

**Putting victims of crime
'at the heart' of criminal
justice:**

**Practice, politics and
philosophy**

Volume 1

**A thesis submitted in partial fulfilment of the
requirements of Sheffield University for the degree of
Doctor of Philosophy**

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2007

Dedicated to the memory of Linda Mary Hall

(1952 – 1989)

Mum

Acknowledgements

This thesis would not have been possible without the enduring help, support and encouragement of family, friends and colleagues too numerous to name. A large debt is owed to colleagues at the School of Law at the University of Sheffield. In particular, I would like to thank Professor Sir Anthony Bottoms and Drs Gwen Robinson, Maggie Wykes and Kirsty Welsh for their invaluable advice, insight and support throughout my time as a postgraduate researcher.

My thanks also go to the many lawyers, practitioners, court staff and administrators who participated in this study both as respondents in interviews and as the focus of observation sessions. To this I must add my gratitude to all the defendants, witnesses, and victims of crime involved in the trials observed for this research, who acquiesced to my presence at this most difficult time for all involved. Special thanks must go to the Area Manager of Her Majesty's Courts Service in the anonymous area under review, who gave so freely of his time to ensure my access arrangements and was a constant source of information and advice.

I am also indebted to the many policy-makers and other personnel at the Home Office, Office for Criminal Justice Reform, and Department for Constitutional Affairs, who found time in their busy schedules to speak to me on a wide range of issues pursuant to this thesis.

I must also thank my family; my father Peter, my sister Emma and my grandmother Joan, who never failed to endure the assorted periods of reduced confidence, low morale and short temper that come with completing a doctoral thesis. If they themselves felt victimised by this they never showed it, and without their support and love this research would never have been completed.

Most importantly, I wish to thank my supervisor, Professor Joanna Shapland of the University of Sheffield. Without her unwavering commitment, advice and patience this thesis would never have been possible. Joanna has provided information and inspiration in equal measure throughout the process and her contribution is incalculable, as is my debt to her.

...and the rest

Jaime Waters, David Moxon, Jane Miller, Jessica Wright, Christian Lopez-Silva, Victoria Chico, Jeremy Wickins, Laure Guille, James Banks, Matthew Saul, Chris Whitaker, James Muiruri, Djims Millius, Roger Wamoall, Michael Schillig, Richard Collins, Katja Samuel, Angela Spriggs, Ryan Davenport

et al.

My thanks to everyone who helped and supported me during the writing of this thesis.
Any errors or omissions remain my own.

Putting victims of crime ‘at the heart’ of criminal justice: Practice, politics and philosophy

Summary

This thesis examines the pledge made by the New Labour government to put victims of crime ‘at the heart’ of the criminal justice system in England and Wales. The central questions addressed are what it would mean to have a victim-centred criminal justice system, what factors have driven this ‘policy’, and what putting victims ‘to the heart’ of the system has meant so far in practice.

Drawing on ethnographic techniques – including courtroom observation, qualitative interviews and surveys – this research is particularly concerned with the place of victims in the criminal trial procedure. As such, observations were conducted of trials at two magistrates’ courts and one Crown Court centre. These were combined with semi-structured interviews with legal practitioners and court personnel. A court users survey was also conducted at one of the magistrates’ courts to ascertain the views of victims and witnesses on court facilities, service provision, and the experience of giving evidence. In addition, interviews were conducted with criminal justice administrators in the local area under review and with central policy-makers at the Home Office, Office for Criminal Justice Reform and Department for Constitutional Affairs in order to shed light on the formation of the victim ‘policy’ and the challenges of its local implementation.

Findings from a grounded analysis of this dataset indicate that whilst, practically, much has been done to assist victims throughout the criminal justice system, cultural barriers and the practices of lawyers, advocates, benches and court staff have not caught up with these good intentions. It is further argued that this ‘policy’ is in fact driven by a multitude of goals and political pressures, not all of which are conducive to victims’ needs. Broadly speaking, this has resulted in central government relinquishing responsibility for victims in favour of local implementers, without providing the necessary financial backing.

The study concludes by proposing a model of victim-centred criminal justice, which emphasises a victim’s ability to make an ‘account’ during the trial process and thereby achieve therapeutic outcomes.

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CHAPTER 1: INTRODUCTION, AIMS AND HYPOTHESES

Most writings on victims in criminal justice begin with the premise that, traditionally, victims of crime have received very poor treatment at the hands of the criminal justice system (CJS). This is not without its touch of irony as, prior to the development of the 'new police' in the 19th century, victims themselves were chiefly responsible for bringing charges against alleged offenders and hence formed one of the central pillars to the criminal justice process.¹ Nevertheless, by general consensus it is now clear that in more recent times crime victims have suffered marginalisation at the hands of that system and those working within it (Zedner, 2002). In 1985, Shapland et al. articulated the discontent felt by many victims of crime in the following terms:

“The [criminal justice] system is not geared to the perspective of the victim. There appears to be a mismatch between the victim’s expectation of the system and the ignorance of and ignoring of his attitudes and experiences by the professionals within the criminal justice system” (1985: p.177).

It is difficult to distinguish the specific reason or reasons behind this rather sorry state of affairs. Certainly, as the modern police force developed from Peel’s 1829 Metropolitan model, it began taking over the task of pursuing prosecutions on behalf of the state. In the years that followed, private prosecutions by individuals became increasingly rare to a point where the victim’s leading role had eroded to that of merely reporting the crime in the first place and making a witness statement. In addition, the beginning of the 19th century saw the blossoming of deterministic notions of criminality, which viewed crime as being pre-empted by factors outside the control of individual offenders. Hence, sympathies were sometimes with the offenders as themselves the victims of social or biological influences (Williams, 2004).

In more modern times, by 1977 Nils Christie was arguing that the criminal justice system – having become over professionalised – effectively ‘stole’ conflicts from their ‘rightful owners’, meaning victims and offenders (Christie, 1977). Indeed, it is commonly implied that the plight of the modern victim is a product of the near-

¹ As such, the recent interest in this area is sometimes referred to as the *rediscovery* of victims (Sanders, 2002).

universal adoption of the adversarial justice model in the British criminal justice system (Ellison, 2001; Jackson, 2003).² As already noted, under this system alleged offenders are brought to court and prosecuted by the state as represented (now in the vast majority of cases) by the Crown Prosecution Service (CPS). The core of the system is therefore an adversarial contest between the state on the one hand and the defendant on the other.

As such, victims of crime themselves have no formal place or representation in these proceedings, save as witnesses called by either side. Furthermore, the fact that defendants are 'alleged' offenders until proven otherwise suggests that any persons who claim to be affected by an offence are only 'alleged' victims (Maguire, 1991). Of course – and as will be argued in this thesis – it is almost certainly an over-simplification to ascribe all the woes of the victim as the 'forgotten man' (Shapland et al., 1985: p.1) of criminal justice to the adversarial system *per se*. Indeed, Brienen and Hoegen (2000) in their sweeping comparison of twenty two European criminal justice systems suggest that the inquisitorial mode of justice is not inherently more favourable from a victim perspective compared with an adversarial one.

What is certain, however, is that issues related to victims within (and without) the criminal justice system have received increasing academic and official attention over the last twenty or so years (Home Office, 2002; JUSTICE, 1998; Crawford and Goodey, 2000; Zedner, 2002). Christie's 1977 contribution has already been mentioned, but as long ago as 1948 von Hentig had challenged the conception of victims as 'passive actors' (von Hentig, 1948). From the late 1970s onwards, victims of crime have been the topic of a fast growing – now extensive – literature and the study of victims' role within the criminal justice system, along with their perceptions and experiences of it, have become important aspects of Victimology (Joutsen, 1987, 1991). In addition, and with particular significance for the present study, recent years have witnessed a growing appreciation for so-called 'secondary victimisation'; the notion that many victims of crime are victimised a second time through poor treatment at the hands of the criminal justice system (Pointing and Maguire, 1988; Rock, 1998).

An extensive review of the relevant literature follows in Chapter 3. Suffice to say (for now) that there has been a marked growth in academic interest in these issues as well as a marked acceleration in official action and policy developments which impact upon

² The singular exception being the inquisitorial proceedings used in coroners' courts.

crime victims and which provide the background for this study. It is hard to know whether such official interest sparked academic debate or vice-versa, most likely the two fed on each other. This point notwithstanding, what is clear is that the victim issue remains a dominant factor in government policy, as confirmed in recent press releases and the Queen's speech of 2006:

"The overriding and primary aim of this review is to ensure that the Criminal Justice System is geared at every stage to protecting the public and putting the interests of the law-aiding majority and the victim first" (Home Office, 2006c).

"My government will put victims at the heart of the criminal justice system" (Queen's speech of 15th November 2006).

It is this aim (or claim) of putting the victim 'at the heart' of the criminal justice system that constitutes the primary focus of this research. By way of introduction, this chapter will provide a brief overview of the background, methodology, initial hypotheses and structural outline of this thesis, all of which will be covered in far greater detail in subsequent chapters.

1.1 – THE POLICY BACKGROUND

In recent years the British government, in common with many other governments around the world, has indeed focused unprecedented attention on the needs of victims and witnesses in the criminal justice system generally, and specifically when they are called to give evidence in court (Maguire and Shapland, 1997; Home Office, 1999, 2003a, 2005b, 2005f). Such moves have resulted in the development of a great many support mechanisms, information sources, service standards and other reforms designed to make the criminal justice system more responsive to the needs, problems and expectations of victims and witnesses.

Chapter 4 provides a detailed review and critique of these reforms as implemented over time. Specific 'highlights' of this long succession of developments and official policy initiatives³ include an expansion in the availability of both state and court-based compensation for victims of crime and, more recently, the proposed creation of a 'Victims Fund' (Brienen and Hoegen, 2000; Wright, 1998; Home Office, 2004a). Since

³ For the sake of brevity, we will proceed here as if these successive developments reflect a consistent and unified policy, although later it will be argued that this in fact seems unlikely (see Chapter 4).

the 1970s, there has also been a marked increase in governmental support for several victim assistance organisations; especially Victim Support, which now receives the vast majority of its funding from the government (Rock, 1990; Victim Support, 2006; Rape Crisis Federation, 2007; Support After Murder and Manslaughter, 2007). Further developments have expanded the provision of information and support to victims and witnesses prior to coming to court, most recently through the rollout of joint CPS/Police 'Witness Care Units' under the *No Witness No Justice* scheme (Home Office, 2004g). Indeed, policy-makers have also begun to address the problems faced by victims of crime outside the confines of the criminal justice system by engaging with housing authorities, insurers and healthcare services (Home Office, 2003a).

In the court buildings themselves, numerous improvements have been made to the facilities and support systems available; particularly through the expansion of Victim Support's Witness Service (with government funds) to provide 'front line' assistance to victims and witnesses in all courts (Home Office, 2002). In the courtroom, the statutory grounding of so-called 'Special Measures' in the Youth Justice and Criminal Evidence Act 1999 has assisted vulnerable and/or intimidated witnesses to give evidence via video-link and other mediums designed to make the process less daunting (Hamlyn et al., 2004a, 2004b). Furthermore, the 2001 national rollout of the victim personal statement (VPS) scheme now allows victims to convey the impact a crime has had upon them to the courts (Home Office, 2001c, 2001e).⁴

More recently, the government has piloted a system of 'victims' advocates', which for the first time provides direct representation for victims⁵ in court. Numerous roles for such advocates have been suggested, but the primary focus appears to be on assisting victims in communicating the impact of the crime to the court; thus constituting an extension of sorts to the VPS⁶ (Home Office, 2005b; Graham et al., 2004).

Several other developments were introduced under Part 3 of the Domestic Violence, Crime and Victims Act 2004. The most significant of these was the substitution of the existing Victim's Charter (Home Office, 1996) with a statutory Victim's Code of

⁴ Although – as we will see in Chapters 3 and 4 – the exact goals of this scheme are less than clear.

⁵ At present, these are restricted to the family of homicide victims, the so-called 'secondary' victims or 'survivors' (Rock, 1990).

⁶ In Chapter 3 it will be argued that this reform may effectively establish such victims as parties in a case.

Practice. This obliges criminal justice agencies to provide victims with minimum standards of service and hence (it is said) affords victims 'rights' for the first time. Also under the 2004 Act, the National Victims Advisory Panel (which has existed since 2003) was given statutory backing with a mandate to:

“[A]dvice the Home Secretary, Lord Chancellor, and the Attorney General (or their representatives) and, through them, other cabinet ministers, of the views of victims and witnesses of crime with particular reference to their interaction with the criminal justice system” (Victims' Advisory Panel, 2004: p.6).

Hence, in accordance with growing trends towards governance discussed in Chapter 4 (Crawford, 1997; Bache, 2003; Jordan et al., 2005), victims are now apparently being included within the policy-making process as well as the criminal justice system.⁷

The 2004 Act also created a new Commissioner for Victims and Witnesses to “promote the interests of victims and witnesses”⁸ and “keep under review the operation of the code of practice”.⁹ If a victim complains to any service provider within the CJS because of a perceived breach of the Code of Practice, and the victim is not satisfied with that agency's response, then it is also open for the victim's MP to address the matter to the Parliamentary Commissioner for Administration, who in turn may direct an investigation.¹⁰

It is therefore clear that victims of crime are receiving considerably more official/governmental attention now than at any time in the recent past. Indeed, in words which appear to summarise policy-makers' aspirations on this issue, the Labour government has pledged:

“[To] put victims more firmly at the heart of our criminal justice system, with a victim-centred approach supported across Government” (Home Office, 2004a: p.28).

On face value this seems to be both a highly significant and highly beneficial promise from the perspective of crime victims. After all, in recent times victims were not merely excluded from the 'heart' of the system, but cast to its furthest margins. The

⁷ See Chapter 4.

⁸ s.49(1)(a).

⁹ s.49(1)(c).

¹⁰ The outcome of which may be that the Commissioner *suggests* the relevant agency pay compensation.

significance of the pledge lies not only in its indication that victims should now expect better from the criminal justice system, but also in the clear implication that 'victims' are now firmly installed as subjects of 'official policy'. 'Official policy' here refers to the apparent acceptance of a need to provide assistance to 'victims' and 'witnesses' both by the government itself – and its associated 'policy-making networks' (Jordan et al., 2005) – and by the 'inner circle' of CJS agencies (Rock, 1990). In other words, it would appear that victims and witnesses are now being seen as genuine issues to be considered and acted upon by these groups (Rock, 1990, 1993).

Such was not always the case. As we have seen, in the not-so-distant past the needs of the victims in a criminal case were very much a non-issue to almost everyone else involved. Indeed, both victims and witnesses were viewed as little more than sources of evidence, and what little heed was paid to their perspectives and expectations was largely down to individual practitioners (Shapland et al., 1985; Joutsen and Shapland, 1989; Groenhuijsen, 1998). To policy-makers as well, victims were simply not on the agenda. Rock (1990) suggests that the victim's absence from the policy-making agenda in the years leading up to the late 1970's and early 1980's was largely down to the government's earlier creation of the costly (but, relative to almost all other countries, extremely generous) state compensation scheme in 1964.¹¹ With such a far-reaching scheme in place, many of those in policy-making circles took the view that that they were already doing a great deal for crime victims (albeit in the absence of any consultation with the victims themselves).

Hence, the promise to put victims 'at the heart' of criminal justice represents a near complete reversal of philosophy on the position of victims over the last 20-30 years. The broad aim of this research project is to examine the meaning, development and implications of this pledge, with particular attention being paid to the criminal trial process.

1.2 – RAISING QUESTIONS

Using the government's pledge to put victims 'at the heart' of the criminal justice system as a starting point, three primary research questions were formulated for this project which I shall now set out in short form.

¹¹ See also (Miers, 1991) for detailed discussion of this point.

The first question is “what would it mean to put victims ‘at the heart’ of the criminal justice system?” This question has many aspects; including what it would mean practically, legally, politically and, indeed, philosophically to have a genuinely ‘victim-centred’ system and what such a system might look like. As a normative point, this issue will greatly inform the investigation of the subsequent two questions.

The second question is “what is driving this ‘policy’?” That is to say, from the government and legislature’s point of view, what has prompted the near complete reversal of philosophy on victims described at the end of the last section? The word ‘policy’ has been placed in inverted commas here because it is not to be assumed that the totality of measures and developments relating to victims (and witnesses) actually constitute a unified and consistent ‘policy’ at all. In fact, the contrary position is hypothesised below. As such, the issue raised in this part of the research is not whether victims and witnesses are indeed receiving the ‘better deal’ they have been promised (Home Office, 2001b). Instead, my concern will be the position of victims as the subjects of official policy interest.

My final question is “what has putting victims ‘at the heart’ of the system meant so far *in practice*?” In real life the criminal justice system faces a whole host of practical and organisational difficulties every day. As one solicitor remarked to me during the course of this project:

“The wheels of justice do not run smooth. They’re square. And falling off” (a solicitor appearing at Courts A and B).

Add to this the complicating influence of occupational cultures within the CJS – traditionally geared around the exclusion of victims (Shapland et al., 1985; Jackson et al., 1991) – and one is faced with the real possibility that the policy and the practice of this ‘victim-centred’ system are two very different things (Rock, 1993).

At this stage, it is important to interject some general points on the intended scope of this research. Firstly, notwithstanding the government’s pledge to centralise the victim within the criminal justice system as a whole, for the purposes of this project I am especially concerned with the operation of criminal trials. Even more specifically, the project seeks to examine the role of victims within the substantive trial procedure prior to the sentencing stage. The reasons for this are both practical and conceptual. Conceptually, it can be argued that it is the trial itself which already stands ‘at the heart’

of the criminal justice system, as many of the other processes we associate with criminal justice are either in anticipation of a trial or the result of one.

As such, in order to understand the government's pledge, it seems vital to examine the implications for victims in criminal trials in specific detail. Practically speaking, there is also a growing literature already in existence addressing the victim's role at the sentencing stage (Ashworth, 1993, 1998; Erez, 1994, 1999, 2000, 2004; Sanders et al., 2001) hence the choice to concentrate on the substantive trial process, on which there is a relative lack of up to date (and certainly, first hand) information. Of course this focus will not be to the complete exclusion of all other issues relevant to a wider 'victim-centred' criminal justice system. Rather, the evaluation will simply concentrate more attention on points relevant to the criminal trial procedure because it is hoped that the conclusions drawn in relation to victims 'at the heart' of this process may be expanded and applied to the system as a whole.

On a technical point, in this project a 'trial' is understood as a criminal proceeding in the magistrates' court or Crown Court that at the outset is intended to determine the guilt or innocence of defendants charged (usually by the CPS) with specific criminal acts. This would normally involve the giving of evidence by witnesses and would be termed an 'effective' trial by court personnel. Nevertheless, we will see during the course of this project that many such 'trials' are ultimately resolved in other ways, either because the proceedings cannot take place as planned and have to be postponed on the day (known as an 'ineffective' trial), or because the case is dropped or the defendant decides to plead guilty at a late stage (known as a 'cracked' trial). In these situations a different (much shorter) procedure is required to determine how to resolve the case or rearrange it for a future date. Such shortened proceedings are also counted as 'trials' for the purposes of this research.¹²

The second point I wish to raise at the outset is that this thesis should not be read as advocating or criticising the notion of 'victim-centred' criminal justice, 'victim rights' or any other related concept *per se*. Rather, my concern here is to objectively¹³ evaluate the meaning, background and practical implications of this policy and to determine what would be required to achieve it.

¹² Further discussion of the definitions used in this research can be found in Chapter 2.

¹³ At least, to the extent that genuine objectivity is possible for any researcher (Bryman, 2001).

Finally, I wish to emphasise here that this research is concerned with criminal justice rather than restorative justice. Again part of the reason for this choice is simply the growing body of other research available on the emerging 'restorative justice system'. In addition, however, it will be noted in Chapter 3 that many commentators suggest restorative justice models as a solution to the problems faced by victims in criminal justice. As a consequence, relatively little work has been done on the notion of achieving 'victim-centredness' in the existing criminal justice system. Given that the vast majority of victims must still deal with the traditional criminal justice model even in the light of restorative options, it is felt that we ignore this model at our peril, or certainly the peril of victims.¹⁴

1.3 – HYPOTHESES

In order to provide structure for both reader and author, I will now set out some initial points to be explored and (it is my hope) validated through the course of this thesis.

1.3.1 – What would it mean to put victims 'at the heart' of the criminal justice system?

For the first of the research questions I hypothesise that, whilst the present system of criminal justice is not 'victim-centred', it would nonetheless be possible to convert this system into one worthy of the label without necessarily resorting to 'fundamental' reforms. The concept of 'fundamental' verses 'non-fundamental' reform will be discussed and explained in Chapter 3, and hence only a brief introduction will be provided here. Essentially it is suggested that the former implies altering the basic tenets or aims of the adversarial system, and that politically this is not a feasible option for policy-makers. Notwithstanding this (and as noted a moment ago) little attempt has been made to assess whether victim-centeredness can be achieved without altering the system we have now. I would argue that 'restorative justice' must be categorised as

¹⁴ Although, in making this claim I by no means exclude the possibility that restorative justice principles may ultimately prove the only way to achieve truly victim-centred justice, and indeed that this may be the conclusion in Chapter 7. This is not my hypothesis, but it is clear that the restorative movement will continue to gather pace and thus become increasingly important to crime victims in the future. It is worth pointing out that many advocates of restorative justice retain in their theorising of such systems a place for more traditional forms of case disposal, although this enters the far wider debates on the role of punishment, which need not concern us here (see Dignan, 2002a; Braithwaite, 2002). As such, this thesis adopts the view of Bottoms (2003) who argues in terms of a separation between the criminal justice and restorative justice systems

fundamental reform, and hence this constitutes another reason why this is not the main focus of this study. Affording victims decision making power (in some cases) may also constitute fundamental reform but – as will be argued in Chapter 3 – consultative participation in the process and the notion of victims having ‘rights’ and party status within proceedings would not, as these would not vitally alter the existing process or the existing roles of those within it.

With these points in mind, I will argue that a victim-centred trial would have three main features that can then be applied to the wider criminal justice system. The first of these is that victim-centred trials would be practically set up and organised to respond effectively to the needs of victims in terms of facilities, procedures, personnel, and so on. Secondly, I will argue in Chapter 5 – and expand in Chapter 7 – that a truly victim-centred trial process would be one that understands and accommodates victims’ need to form accounts of incidents and experiences, and would therefore seek to reduce the many instances in the present system where victims are prevented from constructing a full account of an incident during a criminal trial, and thus miss out on the possible therapeutic benefits of doing so. Whilst this might sound like a fundamental reform of evidential precepts, I will argue in Chapters 5 and 7 that trials are in fact already defined by narrative and storytelling, and the present adversarial model has already accommodated – in the case of young vulnerable or intimidated witnesses giving evidence through pre-recorded examination in chief – a much less restrictive form of evidence-giving without apparent prejudice to the interests of defendants. Finally, and linking the other two features described above, a victim-centred trial process would be one in which the underlying occupational cultures of those working within it (court staff, solicitors, barristers, judges, magistrates and so on) are genuinely receptive, understanding and proactive to victims’ needs.

The key to achieving these three components of victim-centeredness – I will argue – is to afford victims rights which are justiciable from within the criminal justice system, not through separate proceedings but within trials themselves through the proactive interjection of judicial actors ensuring such rights are upheld. Given that we have now reached the stage where victims are said to have ‘rights’ (through the Victim’s Code of

Practice) this again is not so much a fundamental reform as a change in the justiciability of these existing 'rights'.¹⁵

My wider argument is then that these three components can be applied to the wider criminal justice system in order to arrive at a genuinely 'victim-centred' system of criminal justice.

1.3.2 – What is driving this 'policy'?

In relation to the second research question, it is now manifestly unfeasible to argue simply that the needs of victims and witnesses are being 'ignored' by policy-makers. Questions remain, however, as to the exact nature of this 'pro-victims and pro-witnesses' policy that seems to have developed over recent years. As such, I will be attempting to identify the driving force (or forces) behind official actions on victims and witnesses and, most importantly, I will be asking whether such actions can be classified as a unified 'strategy'¹⁶ or whether in fact this strategy is constituted by a whole range of different influences; what Rock has called 'other politics' (Rock, 1990).¹⁷ This is important because policy documents only discuss a limited range of 'officially recognised' influences. Commentators such as Elias, however, suggest that government policies (certainly those relating to victims of crime) may have a deeper, political purpose which is less overt (Elias, 1986). It is my contention that the 'victims policy' has in fact been derived from a wide variety of different pressures, many of which are political. As such, I will seek to show that we may be mistaken in thinking of 'victims' as a single or unified policy at all because, in reality, this 'policy' has been driven over time by a web of political factors. This means that the reforms which bring benefit to victims and witnesses are not necessarily all part of the 'same thing'. Instead, 'victims and witnesses' may be an issue on which a whole variety of different policies intersect.

Such debates as to the political underpinnings of these reforms leave us with three conceivable interpretations of the victims 'policy'. Firstly, there is the straightforward possibility that all these reforms are in fact part of a consistent and unified strategy to assist victims and witnesses. The second possibility is that actions which, incidentally,

¹⁵ Although I will argue in Chapter 3 that as legitimate expectation enforceable only from without the criminal justice process, at present these are not actually 'rights'.

¹⁶ As has recently been suggested (Home Office, 2003a).

¹⁷ See below.

assist victims and witnesses may be grounded in a quite different set of political concerns. The third possibility is that, now that victims and witnesses seem to have achieved at least rhetorical acceptance in the political system, new policies are being re-packaged as the continuation of work for these groups but which are in fact intended to achieve other aims such as, for example, increasing efficiency. Of these three possibilities, it is submitted that a combination of the second and third seems the most likely, and this contention will be tested during the course of this thesis.

1.3.3 – What has putting victims ‘at the heart’ of the system meant so far in practice?

In terms of the third research question. I would expect to see marked development since most previous empirical work focused around courts in relation to meeting the needs of victims and witnesses in criminal trials (Shapland et al., 1985; Jackson et al., 1991; Rock, 1993; Tapley, 2002). Relating back to my three-pronged model of a victim-centred trial outlined in the above hypotheses, given national policy movements I would hypothesise that the practical infrastructure to assist victims would be most developed (separate waiting rooms, facilities for video-linked evidence and so on). I also expect the culture of criminal justice professionals, courts, and possibly a wider ‘legal’ culture¹⁸ to be somewhat softened to the plight of victims and witnesses within the procedure; although I suspect more traditional views (that victims are ancillary to the process) are still rampant. Probably the least developed aspect of a victim-centred trial process as I have conceived it will be the inclusion of victims’ full accounts within the trial process, and hence I will be paying special attention to mechanisms by which victims and other witnesses are prevented from making accounts (by evidential rules, working practices, courtroom environment and so on).

Overall, what I am expecting to find from this part of the research is that genuinely victim-centred trials are not yet forthcoming. Nevertheless, as noted above, I hope to observe within existing procedures the clear potential to make them more victim-centred without resorting to truly fundamental reform.

¹⁸ See Chapter 2 for a more detailed discussion of the notion of ‘cultures’ and how it relates to this thesis.

1.4 – METHODOLOGY

A full methodological overview can be found in Chapter 2 but, to provide a short summary for the purposes of this introductory section, each of the three research questions will be addressed via a distinct research technique.

The first question represents very much the normative underpinnings of the evaluation. Answering this question calls for some detailed legal and jurisprudential analysis of the available literature in order to ascertain what a victim-centred system (trial) might look like. The fruits of this exercise can be found in Chapter 3. Ultimately, my aim is to combine these findings with the more ‘practical’ components derived from empirical data collection at court (which I will come to in a moment).

The second research question requires an in-depth policy analysis similar in some ways to that conducted by Paul Rock (2004)¹⁹ but also informed by the other two components of the study. This inevitably involves examining policy papers relating to victims, but also contacting and conducting qualitative interviews with those involved in the policy-making process itself. Given that Rock’s (2004) study excluded from its ambit the operational execution of victim-related reforms in the working criminal justice system, it will be particularly beneficial for this project to ascertain the views of those responsible not only for formulating the measures, but also for their implementation. Hence, as well as talking to a number of representatives from the Home Office and Department for Constitutional Affairs, I will conduct numerous interviews with members of the Local Criminal Justice Board in the area local to Courts A, B and C (see below) as well as several criminal justice practitioners.

In pursuit of the third research question I will establish links with three local courts – two magistrates’ courts (Courts A and B) and one Crown Court centre (Court C) – and conduct extensive periods of in-court observation of criminal trials. Generally speaking this is an ethnographic technique, although numerical data will be derived from the sessions (albeit these will mainly be indicative, as opposed to statistically significant statistics). The observation sessions will be combined with further qualitative interviews with representatives of the courts. In addition, an attempt will be made through a short survey to sample court users and also witnesses who have given evidence in a criminal

¹⁹ See Chapter 3.

trial at Court B in order to ascertain their views about facilities and the experience of giving evidence.

1.5 – THESIS STRUCTURE

The rest of this thesis will be split into 7 chapters. Following this section, Chapter 2 will provide a far more detailed overview, discussion and justification of the methodologies adopted for this study. Chapter 3 will provide an overview of research and commentary on the issue of victims, and in so doing will also begin to tackle the question of what it might mean to put victims 'at the heart' of criminal justice. Chapter 4 will review in detail the development of policies relating to victims and analyse these policies pursuant to the second research question, drawing on interview data from policy-makers and document analyses. Chapter 5 will discuss the concept of 'account-making', setting out my argument for its incorporation within criminal trials. Chapter 6 will present the empirical results from courtroom observation sessions. Chapter 7 will discuss all the results in light of the three research questions and present an overall model of victim-centred criminal justice based on all the evidence gleaned from this study.

CHAPTER 2: METHODOLOGY

One of the chief goals for this research project is to combine a number of research methodologies in order to fully explore the three research questions under review. Such an approach yields at least two important benefits from the outset. Firstly, there is very little previous research in this area that combines methodologies in the manner outlined below¹, thus improving the credentials of this research as a source of new and interesting information. Secondly, wider discussions on research methodologies seem to have reached a general consensus that the most robust research draws upon multiple research techniques (Kane, 1997; Payne et al., 2004). As such, in the growing spirit of reflexivity (Bulmer, 2001) this chapter presents those methodologies along with their associated practical and ethical implications. The bulk of this chapter is structured around the three research questions, describing and discussing the associated methodologies for each in turn.

2.1 – ANSWERING THE RESEARCH QUESTIONS

Before we come to this, however, it is worth outlining the main methodological goals and characteristics of this project. Fundamentally, this thesis will be an exercise in ethnographic research. ‘Ethnography’ is a term sometimes used quite loosely to denote research which includes observations and interviews, Bryman however has provided a more cogent list of features which characterise genuine ethnographic study:

- Becoming immersed in a social setting for an extended period of time.
- Making regular observations of the behaviour of members of that setting.
- Listening and engaging in conversation.
- Interviewing informants.
- Collecting documents about the group.
- Developing an understanding of the culture of the group.
- Writing up a detailed account of that setting.

(adapted from Bryman, 2001)

An important aspect of Bryman’s conception of ethnographic research is that the writing up and presentation of the results is part and parcel of the ethnography. Hence,

¹ See Chapter 3.

for Bryman it is only at the stage of dissemination that the full ethnography is realised. The true ethnography is therefore something the researcher *constructs* as well as a set of procedures or methods that he or she follows. Bryman's list mirrors closely the methods of research used in this project. Of course, in this study, the 'social setting' under investigation is that of the criminal justice system, especially criminal trial proceedings."

Primarily then, this is a qualitative piece of work and – as will be noted below – one of the key aims aside from the specific topic is to promote discussion and development on ethnographic techniques. In doing so I also hope to illustrate the point that ethnography can be successfully and profitably combined with more quantitative methodologies, especially statistical data derived from courtroom observations.

2.1.1 – Question 1: What would it mean to put victims 'at the heart' of the criminal justice system?

The methodologies employed to answer this first research question were in themselves relatively straightforward but represented a long-term and ongoing effort throughout the course of the project. The question represents the normative component of the thesis and, therefore, called for some detailed legal and jurisprudential analysis in order to ascertain what a victim-centred system might look like. This involved an extensive study of literature from many facets of victimology including, in particular, the question of victim rights, the provision of support and services to victims, victims within the criminal justice system – and within the trial process specifically – and the position of vulnerable and intimidated victims and witnesses. The review was conducted using a broad range of techniques including searches of both legal and medical libraries² plus online academic databases. It also involved following the 'trail' of citations from many established victimological sources. Official publications also yielded a great deal of crucial information for this study.

The sheer volume of literature having direct relevance to the research in question made some degree of 'picking and choosing' inevitable. In particular, the decision was made at an early stage to limit this discussion for the most part to research and literature from the UK, albeit the international influences on British policy-making in this area are widely covered. More specific international comparisons would of course be useful and this is certainly a development area for future research. Nevertheless, the exclusion of

² The latter provided much of the literature on 'account-making' discussed in Chapter 5.

such details in the present study is justified, I believe, by the distinctiveness of the English and Welsh (common law) adversarial justice system compared to continental inquisitorial systems and the US civil law model. There is a further complication in the British context owing to the lack of a written constitution, making concepts such as ‘victim rights’ singularly problematic.

Academic literature aside,³ another underlying intention for this project was for theoretical discussions about victims in criminal justice to be informed as far as possible by the more practical, hands on, impressions of criminal justice workers and those involved in policy-making. Hence, notions of what a ‘victim-centred system’ might look like and how it might operate in practice were greatly informed by *ad hoc* discussions and more formal qualitative interviews with such parties, which will be discussed in more detail below. Indeed, in the broader sense it seemed vital to ensure that the three research questions were not treated as entirely separate projects or entities, but rather that they informed each other. This was especially true for this first question, which is greatly informed by the methodologies utilised to address the other (more empirical) components of the study.

2.1.2 – Question 2: What is driving this ‘policy’?

The second research question required an in-depth political analysis similar in some ways to that of Paul Rock (1993)³ but nevertheless informed by the other two components of the study. Initially this involved examining public policy papers relating to victims, mainly available from government departmental websites such as the Home Office – and especially the Office for Criminal Justice Reform located within it – and Department for Constitutional Affairs (DCA).

Clearly, however, printed materials intended for public dissemination were insufficient to fully establish what processes lay behind the victims policy (or policies, see Chapter 4). As such, it was necessary to establish contact with those involved in the policy-making process itself at the Home Office, DCA and Office for Criminal Justice Reform (OCJR) in order to conduct qualitative interviews. Gaining such access was not especially problematic, and initially involved contacting the Head of the Victims and Confidence Unit in the Office for Criminal Justice Reform, who was effectively the ‘gatekeeper’ for this part of the project (Broadhead and Rist, 1976). As with many later

³ See Chapter 3.

respondents, arranging a mutually convenient appointment posed a few practical difficulties but, once the meeting had been conducted, I employed a form of snowball sampling technique (Becker, 1963) to gain contact details for other relevant parties; including the heads of the Witness and Victims Branch at the DCA, the Vulnerable, Intimidated and Protected Witness Team (OCJR) and Police Reform Unit (Home Office). Some qualification is needed here because – as I had preconceived ideas of the kinds of respondents I wished to interview (working in government departments and responsible for relevant policy-making) – this was not true snowball sampling in its purest form.

I subsequently met and conducted qualitative interviews with all these parties and was also later referred for more interviews to the head of the Courts Innovation Branch (DCA) and a representative of Home Office Research and Development Statistics to discuss the newly commissioned ‘WAVES’ survey (Witnesses and Victims Experience Survey).

In addition to information obtained from the interviews themselves, many respondents provided me with documentary information to assist the research. Generally speaking these were not ‘private’ documents as such, although some had not actively been made public, including e-mails, early versions of reports and timetables for the implementation of some measures. Whenever such documents became available to me it was important to clarify what use I might make of them in terms of quotation or citation, and in most cases no such restrictions were imposed. The interviews themselves were qualitative and semi-structured in nature. By this, I mean that although a general interview schedule was drawn up for each session – containing both topics to cover and specific questions to be asked – the questions were wide and I frequently explored different avenues of investigation as and when they arose in the conversation. The chief benefit of this approach was that it allowed me to ascertain the issues which respondents themselves considered important or vital to the policy-making process, thus making for more insightful and discerning data (Silverman, 2001). For the same reason, I avoided ‘leading’ questions. Such methodology allowed me to gather important information on issues I myself had not anticipated and also provided clues as to the occupational priorities and cultures of respondents, their professions, and the courts at which they work. Interviews were conducted face-to-face, usually in the office of the respondent or in an available meeting room and were generally recorded on tape with respondents’ permission (see British Sociological Association, 2002).

In the above paragraphs I have made several references to 'occupational culture'. Before proceeding further it may be useful to elaborate on this concept and wider notions of 'cultures' in greater detail. In criminological writings, occupational culture has been most thoroughly explored and evaluated in the context of policing. There, the literature is fairly unanimous in the view that the work of police officers is directly affected not only by their formalised training but also (and probably more significantly) by "a patterned set of understandings that help officers to cope with and adjust to the pressures and tensions confronting the police" (Reiner, 2000: p.87). Holdaway (1983) refers to the "ways in which...officers construct and preserve their idea of what constitutes routine police work" (p.134). In other words, 'occupational culture' usually refers to often deeply ingrained (sometimes subconscious) working practices passed between professionals in a given sphere by those professionals interacting (professionally and socially) and swapping stories, ideas and strategies. In so doing, members of that profession build up a 'cultural toolkit' (Chan, 1996) of ready-made solutions to specific problems. In the police context the biggest implication of this has been the realisation that such culture renders the police 'institutionally racist' even when individual officers are not actively trying to discriminate on the grounds of race (Macpherson, 1999).

At the level of professions we might apply the above definitions to barristers, solicitors, court administrators and so on, and investigate how they construct ideas of their roles within the criminal justice system, and whether such roles include victim care. This is what is meant by 'occupational culture' in the present thesis. Nevertheless, 'culture' can be understood in a number of other ways. In a wider sense, we can also ask whether the treatment of victims in the criminal justice system is dictated by a broader 'legal culture' shared amongst all advocates, judges, and criminal justice personnel. Such cultures may differ greatly from the culture of volunteer workers representing Victim Support or the Witness Service⁴. Cultures may also vary at different levels of the criminal justice system (magistrates' courts verses Crown Courts). Similarly, cultural working practices may be geographically based, whereby – in the present study – victim care is highlighted *across* professions (and by volunteers) at one court to a greater extent than another; hence Rock's (1993) discussion of the 'social world' of a (specific) English Crown Court.

⁴ See discussions in Chapter 6 and 7.

In this project, I am seeking to draw on such wider conceptions of 'cultures' as an aid to understanding the treatment of victims in the criminal justice process. This means examining how the different forms of culture discussed above interrelate (or conflict) with each other and how they are produced. The notion of 'culture' will be applied to criminal justice practitioners and administrators specifically ('occupational culture'), and to the individual courts under review ('court culture') but I will also be looking for evidence of wider 'legal' cultures and their respective constituents, conflicts and impacts. In particular, an attempt will be made to evaluate the extent to which the underlying cultures of these groups, professions, or disciplines are conducive to the goal of putting victims 'at the heart' of criminal justice. Indeed, it is being hypothesised that practical reforms (funding for the Witness Service, facilities and so on) cannot achieve this without adequate *cultural* change at all levels (see Rock, 1993). It is important to distinguish between these different 'levels' of cultures in order to identify where the barriers lie in relation to the acceptance of victim issues; focusing exclusively on the individual 'occupational cultures' of barristers, solicitors and so on would therefore provide only a blinkered view.

The project will also seek to examine the occupational culture of criminal justice policy-makers. In this case, it was hoped that the responses of those working in the relevant government departments would to some extent be representative of policy-makers as a whole, thus also shedding light on wider 'policy-making' cultures. In the case of criminal justice administrators and practitioners the same was true, although it must be admitted that because all such respondents were working in close geographical proximity, it is perhaps fairer to say that I was gaining insight into *local* occupational, volunteer, court, and legal cultures and practices, albeit the area under review was not especially unusual in any discernable way and therefore it is suggested that the findings from this area can be applied more widely. In particular, if indeed there is a widely held 'legal culture'⁵ at work amongst all legal professionals – a question to be addressed in the subsequent analysis – then a local sample of lawyers should to some extent be representative of it.

⁵ As a law graduate, it is worth pointing out that I myself may be to some extent swayed by a general 'legal' culture as opposed to the more specific 'occupational cultures' of a practicing barristers or solicitor.

2.1.3 – Questions 3: What has putting victims ‘at the heart’ of the system meant so far *in practice*?

The third research question raised the most significant and complex methodological challenges during the course of this research project, as it engendered not one but three distinct avenues of investigation. Primarily, in order to understand what putting victims of crime ‘at the heart’ of the criminal justice system has meant so far in practice I set out to examine the operation of criminal trials⁶ at two magistrates’ courts and one Crown Court centre. Secondly, I made several attempts at conducting a survey of victims, witnesses and other witnesses just after they had completed evidence in order to ascertain their views and experiences. The survey was also distributed to court users (members of the public attending court) in general in order to obtain their views on the facilities available to them and on service provision. Thirdly, I conducted a separate programme of qualitative interviews with legal practitioners and administrators. Each of these methods will now be discussed in turn.

2.1.3.1 – Stage 1: courtroom observation

In order to preserve confidentiality I will label the courts under discussion magistrates’ Court A, magistrates’ Court B and Crown Court C. Courts A and B are situated at the heart of a large northern city, whereas Court B serves a fairly large town nearby. All the courts fall within the remit of a single Local Criminal Justice Board. Given that a great deal of empirical work was to be conducted at all three courts, part of their selection criteria had to be simple geographic practicality. One early option was to compare the two selected magistrates’ courts with a third magistrates’ court in another area.⁷ Ultimately, however, practicality drew me to Crown Court C as my comparator. Whilst this decision obviously forgoes comparative data between regions, it brought the advantage of extending the project into another area of the criminal justice system, thus making the research as a whole more applicable to the entire system.

⁶ As noted in Chapter 1, ‘trials’ here means criminal proceedings originally scheduled to determine the guilt or innocence of defendants facing criminal charges, but also includes shorter proceedings where the trial must be postponed or the need to establish guilt or innocence is removed, usually because the defendant has plead guilty at the last minute.

⁷ In a future project, I hope to compare the results from this study with data from the newly formed specialised domestic violence courts and the courts of Scotland and Northern Ireland, thereby introducing an element of comparative analysis into the work.

Access to the magistrates' courts was secured firstly through the Justices' Chief Executive of what was then the relevant Magistrates' Court Committee. Having passed that 'gatekeeper' there followed several meetings with the Clerks to the Justices at the two magistrates' courts.⁸ It was also necessary to contact the Chairman of the Youth Panels at both courts in order to gain permission to enter the usually private Youth Courts. Written contact was then made with the Court Manager at Court C, who I later interviewed and through him received permission from the presiding judge to take notes from the public galleries. Gaining access to all three courts was therefore a relatively straightforward process. Of course, a large part of what I was suggesting merely involved observing court proceedings, for which I had the legal right in most courts. Nevertheless, my ease of access might well be ascribed to the development of a 'public-service mentality' in the criminal justice system (Tapley, 2002; Rock, 2004) which will be discussed in Chapter 4.

Trials were selected for observation at all three courts out of the complete list of proceedings scheduled (or 'listed') for the week. The court list was provided to me on a week-by-week basis by the courts' listings officers, whom I originally contacted through the Clerks to the Justices and Court Manager. Trials were selected for observation based on the apparent likelihood that they would involve civilian witnesses and, most importantly, civilian victims. This was established by examining the charge(s) and gathering information before the trial from court ushers, clerks and the advocates.⁹ By 'involved' I do not necessarily mean that the victim was expected to give evidence, although this was usually the case and generally preferable. Nevertheless, this may have simply meant that the charge suggested an identifiable civilian victim or victims. The involvement of civilian victims of crime was generally preferred to police victims, as a choice was made at an early stage to concentrate on civilians. Principally this is because civilians were likely to be involved in a wider range

⁸ In March 2005 the Magistrates' Court Committees were replaced with Local Criminal Justice Boards (originally formed in April 2003). This foreshadowed the creation of a 'unified' system of court administration under Her Majesty's Courts Service in April. Consequently, the equivalent of the Justices' Chief Executive is now the Regional Director of Legal Services (Justices' Clerk) whereas the Clerks to the Justices have now been replaced by District Legal Directors. Permission to conduct this research at the courts in question was renewed with all three of these new appointees.

⁹ In this thesis 'advocate' will be used as a generic term encompassing barristers and solicitors representing clients or the CPS before magistrates' courts and Crown Courts. Technically speaking there is a slight inaccuracy in this, in that in England and Wales barristers are known as 'counsel', and the term 'advocate' is reserved for their Scottish equivalents. The term 'counsel' will therefore be employed when speaking about barristers alone.

of victimisations than police officers in their professional capacity. Furthermore, we will see in Chapter 4 that government policy in this area is increasingly focused on the wider 'law-abiding public' in general.¹⁰

There was therefore no specific – or, at least, positivistic – formula dictating which trials were chosen for observation. Basing selection on the apparent likelihood of civilian victim involvement meant a lot of assault trials fell into the study as well as matters of criminal damage, theft and some public order offences. Motoring matters were largely (although not entirely) effectively omitted from the study because they often involved no specifically identifiable victims and no civilian witnesses. The trials which make up the study were also (and unfortunately) dependent on my own availability to conduct observation sessions and I would occasionally observe a trial which on the face of it seemed less suitable for inclusion simply because it was the only proceeding corresponding with my own availability. Furthermore, in the event of two apparently relevant trials being listed at the same time in different courtrooms (which was not uncommon) I would make enquires with lawyers as to which trial was more likely to proceed as effective.¹¹

This method of selecting trials may at first glance seem rather unscientific. Practically, however, there were few alternatives. To select trials entirely randomly would have resulted in a large number of road traffic cases being observed in the magistrates' courts – many of which are entirely paper-based (that is, no live witnesses and without victim attendance) – and would yield little data directly relevant to victims. A similar technique in the Crown Court would have produced a sample comprising mainly of drug offences where, once again, there are considerably less data to be derived regarding victims *per se*.¹² Furthermore, given that the majority of trials at all three courts were ineffective or cracked, a random selection would have made it impossible to gather enough data on effective trials in the available timeframe. Finally, as my results will later indicate, the status of many listed cases can change very suddenly at short notice prior to the

¹⁰ Although it would be interesting to have some research conducted purely on police victims in the CJS and compare it with results obtained from civilians.

