the VPS in Northern Ireland, before moving on to discuss the impact VPS have on sentencing decisions, and finally some suggestions for further reform on the grounds of: taking of the statement; judges use of the VPS; limit the use of Victim Impact Reports; better information on sentencing; and hearing the victim at earlier stages.

### **The Effect of VPS Reform in Northern Ireland**

#### Capacity

The support sector, in particular Victim Support, has seen a surge in the number of Victim Personal Statements being made. This is unsurprising given the expansion of VPS from murder, GBH and sexual violence to all indictable offences, and resources have been put in place to fund support workers from the DoJ. However, challenges remain in the efficient processing of VPS in magistrates courts, where numerous cases may be heard in a short time period and sentencing within a few days of the judgment where there are guilty pleas. It may be the case that while there are funded positions within organisations like Victim Support, further volunteers will need to be trained and managed by such professional staff to deal with the volume of VPS so that they can inform sentencing decisions.

As one support worker noted 'we've seen a big increase in demand and at the minute we are not sufficiently staffed to meet that'.<sup>2</sup> In the face of cuts one of the main organisations has had its staff cut from 6.25 to 4, with most in Belfast. In one recent case outside of Belfast notice was given of a sentencing decision a few days beforehand, but no qualified local support worker was available to help the victim to fill out the VPS, so they were directed back to the investigating police officer. This

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<sup>1</sup> [2013] EWCA Crim 323.

<sup>2</sup> Support worker.

may be to do with the amount of advanced notice needed for VPS, rather than staffing capacity. In such cases one support practitioner noted that

‘... we are dealing with quite minor offences I don’t know if that’s a good thing or not because sometimes I wonder then does that dilute the impact of the statement for in cases where there is a serious impact where it is a more serious crime I don’t know but certainly its quite frustrating for the advice workers whenever they are spending a couple of hours doing a statement for someone who on the face of it seems to have suffered quite a minor crime and then possibly don’t have time for someone who has suffered a more serious crime.’<sup>3</sup>

Accordingly, expanding VPS to all crimes, the time that it takes to do and disclosure to defence is likely to discourage victim support agencies from completing them for most minor offences. This may cause support practitioners to naturally move back to concentrating resources on serious offences. Support practitioners are still motivated to support VPS as they believe it is therapeutic or inclusive, but disenchanted with the lack of discernable impact on sentencing, which may bring into question their long term commitment and resources spent on VPS for minor offences.

#### Point of access

Under the old scheme the use of Victim Impact Statements was ad-hoc with victims not automatically informed of their use or when to submit a statement. Under the current VPS scheme victims are informed through the decision to prosecute letter from the PPS. However, while administratively this is effective, it may be the case that after a crime and the stress of an upcoming trial, victims may be inundated with material that such information may get lost. With cases of homicide, the PSNI Family Liaison Officers (FLOs) provide an important human face that can guide and inform victims through the criminal justice system, including filling out a VPS. With other offences victims are referred to Victim Support or for children the NSPCC, but there was some perceptions that for serious crimes committed against adults such agencies were inadequate. Some thought should be placed on whether a similar position of FLO should be adopted for other serious offences, like sexual ones, to ensure that there is a human face to guide victims through the process, such as a specialist police or prosecutorial unit (i.e. developing the PSNI’s RCU and CAIU to have specially trained liaison officers in sexual victimisation).

#### Use of the VPS

VPS in Northern Ireland are limited to just sentencing, which remains narrower than the rest of UK, where it is also used to inform bail, probation and prosecution decisions. That said VPS in Northern Ireland are only taken on a judgment of guilt of an accused, whereas in England and Wales it is taken at the same time of their initial statement to the police.<sup>4</sup> The Northern Ireland approach is to be preferred as it does not unduly raise victims’ expectations that there will be a sentence, as well as giving the victim time to reflect what has been the personal impact of the crime. Further thought is needed around how victims can inform other criminal decision making processes that affect their personal interests, some suggestions are provided below.

### **Impact of VPS on Sentencing**

In terms of impact on sentencing, while there seemed to be a good awareness of VPS and the Victims’ Charter, there were differing views of what impact VPS had on sentencing. Many of those spoken to in the support sector and the PSNI who prepare

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<sup>3</sup> Support worker.

<sup>4</sup> Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice*, Routledge (2012) p181.

