
VICTIM PERSONAL STATEMENTS AND SENTENCING

A review of policy, operation and research

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EXECUTIVE SUMMARY

- The role of the victim at sentencing is one of the most active areas of policy and research in the field of sentencing. Victims now provide input into many stages of the criminal process, beginning with bail decision-making and ending with parole. This input usually takes the form of an impact statement which is then considered by courts and parole authorities. This paper explores victim input at the stage of sentencing in England and Wales.
- The Victim Personal Statement (VPS) scheme has been operating for almost 20 years, without any official review of its operation. The primary purpose of the VPS is to allow the victim to document the impact of the crime, and not to provide a recommendation for sentencing. This report reviews recent research and data trends with respect to the use of VPSs at sentencing.
- All crime victims in England and Wales are entitled to make a VPS to be considered by the court at sentencing. Submitting a VPS is optional and the guidance is clear that a victim's decision not to submit a VPS should not result in any adverse inferences at sentencing. The right is specified in the Code of Practice for Victims of Crime (Victims' Code) which states that victims of crime are entitled to be offered the opportunity to make a VPS.
- Until it was discontinued in 2010, the primary source of information about victims was the Witness and Victim Experience Survey (WAVES). Today, the Crime Survey of England and Wales (CSEW) is currently the principal source of information about victims' experiences and responses.
- All respondents to the CSEW who reported a crime to the police are asked whether the police gave them an opportunity to submit a VPS. Across the most recent administrations of the Crime Survey of England and Wales only 13% recalled receiving an offer. The percentage of respondents recalling a VPS offer has changed little over the past six administrations of the CSEW. It is unclear whether victims were offered a VPS, but then failed to recall the offer or whether they never received an offer.
- There was little regional variation in the recall of offer rates: the lowest recall of offer rate was 11% (in Yorkshire and Humberside) and the highest in the Southwest (17%).
- Of the victims who recalled being offered the opportunity to submit a statement, approximately half the victims (53%) stated they had submitted a VPS.
- CSEW respondents are asked the following question: 'Do you feel that what you said in your Victim Personal Statement was taken into account by the Criminal Justice System?'. The latest administration (2018-19) found the following distribution of responses: 'Yes, completely': 35.3%; 'Yes, to some extent': 30.4%; 'No, not really': 13.0%; 'No, not at all': 21.0%.
- Since the CSEW does not probe respondents' reasons for submitting or refraining from submitting a statement, it is unclear why only a small percentage of crime victims ultimately submitted a VPS for the purposes of sentencing.
- Research from other jurisdictions suggests that the use of VPSs do not systematically increase sentence severity. In general, victims who submit an impact statement report being more satisfied with the sentencing process, and indicate that they would submit a statement in the future if they were victimised again. Research in England and Wales has yet to adequately address these questions.
- Current knowledge of the strengths and weaknesses of the regime is insufficient to determine whether the VPS has achieved its objectives. In light of its importance as a primary vehicle for victim input into sentencing, the VPS regime should be subject to a comprehensive evaluation, and the 20th anniversary is a good opportunity for this to take place. The report concludes by identifying a number of research priorities. These include further investigation of the low recall of offer rate, as well as exploration of the reasons why approximately half of all crime victims decline to participate in the VPS scheme.

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1. SCOPE OF REVIEW

This report describes the current status of the Victim Personal Statement (VPS) in England and Wales and draws upon a review of research with a focus on the period 2010-2020. The shortage of recent research means that the review occasionally draws upon findings from other jurisdictions. The focus is upon the role of these statements at sentencing rather than other stages in the criminal process.¹ Most common law jurisdictions operate some form of victim input regime, usually in the form of a Victim Impact Statement (VIS), or VPS in this jurisdiction. This year (2020) marks the 20-year anniversary of the first VPS pilot schemes.

2. BACKGROUND

Over the years, the use of VPSs has attracted advocates as well as adversaries. Advocates have emphasised the therapeutic and informational benefits of victim participation in the sentencing process.

Critics of victim input at sentencing have cited a threat to consistency and fairness if the emotional content of the statements leads a court to assign excessive weight to victim impact. This report does not engage with the normative debate about the role of victims at sentencing. It makes the assumption that VPSs are now a permanent feature of the sentencing process. This said, it is important to understand how the regime is working and how it may be improved.

¹ Although victims are becoming increasingly engaged in parole decision-making, parole affects a much smaller proportion of crime victims. In addition, the principal purpose of the VPS is to provide insight into the effects of the crime and this is critical to a sentencing court. At parole, however, the decision to release a prisoner is focused on the prisoner's risk of re-offending and the likelihood of rehabilitation if they are released. Few victims will have relevant information regarding these two issues.

3.

THE VPS REGIME IN ENGLAND AND WALES

The introduction of the VPS regime in England and Wales followed developments in other jurisdictions.² It originated in the 1996 Home Office Victims' Charter, which informed victims that through making a statement 'you can expect the chance to explain how the crime has affected you, and your interests to be taken into account' (Home Office 1996, p.3).