¹¹ This would have almost certainly increased the effective trial rates presented in Chapter 6. That said, given the unpredictability of whether a trial will proceed (see below), this effect may not have been so great as it first seems. In many cases I received assurances that trials would proceed only to have them crack or become ineffective a few minutes later.

¹² Here I will forestall the considerable debate as to whether or not drug use is a 'victimless' crime (see Meier and Geis, 1997).

expected trial date or the expected time of commencement. Hence, trials that are thought to be proceeding one day can be dropped the next whilst cases which seemed certain to proceed at 09:55 could crack by 10:10, the varying reasons for this will be discussed in Chapters 6 and 7. Consequently, even if such sensitive (and probably unrealistic) access to the Crown Prosecution Service (CPS) or solicitors' and barristers' work schedules could have been arranged, there would still be no guarantees that the proceedings I arranged to observe in advance would have ultimately been useful for the study.

It is necessary at this stage for me to elaborate on what precisely I mean by the term 'victim'. Victims for the purpose of these observation sessions included primary *and* secondary victims; that is to say, the persons directly affected by the crime (for example, the person who is assaulted) but also any other people affected by the wider implications of the crime (friends and family for example). Further discussions on the meaning(s) of 'victimhood' can be found in Chapter 3. Victims were often referred to by criminal justice practitioners as 'complainants'. However, my definition of victims went beyond the generally employed meaning of this term. For example, often in public order matters there is no specific 'complainant' because it is argued that any one of a number of people, often in a crowd, were likely to be caused harassment, alarm or distress (taking s.5 of the Public Order Act as an example). Nevertheless, the present research would usually count the people in that crowd as victims. Clearly this does involve some subjective judgment from case to case. It is again unfortunate that I was unable practically to identify the specific nature of an offence to be tried or identify the victims, and particularly any secondary victims, before attending court.

On the issue of definitions, a 'witness' for the purposes of this study is any person called to give evidence in a criminal trial, whether or not they are victims. This includes defendants, police officers and specialist 'expert' witnesses.

Data were recorded before and during the listed trials via ethnographic techniques. By this, I mean I was immersing myself in the social setting of the courts by attending court every day, observing procedures, engaging with practitioners and court staff and attempting to understand their individual and professional practices and cultures as well any underlying 'court' culture, 'legal' culture or 'localised' culture. Notes were made by hand during the observation sessions from the courtroom's public gallery both during the proceedings themselves and during adjournments when most of the lay

participants/parties were out of the room. Initially I was intending to sit in the press/probation seats (for which I gained permission) but later discovered that in the magistrates' courts and Crown Court there was no real advantage to doing so, and that one is in fact disadvantaged in terms of space.

The courtroom environment, with its prohibition on recording devices, proved particularly challenging for the purposes of recording information for analysis. I was clearly looking for signs of victim involvement in the proceedings but – to an even greater extent – I tried to ascertain the reactions of victims and other witnesses to giving evidence and other parts of the process as well as the expressed or implicit attitudes of criminal justice workers in relation to victims. It became clear from fairly early on that the richness of this information made standardised or 'tick-box' observational approaches redundant. This is also testament to the fact that gathering this information through observing interactions at court first hand was the most effective method available to me. I therefore had to develop systems of combining pre-printed forms and categories (see Appendix 1) with my own unstructured observations. Over time most of the lawyers and staff working at Courts A, B and C come to recognise me and I would endeavour to introduce myself to any new practitioners I encountered. This was particularly important in the Youth Court where I required the permission of both parties and the bench before engaging in observation. The latter was usually (and universally) achieved by asking the court's legal adviser (previously known as 'court clerks') to inform the magistrates or district judge.

On a similar point, despite my regular appearances in the public gallery at Crown Court C, the ushers and Court Clerks still preferred me to obtain permission (through them) from the judge in every session. This became quite laborious, firstly because it precluded me swapping between courts when it appeared a case would not be useful – as I was able to do at the magistrates' – but also because on a number of occasions the court staff failed to pass on my request to the judge. The consequence was that I was asked by the ushers in these cases to stop taking notes and – on one particularly unfortunate occasion – a circuit judge looked up to the public gallery and asked me directly what I was doing. This was despite having received the permission of the presiding judge through the Court Manager. Generally speaking, access arrangements in

the Crown Court centre were sometimes more problematic than at the magistrates' court and the lines of communication less smooth.¹³

The general purpose of these sessions was of course to record observations that reflected on the victim's place in the proceedings. So, for example, it was important to note how many witnesses attended court to give evidence, how many of them were victims and how long they had to wait before being called or released. More specifically, the timing of events was important. Notes were also made on the extent to which the impact of a crime on a victim was brought out at different stages. To this end, the use of and reference to any victim personal statements was also noted.

Sitting in the courtroom often allowed me to speak informally with advocates and legal advisers and I would occasionally ask permission to anonymously include something imparted to me in this study. The same was occasionally true with witnesses and victims who choose to sit in the public gallery, however I always waited for these actors to approach me.

In terms of witnesses giving evidence (victims and non victims, police and other civilians) a number of factors were recorded. Once again, particular attention was paid to how long the different elements of giving evidence took (examination in chief, cross-examination, re-examination and questioning by bench). A record was kept of whether the bench spoke to the witnesses, what was said to them and whether they were, for example, invited to sit down at the start or thanked at the end. I also noted how prepared the witness appeared to answer the questions, how hostile the questioning became and the apparent benefits or drawbacks of any 'special measures' intended to assist them in giving evidence. Further notes were made on how frequently the witness was interrupted whilst speaking and whether or not it appeared that they were allowed to say everything they wished. To this end, a stopwatch was also employed to time precisely how long witnesses actually spoke during examination in chief and cross-examination. I then calculated the relevant percentage of the time giving evidence, of the main sections of evidence and of the whole trial.¹⁴ Averages derived from these percentages will be

¹³ Indeed, in Chapter 6, we will see that similar observations were made regarding communication with victims and witnesses.

¹⁴ In the earlier observation sessions the percentages were estimated without the aid of a stopwatch. This method proved too imprecise and all witnesses were timed from observation session 30 onwards. Ultimately, the methodologies used to observe witnesses before this point were judged to be so different from subsequent observations that they have been excluded from

the subject of t-test analysis in Chapter 6, in order to establish any statistically significant difference in the contribution of victims and other witnesses, and between those who give evidence with and without special measures.

Another important aspect of the observation of witnesses was their emotional reactions to questioning. Hence, I noted down specific emotions the witness seemed to be displaying. This was achieved by watching witnesses giving evidence and recording apparent changes in emotional state or any new reactions as they appeared, with multiple reactions allowed at each 'checkpoint'. From an analytical point of view the subsequent data produced are admittedly difficult to deal with using quantitative methodologies, because reactions were recorded as and when they appeared to change for each witness and not at standard time intervals. Nevertheless, given that all witnesses react slightly differently to giving evidence, it was felt that a more standardised approach would have produced misleading data. Thus, the underlying semi-structured and ethnographic approach taken to this project won out.

Commentators would be justified in pointing out that much of this methodology is rather subjective, especially in relation to the judgement of the emotional reactions of witnesses and whether they said everything they wanted to say. Note however that this research only claims to identify how witnesses *appeared* to feel and whether they *appeared* to be prepared or to say all they wanted to. Method-wise there was little alternative because interviewing all the witnesses observed would be impossible, practically and ethically. Nevertheless, the need to gain more data from victims and witnesses themselves is one of the main reasons my research design supplements the observation sessions with a court users survey, discussed below.

This may also be an appropriate point for me to comment on ethnographic research in general. In recent years there has been a great deal of development in criminological study utilising large scale surveying techniques. This may have been prompted by the development and output from the British Crime Survey (Maguire and Kynch, 2000), leading in the courts context to instruments like the Witness Surveys (Whitehead, 2001; Angle et. al., 2002), Vulnerable and Intimidated Witnesses Surveys (Hamlyn et al., 2004b) and the new WAVES survey. For its part, the Home Office now favours the use of quantitative randomised control trials (RCTs). As such, in the UK there has been a

this study, thus 'Witness 1' is in fact the second defence witness in trial 30, when the stopwatch was first used.

relative lack of development over recent years in the use of ethnographic observational techniques, and of qualitative methodologies in general (Hall, 2006).¹⁵

Nevertheless, ethnography in British criminological study is nothing new. Carlen (1976); Shapland et al. (1985); Jackson et al. (1991) and Rock (1993) have all applied such techniques in the study of courts specifically. Such methodology has also been applied to violent Glasgow gangs (Patrick, 1973); police occupational culture (Holdaway, 1982, 1983); drug use (Foster, 1995) and football hooliganism (Giulianotti, 1995).

It is hoped that this study may contribute to reinvigorating interest in the ethnographic technique in the UK. Of course the method does have its drawbacks; it is time consuming (and therefore costly), challenging in terms of access, raises multiple ethical considerations (discussed below) and is arguably objectionable on the grounds of subjectivity. On this last point, I would initially respond by pointing out that all research is to some extent subjective, including quantitative (statistical) analysis given that figures must always be interpreted by the researcher, who selects the methodology, technique and excludable outliers based on individual experience, training and subjective opinions as to the rigour of different methods (statistical or otherwise) (Sieber, 1998). Nevertheless, if quantitative methodology is thought by some to impart a greater level of objectivity to a project (a position this author does not accept) this study also aims to demonstrate that quantitative analysis can be combined with ethnography.

More generally, I would argue that the drawbacks of ethnographic methodology are more than outweighed by the depth and sheer quantity of data generated, particularly with regards to its observational components. Surveys, for example, are necessarily limited by the amount of time respondents are willing to spend on these and their ability (or willingness) to comprehend and consider the questions. Good survey design can only negate these problems to a limited extent. The same is true when conducting interviews and both methods are naturally limited by the respondent's own memory for details. It is also important to stress the 'human element' of the topic under review in this research. Criminal trials are defined by human interactions – between prosecutor and defence lawyer, defendant and bench, victim and defendant and so on – such that it is not always possible or desirable to reduce such complex interactions to standardised

¹⁵ Welsh (2005) is one of few limited exceptions.

variables to be inputted for quantitative analysis, because important aspects of the data are lost.¹⁶ Breaking with standard thesis orthodoxy for a moment, the words of one district judge interviewed for this research concerning trials seems highly relevant:

“It’s a human process, you can’t dehumanise it” (a district judge sitting at Court B).

As ethnographers, however, we are able to record more of this pertinent (but less stringently definable) information; such as the ‘atmosphere’ created in the courtroom or the ‘attitude’ of lawyers, witnesses and so on. Consequently, an underlying argument to this thesis is that such methodologies merit greater attention and development than they are currently receiving domestically.

2.1.3.2 – Stage 2: court users questionnaire

The other main empirical component of my court-based work was a court users questionnaire distributed at magistrates’ Court B. This sought to establish the reaction of victims and other witnesses to giving evidence and their thoughts about the procedure. Trying to attract a meaningful response rate to such a survey proved highly challenging and resulted in four separate ‘waves’ of the survey, each with a slightly revised methodology.¹⁷

The *initial* plan for conducting this survey was, after further discussion with the Clerk to the Justices at Court B, that the survey would be distributed by the court ushers at all listed trials and would be given to defendants, civilian witnesses (including victims) and anyone coming to support someone from the public gallery or simply attending to watch on their arrival at court. Later, the Witness Service co-ordinator at the court also volunteered to distribute the survey to the witnesses with whom they came into contact.¹⁸ In order to keep track of response rates, a set number of 150 questionnaires were produced to be kept at the court. In addition, it was agreed with the listings officer at Court B that after the survey was complete I could look through the court records to

¹⁶ This is also why the present research utilised semi-structured observational techniques rather than standardised ‘tick-box’ approaches.

¹⁷ It was these time-consuming difficulties and subsequent revisions of the methodology that led to the eventual abandonment of the original plan to conduct similar surveys at Courts A and C. Court B was chosen as the initial venue owing to the particularly wide-ranging access arrangements I had secured there. Unfortunately, by the time the surveys had been made to produce meaningful data, time constraints prevented taking the survey to the other courts.

¹⁸ For the most part, prosecution witnesses.

ascertain how many trials had taken place. In relation to cracked and ineffective trials these records would include the number of witnesses attending. In regards to effective trials, witness numbers would not be recorded but an average number of witnesses per trial could be calculated with reference to the length of time a trial was intended to run for. Thus, it was expected at this stage that a fairly accurate response rate could be ascertained when the survey had run its course.

This first questionnaire itself was extensive¹⁹ and covered such matters as why respondents had attended court, whether they had given evidence, their view of the facilities and sources of information and (in the case of victims) whether they had made a victim personal statement. For those witnesses who gave evidence there were also questions related to their experience of doing so and rating satisfaction with the various professionals they encountered. If respondents arrived at court to attend a trial that cracked or became ineffective they are asked whether they received an explanation, from whom, and whether it was satisfactory. The survey began with a clear explanation of the research and a warning to respondents to write nothing about specific criminal cases, which might have conceivably led to the surveys becoming evidence in appeals.

The 'first wave' survey enjoyed limited success. Whilst ushers and Witness Service volunteers were distributing it to most court users, few respondents were completing the whole questionnaire. Partly this was because of its length but it also seemed to be due to respondents being interrupted and leaving the survey unfinished when told they could leave, their trial having become cracked or ineffective.²⁰ The number of respondents commenting on court facilities was fairly encouraging, however very few indeed were commenting on the process of giving evidence. Given that most trials do not go ahead on the day they are listed this is perhaps not surprising.

Nevertheless, the methodology itself was also causing problems. It had been decided that the ushers and volunteers would distribute the survey as soon as court users arrived and then take it back after it had been filled in. The alternative would have been to give people the survey as they left the court building with an envelope to post back to me. It was felt that the latter method would yield a very low response rate, as it would involve respondents coming back to the issues at a later date. The difficulty with the alternative,

¹⁹ The surveys are reproduced in Appendix 2.

²⁰ Although, confusingly, quite a few respondents seemed to skip a number of questions but then completed the final three on demographics.

however, was that witnesses who actually gave evidence were, perhaps understandably, not returning to finish the surveys after they were released from court.²¹ Thus, little information was gathered on witnesses' actual thoughts on giving evidence.

In the light of these problems, the methodology was adapted in two respects. Firstly, the remaining questionnaires were replaced with a 'second wave', reproduced with clearer instructions highlighting (in colour) certain questions that many respondents seemed to be 'missing', probably because they became 'lost' on the originally densely worded page on a quick read-through. Also, the main questionnaire was supplemented with a third, much shorter, take-home questionnaire to be given exclusively to witnesses who had actually given evidence. Unlike the main questionnaire, the new questionnaire was given to witnesses as they left the court with an envelope to post back. Whilst I did not anticipate eliciting many responses this way with the original questionnaire, it was hoped that respondents would be more willing to fill in and return a much-shortened version.

Once again, however, the response rate to these surveys was negligible. As such, I consulted the Witness Service coordinator at Court B on alternative strategies. As a result, we agreed that the previous surveys had been too long for most people to fill in and thus the fourth and final incarnation of the questionnaire was reduced to just six key questions based on the kinds of questions the volunteers would tend to ask in any event. Furthermore, the survey ceased to be a self-completion questionnaire and was instead administered by the Witness Service volunteers themselves, who asked the questions immediately after the witnesses had returned from giving evidence.

The first point to admit regarding all four waves of the survey is that none of them produced a sufficient response rate to make them viable for a multivariate quantitative analysis. The first wave of the survey produced 65 responses in around three months. Given as a percentage of the total number of witnesses attending court to give evidence in that period, any derived response rate would be so low as to be practically meaningless. The 'second wave' of surveys produced only 16 responses in a further month, again making for a statistically insignificant response rate. The third wave produced just five responses (posted back to me in an envelope). Furthermore, few

²¹ Although this perhaps is a result in itself in that witnesses were clearly not in any mood to stay at the court and/or fill in a survey after giving evidence.

respondents had completely filled in any of the surveys and very few indeed had completed the most crucial information regarding experiences of giving evidence.

Once again, the response rate for this final wave of the survey was negligible, 28 responses in two months; many witnesses having simply left the court after giving evidence and not returning to the Witness Service. Nevertheless, I considered this result an improvement on the previous incarnations²² because, whilst the statistical response rate was low, almost all such responses contained the crucial answers regarding witnesses' thoughts and feelings about the evidence-giving process. I consequently viewed the 'fourth wave' survey as a success in that it finally afforded me some first hand information from the victims and other witnesses themselves.²³

2.1.3.3 – Stage 3: interviews with criminal justice personnel

Given that Rock's (1993) study excluded the operational execution of victim-related reforms in the working criminal justice system (see Chapter 3), I felt it was particularly beneficial for this project to ascertain the views not only of those responsible for formulating these measures, but also those charged with administering them and implementing them in practice. As such, the final stage of data collection for my third research question was to conduct further qualitative interviews with criminal justice personnel.²⁴ Early interviews were conducted with the Justices' Chief Executive and then the Clerks to the Justices at Courts A and B to whom – as noted above – I had already gained access. From April 2005, the Clerk to the Justices at Court B was promoted to Regional Director of Legal Services (Justices' Clerk) under the new system of Local Criminal Justice Boards (Her Majesty's Courts Service) and I interviewed him on two further occasions in that capacity.

²² The low response rate for all four surveys may have been affected at the time by the fact that notably fewer trials seemed to be reaching Court B. This reduction had been attributed by staff and lawyers to the introduction of 'CPS Direct', a telephone line allowing the police to receive pre-charge advice from a prosecutor in most cases. This also corresponded with a 'drought' of effective trials available for observation at the time. In addition, in a later interview with the joint police/cps Witness Care Unit co-ordinator I learned that response rates for the newly launched national 'Witness and Victims Experience Survey' (WAVES) had also been particularly low in the area under review. Hence, there may be regional explanations for the low response rate associated with these surveys as well as methodological ones.

²³ Difficulties gaining access, including data protection issues and privacy concerns of Victim Support and the police, precluded my gaining direct contact with victims themselves for interviews or focus groups.

²⁴ These are of course in addition to the interviews with policy-makers under the second research question.

The Regional Director was also a deputy (that is to say, occasional) district judge and – as a member of the Local Criminal Justice Board – I was able to contact and interview other members including representatives from the CPS, probation service, youth offending team and a local private prison. I then wrote to his replacement at Court B – the newly titled ‘District Legal Director’ – and subsequently conducted an interview. At the same time, the District Legal Director at Court A was also a new appointment, who again I wrote to and then interviewed. Hence, despite numerous changes in the administrative organisations of the courts and the Courts Service over this period I was able to periodically update the information gained from chief administrators. I also spoke to parties with other administrative roles at all three courts; including the listings officers and case progression officers.²⁵ Gaining access to the courts also allowed me to conduct interviews with the professional co-ordinators of the Witness Service at Courts B and C.

It was also important to gather information from those responsible for running courtrooms and conducting trials on a day-to-day basis. With the permission of the District Legal Directors and Court Manager at the three courts I approached Legal Advisers (magistrates’ courts) and Court Clerks (Crown Courts) to request interviews and also spoke with district judges from both magistrates’ courts.²⁶ In terms of trial operation I also interviewed a number of barristers and solicitor advocates, who were usually approached directly at the start or end of a trial, where I was also able to engage in less formal conversation and gain information.²⁷ To facilitate my requests for interviews in general I took to carrying around a standard explanation letter during all court visits.

Methodologically, I employed almost identical techniques for these interviews as I had done when interviewing policy-makers under the second research question. Interviews

²⁵ The latter being a relatively new position created under the Effective Trial Management Programme with the purpose of reducing the number of ineffective trials through keeping in contact with the various agencies involved, see Chapter 6.

²⁶ It was felt that the lay magistracy would not provide particularly vital information for the purposes of this project, as few sit on the bench more than a couple of times per month. Indeed, in broaching the subject with the District Legal Directors some reluctance was detectable on their part which can probably be attributed to a worry that some magistrates would say ‘inappropriate’ things.

²⁷ At Court B such conversations were often facilitated by the presence of a large supermarket situated across the road from the court, and the long checkout queues one encountered when the courts rose for lunch.

with court staff were generally carried out during the court lunch break in the respondents' office or in a convenient unoccupied consultation room. I also visited several solicitors' offices, barristers' chambers and the local headquarters of the agencies represented on the Local Criminal Justice Board.

2.2 – ETHICS AND REFLEXIVITY

The above methodologies clearly raise a whole host of ethical issues, as well as the need for the researcher to ensure reflexivity with regard to the merits of the project as a whole.

2.2.1 – Observations

Some of the clearest ethical issues arose as a result of my court observations, many of which are grounded in the unusual contradiction that sees criminal trials as public proceedings in which personal information is routinely aired. The main difficulty in this respect relates to informed consent. This was less of an issue for courtroom professionals – who could be approached beforehand and given an explanation of the project – although as courts are open to the public, some might have felt unable to object to my presence. Lay participants, however, were rarely approached beforehand; including defendants, witnesses and victims themselves. As Homan (1991) notes, in ethnographic research it is often practically impossible to gain informed consent from everyone. Here this was not because I was conducting 'covert observation' (Fielding, 1982; Holdaway, 1982) but rather because witnesses and victims were usually kept 'isolated' from the public areas of the court, hence approaching them was often impossible. Furthermore, introducing the project on the morning of a trial may well have added to an already confusing situation for them. The same is true for defendants, who might also view the presence of a researcher 'looking at victims' as suggesting bias. Hence, direct informed consent was not forthcoming from all participants.

The only real means of addressing this problem was to go through the lawyers, explaining the project to them (gaining their informed consent) then reacting appropriately to any concerns forwarded through them by defendants or prosecution witnesses. As it happened, such concerns were rare and I was only asked to vacate a courtroom once. In that case (of indecent assault) it was felt that the victim would be extremely upset and would not want anyone who did not have to be there present whilst

she gave evidence, I of course obliged.²⁸ In addition, the Witness Service knew of my project and would introduce me to particularly nervous victims and witnesses during pre-trial court visits. Furthermore, at one of the magistrates' courts, most witnesses were given copies of my survey (see below) before giving evidence, and this contained details of my project. All notes were kept anonymous and free of identifying characteristics or features.

Another ethical concern was that my presence might increase the fear and intimidation felt by witnesses when giving evidence. Essentially, addressing such problems was largely a matter of extending courtesy. For example, if witnesses became particularly upset I would often cease writing. Also, whilst it was necessary for me to observe witnesses' reactions to questioning, I avoided 'staring' in an intensive manner. I also attended court in a suit, partly in an effort to reassure civilians that I was a professional and probably not (for example) associated with the defendant or family.²⁹ That said, appearing 'dressed for work' might well have given victims, witnesses and defendants the impression that I was a reporter from the media, and indeed I was asked about this quite frequently. Consequently, I would often explain to friends and family in the public gallery in order to dissuade this concern and asked lawyers to do the same with the witnesses and clients. Indeed, one difficulty inherent with sitting in the public gallery was that the relatives and friends of those involved in the trial would sometimes try to read what I was recording. This itself caused a degree of ethical conflict because, arguably, it was their right to see this information. On the other hand, my own (attempted) objectivity in taking such notes combined with what to others would be rather cryptic shorthand may have led to offence being taken.

Overall, given that lay participants expected to recount information in front of strangers, I do not believe that the presence of an extra person taking notes caused much additional upset. In terms of the professionals in the court, as time went on it was often

²⁸ Interestingly it was the *defence* solicitor who made the request. This was fairly early on in the observation programme and left me with the distinct impression that the solicitor in question was uncomfortable with me taking notes in any event. Nevertheless, the same solicitor agreed to my presence many times after this and it may well be that I had failed to accurately explain my goals on this early occasion.

²⁹ In addition, I felt that this mode of dress would usually facilitate increased cooperation from court staff and lawyers. Indeed, the suit made me look very much like a lawyer to the extent that I was often stopped by members of the public in the corridors of the courts and asked for legal advice, needless to say I politely refused.

remarked to me that I had become inconspicuous³⁰ and 'part of the furniture'.³¹ Once again this would suggest my own presence in the court was not affecting the manner in which the trials were being conducted or the way in which witnesses and victims were approached. That said, this was fundamentally an overt ethnography as I made no secret of my presence and sought informed consent whenever possible, this is similar to what Gold (1958) has called 'a participant-as-observer' or Gans' (1968) 'a total researcher'. Nevertheless, this was not 'participant observation' as I was in no way a participant to these proceedings.

This does, however, raise the question as to whether I was invading the privacy of participants. One might react with the argument that a trial is usually a public event in which note-taking is to be expected and that to prevent such ethnography taking place in public spaces would invalidate a great deal of existing work which utilises these techniques (Whyte, 1955; Giulianotti, 1995). Nevertheless, what seems more important is how the data were recorded and stored. This was done entirely anonymously, and the real names of the parties were never recorded. Furthermore, the courts themselves, the dates of the hearings and the area in which the courts are based are not mentioned in this study. It is therefore impossible to associate data with specific individuals.

2.2.2 – Interviews

Although conducting qualitative interviews is a more standard technique, this aspect of the project similarly had ethical implications that must be acknowledged. For example, it was clearly important to obtain the *informed* consent of these respondents both for the interview itself and on practical matters like my recording technique and the use to be made of quotations (Bryman, 2001). That is to say, respondents needed accurate information as to what the project was about, as well as its aims and likely outcomes. These issues were initially explained in introductory letters, although informed consent is best viewed in this instance as an ongoing process of answering respondents' questions (Sieber, 1998). In addition – certainly in relation to court administrators –

³⁰ In the magistrates' courts most practitioners were facing away from me, whilst in the Crown Court centre most public galleries were high above the rest of the court or 'out of the way' over to one side.

³¹ Although I here recall one early occasion in the Crown Court where I had (clearly unwisely) remarked to the barristers before the case began that very few lawyers seem to refer to victims of crime as 'victims' during a trial, preferring the term 'complainant'. My impression during the subsequent trial was that the barristers were making something of a 'game' of this, using the term 'victim' very regularly indeed.

many interviewees hoped to get something back from this research (in terms of results or recommendations) and, as such, it was particularly important to present the work realistically and not explicitly or implicitly make promises I could not keep (Denzin, 1975).

I was particularly aware when carrying out these interviews that most of my interviewees were professionals sporting well-established views on victims and, almost certainly, their own agendas for agreeing to talk to me. I was therefore wary of becoming a mouthpiece for their concerns. In particular, respondents' opinions tended to vary markedly with their exact role in the criminal justice or policy-making process; hence defence solicitors tended to have very different ideas about the role and purpose of various 'victim reforms' compared to court administrators or prosecutors. As in all such cases, conflict existed between telling participants absolutely everything about my study and alerting them to issues that would influence their responses (Silverman, 2001). Consent was sought from the interviewees as to my recording technique and a copy of the completed research will be sent to them; allowing me to respond to any final queries and once again implementing a policy of *ongoing* informed consent (Sieber, 1998) in which a dialogue is established and maintained between researcher and participant (May, 2001).

2.2.3 – Court users surveys

Surveying court users (including victims and non victim witnesses) also brings numerous ethical challenges. For example, I was especially concerned that asking witnesses about the process of giving evidence might upset them further and it was partly for this reason that the volunteers were asked to administer the questionnaire. Having greeted the witness before the trial in most cases these volunteers would be a familiar face and therefore less intimidating.

The questions themselves were formulated after discussion with the volunteers. As with the interviewees, it was also important not to deceive respondents as to the goals of the project and to achieve informed consent (Denzin, 1975). Initially, the Witness Service co-ordinator suggested she put it to witnesses as 'a project that will help witnesses in the future', to which I felt obliged to point out that the impact of one Ph.D. thesis might be negligible. Turning the data collection over to the Witness Service volunteers brought particular problems in this regard. Clearly I did not have direct control over how the

surveys were administered and I was particularly concerned that volunteers might not adequately explain the purposes behind the survey to witnesses and therefore gain their informed consent. To address this issue I wrote an explanation of the project on the front of all the 'fourth wave' surveys (as I had for the previous three waves) and asked Witness Service volunteers to show it to respondents or read it to them. Unfortunately, however, I was unable to verify that this had been done. The surveys were anonymous and the only personal features included were demographics (age, sex, ethnicity).

2.2.4 – Reflexivity?

At the beginning of this chapter I noted the importance of the researcher bringing a *reflexive* attitude to the process of gathering data. A textbook interpretation given by Bryman (2001) for this concept reads:

“A term used in research methodology to refer to a reflectiveness among social researchers about the implications for the knowledge of the social world they generate of their methods, values, biases, decisions, and mere presence in the very situation they investigate” (p.507).

Reflexivity brings into question the objectivity of any research, because any results are the product of methodological decisions made by that researcher which are in turn based on underlying personal beliefs about how knowledge in a particular area can or should be expanded and improved (Kimmel, 1988). Ham and Hill (1984) note that this is especially true when analysing policy-making. Hence, this research clearly takes a qualitative approach because I feel the subject matter cannot adequately be described, discussed or disseminated by reducing it to the objective measurements that are the hallmark of the physical sciences and more 'positivistic school'.

As such, whilst I have noted a number of times in this chapter that my presence (especially in court) was not influencing the data I collected³², those data were *certainly* affected by my own opinions, methods, background (academic and otherwise) and pre-existing impressions of the criminal justice system, lawyers and criminal victimisation.³³ In addition, a particular question raised by ethnographic research is how involved the researcher becomes with those he or she is studying.

³² Although see n.31 above.

³³ I have never been the primary or secondary victim of what the majority of the population would probably consider 'typical' crimes such as burglary or violence, although – like most people – I have been the victim of more 'invisible' crimes such as tax fraud and pollution. Had

In modern social research – being, as previously argued, reflexive – one must of course have regard to the position of those being observed. For example, this project avoids the term ‘subject’ in favour of ‘respondent’ or ‘participant’. Striking up an acquaintance with gatekeepers and other respondents is not only (in a clinical light) key to the success of such research but also entirely unavoidable when one is placed in regular contact with such people, itself the hallmark of ethnography. Hence, by the end of the 18 month period of data collection (certainly at the courts) I was on a first-name basis with many of the people I was there to observe, and engaging in regular ‘office banter’ and jokes or general gossip. A practical manifestation of this was the point at which security guards at all three courts began waving me through the metal detectors without stopping to search my bag. Furthermore, given that most of the court staff knew I was interested in observing effective trials, and given that numerically most of these trials failed to go ahead as planned, I quickly acquired the title of ‘the Trialcracker’ at both Courts A and B; it having become a running joke that whenever I appeared the trials ‘always’ failed to go ahead.³⁴

I record this information because it raises significant questions, namely was I becoming too involved with the ‘social world’ (Rock, 1993) of the courts and did this have any impact on my interpretations of what I was seeing? Had I ‘gone native’? For my part, in reviewing the notes I made in court during the 18 month period, in the earlier observation sessions I seem to have adopted more of a third-person perspective (“the lawyers are waiting for the witness to appear”) whereas in later sessions I have associated myself more with the lawyers and court staff (“we are waiting for the witness to appear”). Furthermore, the lawyers and I often shared a common frustration when trials failed to proceed, given that we were all there for an effective trial. Hence, along with the lawyers, I too found myself frustrated when defendants changed their plea at the last moment³⁵ or even in cases where victims of domestic violence refused to give

my own profile of experiences been different it is likely I would have approached this research with a completely different mindset, which would have had some impact on my interpretations (Silverman, 2001).

³⁴ For court staff an effective trial often represents a particularly difficult workday. Consequently, at least one legal adviser would often claim to be ‘relying’ on me to crack a trial. References to me as ‘the Trialcracker’ would often be accompanied by this particular legal adviser humming an improvised theme song.

³⁵ Although, in many cases the frustration was actually mine alone because, as will be discussed in Chapters 6 and 7, it was often the case that lawyers preferred trials *not* to proceed.

evidence, despite my academic and personal appreciation for the complex issues involved in such cases.

Genuinely objective research – whether in the physical or social sciences – is probably a misnomer because, as noted above, the researcher inevitably impacts upon the results of the research. As such, in common with Hobbs (1988) when gathering data in East End London pubs, it was necessary for me to constantly remind myself that I was conducting research, the results of which had to be fair and balanced and as objective as possible even though, as Hobbs also admits, the eccentricities of those I was observing (lawyers, defendants and victims alike) were often most entertaining. The fact that objectivity may be more of an ideal than a realistic goal need not invalidate this or any other research, provided that – as has been attempted in this section – the implications of this are fully and frankly explained and openly admitted, such that the work can be fairly compared with other relevant research, all of which probably suffers the same shortcomings, to greater or lesser extents, but always to *some* extent (Silverman, 2001).

2.3 – OVERVIEW OF DATA AND METHODS OF ANALYSIS

Briefly, the above methodologies have provided the following dataset:

Table 1: Overview of data

OBSERVATION DATA	
	Number of trials
Court A	
Effective trials	50
Ineffective trials	26
Cracked trials	36
Total trials	112
Court B	
Effective trials	50
Ineffective trials	27
Cracked trials	39
Total trials	116
Court C	
Effective trials	12
Ineffective trials	2
Cracked trials	5
Total trials	19
COURT USERS SURVEY RESPONSES	
	Number of responses
Wave 1	65
Wave 2	16
Wave 3	5
Wave 4	28
INTERVIEW DATA*	
	Number of interviews
Legal practitioners	

Defence solicitors	2
Barristers	2
Solicitor advocates ³⁶	2
Court administrators	
Clerks to the justices (Courts A and B)	2
District Legal Director (Court B)	1
Justices' Chief Executive ³⁷	1
Court manager (Court C)	1
Regional Director of Legal Services ³⁸ (Justices' Clerk) (Courts A and B)	1
Court staff	
Legal advisers (magistrates' courts)	4
Court clerks (Crown Court)	2
Case progression officer (Crown Court)	1
Local agencies	
Probation officer (responsible for victim contact work)	1
Chief Crown Prosecutor	1
Manager of police/cps witness care unit	1
Youth offending team manager	1
Private prison director	1
Police chief inspector	1
Victim Support (Witness Service)	1
Judiciary/magistracy	
District judges (magistrates' court)	2
Deputy district judge (magistrates' court)	1
Magistrate	1
Policy-makers and government departments	
Office for Criminal Justice Reform	3
Research Development Statistics	1
Police Reform Unit	2
Department for Constitutional Affairs	1

*All interviews took place during 2005.

Of course, this table does not reflect the many less formal conversations conducted with personnel from across the criminal justice system and policy-making spheres, especially during court observation sessions.

Essentially the evaluation of this dataset was based on three principal schools of analysis; quantitative analysis of the statistical components of the observation sessions, document analysis of policy documents and other official publications, and qualitative analysis of the less structured notes and interview transcripts.

The quantitative analytical components of this study can be dealt with relatively briefly. Many of the observations made during this ethnography were numerical in character,

³⁶ Solicitor advocates are generally sole practitioners who work exclusively as representation in various trial proceedings, either for their own clients, or often as agents for the CPS or defence solicitors. They are not barristers, although they can apply for higher court rights to appear in the Crown Court, and therefore the term 'advocate' here is accurate and widely utilised.

³⁷ Of the old Magistrates' Court Committee.

³⁸ Her Majesty's Courts Service.

such as the amount of time it took for witnesses to give evidence, the lateness of trials and the percentage of time witnesses spoke during the evidential process. In addition, there were also the coded results from the four waves of the court users survey. Whilst much of this data is not suitable for full multivariate analysis (largely because the number of cases are not sufficient to produce statistically significant results, collected as they were in a limited time by a single researcher or subject to the low response rates discussed above) general trends can be gleaned and comparisons made from mean averages backed by standard deviation figures and confidence intervals. In addition, t-test analysis was employed to determine whether the presence or absence of special measures (the grouping variable) impacted upon the percentage of time witnesses were permitted to actually speak during the evidential process (the test variable).

Clearly then this project does not seek to rely principally on quantitative analysis because – as discussed earlier – the goal is to employ and proliferate more ethnographic methods. Nevertheless, it is hoped that the analyses described above will help illustrate the merits of combining both quantitative and qualitative data to produce more robust conclusions.

For the most part, however, this is a qualitative project. The overriding technique employed here has been to identify and code themes emergent from the various data sources in an effort to corroborate or contradict the hypotheses drawn in Chapter 1 and to build up an understanding of what is meant by ‘victim-centred criminal justice’. As themes³⁹ developed, they were used to guide the ongoing progression of data collection and the themes themselves were constantly redefined, making this an iterative process in which data collection should not be separated from outcomes.

Like many qualitative studies the project therefore owes much to grounded theory (Glaser and Strauss, 1967). That said, true grounded theory implies that the data collection continues until ‘theoretical saturation’ occurs, whereby categories derived from the process which are thought to represent real-world phenomena (in this case regarding the place of victims in the criminal trial and the nature of policy-making) are no longer developed or refined through the addition of extra data (Strauss and Corbin, 1998). In this case, however, the number of observations and interviews was limited

³⁹ Coded themes from interviews and observation sessions included – for example – ‘knowledge of victims’ needs’, ‘practical limitations of policy’ and ‘acceptance of victims into working practices’ among many others.

more by the time constraints of pursuing a Ph.D. thesis. Whilst this should not undermine the results, it does imply that more data could further enhance the categories (conclusions drawn regarding victim-centred criminal justice) in Chapter 7. In the case of interview transcripts and observation notes, the qualitative software program 'NUD*IST' was used to help identify themes, although manual coding was also used extensively, especially with the observation notes which were often annotated with themes and other research memos (Glaser and Strauss, 1967) whilst they were being taken. Notes and memos were recorded by hand during the trial observations, but were later transferred to computer where simple word processor text searches and copying and pasting could be used to organise both data and themes.

In the case of official documents, the above principles were applied as qualitative document analysis, through which underlying themes were again sought out. That said, the reflexive nature of the work may imply a closer similarity with what Altheide (1980) has called 'ethnographic content analysis'; whereby once again the initial loosely-defined set of themes were open to reevaluation and amendment as the data collection process continued. Semiotics (Eco, 1978) was also employed to derive underlying meanings from policy documents in an effort to identify political pressures and influences. In other words, documents (combined with the interview responses of policy-makers and administrators in particular) were treated as text in which signs were drawn out. For example, when a document combined measures overtly to assist victims with apparently repressive or punitive measures, the latter may have been viewed as a signifier that policy-makers were more concerned about repressive policies – or 'buying support' for less popular measures – than with the victims themselves. Semiotic analysis was also used to identify underlying occupational cultures displayed in interview transcripts.

Clearly this 'grounded' approach can be the subject of criticism. In particular, one might argue that my identification of themes and categories from the dataset was influenced by my hypotheses and my existing academic opinions regarding issues like victim rights and effective support mechanisms. In other words, the argument is again that these methods lack objectivity compared to more quantitative analysis. Nevertheless, I have already argued that quantitative analyses is also subjective, and whilst there has been general acceptance in recent years amongst social sciences that truly 'objective' research is impossible to achieve, the important thing seems to be that this is openly admitted from the outset so that readers can judge the merits of the work for themselves.

Another criticism of grounded theory rests in the process of splitting up data into component themes, which some argue prompts unnatural distinctions and detracts from the wider context of the issues being studied (Coffey and Atkinson, 1996). I would certainly agree with such criticisms, but have responded to them in this project by constantly bearing in mind the relationships between my three research questions and attempting to view the issue of 'victims in criminal justice' as a unified whole. As noted earlier, one of the strengths of this project is that it combines political analysis with the operational reality of the system in practice. Hence, I would argue that wider context of the subject matter is kept at the forefront of this thesis.

In the next chapter, I will review the outstanding literature relevant to the topic of this research and begin addressing what 'victim-centred' criminal justice might look like.

CHAPTER 3:

LITERATURE REVIEW

This chapter focuses on the literature pertaining to victims and their role(s) in the criminal justice system in order to introduce the debates most pertinent to this research and emphasise gaps in the existing research. The chapter will also assess possible answers to the first of the research questions. Part one of the review examines the development of academic and political interest in victims. Part two examines key debates, beginning with a discussion on the issue of 'fundamental' criminal justice reform before moving on to victim rights, the provision of facilities, support and services to victims, and victims in the evidential process. Part three will summarise ways forward for this research. As argued in Chapter 2, owing to the distinctiveness of the justice and political models employed in England and Wales the bulk of this review focuses on the domestic British literature.

3.1 – PART 1: THE GROWTH OF INTEREST IN CRIME VICTIMS

3.1.1 – Victimology and conceptions of crime victims

Arguably, the advent of victimology came in two 'waves'. The origins of the discipline trace back to Von Hentig's (1948) arguments against clear-cut distinctions between 'victims' and 'offenders'. Von Hentig suggested that individuals could be prone to victimisation and precipitate it through lifestyle choices. The term 'victimology'¹ is usually attributed to Frederick Wertham (1949) or sometimes to Benjamin Mendelsohn (Kirchhoff, 1994). Early victimologists continued these 'precipitation' debates (Mendelsohn, 1956; Wolfgang, 1958; Amir, 1971; Fattah, 1992). Schneider (1991) argues that, following this 'first wave' of victimological investigation, victimology was set off in two directions; as a discipline concerned with human rights, and also as a subdiscipline of criminology concerned specifically with victims of crime.

The second 'victimological wave' came from the US in the late 1960s. Pointing and Maguire (1988) discuss how the 'victims movement' in the US was driven by a host of 'strange bedfellows' concerned with different aspects of victimisation ranging from feminists and mental health practitioners to survivors of Nazi concentration camps (see

¹ The term has been described as "a rather ugly neologism" (Newburn, 1988: p.1).

Young, 1997).² Victimology was certainly an international development, and whilst US victim surveys provided new details about crime victims (Mawby and Walklate, 1994; Dignan, 2005), Heidensohn (1991) also notes the role played by the European women's movement. The United Nations also drew attention to victims (Joutsen, 1987) whilst various international meetings were hosted on the topic by the Council of Europe and HEUNI throughout the 1970s and 1980s (Mawby and Walklate, 1994).

Maguire and Shapland (1997) note how victim groups in the United States adopted aggressive, political strategies emphasising victim rights, whilst the European schemes emphasised service provision. Certainly in the 1970s there were disputes between those victimologists focusing on the provision of services to victims, and those interested in broader research-driven victimology (Van Dijk, 1997). Conflict also arose between 'penal victimology' – focused on criminal victimisation and scientific methods – and 'general victimology' encompassing wider victimisation, including natural disasters and war (Cressey, 1986; Spalek, 2006).

As the view gradually developed that victims of crime were being neglected by the criminal justice system – and perhaps for political reasons (Elias, 1986) – the study of crime victims took centre stage (Maguire, 1991). In a seminal contribution, Nils Christie (1977) argued that conflicts had been monopolised by the state:

“[T]he party that is represented by the state, namely the victim, is so thoroughly represented that she or he for most of the proceedings is pushed completely out of the arena, reduced to the triggerer-off of the whole thing” (p.5).

Such views have led many commentators to propose alternative justice models, often based (to varying degrees) around 'restorative justice' principles (Dignan and Cavadino, 1996; Dignan, 2002a, 2002b; Braithwaite and Parker, 1999; Young, 2000). For Dignan (2005) this is because policies and practice relating to victims of crime within the criminal justice system have led only to their 'partial enfranchisement' at best within that process. As hypothesised in Chapter 1, it is expected that this thesis will also reveal shortcomings in the present justice model that detracts from its 'victim-centeredness'. The difference, however, is that in this study I will be attempting to identify means of

² Doak (2003) suggests that early victimology was quite punitive. Arguably, however, this is more a characteristic of modern victimology in the climate of punitive populism (Brownlee, 1998; Garland, 2001).

adapting that present system in order to make it victim-centred. On this point, certainly one of the key problems faced by restorative justice – at least as it has been nationally applied in England and Wales in the form of Youth Offending Panels and referral orders (see Crawford and Newburn, 2003) – is that it has attracted very little victim involvement, despite clear intentions to the contrary (Newburn et al., 2002; Crawford and Newburn, 2003). That said, the evidence seems to confirm that when victims do become involved in restorative processes they draw benefits from doing so, as does the restorative enterprise itself (see Dignan, 2005; Shapland et al., 2006).³ As such, this thesis will not at any stage deny the ‘restorative’ solution to some of the problems of exclusion faced by victims in the traditional criminal justice system, but rather suggest other – arguably untested and under debated – mechanisms of addressing the issue through less fundamental reform of the present system.

Indeed, crucially, few commentators have examined the possibilities of bringing victims ‘to the heart’ of traditional *criminal* justice.⁴ Hence, one of the questions asked in this thesis is whether ‘victim-centeredness’ can be achieved through the (probably) less costly, more culturally acceptable notion of adapting the present adversarial model to make it ‘victim-centred’. Another critique of this literature is that much of it has focused on counting victims (penal victimology) rather than addressing their need for support; what Van Dijk (1983) calls ‘victimology’. Hence, there are still relatively few empirical investigations examining service issues, whilst our most recent information in England and Wales is based on survey data rather than ethnography.

3.1.1.1 – *Conceiving ‘victimhood’*

Christie (1986) argues that only certain stereotypically ‘ideal’ victims achieve ‘victim status’ in the public’s eye or the criminal justice system. Characteristics attributed to the ‘ideal victim’ include; being weak, carrying out a ‘respectable project’, being free of blame, and being a stranger to a ‘big and bad’ offender. To be labelled as a *bone fide* victim one must first conform to this ideal and then ‘make your case known’ to the justice system. Arguably Christie’s model is incomplete in that he seems to have individual victims in mind rather than groups and does not consider the position of

³ Broadly speaking. The goals of the various kinds of restorative justice intervention are too numerous to discuss here in any great length, see Graef (2000); Diganan (2005: Chapters 4 and 5) and Raye and Roberts (2007).

⁴ As noted in Chapter 1, this thesis generally adopts the view taken by Bottoms (2003) of a separation between restorative and criminal justice systems.

corporate bodies as victims. Nevertheless, the presumption that 'real victims' necessarily become involved with the justice system seems to have resulted in the victim's role often being shrouded in that of the witness, which we will see in Chapter 4.⁵

Elias (1983, 1986) and Rock (1990) draw on similar arguments to suggest that society's narrow conception of victimisation is brought about by selective definitions of 'crime' construed for political purposes. Such ideas may overly simplify the complex interaction of social processes leading to activities being labelled as 'deviant'⁶ but the point remains very significant in the context of the present thesis and its attempt to understand the driving forces behind victim policies.

Such arguments led to the development of so-called 'radical victimology'⁷ and its expanded notions of 'victimhood'. For example, we now know that there is considerable overlap between victims and offenders (Hough, 1986; Dignan, 2005). We have also recognised 'secondary' victims, including friends and family of the 'primary' victim and the bereaved survivors of homicide (Rock, 1998). Of particular relevance to this thesis has been the recognition of 'secondary victimisation', the notion that poor treatment by the justice system 'revictimises' people (Pointing and Maguire, 1988: p.11). Hence, recently there have been moves to recast victims as *consumers* of the criminal justice process (Zauberman, 2000; Tapley, 2002).