VPS believed that they had little or no impact on sentencing, though they felt that the statements were helpful for victims in having their 'say', but not necessarily heard in proceedings. However, there were concerns that victims continued to be an outsider or observer in the criminal justice process, limited to only providing a statement on sentencing where a perpetrator was convicted. Even were such statements were submitted there was some unease that victims' interests on what is disclosed or public stated by the judge in her/his sentencing remarks, were not consulted or at least there was no feedback as to what difference a VPS made on the sentence.

In contrast amongst the legal profession and judges there was a better understanding of the VPS and its impact on sentencing. There was a strong belief that VPS impacted on sentencing as it provided detail on the harm the victim suffered as a result of the crime. The judiciary have on a number of occasions stated the use of VPS in sentencing does impact on the length of a sentence. The Lord Chief Justice has said that there is 'a need to ensure that the victim's voice is heard within the criminal process ...the harm done to the victim is highly relevant to the sentence. Hearing the victim's voice speaking of that in the pages of a report is one way of acknowledging their needs.'<sup>5</sup> More recently the Crown Court has held that,

'One constituent element of sentencing is retribution and accordingly victim impact statements are an important part of the sentencing process informing the court as to the short or long term consequences of criminal activity. Statements from victims not only provide further information to the court in relation to the retributive element but also they inform the public as to the devastation inflicted on the lives of individuals by criminal activity.'<sup>6</sup>

While the Northern Irish courts accept the English precedent that victims' view on the length of sentence are irrelevant,<sup>7</sup> they do view victims' harm as an aggravating factor.<sup>8</sup> Judges do make reference to the VPS, but this is not consistent practice amongst all judges. For those judges who do mention the VPS they do so to provide context or a human side to the case,<sup>9</sup> the victim was not just a statistic,<sup>10</sup> and empathise with victims' suffering and family's loss.<sup>11</sup> The way in which the VIS/VPS is used by judges varies from judge-to-judge in their sentencing remarks. Some of it can be quite dispassionate and terse, such as in *R v Stockman* where the judge stated that two victim statements 'speak of their sadness at the death of' a family member;<sup>12</sup> whereas others can be quite detailed on the impact on different members of the family and family business,<sup>13</sup> and quote at length the VPS on the effect of the crime on the victim or family.<sup>14</sup>

Of cases surveyed between 2012-2015 in county and crown court case of the 36 that mentioned a VIS/VIR/VPS being submitted as evidence for sentencing, only four judges quoted the statement or directed comments to the victim or their family members. Although judges may in these other cases included the VPS in their

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<sup>5</sup> The Right Honourable Sir Declan Morgan Lord Chief Justice of Northern Ireland, Building For The Future, St Dominic's High School, Prioress's Lecture, 14 April 2011.

<sup>6</sup> *R v Chen and others* [2012] NICC 26 at [49].

<sup>7</sup> *Attorney General's Reference (No. 17) of 2013 Ryan McDowell* [2014] NICA 6 at [18].

<sup>8</sup> *R v Holmes and R v Kerr* [2009] NICC 79 at [25] and [45]; and *R v Marcus* [2013] NICA 73 at [9].

<sup>9</sup> *R v McLaughlin* [2013] NICA 55; *R v Coleraine Borough Council* [2013] NICC 17; and *R v Wright and others* [2013] NICC 18.

<sup>10</sup> *Re Boyle* [2004] NICC 13 at [16].

<sup>11</sup> *R v Healy* [2013] NICty 7; and *R v Black* [2011] NICC 40 at [9].

<sup>12</sup> [2011] NICC 36 at [9].

<sup>13</sup> *R v Browne* [2008] NILST 11 at [18-22] and *R v Stewart* [2004] NICC 23 at [27-29] and *R v Carson* [2004] NICC 5 at [17-19].

<sup>14</sup> *R v Valliday* [2010] NICC 14 at [8] and *R v Kerr* [2004] NILST 13.

formulation of harm and the appropriate sentence, without acknowledging the statement victims and those who help to prepare them may feel that it is fruitless and was a waste of time. Greater transparency is needed on how judges use VPS in sentencing through their sentencing remarks.

More critical voices in the legal profession believed that VPS had a way of placating victims by allowing them to present their views on the impact of crime during sentencing so that they would not turn to the newspapers after the sentencing judgment that they had been ignored.<sup>15</sup> Although the VPS is treated as an evidential statement and can mean that the victim is subjected to cross-examination, defence counsel spoken to believed that this would not be a productive strategy as it would just sour the jury's or judge's perception of the defendant as causing further harm to the victim.