A number of pilot schemes were followed by a national roll-out in October 2001. The Victims' Charter was replaced by the Code of Practice for Victims of Crime (the 'Victims' Code') in 2006 and this did not originally include a right to make a VPS. However, the Code was revised in 2013 to include an entitlement for victims to make a VPS; victims may read their statement aloud in court at sentencing, or have their statement read by the prosecution. Additional amendments were made in 2015 to further enhance entitlements for victims of the most serious crimes (including bereaved close relatives), persistently targeted victims and vulnerable or intimidated victims. These categories of victim are entitled to make a VPS to the police at any time prior to sentence irrespective of whether they have made a witness statement.³

The use of VPSs in practice is guided by the Criminal Practice Directions⁴ and this is supplemented by judgments by the Court of Appeal (Criminal Division), the most significant of which is the 2013 judgment in *Perkins*.⁵

PURPOSE OF THE VPS

The purpose of the VPS is described in the Joint Agency Guide to the Victim Personal Statement (hereafter 'Joint Agency Guide'):

'A VPS is a statement given by victims of crime to the police (or any agency or organisation assigned to take the VPS on their behalf)... It provides an opportunity for victims to communicate verbally and/or in writing the effects the crime has had on them (and also their family members). It is the victim's way of telling the court about the crime they have suffered and the impact it has had on them whether physical, emotional, psychological, financial or in any other way.' (2018, para.1)

The VPS promotes an expressive model of victim engagement: 'expression as a form of participation involves the victim wanting to provide information or communicate feelings to the decision-maker for their own benefit' (Manikis 2017, p.66). The conceptual significance of this is explained by Bergstrom and Azmeh:

'VPS fall within one of two different models depending on the jurisdiction: expressive or instrumental. Within the former model, the purpose of the VPS is expressive and communicative: it serves to express the victim's view of the harm created by the offence, a view which is communicated to the court and possibly also the offender. Importantly, this model does not require a nexus between the VPS and the appropriate sentence, which essentially means that the victim's preferences or suggestions as to sentence are not formal parts of the model. The instrumental model, on the other hand, entitles the victim to attempt to influence the judge's decision in order to secure a higher sentence.' (2019, p.7)

In England and Wales, the primary purpose of the VPS is therefore to allow the victim to document the impact of the crime, and not to provide a recommendation for sentencing. As in other common law jurisdictions, failure to adhere to the restrictions may result in the VPS being edited or even withdrawn. Several objectives have been ascribed to the VPS, but the principal purposes are (a) to provide crime victims with a degree of participation in the sentencing process; and (b) to provide courts with a direct source of information about the crime in order to assist in determining the relative seriousness of the offence.⁶

² The first victim impact statements were made in California in 1976 and they were introduced in New Zealand in 1987 and Canada in 1988 (Roberts and Manikis 2011).

³ For further discussion of the evolution of victims' rights at sentencing, see Bergstrom and Azmeh (2019) and Manikis (2017).

⁴ See the guidance on pages 11-13 here: <http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2012/crim-practice-directions-vii-sentencing-101213.pdf> (accessed 9 August 2020).

⁵ [2013] EWCA Crim 323. In *Perkins* the Court emphasised some of the key aspects of the VPS system, highlighting that the decision as to whether to make a statement must be made by the victim, personally, and when this decision is being made, it should be clearly understood that the victim's opinion about the type and level of sentence should not be included. It was further noted that as a VPS constitutes evidence, it must be treated as such – and the contents of the statement may be challenged by the defence in cross-examination.

⁶ Many victims see a benefit to communicating with the offender. For example, one of the victims interviewed by Hoyle et al., said that: 'I wanted to show the defendant that what they did does affect someone's life' (1998, p.26). The VPS is therefore a communication directed at the court and the offender. To date, the emphasis in the scholarly literature has been upon the court. VPS forms make no reference to the offender. For example one form in use by the Thames Valley Police states that: 'Your VPS is important because it will help everyone involved in the case – the police, the prosecutor and the court – to understand the impact the crime has had on your life' (Thames Valley Police, MG11W (VP)).

All crime victims in England and Wales are entitled to make a VPS to be used by the court at sentencing. Submitting a VPS is optional and the guidance is clear that a victim's decision not to submit a VPS should not result in any adverse inferences at sentencing (Joint Agency Guide 2018, para.20). The right is specified in the Victims' Code which states that victims of crime are entitled to be offered the opportunity to make a VPS.

The Victims' Code sets out the minimum level of services that victims of crime should receive from criminal justice agencies and other organisations. However, victims have no mechanism of enforceability if they are denied this entitlement: in England and Wales there is no statutory duty requiring criminal justice professionals to inform victims of the VPS scheme; this is contrary to the position in other jurisdictions.⁷

As noted, victims are prevented from commenting on their preferred sentence for the offender. In this respect, they have no direct influence on sentencing outcomes.⁸ However, the statements may influence the court's calibration of the degree of harm inflicted. In England and Wales, harm and culpability constitute the primary determinants of sentence severity.

Whilst issues of culpability relate solely to factors concerning the offender, the evaluation of seriousness may be influenced by the information contained in a VPS. The Joint Agency Guide notes that:

'When assessing the nature and seriousness of the offender's actions, courts will take into account the physical, emotional and financial harm caused to a victim or his or her family. Whilst the court is aware of the likely impact of most offences, the VPS can help them understand better how they apply to the particular case before them. In other words, it can help them understand how the crime has affected the victim... In summary, the VPS can help refine the court's assessment of the harm caused to the victim by the offender and this may impact on the severity of the sentence passed.' (2018, paras.40-43)

VPSs should contribute to principled sentencing by helping a court craft a sentence proportional to the seriousness of the offence, notably the harm inflicted on the victim. Harm is central to the determination of crime seriousness as section 143(1) of the Criminal Justice Act 2003 states that: '[i]n considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and *any harm which the offence caused*' (emphasis added). In the absence of a VPS, the court may be left to make assumptions of the level of emotional or physical harm caused by reference to its experience or general knowledge rather than being able to make an accurate assessment of the harm caused in the particular case. Therefore, the opportunity to submit a VPS may not only increase victims' satisfaction with sentencing (or at least diminish their sense of being excluded) but may greatly assist the court to arrive at an appropriate sentence.⁹

⁷ A provision in the Canadian Criminal Code creates a statutory duty on courts to inquire of the prosecution whether the crime victim has been advised of the opportunity to prepare an impact statement. Courts may adjourn sentencing in the event that the victim has not been contacted for this purpose.