Whilst much has been written on the 'ideal victim' and 'secondary victimisation', less has been done to establish links between them. The exception is in relation to the police, where we know victims of sexual assault or domestic violence were traditionally not believed unless they visibly reacted in a manner typical of the ideal victim.⁸ What is missing, however, is an investigation into how the rest of the criminal justice system reacts to non-ideal victims, especially during trials. This reflects the criticism of Jackson (2004) that much of the 'victim policy' at present is actually focused on a relatively small group of (mainly vulnerable and intimidated) *witnesses* rather than victims *per se*.

⁵ Which is very problematic given that the majority of crime probably goes unreported (Maguire, 2002).

⁶ What Mawby and Walklate (1994) call 'critical victimology'.

⁷ See below.

⁸ Crying, distraught, and so on (Jordan, 2004).

3.1.1.2 – The way forward: victimology and conceptions of crime victims

Research-driven ‘penal’ victimology characterised much of the early work of victimologists. Whilst in more recent years concern about victims’ need for services and support has galvanised debate on this issue, the present thesis will address the lack of research (other than survey data) on this point.

As notions of victimhood are clearly expanding, a wide body of potential ‘victims’ must be considered by this thesis (see Rock, 2002). Presently we do not know whether ‘ideal’ victims are afforded different levels of support compared with other victims. This research will therefore examine whether non-stereotypical victims figure greatly in the trial process and in the minds of criminal justice personnel.

Finally, whilst much of the existing work tends to draw on restorative justice as a way of facilitating victims, this research will ask how the present criminal justice process can become ‘victim-centred’ without resorting to such ‘fundamental reform’; a concept introduced in Chapter 2 and expanded upon below.

3.1.2 – Victims as state policy

Several attempts have been made to identify driving forces behind the renewed policy interest in victims of crime. In an early examination, Van Dijk (1983) categorises reforms intended to ‘do something’ for victims into four ‘victimogogic ideologies’. The label ‘victimogogic’ distinguished such measures from victimology’s wider goals of counting and gathering information on crime victims.

According to Van Dijk (1983), victimogogic measures can be based firstly on a ‘care ideology’, emphasising welfare principles. Policies can also fall under a ‘resocialisation or rehabilitation’ banner, with offender-based goals. The third victimogogic ideology is the ‘retributive or criminal justice’ model; stressing ‘just desserts’. Finally, the ‘radical or anti-criminal justice’ ideology involves resolving problems without resorting to the formal criminal justice system. Van Dijk also notes two broad dimensions to victimogogic measures, which remain valid in the recent policy context. The first is the extent to which victims’ problems are incorporated as factors to consider within the criminal justice process. The second dimension is the extent to which victims’ interests are goals in their own right, or whether they are intended to ‘feed back’ into decision making regarding offenders.

Examining why victims have become issues of policy clearly affords insight into the limits of such policies. Nevertheless, Van Dijk's construction is restricted to an examination of political ideologies. As such, he does not discuss the wider network of factors – including international influences or social issues like race and secularisation – that may lead to different policies being put into operation.⁹

Robert Elias argues that victimogic policies in the US were actually a tool to facilitate state control:

“[V]ictims may function to bolster state legitimacy, to gain political mileage, and to enhance social control” (Elias, 1986: 231).

The argument is that politicians use victims as political ammunition in elections and to insist on more punitive measures. Hence, Fattah (1992) characterises victimogic measures as “political and judicial placebos” (p.xii).

Elias and Fattah therefore look more closely at the driving force(s) behind such ideologies. This takes our understanding forward, but the concentration on ‘punitiveness’ may distract attention from a still wider range of influences, from which we might understand why political mileage can be gained through the appearance of supporting crime victims in the first place, say if confidence in the criminal justice system is lacking (Garland, 2001).

In a series of publications Paul Rock charts the development of victim initiatives in Britain and Canada (Rock, 1986, 1990, 1993, 1998, 2004). A consistent theme running throughout these studies is the lack of any unified or consistent ‘policy’. Rather, says Rock, the appearance of a unified ‘victims strategy’ only develops *retrospectively*:

“[P]olicies for victims sometimes seemed to have little directly to do with the expressed needs of victims themselves and more to do with other politics. And they attain meaning only within the larger framework which those politics set” (Rock, 1990: p.38).

In a recent instalment, Rock (2004) examines the pressures leading to the Domestic Violence, Crime and Victims Bill.¹⁰ A number of influencing factors are discussed, including: ‘consumer-orientated’ thinking; human rights issues; international

⁹ See Chapter 4.

¹⁰ See Chapter 4.

developments; vulnerable and intimidated witnesses; the development of reparation processes¹¹ and the Macpherson Report. In Rock's view, whilst making victims a party to criminal proceedings was ruled out by 2003, such influences assured that "notions of victims' rights never disappeared" (Rock, 2004: p.570). To escape this impasse, Rock argues that politicians and policy-makers compromised by proposing statutory service standards for victims¹² and witnesses and also the creation of the Victims' and Witnesses' Ombudsman and complaints procedures through the Parliamentary Commissioner:

"[T]hey [victims] were never to be recognized fully as formal participants in criminal proceedings, their eventual standing was to be resolved by a clever *finesse* of the problem of rights that was to be floated as the possible kernel of new legislation" (Rock, 2004: p.xvii, emphasis in original).

Despite its extremely detailed analysis, the key drawback of Rock's methodology is his tight focus on specific institutions (such as the Home Office). As such, there is no consideration of how victim policies link to wider social trends. Also, whilst Rock has studied the policy background and the implementation of such measures (Rock, 1993), these analyses are not combined. As such, it is difficult to draw links in Rock's work between the creation and development of policies and their actual implementation.

3.1.2.1 – Adding the 'macro' element

As a means of addressing such problems, victim policies can also be understood as products of broader social trends. Boutellier (2003) argues that in our post-modern society of secularised morality, the moral legitimacy of the criminal law is no longer self-evident. Nevertheless, for Boutellier a public morality survives secularisation through the awareness people retain for each other's suffering. This leaves us with a *negative* frame of reference for morality, as whilst there is no consensus on what constitutes 'the good life' there is agreement enough to acknowledge the suffering of others. This renders the victims of suffering a 'focal point' for establishing the moral legitimacy of criminal law. Hence, the criminal law becomes the "basal negative point of reference for a pluralistic morality" (p.65). The pain suffered by crime victims becomes a metaphor for wrongful conduct, replacing metaphors of community or collective consciousness. Boutellier calls this the 'victimalization of morality'.

¹¹ Which, rightly or wrongly, Rock associates with restorative justice.

¹² Now found under the Victim's Code of Practice (Home Office, 2005f).

In recent years victims have indeed become more prominent in criminal justice policy with particular reference to those whose suffering seems to be greatest; including survivors of homicide, the victims of domestic violence and childhood victims of sexual abuse. This might however suggest that the policy of 'putting victims to the heart of the system' will be limited to those victims whose suffering is readily acknowledged by society, meaning 'ideal victims'.

Garland (2001) also explains the emergence of victim policies through broader social change. As with Boutellier, Garland's argument is that victims in late-modern society (in America and the UK) are one of the core benchmarks for determining the success of criminal justice. For Garland, this development is grounded in the collapse of support for penal-welfarism in the 1970s, constituted by a loss of faith in the rehabilitative ideal. This heralded a 'fundamental disenchantment' with the criminal justice system and in its ability to control crime. Consequently, we have seen a shift in focus away from the causes of crime onto its consequences, including victimisation. Victims then become central to criminal justice policy for two reasons. Firstly, governments faced with such problems will redefine what it means to have a 'successful' criminal justice system by portraying crime as something the state has little control over. The government therefore focuses on the management of criminal justice and the provision of service standards which leads to victims – as the new 'customers' of the system – being afforded increased participation in the process.

Secondly, under these conditions, victims become agents of 'punitive segregation'. In the face of growing concern that little can be done about crime, Garland argues that governments deny their failure by turning to ever more punitive policies, such as mandatory minimum sentences and 'three strikes' legislation. Victims are used to justify such measures by governments appealing to their 'need' to be protected and have their voices heard.

Garland's view clearly corroborates the suggestion that victim policies are grounded in wider political concerns; specifically the need to give the criminal justice system a politically popular goal that is also *achievable*. Indeed, Garland's tone is one of criticism for governments who 'exploit' victims to these ends. Boutellier seems less disapproving in that the victimization of morality seems to transcend politics.

One final point to make in this section is to draw attention to the connections between victim policy and the development of governance. This will be discussed in greater detail in Chapter 4 but, suffice to say, aspects of this policy seem to reflect the features of decentralised service provision and wider consultation strategies associated with governance. Several authors have drawn links between various aspects of criminal justice policy and the emergence of governance (Crawford, 1997; Loader and Sparks, 2002). Governance is also a key aspect of Garland's (2001) position given above.

3.1.2.2 – The way forward: victims as state policy

The work of Paul Rock and others clearly provides a key starting point for any discussion of victims as state policy in England and Wales and beyond. Nevertheless, developments have continued to increase in pace since Rock's latest review. Furthermore, Rock in particular focuses on the work of individual organisations without incorporating wider 'macro' trends like those just described. This thesis will examine the implications of Garland and Boutellier's arguments for the operational practice of criminal trials; especially the question of ideal versus non-ideal victims. The literature is also lacking many attempts to bring together the policy and practical implications of victim reform. By doing so, this thesis will contribute a discussion on whether the underlying 'politics' influencing victim policies are connected to the present state of 'victim-centeredness' in the criminal justice system.

3.2 – PART 2: KEY ISSUES RELATED TO CRIME VICTIMS

3.2.1 – 'Fundamental reform'?

As noted previously, this thesis will examine whether or not governments must resort to 'fundamental reform' of the present system in order to produce victim-centred justice. Before continuing with the review I will elaborate further on this issue. To some extent this section may seem ill placed, as it partly relies on evidence discussed in Chapter 4 and the issue cannot be resolved satisfactorily until we come to analyse the results of this research in Chapters 6 and 7. In addition, this section will raise some very major issues to be addressed in far greater detail later in the review. Nevertheless, it is necessary to establish at this point the distinction drawn between fundamental and non-fundamental reform, as this will inform the analysis of existing literature. At this point I am only seeking to establish the distinctions between the two concepts; argument as to

whether different fundamental reforms would be 'better' or 'worse' for victims than non-fundamental reforms will be made in the remaining sections of the review.

Primarily, the emphasis of this thesis is on testing the validity of the government's pledge to put victims 'at the heart' of criminal justice. In Chapter 4 it will be argued that the government's strategy to deliver this pledge is characterised by a reluctance to fundamentally alter the nature of the present system.¹³ The point is made by Ellison (2001) when she characterises special measures¹⁴ as an 'accommodation approach' preserving the tenets of the existing evidential system.¹⁵ In the same vein, we have already noted Rock's view that the government compromised in the Domestic Violence, Crime and Victims Bill rather than accepting victims as 'parties' in criminal trials.

This suggests that there are clear limits of reform beyond which governments and policy-makers are unwilling to go to achieve a 'victim-centred' justice system. Some of the reasons for this will be discussed in the next chapter. From the outset, however, this observation implies that the question is not just whether victims are being put to the heart of criminal justice, but whether this is achievable through finesse (Rock, 2004: p.571) and accommodation rather than more 'fundamental reform'.¹⁶

Fundamental reform is difficult to define. Nevertheless, it is possible to establish static norms that essentially characterise criminal justice in England and Wales. The distinction to be drawn, I believe, is between reforms that change this adversarial system in itself and alter the roles of those within it (fundamental) and reforms that adapt the manner in which this existing system operates and how its participants perform existing roles (non-fundamental). Moving towards an inquisitorial system, for example, would require fundamental change in the practices of all involved. Moves towards restorative justice would also be fundamental, and necessitate changing the goal of the process from conviction to restitution, as well as many changes in the process itself.¹⁷ It would also be a fundamental change to alter the basic system of evidence.

¹³ Interview data is also cited in Chapter 4 to support this, see pages 114-115.

¹⁴ Facilities such as video-links and screens to assist vulnerable and intimidated witnesses to give evidence under the Youth Justice and Criminal Evidence Act 1999.

¹⁵ We will return to Ellison's (2001) discussion below.

¹⁶ Although we will see in Chapter 4 that the present reform agenda is even more restricted than the notion of 'non-fundamental reform' would imply.

¹⁷ Whilst the government has of course invested heavily in investigating the merits of restorative justice programmes (Shapland et al, 2004), these have grown up in parallel to the 'main'

One of the key debates in this area is whether victims should become decision makers in the criminal justice process. Using our distinction between changing the system and adapting its operation we can see that some decision making on the part of victims might constitute 'fundamental' reform. If victims were given the power to decide whether or not to pursue a prosecution, for example, this would constitute an essential shift in the role of the Crown Prosecution Service, and therefore a fundamental change.¹⁸ The same would be true if victims selected sentences, as this would usurp the role of judges and magistrates.¹⁹

Nevertheless, official resistance to fundamental reform does not preclude the victim from making any decisions in the process, and certainly not from having opinions canvassed and weighed up by prosecutors or judges, such that they may have a real impact. So, whilst we may rule out victims selecting sentences, in this thesis I will argue that a non-fundamental change would allow them to present information on the impact of crime – or even opinions as to sentence – to the judge and have that information considered. This position is grounded on the principle that decision makers within the system should base their decisions on all available information, and hence there should be mechanisms in place to ensure such information (from all sources, including the victims) is made available to such decision makers. Importantly, these are already basic principles inherent within the criminal justice process, and hence represent non-fundamental reforms. In addition, because the same decisions are being made by the same people – but with more information on which to base those decisions – the system itself does not change.

The key questions are whether it is 'right' for criminal justice actors to weigh up this kind of information – especially victims' opinions – and whether this will adversely affect the defendant. On the latter point, we will see in this review that commentators like Andrew Ashworth (2000) have been greatly concerned by the prospect of victim

adversarial system, and are arguably diversionary processes (Dignan, 1992; Young and Goold, 1999). As such, the argument remains valid that the government is as yet unwilling to contemplate substantially doing away with the existing criminal justice system in favour of restorative justice.

¹⁸ Discussion of the negative connotations this might have for victims will be presented in the review below.

¹⁹ Again, the purpose of this section is to draw the distinction between fundamental and non-fundamental reform without becoming distracted by the considerable debates surrounding these issues, discussed below.

rights adversely affecting defendants. Nevertheless, it should be noted that if information from victims exists (including their opinions) and judges or magistrates are required to take all existing information into account when making decisions then, as such principles are already part of the existing system (non-fundamental reform), it may not matter whether that information adversely impacted upon defendants. This notwithstanding, another, more practical, difficulty will lie in fostering real belief amongst practitioners that victims' views are worthy of genuine consideration. Empirical evidence gathered for this research will later shed light on this issue.

Whilst victims making decisions on sentence and prosecution must be seen as 'fundamental reforms', it might be a non-fundamental reform to allow them the discretion to choose whether they give evidence in the first place. In England and Wales the system is already based on the voluntary provision of evidence. Indeed, as there is no legal duty to report crime, evidence will always be partial. Hence it would be a non-fundamental reform to minimise the exceptions to this rule (courts' discretion to summon witnesses). This is particularly relevant in domestic violence cases, where victims are often unwilling to give evidence (see Cretney and Davis, 1997). It might be argued that this gives victims in cases where there is little evidence other than their own the power to end a prosecution (a fundamental reform). Nevertheless, the absence of good evidence is an issue already dealt with routinely by police and CPS, hence the emphasis remains on the existing system to gather as much evidence as possible and provide an environment in which the victim is happy to give evidence.

Providing such an environment is also a non-fundamental reform. For example, professional standards can be changed such that prosecutors are expected to speak to victims, keep them informed and treat them courteously without impacting on the process. Similarly, fostering a change in attitude amongst practitioners to minimise inconvenience to victims – even if this inconveniences professionals and courts – does not remodel the system itself. In the same vein, one could preserve the basic adversarial nature of evidence, but adapt practices to allow victims to speak more freely.²⁰

In a moment we will move on to discuss the controversial notion of victim rights. In principle, however, it is submitted that ensuring the operation of non-fundamental victim reforms by giving victims 'rights' would not in itself constitute a fundamental

²⁰ See Chapter 5.

change in the system. This is especially true if rights are enforced through existing features of the process. For example, fostering the expectation that judges will step in if victims are interrupted unnecessarily during their evidence (for example) is simply a formalisation and extension of an existing (if discretionary) judicial function. This means that the *enforcement* of 'rights' and the remedies available to victims when they are breached is key, and an important debate to be had in this chapter is whether such remedies would include complaints mechanisms internal or external to the criminal justice procedure, complaints against judges, or indeed appeals in specific cases.

Another key debate is whether giving victims the status of parties in criminal proceedings would constitute fundamental reform. Interestingly, whilst most commentators in this area address this issue, there has been little specific discussion of what constitutes 'party status'. The most likely understanding seems to be that a 'party' has representation in the trial procedure through which their views and (perhaps) opinions are presented to the court for the court to take into account. This suggests that making victims a 'party' to the case need not take us much further than the consultation and consideration of the victims' position already accepted as non-fundamental reform above. The key addition here is that the presentation of this position to the court is guaranteed through the advent of representation. As such, this again does not seem to change the fundamental process of decision making or the respective roles of existing parties (defendant and state) and therefore appears to be non-fundamental reform.

Having defined the concept, a crucial debate for this chapter is whether – in line with the relevant hypothesis from Chapter 1 – 'non-fundamental reform' is enough to bring victims 'to the heart' of criminal justice. As already noted, a fully defensible answer to this question will have to wait until after we have considered empirical results in Chapter 6. That said, it is clear that our ultimate conclusions will influence the standards to which trials (and other procedures) are held if they are to be considered 'victim-centred'. Of course, non-fundamental reforms may be easier to apply in the face of deeply engrained occupational practices. Such reform may also suggest changes that are not resource-intensive, such as treating victims with courtesy.²¹ As such, it may be argued that 'putting victims at the heart of criminal justice' would be a more achievable proposition if it could be accomplished without fundamentally altering the criminal

²¹ Although some victim-centred reform may require significant resources, such as the advent of special measures and processes to keep victims informed about their case. See Chapters 6 and 7 where the concept of 'practical centrality' is discussed.

justice system. That said, we will see in Chapter 4 that from a policy-making perspective reforms once dismissed as extremely controversial can later be implemented, provided they are based on established rhetoric and/or previous policy actions. Hence, what matters here may be that reform is gradual rather than non-fundamental. In other words ‘fundamental reform’ may be a dynamic rather than a static concept.

3.2.2 – Victim ‘rights’

The concept of victims having ‘rights’ in criminal justice is controversial. Whereas most accept the notion of defendant rights – Ashworth (2000) refers to them as defendants’ “‘normal’ rights” (p.189) – both Ashworth and Edwards (2004) object to any ‘common sense’ grounding of victim rights.

3.2.2.1 – *Conceptualising ‘rights’*

Interestingly, the modern debate on victim ‘rights’ is often less about the content of those rights and more about mechanisms for delivery and accountability (JUSTICE, 1998). Hence, there is general agreement in the literature that victims should receive information, courteous treatment and protection from the justice system (Zedner, 2002). Nevertheless, this tacit acceptance of a standardised list of ‘service rights’²² is arguably a weakness of the literature; one that restricts conceptions of ‘victim rights’ and a ‘victim-centred’ system and prevents the incorporation of new ideas, including the notion of account-making discussed in Chapter 5.²³ This also stifles the growing calls for “some form of procedural right of participation within the system” (Doak, 2003: p.2, 2005), as these kinds of rights have proved far more contentious.

3.2.2.2 – *‘Participation’?*

Edwards (2004) labels ‘participation’ “a comfortably pleasing platitude” (p.973) which is conceptually abstract. In this sense, it may be similar to the vague concept of ‘victim empowerment’ popular in South Africa (South African Department of Home Affairs, 2005). In his discussion, Edwards describes four possible forms of victim participation in criminal justice. The most significant casts victims in the role of *decision makers*, such that their preferences are sought and applied by the criminal justice system. Less

²² See below.

²³ I will argue there that this would not constitute fundamental reform.

drastic would be *consultative* participation, where the system seeks out victims' preferences and takes them into account when making decisions. Edwards sees the traditional role of victims in terms of *information provision*, where victims are obliged to provide information required by the system. Finally, under *expressive* participation, victims express whatever information they wish, but with no instrumental impact. Indeed, Edwards highlights the danger of victims believing participation will affect decision making when this is not so.

There is a sense that for Edwards these are 'all or nothing' categories and hence he does not examine how they might be combined in practice. The fact that some types of decision making on the part of victims may be less groundbreaking than others is an obvious example, which the fundamental/non-fundamental distinction picks out. Also, Edwards does not examine how different forms of participation impact on other actors in the process, such as defendants. Overall, however, Edwards' classifications of 'participation' are a useful tool to be drawn upon in this chapter.

3.2.2.3 – *Types of rights?*

A common distinction drawn in these debates is that between 'service rights' and 'procedural rights'. For Ashworth (1993, 1998, 2000) victim participation should not be allowed to stray beyond 'service rights' into areas of 'public interest'. Ashworth is particularly concerned by victims influencing sentencing, citing the difficulties of testing victims' claims and taking account of unforeseen effects on victims (Ashworth, 2000). 'Service rights' is therefore a more limited concept than that of 'non-fundamental' reform as it excludes victims' consultative participation and notions of allowing victims to give evidence in a less restrictive manner. The rights Ashworth has in mind include respectful and sympathetic treatment, support, information, court facilities and compensation from the offender or state (Ashworth, 1998: p.34).

Ashworth's ideas have been highly influential and set out clear distinctions between what is and is not of 'legitimate concern' to victims. Nevertheless, we might take issue with these distinctions, not least because Ashworth's thought seems to be grounded in the defence perspective, incorporating the assumption that there is a 'zero sum game' between victim and defendant rights. The difficulty with Ashworth's argument is he does not elaborate on why fundamentally victims should not have input into sentencing, or be permitted to speak in court, or make decisions. Even if affording victims some

rights could prejudice the defence, Ashworth offers no mechanisms to resolve such conflicts or demonstrate why service rights are acceptable and procedural rights are not. Ashworth also assumes the 'public interest' cannot be synonymous with victims' concerns. This ignores the possibility implied by Boutellier (2000) and Garland (2001) that victim involvement preserves the legitimacy of the justice system, which is surely in the public interest.

It is also questionable whether the services Ashworth has in mind can accurately be labelled as 'rights'. The enforceability of such rights would not derive from the victim's procedural involvement in the justice process (which Ashworth rejects) but rather from external complaints procedures. As discussed below, we might question whether such procedures are adequate mechanisms for enforcing rights. In fact there has been little debate over the possibility of enforcing victim rights from within the process itself; whether through separate hearings (appeals or trials-within-trials) or proactive judicial involvement.²⁴

Sanders et al. (2001) classify Ashworth's argument as a normative defence of the due process approach. Sanders and Young (2000) argue that both 'service' and 'procedural' rights fail to cater for the interests of victims, as does the traditional "due process versus crime control" dichotomy (p.51). Hence Sanders (2002) suggests an alternative 'victims' rights' approach, combined with inquisitorial-style systems in the short term and moving towards restorative justice.²⁵

Sanders therefore ignores the possibility of incorporating victim rights within the present system of adversarial criminal justice, and instead advocates the more fundamental notion, ultimately, of changing the nature and goals of the system. He gives little indication, however, as to why inquisitorial or restorative models would be 'better' for victims (see Brienen and Hoegen, 2000). Furthermore, it seems neglectful for us to hold this up as a solution and forget the problems faced by the vast majority of victims in the still prevailing adversarial system. As such, Sanders' argument is not conclusive.

Sanders et al. (2001) disagree with Ashworth's view of 'service rights' as a solution to victims' problems because they feel that poorly conceived service rights also

²⁴ The latter being my own preferred mechanism, to be argued in Chapter 7.

²⁵ See below.

marginalize victims. This is demonstrated by difficulties encountered during the piloting of One Stop Shops (Hoyle et al. 1998).²⁶ Cape (2004) also takes up the argument that service rights have been poorly implemented, but it is not clear how this invalidates Ashworth's basic view that – in principle, properly conceived and resourced – service rights could assist victims.

Sanders (2002) rejects victim decision making in their 'inclusive model' because:

“[This] would fuel the 'us' and 'them' non-relationship and therefore social exclusion...The aim would be to listen to victims' information and their views, but decision making would be based on clear objective criteria derived from inclusive approaches such as the 'freedom perspective'” (p.218).

Like Edwards, however, the author does not distinguish between different decisions. Problems also lie in their assumed existence of 'clear objective criteria' of a higher 'standard' than the victim's own opinion, or decision. Conversely, Erez (1991) argues that harm, for example, can *never* be measured objectively. Sanders et al.'s (2001) view also seems to assume a 'vengeful' victim, but we will see below that the widespread existence of such victims is debatable (Doak and O'Mahony, 2006). In fact, the notion of listening but not acting upon victims' opinions suggests a danger of raising and dashing their expectations, the key criticism of the One Stop Shops (Hoyle et al., 1998).

A better argument against victims acting as decision makers was provided by the JUSTICE Committee (1998) when they became concerned that domestic violence victims were being burdened with prosecution decisions. Police were asking such victims whether they would support a prosecution, operating under the presumption that they often withdrew such support. The Committee maintained that this practice would 'slur' all domestic violence offences and imply that the state is unwilling to fulfil its duty to police and prosecute such crime.

The 'freedom perspective' referred to above is an attempt by Sanders and Young (2000) to replace the service/procedural rights distinction with a more sophisticated tool. Unlike Ashworth, Sanders and Young propose a mechanism whereby the rights of victims and defendants are balanced by maximising *freedom* within the system. Thus, says Sanders (2002), providing *information* to victims increases their freedom without

²⁶ Especially the inability of the police to explain the decisions made by the CPS to victims, meaning victims' expectations were raised by participation in the pilots only to be dashed. See also below and Chapter 4.

reducing the freedom of defendants. Conversely, Sanders and Young (2000) argue that if victims' opinions sway decision making this reduces the freedom of offenders more than it increases the freedom of victims²⁷, and hence constitutes an unacceptable 'right'. Consulting victims on the discontinuance of their cases, however, is justified provided the final decision is made by the CPS based on an objective evaluation of the 'balance of freedoms'.

Nevertheless, the difficulty inherent in the 'freedom model' lies in the notion of weighing the 'balance of freedoms' between parties. The quantification of 'freedom' is very problematic. In addition, there will always be disagreement as to the practical impact of any measure, and thus how it impacts on 'freedom levels'. As such, the distinctions drawn by Sanders (2002) between 'acceptable' and 'non-acceptable' victim rights are problematic. Furthermore, this model promotes considerable debate as to who would be charged with determining net freedom. If this role were to fall to judges, this raises the further important question of whether appeals could be made based on the argument that freedom during a criminal trial had not been maximised. This then leads to the further question of what kinds of redress would be available to such victims. Assuming such problems could be resolved, there may be the danger of long drawn out hearings (trials within trials) to determine 'net freedom' that (like most legal arguments) once again exclude the victim from participation.

3.2.2.4 – Victim rights in sentencing

Edna Erez argues in favour of victim impact statements (VIS) as a means of affording victims participation rights in criminal justice (Erez, 2000, 1999, 1994). VIS statements developed in the US for victims to communicate information to the court about the effects of crime. These were adopted in Britain (nationally in October 2001) as 'victim personal statements', although the British system excludes judicial consideration of comments made by the victim on sentencing (Lord Chancellor's Department, 2001).

Ashworth (2000) argues that involving victims in sentencing has been used as a means of legitimising a punitive stance against offenders. For Ashworth, the main difficulties with victim impact statements are threefold. First is the effect they have on defendants' rights, as discussed previously. Secondly, Ashworth considers it unjust for

²⁷ It is not clear whether the authors believe this is primarily because such sentencing would be excessively punitive or because it would introduce a lack of consistency into the system between like defendants.

unpredictable or unusual impacts upon victims to affect sentence. Ashworth's third warning again concerns falsely raising victims' expectations of influencing sentence. Ashworth also agrees with Victim Support (1995) that victims should not be burdened with decision making responsibilities. This is the argument of the present thesis in relation to some decision making (a fundamental reform) as opposed to consultation (a non-fundamental reform).

To address Ashworth's critique, in a system grounded on proportionality, it may be the very cases where the impact of crime is unusual where the victim's input into sentencing becomes useful. Again, the above view seems to be based on the defence perspective, without addressing the concerns of victims wishing to have 'a role' in the processes. In line with the JUSTICE committee (1998) I share Ashworth's concerns on burdening victims with decisions, certainly prosecution decisions. Nevertheless, I would suggest that consultative participation coupled with proper explanation – and even decision making in terms of choosing whether or not to give evidence – need not burden victims unduly, and as a due process argument Ashworth offers no evidence to the contrary. Ashworth's third difficulty concerning victims wrongly led to believe they will be making decisions²⁸ can again be resolved through providing them with more detailed and frank information.

Erez (1999, 2004) also challenges Ashworth's warnings. She begins by conceding that VIS statements have little impact on sentencing (Morgan and Sanders, 1999). Nevertheless, for her, this is caused by the resistant cultures of practitioners and the widely held view that only 'normal' levels of impact should affect sentences (Erez, 1999). Arguably, Erez is here describing a wide and prevailing *legal* culture as opposed to the individual professional cultures of barristers, legal advisers, solicitors and so on. Erez also maintains that exposure to victim impact statements will give practitioners a more realistic impression of 'normal' levels of impact (Erez and Rogers, 1999; Erez, 1999). Here Erez's point extends beyond sentencing. Clearly it is down to practitioners to ensure reforms work in practice. Conversely, Sanders et al. (2001) see VPS statements as fundamentally flawed because they rarely contain unexpected information.

²⁸ There is little evidence to suggest victims even want such decision making power (JUSTICE, 1998; Auld, 2001; Tapley, 2002).

Erez argues that victims derive therapeutic benefit and vindication from expressing information about the impact of crime during the sentencing process, which boosts satisfaction with the criminal process and may achieve restorative ends (Erez et al., 1997; Erez, 2004). In other words, her argument is that normative issues matter to victims, which is also the conclusion of Tyler (1990; Tyler and Huo, 2002). On a similar point, Shapland (1990) notes that victims seem to draw benefit from the system of compensation orders²⁹ whereby victims receive the recognition of having a judge order compensation and receiving payments directly from offenders; thus recognising their own pain and suffering or, as Miers (1980) put it, recognition of their 'victim status'.

Whether through compensation orders or wider sentencing, Erez (1999, 2000) argues that what little influence VPS statements have is on the *proportionality* of the sentence. In any event, we are talking here about extending the information and opinions afforded to sentencers for them to weigh up (non-fundamental reform). Even if this does include victims' opinion as to sentence, this is not giving them the capacity to fix sentences based on punitive positions (fundamental reform).

Erez seems to embrace wider notions of consultative participation than Sanders and Young (2000). Her position is however limited to participation rights at the *sentencing* stage³⁰. More specifically, Erez's (1999) conclusions on proportionality have been the subject of debate. Her contention is based on studies from America and Australia (Erez and Rogers, 1999) and also the British pilot, which seems to confirm that VIS statements are generally not used as a vehicle for communicating vindictive opinions to the court (Hoyle et al., 1998).³¹ As such, she suggests a VIS can influence sentences in either direction, such that their overall affect on sentencing is partly hidden in the statistical analyses, as the two cases cancel each other out:

“[S]ome changes in [sentencing] outcomes do occur, but they are hidden as in the aggregate they offset each other. Without victim input, sentences might well have been too high or too low” (Erez, 1999: p.548).

²⁹ Originally introduced in 1972 (Miers, 1980).

³⁰ Although, overall, this is a far more sweeping notion of 'participation' than that of Sanders and Young (2000), whereas Ashworth of course dismisses the concept as unjust.

³¹ Erez claims that this is because they are 'edited' by the police and other parties, which we will discuss in Chapter 5.

Nevertheless, Sanders et al. (2001) heavily disputes the notion that VIS statements can actually reduce sentence severity (see also Giliberti, 1991). Although here the authors are unable to prove statistically that Erez's argument is incorrect, they advise caution on the interpretation of her findings, as there was no comparable finding in the English pilot (Morgan and Sanders, 1999)³² or in a study by Davis and Smith (1994). Erez also appears to base her conclusion on the word of practitioners and:

“[W]hat they say and what they do are not always the same” (Sanders et al., 2001: p.449).³³

That said, on the issue of vengefulness Erez's general point has recently been supported by evaluations of restorative justice in Northern Ireland (Doak and O'Mahony, 2006) and in Britain (Shapland et al., 2006). These indicate that when given the opportunity to speak about sentencing matters victims do not tend to advocate excessively harsh punishments but instead suggest resolutions that may reduce the chance of the offender reoffending. In addition, the 1998 British Crime Survey indicates generally non-punitive attitudes amongst victims and their possible acceptance of restorative principles. It also seems that the more informed about the system the general public are, the less punitive they become (Mattinson and Mirrlees-Black, 2000). That said, Sanders et al.'s argument is not so much that victims in general are vindictive and punitive, “simply that non-punitive victims rarely make a VIS” (2004: 104).

Sanders et al. (2001) also dispute the ‘therapeutic’ benefits of the VPS on the grounds that they “add another layer of depersonalised disempowering procedures which do little to ease secondary victimisation for many, and add to it for others” (p.450). At the pilot stage, Hoyle et al. (1998) and Morgan and Sanders (1999) said that the question of whether the VIS increased satisfaction with the criminal justice system remained inconclusive. In Hoyle et al.'s study some victims expressed inhibitions to give full details because of the dismissive manner in which the police took the statements and the limitations of the form itself. Morgan and Sanders (1999) found that only a small percentage of victims made victim impact statements and that practitioners usually felt they contained no unexpected information.

³² Sanders et al do not attribute this to differences between the UK, American and Australian systems.

³³ A similar finding is made by this research, see pages 324-326.

Nevertheless, following Erez (and rejecting Ashworth) none of the data seem to indicate that giving victims the right to be consulted over sentencing is fundamentally flawed as a concept. We also have no up-to-date study of victim personal statements in England and Wales.³⁴

3.2.2.5 – A zero sum game?

Erez and Sanders and Young agree on the point that a trade off between the rights of victims and defendants is not inevitable. For Erez, procedural rights afforded to victims through victim impact statements do not unjustly affect defendants, but improve sentence accuracy³⁵, whilst Sanders and Young would wish to maximise the ‘freedom’ of all sides.³⁶ Although we have seen that both resolutions are subject to critique, the rejection of a zero sum game supports the notion that a wider range of non-fundamental reforms – especially consultative participation – may be legitimate.

Garland (2001) sees the ‘zero sum game’ between victim and defendant rights as the product of a punitive ethos espoused by governments in an effort to deny the failure of the justice system to reduce crime. The position is summarised by Hickman (2004):

“[F]airness to victims is not a zero sum game. It can be achieved without detracting from the rights of the defendant. The fact that this government wishes us to think otherwise is a profoundly political matter” (p.52).

Jackson (1990) has remarked on the dominance of ‘balance’ rhetoric within criminal justice discourse, in this case the balance between victim and offender rights (Jackson, 2004). Nevertheless, the above discussion seems to suggest that in this case the zero sum game is a product of its time rather than an objective reality.

3.2.2.6 – Victim rights: an interim conclusion

Nothing reviewed so far seems to preclude the application of consultative participatory rights for victims in criminal justice. Ashworth would disagree, but with objections

³⁴ See Graham et al. (2004) for discussion on how they are taken by police.

³⁵ In terms of ‘just desserts’.

³⁶ O’Malley (2004) has suggested a similar mechanism of avoiding zero sum games between victim and offenders related to the management of risk. Instead of burdening offenders with the risk of suffering injustice – based on the notion that they created the risk to society in the first place – O’Malley suggests that ways must be found to minimise the net harm to society and thus achieve crime prevention and restorative outcomes.

grounded on a defence-orientated presumption of the existence of a zero sum game that he does not substantiate, possibly owing to the normative nature of his argument. This ignores the implications of Sanders' and Erez's position that victim rights need not lead to the detriment of defendants.

Admittedly, both contributors exclude the zero sum game through questionable methods. Sanders' and Young's 'balancing of freedoms' is problematic, whereas Erez's conclusion that VIS statement only impact upon proportionality is not supported by the equivalent British research (Morgan and Sanders, 1999; Sanders et al., 2001)³⁷. What we can say, however, is that consultative victim participation leaves decision making with criminal justice actors, informed by the victim's opinions along with other factors. This might be objectionable if we assume – like Sanders – that victims' views are less reliable as the basis of decisions than more 'objective' factors. This presumption may not be borne out in real life situations, however, firstly because the quest for 'objectivity' is probably fallacious, and secondly if Erez (2004) is correct about the non-vindictive impact of victim impact statements or if victims in general are indeed not as vindictive as we might suppose. Garland's analysis also forces us to consider whether the very notion of a 'zero sum game' is a product of populist punitivism.

Erez and Sanders and Young both accept victim participation in some situations, but place artificial limits on their discussion. Erez's focus is exclusively on participation in sentencing. Sanders and Young exclude consultative participation in sentencing but accept victims' information provision relating to prosecution decisions, citing the 'balance of freedoms' as the basis of their distinction, which has already been critiqued.

The present thesis will adopt a wider construction than the above theorists, in which the assumption of a zero sum game is rejected and the right to consultative participation is accepted as a general principle and specifically in relation to prosecution decisions, sentencing, bail decisions and so on. The acceptance of such consultation is based on two main arguments. Firstly, it will be noted below that evidence from the JUSTICE Committee (1998) and Shapland et al. (1985) amongst others indicates that, whilst victims have little desire to run the criminal justice system, they do expect to be consulted on various decisions and have their view taken into account. Secondly, we

³⁷ The dispute as to the interpretation of such data between Erez (1999) and Sanders et al. (2001) helps illustrate the difficulties highlighted in Chapter 2 of claiming true 'objectivity' in any research, even when dealing with quantitative data.

have noted that it is already an accepted part of the existing system for judges and magistrates to take account of all available information when making a decision. In a victim-centred system, this would surely include information from the victims themselves.

This implies not only that victims are consulted, but also that there are clear mechanisms in place for communicating such information to the court and having the court communicate its consideration of this information to the victim, as benches are already required to give details as to how they have arrived at decisions. In short form, this may well mean giving victims party status, which I have argued above constitutes non-fundamental reform. Service rights will also be included in this system because – as Sanders et al. (2001) note – they are almost unanimously unobjectionable and at the very least should foster the normative impression that the system takes adequate account of victims' needs. As none of this involves changing the adversarial system or its goals *per se*, this understanding of 'victim rights' conforms to our notion of 'non-fundamental' reform.

Sanders (2002) implies more fundamental change when he suggests moving towards inquisitorial and restorative process. Nevertheless, as he offers no discussion as to why this is better for victims than an adapted adversarial model – and Brienen and Hoegen (2000) suggest inquisitorial models are no better for victims – it is difficult to accept this solution. Non-fundamental reform implies rejecting Edwards' 'decision making participation' in most cases. This is also broadly accepted³⁸, not because of concerns that this would lead to injustice for the defendant but because placing such expectations and pressures on victims would amount to secondary victimisation and the portioning off of responsibilities criminal justice professionals are paid to bear (JUSTICE, 1998). That said, it is difficult to know what 'evidence of injustice to the defendant' might look like if, as argued previously, we accept the notion that benches in a victim-centred system should make decisions based on all the available information, including information derived from consultation with victims. Punitiveness seems a likely candidate, but this would not necessarily be synonymous with defendants being treated 'unfairly' when the decision maker decides that – on the balance of all the information – this is the 'just' or 'proportionate' outcome.

³⁸ Although later in this chapter it will be argued that the decision to give evidence should remain with the victim.

This section has begun conceptualising the rights afforded to victims in a 'victim-centred' justice system. The list, however, is incomplete. In particular, we have not yet deconstructed 'service rights' to decide exactly what rights a victim might enjoy during a trial. Rights related to giving evidence and interactions with court professionals are obvious possible examples.

3.2.2.7 – *Enforceability?*

True 'rights' must have some mechanism for their enforcement. As Jackson (2003) notes:

"One of the problems with putting obligations on criminal justice agencies, however, is that they are unlikely to be taken seriously unless consequences attach to non-compliance" (p.319).

This was a key observation made by Fenwick (1995) about the first 'Victim's Charter' issued by the Conservatives (Home Office, 1990). Fenwick's criticism of the Charter was that its subtitle – 'a statement of the rights of victims' – was "seriously misleading" (p.844) in that these 'rights' were not backed by enforcement mechanisms.

We might ask whether this class of 'rights/aims' is satisfactory in the context of the government's pledge to put victims 'at the heart of criminal justice'. If enforcement comes from without the system – say through external complaints procedures – then one might argue that the services afforded to victims remain 'expectations' (JUSTICE, 1998; Shapland, 2000) with victim 'rights' essentially limited to the right to complain. One could argue that such 'externally enforceable' rights actually return victims to the periphery of the system, because resolution is available only outside the criminal justice process.

There is a blind spot in the literature on victim rights enforceable from *within* the criminal justice process ('internally enforceable rights'). We can therefore build on Jackson's (2003) critique by suggesting that rights will be taken far more seriously if enforcement comes from within the criminal justice process itself. It seems that the critique of Fenwick – that rights cannot exist without *robust* enforcement mechanisms – has yet to be answered. Ashworth, Sanders and Erez are all largely silent on this issue.

3.2.2.8 – Finding victim rights

We will now examine possible sources for victim rights in order to illustrate why – in this author’s view – victims in England and Wales still lack true ‘rights’.

Government policy in the UK has fluctuated from the language of ‘rights’ in the first Victim’s Charter (Home Office, 1990) to ‘service standards’ in the second Charter of 1995, and subsequently reverted back to ‘rights’ in the 2002 White Paper *Justice for All* (Home Office, 2002). The use of such terminology in the first Charter replicated the language in the preamble to the UN’s 1985 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* – which the Charter was intended to implement – and which spoke of “measures in order to secure the universal and effective recognition of, and respect for, the rights of victims of crime and abuse of power” (p.1).

Generally, both the Declaration and the Council of Europe’s *Recommendation on the position of the victim in the framework of criminal law and procedure*³⁹ of the same year were concerned with ‘service rights’. A few participatory rights were indicated, including the weighing up of victims’ injuries and losses by the court when determining compensation. Neither document sets out any form of redress if standards are not met. That said, at Part A Paragraph 6b, the Declaration refers to allowing victims’ ‘views’ and ‘opinions’ to be “presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused”. This is significant, as it suggests victims’ preferences will be taken into account.

The second (1996) version of the Victim’s Charter does not mention ‘rights’, only service standards related to information, support and protection (Home Office, 1996). The JUSTICE report (1998) also dropped this language to recommend reforms based on victims’ ‘legitimate expectations’. We may persist with labelling these as ‘service rights’, although there is an absence within the Charter of enforcement mechanisms other than individual agencies’ complaints procedures. By now victims’ role as (voluntary) information providers under the Charter was clearer:

“YOU CAN EXPECT the chance to explain how the crime has affected you and your interests to be taken into account.

³⁹ Rec.85(11).

The police will ask you about your fears about further victimisation and details of your loss, damage, injury.

The Police, Crown prosecutor, magistrates, will take this information into account when making their decisions” (Home Office, 1996: p.3).⁴⁰

The ‘interests’ mentioned in the first sentence probably do not include ‘opinions’ or *stated* interests, but rather interests interpreted through information provided on the impacts of crime. The same is probably true in the third paragraph. In other words, this does not encompass interests expressed directly by victims themselves.

Nevertheless, the second Charter does foresee victims’ *stated* opinions influencing decision making:

“If you are worried about being attacked or harassed as a result of the court case you should tell the police. They will tell you what can be done and tell the CPS so that they can let the court know at the time bail is being considered” (p.10).

The ‘worry’ mentioned here would be based on a victim’s *beliefs* about their overall situation. Although there is no emphasis on the system to seek out such beliefs, this does suggest *consultative* participation, as the implication is that bail decisions may be influenced.⁴¹ The Charter also states that victims’ ‘concerns’ are to be considered before releasing offenders on probation from prison. The enforcement potential of any of these ‘rights’ remains suspect, however, and still originates from complaints procedures outside the criminal justice process itself. It is also important to note that in order to be useful victim must be aware of their rights. The 2002/03 BCS however indicated that only 13% of victims were aware of the Charter, compared with 14% in 2001/02 and 34% in 1998, when there was still a great deal of publicity being circulated about the second Charter of 1996 (Ringham and Salisbury, 2004).

3.2.2.9 – *Later developments: moving towards documented, internally enforceable rights?*

We may now be moving closer to a stage where ‘victim rights’ are clarified and documented within international instruments, statute and case law that also provide enforcement mechanisms from within the criminal justice process.

⁴⁰ Extract reproduced here as it appears in the Charter.

⁴¹ Albeit, it is telling that this is not expressly stated.

Case law developments may indicate that victims have rights under the ECHR, which would be enforceable from within the criminal justice process in England and Wales though the Human Rights Act 1998. Of particular benefit to victims giving evidence in criminal trials are a number of rulings to the effect that keeping witnesses anonymous (say, because they are intimidated) does not breach a defendant's Article 6 right to a fair trial, provided the evidence can be challenged (*Baegen v. Netherlands*⁴², *Doorson v. Netherlands*⁴³). Ellison (2003) reports on the case of *Sn v. Sweden*⁴⁴ which confirmed that Article 6 does not grant the defence an unlimited right to secure the appearance of witnesses in court. This might indicate subtle moves toward allowing witnesses to make decisions themselves as to whether they give evidence. The case also maintains that witnesses can give evidence through recorded interviews without breaching Article 6. Doak (2003) suggests that victims might also find favour under Articles 3 and 8 if they are treated in a degrading manner or the state fails to protect their rights to privacy when giving evidence during a trial.

The European Court has resisted interpretations of the Convention which afford victims more explicit influence over decision making in sentencing (*McCourt v. UK*⁴⁵) although in *T and V v. UK*⁴⁶ the parents of a young murder victim were allowed to make representations to the Court (Rock, 2004 and see Chapter 4). In the domestic case of *R v. Secretary of State for the Home Department and another, ex parte Bulger*⁴⁷ the Divisional Court held that the family of a murder victim did not have standing to seek judicial review of any tariff set in relation to the murder.

