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Will the Victim Statement scheme secure greater participation for victims in the criminal justice process?

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Context and summary

From 25 November 2003 to 24 November 2005, a pilot Victim Statement (VS) scheme operated in Ayr, Edinburgh and Kilmarnock. The scheme aimed to provide an opportunity to victims of prescribed offences to make a statement about the personal impact of the crime, once a decision to prosecute had been taken. The Scottish Government is now considering plans to extend the scheme to all cases heard before a judge in the High Court or a sheriff and jury, as part of their strategy to “put victims at the heart of the criminal justice system” (Scotsman 2007). This paper is a response to the Government’s invitation for external parties to submit views on the practical implementation of the VS scheme.

The VS scheme is, in part, an attempt to contribute to the important objective of securing greater participation for victims in the criminal justice process. However, the evidence suggests that, to do so effectively rather than just symbolically, it would require substantial modification. The only (unambiguously) positive outcome for victims participating in the pilot VS scheme was the personal therapeutic benefit of writing their thoughts and feelings down on paper. Yet most victims did not submit their statements for this reason. They did so instead with the expectation that it would have an impact on the legal process and/or the offender’s attitudes and behaviour. However, there is little evidence to suggest that their statements achieved either objective. Hence, we would recommend that the VS scheme should be modified so that the ‘voice’ of victims is given a more substantial role in the legal process. If that is not possible, then it should be limited to the purpose of enabling victims to experience the therapeutic benefit, without leading them to expect that their statements will have any concrete effects on the legal process.

1. The Argument

The *Scottish Strategy for Victims* endeavours to meet the following three key objectives: “the provision of appropriate information (both general and case-specific) to victims; ensuring that emotional and practical support is available to victims; and securing greater participation for victims in the criminal justice process.” (Scottish Executive, 2004, p.3). We are entirely supportive of these three objectives. We also recognise that the Victim Statement (VS) scheme could contribute to the first two aims. However, in the following we will argue that, insofar as the VS scheme is an attempt to contribute to the third of these objectives, the evidence would suggest that it requires significant modification.

First, according to the recent evaluation on the VS scheme pilot in Scotland, it would appear that the only (unambiguously) positive outcome for victims who participated in the VS scheme was that they gained some therapeutic benefit from the process of expressing their thoughts and feelings in a written form. As two victims put it:

"It actually helped, writing it down. I felt as if after I'd written it all down, it just got everything rinsed away from you. I would advise anybody in a robbery just to write it down, supposing you didn't get that form, just to write it all down. Write it down and get it out and just tear it up, burn it or anything, you can do anything with it, just to write everything down, I think it was quite good." - Female victim of robbery. (Leverick, Chalmers & Duff, 2007, p. 41)

"I would say that it's very therapeutic, being able to get it out, to release it, to put it down into words and then just let it go basically." - Female victim of theft by housebreaking. (Leverick, Chalmers & Duff, 2007, p. 45)

The problem is that only 10% of the victims interviewed said that the reason why they wrote their statement was to achieve that type of personal benefit. The majority wrote their statement in order to influence the legal process¹ and/or the attitudes and behaviour of the offender². In other words, the VS scheme was understood by them as an opportunity to 'have a voice' in the sense that *their views and feelings would actually make a difference*. As two victims who participated in the pilot scheme stated:

"People who plead guilty to me are looking for a lighter sentence, but if the judge reads through how the victims are and how they've been since the robbery, they'll maybe get a harsher sentence instead of a wee slap on the wrist." - Female victim of robbery. (Leverick, Chalmers & Duff, 2007, p. 42)

"I think [the victim statement is] worthwhile because it gives you the chance for your side to be heard in the court . . . And the most important point I think is if it does make a difference to the sentence. If it doesn't then . . . you know, I can take a piece of A4 paper and write it

