SWEET & MAXWELL

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# Archbold Review

## Cases in Brief

*Evidence—evidence by counsellors—expert evidence of counselling services—proper scope of evidence of (non-expert) counsellor—purpose—language in witness statement*

**R v SJ AND MM [2019] EWCA Crim 1570; 30 September 2019**

At SJ and MM's trial for the sexual and physical abuse of two foster children, the evidence of P, a counsellor who had worked with one of the children, was wrongly admitted as expert evidence, and some of her evidence was inadmissible. P's evidence was given in an agreed edited witness statement.

(1) As to the proper scope of expert counselling evidence in general, an independent counsellor who had not seen a complainant could only give opinion evidence about counselling techniques and qualifications. An independent counsellor could not give evidence about the cause of any psychological or psychiatric condition and could certainly not comment on the truth or otherwise of allegations in the case: *R v W* [2012] EWCA Crim 1478.

(2) A counsellor could give evidence of the factual context in which they saw the complainant, which may include the statement that they dealt with youths "suffering from psychological trauma, encompassing sexual, physical and mental abuse". Some evidence from a counsellor about the demeanour of the complainant when recounting what they said had happened could be admissible, including obvious signs of distress when recounting a particular event, but should be subject of careful directions: *Venn* [2002] EWCA Crim 236; *Romeo* [2003] EWCA Crim 2844; [2004] 1 Cr.App.R. 30.

(3) The principal purpose of counsellor evidence was as to recent complaint. The counsellor could therefore give factual evidence as to what he or she was told, provided that the judge makes plain that that cannot be evidence of the truth of the underlying allegation.

(4) The evidence of P's opinion was inadmissible. She was not an expert. Examples of her opinion evidence that the court considered egregious were that the complainant was "damaged and suffering the effects of abuse", that she was "believable", and that P had a "deep belief in the truth of all that she ever shared with me". These were not only inadmissible statements of opinion, but they purported to tell the jury that a particular witness was reliable, contrary to the principle stated by Lord Taylor CJ in *Robinson* (1994) 98 Cr.App.R. 370 and repeated by the court in many cases following it.

(5) Legitimate complaint could also be made of the language of P's witness statement, even in respect of matters in respect of which she was entitled to give evidence (complaint, timing, context, demeanour). There was no place whatsoever for over-emotive language in any witness statement, particularly from a counsellor who was only giving evidence to support the timing and consistency of the complaints made. It ran the clear risk of prejudicing the minds of the jury, and it was probative of nothing. P's statement was naively drafted, with much too much subjective comment. Crown counsel should have undertaken a rigorous editing exercise, as should defence counsel before allowing the statement to be read.

(6) The court reviewed the evidence and concluded that the errors did not render the conviction unsafe.

*Investigation of crime—police use of automated facial recognition technology—whether compliant with European Convention on Human Rights Art.8—whether breaches of Data Protection Acts 1998 and 2018—whether breaches of Equality Act 2010 s.149*

**R (BRIDGES) v CHIEF CONSTABLE OF SOUTH WALES POLICE [2019] EWHC 2341 (Admin); 4 September 2019**

B, a civil liberties campaigner, challenged the use of automated facial recognition (AFR) technology by South Wales

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Police, for which it was the national lead. It was agreed that he was to be assumed to have been the subject of AFR on two occasions. The technology created biometric data based on digitised measurements of facial features. In the operation challenged (which involved numerous deployments of the technology), a CCTV camera captured images from which the software identified faces and extracted unique facial features to create a unique biometric template. That was then compared with those contained in a database or "watchlist" of those sought by the police drawn from the force's database of custody photographs. The software compared the two and arrived at a "similarity score", which, over a pre-set limit, produced a match. A police officer monitoring the process would be alerted to a match, and "intervention officers" would investigate or make an arrest. As for data retention, the CCTV feed was retained for 31 days then deleted. Facial images not matched were immediately deleted, as was the biometric template, regardless of whether a match was made. The facial images alerted against were either deleted following the deployment or within 24 hours. Match reports including personal information were retained for 31 days.

(1) The use of the AFR (in the form described above) infringed the European Convention on Human Rights Art.8(1) rights of B and those in a similar position to him (and those whose images appeared on the watchlist). The court considered *Von Hannover v Germany* (2004) 40 EHRR 1; *Re JR 38*; [2015] UKSC 42; [2016] AC 1131; *R (Wood) v Commissioner of Police of the Metropolis* [2009] EWCA Civ 414, [2010] 1 W.L.R 123; *AXA General Insurance v HM Advocate* [2011] UKSC 46; [2012] 1 AC 868; *PG v United Kingdom* (2008) 46 EHRR 51; *Satakunnan Markkinaporssi Oy v Finland* (2018) 66 EHRR 8; *ASNEF v Administración del Estado* [2012] 1 CMLR 48; *Schwarz v Stadt Bochum* [2014] 2 CMLR 5 and *Amann v Switzerland* (2000) 30 EHRR 843 [GC].

(2) As to Art.8(2), B contended that the operation was not "in accordance with law", there being no legal basis for it, or alternatively that the general framework provided by, successively, the Data Protection Acts of 1998 and 2018, were insufficient justification for the purposes of Art.8(2). The court rejected the submission. The use of AFR was not ultra vires. The police's common law powers were amply sufficient: *Beghal v Director of Public Prosecutions* [2015] UKSC 49, [2016] AC 88; *Rice v Connolly* [1966] 2 QB 414; *Wood*; *R (Catt) v Association of Chief Police Officers* [2015] UKSC 9, [2015] AC 1065; and *Hellewell v Chief Constable of Derbyshire* [1995] 1 W.L.R 804. Having regard to the case-law on what was required for a sufficient framework (the court analysed *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12, [2006] 2 AC 307; *Catt*; *Re Gallagher* [2019] UKSC 3, [2019] 2 W.L.R 509; *Sunday Times v United Kingdom* (1979) 2 EHRR 245; *Sliver v United Kingdom* (1983) 5 EHRR 347; *Malone v United Kingdom* (1984) 7 EHRR 14; *Beghal*; and *S v UK*), the cumulative effect of the 2018 Act, the Surveillance Camera Code of Practice issued by the Home Secretary pursuant to Protection of Freedoms Act 2012 s.30, and the respondent force's own policies was that the force's use of AFR occurred within a framework sufficient to satisfy the "in accordance with law" requirement.