⁸ In domestic abuse cases, however, the victim's view as to elements of the sentence may be relevant. For instance, where the intention is for the partners to reconcile, a victim may wish to express their view that a restraining order prohibiting contact ought not to be imposed.

⁹ This has been acknowledged by the Court of Appeal, which in *Perkins* noted that: '[p]roperly formulated statements provide real assistance for the sentencer.' [2013] EWCA Crim 323 at [10].

4. VPS AND SENTENCING GUIDELINES

In the context of the Sentencing Council's guidelines, the contents of the VPS may affect the selection of the seriousness category to which the case is assigned.¹⁰ When determining the appropriate sentence for an offender, judges or magistrates will apply the guidelines to place the offender in a sentencing bracket which will reflect the seriousness of the offence and the culpability of the offender. For example, when sentencing a case of street robbery, a court must first determine the level of harm and the level of culpability. In deciding the appropriate level of harm, a court will consider questions such as whether the harm inflicted was minimal or serious,¹¹ and in doing so the VPS is one source of information. Victim impact is central to the levels of harm in the guidelines. For example, one of the primary (i.e. 'Step 1') factors determining the level of harm for some offences in the assault offences guideline¹² is that the victim is particularly vulnerable because of personal circumstances, and the VPS may well be a useful source of information regarding the victim's vulnerability.

In determining the seriousness of an offence for the purposes of sentencing a court will draw upon a range of sources including pre-sentence reports, medical reports, and submissions. If the offender was convicted following a trial, the court will have the benefit of evidence and testimony. If the offender pleads guilty, the court will review the agreed statement of facts. In both cases, the parties' submissions will contain much of the information necessary to determine the seriousness of the offence. What then is served by allowing the victim to directly provide input, by means of the VPS?

The regime carries the assumption that the victim's statement contains information unavailable from other sources. A key question then regarding the utility of the VPS (regardless of any victim benefit) is whether the statements contain information relevant to sentencing which is unavailable from other sources. Research in other countries suggests that judges find victim statements useful at sentencing. The only research conducted in this country found that 'magistrates and judges said the VPS helps to illustrate and very often provides supplementary information to existing evidence within the court file' (Victims' Commissioner 2015, p.32).¹³

¹⁰ The Sentencing Council issues guidelines that judges and magistrates must follow when sentencing unless 'it would be contrary to the interests of justice to do so' (section 125(1) of the Coroners and Justice Act 2009). For more information see: www.sentencingcouncil.org.uk/.

¹¹ If the court finds that there was 'serious physical and/or psychological harm caused to the victim', the court will use the category 1 starting point; if there was no or only minimal harm caused to the victim the court will begin the sentencing exercise in the lower category 3. The sentencing starting point differs by several years' imprisonment depending on the harm categorisation. See the guideline for robbery offences, available at: www.sentencingcouncil.org.uk/wp-content/uploads/Robbery-definitive-guideline-Web.pdf (accessed 5 August 2020).

¹² Available at: www.sentencingcouncil.org.uk/wp-content/uploads/Assault-definitive-guideline-Web.pdf (accessed 5 August 2020).

¹³ Qualitative and quantitative research in other jurisdictions suggests that the judiciary believe that victim impact statements do assist in identifying accurately the harm of the offence (Moffett 2017; Roberts and Edgar 2003). The Victims' Commissioner's report noted that sentencers 'valued their inclusion' (2015, p.44).

5. USE OF VPS AT SENTENCING

The VPS is a universal provision. The process by which a victim makes a VPS for sentencing is relatively straightforward. Victims are asked whether they would like to provide a VPS by the police at the same time as providing their witness statement. However, in some cases it may be more appropriate for a separate agency (e.g. a support worker in instances of domestic violence) to record the VPS at a later date. The VPS is a written document, with the information that the victim provides orally being recorded in writing by the agency taking the statement. Currently there is no standard framework of a VPS to guide the formulation of the statement, so they may vary in form and structure. If a victim initially declines to provide a VPS, they may still submit one at a later date, although this may be contingent on proceedings not being too far advanced. Once a statement is submitted, it forms part of the court papers and may not be altered or withdrawn. It can be updated with additional information on any continuing impact on the victim or their family.

There are important restrictions governing the content of a VPS. According to the Joint Agency Guide, victims are encouraged to include:

- ‘any physical, financial, emotional or psychological injury they have suffered;
- and/or any treatment they have received as a result of the crime;
- if they feel vulnerable or intimidated;
- if they no longer feel safe;
- the impact on their family;
- how the quality of their life has changed on a day-to-day basis;
- if they need additional support, for example, if they are likely to appear as a witness at the trial;
- the on-going impact of the crime on their lives.’ (2018, para.32)

Victims may express a preference as to how they would like the VPS to be delivered at any future sentencing hearing: it can be read aloud by the victim; a recording can be played of the victim reading it; it can be read on their behalf by prosecuting counsel; or they can elect for it not to be read out at all and simply be considered by the court on paper (Joint Agency Guide 2018, para.22). If read aloud, the content of the VPS can be reported by the media. Whilst the victim may express a preference as to the mode of delivery for their VPS, the decision to grant permission for this rests with the court. In exercising this discretion, the guidance provides that the wishes of the victim should be ‘followed unless there is good reason not to do so’ (Joint Agency Guide 2018, para.23).

