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Illicit drug markets, systemic violence and victimisation

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Abstract

A common theme that runs throughout much of the literature on drug markets, drug-related crime and also the impact of drug law enforcement is how limited our understanding of them is. In the absence of research and reliable evidence, certain ‘taken for granted’ assumptions or stereotypes have emerged to fill the gaps in knowledge. Journalistic and television exposés, present a Hobbesian spectacle of an inherently violent world populated by ‘evil drug dealers’. These representations have also influenced legislative responses, particularly since 1996. In the Republic of Ireland, following the murder of journalist Veronica Guerin, a plethora of new draconian laws were introduced. This led to a form of legislation by ‘moral panic’ particularly in response to drug-related crime. Prior to the mid-1990s, Northern Ireland had largely avoided the growth in heroin consumption of the type associated with Dublin since the 1980s. High levels of police and military security and the anti-drug stance of many paramilitary organisations had a suppression effect on the importation, distribution and consumption of serious drugs. The Good Friday Agreement of 1998 led to the dismantling of the state security apparatus and a reduction in police numbers. This period also marks the beginning of a period of increased drug consumption and the establishment of heroin hotspots in a number of urban areas.

Despite this increased policy attention, drug use in Ireland has been found to be associated with increased levels of systemic violence: fights over organisational and territorial issues; so-called ‘gangland’ murders; disputes over transactions or debt collection; and the intimidation of family members and the wider ‘host’ communities in which local drug markets tend to take hold. Much of this victimisation remains hidden as fear of reprisal from those involved with the drug trade and a lack of confidence in the criminal justice system discourages reporting. This article reviews recent research evidence in this area and examines the implications for future policy responses.

Key words: illicit drug markets; communities; systemic violence; intimidation; fear of reprisal; drug law enforcement; policing; ‘gangland’; hidden victimisation; drugs and crime

Introduction

This article begins with a consideration as to how, in the absence of research on illicit drug markets, certain ‘taken for granted’ assumptions about such markets – how they function, who populates them and how they impact, particularly in those communities

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where they typically take hold – have emerged. We then consider how the boundaries between popular and often sensationalist portrayals of the illicit drug trade, on the one hand, and legislative and policing strategies, on the other, have become blurred. This has contributed to the persistence of policy responses to such markets that are not only difficult to reconcile with the available evidence, but that have failed to halt either the expansion of such markets or the intensification of drug market systemic violence over the past two decades. Next I reflect upon the available international literature on drug market violence and then turn to a review of a number of community-based studies that have been conducted in the Republic of Ireland (ROI) since the 1990s. The failure of legislative and law enforcement strategies to take sufficient account of the lived experience of those communities in which the illicit drugs trade has had the most pernicious effects has contributed to a situation where drug-related community violence and victimisation and widespread fear of reprisal from those involved in the local drugs trade has created a policing vacuum in such communities. Finally, we consider the implications of this crisis for future policing and criminal justice developments north and south.

Pathologising the illicit drugs trade

A common theme that runs throughout much of the literature on drug markets, drug-related crime and also drug law enforcement is how limited our understanding of them is. The relationship between the supply and demand of illicit drugs and enforcement activities remains ‘poorly conceptualised, under-researched and little understood’.¹ In the absence of research and reliable evidence about the nature of illicit drug markets, how they function and who typically populates them, certain ‘taken for granted’ assumptions or stereotypes have emerged to fill the gaps in knowledge.² On the one hand, there are the problematic or dependent drug users, stigmatised and demonised as slaves to the exaggerated and distorted powers of drugs such as heroin.³ On the other, journalistic and television exposés, usually based on unnamed drug law enforcement sources, present a Hobbesian spectacle of an inherently violent world populated by ‘evil drug dealers’.⁴

In Ireland, the ‘true crime’ genre includes such racy titles as Badfellas, Crime Lords, The General,⁵ Gangster⁶ and Godfathers.⁷ The latest ‘Mr Big’, or ‘King Scum’,⁸ is always worse than the last, as he seeks to assert control of his ‘Evil Empire’.⁹ While the popularity of this genre is not in doubt, where the boundaries become blurred between sensationalist accounts of what are largely activities associated with the illicit drug trade and policy responses to the same phenomena, then problems arise.

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² R Coomber, Pusher Myths: Re-situating the Drug Dealer (Free Association Books 2006).
⁴ Coomber (n 2) 145.
⁸ P Reynolds, King Scum: The Life and Times of Tony Felloni, Dublin’s Heroin Boss (Gill & Macmillan 1998).
⁹ Williams, Evil Empire (n 5) (2001).
Although it is not being denied that the drug trade can be extremely violent, representations such as these pathologise drug dealers and drug users and fail to understand or contextualise them in terms of their relations within a market process. Consequently, the prevalence, function and impact of violence, particularly in marginalised communities, is poorly understood. An example of this is the term ‘gangland’, which has come to prominence in recent years and is commonly used, both in the popular and broadsheet media and at policy level, to describe violent activities associated with the illicit drug trade. In July 2014, the Oireachtas Joint Committee on Justice sought submissions from the public on the effects of ‘Gangland Crime’ on the community. From a perspective that supports evidence-informed policymaking, two key problems arise from such representations. The first relates to the emphasis on a hierarchical market structure and how this has contributed to a legislative and policing approach that rests on a dubious premise, one that can be summed up as ‘targeting Mr Big’. It is an approach that is difficult to reconcile with the, albeit limited, academic research that exists in the area. The second related problem is that these strategies are developed with little reference to the lived experiences of individuals in communities with actively operating drugs markets. As a consequence, the impacts, often unintended, that such drug law enforcement policies and strategies can have within and upon such communities are poorly understood.

The killing in Dublin in July 1996 of Veronica Guerin, a high-profile journalist who had written a number of exposés about criminals linked to the illicit drug trade, was a catalyst for a range of legislative and policy initiatives introduced in response to a drug problem that increasingly appeared to be out of control. Notwithstanding these initiatives, 20 years later, the drugs trade in Ireland has expanded and become increasingly violent. This violence is not confined only to those directly involved in the trade, whether users or dealers, but also has been increasingly directed at their family members and the wider community. The research that will be reviewed below has highlighted the corrosive impact such violence and intimidation has had on those communities in which drug markets are typically located, referred to by May et al as their ‘host communities’. It is this, largely hidden, victimisation that is the primary focus of this article. In many marginalised communities in the ROI, the fear generated by those involved in the drugs trade acts as a major barrier to local engagement with policing and criminal justice responses.

The mid-1990s were also watershed years in the drugs trade in Northern Ireland (NI), albeit for different reasons. As NI adjusted to a sustained period of peace, social

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13 H Loughran and M E McCann, A Community Drugs Study: Developing Community Indicators for Problem Drug Use (National Advisory Committee on Drugs and Alcohol, Dublin Stationery Office 2006); L Campbell ‘Responding to Gun Crime in Ireland’ (2010) 50(3) British Journal of Criminology 414–34.

14 M O’Leary, Intimidation of Families (Family Support Network 2009); N Hourigan (ed), Understanding Limerick: Social Exclusion and Change (Cork University Press 2011); P Jennings, Melting the Iceberg of Fear: Drug-related Intimidation in Blanchardstown (Safer Blanchardstown 2013); J Connolly and A Donovan, Illicit Drug Markets in Ireland (National Advisory Committee on Drugs and Alcohol 2014); J Connolly and L Buckley, Demanding Money with Menace: Drug-related Intimidation and Community Violence in Ireland (CityWide 2016).


16 Connolly and Percy (n 12).
problems artificially suppressed by the political conflict and state security began to emerge. Even with the close proximity of Belfast to other urban centres with extensive drug markets and increasing levels of problematic heroin use (e.g. Dublin, Glasgow, Liverpool), NI avoided the growth in heroin consumption in the 1980s. The high levels of police and military security that existed there during the 1970s, 1980s and early 1990s in response to the political conflict and the anti-drug stance of a number of influential paramilitary organisations had a significant suppression effect on heroin consumption, importation and distribution, and the movement of heroin users between NI and Great Britain. The emergence of an active and harmful drug trade in NI has been a post-conflict phenomenon, a negative dividend of the peace process and Belfast Agreement of 1998. Although the research discussed below was conducted in the ROI, its implications, it is suggested, are equally relevant north of the border.

‘Targeting Mr Big’ – the unintended consequences of drug law enforcement

Recent international scholarship concerning the illicit drugs trade has downplayed the involvement or dominance of organised crime groups and instead highlighted its more diffuse nature. Summing up this perspective, Babor et al suggest that:

... the more appropriate metaphor for drug markets is a network. Drugs are produced and distributed by the collective efforts of literally millions of individuals and small organisations that operate in a highly decentralised manner.

No one is in charge. Indeed, most people in the network only know the identities of those with whom they interact directly.

Since the murder of Veronica Guerin in June 1996, a plethora of draconian laws have been introduced in what has been described as a form of legislation by ‘moral panic’, primarily in response to drug-related crime. A great deal of this legislation was informed by assumptions about the operation of the illicit drugs trade that had no basis in evidence.

The Criminal Justice (Drug Trafficking) Act 1996 allowed for the detention of suspected drug dealers for interrogation for up to seven days. Keane suggests that the passage of the Act, which received widespread support across the floor of the Oireachtas, was not preceded by any empirical, medical or criminological research and was not
accompanied by any logical explanation as to why such police detention powers were necessary or proportionate. Meade, drawing from moral panic theory, provides a detailed account of the passage into law of the Proceeds of Crime Act 1996. He describes how the use of terms in the media and in parliamentary speeches, such as ‘Al Capone’, the ‘godfathers of crime’ and the ‘mafia’, created the impression that ‘organised crime’ was an established and overwhelming reality in Irish society, rather than the extremely contested concept that it is. Moreover, it is also one that has received scant academic attention. The Proceeds of Crime Act 1996 began as an opposition Private Member’s Bill one week after the Guerin assassination and was passed and signed into law by the President five weeks later.

The presumption underlying many of these measures is that the removal of ‘Mr Big’ will make a meaningful difference to the operation of the drugs trade. Kleiman and Smith suggest that perhaps ‘justice will be served by punishing a kingpin rather than the usual miscellaneous collection of low-level operatives’. However, ‘whether it serves the ends of drug-abuse control, crime control, neighbourhood protection, or even organised crime is less clear’, they conclude. This is because so-called ‘kingpins’ can be quickly replaced by individuals below them in the organisation or other drug-dealing groups can easily adjust to meet the unfilled demand caused by the removal of a competitor and continue to supply retail-level dealers. They point out that there is no available evidence linking the removal of a high-level dealer with substantial reductions in drug consumption in a city. By way of explanation they pose the following question: ‘What essential service does “Mr Big” provide to the retail dealer that someone else will not supply just as well if he is made to disappear?’ Reuter et al suggest that gaps in the market created by the apprehension of drug-dealing enterprises by law enforcement agencies can usually be refilled within a matter of a few months. Irish research suggests it may take just six weeks.

Crucially, there is little evidence in Ireland, or internationally, that such legislative measures or law enforcement approaches have halted the expansion of the illicit drug trade or reduced the criminal activities associated with it for any sustained period of time. The dominant paradigm for understanding the effects of drug laws is the rational choice perspective and the deterrent capacity of the criminal law. When applied in the context of the decision to use illicit drugs, this emphasises three factors that impact on decision-making: the drug’s availability, the price of the drug and the risk of apprehension and

24 Meade (n 22).
26 Hourigan (n 14).
29 Ibid 84.
31 Connolly and Donovan (n 14).
32 Reuter and Trautmann (n 19).
punishment. Over the past three decades, drug availability has increased throughout Ireland, with the choice of drugs expanding beyond the conventional ones such as cannabis, heroin, cocaine, ecstasy etc’, being added to by a plethora of new psychoactive substances, their availability and distribution being facilitated by the mobile phone and online drug markets. Drug prices have decreased throughout the past 20 years and the reality is that the vast majority of people who use drugs, particularly for recreational purposes, do not appear on the radar of law enforcement as their use is not problematic.

Furthermore, some writers have highlighted the way in which certain drug law enforcement efforts can have unintended negative consequences for drug markets by making them more violent. May and Hough, for example, consider a perverse possible outcome of the relation between effective drug law enforcement and drug prices. According to the argument, where enforcement is successful in sustaining or increasing the risks of criminal sanction; these risks are translated into increased prices. However, the tempting profits to be derived not only attract more people to the trade, they attract the ‘risk tolerant’ as distinct from the ‘risk averse’, fearful of being arrested. The ‘risk tolerant’ may be willing to resort to more extreme and violent measures in response to intensified and successful law enforcement. The authors conclude that ‘if this argument holds up, successful enforcement strategies contain the seeds of their own failure’.

Drug markets and systemic violence

Illegal drugs are commodities that are produced and distributed in markets and therefore, one would presume, subject to laws of supply and demand and other normal market influences. Although the general concept of the market is familiar and such matters should appear to be self-evident, as Babor et al observe, ‘policy discussions show a strange unwillingness to apply this understanding of markets when the commodity is an illicit drug’. Perhaps the most important distinction between legal and illegal markets is that participants in the latter have ‘no recourse to the system of property rights and dispute resolution offered by the civil courts and legal system’. This has important consequences for the way in which drug markets are organised and the way in which business is conducted. The absence of a formal regulatory system can mean, for example, that market control or dominance may often be exercised by the seller who can intimidate others most effectively.

It is popularly accepted that there is a link between some forms of illicit drug use and crime. Within the research literature this link is generally described using explanatory

34 See successive Annual Ireland National Reports to the European Monitoring Centre for Drugs and Drug Addiction <www.hrb.ie>.
36 Reuter and Trautmann (n 19).
37 May and Hough (n 1).
38 Ibid 560.
39 Babor et al (n 20) 63.
40 Ibid 64.
models derived from Goldstein and colleagues. Firstly, a psycho-pharmacological link between drugs and crime arises as a result of the effect of the drugs themselves on the consumer. Secondly, economic-compulsive crimes are committed by dependent drug users as they need to generate income from crimes such as robbery and burglary, low-level drug-dealing and from crimes such as prostitution to support their drug habit. Thirdly, the systemic dimension of drug-related crime results from the activities associated with the illegal drug market. Systemic types of crime surrounding drug distribution include, for example, fights over organisational and territorial issues and disputes over transactions or debt collection.

Goldstein’s conceptual framework was based on studies of drug markets in New York from the mid-1970s to the late 1980s. These focused on drug-related prostitution, the economic behaviour of street opiate users and the market for crack cocaine as it developed in Manhattan in the 1980s. The research concentrated primarily on the relationship between drugs (including alcohol) and violence, particularly homicide. Although Goldstein focused on violent offences, his framework has been extended to include non-violent drug-related crimes and there is now a rich body of literature that is focused on the association between drugs and crime.

With regard to drug use and psychopharmacological violence, Goldstein suggested that this may involve violence by either the offender or victim, through the former behaving violently or, with regard to the latter, drug use may alter a person’s behaviour in such a way as to bring about their violent victimisation. With regard to drug-related economic compulsive violent crimes, Goldstein states that:

. . . the most common victims of this form of drug-related crime are people residing in the same neighbourhoods as the offender … Other drug users, strangers coming into the neighbourhood to buy drugs, numbers runners, and prostitutes are all common targets of economic compulsive violence.

Goldstein acknowledges, and most subsequent research confirms, that most crimes committed by ‘most of the drug users are of the nonviolent variety e.g., shop lifting, prostitution, drug selling’.

In the systemic model, according to Goldstein, violence is intrinsic to involvement with any illicit substance. He provides the following examples:

- disputes over territory between rival drug dealers;
- assaults and homicides committed within dealing hierarchies as a means of enforcing normative codes;
- robberies of drug dealers and the usually violent retaliation by the dealer or his/her bosses;


45 Goldstein (n 49) 147.

46 Ibid 147.
• elimination of informers;
• punishment for selling adulterated or phony drugs;
• punishment for failing to pay debts;
• disputes over drugs or drug paraphernalia;
• robbery violence related to the social ecology of copping areas (open drug scenes).

Goldstein further suggests that the use of violence occurs within specific normative rules. For example, the ‘code of the streets dictates that blood cancels all debts’.\(^{47}\) He gives the example of a street dealer who is beaten up or wounded for returning the incorrect amount of money to his dealer. Subsequent to the beating, the street dealer no longer owes the money.

Importantly, in terms of the Irish research we will review below, for Goldstein, the vast majority of victims of systemic violence are those who use or sell drugs or who are connected to the drug trade in some way. Occasionally, people might be killed accidentally in a dispute between rival dealers, or family members of dealers may be targeted in drug gang wars. Goldstein concludes that:

\[ \ldots [s] \text{ystemic violence is normatively embedded in the social and economic networks of drug users and sellers. Drug use, the drug business, and the violence connected to both of these phenomena, are all aspects of the same general lifestyle. Individuals caught in this lifestyle value the experience of substance use, recognize the risks involved, and struggle for survival on a daily basis.}^{48}\]

Reiss and Roth identify three dimensions of systemic crime:\(^{49}\)

• organisational crime, which involves territorial disputes over drug distribution rights, the enforcement of organizational rules, dealing with informers and battles with the police;
• transaction-related crime, which involves theft of drugs or monies from the buyer or seller, debt collection and the resolution of disputes over the quality of drugs;
• third-party-related crime, which involves bystanders to drug disputes and disputes in related markets such as prostitution, protection or firearms.

Bean suggests that, given the large profits involved in the illicit drugs trade:

An easy recourse to violence in drug transactions is … a \textit{sine qua non} of all dealings, for discipline has to be asserted and debts collected – the system runs on some sort of credit that needs to be overhauled at regular intervals.\(^{50}\)

Drug market studies have also found that drug market violence is not only confined to male participants, but that females are also prepared to use violence either to enforce discipline or collect debt.\(^{51}\)

Some writers have suggested, however, that the role that violence performs in the operation of illicit drug markets has been exaggerated and, although it is often present, it

\(^{47}\) Ibid 49.
\(^{48}\) Ibid 174.
\(^{50}\) Bean (n 44) 27.
depends on the circumstances of the market. Reiss and Roth found that call-girl operations are less violent than street walking and that 'runner-beeper delivery systems may entail less violence than open air markets, while heavily fortified crack houses experience still less risk'. Bean suggests that 'as a general rule', violence is greater when drug dealing takes place at street level. Research by Pearson and Hobbs on the 'middle market' of drug supply between the wholesale level and the retail level found that, although violence is always 'an available resource' in crime networks, it is generally regarded as something to be avoided. Violence is 'bad for business, it leaves traces, attracts police attention as it is frequently regarded as a signifier of organized criminal activity, and invariably leads to more violence'.

Coomber argues that although excessive violent activity is:

"... part and parcel of much of the drug market ... it probably isn't the general experience of most of the dealers (even 'street' dealers) and users that participate in it ... this is because not all markets are the same and thus present the same circumstances and risks but also because not all dealers conform to the retaliatory model."

Research has, he suggests, perhaps unintentionally, emphasized the violent nature of drug markets as opposed to recognizing the consistent levels of routine and mundane activity in most markets that are not particularly violent in essence. Lastly, he concludes that much of what passes for drug market violence is in fact often the 'culture of violence' that many of those involved in the drug trade live by anyway. Market violence is also a consequence of the 'risk environment' in which drug markets are forced to operate by policing activity, for example.

Coomber concludes that a number of issues need to be considered when assessing the likelihood of drug market violence. Firstly, the organisational nature of the market: those which are highly organised will have routine forms of punishment, while fragmented and fluid markets, depending on the context, will be less predictable. Secondly, the maturity of the market: whether it is burgeoning, established or declining. Thirdly, the culture of the market: whether it is dominated by male inner-city machismo. Fourthly, the distribution form: whether it is open or closed, rural or urban. Equally, he suggests, 'different levels of violence are associated with different drugs, the gender of the sellers and the cultural background and even class of the sellers'.

The analysis presented above, of drug markets and related violence, although extremely important in providing perspective on the context in which violence is more or less likely to occur, unfortunately does not address the issue of community-level violence. It fails to address the way in which drug market violence impacts on the communities in which drug markets typically operate. This involves the largely hidden victimisation associated with the illicit drugs trade. This is an area that remains under-researched.

53 Reiss and Roth (n 49) 18.
54Bean (n 44) 28.
56 Ibid 341.
57Coomber (n 2) 117.
58 Ibid.
59 Ibid 63.
60 Ibid 118.
In its annual report for 2003, the UN International Narcotics Control Board highlighted the importance of understanding the relationship between drug abuse, crime and violence at what it referred to as, the ‘micro-level’. The harm caused to communities ‘by the involvement of both adults and young people in drug-related crime and violence is immense’.\(^{61}\) The report describes the way in which drug-related crime at a micro-level can lead to the creation of ‘no-go areas’, the development of a culture of fear and the general erosion of the ‘social capital’ of communities, defined as ‘the norms, or “laws”, that exist in social relations, and through social institutions, that instil foundations for trust, obligation and reciprocity’.\(^{62}\) We will now review a number of Irish research studies that have investigated this issue.

**Drug markets and community violence in Ireland**

The emergence of the heroin trade in Dublin in the late 1970s and early 1980s was facilitated at the time by the diversification of professional criminals into drug dealing.\(^{63}\) The threat of violence and the fear and intimidation that result from it have been some of the worst and least recognised effects of large-scale illicit drug use. Tony Gregory, a prominent anti-drugs activist and politician in the north Dublin inner city at the time referred to the levels of fear during the initial stages of the heroin problem:

> I do know that in the initial stages of the heroin thing the most prevalent reaction was one of fear. The people who were involved were known to be ‘heavies’. And people were afraid they’d be burnt out of their flats. They were afraid for their kids’ sake.\(^{64}\)

A study on homicides in Ireland suggested that between 1992 and 1996 15 homicides were connected to disputes about control of the supply of illicit drugs.\(^{65}\) In more recent years, there appears to have been at least this many drug-related homicides occurring on an annual basis. Campbell identified a clear link between the illicit drug market and an increase in gun crime in Ireland.\(^{66}\) Comparing the percentage of murders and manslaughters in Ireland, England and Wales the author found that, ‘[p]roportionally speaking, between twice and five times as many homicides involving guns occur in Ireland’.\(^{67}\) The author highlighted the fact that drugs and guns were often imported together and the view of the Customs Service that the rise in the detection and seizure of illicit firearms being imported was linked to the increased level of violence involved in drug trafficking and smuggling.

The link between levels of systemic violence, between the shooting dead of a rival drug dealer and the headlines it captures as well as the impact of such drug-related violence on the local communities in which drug dealers live and operate is difficult to establish. It is under-researched and tends not to capture the headlines. Drug-related murders, killings and their coverage in the media can have a profound effect on general feelings of public safety and they can instil in the general public a sense that the problem is out of hand.\(^{68}\) For example, the murder rate in Dublin North Central in 2002 was 79

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\(^{62}\) Ibid.

\(^{63}\) S Flynn and P Yeates, *Smack*: The Criminal Drug Racket in Ireland (Gill & Macmillan 1985); Connolly and Percy (n 12).


\(^{66}\) Campbell (n 13).

\(^{67}\) Ibid 415.

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(per million population) compared with zero in many counties. The ongoing Kinahan/Hutch so-called ‘gangland’ feud led to 12 murders in 18 months, from September 2015 to May 2017. Many of those murdered, however, cannot be regarded as being involved in any organised gang as some of them were cases of mistaken identity. However, seven of the victims were murdered in the north Dublin inner city or they were from there. What effect does this have on the local population of the area?

Irish research has identified increasing levels of violence directed not just at individuals involved in the drug trade, whether users or dealers, but also at their family members. Research has also begun to highlight the corrosive impact that such violence, fear and intimidation is having on the broader communities in which drug markets are typically located.

A study conducted in the north Dublin inner city involved a door-to-door survey of local residents’ concerns about drug dealing, policing and anti-drugs activity in the community. One of the most significant findings of this study was that it highlighted the levels of fear that existed locally about drug dealers and how this impacted on local residents’ willingness to engage with local policing structures such as the Community Policing Forum recently established there.

A 2006 community drugs study by the National Advisory Committee on Drugs found that the very presence of drug dealing creates intimidation in communities and the violence associated with dealing creates an unsafe feeling amongst many community members. The study reported that research respondents felt vulnerable in their own neighbourhoods and, in addition, that life for drug users had become more dangerous since the mid-1990s as penalties imposed by drug dealers for perceived transgressions had become more severe. People avoided community activities due to fear of exposure and possible suspicion of working with the institutions of the state. The community was less able to protect itself than it was in the past due to the decline in the willingness of people to patrol areas, as they had done previously, and many elderly people avoided the streets and shops at night, leading to an atmosphere where, the authors concluded, there were, ‘[p]eople … living in a barricaded society, afraid to come out at night’.

In 2009, the National Family Support Network (NFSN) investigated the experience of families targeted by dealers to pay the debts of their family members who were using drugs. The research found that demands for debt repayment placed huge pressure on the families to come up with the money as quickly as possible and family members often went to great lengths to gather the money to pay off the debt. Families would often know the dealer by reputation and so would be unwilling to refuse payment or report the intimidation to police. The research showed that nearly all participating family support services indicated that their clients – mostly family members of drug users – had

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71 J Connolly, Drugs, Crime and Community in Dublin: Monitoring Quality of Life in the North Inner City (North Dublin Inner City Local Drugs Task Force 2003).
72 J Connolly, Community Policing and Drugs in Dublin: The North Inner City Community Policing Forum (North Dublin Inner City Drugs Task Force 2002).
73 Loughran and McCann (n 13).
74 A Lyder, Pushers Out: The Inside Story of Dublin’s Anti-drugs Movement (Trafford 2005).
75 Loughran and McCann (n 13) 11.
76 O’Leary (n 14). The NFSN is a community-based organisation that supports families coping with drug use.
experienced debt-related intimidation ranging from verbal threats to physical violence and damage to homes or other property. Many affected families survived on very low incomes and were given short periods to repay debts, using salaries and wages and borrowing money from families, friends, banks, credit unions or other money lenders. Drug users themselves often resorted to criminal activity to repay debts to dealers, such as drug-dealing or transporting and storing drugs, performing acts of violence on behalf of sellers and engaging in sex work. Other issues reported included:

- threatening behaviour, including verbal threats, intimidation at the workplace, harassment, death threats, threats of shooting, beatings or ‘kneecapping’ and live bullets posted through letter boxes;
- houses and cars vandalised and burnt out;
- physical violence, including murder, shootings through doors and windows of family home, hospitalisation due to beatings, burning of a drug user.
- physical/sexual violence against women;
- dealers encouraging children to sell drugs to friends and witness family members being beaten; and
- use of the family home by mothers for sex work to pay off debt.

Family members were too fearful to approach Gardaí in relation to intimidation, also believing that Gardaí were powerless to act.

An ethnographic study of violent feuding in Limerick was conducted between 2007 and 2010. The research consisted of 221 interviews with local residents, those on the fringes of criminal gangs, community leaders, Gardaí and also 100 hours of participation observation (one-third of which was conducted at night). Most of the violence centred around certain families. The author describes how ‘the code of the street’ leads to certain people being identified in an area as people to be feared, thus ensuring that any intimidation or acts of violence by them will not be reported.77 The ultimate effect of community violence and intimidation was that it reduced community residents to a state of perpetual fear and anxiety. The following quote from one resident gives an indication of the subservient state community violence and intimidation can impose on local people:

> You know what they really want is for you to be down on yourself so that you don’t believe you can have any other life. They want you to keep your head down and just put up with it, even if there are gunshots comin’ in your window and you’re lyin’ on the floor with your kids... What they want is for you to keep your head down and just shut the fuck up and accept that that’s your life, full stop.78

In 2013, Safer Blanchardstown produced a report, *Melting the Iceberg of Fear*, based on research carried out on drug debt intimidation in the local area.79 The report considered drug-related intimidation as part of a continuum of behaviour, from mild to severe to ruthless. The report describes how, in the absence of appropriate interventions, children can progress from a lower order of intimidatory behaviour to involvement in more serious activities, with an escalating impact on the community.

In 2014 the National Advisory Committee on Drugs and Alcohol published the first national study of *Illicit Drug Markets in Ireland*.80 This exploratory study was conducted over a 36-month period and included a cross-section of four local drug markets: two

77 Hourigan (n 14).
78 Ibid 85.
79 Jennings (n 14).
80 Connolly and Donovan (n 14).
urban, one suburban and one rural drug. The study methodology involved: face-to-face in-depth interviews with former and active drug users – street sellers as well as individuals serving prison sentences of more than seven years for drugs supply; 24 interviews with experienced members of dedicated Garda Drug Units in the four study sites and with senior members of the Garda National Drugs Unit; interviews with drug treatment workers, public health specialists and a family support group; and a street survey of 816 local residents and business people (approximately 200 respondents in each location).

Although not all markets were equally disruptive, the study found that open drug markets, in particular, have an ongoing low-level impact on communities. Their presence leads residents to restrict their movements and activities accordingly, curtailing their freedom of movement and thus leading to a loss of communal space which can contribute to a further deterioration in quality of life. All four sites reported an increase in violence associated with the drug trade – violence that was increasingly visible in public in the form of fights or damage to property. Violence in all four markets was largely related to unpaid debts, although territorial disputes did occasionally emerge in less ordered drug markets.

Drug debts were acquired through people consuming their own supply or as a result of Garda seizures. Where Gardaí seized drugs, debts remained outstanding and still had to be paid for. Drug-related violence and intimidation was a major disincentive to taking action and/or engaging with state agencies in responding to the underlying problems. Fear of reprisal from those involved in the drug trade was the principal reason why residents would not report drug-related issues to the Garda Síochána.

The following imprisoned drug dealer felt that, although violence has always been associated with the illicit trade in drugs, the debt-related intimidation of family members of those who owed money to drug-dealers was relatively recent.

> Violence, it was, it was always in it. It was part and parcel of like you get stigmatised, you know, drugs – with drugs comes violence and it is true. With drugs comes violence but I was never violent. I was always sympathetic to those who went off them, always. I would never go around as they do now fucking like tapping on doors, looking for the aul’ fella, looking for the fathers or mothers to pay but I was never like that. I would write it off – more times out of 10 like if I got out of pocket from doing it, but I would never use violence. 81

A recent study investigated the issue of drug-debt related intimidation and community violence throughout Ireland. The research was a joint collaboration between a community-based advocacy organisation, the Citywide Drugs Crisis Campaign and the Health Research Board (HRB). The research involved the distribution of an audit questionnaire to gather statistical information about incidents of intimidation. The audit was implemented in partnership with 13 participating drugs taskforces and the local projects linked to them during the 2014 to 2015 period. The aim of the research audit was to gather information indirectly from a hard-to-reach population, namely people in communities who have experienced drug-related intimidation, including drug users and their family members, with the ultimate objective of highlighting the issue and informing policy responses at a local level. 83

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81 Ibid.
82 Connolly and Buckley (n 14).
83 L Murphy, L Farragher, M Keane, B Galvin and J Long, Drug-related Intimidation – The Irish Situation and International Responses: An Evidence Review (HRB 2017). This evidence review followed on from the findings of the Citywide/HRB research.
The research consisted of an audit of 140 incidents of intimidation reported to projects throughout the country. Based on the audit findings, focus groups were conducted with approximately 150 people from various local projects nationwide. Targeted focus groups were also conducted with members of the Traveller community, former prisoners, youth workers, family support workers and a Community Safety Forum in Dublin.84 The study reaffirmed many of the findings of the National Family Support Study discussed above.85 Most incidents of intimidation involved a verbal threat while physical violence and damage to the family home or property were also reported. Repeated incidents could go on for months with the mobile phone and social media making targets accessible day and night. Intimidation often escalated from verbal threats to property damage, culminating in physical attacks on drug users and/or their family members. It is likely that there is an under-reporting of sexual violence due to the nature of the audit and the way the data was gathered. Reports from focus groups suggested that females are often coerced into performing sexual acts in order to pay off drug debts. It was also widely reported that young people are getting into significant debt over herbal cannabis and then coerced into ‘working the debt off’ by engaging in illegal activities such as holding or selling drugs, money or weapons and/or transporting drugs.

Drug users, or those in debt, are the primary targets for intimidation. Mothers are the second most likely target and also the most likely family members to pay the debt. The discussion with former prisoners revealed the widespread acceptance, or ‘ground rules’, about drugs, debt repayment and violence. The dealer has drugs on credit and the user takes drugs on credit. They have to beat them up to show everyone the consequences. The intimidation of families is also a way of flushing the drug user out if they are in hiding or refusing to pay. In many focus groups it was reported that Garda members often advise people to pay the debts (although officially this might be denied). On the other hand, in one focus group, it was stated that the view of some Garda members is that paying a debt can invite further pressure as people can be seen as a ‘soft touch’ and further extortion can occur.

Although most of the intimidation involved debt collection, another function was to frighten and subdue the community so as to enforce gang control and facilitate the operation of a drug market or other crimes. Some of the impacts of intimidation identified in the study included mental health issues arising from the stress associated with intimidation. Youth and community workers noticed behavioural changes in young people and reported stories about victimisation, self-harm and suicide ideation. One of the dominant concerns expressed in the audit and in focus groups was that people feared for their personal safety at home. Intimidation can also undermine parental relationships, as mothers sometimes reported not telling the father about the intimidation due to concerns that the father might respond in a heavy-handed manner thereby exacerbating the problem.

The profile of those carrying out the intimidation and threats was primarily male, aged between 18 and 35 years. Females were reported as involved in just under 20 per cent of the threats. About 10 per cent of reported incidents of intimidation were carried out by children aged between 15 and 17. Most of the activity was perpetrated by people acting in groups or loose networks. Focus groups reported different levels or degrees of organisation relating to local intimidation. Drug users and young people are targeted

84 Provided for under the terms of the Garda Síochána Act 2005, Community Safety Fora are initiatives established in a number of locations in Dublin to liaise with the Garda Síochána and Dublin City Council in response to local crime issues.
85 O’Leary (n 14).
largely by their peers, associates and friends of those to whom they owe money. For young people a lot of the time it involves friends intimidating each other. Much of this activity is occurring in school. In the Family Support Network focus group it was reported that young people (aged 14 to 19) who are still in school have lots of small debts under €300.

A strong view highlighted through the various focus groups (ex-prisoners, youth workers and parents and community activists) was the acceptance that debts had to be paid. However, paying the debt does not mean that the intimidation would stop; there were many cases reported throughout all the focus groups of dealers demanding money even after the debt had been paid in full. With regard to reporting the threats, the situation is usually out of control by the time victims come forward. However, of the 140 incidents reviewed, less than 17 per cent of incidents were reported. Of those people who did report, they clearly felt most comfortable reporting their experiences to community organisations, which usually included someone familiar to them. An NFSN/Garda National Drugs Unit Intimidation Reporting Programme was also useful for parents to assess the risk of paying or not paying the debt.86

As with most of the studies referred to above, fear of reprisal from those involved in drug dealing was the number one reason for not reporting incidents of intimidation and violence to the Gardaí. A lot of people experiencing intimidation lived close to the perpetrators and felt that they would be at risk if they looked for support. Some parents might contact projects or groups, but do not want the issue to go further. There is also a widespread belief that nobody can do anything, including the Gardaí. Focus groups reported a widespread view that prosecutions were unlikely and that, even if one took place, it would not succeed as people would not cooperate as victims with the police or criminal justice process due to fear. People felt that even if someone went to prison, the intimidation could continue from inside the prison.

Discussion

The fear and intimidation that can be generated locally as a consequence of illicit drug dealing reveals the insidious and disproportionate impact that crime can have on specific locations where drug markets develop. As Jock Young and others writing from the Left Realist perspective pointed out some time ago, crime and victimisation is concentrated geographically in certain areas and socially among certain groups, but this reality is not captured in national surveys.87 The investigation of this lived experience is key to developing meaningful responses.

A common thread running through many of the studies reviewed above is that much of the research that has been discussed was promoted or undertaken by locally based community groups, such as the NFSN or the Citywide Drugs Crisis Campaign. Since the emergence of the heroin problem in inner-city Dublin in the 1980s, in the face of denial as to the seriousness of the problem by the state it was local research that first brought the issues to public attention.88

86 The Garda National Drugs Unit and the National Family Support Network developed The Drug Related Intimidation Reporting Programme to respond to the needs of drug users and family members experiencing drug related intimidation. For more information see <www.drugsandalcohol.ie/20153>.
88 S Butler, Alcohol, Drugs and Health Promotion in Modern Ireland (Institute of Public Administration 2002) 139.
For example, a study by Dean et al in 1983, popularly known as *The Bradshaw Report*, would provide stark evidence of the prevalence of heroin use in the north Dublin inner city, with a 10 per cent prevalence rate among the 15 to 24 age group and a 12 and 13 per cent prevalence rate for boys and girls respectively in the 15 to 19 age group.\(^89\) Butler describes this report as ‘simply giving a scientific gloss to the statistics which local (drug) activists had already compiled’.\(^90\) Activists in the north and south inner city and in Ballymun, a suburban high-rise estate on the outskirts of Dublin, engaged in ‘popular epidemiology … in an attempt to persuade the Department of Health and the Eastern Health Board that their communities were experiencing a new and unprecedented wave of heroin use’.\(^91\)

The research reviewed above highlights the lived experience of victimisation and the profound effect drug-related violence and intimidation have on community life. Drug-related intimidation also appears to have a strong gender dimension. Although it primarily involves young men as victims and offenders, young women also perform a role. However, a great deal of the burden of responding to the problems, of drug debt, for example, falls on the mothers of those caught up in debt.

The increasing involvement of young people, both as victims and perpetrators, is also a consistent finding. The young people who are victimised experience significant anxiety and mental health problems, either due to drug-related debt within the family or their own debts. The grooming of young people into committing offences related to the drugs trade is also a finding with significant policy implications, in particular, the blurring of the boundary between offender and victim. Young people who are not drug-dependent or involved in selling drugs can become implicated in the drug trade as a consequence of accruing, through recreational drug use, drug debts that they are unable to pay. Their inability to pay can lead them to commit crime, such as holding or running drugs, to pay debt. Intimidation is taking place both in and out of school settings, with bullying and peer conflict occurring in school and the school becoming a place of fear for the young person. The stress involved for young people can lead to them withdrawing from school and/or becoming isolated with potentially very serious mental health consequences. Young people who become involved in the drugs trade at a low level, by running or holding drugs, for example, can progress to more serious involvement if there is not adequate intervention at an early stage.

A common theme that runs throughout all of the studies discussed above is that fear of reprisal from those involved in drug dealing is the number one reason for not reporting incidents of intimidation and violence to the Gardaí, or engaging generally with the criminal justice system. In national crime victimisation surveys, such as those conducted by the Central Statistics Office, fear of reprisal is seldom ever cited as a significant reason for people not reporting crimes to the Garda Síochána.\(^92\) This highlights the largely hidden nature of this community victimisation.

The term ‘gangland’ implies that the land or territory is controlled by gangs, whereas many communities with active drug markets have strong residence groups and informal social controls. ‘Get tough’ talk and legislation is largely symbolic – the state asserting its authority – whereas, in reality, it is a symptom of the absence of such authority.

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90 Butler (n 88) 139.

91 Ibid 154.

Community-based research, such as that presented above, has highlighted the way in which crimes associated with the drugs trade can become normalised in an area. The fact that people are too fearful to report such issues to the authorities and that no one is called to account locally as a consequence means that whole areas and communities can be silenced and controlled. There does not appear to be any safety net that can reassure people in such circumstances. Even where offenders might be prosecuted or even imprisoned, this does not alleviate the fear for most people.

Throughout the history of the conflict in NI, serious legitimacy issues prevailed in those communities alienated from the State and, by extension, from the policing and criminal justice systems. Notwithstanding the major advances made in policing in NI as a consequence of the reforms initiated by the Independent Commission on Policing (ICP), concerns remain as to the success of the Police Service of Northern Ireland (PSNI) in terms of delivering effective ‘policing with the community’ as envisaged by the ICP. The levels of public confidence in the PSNI in those communities previously most alienated from public policing structures remains uncertain. A further key challenge is the continued involvement of paramilitaries with the illicit drugs trade. On the one hand, the drugs trade is a source of revenue. On the other, drug dealing, and related crime at the local level, is used, particularly by dissident republican paramilitaries, to justify continued opposition to the political reforms, and to legitimate ‘crime management activities’ which receive growing community support.

**Conclusion**

Although there are no simple solutions to the issues raised in this article, which arise in most deprived areas with embedded drug markets in Ireland, the hidden community victimisation associated with the illicit drugs trade poses a major challenge in terms of the relevance and, therefore, the legitimacy of local policing responses and, by extension, the criminal justice system as a whole. Addressing these issues will require a shift in the balance of power for such communities, so as to facilitate a radical realignment in local policing and community safety processes. Ultimately, for this to happen there is a need, in both jurisdictions on the island, for a comprehensive response, involving greater state agency engagement and collaboration at community level, as well as community involvement in the planning and delivery of interventions. Such an engagement will also require an acknowledgment on behalf of the state that communities face constrained choices when it comes to addressing local drug markets as, although these markets create...
significant misery and disruption, they are also a source of illegitimate opportunity, of both a social and economic nature, whether in terms of status or income for young people. Other community members may also benefit from cheap stolen goods, a by-product of the drugs trade. The displacement of these highly lucrative markets will require either radical experimentation with alternative forms of drug regulation or massive economic investment in such communities.
Victims of crime with intellectual disabilities and Ireland’s adversarial trial: some ontological, procedural and attitudinal concerns

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Abstract

That the process of delivering evidence orally in court can prove stressful and intimidating is a point well established within mainstream victimological discourse.1 However, what is insufficiently acknowledged, particularly within the Irish academy’s literature on this topic, is the extent to which this sense of distress is heightened for victims of crime with an intellectual disability. In seeking to address this research lacuna, this paper will consider the degree to which the procedural norms of Ireland’s adversarial trial system, and the epistemical values which underpin those norms, pose certain exaggerated barriers to the realisation of justice for members of this vulnerable victim constituency. Owing to their limited cognitive and linguistic development, these victims face significant biomedical or ontological difficulties in responding to experiences of victimhood. Crucially, however, these ontological difficulties are compounded both procedurally and attitudinally by an adversarial system of trial which is predicated upon a ‘contest morphology’ and controlled by a legal community that is overwhelmingly preoccupied with mainstream accounts of victimhood.

Keywords: criminal process; victimology; adversarial procedure; crime victims; intellectual disability; evidence

1 Introduction

Ireland’s adversarial trial, like many of its counterparts across the common law world, has traditionally accommodated a rigorous, interrogative programme for testing proofs in court. The oral nature of proceedings, the combative sensibilities which underpin them, the emphasis on witness demeanour, the insistence upon unmediated responses, the freedom of advocates to engage in robust cross-examination and the forensic passivity of the trial judge and jury are all regarded as essential evidential safeguards in securing a fair adversarial trial for the criminal accused.2 For victims of crime, however, these evidential safeguards

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often contribute to an intimidating, frequently hostile, courtroom environment. As Doak explains, ‘[t]he adversarial trial process, as its name would suggest, is not designed to protect witnesses, and nor is it a place where the weak and vulnerable can feel relaxed and at ease’.\(^3\) Indeed, if, as Ellison contends, the process of delivering evidence orally in court is ‘a difficult and stressful ordeal for many witnesses’, the experience is arguably even more so for vulnerable witnesses such as those, for instance, who approach the courthouse with an intellectual disability.\(^4\)

Owing to limitations in cognitive functioning and linguistic fluency, victims of crime with intellectual disabilities often face severe difficulties in responding to incidents of victimisation. While it is true, as many commentators have pointed out, that all crime victims can expect to experience some degree of marginalisation within the adversarial trial given its bifurcated (i.e. state-versus-accused) structure and its public character, the exclusion felt by members of this vulnerable victim constituency is particularly acute.\(^5\) It is this heightened sense of procedural exclusion which forms the basis of this article. By focusing on the ontological, procedural and attitudinal factors which uniquely contribute to the exclusion of victims of crime with intellectual disabilities at trial, it is hoped that this brief contribution will go some way to exposing the mainstream assumptions which underpin Ireland’s adversarial model of justice. In so doing, the article is intended to act as an emboldening reference point for Irish policymakers, encouraging them to reconsider the types of evidential safeguards that are truly required to secure a fair trial for a criminal accused in light of the experience of victims of crime with intellectual disabilities.

### 2 Ontological barriers to best evidence

An important disclaimer, which must be issued at the outset of any exploration of the ontological or biomedical dimensions of intellectual disability, is that intellectually disabled individuals do not form a homogeneous group. The types of impairment which exist, the level of their severity and the degree to which they inhibit normal social functioning can vary greatly between people falling within this classification.\(^6\) As such, it is impossible to identify authoritatively the full spectrum of ontological or biomedical factors which impact upon the testimonial performance of this heterogeneous group. However, given their shared cognitive disposition and adaptive behavioural characteristics, certain global comments can be made in relation to the capacity of persons with an intellectual disability to act as witnesses within Ireland’s adversarial trial process.\(^7\)

As a preliminary point, many people with intellectual disabilities have been found to have broad deficits in memory encoding, storage and retrieval.\(^8\) Consequently, such

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witnesses have been found to encounter significant difficulty in providing spontaneous accounts of eyewitness events. Moreover, emerging evidence from the field of cognitive psychology suggests that a large proportion of these witnesses are susceptible to a range of additional debilitating psychological vulnerabilities which can significantly impair their capacity to deliver accurate courtroom testimony. Numerous studies, for example, have found that individuals with intellectual disabilities are more suggestible, more acquiescent, more likely to confabulate and more likely to engage in nay-saying than their counterparts within the general population.

There is also evidence to suggest that such witnesses are more likely to obfuscate generic details about an alleged incident, such as names, times and dates, that they will entertain a final option bias in response to closed-multiple choice questions, that their knowledge of the legal process is poor, and that they struggle routinely to comprehend legal terminology. Additionally, each of these psychological vulnerabilities can be significantly exacerbated by a range of environmental factors associated with the setting in which a witness’s narrative is elicited. It is particularly apparent from the research that exists in this area that a witness’s responses will be biased by both the status of the interviewing actor and the formality of the venue in which the exchange is taking place.

However, while these insights from the field of cognitive psychology raise serious questions about the reliability of testimony elicited from witnesses with an intellectual disability, they should not be interpreted as giving cause to automatically discredit a witness simply by virtue of his or her intellectual impairment. There is, as Gudjonsson points out, no empirical basis for treating as unreliable the evidence of a witness simply because its author presents it with a number of psychological vulnerabilities: ‘Persons with moderate learning disability may well be able to give reliable evidence pertaining to basic facts, even when they are generally highly suggestible and prone to confabulation.’ The central controlling factor, it would seem, is the manner in which he or she is questioned about an alleged incident.

Broadly speaking, the dominant research in this field would appear to indicate that the more specific the question asked, the less factually accurate the ensuing response. Thus, whereas open questions (e.g. What happened?) tend to yield a highly accurate, if somewhat factually incomplete, response; closed questions have been found to elicit a
more detailed response which is less factually precise.\textsuperscript{17} This phenomenon was recognized by Perlman et al who arrived at the conclusion following their empirical research in this area: ‘In contrast to the more open-ended recall formats, it appears that less accurate reports are obtained with more focused recall questions for both groups, but particularly for the developmentally handicapped group.’\textsuperscript{18} Given, then, that the adoption by lawyers of an appropriate questioning strategy in court can significantly mitigate the response biases of witnesses with intellectual disabilities, it is wrong to assume that the cognitive limitations of members of this victim constituency present ontological challenges which are insurmountable within the criminal process. However, for best evidence to prevail, the design of the trial is key.

3 Procedural barriers to best evidence

Owing to the legacy of colonialism, the procedural architecture of Ireland’s trial has long been designed in the style and form of the adversarial tradition; that is to say, a tradition which celebrates justice secured through the confrontational, oral interaction of partisan parties who, in accordance with strictly delineated rules, engage in a gladiatorial contest before a neutral judge and jury. From an epistemological perspective, however, the procedural inclusivity and probative integrity of this confrontational tradition is highly questionable. Indeed, by insisting upon the delivery of direct oral evidence, the adversarial trial prematurely assumes that all honest witnesses are equally capable of constructing story narratives, of relaying those narratives in a credible manner, of withstanding the rigours of cross-examination and of calmly confronting an assailant in court.\textsuperscript{19} In short, it fundamentally discounts the fact that witnesses are not uniformly articulate, confident and cognitively developed. As a consequence, Ireland’s adversarial trial invites an inherent bias against those who ‘lack shared cognitive routines for presenting evidence in story-coded forms’.\textsuperscript{20} This sense of procedural bias, it is submitted, is most acutely apparent at two distinct phases of the Irish trial, namely (1) in satisfying the competency standard to testify; and (2) in subsequently delivering viva voce evidence in open court.

3.1. Competency standard as a barrier to inclusion

While the admission of unsworn testimony from persons with a ‘mental handicap’ under the Criminal Evidence Act 1992 represented a welcome departure from the exclusionary approach of the common law,\textsuperscript{21} the modified competency test ushered in by this Act has not been a panacea for all of the competency difficulties which witnesses with intellectual disabilities face in Ireland. As a preliminary point, unsworn evidence is hardly comparable to evidence given under oath in terms of its persuasive force. Inferences of unreliability, as Birch reminds us, are almost inescapable for jurors tasked with weighing up such testimony:

Competence does not . . . imply credibility and an adult witness who has been found fit ‘only’ to give unsworn evidence of abuse allegedly occurring in private is likely to be off to a bit of a shaky start, especially where there is no corroboration.\textsuperscript{22}

\textsuperscript{17} Heal and Sigelman (n 12).
\textsuperscript{18} Perlman et al (n 9) 181.
\textsuperscript{20} W Bennett and M Feldman, Reconstructing Reality in the Courtroom (Sweet & Maxwell 1981) 171.
\textsuperscript{21} Prior to the enactment of s 27 Criminal Evidence Act 1992, there was no mechanism under Irish law by which adults, including those with an intellectual disability, could give unsworn testimony in court. See Mapp v Gilboley [1991] 2 IR 253 (SC), 262.
The shakiness of this start, moreover, is all but assured by the procedural delay which invariably accompanies competency assessments in Irish criminal proceedings. Studies have shown that, for victims of crime with intellectual disabilities, recall accuracy is inversely related to the length of time which elapses between the criminal incident and the date upon which it is relayed in court.\(^\text{23}\) Accordingly, a witness’s capacity to give an intelligible account may be significantly compromised by the procedural delay which is now an engrained feature of modern Irish criminal litigation.\(^\text{24}\)

Additionally, awkward questions need to be addressed concerning the suitability of trial judges to act as arbiters of witness competency in the first place. Although expert medical opinion evidence may be adduced to assist the court in assessing the competency of a witness, the final determination of this issue rests with the trial judge.\(^\text{25}\) In this regard, Edwards et al’s recent discovery that members of Ireland’s judiciary execute competency determinations on an ad hoc basis without reference to strict psychological or medical criteria is a cause for some concern. Citing, for instance, the usefulness of school reports as a source of evidence for competency determinations, one judicial member interviewed as part of the study commented as follows:

> These things can be helpful in kind of fleshing out, giving a clearer idea of how far the person had capacity to go in terms of education, just general training, looking after themselves, you know, awareness of the outside world etc.\(^\text{26}\)

It is submitted that the absolute discretion which is currently afforded to the Irish judiciary in determining issues of competency in accordance with their own individualised notions based on arbitrary questioning formats is entirely inappropriate and provides an unruly template for assuring equal access to justice for witnesses with an intellectual disability. The *Laura Kelly* case strikingly illustrates this point. The complainant in this case was a young woman with Down’s Syndrome who was allegedly sexually assaulted at a 21st birthday party. At the trial, however, the complainant, who was described by the Central Criminal Court as having ‘a mental age of four’, was deemed incompetent to testify and the case was dismissed. Following this determination, the complainant’s mother expressed her deep sense of dissatisfaction with the competency standard applied by the court:

> [Laura] was brought into this room in the Central Criminal Court and asked questions about numbers and colours and days of the week which had no relevance in Laura’s mind. She knew that she had to go into the courtroom and tell a story so the bad man would be taken away . . . It was ridiculous. There is no-one trained in Ireland to deal with someone similar to Laura, from the Gardaí up to the top judge in Ireland and the barristers and solicitors.\(^\text{27}\)

This statement encapsulates the flawed conception of competence which Irish courts continue to entertain in criminal proceedings. Indeed if, as psychological studies have shown,\(^\text{28}\) persons with intellectual disabilities have an increased recollective capacity for salient life experiences, then the trial judge’s exclusive focus in the *Laura Kelly* case on...
impersonal, generic information was psychologically unsound. Worse still, his approach was rooted in a disabling, overly pathological understanding of disability. Instead of adopting a functional approach to capacity as mandated by s 3 of the Assisted Decision-Making (Capacity) Act 2015, and instead of considering whether the complainant had the capacity to impart information relevant to the matter at hand (i.e. give an intelligible account of the alleged crime), the test employed by the trial judge focused entirely on irrelevant details. Not only is such an approach to witness competency discredited within mainstream evidential scholarship, but it has also been discredited in wider areas of mental capacity law.29

3.2. Giving evidence as a barrier to inclusion

As Murphy J in Phonographic Performance Ltd v Cody was at pains to point out, the Irish adversarial trial is founded on a deep-seated belief that oral evidence is best: “The examination of witnesses viva voce and in open court is of central importance in our system of justice and . . . it is a rule not to be departed from lightly.”30 This centrality of oral evidence within Ireland’s adversarial trial is attributable, in the main, to its perceived evidential richness in terms of providing the jury, not only with a sworn narrative of events, but also with a valuable opportunity to judge the authenticity of this sworn narrative in light of a witness’s demeanour in court.31

Consistency of account and credibility of recount are therefore crucial to achieving testimonial success within the adversarial trial. Any factual inaccuracy in a witness’s version of events, or any behavioural anxiety which he or she may exhibit in the witness stand, can cast fatal doubt on the perceived reliability of the resulting testimony. Moreover, the authenticity of a witness’s account is said to assured by the adversarial trial’s subscription to a series of rigorous evidential safeguards.32 It is axiomatic of adversarial trial justice, for instance, that oral evidence should be delivered upon oath, that its veracity should be confirmed through a process of rigorous cross-examination, that the tribunal of fact should have an opportunity to judge its reliability by observing the demeanour of the witness in court, and that the exchanges which constitute the trial should take place in a public forum appropriate to the solemnity of the occasion.33 However, our subscription to these evidentiary safeguards comes at a price. Not only do these canons ignore the ontological challenges of intellectual impairment, but they also arguably exploit them by cultivating a hostile interrogative environment.