(3) Whether the use of the technology was an infringement of Art.8(1) justified under Art.8(2) depended on the third (whether a less intrusive method was available) and fourth (whether a fair balance was struck between individual and community) tests in *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700. Applying a close standard of scrutiny, the court concluded that both tests were satisfied in relation to the two occasions on which, it was assumed, B had been subject to AFR; and the interference was, on the facts of the two deployments, proportionate.

(4) The court acceded to the parties' request that it consider B's data protection claims both under the Data Protection Act 1998 and as if they were governed by the then-not-yet-in-force Data Protection Act 2018 but rejected the claims under each of s.4(4) of the 1998 Act and ss.35 and 64 of the 2018 Act. Under the 1998 Act, the data held was not "personal data" in a direct sense, nor via indirect identification. However, the processing of B's image by the AFR operation was processing of his personal data on the basis that it individuates him from all others: *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [2016] QB 1003 and *Rynes v Urad* [2015] 1 W.L.R 2607. The processing was, however, necessary for the force's legitimate interests taking account of its common law obligation to prevent and detect crime (Sch.2 para. 6 to the 1998 Act.) (b) While, in respect of the (hypothetical) claim under s.35 of the 2018 Act, the AFR operation did involve the "sensitive processing" of the biometric data of members of the public, it also satisfied the requirements of s.35(5) as being necessary for law enforcement purposes and meeting a condition under Sch.8. (c) Contrary to B's claim, the force's impact statement satisfied the requirement under s.64 of the 2018 Act for a Data Protection Impact Assessment to be prepared.

(5) The force had not breached the public sector equality duty in Equality Act 2010 s.149(1), as demonstrated by its initial equality impact assessment.

*Plea—change of plea—when application to change plea may be made—considerations*

**KC [2019] EWCA Crim 1632; 4 October 2019**

K changed his plea to guilty after the start of the prosecution case, then after the jury had entered a directed guilty verdict, sought to apply to change his plea back again to not guilty. Freshly instructed counsel advised that it was not possible to make such an application following conviction by the jury, with which advice the judge concurred. Counsel and the judge had been wrong. The court had a discretion to allow a change of plea at any time up to sentence (*Plummer* [1902] 2 KB 339; *S v Recorder of Manchester* [1971] AC 481; *Dodd* (1981) 74 Cr. App.R 50); but the discretion was to be exercised sparingly in favour of the accused: *R v McNally* [1954] 2 All ER 372; *Revitt v DPP* [2006] 1 W.L.R 3172 and *R v Brahmbhatt* [2014] EWCA Crim 573. However, the errors had no impact on the safety of the conviction, and had an application been made, the judge should not have allowed it where at the time of entering the guilty plea the appellant was represented by experienced counsel and solicitors; K's detailed explanation for the initial change of plea clearly acknowledged guilt; he was under no disability by reasons of drugs or the absence of medication; he had, in full awareness of the context, expressly confirmed to counsel that the complainant was telling the truth; the decision was considered and taken overnight; K had made admissions in the pre-sentence report following the erroneous advice; and there was compelling evidence of guilt.

*Trading standards—Regional Investigation teams—local authority powers—Local Government Act 1972 ss.101, 111 and 222—Localism Act 2011 s.1—investigations under—challenge to—delegation in respect of*

**R (QUALTER) v CROWN COURT AT PRESTON [2019] EWHC 2563; 3 October 2019**

Q, a company director, sought judicial review of production orders granted under the Proceeds of Crime Act 2002 s.345, supported by a number of intervening companies. The orders had been made on the application of Cheshire West and Chester Council, which housed one of the seven national trading standards Regional Investigation Teams (previously, "scambuster teams") supported at a national level by funding directed through National Trading Standards, an informal body supported by a Government Department.

(1) The expediency test in the Local Government Act 1972 s.222(1) ("where a local authority consider it expedient … they may prosecute …") applied to the prosecution of or appearing in legal proceedings. It did not apply to an investigation by a local authority into alleged criminal activity and did not encompass applications made for an investigatory purpose. Accordingly, the argument that the authority's failure to have made a decision as to the expediency of any prosecution rendered any investigation unlawful failed.

(2) The local authority had a power to engage in investigation of the claimants by way of one or more of the Localism Act 2011 s.1, the Local Government Act 1972 Act s.101 or s.111. In particular, s.1 of the 2011 Act was intended by Parliament to widen the power of a local authority, notwithstanding the narrowing effects of *Brent LBC v Risk Management Partners* [2009] EWCA Civ 490, and there could be no doubt that a local authority had a general power of competence to conduct an investigation. The court acknowledged that the use of the term "an individual" in s.1(1) ("A local authority has power to do anything that individuals generally may do") was "legally puzzling", as it was put in *De Smith's Judicial Review* (8th ed, Sweet and Maxwell 2018), but it was unnecessary to resolve the issue. It may be, as the applicants argued, that a production order could not be made by any individual, but it could, in the context of a money-laundering investigation, be made by an "appropriate officer", any of whom were, by definition, "an individual", albeit one of a particular type.