Also under domestic case law, judges should seek out the impact of offending on victims (*Attorney General Reference No.2 of 1995 (R v. S)*⁴⁸) (Shapland, 2002). This might suggest that victims have a right to provide such information.⁴⁹ Furthermore, *R v. Perks*⁵⁰ indicates that a sentence can be moderated if it aggravates the victim's distress

⁴² Application No. 16696/90, 26th October 1995.

⁴³ [1996] 23 EHRR 330.

⁴⁴ Application No. 34209/96, 2nd July 2002.

⁴⁵ [1993] 13 EHRR 379.

⁴⁶ [2000] Crim. L.R. 287.

⁴⁷ [2001] All E.R. 449.

⁴⁸ [1995] Crim. L.R. 835.

⁴⁹ The Victim's Code of Conduct refers to a victim's 'right' to make a victim personal statement.

⁵⁰ [2000] Crim. L.R. 606.

or the victim's forgiveness indicates that his or her psychological or mental suffering must be very much less than would normally be the case. Thus, in certain circumstances, the victim's choice to forgive a defendant becomes relevant to sentencing (Edwards, 2002).

We now also have the EU Council's 2001 Framework Decision on victims' standing in criminal proceedings. The Decision is steeped in the language of 'rights' including the right to compensation and damages, the right to provide and receive information, the right to be treated with respect for the victim's dignity, the right to be protected at various stages of the procedure and the right to have allowances made for the disadvantages of living in another member state from the one in which the crime was committed. Article 2 of the Decision requires member states to ensure victims have "a real and appropriate role in criminal proceedings", which seems to suggest participatory rights, albeit not involving victims in decision making roles.

Whilst the Decision makes liberal use of the language of 'rights', in its own preamble and in Victim Support's (2002b) explanation of the measures it is described as a set of 'minimum standards'. Nevertheless, states are obliged to ensure these standards are met. This hint that the standards guaranteed to victims under the Decision must be *enforceable* suggests a step closer to a more robust form of rights.

The Domestic Violence, Crime and Victims Act 2004 sought to implement the Framework Decision through a statutory Code of Practice (Home Office, 2005f). The Code's basis in statute is significant, although its provisions are not law and failure to comply with the Code does not leave anyone liable to legal proceedings. The enforceability of the Code therefore remains with the complaints procedures of individual criminal justice agencies. If dissatisfied with the outcome of such procedures, members of the public can report the matter to their MP who can refer it to the Parliamentary Commissioner for Administration for investigation. The new Victims and Witnesses Commissioner created under the Act is charged with monitoring the operation of the Code, although it has not been said that discontented victims can complain directly to him/her. It is envisaged that victims can take their complaints to the statutory Victims' Advisory Panel, but neither the Panel nor the Commissioner have

powers of investigation or redress⁵¹, although the Commissioner is being touted as a 'champion' of victims' 'rights' (Home Office, 2006c).

As such, the test of any 'rights' under the Code may again lie in their enforceability, and on this we find ourselves in the same position as the Victim's Charter of 1996. If these provisions are rights, it seems they are still only externally enforceable. Indeed – on this point – it is notable that the judiciary are not included as parties with any obligations under the Code. The substantive text of the Code refers only to the 'right' to make a victim personal statement and the right to a review of a decision from the Criminal Injuries Compensation Authority. The latter seems to be another 'service right', the former sounds more participatory. As under the Victim's Charter, parties within the CJS are obliged under the Code to 'take account' of a VPS when making decisions; although Edwards (2004) argues that it is difficult to clarify exactly what form of participation is afforded through the VPS.

Victims are to be *consulted* under the Code regarding their opinions mainly in relation to the release of serious offenders. To this end, the Code requires the probation service to *seek out* and pass on the 'representations' made by victims (of mentally disordered offenders and road traffic offenders who intended to cause physical injury or damage to property) to those responsible for the prisoner's/patient's release. Parole Boards must take account of victims' representations in conditions placed on offenders' licence and supervision. The police are required to record any 'views' a victim expresses on applying for special measures, although there is no mention of a CPS obligation to consider such views. Whilst the Code for Crown Prosecutors (CPS, 2004) maintains that victims 'views' are relevant when deciding on the public interest test or the acceptance of pleas, it is surprising that this was not also spelt out in the statutory Code.

Overall, whilst the Code is grounded in statute, enforcement mechanisms remain largely the same as if that were not the case. Furthermore, the Code is still mainly concerned with 'service rights'. The same is true of the proposed Witnesses' Charter (Home Office, 2005g) and the draft CPS Children's Charter aimed at child victims and witnesses (CPS, 2005a). Both abstain from the term 'rights' and are modelled around legitimate expectations, enforced through complaints procedures external to the criminal

⁵¹ The Parliamentary Commissioner can *recommend* agencies provide redress.

justice process.⁵² The Witnesses' Charter talks of 'obtaining [victims'] views' on any assistance they require when giving evidence (para.3.10) whilst the Children's Charter ensures the CPS "will listen carefully to children's views" (para.2.5) and "consult victims for their view" (para.3.16) when a defendant offers a guilty plea on the day of trial.

A more significant role for the 'views' of victims was hinted at in the recent consultation paper on the introduction of victims' advocates⁵³ to represent homicide survivors directly in court. Whilst on the face of it the advocate is essentially an extension to the VPS scheme, the consultation emphasises "the importance of seeking the view of victims in prosecution decisions" (Home Office, 2005b: p.12). It also sees the victims' advocate expressing victims' 'views' to the prosecutor at the pre-trial stage "so they can be taken into account". This seems to imply something closer to giving these victims party status because, in-keeping with the understanding of this concept given earlier in this chapter⁵⁴, victims are not only consulted, but have mechanisms in place whereby the fruits of such consultation are clearly presented to the court for the court's consideration.

Examples of issues on which victims may want to express views – either themselves or through their representation – are given as: bail (and conditions); withdrawal or downgrading of charge; discontinuance of criminal proceedings; applications for reporting restrictions and trial management matters. This list of issues on which a victim's views might be relevant expands upon any seen previously in official publications. It still excludes sentencing – which we included in our category of 'non-fundamental' reform – but this may indicate increased acceptance of a right to more *consultative* participation for victims.

When the possibility of producing a Victim's Code of Practice was first announced in the *Justice for All* White Paper (Home Office, 2002) Jackson (2003) noted that the proposals were far more ambitious in affording victims service rights than procedural rights. Jackson's conclusion was that true 'justice for all' would be grounded in a far

⁵² Although 'legitimate expectations' were originally conceived as legal obligations enforceable through ombudsmen or judicial actors (JUSTICE, 1998).

⁵³ The term 'advocate' is used to describe these lawyers in official documentation, even though they will include barristers, see Chapter 2 n.9.

⁵⁴ See page 57.

more explicit 'rights-centred' approach, which the government was clearly unwilling to take. Subsequent developments outlined above seem to support this conclusion.

3.2.2.10 – *The way forward: victim rights*

The initial point to be made about 'victim-centred' criminal justice and victim rights is that in the modern climate it seems one can not have one without the other. As Rock (2004) notes, the language of rights is not going away. In the last section we saw a resurgence of 'victimologic' study on services afforded to victims. Here, we see a parallel concentration on service rights including rights to information and respectful treatment from criminal justice personnel. We also see that much of the 'rights' debate has focused on sentencing rather than the criminal trial.

In many cases, the reason for such preoccupation with services and rights outside the trial process seems to be the concern that victim rights will prejudice defendants. We have seen the counter-argument to the effect that such a 'zero sum game' need not exist, but this is rarely applied to the trial process other than in relation to service rights. As such, this thesis attempts to plug a gap in the literature in that it will problematise the content of victim rights beyond service rights to discuss affording victims procedural rights within trials.

We might draw a distinction between 'internally enforceable' and 'externally enforceable' rights. Internally enforceable rights would be defended from within the criminal justice procedure by judicial actors. These might take the form of separate proceedings – including trials within trials – but could simply involve judges taking responsibility for ensuring victim rights are upheld. The second form of rights are those externally enforceable through complaints mechanisms by criminal justice administrators or other figures, like the parliamentary commissioner for administration or formal complaints submitted to the CPS, the courts service (and individual courts) or the Independent Police Complaints Commission. In this author's view, 'internally enforceable' rights are most conducive to a truly victim-centred system, because they will be more respected and immediate to the work of criminal justice personnel and because it means victims do not need to go *outside* the system to find redress.

The issue of redress is clearly very important here. In the most straightforward cases the expectation would be that in a victim-centred system judicial actors would address any perceived conflict with victim rights during the course of procedures, the redress being

the reversal of such conflict. Hence, if a victim were the subject of excessively hostile cross-examination (see below) a judge would step in and instruct the questioning lawyer to mitigate the approach. Of course real cases are rarely this straightforward, which raises the issue of whether such a system would lead to endless trials-within-trials in the same way as Sanders' model of maximising freedom. This also brings with it the question of what sort of redress a victim can expect if a trial is not conducted in a manner conducive to his or her rights; would this lead to an appeal? Or complaints against the relevant judge? These are matters to be addressed in Chapter 7 but – from the outset – it is clear that any such systems are not yet forthcoming and, indeed, presently the judiciary are excluded from obligations under the statutory Code, meaning there is no emphasis (or pressure) on them to defend the rights of victims in trials or to adapt their occupational cultures (at the level of profession) in favour of doing so. As far as judicial complaints are concerned, the only mechanism presently available is a direct complaint to the Lord Chancellor; which at the moment is a little known procedure that lacks user-friendliness and feedback to the victims or other complainants themselves. As such, this thesis will contribute an assessment of the possibilities of incorporating internally enforceable rights within the trial procedure.

As to the content of those rights, we have concluded that nothing in the literature rules out the legitimacy of a general right to consultative participation for victims – including consultation over sentencing – in addition to less controversial 'service rights', which we will deconstruct in the next section. As with consultation provisions the same actors make the same decisions – simply basing those decisions on more information/opinion – the system undergoes no fundamental change. Given that the 'objectivity' of any factor is questionable, there is no reason to assume that the opinions of victims will lead to injustice. In fact, we have seen that the very notion of a zero sum game between victim and defendant rights may be a political construction.

So far my suggestions have broadly constituted non-fundamental reform, as defined earlier in this chapter. In relation to reforms of a more fundamental nature – including giving victims decision making power – it is almost impossible to draw conclusions as there is a widespread lack of evidence as to whether or not these would be better at achieving victim-centeredness.⁵⁵ This is largely because reforms of a more fundamental nature have not been tried within the context of criminal justice. This means we have no

⁵⁵ Although again we can note Brienen and Hoegen's (2000) view that converting from an adversarial to an inquisitorial system would not necessarily be 'better' for victims.

real indication as to whether, if given widespread decision making power (for example)⁵⁶, victims would enforce punitive or vindictive procedures (when deciding on prosecution decisions) or punishments (when deciding on sentencing) on defendants. Nevertheless, the work on restorative justice seems to indicate that this might not be the case (Shapland et al., 2006).

I also wish to highlight Erez's view that the participation in sentencing could bring therapeutic benefits to the victim. The therapeutic benefit accrued to victims is also one of several 'competing rationales' of participation spoken of by Edwards (2004). The notion that the criminal justice process should bring therapeutic benefits seems consistent with the idea that victims are 'at the heart' of this process. Yet there is little debate on the therapeutic impact of the substantive trial process⁵⁷, specifically the evidential process. Consequently, Chapter 5 will argue that therapeutically benefiting victims by allowing them to give evidence in an unrestricted manner should be a goal of a victim-centred system.

3.2.3 – Facilities, services and support for victims

Arguably, the grievances of victims have less to do with the controversial issue of 'participation rights' and more to do with a lack of basic services afforded to them. This section will deconstruct the notion of service rights in order to identify precisely what services victims need from the system.

3.2.3.1 – Early studies

One of the first examinations of victims in the criminal justice system was Maguire and Bennett's (1982) study on burglary victims. Their findings indicate that the majority of victims were more concerned with the 'public relations' or 'service provision' of the police than their investigative role, albeit possibly because they could only judge police effectiveness by the former. The study is limited to burglary victims and their interaction with the police, but does indicate that service, support and understanding received from the system are very important to victims. This may indicate that non-fundamental reform may be sufficient to achieve victim-centeredness. In fact – despite our earlier criticisms – it suggests that Ashworth's more restrictive notion of 'service

⁵⁶ Beyond the choice of whether or not to give evidence.

⁵⁷ Although we will note in Chapter 5 the recent development of 'therapeutic jurisprudence' (Rottman and Casey, 1999).

rights' may be all victims require. Nevertheless, to take such a view is to assume that 'victim-centeredness' is synonymous with 'victim satisfaction', whereas the argument of this thesis is that putting victims 'at the heart' of criminal justice also necessitates decision makers taking account of information and opinions provided by victims, guaranteeing them certain rights and remedies and indeed affording them decision making power on issues like the choice of whether or not to give evidence.

Similar sentiments were echoed in Shapland et al.'s (1985) *Victims in the Criminal Justice System*. The aim of this study was to follow victims of physical assaults, robberies and sexual assaults through the justice system and report on their experiences and attitudes. The project indicated that victim satisfaction with the police dropped as time went on, owing to a failure to live up to victims' expectations of being kept informed as the case progressed (service rights again). Victims were also dissatisfied with the police when there was disagreement between the two as to whether a prosecution should be pursued. Victims tended to view the giving of a witness statement as a chance to indicate their views on the matter at the time. Officers, though, saw the statement as a watershed indicating victims' support for the prosecution. Victims did not expect or wish to make specific decisions on prosecution, but their expectation was one of *consultative* participation on the matter. This goes beyond Ashworth's 'service rights' but is a right we have accepted in our earlier discussion.

One of the main conclusions from Shapland et al. was that the expectations of victims were not matched by the limited regard paid to them in the criminal justice system. Victims desired respect and appreciation but at court no one was available to keep victims informed or tell them what to do. The listing system employed by most courts "did not seem to be designed for the benefit of lay participants" but was intended to minimise inconvenience to the court (Shapland et al., 1985: p.76). This resulted in victims waiting around for extended periods in buildings lacking the most basic facilities.

As such, it is argued that one aspect of the 'service rights' afforded to victims should be the right to minimal inconvenience achieved through careful consultation before the listing of cases. This remains a non-fundamental reform, because the system of listing cases through a central administrative office at each court is preserved⁵⁸, but becomes

⁵⁸ See pages 362.

based around the consultative participation of victims, perhaps to the extent that listings officers communicate with victims directly.

The study concluded that a victim-orientated system need not look significantly different from the existing one. Victims were not wishing to run the system, or to be endowed with decision making power. Rather, victims expressed the desire to be better informed, consulted over decisions to drop or vary charges and treated with respect. Shapland et al. noted that the changes required to achieve this were more *attitudinal* than *structural*. This represents a significant endorsement of the idea that victim-centeredness can be achieved without fundamentally changing the system, whilst still accepting consultative participation. It also indicates that addressing the occupational cultures of criminal justice practitioners in particular – and the wider legal community in general – is crucial.

Of course, we must install the caveat here that this is now a fairly old study that predates much of the more recent rhetoric and political action regarding victims. Thus we might question whether victims would indeed advocate more fundamental reforms if consulted on the matter now. No such studies or consultations are available.

Further light was shed on the position of witnesses attending court by Rock's (1990) detailed analysis on the place of the witness in the social world of a typical English Crown Court.⁵⁹ Rock's study is limited in that his focus was on witnesses as opposed to victims *per se* and was based on a single court, hence there is little discussion on how different parts of the criminal justice system come together and cooperate to assist victims. Nevertheless, Rock's conclusion showed that witnesses were kept at the margins of the court's social community and received little support, because the criminal justice professionals were afraid of being professionally compromised:

“They [witnesses] are confused and confusing, often distressed, a threat to the insiders who will not and cannot comfort them” (Rock, 1990: p.283).

Rock's findings again seem to indicate that adapting the criminal justice system to provide support and services to victims is largely a cultural issue.

⁵⁹ For an examination of services provided by fledgling victim support schemes outside the criminal justice process, see Maguire and Corbett (1987).

The Shapland et al. project was followed in the late 1980s by a similar study of Belfast's magistrates' courts and the Crown Court (Jackson et al., 1991). The groups under investigation included witnesses, especially those who had been called to give evidence as victims of crime. The project also sought to investigate public perceptions of court facilities by combining courtroom observations with an interview programme and a public opinion survey.

Jackson et al. produced similar findings to those of Shapland and her colleagues. Victims complained about the lack of information regarding their case and the court procedure. They also expressed unease at having to wait with defendants. Victims expressed extra dissatisfaction when called to court in cases where defendants changed their plea to guilty. Witnesses generally found the process of giving evidence uncomfortable and forbidding.

Jackson et al. concluded with a number of recommendations; including the improvement of facilities and the provision of an information desk and what would now be recognised as a Witness Service. In the courtrooms, Jackson et al. recommend improving the acoustics and dividing witnesses from defendants and their families. It was also said that the witness box should not be positioned so the witness had to turn in one direction to hear counsel's questions and in another direction to address the judge. The study does not make any indications regarding victims' participation or consultation in the criminal justice process, the changes suggested essentially amounting to service rights.

3.2.3.2 – Later studies

The report of the JUSTICE Committee (1998) made recommendations concerning victims at all stages of the criminal process, based on evidence submitted by various organisations and agencies of the criminal justice system and on a survey of all the magistrates' courts and Crown Courts in England and Wales. The survey indicated clear cultural separations at the courts as to "what should be provided for victim and witness care and what was not necessary" (Shapland and Bell, 1998: p.546). One cultural 'blind spot' was the need to pass information about victims and witnesses between agencies. Generally, courts accepted the benefits of physically separating victims and witnesses, but were less savvy when it came to (arguably more basic) human responses to these issues; such as preventing intimidation through security and watchfulness (ibid).

In the main JUSTICE report, the Committee stated:

“[C]riminal justice will have no integrity if it does not recognise and consider the role of victims and the services it needs to offer victims” (JUSTICE, 1998: p.22).

Whilst considerable progress in the treatment of victims was noted compared to ten years before, in the view of the Committee, present levels of service and support available to victims was still insufficient, whilst the responsibilities placed on victims within the system caused inconvenience and stress. As such, the Committee advocated a ‘service standards’ approach be taken towards victims within the criminal justice system, backed by a Code of Practice.

The Committee felt that victims should never be burdened with prosecution decisions, which we noted earlier seems an acceptable limit of such reforms. Nevertheless, the report recommended that vulnerable victims should be consulted over matters like bail and the effects of giving evidence. The decision maker should listen carefully to victims, but such consultation may or may not influence decision making and it would be important not to raise victims’ expectations. The report maintained there should be no duty on the CPS to consult *all* victims. In particular, however, those making prosecution decisions should have access to information about the effects of the offence on the victim.

At court, the Committee recommended that – in line with the Bar Council’s revised Code of Conduct – prosecutors should introduce themselves to witnesses before the trial, especially to victim witnesses. The report also called for national minimum standards as to the facilities available at court buildings.⁶⁰ In particular, the report recommended that a Witness Service at all courts should be financed from government funds and become one of the “core functions of running of courts” (p.73).

Overall, the JUSTICE Committee report spelt out recommendations for a criminal justice system based on service standards, backed by national Codes of Practice with a statutory Victims Commissioner as the ultimate point of complaint. The Committee was clearly in favour of much extended services, support and facilities being offered to victims to crime by the court. It is also clear that they entertain the notion of

⁶⁰ The absence of any nationally published survey on facilities at court buildings in recent years is perhaps indicative of their real level of priority in policy-making circles.

consultative participation – at least in relation to probation decisions post-sentence – and the voluntary provision of *information* to judges regarding sentence.

Lord Auld discussed victims in his report on the Workings of Criminal Courts (Auld, 2001). Auld framed his analysis not just in relation to victims, but all members of the public. This may betray an important debate; whether instead of just victims we should be considering the wider implications of ‘public-orientated’ changes to address an overprofessionalised criminal justice system (Christi, 1977) or whether the true focus of policy-making in this area is actually the public in general rather than victims in particular. These debates will be returned to in the next chapter.

Auld’s report noted that the scheduling task of matching the right High Court judge to the right case ‘distorted’ the system in a number of ways “that are unjust and upsetting to defendants, witnesses, victims and others involved in the process” (p.239). Similarly, Auld cites the “personal strain and burden on everyone else involved, not least the defendant, the victim and witnesses” (p.203) as a disadvantage of trying complex fraud cases by jury. Auld also concedes that some witnesses at court are forced to wait for extended periods and are then ‘bewildered’ at the course a case might take; for example, when prosecutors accept a plea to a lesser offence:

“For witnesses who are not victims, it is bad enough; for those who are – those who rightly consider the process to be in part a vindication of their suffering – it must be worse” (p.498).

Auld argues that such concerns pose a serious risk of alienating the public from the criminal justice process, particularly victims.

As a solution, Auld advocates more robust management and preparation of cases so that trials run to a more predictable plan. The report also calls for clear understandings to be established at the beginning of a case as to who is responsible for keeping the victim informed as to the progress of the case. This may indicate a new (service) right victims can expect, that as much as possible will have been done in advance to ensure a case runs smoothly.

Nevertheless, Auld dismisses the notion of *consulting* victims over decisions. In support of this position, the report cites arguments that such consultation would place great pressure on them, leaving them open to intimidation and raising false expectations. Auld also believes that victims lack the necessary objectivity and ‘knowledge or

experience' to be consulted in this way and that "at the pre-trial and trial stages of the process it has yet to be established that the alleged victim is in truth a victim" (p.500).

To offer a critique, we saw earlier that concerns about placing pressure on victims are legitimate, although in this author's view it is doubtful that merely *consulting* victims would cause undue upset, especially in light of Shapland et al.'s findings that some victims want to be consulted over prosecution decisions. Intimidation is a legitimate concern, but one which is dependent on individual (probably unusual, see below) cases. We have already critiqued the notion of 'objective factors' on which to base decisions, whereas it is difficult to see what 'knowledge or experience' a victim needs to form an opinion as to whether they would like a case to proceed. Finally, surely the return to past notions of the 'alleged victim' is a step backwards.

Auld's dismissal of victims' procedural involvement is based on concerns about their 'vindictiveness' and 'vengefulness' and is basically a due process argument. In these respects the report takes a rather narrow view, providing no evidence to support this characterisation of victims. As such, Auld is once again advocating service rights and hinting at the existence of the zero sum game. The report dismisses 'more radical suggestions' like giving victims party status, which I classify as non-fundamental reform. Like Brienen and Hoegen (2000) Auld argues that the continental *partie civile* or auxiliary prosecutor models affords few practical advantages to victims. Unlike the 'vengefulness' points noted above, this latter argument does appear to be made out.

3.2.3.3 – *Victimisation and witness surveys*

In recent years, victims' experiences of support mechanisms have been included in the British Crime Survey. The 1998 sweep confirmed that the key factor influencing police referral to Victim Support was offence type; with burglary victims and victims of violence the most likely to be referred (Maguire and Kynch, 2000a, 2000b). Domestic violence cases were referred to Victim Support more frequently than had traditionally been the case. Contact with Victim Support was highest amongst victims who said the impact of crime had been greatest, and 58% thought such support was helpful or very helpful, which rose to 64% in 2002/2003 (Simmons and Dodd, 2003). The 2002/2003 BCS also shows that most victims (75%) do not want advice or support. Nevertheless, only one fifth of victims who reported an incident to the police and wanted more information actually received it, mainly cases of burglary and violence. Of the victims

who reported incidents to the police, 6% recalled contact with Victims Support (Ringham and Salisbury, 2004).

The International Crime Victimization Survey has been carried out in a total of 54 countries. The latest available data from 1996 reveal that only a small percentage of victims of more serious crimes (burglary or violence) received any specialist help or support from a specialised agency. Less than 10% had received such help in *any* country, although many such victims would have appreciated it (Van Dijk, 2000).

Two other key sources of information are the Witness Satisfaction Surveys (WSS) (Whitehead, 2001; Angle et al., 2002) and the Vulnerable and Intimidated Witness Surveys (Hamlyn et al., 2004a, 2004b).⁶¹ The surveys were commissioned as a means of measuring the success of recent policy measures. Both surveys employed the method of approaching and recruiting witnesses directly at magistrates' and Crown Courts. These witnesses were then interviewed at a later date about their experiences and views.

The 2000 and 2002 Witness Satisfaction Surveys (WSS) revealed high levels of satisfaction with the police amongst witnesses, with 88% of those questioned being 'very' or 'fairly' satisfied with their treatment in 2000 and 89% in 2002. Satisfaction tended to be greater when respondents had been told they might be called as witnesses in court. Nevertheless, only a minority of these witnesses were kept informed about the progress of their case; 26% of victims and 16% of non-victims in 2000 and 19% of all witnesses in 2002. As with previous studies, perceptions of courteous treatment by the police was strongly linked with witnesses' overall satisfaction. In 2000 90% of witnesses claimed the police had treated them courteously and 92% (93% in 2002) of these witnesses felt satisfied. Satisfaction with the police seemed to be linked to whether witnesses felt they had been kept informed about the progress of their case.

More recently, the BCS has shown that in cases the police came to know about, victims were fairly or very satisfied with their handling of the case in 58% of incidents. Witnesses were satisfied with the way the police handled the (most recent) matter in 59% of incidents in the last 12 months where they had contact with the police (Walker et al., 2006). Both these figures remained relatively unchanged from the 2004/05 survey (Nicholas et al., 2005) and from 2003/04 (Dodd et al., 2004). In addition, the BCS shows that only 32% of victims felt they had been kept well informed about 'their' case

⁶¹ Discussion of the latter will be saved for our section on the evidential process below.

by the police in 2004/005 (Allen et al., 2006), a rise from 30% the year before (Allen et al, 2005). The BCS also indicates that victim satisfaction with the police is linked to the outcome of their investigation, specifically whether an offender is charged and/or victims' property recovered (Allen et al., 2005).

The WSS surveys also found that 35% of victims had contact with Victim Support in 2000 and 39% in 2002. Such contact was higher amongst victims of violence, sexual crime or (in 2002) harassment compared with other offences. Overall, in the 2000 survey 88% of victims who had contact with Victim Support were 'very' or 'fairly satisfied' with the service they received. This dropped slightly to 83% in 2002.

At court, 80% of prosecution witnesses and 72% of defence witnesses remembered receiving some information about the process beforehand in the 2000 WSS, mainly through leaflets. Receiving information about court visits had a significant impact on witnesses' overall satisfaction. Information for all witnesses was lacking in relation to how long the whole visit to court would take and what to bring to court.

Between the 2000 and 2002 WSS the number of witnesses having contact with the Witness Service went from 51% in the first survey to 81% in the second. This can be explained by the establishment during the intervening period of a Witness Service at all magistrates' courts. The surveys also showed that 10% of witnesses had a pre-court familiarisation visit before the day of the trial in both 2000 and 2002 (12% of victims in 2000). On the day itself, the 2002 survey shows that a further 57% of witnesses had the opportunity to look around the court before proceedings. Child witnesses and victims were more likely to have a pre-trial familiarisation visit compared to other witnesses.

Overall, in the 2000 sweep, 17% of witnesses had to wait more than four hours to give evidence (9% of victims) although most waited only up to one hour (31%). Forty three percent of victims had to wait up to one hour and 28% waited up to two hours in 2000. The 2002 survey suggested that waiting times had increased slightly. In 2000, 73% of prosecution and defence witness were put in separate waiting rooms, which rose to 83% in 2002. Again, waiting times were linked with witness satisfaction.

The Witness Satisfaction Surveys are perhaps of greater use to us in the present thesis than the BCS, as they cover support provided to victims at courts themselves. Furthermore, the methodological drawbacks of surveys like the BCS are well known (see Maguire, 2002; Criminal Statistics Review Group, 2006). We might be particularly

concerned about the accuracy of respondents' memory, especially if they were having multiple visits by various people at the time, as the affect may be to underestimate or indeed possibly overestimate victims' need for support. Crime surveys may also underestimate violent crime, especially domestic violence. Of course, if crime is being underestimated, then again we are also likely to underestimate the demand for services and support for such victims. In the case of the WSS, one obvious concern is that this is aimed only at witnesses, not victims. As such, this survey does not tell us whether victims are coming to court other than as witnesses – say to observe proceedings – and whether they are then being afforded services. The survey also cannot identify services offered to victims prior to the date of trial – such as pre-trial court visits – in cases where a victim's evidence is ultimately not required. It remains to be seen how the new Witnesses and Victims Experience Survey (WAVES) will address these problems.

As noted earlier, one of the goals of this research is to apply ethnographic techniques to victims in criminal justice, because these methods provide a depth and subtlety of information missed by wide-ranging surveying techniques on which we have had to rely (certainly in England and Wales) for nearly a decade.

3.2.3.4 – A seachange in victim support mechanisms?

Within the UK, Maguire and Shapland (1997) note that support and assistance for victims has traditionally been provided by generalist voluntary organisations. Nevertheless, with Victim Support achieving greater official attention and acceptance (Rock, 1990) such organisations in general have become more institutionalised (Van Dijk, 1988). Maguire and Shapland 1997 argue that this brings the benefits of increased training and resources but may trade away the advantages of a 'hands on' voluntary spirit. In addition the *No Witness No Justice* report from the Inter-Agency Working Group on Witnesses (2003) galvanised moves to ensure agencies within and beyond the criminal justice system began working together to support victims; the so-called multi-agency approach.

Most recently, the government's consultation on proposed reform to state compensation (Home Office, 2005d) has advocated the removal of small payments to victims of violence receiving injuries which are not 'serious' and instead providing them with the immediate practical and emotional assistance (no further details are given) we are told

the BCS suggests they require.⁶² The consultation proposes the creation of ‘Victim Care Units’, which would operate either as a government funded expansion of the services currently provided by the voluntary sector, a police-voluntary sector partnership or as a new system of police-led units. These reforms could represent quite significant changes in the way victims receive support and information in this country.

3.2.3.5 – *The way forward: providing facilities, services and support to victims of crime*

The above literature demonstrates victims’ need for a range of services and information during the criminal justice process, albeit even the more recent investigations continue to maintain that these needs are not being met (Shapland, 2003). Above all, victims appear to appreciate basic courteous treatment⁶³, which is a matter of occupational culture amongst individual criminal justice professions, the local culture of individual courts and, in a wider sense, instilling such treatment within the wider legal culture⁶⁴, which is also of great relevance to the issue of victims’ consultative participation in decision making.

Hence, providing for the needs of many victims may be a case of practicality and funding in the provision of facilities, and of adapting cultures at multiple levels. Both issues fall under the banner of non-fundamental reform which – following our previous section – would be backed by ‘service rights’. Unlike most existing literature, this thesis will examine the cultures of the criminal justice work force and the practical resourcing/operation of victim services and how they relate to the trial process. In any case, it seems that some potential ‘service rights’ have not received specific attention or analysis, such as a right not to be inconvenienced.

Whilst some commentators avoid going further, others make a case for victims’ participation; especially consultative participation on various issues, including prosecution and probation decisions. Whilst restorative justice is not the solution being discussed in this thesis, the support for (fundamental) reforms of this nature at the very least indicate a need to go beyond service rights if victim-centeredness is to be achieved in the existing criminal justice system (see Dignan, 2005). As such, it is submitted that

⁶² Although, as the BCS never asked victims whether they would *prefer* receiving such support to small amounts of compensation, this is a questionable conclusion.

⁶³ Albeit satisfaction with the police is related to outcomes of investigation (Allen et al., 2005).

⁶⁴ Chapters 6 and 7 will offer discussions of how these different cultures may be related.

the true victim-centred system must go further than Ashworth's 'service rights' to embrace the wider range of 'non-fundamental reforms'. The Auld report in particular is against this course of action, but bases its argument on an unsubstantiated 'vengeful' view of the victim. That said, we can agree with the report to the extent that it provides sound argument for why *some* fundamental reform may not assist victims; including the provision of widespread decision making power.

That said, perhaps in drawing such conclusions we miss an important opportunity. In direct contrast to Auld, it may be that truly putting victims at the heart of the criminal justice system means asking the victims themselves whether they need or want 'service rights', 'non-fundamental reform', 'fundamental reform', or some combination of the three, we have seen that this has not been done at all recently. Of course the difficulty with this position – as indeed with all victim decision making or consultation – is that it leaves victims open to intimidation. It also means that defendants in similar positions may be treated differently, although again if this system is to be grounded in the notion that decision makers should base all their decisions on all available information, this is not necessarily an affront to due process.

What we can say is that much of our recent knowledge concerning victim services and support derives from quantitative surveying techniques. Almost all the information we have since the widespread extension of support mechanisms like the Witness Service comes from these sources. One exception is a doctoral thesis by Tapley (2002) that followed victims through the criminal justice system and broadly concluded that they were now generally seen as consumers of that process, albeit the services offered to them were still limited in a number of respects. This notwithstanding, our general reliance on the Witness Satisfaction and other surveys is problematic, not least because the WSS concentrates on witnesses, some of whom are victims (see Jackson, 2004). This thesis is concerned with the position of victims in their own rights when giving evidence.

As such, there seems to be considerable scope for more ethnographic examination of these issues. This will be amongst the first ethnographic studies to examine the support afforded to victims at court in the increasingly professional, multi-agency, context.

3.2.4 – Victims giving evidence and vulnerable and intimidated victims and witnesses in criminal justice and in court

As previously argued, victims' 'rights' relating to evidence are seldom debated, and hence in this section it is hoped to identify specific needs to be addressed in a victim-centred system.

3.2.4.1 – Identifying the problem

Giving evidence can often be a difficult and perplexing experience. A courtroom is an unfamiliar environment for most people (Hamlyn et al., 2004a, 2004b). The evidence is often elicited in an unnatural manner; with witnesses told to present their answers towards the bench or jury whilst simultaneously receiving questions from another direction (Rock, 1993) and often having their answers directed for them by the manner and content of those questions (Danet et al., 1980; Luchjenbroers, 1996⁶⁵; Ellison, 2002). Witnesses are also required to present the information at an unnatural speed and volume; persistently being interrupted in their flow and asked to slow down or speed up or raise their voice (Shapland et al., 1985). In addition, victims are asked to cope with unfamiliar concepts, like hearsay.

Many of these practices reflect conventions steeped in the traditions of advocacy. Carlen (1976) notes how judicial proceedings in the magistrates' courts are facilitated by "the systematic manipulation of temporal, spatial and linguistic conventions" by professionals (p.128). The assumption that victims may be interrupted whilst giving evidence but lawyers should not be interrupted, the notion that victims should face the bench and the idea that there is a 'correct speed' at which to give evidence are therefore all deeply engrained cultural working practices. Crucially to the present argument, however, they are not fundamental to adversarial evidence, certainly not in terms of written rules of procedure, conduct, or laws.

Some victims find this process especially difficult. This may occur when a case involves extremely personal or sensitive information, or members of the victim's family. The victim may be afraid and intimidated by the defendant or supporters in the court's public gallery. In serious cases (or even not so serious cases) victims may simply find it upsetting to recount their experiences in public. Also, characteristics of

⁶⁵ Luchjenbroers's analysis is based on a single trial, but provides a fascinating insight into how lawyers can use their questions to elicit specific information.

specific victims might make them vulnerable; because they are disabled or have speech or learning difficulties, because they are young or just especially nervous individuals.

Rape victims were amongst the first witnesses to be recognised as facing particular challenges whilst giving evidence (Holmstrom and Burgess, 1978). Temkin (1987) suggests that giving evidence may be the most traumatic element of being a victim aside from the actual offence, a point echoed by Lees (2002). Temkin (1999) showed that reaching the trial stage might itself be difficult for these victims because of the poor response by police.

Victims of domestic abuse may also be especially vulnerable or intimidated whilst giving evidence. Cretney and Davis (1997) give the example of Linda Roberts, who attended magistrates' court committal proceedings only to be left alone in a waiting room, fearful that the defendant would find her. At the subsequent trial, Roberts found herself unable to go through with her evidence.

Like Temkin, Cretney and Davis criticise the attitude taken by the police (and prosecutors and sentencers) towards such victims. Their argument is that police are unable to look beyond the relationship that exists (or existed) between complainant and accused and assume the complainant victim will withdraw support. Whilst this is true of many domestic violence victims, the authors argue that this 'blaming' of victims becomes a self-fulfilling prophecy, born of a negative and disinterested police attitude.

Temkin (1987) and Cretney and Davis (1997) therefore emphasise the role of *occupational cultures* as a key prerequisite to victims' discomfort in giving evidence. This is another key argument of this chapter, that often the problems faced by victims and witnesses are not based on the adversarial model *per se*, but on the attitudes of those within it – especially the advocates who elicit evidence – and which may reflect enshrined principles of a wider legal culture on one end of the scale, but also localised 'court' or CPS office culture at the other extreme.

In 1998 the *Speaking Up for Justice* report responded to growing calls for something to be done to assist vulnerable and intimidated witnesses giving evidence. Appended to the report was a review compiled by Elliott of the relevant literature. The review discussed the difficulties inherent in defining 'vulnerable and intimidated witnesses'. Based on distinctions drawn from Healey (1995) a 'combined' approach was advocated for such definitions. Witnesses could be 'vulnerable' by reason of personal characteristics,

(disability, mental and physical disorders) but also for wider circumstantial reasons (being related to or involved with the defendant). The report concluded that witness 'intimidation' could occur in two ways, through specific victims being intimidated in individual cases – with a view to preventing them from giving evidence – or through a general atmosphere of intimidation created to dissuade residents in wider communities from involving themselves with the authorities.

Elliott's review suggests that victim intimidation is more widespread than the intimidation of *non-victim* witnesses. Women were more at risk from intimidation than men and intimidation is more likely when the witness knows the offender, who in most cases perpetrates the intimidation. Intimidation was especially prevalent in cases of rape, domestic violence, racial harassment and crimes against sexual minorities.⁶⁶ A review of the 1994 British Crime Survey suggested that verbal abuse and threats were the most common forms of intimidation. A Police Research Group Study (Maynard, 1994) further indicated that the two most likely times for a witness to be intimidated were soon after the offence and at the time the witness appears to give evidence.

The 1998 British Crime Survey has also shed light on victim and witness intimidation (Tarling et al., 2000). This confirmed that female victims were especially prone to intimidation, as were victims of violence. In the majority of cases it was the original offenders or their friends and family perpetrating the intimidation. Three quarters of reported incidents of intimidation were verbal and only 8% were – in the victim's view – intended to prevent him/her giving evidence. Overall, 8% of victims had suffered some form of intimidation, 15% when the victim knew the offender.

The 2002 Witness Satisfaction Survey (Angle et. al., 2002) indicated that 26% of witnesses feel intimidated by an individual and 21% by giving evidence. Intimidation by individuals was especially prominent among victims (27%), women (26%) and child witnesses (30%). Overall, 42% of all witnesses and 51% of victims were intimidated by either the process or an individual. 56% of witnesses were intimidated by defendants and 35% by 'official sources', including lawyers, police, court staff, judges and magistrates.

The JUSTICE (1998) report identified a class of 'vulnerable victims or victims with specific needs' including: victims of domestic violence; sexual assault; racial abuse;

⁶⁶ The review could not encompass all research on the vulnerability of children.

victims with learning or mental disabilities; victims who had suffered intimidation and the relatives of victims of homicide. During evidence, the Committee thought it strange that criminal justice practitioners considered it necessary to see the witnesses 'live' in the witness box, where they might be intimidated by the defendant. Again, this is a cultural convention rather than a necessity. As such, the report was in favour of screening off adult and child victims or the giving of evidence via video-link. The Committee also concluded that the level of intimidation and upset experienced by some witnesses was against the interests of justice.

3.2.4.2 – *Finding solutions: fundamental reform?*

Intimidatory cross-examination also concerns Louise Ellison (1998, 2001, 2002). Whilst Ellison welcomes restrictions on the cross-examination of rape victims on their past sexual history and the removal of unrepresented defendants' right to personally cross-examine rape victims, she argues that these issues have diverted attention from more fundamental concerns. For Ellison, the difficulties faced by rape and other victims during cross-examination are grounded firstly in the inadequate regulation of the process and, secondly, in the combative features of the adversarial system. Traditional mechanisms of restricting inappropriate cross-examination through the discretionary intervention of the judge are insufficient, because this may conflict with a judge's duty to ensure fair proceedings. Similarly, argues Ellison, the adversarial nature of criminal justice in England and Wales means advocates approach their task in a combative mindset.

Ellison (2001) states that reforms under the Youth Justice and Criminal Evidence Act 1999 – especially the introduction of special measures – did not go far enough because they reflected an 'accommodation approach' preserving the traditional adversarial model and the orality⁶⁷ principle (Ellison, 2002). According to Ellison, measures which deviate least from the traditional adversarial model are also least effective in alleviating stress and securing the best possible evidence.⁶⁸ Hence, Ellison concludes:

“The ultimate test of the government's declared commitment to meeting the needs and interests of victims of crime and of witnesses more generally will be a preparedness to move beyond the straightjacket of established trial procedure in the search for solutions” (Ellison, 2001: p.160).

⁶⁷ The notion that evidence is usually spoken out loud.

⁶⁸ For further arguments in favour of re-evaluating the adversarial model see Jackson (2003).

In the same vein, Victim Support (2002b) calls for more comparisons with inquisitorial criminal justice to temper the excesses of cross-examination.

The broad suggestion being made here is that the best means of assisting vulnerable and intimidated victims during evidence is to alter the character of the adversarial process; a fundamental reform. Arguably, however, these problems are more dependent on the attitude of lawyers and the manner in which questions are asked than on the specific adversarial nature of the system. This would imply that what is needed is not a fundamental alternation of the system, but rather its civilisation. This implies treating victims with courtesy – as people rather than sources of evidence – and installing professional aversions to interrupting victims giving their evidence or resorting to aggressive questioning styles. Such rules of civility are common in other professions that promote conjecture, including academia.

In support of this view, we will note in a moment the findings of witness surveys that seem to indicate special measures are having a beneficial impact on witnesses giving evidence in the existing system. In addition, Brienen and Hoegen (2000) note that although the process of cross-examination has remained largely unchanged the ‘rough edges’ have been taken off by recent reforms. This is not to say that such measures have matured to a point where the problems faced by victims giving evidence are nullified. Birch (2000) notes how ‘poorly served’ witnesses with learning difficulties will be by the 1999 reforms and labels the Act “a somewhat hurried piece of work, enacted to fulfil election promises” (p.223). Crucially, however, Birch’s underlying view is not that refined special measures would be fundamentally incapable of assisting victims in an adversarial system, but that their impact will be minimal whilst practitioners remain sceptical of the measures.

In another example, the impact of restricting the cross-examination of rape victims on their sexual histories – originally under the 1976 Sexual Offences Amendment Act – has been questionable because judges seem quick to allow such questioning under their preserved discretion to do so (Temkin, 1987).⁶⁹ Nevertheless, this limitation is again dependent on the working practices of judges, not the adversarial model or the

⁶⁹ Now under s.41(2) of the Youth Justice and Criminal Evidence Act 1999.

limitations of the measure itself.⁷⁰ Indeed, Ellison's suggestion that judges are incapable of safeguarding victim rights due to conflicts with their duty to ensure fair proceedings is simply a reprisal of the due-process argument, assuming a conflict between victim and defendant rights. In its place I would argue that as judges become accustomed to the concept of victim rights (amounting to non-fundamental reform) and a generally more 'civilised' attitude taken to victims and evidence in general, then the cultural impression that 'due process' is being compromised will fade. Of course this is easier said than done, for despite the impression that judges may already be taking on such roles in some cases (see Chapter 6) it will require training and – perhaps more importantly – cultural change on the part of judges themselves.

3.2.4.3 – *Pre-recorded examination in chief*

Possibly the most significant of the special measures is the capacity for vulnerable child witnesses to give evidence via pre-record examination in chief. Such evidence is adduced by specially trained police officers in suites designed to reduce intimidation. The interview is recorded on video to be played in court. Prior to 2001, guidance for practitioners conducting such interviews was found under a Home Office Memorandum (Home Office and Department of Health, 1992). In a review of research on the application of the Memorandum, Davies and Westcott (1999) confirmed the vulnerability of very young witnesses and the need to present questions in a way they could understand. Children were shown to require support throughout the process, which included adequately preparing them for the interview and giving them proper closure. The language used and the conduct of the interviewer were essential not only in terms of supporting the child but also to avoid children simply 'going along' with implications or suggestive questioning.⁷¹

The report drew its findings principally from empirical field studies of children giving evidence in England and Wales (including observations of pre-recorded examinations) and also from laboratory experiments conducted on school children in the US. Clearly the latter data in particular are questionable in terms of applicability in the British

⁷⁰ Although in *R v. A* ([2001] 1 W.L.R. 789) it was held that s.41 restricted the admissibility of pertinent evidence.

⁷¹ Bull and Corran (2002) suggest that the *manner* in which an interviewer speaks to a child may be as influential as the words used.

context, and the authors admit that these studies reflect 'American concerns'. Nevertheless, it also argued that:

"These experiments do, however, enable researchers to study a single issue with a precision rarely possible in field studies" (p.6).

Overall, the authors advocate a flexible approach to interviewing child witnesses, allowing scope for open-ended questions and the child's 'free narrative' responses. Davies and Westcott (1999) and Welbourne (2002) – who analysed a sample of pre-recorded examination in chief tapes recorded under the *Memorandum* – agree that the foci of the *Memorandum* on evidentially building a case and preparing young witnesses for court were insufficient to meet the needs of vulnerable children.

The 1992 Memorandum was then replaced with new guidelines (Home Office, 2001a). These emphasised the importance of preparing witnesses for the interview and for the interviewer to have regard to the interviewees' specific circumstance; including their race and level of cognitive understanding/disability. The guidelines also set out the benefits of establishing rapport with interviewees in order to reassure them and assess their level of understanding. The document emphasises the interview's progression from rapport to open questions – eliciting a 'free narrative' – to more specific queries.

The potential of pre-recorded examination in chief is discussed in Chapter 7. For now, it will suffice to say that the operation of this measure hints that the adversarial model is capable of incorporating a wider form of evidence, which may be beneficial to victims. The existence of such evidence already in the system also implies that it would be not be a fundamental reform to expand its application to more victims and witnesses, just as video-links, screens and so on were extended to adult witnesses as 'special measures' in 1999.

3.2.4.4 – *Witness surveys*

Witness Surveys have provided some indication as to the impact of special measures and other reforms intended to assist vulnerable and intimidated witnesses.