### **Further reform**

- Taking of the statement
- Judges use of the VPS
- Limit the use of Victim Impact Reports
- Better information on sentencing
- Hearing the victim at earlier stages

### **Taking of the statement**

VPS are usually collected through a written statement guided by a support person in Victim Support, NSPCC or a PSNI Family Liaison Officer including details of psychological, physical, emotional, social, financial harm as well as the impact on the victim's quality of life. Although this written statement can help to capture the impact of the crime on the victim and avoid including details of the crime, opinion on the sentence or other incident, it does not fully capture victims' voice. While the EU Victims Directive provides for victims' right to be heard and is considered 'fulfilled where victims are permitted to make statements or explanations in writing.'<sup>16</sup> The language of heard connotes an oral statement, the lower threshold of writing does not convey tone, emphasis and emotion that a person's voice and physical presence can deliver, which is seen as important in witness testimony in criminal proceedings. To address this issue, video-recorded statements by victims could be piloted in some areas, as suggested by one FLO. These videos could be edited by a FLO or prosecutor to exclude facts and charges beyond the current case and the victim's opinion on sentence. This would require further resources and may strain the work of support workers like FLOs who voluntarily complete VPS.

Perhaps a more cost effective approach would be to follow the experience in England and Wales, where victims are entitled to designate whether or not they want to have their VPS read out aloud or played (where video recorded) to the court, or for it to be read out by a family member or prosecutor. In particular VPS should be recorded where the victim is a child.<sup>17</sup> The Directive does not require this, but it only provides minimum standards for states to enact. The decision whether the VPS can be read out is for the judge, but they should take into account a victim's preference and follow it unless there is a good reason not to do so.<sup>18</sup> This would allow victims to be heard and minimise cost through only video-recording in cases of child or vulnerable victims.

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<sup>15</sup> This is supported in the literature in other countries, see Edna Erez and L. Rodgers, Victim Impact Statements and Sentencing Outcomes and Processes: Perspectives of Legal Professionals. *British Journal of Criminology* (1999) 39 (2): 216-239 , p235.

<sup>16</sup> Article 10 and paragraph 41, EU Directive 2012/29.

<sup>17</sup> England and Wales Crown Prosecution Service, available at [http://www.cps.gov.uk/legal/v\\_to\\_z/victim\\_personal\\_statements/](http://www.cps.gov.uk/legal/v_to_z/victim_personal_statements/)

<sup>18</sup> Code of Practice for Victims of Crime 2015, Ministry of Justice, paragraphs 1.13 and 1.20.

While not wanting to limit victims' voice, it may be worthwhile to develop a VPS form that includes the relevant headings to guide victims, with additional space for them to give more details. Moreover, it would be useful to have a few blank boxes on the form that victims could tick to designate their preference for the statement to be read out or quoted by the judge, and whether they would want a physical copy of the sentencing remarks.

Beyond these suggestions, there was little support amongst support and legal practitioners for victims to give an oral presentation on how the crime has impacted on them. These concerns ranged from an oral presentation becoming a rant or attack on the defendant, with little control of the substance of a victim's statement on the facts and charges before the court, to fears that victims would not want to give any statement if it was oral evidence as they would more likely face cross-examination. In other jurisdictions that allow oral statement by victims at sentencing, such as in Australia, they have no effect on the sentence as the judge has already decided it before she or he enters the courtroom.<sup>19</sup> However, this research establishes that judges do take into account victims' statements on their harm and impacts upon sentencing, and judges have been proactive to learn the context of the harm of the crime to ensure appropriate penalties. It may be the case that victims are allowed to make a written statement that can inform the sentence, but during the sentencing remarks (where the sentence has already been decided) the victim can have the opportunity to read out their statement or parts of it. Beyond this there was little support amongst legal practitioners and judges for victims to have their own legal representative in sentencing proceedings, as there is in homicide cases in England and Wales.