(3) An investigation by a local authority into criminal activity could be open to a rationality challenge, albeit one with a high hurdle (*R v AB* [2017] EWCA Crim 534, [2017] 1 W.L.R 4071). While the applicants made no such claim, the court considered that whether the test was put in the terms suggested by the authority (could the local authority reasonably have believed that the investigation being undertaken might lead to a prosecution pursuant to the discretion under s.222(1) of the 1972 Act?), or a more objective variant (whether there was any realistic possibility that the investigation might lead to a prosecution within s.222(1)), the court had no doubt that the authority would satisfy either.

(4) Cheshire West and Chester Council had been delegated the trading standards functions of other authorities in the North West, in order to investigate region-wide rogue trading, in a protocol associated with the national scheme. One of the authorities was Lancashire, within which, it was alleged, the offences had taken place. Lancashire's power to investigate could not be realistically challenged, and the delegation had been effective. That Lancashire did not specifically refer to s.101 of the 1972 Act did not affect the legitimacy of the delegation so long as they were delegating a lawful function. Further, although there had been no specific reference to money laundering, it was inherent in allegations of corporate fraud that such offences were likely to have been committed. The delegation of the investigative function by Lancashire was not rendered unlawful because Lancashire did not identify every potential allegation.

(5) The court reviewed the authorities on the powers of local authorities in the context of fraud and/or criminal proceedings, noting that none of the authorities dealt with the lawfulness of an investigation rather than that in relation to prosecute or appear in proceedings, considering *London Borough of Barking and Dagenham v Jones* [1999] All ER (D) 923; *Oldham MBC v World Wide Marketing Solutions* [2014] EWHC 1910 (QB); *R (on the application of Donnachie) v Cardiff Magistrates' Court and Cardiff City Council* [2009] EWHC 489 (Admin); *Brighton and Hove City Council v Woolworths* [2002] EWHC 2565 (Admin); *AB v Richmond on Thames LBC ex parte McCarthy and Stone (Developments) Ltd* [1992] 2 AC 48.

# SENTENCING CASE

*Crossing age threshold between commission of offence and sentence*

**AMIN [2019] EWCA Crim 1583, 20 SEPTEMBER 2019**

On 22 March 2019, the appellant was convicted of violent disorder, the offence taking place on 24 March 2018, when the appellant was 17 years and two months old. On 10 May 2019 he was sentenced to four years' detention in a young offender institution. He was then 18 years and four months old. He appealed, on the ground that the court should have taken as its starting point the sentence likely to have been imposed on the date when the offence was committed, the sentencing judge failing to take proper account of the appellant's age, and failing to follow the guidance contained in s.6 of the Sentencing Council's *Children and Young People Definitive Guideline*, and reflecting rulings in *Ghafoor* [2002] EWCA Crim 1857, *Bowker* [2007] EWCA Crim 1608 and *Y* [2013] EWCA Crim 1175.

> 6.2. In such situations the court should take as its starting point the sentence likely to have been imposed on the date at which the offence was committed. This includes young people who attain the age of 18 between the commission and the finding of guilt of the offence. But when this occurs, the purpose of sentencing adult offenders has to be taken into account which is: the punishment of offenders; the reduction of crime (including its reduction by deterrence); the reform and rehabilitation of offenders; the protection of the public; and the making of reparation by offenders to persons affected by their offences.
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> 6.3. Where any significant age threshold is passed, it will rarely be appropriate that a more severe sentence than the maximum that the court could have imposed at the time the offence was committed should be imposed. However, a sentence at or close to the maximum may be appropriate.

Had the appellant been sentenced at the date of the offence, the maximum sentence available would have been a 24-month detention and training order.

In passing sentence, the judge did not refer to the provisions of the Sentencing Council Guideline, nor to *Ghafoor, Bowker* or *Y*. The sentencing remarks made no reference to what would have been the appropriate sentence available on the day the offence was committed. There was therefore a failure to take account of that factor which, following the authorities, would represent the starting point for the sentencing judge.

Having identified the starting point as being one of 24 months' custody, the court then asked whether there were any reasons to increase that starting point. Balancing the fact that the appellant was the leader of the group that committed the offence with the fact that he was 17 years old at the time, and following the guidance set out in para.6.3 of the Sentencing Council Guideline, the Court concluded that it would not be appropriate to impose a more severe sentence than that which could have been imposed at the time of the offence. The sentence of four years' detention was quashed and substituted with a sentence of 24 months' detention in a young offender institution.

# Features

## Reforming Hate Crime Legislation – The Law Commission's Current Review

By Rebecca Cohen and Martin Wimpole[1]

In September 2018, Lucy Frazer MP, then Parliamentary Under-Secretary of State for Justice, announced that the Law Commission would be asked to undertake a review of the coverage and approach of hate crime legislation following its earlier recommendation to do so. The review was to include "how protected characteristics, including sex and gender … should be considered by new or existing hate crime law".[2] This announcement was made after a debate in the House of Commons, in which Stella Creasy MP had tabled an amendment to the Voyeurism Offences (No. 2) Bill – the "Upskirting Bill" – that would add misogyny as an aggravating factor.[3] The new review was to follow a more circumscribed, but related report released by the Law Commission in 2014, entitled: *Hate Crime: Should the Current Offences be Extended?*

### The existing hate crime framework in England and Wales

At present, hate crime legislation is the product of piecemeal reforms that have been made over the past three decades.[4] The overarching framework encompasses five protected characteristics – race, religion, sexual orientation, transgender identity and disability. However, these characteristics are subject to varying degrees of protection by the three main forms of hate crime laws: aggravated offences, stirring up hatred offences, and enhanced sentencing powers.[5]

*Aggravated offences*

There are currently 11 offences[6] which can instead be charged as racially or religiously aggravated versions under the Crime and Disorder Act 1998,[7] if the perpetrator demonstrates or was motivated by hostility on the grounds of race or religion. These aggravated offences are distinct, with higher maximum penalties than the basic form of the offence. However, in circumstances where relevant offending involves demonstration or motivation by hostility based on sexual orientation, transgender identity or disability, there is no recourse to an aggravated version of the offence.