Results from the 2002 Witness Satisfaction Survey (Angle et al., 2003) revealed a number of improvements in witness satisfaction compared to the baseline survey (Whitehead, 2001). Seventy eight percent of witnesses were satisfied with their experience of the criminal justice system, an increase of 2% from 2000. Satisfaction

amongst *victim* witnesses had increased by 4%, meaning 71% of all victim witnesses were satisfied overall. Eighty six percent of victim witnesses reported being satisfied with the conduct of the prosecution lawyer in their case and 92% were satisfied with the conduct of the judge. Nearly all (96%) of witnesses thought they were treated courteously by the lawyer on 'their side'. Witness who were treated courteously by lawyers on both sides and were given the opportunity to say everything they wanted were much more likely to be satisfied overall compared to other witnesses. Two thirds of witnesses (67%) said they would be happy to be witnesses again compared to 61% in the baseline survey. It was concluded by the 2002 survey that witnesses feeling they had been taken for granted was the strongest predictor of dissatisfaction with and unwillingness to be a witness again. Thus, the recommendations were that witnesses must feel appreciated and helped to feel less intimidated (Angle et al., 2003b).

These findings indicate that witnesses can still be satisfied with the criminal justice system after being subject to the adversarial model of evidence. Regarding evidence, it seems that victims and other witnesses want a simple extension of the courteous and civilised treatment they require from the rest of the system, along with the opportunity to say everything they want. This supports the assertion that the manner in which lawyers conduct themselves during evidence is key, not the process itself. It also suggests that victims would benefit from less restrictive styles of eliciting evidence that resist interrupting them.

The Vulnerable and Intimidated Witness Surveys were generally supportive of special measures (Hamlyn et al., 2004b). Overall satisfaction amongst VIWs rose between the first and second phases by 5%, although the 69% of VIWs reporting satisfaction was lower than the 78% of *all* witnesses reporting satisfaction in the WSS. Witnesses rated special measures facilities highly, with a third reporting they would have been unable or unwilling to give evidence without them. Witnesses who used special measures were less likely to feel anxiety than those who did not.⁷² Nevertheless, the report commented that "there is still some way to go before the needs of VIWs are met" (Hamlyn et al., 2004b: p.xv).

⁷² Early concerns from practitioners and the judiciary regarding the impact of special measures on jurors was addressed by Davies (1999) who found that jurors preferred 'live' evidence but this did not affect their decision making.

The NSPCC has also commissioned research on video-links, which involved speaking with 50 young witnesses who had given evidence (Plotnikoff and Woolfson, 2005). The authors suggest that “the essentially compulsory use of TV links for young witnesses in cases of sex or violence” (p.11) restricts the options available to children. This may go against Article 12 of the UN Convention on the Rights of the Child of 1990, which requires decision makers to involve children in the decision making process on matters relevant to their lives. The report suggests that – given a genuine choice – some children might choose to forgo the TV-link in favour of being screened off from the defendant and gallery in the courtroom.

The suggestion that special measures are being forced upon victims is a troubling one. In the application of special measures provisions under the Youth Justice and Criminal Evidence Act 1999 – and following the *No Witness No Justice* scheme (Home Office, 2004g) – ‘vulnerable and intimidated witnesses’ are supposed to be identified as such at an early stage by police officers. To this end, police officers taking a witness statement on the standard ‘MG11’ form should also submit a ‘MG2 initial witness assessment’. This latter form records details of the witnesses’ vulnerability or intimidation and any special measure necessary to improve the quality of evidence (Home Office, 2004h).

It is nevertheless difficult to adduce from the police guidelines how exactly the assessment of vulnerability is made and the recommendation for special measure formulated. The process seems to begin with the question on the MG11 “does the witness require ‘special measures’ as a vulnerable/intimidated witness?” If the officer answers ‘yes’ then he or she is directed to the MG2. No guidelines, however, indicate how this initial assessment is to be made. Following this, the MG2 does contain a section where officers must “give the views of the witness as to why the [special] measures sought are required”. This implies consultative participation on the issue of special measures, an interpretation supported to some extent by the accompanying guidance:

“It is essential that the witness be asked to give his/her views, since any court considering granting a measure must consider all circumstances, and in particular the views of witnesses when deciding where the interest of justice lies” (Home Office, 2004h: p.42).

That said, there is no indication in the guidelines or the police forms themselves as to how a witnesses who *does not* want to give evidence via special measures (even if they

might be entitled to them) would make this view known. The Home Office guidance document for witnesses – *Witness in Court* (Home Office, 2003h) – gives the following indication:

“The court will decide if you qualify for special measures. They will get advice from the police, the Crown Prosecution Service or the defence lawyer, and take account of your views on whether you want to apply for special measures” (p.21).

That said, the guidance is also clear that children under 17 in cases of sexual offences or violence, neglect or abduction will be considered “in need of special protection and “benefit from strong presumptions” that their evidence will be given by pre-recorded examination in chief and video-link “unless the court considers the measures will not maximise the quality of evidence”. The MG2 form itself is even more prescribed in this regard:

“If either a) [sexual offences] or b) [offences involving violence, cruelty or abduction] apply, then the child witness is ‘in need of special protection’ and the admission of a visually recorded interview, if available, is mandatory and any other evidence must be given by a live link” (Home Office, 2004h: p.39).

This is an interpretation of s.21 of the Youth Justice and Criminal Evidence Act 1999, which sets out the special protection to be afforded to witnesses under 17 years of age. Here, s.21(3) confirms that the “primary rule” is that any pre-recorded evidence in chief is admissible, and that all other evidence should be given via live video-link. Nevertheless, a court can depart from this principle if it believes that such facilities will not maximise the quality of a witness’ evidence (s.21(4)(c)). Crucially, s.19(3)(a) of the Act requires courts to take account of any views expressed by the witness when determining whether the quality of evidence will be maximised through special measures. This subsection also applies to all other witness, including those who do not fall under s.21, but are still ‘automatically’ eligible for special measures because they are under 17 years of age (s.16(1)(a)) or a complainant in respect of a sexual offence (s.17(4)). Thus, in most cases, it seems unlikely that young witnesses will be compelled to give evidence via special measures against their will. This includes most young witnesses falling under s.21, as in most cases this surely would not maximise the quality of the evidence. In a similar example, whilst adult complaints of sexual offences are automatically entitled to special measures under s.7(4), the Act clearly states that such victims can give up this automatic ‘right’ under this subsection.

Of course, this is all dependent on victims and witnesses being clearly informed that they are not obliged to give evidence through special measures. In Chapter 6, however, we will see that witnesses are not always presented with the alternatives.⁷³ This effectively means such victims are compelled to use the special measures facilities. Of particular concern on this point is the position of child witnesses giving evidence in sexual offences or offences of violence abuse or abduction, so-called 'witnesses in need of special protection'. The above extract from the MG2 form interprets the 1999 Act as requiring the mandatory admission of pre-recorded evidence, if such evidence is available for such witnesses. The form also suggests that all their other evidence 'must' be given via video-link. Again this is based on s.21, which states at s.21(5) that, in the case of witnesses in need of special protection, the court does not need to be satisfied that the use of special measures will maximise the quality of the child's evidence. This excludes the need to consider the child's view under s.19(3)(a).

Hence, this does raise the concern that at least some children may be afforded little choice over whether they give evidence through special measures.⁷⁴ Essentially the difficulty seems to be that the Act, and the resulting guidance documents (Home Office, 2004h), apparently do not account for witnesses who are automatically eligible for special measures, but for whatever reason do not wish to give their evidence in this way.⁷⁵ Of course, it is open for prosecution advocates not to make an application for special measures, but s.19(1)(b) of the Act gives the court a discretion to make a special measures direction of its own accord; which it seems it may be compelled to do, at least for children 'in need of special protection'.

This poses considerable questions as to what input victims in general have over the manner in which they give evidence. This is something we will return to in Chapter 6 but – at the outset – the implications of our earlier discussion above, coupled with the NSPCC's findings, suggests that victims should not only be given decision making power in relation to whether they give evidence, but also the discretion to choose how that evidence will be given. Arguably, compelling witnesses to give evidence through special measures is contrary to the spirit – if not the letter – of the 1999 Act. It is also

⁷³ See page 296.

⁷⁴ There appears to be no case law to assist us with our interpretations of s.21 on this point.

⁷⁵ Apparent disadvantages to witnesses of giving evidence via video-link in particular are discussed in Chapter 6.

contrary to the principle of consultative participation that may underlie victim-centred criminal justice.

3.2.4.5 – *The way forward: vulnerable and intimidated witnesses in criminal justice and at court*

Victims face significant difficulties giving evidence in the justice system of England and Wales. The reasons for this are multifaceted, incorporating the design of courtrooms, the lack of facilities, lack of information and preparation beforehand, and the occupational practices of lawyers. In recent years, attempts have been made to address these issues (for the most vulnerable) through the provision of special measures which distance the witness from the adversarial process, but do not change it fundamentally. The question is whether this is sufficient to achieve victim-centred criminal justice.

I would suggest that there is no reason to suppose that the adversarial model of evidence cannot be adapted to improve the experience of victims without fundamentally altering its character. The fact that this has not yet been achieved – I would argue – is attributable to the resistant attitudes of professionals accustomed to evidential conventions that include a presumption that lawyers dictate what a victim says and how they say it.

Witness surveys indicate that special measures can assist victims, but what is really needed is a change in lawyers' expectations of the procedure. I therefore agree with Ellsion that the 1999 reforms are not enough. Nevertheless, I would suggest that the basic process of examination and adversarial cross-examination need not be altered (a fundamental reform), evidence to support this contention will be presented in Chapter 6. Rather, the notion of 'service rights' must be extended to victims giving evidence. We have already argued in favour of a right for victims 'not to be inconvenienced'. In evidence this may extend to an expectation that victims will not be unduly interrupted, or will not be the subject of excessively hostile questioning. In other words, the suggestion here is that evidence becomes a *civilised* process whereby the victim is treated as a fellow human being – or perhaps a *customer* (Zauberman, 2000; Tapley, 2002) – rather than a source of evidence. Fundamentally, the survey data indicates this is what the victims themselves value. Victim-centred justice also implies that *all* victims are given the right to choose how they give evidence – minimising apprehension and

intimidation – and will certainly not have special measures enforced upon them. Of course, in keeping with the previous discussion, the suggestion is that such expectations be backed by rights and that such rights are enforceable, which again leads us to questions of whether this means appeals, complaints against judges or separate trials within trials, to be addressed in full in Chapter 7.

Contrary to Ellison (2001), I would argue that judges are in the best position to enforce such rights through proactive intervention. To suggest that this would prejudice the defendant is to presume a zero sum game. The real barrier is cultural, and so it may be that as advocates and judges grow accustomed to dealing with victims courteously, it will become less acceptable for lawyers to resort to intimidating methods. This hypothesis will be tested later in the thesis.

By preserving the existing evidential process, we again avoid fundamental reform. Moves to treat victims in a civilised manner – and to cease interrupting and dictating how they give their evidence – would result in a style of evidence more closely akin to that employed now for children under pre-recorded examination in chief. Even this, I would argue, is not a fundamental change in the evidential system, although the full argument must be saved for Chapters 4 and 7.

On the place of this research, it is again apparent that little observational or ethnographic data has been gathered on the issue of evidence-giving for some time. There are also no up to date first hand data available on lawyers' questioning strategies or on the reaction of judges and magistrates to vulnerable and intimidated witnesses, or support offered from the bench. In this latter case, the two exceptions are the article from Plotnikoff and Woolfson (2005) and a recent discussion on situating video-link rooms outside the court building by Applegate (2006). The first authors cite an extract from a *Judicial Studies Board Bench Book* (a judicial training instrument) which suggest that, in the case of children giving evidence through special measures, Crown Court judges should guard against 'over-rigorous' cross-examination and should ensure the language used is suitable to the child's age and that the child has the opportunity to answer questions. Based on interview data, Applegate (2006) notes that judges do indeed seem to be stopping overly harsh questioning by barristers in video-link cases. This lends weight to the notion that judicial involvement in safeguarding victim rights may simply constitute an extension of an existing judicial function.

There has been no attempt to compare evidence given through special measures directly with other evidence and there are no recent data on the cultural attitudes of practitioners regarding special measures. In addition, I have said previously that a major benefit of ethnographic methodology is that it captures the 'human element' that so characterise criminal trials. This seems particularly relevant in the case of victims giving evidence, where problems may principally lie in the 'attitude' of lawyers and the 'atmosphere' created in the courtroom.

3.3 – PART 3: ASSESSING WAYS FORWARD

In asking "what does it mean to put victims 'at the heart' of the criminal justice system?" we can appreciate that this question is grounded in the 'narrower' form of 'penal' victimology concerned with victims of *crime* (Van Dijk, 1983). Academic impressions of what it means to be a 'victim of crime' are certainly expanding. Hence, a genuinely victim-centred system must accommodate the needs of a wide variety of victims; including secondary victims, victims who do not bring their case to the criminal justice system – or do not *wish* to be labelled as victims – or do not conform to stereotypical notions of victimhood. On this last point, we need to know whether levels of service, support and courtesy extended to victims during trials differs depending on whether victims conform to stereotypical ideals, something this thesis will attempt to shed light on. As far as I am aware, there have been no studies conducted specifically on non-stereotypical victims in court.

In the modern climate, any victim-centred justice system would need to afford victims genuine and enforceable 'rights'. Whilst initially we might be concerned that this will unfairly affect the rights of defendants, we have seen numerous suggestions that a 'zero sum game' need not exist. When looking for evidence of rights in recent policy documents, we can note the general restriction to so-called 'service rights'. Indeed, whilst a lot of attention seems to have been paid to victims' right to services – and also their 'rights' in relation to sentencing – relatively little work has been done on victim rights during the criminal trial procedure itself. At the same time, we can also argue that such 'rights' as have been afforded to victims are enforceable only through complaint procedures external to the criminal justice process. As such, this thesis will contribute by examining whether victims may be afforded procedural rights in the trial – amounting to 'non-fundamental reform' – and enforceable from within the criminal procedure (especially through the proactive involvement of the judiciary). From the

above discussion, such rights will arguably include a right to consultative participation (including consultation on prosecution and sentencing), a right not be inconvenienced, and a right to choose whether or not to give evidence and how it will be given.

This review supports the assertion that our recent information on victims, witnesses and vulnerable and intimidated witness at court derives from surveys. My argument remains that these figures should be supported by more first hand impressions of victims in criminal trials, especially as so much development has occurred since the last in-depth ethnographic studies carried out in this area; including more 'professionalised' service provision, the advent of 'victim rights'⁷⁶ and the use of special measures and victim personal statements. The surveys also provide few details on the evidential process itself; such as the techniques lawyers use to question victims, their views of special measures and VPS statements, and the treatment of all witnesses. We also have no up to date study on the use or views taken by practitioners of victim personal statements in England and Wales.⁷⁷

In relation to sentencing, there has been some suggestion that participation by the victim could be therapeutically beneficial. Such a result however seems potentially conducive to a victim-centred system as a whole. As such, this thesis seeks to apply this to criminal trials more widely – especially the evidential process – by examining the extent to which victims might be allowed to give wider accounts (as a right), which would include fostering the presumption that they should not be interrupted and generally treated in a civilised manner. It will also compare evidence with and without special measures.

As hypothesised in Chapter 1, our review indicates that the government's interest in victims may be born from many influences. Whilst Paul Rock in particular has written a great deal on this relatively recently, the pace of change is such that these developments are now ripe for reassessment. In addition, Rock does not consider 'macro' theories or combine political analysis with an analysis of policy implication. This thesis will bring together both political and practical aspects of the 'victim' issue to reach overarching conclusions on the nature of 'victim-centred' criminal justice and address whether the policy-making background has influenced the application of such reforms. It is to the policy-making process that we next turn our attention.

⁷⁶ Although the author does not consider this an accurate label given their *external* enforceability.

⁷⁷ But see Graham et al. (2004) for discussions on how they are taken by police.

CHAPTER 4: VICTIMS OF CRIME: A POLICY CHAIN?

This chapter seeks to identify whether there are specific driving forces behind the progression of official actions on crime victims and asks whether such actions can be classified as a unified 'strategy'.¹ This is important, because relevant policy documents tend only to discuss a limited range of influences. Commentators such as Elias, however, have suggested that victim policies may have less overt, political purposes (Elias, 1986). As noted in Chapter 2, the conclusions and observations made in this chapter are based on a grounded analysis of policy documents and responses to qualitative interviews conducted with policy-makers and local criminal justice actors. In other words, themes were identified and coded from the data, producing 'categories' which are argued to represent the real world of policy-making. Documents and interviews were also the subject of semiotic analysis (discussed in Chapter 2) whereby each text was evaluated to identify underlying meanings. As Rock (1990, 1998, 2004) has covered preceding developments in great detail, the primary focus of this chapter is on developments from the advent of the New Labour government in 1997, and especially developments from 2004 onwards.

My contention is that 'victim policies' are indeed derived from a wide variety of different political pressures and areas of political activity, not all of them conducive to victims' needs. This will be demonstrated at the end of the Chapter, where the policies as a whole will be critiqued. As such, we may be mistaken in thinking of 'victims' as a single or unified 'policy'. Such pressures/areas include: the nature of policy-making; the mechanisms by which national strategies are implemented locally; developed understandings of 'victimhood'; greater distinctions drawn between 'victims' and 'witnesses'; the work of victim assistance groups; wider reform agendas (financial concerns, efficiency, a 'target culture', the multi-agency approach); so-called 'populist punitiveness'; international influences; the development of 'rights discourse' and macro influences (by which I mean wide scale social and political changes which appear to be transnational, certainly in the developed world). These then are the 'categories' derived

¹ As has recently been suggested (Home Office, 2003a).

from the analytical techniques described above and in Chapter 2. Throughout the chapter, links will be drawn with the more general literature on policy-making to illustrate how the characteristics of reform in this field may be far from unique, reflecting broader political trends, especially in relation to 'governance' (Crawford, 1997; Jordan et al., 2005).

4.1 – THREE POSSIBLE INTERPRETATIONS

This leaves us with three possible interpretations of government action on victims, which were introduced in Chapter 1. Firstly, there is the possibility that all such actions are part of a consistent and unified strategy to assist victims and witnesses. The second possibility is that actions that, incidentally, assist victims and witnesses may be grounded in a different set of political concerns. This is certainly what Rock found when studying the politics of victims relating to the development of Victim Support in the mid 1980s and early 1990's:

“In a sense, *reparation* proved to be the Trojan horse which carried victims support schemes to political prominence. Victims support schemes were to be part of the package that were approved by ministers in March 1984 as a 'submission on reparation', and they were to be carried piggy-back thereafter” (Rock, 1990: p.345-346, emphasis added).

The third possibility is that – now that victims and witnesses have achieved at least rhetorical acceptance in policy-making (*ibid*) – new policies are being packaged as the continuation of work for these groups but are in fact intended to achieve other aims such as, for example, increasing efficiency in the criminal justice system or, to repeat Elias' argument:

“[V]ictims may function to bolster state legitimacy, to gain political mileage, and to enhance social control” (Elias, 1986: p.231).

Of course, all three possibilities can probably be applied to some aspects of the government's work on victims, especially the Victim's Charters. The central question, however, is whether this work is all part of the 'same thing' or instead reflects many different politics.

4.2 – VICTIMS AND WITNESSES: SHAPING THE ‘POLICY’

In July 2003 the Home Office published a national strategy to deliver improved services for victims of crime and witnesses called to give evidence in court. Titled *a new deal for victims and witnesses*, the strategy represented a clear indication of the government’s understanding of the needs of victims and witnesses (Home Office, 2003a). It also presented the government’s views on the changes that had already been made, the gaps that had been left and plans for future improvement. By closely examining such documents one might construct the government’s underlying views of what it means to be ‘a victim’ or ‘a witness’ and whom it is they are trying to help. Indeed, the *new deal* itself includes working definitions for ‘victim’ and ‘witness’.

In sum, the *new deal* is a document that pulls together the various strands of government action relating to victim and witnesses – compensation, information provision, support for vulnerable and intimidated witnesses, funding for the Witness Service and so on – and presents them as a unified strategy.² This is achieved within the broader context of a multi-agency approach and standards articulated through the government’s Public Service Agreement (PSA) targets. So, the *new deal* not only sets out future measures, it also provides a clear example of a ‘strategic approach’ to policy-making on victims and witnesses, which has also been employed in other areas of policy-making like health (Greener, 2004) and education (Selwyn and Fitz, 2001). As such, the *deal* may also be misleading if we are right that ‘victims and witnesses’ is not a unified or consistent ‘policy’ at all. The difficulty with the *new deal* – and most other policy documents relating to victims and witnesses – is that fundamentally it suggests a clarity and consistency of purpose (internally and in relation to all past measures) that may not reflect the complexities and practicalities of actual policy-making.

In fact, this chapter will seek to demonstrate that the occasional publication of ‘review’ documents like the *new deal* is merely the latest product of an ongoing process of policy-making characterised by complex interactions between government departments, the parliamentary and political process and ideological movements domestically and abroad. As such, this is an example of what is now popularly termed ‘governance’ which Crawford – in his discussion on the localisation of crime control – views as:

² The explanatory notes accompanying the Domestic Violence, Crime and Victims Bill called the *new deal* “the first national strategy for victims and witnesses” (Her Majesty’s Stationery Office, 2003: p.4).

“[A] pattern of shifting relations which involve: the fusion of, and changing relations between, the state, the market, and civil society; a move from ‘social’ to ‘community’; greater individual and group responsibility for the management of local risk and security; and the emergence of new forms of management of public services and structures for policy formation and implementation” (1997: p.6).

We will see in this chapter that much of the development in policy-making and implementation in this area of reform seems to reflect these changes. This is also true across other areas of policy-making. For example, in the context of education policy, Bache (2003) defines governance as:

“[T]he increased role of non-government actors in policy-making...The term ‘governance’ implies an increasingly complex set of state-society relationships in which networks rather than hierarchies dominate policy-making” (p.301).

The concept of ‘policy networks’ and still wider ‘policy communities’ (Jordan et al., 2005) is key here, as an important argument of this chapter is that the ‘victim’s policy’ has derived from multiple sources rather than a simple decision on the part of hierarchical policy-makers to address the issue of crime victims.

Consequently, the ‘snapshot’ provided by the *deal* tells us little about the underlying forces or actors driving the policy (if they exist), or the origins of such policies. Thus, even when examining the most recent policy documents – such as the consultations on a new Witnesses’ Charter (Home Office, 2005g) and *Convicting Rapists and Protecting Victims* (Office for Criminal Justice Reform, 2006) – these only provide us with static impressions of a dynamic process.

To achieve a more intricate understanding of official policy regarding victims and witnesses, we must place such documents in the context of wider and preceding developments. This is clearly illustrated by Rock:

“[P]olicies for victims sometimes seemed to have little directly to do with the expressed needs of victims themselves and more to do with other politics. And they attain meaning only within the larger framework which those politics set” (1990: p.34).

Hence, whilst the ‘larger framework’ set by politics suggests a unified ‘strategy’, those politics may not individually be aimed at assisting ‘victims themselves’.

4.2.1 – A policy chain?

The impression derived from documents like the *new deal* and more recent publications is that past and present actions related to victims and witnesses are indeed part of some consistent strategy to improve their lot. If we are right in arguing that the ‘policy’ actually originates from a whole range of different sources, then how are we given this impression? The answer may lie in the fact that policy-makers inevitably link a government’s recent actions to a succession of previous actions. Looking at the various official policy documents one quickly appreciates how they are linked together in a chronological chain of policy-making, which stretches backwards through New Labour’s 1997 election manifesto to encompass measures taken by previous governments. By this, I mean that each new document generally refers to the last in a manner reminiscent of citing legal precedent.

The 2003 *new deal* itself is a particularly good illustration, devoting three pages to recounting the government’s record on victims and witnesses. Indeed the title ‘new deal’ echoes the 2002 chapter *a better deal for victims and witnesses* from the White Paper *Justice For All*, a title also used for a chapter in the government’s criminal justice review of the year before (Home Office, 2001b, 2002). Similarly, the 2003 Inter-Agency Working Group on Witnesses’ report *No Witness - No Justice* and its accompanying Ministerial Response both open with a reference to Labour’s pledge to ‘put victims and witnesses at the heart of the criminal justice system’, also found in *Justice for All*. The chapter *a better deal for victims and witnesses* itself began by recounting the government’s earlier work in assisting Victim Support and the expansion of the Witness Service (Rock, 1990).

That this should be the case is not at all surprising because, as Rock (1986, 1990) observed in England and Canada, policy-making often requires the ‘latest’ innovations to be packaged as a *continuation* of work that has already been done and has therefore already met with political acceptance:

“Policy innovations would have been made to seem not only the inevitable result of all that had gone before but the natural precursor of what was to come” (Rock, 1990: p.253).

“[Y]ou don’t say you’re launching a new initiative. You say you are simply escalating, strengthening, responding in some way to public pressure, regarding

something that's already been going on and has a long and solid history" (Rock, 1986: p.282).

4.2.2 – Deconstructing the policy chain

Rock's observations represented a starting point for the development of the following chapter. Here, I began by ordering the various developments, policy documents and reforms in chronological order, and examining them sequentially. The relevant timeline of developments is reproduced in Appendix 3. This preliminary exercise emphasised, in particular, the impression that new policy developments are almost always presented as the logical extension of previous (established) reform agendas. The timeline of chronological developments (or 'policy chain') was combined with transcripts of interviews conducted with central policy-makers and local administrators in the area under review. In accordance with the principles of grounded analyses (see Chapter 2) overall themes were thus derived, which were listed above as political pressures and areas of political activity.

In this chapter, the goal will be to conduct a thematic analysis of victims 'policy' documents, reforms, and the views of relevant interviewees. In other words, the data is to be analysed not chronologically, but by areas of political activity and pressure. In so doing, the chapter aims to deconstruct and debunk the myth of the 'policy chain' in relation to victims (and perhaps other policy areas), exposing the complex interaction of influences that really drive such reforms³. At the same time, it is predicted that such analysis we will also reveal the limitations of existing reforms to meet the needs of victims.

4.3 – POLITICS, PRESSURES AND INFLUENCES DRIVING THE 'POLICY CHAIN'

4.3.1 – The nature of policy-making

Above, I have introduced the argument that policy-making is portrayed as a sequential process, all actions being linked to previous developments. One good example relates to victim 'rights', discussed in Chapter 3. Here we perceive a development of policy from the first Victim's Charter of 1990 – based on probably fallacious notions of

³ Nevertheless – and purely for convenience – the term 'policy chain' will be retained as a reference to the chronological advent of such developments over time.

(unenforceable) rights (Fenwick, 1995) – to a more refined second Victim’s Charter – based on service standards – to the Victim’s Code of Practice (Home Office, 2005f); a compromise of non-fundamental reform and externally enforceable rights. The wheels of progress were greased throughout by a succession of reports (Auld, 2001) consultations (Home Office, 2005g, Home Office, 2005h) and pilots (Hoyle et al., 1999) although – as argued in Chapter 3 – it could be said that the end result does not take victim rights much further owing to the continued reliance on external complaint mechanisms.

In another example, the development of special measures to assist vulnerable and intimidated witnesses give evidence in court – such as screens and video-links – can be traced back to the initial government funding of the Crown Court Witness Service announced in 1991.⁴ Limited provision for pre-recorded examination in chief (for children) then arrived in the Criminal Justice Act 1991⁵ and then – via the *Speaking Up for Justice* report (Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System, 1998) – came the rollout of special measures under the Youth Justice and Criminal Evidence Act 1999. Again, I have argued in the last chapter that the outcome of this process may still fail to meet the wider needs of victims during the evidential processes, and that special measures remain a non-fundamental reform that does not alter the tenets of the existing system.

Such policies then do not appear from nowhere, or at least are not portrayed as such by policy-makers. This apparent need to ground reforms on well-established principles also means such measures (once initiated) must be consolidated, assessed and refined.⁶ Thus, having introduced practical reforms over the last few years in the Youth Justice and Criminal Evidence Act 1999, the Criminal Justice Act 2003 and the Domestic Violence, Crime and Victims Act 2004, from 2004 onwards there is a sense that policy-makers are trying to win over criminal justice practitioners and administrators to produce occupational cultures and practices more conducive to tackling victims’ needs.

⁴ It was announced in 1996 that all Crown Court centres now had a Witness Service although it is debatable whether this was truly accurate. Funding to expand the Service to all magistrates’ courts came in 2001 when Victim Support’s grant was increased to £22.7 million.

⁵ See Chapter 3.

⁶ Assuming the government does not change. Even if it does, we can note from the history in England and Wales that Labour built on the pre 1997 work of the Conservatives – increasing funding to Victim Support and refining the Victim’s Charters – rather than dropping such measures.

One example of this 'consolidation' process has been the general shift towards collecting information from victims and witnesses themselves. We saw this demonstrated in the last chapter through the Witness Satisfaction Surveys and the Vulnerable and Intimidated Witness Survey. More recently there has been the introduction of the new Witness and Victim Experience Survey (WAVES). This tendency to consolidate reforms with empirical evidence reflects wider trends towards 'rational' or 'evidence-based' policy-making (Lawrence, 2006), the emphasis now being on 'what works' (Shaxson, 2005), albeit Sanderson (2003) notes the frequent difficulties experienced in establishing this across many policy areas. In this context the Poll Tax in the UK is often cited as an example of the disasters that can befall a government if policies are implemented without sufficient evidence as to their likely impact (McGrath, 2000).

Consolidation may also reflect what Rein and Rabinovitz (1978) have termed the 'principle of circularity' in policy-making, whereby policy formation feeds into implementations which feeds into policy evaluation which then contributes to the formation of new or developed policies (Nakamura and Smallwood, 1980). This model also helps explain why victim policies are linked chronologically in documents like the *new deal*, as the implementation of existing policies forms the basis of the next policy idea.

Another example of consolidating recent policy changes in this area came in February 2004, when the Office for Criminal Justice Reform (OCJR) issued 'Toolkits' covering seven key victims and witnesses priorities. These were intended to assist the Local Criminal Justice Boards (LCJBs)⁷ in delivering services and support for victims of crime and included: information provision; service provision; emotional and practical help; improving the experience of victims and witnesses at court; meeting the needs of domestic violence victims and supporting vulnerable and intimidated witnesses. In particular, the toolkit on victim personal statements is apparently intended to convince LCJBs to take the scheme on board.⁸

⁷ Created in April 2003, the 42 Local Criminal Justice Boards were intended to manage the system more effectively through local co-ordinators (Home Office, 2003a). Boards are made up of high-level (administrative) representatives from different criminal justice agencies in the local area.

⁸ See below.

From a policy perspective, the recently introduced Prosecutors' Pledge (CPS, 2005b) may be another consolidation exercise; designed to apply the obligations of the CPS as a whole under the statutory Victim's Code of Practice to individual prosecutors on the front line. Hence, this ten-point pledge purports to "describe the level of service that victims can expect to receive from prosecutors" and is said to be "a further step towards the objective of placing victims at the heart of the criminal justice system" (ibid).

This all implies that policy-making is at any given stage restricted by the limits of what is presently 'acceptable' in political and policy-making terms. So, for example, in the 2001 review of the Victim's Charter the idea of creating a minister for victims was dismissed on the grounds that victims would be better served as a shared responsibility between the Lord Chancellor's Department (as was), Home Office and Attorney General (Home Office, 2001d: para.29). Of course, we might argue that if 'everyone' is responsible for victims then no one is responsible for victims, or at least no one centrally. As such, what we see here is the distribution of the victim issue along a horizontal axis of policy-making (linking different department, agencies and interest groups) rather than along a vertical axis of hierarchical power relationships in a single agency or policy-making organ, this being another feature of governance (Matheson, 2000).

Interviews conducted for this research confirmed this impression of victims as a 'shared' priority:

"One of the things with victims and witnesses is even though we have got this Unit here in OCJR, there's still a huge amount of work happening across other departments, and even across other places in OCJR. So in the DCA there's the victims and witnesses branch, within the Home Office there's people doing work on domestic violence, doing work on vulnerable and intimidated witnesses...and even within OCJR there's other work happening about vulnerable and intimidated witnesses. All of that work will feed into the confidence [PSA] target and in many ways the victims and witnesses satisfaction target as well" (representative of the OCJR).

That said, it was suggested with specific reference to the *new deal* that generalising priorities and responsibilities in this way could have negative implications:

"That was a really useful document, but looking at it now we felt it had perhaps too many priorities and it wasn't always clear who was going to be responsible for delivering on them, and so over the past year we have felt that we really needed quite a tight focus, particularly on the PSA [confidence] target" (representative of the OCJR).

Nevertheless, at this stage, a victims minister was too radical to contemplate, and would remain so until the appointment of Fiona Mactaggart to this position in 2005.⁹ We have seen a similar effect in relation to the (confused) implementation of victim personal statements (Hoyle et al., 1999; Morgan and Sanders, 1999), which the judiciary and magistracy are still under no obligation to refer to. This again indicates that the government is unwilling to go beyond certain levels of reform to the criminal justice procedure. Reforms requiring judges to refer to victim personal statements would depart too far from the preceding developments. Interestingly, however, the above quotation emphasises the *delivery* of guaranteed standards (see Home Office, 2005d), something which was arguably lacking with the largely unenforceable first Victim's Charter (Fenwick, 1995). This would imply 'putting victims at the heart' of criminal justice now means more than simply setting down standards and then hoping they will be followed, but also involves some method of guaranteeing and enforcing such standards (perhaps 'rights') as I suggested was necessary in the last chapter. On this point, Nakamura and Smallwood (1980) have noted the growing importance in modern policy analysis of the *implementation* stage of policy-making, which is reflected by the third research question in this study. Indeed, Bache (2003) notes the argument that 'policies' are not really 'made' until they are implemented.

Arguably the restrictive views adopted in the Auld report of 2001¹⁰ set the tone for the development of victim policy over the next few years, this being essentially Ellison's (2001) 'accommodation' approach discussed in the last chapter. This impression was confirmed by policy-makers:

"I think what the thrust of policy has been working with the system that we have got, how we can best improve it, and I think you can really clearly see all the reforms fitting around that" (representative of the OCJR).

A similar view was echoed by local administrators in the area under review:

⁹ Which has certainly given the victim issues a sense of permanence, with the minister fronting recent developments such as the launch of a recruitment campaign to appoint the first Commissioner for Victims and Witnesses (cjsonline, 2006a, 2006d) and the launch of more specialist domestic violence courts (cjsonline, 2005b). The minister also announced the new compensation consultation (Home Office, 2005d) and Witnesses' Charter (Home Office, 2005g).

¹⁰ See Chapter 3.

“It seems to me that any significant further changes will involve a decision being taken about whether the court process in England and Wales is about the adversarial system...or the more continental idea of the inquisitorial system, where the exercise is sort of ‘let’s get to the truth of this’...As I understand it; from a philosophical and principle point of view the decision is that we will remain with the adversarial system and I think – given that – future changes are likely to be around the edges” (the Justices’ Chief Executive of the local Magistrates’ Court Committee).

This seems to confirm the hypothesis from the last chapter that the government is unwilling to implement ‘fundamental reforms’ to change the basic nature of the adversarial model. To this end we have also noted the lack of internally enforceable rights in the Victim’s Code of Practice and the exclusion of the judiciary from any obligations under the Code. On the latter point, whilst the government’s reluctance to place obligations on judges is understandable – and is again consistent with the principle of reduced compulsion that often characterises governance (Bache, 2003) – it is perhaps questionable whether the total exclusion of judicial actors from the remit of the Code and the Victims and Witnesses’ Commissioner will provide the best results for victims themselves. Once again, this points to the continuing reluctance of policy-makers to venture beyond certain limits of reform to assist victims and witnesses. In this case, their concern may rest in upsetting the relationship between judiciary and executive, but more likely the issue is one of prejudicing the defendant’s rights in a zero sum game.¹¹

A further example of the limits of the present reform agenda is revealed through the Witness Satisfaction Survey (Angle et al., 2003) where, on the issue of intimidation, the court felt that increasing the information available was probably the only option because:

“Given the formality of the judicial process, particularly in the Crown Court, it would be difficult and perhaps not desirable, to make the process unthreatening” (p.57).

Whether or not one agrees, the apparent acceptance of this statement again reflects limits as to how far policy-makers will go to satisfy witnesses and victims.

Overall then, themes derived from policy documents and interviews with policy-makers clearly indicate that putting victims at the heart of the system does not mean

¹¹ I have argued in Chapter 3 that obliging judges to intervene to defend victim rights need not infringe the rights of defendants and is actually a non-fundamental reform.

fundamentally reshaping the system around them, but rather suggests an attempt to adapt the existing model to their needs. Ultimately, this 'straitjacket' adopted by policy-makers would lead to Rock's (2004) 'finesse' in which the language of more far-reaching reform is employed ('rights for victims') but not the operational reality. The argument in this thesis is that whilst 'non-fundamental' reform may be sufficient to achieve victim-centeredness, one can go a lot further towards granting victims genuine rights and participation within the system than has presently been achieved without fundamentally changing it.

Another good illustration of the policy-making process is the newly proposed Witnesses' Charter (Home Office, 2005g). It is surprising that – given the recent popularity of 'rights' language – in this document policy-makers reverted to a service standards approach, similar to that of the second Victim's Charter from nearly ten years ago. This decision seems to confirm that, in policy terms, policy-makers cannot move straight to granting rights (even rights whose true nature is questionable) but must first establish an area of reform with less radical measures. As such, we may say that the creation of externally enforceable 'legitimate expectations' is a necessary first step to creating more substantive 'rights'.

Of course, in this case, whilst the Charter seems to present 'witness rights' as a fresh idea, in practice many of the 'rights' already granted to victims only benefit victim witnesses; including the right to make a victim personal statement. Ironically then, whilst politically the concept of 'witness rights' must pay its dues, in reality it can be argued that rights for witnesses already have an established history. That said, it is clear that the precedent of converting victims' 'legitimate expectations' from the 1996 Victim's Charter into 'rights' under the 2005 statutory Code will make a similar transformation for witnesses easier. Hence, the consultation document (Home Office, 2005g) predicts that the Charter will later be converted into another statutory Code, or form part of a new consolidated Code for victims and witnesses. It seems likely that the timescale will be far shorter than the ten years it has taken such a development from the second Victim's Charter.

Another fundamental aspect of policy-making procedure is the need to change and adapt policies to suit contemporary situations and – in particular – levels of support. So, for example, in 2004 a government suggestion that employers and industry foot the bill for compensating victims had to be withdrawn (Home Office, 2004a). This seems to have

followed behind the scenes discussions to the effect that employers and industry representatives were unwilling to pay for the new measures. The summary of responses to the consultation drew particular attention to the objections of employers and those representing employers, especially given the likely rise in cost of employer liability insurance (Home Office, 2004b). As such, these proposed measures were apparently never put into force. The reforms eventually appearing in the Domestic Violence, Crime and Victims Act 2004 were more modest, introducing a surcharge placed on some convictions and laying down provisions for the future reclaiming of money paid by the Criminal Injuries Compensation Scheme from the offender.¹² The episode is therefore an interesting example of how policy-making can be limited by a lack of outside support. Subsequent consultation suggestions to the effect that narrowing down state compensation to those 'seriously injured' will reduce administrative costs illustrate how governments and policy-makers must adapt their strategies when proposed reforms are met unfavourably (Home Office, 2005d).

As well as necessarily following on from previous reforms, measures, or rhetoric, some developments in the policy chain have themselves necessitated further actions. This was clearly the case after the 1999 Youth Justice and Criminal Evidence Act, which necessitated a challenge to the long tradition in policy-making in this area of avoiding actually gathering information from victims and witnesses themselves concerning their needs. For example, the creation of the state Criminal Injuries Compensation Scheme was largely based on a presumption that victims wanted it, and might turn to vigilantism without it (Rock, 1990).¹³ Victims therefore originally surfaced on the policy-scene in a most *ad-hoc* manner, far removed from the modern focus on evidence-based policies we saw above. That said, this situation with victims is far from unique. Ellis (2005) for example recounts how 'youth' became an extremely important policy concern for the Conservatives in the 1960s based on what turned out to be a mistaken belief that young voters would represent a threat to Conservative values.

It might be argued that the need to assess the impact of the 1999 Act provided the government with a political justification for engaging with victims and witnesses more

¹² A 'Victims Fund' was however established later that year, the government pledging to channel £4 million from the proceeds of crime into the fund over the next two years to develop services for victims of sexual offending.

¹³ Which again suggests a somewhat ulterior political motive and a 'vengeful' characterisation of victims.

directly. Certainly the introduction of the Witness Satisfaction Survey and the Vulnerable and Intimidated Witness Survey was designed to chart how witnesses had reacted to the extension of the Witness Service and special measures, and whether relevant targets had been met (Kitchen and Elliott, 2001; Whitehead, 2001).¹⁴ We have also said that this may reflect a need to periodically consolidate major reform agendas.

The need to gather first hand information from victims was well recognised by policy-makers interviewed for this research. One interviewee from the DCA emphasised that reviewing previous research was no longer enough, and that one had to talk to the victims themselves; hence the creation of institutions like the Victims' Advisory Panel in 2002 and intended to bring the view of victims directly to ministers (representative of the DCA, 2005). That said, the victim members of the Panel are mainly secondary victims of homicide, and therefore do not represent the vast majority of victims of less serious (mainly property) crime. Nevertheless, the attempt to bring victims into the policy-making process itself has been echoed across wider government policy-making in which – pursuant to New Labour's 'Third Way' (Giddens, 1997; Leggett, 2000; Crawford, 2001) – attempts have been made to establish wide policy communities in many areas.

This is so-called 'interactive' policy-making (Mayer et al., 2005) by which we have seen stakeholders such as local communities (Pearce and Mawson, 2003; Irvin and Stansbury, 2004), the elderly (Priestley, 2002) and children (Tisdall and Davis, 2004) given a 'voice' in policymaking.¹⁵ We have also seen this in relation to victims of domestic violence, albeit arguably the relevant forums have not been overly successful (Hague, 2005). The wide-ranging purpose of this form of policy-making is that all those who will be affected by a policy decision should have some involvement in its formation (Cabinet Office, 1999; Williams, 1999).

Another representative of the DCA gave his opinion on gathering first-hand views from local courts:

"I've always worked in Whitehall...never worked on the front line, been in a court dealing with cases – so very much an 'ivory towers' man – but very keen to actually go out there and actually listen to what happens. So I've been along and

¹⁴ We will return to the issue of 'targets' below.

¹⁵ In Australia the exception appears to be in education, where the views of teachers have seemingly been excluded from the policy-making process (Thomas, 2005).

visited fifteen to twenty courts and asked them ‘what are the problems you face on the front line?’” (representative of the DCA, courts innovation branch).

Policy-makers therefore seem increasingly willing to gather ‘front line’ information, a philosophy also underlying this thesis and supported by local interviewees:

“It’s quite concerning for the people on the ground – the operational people – to really read into a lot of this [national policy] documentation. That whilst the ideas are good, firstly they come from a background of some ignorance in terms of what actually happens anyway, and secondly come from a very idealistic stance where there’s no concerns/issues around the practical implications of what’s being suggested” (the District Legal Director at Court A).

It is interesting to note how the manner in which such ‘first hand’ data were gathered could influence the overall character of such policies. For example, in the area of police reform, policy-makers were concerned with the satisfaction of users of police services as a whole, but the performance measures they had available meant victims were afforded particularly close attention:

“The wider issue about *all* contact with the police is important...but, interestingly, the performance measures we have at the moment [locally run surveys based on the standardised Policing Performance Assessment Framework] are heavily weighted towards the satisfaction of the victims, because the user satisfaction surveys we have in place at the moment only get feedback from victims” (representative of the Police Reform Unit).

The ‘PPAF’ is the primary method of assessing the progress of such reform in local areas relating to the police. For the rest of the criminal justice system, the new Witness and Victim Experience (WAVES) survey will be utilised (Representative of the OCJR). It is not clear whether the WAVES survey will be weighted in favour of obtaining the views of witnesses, victims or the public in general. Both of these instruments are new constructions developed specifically for this purpose. Their development also exemplifies the need for different branches of the policy-making progress to work together, in this case to ensure there is not too much overlap between surveys.

By examining the content and the pattern of delivery of victim reforms, one might conclude that these have been used to ‘buy’ public support for other, less popular measures. For example, it is probably relevant that the Halliday report on sentencing was due to be published a few months after the 2001 review of the criminal justice system *Criminal Justice: The Way Ahead* (Home Office, 2001b). Halliday would criticise traditional prison sentences of less than 12 months and suggest a greater role

for community supervision (Halliday, 2001). The Labour government were by now very mindful of appearing 'soft on crime' (Cavadino and Dignan, 2002). As such, one can see the increasing concessions to victims and witnesses made in *The Way Ahead* as a way of securing the political capital to take a more constructive view of offenders and their sentencing which was, of course, a practical necessity given the ongoing penal crisis but one which the public was not terribly inclined to accept (see Rock, 1986).

Admittedly, direct evidence for such a proposition could not be adduced from policy-makers themselves in this research, although recently Walklate (2007) has touched upon this point in the context of the UK. Internationally, in Canada Rock (1986) concludes that to gain support for the abolition of the death penalty the Federal Government included it as part of a wider 'Peace and Security Package', which was assembled in a rather *ad hoc* manner and included victimisation surveys (Rock, 1986). Later in this chapter, we will note how victim policies are often combined with more punitive measures, which may represent a similar effect. The notion of placating the public by combining victim reform with more controversial measures introduces the important question as to whether this 'policy chain' is really concerned with victims at all, or instead with wider notions of the 'general public' or the 'normal, law-abiding citizen' (cjsonline, 2006c; Home Office, 2006b).

Overall, It seems likely that the government's current view of what 'at the heart of the system' means will depend on contemporary political influences and pressures. Indeed, evidence from the policy chain indicates that the government itself sometimes has no clear answer to our first research questions, which is illustrated by the implementation of the victim personal statement scheme. On this point, Hoyle et al. (1999) reported some confusion as to whether victim statements (as they were then called) were intended primarily to act as a tool of expression for the victim or whether they were intended to assist the system by providing more information on which to base decisions. The confusion amongst various criminal justice agencies on this point prompted a further report the following year to examine the uses to which victim statements were actually being put (Morgan and Sanders, 1999). In that report, the authors concluded that the victim statements were seen primarily as an aid to sentencing by criminal justice professionals but that in practice they still had little to no impact on most sentencing decisions. Again it was suggested that there needed to be further clarification as to whether the sole purpose of the scheme was merely cathartic or whether the statements were actually intended to have an instrumental purpose in the criminal

justice system.¹⁶ If the likely or realistic impact of making a statement were not made clear to victims, then the scheme would only raise victims' hopes unduly.