6. KEY ISSUES

6.1

VPS AS EVIDENCE

Once submitted, a VPS is part of the evidence in the case. The implications of this are two-fold. First, the evidential status of the VPS engages disclosure requirements. This means that: 'a VPS will always be shared with the prosecuting agency, ordinarily the Crown Prosecution Service (CPS). If the case reaches court, then the VPS will be served on the court and the defence as part of the Initial Details of the Prosecution Case (IDPC), so the suspect will usually be able to see it' (Joint Agency Guide 2018, para.21). Second, victims may be cross-examined by the defence on the contents of their VPS. Best practice guidance is that these implications should be clearly explained to victims when they are offered a VPS, as this may influence a victim's decision to engage with the scheme at all.

The evidential status of the VPS can be problematic. As an evidential document, the VPS is subject to the pivotal checks-and-balances of the adversarial process, including cross-examination. The Victims' Commissioner's research found that none of the magistrates or judges spoken to had received a request to cross-examine a victim on his or her VPS and that the judges and magistrates said that 'it would be unlikely for defence representatives to make such requests; and in the event that they did, it would be unlikely that the judge or magistrate would allow it' (2015, p.21). This suggests that the possible distress which would be caused to victims by cross-examination on the VPS may lead a court to look unfavourably on a defence counsel who would pursue this line of enquiry.

Hungerford-Welch has noted that if a VPS 'does suggest an unusually high level of harm, fairness to the defendant would usually require this harm to be established by independent evidence (such as a medical report)' (2011, p.36). However this presumption has recently been questioned as a result of the judgment in *Chall*.¹⁴ There, the Court of Appeal held that it is unnecessary to have independent expert evidence to support claims of psychological harm made in a VPS. As a result, offenders may be placed in a higher sentencing bracket to reflect the victims' account of their higher level of harm. The logic underpinning this decision is explained by Harris:

'It is submitted that [determining the facts of VPS] is, at its core, no different to the task faced by a sentencing judge in determining facts which are not discernible from the jury's verdict... the decision to be made is a factual one in which sentencing judges are vastly experienced; there is clear and strict guidance from the Court of Appeal as to the way in which the decision is to be made; and it is one subject to review if the sentencing judge is thought to have arrived at a decision which is not sustainable on the particular facts.' (2019, p.1075)

Following *Chall*, it has been argued that 'if the VPS was initially introduced with a rather loosely defined aim of giving victims a voice and a role in sentencing, it now clearly serves a more defined legal purpose' (Bergstrom and Azmeh 2019, p.9). The evidential weight attached to victim attestations of the harm creates a need for sentencing remarks to clearly recognise (a) when VPS content is being relied on as proof of such harm, and (b) the degree to which this has affected the categorisation of the offence in the relevant guideline. In addition, an explanation should be provided as to how a case meets the criteria outlined in *Chall*.¹⁵ These steps are necessary to ensure that where appropriate, challenges in respect of these findings can be made. In the interim however, significant trust and responsibility is vested in the judiciary who are relied on to exercise their expertise of fact-finding when considering the contents of the VPS. For some, this *de facto* reliance on judicial expertise (due to the non-viability of cross examination) may be problematic.

¹⁴ [2019] EWCA Crim 865.

¹⁵ The importance of following the correct procedure when dealing with a VPS was re-emphasised by the Court of Appeal in *Jones*, where it was noted that: 'evidence from victims' statements is important and can have an integral part to play in and a significant impact on the sentencing exercise. They should not be left as an afterthought, hastily uploaded to the [Defence Case Statement] just before, or in some cases during, the sentencing hearing. They must be in the proper form, contain up-to-date information, and be served in good time on the defence.' [2020] EWCA Crim 1139 at [16].

6.2

VPS DISCLOSURE

Under the provisions of the Criminal Procedure and Investigations Act 1996, the prosecution must disclose relevant evidence to the defence. The Crown's initial and continuing duty of disclosure is an essential due process safeguard of the criminal process; it works to ensure the safety of any conviction. The evidential status of the VPS, and the fact that its content may be relied upon for establishing matters of fact at sentencing, means that disclosure is a prerequisite to ensuring that the accused receives a fair trial. However, there is evidence to suggest that the fact that a VPS will be served as evidence upon the defence may itself deter victims from submitting a statement (De Mesmaecker 2012; Chalmers et al., 2007). Victims are left to undertake a cost-benefit analysis of whether the benefits of submitting a VPS outweigh any concerns they might have about disclosure. A key challenge here is to ensure that victims are provided with adequate information about disclosure; research indicates this is not always the case (Victims' Commissioner 2015). This is particularly important since a VPS may not be withdrawn once it has been submitted.

6.3

ROLE OF EMOTION

The VPS regime arguably facilitates an increased 'flow of emotional information to the court' (Doak and Taylor 2013, p.46). The emotional impact of VPSs is seen by some commentators as problematic (Hoyle 2011; Booth et al. 2018). Doak and Taylor note that 'many opponents of participatory rights for victims maintain that emotional outpourings endanger the objectivity of sentencing and are inherently inappropriate for the courtroom' (2013, p.32). Others argue that the facilitation of 'emotional information' through the VPS simply makes explicit that which has always been implicit in the emotionally-charged context of the criminal process. Thus, it has been argued that the VPS scheme should be embraced, and its potential recognised as an effective facilitator of 'therapeutic jurisprudence':

'Therapeutic jurisprudence posits that lawyers and policymakers can seek to reduce anti-therapeutic aspects of the legal process, whilst simultaneously enhancing its therapeutic effects by studying the emotions and psychological experiences of victims and offenders. While lawyers cannot be expected to act as therapists, and trials cannot provide a substitute for psychological interventions, therapeutic jurisprudence contends that justice processes, and their key players, hold the potential to operate as 'change agents' whereby victims and witnesses are offered respect and space to tell their story and air their emotions.' (Doak and Taylor 2013, p.28)

These are the two ends of a spectrum of views. There is limited empirical data on these issues in the domestic context to determine whether the emotional content of a VPS undermines principled sentencing.