*Stirring up hatred offences*

The Public Order Act 1986 contains offences which prohibit six forms of conduct that are either intended or likely to stir up hatred on the grounds of race, or intended to stir up hatred on the grounds of religion or sexual orientation.[8] The six forms of conduct include, *inter alia*, using words or behaviour and displaying, publishing or distributing written material. For stirring up racial hatred, the conduct must involve an element which is either threatening, abusive or insulting. However, for stirring up hatred on the grounds of religion or sexual orientation, the conduct must be threatening – abusive or insulting is insufficient. Moreover, the legislation carves out specific exemptions to protect freedom of expression in relation to religious beliefs – including "antipathy, dislike, ridicule, insult or abuse" – and criticism of sexual conduct or same sex marriage.[9] There are no such exemptions for stirring up racial hatred. The maximum penalty for each offence is seven years' imprisonment, or an unlimited fine (or both), regardless of whether the offence relates to hatred based on race, religion or sexual orientation. Currently, stirring up hatred on the grounds of transgender identity or disability are not captured by the legislation.

*Enhanced sentences*

The Criminal Justice Act 2003[10] provides that if any offence has involved hostility on the basis of race, religion, sexual orientation, transgender identity or disability, the judge must – on determining the sentence – treat this as an ag-

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2 BBC News, "Misogyny could become hate crime as legal review is announced" 6 September 2018, available at https://www.bbc.co.uk/news/uk-politics-45423789.

3 *Hansard* (HC), 5 September 2018, vol 646, col 253.

4 The first "hate crime" – stirring up of racial hatred – was introduced by way of the Public Order Act 1986.

5 The separate offence of racialist chanting at a football match is also within the scope of the review: Football (Offences) Act 1991, s.3.

6 These include *inter alia* different types of assaults; criminal damage to property; harassment and stalking.

7 Crime and Disorder Act 1998, ss.29 to 32.

8 Public Order Act 1986, ss.18 to 22 and 29B to 29F.

9 Public Order Act 1986, ss.29J and 29JA.

10 Criminal Justice Act 2003, ss.145 and 146.

gravating factor, and as a corollary increase the sentence. These enhanced sentencing powers do not permit the judge to raise a sentence above the available maximum that already exists for that offence. Moreover, if the offending has already been charged as a racially or religiously aggravated offence under the Crime and Disorder Act 1998, but the offender was instead found guilty of the basic version of the offence, the enhanced sentencing provisions cannot be used to increase the sentence.

**The 2014 review**

Following the publication of a consultation paper in June 2013, and three months of public consultation, in May 2014 the Law Commission published its final report on *Hate Crime: Should the Current Offences be Extended?* This review had a narrow scope and was focused on whether aggravated and stirring up hatred offences should each be extended to cover hostility or hatred in respect of all five characteristics.

Key recommendations made in 2014 included: in the absence of a wider review, extending aggravated offences to disability, sexual orientation and transgender identity; not extending stirring up hatred offences to disability or transgender identity on the basis that these offences are rarely prosecuted; and for a full scale review, to consider which characteristics need to be protected and on what basis, as well as whether aggravated offences and the enhanced sentencing system should be retained in their current form or amended.

**The status and scope of the Law Commission's current review**

*Current status of the review*

The Law Commission's current review of hate crime legislation was launched on 8 March 2019, at an academic research conference held at Oxford Brookes University. Subsequently, the Law Commission has focused on fact-finding pertaining to the review's expansive terms of reference, along with preparing the consultation paper in advance of its scheduled publication in spring 2020.

*The review's terms of reference*

The agreed terms of reference are detailed and provide an opportunity for a wholesale review of the existing hate crime framework and potential reforms. However, they emphasise that the review should consider *who* should be protected by hate crime laws – which expressly includes both current and potential protected characteristics – and *how* the law should operate to best provide effective and consistent protection from conduct motivated by hatred of protected groups or characteristics.

**Who should hate crime laws protect?**

*A lack of parity*

Intrinsic to the issue of who – or which characteristics – should be protected by hate crime laws, is a fundamental criticism of the current framework: that it lacks parity between the existing protected characteristics. Indeed, it has been suggested there is currently a "hierarchy of hate",[11] ranging from race, which is subject to the full gamut of available protection, to the characteristics of transgender identity and disability – which are not encompassed by either aggravated or stirring up hatred offences. Moreover, whereas there is a relatively low threshold of "intended to or likely" for the stirring up of racial hatred – with conduct which is either threatening, abusive or insulting – the stirring up of hatred on the grounds of religion or sexual orientation must be "intended", "threatening" and may be exempted by freedom of expression provisions. While counter arguments exist, which suggest groups experience hate crime in different ways requiring unique treatment, achieving parity within the law will be a key consideration in the course of the review.

*Considering additional protected characteristics*

There has undoubtedly been a significant push to extend hate crime to offences involving hatred or hostility of women, with different groups preferring varied terminology including misogyny, gender and sex. This campaign has built on work undertaken in Nottinghamshire, which since 2016 has had a policy of recording hate incidents involving misogyny that are reported to police. However, any consideration of extending hate crime to gender or sex-based hostility must contend with concerns regarding inevitable overlap with other key priority areas, including domestic abuse and violence against women and girls. Some have also argued that misandry must also be encompassed by any such reforms. There have also been arguments made for the protection of additional characteristics, particularly age, but also alternative subcultures, philosophical beliefs, people experiencing homelessness, sex workers, and other groups.

*Criticism of distinct characteristics*

While protected characteristics comprise a core component of the current hate crime framework, some view such categorisation as inherently problematic. In particular, victims' experience of hate-based offending is often intersectional, in that they are targeted on the basis of numerous characteristics – for example, religion, disability and gender – rather than one distinct trait. In addition, it has been suggested that with society's development and shifting prejudices, the specification of particular characteristics is short-sighted and a residual, inclusive category is preferable. However, equally, there are concerns that extending the application of hate crime in this way would remove the symbolic potency of naming particular forms of hatred.