3.2.1 Evidence under oath and cross-examination as a barrier to inclusion

In their quest to put their best evidence before Irish jurors, victims of crime with intellectual disabilities must endure a rigorous, often invasive, cross-examination process which can have a devastating impact on the coherency, consistency and credibility of their testimony.34 Notwithstanding, however, the heightened risk of narrative bias which

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29 Birch (n 22); Edwards et al (n 26); R Byrne, ‘Sexual Offences and Capacity to Consent: Key Issues’ (2015) 5(1) Irish Journal of Legal Studies 22.
32 Ellison (n 4) 34.
33 Significantly, physical confrontation in the sense of a face-to-face exchange is not an essential ingredient of Ireland’s adversarial trial. See Donnelly v Ireland [1998] 1 IR 321.
accompanies the cross-examination of such witnesses, empirical research suggests that advocates do not adapt their interrogative strategy when confronted with an intellectually disabled witness in court. Thus, in much the same way as they seek to control the narrative of mainstream witnesses through a range of techniques, so too do lawyers, in cases involving vulnerable witnesses, invoke ‘constraining and coercive questioning strategies which have a particularly negative impact on the testimony of witnesses with [learning disabilities].’

One particularly insidious technique employed routinely during cross-examination is for counsel to have recourse to advanced terminology and complex syntax in court. In this way, lawyers use language as a tool to manipulate and subordinate comparatively naive and vulnerable language users. There is a wealth of research attesting to the distortive impact which legal parlance can have on the accuracy of testimony provided by witnesses with intellectual disabilities. A study by Smith, for example, found that 16 per cent of offenders with an intellectual disability did not understand the meaning of the word ‘guilty’, while a further 22 per cent of respondents did not appear to understand the meaning of the phrase ‘not guilty’. A similar dearth of knowledge has been identified in separate psychological studies by Gudjonsson et al, Smith and Hudson, and Ericsson and Perlman respectively. Significantly, these studies point to the importance of explaining clearly to intellectually disabled witnesses the basic principles, terminology and procedures involved in the adversarial trial: ‘The results of this study suggest that when many legal terms are used in questioning and they’re not explained to “developmentally disabled” individuals, answers to questions may be confused or incorrect or both.’

Additionally, owing to the heightened sensitivity of these witnesses to aggression – as well as their overt desire to appease authority figures – there is a risk that intellectually disabled witnesses will simply feign understanding in order to bring an interrogation to a close and avoid any undue public embarrassment. As one respondent in McLeod et al’s study remarked: ‘You can tell people with learning disabilities anything and they would agree or say they had understood. But you really need to check that they actually understand what’s being said.’ It should also be noted, that these difficulties in comprehension are often further compounded by the design of the adversarial trial which makes it difficult for a witness to articulate a lack of comprehension in a manner which does not detract from his or her credibility.

Another popular tendency amongst cross-examining advocates is to construct their examination of a witness almost entirely around coercive, closed-ended, leading...

35 Kebbell et al (n 8) 32.
36 Ibid 32; Kebbell and Hatton (n 6).
37 Kebbell, Hatton, Johnson and O’Kelly (n 7) 98.
39 S A Smith, ‘Confusing the Terms “Guilty” and “Not Guilty”: Implications for Alleged Offenders with Mental Retardation’ (1993) 73 Psychological Reports 675.
41 Ericsson and Perlman (n 13) 542.
42 Ibid 531.
questions. Narrative control is key for these actors and their overriding concern is to adopt an interrogative approach which best assures them of eliciting an account that is sympathetic to their hypothesis. Thus, we find advocacy manuals explicitly counselling the untrained advocate to avoid the type of free recall inquiries which best speak to the cognitive strengths of persons with an intellectual disability: ‘Almost anything is responsive to a question that asks how? or why? Those words are to be avoided like the plague in cross-examination.’

While coercive questioning may well be celebrated in advocacy scholarship for allowing the wily advocate to construct the ‘desired reality’ in court, they invite an increased risk of confabulation amongst witnesses with an intellectual disability. Similarly, suggestive questioning – achieved principally through the use of leading questions – has been shown to cultivate an increased suggestibility effect amongst persons with an intellectual disability.

A further final technique employed by counsel during cross-examination is their adoption of an overtly hostile and aggressive interrogative demeanour to intimidate opposing witnesses. As Ellison writes:

Tone of voice, speech rate, emphasis, physical proximity, eye contact, physical gesture and facial expression are all devices which can be used to unsettle or unnerve a witness. In addition, an array of conversational ploys are used to intimidate and thereby undermine [an] opposing witness.

The conversational ploys to which Ellison refers include the use of repeated questions, asking questions in rapid succession, raising fallacious objections and paying inordinate attention to trivial and seemingly obscure details about the alleged criminal event. These tactics are adopted by cross-examining counsel, not singularly for the purpose of intimidating witnesses into giving a sympathetic account of events, but also for the purpose of casting doubt on the credibility of any opposing truth claims raised in court.

### 3.2.2 Emphasis on witness demeanour as a barrier to inclusion

Within adversarial proceedings it is not simply sufficient for a witness to deliver a factually accurate account in court; they must do so in a behaviourally plausible manner. Any failure to conform with behavioural norms associated with truthful storytelling is

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44 Kebedel al (n 7) 99.
45 According to Levy, the cardinal rule of cross-examination is ‘thou shalt control the witness’. See E Levy, Examination of Witnesses in Criminal Cases (Thompson Professional 1991) 203.
49 Ellison (n 38) 359–60.
51 Levy (n 45) 227.
52 Bennett and Feldman (n 20) 132.
53 Evans’ advocacy manual, for example, encourages advocates to adopt a strategy of ‘probing the witnesses recollection on things which are anything but central to the case’. See K Evans, Advocacy in Court: A Beginner’s Guide (Blackstone 1995) 161.
implicitly taken to be evidence of a witness’s untruthfulness. In this regard, ‘witnesses’ behaviour and performance in the witness box may be as important as the substance of what they have to say. Empirical support for this observation is to be found in an important study conducted at Bristol University into incidents of child abuse wherein one lawyer confessed that ‘juries acquit sometimes because they don’t like the look of the victim’. Herein, we again encounter difficulties arising from the adversarial tradition’s mainstream construction of victimhood which creates ‘a real problem for all complainants whose appearance or demeanour does not engage the jury’s sympathies’.

For victims with intellectual disabilities, these credibility hurdles are further compounded by the adversarial model’s restrictive evidential protocols which limit both the admission of expert testimony in court and the degree of pre-trial consultation permitted between counsel and prosecution witnesses. According to the strict dictates of legal adversarialism, expert evidence is only admissible in relation to technical matters which fall outside the ordinary knowledge and expertise of the tribunal of fact. The probable truthfulness of a witness’s account is not regarded as such a matter. As a consequence, jurors are tasked with making value judgements about the credibility of all witnesses – including those with an intellectual disability – without the benefit of any psychological insights to guide them.

3.2.3 Insistence on unrehearsed testimony as a barrier to inclusion

In addition, the witness’s task of relaying a convincing narrative in court is complicated by the adversarial system’s entrenched insistence upon the delivery of unrehearsed testimony in court. As Hoyano explains:

The prevailing view . . . is that a witness who gives a spontaneous and unconsidered answer to a question out of the blue is more likely to be telling the whole truth, in the most compelling way – in short, to be giving her best evidence – than one who has had an opportunity beforehand to recollect and reflect on the subject matter of the question.

In trial practice, this logic has manifested itself in the shape of a rule prohibiting the coaching of witnesses. The significant anxiety which this prohibition causes for vulnerable witnesses hardly needs explaining. Indeed, in the inquest which followed the death of Frances Andrade in England, it emerged that she had had significant misgivings about the paucity of pre-trial support which she received in contrast to the

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55 Wellborn (n 31).
58 Birch (n 22) 233.
63 Frances Andrade died of an overdose in 2013, a week after giving evidence at the trial of Michael Brewer for her alleged rape. Frances Andrade was visibly distressed at the gruelling nature of cross-examination and told the court that she felt as though she had been ‘raped all over again’ following her cross-examination. See A Hill, ‘DPP Proposes New Guidelines to Help Victims and Witnesses in Court’ The Guardian (London, 19 January 2015).
significant level of legal assistance which the accused received from his own counsel. In the moral outrage which followed Ms Andrade’s death, even the director of the Crown Prosecution Service in England and Wales, Alison Saunders, was forthcoming in acknowledging the difficulties that this traditional prohibition on pre-trial communication poses for vulnerable victims of crime:

Asking someone to come to court without any idea of what they face in the witness box does not seem fair to me . . . To stand up in a formal setting and to be asked sometimes difficult and personal questions in front of a court full of strangers is a very big ask. In coming to court to give evidence, victims and witnesses are performing an important public service and I think we can assist them better.65

3.2.4 Trial in public as a barrier to inclusion

It is also considered essential that adversarial criminal proceedings should take place in a public forum; the underlying assumption being that a witness is less likely to lie in the presence of an audience. However, again here we find little psychological evidence to support this assumption. The opposite, if anything, is true. Indeed, there are numerous psychological studies attesting to the corruptible effect which stress can have on memory. From McLeod’s research in England and Wales, it would seem that there are few climates less conducive to accurate recall than the hostile arena of the adversarial courtroom. As one respondent in that study explained:

We went into the courtroom and it was bigger and a bit more full than I was expecting. I don’t really like busy places. I started to get a headache and I felt all stressed and shaky. I got asked a question and told I had to explain things in my own words. I had to stop for a minute and calm down.68

4 Attitudinal barriers to best evidence

Two recent quantitative research endeavours point to the subtle subsistence amongst Ireland’s criminal justice agencies of a presumptively dismissive attitude towards the competency and credibility of victims of crime with intellectual disabilities. In the first of these studies, McCormack et al noted that, out of 118 confirmed episodes of abuse against persons with intellectual disabilities, only two incidents were prosecuted and only one of those prosecutions resulted in a formal criminal conviction. In a separate study, meanwhile, Hamilton found that out of 17 cases involving an intellectually disabled crime victim which were classified as rape by the Director of Public Prosecutions (DPP) Prosecution Policy Unit between 2005 and 2007, only four were eventually prosecuted,
whilst another one case was withdrawn.\textsuperscript{70} These figures speak of a legal community that is indoctrinated in a narrow, mainstream construction of victimhood; a community which, on the whole, is sceptical about the testimonial reliability and behavioural credibility of witnesses with intellectual disabilities.

One possible explanation for this cultural scepticism is the paucity of disability awareness training which exists within Irish criminal justice institutions. It is notable, for instance, that at the time of writing, none of the principle stakeholders involved in Ireland’s adversarial trial – including the Office of the DPP, the Courts Service, the Law Society, the Bar Council of Ireland and the Judicial Studies Committee – recognise any mandatory disability awareness training programmes for their members.\textsuperscript{71} This absence of legal education precipitates a lack of professional awareness amongst criminal justice agencies which, in turn, fortifies a political climate of neglect for the testimonial needs and concerns of victims of crime with intellectual disabilities.

The end result is that crime victims with intellectual disabilities are bereft of a structured support framework at trial. Neither the DPP nor the Court Service give any express undertaking within the terms of the Victims’ Charter – or indeed within any other policy instrument — to facilitate people with disability as victims of crime. Indeed, within the entire corpus of pro-victim policy literature that has been published to date by Irish criminal justice agencies there is only one single policy protocol dealing specifically with the testimonial concerns of a person with a disability. The provision in question is a brief two-page section entitled ‘Guidance on Appropriate Treatment of Persons with Disabilities’ in the Committee for Judicial Studies’ non-binding guidance note for members of the Irish judiciary which is entitled \textit{The Equal Treatment of Persons in Court: Guidance for the Judiciary}.

Beyond the obvious instrumental concern that incidents of victimisation will not be reported by people with intellectual disabilities, this absence of a structured support programme poses the additional risk that the heightened challenges which these victims face in court will go unnoticed by those who marshal the proceedings. For example, in a study of the treatment of vulnerable adults at court in England and Wales, the Ministry of Justice identified:

\textit{...several cases...} in which the judiciary and magistrates had not been informed of a court user’s mental health condition, learning difficulty or limited mental capacity prior to the hearing, despite the court user having disclosed this or its having been clearly identified by a professional at an earlier stage in the case.\textsuperscript{72}

Ineffective communication of this nature not only risks depriving eligible witnesses of important testimonial supports at trial, but the uncertainty which it creates for witnesses can greatly compound the courtroom ordeal which faces them. As Burton et al have written in the context of the experience of vulnerable witnesses in England and Wales: “The practice of delaying applications until the day of trial means that witnesses may have little reassurance in the run up to trial about whether they will have the benefit of special measures.”\textsuperscript{73}

\begin{itemize}
  \item \textsuperscript{70} J Hamilton, ‘Sexual Offences and Capacity to Consent: A Prosecution Perspective’ (Annual Conference of the Law Reform Commission, Dublin, 7 November 2011).
  \item \textsuperscript{71} The need for greater disability awareness training within Ireland’s legal profession was acknowledged as far back as 1996, see Commission on the Status of People with Disabilities, \textit{Report of the Commission on the Status of People with Disabilities} (Commission on the Status of People With Disabilities 1996) para 15.2.
  \item \textsuperscript{72} McLeod et al (n 43) 8.
  \item \textsuperscript{73} M Burton, R Evans and A Sanders, \textit{Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies} (Home Office 2006) 52.
\end{itemize}
5 Addressing the barriers: a note on special measures

As many commentators have pointed out, Ireland’s criminal justice landscape has undergone a dramatic ‘victim revolution’ in recent years as national policymakers have endeavoured to reconfigure Ireland’s courtroom formalities in order to demonstrate an increased sensitivity for the needs and concerns of crime victims.\(^{74}\) The enactment of the Victims’ Charter, the recognition of a victim’s limited right to separate legal representation and the introduction of Victim Impact Statements at sentencing, are all emblematic of a concerted political and legal effort, not only to foster greater support for crime victims at all stages of proceedings (through service rights), but also to actively accommodate their increased participation in the trial process itself (through procedural rights).\(^{75}\) Unsurprisingly, victims of crime with intellectual disabilities have not been immune to the ameliorative effect of this inclusionary trend. In recent years, in particular, we have witnessed the unprecedented unveiling of a series of special accommodations within Ireland’s paradigmatic adversarial trial with a view specifically to tempering the hostile excesses of the courtroom contest for vulnerable witnesses. Accordingly, under the legislative bricolage which governs the delivery of evidence in Irish courts, child witnesses and witnesses with an intellectual disability can expect to benefit from at least some of the following measures: (i) a presumption in favour of giving evidence via a live television link; (ii) the removal of wigs and gowns; (iii) the use of intermediaries; (iv) the admission of video-recorded evidence and sworn depositions in court; (v) the use of screens; and (vi) a prohibition on the personal cross-examination of child witnesses and adult complainants by accused persons in trials for sexual offences.

However, while the vast improvements wrought for vulnerable witnesses by the introduction of these special measures cannot be gainsaid, it would be misleading to view the accommodations introduced by the Criminal Evidence Act 1992 and, more recently, by the Criminal Law (Sexual Offences) Act 2017, as a panacea for all of the ills of Ireland’s adversarial model of justice. Indeed, there is disconcerting evidence that victims of crime with intellectual disabilities continue to fall through the cracks in Ireland’s trial apparatus due to the inadequacy of our existing support framework, the stubborn mainstream attitudes of the Irish legal profession and the overly pathological and disempowering discourse within which this reformative exercise has been rooted.

5.1. THE LIMITED RANGE AND ACCESSIBILITY OF SUPPORT MEASURES

At a basic level, Ireland’s special measures framework can be criticised for the general paucity of the testimonial protections which it statutorily affords to vulnerable witnesses in court. Unlike our neighbours in England and Wales, Irish law does not, at present,\(^{76}\) recognise adult witnesses with intellectual disabilities as having any legal right to the use of screens in court,\(^{77}\) nor does it recognise such witnesses as enjoying any legal right to

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\(^{76}\) It should be noted that s 36 Criminal Law (Sexual Offences) Act 2017 provides for the insertion into the Criminal Evidence Act of a new s 14A which will allow evidence to be given from behind a screen and a new s 14C which will prohibit accused persons from personally cross-examining certain categories of vulnerable witness. At the time of writing, these provisions have not yet commenced.

\(^{77}\) S 23 Youth Justice and Criminal Evidence Act 1999 provides for the use of screens in court in England and Wales where witnesses are vulnerable or intimidated.
be protected from personal cross-examination by an accused in sexual offence cases. Moreover, Ireland’s legislature has, in more recent times, failed to approximate the statutory pre-trial cross-examination facility which currently exists across the Irish Sea. Consequently, vulnerable witnesses in Irish criminal justice proceedings continue to face the daunting task of attending court in person for the purpose of undergoing live, cross-examination before members of the jury and the criminal accused. These statutory shortcomings are acutely regrettable. In a study carried out by Hamlyn et al, for instance, screens were found to be highly regarded amongst vulnerable and intimidated witnesses, and many court users who had not used this facility would have liked to do so.

Pre-trial cross-examination, meanwhile, was introduced on a pilot basis in England and Wales in April 2014. Staged across three Crown Courts (Liverpool, Leeds and Kingston-upon-Thames), the pilot was launched in order to ‘help vulnerable witnesses give their best possible evidence – without subjecting them to the full atmosphere of the courtroom’. Following the successful completion of the scheme last year, Elizabeth Truss launched a joint paper which indicated that pre-trial cross-examination was to be rolled out nationally in England and Wales from 2017. According to the paper, the pilot results indicate that pre-trial cross-examination ‘results in a better experience for witnesses, with the cross-examination taking place in around half the time compared to other cases, and also showed an increase in early guilty pleas by defendants’.

Arguably, a further shortcoming of Ireland’s current special accommodations regime is its adherence to strict eligibility criteria. In particular, the restriction of testimonial accommodations under the Criminal Evidence Act 1992 to certain specified offences is profoundly irrational. In Speaking Up for Justice, the Home Office Interdepartmental Working Group in the UK expressly rejected the notion of an ‘offence gateway’ on the reasoning that ‘a witness was either vulnerable or s/he was not and . . . the offence was relevant to the extent to which it helped to inform the assessment of vulnerability’. Moreover, the failure of Ireland’s Criminal Evidence Act 1992 to extend its procedural accommodations on an equal basis to defendants is a further cause for concern. As it stands under Irish law at present, vulnerable defendants have no special protections.

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78 It should be noted that s 36 of the Criminal Law (Sexual Offences) Act 2017 provides for the insertion of a new section 14C into the Criminal Evidence Act 1992 which will restrict the right of an accused to cross-examine sexual offence complainants. At the time of writing this provision has not commenced. In England and Wales, ss 34–36 of the Youth Justice and Criminal Evidence Act 1999 provide a statutory prohibition on the cross-examination of adult and child complainants by self-represented defendants.

79 The use of pre-trial cross-examination has been statutorily prescribed in England and Wales since 1999 under s 28 Youth Justice and Criminal Evidence Act 1999.

80 See A Cusack, ‘Making the Case for Introducing Pre-Trial Cross-Examination’ Irish Examiner (Cork, 28 September 2016).


82 Ministry of Justice, Process Evaluation of Pre-recorded Cross-examination Pilot (Section 28) (London 2016).


84 Ministry of Justice, Transforming our Justice System, by the Lord Chancellor, the Lord Chief Justice and His Senior President of Tribunals (Joint Statement, September 2016).

85 Ibid 8. See further, Cusack (n 80).

86 It should be noted that s 18 Criminal Justice (Victims of Crime) Bill 2016 proposes to extend the category of witnesses eligible for special measures under Part III of the Criminal Evidence Act 1992 to all victims of crime who have ‘special protection needs’, irrespective of the nature of the offence alleged to have been perpetrated against them. At the time of writing this measure has not been enacted.

equivalent to those afforded to other witnesses. Given that the guilt of the accused has yet to be established at the time of the trial, this inequality of provision would appear to be an explicit infringement of the common law principle of equality of arms. Indeed, the absurdity associated with this lopsided legislative approach has perhaps best been encapsulated by Birch in the following hypothetical scenario:

If A and B are equally disabled, and B’s answer to a complaint of sexual assault made by A is that A was the aggressor and he the victim, why should A be the only one to benefit from special measures because it has been decided to prosecute B.88

Ireland’s subsisting approach would also appear to be at odds with the stance adopted by the European Court of Human Rights on this issue. In T v The UK89 the court emphasised the need for special provisions to be made available to child defendants in order to allow them to participate effectively in the trial process. More recently, in R (on the application of C) v Sevenoaks Youth Court,90 the Divisional Court held that notwithstanding the absence of any express statutory power, a youth court had an inherent jurisdiction under both the common law and under procedural rules to appoint an intermediary for a defendant who had an intellectual disability in circumstances where such a measure was necessary to ensure he received a fair trial and could participate effectively. More recently, the same court required the Ministry of Justice to reconsider a decision whereby it refused to make available to a vulnerable defendant the services of a registered intermediary.91

5.2. Poor professional practice

The inadequacy of Ireland’s statutory special accommodations framework is compounded by a reluctance amongst Irish legal professionals to invoke the limited number of measures which currently exist on our statute book. It is striking, for instance, that, although having existed on our statute book since 1992, the facility for delivering evidence through an intermediary was only used for the first time in this jurisdiction on 12 April 2016.92

As a consequence of this cultural lack of enthusiasm for Ireland’s statutory special measures framework, practitioners and members of the judiciary have shown themselves to be unfamiliar with the significant procedural issues involved in granting accommodations under the Criminal Evidence Act 1992. Indeed, the damaging effect which this culture of ignorance can have on the courtroom experience of victims of crime with an intellectual disability was exemplified in D O’D v DPP and Judge Patricia Ryan.93 In this case, O’Neill J in the High Court, ostensibly misinterpreted the legislative framework governing the admission of live link testimony with the resulting effect that two complainants with mild intellectual disabilities were faced with the prospect of delivering viva voce evidence against an applicant in the Circuit Court in a trial on sexual offences. In representing, what Kilcommins and Donnelly have termed ‘a blindingly narrow emphasis on adversarial legalism – rooted stubbornly in a state-accused way of knowing’, this decision is an indictment of Ireland’s criminal justice process and speaks of a legal system ‘unwilling to adjust its practices to accommodate the different

88 Birch (n 22) 242–3.
90 [2010] 1 All ER 735.
91 R (on the application of OP) v Secretary of State for Justice and Others [2014] EWHC 1944 (Admin).
circumstances of some witnesses and the distress and trauma that giving evidence in court may cause them.94

Additionally, at a more primitive level, before a court can even begin to assess the merits of an application for a special accommodation, it must first have the technical wherewithal to provide the requested support. Here, again, we have reason to be concerned. Notwithstanding the fact that the Court Service has undertaken major renovations of many of the court buildings throughout Ireland in recent years, it is nevertheless alarming to find that almost a quarter of a century after the enactment of television link testimony, some courts in this country are still unable to provide this facility due to a lack of resources.95 Moreover, even those courthouses which do benefit from the necessary technology have, on occasion, been found inept at putting it into operation. Most recently, for instance, a trial of a mother for cruelty and neglect at Galway Courthouse collapsed when it was discovered that there had been a failure to record footage of a child witness who gave testimony via a live television link.96

5.3. DISEMPowering DISCOURSE

One of the paradoxes that victims of crime with intellectual disabilities face in seeking the benefit from special accommodations set out in the Criminal Evidence Act 1992 is that, in order to be eligible for these measures, they must first subscribe to a pathological discourse which is based entirely upon a medicalised understanding of disability. This prescriptive identification process, Edwards points out, goes ‘against everything people with disabilities and the disability movement have fought for; that is the right to autonomy, independence and self-determination’.97 Specifically, in order for an adult witness to be eligible for special accommodation in court, he or she must first satisfy the court that they are a ‘person with a mental handicap’ within the meaning of the Act.98 Not only is this phraseology problematic in terms of perpetuating pejorative and outdated language, but it is also grounded in a presumption of incompetence.

Consequently, victims of crime with intellectual disabilities in Ireland face a serious credibility challenge in seeking, on the one hand, to demonstrate their vulnerability for the purpose of being granted a special accommodation in court without, on the other hand, cultivating an ethic of unreliability in the eyes of the jury. One health and social care provider interviewed by Edwards et al summed up this dichotomous challenge in the following terms: ‘It’s difficult, it’s like a seesaw, in one way you’re saying they’re vulnerable and there’s a power imbalance and at the same time you’re saying, but we absolutely believe they’re able to give evidence and that the evidence is truthful’.99 This disempowering effect of Ireland’s legislative regime is compounded by the fact that the country’s special measures scheme was ostensibly designed to meet the needs of child

94 Kilcommins and Donnelly (n 74) 316.
95 See A Lucey, ‘No Kerry Court has Facilities for Minors to Give Video-link Evidence’ Irish Times (Dublin, 22 January 2016).
96 A Healy, ‘Trial of Mother for Cruelty to Eight Children Collapses’ Irish Times (Dublin, 3 December 2015).
98 See s 19 Criminal Evidence Act 1992. It is striking that the Criminal Law (Sexual Offences) Act 2017 did not remove this pejorative terminology from the 1992 Act given that elsewhere in the instrument, the term ‘protected persons’ is used to refer to persons with intellectual disabilities who are incapable of consenting to sex. See s 21 Criminal Law (Sexual Offences) Act 2017. Section 30 of the Criminal Justice (Victims of Crime) Act 2017 is expected to amend s 19 of the Criminal Evidence Act 1992 by replacing the phrase ‘mental handicap’ with the phrase ‘mental disorder’. At the time of writing, this provision has not been commenced.
99 Edwards et al (n 26) 111.
witnesses, not persons with an intellectual disability. As Benedet and Grant have been at pains to point out, the credibility of a witness with an intellectual disability is severely diminished when he or she is compared to and treated as a child:

When women with mental disabilities are treated like children, their credibility is often correspondingly diminished. They are also subject to a host of incorrect assumptions about the kinds of supports that will facilitate their testimony, by simple analogy to the situation of child witnesses.100

6 Conclusion

The barriers which victims of crime with intellectual disabilities face in seeking to deliver best evidence in court are formidable. Ireland’s adversarial trial, through its subscription to a hostile, exclusively oral, contest morphology, is not only blind to the ontological realities of intellectual disability, but it positively exacerbates them. The requirement that witnesses deliver testimony under oath, that they be subject to cross-examination, that their demeanour be observable to the tribunal of fact, and that their interrogation take place in a public forum, all present significant testimonial challenges to victims of crime with intellectual disabilities. Yet conventional adversarial legal wisdom accepts these evidentiary safeguards unconditionally. Moreover, the strategic incentives of the adversarial contest have cultivated a predatory Irish advocacy culture within which vulnerable witnesses can find themselves exposed to highly invasive credibility attacks in court. Victims, it would seem, to the limited extent that they have been given any formal consideration in Ireland’s modern criminal justice process, have been cast as a homogeneous group; defined almost exclusively by the needs of the mainstream victim constituency. Consequently, in a legal system which places inordinate emphasis on consistency of account and credibility of recount, victims of crime with intellectual disabilities are doubly victimised, first as victims of crime and secondly as victims of the legal process and profession.

While a number of special accommodations have been introduced into the Irish trial framework in recent years to support vulnerable witnesses, these concessions have, for the most part, been rooted epistemically in an adversarial value system and have done little to dilute the entrenched hostility of the trial. To quote Birch, the approach of our legislature has been to ‘hammer the square peg of the vulnerable witness into the round hole of the adversarial system’.101 Accommodation, however, is not the same as integration. Restricting Ireland’s reforms to solutions which fit within the limited confines of our established trial framework arguably represents a missed opportunity to engage in a wider, holistic re-evaluation of the embedded assumptions of Ireland’s adversarial criminal process. In 2007, Benedet and Grant declared that ‘The greatest impediment to accommodating complainants with mental disabilities lies in our assumptions about what is necessary to ensure a fair trial for an accused.’102 Indeed, for too long, the inculpatory design of Ireland’s adversarial trial has eclipsed efforts to secure the best evidence of vulnerable witnesses.103 With Ireland’s approaching (and overdue) transposition of the Victims’ Directive, policymakers now have a unique opportunity to re-examine the formalities of Ireland’s criminal trial in light of the experience of victims of crime with

101 Birch (n 22) 223.
102 Benedet and Grant (n 100) 547.
intellectual disabilities. Although this re-evaluative exercise may well entail challenging some fundamental truths about Ireland’s adversarial tradition, this should not deter Irish policymakers in their inclusionary crusade. After all, there is a strong public interest in empowering victims of crime with intellectual disabilities to give their best evidence in court, not only in the moral sense of ensuring that the legitimate expectations of all court users are equally met within our criminal justice process, but also in the instrumental sense of making sure that those who prey on some of the most vulnerable members of our society are brought to justice.

Non-verbal victims in the adversarial criminal process: communication, competency, and credibility

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Abstract

Research consistently shows that persons with learning disabilities are more likely to be victims of crime. For such victims, engaging with the criminal justice system may be fraught with difficulties given the expectation that victims should normally articulate verbally and with fluency both their testimony and their views on issues pertaining to the justice process itself. Grounded in the principle of orality and often likened to a system of gladiatorial combat, adversarial justice systems have a poor track record of hearing the voices of victims of crime who have learning disabilities. However, recent years have witnessed an attitudinal shift towards meeting the needs of victims who require communication support; with legal and policy reforms introduced across multiple jurisdictions designed to enable more effective participation in the justice process. Augmentative and alternative communication could constitute an important support mechanism to enable and empower victims of crime who would struggle to express themselves verbally in the courtroom; yet these alternative forms of voice are alien to the oral tradition and sit uneasily within the priority traditionally afforded to adversarial questioning techniques.

Keywords: victims; witnesses; disabilities; communication; competency; credibility; augmentative and alternative communication

Introduction

There is a growing corpus of literature documenting the specific difficulties experienced by victims with learning disabilities within the criminal process.1 Disabled persons are at a considerably higher risk of victimisation generally, and disability hate crime and sexual offences in particular.2 They are often highly dependent on paid or family caregivers for assistance in multiple domains including managing personal finances, personal (intimate) care and social care which may create opportunities for abusers; and people with learning


disabilities may be less likely to realize the nature of the offence and/or report it. This article focuses on the issues facing such victims as they are often the only sources of evidence, though much of what we argue is equally applicable to non-victim witnesses (including defendants). Questioning techniques and the stress of the investigation can disorientate many witnesses; they may appear to be inarticulate or may make inconsistent statements. Perceptions that they are incapable of providing credible evidence or that they are unlikely to cross the competency threshold (sometimes held by victims themselves) mean that many complaints are not made, not taken seriously, or fall to the wayside before they reach court.4

This article explores the participatory barriers facing a specific sub-group of learning disabled witnesses, namely those who might be described as ‘non-verbal’ or ‘minimally verbal’. Until very recently at least, such victims have largely remained invisible to both researchers and criminal justice professionals.5 At the outset, it is worth clarifying what these labels mean, given that they are contested terms across different disciplines (including speech therapy, education studies and psychology).6 For present purposes, we define a non-verbal witness as one who does not have enough command of any language system (oral/spoken, signed or technology-mediated) to deliver verbal evidence fluently and would require significant communication support such as the provision of a limited selection of picture symbols to indicate meaning and/or the support of a communication partner. This is likely to arise from autism, severe learning disabilities (SLD) or profound and multiple learning disabilities (PMLD) which may stem from an acquired brain injury or from a genetic, congenital or neurological impairment.7 Our working definition therefore does not encompass disabled witnesses who have access to a complex language system which provides a comparable equivalent to oral testimony such as Deaf witnesses (since British Sign Language is a language system in its own right) or witnesses with motor neurone disease and high cognitive functioning who can produce fluent accounts through an electronic communication device. Rather, our focus is on witnesses who have limited language (through any medium) and will require significant support including


5 Notable exceptions are a range of studies relating to non-verbal participants in the South African criminal justice system. See Bornman et al (n 3); Diane Bryen and Christopher Wickman, ‘Ending the Silence of People with Little or No Functional Speech: Testifying in Court. (2011) 31 Disability Studies Quarterly <http://dsq-sds.org/article/view/1711 on 30/06/17>; Robyn White et al, ‘Testifying in Court as a Victim of Crime for Persons with Little or No Functional Speech: Vocabulary Implications’ (2015) 16 Child Abuse Research in South Africa 1.


symbolisation of words and/or communication partner support so they can access participatory rights on an equal footing.

Drawing on recent developments to support vulnerable witnesses in the criminal process of England and Wales, we undertake a thematic analysis of the nature of these participatory barriers and how they might be overcome. The most obvious starting point concerns the question of communication. Verbal interaction is the norm in most such settings — and the principle of orality has long been considered part of the bedrock of adversarial trial.8 We aim to explain the various alternative forms of voice for those who do not communicate verbally, outlining how Augmentative and Alternative Communication (AAC) offers an auspicious mechanism that can enable meaningful interaction using approaches such as picture exchange communication systems (PECS), Makaton signing, or speech-generating devices (SGDs).9 We analyse some of the positive developments that have occurred in relation to facilitating such witnesses and the opportunities that lie ahead, and the valuable role that intermediaries and aids to communication can play in facilitating these.

Having highlighted the ways in which voice might be exercised, the second part of the article explores the issue of competency. Some witnesses with severe learning difficulties will not be deemed capable of giving intelligible evidence and, as such, will be considered incompetent to testify. However, recent years have seen a more enlightened approach from the courts in determining such matters; and many non-verbal witnesses may now be deemed competent to testify.

The final part of the article turns to the issue of credibility. The evidence of learning disabled witnesses has long been viewed through a lens of suspicion, and as noted above, this goes some way to explaining the high attrition rate. It is suggested that negative perceptions of credibility are further compounded by the use of an atypical means of communication which, when aggravated by the structural deficiencies of the adversarial model of proof, means that justice is often denied for some of the most vulnerable in society.

Communication

The effectiveness and responsiveness of the public prosecutions system hinges upon vulnerable voices being heard and being taken seriously. The question then arises as to how the ‘best evidence’ of such witnesses can be best facilitated. Evidently, non-verbal victims face a unique challenge in this regard since they do not express themselves verbally.

Alternative forms of voice

One possible mechanism that might empower witnesses to interact more effectively with the criminal justice system is AAC. AAC refers to a burgeoning area of educational and clinical practice which aims to provide a range of communication methods to supplement or replace a person’s natural speech and which is generally acknowledged to have emerged as recognised professional specialisation in the 1980s.10 Three of the most common

methods of communication support which fall within the umbrella term AAC include SGD s (also known as voice-output communication aids or VOCA s) which may be operated by hand or through eye-gaze recognition technology; the use of symbol/picture cards; and the use of simplified manual signing systems designed for people with learning disabilities such as Makaton which draw upon the vocabulary of signed languages such as British Sign Language but which have significantly less grammatical complexity. However, a rich diversity of other methods also exists – including the use of writing and drawing, the use of artefacts such as dolls to re-enact scenarios – and any approach which aims to facilitate communication by supplementing or replacing natural speech with alternative mediums may be said to constitute a form of AAC.

It would be a mistake to think of ‘AAC users’ as a homogeneous group of witnesses as there will be wide variations in a range of factors, both individual and environmental, which will subsequently influence their communication output. A useful model for conceptualising this interplay of factors is the biopsychosocial model of disability recommended by the World Health Organization’s International Classification of Functioning, Disability and Health or ICF. This biopsychosocial model conceptualises dis/ability as an emergent property of the interplay between individual impairment and environmental barriers and facilitators. According to this model, therefore, the successful facilitation of testimony by an AAC user would need to take account of both the user’s individual characteristics and the extent of environmental communication barriers and facilitators. Individual variables might include: level of cognitive functioning; degree of mastery of chosen communication mediums; level of physical independence in operating AAC; level of social/emotional support and encouragement required; and psychological factors such as the individual’s degree of confidence and motivation in using AAC generally, as well as their level of resilience to the stress of giving evidence. Environmental factors (in the immediate courtroom context) might include: the experience and knowledge of the intermediary appointed to support the user; the suitability of the AAC provision which is put in place; the extent and limitations of the vocabulary set provided by that AAC; and the degree to which the person’s needs are effectively identified and met in relation to issues such as clear questioning techniques and minimisation of sensory distractions. Finally, more distal environmental factors come into play such as the witness’s prior experience of AAC through education settings and/or speech and language therapy services. A witness who has their own familiar and well-established AAC system (whether that be embedded and extensive knowledge of Makaton signing or their own SGD in everyday usage) has the advantage over a witness who has only recently been introduced to AAC as part of the evidence-giving process; and a witness who is already familiar with sign or symbol vocabulary sets relevant to (for example) sexual abuse such as private body parts will be further advantaged. This complex interplay of factors will produce a diverse range of AAC users, from those who can convey basic short messages such as yes/no or 1–2 word phrases to users who can rapidly and confidently combine symbols or signs to answer a range of questions.

It is important to clarify the distinction between AAC and facilitated communication (FC). FC is a controversial technique which involves a facilitator supporting a person to spell out messages on an alphabet board through any combination of physical support to the person’s arm or hand; verbal prompts and moral support, often producing startling outcomes of fluent, highly literate communication where communication ability of this level had not been evidenced previously. FC has a controversial history in the courtroom.

11 Roulstone et al (n 9); Sheehy and Duffy (n 9).
having been implicated in multiple instances of sexual abuse allegations which were subsequently found to be untrue, with authorship suspected to lie with the facilitator.\(^{13}\) FC is not accepted as a legitimate AAC intervention by the International Society for Augmentative and Alternative Communication,\(^{14}\) and its troubling courtroom history makes it worthy of mention for two reasons: firstly, to raise awareness of the possibility that jury perceptions of ‘validity’ and ‘authorship’ of AAC-mediated evidence more generally may be compromised by the history of FC in particular; and secondly to highlight the need for further unpacking of the different dimensions of support offered by intermediaries (social, emotional, organisational, communicative, physical) and the implications of these for perceived validity and authorship. These questions are discussed further below.

The technologies outlined above have undoubtedly empowered voices that have long gone unheard in a range of social settings. While the use of these technologies is relatively novel within criminal justice, and there are few reported cases on their use in legal settings,\(^{15}\) there is a growing body of evidence that such aids are becoming much more commonplace.\(^{16}\) The evidence gathered within other social settings suggests that, if properly used, AAC holds the potential to empower non-verbal victims through reducing levels of stress and facilitating them to give best evidence.

**Facilitating communication**

The main statutory framework that assists non-verbal victims is contained in Part II of the Youth Justice and Criminal Evidence Act 1999 (YJCEA).\(^{17}\) Under s 16, any witness whose quality of evidence is likely to be diminished because, inter alia, they have a significant impairment of intelligence and social functioning is presumed to be eligible for a special measures direction. The court must satisfy itself that the special measure or combination of special measures is likely to improve the quality of the witness’s evidence in terms of ‘completeness, coherence and accuracy’.\(^{18}\) In total, eight such measures are set out in ss 23 to 30 of the Act. Ordinarily, witnesses with learning disabilities may expect to receive the benefit of pre-recorded evidence and the use of a televised link for the purposes of cross-examination in chief,\(^{19}\) and advocates and judges may remove wigs and gowns.\(^{20}\) Often, measures such as removal of wigs and gowns and the use of a live link or pre-recorded examination-in-chief are unlikely to be particularly contentious. One of

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\(^{15}\) An exception can be located in *R v Watts* [2010] EWCA Crim 1924, where one witness was entirely incapable of speech or any other form of communication and where evidence from one non-verbal witness was facilitated through eye gaze technology and an electronic communication device. Her ABE interview was admitted under s 116(2) Criminal Justice Act 2003 as an exception to the hearsay rule.


\(^{17}\) Special measures are not, however, available to defendants. A live link may be made available in certain circumstances under YJCEA, s 33A. Intermediaries may also be used in ‘rare’ cases for defendants: Criminal Practice Directions (Crim PD) (Amendment No 1) [2016] EWCA Crim 97. See further Laura Hoyano and Angela Rafferty, ‘Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction’ (2017) Criminal Law Review 93.

\(^{18}\) YJCEA, ss 16(5) and 19(2).

\(^{19}\) Ibid ss 27 and 24 respectively.

\(^{20}\) Ibid s 26.
the most radical measures is contained in s 28 of the YJCEA, which provides for the cross-examination and re-examination of the witness in advance of the trial. Receipt of the entire testimony of a vulnerable witness outside the formal courtroom environment in advance of the trial clearly holds the potential to significantly reduce fear and apprehension and to allow the witness to achieve some sense of closure within a relatively short time frame after the offence. However – citing concerns among the profession about its practical operation – the government declined to implement this provision when most of the other special measures came into force in July 2002. A pilot programme was eventually trialled at three Crown Court Centres at the end of 2013, but at the time of writing the prospect of national implementation remains uncertain. In terms of specific support for non-verbal witnesses that are currently available, two key provisions merit further consideration. Sections 29 and 30 provide for the use of intermediaries and the use of aids to communication respectively.

Intermediaries

Under s 29 of the Act, a court may order that an eligible witness may be examined through an independent intermediary in order to communicate:

. . . questions put to the witness, and to any persons asking such questions, the answers given by the witness in reply to them, and to explain such questions or answers so far as necessary to empowered them to be understood by the witness or person in question. 21

Designed to assist witnesses with severe communication difficulties, intermediaries were first piloted in 2004, before a phased national roll-out began in 2008. The scheme has since made a significant impact on access to justice in cases which would never have previously gone to trial. 22

Ordinarily, a non-verbal victim should be identified at an early stage in the investigative process, 23 and at this stage the Achieving Best Evidence (ABE) process is triggered. 24 The police and other criminal justice agencies should adhere to best practice guidelines laid down in respect of interviewing and questioning techniques to ensure that vulnerable witnesses are empowered to give their ‘best’ evidence. A registered intermediary, selected from a range of professionals with various skills sets, will then be matched with the witness by the National Crime Agency to assess the witness and make recommendations to various criminal justice personnel (such as police officers, advocates, judges and magistrates, Witness Service and court personnel) as to how the witness should be questioned. 25 In many cases, this results in a video-recorded interview being used to substitute the child’s live evidence-in-chief in court. 26

21 YJCEA, s 29(2).
22 One evaluation estimated that more than half of cases evaluated would not have reached court without intermediary involvement: Joyce Plotnikoff and Richard Woolfson, The ‘Go-between’: Evaluation of Intermediary Pathfinder Projects (Ministry of Justice 2007).
23 In other cases, certain disabilities or other forms of vulnerability may not be so readily apparent. See further Brendan O’Mahony et al, ‘The Early Identification of Vulnerable Witnesses Prior to an Investigative Interview’ (2011) 13 British Journal of Forensic Practice 114.
The initial assessment of a non-verbal victim by an intermediary should analyse the communicative capacities of the person concerned. This process can thus be used to identify users of AAC, the type of AAC technology relied upon, and the understanding, fluency and skill level of the user. This varies considerably from individual to individual. The intermediary is tasked with making ‘recommendations as to special measures to enable the best communication’, and the report should detail the ability and fluency of the AAC user and recommendations on what form of questions should be put to the witness. Often, questioners will be advised of ways to explain basic ground rules to witnesses such as ‘Don’t guess’ or ‘Tell the truth’. Although ABE interviews generally place emphasis on the need for free narrative, witnesses with learning difficulties may often require more structured and closed questions as many are reluctant to respond to open invitations. These recommendations will then be communicated to criminal justice professionals to inform decision-making about whether, and if so how, the investigation should proceed and a trial should be held. Where a case proceeds to trial, intermediaries will often attend a familiarisation visit with the witness and sit with the witness throughout proceedings. They are expected to monitor questioning and ‘actively to intervene when miscommunication may or is likely to have occurred or to be occurring’ (though their primary duty is to the court).

Evidently, this represents a radical departure from the archetypal adversarial duel and ‘vigorouos and polarized’ debates have taken place on intermediaries since they were first proposed by the Pigot Committee in 1989. Concerns have been expressed that the filtering of questioning could result in the loss of meaning, intonation and emphasis leading to questions as to how effective a defence the accused is able to mount in these circumstances. It also represents a threat to the long-standing principle of party control of evidence, and whether they are sufficiently equipped to identify and object to inappropriate lines of questioning. The risk of intermediaries ‘overreaching’ their role was addressed by the Court of Appeal in R v Christian, where an intermediary put her arm around a witness when she became distressed, comforted her during her cross-examination, and asked counsel to moderate the tone of her voice. The judge instructed the jury not to allow sympathy for the complainant as a person to cloud their judgement of her as a witness. The appellant’s concern that these actions interfered with the defendant’s right to a fair hearing was dismissed; with the court stating that the question was not whether the intermediary had overstepped her proper role, but whether there was any serious risk of unfairness. Given the judicial direction, there was no sensible prospect of unfairness in the current case.

28 The report may cover other issues, such as how a witness might best be supported emotionally: Michelle Mattinson, ‘Putting Theory into Practice: A Comparison of the Guidance Available to Investigative Interviewers and Advocates when using Communication Aids in the Criminal Justice System’ in Penny Cooper and Linda Hunting (eds), Addressing Vulnerability in Justice Systems (Wildy, Simmonds and Hill 2016).
29 Cooper and Mattinson (n 25); Plotnikoff and Woolfson (n 16) 88.
30 Plotnikoff and Woolfson (n 16) 90–1.
31 R v Cox [2012] 2 Cr App R 6, [28].
36 [2015] EWCA Crim 1582.
There are grounds for optimism in that many advocates now recognise that intermediaries can make a valuable contribution to decision-making processes, particularly concerning which cases to pursue and specific strategies that could be adopted to prevent miscommunication at trial. Interviews conducted with judges and advocates as part of a study by Emily Henderson in 2013 found widespread ‘enthusiasm and warmth’ for intermediaries, and that widespread fears over resistance from the profession had not materialised. Other studies have arrived at similar conclusions, and law reform bodies across the globe have also looked to the English model. While concerns remain that some advocates continue to hold reservations or lack the specialist knowledge that would enable them to conduct appropriate questioning, ongoing education and training may be capable of addressing this issue.

Aids to communication

The use of an intermediary alone is unlikely to facilitate the evidence of non-verbal witnesses. In addition, such witnesses are likely to need the assistance of some form of AAC to express themselves. To this end, s 30 of the Act provides that the court may direct that a witness is permitted to use an ‘aid to communication’; intermediaries will recommend which aids might improve communication on the basis of the individual needs of the witness. Aids to communication may thus not only enhance the quality of evidence, but may also reduce stress levels of the user. Oddly, no definition of what might constitute such an aid is provided in the legislation itself; anything deemed appropriate to the court is permissible although both the Equal Treatment Bench Book and the Criminal Procedure Rules (Crim PR) 2015 refer to an array of tools such as pictures, plans, symbols, dolls, figures, models, body maps and similar aids.

On a practical level, however, concerns have been expressed that advocates and judges, in particular, are unfamiliar with the range of aids available and their potential to empower witnesses who lack verbal skills. There are some positive indications, however, that levels of understanding are improving. The Inns of Court College of Advocacy (formerly the Advocacy Training Council) has developed an online portal, The Advocate’s Gateway, which is designed to offer evidence-based guidance to advocates, police officers, social workers, solicitors, guardians and judges who may encounter vulnerable witnesses or defendants at some point in their journey through the criminal justice system. Seventeen separate ‘toolkits’ are available and Toolkit 14: Using Communication Aids in the Criminal Justice System, is one of the few guidelines for advocates that make express

38 Henderson (n 34) 168.
40 Henderson (n 34).
41 See below, p 461.
42 Plotnikoff and Woolfson (n 16), 69.
43 Judicial College, Equal Treatment Bench Book (Judicial College 2013); CPR 2015, r 3.9(7)(vi).
44 See further Mattinson (n 28).
reference to the use of high-tech and low-tech forms of AAC outlined above.\textsuperscript{45} In addition to providing a lucid and informed outline of many of the forms of AAC, \textit{Toolkit 14} emphasises the importance of the role of the intermediary in assessing the verbal limitations or idiosyncratic speech patterns of a learning disabled witness and recommends a mixture of tools and strategies that might best facilitate the evidence of an individual witness.

The YJCEA has created a framework whereby evidence is much more likely to be received from non-verbal witnesses providing the competency test is met. Yet notwithstanding the introduction of special measures and greater numbers of witnesses with communication difficulties now being deemed competent to testify, fears have been expressed that ‘the intimidatory and intrusive antics employed daily by defence lawyers in a range of contexts have escaped examination’.\textsuperscript{46} The onus then falls on the trial judge to militate against such tactics.\textsuperscript{47}

\textbf{Judicial control}

Under the adversarial paradigm, judges have long been expected to exercise an ‘umpireal’ role and as such have been reticent to intervene to prevent oppressive advocacy lest s/he be seen as ‘descending from Avernus’,\textsuperscript{48} and ‘entering the arena’ in favour of one side or the other.\textsuperscript{49} Indeed, empirical research confirms judicial intervention to prevent excessive cross-examination of vulnerable parties has been relatively rare,\textsuperscript{50} although this may be partly attributable to the fact that until recently many have lacked the necessary knowledge about the needs of learning disabled witnesses in order to do so.\textsuperscript{51}

Yet, in more recent times, it seems that the judiciary are rising admirably to this challenge, with the courts increasingly underlining the need for trial judges to take proactive steps to control the nature and substance of cross-examination. This metamorphosis of the judicial role has been spearheaded by the Court of Appeal in a line of decisions since 2011, and the court has made clear that it is incumbent on advocates to adapt their questioning so that it reflects the developmental needs of the witness.\textsuperscript{52} In \textit{Barker} it was stressed that advocates should adapt their ‘forensic techniques’ in order to enable best evidence. This should entail the use of ‘short, simple questions which put the

\textsuperscript{45} The Advocates Gateway, \textit{Toolkit 14: Understanding Communication Aids in the Criminal Justice System} (Council of the Inns of the Court 2015: <www.theadvocatesgateway.org>). These toolkits have been endorsed by the Court of Appeal in \textit{Lubemba} [2015] 1 WLR 1579, 1581; Crim PD I [2015] EWCA Crim 1567, [3D.7].

\textsuperscript{46} Louise Ellison, \textit{The Adversarial Process and the Vulnerable Witness} (OUP 2001) 125.

\textsuperscript{47} It is possible, however, that social stereotypes and prejudices that emanate from the demeanour of the witness may be neutralised to some extent through jury discussion: Janne Dahl et al, ‘Displayed Emotions and Witness Credibility: A Comparison of Judgements by Individuals and Mock Juries’ (2007) 21(9) Applied Cognitive Psychology 1145.


\textsuperscript{49} See comments of Stuart-Smith LJ in \textit{R v Sharp} [1993] 3 All ER 225, 231.


