

THE USES OF VICTIM STATEMENTS

by
Rod Morgan and Andrew Sanders
Department of Law, University of Bristol

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**A report for the Home Office
Research Development and Statistics Directorate**

**By Rod Mogan and Andrew Sanders,
Department of Law, University of Bristol**

DECEMBER 1999

Additional copies of this report can be obtained from the Home Office, Information and Publications Group, Research Development and Statistics Directorate, Room 201, 50 Queen Anne's Gate, London SW1H 9AT.

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First published 1999

ISBN 7 84082 353 4

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1. INTRODUCTION

The Victim's Charter (Home Office, 1996) formally set out the right of victims to make a statement explaining how the crime had affected them and drew attention to pilot projects which were being undertaken to test out how this might best be done. These statements are referred to in this report as Victim Statements (VSs), although they have sometimes been known as 'Victim Impact Statements'.

Although VSs were not unknown in England and Wales prior to the 1996 edition of the Charter, there was considered to be a need to establish some systematic form of victim participation in criminal justice decision-making under our international obligations (Council of Europe 1985; UN 1985). The essence of the concept of the VS is that the victim is given the opportunity to describe the wider effects of the crime than is usual in an evidential statement. These effects could be emotional or psychological, physical and financial. They could include anxiety. A VS could be made by a parent on behalf of a child. There need, in law, be no formal distinction between a VS and an evidential statement, but the former could contain, for example, hearsay. Unlike a formal evidential statement, no warning is given that untruths could be punishable. In practice this means that VSs are not vetted for their evidential relevance and soundness and are not introduced in criminal proceedings before guilty verdicts are entered or, in the case of trials, verdicts are returned (see Chapter 3). In the event of proceedings being discontinued, or the accused being acquitted, this means that the VS will not be referred to — an outcome that may cause distress or lead to dissatisfaction on the part of the victim. This limits the usefulness of the VS scheme in its current form (see Chapter 7). It should be noted that the VS should only contain facts about the crime and its impact. The opinions of the victim, or his/her family, are not relevant. In this, the Victim's Charter follows the practice of most common law jurisdictions, although in some American states victim *opinion* statements are allowed¹.

The Victim's Charter states that:

"You can expect the chance to explain how the crime has affected you, and your interest to be taken into account. The police will ask you about your fears about further victimisation and details of your loss, damage or injury. The police, Crown Prosecutor, magistrates and judges will take this information into account when making their decisions." (P.3)

The term 'victim statement' (rather than 'impact' statement) was chosen in order to distance this scheme from the sentence orientation of American schemes. There is an ambiguity concerning the intended effect on sentencing, and therefore an ambiguity concerning the objective of the scheme as a whole. However, it is intended that the information in these statements could have an effect on bail and charge, as well as on sentencing decisions.

In summer 1998, we reported an evaluation of the manner in which VSs were collected in five of the six pilot areas established in 1996/7 (Hoyle *et al*, 1998). We also reported on the operation, in the same pilot areas, of the so-called 'one stop shop' schemes, whereby the police inform victims about progress in their cases whenever an offender is apprehended and proceeded against. The research showed that victims felt a good deal of dissatisfaction regarding: the manner in which VSs were taken; the uses to which they thought VSs were put; and the lack of communication from the criminal justice system about the way in which VSs were used.

¹ The opinions provided are usually in relation to sentencing.

These findings proved difficult to act upon from a policy standpoint because it was far from clear to what uses the various criminal justice agencies considered VSs *should* be put and there was little or no information about the uses to which VSs *had been* put. It was agreed that there was an informational deficit, which had to be repaired if sensible policy choices were now to be made regarding the future collection and use of VSs. By discovering the uses to which VSs *are* put it would be possible to consider more sensibly whether their continued collection is worthwhile and, if considered worthwhile, how their value to practitioners might be maximised and victim dissatisfaction with the process minimised.