**How should hate crime laws operate?**

*Bringing clarity*

In considering how the hate crime framework can be modelled to best effect, a key focus will be on ameliorating the lack of clarity which has beset the current law. As a result of their piecemeal development, the relevant hate crime laws are located in separate statutes. Complexities – pertaining to the overlap of these laws as well as the inconsistency of application to different characteristics – mean that the

11 See, eg: Equality and Human Rights Commission, "Hierarchy of hate crime is undermining confidence in the law" 12 October 2016, available at: https://www.equalityhumanrights.com/en/our-work/news/hierarchy-hate-crime-undermining-confidence-law.

framework is not easily understood by those working with the law or affected by it.

*Developing a more inclusive model*

It has been argued that current hate crime laws were historically predicated on the nature of race-based hatred, and that, in particular, they are ill-equipped to address the bulk of crime experienced by people with disabilities. For example, whereas hate crime is currently built on a model of the perpetrator being motivated by or demonstrating hostility towards a particular characteristic, it has been suggested that disabled people are more likely to experience contempt and derision or exploitation, rather than outright hostility.

*Evaluating existing components of the hate crime framework*

The review will necessarily include assessment of the existing approaches to hate crime laws and evaluating their success. The UK has been described as having "one of the strongest legislative frameworks to tackle hate crime in the world".[12] However, key questions will include whether the current hostility model is the right test, and whether there is a need for both aggravated offences and enhanced sentencing, and if not, which approach is preferable. In addition, any interrogation of the stirring up hatred offences will undoubtedly include consideration of the rarity of prosecutions[13] and freedom of expression concerns.

*Beyond the law*

While the review is limited to the hate crime legislation itself, any proposed reforms must be placed in a wider context, including the application and enforcement of the law by police and other components of the criminal justice system. Particular considerations include the scale of offending, especially of hate crimes committed in the online context; the extent of regional inconsistency between police forces; the distinction between anti-social and criminal behaviour; and alternatives to prosecution including out of court disposals and restorative justice.

**Next steps for the review**

Following publication of the consultation paper in spring 2020, the Law Commission will hold a three-month public consultation period. The final report for this review is scheduled for early 2021. For further information, please see: https://www.lawcom.gov.uk/project/hate-crime/ or email hate.crime@lawcommission.gov.uk.

12 Home Office, "Action Against Hate: The UK Government's plan for tackling hate crime" July 2016, at para. 10, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/543679/Action_Against_Hate_-_UK_Government_s_Plan_to_Tackle_Hate_Crime_2016.pdf.

13 There were nine prosecutions for stirring up hatred offences in 2017-18, eight of which resulted in conviction: Crown Prosecution Service, "Hate Crime Annual Report: 2017-18" October 2018, available at https://www.cps.gov.uk/sites/default/files/documents/publications/cps-hate-crime-report-2018.pdf

# The role of the Victim Personal Statement in Sentencing

By Sarah Bergstrom and Umar Azmeh[1]

This article considers how the role and scope of the Victim Personal Statement (VPS[2]) has changed from what many initially regarded as a victim focused therapeutic tool, to become an integral evidential part of the sentencing process.

**Background to the VPS**

A VPS is a statement that victims of crime may give to the police explaining the impact of a crime upon them, whether physically, emotionally, psychologically, financially or in any other way.[3] Over time these statements have had at least three labels, having previously been known as Victim Impact Statements (VIS) or Family Impact Statements. The terms VIS and VPS have been used interchangeably by the courts,[4] but VPS is now the term were always consistently used in the Victims' Code and the Criminal Practice Direction. VPS were always potentially relevant at sentencing. They may also be relevant at the Parole Board stage, but this falls outside the scope of this article.

The origins of VPS in England and Wales can be traced back to the 1996 Home Office Victims' Charter, according to which victims could "expect the chance to explain how the crime has affected [them] and [their] interests to be taken into account."[5] Following various pilots, a 2001 VPS scheme was introduced nationwide.[6] In 2006 the Victims' Charter was replaced by the Code of Practice for Victims' of Crime, known as the "Victims' Code."[7] As originally drafted, the Victims' Code contained no right to make a VPS, and if one was made the courts were left to self-regulate the procedure. In 2007, the Crown Prosecution Service (CPS) introduced the Victim Focus Scheme,[8] which entitled family members of murder or manslaughter victims to make a single VPS on behalf of the family, which could be read to the court prior to sentence.

A revised Victims' Code in 2013[9] conferred on the victim the entitlement to make a VPS and a further change allowed a victim to read their VPS in court prior to sentence or to ask that their VPS be read out aloud, usually by the

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2 This acronym is used for both the singular and the plural in this article.

3 Ministry of Justice, *Making a Victim Personal Statement* (2013), p.3 - available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/264625/victims-vps-guidance.pdf (accessed 25 June 2019).

4 In *Perkins* [2013] 2 Cr.App.R. (S.) 72, the court uses the term victim impact statement at para.50, but VPS predominantly throughout the rest of the judgment.

5 H Fenwick, "Procedural Rights of Victims of Crime: Public or Private Ordering of the Criminal Justice Process" (1997) 60 *MLR* 317.

6 JV Roberts and M Manikis, "Victim Personal Statements – A Review of Empirical Research, Report for the Commissioner for Victims and Witnesses in England and Wales" (2011), p.8 - available at https://www.justice.gov.uk/downloads/news/press-releases/victims-com/vps-research.pdf (accessed 25 June 2019).

7 A change made by Pt.3 of the Domestic Violence, Crime and Victims Act 2004.

8 http://www.cadd.org.uk/docs/Victim%20Focus%20Scheme%20Leaflet%2017%2009%2007.pdf (accessed 25 June 2019).