\textsuperscript{53} [2010] EWCA Crim 4.
essential elements of the defendant’s case to the witness’, with any comment on
credibility following after the testimony has concluded.\textsuperscript{54} Likewise, in \textit{E},\textsuperscript{55} it was stated
that steps taken by trial judges to place limits on cross-examination would not ordinarily
undermine the accused’s right to a fair trial. Underlining the importance of the principle
of equality of voice in \textit{Cox},\textsuperscript{56} Lord Judge C J outlined the duty on trial judges to adapt
proceedings to ensure that those with disabilities were not placed at a disadvantage:

\begin{quote}
\textit{As parts of their general responsibilities judges are expected to deal with specific
communication problems faced by any defendant or any individual witness . . . as
part and parcel of their ordinary control of the judicial process. When necessary,
the processes have to be adapted to ensure that a particular individual is not
disadvantaged as a result of personal difficulties, whatever form they may take.}\textsuperscript{57}
\end{quote}

More recently, it was held in \textit{Lubiomba} that trial judges are under a duty to intervene where
cross-examination is confusing or inappropriate, and should set reasonable time limits.\textsuperscript{58}

Moreover, this line of reasoning is reflected in the Lord Chief Justice’s Criminal Practice
Direction 2015 which provides:

\begin{quote}
The judiciary is responsible for controlling questioning. Over-rigorous or
repetitive cross-examination of a child or vulnerable witness should be stopped.
Intervention by the judge, magistrates or intermediary (if any) is minimised if
questioning, taking account of the individual’s communication needs, is
discussed in advance and ground rules are agreed and adhered to.\textsuperscript{59}
\end{quote}

In practice, such limits on cross-examination are enforced through ground rules hearings
\textit{(GRHs)} which should be held before a child witness or any other witness with special
communication needs gives evidence. Such hearings are mandatory in all cases involving
intermediaries and recommended in others.\textsuperscript{60} The GRH should determine the nature and
form of questioning that should be used where a vulnerable witness is cross-examined. A
range of issues may be considered, including: the need to avoid repetitive questioning;
controlling comment and accusations of lying; time limits on cross-examination; the type
of vocabulary used in questioning; and the practicalities surrounding any intervention by
the intermediary.\textsuperscript{61}

While the powers and mechanisms to control the excesses of cross-examination have
certainly been bolstered, scepticism has been expressed – often with good reason – that
the working cultures of the legal profession and embedded practices of the adversarial
tradition often stymie the reach of well-intentioned reform.\textsuperscript{62} Ultimately, the success or
failure of these changes hangs upon the extent to which practitioners, and in particular
the judiciary, are prepared to embrace such a radical culture change; robust judicial case
management is undoubtedly required to ensure that advocates understand and comply
with legal and policy expectations. Somewhat disconcertingly, the track record of

\begin{footnotes}
\item\textsuperscript{54} Ibid [42].
\item\textsuperscript{55} [2011] EWCA Crim 3028. See also \textit{Wills} [2012] 1 Cr App R 2.
\item\textsuperscript{56} \textit{Cox} (n 30).
\item\textsuperscript{57} Ibid [29].
\item\textsuperscript{58} \textit{Lubiomba} (n 44).
\item\textsuperscript{59} \textit{Crim PD I}, 3E.1 [2015] EWCA Crim 1567.
\item\textsuperscript{60} See \textit{Crim PR} 3.9(7); \textit{Crim PD I}, 3E.2 (2015); \textit{R v JP} [2014] EWCA Crim 2064. See further Penny Cooper et
al, ‘Getting to Grips with Ground Rules Hearings – a Checklist for Judges, Advocates and Intermediaries’
(2015) Crim LR 417 (noting that forms of GRHs were occurring as early as 2006).
\item\textsuperscript{61} Ibid.
\item\textsuperscript{62} Doak (n 33); Ellison (n 46); Matthew Hall, \textit{Victims of Crime: Policy and Practice in Criminal Justice} (Willan 2009).
\end{footnotes}
advocates (and to a lesser extent, judges) in embracing such reforms aimed at improving the experiences of vulnerable witnesses is not particularly encouraging. 63

Given that AAC constitutes such a radical departure from the emphasis that has traditionally been placed on ebb and flow of adversarial advocacy, there may be good reason to question whether it might ever become embedded as a norm of communication. That said, there is evidence that attitudes are shifting. In a qualitative study in 2013 involving interviews with criminal advocates experienced in sex cases, Henderson found ‘a more sophisticated understanding of the language issues’ than that of advocates interviewed 15 years previously, 64 and also found a genuine desire to improve practice and adopt innovation even where this conflicted with embedded traditions. Despite these positive overtones, the research concluded that the majority of cross-examiners lack the skills and specialist training to cross-examine vulnerable witnesses. 65 Other studies have arrived at similar conclusions, 66 and have also identified a lack of understanding by other criminal justice professionals. 67 Evidently, without such training many advocates would be ill-placed to know what constitutes an inappropriate question or how to elicit comprehensible responses from a non-verbal witness.

Competency

Of course, the AAC technologies discussed above will only be of value where a witness is deemed competent to testify. Historically, there has been significant suspicion around the evidence of those with communication difficulties; 68 only a few decades ago strict exclusionary principles were applied in relation to the testimony of children 69 or those living with a mental illness. 70 Section 53 of the YJCEA provides for a presumption of competency in respect of all witnesses though this is rebuttable where a party can show that a witness is unable to understand questions or give answers that cannot be understood. 71 Whilst a learning disability involving a severe language impairment may not in itself preclude a witness from testifying, it could provide grounds for one party to query competence, in which case the party calling the witness is required to prove that


64 Henderson (n 63).

65 Ibid 676.


70 R v Bellamy (1986) 82 Cr App R 222. Indeed, it was formerly the case that the witness had to believe in some form of divine sanction: Attorney General v Bradlaugh (1885) 14 QBD 667.

71 YJCEA, s 53(3).
s/he is able to communicate intelligibly on the balance of probabilities. In practice, any issues around competency of a witness will be identified at an early stage in the process, and the court may question the witness, consider expert evidence, and evaluate extracts from the recording of the ABE interview as part of any competency hearing. Any determination reached at that point in the process may be revisited by the trial judge after cross-examination.

In recent times the higher courts have made clear that testimony ought to be received where possible, even if this would involve a radical departure from the traditional oral hearing. In R v Watts, the complainant had cerebral palsy and was only capable of uttering a few limited words. As the Court of Appeal noted, the parliamentary intention underpinning the 1999 Act is that those who are competent to give evidence should be assisted to do so. The court has also stressed that fulfilment of the competency requirement does not hinge upon the ability of the witness to offer detailed or intelligible replies to all questions; rather the court should look to form an overall impression. This view was echoed in Barker, where the court drew an important distinction between competency and credibility. While the former was a question of intelligibility, the latter was a question of weight for the jury. Thus, there should be no ‘implicit stigma’ relating to child witnesses, and nor should children be regarded as inherently less reliable. For Hallet LJ, it is essentially reduced to the principle of equal access to justice:

The purpose of the trial process is to identify the evidence which is reliable and that which is not, whether it comes from an adult or a child. If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness. In trial by jury, his or her credibility is to be assessed by the jury, taking into account every specific personal characteristic which may bear on the issue of credibility, along with the rest of the available evidence.

Although these remarks were made in the context of child witnesses, it is evident that they also apply to witnesses with learning disabilities:

These statutory provisions are not limited to the evidence of children. They apply to individuals of unsound mind. They apply to the infirm. The question in each case is whether the individual witness, or, as in this case, the individual child, is competent to give evidence in the particular trial.

Moreover, whilst factors such as age and the nature and extent of any learning disability ought to be taken into account, these should not be determinative and the ultimate question for the court to determine is whether the evidence as a whole is intelligible:

The question is entirely witness or child specific. There are no presumptions or preconceptions. The witness need not understand the special importance that the truth should be told in court, and the witness need not understand every single question or give

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72 Ibids 54(2).
73 R v Malicki [2009] EWCA Crim 365; Police and Criminal Evidence Act 1984, s 78, may be used as a basis on which to exclude evidence where the witness is deemed incompetent following cross-examination.
74 Watts (n 15).
75 Ibid [18].
77 Barker (n 53).
78 See also Watts (n 15); R v Macpherson [2006] 1 Cr App R 30.
79 Barker (n 53) [40]. The primacy of the jury is the trier of fact was also mentioned in a similar context in Watts (n 15) [54]. See below, pp 466–7.
80 Barker (n 53) [38].
a readily understood answer to every question. Many competent adult witnesses would fail such a competency test. Dealing with it broadly and fairly, provided the witness can understand the questions put to him and can also provide understandable answers, he or she is competent.81

The rules introduced by the 1999 Act governing the competency of witnesses are of symbolic, as well as practical, importance. As Spencer notes:

[T]he rules ‘mark the final transition from a system where the courts refused to hear all sorts of persons for fear they might not tell the truth, to one where the courts listen to everybody, and try to decide whether they are truthful or not on the basis of what they have said’.82

The judicial plasticity regarding the competency requirements has enabled many more witnesses with learning disabilities, including non-verbal victims, to give evidence in recent years. It is also consistent with psychological evidence regarding the capacity of learning disabled witnesses to give reliable evidence. Providing the witness is equipped with the correct tools to understand questions and give intelligible answers, there are no grounds for a blanket policy exclusion.83 Even where witnesses are deemed not to be competent, potentially, a hearsay statement may be admitted where the court deems that the interests of justice require it (competency is not a precondition in such instances).84 However, even where many non-verbal witnesses are considered competent, fears around how juries will perceive the credibility of such witnesses impede the prospects of many such cases reaching trial and there is evidence to suggest that the Crown Prosecution Service has traditionally exercised caution in proceeding.85 In the section below, we seek to unpick some of the reasons why their testimonies are often viewed as suspect.

Credibility: a problem of perception

Manifestations of learning disabilities – mostly around communication and social function – sometimes result in certain witnesses being perceived as less credible or reliable. In particular, non-verbal individuals with autism may exhibit atypical forms of behaviour in stressful environments such as poorly modulated eye contact, unusual body movements (e.g. rocking, hand-flapping or clapping), hesitation in answering questions and odd vocal responses (e.g. echolalia or random sounds). These may negatively affect how a non-verbal witness is perceived by both criminal justice professionals (such as police officers, prosecutors, advocates or intermediaries) and, where the case proceeds to trial, the judge and jury.87

Such cues may give the impression that a witness is being deceptive, less sincere, or uncertain of the facts, though this erroneous and widely held assumption has been

81 Ibid. See also DPP v R [2007] EWHC Crim 1842; R v LA and Others [2013] EWCA Crim 1308.
83 Brown and Lewis (n 4).
84 Criminal Justice Act 2003, s 114(1)(d).
comprehensively rebutted by psychological research.\textsuperscript{88} Even if the prosecution believes that the witness is likely to pass the competency threshold, the prosecution may still not proceed if it is determined that the likelihood of a conviction is reduced by how the witness may perform in court.

The secrecy surrounding jury deliberations means that it is difficult to discern the impact of certain idiosyncratic behaviours on jury decision-making.\textsuperscript{89} However, research based around mock juries, as well as evidence from other jurisdictions, suggests there is strong evidence that witnesses with learning disabilities are less likely to be believed in giving evidence (although there is no specific existent research on perceptions of AAC users).\textsuperscript{90} Various ‘testimonial factors’ are said to affect credibility, such as perception, memory, communication and sincerity,\textsuperscript{91} and even others that have clearly no relevance whatsoever, such as ‘attractiveness’, have been documented as factors taken into account.\textsuperscript{92} However, it has been established that although those with learning difficulties may recall less detail in response to open-ended questions than neurotypical witnesses,\textsuperscript{93} the accuracy of their recall is generally high although their answers may be perceived as vague or confused.\textsuperscript{94} Henry et al found that many mock jurors noted how they appeared to be distracted or disinterested.\textsuperscript{95} Overall, there seems to be a discrepancy between the ability of such witnesses to offer accurate testimony and jurors’ perceptions of their ability.\textsuperscript{96} Learning disabled witnesses are also much more likely to be open to suggestion when questioned by authority figures in unfamiliar environments.\textsuperscript{97} In turn, they are more likely to acquiesce and provide the answer that they believe the questioner is seeking as opposed to attempting accurate recall.\textsuperscript{98} Or they may simply comply in order to escape the confines of a stressful setting.\textsuperscript{99} These risks are particularly pertinent at both the investigative and trial stages of the criminal process, where evidence confirms that high stress levels, coupled with inappropriate questioning techniques, may negatively affect the ability of vulnerable witnesses to recall past events accurately.\textsuperscript{100} Stereotyping and biases against AAC users may be even more prominent given that there appears to be a


\textsuperscript{89} Ellison and Munro (n 63).


\textsuperscript{92} Stobbs and Kebbell (n 90).

\textsuperscript{93} Gisli Gudjonsson and Lucy Henry, ‘Child and Adult Witnesses with Intellectual Disability: The Importance of Suggestibility’ (2003) 8 Legal Criminological Psychiatry 241; Stobbs and Kebbell (n 90).


\textsuperscript{95} Henry et al (n 4).

\textsuperscript{96} Stobbs and Kebbell (n 90).

\textsuperscript{97} Gudjonsson and Henry (n 93); Mattinson (n 28).


\textsuperscript{99} Brendan O’Mahony, ‘How Effective are Judges and Counsel at Facilitating Communication with Vulnerable Persons in a Criminal Trial?’ in Cooper and Hunting (n 28).

\textsuperscript{100} See e.g. Green (n 4); Milne and Bull (n 26).
correlation between perceived maturity and credibility. In other words, the sharp contrast between the communicative style of a learning disabled AAC user against the expectation of how a neurotypical witness of the same age should communicate might further undermine credibility.

In addition, these erroneous indicators of credibility are often exacerbated by the impact of trauma which by itself may negatively impact upon memory recall and be wrongly interpreted as an indicator of mendacity. As Ellison and Munro highlight, trauma victims often live with fragmented memories, lacking in specific detail and framed without a linear narrative. As the impact of trauma on memory recall is not widely known, the authors contend that jurors ought to be provided with this information in order to inform their decision making. A further dimension of credibility turns on how the presence of an intermediary and/or AAC provision could influence the court’s perception of the ‘validity’ and ‘authorship’ of the evidence. By ‘validity’, we refer to the extent to which the expressed message is deemed to reflect what the witness wished to convey to the court; and by ‘authorship’ we refer to the extent to which the expressed message is deemed to have been constructed by the witness themselves. With regard to validity, questions might arise around the size of the symbol/signed vocabulary set used by the witness and whether limited vocabulary might give rise to approximated and misleading meanings (for instance, the verb ‘touch’ has a plethora of related verbs such as ‘grab’ and ‘caress’ with very different connotations of intensity, intention and reciprocity). Similarly, given the unfortunate history of FC in the courtroom, combined with the clearly visible support from an intermediary and/or communication device, questions could arise about the extent to which the witness independently authored the AAC-mediated message of their own volition. Toolkit 14 does not explicitly address this issue in its advice to intermediaries, seemingly working on the assumption that the witness will physically produce their own communication output through (for example) signing or independent manual operating of a device; and that the various elements of intermediary ‘good practice’ recommended, such as pointing to timelines or translating unclear speech for the court, will not compromise perceptions of ‘authorship’ in any way.

We are conscious that even discussing the very concepts of ‘validity’ and ‘authorship’ of AAC-mediated evidence runs the risk of what Ashby describes as the ‘othering’ that takes place when a particular (disabled) group is made the subject of special scrutiny in a way that non-disabled people are not. This concern is relevant in the current context: we would argue that AAC users are not categorically different from verbal witnesses whose oral ‘validity’ or ‘authorship’ might be compromised by any number of factors, including limited vocabulary; low educational level; susceptibility to stress; or acquiescence to the suggestions of an aggressive cross-examiner. On this basis, ‘validity’ and ‘authorship’ concerns should thus be dealt with on an ad hoc basis rather than in the form of presumptions about whole categories of witnesses. At the same time, it seems preferable to explicitly acknowledge that AAC may give rise to particular concerns around

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101 Henry et al (n 4).
102 Ellison and Munro (n 63).
103 Ibid.
104 Again, the courts have been proactive in facilitating this: see R v Doody [2008] EWCA Crim 2394 (regarding the impact of trauma on the testimony of a rape victim).
105 See Balandin (n 14); Jacobson et al (n 13); Travers et al (n 13).
106 Christine Ashby, ‘Whose “Voice” Is It Anyway?: Giving Voice and Qualitative Research Involving Individuals that Type to Communicate’ (2011) 31(4) Disability Studies Quarterly.
'validity' and 'authorship' in the minds of jurors, advocates and others who are unfamiliar with its usage, rather than leaving this as a dangerous unconscious prejudice. Further, theoretical unpacking of this issue may be necessary to explore (for example) whether providing jurors with reports on an AAC user's typical communicative style and repertoire would help to challenge unfounded assumptions on the basis of appearances and encourage rational, conscious evaluation of likely validity and authorship; or alternatively further stigmatisate AAC users by problematising issues which are not generally raised in the case of speaking witnesses.

Yet, as suggested above, the greatest single barrier to the issue of credibility is located within the confines of the adversarial paradigm itself. The belief in the primacy afforded to oral evidence has informed the evolution of the rules of criminal procedure and evidence for centuries. There is something of an inbuilt perception that oral forms of evidence are superior to other forms (such as written evidence or 'real' evidence); thus adversarial proceedings have placed a strong emphasis on the proper use of articulate and detailed oral accounts that can be readily challenged through cross-examination in court. Accounts that appear confused, disjointed and inarticulate are portrayed as untrustworthy; little allowance has been afforded to pertinent questions posed by psychologists around the reliability of memory or the capacity for factual recall under stress. At every stage of the criminal process there is an inherent assumption that participants are verbally equipped to report offences, explain their actions, and answer questions to aid the investigative and trial processes.

It is well documented that the nature of the adversarial trial is a source of secondary victimisation for many victims and witnesses, but the sequelae are significantly exacerbated among those who live with learning difficulties, some of whom will have minimal understanding of its nature and function. In particular, the convoluted and unfamiliar language of the courtroom, coupled with the use of forensically tuned linguistic devices adopted by cross-examiners, have been widely decried as mechanisms which are deliberately used to confuse and disorientate vulnerable witnesses. While the introduction of special measures and a more robust judicial stance on controlling of cross-examination have served to mitigate against some of the worst excesses of the adversarial trial, its structural orientation as an oral duel between prosecution and defence continues to discriminate against those least able to participate within this paradigm.

**Addressing the Credibility Deficit**

Two suggestions can be made in addressing issues pertaining to credibility. First, the wider use of expert evidence (particularly that of a psychologist or psychiatrist) may militate against negative perceptions of credibility and reliability. In particular, it could be used to explain that some of the manifestations of disability outlined do not equate to an inability to provide truthful and accurate evidence.
Unfortunately, there is a longstanding rule that expert evidence pertaining to issues of credibility is generally inadmissible. Thus, in *R v Robinson* the Court of Appeal held that the prosecution should not have been permitted to recall a psychologist to give evidence as to whether or not the complainant was suggestible and liable to fantasise; exceptions to the rule in *Toobey* only applied where the prosecution sought to pre-empt or rebut any suggestion by the defence that the evidence should be disregarded due to mental abnormality. On these grounds, *Robinson* was distinguished in *R v S (V J)*, where the appellant had been convicted of a range of sexual offences against a 13-year-old girl who had autism. A paediatrician gave evidence that the demeanour of the complainant in a video interview was not unusual for someone with autism, and, in general, autistic people would be highly unlikely to invent such a story and retain it in their memory. The appellant contended that this evidence was essentially an effort to boost credibility and, as such, should have been excluded. The appeal, however, was rejected on the grounds that the evidence was of generic application since it was a trait common to all people living with autism and did not pertain to the specific capabilities of a particular witness.

Although the clarification of the law in *S* may assist non-verbal victims who live with a clinical label, this is not always the case and non-verbalism may be attributable to an unidentified or undiagnosed condition. The broader rule (i.e. prohibiting expert evidence of issues of credibility of a specific witness) has been roundly criticised on the grounds that ‘the questions which it is important for a jury to decide for itself may be the very questions on which it most needs expert advice if it is to avoid serious injustice’. There appears to be a compelling case for reform; expert evidence is widely used to such ends in others jurisdictions and it seems intuitively odd to adopt a stance whereby experts are unable to tailor their evidence to reflect the particular difficulties of individual witnesses.

An alternative (or additional) solution may lie in trial judges providing the jury with some direction on these matters. While judicial warnings have long been commonplace on matters such as suspect identification, delays in making sexual complaints, accomplice evidence, histories of false allegations and previous convictions, there is little evidence that they are issued regularly in respect of issues pertaining to demeanour and perceptions of credibility. In light of the expansive evidence that demeanour is a poor indicator of veracity, calls have been made for a mandatory demeanour warning, particularly in regard to evidence from vulnerable groups. The possibility was rejected by the New Zealand Court of Appeal in *E v R*, which seemed to prefer the historical practice for juries being free to evaluate demeanour as an indicator of credibility over the weight of social scientific evidence against it. From our perspective, however, is clear that

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112 *Toobey v Metropolitan Police Commissioner* [1965] 1 All ER 506.
113 (1994) 98 Gr App R 370.
114 [2006] EWCA Crim 2389.
117 Ellison and Munro (n 63).
119 Brown and Lewis (n 4); Fisher (n 118).
120 [2013] NZCA 678.
such a mechanism holds the potential to address negative stereotyping in relation to learning disabled witnesses, particularly when the opportunities for experts to inform juries is so limited.\footnote{121 Brown and Lewis (n 4).}

**Conclusions**

Non-verbal victims, at least those who are capable of understanding basic questions and offering intelligible answers, are now afforded an opportunity not only to have their voices heard, but also to have those voices considered seriously at both the investigative and trial stages of the criminal process. In addition to these developmentally sensitive adjustments to law, policy and procedure, the courts have exercised considerable juridical vigour in facilitating the best evidence of atypical vulnerable witnesses, and the Advocates Training Council and Judicial College have also been proactive in promoting specialist education and training.

It is encouraging to see the legal profession demonstrate that it is open to challenging traditional assumptions about learning disabled witnesses and exhibit an openness towards reform. These changes will take some time to embed, and challenges still lie ahead in ‘mainstreaming’ alternatives to oral evidence. But it is anticipated that in the years ahead more non-verbal victims will feel able to exercise their voice and will receive appropriate support to convey their message, have the content of that message carefully considered, and, subsequently, exert an influence on the decision-making in both the investigative and trial phases of the criminal process. It is hoped, and expected, that in time this will boost reporting and conviction rates, and reduce attrition rates. While this article has focused on the trial process, some of the lessons set out here may inform future approaches concerning participation in other facets of the criminal process, such as requesting information about the case or challenging charging decisions. If this is accomplished, we are well on the road to establishing a more equal, legitimate and inclusionary criminal justice system where all witnesses are enabled to participate irrespective of their cognitive or developmental capabilities.
Victims of crime: culture, politics and criminal process in the twenty-first century

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Abstract

This paper sets out to marry three areas of concern to modern victimology. In the first instance the paper will explore the ‘cultural turn’ taken in our understandings of what it means to be a victim of crime in the twenty-first century. McGarry and Walklate (2015) characterise such ‘cultural victimology’ as comprising a wider sharing and reflection of individual and collective victimisation experiences, on the one hand, and, on the other, the mapping of those experiences through the criminal justice process. This paper will explore the interaction between such cultural understandings of victimhood and the political and policy forces which, since at least the late 1990s, have pledged to ‘rebalance’ the criminal justice systems of England and Wales and other jurisdictions to put victims ‘at the heart’ of those processes.

Keywords: victims; criminal justice; culture; victims policy; ideal victims

Introduction

In the early twenty-first century criminal victimisation is everywhere. From high-definition videos of the latest terrorist atrocities beamed into our homes, our phones and our laptops by 24-hour news networks to the bite-size, personal, accounts from victims of crime, their families and their supporters appearing on our social media feeds. Under such conditions, members of the public can feel more personally connected with such instances of victimisation than at any time in recent history. Whether it be the collective outrage felt when terrorists strike at the ‘heart of our democracy’ or a deep sense of personal empathy felt for the victims of historic sexual abuse coming forward to ‘tell their stories’, the notion of ‘standing alongside’ and showing ‘solidarity’ with the directly victimised is becoming ubiquitous in modern society. Under such conditions, public consciousness has become flooded with concepts like ‘post-traumatic stress’ and ‘trauma’. At the same time, an
increasingly informed public can engage like never before in detailed debates over how precisely such victims should be treated and what they should expect from the criminal justice process. In the flurry of such debates, opinions from members of the public on highly technical legal issues – such as the cross-examination of rape victims in court, compensation for victims of violent crime and the nature of ‘consent’ in sexual offences – are now routinely juxtaposed with those of agents of the state, prosecutors, lawyers, politicians and professional scholars.

This paper sets out to marry three areas of concern to modern victimology. In the first instance the paper will explore the ‘cultural turn’ taken in our understandings of what it means to be a victim of crime in the twenty-first century. This paper will explore the interaction between cultural understandings of victimhood and the political and policy forces which, since at least the late 1990s, have pledged to ‘rebalance’ the criminal justice systems of England and Wales and other jurisdictions to put victims ‘at the heart’ of those processes. The paper will then move on to combine these two areas in seeking to expose some of the complications that exist when attempting to reconcile seemingly ever-expanding understandings of victimisation with legal and procedural practicalities, especially within a still staunchly adversarial criminal justice system.

**Cultural victimology**

So-called ‘cultural victimology’ represents a relatively new direction taken in the victimological literature over recent years in an attempt to incorporate a number of features of the modern social, political and cultural landscape which both surrounds and permeates the notion of being a ‘victim’. These features include the increasingly visual nature of social life and the symbolic displays of shared emotion that go along with this. In this context, the notion of ‘standing alongside’ victims of crime becomes more prevalent. Victims of crime (and their supporters) in turn provide increasingly public accounts of the harm they suffer. Cultural victimologists are also interested in the means by which the victimisation experience is mapped through the workings of the criminal justice system. Through such a process, public narratives concerning these experiences are developed, some of which become features of a shared cultural understanding about what it means to be victimised. In short, cultural victimology foregrounds suffering, how it is presented to society and what sense that society then makes of it. This reaches beyond standard critical victimology approaches to place emphasis on the nature of victimization itself in addition to the social standing of the person or group being victimised.5

At the forefront of this development, McGarry and Walklate6 characterise cultural victimology as broadly comprising two key aspects. These are the wider sharing and reflection of individual and collective victimisation experiences on the one hand and, on the other, the mapping of those experiences through the criminal justice process. I have previously drawn upon the work of Hans Boutellier,7 whose discussion of victimisation and morality in a secular society to some degree foreshadowed this trend. Boutellier argued that, as the process of secularisation goes on, common standards of morality decline but common appreciation of and sympathy for the impacts on those who have suffered harm remains and takes over as a shared moral barometer for society. In more recent parlance, we could say that such victimisation becomes incorporated into the fabric

of our social culture. The author refers to this as the 'victimization of morality’. Furedi in pioneering aspects of the cultural approach made a similar point in terms of social solidarity with victims in the UK context:

It is difficult to avoid the conclusion that, with British people feeling so fragmented, the ritual of grieving [for victims] provides one of the few experiences that create a sense of belonging.8

Central to this cultural approach to victimisation is an understanding of victimhood as a dynamic and developing concept, both in terms of society’s understanding of it and the individual (or group) victim’s personal experience. Significantly for the present discussion, if victimisation is now shared, defined and recognised as a matter of culture then recognition of ‘victim status’ becomes subjected to the ever-shifting contours of said culture. To illustrate this idea, we can look to the ongoing example from the UK of the Hillsborough Football Stadium disaster.

The Hillsborough disaster is the worst sporting-related tragedy in UK history.9 It followed a human crush in the overcrowded Western Stand (at the time a standing terrace) of the Hillsborough Football Stadium in Sheffield, England, during a 1989 Football Association Cup Semi-Final. Over 700 people were injured in the crush and 96 people – all supporters of the Liverpool Football Club – lost their lives. In the days following the disaster, accusations quickly arose from those present, and then the families and supporters of those killed, that poor management of the situation by the presiding South Yorkshire Police Force had directly contributed, if not caused the tragedy.10 At the time, however, these concerns were played down in public discourse in favour of the police’s version of events. This version included a number of accusations to the effect that the behaviour of the football supporters themselves had been the main contributor to the tragedy. These accusations against the supporters were most prominently taken up by The Sun newspaper, which was then and remains now Britain’s most read newspaper. Four days after the tragedy The Sun ran with the front-page headline ‘The Truth’ followed by the sub-headlines: ‘Some fans picked pockets of victims’; ‘Some fans urinated on the brave cops’; and ‘Some fans beat up PC giving kiss of life’. In the years that followed, those seeking to expose what they argued to be the gross negligence of the police and their vilification of the victims coalesced into a distinct movement – ‘Justice for the 96’ – organised by the Hillsborough Family Support Group. This group championed the perspective of the families of those killed and injured through an independent inquest in 1991 (which returned a verdict of accidental killing), the subsequent quashing of this panel’s findings and an attempted private prosecution of the Chief Constable of South Yorkshire Police in 1998.11 Ultimately, as a result of this unceasing campaign, a second inquest began hearing evidence in 2014, with a jury of nine delivering verdicts in April 2016 to the effect that the 96 supporters had been ‘unlawfully killed’. This jury also found that the supporters themselves bore no blame for the disaster.12 Following this verdict, the case was examined by the Crown Prosecution Service (CPS) which subsequently

8   Frank Furedi, ‘A New Britain – A Nation of Victims’ (1998) 35 Society 80, 82.
10  Ibid.
pursued criminal charges against six individuals, including former Chief Superintendent, and match commander on the day, David Duckenfield.

The Hillsborough case exemplifies a great deal about the contemporary cultural context of victimisation and victim policy. The story of ‘the 96’ and their families is one of becoming victims in the eyes of the establishment and the public at large. The process by which this occurred has been frequently described as a ‘journey’\(^\text{13}\) culminating in a public acknowledgment of this status by the Prime Minister after the 2016 verdict was announced. On this occasion, David Cameron commented on the victims ‘long search for the truth’.\(^\text{14}\) The progression in the case from 1989 to 2016 is inherently interconnected with much wider social and cultural changes from a position in the late 1980s where deference to authority and to the media’s presentation of ‘facts’, as well as basic trust in the police, was much more prevalent (as discussed by Garland).\(^\text{15}\) Furthermore, in 1989 the largely working-class football supporters and their families had very little platform to air their own grievances. More broadly, the victimisation experience in this case took on a wider cultural component as the city of Liverpool itself was increasingly seen as being vilified – especially after *The Sun*’s headline – and its residents the collective victims of a still wider injustice. As noted by the chair of the Hillsborough Supporters Group following the announcement of the 2016 inquest verdict:

> Let’s be honest about this – people were against us. We had the media against us, as well as the establishment. Everything was against us. The only people that weren’t against us was our own city. That’s why I am so grateful to my city and so proud of my city. They always believed in us.\(^\text{16}\)

The cultural narrative of a city beset as a collective victim is epitomised by the continued virtual boycott of *The Sun* newspaper in Liverpool.\(^\text{17}\) This notion that victimisation is no longer an ‘individual’ experience, but in many cases transcended the direct (or even indirect) victims to include still larger groups within society is a key feature of victimology’s cultural turn.

This development of cultural victimology now challenges victimologists to reconsider some of our most entrenched assumptions about our subject matter. For example, few conceptualisations of victimisation and the relationship between victimisation, public policy and criminal justice reform have been more influential than that of Nils Christie’s widely referenced discussion of ‘ideal victims’.\(^\text{18}\) His argument was that some victims are endowed by the public and by policy-makers with ‘ideal’ status making them ‘worthy’ of public sympathy, accommodation, and facilitation of their rights through reform. Cultural victimology, however, has problematized this basic understanding of who is and who is not regarded as a genuine victim by focusing increased attention on the process of becoming recognised as a victim rather than assuming this as a static concept. Hence, the


\(^{17}\) Chris Horrie and Peter Chippindale, *Stick It Up your Punter!: The Uncut Story of The Sun Newspaper* (Faber & Faber 2013).

early characterisations of those hurt and killed at Hillsborough as ‘football hooligans’ gave way over time to a far more sympathetic public acceptance – and then official acceptance – of their victimised status. Significantly, most of the 96 killed at Hillsborough were young, able-bodied working-class men, some with criminal records. On the face of it these are not the ideal, vulnerable, victims of Christie’s thought, but rather have become so (or recognised as so) over a long period of cultural shift in the public’s overall impression of the police, its deference to authority figures and to the media in general.

Another pertinent example of shifting public – and perhaps cultural – understandings of victimhood revolves around the sufferers of historic sexual abuse at the hands of clergy of the Catholic Church and other historic child sex abuse cases. In the UK context McGarry and Walklate discuss the cultural relevance of revelations concerning noted television and radio celebrity Jimmy Savile, that is, that he was engaged in a decades-long campaign of persistent sexual abuse against some 300 victims aged between five and 75 years old. Such revelations have forced a cultural confrontation in the UK with the victims of these crimes, so long dismissed by the authorities and by public organisations like the BBC and the NHS. Whereas the public narrative in this case was once one of ‘(possibly) dirty old man’, ‘rascal’ and ‘celebrity’, the public narrative is now one of ‘abuse’, ‘exploitation and ‘violence’: as of course, it has been for the victims all along. In both the Catholic Church cases and the Savile cases, victims were usually met with disbelief initially and have won recognition over decades only though a long-term campaign in the context of changing attitudes about religion and celebrity. Practically, the length of time since many of these events occurred has inevitably frustrated efforts to now bring the perpetrators to justice: raising the key question of how such cultural, constructivist, notions of victimhood interact with the more positivist criminal justice process. This will be a key question returned to in the last third of the present paper.

For their part, McGarry and Walklate tie the increased recognition of ‘less ideal victims’ back to the growing importance of ‘trauma’ in victimological understandings, and the recognition that even ‘non-ideal’ victims whom we would not ordinarily consider vulnerable can suffer from this. The recent resurgence of ‘trauma’ as a concept in victimology reflects the fact that, as a condition, trauma develops over time and in directions many steps removed from the initial act (criminal or otherwise) that initiated the victimisation. Trauma can also be amplified or sustained by actors well beyond the specific criminal perpetrator in a given case. So-called ‘secondary victimisation’ at the

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19 78 were under 30 years old.
21 ‘The Class Contempt that Killed 96’ Socialist Worker (London, 18 September 2012) <https://socialistworker.co.uk/art/29084/The+class+contempt+that+killed+96>.
22 McGarry and Walklate (n 6).
26 McGarry and Walklate (n 6).
hands of the criminal justice system is a case in point, but so too is the ongoing treatment of victims by support services, local communities and the media. As an illustration, McGarry and Walklate\(^{28}\) draw on the story of Doug Beattie, an English soldier and decorated Afghanistan veteran who opened up about his personal and emotional struggles both during and after the conflict. More recently, families of UK soldiers killed in the second Iraq war threatened to mount legal action if the delayed ‘Chilcot Report’ of the independent inquiry into to the reasons the UK entered the war did not get an official publication date, arguing that their family members were ‘victims’ of the conflict and, possibly, of deception by the UK government.\(^{29}\) The key point is that, as archetypal (often) masculine figures, soldiers usually lack the traditional characteristics of overt ‘weakness’ attributed to ideal victims.

A telling aspect of these examples is not just how ‘victim status’ or ‘ideal victim status’ is ascribed, but how they suggest a need to acquire this status not just through prolonged trauma, but also through sustained effort. It is almost impossible to imagine that the 96 Hillsborough victims and their families would have received the recognition they now have (with the tangible possibility of ‘justice’) without the consistent and organised efforts of the Hillsborough Family Support Group, not to mention a multitude of other supporters, lawyers, academics, investigators and so on. In the case of Doug Beattie it was the telling of his story via the publication of his biography that ‘won’ him recognition as having been ‘truly’ victimised.

Gaining victim status is one thing, but keeping it in the modern cultural context is quite another. Further to the above points, cultural understandings and recognition of victimisation may often appear fickle. One key example of this can be drawn from the case of Kate and Gerry McCann who, over the course of the decade since the disappearance of their daughter Madeleine from a Portuguese holiday resort, have been painted both as villains and victims. Thus, in late 2007 articles began appearing branding the McCanns and their friends (whom the media labelled ‘the tapas seven’) as ‘swingers’.\(^{30}\) Accusations of inconsistencies in the McCanns’ story developed into theories, without corroborating evidence, that Madeleine had died through some misadventure in the family’s apartment and that the alleged ‘kidnapping’ was a means of covering this up. The McCanns themselves were for a time given the status of arguidos (official suspects) by Portuguese investigators.\(^{31}\)

Nevertheless, in the light of accusations which might have destroyed any sense of public, let alone official, goodwill to the couple, the McCanns have maintained a significant media presence throughout the period that has kept them, for the most part, on the sympathetic side of public/cultural discourse, securing intervention by Scotland Yard to the tune of a £10 million investigation.\(^{32}\) Indeed, it has often been commented that the McCanns have approached their situation in a way that is very media savvy,

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28 McGarry and Walklate (n 6).
exploiting all the advantages of being middle-class, articulate professionals.\textsuperscript{33} Interesting comparisons were initially drawn with the case of Shannon Matthews, a nine-year-old girl who disappeared from her home in Dewsbury, West Yorkshire, in February 2009, some two years after the McCann disappearance.\textsuperscript{34} Media attention continued to be poured on the McCann case at the time, with relatively little attention paid to the Matthews case. The Matthews were a low-income working-class family who appeared far less capable of courting media attention. Notwithstanding the fact that, ultimately, it emerged Shannon's disappearance was orchestrated by her own mother and her boyfriend as a means of generating income thorough the publicity, the case still highlights that winning and retaining victim status for some requires both effort and social capital. It is in itself very telling of the cultural status of such victimisation in twenty-first-century Britain that Shannon’s mother and boyfriend reached the conclusion (no doubt inspired by the McCann case) that this would be a workable means of gaining finance.

As the above examples illustrate, it has become impossible to approach the question of how cultural attitudes to victimisation change and adapt over time without discussing media representations and, most significantly, the role that social media has exerted in this sphere. Whilst work on the portrayal of crime and criminal justice in the media has been pursued for a long time and by a range of scholars,\textsuperscript{35} the interactive and up-to-the-minute nature of so much of this media now increases its impact tenfold. It is not, however, just the recognition of victimisation by the media or by the public in general that changes over time. In reality victims themselves may only come to recognise their own victimisation after a period of reflection, and in most cases their thoughts and ideas about that victimisation will develop as time goes on.\textsuperscript{36} Again, such development is part-and-parcel of modern understandings of ‘trauma’\textsuperscript{37}. Victimisation is therefore a dynamic process both personally as well as publicly and culturally. Those studying victimology have themselves been slow to adapt their methodologies to incorporate this dynamic nature of victimisation. Indeed, Shapland and Hall's 2007 extensive review of what we know about the effects of crime on victims indicated a marked lack of victimisation studies which incorporated any longitudinal component.\textsuperscript{38} In this next section, this paper will move on to discuss how this newly acquired appreciation for the cultural aspects of victimisation has impacted upon public policy.

**Victim culture and victim reform**

In 2017, the basic proposition that victim policy, like criminal justice policy as a whole, is intricately bound up with the political aspirations of different governments, parties and other groups, rather than representing some ‘pure’ or paternalistic philosophy of assisting victims of crime, has become somewhat prosaic. The difficulty with such a proposition when viewed in isolation is not that it is wrong, but rather that it offers little by way of explanation for why certain victims, victimisations and reform agendas appear to gain

\textsuperscript{36} Joanna Shapland and Matthew Hall, ‘What Do We Know about the Effect of Crime on Victims?’ (2007) 14(2) International Review of Victimology 175.
\textsuperscript{38} Shapland and Hall (n 36).
momentum in public discourse and public policy whilst others do not. True, one can begin to add a greater degree of substance to this position by noting the ideological and economic drivers that push government policy as a whole. Hence, one might argue that governments of all shades and hues in the UK have since at least the turn of the century rarely detracted from policies which broadly support neoliberal, market-based ideologies. Under this construction, we might explain the advent of different victim polices largely by reference to their capacity to generate efficiency in the criminal justice system, even if this comes at the cost of increased punitiveness and/or the prioritisation of crime control over due process. Victims therefore become significant from a policy perspective largely because it is recognised that a criminal justice system – certainly an adversarial criminal justice system – needs their support in order to run effectively.

Certain theorists have added another level of conceptual depth to the above basic propositions. Hence, Garland incorporates this use of victims as a tool for buttressing confidence in, and thus effectiveness of, the criminal justice process within a broader ‘culture of control’ which he argues permeates through politics and public policy in late modernity. Whilst such macro perspectives are extremely illuminating, again they are not tailored to facilitating a closer inspection of which specific victims are actually benefiting (or not) from this increased attention, nor do they conceptualise the processes through which this comes about. For many years, the customary victimological answer to these outstanding questions has been that the policy direction described above inevitably becomes centred around ‘ideal’ victims, because it is these victims who attract public sympathy and are thus the most advantageous for a political party also seeking to gain votes. Usually, such victims are conceptualised in abstract terms that have not progressed a great deal from those described by Christie in 1986, as discussed above. Indeed, the phrase ‘ideal victim’ is often used in a rather offhand way by victimologists, betraying a confidence that we know who these people are, that their characteristics are largely established and that we can pinpoint the forms of victimisation to which they are most often associated. Critical criminologists in turn added detail to this picture, arguing that the identification of these so-called ‘ideal victims’ was far from objective and in fact reflected deeply ingrained power inequalities within society. Once again, however, this macro-level view tends to obscure the specific mechanics by which certain victims are promoted up the political hierarchy.

From the discussion of cultural drivers presented in this paper, it can now be confidently asserted that the more traditional perspectives encapsulated within the previous paragraph are limited in the contemporary context. In reality, however, what the cultural victimological approach reveals is the means by which the victims who actually benefit from the attention of policymakers (or at least are supposed to) is strongly influenced by the ebbs and flows of prevailing cultural attitudes. More specifically, this process seems to be driven by the production and reproduction of narratives around different kinds of victimisation (or harm) that become more or less culturally pervasive over time and, in so doing, generate what this paper will call ‘victim capital’.

It is these cultural narratives on the nature and impact of victimisation, rather than a fixed notion of ideal victimhood, which I suggest policymakers are in fact responding to. To illustrate how this process operates I will here focus on three key example – rape, child sexual exploitation (CSE) and terrorism – as broad categories of victimisation-types which have been subjected to prolonged cultural scrutiny, shifting public understandings

39 Henry A Giroux, Against the Terror of Neoliberalism: Politics beyond the Age of Greed (Routledge 2015).
40 Garland (n 15).
and constructions, resulting in the advent of greater victim capital which in many cases has been translated into public policy and reform.

VICTIMS OF RAPE

One of the clearest examples from England and Wales in recent years of an apparently heightened cultural resonance surrounding a particular group of victims is that associated with victims of rape. Of course, many victimologists would rightly assert that, since the mid-1990s, rape victims had already achieved a degree of cultural and political prominence hitherto unknown in criminal justice circles. Rape victims have long been held up as the archetypical invisible and mistreated victim of crime. Indeed, the development of modern victimology itself owes much to an initial focus on such victimisation and the difficulties faced by rape victims on approaching the criminal justice system. This development was driven in particular by feminist commentators. Notwithstanding this background, however, it is argued that the increasing cultural resonance now associated with rape victimisation in more recent years – protracted through the lens of social media and 24-hour news coverage – has rendered contemporary levels of public commentary and debate largely unprecedented. This is especially the case in relation to the position of rape victims within the criminal justice process itself.

In the shorter term, much of this renewed public interest appears to have been brokered in England and Wales by the considerable public and media attention given to the case of Chedwyn Michael ‘Ched’ Evans. Evans was a Premier League footballer initially convicted in 2012 of raping a 19-year-old woman who was at that point deemed too drunk to consent. Many supporters rallied to his defence. Many more were quick to condemn a criminal justice process which granted victim status to the woman in question. Indeed, some of the public comments on the matter harked back to debates concerning victim precipitation/blaming whilst also questioning the legal status of ‘drunken’ consent: which in the UK criminal law has been fairly clear since the case of R v Bree in 2007. Some commentators saw a positive side to this in that, for them, the strong public reactions to the case reflected a criminal justice system that had become more willing to tackle ‘difficult’ cases and also indicated that juries were now more willing to put aside victim-blaming attitudes and myths about rape. Whatever the interpretation, it is clear that this case exemplifies how victim status is now caught up in social culture and protracted through social media platforms. This final point was emphasised by Duggan

41 Jennifer Temkin, Rape and the Legal Process (2nd edn OUP 2002).
42 Menachem Amir, Patterns in Forcible Rape (University of Chicago Press 1971).
43 Sue Lees, Carnal Knowledge: Rape on Trial (2nd edn Women’s Press 2002).
44 See R v Ched Evans (Chedwyn Evans) [2012] EWCA Crim 2559.
47 [2007] EWCA Crim 804.
and Heap as contributing to what they term the ‘administering’ of victimisation in twenty-first century Britain.49

It was in such a social and cultural context that when the Criminal Case Review Commission (CCRC) of England and Wales received a referral of the case by Evans’ new legal team in 2015, it chose to fast-track the case, stating:

... in line with our published policy on prioritisation, and in relation to the facts of the case and the issues raised in Evans’ application to us ... we now expect our substantive investigation to begin within the next few weeks.50

The CCRC referred the case for reconsideration by the Court of Appeal in October 2015 and the court ordered a retrial in March 2016, on the grounds that the trial judge had erred in law in excluding evidence of the complainant’s sexual history. In this second trial, Evans was acquitted.

For present purposes, what is particularly noteworthy about the conviction and subsequent acquittal of Ched Evans is the impact this appears to have had not only on public discourse, but also in relation to concrete reform agendas emanating from major political parties. Indeed, the degree of significance associated with the Evans case can be appreciated through examining an open letter sent to the Labour MP Harriet Harman from the Criminal Bar Association in March 2017. In that letter, the Bar bemoaned the apparent influence the case was exercising over public debate:

Continued references to the Ched Evans case as an example of what ‘typical’ cases involve are wholly misleading; it was an unusual case that turned on an unusual set of facts. It was on the peculiar circumstances of that case that the judicial decisions were made.51

Specifically, the Association was seeking to criticise an amendment to s 41 of the Youth Justice and Criminal Evidence Act: a so-called ‘rape shield’ provision which purports to limit the cross-examination of witnesses on their sexual history. The amendment, which had been proposed by Harman as part of the Prisons and Courts Bill then going through Parliament, would have effectively banned all sexual history questioning in court without the exceptions and discretions the law presently entails.52 This tabled amendment followed the introduction of a separate Private Member’s Bill a few weeks before – set out by Liz Saville Roberts MP of Plaid Cymru – which proposed a different reform to the rape shield, retaining certain discretionary exceptions.

In the end, both proposals ran out of parliamentary time following the call of an unexpected snap general election in the UK in May 2017. It is nevertheless extremely telling of the degree of victim capital rape victims have recently acquired in the contemporary cultural context that it drove two distinctly different calls for reform in the space of one month: s 41 having existed on the statute books and operated since 1999. Indeed, we might conceptualise this situation as one of two competing narratives concerning what such victims ‘need’ from the criminal justice system, each vying for cultural predominance.53

52 Matthew Hall, Victims and Policy Making: A Comparative Perspective (Willan 2010).
Returning to the Criminal Bar Association’s letter, the criticism made in the above extract is essentially that both activists and MPs had presented the Evans case as a ‘typical’ narrative of rape trials, a narrative the Association claimed was misleading. What is especially telling is the level of concern expressed about inaccurate representations of the Evans case as ‘precedent’ and how this might impact upon public sensibilities on the issues:

Sadly, the previously mentioned characterisation of the judgment as a ‘precedent’, coupled with incautious public remarks (that the law was being set back by decades) appear designed more to alarm than inform. We are concerned that this is a trend set to continue in light of recent reports and comments made on social media.  

From a cultural perspective then we might characterise the Bar’s concerns as centred around the public narrative forming around this case and its implications for the criminal justice system: namely, a shift in policy, engendered by growing victim capital, to initiate a change in the evidential rules. For many commentators, especially those representing the legal profession, further restrictions on the use of sexual history evidence can only prejudice defendants’ ability to have a fair trial. 55 In this example then we see not only the influence of such cultural narratives and the degree of victim capital it may command, but also the potential dangers of this influence: especially when this appears to be based in part on misinformation or incomplete understanding.

Another aspect of the developing public conversation on the place of rape victims in the criminal justice system of England and Wales has revolved around so-called ‘victim blaming’ by the judiciary. This came to the fore in March 2017 when a retiring senior circuit judge in Manchester, Judge Lindsey Kushner, used her sentencing remarks in her final trial to advise/warn women that excessive drinking might enhance their vulnerability to victimisation:

I don’t think it’s wrong for a judge to beg women to take actions to protect themselves. That must not put responsibility on them rather than the perpetrator. How I see it is burglars are out there and nobody says burglars are OK but we do say: ‘Please don’t leave your back door open at night, take steps to protect yourselves.’

The judge continued:

It should not be like that but it does happen and we see it time and time again.

She added:

They are entitled to do what they like but please be aware there are men out there who gravitate towards a woman who might be more vulnerable than others.

The trial in question had involved a 19-year-old woman who was attacked and raped by a man she met in a fast food restaurant. The victim had spent the evening drinking beer and vodka during a night out in Manchester. It is notable that this ‘warning’ issued by the judge was couched in careful terms which appear to try and avoid the charge of victim

54 Criminal Bar Association (n 51) 2.
55 Andrew Ashworth, ‘Victims’ Rights, Defendants’ Rights and Criminal Procedure’ in Adam Crawford and Jo Goodey (eds), Integrating a Victim Perspective within Criminal Justice: International Debates (Ashgate 2000).
57 Ibid, unpaginated.
58 Ibid, unpaginated.
blaming. Nevertheless, the speech was emphatically interpreted as such by Rape Crisis\(^59\) and also, notably, by Dame Vera Baird, the Police and Crime Commissioner for Northumbria.\(^60\) Baird, for her part, had been responsible for commissioning a 2016 study of rape trials by Durham et al\(^61\) which led to the introduction of the Private Member’s Bill by Liz Saville Roberts MP concerning rape shield laws discussed above. Around the same time, a Canadian case gained international notoriety after a judge allegedly told a complainant in a rape trial to ‘keep her knees together’.\(^62\) Prior to this, in 2015 another judge in England sparked anger after branding a rape victim ‘extremely foolish’ for drinking too much before she was attacked outside a nightclub.\(^63\)

This narrative of judges ‘abusing’ rape victims in court has therefore built up a cultural pedigree over time. In the Kushner case it is significant that the victim later came forward to express her support for the judge’s comments. In so doing the victim indicated that, whilst she had initially felt a sense of self-blame for the incident, she had come to realise it was not her fault, although she continued to think that women who had been drinking would be less likely to be believed.\(^64\) A few months after this case was reported, Ched Evans in an interview with *The Times* newspaper himself offered the view that ‘women need to be made aware of the dangers they can put themselves in because there are genuine rapists out there who prey on girls who have been drinking’.\(^65\) The choice by Evans to speak out on this issue was met with palatable cynicism by many commentators, but the episode does serve to reinforce the cultural impact of such cases and figures in the twenty-first century.

Another related development coming in late 2016 was the publication of a report into the piloted use of pre-recorded cross-examination in certain participating Crown Court centres.\(^66\) The results of that study appeared broadly favourable to the wider use of this special measure in the future. Still in the wake of the ongoing public debates about sexual history and victim blaming in rape cases, the Lord Chancellor appeared to announce soon afterwards that the government would be accelerating the rollout of pre-recorded cross-examination to all courts for use in rape cases. The press release stated:

> New measures that will spare rape victims the trauma and inconvenience of attending court hearings will be rolled out across the country from September. Victims of rape and other sex crimes will have their cross-examination evidence pre-recorded and played during the trial. Originally the rollout was not due to


\(^65\) Ibid.

begin until next year but will now start in September after Justice Secretary Elizabeth Truss and senior judges agreed to accelerate the scheme.\textsuperscript{67}

Significantly, this announcement was met with the unusual step of the Lord Chief Justice writing a public letter to senior judges essentially criticising and explicitly correcting the impression that the Lord Chancellor had given in the press release. In the letter, Lord Thomas acknowledges the success of the pilots, but points out that they were limited to vulnerable witnesses falling under s 16 of the Youth Justice and Criminal Evidence Act, who are mainly children. This does not automatically include victims of rape, who qualify as ‘intimidated’ witnesses under s 17(4). The letter indicates that the pilot will indeed be extended to other courts, although only on a ‘carefully phased basis’ which will ‘inevitably take some time’. He also notes that this pilot will be restricted to s 16 witnesses. The letter goes on to indicate that the judiciary has agreed with the Ministry of Justice to extend piloting of pre-recorded cross-examination to s 17(4) rape victims only in the original three pilot areas and that ‘this new pilot will have to be evaluated and no decision has yet been made as to expansion of these provisions to other court centres’.

This interaction between the Ministry of Justice and the judiciary, played out in public and disseminated via social media, demonstrates both the cultural dimension of such policies in the twenty-first century as well as the multi-levelled governance and variety of stakeholders to those policies which will be the focus of the following section of this paper. It is also undoubtedly significant to note in this case the broader political context of the Lord Chief Justice’s letter, coming as it did in the immediate wake of a perceived lack of support by the Lord Chancellor for the independence of the judiciary following heavy criticism by some media outlets of the judges (including Lord Thomas himself) when they ruled against the government in the High Court in the case of \textit{Miller}.\textsuperscript{68} The case had concerned the executive’s right to trigger Article 50 of the 1992 Maastricht Treaty on European Union without first consulting Parliament.\textsuperscript{69} This once again indicates that culture, politics, the media and victim policies are all heavily intertwined.

Overall, what we see in these events is a combination of mediated stories, disgruntlement at the judiciary and a relatively new level of empathy even for potentially ‘less-ideal’ rape victims coming together to enhance public sympathy and cultural meaning surrounding this form of criminal victimisation.