Edwards (2004) notes that the participatory goals of victim personal statements have never been clarified, and could be expressive, consultative or informative. This confusion surrounding the purposes of victim personal statements forces us to fall back to questioning the existence of any consistent policy at all. The reality may be that 'at the heart of the system' sometimes means providing information, sometimes means consultation, sometimes means both and sometimes means neither, depending on the circumstances at the time. As such, it is only when the different policies and developments are taken together – and arranged into a policy chain – that the impression of a consistent purpose is created.

4.3.2 – Influencing the local context

A major component of our understanding of the policy chain lies in establishing how national policies are implemented locally. Of course, certainly in the case of England and Wales, it is not only the public that must be 'won over' to a new reform agenda, but also the local actors charged with implementing those reforms. As noted by one OCJR policy-maker:

“We can't do anything if the Local [Criminal Justice] Boards don't buy into it; it's a partnership really that they agree that these objectives are the right ones and they sign up to it and then they help us deliver it” (representative of the OCJR).

To this end, policy-makers interviewed for this research stressed the need for effective communication between the centre and local service providers to get policy implemented. For example, one interviewee from the OCJR suggested that the main problem with the Youth Justice and Criminal Evidence Act 1999 was that parts of it were not specific enough and open to wide interpretation. In addition, we have noted the view that documents like the *new deal* 'bombarded' readers with large numbers of priorities. The OCJR's response to this was to produce a 'delivery plan' (OCJR, 2005) containing the seven key priorities mentioned above for victims and witnesses, which were agreed by the National Criminal Justice Board. Nevertheless, even these priorities required clarification for local implementers (LCJBs):

¹⁶ The possibility that victim statements could achieve both aims simultaneously does not appear to have received much attention.

“I felt that those seven priorities are very very high level and they’re very broad, and certainly if I was somebody who worked in a Local Criminal Justice Board area I wouldn’t necessarily know what I was supposed to do with that” (representative of the OCJR).

So, for example, one policy-maker from the OCJR explained ‘disappointing’ take-up rates for victim personal statements in terms of local agencies not really understanding their purpose. Priority four is that victims’ views will be sought and used in the criminal justice process and, as such, the relevant toolkit spelt out how victim personal statements should be collected and used in an effort to boost the implementation of existing reforms.

Another mechanism designed to achieve broadly the same ends was the promotion of ‘victim champions’ in the police and other agencies. The idea was to have designated people (‘champions’) in each local agency to promote awareness and disseminate good practice in relation to victims and witnesses. One interviewee from the DCA was particularly enthusiastic about this method of ‘localising’ victim and witness policies, although as of Autumn 2005 progress had been slow in finding people willing to act as champions (representative of the DCA).

Implementing criminal justice policies like these clearly brings numerous challenges:

“We’re trying to deliver something in an amazingly complex delivery chain” (representative of the OCJR).

This is especially the case when dealing with non statutory local bodies – as the LCJBs used to be¹⁷ – who do not have their own finances¹⁸ and “in a sense don’t exist”, because such bodies are not expressly subject to the authority of central policy-making Units (representative of the OCJR). Of course, this also implies a lack of accountability (see Crawford, 1997), and perhaps enforceability of victim rights. One way around such problems in recent years has been for the OCJR to provide a ‘delivery fund’ of £150,000 from which small grants have been awarded to the local agencies making up the LCJBs. Of course, this is a very small sum indeed compared to the £25 million afforded to Victim Support (2006), itself a tiny proportion of the budget for the entire

¹⁷ They became statutory in April 2004.

¹⁸ Which largely remains true in the statutory era.

criminal justice system. This system also ensures that the OCJR retains control of the local implementation of relevant measures.

The most common way of applying central policies in local contexts has been for the centre to set national minimum standards and then allowing each local area to implement these in their own way following individual impact assessments:

“The messages they [the centre] are giving out is that of a national framework with a strategy, but with local discretion and decision-making” (the Regional Director of Legal Services (Justices’ Clerk)).

We might be concerned by this remark to the extent that it implies a lack of consistency between areas and maybe a postcode lottery of victim services, especially when – as we shall see below – the national standards may not be difficult to meet.

For the police, such standards went beyond ‘victim and witnesses’ to encompass ‘citizen-focused’ policing in general. Again, this hints at a wider scope for such policies, aimed at the public in general rather than just victims. These standards were however formulated with reference to the Victim’s Code of Practice to ensure consistency across the spectrum. The Police Reform Unit also organised ‘practitioner networking’ events to disseminate best practice (representative of the Police Reform Unit).

Members of the LCJB in the area under review were clear that they did indeed enjoy a degree of autonomy from the centre but – contrary to the above sentiments expressed in Whitehall – they were more inclined to consider themselves ‘accountable’ to the OCJR and the National Criminal Justice Board. The local view was thus that national standards essentially compelled the Board to take action:

“We believe they [the centre] can [make the LCJB do things]...There are certain givens which you have to do and we wouldn’t argue that we shouldn’t either...But there are some which are negotiable almost. For example...conditional cautioning, they were desperate to get pilots for conditional cautioning...there was a feeling in CPS and police that we couldn’t take any more at this time and we wanted to defer it and we did defer it for a few months, but then they came back to us – sweet talked us – and they particularly wanted an area to pilot it and we have agreed to it. But we were able to deflect it to the long grass for a while...There are obviously some key strategic aims and objectives set by the government as part of the criminal justice service strategic plan, so it would not be incumbent upon us to say ‘no we’re not going to prioritise [such areas]’ because they are part of the national strategy and it’s our job to deliver those” (the Regional Director of Legal Services (Justices’ Clerk)).

As such, it was not usually a case of the Board or its constitutive agencies specifically acquiescing to each new requirement – which would be more in keeping with notions of governance (Bache, 2003) and interactive policy-making (Mayer et al., 2005) – although the Board had been successful in deflecting such requirements for limited periods.

Take, as an example, the national implementation of the *No Witness No Justice* scheme, designed to promote witness attendance at court (Home Office, 2004g). At the pilot stage, the police in the local area under review were given a wide remit to run tailored initiatives. Nevertheless, when the national minimum standards were delivered, local actors found themselves with less discretion:

“We’ve had to fit the national model, I’d say 50% of everything we’ve done at the pilot had to change. At the pilot we were basically given ‘this is the remit, and we want you to increase standards – hit these targets – and we don’t particularly care how you do it’. Then...suddenly...we went down to London one day...expecting to go to a review of the pilot meeting and we walked into the DCA at Whitehall and they said ‘oh, the format today has changed, we are now going to set minimum standards’ and because all the pilots had come from different size areas we found that minimum standards seemed to be ‘bits’ from everything...bashed together...and there are one or two issues that have been a thorn in our side ever since” (a witness care unit manager).

Indeed, as one police chief noted:

“Things were moving at a national level, a big scale. These so-called pilots, we got the feeling that whatever the outcome they would be implemented” (a police chief inspector).

Hence, it is clear that whilst the policy of allowing local implementation of national strategies does afford LCJBs some measure of discretion, the reality is that whilst the strategies and standards themselves are applied in a broad, untailored manner, local agencies have little alternative but to follow the centre’s lead. That said, it was clear that local difficulties like those described above have fed back to central policy-makers to some extent, which may reflect Rein and Rabinovitz’s (1978) principle of circularity noted above:

“Finally I think they are beginning to realise as a corporate voice now [that] if 42 [police] forces are coming back and only two can actually hit the minimum standard then there is something that they ought to be listening to. So there are little things now that they’re beginning to tweak” (a witness care unit manager).

In terms of the influence of the Board itself, it is clear that its members are top management figures from each agency, and as such the Board has a lot of influence on those agencies:

“[The Board] cannot commit resources of a separate organisation...but it’s extremely powerful and persuasive – at least persuasive – because the whole point of it is it’s got the chief officers on it, these are people with purse strings, these are people with clout” (the Regional Director of Legal Services (Justices’ Clerk)).

Disagreements within the LCJB were apparently rare, but when they occurred members would:

“Use our skills of negotiation and persuasion to try and come to a consensus and see what support other agencies might be able to give. We try to look for a win-win situation” (ibid).

Another interviewee described the LCJB as “a very polite setting” without much robust contention or debate (Youth Offending Team Manager, 2005). Indeed, some argued that the lack of a genuine power of compulsion was a disadvantage for the LCJB:

“The way that it’s set up it’s all about influencing people rather than having control over outcomes...I just think the structure doesn’t allow it to be as proactive as it could be” (the director of a private prison).

Nationally, a representative of the Department for Constitutional Affairs (2005) told me that her Department had certain ‘levers’, especially to influence the courts. Here, the chain of influence stretched from the DCA, which could make recommendations to the Courts Service Board, which were then passed on through the regional and area directors to the individual court managers and, finally, operational staff on the ground. This helps illustrate the ‘complex delivery chain’ referred to above and is an example of the vertical axis of policy-making (Matheson, 2000). That said, the DCA can contact the courts directly. For example, in 2004 the Courts Innovation Branch of the DCA contacted every magistrates’ court to ask whether they wanted to establish a recognised specialist domestic violence court.

In this instance the DCA also relied on word of mouth between neighbouring areas to disseminate the merits of the specialist courts:

“What was also quite clear was that a number of them [criminal justice areas] had already been talking about this locally with their local partners...quite often people locally – local agencies – will already be talking about ‘how we tackle domestic violence’” (representative of the DCA, courts innovation branch).

In the area under review, there was indeed regular communication between local agencies and neighbouring areas, especially to swap ideas on the local implementation of national standards:

“It’s funny, we received something through from my equivalent in [a neighbouring area] the other day saying to us, how are *you* going to do it?” (a police chief inspector).

Hartley and Barrington (2006) in particular have stressed the importance of such inter-organisational sharing of information in a wide range of policy-making. In this context, it was also clear that local agencies are able to take concerns to the Local Criminal Justice Board if they feel national standards are omitting important issues. For example, the local Youth Offending Team (YOT) manager expressed frustration at the exclusion of young people from the new WAVES survey and was determined to plug this gap:

“One of the things that I think has clearly been excluded from this ‘putting victims at the heart of the criminal justice system’ is the notion of young people. They do a thing called WAVES...and indeed young people are explicitly excluded from that survey...This is something I’ve raised with the Local Criminal Justice Board...and the Board have accepted that and I’ve actually self-delegated the task of going away to come up with something we can do locally to try to redress that to get the views of young people who are victims in the criminal justice system” (a youth offending team manager).

The same interviewee noted that there was little point taking operational-level issues to the Board because the Board was comprised of the highest-level representatives of the agencies and it was more productive to go straight to lower level representatives.¹⁹ The YOT manager was keen to emphasise how gaining a place on the LCJB for the YOT had been an important breakthrough for the recognition of the service:

“There is another aspect to it which is one – from a YOT point of view – is one of kudos actually, and it was a significant achievement by the Youth Justice Board to get YOT down as a stand alone member of the Criminal Justice Board in its own right” (ibid).

¹⁹ Some of the earliest moves in the area under review had been taken forward entirely unofficially. For example, waiting rooms and TV links were introduced at Court C on the initiative of an usher (interview with a court clerk at Court C).

This is in contrast to Victim Support and other voluntary organisations, which have no place on the Board. On this issue we might question the ability of Local Criminal Justice Boards to achieve genuine change for the benefit of victims when they are made up of administrators rather than victims or other ‘customers’ of the criminal justice system themselves. Clearly, the Boards seem to be examples of the “new forms of management of public services and structures for policy formation and implementation” spoken of by Crawford (1997: p.1). Nevertheless, administrators may be said to have an interest in promoting efficiency and reducing costs rather than innovating to provide services to victims. This is not to say individual Boards may not become particularly enthusiastic about victims²⁰, but as a whole this system relies on the enthusiasm of individuals rather than the combined or inherent goals of the body itself.²¹

4.3.2.1 – Local funding

As in most areas of policy and administration, funding was an issue of some concern amongst local service providers and agencies. Very little central funding had been made available for many of the victim and witness initiatives necessary to achieve national standards. For example, the probation service in the area under review had been required to take money from the local pot to fund its victim contact duties under Multi Agency Public Protection Arrangements (MAPPA). The same was true of the YOT manager referred to above, who had to personally negotiate the funding of his initiative to plug gaps in the WAVES survey, the money being drawn from existing local resources. Indeed, the same was true of the Youth Offending Team more generally, which contracted out some of its victim contact work to the charity REMEDI:

“My initial view here was that it could be and should be something that the YOT workers should be able to do themselves, that they should be professional enough to be able [to do that]. It’s not necessarily that I’ve changed my view on that but the reality was that the victims weren’t getting the service that was required from us by national standards, so I got in touch with REMEDI and we co-fund a post here. They pay for half of it and we pay for half of it” (a youth offending team manager).

²⁰ As was evident in the area under review.

²¹ Several members of the Board were highly experienced lawyers. Nevertheless, on this point Batten et al. (2006) note that lawyers in high-ranking positions in local *government* often relinquish any claims to specialisation in any particular area of law. As such, they do not use their ‘specialist’ knowledge of legal practice to influence local policy-making. It could be speculated that a similar effect may occur when a lawyer is appointed to a high-level management position and the LCJB in relation to policy implementation.

Again the YOT had received no central funding for these measures, nor was it to receive any money to help meet the standards under the new statutory Code. The local private prison also had a MAPPA role to play in contacting victims of very serious offences before the release of offenders that prompted no extra funding from the centre:

“We haven’t received any extra resources for that, we’ve had to build those resources into what we do. Contractually we could have taken the line that – unless there’s some resources with it – we’re not going to do it. Morally I didn’t feel that – whilst we said we wanted resources for it – even though we didn’t get any, morally I said we still need to be doing this” (the director of a private prison).

The ‘resource issue’ was also a prominent concern in the organisation of the joint CPS/Police witness care unit:

“Years ago there was a declaration that [the] CPS were going to be the guardians of witnesses in the future²², and really they’ve never really had the resources to do that, they’ve always relied on the police to have witness liaison clerical staff...in fact it’s still 95% police” (a police chief inspector).

This was despite the fact that the CPS had received central funding for *No Witness No Justice* initiatives, as well as the Effective Trial Management Programme (Chief Crown Prosecutor). Nevertheless, it was clearly emphasised that – certainly as far as the police were concerned – the WCU was competing with completely separate initiatives for scarce resources:

“What tends to happen is the Chief will look at the overall budgets and say ‘well, I want some of that for automatic number plate recognition for counter terrorism measures’. So I can’t quite manage my own budget...perhaps naivety compelled me to declare what we’d got!” (a police chief inspector).

That said, one court administrator accepted that many of the initiatives necessary to help victims and witnesses did not cost a great deal of money:

“There were plenty of excuses over resources, it hasn’t cost us that much to set this up at all” (the Clerk to the Justices at Court B).

Some respondents – especially local administrators – believed that more funding should also be available to help voluntary agencies provide a more professional service:

²² In the Glidewell (1998) Report.

“All the organisations supporting victims are voluntary organisations – not publicly funded – I think it’s very sad...We’re not wealthy here but compared to [Victim Support] we’re rich people. They’ve got nothing at all, they really are struggling” (the Clerk to the Justices at Court A).

“I would put the money not necessarily into statutory organisations, but into voluntary organisations so that the follow up and the additional work is there, and particularly into services like counselling and mental health help...There is differential quality in terms of the volunteers at Victim Support – and I don’t want to detract from the wonderful job, I think they do an absolutely brilliant job, they really do. But, you will have some victims that-. One I’m thinking about that somebody talked to me about last week, where she had a Victim Support volunteer where as soon as she started hearing about the victim’s loss of their son who’d been murdered she said ‘well that’s why I came into Victim Support because my daughter was murdered’ and proceeded to talk all about *her* experience. The victim found themselves almost counselling the volunteer...The training and the money needs to go into providing salaries for Victim Support workers” (representative of the probation service).

Applying to the Home Office for ever-increased funding has been a permanent occupation for Victim Support. Indeed, the Chair of Victim Support’s National Board of Trustees has called for a substantial increase of government funding to £60 million (Victim Support, 2003b). The charity is sometimes portrayed as a quasi-government department on the basis that it has firmly established itself within the ‘inner circle’ of CJS organisations (Rock, 1998; Home Office, 2003a). If this were indeed the case, however, then the disparity between the amounts being asked for by Victim Support and the money being provided by the Home Office is the most striking evidence yet for the lack of a unified victims strategy and a reluctance to fully fund this new ‘victim-centred’ system centrally.

The government, for its part, has often drawn on its grants to Victim Support to illustrate its work in supporting victims and witnesses (Home Office, 2001a, 2003a). Once again, however, one might argue that Victim Support’s permanent obligation to request increased funds from the Home Office – and their subsequent need to establish a ‘reserves policy’ in the event of funding being withdrawn (Victim Support, 2006) – suggests an absence of any long-term or fixed strategy on the part of the government.

4.3.2.2 – Local responsibility?

From the themes derived above, it seems clear that the government’s strategy on providing support to victims is one of local agencies taking responsibility for delivering services – usually with existing funds – which meet national targets, distributed through

the Local Criminal Justice Boards. The advantage to this is that local bodies have the discretion to tailor activities to fit their own needs. Nevertheless, a less flattering interpretation of this model sees the government portioning out responsibility for victims to local actors. Indeed, some links may be drawn here with the government's tendency to 'depoliticise' issues, by which government keeps at arms length – or 'at one remove' – the political character of decision-making, as discussed by Burnham (2001) in the economic sphere.

Under this construction, the government's maintenance of victims as a 'shared priority' becomes more understandable. Support must be offered (for the most part) through existing local funding, meaning the payment for this 'victim-centred' system does not come from central resources; hence the minuscule sums afforded to Local Criminal Justice Boards. Indeed, funding-wise victims couldn't be any further from the 'heart' of the system, even if one includes the funding provided to Victim Support and the cost of the Criminal Injuries Compensation Scheme. We have also seen that it is questionable whether Local Criminal Justice Boards are the best agencies to coordinate the delivery of such local support, as they are not inherently interested in victims *per se*, but rather in meeting targets handed down from the centre. Setting these targets does not however fulfil what is arguably the government's and policy-makers' role to provide the victim-centred model of criminal justice we have been promised²³, especially as it is the local agencies who are held accountable (certainly in their view) if such policies do not meet the required standard.

It should be noted that local implementation did not begin and end with the Local Criminal Justice Boards, as several other (multi-agency) groups existed in the area under review that discussed victim issues. These included the probation-led 'Victims Network' which – like the LCJB – included representatives of all local agencies and was essentially a consultative group. The LCJB itself would form 'subgroups' to focus on specific targets, including the Victims and Witnesses Subgroup on which Victim Support did have representation (the District Legal Director at Court A). As we might by now expect, these were essentially local initiatives for which central funding was again absent.

²³ Nor does publishing reams of informational leaflets and online walkthroughs.

4.3.3 – Growing understandings of ‘victimhood’

Throughout the policy chain and its local implementation we can note development in official understandings of ‘victimhood’.²⁴ This is clearly demonstrated by the recently proposed (and now piloted) ‘victims’ advocates’ (Home Office, 2005b, Home Office, 2005c) afforded to secondary victims (‘survivors’) of homicide.²⁵ In Chapter 3 we noted that this reform may effectively afford party status to this small percentage of victims. Such development in official definitions is intricately connected with other factors influencing the policy chain, especially the victim assistance groups and international influences. The former have been particularly influential in developing an appreciation for the needs of victims outside the criminal justice system (Victim Support, 2002a). We see this reflected in policy through documents like the *new deal*, by which time the ‘official’ definition of ‘victims’ had become quite wide:

“Those who are the direct subject of crime, or of anti-social behaviour, or are the close family or friends of those bereaved by road traffic accidents” (Home Office, 2003a: p.29).

The *deal* also emphasises the role of government services outside the criminal justice system, especially housing and healthcare services, which links with the development of the multi-agency approach discussed below and again seems to be part of a broader trends towards governance in this area and ‘horizontal’ policy-making more generally (Matheson, 2000; Milbourne et al., 2003). In its list of ‘victims with particular needs’ the *deal* referred to several groups that were traditionally sidelined, including bereaved families²⁶, victims of human trafficking and victims of domestic violence. It is interesting to note that this definition merely requires a person be the subject of crime or anti-social behaviour and does not specify any particular harm or loss endured.²⁷ Technically, the inclusion of victims of anti-social behaviour extends this definition beyond victims of crime. A related – and very interesting point – was raised by one DCA representative, concerning witnesses in these proceedings:

²⁴ See Rock (2002), and for a wider discussion of how policy-makers use definitions see Macleavy (2006).

²⁵ See also the *Coping with Grief* leaflet for survivors (Home Office, 2003b). It is perhaps not coincidence that such measures come at the same time as the Victims Advisory Panel is dominated by homicide survivors.

²⁶ ‘Survivor’ is becoming the established term to refer to this group (Rock, 1998).

²⁷ Although Elias would argue that it is our social definitions of crime that are to blame for excluding many victims (Elias, 1986).

“[Courts] had a real problem with the fact that anti-social behaviours- because they’re civil orders...quite often the kinds of witnesses you get are fairly vulnerable, very open to intimidation because you may be living *next* to the person you’re giving evidence against...until recently [special measures were] not available in anti-social behaviour order cases, because it’s a civil matter, the terms of the legislation is that you can use special measures for criminal proceedings, there was a lot of confusion” (representative of the DCA).

On realising this problem the law was changed – through action by DCA policy-makers – such that special measures are now available in anti-social behaviour order proceedings.²⁸ This episode again represents an expansion in our understanding of different victims (of intimidation) and their needs, and the reform of services to meet those needs.

We might also note here the finding of Tarling et al. (2000) that many intimidated British Crime Survey victims and witnesses were not being intimidated with the principal intention of preventing them from giving evidence at court, and indeed:

“[I]ntimidation to deter witnesses giving evidence is relatively rare” (p.3).

This is an important breakthrough because it extends our understanding of what it means to be a victim of intimidation and separates it from the criminal justice process. In other words, intimidation is not simply an issue for the system, but for the victims and witnesses themselves in their everyday lives.

We have also seen the development of legal concepts of victimisation in the Sexual Offences Act 2003, which expanded definitions of ‘sexual victimisation’. This again followed long-term arguments from victim groups to the effect that non-consensual oral sex was as distressing for the victim as ‘traditional’ rape (see Rape Crisis, 2007).²⁹ As such, the Act may be said to reflect more accurately the harm and suffering of those experiencing such acts, as opposed to restrictive legalistic definitions that exclude many victims.

²⁸ s.143 of the Serious Organised Crime and Police Act 2005.

²⁹ Although the 2003 Act still restricts ‘rape’ to non-consensual penetration by the penis into the vagina or anus, this definition has been extended in some parts of America.

By the time the Domestic Violence, Crime and Victims Bill was published in December 2003 the accompanying explanatory notes suggested that the Bill's definitions of victimhood were:

“[W]ide enough to include victims of offences of which no offence was reported to the police or no suspect was charged or convicted...and witnesses who are not actually called to give evidence” (Her Majesty's Stationary Office, 2003: p.3).

This perhaps indicates a move away from the often-criticised convention of referring to 'alleged victims' in accordance with the defendant's presumed innocence (Rock, 1993).³⁰ In addition, the government's 2005 consultation document on creating a tougher framework for road traffic offences (Home Office, 2005e; Home Office, 2005a) argues that such a framework should accurately reflect the 'devastating consequences' suffered by the victims of such crime. As with the reforms under the Sexual Offences Act 2003, this seems to indicate a move towards defining victims by the suffering they experience (initially and in the criminal justice system) rather than through more exclusionary legal definitions. Consequently, at least one policy-maker (and several lawyers and practitioners) spoken to for this study said they would always try to put themselves "in the shoes of the victim" (representative of the DCA).³¹ We will return to the expanded definitions of 'victimhood' and the notion of 'finding new victims' in our discussion of macro influences.

4.3.4 – Distinguishing victims and witnesses

Another notable feature of policy-making in this area is that 'victims' have rarely been distinguished from 'witnesses' until quite recently. This is rather ironic, as we have seen in the last chapter that victimology was initially far more concerned with victimisation in general, and only later narrowed its focus down to victims of crime, and still later to victims in criminal justice. In line with Christie's (1977) notion of the 'ideal victim', the assumption that 'real victims' necessarily become involved with the criminal justice system is perhaps responsible for the victim's role often being combined with that of the witness in official policy; hence Jackson's (2004) argument that much of this policy is focused on vulnerable and intimidated witnesses.

³⁰ Although in practice it has been shown that the high percentage of guilty pleas means that in many cases CJS professionals presume the opposite (Carlen, 1976).

³¹ See Chapter 6.

The eventual separation of 'victims' by policy-makers as a group distinct from witnesses follows on from the last section as another example of how 'victims' are being defined more widely and precisely to include, for example, victims outside the criminal justice process. Nevertheless, the tendency to consider victims and witnesses at the same time, and often in the same breath, seems to have worked its way along much of the policy chain right up to the *new deal* (Home Office, 2003a). It is only recently, with the advent of a separate Victim's Code of Practice (Home Office, 2005f) and (proposed) Witnesses' Charter (Home Office, 2005g) that policy-makers now seem to be accepting that victims and witnesses can have different (if overlapping) needs.

We can draw many examples from the earlier policy-making agenda where victims and witnesses have been truncated into one group. For example, Labour's initial 1997 manifesto pledge on 'victims in rape and serious sexual offence trials' underwent a subtle metamorphosis through the subsequent *Speaking up for Justice* report written by the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System (1998). The first paragraph of that report cites the manifesto pledge as the basis for the formation of the Group. Nevertheless, through reading the report it becomes apparent that this pledge was now being interpreted not as a statement on victims but one about intimidated witnesses, a number of who will be victims. Consequently, there was a change in emphasis; for in the wording of the pledge it was the victim who was given principal position and the witness who was phrased as the ancillary. The change is important, as it implies that neither the pledge nor the report viewed victims as victims in their own right, but simply as a special category of witness. Whilst the report was clearly presented as a review of the situation relating to witnesses, the manifesto pledge certainly implied a more central focus on the victim's status as a victim.

The situation here may have been somewhat akin to Rock's impression of reparation as the 'Trojan horse' smuggling victims into politics (Rock, 1990).³² Whilst victims unquestionably drew benefits from the outcomes of *Speaking up for justice* (as some did from reparation schemes) the fact remains that such benefits were not the government's primary focus and therefore, in the larger framework, the policy did not indicate any

³² In this study one Youth Offending Team manager told me that victim contact work had originally been 'sold' to him as something that would benefit offenders.

seismic governmental shift in favour of victims.³³ The *Speaking up for Justice* report also illustrates how policies affecting 'victims' and 'witnesses' are influenced not only by different concerns external to themselves, but are also influenced by each other. Hence, the 1997 pledge and the 1998 report provide a good example of how various issues and politics can combine together, making it less clear what this 'policy' is really about.

The tendency to truncate victims and witnesses into one category appears to have continued until around 2000, with the publication of the Occasional Paper *Victim and Witness Intimidation: Findings from the British Crime Survey* (Tarling et al., 2000). This document is amongst the first reports collating information from (British Crime Survey) victims who were not necessarily witnesses. Increased recognition of victims as a separate group is also certainly appreciable in the 2001 review of the criminal justice system – *Criminal Justice: The Way Ahead* – where reference is made to the problems faced by victims outside the criminal justice system (Home Office, 2001b). Interestingly, however, in the list of various past schemes and policies we have come to expect in such reports, only the Criminal Injuries Compensation Scheme is identified as a measure *purely* for the benefit of victims without also linking them to witnesses:

It is telling that the writers of the 2001 policy document chose to fall back on CICS as an illustration of the work that had been done to provide 'support for victims'. This suggests that CICS (created in 1964) was at this stage still seen by policy-makers as the government's most significant response to the problems faced by victims as a distinct group and that many of the more recent developments were still very much concerned with 'victims as witnesses'. This is ironic given that CICS excludes a large proportion of victims (Miers, 1991). Indeed, the *de facto* requirement that successful applicants have co-operated with the criminal justice system effectively means CICS is again aimed at victims who are witnesses, or are at least willing to become witnesses.

Nevertheless, the beginnings of support for victims outside the CJS suggests that the needs of 'non-witness victims' were starting to be recognised. Certainly after 2001, policy documents seem to distinguish victims from witnesses more specifically and the victim personal statement scheme – launched nationally in October 2001 – is overtly

³³ A shift in favour of reparation outcomes may constitute fundamental reform, but not a fundamental reform specifically intended to assist victims as Rock argues the goal was one of diversion.

focused at victims in their own right.³⁴ Nevertheless, it is significant that victims will only be offered the chance to make a VPS having already submitted a witness statement. This point may seem inconsequential, but one might conceive of situations where a case is prosecuted on the strength of other witnesses' evidence and the victims themselves wish to communicate the lack of impact to the court.

Nevertheless, by the end of 2005, the publication of a draft 'Witnesses' Charter' seems to have cemented this newfound policy distinction between the needs of victims and witnesses. This Charter sets out the "standards of care for witnesses in the criminal justice system" whether or not they are also victims. It is also worth noting that by the time I began interviewing policy-makers for this research in the summer of 2005, I was being asked whether my focus was on victims *or* witnesses (representative of the Police Reform Unit). We might add here the new Prosecutors' Pledge (CPS, 2005b) which is significant in that – like the statutory Code – the document is specifically focused on victims who may be witnesses rather than witnesses who may be victims.

It seems that this issue of distinguishing victims from witnesses in policy-making helps bring together a number of the 'other politics' identified by Rock (2004) and the present research. In Chapter 3 we noted Garland's (2001) macro-level argument that, in late modern times, governments react to falling confidence in the ability of the system to control crime by redefining its success criteria in terms of the efficient management of cases and the provision of minimum standards of service to victims. This effectively prompts a philosophy of 'victims as consumers' of the criminal justice system, which Tapley (2002) and Rock (2004) have discussed and which is also now seen in other areas, including the National Health Service (Greener, 2004). This new focus on the process as experienced by victims rather than the specific outcomes as precipitated by participating witnesses necessitates the conceptual separation of these two groups, including gathering their separate thoughts and opinions, which we see towards the end of the policy chain with the advent of Witness Surveys and questions aimed specifically at victims in the British Crime Survey.

4.3.5 – Victim Support and other victim interest groups

Throughout the policy chain a certain degree of choreography has developed between the issues raised by Victim Support and the actions of policy-makers. So, for example, it

³⁴ Notwithstanding the criticisms surrounding its implementation discussed above.

is notable that many (although not all) of the issues raised in Victim Support's (2001) manifesto were later found in *Criminal Justice: The Way Ahead* and/or the 2001 review of the Victim's Charter (Home Office, 2001b; Home Office, 2001d). Similarly, when Victim Support published its *No Justice Beyond Criminal Justice* report on the plight of victims outside criminal justice (Victim Support, 2002a) this was swiftly followed by similar views being expressed in the *new deal* (Home Office, 2003a).³⁵ In addition, we can note the active involvement of Victim Support in drafting the 2001 European Framework decision, which the Victim's Code of Practice is intended to implement (Victim Support, 2002b).

Contributions were also made by more specialist victim assistance organisations towards widening official definitions of victimhood, including Rape Crisis (Rock, 2004) and Support After Murder and Manslaughter. The view of SAMM in particular appears to have carried some weight following the recent consultation on victims' advocates for homicide survivors (Home Office, 2005b). Indeed, in announcing the pilot for this scheme, the government seems to be following the views of SAMM and other such organisations rather than those of the judiciary and lawyers, who mainly opposed the pilots (Home Office, 2005c). With the (statutory) establishment of the Victims' Advisory Panel we are told that victims will get the opportunity to feed directly into policy-making; the panel comprising of victims of hate crime, burglary and anti-social behaviour, although we noted earlier that most are secondary victims of serious violent crime, making them atypical victims.

Thus, the policy-making process in this area has frequently involved governments reacting to periodic requests or calls for action from a variety of different victim assistance groups. With this comes the implication that 'the policy' has been driven and developed on a much more *ad hoc* basis than it may first appear. Rock (1998) has already described how policy-makers began taking greater account of 'secondary victims' during the late Conservative era following pressure from organisations like Parents of Murdered Children (POMC) and SAMM.

More recently, proposals to amend the Criminal Injuries Compensation Scheme have apparently been spurred on by the dissatisfaction of victims and relatives of victims who were injured or killed in the London bombings of July 2005 (Home Office, 2005d: p.17)

³⁵ Which in turn was followed that same day by a statement from Victim Support applauding the government for adopting its ideas so quickly.

and the comparisons that have been drawn with the operation of the US compensation systems after September 11th (BBC, 2006; Walklate, 2007). This interpretation is consistent with Harland's (1978) impression that state compensation programmes are often grounded in the contemporary emotional and political climate, created in the wake of tragic and dramatic events or victim rallies.

Whilst Victim Support continues to defend its independent, voluntary status, the organisation has arguably developed a more political character.³⁶ We have seen this through its work on the 2001 Framework Decision, the publication of a 'manifesto' (Victim Support, 2001) and its inclusion on the list of 'Criminal Justice System Agencies and Partners' (Home Office, 2001b). It is also included as an organisation with obligations under the Victim's Code of Practice, effectively establishing it as a statutory agency (Rock, 2004: p.561). More recently, Victim Support has been involved in the organisation of conferences in conjunction with the Office for Criminal Justice Reform's Victim and Confidence Unit and intended to further the consultation exercise on proposed changes to the Criminal Injuries Compensation Scheme (Home Office, 2006c).

It therefore seems likely that Victim Support is now being consulted on almost all upcoming actions and reports relating to victims and witnesses.³⁷ Given such observations, it might be tempting to think of Victim Support as the logical 'driving force' responsible for pushing government reforms on victims and witnesses. The reality, however, is probably far more complicated and – as this chapter suggests – influenced by a wider range of factors.

Fundamentally, we can question the extent to which Victim Support has been afforded the political ability to sway policy-making. Indeed, despite adopting a more professionalised character in recent years, the charity has still resisted any attempts to actively sway opinion on victims by commissioning research or holding independent conferences. In fact the role of Victim Support appears to be more consultative. We saw in Chapter 3 how victims themselves are now being consulted on various issues by the criminal justice system, although their opinions may have little practical impact. Victim

³⁶ See Lindblom and Woodhouse (1993) for a discussion of how interest groups adapt their strategies in order to retain their influence in policy-making.

³⁷ Indeed, this is made clear though its Annual Reviews (Victim Support, 2004, 2005, 2006). Victim support schemes also had representation on the JUSTICE Committee (1998).

Support may be in a parallel position with regard to policy-making, hence the charity's permanent (usually frustrated) obligation to call for more government finance, despite the fact that the services afforded by Victim Support are generally recognised as providing good value for money (interview with representative of the OCJR). In addition, at the local level we have noted that Victim Support and other voluntary organisations are not yet represented – certainly in the area under review – on the Local Criminal Justice Board, albeit at least one member did hint that this might be possible in the future:

“I think it will be something which comes back to the table about actual direct involvement by Victim Support at the Board but when the Board was set up it was pretty specific what the membership should be and Victim Support were not intended to be. They are a local service and they need to be an integral part of things like the court user groups and the county performance group and they need to be consulted by the group and are, but they do not have a seat round the table – it's arguable that they should have” (the Regional Director of Legal Services (Justices' Clerk)).

Again Victim Support is generally relegated to a consultation role.

What seems to have happened then is that Victim Support has been accepted as what Maloney et al. (1994) call a 'core insider' to the policy-making network in this area (Tisdall and Davis, 2004). Whilst some theories of governance point out a loss of control of policy-making by government (Pearce and Mawson, 2003), in fact governments can retain significant influence, especially over the composition of the policy-network (Richardson, 2000), which seems to be the case here. Indeed, unlike other pressure groups (such as the Howard League of Penal Reform) Victim Support has failed to establish any platform itself (such as the courting of media interest) whereby it can criticise the government when its calls for reform are not heeded. Hence, to see Victim Support as the driving force behind reform rather begs the question; for as Rock (1990) shows, the acceptance of the charity within the 'inner circle' of criminal justice agencies was itself *part* of the ongoing development of victim recognition and victim policy. This is not to say that Victim Support has not come to play an important role in the development of victim policy. In particular, we may attribute to this and other victim assistance organisations the continued proliferation of 'rights' language in relation to victims – especially given its contribution to the 2001 European Framework Decision (Victim Support, 2002b) – and, more recently, the acceptance of the concept

of 'Victims Voice' (and with it, victims as parties) has been given new impetus through the victims' advocates pilots proliferated by SAMM.

This last observation may indicate a wider point about policy-making. Whilst we have noted before that 'new' policies are generally repackaged as the logical extensions of existing schemes, it is perhaps sufficient that such policies have *some* rhetorical pedigree, even if the rhetoric is not espoused by policy-makers themselves, but by relevant interest groups. Nevertheless, the point I wish to make is that Victim Support is unlikely to be the only factor influencing government policy on victims and witnesses and is perhaps not even the most significant one.

4.3.6 – Criminal justice and other non-victim reform

Above, I have noted that one possible explanation for 'victim reforms' is that they are intended to achieve other ends that have little to do with victims themselves. As noted by one interviewee in this research:

“There’s always an awareness in any policy unit, there’s so many ways you can cut things – always so much work that overlaps – in any policy job that I’ve ever had” (representative of the OCJR).

In this section we will gather together some of the most prominent ends achieved or connected with victim reform. These are wide-ranging, encompassing financial concerns, system efficiency, a 'target culture', the multi-agency approach and other goals for the system.

4.3.6.1 – Financial concerns

At the outset, financial concerns have clearly had a part to play at many stages of the policy chain. One obvious example is the persistent attempts to reform the Criminal Injuries Compensation Scheme in order to stem the tide of ever-growing costs. As such, we can be mindful of Harland's (1978) view:

“The reality of state-funded victim compensation seems to be that it is an extremely limited service available to only a minute proportion of those who suffer loss or injury as a result of crime. Too often, however, this reality is cloaked in a political show of concern for victims, while the underlying fears of costs continue to emerge in the form of programme restrictions” (p.213).

Hence, we might be justified in wondering whether the government's most recent suggestion to cease payments for 'non-serious' injury (Home Office, 2005d) has more to do with the financial cost of the scheme than with benefiting victims directly. The new system is said to reflect the practical and emotional support victims say they need in the BCS, although the survey has never actually asked victims whether they would prefer such practical support to small amounts of compensation. Also, as the Victim's Charter had already guaranteed victims such services anyway, the government's justification here seems dubious.

We might also here mention the government's continued development of the system of court-based compensation orders, most recently in the Powers of Criminal Courts (Sentencing) Act 2000. We have already noted in Chapter 3 that such orders – as distinct from state compensation – may represent an especially important symbolic recognition of a victim's suffering (Miers, 1980). To this end, courts have been required to state reasons for *not* making such orders since 1988 (Miers, 1991). The suggestion is made in both the 2004 (Home Office, 2004a) and 2005 compensation consultations to place more emphasis on reclaiming money from offenders therefore seems a positive move. Of course, this would also lift the strain on the state system, as a victim is not compensated twice. In court, however, the limitations placed on compensation orders seems to be cultural, with judges and magistrates still unwilling to impose the orders as a single penalty or to combine them with custodial sentences (Home Office, 2004a). Difficulties also lie with the prosecution in that they often do not have enough information to know how much they should ask to be paid to the victims via a compensation order, which sometimes leads to them asking for such small amounts as to be insulting or not asking at all, and in which cases magistrates may be reluctant to make awards at their own discretion (Newburn, 1988, Moxon et al., 1992). Of course the key solution here seems to be the effective communication of the impact of crime to the courts, which I will argue in Chapter 5 is best accomplished through account-making.

Also in relation to financial concerns, we have already noted the moves to reduce ineffective trials through instruments like the *No Witness No Justice* report (Inter-agency working group on witnesses, 2003) and the Effective Trial Management Programme (Home Office; 2004d).³⁸ Ineffective trials represent a considerable drain on

³⁸ On which, see below.

resources for the criminal justice system as a whole. Of course – unlike the various schemes implemented through the LCJBs – this is *central* funding going to ‘waste’.

At least one solicitor I spoke to during the course of this research believed that trial statistics were collected to allow the Legal Aid Board to decide which solicitors’ firms were more cost-effective (‘user-friendly’) and therefore worthy of franchised criminal contracts:

“They’re saying ‘ahhh, you’ve got so many cracked trials you’...so when they come to do the franchising, when they come to say who is going to get a criminal contract, they’re going to use the people who have toed the line, they’re going to use the people who don’t have trials because they’re more user-friendly, they’re more cost-effective” (a defence solicitor appearing at Court B).

The same respondent went on to blame cost-cutting priorities for the recent focus on ineffective trials:

“No adjournments, no adjournments, that’s the philosophy, and the reason why is cost, they don’t want trials, they’re too costly” (a defence solicitor appearing at Court B),

Of course, in the wider policy field it has been noted that the economic and social policy spheres are being integrated in many areas (Valler and Betteley, 2001), meaning the financial influence here may once again reflect wider policy-making trends.

4.3.6.2 – *Increasing efficiency*

On a related issue, there are also many indications throughout the policy chain that the ‘victim’ question is often linked with increasing the efficiency of the criminal justice system rather than addressing their needs as a goal in itself. A clear example came in October 2003 with the introduction of a consultation paper entitled *Securing the attendance of witnesses in court* (Home Office, 2003d). This document invited consultation on the proposed resurrection of witness orders to compel witnesses’ attendance at Crown Court and summary trials. These proposals illustrate the fact that – whilst improving victim and witness satisfaction and making them feel more at ease with their role in the criminal justice system is presented as the ‘headline policy’ – these aims are still connected with the less personal goal of getting witnesses (not *victims*) to come to court and thus improving the operation of the system. The consultation paper itself points out the possible conflict of policy:

“Ensuring that witnesses attend court...is directly relevant to the delivery of the Government’s Public Service Agreement (PSA) targets on bringing more offences to justice and increasing confidence in the criminal justice system. However, it is possible that introducing a greater element of compulsion [through witness orders] might have a negative effect on the confidence PSA (particularly the witness satisfaction element of this target)” (Home Office, 2003d: p.3).

The proposed renewal of witness orders now appears to have been dropped. Nevertheless, the publication of this consultation suggests that policy-makers were, in this instance, willing to trade witness satisfaction for increased efficiency. This indicates a very different set of priorities than those implied by the pledge to ‘put victims and witnesses at the heart of the criminal justice system’ or the apparent moves from an institutional-based to a citizen-based criminal justice system (Tapley, 2002; Goodey, 2005). Instead, it reminds us that the government is still very concerned with efficiency and the associated low public confidence (and costs) in the criminal justice system, and that these concerns have a large influence on measures incidentally benefiting victims and witnesses. Hence, victims and witnesses were a key issue in the criminal justice system Framework Document of July 2003 on improving public satisfaction and confidence in the criminal justice system, which is a central Public Service Agreement target (Home Office, 2003c).

This drive for efficiency underlying much of the work on victims is also evidenced by the fact that many of the proposals for reform appear in the context of wider reports aimed at streamlining the criminal justice process. This was certainly the case with the Glidewell Report (1998), which recommended that the CPS take over responsibility for cases from the point of charge; becoming responsible for providing information about case decisions to victims directly and also taking overall charge of witness warning.³⁹ This report was actually commissioned to review the CPS – essentially to examine the efficiency of one aspect of the criminal justice system – not to look specifically at the quality of information provided to witnesses and victims. The Auld (2001) report similarly illustrates how different policy areas can feed into each other. Lord Auld’s terms of reference (formulated in December 1999) were as follows:

³⁹ That is, informing them of their need to attend court and giving them the relevant details. Witness warning and de-warning was later described as a “multi-agency process involving, in particular, the police, CPS, the courts and the Witness Service” (Home Office, 2003g).

“[To inquire into] the practices and procedures of, and the rules of evidence applied by, the criminal courts at every level, with a view to ensuring that they deliver justice fairly, by streamlining all their processes, increasing their efficiency and strengthening the effectiveness of their relationship with others across the whole of the criminal justice system, and having regard to the interests of all parties including victims and witnesses, thereby prompting public confidence in the rule of law” (Auld, 2001: p.1).

Clearly then this was a report intended to facilitate the smoother and more efficient operation of the criminal justice system rather than address the needs of victims and witnesses. Hence, providing a ‘better deal’ for victims and witnesses is placed in the context of a wider strategy to improve the criminal justice system; it was an *aspect* of this wider strategy but not the strategy itself. The same is also true of policy documents like *Criminal Justice The Way Ahead* (Home Office, 2001b) in which the chapter *a better deal for victims and witnesses* must be seen in its wider context; namely a review of the criminal justice system in general. Victims and witnesses were given seven out of 139 pages despite a pledge to “put the needs of witnesses and victims more at the centre of the criminal justice system” (p.8). Hence, victims and witnesses were again just one element of a far wider strategy.

Also on the topic of system efficiency, running in parallel to all these developments were continued efforts to streamline the management of criminal trials. The Criminal Case Management Framework (encompassing the Effective Trial Management Programme), for example, is clearly focused on efficiency rather than victims, as indicated by the exclusion of youth cases – which often involve particularly vulnerable, young victims – from the ambit of the companion guide published by the government (Home Office, 2004d). It is telling that the prescribed aim for courts is to reduce *ineffective*⁴⁰ trials rather than *cracked* trials⁴¹, which often still involve victims and witnesses attending court unnecessarily. As one local administrator put it:

“We’re not monitoring cracked trials [but] they’re as much an evil in terms of the process as ineffective trials!...The LCJB aren’t even concerned about cracked trials anymore because we’ve not been asked to monitor them! Why? They’re just as important as the other ones!” (the District Legal Director at Court A).

⁴⁰ Trials postponed on the day for a future date.

⁴¹ Trials listed to take place on a given day which are then resolved without going through the full trial procedure, usually because the defendant has changed his or her plea to guilty.

Hence, in some cases, the goal of the scheme appears to be efficiency rather than the convenience of victims. Of course, this relates back to a point made earlier concerning the local implementation of victim reform through the LCJBs. Again, we might argue that as the Boards are comprised of criminal justice administrators rather than members with specific interests in victims *per se*, it is unsurprising that these policies become more about efficiency on implementation, even if they are not already weighted in that direction.