9 Giving effect to the EU Directive for Victims of Crime 2012/29/EU.

prosecutor, with the agreement of the court. Then in 2015 the Victims' Code was amended yet again,[10] with enhanced rights given to victims in certain categories of case, particularly to victims of the most serious crime, persistently targeted victims, and vulnerable or intimidated victims, as these categories of victim were deemed to be more likely to require enhanced support and services through the criminal justice process.

Notwithstanding these developments and the concomitant increase in the importance of the VPS, there is still a clear political imperative further to improve the treatment of victims by criminal justice agencies. To that end, the government has recently published its Victim's Strategy, setting out its commitment to amend and strengthen the Victims' Code and to give victims greater support.[11] This support would include "improved police training, including guidance on conducting interviews and collecting evidence".[12]

## The initial purpose of the VPS

VPS fall within one of two different models depending on the jurisdiction: expressive or instrumental. Within the former model, the purpose of the VPS is expressive and communicative:

> it serves to express the victim's view of the harm created by the offence, a view which is communicated to the court and possibly also the offender.[13]

Importantly, this model does not require a nexus between the VPS and the appropriate sentence, which essentially means that the victim's preferences or suggestions as to sentence are not formal parts of the model. The instrumental model, on the other hand, entitles the victim to attempt to influence the judge's decision in order to secure a higher sentence. England and Wales use the expressive model.[14]

Victims are not a party to criminal proceedings in England and Wales. The prosecution does not represent them in the same manner in which a defence advocate represents a defendant and furthermore, court proceedings can be somewhat esoteric to a layperson. As a result, the victim and their family may feel disconnected from the process and "that they have no control over anything taking place around them.[15] Indeed, the experience of victims in the Crown Court has been described as "alienating", in which they have a "marginalised outsider status".[16]

The VPS process was no doubt intended to address the issue of exclusion. Indeed, the Victims' Code provides that the purpose of the VPS is to give "victims a voice and explain in their own words how a crime has affected them[17]." That said, however, its success in doing so thus far is not universally accepted.

According to some critics,

> ... political imperative to do *something* for victims (…) has meant that the VPS Scheme is unclear in its aims and justifications, with the victim left inexorably an ambiguous participant.[18]

Giving a VPS can be deeply personal: it humanises the effect of a criminal offence. When it is read out loud, it forces the offender (who is in court awaiting sentence) to listen to the consequences of their actions. The impact of the offending can tangibly be heard and then assessed by the sentencing court. Many victims are thought to benefit from this more emotive facet of a VPS, which is why the VPS is often seen as having multiple purposes. On the one hand, it assists the sentencing judge in assessing the impact of an offence, and on the other, it serves to empower the victim by recognising them and allowing their voice tangibly to be heard in the criminal justice system (if the proper procedure is followed).

## Problems within the VPS scheme

In November 2015, the Victims' Commissioner for England and Wales published a report entitled *The Silenced Victim: A Review of the Victim Personal Statement* (note 15 above). The report found that many victims had negative experiences of the VPS scheme, including uncertainty as to what difference their VPS may make, and not understanding why their request to read their VPS aloud was refused by the judge. The report also identified a systemic failure in that most victims did not recall being offered the opportunity to make a VPS. That said, most victims did value their right to make a VPS.

Following the 2015 Report, a joint guide was developed between the police, the CPS, Her Majesty's Courts and Tribunals Service (HMCTS), and other crime agencies, in order to "… provide practical advice to anyone who might be involved in the VPS process" and to help police officers "to understand what information they should provide to victims if they choose to make a VPS."[19] Each agency party to this guide agreed to incorporate it into their victim-focused policies, and where relevant, to establish processes to monitor compliance under the Victims' Code in relation to VPS.[20]

Beneficial as these changes may have been, one issue that has not been resolved with clarity is the right, or otherwise, of the victim to read their statement aloud in court.

The 2013 revisions to the Victims' Code permitted a victim to read their own VPS (or to have it read on their behalf) prior to sentencing with the agreement of the court.[21] The extent to which a victim is permitted to read their VPS in court (as well as the use made of the VPS in sentencing generally) is currently the subject of a consultation exercise being carried out by the Ministry of Justice in consultation with HMCTS.[22]

As readers will note, a particular problem with the scheme as currently conceived is that it accords the sentencing judge

10 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/476900/code-of-practice-for-victims-of-crime.PDF (accessed 25 June 2019).

11 *https://www.gov.uk/government/publications/victims-strategy* (accessed 13 October 2019).

12 Ibid Ch 3.

13 See footnote 9, at p.9.

14 JV Roberts and E Erez, "Victim Impact Statements at Sentencing: Expressive and Instrumental Purposes", in JV Roberts and T Bottoms (eds.) *Hearing the Victim: Adversarial Justice, Crime Victims, and the State* (Willan Publishing, 2010).

15 Victims' Commissioner for England and Wales, *The Silenced Victim: A Review of the Victim Personal Statement* (2015). Available at: https://s3-eu-west-2.amazonaws.com/victcomm2-prod-storage-119w3o4kq2z48/uploads/2019/02/VC-Silenced-Victim-Personal-Statement-Review-2015.pdf (accessed 25 June 2019).

16 See J Jacobson, G Hunter and A Kirby, *Inside Crown Court: Personal Experiences and Questions of Legitimacy* (Policy Press, 2015).

17 At para.1.12.

18 "An Ambiguous Participant: The Crime, Victim and Criminal Justice Decision-Making", I Edwards (2004) *British Journal of Criminology* 44, 967-982.

19 *Joint Agency Guide to the Victim Personal Statement – A guide for all criminal justice practitioners*, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/740196/joint-agency-guide-victim-personal-statement.pdf (accessed 25 June 2019).