\textbf{Victims of CSE}

A related but to some extent even more profound shift in the cultural landscape has taken place over recent years concerning CSE in general, and historic cases of sexual abuse in particular. This paper has already noted how in England and Wales the Savile cases have instilled within public consciousness a new impression of sex offenders and the nature of sexual victimisation itself. Similar examples can also be drawn from further afield, notably in the US with the ongoing criminal cases against comedian Bill Cosby.\textsuperscript{70} In the light of


\textsuperscript{68} [2016] EWHC 2768 (Admin)


such cases, long-held cultural views, epitomised by symbolic pronouncements such as ‘it was a different world then’, have clearly lost cultural significance, whereas complainants themselves have gained it. In the process, we have witnessed the development of new narratives of risk associated with the power and influence endowed to ‘celebrities’. Indeed, in many ways this represents an archetype example of a risk generated by modernity itself, as understood by Beck. Moreover, it is a risk that has forced not only the government and the criminal justice system to confront such victimisation, but also wider organisations including the NHS and the BBC, each of which having, to some extent, enabled abuses to continue.

Child sexual abuse was further catapulted into public prominence by the so-called CSE abuse scandal in the Yorkshire town of Rotherham. Here, in 2010, five men were found guilty of a series of sexual offences against girls as young as 12. A subsequent investigation by The Times newspaper reported that the exploitation of children in the area was much more widespread, and the Home Affairs Select Committee criticised South Yorkshire Police Force and Rotherham Metropolitan Borough Council for their handling and covering up of the abuse. On 10 September 2014, the Secretary of State for Communities and Local Government, Eric Pickles, announced that an independent investigation would be held into whether Rotherham Council covered up information about the abuse. Led by Louise Casey, former Victims’ Commissioner and now Director General of the government’s Troubled Families Programme, the investigation looked into the council’s governance, its services for children and young people, as well as its taxi and private hire licensing provisions. Casey’s investigation found that the CSE team was poorly directed, suffered from excessive caseloads, and did not share information. Following the report’s publication in February 2015, Pickles stated that the local authority was ‘not fit for purpose’ and announced proposals to remove control from the local councillors and give it to a team of five appointed commissioners, including one tasked specifically with looking at children’s services. After the report’s publication, files relating to a current councillor and a past councillor, identifying ‘a number of potentially criminal matters’, were passed to the National Crime Agency. The leader of the council, Paul Lakin, resigned, and members of the council cabinet also stood down.

The Rotherham case has been instrumental in helping to project CSE into public consciousness. Indeed, the very acronym ‘CSE’, unknown to a large proportion of the public only a few years ago, has now become widely utilised in the UK context, especially on social media. The cultural narrative of ‘cold’ cases, usually involving child victims who have since grown into adulthood, has provoked particular attention. In many cases the narrative around these crimes – owing to their long-ignored nature – has revolved around the longer-term and developing trauma elements of the victimisation. Thus, one sees the trauma experienced by such victims frequently in the surrounding public policy rhetoric. It is within this cultural context that the CPS in 2015 constituted a dedicated Child Abuse Review Panel capable of

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72 See above n 23 and n 24.
74 Louise Casey, Report of Inspection of Rotherham Metropolitan Borough Council (Department for Communities and Local Government 2015).
76 Ibid.
revisiting decisions to drop such prosecutions on the behest of victims themselves. The significant decision to muddy (to a limited degree) the highly engrained operating principle of the CPS that its decisions are not subject to appeal and only account for, rather than prioritise, the views of victims illustrates the significance of the victim capital now afforded to such victimisation. This example also raises another cultural tendency developed over recent years of an apparent increased public willingness to question official determinations of victimhood, an issue to be returned to later in this paper.

**Victims of terrorism**

One of the most prevalent and impactful cultural shifts in recent decades concerning the meanings attributed to a specific form of victimisation has been the new degree of victim capital associated with terrorism. Terrorism has of course achieved a central place in social-political discourse since at least the 2001 attacks on the World Trade Centre in New York. Indeed, the cultural impact of terrorism on public consciousness has had broader impacts beyond terrorist cases themselves. Thus, the recent drive for reform to the Criminal Injuries Compensation Scheme in England and Wales was partly spurred on by the dissatisfaction of victims and relatives of victims who were injured or killed in the London bombings of July 2005. As argued by Mythen and McGowan:

> It is precisely because the survivors of 7/7 were party to an attack that deeply offended the moral sensibilities of ‘ordinary people’ that the UK government decided to increase compensation paid to victims. What is at play here is essentially a moral judgement about degrees of suffering, gauged in terms of cultural proximity and perceived psychological impact rather than a decision determined solely by physiological disability. Thus, victims of terrorism are culturally constructed as more important and deserving of sympathy than victims of other violent crimes, such as corporate homicide. Put bluntly, some victims are more equal than others.

Mythen first raised these issues directly in relation to the development of cultural victimology in the following terms:

> From here, the cultural construction of the terrorist threat in the UK is utilised as a way of tapping into the institutional tendency to use the figurehead of the victim as a way of organising and regulating social activity. Centring on the shaping of ‘new terrorism’, the chapter elucidates how cultural institutions play a major role in defining crime risks and circulating dominant ideas about victimisation. The example of ‘new terrorism’ is used to bring into view current debates about the ‘risk society’ and the generation of a ‘culture of fear’. Under this increasingly mediatised construction of terrorism, the harm and suffering attributed to terrorist victims and their wider families has generated a sense of shared, cultural mourning (and trauma) around these kinds of crimes. From this, new victims’ spokespeople have emerged. Amongst the most prominent in England and Wales is the figure of Brendan Cox, husband to murdered MP Helen Joanne Cox, who was shot and stabbed outside her constituency office in June 2016 in Birstall. What followed was a

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78 Gabe Mythen and Will McGowan, ‘Cultural Victimology Revisited Synergies of Risk, Fear and Resilience’ in Wulkate (n 5) 465.
80 Duggan and Heap (n 49).
significant public outpouring of grief and dismay at the loss of ‘Jo’.\textsuperscript{81} Although the assailant was convicted of murder rather than of terrorist offences, the case quickly became labelled as one of ‘terrorism’ in accordance with its technical definition under s 1 of the Terrorism Act 2000. Brendan Cox’s extremely articulate and dignified responses (attributable in no small part to cultural capital) to the murder of his wife, delivered through the 24-hour news media (and, later, a book) became the target of great swathes of sympathy from a public who saw themselves as ‘standing alongside’ him. Jo Cox’s position as an MP and therefore ‘representative of the people’ helped to cement this impression. Brendan Cox himself identified the ‘public support’ as a ‘great help’ following the murder.\textsuperscript{82}

Significantly, the cultural approach to victimology would emphasise the sense of a public ‘bearing witness’ to this victimisation, especially thorough social media and 24-hour television coverage.\textsuperscript{83} Indeed, in other cases of victimisation around the world the point has been reached where people thousands of miles away can bear witness to crimes in real time through the social media updates of those involved on the ground. A prominent case is that of Bana al-Abed, the seven-year-old girl who tweeted updates in the last weeks of the siege of Aleppo in Syria during 2016.\textsuperscript{84} The identification of the ‘global community’ with this little girl they had never met and indeed had very little in common with was borne out by the significant concern expressed around the world when her tweets abruptly ceased. More recently, one can also look to the tweeting of images from inside the main chamber of the House of Commons in Westminster during the lock-down of MPs during the March 2017 terrorist attack.\textsuperscript{85} In this latter case, it is notable that these public accounts of victimisation went unchallenged despite being technically against the usually strict rules against taking and uploading photos from within the chamber.

As was the case with Jo Cox, the Westminster attack – also labelled as a ‘terrorist’ incident – was ‘witnessed’ live through media reporting within minutes of it occurring and in the next few days hundreds of mobile phone-captured images and videos of the events as they occurred (over the course of 82 seconds on one Wednesday afternoon) were constantly broadcast. The four people who were initially killed during the attack were identified quickly and their faces adorned posters and walls of remembrance around the country and at hastily arranged public vigils. The cultural portrayal was one of an attack not just on individuals but on ‘British democracy’.\textsuperscript{86} Out of the 50 people injured in the incident, it is notable that particular attention and public sympathy was directed at Andreea Cristea following the broadcast of a video of her being knocked off


\textsuperscript{83} McGarry and Walklate (n 6).


\textsuperscript{85} In which the perpetrator drove a car onto the pavement on Westminster Bridge outside the Houses of Parliament, killing many people and then stabbing and killing a police officer stationed at Parliament.

Westminster bridge into the River Thames during the attack. She died from multiple organ failure in hospital some days later to become the sixth fatality associated with the event, including the perpetrator himself. Again, through such means the public were able to bear witnesses to Cristea’s victimisation in particular and in a very direct way. Returning to Brendan Cox, his status as something of a voice of those affected directly by terrorism was borne out by his frequent media coverage after the Westminster incident, including during the 2017 general election, when all the major parties agreed to suspension of campaigning for one afternoon as a token of respect to the murdered MP.

The collective unity shown after terrorist incidents in different cities – the notion that the residents of those cities are collectively victimised – points to another prominent feature of cultural victimology: greater deference to the concept of mass victimisation. Previously, we have noted the impression of a city beset as a cultural victim epitomised by the boycott of The Sun newspaper in Liverpool following that paper’s reporting of the Hillsborough disaster. Indeed, in a recently published editorial one 30-year-old citizen of Liverpool, who was two years old at the time of the disaster and has no direct relation who was there, reflects on how he feels a sense of personal investment in the tragedy having ‘inherited Hillsborough’ growing up in the city. Elements of such collective victimisation passed down through generations can be seen in relation to London after both the terrorist bombings of 7 July 2005 and the March 2017 attacks, where, on both occasions, comments were made in the media around Londoners drawing on the resilience shown by older generations in that city who lived through the Blitz during World War II. Indeed, the same sense of collective cultural mourning is now present at an international level in these major cases, reflected by what has become a standardised ritual of national landmarks around the world being adorned in the colours of the ‘country’ most recently victimised, working down to individuals updating their social media pictures to reflect a sombre meme of support and/or defiance. Associated cultural artefacts have developed, including the ‘pray for London’ and ‘pray for Manchester’ meme, where the city is continuously replaced with the location of the most recent high-profile terrorist incident.

Victim culture and the criminal justice processes

The above examples illustrate both the culturally enthused and politicised nature of the victim issue in the twenty-first century, as well as, crucially, the practical influence such matters are exerting over public policy. As well as in the political realm, the advent of more culturally enthused notions of victimisation discussed above raise significant challenges for the criminal justice system, most notably when attempting to reconcile these seemingly ever-expanding and culturally charged understandings of victimisation with legal and procedural practicalities, especially within the still staunchly adversarial criminal justice system utilised in England and Wales. Such a meeting exposes a fundamental tension between the more constructivist approach outlined by cultural

87 Horrie and Chippindale (n 17).
88 Ciaran Varley, ‘I’ve Inherited Hillsborough . . . What It Means To a Scouser Like Me’ BBC News (14 April 2017) <http://www.bbc.co.uk/bbcthree/item/1a5e1066-bbh2-46f9-a1e-c03b05f6c127>.
victimologists and the more positivist understanding of crime, harm and victimisation usually favoured (some would say necessitated) by the legal system.

Delving deeper for a moment into the basic precepts of criminal justice systems (especially adversarial justice systems), it can be quickly gleaned that these systems are not for the most part geared around the notion of victimisation or trauma, including ‘vicarious trauma’, being realised and accepted over time. Indeed, the assumption of such systems is that the majority of evidence loses quality rather than improves through prolonged reflection. Witnesses’ memories fade and physical evidence degrades, which make it more difficult to prove a crime (or a victimisation) has occurred to the required high standard as a matter of law. Other factors come into play too, which are illustrated by an examination of domestic violence cases. Domestic violence has long been held as a particularly difficult form of prosecution to achieve, largely due to victims’ reluctance to come forward in the first place and, secondly, due to their perceived tendency to change their mind at the door of the courtroom and refuse to give evidence. Police and prosecutors in many jurisdictions have for several years emphasised the speedy progression of such cases precisely so the main (often only) evidence, the victim’s testimony, is not lost. Interestingly, the temporal component of victimisation therefore works in a different direction in these cases to the examples discussed earlier (such as child sexual abuse) in the sense that, rather than realising their victimisation over time, domestic violence victims might self-define themselves as such initially at the point of reporting to the police, but come to define themselves differently as time passes.

Nevertheless, from the victims’ perspective the cultural discussions outlined above strongly hint that it can matter less what they feel at the ‘initial’ point of victimisation or at the time of giving a statement to the police. More important to some victims may be their developed impressions and feelings about what has happened to them as they see things when the time comes to give evidence at trial. Moreover, others have previously discussed the concept of narrative and account-making in the experience of victimisation. McGarry and Walklate speak in terms of ‘testimony’. A fundamental division therefore exists between the desire of the criminal justice process for ‘evidence’ and the victim’s desire to ‘tell a story’, their understanding of which may have developed over time. In adversarial justice, by contrast, any ‘development’ of what a victim says at the time of trial versus what they said in their initial statement will be held up by the defence as evidence of inconsistency and therefore reduced credibility. In other words, the criminal justice system is specifically engineered to factor out the temporal development of victimisation as an experience. It is not just ‘new’ stories (in the sense that they are developed stories) that cause difficulties for the traditional criminal justice system. Such a system also has problems with old stories, even if those stories are not

94 Albeit, typically, only after such victimising has been ongoing for some time.
97 Mcgarry and Walklate (n 6).
subject to factual changes. This is most keenly felt with the difficulty in bringing so-called ‘cold cases’ to justice, even in the light of substantial changes in both the legal and cultural acceptance of various kinds of victimhood discussed. Furthermore, because the law as it was at the time of the commission of an offence will be the law applied when these cases come to trial, a situation develops where this applicable law is many steps behind this modern cultural, and even legal, narrative of victimisation.

In order to illustrate practically the conflicts that occur between the more culturally informed notions of victimisation discussed above and the legal practicalities/requirements of the criminal justice process, I will here turn to another highly publicised case in the UK, that of long-time children’s entertainer Rolf Harris. Another noted case arising in the light of the Savile revelations, entertainer Rolf Harris was convicted in 2014 on 12 counts of indecent assault. The crimes occurred across the 1960s, 1970s and 1980s against children between the age of 13 and 19. Harris was sentenced to five years and nine months in prison in accordance with sentencing practices in force at the time of the offences. The judge in the case expressly acknowledged both that the activities of Harris would now fall within the definition of more serious offences and that those ‘equivalent offences today attract significantly higher maximum sentences’ (with a potential maximum of 14 years in prison). Again, this reflects the difficulty of ensuring the law continues to reflect changes in culturally prevalent conceptions of victimisation.

In January 2017 Harris was back in court (although appearing via video-link) to face seven further indecent assault charges. The offences allegedly occurred between 1971 and 2004 and involved seven complainants who were aged between 12 and 27 at the time. Coming in the wake of the Savile revelations, both of Harris’ trials were cast very much in the same mould by the press. The narrative in each case was of a previously lauded children’s entertainer with a predatory side who had cunningly got away with serious crimes by abusing his celebrity status for decades. This itself has become a new ‘stereotypical’ narrative of victimhood added to the cultural lexicon over recent years. What is noteworthy in this case is that such points have been explicitly raised by Harris’ defence team. Hence, in his 2017 trial his barrister noted:

'It’s difficult to imagine a harder or faster or deeper fall from grace than that suffered by Rolf Harris.'

In the reporting of the 2017 case there are stark examples of the prosecution and defence each attempting to convince the jury of their position by respectively advocating or actively challenging this narrative. Hence, the prosecution in the case painted Harris very much in a way that recalls his previous trial and the case of Savile:

'It is striking that so many of the allegations involve Mr Harris getting away with a sly, quick grope right under the noses of people who did not notice... We suggest that Mr Harris was very good at getting away with it.'

Here then is a formulaic characterisation of a sly, ‘hiding in plain sight’ celebrity with a predatory side. The defence meanwhile was at pains to both challenge this narrative and, indeed, to imply that the cultural embeddedness of this ‘standard’ story was in fact a deeply prejudicial influence on the jury. Thus, the defence turned attention back to the

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100 Ibid
complainants in the case, arguing that the jury in the 2014 trial had ‘got it wrong’ and more so that a ‘media frenzy’ had made Harris ‘vulnerable to people making accusations against him’. The jury in this case ultimately returned verdicts of not guilty for three of the assaults, and were then discharged from deliberating on the further four counts.

Such arguments over the impact of the media attention focused on Harris’ trials continued in May 2017 when, at the same time as Harris was being released from prison following his original convictions, he was brought to trial again on the four charges from which the jury had been discharged in the previous proceedings. These were four counts of indecent assault against three teenagers between 1971 and 1983. In this trial, Harris’ defence team once again argued that one of the complainants in the case was simply jumping on the ‘compensation bandwagon’. In response, the complainant is reported to have said:

I absolutely have not . . . One of the reasons perhaps it was easier for me to tell police is because I had told people over the years.

We can note in this statement a reflection of developing victimhood over time through repeated remaking of a narrative. Ultimately, the jury in this case was unable to reach verdicts on all four charges. The key observation here is that in this ongoing set of cases we have two radically different narrative constructions around the crime of indecent assault. Harris is either a ‘Savile-esque’ villain portrayed as ‘fallen from grace’ (a term notable for emoting binary images of good and evil), or he is a victim (in relation to his last two trials) of the modern cultural acceptance of a set narrative concerning a stereotyped victimisation story. The key observation though is that we see in the second and third Harris trials that the cultural prevalence of a set narrative about celebrity abuse led to allegations being made which were not substantiated in court; in cultural terms the reality as defined by the criminal justice process did not always match the prevalent cultural narrative. As such, we might express concern here that an over-reliance on cultural narratives as a basis for assigning victim capital has the potential to breed injustices.

Discussion

The core implication of the above discussion is that those seeking to understanding victim policy in the contemporary context must become attuned to its dynamic, cultural meanings which are inevitably connected with this endeavour. We have seen how the way the public views and attributes meaning to specific cases can alter over time. Hence, the cultural meanings attributed to the ‘Hillsborough Disaster’ are infinitely more shaded and complex in 2017 than they were in 1989. Similar developments can be seen in relation to Madeleine McCann’s disappearance. In some cases, we see conceptually distinct and contradictory narrative constructions playing out on the public stage. Hence the Ched Evans case either represents a criminal justice system ‘gone wrong’ and setting dangerous ‘precedents’ for rape victims, on the one hand, or a triumph of common sense over exacting ‘political correctness’ on the other. Again, the narrative construction and the ‘meanings’ attributed to rape victims and their interactions with the criminal justice system have in this case been heavily influenced by media representations, the Ministry of Justice, the judiciary and others. In this we should note in particular the degree to which certain kinds of victims are now facilitated in making very public accounts of their experiences.
victimisation, notably victims of terrorism, and the cultural phenomena whereby vast swaths of the national and international community are seen as ‘standing alongside’ those victims. It is also important not to underestimate the significance of the criminal trial itself as the most publicised component of the criminal justice process. We know the majority of people still base much of their opinion of the justice system on knowledge obtained through media portrayals of the trial: both fictional and non-fictional. Through such means, cultural understandings and ‘meanings’ become attributed to victims and the criminal justice process which then, as we have seen, through thus acquiring victim capital, goes on to influence public policy.

Such public meanings attributed to different kinds of victims and victimisations are in constant flux and are subject to the influence of competing narratives delivered by a whole range of actors. In recent years, the rise and fall of said narratives have led to sometimes quite dramatic shifts in government policy. Clearly, victim reform cannot be separated from its wider socio-economic and cultural context. As such, it is submitted that understanding and challenging the cultural constructions and meanings attributed to victimisation have become core competencies for modern victimologists. Attributing this full pantheon of interacting cultural narratives concerning victimisation and their impact on public policy to a simple and static notion of ‘ideal’ or ‘politically advantageous’ victimhood, is no longer sufficient.

At the same time, the above discussion injects a note of caution when such cultural narratives surrounding victimisation are played out in conjunction with the formal criminal justice process. The Harris case exemplifies the complex questions that are raised both in terms of the apparent inability of the formal criminal justice mechanisms to adapt as quickly to the oscillating and culturally charged notions of victimisation as society in general and to what extent justice mechanisms, notably the standard of proof required to achieve convictions, guard against such narratives promoting ‘unjust’ outcomes. Of course, many commentators and victim advocates may consider that Harris ‘should’ have been convicted of his second round of charges and that it is still reflective of a lack of understanding or deference to victims’ perspectives that he was not. The complex question that arises from this is to what extent the justice system must guard against becoming hostage to the ‘fickle’ whims of victim culture and to what extent it must adapt itself to genuine advances in our understanding of what it means to be ‘victimised’.

Conclusions

This paper has sought to ground recent developments in public policy concerning victims of crime in England and Wales in what it sees as much broader and ongoing cultural developments concerning the meanings we as a society attach to the notion of ‘victimisation’. In so doing, I have examined whether, from such a perspective, there is evidence that a less positivistic, more culturally attuned notion of victimisation is being recognised in the criminal justice system itself and/or by the various stakeholders and policy actors charged with supporting victims of crime. What we have witnessed in England and Wales (and further afield) since 2010 is an escalation in the development of a socio-political climate in which various, sometimes contradictory, narratives of victimisation constituted by a wide range of official and unofficial actors compete for cultural primacy. When a form of victimisation does achieve such prevalence, this can spur policy actors to quick and decisive action. This culturally informed understanding of

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victim reform arguably offers a more sophisticated tool than the traditional critical or radical approaches, which tend to be based on static ideas of ‘ideal’ victimhood. Of course, it might be argued that cultural acceptance of various kinds of victimhood, and its manipulation by powerful actors, has arguably only served to create a new breed of ‘ideal’ victims. Further, we have noted that the challenges to the formal criminal justice process presented by such broader notions of victimhood raise significant questions – in terms of procedural fairness and justice values – which require much further scrutiny.
The participation of victims in the trial process

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Abstract

Directive 2012/29/EU, establishing minimum standards on the rights, support and protection of victims of crime, forms part of a package of measures designed to ensure that victims have the same basic level of rights throughout the EU regardless of their nationality or the location of the crime. One of the Directive’s innovations is a suite of measures designed to facilitate the participation of victims in the criminal process. The provisions include a right on the part of victims to be heard and a right to have their dignity protected when giving evidence.

Although there has been a gradual strengthening of victims’ rights at national and international level, the concept of participation remains poorly defined and practice varies widely across the EU. The issue is particularly controversial in common law systems where victims are not assigned any formal role in the trial process. The traditional adversarial trial, designed to accommodate the prosecution and the defence, poses a structural obstacle to reform. However, recognising the limits of EU competence to legislate in the area of criminal justice, the member states have been afforded a wide margin of appreciation when implementing the Directive’s provisions on participation.

Keywords: victims of crime; victim participation; adversarial trial; EU criminal law; special measures for witnesses; right to be heard

This article explores the implications of the emerging EU right to victim participation for the adversarial trial process. The focus is Ireland, a common law country and EU member state in which the conduct of criminal proceedings is shaped by the personal rights guarantees of a written constitution. Through analysis of the Directive and Ireland’s proposed legislation on point, the article considers in particular the evolving role of the victim as witness in the criminal trial.

Introduction

Recent decades have seen an increase in international cooperation and engagement in the field of criminal justice. The prevalence of transnational crimes such as terrorism, human trafficking and cybercrime has prompted governments to collaborate on common solutions. At the same time, the permeating effect of human rights has fostered the harmonisation of minimum standards across legal systems. These phenomena find particular expression in Europe and are reflected in a heightened emphasis on criminal
justice within the Council of Europe and the EU. It cannot be gainsaid that comparative criminal justice is exerting a discernible influence on the development of law and procedure at national level. However, the extent to which enhanced international engagement has fostered convergence among adversarial and inquisitorial systems remains a subject of debate.  

One area of criminal justice where the EU has played a heightened role is the crystallisation of legal standards on the position of victims of crime. Directive 2012/29/EU establishes minimum standards on the rights, support and protection of victims of crime and, as such, combines with other initiatives to ensure that ‘any victim can rely on the same basic level of rights, whatever their nationality and wherever in the EU the crime takes place’. The Directive houses a wide range of concrete measures that speak to the experience of victims in the national systems of criminal justice.

The Directive’s core policy objectives are to ensure that victims ‘receive appropriate information, support and protection and are able to participate in criminal proceedings’. Whereas the bulk of the provisions relate to support and protection, the present article explores the more ambiguous and controversial idea of victim participation. The discussion focuses on Ireland, a common law member state that has an independent constitutional tradition, and considers the likely impact of the Directive on the development of this aspect of Irish law and practice. Victim participation presents a particular challenge for the Irish legal system because victims do not play any formal part in the common law trial process. However, because there is considerable variation in the role of victims across the member states, the EU legislature has adopted a flexible stance on the transposition of national measures to give effect to the Directive’s minimum standards on participation.

The government’s proposed transposition of the Directive is embodied in the Criminal Justice (Victims of Crime) Bill 2016 and it draws on this latitude in drafting legislative measures that would enhance opportunities for victim participation without altering the essentials of the current system. The government published a General Scheme of a Bill in July 2015 and a formal Criminal Justice (Victims of Crime) Bill as late as 27 December 2016. The Directive has been in force since 16 November 2015 (the deadline for transposition) and, in principle, has direct effect in Ireland.

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3 Adopted by the European Parliament and Council on 25 October 2012, OJ L 325/57, 14/11/2012. The Directive replaces Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings: Directive, Art 30. A victim, for purposes of the Directive is a natural person who has suffered physical, psychological or other harm as a direct result of a crime. However, the term also extends to a family member of a person whose death was directly caused by a crime and where the family member has suffered harm as a result: Directive, Art 2(1)(a).


5 Directive, Art 1.

6 Directive, Art 27(1).

7 No 121 of 2016, sponsored by the Minister for Justice and Equality. The present article was written before the very recent enactment of the Bill as the Criminal Justice (Victim of Crime) Act 2017, No 28 of 2017. The legislation has not yet been commenced.

8 Ireland is not obliged to participate in EU instruments relating to criminal justice but exercised its right under the Lisbon Treaty to opt in to the Directive: Directive, Recital 70 (referencing Treaty of Lisbon, Protocol 21, Art 3.1).

It is essential to acknowledge at the outset that the Irish common law trial process is framed and operated by reference to the well-established rights of the defence under the Irish Constitution and international human rights law. It is a fundamental precept of our liberal democratic tradition that trials are conducted within a system calibrated to ensure that the accused is protected against the power of the state and the possibility of wrongful conviction. In particular, the Irish Constitution, the EU Charter and the European Convention on Human Rights (ECHR) expressly and robustly safeguard the right of an accused to a fair trial, a broad guarantee that shelters a panoply of substantive and procedural protections. Thus, any argument in favour of greater legal recognition of the role of victims in the process is necessarily complicated by the potential implications for the rights of the defence. As we shall see, the concept of victim participation has not yet crystallised into a clear-cut legal construct that would enable us to pinpoint with a degree of certainty where the individual’s rights and the state’s corresponding obligations begin and end. It is clear, nevertheless, that the role of the victim must co-exist with the position of the accused and, in particular, must evolve in a manner that respects the accused’s right to a fair trial.

The common law trial process

In contrast to the position in some other member states, the victim has no official role or standing in the Irish common law trial process. The victim is neither a party to criminal proceedings nor represented independently as a general rule, and she does not give evidence in the proceedings as of right. Indeed, the design of the common law trial as a two-party system (dominated by the roles of the prosecution and the defence) presents a substantial structural obstacle to the very concept of victim participation. Although the victim’s interests are presumptively aligned with the prosecution, the prosecution does not represent the victim in any formal sense. As the late Mr. Justice Carney observed:

Victims tend to instinctively feel that counsel appearing on behalf of the prosecution is ‘their barrister’ as they would put it. This is not the case and the

10 Constitution, Art 38(1); EU Charter, Art 47; ECHR, Art 6.
13 Maguire v Central Mental Hospital [1996] 3 IR 1; Application of Gallagher [1991] 1 IR 31; Re Ellis [1990] 2 IR 291. The exception in relation to legal representation is the Criminal Law (Rape) Act 1981, s 3, as amended by the Sex Offenders Act 2001, s 34, whereby a complainant in a trial for a sexual offence is entitled to legal representation where the defence seeks leave to cross-examine the complainant about her sexual history.
14 Doak (n 11) 244–5. It is salient to acknowledge, at the same time, that a jury’s perception of the role of the victim may transcend the law’s formal classification. In the reality of courtroom practice, the victim is no ordinary witness and, regardless of the outcome, her evidence may be influential if not decisive. Particularly in cases where the accused elects to testify, the victim’s evidentiary function may make her seem to be something close to a party in the mind of the finder of fact. In the absence of empirical research in Ireland on juror perception and adjudication, this is necessarily a matter of speculation.
prosecution team does not in any way represent the victim. There may be a coincidence of interest and there may not. There can be situations where the interests of the victims as they see them and the interests of the prosecution are diametrically opposed . . . 15

The prosecution is not obliged to afford the victim an evidentiary voice at trial. In practice of course, victims tend to participate under the umbrella of the prosecution’s case in the majority of trials and their evidence may have a decisive effect on the trial and verdict. But, as Mr Justice Carney has indicated, this does not in itself guarantee ‘a coincidence of interest’ between the victim and the prosecution in the denouement of the giving of evidence.

An extreme example of divergence of interest occurs where a dispute between the victim and the prosecution over the victim’s intended evidence escalates to the point where the court allows the prosecution to treat the victim as a hostile witness. 16 A marginally more benign possibility is that the prosecution may ask the court to admit the victim’s pre-trial statement in addition to, or in lieu of, testimony, on the ground that she is an uncooperative witness. 17 These circumstances may be highly exceptional, but they underscore the reality that the giving of evidence is not an autonomous prerogative, but rather is dependent upon the decisions of the parties and the court. Indeed, in theory a victim may be called to testify and compelled to appear even where she does not wish to give evidence or participate in the proceedings in any other way. 18

There are other procedural and practical limitations that may inhibit active participation at trial above and beyond the victim’s dependency on the prosecution. For example, the voice of the victim, like that of any witness, does not sound in a free-flowing narrative, but rather is constrained by the rituals of examination-in-chief and cross-examination. The posing of questions by counsel is inherently directive and at times invariably confrontational. The adversarial approach is assumed to serve the epistemic function of getting to the truth; the very term ‘examination’ reflects its capacity to probe a factual narrative by testing the witness’s account, highlighting matters that are contested between the parties and exposing inconsistencies in the witness’s version of events. The interactive exchange that forms the centre-piece of the process requires the witness to provide direct, specific responses to all manner of individual questions within possibly lengthy lines of questioning. The dialogue is buttressed by the broader impression that the exchange makes on the jury and the potentially powerful role of inference in adjudication on the facts.

For some time Irish law has operated some limited rules and procedures that indirectly govern the giving of evidence by victims. However, there is no dedicated statute or case law that expressly governs the evidentiary role of victims. Such rules and

### Notes

16 DPP v Cunningham [2007] IECCA 49; People (AG) v Taylor [1974] IR 97; People (AG) v Hannigan [1941] IR 252.
17 Criminal Justice Act 2006, s 16. Specifically, the prosecution must satisfy the court that the witness is refusing to testify or denies that she made a pre-trial statement or is offering testimony that materially contradicts a pre-trial statement.
18 Liz Heffernan (with Una Ní Raifeartaigh), Evidence in Criminal Trials (Bloomsbury Professional 2014) 18–20.

Prosecutorial influence may bear on victim participation in additional less obvious ways. Occasionally, the prosecution may be allowed to present a victim’s pre-trial statement as evidence and, of course, the victim’s perspective may be heard indirectly through the testimony of other witnesses who appear for the prosecution. Similarly, it is the task of the prosecution to secure the permission of the court where a victim may be eligible for a special evidentiary measure such as video-link.
procedures as exist regulate the giving of evidence not because the witness is a victim per se, but rather because her position is distinct in some other sense from that of witnesses in general. Special statutory measures have been extended to certain categories of witness, notably children and persons with intellectual disabilities and witnesses who are subjected to intimidation. The enactment of these special measures is a reflection of evolving societal attitudes regarding vulnerability coupled with a greater understanding of the trauma that testifying can cause. This may be particularly true where the individuals in question are not merely witnesses but also victims of the offences for which the accused is being tried. But where the witness is a victim, her eligibility for special measures turns not on her status as the injured party but rather on her designation within a category that attracts special measures. For example, a child or a person with an intellectual disability who is the alleged victim of a physical or sexual assault is eligible to give her evidence via video-link, through an intermediary or by means of a video-recorded statement because she is a child or a person with an intellectual disability. In the majority of cases, the fact that she is a victim is incidental and does not formally trigger the application of the special measure although her experience as a victim of the crime at issue may encourage the trial judge to exercise any discretion at the court’s disposal in favour of protection.

The adequacy of the statutory framework for vulnerable witnesses and the efficacy of the existing measures are highly debatable questions. The absence of a cohesive normative vision has stymied the development of a coherent policy agenda; legislative provision for special measures has been influenced by the seemingly interchangeable motives of supporting witnesses, safeguarding the integrity of the evidentiary process and prosecuting particular crimes. Thus, the enactment of measures and their gradual implementation in the courts has not been driven invariably by the policy of supporting vulnerable witnesses per se or respecting their fledgling right to be heard.

A prominent means whereby a victim’s voice can be heard in an Irish courtroom is the delivery of a victim impact statement at the sentencing of a convicted offender. A procedure traditionally exercised exceptionally at the discretion of the judge, the hearing of victim impact evidence was placed on a statutory footing over 20 years ago. Victim

19 Criminal Evidence Act 1992, Part III.
20 Criminal Justice Act 1999, s 39.
22 The psychological trauma that testifying in open court would cause to a victim of a violent or sexual offence, for example, is a possible ground on which a trial judge might exercise her statutory discretion to permit the use of video-link to support a witness: Criminal Evidence Act 1992, s 13(1)(b); O’D v DPP [2015] IECA 273; DPP v McManus [2011] I ECCA 32.
23 Criminal Evidence Act 1992, s 13(1)(a), s 14 and s 16(1)(b).
24 Ibid s 19.
26 For example, trial judges retain a discretion to caution juries about the risks of relying on a child’s testimony if it is uncorroborated, a legacy of the scepticism with which children’s evidence was approached by the historical common law: Criminal Evidence Act 1992, s 28.
27 Criminal Justice Act 1993, s 5. A new s 5, incorporating amendments, was substituted by the Criminal Procedure Act 2010, s 4.
impact statements facilitate participation by allowing the victim an opportunity to give a subjective narrative account of the effect that the offence has had on her. The statement also provides the court with an evidentiary basis on which to take the victim’s perspective into account when sentencing. Because the sentencing decision rests firmly in the hands of the judge and the evidence of victim impact is just one factor that the judge must take into account, the procedure is generally perceived as less controversial than victim participation at trial.  

At the same time, it is apposite to acknowledge that victim impact evidence is circumscribed under Irish law and practice in a number of respects. The first and most obvious limitation is that the opportunity to participate in this way arises only at sentencing and thus does not avail a victim where a case does not go to trial or results in the dismissal of the charges or the acquittal of the accused. Second, victim impact statements are confined under the existing law to sexual offences and violent offences and are not generally available in other proceedings. Third, a victim for purposes of impact evidence at sentencing is relatively narrowly defined as a person who has been harmed directly by the offence. Thus, a family member of a direct victim is entitled to make a statement only where the direct victim has died, is ill or is otherwise incapacitated as a result of the offence.

The Directive

The term ‘participation’ is not defined in the Directive and apparently symbolises a broad entitlement that encapsulates certain specific, limited rights. Chapter 3, which is styled ‘Participation in Criminal Proceedings’, comprises the following concrete entitlements: the right to be heard, rights in the event of a decision not to prosecute, the right to safeguards in the context of restorative justice services, the right to legal aid, the right to reimbursement of expenses, the right to the return of property, the right to a decision on compensation from the offender in the course of criminal proceedings, and the rights of victims resident in another member state. Participation, it seems, is not a self-standing, justiciable right but rather a broad canvas for these specific, limited entitlements. The variation in the nature and rigour of the rights listed in Chapter 3 represents an additional limitation. Some of the listed rights, such as the right to legal aid, apply only in those member states where the victims have ‘the status of parties to criminal proceedings’ and, even then, the conditions and procedures that govern access are stated to be a matter for national law. The Directive’s nomenclature is misleading in so far as important provisions relating to victim participation are housed not only in Chapter 3 but also in Chapter 4, which is titled ‘Protection of Victims and Recognition of Victims with Specific Protection Needs’ and which includes special measures that can and should be available to victims at trial. Finally, it is noteworthy that the Directive’s stipulations on the provision of information to victims are also relevant in so far as they facilitate both active and passive participation in the proceedings as a whole.

29 Directive, Article 10.
30 Directive, Article 11.
31 Directive, Article 12.
33 Directive, Article 14.
34 Directive, Article 15.
35 Directive, Article 16.
36 Directive, Article 17.
The concept of victim participation and its application within national legal systems varies across the EU. The equivocation of the EU legislature over the idea of harmonising disparate national approaches to victim participation is reflected in the ambiguous language employed in the Directive. Whereas the provisions on victim support are prescriptive for the most part, the legislative approach to participation is more descriptive and aspirational. Participation is an area where the Directive sets ‘minimum rules’ in the literal sense of the lowest common or accepted practice among the member states. Moreover, the EU legislature has afforded member states a wide margin of appreciation in the transposition of these provisions. It is seeking neither to standardise the national systems nor to substantially alter particular models of criminal justice. This is understandable given the limits of EU competence in the field of criminal justice and the sensitivities that would surround any radical reform by dint of mandatory harmonisation. A potential claw back on this minimalist approach is the statement in Recital 11 that the Directive’s minimum rules do not stifle the freedom of member states to afford victims more extensive recognition and protection. This allows for the possibility that the incremental augmentation of entitlements in member state practice may coalesce over time into a broader and more robust understanding of victim participation as a matter of national and European law.

The wide variation in the exercise of a victim’s right to participate from one member state to another and the relatively low bar on transposition are difficult to reconcile with the Directive’s ambitions for harmonisation and equal treatment for victims across the member states. It is and will remain the case that a victim’s entitlement to participate and her experience of participation will depend to a considerable extent on her geographical location within the EU. It is appropriate in this regard to de-couple participation from the other areas of the Directive – information, support and protection – where greater uniformity in national law and practice is a boon to convergence. Even so, it is possible to identify the emergence in the Directive of certain minimum, harmonising standards that are likely to characterise future practice in Ireland and elsewhere. The remainder of the present discussion will focus on two emerging participatory rights: first, a right on the part of a victim to be heard during the course of the trial process; and, second, a right to protection from harm caused by the process itself. These fledgling participatory rights are distinct but related and consequently are dealt with interchangeably in both the Directive and the Victims of Crime Bill.

The right to be heard

Arguably, the most significant dimension of victim participation under the Directive is the right to be heard, which Article 10 expressly guarantees in the following terms:

1. Member States shall ensure that victims may be heard during criminal proceedings and may provide evidence. Where a child victim is to be heard, due account shall be taken of the child’s age and maturity.

2. The procedural rules under which victims may be heard during criminal proceedings and may provide evidence shall be determined by national law.

On its face Article 10 implies a broad principle that might apply to victims of any crime and throughout the process. However, the interpretative waters surrounding the right to be heard are muddied by commentary in the supporting texts. For example, Recital 41

37 See generally Jackson and Summers (n 2) chs 2 and 3; Andrea Ryan, Towards a System of European Criminal Justice: The Problem of Admissibility of Evidence (Routledge 2014); Doak (n 12) 294.

states: ‘The right of victims to be heard should be considered to have been fulfilled where victims are permitted to make statements or explanations in writing.’ In contrast, the European Commission has adopted a more flexible stance:

... this right may range from basic rights to communicate with and supply evidence to a competent authority to more extensive rights such as a right to have evidence taken into account, the right to ensure that certain evidence is recorded, or the right to give evidence during the trial.\(^{39}\)

The overall thrust of the textual guidance is that the Directive’s minimum rules on victim participation will be met where member states are affording victims some opportunity to be heard at any stage in the criminal process. This interpretation is consistent with the understanding of the right under Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings which the Directive replaced.\(^{40}\) In that context, the Court of Justice recognised that member states enjoy considerable discretion when implementing mechanisms and procedures to give effect to the right.\(^{41}\) Thus, the right to be heard is more variable and less robust than a literal reading of Article 10 would suggest.

A notable aspect of Article 10 is the inclusion of an express obligation on member states to ensure that victims ‘may provide evidence’. Intriguing questions surround the nature and extent of a victim’s entitlement to provide evidence and the relationship between the concepts of being heard and providing evidence. The structure of Article 10(1) implies that a victim’s entitlement to provide evidence forms a single albeit significant strand within the broader right to be heard; giving evidence, in other words, constitutes one of the ways in which a victim may be heard. However, this interpretation risks rendering superfluous the reference to providing evidence. A plausible import of the conceptual distinction is simply its effect in ensuring that the information victims convey to national authorities plays a formal role in the process, namely, that it is included in the evidence that may influence adjudication on the offence with which the accused is charged.\(^{42}\) So read, the language relating to providing evidence may safeguard against national practices that pay lip service to the right to be heard.

### The right to protection

Contemporary research that has shone a light on the adversarial process casts some doubt on the ability of vulnerable witnesses, in particular, to provide complete and accurate evidence under these conditions.\(^{43}\) For the victim, as well as the parties and the court, furthering the epistemic goal of providing one’s ‘best evidence’ may be an important or even defining characteristic of participation. If we take the view that victim participation serves other purposes, such as personal dignity and rehabilitation, then the suitability of the adversarial approach becomes even more problematic. Putting aside testimony’s truth-seeking function, it is questionable whether examination is an appropriate much less ideal means of allowing any particular victim to participate in the sense of being heard during the trial phase. Respecting the dignity and well-being of a victim who testifies should be an imperative in all cases, but it is an acute concern when the nature of the offence or the

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40 OJ L 82/1, 22/3/2001. Art 3 stated: ‘Each Member State shall safeguard the possibility for victims to be heard during proceedings and to supply evidence.’
42 SN v Sweden (2004) 39 EHRR 13, para 45 (recognising that a person is a witness where she has given statements to the police that were used in evidence by the domestic courts).
43 See (n 21).
victim's personal circumstances compound the inherently difficult process of responding to confrontational questioning in open court.

One of the Directive's salutary advances is an express commitment to shielding victims and their family members from secondary and repeat victimisation, from intimidation, and from retaliation either by the alleged offender or more generally as a consequence of participating in criminal proceedings.\(^{44}\) Protection of a victim’s safety and dignity from these sources of harm is established as a matter of right under Article 18. Crucially, the concept of harm includes ‘the risk of emotional or psychological harm’ and the scope of protection extends to ‘the dignity of victims during questioning and when testifying’.\(^{45}\)

Article 18 is reinforced by the general duty in Article 1 to ‘ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner’, and it is buttressed by further specific recognition of the right to privacy in this context.\(^{46}\) The dignity right of a victim who gives evidence constitutes a weighty guarantee that operates hand-in-glove with the right to be heard and the right of victims with protection needs to special measures at trial. It also reflects a symbiosis between EU law and the ECHR in so far as the European Court of Human Rights has acknowledged the importance of protecting victims in particular trial contexts, notably proceedings for sexual offences, especially where the victim is a child.\(^{47}\) Drawing on the right to respect for personal integrity, the court has observed that:

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\ldots\text{criminal proceedings should be organised in such a way as to not to unjustifiably imperil the life, liberty or security of witnesses, and in particular those of victims called upon to testify, or their interests coming generally within the ambit of Article 8 of the Convention}.\(^{48}\)
\]

This challenging objective of safeguarding the dignity of victims who give evidence necessitates multi-faceted endeavour on the part of national authorities. Article 18 embodies a commitment to protect victims from the criminal justice system itself by ensuring that participation in criminal proceedings will not be a source of undue harm. The trauma that some victims experience as witnesses is widely acknowledged, but it has tended to be tolerated as an inevitable side-effect of the adversarial system of justice. For complainants of sexual offences, the distress engendered by the experience of testifying in court can be particularly acute. Thus, Article 18 is important for its express acknowledgment that the dignity of victims is a factor that lawmakers, courts and other decision-makers must take into account.

At the same time, the content of a dignity right for victims and the legal consequences that may flow from its recognition remain uncertain. The wording of Article 18 might be construed as imposing no more than a limited obligation on national authorities to ensure that some measures are available to protect the dignity of victims during questioning and when testifying. So read, the provision affords the victim an objective right to generic measures, if applicable, as opposed to a subjective right to protection from all forms of harm. The state might argue further that a right in the style of Article 18 is necessarily

\(^{44}\) Directive, Recitals 52 and 53.
\(^{45}\) See also DG Justice Guidance Document (n 4) 39–40. This is supported by Directive, Article 20, which affords certain specific safeguards including protection against unjustified delay in the conduct of interviews and an entitlement to be accompanied by a legal representative.
\(^{46}\) Directive, Article 21.
\(^{47}\) SN v Sweden (n 42) para 47; Vronchenko v Estonia, App no 59632/09, 18 July 2013 (First Section), para 56.
\(^{48}\) Y v Slovenia (2016) 62 EHRR 3, para 103.
qualified by considerations of reasonableness and practicality, caveats that resonate in the unpredictable setting of the criminal trial. At this stage in the evolution of European criminal justice, the significance of participatory rights remains subtle but heady. Article 18 may signal a shift in legal culture, but its realisation will necessitate the implementation of concrete measures and the allocation of resources in practice.

The right of a victim to protection during the course of a trial is necessarily circumscribed by the constitutional and human rights imperative of ensuring that the accused receives a fair trial. Article 18 is one of just a handful of provisions in the Directive that expressly acknowledges that the member states’ obligation shall operate ‘without prejudice to the rights of the defence’.49 This language serves as a valuable reminder that both the design and delivery of measures to protect the dignity of victims must respect the many and varied rights of the accused under the Irish Constitution and international human rights law. As the European Court of Human Rights has put it: ‘principles of fair trial require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims that are called upon to testify’.50 The implication is that special measures will be compatible with the ECHR only where they can be reconciled in principle and in practice with ‘the adequate and effective exercise of the rights of the defence’.51

Transposing participatory rights

Bearing in mind the structural obstacles to victim participation in the adversarial trial system and the robust constitutional commitment to safeguarding the rights of the defence, it is perhaps not surprising that the Irish government has eschewed dramatic reform and opted for a series of discrete proposals. A consequence is that the Victims of Crime Bill fails to replicate the Directive’s substance and symbolism on the core concepts of ‘participation’, ‘being heard’ and ‘dignity’. Indeed, the absence of these terms within the proposed statutory language underscores an essentially functionalist approach to transposition of this aspect of the Directive.

In Ireland, victims may have the opportunity to participate in criminal proceedings in three principal ways: reporting an alleged offence to the Gardaí, testifying at trial and, delivering a victim impact statement at sentencing. The Bill purports to strengthen each of these dimensions of victim participation through a bevy of specific statutory provisions, most of which take the form of amendments to existing legislation. These proposals are welcome in substance and, if enacted, will enhance the range and depth of opportunities for victims to participate in the trial process. However, the proposals are inhibited by their form because most of the intended amendments would extend the already complicated existing legislation and the overall effect is likely to hamper the accessibility of victims’ participatory rights.

An area where the proposed legislation is likely to influence the ability of victims to provide evidence relates to the giving of pre-trial statements to Gardaí. These statements serve a significant investigative function and, where a case goes to trial, they are disclosed to the other side and may assist both the parties and the witness herself when preparing for trial. Their use by counsel as a tool to test the credibility of the witness during cross-

49 The other provisions that contain this qualifying language are Art 7 (right to interpretation and translation), Art 20 (right to protection during criminal investigations) and Art 23 (right to protection during criminal proceedings). The premise that the rights in the Directive are without prejudice to the rights of the defence is arguably implicit throughout the Directive. See Directive, Recital 12.
50 Doorson v The Netherlands (1996) 22 EHRR 330, para 70.
51 SN v Sweden (n 42) para 47; Vronchenko v Estonia (n 42) para 56.
examination is long-standing and legendary.\textsuperscript{52} Moreover, in recent years, the Oireachtas has sanctioned the limited admission of witness statements as independent evidence by dint of exceptions to the rule against hearsay.\textsuperscript{53}

Against the backdrop of this trend, the Bill takes the noteworthy step of formalising the interaction between victims and the Gardaí during the investigative stage that leads to the gathering and recording of such evidence. Whereas Part 2 of the Bill delineates a comprehensive obligation on the part of the Gardaí to furnish victims with information relevant to the process, Part 3 contains a number of disparate provisions, for example, relating to the making of complaints by victims\textsuperscript{54} and the conduct of interviews between victims and the Gardaí.\textsuperscript{55} At the heart of the new regime is a requirement that the Gardaí assess each individual victim pursuant to s 14. The purpose of the assessment is to identify the protection needs, if any, of the victim\textsuperscript{56} and to ascertain whether and to what extent she might benefit from special measures during the investigation and/or at trial.\textsuperscript{57} It is salient to note that a special measure, whether theoretically applicable during the investigation or at trial, may be withheld on strikingly open-ended grounds such as potential prejudice to a criminal investigation, criminal proceedings or the administration of justice.\textsuperscript{58} This sweeping proviso could have the practical effect of reversing the benefits of an individual assessment and a direction for special measures.

The cornerstone of the Bill’s approach to participation is to extend the concept of special measures to victims who give evidence at trial. The suite of proposed provisions would authorise trial judges to apply the special measures contained in Part III of the Criminal Evidence Act 1992 to victims who have been identified as having special protection needs. Victims would not be entitled to special measures simply because they are victims, but rather on the basis of the trial judge’s determination that they are particularly vulnerable to secondary and repeat victimisation, intimidation and retaliation.\textsuperscript{59} Included in a list of mandatory matters that would inform the trial judge’s determination are the nature and circumstances of the offence and the personal characteristics of the victim.\textsuperscript{60}

Part III currently applies only where the accused is charged with one of a list of violent or sexual offences\textsuperscript{61} that are referred to collectively as ‘relevant offences’ under the Bill. Part III provides heightened protection to witnesses who are children or persons

\textsuperscript{52} Heffernan (n 18) 189–93.
\textsuperscript{53} Notably under Criminal Justice Act 2006, s 16, and Criminal Evidence Act 1992, s 16(1)(b).
\textsuperscript{54} The statement may be made orally or in writing, including by electronic means, and may be made by the victim or by another person: s 2(1). When making a complaint, the victim may be accompanied by a person of her choice including a legal representative. The Gardaí must furnish the victim with a written acknowledgment of the complaint: s 11.
\textsuperscript{55} For example, interviews should be held as soon as is practicable (s 13(1)(b)) and the victim may be accompanied by a person of her choosing including a legal representative (s 13(2)). In the case of victims with special protection needs, interviews should be conducted by specially trained personnel and in premises designed or adapted for that purpose (s 14(1)).
\textsuperscript{56} The statutory language is circular in so far as the term ‘specific protection need’ is defined as ‘a particular need of a victim which is identified by an assessment’: s 2(1).
\textsuperscript{57} Bill, s 14(1). ‘Secondary victimisation’ is defined as ‘victimisation that occurs indirectly through the response of institutions and individuals to the victim’: s 2(1).
\textsuperscript{58} Bill, s 16(2).
\textsuperscript{59} Bill, s 26(d) inserting a new s 14A into the Criminal Evidence Act 1992.
\textsuperscript{60} Bill, s 26(d) inserting a new s 14B into the Criminal Evidence Act 1992.
\textsuperscript{61} Criminal Evidence Act 1992, s 12 as amended.
with intellectual disabilities. There is a presumption in favour of these witnesses testifying through a live television link and they may be eligible for other measures, specifically: receiving questions through an intermediary; avoiding any need to identify the accused at trial; and giving evidence-in-chief by means of a pre-recorded statement. Other witnesses who give evidence in proceedings for violent or sexual offences are afforded far less protection at trial. Very exceptionally, and at the discretion of the trial judge, they may to testify via video-link and avoid having to make an in-court identification of the accused. However, they are not eligible for the other special measures under Part III that facilitate the giving of evidence by children or persons with intellectual disabilities. The broad area of special measures for vulnerable witnesses has recently been expanded through the enactment of the Criminal Law (Sexual Offences) Act 2017. The new provisions, which apply in violent and/or sexual offences, include provision for the use of screens in courtrooms and a prohibition on personal cross-examination by the defendant in certain circumstances.

The Bill purports to preserve these existing provisions that apply to witnesses in trials for relevant offences and, at the same time, to establish parallel streams within Part III that would govern special measures for victims. When combined with the recent amendments occasioned by the Criminal Law (Sexual Offences) Act 2017, the proposed rewriting of Part III creates a statutory maze that is likely to be difficult to navigate. Following enactment, the eligibility of a witness for any particular special measure will depend upon a series of distinctions based on the status and personal characteristics of the person giving evidence and the nature of the offence. However, the provisions in the Bill are not structured around these conceptual streams of eligibility: Part III houses distinct sections for each individual special measure and the Bill simply adds subsections to each existing section. To take one example, a person may be eligible for a particular special measure because she is a child and is testifying in respect of a relevant offence, or she may be eligible on the separate basis that she is a child and a victim of an offence. She could not be eligible simultaneously under both streams, although this may be a formalistic limitation because the level of protection is largely the same under the respective streams. The clarity and accessibility of the legislative text is undermined because each and every section must be carefully parsed in order to determine a person’s eligibility for special measures.