7. RESEARCH FINDINGS

Recent empirical data on the use of VPSs are limited. This has impaired research on the regime, and restricts the conclusions which may reasonably be drawn about the benefits and burdens/ disadvantages of victim impact statements. No data on the volume of victim statements are currently collected by either the Government or the Ministry of Justice and questions about the VPS have not featured consistently on the Office for National Statistics' National Crime Survey. Publications have analysed information from a range of sources, many of which are no longer available, for example the Witness and Victim Experience Survey (WAVES), which was discontinued in 2010. More recent research was reported by the Victims' Commissioner, which identifies the systemic failure of criminal justice agencies to offer victims a VPS at all (Victims' Commissioner 2015, p.7), and has been cited as an authority for subsequent policy reforms.¹⁶ However, the report warns that the views of victims included in the research sample 'do not necessarily represent the views of all victims' (Victims' Commissioner 2015, p.12).

Previous research consistently revealed that only a small minority of victims elect to make a VPS (HM Government 2018; Victims' Commissioner 2015; Roberts and Manikis 2012; Roberts and Manikis 2011). The question is why? There are two key metrics here: the percentage of all victims to whom the offer is made, and the percentage accepting the offer. Regarding the first variable, it may be that some victims have simply forgotten the offer by the time they participated in the research. This seems unlikely, since all victims complete a witness statement where they are asked to confirm that they have received the VPS leaflet and have been informed of their right to submit a VPS. Nevertheless, the data suggest that only a minority of victims access the scheme. An important key question is whether administrative barriers account for this low uptake.

Latest trends from the Crime Survey of England and Wales

The Crime Survey of England and Wales (CSEW) is the principal source of information about victims' experiences and responses. All respondents to the CSEW who reported a crime to the police are asked whether the police gave them an opportunity to submit a VPS. Roberts and Pina-Sanchez (2020) report that across the most recent administrations of the CSEW only 13% recalled receiving an offer. Of the victims who recalled being offered the opportunity to submit a statement, about half (53%) stated they had submitted one. Compared to the 'recall of offer' question there was more variation in this percentage across the country: from 47% in the North East to 62% in the West Midlands. The percentage participating in the scheme varied little over time, ranging from 50% to 54%.

Since respondents were not asked their reason for participating or declining to participate, it is unclear why almost half of the victims who were aware of the opportunity nevertheless declined to submit a VPS. Taken together, however, these two statistics suggest that approximately 5% of all victims of a crime serious enough to be recorded by the police ultimately participated in the VPS scheme. The remaining victims either did not recall the offer, or declined participation having been informed of the opportunity. Either way, they did not participate.

Drawing upon the last cycle of the WAVES survey (conducted in 2010), Roberts and Manikis found that the percentage of victims reporting having been offered a VPS varied from 29% in London to 63% in Northumbria (2012, p.254). One of the reasons for the variable uptake in the VPS scheme may be a failure of some criminal justice agencies to offer the VPS (HM Government 2018; Victims' Commissioner 2015; Roberts and Manikis 2011). The Victims Strategy document acknowledges the problem: 'Victims are not always being offered their entitlements from the Victims' Code: The Victim Personal Statement (VPS) is one of the Code's key entitlements, providing the opportunity for victims to express how a crime affected them. Yet the Crime Survey for England and Wales found that for the past few years only around 15% of victims said they were given the opportunity by the police to make one' (HM Government 2018, p.29). The latest data, drawing upon the CSEW reveal far less variation in the recall of offer rates: the lowest recall of offer rate was 11% (in Yorkshire and Humberside) and the highest in the Southwest (17%) (Roberts and Pina-Sanchez, 2020).¹⁷

¹⁶ E.g. The Victims Strategy (2018); Joint Agency Guide on the use of the Victim Personal Statement (2018); Consultation: A New Victim's Code for England and Wales (2020).

¹⁷ Differences in sampling and survey methodology are likely to account for the significantly higher (and more variable) recall of offer rates in the WAVES survey.

Characteristics of victims more likely to participate in the VPS scheme

Victims of serious crime are more likely to submit a VPS (Mastrocinque 2014; Roberts and Manikis 2012; Leverick et al. 2007). Mastrocinque analysed data from several waves of the British Crime Survey (the previous name for the CSEW) to explore the interrelation of victim, offence and offender characteristics, with the likelihood of engagement with the VPS scheme. She concluded that with the exception of age ‘victim characteristics (gender, ethnicity, socioeconomic status) did not have a relationship with whether victims reported being informed of the VPS regarding the incident’ (Mastrocinque 2014, p.228).

Some victim characteristics were found to be related to the decision to submit a VPS; Asian victims were more likely to provide a VPS than White victims, and victims from rural areas were more likely to provide a statement than urban respondents (Mastrocinque 2014, pp.228-9). Victims of racially aggravated crime were significantly less likely to provide a VPS (Mastrocinque 2014, p.228) and characteristics of the offender were unrelated to whether a statement was provided (Mastrocinque 2014, p.227). The findings reported in this article are based on data collected well over a decade ago,¹⁸ but more recent analyses based on the CSEW and reported by the Victims’ Commissioner are broadly the same (see Victims’ Commissioner 2018).