The proposition that 'efficiency' goals may be behind a number of victim reforms means a conflict arises for policy-makers between providing information to victims on the one hand, and ensuring witnesses will actually turn up to give evidence on the other. Some elements of government policies therefore bear the hallmark of an aggressive advertising campaign. Hence, information sources like the *Victim of Crime* booklet (Home Office, 2003f) and online virtual walkthroughs for victims and witnesses (cjsonline, 2006e) highlight the positive aspects of the product – like the information and support available to witnesses and victims, the ability for victims to 'be heard' through victim personal statements and special measures to counter vulnerability and intimidation – whilst downplaying the less appealing aspects such as intimidatory cross-examination, waiting times and the confusing, restrictive evidential process. All this suggests certain negative implications to victims' recasting as 'consumers' of this product, which interviews confirmed has been a clear goal of policy-makers since at least December 2004 (representative of the DCA). One might argue therefore that, if victims and witnesses are indeed being brought more to the heart of a criminal justice system, this may not be the *same* criminal justice system as that inhabited by criminal justice professionals; the 'professionals' CJS' is the unedited version.

Of course, it may be quite wrong to think of 'efficiency' as a separate endeavour to supporting victims:

"I think one of the things has been the recognition that the evidence out there suggest that these things don't operate independently of each other...a very large proportion of the burglaries [police] solve are solved by victims and by witnesses. So if you want to achieve [high detection rates] one of the things you've got to make sure of is that you are providing the right kind of services for victims and witnesses" (representative of the Police Reform Unit).

My point, rather, is that if this is indeed what the government is doing (or sometimes does) to understand the 'larger framework' of policies related to victims and witnesses

we must also understand the government's intentions for the CJS and the factors driving that policy, especially given the conflicting nature of various criminal justice goals, as demonstrated by Elias:

“Like prosecutors and police officers before them, judges seem trapped by conflicting penal goals, none of which seems to argue for a very strong victim role. For deterrence, judges want certainty and uniformity; for rehabilitation, the sentence must be tailored to offender needs; and for retribution, it must be orientated to the crime. If judges consider victims, then they must sacrifice either uniformity or offender needs or social goals” (Elias, 1986: p.156).

4.3.6.3 – Other goals for criminal justice

Elias' observation leads us to another issue; whether the current 'social goals' of the CJS are conducive to the needs of victims. In other words, victim policy can sometimes be grounded in wider strategies to achieve certain outcomes from the criminal justice process. For example, one stated aim of the *new deal* was to provide victims and witnesses with alternative options to the court; including restorative justice and other 'problem-solving' remedies like anti-social behaviour processes and Community Justice Centres.⁴² Naturally, such 'alternatives' bring with them questions about whether the aim of the policy is to help victims and witnesses or to divert cases away from an overstretched criminal justice system (see Dignan, 1992), which could be seen as another bid to boost system efficiency.

As another illustration, we can look to the Executive Summary of the *Justice for All* White Paper (Home Office, 2002). This sets out the aims of the reforms as follows:

“Our programme of reform is guided by a single clear priority: to rebalance the criminal justice system in favour of the victim and the community so as to reduce crime and bring more offenders to justice” (para.0.3).

In this construction, it would appear that reforms in favour of victims are grounded in a higher set of priorities to reduce crime and prosecute more offenders; both of which are consistently popular as political aims. It also appears that the aims of the reforms go beyond victims, to encompass once again the wider community. This is problematic for, as Crawford (1997) points out, notions of the 'community' are elastic. Indeed for Crawford the concern is not that this term is meaningless, but that it is “overflowing with meaning” (p.300) and therefore must be problematised. Hence, we are again forced

⁴² These of course represent massive areas of study, beyond the scope of the present thesis.

to consider the possibility that the 'policy' of bringing victims to the 'heart of the criminal justice system' is not actually a policy about victims at all, but is rather – in this instance – a means to the end of achieving other criminal justice goals.

If the subject of the reform agenda is now 'the community' rather than victims in their own right, this introduces a whole new set of problems. Aside from the general elasticity and multi layered nature of the term discussed by Crawford (1997), this may reflect some ideal notion of the 'normal law-abiding citizen', whom we see referred to increasingly in more recent announcements:

"This Government is committed to rebalancing the criminal justice system in favour of victims of crime and the law-abiding majority" (cjsonline, 2006d).

"Eight thousand new prison places were announced today as part of a package of measures to protect the public and further rebalance the criminal justice system in favour of the law-abiding majority" (cjsonline, 2006c).

This wider emphasis on the public in general in relation to victim policy⁴³ was reflected in the recent criminal justice review document of 2006; *Rebalancing the criminal justice system in favour of the law-abiding majority Cutting crime, reducing reoffending and protecting the public* (Home Office, 2006c). Here then it is the 'law-abiding majority' being placed at the heart of criminal justice rather than the victims themselves⁴⁴.

We know from Crawford (1997) and Bouterllier (2000) that notions of the 'community' in the late-modern context is a difficult concept. The 'law-abiding majority' may itself be a myth given the apparent prevalence of unreported crime, including white-collar crime (Nelken, 2002). More importantly, however, reforms intended to please this assumed 'public' audience will not necessarily be tailored to benefit the crime victims themselves, especially as we now know that many actual victims of crime would not form part of this 'law-abiding majority' (Dignan, 2005). On this point Jackson (2003) notes the "dubious symmetry between the interests of the victims and the community" (p.317). Hence, whilst diverting victims from the traditional criminal process and improving the 'efficiency' of the justice system may find favour with the tax paying 'public', these are not necessarily the kinds of reforms victims need or expect from the

⁴³ And in other policy areas too (Ryan, 1999).

⁴⁴ Young (1996) discusses how 'victimhood' has been overtaken by notions of 'citizenship', meaning 'victimhood' is now equated with 'all of us' (Walklate, 2007: p.21).

system. In short, we might speculate along with Elias that victims are being used as political vote-catchers, but as the majority of voters are probably not victims of crime (or at least would not see themselves as such)⁴⁵ what matters to governments is to give this wider public the impression that victims are being helped rather than actually following through with providing (and financing) such help themselves.

We might also look to government goals outside the confines of criminal justice *per se*. For example, Ashworth (1986) has noted that the creation of the Criminal Injuries Compensation Scheme was based not on the government's acceptance that it had an obligation towards victims, but rather as a measure to align welfare provision to crime victims with victims of other misfortunes. Successive governments down the policy chain have continued to maintain that the state is not liable for the criminal injuries of victims (Home Office, 2005d).

In addition, one strand of the *No Witness No Justice* strategy (Home Office, 2004g) envisioned the normalisation of reporting crime as part of a wider citizenship and 'rights and responsibilities' agenda. On a related issue, Rock (2005) observes that issues of race and dissemination played their part in the development of victim policy following the publication of the Macpherson Report into the death of Stephen Lawrence, which never focused specifically on witnesses or victims.

The *new deal* places the government's work on victims and witnesses within the context of two of its Public Service Agreement targets; which were outlined above in our earlier quotation from the 2003 Witness Order consultation document. The first revolves around bringing more offenders to justice and the second requires the government to increase public confidence in the criminal justice system. These two PSA targets feature in many of the policy documents, and interviews with policy-makers reinforced their importance:

"We're very much focused around the PSA targets" (representative of the OCJR).

"This has been one of the main pieces of work over the summer, and it's literally about driving satisfaction, how we're going to meet that PSA target" (representative of the OCJR).

⁴⁵ In any event, the 2003/2004 suggests that the largest proportion of adult males (50%) believe bringing offenders to justice was the highest priority for the criminal justice system, as opposed to the 5% who thought it was meeting victims' needs (Allen et al., 2005).

Policy-makers were particularly concerned with the 'confidence in the criminal justice system' PSA target and were open about the fact that helping victims and witnesses would bring benefits to the system though increased confidence passed on by word of mouth to future potential witnesses (representative of the DCA). One policy-maker from the OCJR told me:

"I think what's been driving a lot of this is we've got evidence that the public feel our criminal justice system is very good at reflecting the rights of defendants but its not good at all at reflecting the rights of victims and witnesses, and I think the statistics show that whilst three quarters of people feel that it's fair and it's good for the defendants, only a third think it's the same for victims and witnesses. I think it's those sorts of statistics that have been driving things" (representative of the OCJR).

Here, this respondent is referring to British Crime Survey data indicating that whilst 80% of adults are very or fairly confident that the criminal justice respects the rights of those accused of crimes, only 36% believe it meets the needs of victims (Walker et. al., 2006). Both figures have risen slightly in recent years from 77% and 33% respectively in the 2003/04 sweep (Allen et al., 2005) and 78% and 34% respectively in 2004/05 (Allen et al., 2006).

General public confidence was also a particularly important factor underlying policy reforms related to the police in the new era of 'citizen-focused policing':

"Our focus is not just on victims, it's about putting citizens and the users of policing services centrally...one of the drivers that led to this programme of work being developed was the government's priorities for reform of the public service which are about making it a customer-focused service" (representative of the Police Reform Unit).

These extracts again suggest that the true focus of these reforms is on the 'law-abiding public' rather than victims. The emphasis on public perceptions of criminal justice had also filtered down to local actors in the area under review:

"I think it's as things have become more customer oriented, there's been such an outcry in the press and even murmurings in the general public that, noticeably, what we had was not of this day and age" (a court clerk at Court C).

On a related point, a number of respondents raised the issue of media coverage of criminal justice and suggested this was the true (politically-motivated) driving force

behind the government's policies, which for one solicitor had greatly influenced domestic violence policies:

“Because it's topical, because it's so much in the public eye, and I blame newspapers, because newspapers build it up into this bloody thing!” (a defence solicitor appearing at Court B).

Indeed, one interviewee felt sure that the government encouraged reporting of certain crimes in order to justify repressive measures:

“[Politicians] are making our communities feel victimised, the extent of lawlessness, of feral wild-beyond-control children prowling our streets...isn't the horrific problem – necessarily – it is portrayed as” (a youth offending team manager).

4.3.6.4 – A 'target culture'

The proliferation of the PSA targets has led to the present government receiving criticism for establishing a 'target culture' across many areas of policy-making including education (Gorard et al., 2002), health (Greener, 2004) and the economy (Dorey, 2004). One court representative described the change in largely positive tones:

“[There has been] much more of a performance focus in the last 5/7 years, focus on performance, focus on measurement of performance, setting clear aims and objectives, having a strategic plan; that was something that was unheard of in the public sector until the early 90's, in courts till the mid 90's” (the Clerk to the Justices at Court B).

Other interviewees expressed unease at such developments. One court clerk simply told me:

“Figures mean everything these days” (a court clerk at Court C).

Such disgruntlement was usually based on respondents' scepticism that numbers could accurately convey the complexities of real-life court operation. Here, we might recall the words of one district judge (a self-confessed hater of statistics) at Court B concerning trials, which we noted in Chapter 2:

“It's a human process, you can't dehumanise it” (a district judge sitting at Court B).

Nevertheless, targets can often be useful in the context of a policy chain as a way of measuring success or justifying current measures. In addition, setting targets – even

targets that are 'broad brush' and difficult to apply in individual areas – can compel agencies to take action:

“There needed to be a head of steam about it to get these things moving, unless there was that big push [on national minimum standards concerning witness care] then I don't think [police] forces and CPS areas would have got on with it at the rate they have, so I think it has been needed” (a police chief inspector).

Conversely, the lack of targets can cause measures to stagnate. A good example of this is the early low take-up rates of victim personal statements, which were explained by one policy-maker in the following way:

“Informal information we had was that this was a fairly common situation, that a lot of areas just weren't making much of a thing of victims' statements and weren't taking them...The reasons were felt to be that it was a time when there were a lot of other initiatives going on and a lot of things being measured...agencies concentrate on things where there's a target and they're going to be measured. Because there was no target to achieve a particular take up of victim statements it was felt that the police weren't really pushing them” (representative of Research Development Statistics and OCJR).

We have already noted the lack of interest in cracked trial rates based on the absence of specific targets. On a more positive note, however, one case progression officer⁴⁶ at Court C noted that targets did make it easier to acquire central and local funding to achieve these goals, albeit we have already seen how central funding is extremely hard to come by in this area. As such, targets can be useful in order to drive the implementation of new policies in the early stages before they become culturally accepted and 'automatic'. This certainly appears to have been the case in the area under review regarding ineffective trials:

“From our perspective it's clearly the government focus, and quite rightly so...you can't have the sort of inefficiencies that we had up until recently...you can't have situations where you've got a massive ineffective trial rate, it's unacceptable...we're constantly filling out statistics about why trials were cracked or if they were effective or why they were ineffective, so inevitably it's at the forefront of your mind” (a legal adviser at Court B).

⁴⁶ Case Progression Officers (CPOs) were introduced as part of the new Case Management Framework and are intended to facilitate effective pre-trial review hearings in order to resolve any outstanding difficulties or issues before the day of a trial (Home Office, 2004d). See Chapter 6.

Of course, just because a target has been set does not necessarily mean it will be particularly difficult to achieve, as noted by one Youth Offending Team Manager in relation to victim contact work:

“I honestly don’t know what sort of take up she gets – what percentage it is – we meet our national standard I know that, but our national standard is pretty easy to beat to be honest” (a youth offending team manager).

The ease by which this particular respondent felt his agency could meet national targets may again reflect the fact that the centre prefers to ‘wash its hands’ of responsibility for victims, as opposed to reacting if targets cannot be met. Of course, this is always assuming that different targets are viewed as compatible, and are a realistic measure of performance in the local context. On the latter point, one Justices’ Chief Executive described a perceived conflict between the targets of reducing witness waiting times and ensuring the court’s time is not wasted:

“There are many performance measures and standards that are to some extent inconsistent. For example, the courts that perform best in having low witness waiting times...are the courts with very poor effective trial rates. So, the witnesses are coming to court...and they aren’t waiting very long, but they are very frustrated because they didn’t need to be there at all...The victim has got the biggest (the longest, the most detailed) story to tell so it’s almost always the case that they’re in the witness box an hour in anything like a meaningful trial. Therefore every other witness falls outside the criteria, which is the percentage of witnesses that wait for an hour or less. It’s an unrealistic measure unfortunately because the only way to perform well is for your trials to crack” (the Clerk to the Justices at Court B).

A similar point was raised by a magistrates’ legal adviser:

“I certainly don’t think witness waiting times are [a good way of monitoring court efficiency]...If you know within ten minutes the trial is going to be adjourned then on the witness waiting times that’s a positive thing – the witness has only waited ten minutes – but then of course they’ve got to come back another day...one [indicator] says the service is great – they’re all out in ten minutes – the other one will say, well, they’ve got to come back on another day” (a legal adviser at court A).

This all implies that targets themselves are the product of complex political interactions, which need to be mapped and understood before the measures carried out in their name can be placed in their proper context. By using the PSA targets as the context, the *new deal* cements the (probably false) impression that this is indeed one all-encompassing ‘strategy’ driven over time by unified and consistent goals.

4.3.6.5 – The multi-agency approach

Moves to assist victims have also all been tied up with the development of the governments' wider multi-agency approach to public sector services, including health and education (Milbourne et al., 2003). Indeed the Home Office's (2003e) *Tackling Witness Intimidation – An Outline Strategy* is interesting because it reveals as much about the multi-agency approach as it does about intimidated witnesses. Some policy-makers interviewed for this research pointed out how a 'joined-up' approach to criminal justice in which different agencies readily communicate is far more logical from the victim's perspective:

“From the perspective of the person [civilian] who's entering into the system, they see it all as one, it's all happening as one thing” (representative of the Police Reform Unit).

“Even though people use the term 'criminal justice system', I'm not sure that for a long time it has been...and of course victims and witnesses are the people who do go through that system end to end” (representative of the OCJR).

That said, at the local level interviewees pointed out that a great deal of less formal communication between agencies was already going on prior to the arrival of this policy:

“I think if I'm honest it's rather naïve of the policy-makers to suggest that they've come up with this good idea and no one spoke to each other previously, because that just simply isn't the case...in terms of the [Local Criminal Justice] Board, there was a very effective group in [this area] pre-Criminal Justice Board, which dealt with very much the same issues as the Board look at; and I think for six to nine months whilst the Board was starting to form we very much regretted the demise of that other group, because it was felt to be much more effective than the Board was at that time” (the District Legal Director at Court A).

“Has the LCJB had a big impact on the work of the YOT? No. I think it has quite a big impact upon those members who are the Board members in terms of the amount of stuff that we have to do. Whether any of that stuff adds value to the work of your independent agency – I guess – no. What it does do is make important contacts, but a good agency would have already established those kinds of contacts anyway” (a youth offending team manager).

In many cases the continuation of such 'unofficial' multi-agency ambitions relied on the work of individuals, which made them for the most part *ad hoc* arrangements:

“I already had lots of contacts...it was then reliant on individual enthusiasm, to some extent, and you’d have certain bits folding because that individual would leave” (representative of the probation service).

It is also the case that not all multi-agency endeavours were functioning as efficiently as local actors would wish. For example, this probation service representative clearly believed the police were not forwarding key information necessary for their victim contact work:

“You still have some people who are like ‘this is *our* work, we know how to do things properly’...In terms of the victim contact work we now get names and addresses of victims without a problem; they’re not always that accurate because people aren’t always that good with the files. But we don’t get the additional bits of information; we don’t for example get ethnicity – which the police do monitor – which we could do with because when you’re going out to see a victim who is still very distraught you don’t in the middle of that whip suddenly out a form and say ‘can you actually tell me how you’d like to call yourself?’ We don’t always get information in terms of vulnerability or disability or issues that would make us more sensitive in how we approach people, for example that someone has learning difficulties, that somebody has a regular social worker” (ibid).

Such concerns reflect Crawford and Enterkin’s (2001) view that, practically, victim contact work in the Probation Service presents “significant challenges” (p.722). There were also administrative tensions apparent between the police and CPS in their joint witness care unit:

“It’s never been proven as a concept that we must all adhere to because it works. I think it’s a noble concept of having joint PC/CPS clerical and I think it would be even better if we had joint administrative systems – and we’re getting a witness management system that’s coming – if we shared our admin for example, which we still don’t. We’re still two separate bodies joined for certain functions” (a police chief inspector).

One particular example given was that of the CPS Victim Information Bureau, which was still separate from the witness care unit, meaning that if the WCU – which just dealt with witnesses – needed to contact victims, they would need to go through this separate body.

It is nevertheless clear that victims and witnesses as policy areas are once again becoming entwined with wider issues and strategies. Not only do these encompass the development of a multi-agency approach *within* the criminal justice system, but also a much wider approach *outside* it. Of course, the current government has championed the ‘strategic’ or multi-agency approach in many areas (Milbourne et al., 2003). This again

raises questions regarding the political influences guiding this approach and how they interact with the issues of criminal justice, witnesses and victims. Even with the creation of a victims minister in 2005, the government does not appear to have abandoned its philosophy of victims as a 'shared' priority between agencies and departments and – based on experience so far – it seems the minister is largely being used as a spokesperson on 'victim policy' rather than the driving force behind renewed reform, which again implies responsibility for such reform still rests away from the centre.

4.3.7 – Punitiveness and expanding state control

The policy chain also reveals many examples of victim reform being packaged with reforms of a more punitive nature. For example, certainly at the time of its implementation, some commentators (Haines, 2000) argued that the system of referral orders orchestrated through Youth offending Panels under the Youth Justice and Criminal Evidence Act 1999 (which also introduced special measures) would only exclude defendants from the process, and was therefore punitive.⁴⁷ Even if one rejects this interpretation, one might still see Youth Offending Panels primarily as a diversionary tactic, diverting offenders away from the main CJS rather than assisting victims of crime.

We can draw upon several other examples. The 2001 criminal justice review (Home Office, 2001b) accepted broader notions of 'victims' but packaged such concessions alongside provisions to tackle organised and international crime and a pledge to create 2,660 more prison places. Later, in the *Justice for All* White Paper (Home Office, 2002) reforms relating to victims and witnesses were combined with measures relating to the admission of hearsay, the partial abolition of double jeopardy and the possibility of trial without jury.⁴⁸ *Justice for All* also introduced proposals later enacted in the Courts Act 2003 to increase courthouse security by creating a court security service with powers of arrest and detention; thus constituting a further extension of state power (see Jackson 2003, 2004).

Another particularly revealing example was the proposed reintroduction in October 2003 of witness orders, which we discussed above and seems to reflect Elias' (1986)

⁴⁷ Although, subsequent evaluation seems to avert these fears (Newburn et al., 2001; Crawford and Newburn, 2003).

⁴⁸ The government had difficulty getting its Criminal Justice Bill through the House of Lords due to this provision (BBC, 2003).

assertion that 'victim reforms' may be intended to increase state power. In this case, state power is extended by eroding the principle currently applied in England and Wales (but not in Scotland) that the criminal justice system is based on the *voluntary* attendance of witnesses.

The Sexual Offences Act 2003 also contained punitive provisions. In the accompanying guidance document the Home Office (2004f) said the Act would 'put victims first', chiefly by encompassing broader definitions of sexual victimisation, as we saw earlier. Nevertheless, elsewhere in the Act a conditional discharge was now to be considered a 'conviction' for the purposes of the sex offenders register; meaning people can be put on the register without being convicted of any sexual offence. It therefore seems once again that reforms offering greater recognition to victims (witnesses) are being combined with more restrictive measures. The argument again is that 'victims' provide a 'liberal smokescreen' that dilutes the impact of repressive measures.

In the same way, from a defendant's perspective the Criminal Justice Act 2003 brought radical reforms such as abolishing the double-jeopardy rule in serious cases where 'new and compelling evidence' is available⁴⁹ and the wider admissibility of hearsay and evidence of bad character (often a criminal record). The former is clearly of benefit to victims and witnesses, removing in some circumstances a complex component of giving evidence. Nevertheless, from the defence position one might argue that this prejudices the fairness of proceedings, with second-hand information being considered as evidence.⁵⁰ Whilst non-defendants (victims and other witnesses) may also have evidence of bad character adduced, the Act makes this easier in the case of defendants by providing more circumstances (seven 'gateways' in s.101(1)(a-g)) by which the prosecution can argue a case for this information being admissible.

Furthermore, under s.101(1)(g) a defendant's bad character can be adduced following his or her 'attack on another person's character', whilst no comparable provision is present for non-defendants. The *new deal* (Home Office, 2003a) cites this as a provision that can "limit the scope for gratuitous attacks on witnesses' character" (p.19) but this will only be so if defendants are given clear guidance on the issue from advocates. The observation sessions conducted for this research suggest witnesses (including victims) are just as capable of attacking defendants' characters from the witness box as vice-

⁴⁹ Part 10.

⁵⁰ Defence solicitors seemed to believe this, see Chapter 6.

versa⁵¹, but under the 2003 Act this would not necessarily lead to their own bad characters being adduced.

Following on from this, in the Domestic Violence, Crime and Victims Act of the following year, benefits to victims (especially the statutory Code) were once again balanced by punitive provisions. Of particular note are the new (up to five-year) jail sentences for breaching non-molestation orders and also the court's new power to impose restraining orders even when defendants are *acquitted*.

More recently, we have seen further indications of a dual purpose behind victim reform. The Home Office has given its pledge to "toughen up every aspect of the criminal justice system to take on the criminal and support the victim" (Home Office, 2004c: p.6). Indeed, throughout this 2004 strategy document the promise to 'support' victims is almost always preceded by a pledge to catch, punish and stop more offenders from committing crime. In some areas of the strategy these goals seem to be directly associated with 'providing justice' to victims, with supporting them constituting a separate endeavour (p.26).

Finally, in July 2006 we can note the publication of another CJS review document (Home Office, 2006c). This publication reaffirmed that:

"[T]he needs of victims must be at the heart of what the criminal justice system does" (p.6).

Nevertheless, the choice to run "increased prison places" as the headline in the press release accompanying this review is indicative of underlying punitiveness; including an end to automatic one-third reductions in sentences for early guilty pleas, parental compensation orders, increased use of anti-social behaviour legislation and tougher penalties for carrying knives and "tougher new action on alcohol". The strategy also seems greatly concerned with speeding up the criminal justice system, a point returned to in the subsequent document *Delivering Simple, Speedy, Summary Justice* (Home Office, 2006a) which proposes further streamlining in case management systems and addresses cases with very high costs. Once again, we see the combination of 'victim measures' with more punitive and economic reforms.

⁵¹ See Chapter 6.

Brownlee (1998) notes a significant contradiction between recent trends towards 'populist punitiveness' on the one hand, and moves to increase efficiency in criminal justice on the other. Whilst the latter implies diverting offenders from the main criminal justice system, the former demands expensive punishments. Hence, once again the different aspects of the policy-making process are not all working in the same direction.

Some might argue that in terms of the criminal justice system as a whole, this is a case of the government giving with one hand (to victims) so it can take with another (from defendants) or, following Elias' reasoning, employing victims as a way of extending state power (Elias, 1986). Crucially, however, my point here relates to the policy, not the practice. Thus, my argument is not that some zero sum-game exists between the needs and interests of victims and defendants in the operational criminal justice system after all, but rather that – at the policy stage – such a 'balancing act' is more apparent.

4.3.8 – International influences

On one level, we can understand the international influence on victim 'policy' in England and Wales purely in terms of the increasing number of international instruments and documents appearing in the policy chain related to the issue of victims and witnesses. As such, it is evident that *specific* international pressures – from the EU, Council of Europe and UN amongst others – are another factor complicating our larger framework of interconnected politics. On another level, we might view this as a broad international growth in our understandings of victimhood and victims' needs, reflecting even wider 'macro' developments. I will return to the latter possibility below.

The most prominent ('specific') development of the recent period has been the EU Council's 2001 Framework Decision on the standing of victims in criminal proceedings. This document arguably spurred the recent revival of 'rights' language (and policy movement) associated with victims in the UK because, unlike the various recommendations made by the Council of Europe, a decision from the Council of the European Union is binding on all those to whom it is addressed and, therefore, highly significant politically in the domestic context. As such, this is an example of what is generally now being referred to as 'multi level governance' with national and international (and other) levels (Smith, 2004).

Victim Support points out that whilst the UK and Ireland have two of the best records on victims in Europe, both countries still have things to learn before they are fully

implementing the Decision (Victim Support, 2002b). Member states had until 22nd March 2002 to introduce the necessary laws giving effect to most of the provisions and until March 2006 to implement Article 5 (Communication Safeguards), Article 6 (Specific Assistance to Victims⁵²) and Article 10 (Penal mediation in the course of criminal proceedings).⁵³ Consequently, the Framework Decision delayed the introduction of what was then the Victims and Witness Bill in parliament and prompted the introduction of the statutory Code of Practice. Hence, the return of 'rights language' to UK policy discourse (following its removal in the second Victim's Charter) can be directly attributed to the international scene.

The proliferation of rights language in the 2001 Framework Decision is an example of a general growth in 'human rights' discourse internationally, especially in Europe following the introduction of the European Convention on Human Rights enshrined into British law by the Human Rights Act 2000. We saw in Chapter 3 how – thus far – such rights as may be present for victims under the Convention are still the topic of considerable debate, within and beyond the European Court of Human Rights. Nonetheless the Convention has arguably provided rights for victims domestically in England and Wales indirectly through the very culture of rights it instilled.⁵⁴

International developments can (and have) led to whole new dimensions of a given issue being incorporated within the domestic framework. Thus, we know from the *new deal* that earlier conceptions of the Domestic Violence, Crime and Victims Act did not place such emphasis on victims of domestic violence.⁵⁵ Domestic violence was (and remains) very high on the international agenda at the time and the latest recommendation from the Council of Europe had been on the protection of women against violence.⁵⁶

A similar effect is discernable regarding victims of human trafficking, which is becoming a major international concern (see Konrad, 2006). Certainly 2002 saw the

⁵² Including free legal aid where warranted.

⁵³ It is questionable whether relevant reforms have been put in place to meet these latter requirements, especially on the issue of mediation.

⁵⁴ Although, it is maintained that the 'rights' attributed to victims under the Code are still better understood as 'legitimate expectations' owing to the lack of internally enforceable complaints or appeal mechanisms.

⁵⁵ We therefore know that the change took place sometime between July and December 2003.

⁵⁶ Recommendation 1450 (2000).

publication of the EU proposal for a Council Directive on short-term residence permit issues in relation to victims of action to facilitate illegal immigration or trafficking in human beings. The following year, the Home Office funded the pilot 'Poppy projects' to provide shelter and basic services to such victims. The chain of causation actually becomes cyclical, as following this the UK made human trafficking a priority during its tenure as president of the G8 and the EU, driving forward the adoption of an EU action plan on this issue in December 2005 (Ferrero-Waldner, 2006) and then consulting on a domestic action plan in early 2006 (Home Office and Scottish Executive, 2006).

More recently, the Crown Prosecution Service's proposed 'Children's Charter' (CPS, 2005a) refers to the UK's 1991 adoption of the United Nations Convention on the Rights of the Child⁵⁷; specifically the obligation to "consider the best interests and views of a child" and to afford them "the right to legal help and fair treatment in a justice system that respects their rights" (Articles 3 and 12). This again indicates how international developments have impacted on the development of victim policies, as well as the abundance of 'rights' language internationally.

It was noted expressly by at least one interviewee that international influences were responsible for the piloting of new measures in England and Wales:

"Internationally, the idea of domestic violence courts has grown out of the drug courts model – in terms of drug courts were developed in the late 80's/early 90's in the US – and they've grown into a sort of problem-solving approach" (representative of the DCA).

What these examples demonstrate is that the international and domestic contexts are not easy to separate. Here, this obviously relates to victims issues, but the point probably applies to modern policy-making in general (Smith, 2004). From the perspective of the present thesis, what is interesting is how the international 'victims movement' broadens our narrower conceptions of victimisation and often promotes swift government action. The international sphere also provides policy-makers, academics and others with useful comparators for the situation in England and Wales. For example, following the publication of the 2001 EU Framework Decision, Victim Support (2002b) called for more comparisons with inquisitorial criminal justice systems to temper the excesses of intimidatory cross-examination. This has also been suggested by Ellison (2001).

⁵⁷ Para.1.3.

4.3.9 – Rights language generally

To develop a point made in the last section, the language of ‘rights’ has clearly expanded internationally in recent years. Since the Human Rights Act of 2000, we have seen the domestic emergence of a ‘human rights culture’ in England and Wales applied to victims, whereby policy-makers and governments have felt more able to depart from the ‘service standards’ approach. As such, we saw in the last chapter that it is only relatively recently in the policy chain that victims of crime have been consistently endowed with the language of rights by policy-makers.⁵⁸ This is clearly reflected in the more recent policy documents, which often speak in terms of ‘creating’ victim rights for the first time. For example, the consultation on the Victim’s Code of Practice expressed a desire “to finalise the Code and introduce victims’ rights as soon as possible” (Home Office, 2005h: p.5).

As the policy chain progressed, government policy in the UK fluctuated from the language of ‘rights’ in the first Victim’s Charter (Home Office, 1990) – following the UN in its preamble to the 1985 Declaration – to that of ‘service standards’⁵⁹ in the second Charter of 1995, and subsequently reverted back to ‘rights’ after the 2001 EU Framework Decision, and certainly by the publication of the 2002 White Paper *Justice for All* (Home Office, 2002). Since then, the policy discourse of rights for victims of crime has accelerated such that Doak (2003, 2005) now identifies a widespread call for some form of procedural right of participation (for victims) within the system.

This general policy shift – from measures like the service-based Victim’s Charter of 1995 to the statutory (and allegedly ‘rights-based’) Victim’s Code of Practice in 2005 – may indicate the pending emergence of more robust (internally enforceable) rights for victims. Alternatively, however, we might argue that this is all just political rhetoric because – as noted in the previous chapter – there are still many questions regarding the practical enforceability of such ‘rights’, which presently comes from outside the criminal justice process. In terms of ‘rights rhetoric’, it is interesting to note that when the review of the second Victim’s Charter first suggested legislating for victims’ needs, the rationale given still utilised the language of ‘services’ rather than ‘rights’:

⁵⁸ Notwithstanding the initial ‘rights approach’ adopted by the first Victim’s Charter, discussed in Chapter 3.

⁵⁹ Thus reflecting the now popular conception of victims as the *customers* or *consumers* of criminal justice (Zauberman, 2000; Tapley, 2002). See Chapter 3.

“[I]n the light of the growth of services for victims, the Government believes that this is the right time to define at least the key services in legislation” (Home Office, 2001a: para.27).⁶⁰

It is also interesting that, whilst later policy documents have increasingly drawn upon ‘rights language’ since 2001, the eventual culmination of this – the Victim’s Code of Practice – seems to downplay the language of rights in its substantive text; albeit the preamble does refer generally to a ‘right to receive Code services’. Nevertheless, from around 2003/2004 it was clear that the language of ‘victim rights’ had reasserted itself. Hence, the final version of the Code was hailed as a pronouncement of the ‘rights’ now enjoyed by victims.

Rights language is also prominent in the 2005 consultation on victims’ advocates (Home Office, 2005b). Furthermore, the Home Office’s (2004c) strategy document goes so far as to indicate that a ‘robust and effective’ criminal justice system “acts on behalf of the victim and supports victims and witnesses through the justice process” (p.69). In the context of other reforms we have seen, we can be sure this does not literally mean the system or its prosecutors now represent victims rather than the state (a fundamental reform), but the use of what would have been quite radical language twenty years ago still indicates a change in policy (or, at least, rhetoric) over time. By 2008, the strategy aims to make victims “feel they are central to the system” (p.97). The government gave more specific details about its plans for the criminal justice system in its CJS strategy document *Cutting Crime, Delivering Justice* (Home Office, 2004e). It is again interesting how the language (if not the substance) of this document appears to cast victims as *quasi* parties in the case, pitting the victim directly against the defendant:

“Criminal justice will be organised to support the victim and thwart the offender” (p.26)⁶¹.

Of course, such remarks again instil notions of the zero sum-game. Nevertheless, policy-makers are clearly now willing to speak in terms of giving some victims their own representation in court; which is important because those with representation usually also have rights to be represented, and are usually called ‘parties’. We have also

⁶⁰ Victim Support had also called for ‘statutory rights’ for victims earlier that year (Victim Support, 2001).

⁶¹ Walklate (2007) discusses how this is a reflection of the relationship between the state and the law.

noted in recent years discussion of victims being given a 'voice' (cjsonline, 2006d), which was clearly an important issue to one policy-maker interviewed for this research:

"I want the Victims' Advisory Panel to play a very important role...it's made up of victims themselves whereas most of the other boards and panels we've got, they're actually policy boards...this Panel is actually victims themselves getting a direct voice to ministers...it's actually quite incredible⁶² that members of the public – and people who have been victims of crime directly – get to speak to the three criminal justice ministers to tell them their concerns. I think that's just incredibly valuable, amazingly valuable from a policy point of view" (representative of the OCJR).

The question throughout is whether the 'radical' nature of these and other reforms is confined to the rhetoric used to describe them; that is whether calling these 'rights' and not 'service standards' reflects a development of language – precipitated by international developments like the 2001 Framework Decision – rather than policy.⁶³ The answer to this of course brings us back to the definition of 'rights'. When questioning policy-makers on the exact nature of such 'rights' under the Code this rhetoric can slip:

"It depends on what you mean by 'rights', we think there are certain minimum standards that anyone ought to be able to expect and we set those out very very clearly and we do expect agencies to comply to them. So I suppose it's more about minimum service standards" (representative of the OCJR).

Certainly, looking at the reforms that have occurred, if we take the view that 'rights' should be enforceable from within the criminal justice process, then the 'rhetoric' interpretation seems to carry greater weight.

4.3.10 – 'Macro' influences

The more macro-level influences on victim reform as suggested by Boutellier (2000) and Garland (2001) have been described in Chapter 3. At this stage, however, we can identify a number of features of the policy chain that seem to back up their conclusions.

Rhetorically at least, victims do seem to be taking a more prominent position in criminal justice policy. Both commentators argue that this is because the system has become

⁶² Arguably it is even more incredible that this policy-maker found it so amazing that victims, or lay people generally, should be allowed to talk to politicians.

⁶³ The notion of introducing specialist victims' advocates first appeared in Labour's 2005 manifesto (New Labour, 2005), which makes no mention of victims having 'rights'.

defined by its treatment of victims and the addressing of their suffering. Under this construction, it is not surprising that the criminal justice system, policy-makers and other outside agencies have sought to identify a wider range of 'victims', hence the expansion of our conception of 'victimhood'. This has involved not only identifying different *categories* of victim (survivors of homicide, victims of domestic violence) but also different types of suffering (intimidation, secondary victimisation, anti-social behaviour). Thus, having excluded the victim for so long, one might argue that in this new era of moral pluralism and loss of faith in penal-welfarism, the system ironically now needs more victims in order to legitimise itself.

Hence, we noted above the wider definitions of victimhood found in the Sexual Offences Act 2003, which were based on the argument that other forms of sexual victimisation were just as distressing to victims as the legal definition of 'rape'. This may reflect the wider point that victims have indeed become more prominent in criminal justice policy with particular reference to those whose suffering seems to be the greatest. So, whilst the present limitations of the victim personal statement scheme must be acknowledged (especially as it excludes the consideration of victims' opinions), we can again view these developments as reflecting a new ethos of the system to address the suffering of crime victims. Similar arguments can be made regarding special measures, the Witness Service and the provision of information generally. Thus, we may be moving closer to defining victims by the suffering they endure. Of course, this has negative implications if it leads to policies focusing only on Christie's (1977) 'ideal victim'.

Garland (2001) also argues that governments deny the failure of the criminal justice system to solve the problem of crime by turning to ever more punitive policies, thus appealing to victims' 'need' to be protected and to have their voices heard. As such, notions of a 'zero sum game' develop between the needs of victims and offenders, which sustains and intensifies the punitive ethos. As already discussed in this chapter, we have seen clear examples throughout the policy chain of victim reform being combined with more punitive measures.

Another clear indictment of the 'macro' perspective is the fact that these developments have been international in nature, especially in relation to human rights. Again this hints that victim measures are ultimately the result of broad social trends, and perhaps even inevitable in the broadest sociological context.

4.3.11 – One extra point

In this Chapter I have discussed various alternative goals and explanations that might be attributed to measures that overtly appear to assist victims and witnesses. These were derived in accordance with the basic principles of grounded theory whereby themes and signs – and later ‘categories’ – are drawn from interview and document data (Glaser and Strauss, 1967). Nevertheless, I want to emphasise that all the policy-makers I spoke to seemed genuinely concerned and committed to relieving the plight of victims and witnesses as a problem in itself. To pick out one of many such examples, one respondent from the DCA said the criminal justice system owed a “duty of care” to these people to ensure they feel “safe, confident, informed, valued and appreciated” (representative of the DCA).

As such, I am certainly not suggesting that policy-makers consciously or maliciously ‘disguise’ policies. After all, Goddard (1997) notes that policies usually reflect the ideas of policy-makers. Rather, I am arguing that it is an intrinsic characteristic of this set of policies – and by extension perhaps policies in other areas of official interest – that due to the substantial overlap with other concerns not directly related to victims and witnesses, victims themselves were never *and could never be* the only relevant issue.

4.4 – A ‘POLICY CHAIN’?

At the start of this Chapter I provided three possible explanations for the acceptance of victims into criminal justice policy-making. At this stage it seems justifiable to state a conclusion as to these three possibilities and, in so doing, confirm my original hypothesis from Chapter 1 regarding the second research question. It is therefore submitted that victims of crime have become prominent in policy-making over recent years because actions that, incidentally, assist victims and witnesses have frequently been grounded in a quite different set of political concerns, and because – now that victims and witnesses have achieved rhetorical acceptance in the political system – new policies are being packaged as the continuation of work for these groups but which are in fact intended to achieve other aims.

It therefore seems logical to return to my original contention that, in reality, all the developments related to victims and witnesses are not actually part of the ‘same thing’ at all. No single actor (like Victim Support) or even a small group of actors are

responsible for driving this 'policy'. The reality is far more complex. In truth, this is probably not a single policy 'about victims and witnesses' at all but one comprised of, as Rock suggests, numerous 'other politics' and grounded in wider policy-making developments. Indeed, these 'other politics' may encompass far wider notions than 'victims of crime' to include the public in general.

It is by now clear that, whilst out of convenience I have continued describing this as a 'policy chain', this label implies a degree of linearity and consistency which is simply not present and must therefore be dropped. Recently, Rock (2005) has described these policies as more of a 'web' of developments and with this observation one can scarcely disagree. For Rock, there are eight main influencing focal points to this web: the structure of the Home Office⁶⁴; the nature of policy-making; the growth of the victim as a consumer of criminal justice; the development of human rights; compensation developments; developments in reparation provision; the identification of vulnerable and intimidated witnesses and race issues (specifically, the aftermath of the Stephen Lawrence enquiry)⁶⁵.

The present analysis completely supports these views, although I would seek to emphasise different aspects of this 'web' and different interrelations within it. For example, it seems clear that this is a group of policies based on multi-levelled governance rather than government⁶⁶. It also seems that many of the influences in this 'policy community' (Bache, 2003) can be placed in the context of the wider social changes described by Boutellier (2000) and Garland (2001). Furthermore – whilst Rock (1998) has talked about the growth in recognition of homicide survivors as secondary victims of crime – I would seek to emphasise the growth in our conceptions of 'victimhood' and 'suffering' more generally, and would cite the identification and support offered to vulnerable and intimidated witnesses as reflecting these wider developments.

Indeed, perhaps here lies one possible explanation for the often confusing truncation of victims and witnesses into a single group. Recognising the problems witnesses face when coming to court or giving evidence brings them within the ambit of 'victimhood',

⁶⁴ On which see also Egeberg (1999).

⁶⁵ Walklate (2007) adds the development of research linking gender with victimisation.

⁶⁶ Whereas Rock (2004) was purely concerned with national policy processes rather than international, local or regional policy-making.

meaning witnesses are the new victims. Finding 'new victims' is important because, as the macro theorists have argued, criminal justice is now legitimised by the treatment of victims and what little common ground remains within a generally secularised morality is maintained by reference to the acceptance and recognition of their suffering. This feeds into victims' acceptance as consumers of the criminal justice system.

I also wish to draw attention to the wider international context and, in particular, its influence on the recognition of 'new' forms of victimisation and suffering including domestic violence and human trafficking. Going back to the 1986 UN Declaration, this was amongst the first documents to draw attention to victims in criminal proceedings in the first place, and was also concerned about the abuse of (state) power. Human rights have been an important international influence on domestic victim policy. Again, these international developments reflect macro-level trends.

The above (grounded) analysis also lends weight to the proposition that, at numerous stages, the development of victim measures have been influenced by a number of other policy aims or goals for the criminal justice process. Here Rock has discussed the development of reparation schemes. In addition, the need to promote the efficient running of the criminal justice process appears to be a constant theme, to an extent that it has sometimes overtaken the goal of promoting witness satisfaction.⁶⁷ We see the goal of efficiency expressed through the aim of reducing ineffective (not cracked) trials and promoting effective case management. We might also note that many victim proposals have arisen in the context of reports designed to streamline the criminal justice process and extend the government's wider multi-agency, professionalised, approach to the provision of services.

In this category I would also include the (proposed) developments and reforms of state compensation, the burden of which were originally to be shared between employers and the insurance industry. Whilst assurances have been given that the more recent proposals to only compensate 'serious injury' will not lead to a reduction in funding for state compensation⁶⁸, it is hoped that the new system will reduce administrative costs; another streamlining measure which also has a financial incentive for the system.

⁶⁷ For example, the proposal to reintroduce witness orders.

⁶⁸ At the joint Office for Criminal Justice Reform/Victim Support 'Victims and Witnesses conference' held in Westminster, Central Hall, February 2006.

This streamlining of how crime is dealt with by a number of criminal justice and other agencies may once again reflect Boutellier's (2000) wider construction, which suggests governments will engage in a process of rationalising the law in order to promote its legitimacy; a process we have seen in England and Wales (and elsewhere) since the 1980s. All this suggests that we should be wary of the underlying influences behind reforms which assist victims and witnesses, particularly when they are presented as part of a wider package, as was the case in 1999, 2001 and most occasions thereafter.

The overarching point here is that the 'victim policy chain' is a retrospective construction, achieved by concentrating on specific elements of much wider strategies, processes and influences over time. Academics have had their role to play here, as their tendency is to compartmentalise such developments, placing them in order and treating them as a unified whole. We have also seen, however, that the policy-making process itself requires new initiatives to be billed as the continuation of old ones. Hence, policy documents like the *new deal* are designed to suggest a unified and consistent 'strategy' to assist victims and witnesses when in fact there is none. For example, because its recommendations had resonance with the contemporary 'victim theme', the outcomes of the Stephen Lawrence enquiry were cited as part of the 'background' to the government's response to *Speaking Up For Justice* (Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System, 1998; Home Office, 1999). This amalgamation of the Macpherson recommendations into a policy document primarily concerned with vulnerable and intimidated witnesses shows that sources which are grounded in different issues at their conception can be later brought together to give the appearance of a unified strategy.

We have previously noted Van Dijk's (1983) arguments that much of the 'victim movement' is action-orientated, meaning that 'doing something for victims' is often more important than constructing long-term policies based on victims' expressed needs. Of course, this supports the argument that the 'victims' policy has arisen out of a variety of different politics rather than any long-term plan. So, for example, one may take the view that periodically increasing Victim Support's grant so the charity can implement some new scheme is little more than an action-oriented measure to intermittently 'do something for victims'.

Thus, as priorities change, so too does the funding for new projects, like the expansion of the Witness Service. For example, a recent announcement guaranteed £1million of

central funds to pilot the new victim care units (cjsonline, 2006b). It was noted in Chapter 3 however that such units were proposed in the context of a consultation paper intended to reduce the costs of state compensation by instead offering 'practical support' to victims of 'non-serious' injuries; a cost-cutting measure (Home Office, 2005d). As we have already noted, the fact that the majority of funding for localised victim care must come from local resources not only distances the centre from responsibility for such measures, but also ensures that the continued funding of victim care is reliant on victims retaining their present status as a key political issue.

Overall, it may be futile to try and derive consistent meanings or definitions from a policy that is actually not one policy at all (unified and driven by identifiable aims and actors) but is instead constituted by a wide range of political influences and objectives. Many of these individual 'other politics' uncovered in this chapter were not in fact primarily aimed at addressing the needs of victims themselves. In other words, this seems to be a case of the whole being more than the sum of its parts.

4.4.1 – A 'victims' policy?

These are important observations because, if accurate, they suggest that the government and policy-makers might not have undergone a wholesale conversion to victim and witness issues. Instead, this would suggest that benefits brought to victims and witnesses are more properly understood as the *bi-products* of other agenda(s). I would suggest that the strongest evidence for this position lies in the reality exposed in this and the last chapter that many of these policy developments are open to critique, or at least have not served victims directly as well as they might.

For example, the argument has already been made in Chapter 3 that victims still lack what are considered by this thesis genuine 'internally enforceable' rights. Hence we noted that recent developments like the Victim's Code of Practice (and therefore the European Framework Decision it is supposed to implement) have not taken the issue much further from the second Victim's Charter introduced by the Conservatives in 1990. In any event, we have seen that the 'rights' victims have been afforded are mainly restricted to 'service rights', coupled with limited forms of participation.