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62 The statutory term employed in s 19 is persons with ‘mental handicap’. The Bill, s 26(i), would substitute the term ‘mental disorder’ as defined by Criminal Justice Act 1993, s 5.
63 Criminal Evidence Act, s 13(1)(a) and s 19. Neither judges nor lawyers may wear wigs or gowns while either category of witness is testifying via video-link: Criminal Evidence Act, s 13(3).
64 Criminal Evidence Act, s 14 and s 19.
65 Criminal Evidence Act, s 18 and s 19.
66 Criminal Evidence Act, s 16(1)(b) and s 19. This particular measure is subject to statutory conditions including the availability of the witness at trial for purposes of cross-examination.
67 Criminal Evidence Act, s 13(1)(b). No statutory guidance is offered as to the factors that should or might influence the exercise of the trial judge’s discretion.
68 Criminal Evidence Act, s 18.
69 Some limited measures may apply under other statutes. For example, a witness may testify via video-link under Criminal Justice Act 1999, s 39, if the court is satisfied that she is being intimidated. A witness statement may be admissible in lieu of examination-in-chief under Criminal Justice Act 2001, s 16, if the witness refuses to testify, denies making the statement or gives testimony that is materially inconsistent with the statement.
70 Criminal Law (Sexual Offences) Act 2017, s 36, inserting a new s 14A and s 14C into the Criminal Evidence Act 1992. The sections in question have not entered into force.
So what does the proposed legislation promise in terms of victim participation at trial? With the leave of the court, a victim of any offence who has been identified as having special protection needs would be able to testify via video-link from a location outside the courtroom or from behind a screen or other similar device. In addition, a victim who testified through either medium could avoid having to make an in-court identification of the accused. A child victim or a victim with an intellectual disability could potentially avail of the additional special measures of receiving questions through an intermediary and giving evidence in-chief by means of a pre-trial statement. The Bill also proposes a prohibition on the wearing of wigs and gowns by judges and lawyers when a child victim or a victim with an intellectual disability is giving her evidence.

Unfortunately, whereas the Directive designates child victims as presumptively in need of special protection, it applies no corresponding assumption to victims with intellectual disabilities. The EU legislature has acknowledged that victims with disabilities should benefit from protection ‘on the same basis as others’, but, at the same time, disability is merely as one of several features that might necessitate the application of special measures during an investigation or at trial. That said, the Directive has the merit of a broad understanding of disability that contrasts with the narrow and more antiquated approach of the traditional Irish legislation. If lawyers and judges actively recognise disability as a factor influencing the use of special measures under the proposed regime, then a broader range of persons with disabilities may benefit in practice than under existing legislation. However, it would be preferable if the Bill were amended to fill this procedural lacuna by including a presumption that a victim with intellectual disabilities has special protection needs and consequently would benefit from special measures.

The final way in which the Bill seeks to enhance victim participation is by expanding the current regime governing victim impact evidence at sentencing. Section 27 purports to build on the existing statutory foundation by extending the facility of victim impact statements beyond the current contexts of sexual or violent offences. The result is that the direct victim of any offence would have the option of delivering a statement to the sentencing court, a move that could result in victim evidence becoming a routine feature of sentencing across the gamut of criminal practice. The Bill does not disturb the other features of the existing legislation such as the possibility of a family member delivering a statement in certain defined circumstances and the entitlement of some victims, notably a child or a person with an intellectual disability, being heard via video-link.

It is salient to note that participation through victim impact evidence is not mandatory; the statutory requirement that the victim apply to the court in order to be heard reflects the reality that not every victim will wish to give evidence. The procedure assumes that the victim is aware of her right to participate and is ready and able to make the necessary application. The emphasis within the EU Directive and the Bill on the

71 Bill, s 26(b), inserting a new s 13(1A) into the Criminal Evidence Act 1992.
72 Bill, s 26(d), inserting a new s 14A(2)(b) into the Criminal Evidence Act 1992.
73 Bill, s 26(h), amending s 18 of the Criminal Evidence Act 1992.
74 Bill, s 26(c), inserting a new s 14(1A) into the Criminal Evidence Act 1992.
75 Bill, s 26(f), amending s 16(1)(b)(i) of the Criminal Evidence Act 1992.
76 Bill, s 26(d) inserting a new s 14C into the Criminal Evidence Act 1992.
77 Directive, Recital 15.
78 Directive, Recital 56.
79 Criminal Justice Act 1993, s 5 as amended.
80 Bacik et al (n 12) 44.
provision of information to victims may bolster the position of the victim in this regard. Under s 6, one of the items of information of which the Gardaí are obliged to inform a victim on first contact is ‘a victim’s right to give evidence or make submissions under section 5 of the Act of 1993’.

Concluding remarks

In Ireland, victims may participate in criminal proceedings in various ways, notably reporting an alleged offence, testifying at trial and delivering a victim impact statement at sentencing. These indicia of participation tend to be viewed as disparate aspects of the process and each is subject to its own inherent limitations. The Directive, and its transposition in the form of primary legislation, signals an increasing need to perceive criminal justice as a seamless process that spans the investigative, trial and post-trial phases. The overarching principle is that victims should be treated throughout the process ‘in a respectful, sensitive, tailored, professional and non-discriminatory manner’ by the relevant authorities. Indeed, this principle should govern state interaction with all individuals involved in the process including persons suspected of crime or charged with offences and witnesses other than victims who report wrongdoing or provide evidence.

The inclusion within the Directive of a right to participate invites reflection on the role of the victim in criminal justice from the standpoint of theory, policy and practice. The co-existence of the emerging participatory rights of victims and the established rights of the defence is a complex issue that will necessitate careful, considered judicial development. The principle that a person who is accused of crime is entitled to a trial that is fair overall is a mainstay in our systems of criminal justice and human rights. At the same time, the notion of ‘fairness’ has evolved to a degree in tandem with developments in societal understanding of the experience of victims and other witnesses who participate in the trial process. This trend finds expression, for example, in the heightened profile of special measures at trial and a corresponding diminution in the prevalence of confrontation between the accused and the victim in open court. The Directive and the Bill take up their place at a sub-constitutional level, and for their part reflect an emerging fluidity within the rights equilibrium.

The common law trial process has become a highly regulated enterprise and, as the changes discussed in this article suggest, trial judges will be called upon to play an expanded role in supervising the presentation of evidence. The time is ripe in Ireland to explore comparative common law experience and consider, in particular, the development of pre-trial protocols that might constructively assist all actors in preparing for trial. Reconciling rights and protecting distinct interests requires a delicate balance that should be informed by ongoing policy debate and close monitoring of developments in practice.

81 Bill, s 6(1)(j). The Gardaí are further obliged, under s 7, to inform a victim of her right to request information at various stages of the criminal process including the date of sentencing: Bill, s 7(2)(q)(i). Similarly, a victim is entitled to request a copy of any victim impact statement or submission she has made, s 7(2)(b)(ii).

82 Directive, Art 1 and Recital 9.
The victim in the Irish criminal process: a journey from dispossession towards partial repossession

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Abstract

This article has sought to examine the criminal justice system’s interactions with victims of crime. It is a relationship which has changed irrevocably over time. A significant discontinuity occurred in the nineteenth century when a new architecture of criminal and penal semiotics slowly emerged. An institutional way of knowing interpersonal conflict crystallised, one which reified system relations over personal experiences. It also emphasised new ideals and values such as proportionality, legalism, procedural rationality, equality and uniformity. New commitments, discourses and practices came to the fore in the criminal justice network. In modernity, the problem of criminal wrongdoing became a rationalised domain of action, a site which actively distrusted and excluded ‘non-objective’ truth claims. The state, the law, the accused and the public interest became the principal claim-makers within this institutional and normative arrangement, an arrangement which would dominate criminal and penal relations for the next 150 years. In the last 40 years, the victim has slowly re-emerged as a stakeholder in the criminal process.

Keywords: victims; state; accused; crime victimology; conscious raising

This article will examine the changing role of victims of crime in the Irish criminal process. Their status has not remained static over time. Rather it has been subject to a series of ruptures which have dramatically altered their standing. Under the pre-modern exculpatory justice system which existed in the seventeenth and eighteenth centuries, wrongdoing was understood as a personal altercation, victims were given primacy as decision-makers. Their ownership of the alleged wrongs meant that their voices – built largely upon subjective experiences – carried a powerful justificatory force. By the mid-nineteenth century, however, the justice system was steadfastly disassociating itself from local and personal determinants. It sought instead to become a more depersonalised, rule-governed affair with the state at the centre. Conflicts were no longer viewed as the property of the parties most directly affected. New imperatives were foregrounded within the criminal justice system, particularly those that emphasised procedure, the ideological neutrality and rationality of the process, and its objectivated nature. In the last 40 years, the criminal justice system has again been changing, moving away from the operational self-enclosure that dominated institutional arrangements under a state-accused model of justice.

The purpose of this article is to trace the epistemic shifts in the ways in which the justice system has depicted and signified the victim. Engaging in such a wide-ranging historical analysis of the institutional status of the victim is of course fraught with dangers. Lawyers who attempt to understand criminal legal method through the prism of
history often fall into the fallacy of creating linear lines of development between the past and the present. Such lines facilitate neat reassuring narratives of continuity, but they often make for poor, uncritical history. Tracing such changes also necessarily involves sweeping generalisations about changes in social life and in the criminal legal structure. Searching for patterns and trajectories of the *Gemeinschaft* and *Gesellschaft* variety can in many instances do violence to historically specific particulars and phenomena that do not fit with the selective frameworks and periodisations adopted. Justice, like most other routine phenomena, has a fluid rhythm that does not easily or naturally lend itself to partition, compartmentalisation and capacious reasoning or inquiry. Formulating concrete systems of justice across 300 years of history necessarily results in some factuality being ignored or under emphasised.

There are still very good reasons for engaging in such an exercise as long as it is remembered that some local particulars might not unerringly conform with the generalised patterns produced. In particular, it can help us to identify and consider different trends, tendencies and currents of reflection that broadly comprise patterns of action vis-à-vis those who are victims of crime. It can therefore serve a very useful heuristic purpose. The intention is that by highlighting the broad historical changes in the assumptions and realities that governed victim relations under pre-modern exculpatory and modern inculpatory models of justice, it will help to amplify the dynamics and principles that shape and determine our current arrangements.

**The victim as the principal claim-maker**

The justice system that existed in Britain and Ireland in the seventeenth and eighteenth centuries was exculpatory and localised in nature. The ‘paradigm of prosecution’ was the victim of the crime. Victims were the principal investigators of crime and the key decision-makers in the prosecution process. As Bentham disapprovingly noted:

>The law gives to the party injured, or rather to every prosecutor, a partial power of pardon . . . in giving him the choice of the kind of action he will commence . . . The lot of the offender depends not on the gravity of his offence but on . . . the injured party . . . The judge is a puppet in the hands of any prosecutor.

Victims could elect not to invoke the law and let the criminal act go unpunished; they could engage in a personal settlement or private retribution; or, they could prosecute, but shape the severity of any criminal charge (capital or non-capital) through their interpretation of the facts. Conflicts remained the property of the parties personally affected and this often involved recourse to informal dispute settlement:

>formal prosecution was the exception; negotiation and informal sanction the norm. The major courts had no monopoly over punitive sanctions in the eighteenth century. Indeed, they usually had to content themselves with

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processing a few scraps and particularly tough morsels which those involved in informal sanctioning processes threw their way or spat out as indigestible, and as therefore requiring the tougher teeth of the criminal law.\(^7\)

If victims did proceed with a prosecution, it was their energy, for the most part, that carried the case through the various prosecution stages. Victims engaged in the fact-finding, gathered witnesses, prepared cases, presented evidence in court as examiners-in-chief, and bore the costs involved.\(^8\) When formal justice was invoked, which was the exception rather than the rule, it relied heavily on victim and popular participation. Formal resolution of grievance remained very much the property of individual victims or associations of victims who monopolised the investigative and prosecutorial functions. Victims could thus assert primacy as claims-makers. Their ownership of the alleged wrongs had a powerful justificatory force, which ensured that their subjective experiences and personal preferences were received relatively unfiltered, and carried meaningful weight. The criminal trial itself was a personal, largely unregulated altercation with the working assumption that the accused was, in the absence of exculpation, guilty. This ensured that the accused was at all times an active, participating trial actor, a vital ‘testimonial resource’ whose self-exculpatory narrative was closely scrutinised by the judge and local jury in determining culpability. The degree of culpability itself was heavily shaped by moral and local knowledge considerations. Moreover, few restrictions existed on what could be admitted in trial. Most evidentiary facts which had broad probative value as regards the offence committed were heard in open court and required defence rebuttal regardless of their prejudicial effect on the accused.

**A state-accused model of justice**

A significant discontinuity occurred in the nineteenth century when a new architecture of criminal and penal semiotics slowly emerged. An institutional way of knowing interpersonal conflict crystallised, one which reified system relations over personal experiences. It also emphasised new ideals and values such as proportionality, legalism, procedural rationality, equality and uniformity. New commitments, discourses and practices came to the fore in the criminal justice network. Prosecutorial practices, for example, began to focus on more analytic considerations such as the accused’s conduct rather than his or her character. More mechanical determinants (such as rulebook formalism) took priority over contextual experiences. The state came to dominate the crime conflict, positioning itself as the only legitimate means of coercion. Monopolisation of this kind recalibrated the circuits of governance, resulting inter alia in the construction of l’égalité des armes to rebalance dissymmetries in power relations.

The ‘incidence of interruptions’\(^9\) were manifold. To begin with, solutions for the problems of crime and violence were increasingly rooted through central authority mechanisms. The era of victim justice as ‘accommodation’ and theatre was at an end. Conflicts were no longer viewed as the property of the parties most directly affected. Previously strong stakeholder interests such as those of victims and the local community were gradually colonised in the course of the nineteenth century by a state apparatus which acted for rather than with the public. Subjects increasingly ceded ‘their authorisations to use coercion to a legal authority that monopolises the means of legitimate coercion and if necessary employs these means on their behalf’\(^10\).


\(^9\) Michel Foucault, *The Archaeology of Knowledge* (Tavistock) 3.

In monopolising the investigative and prosecutorial functions, the state obviously imbalanced the equilibrium in power relations. Though constituted as a rational being, the accused in such circumstances was now seen as vulnerable in that he or she was pitted against the unlimited resources of the state. In this context, it is not surprising that a whole corpus of exclusionary rules and fairness of procedure rights emerged to ensure that the accused was afforded the best possible defence against unfair prosecution and punishment. This was greatly helped by the lawyerisation of the trial process. Since, and to paraphrase Stephen, the state was so much stronger than the individual citizen, and was capable of inflicting so very much more harm on the individual than the individual could inflict upon society, it could afford ‘to be generous’.\(^\text{11}\) The local victim justice system thus increasingly yielded to a Leviathan criminal justice system that was governed by a new set of commitments, priorities and policy choices.

The prosecutorial system increasingly came to resemble an ‘obstacle course’ where ‘each of its successive stages is designed to present formidable impediments to carrying the accused any further along in the process’.\(^\text{12}\) Common law and statutory rules were introduced to safeguard those accused of crime. In time, they also increasingly became fused with constitutional jurisprudence and, more recently, with human rights jurisprudence. The institutionalised nature of these accused rights has ensured that they cannot be easily ‘trumped’ for collective policy reasons such as security and public protection.\(^\text{13}\) They remain very much part of the topography in the criminal process, carrying a threshold weight ‘which the government is required to respect case by case, decision by decision’.\(^\text{14}\)

Moreover, and very much in keeping with the rationalising impulse of the age, the personal knowledge and benevolence of the exculpatory model of justice seemed increasingly arbitrary and overly discretionary. The goal became to ‘rout the personal from the courtroom’\(^\text{15}\) through establishing a new administrative machinery for investigating, prosecuting, trying and sentencing for criminal wrongdoing. Gradually the trial shifted from an intense local ‘kind of morality play’\(^\text{16}\) to a more structured affair which relied on ideals such as proportionality, reason, equality and uniformity, where the focus was on the actions rather than the character of the accused. Thus, over the course of the nineteenth century the criminal trial jettisoned its amateur, local, personal and unstructured tendencies. As Wiener suggested:

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\text{[R]} \text{emoving the personal element from the workings of the law would, it was hoped, lower the emotional intensity of the subject’s relationship to the law. In the place of the metaphors of the family, which encouraged both unpredictability and excessive release of the passions by plaintiffs and accused, the law and its courts were to be imbued with the character of a market, a meeting place of self-contained, self-disciplining individuals rationally pursuing their own interests under the impersonal arbitration and discipline of the unvarying rules of law. Passionate contest was to be placed in the professional hands of lawyers, for whom passion was an instrument of calculation, and}
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confined by the rules of law, presenting no danger to society. Out of their contest, as out of a noisy but rule-governed marketplace or stock exchange, justice would emerge. 17

This deep commitment to the reception and observation of unmediated viva voce testimony was grounded in the need to uphold the integrity of the adjudicative process and minimise the risk of misdecision. 18

This new institutional pattern quickly transcended the victim’s interaction with the crime conflict and reshaped how it was presented, addressed, legitimised and concluded. Within such a depersonalised, bureaucratised system, the victim was displaced, confined largely to the bit-part role of reporting crime and of adducing evidence in court as a witness, if needed at all. The victim’s space for negotiation and participation in pursuing his or her own interests was thus dismantled by an increasingly State/accused-centred logic of action which sought to institutionalise the politics of pain and disturbing events within an ‘iron cage’. Bureaucracy, as Weber informs us, ‘develops the more perfectly’, the more it is ‘dehumanized, the more completely it succeeds in eliminating from official business love, hatred, all purely personal, irrational, and emotional elements’. 19 The functional and impersonal imperatives of a modern criminal justice apparatus did not require the establishment of ‘contextual’ relations with either the accused or the victim. Instead, it was increasingly organised around a constitutional state and the ‘institutionalised fiction’ of the ‘public sphere as the central principle of its organisation’, 20 both of which helped to promote the sense of ‘civilized association’ and an ‘objectivated’ criminal process. 21 The adversarial criminal trial – involving ‘a contest morphology’ that included oral presentation of evidence, lawyer-led questioning, cross-examination by counsel, relative ‘judicial passivity’ during the guilt-determining phase of the trial, and informational sources secured by both the prosecution and defence – exemplified this objective representation. 22

From being a cornerstone in the regulation of relations concerning the conflict, victims increasingly found their individual experiences (such a vital currency in the pursuit of justice in the pre-modern era) assimilated into general group will – the public interest. The latter was validated through the institutional architecture of a criminal justice system, whereas the former was increasingly viewed as invalid knowledge given its partiality, subjectivity, emotiveness and unconstrained dimensions, all of which were filtered out by the operations of a justice system. In the course of the nineteenth century, the individual victim’s experience was increasingly rendered as part of the fiction of the collective public interest and packaged and presented in institutional terms. The medium of the public interest itself – though represented as a neutral space for reasoning and dialogue – emphasised the values and outlooks of dominant interest groups within the criminal process, ensuring that there would be little alteration in the status quo.

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This marked the shift from victim-mediated justice to bureaucratised, state/accused mediated justice. Crime therefore was no longer viewed as a personal altercation, but a phenomenon that required an institutional response demarcated from emotive, subjective and personal references. In creating this ‘buffer zone between system and person [by establishing a] zone of indifference’ between the lived ontological experiences of the crime conflict and its effective administration, new imperatives could be foregrounded, particularly those that emphasised procedure, the ideological neutrality and rationality of the process, and its objectivated, reasoned nature. The elevation of these imperatives to a ‘position of authority’ sounded the death knell for emotional and subjective forms of knowledge which were increasingly considered to be ‘abnormal, dangerous, [and] half-animal’.

The ontological dimensions of crime – so personal and subjective – were increasingly institutionalised and systematised. The depersonalisation of these experiences occurred via the filtering mechanism of the ‘public interest’. In modernity, the problem of criminal wrongdoing became a rationalised domain of action, a site which actively distrusted and excluded ‘non-objective’ truth claims. The state, the law, the accused and the public interest became the principal claims-makers within this institutional and normative arrangement, an arrangement which would dominate criminal and penal relations for the next 150 years. This newly established configuration suppressed the emotive and personal elements of crime (at least as far as the victim was concerned). It did so by denying ownership claims to victims over the conflict and by removing any pathways which permitted the possibility of personal interest. ‘From now on’, as Nietzsche notes about interpretation of criminal wrongdoing in modernity, ‘the eye is trained for an increasingly impersonal evaluation of the deed, and this includes even the eye of the injured party’. Facticity, objectivity, rationality, and neutrality – coalescing with the filtering fiction of the ‘public interest’ – facilitated this drive from personal to institutional referents. Victims were displaced, rendered neutral by the hegemonic impulses of a state/accused logic of action. They became non-subjects, disenfranchised and dispossessed of all legal and claims rights. They were no longer recognised (or recognisable) in the justice system, their non-status and non-presence legitimating features of the modern institutional process.

In addition, the focus of criminal law moved to a more formalised conception of criminal liability. Hierarchy, status, patronage, absolute sovereignty, and moral and discretionary imperatives had no place under this rule of law vista which advocated certainty, permanency, coherency, systematic application and a ‘strictly professional legal logic’. Veritas non auctoritas facit legem (truth not authority makes law) became the driving impulse. The private, personal and negotiable elements of the exculpatory process were thus increasingly dismantled by more bureaucratic, rational impulses. As Habermas noted: ‘[t]he positivization, legalization, and formalization of law meant that the validity of law can no longer feed off the taken-for-granted authority of moral traditions’. Instead, its validity would be based on the systematisation of doctrinal propositions and the emphasis on legal formalism and professional juridical input. The positivization and densification of law also helped to steer the conflict away from local and lay participation.

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24 Frederich Nietzsche, The Will to Power: Selections from the Notebooks of the 1880s (Penguin 2017 repr) 225.
26 See Weber (n 19) 885; Habermas (n 20) 53.
27 King (n 3) 25.
28 See Habermas (n 21) 260.
29 Ibid 256.
The initial anchoring point of this more rationalised approach to criminal law was the ‘reasonable man’, a responsible, rational, self-disciplining subject who, it was thought, was capable of being deterred by a properly proscribed system of criminal laws and a tariff of enforced sanctions.\(^3^0\) This more codified approach to law also impacted on the image of the human subject who increasingly came to be constituted as a rational, autonomous and self-governing being. This is brilliantly captured by Wiener who noted:\(^3^1\)

The ideal of the responsible individual came to stand ever more at the centre of the law. Its administration was overhauled to better embody the assumption that the members of the general public were to be considered more rational and responsible than they had been hitherto . . . A crucial supposition underlying early Victorian law reform was that the most urgent need was to make people self-governing and that the best way to do so was to hold them, sternly and unblinkingly, responsible for the consequences of their actions. Thus in the course of the early to mid-nineteenth century the accused was gradually constructed as an abstract juridical subject who was free and equal, and capable of logically determining what was in his or her best interests. It was accordingly his or her constitution – rather than situation – that became a key legal battleground.

This drift towards the creation of an asocial subject also had important consequences in terms of the penal disposal of convicted offenders. In keeping with the ideology of individualism, rationality and self-governance, judicial sentencing in the nineteenth century increasingly embodied a policy of deterrence and retribution, the former ‘to deny the utility of crime, the latter to reconstitute the social contract after breach.’\(^3^2\) The discourse of individualism and moralisation held that criminal acts – like actions in any other realm where the ideology of economic liberalism could permeate – were the outcome of rational choice, calculation and volition. Such an archetype of sentencing is premised on presumed rationality: ‘thus conceived, criminal law becomes a wholly abstract construction, taking cognisance only of the crime, while ignoring the criminal . . . Crime becomes a legal abstraction, after the manner of a geometrical construction or an algebraic formula’.\(^3^3\) In effect, the system of sentencing created in the mid-nineteenth century focused on the materiality of the crime ‘where the subjective criminality of the agent was determined by the objective criminality of the deed’, and where the system of disposal for the judiciary rested on ‘crystallised’ and mechanical punishments.\(^3^4\) David Garland neatly encapsulated the asocial juridical framework which emerged in the nineteenth century when he suggested:\(^3^5\)

The offender is defined as a legal subject, a citizen inscribed with rights and duties, entitled to equal treatment before the law. The State which punishes does so by contractual right in accordance with the terms of a political agreement. Its power to punish has its source in the offender’s action – it is the agreed consequences of a contractual breach. The state has here no intrinsic or superior right. It meets the citizen on terms of equality and must not encroach upon his or her rights, person or liberty except in circumstances which are rigorously and


\(^{31}\) Wiener (n 17) 54–5.


\(^{33}\) Raymond Saleilles, The Individualisation of Punishment (Patterson Smith 1968 repr) 43.

\(^{34}\) Ibid.

\(^{35}\) David Garland, Punishment and Welfare (Gower 1985) 18.
politically determined in advance – *nulla poena sine lege.* In this penal vision we meet the ideology of the minimal legal state, the liberal dream, guardian of the free market and the social contract.

In order to complete the modern picture, there is one further strand that must be traced – the need to individuate justice. Sentencing in the late nineteenth and early twentieth century gradually extricated itself from the assumptions and commitments underpinning mid-nineteenth century sentencing practices (individualism, the rationality of offenders and a focus on the proximal conditions of crime) to become a more ‘knowledgeable form of regulation’ (with an emphasis on individualisation, the distal conditions of crime, and the creation of a plethora of ‘non-equivalent’ penal disposals). Alongside the ‘generous’ – and mostly already won – procedural safeguards provided to the accused at investigation and trial stages, a person guilty of a crime became entitled at conviction stage to have his or her individual mitigating circumstances factored into any decision about penal disposal. Justice, it was reckoned, could not be satisfied by ‘any penalty which . . . [had] been exactly fixed beforehand’; punishment, from now on, had to ‘be fitted to the criminal rather than to the crime’.  

The all-powerful state had again decided to be generous and noble with its weak enemies as it gradually recoiled from the laissez-faire individualism and the postulate of free will which had been key policy ingredients of sentencing and the social contract for much of the nineteenth century.

A state-accused logic of action thus came to cast a long shadow over criminal process relations in the nineteenth and twentieth centuries. It defined the accused as the primary (exclusive) rights-bearer, with institutional practice heavily coordinated in accordance with this feature. Criminal wrongdoing was increasingly reconstituted as a public matter to be resolved almost exclusively through the prosecution process. Localism and heterogeneity, elements cherished under the old order, were actively jettisoned under this modern arrangement. This must be seen as part of a drive to institutionalise interpersonal conflicts, uncoupling them from everyday practices in lifeworld contexts. A state-accused logic of action came to constitute and demarcate the modern criminal process, mediating all validity claims in respect of the conflict. Criminal wrongdoing became a rationalised domain of action, measured in part by its capacity to filter out non-objective truth claims. Victims who participated in the modern inculpatory process did so as legal subjects, with little or no powers to make decisions about outcomes.

The state could draw upon a centralised police force and a public prosecutor’s office which would gather and present evidence in the public interest. As a consequence, in part, of this process of state monopolisation, a discourse and practice of liberal legalism emerged (emphasising the universality, liberty and sameness of the individual person) to rebalance power relations in the justice arena. For the accused, this meant that the justice network was restructured to incorporate a clearer and more substantive body of due process rights that would guarantee, as far as practicable, both substantive and procedural justice. This ensured that the dynamic of the courtroom altered so that the trial gaze re-orientated itself to focus almost exclusively on the prosecution case. Even when convicted of the crime, the offender was still protected from the state – exercising the will of the people – through the entitlement of having a proportionate punishment imposed, one that accorded both with the crime committed and, in time, any relevant individual circumstances.

The reification of these state-accused relations had the effect of excluding the victim, his or her absentee status quickly acquiring a relative permanence, ‘fixity’ and
immovability. His or her experiences were rooted exclusively through this new institutional framework, ensuring that they were interpreted and understood around an axis that focused on the state, the law, the public interest and the accused. The inculpatory model of justice that emerged zealously neutralised any emotive or personal dimensions to the crime by distilling them into a single, rationally knowable, closed worldview – the public interest. The victim increasingly therefore became a ‘non-person in a Kafka play’, unable to raise claims about the validity of his or her ontological experiences within this objectivated ‘public interest’. His or her voice was not heard – and was not capable of being understood – given the commitments, value choices and governing principles of this new institutional arrangement.

The re-emergence of the victim

In the last four decades, justice systems are partially being reconstructed again, as they demonstrate an increased sensitivity to the needs and concerns of victims of crime. A ‘vision of the victim as Everyman’ is part of a ‘new cultural theme’, one which is widely represented in social, political and media circles. It has been suggested that a number of factors has facilitated this increased awareness of victims in western criminal justice systems. To begin with, the introduction of state compensation programmes can be viewed as an early attempt to move victims away from the periphery of the criminal process. In England and Wales, for example, Margaret Fry proposed a scheme of state compensation for the victims of violence as early as 1957. In 1964, a Criminal Injuries Compensation Scheme actually came into operation following the publication of a White Paper, *Compensation for Victims of Crimes of Violence*. Specific victimological studies became more prominent and began to direct the criminological gaze away from its focus on offenders, towards a typology of victims’ experiences of the wrongdoing. These studies, among others, were important reference points in generating academic interest in victims of crime. This in turn helped to illuminate the intersectional nature of crime, moving the discourse on from conventional criminological accounts that framed and explained the phenomenon exclusively through offender theories of causation. They were of course followed up by the introduction of mass victimisation surveys, commencing in the 1970s in the US before also being employed in the early 1980s in the UK, which among other things drew attention to the under-recording of crime, repeat victimisation, fear of crime, and victims’ experiences with various criminal justice agencies such as the police, prosecutors, trial judges, and other court personnel.

In the Republic of Ireland, studies such as that undertaken by Breen and Rottman, O’Connell and Whelan, and Watson all began to highlight the experiences of victims. They all helped to gather data on experiences of crime and fear of crime, providing

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37 Christie (n 6) 8.
41 Carolyn Hoyle, ‘Victims, the Criminal Process, and Restorative Justice’ in Maguire et al (n 1) 398–425.
insights quite different from institutional representations. However, mass crime victimisation studies had a somewhat sluggish trajectory when compared with other jurisdictions (commencing in the US in 1972 and the UK in 1982), hindered no doubt by the absence of a strong criminal justice research culture and successive governments’ dismissive attitude towards policy based on crime data and crime statistics. Notwithstanding such inertia, mass crime victimisation surveys did commence in 1998 with the introduction of a crime segment into the Quarterly National Household Survey (follow-up studies were conducted in 2003, 2006 and 2010). Since 2002, Garda public attitude surveys have also been conducted (though they are not annual); they focus, among other things, on the experiences and fears of crime of individuals.

During the 1970s, the women’s movement also began to ‘conscious raise’ about female victimisation, highlighting previously invisible and unvoiced social problems. Campaigning activists started to establish support networks such as Rape Crisis Centres and Women’s Refuge Centres, whilst simultaneously drawing attention to the limitations and challenges posed by an exclusively state/accused model of criminal justice. More specifically, increased self-activism also ensured that victims of crime became more visible again. The first domestic abuse shelter, for example, was established in 1974. The first Rape Crisis Centre was set up in Dublin in 1977 and Derek Nally established Victim Support in 1985. Service provision for victims of crime in the Republic of Ireland has expanded in recent decades. The Victim’s Charter, for example, marked an important policy development. This charter was produced by the Department of Justice, Equality and Law Reform in September 1999 (and was revised in 2010), reflecting the ‘commitment to giving victims of crime a central place in the criminal justice system’. The needs of crime victims are also addressed by a wide variety of victims’ organisations, alliances and associations. Whilst a significant proportion are specialised in nature, dealing with specific types of victim or services, there are also some key national groups.

Increasing concerns about rising crime rates in western countries from the 1970s onwards, and the perceived failure of correctionalist criminal justice projects to rehabilitate offenders, have also had an impact. The noble post-war dream of winning the war on crime also began to fade in western countries from the 1970s onwards as the nihilism of ‘nothing works’ took hold. As crime became accepted as a normal social phenomenon, discourse and practice moved away from an exclusive focus on normalising the wrongdoer. A new emphasis on pragmatism was espoused, one which was agnostic as regards the social or psychological causes of deviancy. Instrumental reasoning of this kind accepts the normality of crime and seeks strategies and practices to prevent or displace it. The victim is much more central and visible under such a framework of...
understanding. Moreover, and in managing an incident, effective service provision to a victim provides relatively quick, attractive and measurable outputs from criminal justice agencies, at least when compared with more long-term and contingent results such as convictions or successful rehabilitative outcomes. It is not surprising, according to commentators such as Garland, that the ‘aim of serving victims has become part of the redefined mission of all criminal justice agencies’.\(^{51}\) Among other things, it has brought into vogue the question: ‘What about the victim?’\(^{52}\)

Moreover, the revelations brought about as a result of inquiries over the last two decades into Church sexual abuse and institutional abuse which occurred in the carceral archipelago that emerged post-Independence – and the harrowing accounts of the ‘endemic’ of deaths, beatings, assaults, molestations, rapes, neglect and ritual humiliations – is now very much part of the Zeitgeist.\(^{53}\) Among other things, it has helped to raise experiences of victimhood in the collective conscience, and awareness of illegitimate and abusive hierarchies of dominance. It was aggravated by the horrors of brutal clerical abuses in parishes in different parts of the country. The flood of delayed sexual offence cases coming before the courts from the mid-1990s onwards cast further light on institutions and clerics, but also on the dark dimensions of abuse perpetrated on children by family members, neighbours, teachers and so on.\(^{54}\) The horrific and tragic details of this maelstrom of abuse details – and the existential despair that it gave rise to – has forced Irish society to confront widespread experiences of victimhood.\(^{55}\)

Events of this kind were also covered by a media industry that was becoming more specialised and instantaneous.\(^{56}\) It was also increasingly adept at individualising the experiences of victimhood through focused analysis and imagery. Aside from being conscious-raising, these insights have also contributed to the development of a healthy scepticism of institutions of power, and any uncritical deference to such power. This has been aided no doubt by repeated findings of corrupt practices in political and executive circles. This has, in part, contributed to a growing scepticism about the institutional reification of state functionaries such as the Office of Director of Public Prosecutions and Gardaí.\(^{57}\) Given the demands for increased accountability and transparency in decision-making structures, government agencies are no longer as free to set their own imperatives, or to claim absolute immunity from scrutiny. Nor can they so easily defend their actions on the basis of the neutrality of their activities, or hide behind a broad-based appeal to public interest considerations or respect for institutions of state power.

The legal system has also acted as a steerer of reintegration. This is occurring through the deliberative capacity of domestic and EU legislatures, and through expansive judicial interpretation of constitutional and Convention texts. The emerging ‘rights revolution’ is evident in both criminal and civil spheres, and it serves to open up the operational self-enclosure that exists under a state-accused model of justice. Juridification of this kind is

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\(^{51}\) Garland (n 38) 121.

\(^{52}\) Maguire (n 39) 368.

\(^{53}\) Mary Raftery and Eoin O’Sullivan, Suffer Little Children: The Inside Story of Ireland’s Industrial Schools (Continuum 1999).


providing victims with a stronger legal status and permits their claims to be severed from more public interest considerations. It will help to ensure that the intersubjective dimensions of the crime conflict are increasingly recognised.

Considerations of process fairness now include the victim within its conceptual framework. Whilst previously such deliberations were housed within the more remote medium of the ‘public interest’, the courts are now becoming more explicit in specifically identifying victims and competing rights. Of course, the regulation of victim experiences in law necessarily involves a level of abstraction and institutionalisation that never fully captures all of the relevant exigencies. Nevertheless, and despite these shortcomings, increasing juridification of the crime conflict, is helping to overcome the previous ambivalence towards victims of crime.

The European Convention on Human Rights is one example of an influential normative legal framework that seeks to extend the reach of rights in the criminal process to include victims of crime. Though the Convention does not explicitly refer to victims of crime, the court has placed obligations on member states under Articles 2 (right to life), 3 (degrading treatment), 6 (fair trial) and 8 (private life): to criminalise wrongdoing; to take preventive operational measures; to protect society from potential dangers; to provide appropriate civil remedies; to investigate and give reasons; and to adequately protect victims and witnesses at various stages in the criminal process. A series of other obligations and safeguards have been interpreted through the provisions. They include, for example, the requirement that states carry out effective investigations of crime. Effectiveness in this context requires public scrutiny to ensure accountability in practice; an efficient and independent judicial system; the hierarchical and institutional independence of those responsible for the investigation of a crime from those implicated in the events; prompt responses by the authorities; the effective implementation of court orders to protect victims; and a legal and administrative framework that adequately protects rights such as bodily integrity and privacy. Such interpretations help to identify more concrete rights for victims of crime, and act as a powerful counterpoint to the hegemonic dominance of state/accused relations.

Conclusion

The ‘axis of individualisation’ in the criminal justice process – which for so long was directed only at offenders, the causes of their wrongdoing (including ‘othering’) and their right to protection from the state – has now bifurcated to embrace the multi-faceted experiences of victimhood. This of course disturbs older, hegemonic ways of doing things (an accused/offender-organising logic that infused a police–public interest-prosecutions-prisons model of justice) and the reified, exclusive voices of certain actors that were central to that process (prosecution and defence lawyers, policing authorities, and judges). Its recent emergence must be seen much more as a response to a previous scandalous neglect, as a justified attempt to correct an imbalance in which the victim was


60 Michel Foucault, Discipline and Punish (Penguin 1991 repr) 190.
constituted as a ‘silent abstraction, a background figure whose individuality hardly registered’. 61

Victims of crime are again being recognised as a ‘community of identity’. 62 This reshapes the construction and presentation of intersubjective criminal conflict, not least because pluralism of this kind generates competing interests, priorities and validity claims in the decision-making process. Momentum of this kind makes it more difficult to rely exclusively on tradition and previously settled conventions of practice. The criminal process is thus slowly moving from a monolithic culture of rights to cultures of rights that reflect ‘multiple identities’ which are deserving of concern and respect. 63

61 Garland (n 38) 179.
63 Ibid 178.
Exploring the impact of the Victims’ Directive on service provision for victims of crime in Ireland

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Abstract

The article considers the impact which the Victims’ Directive will have on service provision for victims in Ireland and the challenges which will be faced in seeking to make the objectives of the Directive a reality. The primary focus of the Directive is the provision of effective services to victims of crime ‘to ensure that [they] receive appropriate information, support and protection and are able to participate in criminal proceedings’. Unlike proposals to give participatory or procedural rights to victims, providing services such as court accompaniment or similar supports is uncontroversial. However, while these rights are not controversial in principle, ensuring that victims receive consistent and effective services throughout their engagement with the criminal justice process is not necessarily easily achieved. The article begins by discussing the expectations which the Directive creates for victims under each of its three themes; that is, information, support and protection. Within the discussion of each theme, the article will highlight shortcomings which have been experienced by Irish victims in that area in the past and consider the initial attempts which have been made to meet the Directive’s objectives with regard to that specific theme. The authors argue that although clear efforts have been made to ensure the expectations created by the Directive become a reality, Ireland still has some way to go before full compliance is achieved. The article concludes by considering some of the general, practical challenges posed when seeking to implement the level of service provision envisaged by the Directive and outlining the commitments which the state will need to make to ensure that appropriate, Directive-compliant services are provided to victims.

Keywords: victims; services; crime; Victims’ Directive; service rights; information; support; protection

Introduction

The primary focus of the Victims’ Directive¹ is the provision of effective services to victims of crime ‘to ensure that [they] receive appropriate information, support and protection and are able to participate in criminal proceedings’.² Unlike proposals to give participatory or procedural rights to victims, providing services such as court accompaniment or similar supports is uncontroversial. As Rogan notes: ‘alleviating the

² Article 1(1).
effects of victimisation is uncontroversial.\(^3\) However, while these rights are not controversial in principle, ensuring that victims receive consistent and effective services throughout their engagement with the criminal justice process is not necessarily easily achieved. In Ireland, standards for service provision are set out in the *Victims’ Charter and Guide to the Criminal Justice System* (hereafter the Victims’ Charter)\(^4\) which, although not legally binding, imposes obligations on all key criminal justice stakeholders to provide victims of crime with appropriate support. In spite of these guarantees, however, shortcomings in service provision for victims of crime have been repeatedly identified by both research reports and victim representative groups.

The Victims’ Directive and the legislation which implements it in Ireland (i.e. the Criminal Justice (Victims of Crime) Act 2017) (hereafter the 2017 Act) will place the obligation to provide effective services to victims on a statutory footing, providing Irish victims with justiciable rights in this area for the first time. The article considers the impact which the Directive will have on service provision for victims in Ireland and the challenges which will be faced in seeking to make the objectives of the Directive a reality. The article begins by discussing the expectations which the Directive creates for victims under each of its three themes, that is, information, support and protection. Within the discussion of each theme, the article will highlight shortcomings which have been experienced by Irish victims in that area in the past and consider the initial attempts which have been made to meet the Directive’s objectives with regard to that specific theme. The authors argue that, although clear efforts have been made to realise the expectations created by the Directive, Ireland still has some way to go before full compliance is achieved. The article concludes by considering some of the general, practical challenges posed when seeking to implement the level of service provision envisaged by the Directive and outlining the commitments which the state will need to make to ensure that appropriate, Directive-compliant services are provided to victims.

### The promise of the Directive: expectations for service provision post-implementation

The Victims’ Directive sets the bar high for service delivery, imposing clear obligations on member states to provide quality services at all stages of the criminal justice system from initial contact (even if no subsequent formal complaint is made), right through to an offender’s eventual release from prison. All criminal justice stakeholders incur responsibilities in this and the state must also ensure that voluntary support organisations are adequately resourced to be able to support victims effectively.\(^5\) Prior to the implementation of the Directive in Ireland, service provision was governed by the Victims’ Charter which was originally enacted in 1999 and revised in 2010. Although the Charter imposes key responsibilities on criminal justice stakeholders such as the Gardaí, the Director of Public Prosecutions (DPP) and the courts in relation to service provision, it does not give rise to legally enforceable rights. Consequently, ‘[t]ermining it a charter is perhaps giving it a little too much credit, as it really just sets out existing protections for victims in consolidated format’.\(^6\) Indeed, the Charter ‘acknowledges its own inherent limitations as a tool for instantiating the rights of victims by placing considerable

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\(^5\) Article 8(3).

emphasis on how to make complaints about criminal justice agencies.\footnote{7} Thus, the Directive and the 2017 Act mark a significant development for victims, providing them for the first time with justiciable rights in relation to service provision. In turn, naturally, this places heightened pressures on the state to ensure that these rights are realised.

This section of the article will discuss the level of service provision which victims can expect with the implementation of the Directive in Ireland. Given the space available, it is not possible to discuss the entirety of the Directive here. The article focuses on the rights available to adult victims\footnote{8} from initial complaint through to the completion of the trial process. For ease of discussion, the services which should be provided will be discussed according to the three themes of the Directive (information, support and protection). The Directive’s guarantees under each heading will be outlined and any pre-existing shortcomings in service provision under each heading will be highlighted. Moreover, initial attempts to realise the expectations created by the Directive under each theme will be discussed and critiqued.

**Information**

Providing information to victims as they journey through the criminal justice process is vital. Ensuring that victims are aware of developments in the investigation and trial of an offence empowers them, minimising the potential for secondary victimisation which can arise when they feel isolated in their journey through the criminal justice system. At a more practical level, effective information provision ensures that victims are aware of available supports and protections which they are entitled to. As noted by the EU Agency for Fundamental Rights:

> Lack of information not only represents a serious obstacle to the enjoyment of victims’ rights, but research on victim satisfaction with support services has also repeatedly identified the lack of information as a prime source of dissatisfaction with criminal proceedings, and one which discourages them from actively participating.\footnote{9}

The Victims’ Directive places obligations on member states to ensure that victims receive appropriate information at the initial reporting stage (Article 4) and in relation to the progress or otherwise of the case (Article 6). Each Article is discussed here in turn, with reference to Ireland’s efforts to comply with the requirements set by them.

**ARTICLE 4: RIGHT TO RECEIVE INFORMATION FROM THE FIRST CONTACT WITH A COMPETENT AUTHORITY**

Article 4 provides that:

> Member States shall ensure that victims are offered the following information, without unnecessary delay, from their first contact with a competent authority in order to enable them to access the rights set out in this Directive:


\footnote{8} Specific protections provided for child victims in the Directive will not be discussed here. For the purposes of the Directive, ‘victim’ includes ‘a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence’ and ‘family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person’s death’: Article 2(1)(a). In relation to the latter category, ‘family members’ includes ‘the spouse, the person who is living with the victim in a committed intimate relationship in a joint household and on a stable and continuous basis, the relatives in direct line, the siblings and the dependents of the victim’: Article 2(1)(b).

a) the type of support they can obtain and from whom, including, where relevant, basic information about access to medical support, any specialist support, including psychological support, and alternative accommodation;
(b) the procedures for making complaints with regard to a criminal offence and their role in connection with such procedures;
(c) how and under what conditions they can obtain protection, including protection measures;
(d) how and under what conditions they can access legal advice, legal aid and any other sort of advice;
(e) how and under what conditions they can access compensation;
(f) how and under what conditions they are entitled to interpretation and translation;
(g) if they are resident in a Member State other than that where the criminal offence was committed, any special measures, procedures or arrangements, which are available to protect their interests in the Member State where the first contact with the competent authority is made;
(h) the available procedures for making complaints where their rights are not respected by the competent authority operating within the context of criminal proceedings;
(i) the contact details for communications about their case;
(j) the available restorative justice services;
(k) how and under what conditions expenses incurred as a result of their participation in the criminal proceedings can be reimbursed.

Given their central role in receiving complaints and investigating offences, the Gardaí are the organisation which bears the primary responsibility for providing victims with the information outlined in Article 4. The Victims’ Charter imposes substantial obligations on the Gardaí to provide information to victims. When a victim makes a complaint, s/he must be informed of ‘the name, telephone number and station of the investigating Garda and the PULSE incident number’.

The Gardaí must ‘[e]xplain what will happen and keep [the victim] informed of the criminal investigation’ and ‘[t]ell [the victim] in writing about the crime victims helpline’ and the other services available for victims, as well as providing victims with specific information when a suspect is due to appear in court.

Thus, the obligations to provide information outlined in the Directive were already required in Ireland, albeit not on a statutory basis. However, despite the obligations in the Charter, the provision of information to victims by the Gardaí has been repeatedly found wanting.

Information is formally communicated to victims by the Gardaí via standardised victim letters that are generated by the PULSE system. The first letter empathises with the victim and provides the PULSE reference number, the investigating Garda’s name and the Garda

10 A PULSE (i.e. police using leading systems effectively) incident number is the unique computer-generated number which is allocated to an incident on the Garda computer system.
11 Victims of Crime Office (n 4) 16.
12 Ibid.
13 The information to be provided included: whether the suspect is being held in prison or is on bail (and any conditions which attach to bail); the time, date and location of the court hearing; details of the prosecution process, including information about support which is available from voluntary organisations in relation to attendance at court (e.g. accompaniment services); whether a victim impact statement is possible; and the final result of the trial: ibid.
station contact number, as well as the contact details for the crime victims’ helpline.\textsuperscript{15} A leaflet with the contact details of other support organisations is also enclosed.\textsuperscript{16} The second letter will be sent once an offender is identified and the case has progressed.\textsuperscript{17} Presumably, in some cases, these letters will be supplemented with informal updates from investigating Gardaí as and when appropriate. However, despite these processes, the Gardaí have not been consistent in delivering information to victims. For instance, in a study of victims’ experiences in the criminal justice system conducted in 2010:\textsuperscript{18}

Roughly 1 in 10 of the respondents who reported a crime indicated that they did not receive the name of the Garda to whom they reported the crime; 1 in 5 claimed not to have received the contact details of the investigating Garda; 1 in 2 claimed not to have received the pulse incident number; 1 in 2 claimed not to have received a contact for a group supporting victims; and only 4 in every 10 respondents who reported the crime indicated that they received the number for the [crime victims’ helpline].\textsuperscript{19}

Based on their interviews with victims in that study, the researchers found that for victims, ‘the lack of information was evidence of a lack of respect, demonstrated that they were not being taken seriously, and acted as a further burden’.\textsuperscript{20} Thus, the ‘information gap’ results in more than an inconvenience and can create significant distress for victims. The Garda Inspectorate has also identified deficiencies in Garda provision of information to victims. In a review of letters sent to victims in the third quarter of 2013, the inspectorate found that just over 3000 victims did not receive the first standardised letter and just over 1500 did not receive the second.\textsuperscript{21} The inspectorate expressed disappointment that there was ‘little or no evidence of supervisors contacting victims of crime to determine the levels of service provided’.\textsuperscript{22} In 43 per cent of the cases investigated by the inspectorate, there were no updates on PULSE in the 12 months that followed the creation of the record.\textsuperscript{23} Consequently, the inspectorate concluded that there was ‘an inconsistent approach to updating victims and there was no national standard as to how or when this contact should take place other than the two required victims letters’.\textsuperscript{24} Most recently, in the \textit{Garda Public Attitudes Survey 2015}, of the 682 respondents who were victims of crime, only 34 per cent were given a PULSE number and just 33 per cent were given the number of victim helplines and services.\textsuperscript{25}

It is clear then that the efforts of the Gardaí to ensure that victims’ entitlements to information are realised have not been entirely successful to date. The Act places statutory obligations on the Gardaí to deliver information to victims. Section 7 creates a list of information which must be offered to victims upon first contact with the Gardaí

\textsuperscript{15} The crime victims’ helpline is a ‘confidential national helpline run by a team of trained volunteers’. The helpline supports all victims, regardless of when the crime took place, who committed it or whether or not it has been reported to the Gardaí: Victims of Crime Office (n 4) 13.
\textsuperscript{16} Ibid.
\textsuperscript{17} Ibid, 5.
\textsuperscript{18} This study involved a postal survey of approximately 1050 victims who had availed of a victim support service: Shane Kilcommins, Máire Leane, Fiona Donson, Caroline Fennell, Anna Kingston, \textit{The Needs and Concerns of Victims of Crime in Ireland} (Commission for the Support of Victims of Crime 2010) 10.
\textsuperscript{19} Ibid 45.
\textsuperscript{20} Ibid 55.
\textsuperscript{21} Garda Inspectorate (n 14) Part 7, 5.
\textsuperscript{22} Ibid 6.
\textsuperscript{23} Ibid 11.
\textsuperscript{24} Ibid.
\textsuperscript{25} An Garda Síochána, \textit{An Garda Síochána Public Attitudes Survey} (An Garda Síochána 2015) 11.
regarding an alleged offence. This includes information about: support services; formal complaint procedures; where to direct queries relating to the complaint; availability of interpretation and translation services; the role of the victim in the criminal justice process; special measures available for victims who are residents of the state or for child victims; availability of protection measures and/or compensation; a victim’s right to make a victim impact statement; complaints procedures where entitlements under the legislation are not honoured; restorative justice (where available); availability of legal aid; and entitlement to expenses. The extent and detail of the information offered will be determined on a case-by-case basis with reference to the type or nature of the alleged offence and any specific needs and personal circumstances of the victim which are identified. Where a victim requests any of the information offered under s 6, s/he may specify whether the information should be provided orally or in writing (including by electronic means) and s/he shall be provided with the information as soon as practicable and where possible, in the manner specified in his/her request.

In an effort to ensure that the obligations imposed in the Directive and the forthcoming legislation are met, in December 2015 the Gardaí introduced 28 Victim Service Offices, one in each Garda Division. Staffed by specially trained Gardaí, the offices are open Monday to Friday from 9am to 5pm. Victims can choose between receiving contact by phone, letter or email. The central role of these offices is to keep victims informed of all significant developments associated with their case and to provide contact details for relevant support/counselling services. Victims receive a follow-up call from the Victim Service Office to ensure they have all the information they require including contact details of the investigating Gardaí. Victims can also raise any problems or concerns they have in the wake of the crime or issues with the investigation. They will be provided with crime prevention advice and details for external support services.

Importantly, the Gardaí are committed to monitoring victim satisfaction with their service provision through their quarterly Public Attitude Survey and engagement with victims and their representative groups. An upgrade of the PULSE system is also promised which will record more details about victims’ needs, as well as ‘enhanced functionality in relation to the printing of letters to victims of crime including two additional letters’. It is too early to assess whether the foregoing efforts are sufficient to ensure that the victims’ rights under Article 4 are effectively realised. However, initial reactions are positive. For example, the crime victims’ helpline has recorded a ‘notable decrease in calls to the helpline where the caller is unable to make contact with the investigating Garda’. The Gardaí have thus clearly made a concerted effort to honour their obligations under the Directive. Nevertheless, given the shortcomings which have been identified with information provision in the past, it is important not to become complacent, especially now the Act is commenced and the duty to provide information has become a legal obligation. The Gardaí must continue to monitor and evaluate their

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26 S 7(1).
27 S 7(2).
28 S 7(3).
29 It is noteworthy that victims of crimes where there is significant trauma such as sexual crimes or domestic abuse will continue to be dealt with in person by an investigating or specialist Garda.
30 Anne-Marie McMahon, ‘Putting Victims at the Heart of Garda Service’, presentation delivered at Victims in Focus: European and Domestic Perspectives, Association for Criminal Justice Research and Development Annual Conference (2 October 2015).
information provision and develop their protocols so that victims are kept adequately informed at all stages of the criminal justice process.