Victims cite a wide range of reasons for submitting a VPS

After reviewing the international literature, Roberts and Manikis concluded that: ‘Victims who submit a statement often have multiple reasons for participating. The desire to communicate a message to the court and the offender is the most frequent reason given; however, some victims wish to influence the severity of the sentence imposed’ (2011, p.3). Similarly, the data collated by the Victims’ Commissioner noted that motivations included: a desire to provide proof that the crime had taken place (no percentage provided); to convey the impact of the crime to the court (51%) and/or to the offender (14%); and to gain cathartic or therapeutic benefit alone (5%) (2015, pp.23-24).

Most victims believe that their VPS was taken into account to some degree

CSEW respondents are asked the following question: ‘Do you feel that what you said in your Victim Personal Statement was taken into account by the Criminal Justice System?’. Although the question does not specify ‘at sentencing’ it seems reasonable to assume that respondents had the court system in mind. The latest administration (2018-19) recorded the following distribution of responses to the question: ‘Yes, completely’: 35.3%; ‘Yes, to some extent’: 30.4%; ‘No, not really’: 13.0%; ‘No, not at all’: 21.0%.

At this point we turn to research findings for which there is little recent national data.

Effect of victim statements on sentencing severity

Some commentators warned that the introduction of the VPS would result in harsher sentencing as courts focused to a greater degree on emotional, subjective accounts of harm. The evidence from foreign jurisdictions suggests that victim impact evidence has not had this effect on sentencing outcomes (Booth et al. 2018; Roberts 2012). This conclusion must be qualified by the absence of domestic research looking specifically into the degree to which VPSs (or indeed their absence) influence sentencing outcomes. In answering the question whether a VPS makes a difference to sentencing outcomes, Hungerford-Welch asserted ‘the short answer is almost certainly ‘no’ (2011, p.36). Research supports this conclusion but data are limited, and there is a shortage of data and knowledge on this issue.

The report from the Victims’ Commissioner notes the following:

‘[M]agistrates and judges made clear that the VPS was by no means a sole factor in determining the sentencing outcome – they also made reference to the sentencing guidelines by which they are bound. They reported that by considering the VPS when sentencing in some instances, sentences were increased, whereas in some instances, sentences were not affected at all’ (2015, p.32)

However, the absence of information provided in the report regarding the proportion of respondents who expressed this view renders these conclusions tentative at best. Calls for researchers to examine references to VPSs in sentencing remarks – which would shed light on this issue – remain unanswered. As a result, current knowledge about the impact of the VPS on sentencing (particularly in terms of influencing where in a sentencing category an offender is placed) remains limited.

¹⁸ The most recent British Crime Survey data reported by Mastrocinque derive from 2006.

Most victims who submit a VPS report benefitting from the experience

It is difficult to generalise about victims' experiences with the VPS. Many variables affect whether the experience is viewed positively or negatively:

'Research indicates that the expressive function of a [victim impact statement] is particularly important from a victim perspective; having a voice is a major reason that victims submit a [victim impact statement] (Lens et al. 2010). Studies show that many victims want to tell their stories and express their feelings about the crime (Konradi and Burger 2000; Chalmers et al. 2007; Lens et al. 2010; Booth 2016). They want input in the process and feedback, evidence that someone has listened to them and engaged with their stories (Wemmers 2005); they want the harm they have suffered to be recognized and acknowledged (Roberts and Erez 2004; Booth 2016); and they want to be treated with dignity and respect (Daly 2014; Kool and Verhage 2014). For victims then, the manner in which their voice is accommodated in legal proceedings is a key issue. Not surprisingly, research has found that limitations on their voice can generate frustration, resentment and further alienation from criminal justice (Orth 2002).' (Booth et al. 2018, p.1481)

Consistent with this, the limited research indicates that victims who submit a VPS appear more satisfied with the sentencing process than those who do not (Victims' Commissioner 2015; Roberts and Manikis 2011). After reviewing the literature, Doak and Taylor conclude that: 'A range of empirical studies confirm that victim participation in the criminal justice process enhances satisfaction with justice through giving victims a sense of empowerment and official, albeit symbolic, acknowledgement' (2013, p.30).

Research suggests many victims are confused about the purpose of the VPS

The literature on the VPS contains cautionary tales of victims expressing disappointment as a result of their engagement with the VPS scheme (Victims' Commissioner 2015, p.9). Various studies 'have identified a real risk that victims may end up frustrated and even more isolated if they feel their expectations have not been met' (Doak and Taylor 2013, p.40). Central to this issue is the perceived lack of clarity surrounding the VPS regime:

'[The VPS was] introduced citing a myriad of justifications and objectives, and it is unclear whether [the] primary purpose concerns boosting satisfaction levels (and/or therapeutic benefits) among victims, or whether they are simply intended to give the sentencer an improved picture of past events.' (Doak and Taylor 2013, p.43)

Respondents to the Victims' Commissioner's survey expressed uncertainty about the scheme and approximately a quarter stated they had not been told anything about the use of their VPS in court (Victims' Commissioner 2015, p.14). The provision of incomplete and/or inaccurate information to victims regarding the use and purpose of the VPS may mean that their experience of the criminal process is set up to fail from the outset. The Victims' Commissioner has cautioned that some victims 'seem to have their expectations built up about what the VPS can offer, only to be let down often with devastating results' (2015, p.9).¹⁹ However, this criticism may be less relevant today as recent years have seen efforts by Government and practitioners to clarify the purpose and role of the VPS (in particular, the publication in 2018 of the Joint Agency Guide to the Victim Personal Statement).