¹ Of those interviewed, 30% wrote their statement in order "to get their views across" (presumably to the judge or the offender), 23% wanted to influence the outcome of trial/help the case, 5% wanted to ensure conviction, 5% wanted to influence sentencing. Participating victims were also asked what they had hoped for in making their statement. The majority said that they hoped it would influence the legal outcome in some way: 25% hoped it would lead to a conviction, which, as the researchers point out, indicates "a certain level of misunderstanding about the victim statement scheme"; 15% wanted to get their views across; 7% hoped that their statement would provide more evidence for the case (even though, "in the normal course of events, a statement would have no such effect"). 15% hoped that it would result in a longer sentence, 1% wanted a more lenient sentence; 7% wanted the judge to understand the impact of the crime. (Leverick, Chalmers & Duff, 2007, p. 40-42).

² Of those interviewed, 30% wrote their statement in order "to get their views across" (presumably to the judge or the offender), 14% wanted to make accused think about what he/she had done. When participating victims were asked what they had hoped for in making their statement, 14% wanted the accused to understand the impact of the crime, 15% wanted to get their views across; and 1% hoped that the accused would be deterred from re-offending. (Leverick, Chalmers & Duff, 2007, p. 40-42)

out if it's going to help me. That is, I think, fundamentally the whole purpose of the system. And if it's not making a difference to the sentence then it's either the system that's failing or the sheriff is failing the system.” - Female victim of assault (Leverick, Chalmers & Duff, 2007, p. 41)

Second, contrary to the expectations of most of the victims who participated, there is very little evidence to suggest that their statements did, in fact, have a significant influence on the legal process. After conducting interviews with the sentencers, researchers found that:

“while victim statements may have occasionally influenced the sentencer at least to consider a sentence of a different nature to the one he or she was initially minded to impose, they are unlikely to have made a significant difference to sentences in most cases”. (Leverick, Chalmers & Duff, 2007, p. 5).

Even in those cases in which statements may have had an effect, the only impact was that they slightly increased the chances of the offender receiving compensation orders rather than fines in some cases (8% of statement cases compared to 4% of non-statement cases). However, monetary compensation was neither a reason why victims participated nor what they hoped to get out of participation. The majority of the content of the victim statements was in relation to the emotional impact of the offence rather than the financial or physical impact. (Leverick, Chalmers & Duff, 2007, p. 6).

This finding is consistent with the results of interviews with participating victims. The majority said they did not know whether their statement was taken into account by a sheriff or judge in the sentencing process; and most of the remainder felt that their statement had not made a lot of difference³. It is also consistent with the use of victim statements elsewhere:

“[m]ost prosecutors, judges and magistrates believed that VSs rarely influenced sentencing . . . When they did, the information they contained could be collected more easily and accurately by other means.” (Hoyle, Morgan & Sanders, p. 1, 2)

There is also little evidence that victim statements had a positive impact on the offender's attitudes and behaviour. Even if they did, there seems to have been no system in place to find out whether the offender read or heard the statements, or what their reaction might have been. Consequently, victims would not have known whether their statement had any impact at all⁴. Indeed,

³ When asked “how much consideration they felt was given to their statement in court”, 50% did not know, 18% thought it was only given “little or no consideration”, 21% thought it was given “some consideration”, and only 8% thought it was given “a lot of consideration”. Victims were asked “whether or not they felt that their statement had been taken into account in sentencing”. 53% said they did not know; 16% felt that their statement had not been taken into account in the sentencing process; and only 19% felt that it had.

⁴ It should be noted that 8% of those who did not even make a statement cited that this was due to fear of reprisals (Leverick, Chalmers & Duff, 2007, p. 6). If statements are to be presented to offenders, then it would surely be more appropriate to provide some kind of feedback system, so that victims might at least have the assurance of knowing to what extent their fear might or might not be justified.

the only evidence in the evaluation in which victims appear to have become aware of the offender's reaction, was when they were negative.

“Rather worryingly, 2 respondents stated that they thought that making a statement was the wrong decision because there had been some sort of reprisals as a result.”