20 See p.1.

21 Guidance in *Archbold* also notes that the courts are increasingly frequently allowing victims or their families to read out VPS in court (see *Archbold* 2019 at 5A-305).

22 See para.2.7 of the Proposals for revising the Code of Practice for Victims of Crime, available at: https://consult.justice.gov.uk/.

essentially open-ended discretion as to whether or not a VPS may be read out aloud in court, with the victim not knowing in advance what the judge will decide.

**Development of the caselaw and the Criminal Practice Direction**

In *Perks*[23] the Court of Appeal considered the evidential status and admissibility of the VPS, Garland J drawing the following propositions from the authorities (at [72]):

(i) A sentencer must not make assumptions, unsupported by evidence, about the effect of an offence on the victim.

(ii) If an offence has had a particularly damaging or distressing effect upon a victim, this should be known to and taken into account by the court when passing sentence.

(iii) Evidence of the effects of an offence on the victim must be in proper form, a section 9 witness statement, an expert's report or otherwise, duly served upon the defendant or his representatives prior to sentence.

(iv) Evidence of the victim alone should be approached with care, the more so if it relates to matters which the defence cannot realistically be expected to investigate.

(v) The opinions of the victim and the victim's close relatives on the appropriate level of sentence should not be taken into account. The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender subject to two exceptions: (i) Where the sentence passed on the offender is aggravating the victim's distress, the sentence may be moderated to some degree. (ii) Where the victim's forgiveness or unwillingness to press charges provides evidence that his or her psychological or mental suffering must be very much less than would normally be the case.

In *Perkins,*[24] the Court gave further guidance on the use of VPS. Lord Judge CJ concluding:[25]

(i) Decisions as to whether to make a VPS must be made by the victim personally. They must be informed of their right, and allowed to exercise it as they wish.

(ii) When the decision whether or not to make a VPS is being made, it should clearly be understood that the victim's opinion about the type and level of sentence should not be included.

(iii) The VPS constitutes evidence and must therefore be treated as such. It may be challenged in cross-examination, and it may give rise to disclosure obligations.

(iv) Responsibility for presenting the VPS lies with the Prosecution.

(v) Properly formulated VPS provide real assistance for the sentencer, and experience has shown that in the overwhelming majority of cases they are put before the court in the usual way. The judge will always have read the VPS.

Some of this guidance was later incorporated into the Criminal Practice Directions.[26] Further and updated guidance on VPS can now be found in the current Criminal Practice Directions,[27] with paragraph F.1 setting out the general entitlement of victims to make a VPS, and stating that the court "will take the statement into account when determining sentence", F.2 stating how the police should go about informing a victim of crime of the scheme, and how and when a VPS should be taken, and F3 summarising the key guidance from *Perkins*.

In *Gregory,*[28] Thirlwall J affirmed the general principle that responsibility for sentencing rests solely with the sentencing judge, and that the victim should not be asked about the nature of the sentence which should be imposed on the applicant – following England and Wales's expressive model of VPS.

**The statutory sentencing framework**

When sentencing a defendant aged 18 or over, the court must have regard to the purposes of sentencing contained in s.142(1) of the Criminal Justice Act 2003: (i) the punishment of offenders, (ii) the reduction of crime (including by deterrence), (iii) reform and rehabilitation, (iv) public protection, and (v) reparation. There is no indication in the statute as to which purpose takes priority and therefore the sentencer must decide what weight to accord one or more of those purposes in any particular sentencing exercise.

A basic principle of sentencing is that the courts are required to pass a sentence that is commensurate with the seriousness of the offence.[29] The Sentencing Guideline Council's *Definitive Guideline on Overarching Principles: Seriousness* notes that the assessment of seriousness will determine which of the sentencing thresholds have been crossed, what type of sentence is most appropriate, and will also be the key factor in determining the length of a custodial sentence, the onerousness of a community order, or the amount of any fine.[30] The underlying notion here is proportionality, whereby like cases must be treated alike, and cases of different seriousness cannot be treated with equal severity.[31]

Section 143(1) of the Criminal Justice Act 2003 provides:

> In determining the seriousness of any offence, the court must consider the offender's culpability in committing the offence and *any harm which the offence caused, was intended to cause or might foreseeably have caused.* [emphasis added]

The same language is now used in the Sentencing Council's new General Guideline and the explanations that accompany it.

From this it follows that a VPS will be most useful to the sentencing court in assessing the harm caused to a victim. Culpability, by contrast, will generally focus on factors concerning the defendant, for example whether or not they acted intentionally, recklessly, negligently, etc. In respect of harm, the *Definitive Guideline on Seriousness* says this[32]:

> The nature of harm will depend on personal characteristics and circumstances of the victim and the court's assessment of harm will be an effective and important way of taking into consideration the impact of a particular crime on the victim.

23 [2001] 1 Cr.App.R. (S). 19.
24 [2013] EWCA Crim 323, [2013] 2 Cr.App.R. (S.) 72.
25 See para.9 of the judgment. The passage has been paraphrased for the purposes of this article.
26 [2013] EWCA Crim. 1631.
27 [2015] EWCA Crim. 1567.
28 [2015] EWCA Crim. 1708, at [13].
29 A principle first clearly established by the Criminal Justice Act 1991: see J V Roberts (ed.) *Mitigation and Aggravation at Sentencing* (*Cambridge University Press*, 2011), page viii.
30 https://www.sentencingcouncil.org.uk/wp-content/uploads/Seriousness-guideline.pdf at p.3 (accessed 25 June 2019), This Guideline was replaced on 1 October 2019 by the new *General Guideline*, which adopts the same language.
31 For example, A Ashworth and A von Hirsch, *Proportionate Sentencing* (Oxford University Press, 2005).
32 See p.4. This Guideline was replaced on 1 October 2019 by the new *General Guideline*, which adopts the same language.