¹⁹ Ashworth notes: '[There] are principled and pragmatic reasons against taking account of the victim's views, rather than impact on the victim(s). If this is not made plain to victims so that they understand, there is an enhanced danger of victim dissatisfaction with the decision of the prosecutor, Parole Board or sentencer' (2014, p.776).

8. RECENT DEVELOPMENTS AND REFORM PROPOSALS

The law framing victim engagement in the criminal process is currently in a state of flux. As of June 2020, the Government is in the midst of undertaking its second round of consultations for further revisions to the Victims' Code. A consultation for a Victims' Law has been scheduled to commence later in 2020. Details regarding the content of the proposed Victims' Law are not yet available, however the general premise of the law centres on enhancing the enforceability of victims' rights as provided for in the Code.

The specific ways in which the VPS scheme might be affected by a new Victims' Law are impossible to determine at present. However, concerns regarding the efficacy of the VPS regime feature in the reform proposals. The Government published the Joint Agency Guide to the VPS in 2018 in response to concerns regarding the informational deficit that has faced victims making a VPS, and to ensure greater consistency amongst criminal justice agencies regarding their understanding of the purposes and procedures associated with the VPS. The draft revised Victims' Code recognises that the current 'one size fits all' approach to the administration of the VPS may produce inconsistencies in uptake and underutilisation. Two potential VPS reform proposals to counter this are made in the 'Victims' Voice' chapter in the consultation paper (HM Government 2020). These are:

- Offering agencies more discretion in the timing at which a VPS is offered in 'recognition that individuals deal with experiences differently and that offering a VPS at the beginning of the process may not be the best time for some victims' (p.32).
- Allowing victims to retain a copy of their VPS (p.33).

This emphasis on the flexibility of the VPS process aims to have the effect of 'increasing the voice of the victim' (HM Government 2020, p.3), presumably through encouraging greater participation. Notably absent are proposals for reform to assist in the practicalities of the VPS administration which may influence issues of consistency, such as adopting a standard framework for agencies recording statements.

The Government is intending to trial body-worn cameras to assist the police and other agencies in taking VPSs (HM Government 2018, p.30). This would permit an audio-visual record of the VPS. The rationale for this was explained by the then-Solicitor General, Robert Buckland, as follows:

'The Victim Personal Statement is a vital opportunity not just for the victim to have their voice but for the court to be able fully to understand the impact on them. That is why I am particularly enthused by the proposals to use body-worn videos to capture not just what is said but the way in which it is said and the sense that the victim statement should be a living document. At the moment, there are sometimes one, two or three versions of the VPS designed to update the court. Asking the victim to make a statement again and again is not necessarily the best way to support them, so the concept of a living VPS would really help.' (HC Hansard, Vol. 647, col. 376, 11 October 2018)

This approach to the VPS may exacerbate the emotional impact of statements, something already subject to adverse commentary. The practical benefits for victims, according to the then-Parliamentary Under-Secretary of State for Justice, Edward Agar, are that it 'will give greater choice in how victims are heard and reduce the need for statements to be repeated multiple times to multiple people, which involves the added trauma of having to relive the experience once again' (HC Hansard, Vol. 647, col. 335, 11 October 2018). The consequences for offenders, and for the objectivity and consistency of sentencing, are harder to determine.

9. RESEARCH GAPS AND PRIORITIES

Current knowledge of the strengths and weaknesses of the regime is insufficient to determine whether the VPS has achieved its objectives. In light of its importance as a primary vehicle for victim input into sentencing, the VPS regime should be subject to a comprehensive evaluation, and the 20th anniversary is a good opportunity for this to take place. The House of Commons Justice Select Committee would be an obvious candidate to initiate an inquiry and to hear evidence on the subject. Some key questions which need to be answered are the following:

- * Why do victims decline to submit a VPS? Is this simply a personal preference or does the prospect of cross-examination inhibit victims?
- * Is there a need for some kind of triage with more intensive provision being offered to victims of serious crimes?
- * Are there specific categories of victim (such as relatives of homicide victims) for whom a special protocol and VPS should be devised?
- * How satisfied are crime victims with the scheme as currently administered?
- * How often does a court sentence without having received a VPS in a case of a serious sexual or violent crime?²⁰
- * To what extent do victims understand the purpose of the VPS scheme and the limits it places upon the nature of the input? What do victims/judges perceive is the objective of a VPS: mainly to benefit the victim therapeutically; mainly to provide information about the crime relevant for sentencing; or a combination of the two?
- * Are particular categories of victims – new immigrants, vulnerable victims – less likely to understand the nature of the VPS scheme and therefore to participate? To date the literature has focused on the overall recall and participation rates, and overlooked the possibility that while the scheme is universal, barriers may exist for particular categories of victims.
- * What are the reasons behind some of the differences in victim engagement discussed above (e.g. Asian vs. White; rural vs. urban)? Understanding this could enable engagement efforts to be directed at those hardest to reach, and could be more effectively tailored to these victims' needs.

These (and other) questions could be answered by a periodic survey to replace the WAVES survey which, as noted earlier was discontinued in 2010. Alternatively, a more comprehensive suite of VPS questions could be added to the CSEW, to be repeated on a periodic basis. Qualitative research is also a necessary component of any comprehensive evaluation.