**ARTICLE 6: RIGHT TO RECEIVE INFORMATION ABOUT THEIR CASE**

Article 6 provides victims with the right to receive information about:

(i) any decision not to proceed with or to end an investigation or not to prosecute the offender;\(^{32}\)

(ii) the time and place of the trial and the nature of the charges against the offender;\(^{33}\)

(iii) any final judgment in a trial;\(^{34}\) and/or

(iv) information enabling the victim to know about the state of the criminal proceedings, unless in exceptional cases the proper handling of the case may be adversely affected by such notification.\(^{35}\)

The Victims’ Charter imposes the primary obligation of delivering this information on the Gardaí.\(^{36}\) Thus, the shortcomings which have been identified in relation to information provision by the Gardaí would apply to this category of information also. For example, when victim respondents to the *Garda Attitudes Survey 2015* were asked for their views on the information provided regarding the progress of the investigation, although 46 per cent felt it was ‘about right’, 36 per cent felt that it was ‘too little’ and 16 per cent were not provided with updates.\(^{37}\) Section 8 of the Act provides that all of the foregoing information and more can be requested from the Garda Síochána, the Ombudsman Commission, the DPP, the Irish Prison Service, the director of a children detention school or the clinical director of a designated centre, as the case may be.\(^{38}\) Thus, the Gardaí now have a statutory obligation to provide this information, a duty which will be discharged through use of the Victim Service Offices and changes to the PULSE system discussed above.

Perhaps one of the most significant pieces of information covered by Article 6 is the provision of reasons for a decision not to prosecute. Given the upset experienced by a victim when their case is not prosecuted, effective communication about this decision is crucial to avoid secondary victimisation.\(^{39}\) For less serious offences, such as minor assaults or public order offences, the Gardaí make the decision on whether to prosecute and will prosecute the offence in the name of the DPP. Victims can request a summary of reasons for the decision of the Gardaí not to prosecute. Forms for this request are available on the Garda website. The application must be made within 28 days of the victim finding out that prosecution will not take place and must be sent to the relevant superintendent. For all other prosecution decisions, an application for reasons for a decision not to prosecute must be made to the DPP. The Victims’ Charter provides that the DPP will provide reasons for decisions in fatal cases which occurred on or after October 2008.\(^{40}\) With the implementation of the Directive on 16 November 2015, this

\(^{32}\) Article 6(1)(a).

\(^{33}\) Article 6(1)(b).

\(^{34}\) Article 6(2)(a).

\(^{35}\) Article 6(2)(b).

\(^{36}\) Victims of Crime Office (n 4) 16.

\(^{37}\) Ibid.

\(^{38}\) S 8(2), S 8(1) provides that the Gardaí or the Ombudsman Commission must inform victims of their right to request this information.

\(^{39}\) Victims who are not satisfied with these reasons can request a review of the decision. This right is guaranteed by Article 11 of the Directive and s 10 of the Act.

\(^{40}\) Victims of Crime Office (n 4) 30.
facility was extended to all offences.\footnote{The DPP cannot provide a summary of reasons where a suspect was dealt with under the Garda Síochána Adult Caution Scheme or the Juvenile Diversion Programme or where the information would: interfere with an ongoing criminal investigation; prejudice a future court case; or jeopardise the personal safety of any person or the security of the state: Office of the DPP, \textit{How to Request Reasons and Reviews} (Office of the DPP) 3. These limitations are included in s 10 of the Act.} Victims or the families of victims in fatal cases can obtain a summary of reasons for a decision not to prosecute upon completion of a ‘request for reasons’ form.\footnote{This is available on the DPP’s website or from Garda stations: Office of DPP (n 41) 4.} The request must be sent within 28 days of the date the victim is informed of the decision not to prosecute.\footnote{This time period might be extended ‘if there is good reason and if it is in the interests of justice’: ibid 5.} A summary of reasons should be provided in writing within 28 days.\footnote{If this period is to be extended, the victim will be informed in writing that it may take longer to release the information and provided with an indication of when this information may be available: ibid 6.} The right to request reasons for a decision not to prosecute and a summary of reasons for the decision is placed on a statutory footing by the Act.\footnote{S 8(2)(d).}

In the period from October 2008 (i.e. the introduction of the policy on giving reasons for decisions not to prosecute in fatal cases) to November 2015, 97 requests for reasons were made.\footnote{Office of the DPP, \textit{Annual Report 2015} (Office of the DPP 2016) 25.} Ninety-two of these requests were granted. Predictably, when the facility to ask for reasons not to prosecute was extended to all crimes in November 2015, the number of requests increased considerably. Between November 2015 and June 2016, 333 requests for reasons were made with reasons being given in 216 cases.\footnote{Examples of instances where requests are refused would include requests relating to decisions made prior to 16 November 2015, or where giving a reason may prejudice a future court case.} Thus, it seems that, with regard to informing victims about the reasons for the non-progression of their cases, the Office of the DPP has been very progressive in seeking to meet its obligations. The provision of information in a timely manner is also likely to be furthered by the specialised Communications and Victims Liaison Unit which was established by the DPP in July 2015 to ensure that the office meets its obligations under the Victims’ Directive.\footnote{Office of the DPP (n 46) 24.} The Unit provides information to victims and deals with requests for reasons not to prosecute and for reviews of decisions.\footnote{The Unit also provides booklets on both these topics on its website.}

The Office of the DPP has been particularly proactive in seeking to meet its obligations under the Directive, forging ahead and implementing changes to the ‘reasons for decisions’ procedure even before this was required by national legislation. As the figures above illustrate, extending the facility to receive reasons for decisions to all crimes has already led to an increase in requests, thereby increasing the workload for the Office. This burden is likely to increase further now the Act has commenced and more victims become aware of their rights in this area. Consequently, resource implications are likely to arise which must be dealt with to ensure the Office continues to meet its obligations and that victims’ rights are realised. What is also significant to ensure effective service delivery in this area is considering how information about reasons is delivered. A decision not to prosecute is typically based on the insufficiency of evidence in the case (i.e. there is no reasonable prospect of securing a conviction) and/or the fact that it is not in the public interest to prosecute (i.e. because the case is unlikely to be successful).\footnote{See Office of the Director of Public Prosecutions, \textit{Guidelines for Prosecutors} (4th edn, Office of the DPP 2016) ch 4.} It is important that victims’ expectations are managed so that when they receive what may
appear to be sterile or generic responses to their request for reasons, they will not be unduly disappointed. To optimise service delivery in this area, it will be necessary to collect qualitative data on victims’ perceptions of the reasons they are receiving. This will allow the DPP to monitor whether the information is being delivered effectively and serving to meet victims’ expectations of the process as far as possible. If victims’ expectations of the process are found to be unrealistic, for example, expecting access to information which cannot be disclosed, it is important that appropriate methods of managing victims’ expectations are devised. Thus, whilst significant strides have been made in this area of service provision, victims’ satisfaction levels and the extent to which this process can deliver the results which victims might expect have yet to be explored.

Support

The journey through the criminal justice system can be both daunting and traumatic for victims of crime. Appropriate supports are essential so that victims receive assistance where necessary to assist them in participating in the investigation and trial of the offence and, above all, to recover from the harm which they have suffered. Article 8(1) of the Directive provides that: ‘Member States shall ensure that victims, in accordance with their needs, have access to confidential victim support services, free of charge, acting in the interests of the victims before, during and for an appropriate time after criminal proceedings.’ Member states are obliged to ‘facilitate the referral of victims, by the competent authority that received the complaint and by other relevant entities, to victim support services’. Access to such services cannot be dependent on a victim making a formal complaint.

A full discussion of the myriad of supports for victims which are provided by non-governmental victim support groups is outside the scope of this piece. Instead, the primary focus of discussion will be on supports provided by state agencies at both the investigation and trial stages of the criminal process. At investigation stage, the Gardaí provide a number of supports for victims who might be particularly vulnerable. Specialist family liaison officers (FLOs) are available to support and maintain contact with the families of homicide victims. These officers can also be appointed in other cases where the Garda District Officer deems it appropriate. For victims for whom English is not their first language, free translation services are provided by the Gardaí. Finally, there is special provision for members of the LGBT community who may be referred to an LGBT liaison officer and for victims of racist incidents who may have the support of ethnic liaison officers (ELOs). Access officers are also available for victims with disabilities to assist and guide them in surmounting any obstacles which they might face in accessing Garda services.

At trial stage, a key support for victims is preparing them for what will happen in court. The pre-trial meeting with the prosecution legal team is particularly important. Naturally, any interaction between the prosecution lawyers and the victim must be limited as the lawyers cannot be seen to be ‘coaching’ a witness. However, ‘[w]hile the evidence or content of the case is not discussed the victim is made aware of the form of the
proceedings, the courtroom and the proximity they will have to the accused'. The Rape Crisis Network of Ireland has praised the introduction of meetings between representatives of the DPP and victims, noting that this process (which includes a tour of the courts) ‘though very simple . . . has a profound effect on victims and has been very helpful in alleviating fear of unknown surroundings and procedures’. Such meetings are ‘extensively held’. However, while victim advocates have reported that these meetings are very effective, particularly in the Courts of Criminal Justice in Dublin, some inconsistencies in the quality of the meetings were reported in other parts of the country. Moreover, although victims of any crime can request a meeting with the prosecution lawyers and the DPP will attempt to facilitate it, if possible such meetings are only offered in cases involving violent or sexual offences. Grozdanova and de Londras found that it was not clear that victim advocates knew that victims could request a meeting with a representative of the Office of the DPP where they were not automatically entitled to one. Thus, greater clarity about this procedure may be required to ensure that victims have full access to this service.

Once the trial begins, court accompaniment is an essential service for victims, providing them with support and a source of information throughout the trial which can be a very confusing and traumatic process. One of the main providers of court accompaniment is Victim Support at Court (VSAC). This independent voluntary organisation is dedicated solely to supporting victims in court and also organises pre-trial court visits for victims and their families to familiarise them with the court setting before the trial. VSAC provides assistance in trials ‘involving criminal offences including murder, manslaughter, death by dangerous driving, attempted murder, rape, sexual assault, harassment, human trafficking, robbery, aggravated burglary, theft, arson and tiger kidnappings’. Kilcommins et al found that court accompaniment is an ‘important means of minimising the negative impact of a victim’s experience of court’. Of the 96 respondents who had used court accompaniment services, 92 stated that they were very satisfied or satisfied with the level of support received from support organisation personnel. Thus, it is clear that court accompaniment can significantly minimise the potential for victims to suffer secondary victimisation within the court process and it is a very important service for victims.

Although supporting victims is extremely important to help them as they journey through the criminal justice process, ensuring that they have the appropriate opportunity to heal and to participate in the investigation and trial of the offence, there is very little attention paid to this theme of the Directive in the 2017 Act. Section 7(9) provides that on first contact with Gardaí, where the victim consents, arrangements can be made ‘for

58 Grozdanova and de Londras (n 56) 11.
59 Ibid.
60 A number of other specialist victim support groups also offer court accompaniment, including: Children at Risk Ireland which offers support to child victims; Rape Crisis Centres; and OneinFour which offers support to victims of sexual violence; and Women’s Aid and ADAPT which offer support to victims of domestic abuse.
61 VSAC Leaflet.
62 Kilcommins et al (n 18) 143.
63 Ibid.
the victim to be referred to an appropriate, and where relevant specialist, service which provides support to victims’. However, aside from this, support services, whether offered by state or non-state actors receive scant attention in the proposed legislation. Significantly, no commitment is made to adequately fund support services to make sure that appropriate levels of support are available to meet the increased demand for services which will no doubt arise now that the Directive is fully operative in Ireland. The legislature probably shied away from making a commitment like this in the legislation due to the level of resourcing required. Given economic and budgetary constraints, choices may inevitably have to be made about the level of funding which is available for support services at any given point in time. However, it is important, even at policy level, that a commitment is made to adequately resource support services as these are integral to aiding victims during the criminal justice process and in helping them to heal from the trauma of victimisation.

Protection

Having already been traumatised by victimisation, engagement with the criminal justice process can be very intimidating for victims. This is especially true for particular categories of victims, for example, victims of sexual or domestic abuse, families of victims of homicide or victims who may face intimidation or reprisal for engaging with the criminal justice system. Chapter 4 of the Directive provides for ‘protection of victims and recognition of victims with specific protection needs’. Article 18 places an obligation on member states to:

- ensure that measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying.

The Directive envisages two levels of protection for victims of crime. They are: general protection which is available for all victims; and special protective measures which are available for victims who are assessed and found to have special protection needs. At a general level, Article 20 provides that during criminal investigations, states must ensure that:

(a) interviews of victims are conducted without unjustified delay after the complaint with regard to a criminal offence has been made to the competent authority;
(b) the number of interviews is kept to a minimum and interviews are carried out only where strictly necessary for the purposes of the criminal investigation;
(c) victims may be accompanied by their legal representative and a person of their choice, unless a reasoned decision has been made to the contrary;
(d) medical examinations are kept to a minimum and are carried out only where strictly necessary for the purposes of the criminal proceedings.

These measures represent best practice for the protection of victims during the investigation stage of the criminal process. It is likely that Gardaí adhered to these principles before they were formally obliged to do so. However, these best practice principles are elevated to legislative obligations by s 14 of the Act. Section 14(1) provides that a Garda investigating an alleged offence must ensure that:

(a) where a victim . . . is a resident of a Member State other than the State, the victim may make a statement immediately after the complaint is made or at such other time as may be agreed with the victim,
(b) any interviews of a victim that may be required in respect of a complaint are carried out as soon as practicable after the complaint is made, and
(c) interviews of the victim are carried out only where necessary for the purpose of investigating the alleged offence.

Section 14(6) provides that any medical examinations of a victim ‘are limited to those which are strictly necessary for the purpose of the investigation concerned’. Further, the Act provides that victims are entitled to be accompanied by a person of their choice, including their legal representatives, when making a complaint and during investigation interviews. This will only be denied where the presence of the chosen person or legal representative would be contrary to the best interests of the victim or would prejudice any investigation or criminal proceedings regarding an alleged offence. Where a decision is taken to exclude a person from accompanying a victim, they may be accompanied by another person and may make such arrangements as are necessary to be so accompanied.

These new requirements to protect victims during criminal investigations may require some changes to how Gardaí approach statement-taking and interviews, but they will ensure best practice in this aspect of investigations. Allowing victims to have accompaniment when being interviewed will be a great source of support and may well encourage victims to stay the course with an investigation where they might otherwise have been too intimidated to continue. Minimising the number of interviews and ensuring that they take place in a timely manner also diminishes the potential for secondary victimisation where victims are forced to relive an incident unnecessarily and/or after a considerable amount of time has passed since the incident occurred. All of these measures also benefit the Gardaí as timely interviews with victims who are comfortable because they are supported by a person of their choice will lead to the collection of better evidence.

At trial, an important general protection for victims is avoidance of contact with the accused. Article 19(1) provides that conditions must be established ‘to enable avoidance of contact between victims and their family members, where necessary, and the offender within the premises where criminal proceedings are conducted, unless the criminal proceedings require such contact’. Member states are obliged to ensure that ‘new court premises have separate waiting areas for victims’. Such protection is highly significant for victims. As Mulkerrins notes: ‘[e]vidence of low-grade intimidation abounds where complainants have to share waiting/cloakroom facilities with the defendant and his family while awaiting hearings’. Under the Victims’ Charter, the Courts Service has committed to aiding victims in avoiding contact with offenders, providing that customer liaison officers can arrange access to victim rooms. The Charter also provides that a dedicated suite of four rooms and a reception area for victims is available within the Criminal Courts of Justice in Dublin and that waiting rooms are available in ‘almost all refurbished courthouses and also in a number of other courthouses’. Moreover, the

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64 S 12(1).
65 S 14(2).
66 S 12(2) and 14(3).
67 S 12(3) and s 14(4). A record must be kept of any decision to exclude a person from accompanying a victim pursuant to s 12(2) or 14(3) and this record must include reasons for the decision: s 12(4) and 14(5) respectively.
68 Article 19(2).
70 Victims of Crime Office (n 4) 24. It is also possible to reserve family seating in murder and manslaughter cases: ibid.
71 Ibid.
Charter makes a commitment that ‘rooms will be set aside for victims in all future refurbishment projects’.72

Despite these promises, effectively protecting victims from contact with offenders in court has proved difficult to deliver in Ireland because of the structure of many court buildings. Kilcommins et al’s study reported that the architecture and design of court facilities is not ‘fit for purpose’.73 Of 141 relevant responses to a question in the survey on the issue of access to a separate waiting room, only 27 per cent of respondents reported access to this facility.74 Recommendations have been made for improvements in this area75 and it is clear that this is needed, but this facility is challenging for the Courts Service to deliver. Many Irish courthouses are antiquated and given the volume of cases being dealt with each day, overcrowding is a persistent problem. Admittedly, ensuring that victims are afforded separate waiting facilities in all cases would require major refurbishment of existing courthouses which is resource-intensive, but, to protect victims appropriately, this investment in appropriate facilities for victims in all court buildings is necessary. Unsurprisingly, given the significant resource implications and practical obstacles involved, the Act does not contain a commitment to provide separate waiting areas in courts. Thus, it is likely that this aspect of the Directive’s requirements will continue to be unmet in Ireland for the immediate future. Given the trauma experienced by victims when facing defendants and their families in courts, some attempt to overcome these structural and resource issues to find a means of separating victims and defendants during the trial process ought to be considered.

 Aside from the general protections that are available for all victims, the Directive also envisages that some victims, because of their characteristics or the nature of the crime, may require additional protective measures. Consequently, the Directive requires member states to:

Though... ensure that victims receive a timely and individual assessment... to identify specific protection needs and to determine whether and to what extent they would benefit from special measures in the course of proceedings... due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation.76

This assessment must focus on: (a) the personal characteristics of the victim; (b) the type or nature of the crime; and (c) the circumstances of the crime.77 The wishes of the victim must also be considered.78 If a victim is judged to have special protection needs, special measures are available both during the investigation and during the trial. In relation to the latter, the protective measures available would be classed primarily as procedural or legal rights, providing victims with access to facilities such as giving evidence via television link or from behind a screen or measures to prevent unnecessary questioning about a victim’s

72 Ibid.
73 Kilcommins et al (n 18) 127.
74 Ibid.
76 Article 22(1).
77 Article 22(2). Victims must also be closely involved in such assessments and their wishes should be taken into account: Article 22(6).
78 Article 22(6).
private life.\textsuperscript{79} Since the focus of discussion here is on service rights, a consideration of
these measures is outside the scope of this article. Instead, the special protections which
might be available during the investigation stage will be discussed.

Article 23(2) provides that, during criminal investigations, the following measures
shall be available to victims who are identified as having specific protection needs:

(a) interviews with the victim being carried out in premises designed or adapted for that
purpose;
(b) interviews with the victim being carried out by or through professionals trained for that
purpose;
(c) all interviews with the victim being conducted by the same persons unless this is contrary
to the good administration of justice;
(d) all interviews with victims of sexual violence, gender-based violence or violence in close
relationships, unless conducted by a prosecutor or judge, being conducted by a person
of the same sex as the victim, if the victim so wishes, provided that the course of the
criminal proceedings will not be prejudiced.

These are important protections to avoid victims being further traumatised during the
investigation stage. In Ireland, commitments to offer these protections have already been
made by the Gardaí. For example, the Victims Charter guarantees that sexual offence
victims will be assigned a Garda of the same gender for the investigation of the offence
and, as far as possible, a doctor of the same gender will also be provided for examination
purposes.\textsuperscript{80} The Gardaí also provide specialist interviewers who are trained to interview
children under 14 years of age and persons with an intellectual disability who are making
complaints in relation to sexual crime, or offences involving violence or threats of
violence.\textsuperscript{81} These specialist interviewers can also interview victims of sexual crime or
serious crime or witnesses to those crimes where they are directed to do so.\textsuperscript{82} These
interviewers will interview children and persons with intellectual disability in plain clothes
‘unless the circumstances dictate otherwise’.\textsuperscript{83} Further, there are ‘dedicated interview
suites’ in various locations which are designed to provide appropriate facilities for
interviewing vulnerable witnesses and children.\textsuperscript{84} These suites are located away from
Garda stations and may also be used for interviewing complainants of other serious
crimes when this is appropriate.\textsuperscript{85}

The Act introduces victim assessments as per the Directive’s guidelines. Section 15(1)
provides for assessments of victims for the purpose of:

\textsuperscript{79} Article 23(3). Special measures to assist victims in giving evidence were introduced into Irish law via the
Criminal Evidence Act 1992. These include: giving evidence via television link (s 13); use of an intermediary
(s 14); and the use of video-recorded evidence (s 16). Once the relevant Part of the Criminal Law (Sexual
Offences) Act 2017 is commenced, it will also be possible for victims to give evidence from behind a screen.

\textsuperscript{80} Victims of Crime Office, \textit{Victims Charter} (Department of Justice, Equality and Law Reform 2010) 17. Details
of relevant support agencies will also be provided to these victims: ibid.

\textsuperscript{81} An Garda Síochána, \textit{Garda Síochána Policy on the Investigation of Sexual Crimes against Children, Child Welfare} (2nd
cdn, An Garda Síochana 2013). Available at: www.garda.ie/Documents/User/Policy
%20on%20the%20Investigation%20of%20Sexual%20Crime,%20Crimes%20Against%20Children%20and%20
Child%20Welfare%202014%202014%202048%2013.pdf.

\textsuperscript{82} Ibid.
\textsuperscript{83} Ibid 72.
\textsuperscript{84} Ibid.
\textsuperscript{85} Ibid 73.
(a) identifying the protection needs, if any, of the victim,
(b) ascertaining whether and to what extent the victim might benefit from protection measures, and
(c) ascertaining whether and to what extent the victim might, due to his or her particular vulnerability to secondary and repeat victimisation, intimidation and retaliation, benefit from
(i) special measures during the course of an investigation of the alleged offence, and
(ii) special measures during the course of any criminal proceedings relating to the alleged offence.

These assessments are to be carried out by the Garda Síochána or an officer of the Garda Síochána Ombudsman Commission who, when carrying out an assessment, will have regard to the following matters:
(a) the type and nature of the alleged offence;
(b) the circumstances of the commission of the alleged offence;
(c) whether the victim has suffered considerable harm due to the severity of the alleged offence;
(d) the personal circumstances of the victim, including his or her age, gender, gender identity or expression, ethnicity, race, religion, sexual orientation, health, disability, communication difficulties, relationship to, or dependence on, the alleged offender and any previous experience of crime;
(e) whether the alleged offence appears to have been committed with a bias or discriminatory motive, which may be related to the personal characteristics of the victim, including such characteristics as are referred to in paragraph (d);
(f) the particular vulnerability of victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence or exploitation and victims with disabilities.86

The views of the victim will also be taken into account.87 If a victim is judged to have special protection needs, special measures will be made available to him/her both during the investigation and the trial.88 The special measures which may be implemented during the course of an investigation include:
(a) that any interview with the victim—
(i) be carried out in premises designed or adapted for that purpose,
(ii) be carried out by or through persons who have been trained for that purpose, and
(iii) where there is more than one interview, be carried out, where possible, by the same member or members of the Garda Síochána or the same officer or officers of the Ombudsman Commission, as the case may be;
(b) where the alleged offence involves sexual violence, gender-based violence or violence in a close relationship, that the victim be informed of his or her right to request that interviews are carried out by a person of the same sex as him or her.89

86  S 15(2). It should be noted that a child victim will be presumed to have special protection needs: s 15(7).
87  S 15(4).
88  Special measures available during the trial include the potential to exclude the public from the courtroom, limiting questioning about the victim’s private life and extension of the availability of special measures for giving evidence under the Criminal Evidence Act 1992 (e.g. giving evidence by TV link): s 19. As explained already, discussion of these special measures is outside the scope of this article.
89  S 17(1).
Such special measures must be made available unless:

(a) legal, operational or practical constraints render it impossible to do so,
(b) during the course of an investigation of an alleged offence by the Garda Síochána or the Ombudsman Commission, as the case may be, there is an urgent need to interview the victim and there are reasonable grounds for believing that a failure to do so may result in harm to the victim or another person,
(c) the application of a special measure would be prejudicial to a criminal investigation or criminal proceedings, or
(d) the application of the special measure would be otherwise contrary to the administration of justice.  

The protections in the Act replicate existing protections offered by the Gardaí. However, as victims now have a legal entitlement to these protections, they must be made available to them. This will necessarily impact upon resources and operating procedures as the Gardaí must ensure that these protections are available. However, given the various limitations on these rights which are included in the Act, there appears to be some latitude to permit derogation from these protections where necessary. It is to be hoped that these limitations will be strictly interpreted and that victims will not be denied access to these protections lightly.

Making the Directive’s objectives a reality in Ireland: practical challenges

The specific obligations which are imposed on Ireland in relation to service rights as a result of the Directive have been outlined in detail above. It is clear that realising the Directive’s goals will give rise to a number of specific challenges and require criminal justice stakeholders to rethink their practices in significant ways. However, aside from the specific challenges faced in effectively delivering services under each of the key headings here, there are also a number of general, overarching practical challenges posed by effective implementation of the Directive and these must also be tackled if the goal of complete and effective service provision for victims of crime is to be met in Ireland.

Unified service provision

The fragmented nature of the response system available to victims in Ireland causes difficulties for victims, adding stress at a time when they are already vulnerable. Research has highlighted the difficulty victims experience in identifying and accessing the range of services which exist, often due to a lack of co-operation between the statutory and non-statutory agencies working in the field:

... [o]verall the lack of a joined up approach is a major difficulty. To affect change individual women still rely on individual responses – e.g. by the Gardaí, by a Judge, by a housing officer, by a social worker. Supporting infrastructure and leadership needs to be developed as to how agencies all interact to help make victims safer (Women’s Aid)’.  

Efforts have been made between agencies to encourage co-operation amongst key stakeholders in recent years, including, for example, the memoranda of understanding settled between the Office of the DPP and service providers and the appointment of a Detective Inspector Domestic Violence and Sexual Assault Investigation Unit as national liaison between An Garda Síochána and the NGO Sector. A strategy to encourage closer

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90 S 17(2).
working relationships amongst key stakeholders in the field to ensure co-ordinated and effective referrals between support organisations will be important in coming years to ensure an improved experience for victims.\textsuperscript{92}

Training

It is clear from the preceding discussion that a multi-pronged approach to minimise the potential for further traumatisation of victims in this jurisdiction is necessary, including the provision of appropriate facilities in all courtrooms and better communication with victims at all stages of the process. Key to this effort is the training and education of all frontline staff on the rights and needs of victims and the services available to them, thereby ensuring the rights of the victim move from rhetoric to reality. Article 25 specifically requests both general and specific training for police officers, court staff, judges, prosecutors, lawyers, and victim support and restorative justice organisations, with the form and scope of training varying depending on the duties of the cohort and nature and level of contact. Ultimately, the ‘training shall aim to enable the practitioner to recognise victims and to treat them in a respectful, professional and non-discriminatory manner’.\textsuperscript{93} That training to tackle a lack of sensitivity amongst criminal justice agencies and actors in this jurisdiction is necessary is clear\textsuperscript{94} and should aim to do more than inform service providers of their obligations. Rather, it should provide them with supports they need to provide victims with the sensitive approach mandated under the Directive. The Fundamental Rights Agency has highlighted that ‘to be effective, training needs to cover both the need for a sensitive approach to victims, especially regarding particularly vulnerable groups such as child victims, and specialised knowledge, again with an emphasis on certain groups of victims’.\textsuperscript{95} The coming years should see all organisations involved in the provision of services to victims implement a training needs assessment and a systematic training plan. While the emphasis will undoubtedly be on key frontline service providers such as the Garda Síochána, all organisations and agencies with whom victims interact including healthcare services, social services, victim support groups and legal professionals should engage with this process.\textsuperscript{96}

Quality assurance and monitoring

The absence of formal processes to monitor the quality of services provided to victims of crime in Ireland has been the subject of criticism.\textsuperscript{97} The importance of ‘clear and consistent quality control mechanisms’\textsuperscript{98} has been emphasised by the Fundamental Rights Agency which notes that it is the ‘responsibility of EU Member States . . . to monitor support services’ performance, ensuring that they conform to designated standards while also respecting the independence of civil society’.\textsuperscript{99} The adoption of a system of quality control for victim support services, including key performance indicators and benchmarks, would enable transparent assessment of services and encourage remedial

\textsuperscript{92} EU Agency for Fundamental Rights (n 9) 14.
\textsuperscript{93} Article 25.
\textsuperscript{94} Mulkerrins (n 70); Lucia Zedner, \textit{Criminal Justice} (OUP 2004); D Parkinson, ‘Supporting Victims through the Legal Process: The Role of Sexual Assault Service Providers’ (2010) 8 Australian Institute of Family Studies; Eimear Spain, Sarah Gibbons and Shane Kilcommins, \textit{Analysis of Text for the Final Review of the National Strategy on Domestic, Sexual and Gender Based Violence, 2010–2014} (COSC 2014) 14; Garda Inspectorate (n 14) 335–6.
\textsuperscript{95} EU Agency for Fundamental Rights (n 9) 51.
\textsuperscript{96} Ibid.
\textsuperscript{97} For example, Garda Inspectorate (n 14) 20.
\textsuperscript{98} EU Agency for Fundamental Rights (n 9) 14.
\textsuperscript{99} Ibid.
action and consequential improvements in services, ultimately ensuring access to rights in practice. The importance of this process is underscored by Article 28 which requires member states to provide the European Commission with available data on how victims have accessed the rights established in the Victims’ Directive on a three-yearly basis, beginning in November 2017. As part of this process, it will be necessary to address the deficiencies in the recorded crime data in Ireland.\(^{100}\) While important, it is suggested that an over-reliance on official crime statistics should be avoided and efforts to gain a holistic understanding of the experience of victims, including those who do not report to official authorities, should be made, particularly though the use of victims’ surveys.\(^{101}\)

**Resources**

It is clear from the preceding discussion that, if victims of crime and their families are to have access to justice, adequate information and services in practice, rather than simply in theory, then significant investment in the sector will be required.\(^{102}\) The difficulties for victims and support services in Ireland, both statutory and non-statutory, resulting from inadequate resourcing has long been recognised.\(^{103}\) Funding will be required to provide all the services outlined in the preceding discussion, including for: training; data collection and quality assurance; investment in personnel to provide services to all victims irrespective of whether the crime has been reported; and capital investment. It is therefore surprising that the Regulatory Impact Analysis of the General Scheme of the Victims of Crime Bill, which aims to transpose the Directive,\(^{104}\) indicates that ‘it is likely that [the costs of implementation] . . . can be met from within existing resources’.\(^{105}\) Despite this rhetoric, some increase in funding to the sector has been announced.\(^{106}\) The increase in funding announced in 2016 to COSC amounts to approximately €12,500 extra for each of the 40 organisations supported, while the Victims of Crime Office will have an extra €6000 available for each of the 50 victim support organisations for whom it has

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responsibility. Given the significant under-resourcing of the sector to date, it is questionable whether these rather small increases in funding will be sufficient to meet increased demands under the Directive and to ensure adequate and effective access to services. The creation of new rights without adequate support or funding from central government creates frustration amongst service users, a frustration which is directed at individual services and criminal justice agencies. It is incumbent upon central government to adequately resource the agencies and services which are required to deliver upon the expectations of victims.

Transposition of the Directive

Concerns have also been raised about the proposed measures to transpose the Directive into Irish law, including whether the proposed implementation measures meet national obligations under the Directive. The narrow focus of the 2017 Act, which focuses exclusively on the right to information (Part 2) and the protection of victims during investigations and criminal proceedings (Part 3) and limits its reach to victims who engage with the Garda Síochána or the Garda Síochána Ombudsman Commission, is to be lamented. While s 7(9) of the Act provides that a member of the Garda Síochána or an officer of the Ombudsman Commission may arrange for the victim to be referred to a victim support service with their consent, the obligation is limited to these organisations. This is not reflective of Article 8 of the Victim's Directive under which the obligation to facilitate referrals of victims to victim support services applies to both competent authorities and 'other relevant entities' which include 'public agencies or entities, such as hospitals, schools, embassies, consulates, welfare or employment services, who are in contact with victims and identify the need for the victim to seek the specialised services of a VSO'. It is also unfortunate that wider rights given under the Directive are not accommodated within the Act, for example, the right to access support services mentioned

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107 Victims' Rights Alliance, ‘Budget 2016 21% Increase in Funding for Victims of Crime Office. This Amounts to an Increase of €300,000 for 50 victim support organisations, €6,000 each’ https://victimsrightsalliance.com/2015/10/14/budget2016–21-increase-in-funding-for-victims-of-crime-office-this-amounts-to-an-increase-of-e300000-for-50-victim-support-organisations-e6000-each>. A further €250,000 in funding for the Victims of Crime Office was announced for 2017 <www.justice.ie/en/JELR/Pages/PR16000311>. €600,000 in funding was also announced for COSC and Victims of Crime to facilitate an awareness-raising campaign on domestic and sexual violence and to fund domestic violence perpetrator programmes required under the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence: “Tánaiste Welcomes Extra Funding for Garda Recruits, More Civilian Staff and Sustained Additional Overtime in 2017” <https://merrionstreet.ie/MerrionStreet/en/News-Room/Releases/Tanaiste_welcomes_extra_funding_for_Garda_recruits_more_civilian_staff_and_sustained_additional_overtime_in_2017.html#hash=kJ1PPxsl_dpu7>.


110 Several Bills have been published, including the Domestic Violence Bill 2017 and the Criminal Law (Sexual Offences) Act 2017, which supplement existing legislation and fulfil some of our obligations under the Victims Directive. However, the primary piece of legislation in this regard is the 2017 Act, the long title of which identifies it as ‘an act to give effect to provisions of Directive 2012/29/EU . . . establishing minimum standards on the rights, support and protection of victims of crime’.

above or the broad rights to information, advice, support, referral, and emotional and psychological support, where available, under Article 9 of the Directive.

**Conclusion**

The opportunity to improve the experience of victims of crime in Ireland presented by the momentum associated with the Victims’ Directive is welcome and this article has highlighted the many positive developments and practices in recent years, while cognisant of the many challenges posed in delivery effective services to victims. Given the broad rights to information, support and protection afforded to victims under the Directive, stakeholders will be required to re-examine the nature of their engagements with victims in the coming years and recognise them as bearers of rights rather than mere ‘consumers of criminal justice’.

While victims have become a focus of political and societal concern and strides have been made to improve their experience in the criminal justice system, the article has highlighted serious deficits and significant investment in service provision, research, training and education is required. Efforts must also be made to address the systemic problems which impact on victims of crime, particularly those affecting rates of reporting and attrition. The responsibility rests with the state to move from the rhetoric of legal and service rights to a reality where victims of crime are respected, accommodated and provided for in this jurisdiction.

112 Zedner (n 94) 144.
113 Ibid.
‘Respectable’ victims and safe solutions: the hidden politics of victimology?

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Abstract

This paper offers a critique of the dominance that victim discourse has come to occupy in debates about criminal justice in Ireland. It argues that such a discourse works with an unacceptably simplistic notion of the term ‘victim’, it can lead to reforms that result in revictimisation rather than victim empowerment and it distorts the experiences of many crime victims for whom victimisation is inconvenient rather than traumatic.

Key words: victim; crime; Ireland; revictimisation; experience of victims

Introduction

It has become a truism of criminological discourse to say that the crime victim has been the forgotten actor in the crime equation, ignored by academic theorists and criminal justice policy-makers alike. Whatever the accuracy of this narrative of the absent victim and whatever the accuracy with which it characterises the past, it is now largely of historical interest. As Garland puts it: ‘[I]f victims were once forgotten, hidden casualties of criminal behaviour, they have now returned with a vengeance, brought back into full public view by politicians and media executives.’

The victim is now, in Walklate’s words, a ‘dominant symbolic reference point in criminal justice’.

This can be seen in a variety of disparate ways in Ireland. The previous Garda Commissioner has spoken about the need to create ‘a victim-centred, community-focused police service’. This echoed somewhat the thoughts of one of the more recent Ministers for Justice, including Frances Fitzgerald who talked about the need for a policing service that put ‘victims first’ and Alan Shatter, who spoke about his intention ‘to ensure that victims and their needs are at the heart of the justice process’. In a later statement, Fitzgerald suggested that this had been achieved, as ‘victims were now being placed at the

1 David Garland, The Culture of Control (University of Chicago Press 2011) 143.
5 Written Answers, Department of Justice and Equality, Programme for Government Implementation, 16 July 2013.
It has suddenly become unfashionable to suggest that that place might be occupied more appropriately by the concept of justice.

Then there is the ‘victim test’. When victims of crime or their families emerge from the courts they are routinely asked if the sentence imposed has given them ‘closure’. The answers are generally negative and that is not surprising. The expectation of victims is that sentencing will provide ‘closure’, a term that is somewhat amorphous in its meaning, and yet, while it is something that the criminal justice system seems to have embraced, it is something that sentencing is not designed to provide. The objective of sentencing is justice, fairness and proportionality and not the kind of retaliation on which expectations of ‘closure’ often seem to be based. However, the failure to provide closure is presented as a failing of the justice system rather than of an unrealisable expectation of crime victims and their families.

Victim discourse has also acquired a role in policy-making. So, for example, groups representing crime victims are asked as a matter of routine newsgathering to comment on the likely efficacy of new criminal justice policies. There is also evidence of victims being used in an argument for longer sentences, a process characterised by Ashworth as ‘victims in the service of severity’. Advic, for example, provides services for the families of homicide victims and is a recipient of state funding. But it also campaigns on sentencing and takes the view that the justice system is unbalanced, with offenders having more rights and protections than victims. It wishes ‘to ensure that the interests of families of homicide victims are not ignored within the Criminal Justice System and wants to bring about a fairer, more balanced system for such families’. Its aim ‘is to advocate for changes that will bring about a re-balancing’.

These examples suggest that victims, victim concerns and victim discourse, what the Department of Justice and Equality calls ‘the rights and expectations of victims’, are now a central part of how we talk about, and how policy-makers work within, the criminal justice system in Ireland. What is perhaps most remarkable, however, is that this ‘sea change’ has not been the subject of much critical scrutiny or independent examination, though there are some notable exceptions.

The intention of this paper is to raise a number of questions about this discourse. It will focus on three aspects of it. The first is the concept of victim and what it means. The second is the question of the degree to which victims benefit from the pervasiveness of a victim discourse and from reforms that are justified by reference to their experiences. Finally, it will ask whether the current discourse overstates the experience of victims of crime, and so may contribute to the development of a culture of victimhood in Ireland.

1 The concept of a victim: deserving and undeserving?

According to McGrath: ‘The broad public appeal of victims’ rights is easy to understand.’ Part of the attraction of the concept of victim is its apparent simplicity

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7 Andrew Ashworth, ‘Victims’ Rights, Defendants’ Rights and Criminal Procedure’ in Adam Crawford and Jo Goodey (eds), Integrating a Victim Perspective within Criminal Justice (Ashgate 2000) 185–205.
8 See <www.advic.ie>.
9 Quote from advice leaflet. See ibid.
10 Department of Justice and Equality, The Community and the Criminal Justice System (Department of Justice and Equality 2011).
11 See, for example: Anthony McGrath, ““In Whose Service?” The Use and Abuse of Victims’ Rights in Ireland” (2009) 1 Judicial Studies Institute Journal 78–96.
12 Ibid 78.
and rootedness in common sense. We all ‘know’ what a victim is and we all can know who is a victim of crime. But is it that simple? Consider these two examples.

On 7 December 2016 a man was attacked in Blackpool, a suburb of Cork City. He was shot in the back and then a number of times in the head. A ‘source’ told the Irish Independent journalist, Ralph Riegel that ‘this was a particularly shocking killing because [the man] was shot in a quiet residential area on a busy street’. He was a painter by trade and a father of two young boys. He had been due to marry his fiancée in May 2017. An active member of both the local GAA and soccer teams, he was described at his funeral as ‘a good community man’. He had been involved in attempts to rid the local area of illegal drugs. The local Catholic church was full for his funeral and he was buried in what the Irish Examiner described as a ‘respectful ceremony’. It included a guard of honour from the local GAA club.

On 25 February 2017, a 90-year-old man, a lifelong bachelor who lived alone, was found dead in his farmhouse in an isolated area of county Waterford. He had head injuries. A post mortem subsequently found that he had been murdered. He was described as ‘a well-known character in his local area’. If anything was going on, he would be there. He had been at a local tea dance a few days before he was murdered. It was when he failed to show up at the funeral of a man with whom he had been friendly that neighbours went to check on him. The priest told the mourners at his funeral that his death was ‘untimely’ and the manner in which he died was a source of anger in the local community. His death, they were told, cast ‘a long shadow’.

Two separate violent deaths, both shocking in their own way, two crime victims, both worthy of the sympathy that our concern with the plight of crime victims might lead us to anticipate would be mobilised on their behalf and on behalf of the families, friends and neighbours of both men. But that is not how it transpired. The newspapers referred to the first victim, Aidan O’Driscoll, as the ‘Beast’. The nickname had suitably demonic and violent associations, but it had been given to him as a teenager for his particular style of playing GAA football and had no relevance to any alleged criminal activities on his part, something that was not highlighted in much of the reporting. He had, according to media accounts, been a member of the Real IRA, an offence for which he had been charged, convicted and imprisoned but the conviction was subsequently quashed on ‘a technicality’, thus depriving him of any claim to be a victim of a miscarriage of justice. Media accounts implicated him in a series of killings in internecine paramilitary feuds, none of which he was ever charged with and which he obviously was not in a position to refute. But he was not a victim worthy of our sympathy; he was not a ‘deserving victim’ as his paramilitary activities formed an essential backdrop to his murder.

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14 Noel Baker, ‘Funeral of Aidan O’Driscoll Hears of the “Futility of Violence”’ Irish Examiner (Dublin, 16 December 2016).
16 Conor Kane, ‘Death of Paddy Lyons Cast a Great Shadow; Funeral Told’ Irish Times (Dublin, 6 March 2017).
17 See, for example: Barry Roche, ‘Head of Real IRA Shot Dead’ Irish Times (Dublin 8 December 2016).
19 Barry Roche, ‘File for DPP on Murder of Former Real IRA Chief-of-Staff’ Irish Times (Dublin 8 June 2017).
By contrast the emotions surrounding the death of Paddy Lyons were characterised by *The Sun* newspaper as ‘Numbness, Sorrow and Grief’. The praiseworthy aspects of his life were emphasised and it was noted that the murder had sent ‘shock’ waves through the local community. Though O’Driscoll had been killed in a more public place, the community in which the killing took place was not accorded the right to be shocked and, indeed, few media outlets asked how the community felt about the murdered man. Moreover, the possibility that he might have been popular in the local area because of his activities against drug dealers was not considered overly relevant.

It would be unwise to overstretch the comparisons and contrasts between the two murders. But they do illustrate an essential point. It is not enough to be a victim of a crime to become a ‘crime victim’. One is a legal classification, the other a ‘social one’. The manifest language of victimology pretends that all victims are a concern; the latent language of victimology does not. It embodies hidden social and probably class-ridden notions of the ‘deserving’ and ‘undeserving’ victims of crime. There are additional qualities and social judgements involved in acquiring the status of the legitimate and deserving victim of crime beyond simply being a victim of crime.

Nils Christie has set out some of these. Victims must be weak in relation to the offender. So it helps to be a woman, a child or just old. Victims must have been going about their legitimate, mundane and everyday lives, so making them blameless for what happened to them. The offender must be unknown to them, thus strengthening the blamelessness of the victim. The offender must be ‘unambiguously big and bad’. Finally, giving them victim status must not threaten any powerful interest in society.

Heber has enlarged on the attributes of the ideal victim. She sets out some further cultural and behavioural characteristics of the ideal victim. The victim must behave like a ‘victim’ with a display of passivity and willingness to accept the sympathy and assistance that is extended to them. They must be seen to be taking the necessary steps to avoid being victimised again and, while they may express feelings like anger, rage and a desire for vengeance, they must do so in moderation. ‘A fundamental requirement’, Heber argues ‘is that the crime victim is innocent and blameless – a prudent citizen’ and so ‘worthy of our sympathy and access to compensation’. So while, as Tham argues ‘everybody is for, and nobody is against the crime victim’, the actual situation is more nuanced. Victims must live up to and embody these characteristics if they are to be seen as ‘deserving victims’.

We can illustrate this with four sets of circumstances in which the status of victim is hard to attain. The first is the counter-intuitive phenomena of ‘repeat or multiple victimisation’. This refers to the degree to which individuals who are victims of crime on one occasion have a serious chance of being victims of crime again. The experience of many crime victims is, in Farrell and Pease’s phrase, ‘once bitten, twice bitten’. This is most apparent in domestic violence. But the levels of repeated or multiple victimisation

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24 Ibid 421.
25 Tham, quoted in Heer (n 23) 414.
are also significant in other types of offences such as assault, vandalism, domestic burglary and various forms of car crime.

Watson says that repeat victimisation is 'quite extensive' in Ireland.27 Victims of domestic violence were not included in her analysis, but half of those in her study who were victims of a criminal incident had been victims in the previous three-year period. Sarma found somewhat lower but still significant levels of repeat victimisation.28 Ten per cent of those who had been physically assaulted in this period had been victims of assault before and repeat victimisation levels for burglary of, and criminal damage to, residential premises were 'particularly high'.29

The Quarterly Household Budget Survey30 asked about repeated experiences of the same crime, although many multiple victimisations can involve different kinds of crimes. Yet, even with this definition, it too has shown that repeat victimisation is significant. For example, it reported that in 2010 more than a quarter of households who experienced vandalism had been victimised more than once before. Most commonly the vandalism involved the breaking into or damaging of motor vehicles. It suggested that the ‘real’ level of repeat victimisation may well be higher as about 45 per cent of acts of vandalism are not reported to the Gardaí.31 Van Dilk has suggested that the small group of criminals involved in a significant amount of crime has ‘its victimological counterpoint’. This is the ‘relatively small section of the public . . . disproportionately often victimized by crime’.32 Those subject to repeat victimisation are a significant part of the total of crime victims, but do not elicit our sympathy in the same way as others do, as they do not appear to take the appropriate steps to avoid revictimisation.

The second situation is where we ask if being a victim and being an offender are distinct and different statuses; that is, can a clear distinction be drawn between victims and offenders, and, if so, do offenders who become victims of crime qualify to be regarded as victims also? The answer to both questions may well be no. There are many cases where we can make a clear distinction, but equally there are many where it is not possible. This has not been explored in the Irish context, but it has been substantiated in other jurisdictions. Bottoms and Costello refer to this as the ‘victim-offender overlap’.33 This is particularly the case with household offences like burglary. Offenders are willing to report such victimisations, even though the evidence suggests that the ‘offences might be disproportionately often committed by acquaintances’.34 These kinds of findings, Schreck and Stewart say, discredit ‘the idea that victims and offenders are distinct entities . . . in fact that they are often the same people’.35 They concluded that there is one

27 Dorothy Watson, Victims of Recorded Crime in Ireland: Results of the 1996 Survey (Oak Tree Press 2000).
29 Ibid 111.
31 Ibid 2.
34 Ibid 127.
consistent finding in the study of crime victims, ‘people who break the law have a higher likelihood of falling victim to crime as well’.36 ‘There are’, they argue ‘very few examples of pure types of victims’.37

So why are we unwilling to recognise offenders who are themselves offended against as crime victims? Part of the problem is that the distinction between offenders and victims is often based on the use of the small number of violent and high-profile offenders as the ‘typical criminal’ and the elderly and vulnerable individual as the ‘typical victim’. O’Connell has shown how the media in Ireland emphasises atypical and violent kinds of crime and frame them within the two ideas – that criminals are unfeeling and unreformable and that victims are typically blameless, vulnerable and unable to protect themselves.38 If the working assumption is that all offenders lack empathetic feelings, then they do not conform to our notion of a ‘victim’ when they become one.

Thirdly, there is the difficulty that men face in establishing that they have been victims of crime. We have seen how in cases of homicide there are nuances in the understanding of the ‘deserving’ victim. The notion that the victim may have contributed to the violence inflicted on him by past violent behaviour is a case in point. But it is by no means confined to homicide. For some other kinds of crime the possibility of there being male victims is simply ‘unbelievable’. Male victims of domestic violence are a case in point. While there is no suggestion that there is any equivalence with women in terms of the incidence of domestic violence, the so-called and mythical issue of gender symmetry,39 men do experience domestic violence. The research of Watson and Parsons is important in this respect.40 It confirmed that levels of violence against women are substantial in Ireland, but that violence against men is by no means insignificant. They found that: 15 per cent of women and 6 per cent of men have suffered severe domestic abuse at some point in their lives; 13 per cent of women and 13 per cent of men have suffered physical abuse or minor physical incidents; and one in three women and only one in 20 men reported it to the Gardaí. Their study suggests that 213,000 women and 88,000 men in Ireland have been abused at some time in their lives by a partner,41 though it should not be assumed that the abusive partner is of the opposite sex. Violence can also be a problem in same sex relationships. Neither should it be assumed that the physical or psychological consequences for male and female victims are necessarily equivalent. Nonetheless, as the National Office for the Prevention of Domestic, Sexual and Gender-based Violence says, ‘it is now widely accepted in Ireland that both men and women can be victims and perpetrators of violence in the home’,42 And while the AMEN website may assure us that ‘there is no shame in being a male victim’,43 there is.

There is a readily available set of cultural justifications in Ireland to trivialise domestic violence against men and delegitimise males as victims of domestic violence. The AMEN

37 Ibid 666’
41 Ibid 169.
43 See AMEN website <www.amen.ie>.
website reproduces some of these including: ‘You must have done something terrible to her to deserve this!’; or ‘[L]ook at the size of you! Maybe she was just defending herself!’

Weiss has pointed out how the gendering or feminisation of victimisation works. She argues that the:

... social expectations of what it is to be a man in our society—as strong, tough, self-sufficient, and impenetrable... counter images of victimization in general and sexual victimization in particular. With ‘real’ men expected to avoid behaviours associated with femininity, men who are overpowered by others may be judged to have failed in their masculine duty to stick up for themselves.

Real men do not get sexually assaulted, either by other men or, most shamefully of all, by women and, if they do, then it is likely that they ‘deserve the violence they experience’. Against this kind of background, suppression of the experience and non-reporting are inevitable consequences.

This denial of victimhood to men can also be seen in what might be termed more conventional forms of male violence. It is difficult for youths and young men to establish that they have been victims of assault by other men, particularly when this happens in the night-time economy of drinking and drug-taking. There are two reasons for this. The first is that they may be unwilling to report being assaulted because of the damage that it would do to their sense of masculinity. The second is the fear that they will not be believed. The point about stereotypes of the ‘real’ man is that they are common to all institutions, such as the police, that deal with violent crime and young men can face a ‘credibility’ issue in trying to establish that they have been victims of assault rather than being joint participants in a public affray. So, while there is considerable agreement in criminology that men are more likely to be victims of violent crime, this does not automatically entitle them to the status of ‘real’ victims.

A fourth category of people who find it difficult to achieve the status of victims are those who are involved in issues with powerful groups like the police and the state in the course of which they are denied their rights as citizens, but which is done in ways that make it difficult for them to elicit the kind of public sympathy that is a necessary to achieve the social status of ‘victim’. The example of one group and one individual can be used to illustrate the point. Young people are the group. They told an Irish Times journalist in Dublin about the persistent problems of being stopped and searched without, they claimed, any good reason.

Dermot Walsh said that an investigation of this problem by the now defunct National Crime Council confirmed ‘the extent to which Gardaí treat these young people as

44 Ibid.
46 Ibid 277.
48 See Weiss (n 45), for example.
49 Patrick Freyne, ‘Stop and Search: Garda Harassment or Crime-fighting?’ Irish Times (Dublin, 22 July 2017).
trash... not fellow human beings who are deserving of respect’. As such, this is not a new issue, but has been highlighted in previous research.50

Similarly, those who are subject to persistent and unfair pursuit by the Gardaí and by the legal institutions of the state are denied or do not find it easy to achieve the status of victim. The case of Ian Bailey illustrates the point. He was arrested in February 1997 for the murder of Sophie Toscan du Plantier in Bantry in December 1996. Given that he had come to Garda attention for domestic violence in the past, he was not an unlikely suspect. However, Bailey co-operated with the Gardaí, giving everything – samples of hair, blood and DNA – everything, that is, except a confession. The main witness against him withdrew her statement, claiming that the Gardaí pressured her into making it. In 2001 the Director of Public Prosecutions found significant flaws in the ‘evidence’ against him and said that there were no grounds for a prosecution. Quite simply there was no case for him to answer.51

That has not stopped attempts to construct such a case. The Fennelly Report concluded that the Gardaí were prepared to ‘contemplate altering, modifying or suppressing evidence’ that obstructed their attempts to get a conviction.52 The most recent attempt to extradite him to France to face charges of murder was described by the trial judge as ‘an abuse of process’. As Kerrigan put it:

Bailey’s intimate diaries were examined, details leaked; every fact that could possibly discredit him was dug up and spread around. His life was destroyed. And after 20 years of intense focus on one man there remains a total – total – absence of hard evidence against him.53

Yet he does not merit public sympathy as a victim and his case is remarkable in the degree to which significant public figures in politics, law and academia have remained silent on the issue. There is, in the public perception at least, no smoke without fire.