This is partly because – as confirmed earlier in this chapter – the government has subscribed to a strategy of preserving the existing justice system rather than adapting it with fundamental reform to suit the needs of victims, and it certainly has not asked the

victims themselves whether they require more fundamental changes. I have suggested that non-fundamental reform as defined in Chapter 3 is a legitimate mechanism to achieve victim-centeredness. Nevertheless, the government's view is far more restrictive than this, excluding victims' participation (especially consultation) within the system essentially on the grounds of a zero sum game. So, we have seen the confused introduction of victim personal statements, replete with a practice directive to ensure the views of victims on sentence, are not considered (Lord Chancellor's Department, 2001; Hoyle et al., 1999; Morgan and Sanders, 1999). We have also seen the introduction of special measures, which do seem to assist victims (giving evidence in the guise of witnesses) but fail to address the arguably more fundamental problem of questioning techniques and the occupational practices of lawyers and judges.⁶⁹ In addition, it is worrying if indeed – as discussed in the last chapter – young victims are being given no choice over whether or not to give evidence this way.

Furthermore, we have seen numerous indications in this chapter that the government has no clear or consistent 'plan' for implementing reform. Hence we note the awkward introduction of two completely separate means of reducing administrative costs in state compensation in short succession, which we have argued may reflect financial concerns more than anything else (Home Office, 2004a; Home Office, 2005d). We have also seen the unstructured, unplanned manner in which Victim Support must permanently compete for extra funding as its role expands.

The issue of funding is key to this debate, because the lack of central money to finance the support offered to victims by local agencies strongly suggests that the government is unwilling to take responsibility for this area. Instead, local agencies must find resources from existing allocations. Again this means that the continuation of support for victims is dependent on them remaining important political figures. This is particularly so given that the bodies charged with implementing such policies – the Local Criminal Justice Boards – are comprised of criminal justice administrators who are more concerned with system efficiency than victims needs *per se*. Where the government have provided funding, it has usually been in the name of getting witnesses to court to give evidence – under the *No Witness No Justice Scheme* – which boosts system efficiency (and ultimately *cuts* the cost to the central purse). In addition, we note that whilst victims are given information about the system – such as the presence of special measures, facilities

⁶⁹ Discussed in more detail in Chapter 5.

and so on – this is all information that would compel them to come to give evidence, rather than a full and realistic overview of the highs and lows of being a witness.

At the centre, after many years victims now finally have their own (Home Office) minister, but this position seems to be one of spokesperson rather than agent of reform and therefore the appointment is sparse indication of the government taking responsibility for victims. Indeed, there is a real question as to whether the true ‘audience’ for these reforms are the victims at all, but may instead be the wider (and rather mystical) ‘law-abiding community’. The majority of this community apparently do not have to deal with the criminal justice system (on any kind of regular basis) but they do appreciate the suffering of victims who must do so, especially if these victims meet with stereotypical notions of vulnerability and need. On the latter issue, we can note again the latest suggestion to reduce state compensation for ‘non serious’ injury, based on alleged BCS findings that such victims would prefer services. In fact, no BCS sweep has ever asked victims to choose directly between the two, and we might ask – in a ‘victim-centred system’ – why should they? As such, the appearance of assisting victims may be all this ‘policy’ needs to achieve from the government’s perspective, hence the limitations of some of the reforms noted above. It has to be said that ‘the public’ also appreciate cost-cutting, hence some very clear statements in more recent policy documents that government is attempting to reduce costs and boost efficiency in criminal justice (Home Office, 2006a).

Whilst many of the measures intended to help victims have therefore had questionable results – and their implementation raises many questions as to the government’s real intentions – other reforms linked with improving victims’ lot in criminal justice seem to have little to do with victims (or even the narrower notion of ‘victim witnesses’) at all. I refer in particular to the punitive reforms we have seen, such as the hearsay and bad character provisions under the Criminal Justice Act 2003. Indeed, more recently we have seen ‘clamping down on offenders’ linked directly with supporting victims, as if the former necessarily implies the latter (Home Office, 2004e). This is surely nothing more than a political strategy to appease perceived punitive values amongst victims. Nevertheless, we have already argued in the last chapter that victims may well not be as punitive or vindictive as this implies (Erez, 2004). Hence, once again the audience for such measures are not the victims, but the public at large in an era of populist punitiveness.

Of course, notwithstanding the above points, the positive views expressed by victims and vulnerable and intimidated witnesses regarding court facilities and special measures clearly indicates that some victims have indeed benefited from some aspects of these 'policies'; including the advent of special measures, the extension of the Witness Service and even the efficiency-driven Effective Trial Management structure. In addition, with the introduction of victims' advocates we may be seeing a small percentage of (possibly ideal) victims afforded some measure of party status.

There remains much doubt, however, as to whether the victims themselves have been the true focus of this policy, especially as most of these measures only benefit victims *as witnesses*. There is also much evidence to suggest that other politics had a big part to play. Whilst we have noted from the early policy history how new governments can inherit the position of old ones – such as the 'service standards' approach adopted by the Conservative and continued by New Labour – it was confirmed explicitly by one interviewee that policy units are heavily influenced by changes in ministerial appointments (representative of the OCJR). Hence, whilst many victims have been helped, this may sometimes have been more by accident or happy coincidence rather than specific design. For this reason – as argued in the last chapter and above – the government has really not gone far enough in any of its reforms to genuinely bring victims 'to the heart' of this system. In the next chapter we will begin discussing one possible mechanism by which this could be achieved.

CHAPTER 5: AN ACCOUNTS-BASED MODEL OF VICTIM-CENTEREDNESS IN CRIMINAL TRIALS

Having now compiled and assessed the policy and political background behind the government's pledge to put victims 'at the heart' of the criminal justice system, the purpose of this chapter is to put forward one possible model (or an important component of a model) of victim-centred criminal justice. The features of this proposed system will then be contrasted with empirical findings from the system as it presently operates in England and Wales in the next chapter, and subsequently expanded and incorporated into a wider 'victim-centred' criminal justice model in Chapter 7.

5.1 – ACCOUNT-MAKING

As already noted, few recent studies have directly questioned what a genuinely 'victim-centred' criminal justice system might look like, specifically in relation to the criminal trial procedure. As such, this chapter will draw upon developments in our understanding of account-making – from the sociological and psychological literatures – to suggest that putting victims 'at the heart' of criminal justice necessitates a more detailed appreciation of the roles victims' 'accounts' and 'account-making' might play within the substantive trial process. Examples are given from the literature to illustrate the social functions and therapeutic benefit of 'story telling' for sufferers of many traumas, and for crime victims in particular. Under the proposed model, criminal trials themselves are viewed in terms of a collection of stories and interpretations of stories.

5.1.1 – 'Story telling' and 'account-making'

It has often been suggested that people are natural storytellers and that all human beings share this fundamental capacity (Coles, 1989). Recent years have witnessed an explosion of academic interest in the way human beings interpret and ascribe meaning to life experiences by recounting them in the form of stories (Maines, 1993; Orbuch, 1997). With the realisation that stories play such a key role in people's lives has come the widespread application of concepts like 'story telling', 'account-making' and 'narrative' to a vast array of issues from across the social sciences, humanities, and even

the physical sciences (Maines, 1993). Pioneering the use of life stories in social research, Ken Plummer describes these developments in the following terms:

“Recently, from all kinds of different theoretical perspectives in the human studies...there has been a convergence on the power of the metaphor of the story. It has become recognised as one of the central roots we have into the continuing quest for understanding human meaning” (1995: p.5).

Given such endorsement, applying this ‘metaphor of the story’ to victims in criminal trials might well prove advantageous when attempting to identify features of a ‘victim-centred’ system. As such, this chapter is chiefly concerned with the place and roles of story telling or – as I will term it here – ‘account-making’ within the substantive criminal trial procedure.

Orbuch et al. provide one concise definition of ‘account-making’:

“[P]eople’s story-like constructions of events that include explanations, descriptions, predictions about relevant future events, and effective reaction” (1994: p.250).

Whilst the breadth of this definition must be conceded, it does illustrate that account-making goes beyond the simple retelling of events in a ‘story like’ way. Account-making is thought to have important psychological and social implications for storytellers. In particular, it is argued that account-making improves a person’s understanding and acceptance of the specific events being recounted and can also help one cope with future life-challenges (White and Epston, 1990). Indeed, one understanding of the concept of ‘trauma’ is that it represents discontinuity in a person’s life story and is damaging precisely because it robs sufferers of the ability to story their ongoing experiences in a coherent way (Sewell and Williams, 2002). Such ideas have been most developed in the medical field, where Bury (1982) argues that chronic illness represents a ‘biographical disruption’ in a person’s life that causes them to rethink their self-concept. Williams (1984) develops this idea further to describe the conceptual strategies people employ to create a sense of stability and order in their lives following such disruption. In a similar vein, Giddens (1979) has argued that major events – such as war – undermine taken-for-granted aspects of the social fabric.

So far, the term ‘narrative’ has been avoided. Whilst there is a clear overlap in the literature between ‘narrative’ and ‘account-making’ Orbuch (1997) draws two main distinctions between the two. Firstly, he argues that ‘narrative’ implies a public

recounting of events, usually delivered orally to an audience. Account-making, on the other hand, can include private activities like writing diaries or self-reflection. As a second distinction, Orbuch emphasises that account-makers are usually troubled by specific 'stressful or imposing' events, whereas such events do not necessarily feature in narratives. An additional distinction is made by Kellas and Manusov (2003), who view accounts as a subgroup of narratives which set out to make sense of or explain life-events.¹

At first glance, the stories communicated by victims of crime during English trials seem to have more in common with narrative, as they are usually delivered orally before a court's public and professional audience. Nevertheless, in the present discussion the term 'account-making' is preferred because it corresponds more specifically to the perceived expectations of crime victims participating in criminal trials. For example, it is submitted that most victims do not anticipate presenting a complete 'life-narrative' *per se*, but attend court rather to tell a story which revolves around a specific (troubling) event or events. This is true even in cases where victims themselves believe that a far wider range of issues have relevance to the story than are conventionally accepted by the courts. Victims may subsequently incorporate these accounts into a wider life-narrative, but probably do not anticipate engaging in such an exercise during the course of a criminal proceedings. Indeed – practically – this is probably too big a task to achieve during a criminal trial. Nonetheless, the building blocks of this exercise may begin with the formulations of less wide-ranging accounts.

Literature on the impacts crime can have on victims confirms that victimisation can indeed represent a 'stressful or imposing' event (Shapland and Hall, forthcoming). Leading on from this, the argument to be developed in this chapter is that effective story telling through the trial process could bring significant therapeutic advantages to victims; aiding them in the understanding and acceptance of their victimisation. As such, and following Kellas and Manusov's (2003) interpretation given above, this position again seems more in-keeping with the goals of account-making – in terms of coping with specific troubling events – as opposed to the wider goal of constructing (or reconstructing) a life-narrative in the wake of such events.

¹ In this case, the dissolution of relationships.

The final reason the term 'account-making' is preferred here is because the evidence seems to suggest that writing one's account can be particularly therapeutic (Harber and Pennebaker, 1992) whereas the criminal trial process presently emphasises the orality principle (Ellison, 2001), as does Orbuch's (1997) understanding of narrative.

5.1.2 – The benefits of account-making

I am hypothesising in this chapter that victims would benefit from the opportunity to construct story-like accounts through the criminal trial procedure. As such, before drawing specific connections between account-making and trials it is first necessary to illustrate the apparent benefits of account-making in a general sense.

If human beings are indeed natural storytellers then it perhaps comes as no surprise that account-making seems to bring therapeutic benefits. This view is often prefaced on the notion introduced above; that traumatic events interrupt the ongoing process of ordering and presenting one's experiences as a story. As such, a trip to any health services library will uncover a whole host of therapeutic texts – written by and for practitioners – emphasising the benefits of patients 'externalising' such experiences and helping the individuals who experience them to tell their stories (Kleinman, 1988; White and Epston, 1990)

The clinical observations of practitioners have been substantiated by researchers (and vice-versa). For example, Harber and Pennebaker (1992) refer to developments in 'schema' theory to illustrate how traumatic events represent a disparity between the learned schemas people develop over the course of their lifetimes in order to live and operate in their environment, and new (traumatic) experiences. As such, victimisation can affect a person's underlying assumptions concerning, for example, orderliness and justice in the world (Herman, 2003; Shapland and Hall, forthcoming). Harber and Pennebaker suggest that, in order to resolve such "significant disparities between expectations and events" (1992: p.362) trauma victims must confront the troubling memories and that:

"This confrontation is best accomplished by translating the chaotic swirl of traumatic ideation and feelings into coherent language" (p.360).

According to the authors, the therapeutic benefit of such narratives (to use their terminology) will be enhanced when these narratives are organised and have a clear beginning, middle and end.

Harber and Pennebaker (1992) back up their assertions with their own detailed review of practical experiments conducted in this area. One category are the so-called 'writing experiments' in which a group of respondents are asked to write about emotions and facts surrounding traumatic events in their lives over a number of days, and are then compared to a control group (Pennebaker and Beall, 1986; Pennebaker et al., 1988; Pennebaker et al., 1990). In their review of the findings of these projects, Harber and Pennebaker (1992) note that writing such stories seems to bring genuine (if temporary) health benefits to the participants as well as 'self-perceptual' and 'moral-enhancing' advantages. It should be noted that the research participants in some of these experiments were university students (as is quite common in psychological studies). This of course leaves the work open to criticism that the results should not be applied to society in general. It is also clear that these authors are largely reviewing their own research, which always raises questions of objectivity. Nevertheless, the findings do seem indicative of wider trends and at least on the first point it is worth bearing in mind that student victimisation rates are unusually high – especially in relation to burglary (Barberet et al., 2003) – compared to the general population.

The fact that such benefits are accrued from writing about traumatic incidents is particularly interesting for the purposes of the present discussion, which is based on a criminal trial procedure still firmly grounded in the orality principle (Ellison, 2001). Indeed, Harber and Pennebaker (1992) go on to suggest that the act of writing may itself bring extra therapeutic benefits to victims of trauma, because it is a constructive activity that yields a tangible product.

In another excellent review of the wider evidence, Orbuch (1997) discusses how communicating accounts can help people cope with major life events, whilst failure to engage in an account-making process can lead to chronic problems. The notion that an absence of successful account-making is actually detrimental to health is a consistent theme running through the literature (Pennebaker and Beall, 1986; Harber and Pennebaker, 1992; Sewell and Williams, 2002).

Kellas and Manusov (2003) studied the effect of account-making on people's adjustment to relationship dissolutions² and, once again, this involved respondents providing written accounts. Whilst accepting some methodological limitations (again including the use of student respondents) their results nevertheless confirm that the coherence of an account and the maker's ability to put it in episodic or sequential order are positively related to their adjustment to relationship dissolution. Furthermore, the results indicate that people who can communicate complete accounts may have a greater sense of self worth compared to those who are unable to do so.

Notions of account-making also appear in the literature on victims of crime; although sometimes only by implication. For example, Kenney (2003) argues that homicide survivors³ have a greater sense of 'coping' when they engage in activities enabling them to "compartmentalize their thoughts and deal with them one at a time" (p.25). In a subsequent paper, Kenney expresses another telling point:

"Subjects [homicide survivors] were very clear that coping is not recovering completely, returning to 'normality', or going back to the way they were before the murder. Instead, subjects referred to the ability to live their lives 'around it' and 'go on'" (2004: p.244).

This seems closely akin to the view that victims must find ways to resolve traumatic events from their pasts through ongoing coping strategies or schemas, which allow such events to be successfully incorporated into their wider life narratives (Harber and Pennebaker, 1992).

Criminal victimisation has been linked more specifically with account-making in relation to sexual abuse. Dalgleish and Morant (1992) suggest that the manner in which people tell their stories shapes their claims concerning their own positions and lives. Linking this with accounts of sexual abuse, Riessman (1992) emphasises the value of account-making⁴ in the transitional process from 'victim' to 'survivor' of rape. As such, Riessman argues that victims of sexual abuse can construct a 'surviving self' through telling their story. The findings of Orbuch et al. (1994) also demonstrate the value of

² Although, as noted earlier, they prefer to think of account-making as a specific form of narrative.

³ That is, the secondary victims of homicide.

⁴ She also speaks in terms of 'narratives'.

account-making activities in the context of sexual abuse, the authors summarising the forms and benefits of account-making as:

“[E]xpressing emotions about the assault; cognitively clarifying aspects of the assault; resolving some of the resultant anger, fear, and paralysis of action; and actually moving on with one’s life constructively” (p.261).

This construction illustrates both short- and long-term benefits derived from successful account-making.

Of course, much of the above literature does not focus on victims of crime specifically and none of it draws links with the criminal trial process. We have also seen certain methodological limitations to these studies, and it is also clear that a relatively small group of researchers are working in this area. Nevertheless, there seems to be evidence enough to support the basic proposition that account-making can be beneficial, which means we must consider its place (or lack thereof) in a victim-centred system.

5.2 – STORIES IN CRIMINAL TRIALS

Given the apparent therapeutic benefits of account-making the next logical question is whether, in the context of the government’s pledge to put victims at the heart of the criminal justice system, it might be desirable to apply some of these benefits to victims in criminal trials and how this could be achieved. Thus, to begin addressing the issues of primary interest here, we will first investigate the role of stories and account-making in criminal trials.

The preceding paragraphs have concerned themselves with stories told by victims of crime and other traumas in isolation or, at most, communicated to specific researchers and/or therapists. When examining the implications of account-making for criminal trials, however, it is vital to consider the impact of multiple accounts. The adversarial justice model of England and Wales revolves around a competition between the prosecution and the defence. In a contested trial both sides therefore have their own version or versions of events to convey, their own stories to tell. Nevertheless, Van Duyne’s (1981) psychological analysis of sentencing differences suggests that the picture is actually far more complex.

Amongst numerous important issues raised by Van Duyne is the author’s contention that information presented in court during a criminal trial (whether in oral or written

form) is far from objective. In fact, such information always allows a certain leeway for differing interpretations by different actors involved in the process. As such:

“We may regard the total information in a case as a ‘story’ concerning one or more criminal offences in which the reporting officers, defendants and witnesses express their findings and views, and which may contain contradictions and points which are unclear; this can result in different interpretations of one and the same file” (Van Duyne, 1981: p.15).

Effectively then, these differing interpretations create a whole collection of stories. For example, as Van Duyne illustrates, a prosecutor’s professional experience (amongst other factors) will shape the case files he or she produces for the court. Indeed McConville et al. (1991) have emphasised the role of the police and prosecution working together in the construction of cases (stories) before they even reach court, to the extent that:

“The reality of Crime Control (in which, whatever their public postures to the contrary, police and Crown Prosecutors join hands) means that courts do little more than endorse constructions according to the quality of workmanship, the combativeness of the defence lawyer and the hand of Fate” (p.172).

Indeed, to draw a parallel with the defence side of the equation, we might refer to McConville et al.’s (1994) study of the work of defence solicitors and how they adopt a confrontational attitude to clients as a means of enforcing ‘standardised case theories’ in individual cases:

“Certainly at the magistrates’ court stage, if not beforehand, solicitors and their staff adopt a confrontational approach to clients, challenging them to deny the police evidence against them and virtually to prove their own innocence” (p.276).

As such, defence solicitors effectively compel defendants to accept a version of their story that corresponds to lawyers’ stereotypical impressions:

“Like the police, defence solicitors and their staff frequently work on the basis of standardised case theories and stereotypes of the kinds of people who become involved in events leading to arrest and criminal charge, whether these be fights outside pubs, domestic burglaries or car thefts, or incidents of shop-lifting. These people are commonly seen by their ‘legal advisers’ as feckless and dishonest, and such images are allowed to structure the way in which their cases will be handled from the outset” (p.277).

Hence, it seems that by the time a case has reached the court, the stories involved will already have gone through a substantial process of interpretation by both sides. Of

course, such stories will then be reinterpreted by judges based on their own experience and 'knowledge of the world' (Van Duyne, 1981). Judges, juries, clerks and magistrates will likewise interpret the oral or written evidence of victims, witnesses and police officers – who similarly develop their own versions of the story. Thus, in addition to the two versions presented by the opposing sides in the adversarial process, a criminal trial will typically involve a whole host of other stories, including those stories participating actors tell themselves in interpreting the information. Thus, a criminal trial can be understood in terms of a collection of stories.

5.3 – VICTIMS' ACCOUNTS AND ACCOUNT-MAKING 'AT THE HEART' OF CRIMINAL JUSTICE

Having discussed the therapeutic benefits of account-making and the conception of trials as a collection of stories, I will now elaborate on how I believe incorporating victims' account-making within criminal trials appears consistent with the government's pledge to place victims 'at the heart' of criminal justice.

In Chapter 1 it was argued that the criminal justice system revolves around the criminal trial. As such, if trials are typified by a collection of stories, it makes sense to suggest that in a victim-centred system the accounts made by victims would be afforded particular distinction within the trial process. It is not the specific goal of this chapter (or this thesis) to argue for or against the instrumental impact of such accounts on criminal procedure, either before or during the sentencing stage. Whilst such effects might well prove a significant feature of a victim-centred system overall, the contention here is simply that incorporating victims' accounts within trials is an important feature of such a system. In other words, a normative argument is submitted based on the view that the trial procedure is equally or more important to members of the public compared with instrumental outcomes.

We saw in Chapter 3 that this focus on procedure rather than outcomes is well grounded in established literature, with Ashworth (1993) Erez (1994) and Tyler (1990) all emphasising the view that "normative issues matter" (Tyler, 1990: p.178). So, for example, the 2002 Witness Satisfaction Survey indicates that witnesses' feelings that they have been 'taken for granted' is a strong predictor of overall dissatisfaction with their experience (Angle et al., 2003).

Aside from these purely normative concerns, however, the above discussion implies that incorporating victims' account-making within criminal trials will bring more tangible benefits in the form of therapeutic effects. It is not being suggested that these benefits could replace the benefits derived from professional counselling⁵ or even the less structured reflection and re-telling of stories in the longer-term. It might however constitute a means by which victims take something positive away from the criminal justice system; and it is submitted that this is an important goal for any victim-orientated process.

In fact, the notion that criminal justice can and should afford participants therapeutic outcomes is the subject of a growing literature (Wexler and Winick, 1996; Stolle, 2000). Rottman and Casey (1999) introduce the notion of 'therapeutic jurisprudence' in the following terms:

"Legal rules, legal procedures, and the roles of legal actors (such as lawyers and judges) constitute social forces that, like it or not, often produce therapeutic or antitherapeutic consequences. Therapeutic jurisprudence proposes that we ask whether the law's antitherapeutic consequences can be reduced, and its therapeutic consequences enhanced, without subordinating due process and other justice values" (p.14).

So far, therapeutic jurisprudence has been associated mainly with restorative and community justice initiatives, as well as with wider 'problem-solving' strategies, often adopted through the creation of specialist courts (such as domestic violence or drug courts) (Rottman and Casey 1999; Rottman 2000). Nevertheless, it is clear that provided 'other justice values' are not infringed (a point I return to in Chapter 7), therapeutic account-making as part of the criminal trial process would be commensurate with the goals of this approach.

To summarise, the argument here is based on the idea (or ideal) of a criminal justice system which genuinely holds victims at its heart. Whilst accepting the existence of other attributes, two desirable features of such a system are submitted. Firstly, because the system revolves around a process constituted by multiple stories, to put the victim at the heart of that system implies that the victim's story should be highlighted within that process, not excluded, marginalized or reinterpreted to the extent that it is no longer the

⁵ Although joint CPS, Home Office and Department of Health guidelines indicate that child witnesses should not receive any form of therapy which involves the detailed recounting of experiences prior to giving evidence at trial, as a guard against witness coaching (CPS, 2001).

victim's own account. Secondly, the notion of a victim-centred system implies some form of benefit will be accrued to victim participants. The relevant literature suggests that account-making is one way to inject such benefits – achieving a more therapeutic jurisprudence – whilst this would also be consistent with the first feature.

5.3.1 – Victims' accounts in criminal trials

Having set out its main arguments, this chapter next turns to the roles currently played by victims' accounts amongst the multitude of stories and interpretations of stories found in criminal trials.

Within the current system in England and Wales, victims contribute to the trial process in three main ways: witness statements, victim personal statements and the process of giving evidence. Each of these will be taken in turn with a view to establishing why – in principle and based on guideline documents and literature – all three fail to produce true accounts or account-making from the perspective of the victim. These arguments will then be backed up by reference to the empirical findings of the present research in the next chapter. This section also demonstrates how account-making can be used as a tool in assessing the victim-centeredness of the criminal justice system.

5.3.1.1 – Witness statements

The taking of witness statements is usually one of the first steps in the process culminating in a criminal trial. It is largely based on such statements that lawyers from the Crown Prosecution Service make their decisions on whether to pursue a prosecution, guided by public interest and evidential criteria (CPS, 2004). Witness statements therefore form the core of the case file assembled by a prosecutor and subsequently presented to the court.

The witness statements of crime victims contain what is purported to be their own version of events or, from the lawyers' perspective, their evidence. There has been little investigation into the manner in which witness statements are taken, but generally it appears that they are not usually written out by the victims themselves, but are instead compiled by police officers based on an interview. Certainly the 2004 edition of the *Prosecution Team Manual of Guidance* seems to envision the police filling in most of the relevant (MG11) form and the language employed is always one of police 'taking' witness statement rather than victims 'giving' their evidence (Home Office, 2004h).

Graham et al. (2004) also note that this police-led method is the traditional way of gathering witness statements.⁶ Victims are of course given the opportunity to read their statements and make corrections before signing each page. Subsequently, a typed version of the statement is produced and the victim is again asked to sign each page to confirm its accuracy (Home Office, 2004h).

Two main distinctions can be drawn between genuine account-making on the one hand and this process of victims making witness statements on the other. Firstly, the fact that witnesses' statements are apparently compiled by police officers means the victims themselves will be somewhat removed from the process. This seems to detract from the established norms of therapeutic account-making – as described in the literature above – in which respondents are usually asked to physically write about 'stressful or imposing events' themselves. Hence, in the case of witness statements victims miss out on any benefits derived from engaging in the constructive exercise of physically writing out their accounts.

The second distinction between witness statements and account-making lies in the fact that police officers are under pressure to take statements from victims as soon as possible after an alleged offence (Home Office, 2004h). Account-making, on the other hand, is usually conceived in terms of a story being told sometime after the events and following reflection and interpretation. Indeed, according to Orbuch et al.'s (1994) definition, this is largely the point of any account-making exercise. Of course, giving the victim time to 'reflect and interpret' events is precisely what the police, the courts and lawyers are seeking to avoid by taking statements as soon as possible, because from their perspective the statements are taken for evidential purposes. The issue then is whether victims themselves have this same purpose in mind when they give their statements, or whether they view the procedure more in terms of account-making. It is submitted that the latter possibility is more likely considering that everyone is to some extent a 'story teller' whereas few civilian victims are likely to think in terms of evidential rules.

Of course it could be argued that – regardless of what the officer actually writes down – the victim is in fact participating in an account-making exercise just by reporting the information. That said, the lack of time to reflect on the events in most cases, coupled

⁶ Evidence from the present research also supports this view, see Chapter 6.

with victims not actually writing the accounts physically and in their own words, seems to distance this process from true account-making. Furthermore, even if providing statements did afford victims some of the therapeutic benefits associated with account-making, if such accounts are not fully recorded they will never form part of the trial procedure. It is submitted that, given the evidential priorities of police officers, it is unlikely that victims' full and unedited accounts are in fact recorded in witness statements, and we will examine ethnographic evidence for such a proposition in the next chapter. If this hypothesis proves correct, then considerable doubt would be cast on the notion that victims are presently being brought 'to the heart' of the criminal justice system. On the contrary, this would suggest victims' stories are kept very much at the periphery.

Even if victims did write out their witness statements themselves – based on account-making rather than evidential criteria – following Van Duyne (1981) this would still be subject to the prosecutor's interpretation of that statement. Such interpretation will clearly influence the presentation of the information by prosecutors; in their opening speeches and also in the way they conduct a trial generally.

5.3.1.2 – Victim personal statements

We have seen that victim personal statements were rolled out as a national initiative in October 2001, following two major evaluations of pilot schemes (Hoyle et al., 1999; Morgan and Sanders, 1999). Their apparent purpose is to give victims of crime the opportunity to submit another statement in addition to their regular witness statements. Within such statements, victims are invited to comment on how a crime has affected them "physically, emotionally, psychologically, financially or in any other way" (Home Office, 2001e: p.2).

In terms of providing victims with a vehicle for account-making, victim personal statements boast a number of advantages over traditional witness statements. Firstly, it seems that victim personal statements are intended to be written in the victim's own words, and, perhaps in the victim's own hand. Some qualification is necessary here because the language used in the relevant guidance note for practitioners (Home Office, 2001c) is somewhat vague, again referring to police officers "taking the statement" but also clearly maintaining that victims "will be free to say what they wish". The *Manual*

of *Guidance* is similarly vague on this point (Home Office, 2004h). The leaflet produced for the victims themselves is more consistent, advising victims:

“The police will ask if you want to fill in a victim personal statement when they have finished filling in the witness statement” (Home Office, 2001c: p.5).

In practice, qualitative analysis has suggested that VPS statements are completed in a number of ways. These can be placed on a continuum ranging from ‘self-completion’ methods – where victims write out their own statements with a low level of police control – to ‘police checklist’ methods, where the police elicit victim personal statements in a similar way to witness statement (Graham et al., 2004). The lack of any quantitative data⁷ makes it impossible to know which methods are most commonly utilised by the police, but techniques which involve victims writing their own VPS statements obviously seem more consistent with account-making principles. As such, if the system is to become truly victim-centred, it is submitted that clearer guidelines to this effect would be required. In addition, victims’ awareness of the existence and purpose of the scheme needs to be increased, as Graham et al. found both to be very low.

The above extract refers to so-called ‘stage one’ victim personal statements, which are taken at the same time as the traditional witness statement. According to the *guidance note* and the *Manual of Guidance*, stage one victim personal statements should be taken on the same form (form MG11) as the main witness statement, “with a clear separation between the evidential part of the statement and the VPS” (Home Office, 2004b: p.138). This is a puzzling definition, as a victim personal statement is itself evidence, a point we will return to in a moment. What is perhaps more interesting for present purposes is that victims can also make subsequent ‘stage two’ victim personal statements on separate MG11 forms. A stage two VPS can be used to record the more long-term effects of crime or simply update/supplement a previous personal statement. The VPS guidance for victims assures them they can update their personal statements “at any stage before the case gets to court” (Home Office, 2001b: p.9).

This is clearly significant from an account-making perspective, as it seems to give victims the freedom to develop the information initially presented; allowing time for the reflection and interpretation associated with genuine account-making. As such, it seems

⁷ Which was rendered unviable by low take-up rates, see Chapter 4.

likely that stage two victim personal statements have the greatest potential to elicit therapeutic benefits for victims compared with witness statements, or even the stage one VPS. Once more, however, the accrual of such benefits is reliant on victims actually being informed about the scheme, an issue on which Graham et al.'s findings are again telling:

“There was low or no awareness of the option of making a later VPS” (2004: p.54).

Of course, even if stage one or two VPS statements are made, at this stage the victim personal statement encounters the same limitations as the traditional witness statements discussed above. Whilst producing such a statement (or statements) through methods involving low levels of police control might constitute account-making, the question becomes whether – in the context of the government's pledge on victims – these accounts are being readily incorporated within the trial process itself.

This is a question for Chapter 6, but the difficulty here is clearly that – just like the stories presented in witness statements – the use and interpretation of victim personal statements are in the hands of the prosecutor presenting the case. Unlike the equivalent schemes in several US states (Erez, 2000) the English and Welsh version of victim personal statements does not allow the victims themselves to read a VPS orally in court (JUSTICE, 1998).⁸ Thus, the victim must rely on the prosecutor presenting the statement to the court, referring to it in a speech, eliciting information contained within it during the victim's examination in chief or simply handing it in to the judge, who is under no obligation to refer to it. Roberts and Erez (2004) therefore argue that the communicative function of a victim impact statement is curtailed by prosecutors, who take away the uniqueness of victim's story and emphasise different aspects of it than the victim would. Once again, therefore, the victim's own interpretation of the story may easily be subjugated by that of the prosecutor and judge.

Even assuming the full text of a VPS was faithfully reproduced during a trial in a manner true to the victim's own interpretation, meaning and understanding, in such a case the victim's story is still subject to the interpretation of those who hear it. In the trial context such interpretation may well involve the exclusion of a lot of the

⁸ And even if they could – as might be possible under the victims' advocate proposals (Home Office, 2005b) – the statements themselves would still be subject to the same limitations as the existing VPS.

information due to restrictive interpretations of how victim personal statements can be used. So, at the pilot stage Morgan and Sanders (1999) concluded that victim statements were seen primarily as an aid to sentencing by criminal justice professionals but that in practice they still had little to no impact on most sentencing decisions. This is because the vast majority of cases were – from the court’s perspective – unremarkable as opposed to novel, and therefore sentencers felt they do not require the VPS, because it did not tell them anything they didn’t already know about the impact of the crime.

As we have already seen, soon after the national rollout of victim personal statements the then Lord Chancellor’s Department published a Practice Directive that drew attention to the VPS scheme, but also set out some fairly restrictive limitations. The text of that Directive is worth repeating here:

“The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence taking into account, so far as the court considers it appropriate, the consequences to the victim. The opinions of the victim or the victim’s close relatives as to what the sentence should be are therefore not relevant...[if] opinions as to sentence are included in a statement, the court should pay no attention to it” (Lord Chancellor’s Department, 2001).

This statement firstly confirms that the court’s consideration of victim personal statements should be confined to the sentencing stage following conviction. More significantly, however, the directive suggests that if criminal justice actors consider a victim’s ‘VPS made’ account to be ‘inappropriate’ or contain ‘irrelevant’ elements then the account should be wholly or partly excluded. Either way, this results in a brand new interpretation of the victim’s story.

5.3.1.3 – Giving evidence

Giving evidence in court is still the most visible and obvious contribution made by victims of crime during the trial procedure. Unlike witness statements or victim personal statements, the process of giving evidence represents victims’ sole opportunity to communicate information to the court firsthand. Further to this, the evidence itself can often sound very much like a ‘story’ being told by the victim. Nevertheless, a number of significant features seem to distinguish the evidence-giving procedure from true account-making. These will be discussed now and illustrated with practical examples in Chapter 6.

The main difference between accounts and court-based evidence is that whilst the former are 'made' the latter is elicited by questioning lawyers. Of course, counsellors might also elicit accounts from clients by prompting them to participate in an account-making exercise. In such cases, however, the counsellor is not attempting to actively control the information provided (as is arguably the case with lawyers) but is instead acting in the capacity of a receptive audience (Sewell and Williams, 2002).

To make the point concisely, in the present system victims giving evidence in courtrooms are not there to tell stories, but to answer questions. This immediately renders the victims subservient to the procedure because the stories they tell are thereby constrained by the logical scope and reasonable interpretation of the questions being asked, with lawyers/judges possessing the exclusive right to determine what such 'logical and reasonable interpretations' entail. Thus, if victims' answers stray beyond the scope of the information lawyers intended to elicit from a question, they are likely to be halted. Even when questioning lawyers employ relatively open language – 'tell the court what happened' – there is still an implicit limitation to the scope of the answer being called for beyond which victims are not permitted to stray. The consequence of this is that, once again, the victim's own account is distorted in favour of an alternative version of the story.

The notion that questioning lawyers effectively control the evidence presented by witnesses is supported by established literature. Luchjenbroers (1996) has provided a detailed content analysis of barrister-witness dialogue during a six-day Supreme Court murder trial in Australia. Although based on a single trial, the results clearly illustrate the questioning strategies employed by barristers to effectively control the information provided by witnesses. The wording of Luchjenbroers' conclusion makes it particularly suitable for inclusion here:

“[W]itnesses can hardly be thought to tell their own stories in their own words”
(Luchjenbroers, 1996: p.501).

Indeed, in direct contrast to notions of account-making as rewarding and therapeutic, the wider literature is almost unanimous in its portrayal of the evidence-giving process as a difficult and uncomfortable experience (Carlen, 1976; Shapland et al., 1985; Jackson et al., 1991; Rock, 1993; Ellison, 2001).

This last observation pre-empts another important distinction between account-making and evidence, which reflects a contrast between natural and unnatural modes of expression. As noted already, account-making usually involves account-makers telling their stories in their own way, based on personal reflection on past events. Aside from the specific experiments that have been carried out in this area, this can often be achieved privately through notes and diaries (Orbuch, 1997). Even when account-making is carried out in the context of an experiment or therapy – where respondents/clients may be specifically asked to present their accounts in written form – there are usually few further stipulations as to how exactly this must be done. For example, in some written experiments, respondents are told not to concern themselves with spelling, punctuation or grammar (Harber and Pennebaker, 1992). Hence, as pointed out at the beginning of this paper, genuine account-making seems to reflect a very natural way of imparting information through stories.

The contrast referred to above lies in the fact that, when victims give evidence during criminal trials, they are asked to relay information in a very unnatural, unfamiliar way. A courtroom is an unfamiliar environment for most people and can be frightening and intimidating (Hamlyn et al., 2004a). The evidence is itself elicited from witnesses in a very unnatural manner, with witnesses usually being told to present their answers towards the bench or jury whilst simultaneously receiving the questions from a lawyer standing in another direction (Rock, 1993). In addition, the fact that notes of a witness' evidence must be taken by hand by more than one person in the room means that witnesses are required to present the information at an unnatural speed and volume; persistently being interrupted in their flow and asked to slow down or speed up or speak more loudly. In summary, Jackson (2004) points out:

“It is seldom appreciated just what a wide array of cognitive, social and emotional skills the legal system demands of witnesses” (p.73).

Furthermore, it is not just the procedure of giving evidence that may be difficult to victims and other witnesses. In many cases victims will be asked to cope with some very unfamiliar concepts, hearsay being a prime example and one on which witnesses of all kinds receive no information or guidance in published materials.

Of course, as with written statements, witnesses giving evidence may be asked to elaborate on what they consider to be very small details whilst passing over what they view as important ones. Not only is this all highly frustrating, it is also likely to

compromise witnesses' ability to present their accounts in what they consider a logical and consecutive order; another important characteristic of account-making emphasised earlier (Kellas and Manusov, 2003). In addition, and particularly during cross-examination, questions may be confusing, coercive or insulting (Temkin, 1987). Overall then, the evidence-giving procedure seems far removed from the very natural process of therapeutic account-making.

Ellison (2001) places some of the blame for the problems faced by witnesses (specifically vulnerable and intimidated witnesses) on the system's continued reliance on the orality principle (the notion that evidence should typically be presented out loud). Certainly this seems at odds with our understanding of account-making, which embraces written accounts. Of course, even if the orality principal were not so dominant in current legal thinking, the preceding discussion of witness statements and victim personal statements suggests that presently it would still be difficult to ensure a written version of the victim's account was incorporated within the trial procedure.

The final distinction I wish to draw between account-making and evidence is that the latter is not necessarily a voluntary exercise.⁹ It has already been noted that therapists might try to convince their clients to engage in an account-making process. Such persuasion is however far removed from the position of some victims in criminal trials; summoned to give evidence on pain of arrest and imprisonment. At present, the clearest examples can be drawn from cases of domestic violence.

Traditionally, it has been very difficult to prosecute cases of violence in the home. Some blame for this can be attributed to the prevailing police professional culture that was to a large extent uninterested in such crimes, dismissing them in favour of 'real' police work (Reiner, 2000). More specifically, however, the difficulty of attaining prosecutions for domestic violence lies in the fact that many of its victims are unwilling to report the matter or provide evidence (Cretney, and Davis, 1997; Temkin, 1999). When such cases are reported, it is still very common for victims to subsequently withdraw their complaints and submit so-called 'retraction statements'.

The reaction of the Crown Prosecution Service to poor conviction rates for domestic violence has been to initiate a policy of driving forward these prosecutions. The full

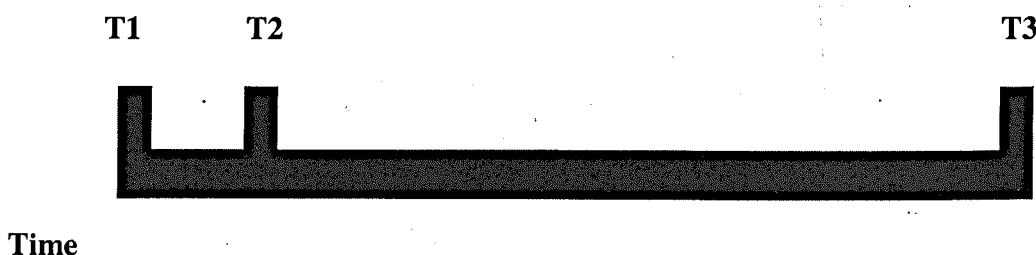
⁹ Although, unlike Scotland, the general theory in England and Wales is that a witnesses' evidence is based on their voluntary attendance at court.

details will be reviewed in Chapter 6 but, essentially, this policy involves treating domestic violence victims as parties with reduced capacity who – unable to make ‘rational’ decisions as to supporting a prosecution and giving evidence by reason of their relationship with the defendant – need to be ‘saved from themselves’.¹⁰ Effectively, this often removes any influence the victim might exert over whether or not a case is proceeded with (albeit this influence is generally quite minor to begin with). The consequence is that if a case of domestic violence is brought to court against victims’ wishes, it is open for prosecutors to summon them to attend or – if a summons has failed to secure attendance – to request a warrant. One can see this as a strange reversal; where from the victim’s perspective there is no story to tell but the system itself demands one. Of course, such a ‘forced’ account would be limited by the factors already discussed whilst – most likely – any remaining benefits to the victim would be further eroded by the mandatory nature of the exercise.

5.3.2 – Victims’ accounts in criminal trials: a summary

The limitations placed on victims’ capacity to tell their stories through the criminal trial procedure can be broadly summarised by reference to the disparity alluded to earlier between the system’s evidential criteria and the account-making requirements (or natural expectations) of the victims themselves. The implications of this can be illustrated diagrammatically on a timeline:

Figure 1: Timeline of victims’ accounts



T1 = time of victimisation T2 = time of giving witness statement

T3 = time of giving evidence at trial

On Figure 1, the horizontal line represents time, running from point T1 (the point of victimisation) through point T2 (when a victim gives evidence to the police in the form

¹⁰ Based on various interviews conducted for this research with legal practitioners and the Chief Crown Prosecutor in the area under review. Chapter 6 reproduces the relevant quotations, see pages 243-243.

of a statement) and ending at T3 (the trial, when a victim gives evidence in court). As has already been observed, the police usually take a victim's witness statement as soon as possible after the initial incident. Subsequently, however, many victims will face a prolonged wait between stages T2 and T3 whilst the case is brought to trial. This waiting period (T2-T3) can be anything from a year to eighteen months for offences of violence, and possibly even longer in complex cases (Bari, 2006).

The question raised by this is whether victims' stories remain static in their own minds during this prolonged waiting period. The use people make of stories to bring order and ascribe meaning to past experiences (especially troubling experiences) has already been discussed. Taking this into account, it seems fairly unlikely that many victims arrive at court at stage T3 prepared to tell exactly the same story they told at stage T2. This is because, in the intervening period, the victim's ongoing attempts to 'story' the experience of victimisation will result in extensive thought, reinterpretation and development of that story.

Hence, the stories victims are prepared to tell when they arrive at court at stage T3 may be quite different from those given at stage T2. Such differences might include new details occurring to the victim in the intervening period, links drawn with other experiences prior to or following stage T1 and variation in the language used to relay these events. In a more general sense, different aspects of the story may – by stage T3 – seem important to the victim and worthy of inclusion, exclusion or emphasis. It is crucial to appreciate that this is not a case of victims 'carelessly' allowing their minds to slip, but is instead representative of the natural way people deal with these kinds of experiences; Plummer's root to understanding human meaning (1995: p.6).

The problem faced by victims at trials, however, is that the process restricts them to the version of the story given in their witness statements at point T2, because this is the version the lawyers are expecting and which they will be seeking to elicit. The difficulty here may lie in the fact that the system presently has no way of making any version of the story between T2 and T3 available to prosecutors, as the CPS usually only has the T2 statement to work with. This is because 'later' witness statements are generally not taken (as they would be considered unreliable) whilst we have seen that stage two victim personal statements are still rare. Hence, what prosecutors are left with is the T2 story that – as we noted earlier – is largely constructed by the police. This implies that

the accounts victims are allowed to make though the criminal justice are effectively set in stone at the earliest stage of the justice process.

In sum, criminal trials effectively restrict victims to the T2 version of their stories that – in their own minds – might well constitute an outdated account. This of course suggests that the accounts victims are permitted to make will have less relevance to them than the more reasoned and considered (T3) version, which is born from a prolonged period of self-reflection, interpretation and developments in understanding (T2-T3). The victims themselves can hardly be blamed for engaging in such activities – given our understanding of the natural ways people use stories – nor can they be criticised for wishing to give what they view as the most up to date and relevant account. In contrast, the system compels victims to cast their minds back many months to a version of the story from which they themselves may now derive little meaning; effectively excluding the fruit of the prolonged period of self-reflection and development.

Fundamentally, therefore, the argument submitted by this chapter is that a genuinely victim-centred trial procedure would be capable of incorporating more developments between points T2 and T3, thus allowing victims to tell their full stories and derive therapeutic benefits from so doing. Many questions are raised by this proposition; including how it would operate, whether it would be legitimate to impose any limits on victims' accounts in a victim-centred system, and whether this model would necessitate 'fundamental reform' after all.

Clearly these questions overlap with issues raised in previous chapters, especially the notion of victim rights and the incessant objections of the due process perspective. In Chapter 3 it was argued that a victim-centred system might afford victims the (internally enforceable) right to present a wider category of evidence and to avoid – for example – being interrupted or having the course of their evidence dictated to them through questioning strategies. In this thesis I have argued consistently against notions of a zero sum game between victim and defendant rights, but before moving on to address how the 'accounts-based' model would operate we first need to substantiate what role (if any) victims' accounts play (or could potentially play) in existing criminal procedures. This will be achieved by examining in the next chapter the empirical evidence gathered for this project. We will then be in a position to conclude whether or not 'accounts' could be incorporated into the existing justice model (without fundamental reform) and thus into our overall model of victim-centeredness to be presented in Chapter 7.