### **Judges use of the VPS**

A number of respondents raised concerns over the opaqueness of judicial decision making in sentencing and what impact the VPS had on a sentence. As noted this reflects a wider lack of public understanding of sentencing guidelines, but also exhibits a paucity of procedural justice for victims who have 'poured their soul' into the statement and never had their contribution acknowledged by the court. This reflects questions over satisfaction with sentencing decisions and notions of being heard by the court. To address these issues guidance should be adopted for judges to acknowledge the victim (and where appropriate thank them for providing this difficult, but helpful information), read out parts of the VPS, but be sensitive that the victim may not want it all read out, and state how this has helped determine the sentence. In addition, as victims may not be attendance at sentencing or overwhelmed by the court process and seeing the defendant, written sentence remarks should be posted or emailed to victim so that they have a copy and official recognition of their harm and contribution. There is some precedence for this with a Northern Irish judge in one case ordering the PPS to provide the sentencing remarks to the victim who provided a VIS.<sup>20</sup>

### **Better information on sentencing**

In order to better manage victims' expectation on sentencing and wider misunderstanding of sentencing guidelines and standards by the Northern Ireland public, a civic education campaign should be adopted. Clearly there are different standards on sentencing for different crimes, but there is also practice that with vulnerable victims that their age, capacity or situation will more likely to increase a sentence.<sup>21</sup> There is some suggestion that were there is no VPS, some of this harm

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<sup>19</sup> Edna Erez and Pamela Tontodonato, The Effect of Victim Participation in Sentencing on Sentence Outcome, *Criminology* 28(3) (1990) 451-474, p469.

<sup>20</sup> *R v Stephen Lee Wright and Russell Hector Hunter* [2007] NICC 33 at [8].

<sup>21</sup> *R v Cambridge* [2015] NICA 4 at [49]; and *R v AB* [2012] NICC 27 at [10].

can be assumed, suggesting that in some cases it makes no difference to the sentence. While this may be the case in some decisions in the 1990s, the Court of Appeal has been ensuring that weight can only be given to VPS with corroborating medical evidence.<sup>22</sup> Innovative ways should be used to educate and inform victims and the public on sentencing ranges, such as infographics, online videos and pamphlets to better manage expectations and encourage better understanding of sentencing decisions.

### **Limit the use of Victim Impact Reports**

Despite the formalisation of the VPS scheme, Victim Impact Reports (VIR) continued to be used. Although judges and the PPS have requested these VIR over the past thirty years, there is growing dissatisfaction amongst the judiciary and legal practitioners on their evidential value in sentencing. Over the past year there have been four Court of Appeal decisions that have rejected the value of VIR where they failed to be backed up with medical evidence and simply noted down the victim's testimony and assessed them against the WHO ICD-10 criteria for PTSD.<sup>23</sup> As a result judges were unable to rely on the VIR as evidence of the impact of the crime in causing further harm to the victim in determining the appropriate sentence. The practice of VIR outside of Belfast is to use organisations like NSPCC, whose expertise and relationship with each child victim allows for more detailed reports on the impact of the crime on a victim and can be produced at no cost. Whereas those requested from private psychologist practices have a high resource cost for each VIR and as these Court of Appeal cases demonstrate have little value in sentencing as they are not backed up with medical evidence.

### **Hearing the victim at earlier stages**

Although noted above that taking a VPS in the initial witness statement may not be effective in capturing the full extent of the personal impact of the crime on the victim and in managing their expectation, hearing victims' voices through the VPS is very back-ended and only benefits those who see a conviction. Moreover, in serious crimes which can take 18 months to process through the Northern Ireland criminal justice system it may be a very removed from the crime. Instead victims should be informed and be able to *inform* earlier decision-making processes, such as on bail, probation and prosecution selection of charges and perpetrators. The VPS as a means to inform all these decision making processes would be too strained to accommodate all these processes, thought is needed around more fluid interaction with the victim on decisions on bail, probation and prosecutorial decisions, to at least keep them informed and to be able to inform these processes.<sup>24</sup> In addition in cases of road traffic accidents that amount to serious injury or death, yet do not proceed to trial or end in a conviction, victims do not have the opportunity to have their voice heard. In such instances provision should be made in coroners' inquests to allow victims to make a statement on the impact of the accident on the victim and/or family, and for this to be acknowledged in the coroners' report, so as to provide that official acknowledgement of their harm.

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<sup>22</sup> *R v D - Attorney General's Reference (No.5 of 1996)* [1997] NIJB 45; and *R v Lukasz Artur Kubik*, [2016] NICA 3.

<sup>23</sup> *R v S and C* [2015]; *R v TH* [2015] NICA 48; *R v McCormick* [2015] NICA 14; and *R v Lukasz Artur Kubik*, [2016] NICA 3.

<sup>24</sup> The Justice (NI) Act 2015, section 35 does make provision for a victim statement to be available to the defence and the court.