It is clear from these that the concept of the crime victim that animates victim discourse – the notion that the victim is an ‘innocent’ and blameless individual and so worthy of our unconditional sympathy – does not reflect the reality of being a victim of crime. There are many additional attributes that the victim must have to qualify as a ‘deserving’ victim. These are not clearly articulated in victim ideology, but have the capacity to surface in a brutal fashion when the discussion moves on to victim compensation. This is a topic that would repay further research and could investigate the role that social class pays in victimhood. Is it easier, for example, for a young middle-class man to establish that he has been the victim of assault if the alleged offender is working class than it is for a young man from a working-class background to establish that someone from the same background has assaulted him?

2 Do victims benefit from a victim discourse?

A central motivating force in many attempts to reform the criminal justice system is to make it more ‘victim-friendly’. Such attempts, however, are not always successful. They run the risk of raising victim expectations, but these are not expectations that the system, even a reformed one, can necessarily satisfy. Thus, the question must be asked: do victims benefit from the increasing centrality of a victim discourse?

50 See, for example, Ciaran McCullagh, ‘Juvenile Justice in Ireland: Rhetoric and Reality’ in T O’Connor and M Murphy (eds), Social Care in Ireland (CIT Press 2006) 169.


52 Report of the Fennelly Commission, 6 April 2017, 105

53 See Kerrigan (n 51).
This has been explored in a number of recent studies. One looked at the long-standing problem of the low prosecution rate for the crime of rape. In England and Wales this has been attributed to the tendency only to prosecute cases where there is a strong likelihood of success. These are ones that fit the image of ‘real’ rape. That is: the offender is a stranger; the victim is a sober ‘respectable’ woman; and there is clear evidence of violence. It has been argued by those seeking reform that it is necessary to bring non-stereotypical cases into court to challenge these stereotypes. Such cases would include those where the victim had been drinking, where the victim and offender are known to each other, where there are claims that the behaviour was consensual, and where there were discrepancies in the evidence provided by the victim. Yet, when such an approach is used, it results in the prosecution of a greater number of cases, but this has a paradoxical consequence. There may be a need to bring non-stereotypical cases into the public domain to challenge stereotypes of rape, but it does not necessarily succeed. The evidence suggests that it leads to a higher acquittal rate and may increase victimisation in the short term at least.

The same possibilities of revictimisation exist in relation to the Criminal Justice (Victims of Crime) Bill 2016. This Bill gives legislative substance to the Victims’ Directive and as such it is seen as a positive development for victims. The Minister for Justice described it as a ‘ground breaking piece of legislation’. Victim groups have also welcomed it. Essentially, it appears to meet the problems with previous approaches to victim needs such as that of the Victims’ Charter, first introduced in 1999. These Charters embodied, as Mawby and Walklate, put it, ‘an approach based solely on the question of meeting needs, without translating any of these needs into rights’. Under the terms of the new Bill, what previously had been a requirement for the Gardaí and the state has now become a series of rights for the crime victim.

But, as always, the devil is in the detail. If the European Commission feels that a state has not fulfilled its obligations under the terms of the Directive, it can initiate legal proceedings against that particular state. Equally, an individual citizen can ask the European Commission to initiate infringement proceeding against a member state if the citizen feels that the state is not living up to its commitments as set out in the Victims’ Directive. However, it has been argued that, where individual victims are concerned, ‘it seems unfair and unreasonable to expect a victim to go through the stress and trauma of court proceedings once again’. Hence, the dangers of revictimisation in pursuit of one’s rights are significant here.

Then there is the issue of compensation. Under the terms of the European Directive, states are required to ensure that victims ‘have appropriate access to compensation’ and that member states provide ‘fair and appropriate compensation to victims of intentional violent crime’. In Ireland we have the Criminal Injuries Compensation Scheme. It awards

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55 Ibid 43.
56 Ibid 48.
57 Ibid 43.
58 The Bill was published in December 2016 but has not yet been passed by the Houses of the Oireachtas.
59 Dáil Debates (1 March 2017).
60 Rob Mawby and Sandra Walklate, Critical Victimology (Sage 1994).
'compensation for expenses and losses suffered as a direct result of a violent crime or whilst assisting or trying to assist in preventing a crime or in the course of saving a life'.

It will also consider claims for injuries incurred when going to the assistance of a member of the Gardaí. But the scheme has significant limitations in that it does not cover domestic violence (where the victim and the assailant are ‘living together as part of the same household’), and it does not cover traffic offences unless someone deliberately tried to run you down. But what is more important in this context is that, unlike those compensation schemes available in Europe, it does not cover damages for the ‘pain and suffering’ that a crime has imposed. The exception is where ‘[i]t will . . . pay mental distress money for immediate family members of a murder victim’. But pain and suffering is covered by the schemes available in Belgium, the UK, Luxembourg, Sweden, Denmark and Finland. In addition, Belgium, Denmark, Finland, France and Sweden give extra compensation for the ‘moral damages’ inflicted by crime, a phrase that refers to the violation of the victim’s personal integrity and covers, for example, the cost of psychotherapy. Moloney argues that the unwillingness of the Irish state to compensate crime victims for the pain and suffering of crime victimisation means that they ‘are being discriminated against when it comes to appropriate and fair levels of compensation’. Is this revictimisation under another guise?

What is also unclear is what the consequences will be if the Gardaí or the other institutions of the state fail to respect these rights? If a member of the force does not keep the crime victim up to date with what is happening in the investigation, what difference will it make? If the Director of Public Prosecutions does not inform victims of why the case against particular offenders has been dropped or if they are charged with a lesser offence than victims anticipated, what happens?

Obviously, it can have no implications for the criminal process against the suspected offenders. But, if victims are not provided with relevant information, will they have legal redress and what function would such legal redress serve? Is it possible that these are ‘empty rights’, simply put in place to demonstrate that we are on the side of victims, another example of symbolic legislation to make a social and political point rather than a legal and enforceable one? Is it just the extension of pointless rights to crime victims, thus resulting in their further victimisation?

The same could well be true for the changes in victim impact statements (VISs). These were first introduced in the Criminal Justice Act 1993 as a formal means through which victims of serious crime could make the court aware of the impact that the crime had on them. It covered both the VIS where the victim tells the court of the impact of the offence on them and the victim impact report (VIP) where another person presents the case on the impact of the offence on the victim. Initially, the right was confined to victims of violence and sexual offences. Under s 27 of the new Bill, the right to make such statements is extended to all crime victims.

The main reason why this may not be a positive, victim-friendly reform is that, as the situation stands at the moment, it is unclear what these statements are intended to achieve. Are they envisioned to be therapeutic in that the public expression of hurt is to be a cathartic experience for a crime victim? Or are they intended to influence the judiciary in the sentencing process by making the individual judge aware of the damage inflicted on

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63 Ibid.
64 Ibid.
the victim by the crime? Or are they both cathartic and punitive? The expectation that making such a statement will give closure to victims by allowing them to influence the outcome of their cases is something which, its critics allege, is both ill-defined and somewhat amorphous in its meaning, and it is also not necessarily something that criminal justice sentencing can allow.\(^65\) Paul Rock has argued that, as these statements do or are not supposed to influence the sentencing process, their role is in the criminal justice process ‘tends to be ill-defined’.\(^66\) What seems to be planned under the 2016 Bill is the extension of an ill-defined process to all victims in a situation where we are unsure what it achieves for the present set of victims who are already allowed to make them.

There are, as Roberts and Manika point out, two opposing models of the VIS.\(^67\) In one, the purpose of the statement is expressive, allowing victims to say what damage has been done to them by the offence. It is not intended to influence the sentence. In the other, it is instrumental: that is, it is intended to have an impact on the sentence of the court.

It is not immediately clear which description best characterises the current Irish use of the VIS. O’Malley has argued that the legislation that introduced the VIS fails to give any guidance on what precise weight is to be assigned to them.\(^68\) According to Guiry, ‘judges are expected to treat a VIS with what could be regarded as a genuine but distanced respect’. She goes on to say that ‘a VIS does give a judge a unique insight into the effects of crime, but it need not necessarily be used in sentencing’.\(^69\)

The late Mr Justice Carney had a different perspective. He argued that ‘victim impact evidence is meant to be of assistance to the judge in selecting the appropriate penalty and not merely therapeutic to the victim’.\(^70\) He said that he has been affected by the nature of the evidence presented in such statements. He did not make clear quite what weight he put on it in when selecting an appropriate sentence, though the statements obviously had some impact on him.

So there is a considerable lack of clarity around the purpose of such statements and around the weight that the courts should place on them. Perhaps more pertinently, it is unclear what attention the courts currently pay to them. If they are not intended to influence sentencing, why should court personnel take anything other than polite notice of them? Rock, for example, has noted how the ‘memorialisation of the dead’ through the VIS is a deeply emotional event for those delivering them in homicide cases, but they are often met with ‘civil inattention by the court’.\(^71\) Similarly, Booth found in Australia that, while judges listened attentively to the statements, other court personnel were not so focused.\(^72\)

If this is the situation in homicide cases, there is no guarantee that the extension of the right to make such statements to all criminal cases will be met by any increased level of enthusiasm or attention by the courts and by court personnel. If benign indifference

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\(^{65}\) See, for example, McGrath (n 11).


\(^{69}\) Ibid.

\(^{70}\) Mr Justice Paul Carney, ‘Victim Impact Evidence’ Irish Times (Dublin, 12 October 2007).

\(^{71}\) See Rock (n 66) 219.

is the current mode of reception, then this will inevitably increase if they are required to listen to more of them and this will inevitably be communicated to those making them. More than likely it will be experienced by them as a form of revictimisation, particularly if they are delivered in the random chaos that marks the working of the lower courts where most criminal cases are held in Ireland.

The belief that underpins such reforms is that it is possible through a series of strategic modifications to make the current criminal justice system more victim-friendly and to make it a more suitable vehicle for victim participation and victim satisfaction. It remains an open question as to whether this is possible. McBarnett, for example, maintains that the experiences of victims are not simply a by-product of an insensitive system, but very much at the heart of the criminal trial and their experiences are ones that are shared with defendants. As criminal trials are currently structured, it is in the interests of the defence to undermine the credibility of victims. This is done through the use of various ‘discrediting techniques’ on them when they appear as witnesses and which victims find upsetting. Equally, it is in the interests of the prosecution to use similar techniques on defendants. For prosecutors, she argues, ‘the victim is a problem requiring careful management’. They have developed techniques to ensure that victims do not provide the court with information that might call into question their purity as victims or raise the spectre of any possible contribution they might have made to the offence of which they are claiming to be victims. As Walklate puts it, ‘prosecuting counsel in trying to secure a conviction will often cut witnesses short or confine them to very specific answers which victims find difficult to relate to since such a process does not match with their actual experiences of events’. Their situation in the adversarial system is one of vulnerability and potential humiliation.

Thus, it is hardly surprising then that, as Winick puts it, ‘victims often experience the criminal process as unfair, disempowering, disrespectful, and an affront to their dignity’. McBarnett extends this by saying that ‘if victims feel that nobody cares about their suffering, it is in part because institutionally nobody does’. The position of crime victim will always be a problematic one in an adversarial justice system. Attempts to make it more victim-friendly run the risk of exposing victims to further humiliation and revictimisation. Moreover, attempts to persuade victims that it has become more victim-friendly increase the shock that victims experience when they are exposed to the rigours of an adversarial justice system.

3 Overstating the case for victims: victims of crime, but not crime ‘victims’?

Arguments about crime victims and proposals for dealing with their concerns depend on a foundation of crime victims who have negative victimisation experiences. It is through official labelling that one acquires the status of victim and through that an entitlement to access the rights of the victim. Some may want this acknowledgment of their status, but it is possible that others do not. Many people may meet the legal specifications of being a victim, but not see themselves in this way. For them, being a crime victim is simply one of the unpleasant costs of modern life, particularly of life in the city. As Rock puts it,

74 Ibid 296.
75 Sandra Walklate, Victimology: The Victim and the Criminal Justice Process (Routledge 2013) 127.
77 See McBarnett (n 73) 115.
‘being victimised and assuming an enduring social role of victim are not at all the same’.78 As a result, the state and its official agencies may be more concerned about the victimisation experience than many actual crime victims.

There are a number of arguments to sustain this proposition. One is the question of response rates to victim surveys. There is a growing concern in research circles at the difficulties in getting people involved in survey-based research and a range of strategies have been devised to address this, including offering payment or entry in raffles in return for participation.79 But, equally, there is the belief that if the issue under investigation is of sufficient interest and topicality to respondents then they will participate. Given the predominance of victim-centred discourse in public debate and the valorisation of crime victims in public discussion, one would anticipate that surveys about crime victimisation would have high response rates. They do not. These low response rates may be understandable in rape and domestic violence where victims may be unwilling or unable to relive their experiences. But response rates are low among victims of all other kinds of crime also.

Just look at two Irish examples of research on crime victims. The Garda Inspectorate sent letters to 158 of the people who had contacted the Gardaí about criminal incidents. They received six responses.80 Similarly, the study of Kilcommins and his colleagues had a low response rate.81 Their main questionnaire was distributed by those support organisations who agreed to co-operate to 1050 respondents: 303 were returned, a response rate of just under 30 per cent.

Then there are the people who are victims of crimes, but who do not report them to the Gardaí. Their reasons for non-reporting makes them interesting in this context. They are, as Goodey says, people about whom little is known.82 It is often assumed that such groups include a preponderance of victims of domestic violence and homophobic assault. The data from victimisation surveys in Ireland suggests that, while this may be true, there is more going on here than is immediately apparent.

For example, the 2006 victimisation survey done by the Central Statistics Office asked crime victims who had not reported their victimisation to the Gardaí why they had not done so:83 13 per cent of those who had been victims of burglary said that they ‘had solved it themselves’. A further 5.3 per cent said that they did not ‘wish to involve the Gardaí’. Where theft without violence was concerned, the relevant figures were 4.1 per cent and 2 per cent. With theft with violence, 8.9 per cent said they ‘solved it themselves’ and 7.2 per cent did not wish to involve the Gardaí. The relevant figures for assault were 6.9 per cent and 10.9 per cent. This suggests that there may be a parallel system of justice that such victims can access and through which victims can ‘solve the problem themselves’. It is one that does not require Garda involvement or the associated apparatus of victim support.

79 See, for example, Sonia Thompson, ‘Paying Respondents and Informants’ (Social Research Update, University of Surrey 1996).
80 Garda Inspectorate, Criminal Investigation (Dublin 2014) 299.
82 Jo Goodey, Victims and Victimology: Research, Policy and Practice (Longmans 2005) 38.
The third piece of evidence is the relatively low levels of engagement with victim support services. We have no data on this in Ireland, but the experiences in England and Wales suggests that it is a lot lower than might be anticipated. Less than 40 per cent of victims of serious crime (defined as a crime where the offender is sentenced to 12 months or more in prison) take up a service offered by the Probation Service to provide them with information on sentencing and subsequent release dates of the person who perpetrated the offence against them. The figure rises to 50 per cent in cases of sexual offences.\(^4\) Williams says that the low take-up may be because the Probation Service provides the service and the perception that it works on behalf of offenders may be a constraining element.\(^5\) Again, this is a plausible but not entirely satisfactory explanation.

These disparate pieces of evidence suggest that many crime ‘victims’ resist or are indifferent to being so designated. The question is why? One possibility is that crime victimisation may not actually be as traumatic as it is often presented. The received wisdom is that criminal events take their toll, though the exact nature of the effects may differ depending on the individual victim, the particular crime, and the circumstances in which the crime takes place. Thus, it has been established that the effects include: loss of earnings due to time off work; stress and shock at the nature of the invasion implied by a burglary or an assault; the impact on family relationships; and post-traumatic stress syndrome experienced by women who have been victims of sexual assault. ‘This’, as Walklate puts it, ‘amounts to considerable harm done’.\(^6\)

Yet many of the harms are conceived in psychological terms, and the extent to which these are significant, consequential and permanent remains an open question. Watson found that most crime victims do not suffer long-term psychological damage in the shape of increased anxiety, trouble sleeping or difficulties in concentrating.\(^7\) Only 3 per cent of those who were victims of crime that involved some level of violence, suffered permanent or recurring problems such as backache, or headaches. Is it possible, as Watson suggests, that ‘crime is often inconvenient rather than traumatic’?\(^8\)

A second possibility is that some victims use other strategies to solve the problem. We have seen how many victims said that they ‘solved it themselves’ or that ‘they did not wish to involve the Gardaí’. These categories have not been explored so quite what is involved in ‘solving it themselves’ is unknown. If we look at other reasons available to survey respondents we can exclude the level of loss involved and the victim’s perception that the Gardaí would not do anything about the offence. This raises the possibility that, for example, many crime ‘victims’ respond to their victimisation through retaliatory attacks or vigilante justice. Hence, the difficulties that we have seen about making clear and unequivocal distinctions between victim and offender.

A third possibility is that many people have self-defined needs that they believe the services cannot meet, because they do not see themselves as victims in the manner in which they are defined by the relevant service-providers or else they get through the experience in other ways, for example, through relying on intimate and family supports. It is also possible that, although men are more likely to be crime victims than women, they may not see victim organisations as relevant to their experiences. The other possibility is that the designation of victim is a feminised one and so one to be avoided.

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\(^{5}\) Ibid.

\(^{6}\) See Walklate (n 2) 106.

\(^{7}\) See Watson (n 27) 131.

\(^{8}\) Ibid 140.
The implications of the argument being made here is that we may need to be more
circumspect in terms of our discussion of crime victims. For many, the experience may
be irritating and upsetting, but not sufficient in terms of its long-term impact to warrant
the use of the kinds of victim support services that the state provides. Indeed, their
concerns may be met in other ways through, for example, some form of financial
recompense, an area where the state is a somewhat reluctant participant as evidenced in
our discussion of compensation in a European context.

Conclusion

This paper has argued that a discourse that places the victim at the centre of the criminal
justice system has the benefit of apparent simplicity, hence making it irresistibly appealing
in the new world of populist politics. It conjures up a world of ‘respectable’ victims and
safe solutions that do not threaten the power structure within which crime occurs and
within which the criminal justice system is embedded. But it is a discourse that collapses
on more sustained interrogation. The status of being a crime victim is not one that is
accorded to all victims of crime; it leads to solutions that do not necessarily help victims
and it can distort the nature of the experience of being a crime victim, one which for
many is not of the significance that victim discourse attributes to it.

Yet the category of ‘victim’ has enduring attractiveness. Its appeal transcends that
narrow focus of crime and has become a dominant frame through which social
movements and political groups stake claims to resources and public attention. Moreover,
through its combination of victimhood, vulnerability and the need for state protection it
reinforces a model of state and professional paternalism that may in the end result in the
disenfranchisement, and disempowerment and manipulation of significant sections of
the population. It is an ideology that has great potential for rhetorical development,
endless scope for expansion and our culture lacks a language through which it can be
resisted.
Victim personal statements in managing victims’ voices in sentencing in Northern Ireland: taking a more procedural justice approach

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Abstract

Victim personal statements (VPS) have been introduced in a number of common law criminal justice systems. Although they have been espoused as important in ensuring victims’ ‘voices’ are ‘heard’ in sentencing, this article examines the extent of improving victim satisfaction and procedural justice in Northern Ireland. In light of increasing juridification of victim participation through the VPS by the EU and the English Court of Appeal, its impact on sentencing has received mixed views amongst victims, intermediaries and legal practitioners. Drawing from 24 interviews with judges, lawyers and intermediaries, this article finds that greater attention should be paid to vulnerable victim’s inclusion and that judges should better articulate the impact the VPS has on sentencing and the significance of such statements in acknowledging the victim’s experience, rather than engendering harsher sentences.

Keywords: victims; sentencing; victim participation; procedural justice; the Troubles

‘[Y]ou could actually have a good decent case and your victim could just ruin it for you.’

Victims bring a certain amount of chaos to trials, despite calls for greater sensitivity to their needs in criminal proceedings over the past few decades. Many governments have included victims in criminal trials through use of the Victim Personal Statement (VPS) to improve the legitimacy and self-sufficiency of their criminal justice systems. While Ashworth and Sanders argue that VPS make little difference to sentencing decisions, Roberts and Erez assert that such statements are not redundant, but can improve victim satisfaction and help judges to contextualise the crime. In light of these debates this article examines the use of VPS in sentencing in Northern Ireland through the lens of procedural justice. Early social psychologist theorists on procedural justice found that participants’ perceptions of fairness and respect were dependent on how they were allowed to express their interests or ‘voice’ and how this shaped outcomes determined by third-party

1 This work was kindly supported through the Socio-Legal Studies Association small grants awards.
decision-makers. Such research has informed victimology and more recently criminal justice policy of increasing victim satisfaction through procedural fairness, but with less emphasis on victims’ input in informing outcomes.

This article explores the extent to which VPS deliver procedural justice, as not only being sensitive to victims’ input, but also as to how their statements can help to inform and shape sentencing decisions. This article grounds its analysis on research conducted in Northern Ireland. VPS in Northern Ireland are noteworthy as they were developed by judges in the 1980s to better respond to victims’ harm in sentencing. In the past few years there has been an increasing move towards a policy-orientated improvement in victim satisfaction which has seen the statements widened to all crimes. This article begins by outlining theoretical debates on the use of victim statements in sentencing, focusing its analysis through the lens of procedural justice. The following section traces the emergence of VPS in common law criminal proceedings, in particular the case study of Northern Ireland. The article then goes on to outline the process of giving a VPS, how this can be framed by criminal justice actors, and the difficulties for victims who make a statement. The next section concentrates on the impact of the VPS on sentencing decisions, taking into consideration the role of the victim from perspectives of defence counsel, judges and prosecutors, and intermediaries. In concluding, the article finds that, while victims are able to voice their harm, the extent to which it is heard and impacts on sentencing is very much dependent on the judge and the articulation of the statement. As such, procedural justice may be more about improving respect for victims in the decision-making on how the VPS is used in sentencing, rather than increasing their procedural ‘rights’. In closing, the piece considers new ways forward in improving victim satisfaction of VPS in Northern Ireland and engendering procedural justice.

Methodology

This article is based on research conducted in Northern Ireland during June to October 2015 involving semi-structured interviews with 24 professionals including: judges (4); defence counsel (3); representatives from the Public Prosecution Service (5); Department of Justice representatives (4); family liaison officers (FLOs) in the Police Service of Northern Ireland (PSNI) (5); and members of Victim Support NI and the National Society for the Prevention of Cruelty to Children (NSPCC) (3). Respondents were a mixture of male and female (50:50). Purposive sampling was used to identify key actors based on their experience and role through gatekeepers in these organisations and snowballing. Interviews lasted between 25 and 70 minutes, were audio-recorded and then transcribed. Data was collected, coded and analysed with NVivo using key themes identified during project. The identities of respondents were anonymised and are referred to in terms of their profession. Judges included senior justices in the Northern Ireland Court of Appeal, and the criminal and magistrates’ courts to reflect the widening of the use of victim statements in cases involving murder, rape and grievous bodily harm (GBH) to all crimes, including those coming before magistrates’ courts. Questions focused on the impact of the reform, the process of giving a VPS, perceptions of procedural justice for victims and their engagement with criminal justice actors, and whether VPS had impact on sentencing. While this project examines the procedural justice aspects of victims’ statements in sentencing, victims were not interviewed, given the breadth of crimes the VPS covers and the focus of the research on how VPS impact on the criminal justice system and actors within it, rather than victims’ perceptions. Some anonymised examples

8 Ashworth (n 4) 509.
of VPS were provided to the author. This research also analysed media coverage of cases and examined sentencing judgments and remarks. This involved looking through reported and unreported judgments on LexisNexis and the Northern Ireland Courts and Tribunals Service case database sentencing judgments and relevant appeals for when and how victim impact statements (VIS) and VPS were used or reported in decisions.

The VPS as procedural justice

Social psychologists have long had an interest in procedural justice of participants and the role of third parties with regards to their perceptions of fairness in decision-making and arbitration processes. Early research on procedural justice by Thibaut and Walker found that participants who were able to exercise their voice in procedures which affected them and influence decision-making had improved satisfaction when compared to those who were unable to express their views.9 Thibaut and Walker split procedural justice into process-control, capacity to present evidence, and decision-control – authority over the final decision.10 Tyler clarifies these down to consistency, representation and accuracy: consistency is based on comparison to prior decisions; representation on the extent to which participants can make their case; and accuracy in how decisions are reached taking into account participants’ input.11 With regards to representation, while it is subject to the values and beliefs of the individual,12 exercising voice can have instrumental or value-expressive effects.13 With the instrumental perspective, the participant recognises that their input does not determine the third-party’s decision, but that they are able to state their case and support the objectiveness and legitimacy of the third-party arbiter in reaching a decision. Value-expressive effects are where the participant’s input has no effect on the outcome, but participants appreciate being given the opportunity to voice their concerns.

Tyler suggests that value in voicing concerns is only shared by participants where a decision-maker considers their views, and this can be emphasised by decision-makers in how they communicate and explain their decisions.14 If decision-makers do not consider participants’ interests and communicate to them in the long term, it can lead to frustration and lack of engagement, undermining efforts to improve participants’ self-esteem or personal worth through the process.15 This group-value approach goes beyond the participant’s perceptions of being treated fairly to include how such input by participants – as respected members of the community – is considered in decision-making processes, thereby adding value by exhibiting social inclusion.16

9 Thibaut and Walker (n 7).
10 Leventhal suggests six criteria: consistency; the ability to suppress bias; decision quality; correctability; representation; and ethicality. See Gerald Leventhal, ‘What Should Be Done with Equity Theory?’ in K Gergen, M Greenberg and R Weiss (eds), Social Exchange: Advances in Theory and Research (Plenum 1980) 27–55.
12 Leventhal (n10).
14 Ibid 342.
15 Ibid 343.
Victimologists have used procedural justice as a lens to examine how victims’ satisfaction can be improved in criminal justice processes. Wemmers suggests that victim satisfaction and perceptions of fairness are shaped by how they are treated by criminal justice actors, including feelings of respect, how their input is valued, and perceptions of objectivity of decision-makers. Research by Lind and others suggests that procedural justice can be significant to victims despite a negative outcome in criminal proceedings, such as a lower sentence or acquittal. By allowing victims to voice their views and concerns through participation, such as making a statement for sentencing, it can help to affirm their dignity and self-worth. For victims, the use of personal statements in sentencing allows them to have a voice or input into the criminal justice system, which is supposed to provide them with important procedural justice benefits of inclusion and respect. Indeed, hearing victims’ voices can acknowledge the importance of their agency and worth in shaping appropriate proceedings and outcomes.

A more critical approach to procedural justice is that, while being sensitive to victims, VPS may be just a way to allow victims to voice their views in the criminal justice system and mollify them with procedural fairness without considering their interests in sentencing. This can reflect a dissonance between procedural and substantive justice in that victim-sensitive processes have no impact on outcomes of proceedings. Procedural justice factors of sentencing consistency and decision accuracy may be in conflict when allowing victims to present evidence on the nature of their personal harm, and thus consistency with other sentencing decisions can be less important for individual victims in their perceptions of procedural justice. However, the quality of decision-making in outcomes, such as sentencing, can be important to victims in terms of their perceptions of fairness, based on the ethicality and neutrality of judges. In relation to this study, perceptions of third-party decision-makers (judges and prosecutors) and facilitators (intermediaries), but not victims, were sought to determine to what extent victims’ exercise of voice was considered in sentencing judgments (i.e. outcomes). This is analysed against current policy and legal reforms and theoretical procedural justice considerations of instrumental and/or value-expressive uses of victim participation.

Any sort of intrusion by victims in the criminal trial has to be carefully managed, even if the responsibility of the defendant has been settled at trial. This is to ensure fair proceedings and that the sentence is a factual and evidential decision-making process based on the crime of which the defendant is convicted. Victims’ interests also have to be balanced with other sentencing priorities, such as deterrence, retribution, rehabilitation and public protection. That said, victims’ input on the harm they have suffered could help to ensure retributive goals of proportional punishment, thereby improving the quality of justice.

17 J Wemmers, Victims in the Criminal Justice System (Kugler 1996).
21 Tyler (n 13) 107
justice. From a more victimological perspective, proponents of victim inclusion in sentencing have been criticised for instrumentalising victims in retribution. This has been well documented in the USA with victims able to present their statement in person or through a video and to recommend a specific sentence. In contrast, in the UK there has been a more measured use of VPS, where victims’ experience of suffering is used to inform sentencing, rather than dictate it. This reflects that sentencing remains ‘public policy rather than private preference’ but the harm of the victim is considered as part of the public interest. Nevertheless, victim statements in sentencing benefit the court in contextualising the personal harm suffered by the victim and reflecting its gravity in the sentence.

VPS are viewed as key in enabling victims to achieve expressive and communicative functions of participation by allowing them to inform the court of their harm and for it to be reflected through the sentence and judgment. Edwards suggests that victim participation can have an impact on proceedings and outcomes through four categories: decision-making; consultation; information; or expressive dimensions. UK judges have been clear that victims’ opinions on sentencing are irrelevant, but their harm can inform the appropriate sentence. While this clearly rules out victim participation being about decision-making or consultation, it suggests that VPS is informative and expressive, yet its impact on sentencing can be indiscernible for all but legal practitioners. In turn, it dilutes procedural justice notions of process-control and perceptions of representation and accuracy of victims’ expression of harm in sentencing. Essentially, the VPS is another means for victims to testify as a witness on their harm as a consequence of the crime, a factual exercise to provide further evidence. This can have useful informative value for the court in determining aggravating factors for sentencing. The VPS can also have expressive benefits for victims by giving them public space to have their suffering expressed and ‘heard’ by the court, the defendant and wider public. Nonetheless, there remain tensions between victim expectations of procedural justice and the purpose of the criminal justice system in ensuring fair trial guarantees of accused persons during trial and punishment. In light of these debates, it is worth turning to consider the origin of VPS.

The rise of the VPS criminal proceedings

The first use of the VPS (also known as VIS) was in common law courtrooms in California in 1976 and followed soon after in other US states, with New Zealand and Australia in 1987, and Canada in 1988. In England and Wales, VPS were piloted in the late 1990s before being introduced nationwide in 2001 as part of the government’s Victim Charter to enable victims to better inform the criminal justice system on how the crime
affects them. Since then there has been an increasing juridification of the victim’s role in sentencing with the English Court of Appeal Perkins and Others v R, finding that VPS are a ‘right’, a form of evidence to be heard in open court and can be cross-examined, but exclude the victim’s opinion on the sentence. This is further entrenched with EU Directive 2012/29, which requires all member states to pass legislation that inter alia provides victims with the ‘right to be heard’ in criminal proceedings, whether through oral or written statements.

The Northern Irish experience of VPS has been somewhat different – used by judges since the 1980s with only recent formalisation in the Victim Charter and the Justice Act (Northern Ireland) 2015. Under the old system, victim statements in Northern Ireland were made through VIS or victim impact report (VIR), requested at the judges’ discretion. The VIS were usually letters written by victims on how the crime impacted them. In contrast VIR were prepared by psychiatrists or psychologists to provide a ‘specialist opinion on the traumatic impact of the crime on the victim and any consequent needs of the victim’. In a VIR the victim’s account is recorded, but they are not able to provide any further comment or voice an opinion on the contents of the report. VIS and VIR could be used in cases together to provide a personal and professional account of the victim’s suffering. However, recent Court of Appeal judgments on the evidential benefits of VIR have questioned the ongoing value of relying on VIR in sentencing.

In 2015 the VPS was placed on a statutory footing through the Justice Act (Northern Ireland) 2015 to improve public clarity and victims’ understanding of how to make such statements, as well as to expand the VPS scope from cases of homicide, GBH and sexual violence to all crimes. This codified approach came from the then draft 2014 Victim Charter. The Victim Charter was intended to set standards for the services to be provided to victims and expectations of how victims should be treated in the criminal justice system. Section 33 of the Justice Act (Northern Ireland) 2015 provides a broad ambit for victims to make statements, without reference to sentencing, but a subsequent section obligates that in sentencing ‘the court must in determining the sentence in respect of the offence have regard to so much of any victim statement’. Yet, unlike in other jurisdictions, VPS in Northern Ireland remain in written form and are only used for sentencing, whereas in the rest of the UK they can be submitted for decisions on bail, probation or prosecution decisions. The shift to VPS was meant to reflect in part the focus on the personal impact of the crime on the victim after the incident, so as to minimise, if not negate, any need to refer to the crime itself and avoid the responsibility of the accused. Despite this reform, the ambit of VPS in NI means that it has no impact on improving the procedural justice aspects of victims’ interests in criminal justice proceedings beyond sentencing.

34 [2013] EWCA Crim 323.  
36 Department of Justice, Provision of Victim Impact Statements and Victim Impact Reports: A Department of Justice Consultation (Department of Justice 2011) para 10.  
38 DoJ Official A, Interview 1, June 2015.  
40 Ibid s 35(2).  
The process of giving a VPS

Victims are informed that they can make a VPS though a leaflet provided by the Victims and Witnesses Care Unit in the Public Prosecution Service when the letter approving the decision to prosecute is sent. A statement is usually made after a conviction or guilty plea, but before sentencing. This contrasts with the experience in England and Wales, where VPS are taken after the crime following the witness statement, as it was felt that this was done too early –before the full effects of the crime had manifest themselves.\textsuperscript{42} In Northern Ireland, there was consensus amongst respondents that taking the VPS after the trial or guilty plea was appropriate, as it allowed the victim to reflect on the impact of the crime and the trial.

For victims, writing down and reflecting on their suffering through their statement could be cathartic. A number of intermediaries noted that victims making the statement provided a ‘sense of relief that they have all this down on paper’,\textsuperscript{43} allowing them to unburden themselves,\textsuperscript{44} or to ‘vent their spleen’.\textsuperscript{45} One police officer suggested that for some victims it is a ‘way of working through their bereavements’.\textsuperscript{46} Another officer found that, for a woman whose son had been murdered, the VPS ‘sort of cleansed her soul a wee bit in relation to it, because she’s a lot of stuff she has needed to say and this gave her the output to say it’.\textsuperscript{47} Others were more cynical, with one police officer feeling that it may ‘help people and it might be therapeutic to a degree, but I don’t know if it would give people closure’.

In all, for some victims a VPS can be helpful by getting them to confront the pain and loss they have suffered, indicating some procedural justice aspects of representation and voice. Yet the statement is not enough in itself, or the same for all victims.

The extent to which the VPS demonstrated more procedural justice aspects of accuracy of voice, according to respondents, depended on both the ‘caring skill of the statement taker’ and how articulate a victim is in enunciating the harm they have suffered.\textsuperscript{49} In terms of the statement-taker, victims do not directly petition the court, but their statement is made through a range of intermediaries tasked with recording the VPS and passing it on to the prosecutor. Different actors document the VPS depending on the crime or victim. For cases involving homicide or GBH, they are prepared with a police (PSNI) FLO, with other crimes written up by Victim Support NI and the NSPCC Young Witness Service if the victim is a child. Victim Support NI would deal with the greatest volume of VPS (doubling from 94 to 210 in the first six months of 2014 and 2015), given the expansion to all crimes, with the NSPCC only addressing a handful of cases.

In taking the statement, intermediaries said they were sensitive to victims’ voice, allowing them to write it out by hand or dictate it, with the intermediary then typing or writing it up. One FLO said it was a ‘free text’ and ‘like taking an evidential statement, we can’t influence what goes in’.\textsuperscript{50} A senior police officer responsible for the FLOs, who also had personal experience in making a VPS for a family bereavement, outlined that:

\textsuperscript{43} Victim Support Worker A.
\textsuperscript{44} Defence Counsel A.
\textsuperscript{45} Police Officer D.
\textsuperscript{46} Police Officer E.
\textsuperscript{47} Police Officer D.
\textsuperscript{48} Police Officer A, Interview 7, June 2015.
\textsuperscript{49} Prosecutor A, Interview 3, June 2015.
\textsuperscript{50} Police Officer C, Interview 9, June 2015.
generally speaking this is a verbatim statement recorded at someone’s dictation essentially so what goes into it really isn’t up to us; we influence what should go into it in terms of financial and psychological impact, but essentially it’s down to the victim to actually give those words, and sometimes they are very powerful.\textsuperscript{51}

In terms of procedural justice, while intermediary involvement does not mean that victims’ voices are shared with those that facilitate the VPS, it does reflect the restraints placed on victims’ process-control and representation, which can distort the accuracy of their voice. In terms of articulation a number of respondents noted how a well-worded or emotionally charged statement by a victim could more effectively convey the full impact of the crime on their life. This can be reflected not just in the quality, but also the length of the VPS, with statements ranging from a few sentences to five or six pages. For instance, in a case of theft, a prosecutor recalled how a woman who had had money stolen from her children’s money-box by her cleaner wrote a nine page VPS: ‘it was very little money really that was taken out of her children’s money boxes, but it was just the abuse of trust she felt very let down’.\textsuperscript{52} This raises issues of consistency of statements and the ability of a more expressive victim to sway the judge to impose a heavier sentence, than could a more reticent or inerudite person. This was reflected by a judge who found that: ‘you never know what the VPS will say, some can be more powerful than others, more persuasive’.\textsuperscript{53}

There can also be multiple VPS in a single case, which can have implications on the resources available for recording the statement and the impact on sentencing. In the \textit{R v Connors} murder case there were 10 VPS submitted to the court.\textsuperscript{54} In a case involving a death caused by a road traffic accident one FLO that recalled 15 members of a family wanted to make VPS, but the officer agreed to do eight, as it takes on average two-three hours to do a single statement. Such cases impact on officers and other intermediaries’ workload and other work commitments. The Justice Act (Northern Ireland) 2015 now provides for a collective VPS for families to complete.\textsuperscript{55} While multiple VPS increase the workload of intermediaries in assisting victims to complete a VPS, it also raises difficulties for competing voice amongst victims and collectivising of victims’ voices. There is a perception amongst legal practitioners that multiple VPS in a single case can ‘dilute the impact of those views’.\textsuperscript{56} Although the VPS is meant to provide a picture of the personal harm suffered by victims because of the crime, it may be distorted by how their voices are presented through the multiple prisms of different family members affected by a crime. Nonetheless, judges in cases like \textit{Connors}, where there are multiple victim statements, are able to discern the manifold suffering of family members and allow a pluralistic understanding of the victim and the impact of the crime on their family.

\textbf{Framing the VPS}

Although the VPS can offer victims an outlet to express their suffering, it is still treated as a piece of evidence, subject to cross-examination and limited to the charges and facts before the court. Ensuring the victim’s voice remains within these bounds necessarily requires some framing by those who help to prepare or submit VPS to the court. In the

\begin{itemize}
\item \textsuperscript{51} Ibid.
\item \textsuperscript{52} Prosecutor A.
\item \textsuperscript{53} Judge C, Interview 21, September 2015.
\item \textsuperscript{54} \textit{[2011] NICC 35 [11].}
\item \textsuperscript{55} S 33(2).
\item \textsuperscript{56} DoJ Official B, Interview 2, June 2015.
\end{itemize}
taking of a VPS, intermediaries assisting in the drafting of the statement will encourage
the victim to make reference to the headings referred to in the Department of Justice
guidance, such as physical and psychological harm, and any financial loss. These headings
help to give the statement ‘shape’,\(^{57}\) and make it appear less of a ‘rant’.\(^{58}\) Intermediaries
often informed victims that inappropriate language or opinion on the appropriate sentence
or punishment for the convicted person should be excluded or would be redacted.\(^{59}\)

A prosecutor will include the VPS in their sentencing submission to the court after
they have edited it. The prosecutor may read out the statement in part, whole or not at all
at their discretion. This reflects that the selective use and ‘interpretation’ of VPS ‘are in
the hands of the prosecutor presenting the case’.\(^{60}\) Prosecutors can undermine the
communicative function of VPS by taking away the uniqueness of a victim’s story, emphasising different aspects, or representing victims’ harm in generic terms which may
understate impact of the crime.\(^{61}\) Once the prosecutor has edited the statement, it will be
disclosed to the defence who will also have an opportunity to further redact it before the
judge reads it. This instrumentalisation of VPS sees victim’s statements being mediated
by other actors in the criminal justice system for their own ends, undermining process-
control and victims’ perceptions of procedural justice in how accurately their harm is
being represented.\(^{62}\)

There are good reasons for redactions. Defence counsel found that they often edit the
statement if it is not backed up by medical evidence. As one defence counsel remarked,
‘not all victims are objective, and not all victims are necessarily reliable’,\(^{63}\) continuing:

You do tend to find that a necessity for an awful lot of editing in those
documents. It would be rare that you would get one that you didn’t have to edit
because it contains a lot of fairly volatile and very emotional statements about
what they think should happen to the defendant . . . I’ve seen some very, very
informative and very, very powerful and passionate victim impact statements, but
again they have to be treated very carefully to make sure that they don’t unduly
prejudice the judge by including material which would interfere with the judge’s
ability to fairly sentence a defendant.\(^{64}\)

There is also a danger that victims may exaggerate or put unsubstantiated claims into their
statements that would unfairly prejudice a defendant.\(^{65}\) As one defence counsel recalled
with regard to one victim statement of a mother in a murder case, ‘she was saying . . . he
was unrecognisable, he was beaten to a pulp, which actually wasn’t true that was a rumour
that had been spread round the community.\(^{66}\)

A Victim Support NI worker recounted that in one case a victim claimed that as a
result of the crime they developed had fibromyalgia and the ‘judge didn’t believe that
would have happened. He thought that was maybe an over inflation of what actually did

\(^{57}\) Police Officer C.
\(^{58}\) Police Officer B, Interview 8, July 2015.
\(^{59}\) Victim Support Worker A, Interview 5, July 2015.
\(^{60}\) Hall (n 42) 107.
\(^{61}\) Roberts and Erez (n 6) 228.
\(^{63}\) Defence Counsel A.
\(^{64}\) Defence counsel A, Interview 12, July 2015.
\(^{65}\) Magistrate A, Interview 18, August 2015.
\(^{66}\) Defence Counsel A.
happen and it actually went against the victim.67 One prosecutor suggested that some victims can suffer from a ‘bit of a claimitis’.68 Despite noting the risk of exaggeration of victims’ harm, there are perceived limits by defence counsel in challenging victims’ harm through cross-examination, using instead redactions before the sentencing hearing. With senior counsel dealing with more serious offences, such as murder and sexual violence, one remarked that:

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\ldots \text{you are certainly always very, very careful not to be seen to be causing any more damage to the character or the truthfulness of the honesty of the victim its seen as kind of compounding the harm [through cross examination] \ldots} \\
\text{Rather than do that you just leave it, because the prospect of damage that you can cause to your client's claims for leniency and discount for the guilty plea.69}
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This lack of cross-examination by defence counsel to comply with sensitive practices of the court in the hope of a reduced sentence is apparent in other jurisdictions. Erez, in discussing England and Wales, found that there were similar ‘strategic disincentives militating’ against defence counsel cross-examining the VIS.70 In the Republic of Ireland, McGrath also identified that cross-examination was unnecessary as the defence counsel can edit the statement before it is submitted to the court and it had little impact on the sentence.71

Redacting or editing the victim’s statement is what Edwards terms maintaining ‘quality control’ of a piece of evidence, rather than capturing victims’ voices.72 Prosecutors can ‘sanitize’ the impact of the personal harm of the victim or represent their suffering in ‘clinical’ terms.73 Englebrecht and Chavez suggest that ‘[a]ny constraints placed on participation are likely to diminish the therapeutic value’ of victims engaging with VPS.74 That said, framing the VPS to just those crimes of which a defendant has been convicted very much narrows the victim’s experience of suffering. As such, the framing of the victims’ voice, while to some extent necessary in maintaining the rights of the defendant, pays little heed to a victim’s emotional experience and voice. In light of procedural justice, such tight process-control of the victim’s voices and how it is represented could affect victims’ perceptions of fairness and influence of their VPS on sentencing decisions. However, as victims never see their statement again, the extent to which prosecutors and judges use it in sentencing hearings and decisions plays a more important role.

Hurdles in making a VPS

The process of taking a VPS can discourage victims from making a statement. Here, we discuss three main hurdles: cross-examination; intimate perpetrator crimes; and the legacy of the Troubles. These reflect the practical challenges in making VPS inclusive and a measure of procedural justice, due to the secondary victimisation they pose to some victims. With regards to the first of these, VPS are treated as evidence, allowing defence

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67 Victim Support Worker A. 
68 Prosecutor C, Interview 14, August 2015. 
69 Defence Counsel A. 
70 Erez (n 20) 549; Ashworth (n 4) 507; Sanders (n 5) 454. 
72 Edwards (n 23) 319. 
73 Roberts and Erez (n 6) 228. 
counsel to cross-examine victims on the veracity and reliability of their statement. As one prosecutor stated, cross-examining a victim on a VPS:

... would have dire consequences. ... it's just horrific for a victim to go through the adversarial court system, absolutely horrific and to me nearly that's the problem, that's the root of it, the whole system, you can tinker all you like with victim impact statements, but you nothing is going to change the fact that you have to go into a witness box, you have to tell your story and then to the jury as strangers and then you have to be cross-examined? I mean people will say afterwards their hearts sinks.

As such, the fear of facing cross-examination, perhaps for the first time if the victim did not testify at the trial, could discourage them from making a VPS. Yet, as discussed, victim cross-examination is a risky defence strategy when trying to demonstrate the defendant's good behaviour, and therefore more of a perceived than practical risk.

Second, disclosure to the defence can silence some victims. Certain victims of intimate perpetrator crimes, such as domestic violence or child abuse, may be unwilling to make a VPS, given that the perpetrator could use the knowledge of the harm caused – such as being unable to sleep or bed wetting – in future attacks or as emotional abuse. As one intermediary suggested,

... if you are a victim of domestic violence do you really want this person who has power over you for so long to know the impact that they have had on you and how that they have totally affected your life?

Once submitted, ownership of the victim’s voice through the VPS is forfeited and can be used as much or as little by criminal justice actors and will be disclosed to the defendant. Although intermediaries will inform victims that anything they write in the VPS will be seen by the defence, it can have the effect of minimising or suppressing certain harms or circumstances of the victim, limiting their voice and experience. This corresponds to Erez and Rodger's view that VPS can silence some victims, as they 'are successful in maintaining the time-honoured tradition of excluding victims from criminal justice with a thin veneer of being part of it'.

Victims can refuse to make a VPS. In R v Chen and others, three victims of human trafficking for the purposes of sexual exploitation testified during the trial, but refused to make a VPS. A magistrate suggested that, where a victim refuses to make a statement, there is an informal practice of the judge querying the prosecution as to why and whether they have met with the victim. In both these cases there was other evidence on the harm suffered by the victims. Refusing to make a VPS reflects a victim's agency, but it signifies that sensitivity is needed around disclosure to protect more vulnerable victims from future victimisation by the perpetrator (i.e. in child abuse or domestic violence cases). Not all victims are the same. There should be fresh thinking on how to allow vulnerable victims to submit a VPS to inform the court of their experience – such as pre-recorded video statements – without fear of further violence or that all the particulars...

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75 Prosecutor A.
76 Edwards (n 23) 300.
77 NSPCC Worker A.
78 Victim Support Worker A.
81 Magistrate A, Interview 18.
being revealed to the defendant. A fine balance needs to be struck between ensuring the veracity of the harm caused to the victim and sufficient protection of their privacy and ability to inform the court of their suffering. Otherwise individuals who have suffered from serious harm could have their voice and personal experience silenced in sentencing proceedings by the system itself. This undermines notions of procedural justice and respect for the personal voice of the victim as a participant. For victims, participants’ perceptions of procedural justice are not just about voicing their views, but also about being heard and their interests being considered by judges in sentencing.

A final hurdle is continuing distrust of the police and the criminal justice system by some people in Northern Ireland. This is a consequence of the Troubles that still cast a long shadow over some communities’ engagement with the criminal justice system because of findings of collusion between the former police force (the Royal Ulster Constabulary) and paramilitaries, as well as the use of internment and enhanced interrogation. As one FLO recalled, ‘my very first deployment was a murder in North Belfast and the first words out of the fathers mouth were Danny McCaughan didn’t get justice, such and such didn’t get justice and I’m not f’ing expecting justice’. Another reported that they had the door closed in their face three times by the family of a murdered victim before they were able to put their foot in the door and speak to them. Other FLOs discussed how they had to engage the victim through a solicitor or community representative, as the victims did not want to have any contact with the police. One FLO explained that in her experience a family did not trust her because she was a member of the police, even though she was trying to inform them of the investigation and assist in filling out the VPS.

... it’s very difficult to build any kind of relationship with them and when it comes to making victim impact statements ... they would want to say a lot about police mishandling of the investigation ... I would say that’s had more of an effect on them than the murder themselves, that’s what is really biting them.

Although many of these engagements with families are in relation to contemporary murders, the past perception of the police within certain communities creates a barrier for victims being able to inform the court of their suffering, or at least inhibits its effectiveness. This reflects wider structural issues with the criminal justice system and procedural justice in post-conflict societies.

**Being heard: the impact of the VPS on sentencing**

The VPS as only a written representation of a victim’s ‘voice’ has the effect of flattening the emotional expression, tone and emphasis of their suffering. More functionally, as one judge indicated, the VPS ‘can be kept under control if it is kept in writing. It is structured and less likely to give concerns.’ The VPS is informative in clarifying the judge’s decision on the sentence through ‘material to the question of harm’, a fact-finding exercise removed from the uncertainties of emotion. But what impact does it have, if any, on
sentencing? For victims the VPS can provide a communicative outlet to the court on the particulars and gravity of the harm they have suffered as a result of the crime. As one Victim Support NI worker found:

[The VPS] gives the victim a wee bit of power back over the whole process, because . . . The victim seems like the unimportant person, it's all about the offender. The victim can feel very much forgotten about . . . at least through this statement that they are getting some kind of a say in the process and someone in authority is listening to how this has impacted on them.89

The VPS serves a vital role in capturing the victim’s voice. Even if other actors redact it or the judge does not refer to the statement, at least it becomes part of the court record. As one NSPCC support worker found:

. . . it's really important to have the child’s voice central to the proceedings . . . You’ve got a whole system running and it’s not designed for the victim or the witness and so this is another way to get the child’s voice in there.90

The VPS can also send moral messages about the defendant’s responsibility in the crime as a way of ‘shaming’ the defendant by laying bare the harmful consequences the crime has had on the victim and their next of kin.91 One prosecutor found that, in a case involving a heavily pregnant woman who lost her baby in a car crash close to term, the VPS was helpful, that even though she wanted the driver of the other car prosecuted:

. . . she had stated she forgave him and she was able to move on and she had gone onto have another child, but she really didn’t want him to be heavily sentenced. In cases like that where they want a conviction, but not really not everything to be thrown at him, it helps the court to understand all the emotions and stuff involved.92

This is not to suggest that VPS can always provide a sort of restorative justice forum in criminal sentencing, but it can help to return some of the victim’s agency and identity undermined by the defendant during the crime by confronting them and the court with the harmful effects.93

The VPS can have therapeutic benefits through the victim’s harm being publicly acknowledged. This reflects both the practice of emoting (i.e. publicly sharing their emotions) and the role of procedural justice in how their voices are accurately respected and considered by the criminal justice system.94 Lens et al suggest that there are no direct therapeutic effects from making a VPS, but feelings of anxiety can decrease where the victim feels satisfied by how they were respected and treated.95 The VPS can offer a way of acknowledging the victim’s suffering through their inclusion in the sentencing process. Judges reading out the VPS alongside their sentencing remarks can publicly acknowledge the victim’s experience, making their suffering official and giving a valued place for their voice.96 Acknowledgment can help to give the victim a human face, rather than being just

89 Victim Support worker A.
90 NSPCC Worker A, Interview 6, July 2015.
91 Police Officer B.
92 Prosecutor A.
94 Ibid.
96 Doak et al (n 25) 668.
the anonymous outsider. As one prosecutor noted, this acknowledgment by judges ‘really helps that this person was a person, rather than just simply a statistic’.97 This recognition of the victim can evince procedural justice aspects of representation and accuracy of sentencing decisions in accounting for the harm victims suffered.

Erez found that judges citing victims’ statements made them ‘feel gratified when their sense of harm is validated in judges’ remarks’.98 This serves an almost communicative function that the victim’s voice is heard, listened to by the judge and echoed in their sentencing remarks. One defence counsel remarked that:

... victims and their families do probably at least feel that they’ve been heard and a judge refers to the [VPS]. . . . I suspect that probably gives the families at least the sense they have been listened to and that their views have been taken into consideration. I suppose maybe that’s part and parcel of this whole idea that justice needs to be seen to be done.99

However, analysing sentencing judgments and remarks by judges in Northern Ireland over the past 20 years found very few instances where judges quoted the victim’s statement, though judges would often note that they have received it and found it helpful. Some prosecution counsel and judges noted that referencing or quoting the VPS was often kept to a minimum to avoid victims’ statements being subject to an appeal. Yet this clearly diminishes the procedural justice aspects of consistency, representation and accuracy if victims are unable to discern their input. That said, the potential of acknowledgment represents reciprocal benefits for some, but not all victims. Nevertheless, the lack of acknowledgment in the judge’s remarks can inhibit victims’ and intermediaries’ perceptions of the impact and value of the VPS in sentencing.