With this in mind, the courts have consistently recognised the value of the VPS in sentencing, and were doing so even before harm was expressly to be taken into account by virtue of the 2003 statutory provisions.

Section 121(3)(b) of the Coroners and Justice Act 2009 stipulates that, in developing sentencing guidelines, the Sentencing Council should refer to, inter alia "… the harm caused, or intended to be caused or which might foreseeably have been caused, by the offence".

As a result, the assessment of harm is embedded in all of the Sentencing Council's Definitive Guidelines at Step 1, which determines an offence category through culpability and harm.

Thus, in the *Overarching Principles: Domestic Abuse Definitive Guideline*, one of the aggravating factors of particular relevance to offences committed in a domestic context is whether the victim is "forced to leave home", or that "steps have to be taken to exclude the offender from the home to ensure the victim's safety".[33] This may be a factor indicating a significantly high degree of harm, potentially resulting in a material difference to sentence. The manner in which a sentencing judge would come to know about that material fact, particularly if the defendant had pleaded guilty, would be via a VPS. Similarly, in the context of a domestic burglary, the *Definitive Guideline* indicates that where items of "… sentimental or personal value" have been stolen or damaged, the offence will involve "greater harm"[34]; statements to similar effect can be found in the *Definitive Guideline* in relation to theft from the person.[35] The VPS would be the appropriate vehicle for communicating these matters to the sentencing court, and accordingly a sentencing judge might require a VPS to highlight the extent of harm caused by the offending in order to impose a sentence that is just and proportionate.

It is also worth noting that there is nothing in the rules that would prevent a judge from asking for a VPS if none was taken, or indeed asking for an updated VPS if the one in front of them does not, in the judge's view, contain all the information they require for sentence. This is of course subject to the victim's right to refuse to make a VPS. In these circumstances, judges must also be wary of applying undue pressure on a victim to make a VPS: as noted above, Lord Judge CJ in *Perkins* made it clear that decisions as to whether to make a VPS are solely matters for the victim personally, and they must be allowed to exercise this right as they wish (or not to, as the case may be). Courts must also beware of minimising harm in cases where there is no VPS; this may be, for example, because the victim is too traumatised to make a VPS. It is worth noting that it is always the responsibility of the prosecution to present admissible evidence relevant to sentencing.[36]

## Practical impact of VPS at sentencing

The practical use of VPS at sentencing was explored in *Chall*.[37] In each of the combined appeals the sentencing judge had found that the complainant had suffered severe psychological harm as a result of the offence(s), and had placed the defendant in a higher sentencing category as a result. Each appellant complained that the sentencing judge had used a VPS to make a finding of severe psychological harm in the absence of any other evidence such as a psychological report. Counsel for the appellants initially submitted that consideration should be given to obtaining a clinical assessment of the psychological state of a victim whenever there is scope for argument as to the degree of psychological harm. That submission was modified orally where it was submitted that in the absence of expert evidence, a judge has no benchmark against which to assess whether psychological harm is severe. There was no guidance as to whether, for example, such an assessment could be made on the basis of a single adverse psychological impact or whether a combination of psychological impacts is necessary.

The Court rejected those arguments. A sentencing judge, it said, is not called upon to make a medical judgement as to where the victim sits in the range of clinical assessments of psychological harm but is making a factual assessment as to whether the victim has suffered psychological harm, and if so, how severely. The objection that the judge was making an expert assessment without the necessary expertise was therefore misconceived.[38]

At [31] and [32] the Court also discussed the manner in which a sentencing judge may assess a VPS, mentioning that an updated VPS may be served at any time prior to the disposal of the case, and stressing the intensely personal nature of a VPS.

## Conclusion

As the Court of Appeal said in *Perkins*:

> Except where inferences can properly be drawn from the nature of or circumstances surrounding the offence, a sentencer must not make assumptions unsupported by evidence about the effects of an offence on the victim.[39]

The evidential value of the VPS is that in many cases it will give the sentencing court the evidence it requires to understand, assess and categorise the harm caused by a particular offence: this will allow the court fully to gauge the seriousness of the offence and impose a just and proportionate sentence.

An assessment of the harm caused by the offending is a step that is embedded in the Definitive Guidelines compiled by the Sentencing Council, a structure reflected in s.121(3)(b) of the Coroners and Justice Act 2009. In sentencing an offender, the statute requires the sentencing court to follow those Guidelines.[40]

As the Sentencing Council continues to produce more Definitive Guidelines which categorise culpability and harm, the assessment of harm becomes more structured and transparent. The evidential role of the VPS is clearer to see, and *Chall* demonstrates that the VPS can often be integral to that assessment. So if the VPS was initially introduced with a rather loosely defined aim of giving victims a voice and a role in sentencing, it now clearly serves a more defined legal purpose.

It is hoped that the Victims' Strategy published in September 2018 will lead to improved communication to victims and their families, especially as to their entitlement to make a VPS. It is also hoped that it will clarify for them the use the sentencing court may properly make of it, and also help ensure that VPS address the factors relevant to the Definitive Guideline applicable to the offence in question.

33 https://www.sentencingcouncil.org.uk/wp-content/uploads/Overarching-Principles-Domestic-Abuse-definitive-guideline-Web.pdf at p.3 - (accessed 25 June 2019).
34 https://www.sentencingcouncil.org.uk/wp-content/uploads/Burglary-definitive-guideline-Web.pdf at p.4 (accessed 25 June 2019).
35 https://www.sentencingcouncil.org.uk/wp-content/uploads/Theft-offences-definitive-guideline-Web.pdf at p.4 (accessed 25 June 2019).
36 See *Perkins* at [9].
37 [2019] EWCA Crim. 865.
38 Per Holroyde LJ at [10] and [12].
39 Note 22 above, at [5].
40 Section 125(1) of the Coroners and Justice Act 2009.

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