Participation rates represent only one measure of the success of a regime, and many empirical publications report what are described as low rates of statement submission. However, caution must be exercised in interpreting these statistics. Many victims may not need to submit a VPS. The crime may be relatively minor and/or the loss sustained has been recompensed. Without some filter on the cases sampled, raw participation rates are therefore an ambiguous indicator of the health of a VPS regime. What is needed is a targeted study focusing on victims of mid to high seriousness crimes. If such a category of victims is identified, a cohort study could track the percentage of victims who recalled being offered a VPS, the proportion deciding to submit a statement, and the reasons why some victims decline to participate. Researchers could also compare attitudes to the criminal justice system in groups of participants and non-participants. Are participating victims more satisfied with the criminal justice response to their experience?

If the participation rate is deemed too low, we need to know whether the response of criminal justice professionals (predominantly the police) play a role. This touches on a pivotal issue of operation, as noted by the Victims' Commissioner's report which found that victims were generally ill-prepared physically, emotionally or practically when providing their VPS and are not always treated with empathy and sensitivity when making their statement (2015, p.7). The failure of the VPS to attract more than a small minority of victims raises concerns. Furthermore, the Victims' Commissioner found that 'victims reported that the attitude displayed by some staff was akin to the VPS being a 'bolt on' to existing processes, rather [than] being handled as a key entitlement for victims' (2015, p.14). This suggests a potential disconnect between the principle and practice of the VPS scheme.

²⁰ The Victims' Commissioner's report noted that in most cases sentence was imposed without a VPS (2015, p.5).

Nature of the VPS forms

A review of current forms may suggest improvements to highlight the benefits of VPSs for victims and sentencers. At present, victim impact information appears to be collected in different ways across the country. For example, Thames Valley Police use a separate VPS statement form (MG11W (VP)). In other areas, a single form is used (the standard witness form (MG11T1)). Both forms contain two tick boxes where the witness is asked to confirm having been given a description of the VPS scheme and a copy of the ‘tear off’ VPS leaflet. Using the same form as the witness statement may understate the importance of the VPS. It is worth noting the description of the VPS on the Government’s Gov.UK website: ‘The Victim Personal Statement gives victims an opportunity to explain how the crime has affected them, physically, emotionally, psychologically, financially or in any other way.’²¹ This purpose is different from a witness statement in a criminal case and this will be reflected in the contents of the document. If the purpose and content of a VPS is clearly different from a standard witness statement, the form (or forms) should make this distinction clear.²² If approaches to collecting information do differ significantly across the country this may help explain the variation in recall of offer rates, or participation rates.

Adequacy of guidance for victims and courts

The purpose of the VPS may be unclear or seem paradoxical to crime victims who may feel that if they are encouraged to submit a statement, it should affect the sentence imposed. It is important to communicate the message that the sentence will only be affected if the VPS contains information which affects the court’s evaluation of the seriousness of the case. One of the long-standing findings in the literature is that victims sometimes feel let down at the lack of obvious impact. A review of the current guidance (accompanied by interviews with victims who have submitted a VPS) would confirm whether they have an accurate understanding of the nature and purpose of the VPS.

Courts may also benefit from more guidance in the appropriate use of the VPS, particularly magistrates who are involved in fewer sentencing decisions than district judges or Crown Court sentencers.²³ For example, courts have recognised that there may be occasions when the VPS suggests that a particular disposal such as immediate imprisonment would inflict undue hardship for the victim. If this occurs, the VPS provides insight into the impact of the potential sentence as well as the offence. How much weight should this information carry? In addition, might courts benefit from guidance as to the recognition of the VPS? At present, this guidance takes the form of a relatively brief section in the Criminal Practice Directions which is supplemented by judgments from the Court of Appeal.

Is this level of guidance adequate? It is hard to draw firm conclusions, and this represents one of the gaps in our knowledge. Some foreign jurisdictions have suggested more guidance would be useful. The Law Reform Commission of New Zealand, for example, drafted a stand-alone sentencing guideline to guide the use of VPSs by courts at sentencing.²⁴ The Judicial College represents another possible source of guidance for courts. Research with sentencers would provide clarification on the issue by revealing whether they share a common understanding of the role of the VPS and whether they are satisfied with current levels of guidance.

Content analysis of a sample of VPSs would provide useful information to answer a number of the key questions. For example, this could determine how much relevant information is contained in the statements, and the degree to which they supplement other sources of information available to a sentencing court. Analysis could also determine the level of extraneous or prejudicial information found in the statements, as well as whether any of this material had survived prosecutorial scrutiny and reached the court.

²¹ See: www.gov.uk/government/publications/victim-personal-statement (accessed 9 August 2020).

²² In other jurisdictions, victim input is recorded by means of a separate form, with specific directions about the content that should and should not be included. If the crime impact information is collected in this more systematic way it is less likely to include material that may need to be edited. A separate form may be able to accommodate particular concerns about sensitive material. Moffett (2017), for example, proposes allowing victims to identify information which would not be communicated in open court for privacy issues, although it would be available to the parties and the court.

²³ Magistrates sit for approximately 15 days each year, and are likely to see few VPSs since the crimes sentenced in the magistrates’ courts are less serious.

²⁴ This guideline has yet to be proclaimed into law.

10. CONCLUSION

Views of the role of victim input at sentencing vary widely, and the impact on sentencing practices has yet to be adequately explored. From the victim's perspective, the scheme may confer benefits yet also carries risks. The benefits include an enhanced sense of involvement in proceedings against the perpetrator of the crime. The risk is that victims' perceptions of the appropriate role may diverge from current practice. The result may be that submitting a statement results in greater alienation, and more negative views of the sentencing process. Further research is necessary, to establish how the VPS may best be administered, for the benefit of both victims and sentencers.

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