Espousing the therapeutic benefits of VPS for victims is seen as a ‘soft’ role for them, where they are denied participatory rights and, instead, given more of a token gesture to keep them satisfied and engaged. This can reflect Ashworth’s arguments in favour of service rights over procedural ones on victim participation in improving respect for victims rather than influencing decision-making.100 As one senior police officer said:

I don’t think that judges pay much attention to the victim impact statement in a murder investigation. It’s more of a cathartic tool for the family to be able to express what a devastating effect the murder of the loss of a loved one has had.101

Some view the VPS as having little impact on the sentence and perceive it as just a consolation prize for victims. One senior counsel said: ‘although undoubtedly it probably does have some impact upon sentence, the value really is in the degree to which it helps victims and makes them feel that they are being heard and taken into consideration’.102

These sentiments reflect the experience in other jurisdictions where the therapeutic label has been attached to victim statements in sentencing, but in practice they are blunt therapy tools.103 Doak, Henham and Mitchell note the ‘danger in attaching the “therapeutic” label to criminal justice initiatives, which, while promoting “participation on paper, actually do very little in practice to encourage a form of participation that is both

97 Prosecutor A.
98 Erez (n 20) 553.
99 Defence Counsel A.
100 Ashworth (n 4) 509.
101 Police Officer B.
102 Defence Counsel A.
meaningful and effective in terms of catharsis’. More cynically, one defence lawyer suggested that VPS help to neutralise public perceptions of weak sentences and the apathy of judges towards victim suffering; whereas without a VPS the newspapers would jump on a story where the victim was outraged that their suffering was not taken into account. It may be the case that VPS are a way of managing and mollifying victims. Yet, as Tyler suggests, only allowing victims to voice their interests and not taking them into account may have short-term value-expressive benefits (such as emoting), but in the long term the failure to shape sentencing will cause them frustration, disengagement and loss of satisfaction with the criminal justice system. This feeds back to Thibaut and Walker’s research finding on procedural justice that ensuring satisfaction is not enough if it is not at least seen to be considered in decision-making. At best, the VPS may not be therapeutic for all victims, but it can contribute to victims having a better understanding of the sentencing process and what was involved in it.

**Measured expectations and measured justice**

Writing a VPS can encourage victims to have measured expectations of the likely outcome of sentencing and what the criminal justice system can and cannot do. As a Victim Support NI worker found, victims can ‘sometimes . . . have a very inflated opinion of what is going to happen on the back of this statement that it is going to work miracles’, but, the process of providing the VPS and engagement with an intermediary can help to inform those expectations. Similarly, one FLO remarked, in a case of a mother giving an impact statement against the man convicted of manslaughter as a co-accused rather than a direct perpetrator over the death of her son, the VPS helped her to: . . . put on record the best of her thoughts. Ultimately she knows the guy that murdered her son isn’t going to get prosecuted for murder and she’s really not happy. But you’re never going to be happy. I know if it was my kids, seeing them hanging from a lamppost would be enough, but you got to be big enough to understand justice works in certain ways. We are not in the Wild West unfortunately or fortunately!

Accordingly, while the retributive function of VPS in increasing a sentence may be limited, the VPS can at least better inform victims about sentencing and their role in it. This corresponds to literature on procedural justice and the role of information in providing a ‘cushioning effect’ where outcomes were not expected. However, Killean suggests that such a cushioning effect in sentencing outcomes will likely be ineffective in serious crimes were there is an acquittal or an overly lenient sentence. In the procedural justice literature, such a cushioning effect in creating measured expectations for participants, where they have no direct impact on decision-making, will only exist where they are able to participate and feel that they have voiced their interests. To an extent, the expansion of VPS to all crimes in Northern Ireland may be effective in having a cushioning effect and procedural justice benefits for minor crimes, but where the

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104 Doak *et al (n 25) 668.
105 Defence Counsel B.
106 Tyler (n 13).
107 Victim Support Worker A.
108 Police Officer D.
109 See Killean (n 22) 26.
110 Ibid. 26–7.
statement is perceived as having no impact on sentencing in serious crimes it may be detrimental to achieving the goals of the Victim’s Charter.

Impact on decision-making

Procedural justice for victims is also concerned with their views being considered and being seen to have some sort of impact on a judges’ decision-making in sentencing.\textsuperscript{112} Judges and prosecutors shared the perception that victim statements do have an impact on sentencing. As one magistrate said: ‘we have always regarded it [the VPS] as very important, because the impact on the victim has always been an important feature in sentencing as a potential aggravating factor’.\textsuperscript{113}

VPS intermediaries viewed the statements as having more of a therapeutic role, as the veil of judicial discretion makes it very difficult to discern what impact victims’ statements have on sentencing. This sits in stark contrast to the perceptions and understandings of sentencing by legal practitioners. This divergence may reflect the distinction between non-lawyers and the legal profession, and the legalese shroud around sentencing practices. As one NSPCC worker argued:

\ldots the legal world is a world all of its own \ldots It has its own etiquette, its own rules, and when you go into it you’re very conscious that you’re in this legal arena.\textsuperscript{114}

Judges and prosecutors do refer to the VPS for consideration as an aggravating factor in sentencing.\textsuperscript{115} The VPS serves a valuable function in informing the court on the extent of the harm caused by the crime.\textsuperscript{116} The VPS serves informational and retributive roles for the court. However, the use of the VPS is more nuanced in terms of (1) the type of victim and crime, and (2) how judges and prosecutors include the statement in their judgments and remarks. This goes beyond retribution, by the court communicating expressive moral messages that publicly acknowledge the victim’s experience. With the first of these, the weight of the VPS for sentencing depends on the kind of victim and crime. There are a range of standards on sentencing for different crimes in Northern Ireland depending on the sentencing practice statement, for instance, on murder/manslaughter\textsuperscript{117} and child abuse\textsuperscript{118} that take into account the victim’s harm as an aggravating factor.

Victim vulnerability is an important aggravating factor for sentencing. Elderly victims,\textsuperscript{119} and children who have suffered sexual violence or abuse,\textsuperscript{120} are considered to suffer increased harm, which is then reflected in the sentence. It also raises the profile of the individual victim’s harm in ‘less’ serious offences, such as theft. As one judge commented:

\ldots [the] expansion [of the VPS] into all offences is perhaps overkill in every case.

On the other hand in cases of burglary or an assault in the street it can be useful,

\textsuperscript{112} Wemmers (n 17).
\textsuperscript{113} Magistrate A, with similar comments by Judges A and C. This position is now codified as an obligation under s 35(2), Justice Act (Northern Ireland) 2015.
\textsuperscript{114} NSPCC Worker B, Interview 19, October 2015.
\textsuperscript{115} R v Holmes and R v Kerr [2009] NICC 79, [25] and [45].
\textsuperscript{116} R v Chen and Others [2012] NICC 26, [49].
\textsuperscript{117} R v McCandless [2004] NIC 1.
\textsuperscript{118} R v ML [2013] NICA 7.
\textsuperscript{120} R v Curran [2013] NICA 1, [13].
as you can lose sight of the harm to the victim, especially a woman or elderly person living on their own or in cases of violence impact can still be profound.121

There is a danger that, with the increased use of the VPS and perceived vulnerability of certain victims, their harm becomes normalised in sentencing decisions, disregarding the individual’s experience by assuming their harm. Commentators in other jurisdictions have found that the impact of the crime and details could be anticipated and expected by legal practitioners based on the charge.122 As such, ‘the victim of a crime ceases to be an individual, with idiosyncratic responses to his/her experience, but is reduced to the victim of the specific crime category with its concomitant injuries’.123 This corresponds to similar experiences in the rest of the UK where the common use of the VPS leads to production of ‘mundane predictable information’ in the majority of cases with ‘nothing unexpected, it inevitably makes no difference’.124 The VPS as a piece of evidence helps to confirm these assumptions.

The VPS can lead to duplication of material already before the court, such as medical reports, as, according to one magistrate, ‘we are very aware of potential impact that these crimes do have on victims . . . but we do not need victims to tell us we know, we know’.125 Similarly, a criminal court judge said:

A victim’s harm does not come as a surprise. The danger with judges hearing a case after case without a victim personal statement is that they may lose sight of the victim behind the crime. It helps to put a proper, personal context.126

Nonetheless one senior prosecutor noted that:

. . . the offences in themselves are almost so serious that it goes hand in hand that such is the nature of the offence, abuse of a child or something like that is likely to leave a lasting permanent deficit. I’ve personally never found any judge rushing themselves to find the harm more than it is. I found the judges to be very careful to ensure that they are only relying on what evidence they can properly rely upon. So it’s not a knee-jerk reaction, far from it.127

The value-expressive dimension of how the VPS is used by prosecutors and judges is considered valuable. As one judge elegantly found: ‘it is helpful to hear the victim’s voice, it helps to breathe life into the facts’.128 The VPS helps to humanise the victim, that they were ‘much loved’, ‘a man dedicated to his family’ and ‘a young mother who had everything that life could offer to look forward to’, but also the profound and senseless loss of this human being.129 As one prosecutor said:

[The VPS] benefits the court in that because they have a fuller picture of the effect of the loss on the survivors, because very often you are just the victim, your role is almost to satisfy the criminal justice system – your ‘V’. All of a sudden when you have those victim impact statements the court is reminded again that you were a person, and you were valued as a person. I think that’s

121 Judge C.
122 Ashworth (n 4) 506; Erez and Rodgers (n 79) 220.
123 Erez and Rodgers (n 79) 224.
124 Sanders (n 5) 454.
125 Magistrate A.
126 Judge C.
127 Prosecutor E, Interview 17, August 2015.
128 Judge C.
personal to me and obviously it has an effect as well on court... for victim impact you've lost something very special here, this has had a devastating effect on your life and that's very important.\textsuperscript{130}

As such, the VPS gives a more visceral and emotion connection to the personal suffering of an individual or family that moves beyond the banal legalese of court proceedings and a crime ‘statistic’. Some judges also echo the VPS, such as in \textit{Re Boyle} where involved a defendant murdering his flatmate, where the judge in his sentencing remarks read from the VPS: ‘Our hurt is our human feelings, we miss him deeply, not being able to hear his voice or his laughter, never to see his smiling face, or embrace him.’\textsuperscript{131} Accordingly, VPS exhibits procedural justice factors of participants being best placed to represent their own interests to ensure accuracy in decision-making.

Judges can also empathise with victims’ suffering and human loss, such as in \textit{R v Healy} where the judge commented that he ‘recognises the terrible loss that this family has suffered’,\textsuperscript{132} and in \textit{R v Stephen Lee Wright and Russell Hector Hunter} where the judge quotes the VIS as ‘graphic evidence of the effects of the killing’ of a sibling, taking into ‘account on that basis as showing the damaging and distressing effects of this crime on his surviving close family’.\textsuperscript{133} However, such remarks are not a verbatim reading of the VPS, but can be a summing-up of the statements in a couple of sentences.\textsuperscript{134} In addition, judges have recognised the ongoing suffering victims face as a result of the crime (in particular sexual offences against children).\textsuperscript{135} Importantly, judges can offer affirmative statements to victims, acknowledging that, despite the harm from the crime, they are not broken, commending their robustness for those who have gone on to study at university or progressed in their career.\textsuperscript{136}

A few intermediaries noted the excellent practice of some judges in sensitively quoting the victim, placing their harm in the context of the crime and taking the time to read and reflect over the VPS. This acknowledgment can help to communicate to victims the value their input has in the decision-making process that is instrumental in decision-control, rather than value-expressive. However, there was a consistent opinion amongst intermediaries that judges were very much detached from the personal suffering of the victim – ‘at arm’s length’\textsuperscript{137} and ‘quite untouchable’.\textsuperscript{138} While recognising that judges have sentencing guidelines to work within, ‘some of the judges see themselves as totally detached from life nearly, they don’t seem to live in the same world we all live in’.\textsuperscript{139} There is a need for judges to have some detachment and objectivity, which is difficult for intermediaries who are confronted with the human consequences of the crimes. As the FLO continued:

\ldots there’s another fatal this morning. You can be sitting here every day bawling your eyes out, you can’t, there has to be a certain amount of detachment. I

\textsuperscript{130} Prosecutor B, Interview 3, June 2015.
\textsuperscript{131} [2004] NICC 13, [16]–[17].
\textsuperscript{132} [2013] NICry 7.
\textsuperscript{133} [2007] NICC 33, [8].
\textsuperscript{134} \textit{R v Black} [2011] NICC 40, [9].
\textsuperscript{135} \textit{R v RD} [2013] NICA, [12]; \textit{R v Curran} [2013] NICA 1, [12].
\textsuperscript{136} \textit{R v ML} [2013] NICA 27, [4]; \textit{R v RD} [2013] NICA, [10].
\textsuperscript{137} Police Officer C.
\textsuperscript{138} Victim Support Worker A.
\textsuperscript{139} Police Officer B.
understand that the magistrates and judges too, but you have to recognise that this
has been a huge impact on that whole family and that never ever goes away. Nonetheless, the detachment of judges and lack of consistent practice in engaging with the VPS in sentencing remarks reinforces the perceived futility of intermediaries working on victim statements.

Reference to or comment on the VPS is often rare and depends on the judge, undermining procedural justice concerns for consistency in decision-making and consideration of victims’ input. Some of these remarks can be quite dispassionate and terse, such as in R v Stockman where the judge stated that the two VIS ‘speak of their sadness at the death of’ in the manslaughter of a family member; whereas others can be quite detailed on the impact on different members of the family and family business in cases of murder (R v Brown and R v Stewart and R v Carson). Indeed, some judges will quote the VPS at length on the effect of the crime on the victim or family. This inconsistent practice reflects the discretion judges enjoy, but also perhaps their caution to explicitly state their reliance on the VPS for fear of ‘downriver consequences’: that is, being subject to an appeal. As one senior counsel remarked:

... you do tend to see judges reflecting on the contents of victim impact statements that undoubtedly it has an emotional effect upon them. Judges are maybe might find themselves somewhat torn between reflecting on the impact that an offence has had upon the family, but not allowing that to affect them in such to such an extent that it actually interferes with the proper dispensing of sentence in the case.

One senior judge took a more objective view that medical evidence will support a VPS and that these statements ‘assist us in identifying accurately the harm’ and ‘appropriate’ sentence, but that there is ‘no particular impact’ of the VPS which is taken into account when weighing harm and culpability within the sentencing brackets.

Another FLO found VPS too emotional and judges too constrained by legal rules, sticking instead to legal certainty in their sentencing guidelines:

... generally I don’t think that [the VPS] has any impact because he’s looking at rules of law he is looking at all the background so he’s not thinking well I’ll add more time on because they are really upset, because who isn’t going to be absolutely distraught family members been murdered.

The lack of clarity around sentencing practices also taps into frustration with perceptions of light sentences and lower tariffs for murder in Northern Ireland than in the rest of UK. This could reflect the association with intermediaries and victims that VPS is a tool meant to support the retribution function of sentencing in achieving more proportionate sentences. As one FLO said:

140 Police Officer E.
141 [2011] NICC 36, [9].
142 [2008] NILST 11, [18]–[22].
143 [2004] NICC 23, [27]–[29].
144 [2004] NICC 5, [17]–[19].
146 Defence Counsel B.
147 Defence Counsel A.
148 Judge A.
149 Police Officer B.
It’s actually the point in the investigation that I dread the most is the sentencing, cos I know that they are always going to be disappointed unless like flip it was a Masserene kind of incident [referring to the shooting of two soldiers by dissident Republicans in 2009] where they would actually get them some regular years. The guy who I was FLO for his family, he was a peeler and his father murdered his mum. He stalked her, stabbed her and beaten her round the head with a meat mincer. He got like fourteen years and I was sitting and her sister was in court next to me holding my hand like shaking the whole way through. She heard the sentence she was like what, what that’s absurd. It’s heart breaking watching that.

That said, a distinction can be drawn between cases of Troubles-related murders and other serious offences, where judges more readily engage with the VPS, despite the likely short sentences that will result. As part of the Good Friday Agreement and under the Sentences (Northern Ireland) Act 1998, those convicted for scheduled offences committed during the Troubles can only be imprisoned for two years before getting early release. As one FLO (Police Officer B) recalled: ‘it is a bit soul destroying and he’ll get some pathetic [sentence]’. In another case, the FLO discussed how family members were disillusioned with the criminal justice system, as one brother of a murder victim murdered by Loyalists in the 1990s told him: ‘I don’t even know why yous even bother, my brother wouldn’t have wanted this. What’s the point he’ll get a couple of years.’

Despite the punitive futility of the VPS impact on the sentence for historic Troubles convictions, the role of a sentencing judgment in acknowledging victims’ suffering becomes more central. Acknowledgment is the way in which to publicly recognise the human dignity and value of the victim, while bringing to light the full impact of the crime on them. This is apparent in the R v Rodgers152 case involving the murder of a Catholic teenager by a Loyalist gunman in 1973. After the gunman was convicted 40 years later when new evidence emerged, the sentencing judge, having read the VPS, stated:

I have had the opportunity to consider the moving and detailed account of the effect Eileen’s murder has had on her family from her sister Linda Marsden. It describes a young girl so full of life without a bigoted bone in her body with so much to look forward to, marriage, a family, a career, who was gunned down in her prime. The murder has left a bitter and lasting legacy for those who remained behind. Her father visited her grave at least on a daily basis unable to cope with the loss of his beloved daughter withdrawing into himself until he died 2 years ago. His wife had to shoulder the burden of bringing up Eileen’s siblings. On 30 September 1973 the lives of all the members of the Doherty family changed utterly. They were never to be the same again. Eileen’s father died, denied the satisfaction of seeing one of her murderer arrested, put on trial and convicted.

As one judge noted in a historic murder during the Troubles, he found that a VPS prepared by a boyfriend of the victim was a ‘very moving’ statement, which ‘brought the crime to life, even to describe it as historic, nothing historic about it for the family and boyfriend as a daily suffering’ and ‘VPS are very helpful.’154 Accordingly, while the retributive function of VPS in increasing a sentence may be limited, the VPS and judges’

150 Police Officer B.
151 Police Officer B.
152 [2013] NICC 5
154 Judge C.
communication with victims through their sentencing remarks can offer valuable acknowledgment and a sense of procedural justice for victims.

For ordinary crime not related to the Troubles, the VPS impact on sentencing could also be limited to prevent a ‘new and unpredictable variable into the penalty equation and would jeopardise core principles such as just-deserts, proportionality, certainty and objectivity’. While there are good reasons for judicial discretion in sentencing, if VPS are to reach their goals of ensuring victims are heard and engendering a sense of procedural justice for them, they need to be more carefully crafted to acknowledge victims’ input and judges must clearly state how their statement on harm is balanced with the defendant’s culpability. This is also important in informing perceptions and engagement by intermediaries in facilitating VPS.

Conclusion

The VPS allows victims’ voices to be captured, but it does not mean they will be heard by the criminal justice system. This study in Northern Ireland reveals two main findings. First, victims make VPS not purely out of retribution, but also to seek official acknowledgment of their harm by a judge. In this way the VPS operates as a space for victims to feel their voice is heard. Second, hearing victims is muffled by the opaqueness of sentencing practices, whereby redactions limit the magnitude of victims’ voices and the lack of sentencing remarks by judges on the role of the VPS in determining the sentence.

Despite increased top-down juridification from the EU and the courts in cases like *R v Perkins*, acknowledging victims’ voices in VPS remains discretionary. Reform should be aimed at the process of taking a VPS and how it is used by judges to improve procedural justice for victims in terms of process and their interests being considered in sentencing. First, in taking the VPS, the statement could be video-recorded to capture the victim’s voice and emotion that they may not be able to articulate on paper. Moreover, there should be greater opportunity to give victims the choice of reading their statement out to the court, given that this will be after the judge has made their decision on the length of sentence. In the Republic of Ireland, McGrath found that the victim reading out their statement in court after sentencing made it ‘part of the offender’s sentence and not a factor in determining it’. This can ensure better representation practices that the victim is a participant and greater process-control to state their case. Second, to better acknowledge victims’ voices, judges should establish a protocol to quote the VPS in the sentencing judgment and victims should receive a copy of these sentencing remarks. This would help to propagate some sense of respect and procedural justice for victims. This practice has already been adopted by some judges (e.g. *R v Stephen Lee Wright and Russell Hector Hunter*). However, the VPS form should allow the victim to highlight areas they do not want the prosecutor or judge to read out in court, in order to protect their privacy and dignity. This reflects that the VPS operates as not just a vehicle for informing the court of the victim’s harm, but a space for victims to confront the harm they have suffered.

Beyond these suggestions, there was little appetite amongst intermediaries and legal practitioners to allow victims to have a bigger say in sentencing (i.e. give their opinion on the length of punishment or through a legal representative). Legal practitioners were very much wary of such an approach that would appear to be more like mob’ justice, or in

155 Doak et al (n 25) 655.
156 Edwards (n 23) 12.
157 [2007] NICC 33, [8].
158 Defence Counsel A
contrast to the USA’s ‘politicised justice system’; instead, there was concern that in Northern Ireland a clear separation of powers needs to be maintained.\textsuperscript{159} This reflects research in other contexts where allowing a victim to state the appropriate sentence was unsuitable, as they have no legal background or might simply be ‘seeking revenge’.\textsuperscript{160} That said, one barrister suggested that, even if VPS were improved, more fundamental reform is required to balance the criminal justice system for victims:

\begin{quote}
. . . defendants are rarely made to make good any loss or make up for the harm caused to victims and I think that implies the scant level of regard paid to victims, despite victim policies and charters that are enunciated by the criminal justice system through various organisations.\textsuperscript{161}
\end{quote}

Procedural justice concerns with improving victim satisfaction cannot be satisfied by only allowing victims to voice their views, but such interests still need to be considered. As such, procedural concerns with ensuring fairness and respect to victims cannot be detached from their role in informing outcomes, albeit in a measured way. Otherwise, past problems of victims’ interests being marginalised in the criminal justice system will only have the effect of creating a veneer of satisfaction and a long-term frustration and disengagement not just by victims, but also intermediaries involved in sustaining the work of the criminal justice system.

If we are serious about hearing victims’ voices, then judges should accommodate victims’ statements in their sentencing remarks. This sensitive personal outpouring should be carefully handled by courts, given its emotional and intimate value to the victim. Failure to acknowledge their voice and the role it plays in sentencing will leave victims and intermediaries feeling that the process was merely perfunctory, as the experience in Northern Ireland suggests. Nevertheless, while the VPS may not be therapeutic for all victims, it can be an important procedural justice mechanism for judges to acknowledge the personal experience of victims and to offer them a place in proceedings that respects and appreciates their input in the decision-making process. A better balance could be struck in Northern Ireland in hearing victims’ voices in sentencing by allowing victims to read their VPS out in court and for judges to acknowledge or quote the statement in their sentencing remarks. Although victims do bring a certain amount of chaos to criminal proceedings, the VPS offers a structured means for victims to be participants. However, judges have an obligation to communicate to victims through their remarks that their voices are heard in order to engender a better sense of procedural justice.

\textsuperscript{159} DoJ Official A.


\textsuperscript{161} Defence Counsel C, Interview 23, October 2015.
The General Scheme of the Assisted Human Reproduction Bill 2017 was approved for drafting by the Irish government on the 3 October 2017. When published, most media outlets focused on the Minister for Health’s announcement concerning state funding for in vitro fertilisation (IVF) treatment, with little commentary on the substantive provisions of the Bill. This is perhaps surprising given that this Bill has been ‘imminent’ since February 2015 and has been eagerly awaited by all stakeholders for some years. The Bill proposes to further regulate the area of assisted human reproduction (AHR), essentially filling in the gaps of the regulation created (but not yet commenced) by the Children and Family Relationships Act 2015. The Bill provides for:

1 the regulation of assisted human reproduction;
2 gamete and embryo donation for use in assisted human reproduction treatment and research;
3 posthumous assisted reproduction involving the gametes or embryos of a deceased person under certain conditions;
4 pre-implantation genetic diagnosis and sex selection;
5 surrogacy;
6 embryo and stem cell research; and
7 the creation of a new Assisted Human Reproduction Regulatory Authority.

This article examines the proposals for surrogacy that are set out in the General Scheme. It argues that these proposals are unnecessarily complicated and that the delayed model of parentage that is proposed would not be an adequate approach to regulation in Ireland. It is argued that Ireland should instead adopt a pre-conception model of parentage in surrogacy in order to better protect the interests of all those involved in the surrogacy process.

Surrogacy in Ireland

Surrogacy is a process whereby a person agrees to carry a child on behalf of another person or couple. It is a process that raises complex legal, ethical and moral considerations about a range of issues such as the potential commodification of children; the psychological development of children born through surrogacy; and the perceived exploitation of women who act as surrogates. There is no consensus on these questions and as a result countries adopt varying approaches to the regulation of surrogacy. In some countries, surrogacy is permitted and fully regulated, in other jurisdictions surrogacy is legal but there is no regulation, while in other countries surrogacy is prohibited completely. Ireland currently falls into the middle category: tolerant but (arguably) not accommodating (due to the lack of regulation). The absence of legislation to specifically address surrogacy gives rise to a plethora of difficulties, principally because the absence of legislation does not mean an absence of surrogacy. Each year, more and more children are born through surrogacy to Irish intended parents, both at home and abroad. They are born, to use the words of O’Donnell J in MR and An tArd Chlaraítheoir, ‘into a legal half world’ where their status is ‘determined by happenstance’.

The absence of specific legislation to regulate surrogacy creates a number of difficulties. Without specific legislation, parentage is determined by recourse to the same rules that apply in ‘natural’ conception: the woman who gives birth to the child is always regarded as the child’s legal mother; if she is married to a man, her husband is presumed to be the legal father; and if she is not married (or if the presumption in favour of the husband is rebutted), the genetic father is recognised as the legal father. Therefore, in cases of surrogacy, the surrogate is always recognised as the legal mother, and the genetic father typically is recognised as the legal father. This means that an intended mother (genetically related to the child or not), or an intended father who is not genetically related to the child, are not recognised as legal parents upon the birth of the child. They are left to rely on guardianship or adoption as their only options to acquire any legal connection to the child that they will likely raise from birth.

Proposals for regulation

Ireland has committed itself to introducing legislation to regulate surrogacy and surrogacy legislation has been discussed for many years. As far back as 2005, the Commission on Assisted Human Reproduction recommended by a majority that legislation should be introduced to regulate surrogacy and that the intended parents should be presumed to be the legal parents of any child born through surrogacy. In January 2014, the Irish government included proposals to regulate surrogacy in the Children and Family

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3 For example, in California, surrogacy is regulated under the Uniform Parentage Act and Assembly Bill No 1217.
4 In Ireland, for example, surrogacy is legal but there is no specific regulation.
6 MR and An tArd Chlaraítheoir [2014] IESC 60; [2014] 3 IR 533, [211].
7 Ibid.
Legislation

Relationships Bill 2014. In essence, the 2014 Bill made provision for a ‘delayed’ or ‘post-birth’ model of parentage whereby the surrogate would be recognised as the legal mother upon the birth of the child\(^{10}\) and the intended parents could subsequently apply for a declaration of parentage to extinguish the surrogate’s parental status and to acquire parental responsibilities and rights for themselves.\(^{11}\) The surrogate’s consent would be required before this declaration could be made\(^{12}\) and the application for the declaration could be sought not less than 30 days after and not more than six months after the child’s birth.\(^{13}\)

The surrogacy proposals were subsequently removed from the 2014 Bill, as it was felt that further policy work and consultations were required in relation to surrogacy. As such, the regulation of surrogacy was deferred to the recently published Assisted Reproduction Bill 2017. The new General Scheme proposes to introduce a comprehensive framework for the regulation of surrogacy in Ireland. The model of parentage that is proposed is broadly similar to that put forward in the 2014 Bill, but there are some notable differences. For example, the 2017 Bill requires that all surrogacy agreements be pre-authorised by a new Assisted Human Reproduction Regulatory Authority, which had not previously been proposed. The main elements of the proposed regulation of surrogacy are set out below.

Head 36 of the General Scheme establishes a number of conditions that have to be met for surrogacy to be permitted. This Head establishes a fairly restrictive model of surrogacy as it only permits specific types of surrogacy arrangements. It establishes that the surrogacy must be domestic, gestational and non-commercial. This means that the proposed regulation will not apply in situations where international or cross-border surrogacy is used and so intended parents who have embarked on surrogacy abroad would not be able to rely on the provisions in the General Scheme to establish their parentage upon return to Ireland. The surrogacy must also be gestational which means that the surrogate must not be genetically related to the child. Thus, ‘traditional’ surrogacy, where the surrogate provides her egg to enable the conception of the child, is not permitted. Commercial surrogacy is also prohibited meaning that the surrogate cannot be offered or given any payment or other reward for her involvement in the process.\(^{14}\) ‘Reasonable expenses’ are, however, allowed. Reasonable expenses are defined in Head 41 of the General Scheme to include medical expenses, travel expenses, loss of earnings, and legal advice among other things. In fact, it would seem that the surrogate would have the right to demand payment of such expenses as the General Scheme specifically states that a surrogacy agreement is not an enforceable contract, except in relation to the payment of the surrogate’s reasonable expenses.\(^{15}\)

In order to avail of the regulation proposed by the General Scheme, the surrogate and intended parents must also meet specific criteria. The surrogate must: be habitually resident in Ireland; have previously given birth to a child; be least 25 years of age but under 47 years of age; and must have been assessed and approved as suitable to act as a surrogate by a registered medical practitioner and also by a counsellor.\(^{16}\) The intending parent(s) must be at least 21 years of age and at least one of them must: be under 47 years of age; be habitually resident in Ireland; and have contributed a gamete to the child’s

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10 General Scheme of the Children and Family Relationships Bill 2014, Head 12(1).
11 Ibid Head 13
12 The surrogate’s consent would be required unless she is deceased or cannot be located: ibid Head 13(9)(b).
13 Ibid Head 13(5).
14 Ibid Head 40.
15 Ibid Head 41.
16 Ibid Head 38.
conception. Where there is only one intended parent, one of the following conditions must apply: he or she must be unable to gestate a pregnancy; unable to conceive a child for medical reasons; unlikely to survive a pregnancy or giving birth; or likely to have her health significantly affected by a pregnancy or giving birth. Where there are two intended parents, together as a couple they must either be: unable to gestate a pregnancy; unable to conceive a child for medical reasons; include a woman who is unlikely to survive a pregnancy or giving birth; or include a woman who is likely to have her health significantly affected by a pregnancy or giving birth.\(^{17}\)

The Bill also requires that the surrogate and intending parent(s) undergo counselling and receive independent legal advice at each stage of the surrogacy agreement.\(^{18}\) The stages referred to are: (i) before the agreement; (ii) after the birth of the child but before the child is living with the intending parents; and (iii) at the time of the application for the transfer of parentage of the child.\(^{19}\) In addition, the General Scheme provides that the personal details of each intending parent, the surrogate, donor (where applicable) and any child born under the surrogacy agreement must be recorded in the National Surrogacy Register.\(^{20}\)

The model of parentage established under the 2017 Bill is broadly similar to that which had been put forward in the 2014 Bill. It is a ‘delayed’ model of parentage whereby the surrogate will be recognised as the legal mother on the birth of the child (and if she is married to a man, her husband is recognised as the legal father). The intending parents may not automatically have any legal connection to the child at birth. The General Scheme provides that following the birth of the child, the surrogate is required to provide her consent to the child living with the intending parent(s).\(^{21}\) Thereafter, the intending parent(s) (or the surrogate) can apply to the court for a parental order to transfer parentage from the surrogate to the intending parent(s). This application cannot be made earlier than six weeks and not more than six months after the child's birth,\(^{22}\) and the consent of the surrogate (and her husband, if she has one) is required before the parental order can be granted. This requirement can be waived in certain circumstances, such as where the surrogate is deceased or cannot be located.\(^{23}\)

A notable difference between the 2017 Bill and the earlier proposals to regulate surrogacy is the requirement for pre-authorisation of the surrogacy agreement. An AHR treatment provider is required to apply to the Regulatory Authority and receive written authorisation for a surrogacy agreement before any treatment can be provided under that agreement.\(^{24}\) The Regulatory Authority will only provide authorisation if the agreement meets all of the conditions set out in Head 36 of the Bill and if the agreement has been signed by the surrogate, and each intending parent. Once the authorisation is issued, it is only valid for the period specified in the authorisation, up to a maximum period of two years. The pre-authorisation of the surrogacy agreement does not determine the allocation of parentage in any way. It simply ensures that all of the conditions set out above are adhered to before the conception of the child takes place. After the birth of

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17 Ibid Head 39.
18 Ibid Head 43.
19 Explanatory Note accompanying Ibid Head 43.
20 Ibid Ibid Head 36.
21 Ibid.
22 Ibid Head 47.
23 Ibid Head 48.
24 Ibid Head 37.
the child, the intended parents will still need to make an application to the court for a parental order to transfer parentage to them.

The time limits proposed in the General Scheme for the parental order application also differ significantly from those proposed in the 2014 Bill. Under the 2014 proposals, the application to transfer parentage could not be sought less than 30 days after and not more than six months after the child’s birth.25 By contrast, the General Scheme proposes that the application for the parental order could not be made earlier than six weeks and not more than six months after the child’s birth.26 The Explanatory Note accompanying the General Scheme explains that this longer waiting period is designed ‘to allow the surrogate sufficient time to recover from the rigours of pregnancy and childbirth before participating in proceedings’.27 The surrogate’s consent is required for the parental order to be granted and so the rationale behind the waiting period is that she must be in full health before consenting to the transfer of parentage.

The rationale for the delay in the transfer of parentage might seem a sensible approach, but a significant difficulty with any sort of time limit for the transfer of parentage is that the child will be in the care of the intending parents from birth.28 As was noted above, at the time of the child’s birth, at least one of the intended parents will not be recognised as a legal parent and therefore will not have automatic legal rights and responsibilities towards the child. This leaves the child in a vulnerable position as the intended parents may have limited legal powers to care for the child, for example, in relation to medical decision-making. While this criticism could also be made about the 2014 proposals (and indeed any delayed model of parentage), the shorter waiting period at least reduced the period of vulnerability. Extending the time limit so that the parental order cannot be sought until at least six weeks after the child’s birth prolongs the child’s precarious legal position.

The time periods proposed under the 2017 General Scheme are the same as those that currently apply in England and Wales under the Human Fertilisation and Embryology Act 2008. Under this Act, the surrogate is automatically regarded as the legal mother upon the birth of a child. The intended parents may then apply for a parental order to transfer legal parentage to them. Similar to the General Scheme, this order cannot be made for the first six weeks after the child’s birth, but it must be made within six months of the birth and the surrogate’s consent is required for the order to be granted.29

It is arguable that the approach adopted in the current English regulation, and mimicked in the General Scheme, disproportionately favours the surrogate at the expense of other stakeholders. The surrogate is effectively given a veto over the transfer of parentage to the intended parents and has the power to change her mind about the transfer at any time up to that point. In England and Wales, the difficulties that arise under this approach are exemplified by recent case law such as in the recent case of AB (Surrogacy: Consent).30 In this case, two children born through surrogacy had been in the care of their intended parents (who were also the genetic parents) since the day following their birth. The intended parents subsequently applied for a parental order to transfer

25 General Scheme of the Children and Family Relationships Bill 2014 Head 13(5).
26 General Scheme of the Assisted Human Reproduction Bill 2017, Head 47.
27 Explanatory Note accompanying ibid at p 119.
28 The General Scheme requires the surrogate to provide her consent to the child living with the intended parents following his or her birth: Head 46 of the General Scheme of the Assisted Human Reproduction Bill 2017.
29 Human Fertilisation and Embryology Act 2008, s 54(7) and s 54(11).
30 AB (Surrogacy: Consent) [2016] EWHC 2643 (Fam).
parentage to them and to extinguish the surrogate’s parental status. The parental order could not be granted, however, because the surrogate and her husband ultimately refused to give their consent to the transfer of parentage. This refusal was not based on any desire on the part of the surrogate and her husband to keep the children, nor did they raise any concerns about the suitability of the intended parents. Their refusal was based on ‘their own feelings of injustice, rather than what is in the children’s best interests’. Essentially, the surrogate felt that the intended parents did not show sufficient concern for her wellbeing whilst pregnant.

In this case, the intended parents had met the surrogate and her husband through a non-profit organisation. The parties underwent the recommended three month ‘getting to know’ period and attended for mandatory implications counselling provided by the fertility clinic before the embryo transfer took place. With the exception of the provision of the consent of the respondents, all other legislative criteria for the making of a parental order had been met: gestational surrogacy was used; both of the intended parents were the genetic parents of the children; the applicants were married; they applied for the parental order within six months of the children’s birth; the children had their home with the applicants since birth; the applicants domicile of origin was England; the applicants were both over 18 years; and they had only paid the surrogate reasonable expenses which did not require court authorisation. Nonetheless, without the consent of the surrogate and her husband, the parental order could not be granted.

The children at the centre of this case are now (still, it seems) left in a position where the surrogate and her husband remain the legal parents but have no desire to play any part in their upbringing. Meanwhile, the children are cared for by the intended parents who are not recognised as legal parents. This is such notwithstanding an acknowledgment by the court that ‘the children’s lifelong welfare needs require a parental order to be made’. In the circumstances, the only option available to the Court was to

... express the hope that [the surrogate] will be able to rediscover what led her to undertake such a selfless role and see the situation from the view point of these young children. From the perspective of these children’s lifelong emotional and psychological welfare parental orders are the only orders that accurately and properly reflect the children’s identity as surrogate born children.

This case highlights the disadvantages inherent in the delayed model of parentage: it leads to uncertainty regarding the child’s parental status and it fails to respect the reality of the child’s intended upbringing. This leaves the child in a vulnerable position as the intended parents will typically care for the child from birth but may lack any automatic rights and responsibilities in doing so. Even where the surrogacy arrangement is carried out as intended (as most are), the delayed model of parentage ignores the reality of the situation. As Gamble, notes ‘[w]here the surrogacy arrangement runs according to plan, this works

31 Ibid [8].
32 Human Fertilisation and Embryology Act 2008, s 54(1)(a).
33 Ibid s 54(1)(b).
34 Ibid s 54(2)(a).
35 Ibid s 54(3).
36 Ibid s 54(4)(a).
37 Ibid s 54(4)(b).
38 Ibid s 54(5).
39 Ibid s 54(8).
40 AB (Surrogacy: Consent) (n 30) (Fam) [11].
41 Ibid [32].
to everyone’s detriment, leaving the parents without any parental responsibilities, the surrogate with responsibilities she does not want, and the child in limbo for far too long’.42

It should, of course, be noted that the Irish proposals contain a provision that would prevent a case like AB (Surrogacy: Consent) from arising in this jurisdiction if the proposals are signed into law. Head 48 of the General Scheme would allow a court to waive the requirement for consent to be provided by the surrogate or her husband where he or she:

a) is deceased;

b) lacks the capacity to provide consent;

c) cannot be located after reasonable efforts have been made to find him or her; or

d) for any other reason the court considers to be relevant.

The last clause would allow the court to grant the parental order in a case in which the surrogate does not consent, and where there are exceptional reasons to do so. Conceivably, this would apply in a case such as AB (Surrogacy: Consent) where there is seemingly no reasonable basis for the surrogate to refuse her consent and where the best interests of the child require that the parental order is granted.

Notwithstanding this subtle but significant difference between the Irish proposals and the English approach, it is submitted that Ireland should remain wary of the ‘delayed’ or ‘post-birth’ model of regulation that is proposed. The delayed model of parentage ignores the reality of most surrogacy arrangements. It has also led to confusion among healthcare professionals in England and Wales, negatively affecting the provision of care to all stakeholders in surrogacy. Recent newspaper reports have revealed that staff at certain hospitals have required surrogates to hand over new-born babies to intended parents in car parks because the hospitals feared that they would be open to liability if the handovers were to take place on their premises.43 In other cases, the intended parents have not been allowed to be present for the birth of their child.44 These reports demonstrate that, notwithstanding an increase in the use of surrogacy in recent years, hospitals are still unsure how to treat intended parents because, under the delayed model of parentage, those intended parents have no legal relationship with the child at birth.

It is also notable that both intended parents and surrogates have called for reform of the English surrogacy laws in recent years. In a 2015 study published by Surrogacy UK, for example, 70.1 per cent of intended parents who responded indicated that the surrogacy laws in England and Wales are in need of reform, while 65.7 per cent of surrogates expressed the same sentiment.45 Of the surrogates who responded to the survey, 64.9 per cent said that they thought that the intended parents should be the legal parents of a child, ‘whether genetically related or not’, while 68.5 per cent did not believe that the surrogate should have the right to change her mind about giving the baby to the intended parents.46

42 Natalie Gamble, ‘Should Surrogate Mothers Still Have an Absolute Right to Change their Minds?’ Bionews (22 October 2012) <www.bionews.org.uk/page_196180.asp>.


44 Ibid.


46 Ibid.
The delayed model of parentage is increasingly regarded as out of step with the reality of surrogacy. England and Wales forged new ground when it introduced its first Act of Parliament to regulate surrogacy, the Surrogacy Arrangements Act 1985, over 30 years ago. This law became a prototype for the regulation of surrogacy in countries around the world and is still in force today (as amended by the HFEA 1990 and HFEA 2008). However, recent developments in England and Wales, discussed above, demonstrate the inadequacy of the English surrogacy laws in contemporary society and suggest that such developments should act as a caution to other countries, including Ireland, yet to introduce legislation to regulate surrogacy.

The proposals in the Irish General Scheme suffer from the same disadvantages as the English regulation discussed above, with the added burden of pre-authorisation. This requirement essentially means that the surrogacy agreement must be approved twice: before conception by the Regulatory Authority and after birth by the courts. A much simpler (and cheaper) process would be to allow for pre-conception court orders that provide approval of the surrogacy arrangement and determine the parentage of the child before conception takes place. This approach would allow the surrogate to give her consent to the transfer of parentage in advance of the conception with the effect that the intended parents acquire full parental responsibilities and rights at birth and the surrogate is never recognised as a legal parent. This approach would also provide certainty, as the parties would know who the child’s legal parents are at the outset and there would be no need for post-birth litigation to establish who the legal parents are or indeed should be.

**Pre-conception court orders**

Pre-conception court orders allow for a child’s legal parental status to be determined prior to conception and so the intended parents are recognised as the child’s legal parents at birth. This approach to allocating parentage in surrogacy is adopted in a number of countries, such as in South Africa. In that country, surrogacy agreements must be validated by the High Court before the surrogacy is undertaken. Where the pre-conception order is granted, the intended parents are recognised as the legal parents upon the birth of the child and the surrogate does not acquire any legal parental status. There is an exception for cases of ‘partial’ or gestational surrogacy where the surrogate is also the genetic mother of the child. In this case, the surrogate retains the right to terminate the surrogate motherhood agreement by filing written notice with the court within 60 days of the birth of the child.

The pre-conception order removes many of the difficulties that can arise under the delayed model of parentage, as discussed above. The pre-conception order allows the intended parents to acquire full joint parental responsibilities and rights from the moment of the child’s birth, which offers security and protection to the child. In the South African case of *Ex Parte MS and Others*, the court noted that pre-authorisation of a surrogacy agreement is ‘aimed largely at ensuring that there is certainty in the legal relationship between the parties involved’. Furthermore:

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47 Children’s Act 2005, s 292.
48 Ibid ss 295, 297.
49 Ibid s 298.
50 *Ex Parte MS and Others* 2014 (3) SA 415 (GP).
[It] advances the principle of the best interests of the child in that there can be no doubt that it is in the prospective child’s best interests for his or her legal and parental status to be settled at the earliest possible opportunity. Ideally, this should be before there is any prospect of conception.\textsuperscript{51}

It is submitted that the element of certainty emphasised by the Court in \textit{Ex Parte MS} is one of the main advantages of determining parentage prior to conception. This certainty promotes the best interests of the child as the intended parents have automatic rights and responsibilities towards him or her. It also reflects the practical reality of the situation and the child’s intended upbringing. It is to be hoped, therefore, that the proposals contained in the 2017 General Scheme will be amended to allow for pre-conception agreements to be adopted to not only authorise the surrogacy arrangement in advance but to also determine the parentage of the child before treatment takes place.

Conclusion

Ireland has a long-established tradition of looking across the Irish Sea for inspiration in legislative matters. Quite often, this approach allows the Irish legislature to produce innovative laws that fit the needs of contemporary society. This article has shown, however, that the surrogacy laws of England and Wales should not be subject to the same treatment and should not be adopted in any future Irish legislation in this area. Recent developments in England and Wales demonstrate that the English surrogacy laws are out of step with the reality of surrogacy in that country and show that the delayed model of parentage is not an appropriate one for Ireland to follow. In this light, it has been shown that the model of parentage advanced in the 2017 General Scheme would not be appropriate and should be reconsidered by the legislature. In order to fully protect the best interests of children who are born through surrogacy, it is argued that an intention-based model of parentage, based on a system of pre-conception agreements that allow parentage to be determined before conception, should be introduced.

\textsuperscript{51} Ibid [38].
International Copyright and Access to Knowledge, Sarah Bannerman, Cambridge University Press*

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How the Access to Knowledge (A2K) movement has historically worked within the framework of international law is the main focus of this work. Over 10 chapters, Sara Bannerman is able to give a context for international copyright/intellectual property law to show how the rights of so-called ‘developing countries’ have been largely ignored over the course of the entire history of this area of international law. The scope of the work is narrow and easily comprehensible to the neophyte, but also beneficial to those looking for a historical context to the global intellectual property mechanism’s disinterest in change. Essentially, the work covers all the ground in this area of international copyright law and A2K. Bannerman takes the reader on a topic-by-topic journey of discovery as she charts her way through this history.

The book is separated into three parts: ‘Ideas’, ‘Interests’ and ‘Institutions’. A brief examination of each of these sections will be conducted in turn. Ideas refer to the ‘sources of knowledge’, as Bannerman puts it. The ‘Interests’ section discusses groups involved in and/or with the legal institutions surrounding international copyright. The last section, ‘Institutions’, takes a brief look at the history of international copyright institutions themselves and how they are situated today alongside other international law institutions.

Part one is separated into five chapters. The first (chapter 2) lays the groundwork of the rest of the section on ‘Ideas’. The latter four (chapters 3–6) each discuss access to knowledge, but also access to information, in four different areas. Each of these starts with an anecdote about that specific area of access to knowledge. In this way, the reader has an example in mind of what the author then discusses. The choice of anecdotes appears to also reveal her opinion on these matters, or why she finds these topics interesting. In fact, by the end of the text, it becomes apparent that all of these chapters with their anecdotes corroborate her view that these international institutions do not satisfy the needs of access to knowledge in the world.

The first (3) discusses access to scientific knowledge. It is introduced with the story of Aaron Swartz who broke into a network closet at Massachusetts Institute of
Technology, where he began to download a massive amount of articles from JSTOR to his own laptop, presumably to share them with the world as open access files. This example is used to introduce a discussion on the deficiencies of access to academic knowledge in ‘developing’ countries, especially when it comes to academic information about the sciences. The author then summarises the history of the various international agreements that we encounter in the remainder of the book: the Berne Convention, the Universal Copyright Convention, the failed Stockholm Protocol, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the World Intellectual Property Organization (WIPO) Copyright Treaty. She finds an A2K hero in Louis-Joseph Janvier, a delegate from Haiti who attended all the meetings of the Berne Convention in 1886 and returned in 1896 for the revision of that document. However heroic this delegate from a small country, it is noteworthy that the interests of small or developing countries (i.e. not the ‘Western powers’) have rarely been well represented or advocated for in the history of these agreements. Bannerman also notes the dismal state of affairs for A2K in developing countries that continues today. She even cites an A2K problem in a ‘developed’ country where a medical student was unable to access a scientific article written by a member of the faculty at the university in which he was studying.

Chapters 4, 5, and 6 continue in the same vein. Chapter 4 explores access to education, libraries, and traditional knowledge. Framed by a quote from Malala Yousafzai, the Nobel Peace Prize-winning advocate for girls’ education, the chapter details the obvious global problem of access to education, focusing on different levels of access, from girls from Malala’s Pakistan, to educational materials in schools and universities around the world. A lot of the discussion boils down to how payment will be offered to creators and publishers of educational materials. The rights of open access to copy or use quotations from educational works are also discussed.

Chapter 5 provides a succinct account of access to news. Memorably, an interesting question is raised: is there copyright in news? The answer is that some pieces of information may be used openly, but others cannot. The history of how much (i.e. the length in words or lines) of an extract from a news source can be quoted has been discussed in the formation and amendments of the aforementioned international treaties. The rights of modest-size news providers in smaller countries with local languages are considered, as well as a potential monopoly of information by platforms like Google or major news sources like the Associated Press and the post-imperialist Reuters.

The ‘Ideas’ section is wrapped up with a discussion of ‘access to translation’ in chapter 6. Here, another great struggle in the history of these international treaties is described and former and currently colonised nations are examined in great detail. As regards the nature of these countries, the author discusses the receipt of works and information into a translated language from their major coloniser ‘educated’ countries. In this context, the author goes on to discuss the dominance of those languages of the more powerful, ‘developed’ nations. The state of translation copyrights, after a history of the discussion on fine points of law by international bodies, has still left English as a major source language, with 49 per cent of translations worldwide. However, despite the continuing dominance of the Western imperialist states, the WIPO does operate with the majority of speakers of different languages in mind. However, in Bannerman’s view, that

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3 Ibid 36, for more detail.
does not mean that international legislation created by WIPO favours individuals within countries with more limited access to knowledge.

The second part of the book is concerned with ‘Interests’ of nations, organisations and groups involved in access to knowledge and the international framework for making changes to international copyright. Chapter 7 looks at ‘the role and inclusion of developing countries in international copyright’. This chapter, in essence, reiterates much of the information already covered in previous chapters, but it observes how developing countries have in the past, and also currently, played a role in governing international copyright to benefit themselves. Of interest, the chapter speaks about the WIPO’s development agenda. Bannerman sees the positive aspect of this agenda, which ‘has caused WIPO to engage more fully with questions of development’. However, she laments that this development agenda only receives about 4 per cent of the annual budget of WIPO. Also, to Bannerman, WIPO is not as experienced in engaging development in the way the UN is, and can thus fail developing nations.

Continuing on with the section on ‘Interests’, chapters 8 and 9 discuss NGOs and the role of indigenous peoples, respectively. Of NGOs, Bannerman notes that WIPO welcomes a different class of organisations under the NGO umbrella than do other supranational legal bodies do. At WIPO, the term NGO ‘applies to any organization that is independent from government, including private sector organizations’. For her, this is a two-edged sword, one side favouring her argument, the other not. On the one hand, this means that certain groups may be able to come in and advocate for developing nations, including groups that further A2K. However, the counter argument is that powerful corporations may end up having a lot of influence in decision-making. One particular high point for the influence of NGOs and A2K was with the formation of the Marrakesh Treaty that enforces benefits to people with disabilities such as blindness. Besides that treaty, Bannerman feels underwhelmed by WIPO’s incorporation of NGOs in favour of A2K, including the rejection of the Pirate Party as an observer at WIPO.

In the last part of the ‘Interests’ section the role of indigenous peoples is also discussed. In this chapter (9), the overall conclusion of the work begins to emerge. The role of indigenous peoples in international copyright could almost be seen to encapsulate the position of minority or developing country opinions in world copyright discussions: they have often been left out, and even today do not receive enough attention. Even though indigenous peoples have alternative views of property rights, the main world powers ignore them. However, as more attention is garnered by these ‘minority’ voices, A2K progresses. Bannerman here quotes Anthony Taubman, who says: ‘Ideas, concepts and concerns that were perhaps considered tangential or barely relevant to the IP system a little more than a decade ago are now central to work being done by . . . WIPO . . . and the WTO.’

All of what has been said by Bannerman up to this point in the book is next put into a wider context as regards the institutions that govern international copyright. Thus, in chapter 10, the only chapter on the ‘Institutions’ topic (though, these international institutions have been mentioned in previous chapters), she wraps up this volume by

5 Bannerman 153.
6 Ibid 166.
7 Some names, for example, Proctor & Gamble are noted: ibid 211.
describing some of the powers of the institutions. Much of this chapter is devoted to a post-colonial examination of signatories to treaties like the Berne Convention. Significantly, she notes mechanisms surrounding these treaties that have essentially been grandfathered in countries that broke away from imperialist states (like Tunisia and Morocco which had little choice but to adopt decisions of the French delegate), but had decisions made and treaties signed for them while under colonial rule. Alongside that, she also notes the obstacles to leaving these treaties which means that such nations, with very little influence, are bound by and locked into them with an extremely difficult route to either escape them or change their position in relation to them. Although some countries have been able to avoid being part of the international treaties that would otherwise not benefit them, it seems Bannerman still prefers strong international law that benefits all nations, but especially those developing nations.

Ultimately, the book acts an excellent reference for those interested in the struggles and achievements of international copyright law and A2K in general. It is a perfect starting point for individuals wishing to research more heavily into this topic. What it does not do is explicitly express alternative modes of international law that better accommodate ‘developing’ nations. Instead, it merely calls for the potential destruction of the institutions discussed in this volume if they cannot accommodate to a higher priority the principles of A2K. In this way, the reader is left wondering where to go next. What would be the next coherent step in reforming these treaties or is starting over the better option? Such researchers have an opportunity to use this work as a springboard for potential constructive solutions that are not covered here. However, the work is satisfying overall as the topic is discussed at length in what appears to be a most comprehensive fashion.