“Four of the 6 telephone interviewees stated in addition that they would be wary of making a statement in the future because, in the light of their experience, they would not now want the offender to see the statement.”

(Leverick, Chalmers & Duff, 2007, p. 43, 47).

Third, on the principle that the ends do not justify the means, we would argue that victims should not be led to expect that their statement could make a difference, merely in order to motivate them to write a statement and thereby achieve the therapeutic benefit of doing so. Moreover, the potential harm caused by dashing raised expectations does not, in our view, outweigh the possible therapeutic benefit of the statements⁵. Defence lawyer George Moore was reported by BBC Scotland as saying:

“I believe that victims will expect what they say to influence the sentence. If you raise expectations then dash them because eventually the judge takes the same decision as usual, then what is the point of it all?” (BBC Scotland, 2001)

A similar concern was expressed by researchers of a victim statement scheme in England:

“Objectives were unclear and need to be identified. If they are mainly expressive, victims should not be led to expect that VSs will have any concrete effects. If primarily instrumental, there should be guidelines for taking them into account consistently and victims should be informed of the uses to which their VSs have been put.” (Hoyle, Morgan & Sanders, 1999: p. 4)

⁵ It might be argued that the evidence, in fact, suggests that most of the participants did feel that the VS scheme was worthwhile, even though their expectations were not fulfilled. After all, eighty-six per cent of respondents who had made victim statements stated that, “with the benefit of hindsight, they thought that making a victim statement was the right decision” (p. 42). However, it is worth interpreting these results with caution, as this response ‘positions’ the respondents as people who make the right decisions and have no regrets, and it may be very difficult for people to position themselves as people who make bad decisions and have regrets (see Harré & Gillet, 1994, regarding “subject positions”). This also may be a result of the general lack of information about the effect of their decision; if all they know is that they used the opportunity to exercise their ‘voice’, and have no information about the effectiveness of this effort on their part, then the default position may be that they are satisfied with having taken up the opportunity. This can be contrasted with the research on the pilot schemes in England, where victims felt cheated if they made statements, expecting them to have an impact, and the expectations were not met.

2. Recommendation

Taking into account the argument above, we would therefore recommend the following as a way of better enabling victims to have a greater participation in the criminal justice process.

If the VS scheme is to continue, it should be modified so that victims have a more meaningful, direct and substantial role within the court process itself. One example of this is the “Victims’ Advocate Scheme Pilot”, currently running in England and elsewhere, in which it is possible for relatives of murder and manslaughter victims to speak directly to the court about the effect of the death on them, after conviction and before sentence. In this way, victims would at least know for certain that their voice had been heard and acknowledged within the context of the court.

We would, however, recommend one key addition: that, under this scheme, victims are not only permitted to present their statement in court, but they are also given the opportunity to challenge statements made by the defence. In other words, we agree with David McKenna, the chief executive of Victim Support Scotland, who also appears to support such a scheme:

“The final stages of a court case, particularly in cases such as rape and serious violence, are often the most distressing to victims of crime. At present, the defence can say anything they like because nobody can say ‘that’s not true’. The family will sit in court and hear lies and see nobody bothering to correct them because it doesn’t affect the prosecution. They will hear someone being sentenced to five or six years and think that, if the court had been told that wasn’t true, he would have got seven or eight years.” (Scotsman 2007)

In a Justice 2 committee meeting, David McKenna suggested how this approach might work:

“The victim could be legally represented in court, so that they could cross-examine or examine witnesses. The victim could be a party to the case, so that they sit with the prosecutor and give information to the prosecutor—for example, ‘That is not right. It was X, Y and Z.’” (Justice 2, 2002, Col 1478).

If this recommendation is not regarded as viable, then, for the reasons given above, we would suggest the following: if a VS scheme is to continue, then its aims should be explicitly limited to that of a therapeutic process that forms part of a general support programme for victims. In other words, victims “should not be led to expect that [their statements] will have any concrete effects.” (Hoyle, Morgan & Sanders, 1999: p. 4).

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