Methods of the research

In each of the four pilot areas selected for fieldwork (Bedfordshire, Merseyside, the Metropolitan Police District (MPD) and Sussex) the aim was to interview the following personnel:

- A senior police officer and civilian responsible for collecting VSs
- CPS lawyers (4)
- A magistrates' court clerk
- Magistrates (4)
- Judges (4)
- Defence lawyers (2)

It was also agreed that in order to capture the views of decision-makers based on experience rather than conjecture we should attempt, to the greatest possible degree, to speak to persons previously identified as decision-makers known to have dealt with cases involving VSs. Moreover, to the extent that we were able, we would focus part of our conversations with decision-makers on specific cases with which they were known to have dealt, before passing on to general experience and broader issues. The only exception to this rule concerned judges to whom we were asked (by the Lord Chancellor's Department) *not* to put questions relating to specific cases, a proposition to which we agreed but which, as we shall see, proved to be a purely academic restriction. With these objectives in mind we adopted the following fieldwork method. It is worth examining the method in a little detail because our relative failure to carry it through is illustrative of the uses to which VSs are — and are not — put and the lack of knowledge which many decision-makers have regarding the pilot schemes in particular and VSs in general.

The four pilot areas selected for data collection were those in which the most VSs had been collected. In Merseyside, the MPD and Sussex, victims who opt to make a VS self-complete a pro forma which is sent to them; in Bedfordshire victims wishing to make a VS are assisted by a police officer who visits them for the purpose. In one of the two MPD areas, victims are offered officer assistance if they prefer this to completing a pro forma.

In autumn 1998 we contacted the relevant administrative support units (ASUs) in each of the four pilot areas and requested that they send us copies of all VSs collected since 1 January 1998, together with details of the prosecution file (the unique reference number, name of the defendant and, if known, the CPS lawyer to whom the file had been assigned). To this request ASU personnel readily acceded but, in the event, for reasons about which we are not clear, the documents and information took a great deal of time and many telephone reminders to be transmitted. Not until December did we receive the requested information from the last of the pilot areas. The numbers of VS cases about which we were informed were: Bedfordshire 12; Merseyside 41; the MPD 37; and Sussex 32.

The above case details enabled us, in nearly all cases, to identify the prosecutors responsible for the files. We contacted each of the Branch Crown Prosecutors with the names of those prosecutors who we knew had handled most cases involving VSs and made arrangements to interview them. Interviews were normally face-to-face but, when it proved difficult to make appointments with individual prosecutors, lengthy telephone interviews were conducted instead. Thus, as planned, we were able to focus our interviews first on specific identified cases and files which, in most cases, the prosecutors had with them when we met. We were able to read these files in order to put the VSs

and our discussions with prosecutors in their proper context. However, most cases have two or more hearings, and it is rare for the same prosecutor to handle any given case at each hearing. We frequently found that no one prosecutor had first-hand knowledge of all aspects of a case in which we were interested. Where possible we sought the prosecutor who handled the case at the sentencing stage and occasionally spoke to the two lawyers who had had most to do with the case. The discussions concerned 31 specific cases across the four areas, as well as more general matters.

It proved much more difficult, however, to prepare the ground for interviews with magistrates and judges in like manner. When going over the details of cases involving VSs with prosecutors we established whether each case was still in progress or completed and, if completed, which court had dealt with it. However, prosecutors were rarely able to identify precisely which sentencers had dealt with cases and, when we tried to identify the right personnel from magistrates' court clerks and Crown Court administrators, it was suggested to us that there was little point in pursuing this approach on the grounds that sentencers would not, or, in some cases, allegedly did not, recall the cases concerned. There were also practical difficulties in arranging interviews with particular sentencers, be they magistrates or judges. In the event, the identified case/sentencer approach was abandoned in favour of visits to magistrates' courts and Crown Courts with a view to talking to groups of magistrates and judges generally about their overall experience of VSs and cases involving them. During these visits we also talked to court clerks (or court legal advisers as they are often now known), court administrators and defence lawyers. As will become apparent, the latter interviews provided ample demonstration that our original proposed method of following up specific cases with sentencers would almost certainly have produced few insights that did not emerge from the method on which, perforce, we settled.

The overall number of interviews in the four pilot areas is shown in Table 1.1.

Table 1.1: Interviews with criminal justice practitioners in the pilot areas

	Bedfordshire	Merseyside	MPD	Sussex	Total
Prosecutors	3	3	5	3	14
Magistrates	3	6	3	14	26
MC Clerks	0	2	1	1	4
MC legal advisers	0	2	0	4	6
Judges	3	5	4	2	14
Crown Court admin	0	1	1	1	3
Defence lawyers	3	2	3	5	13
Police admin	0	2	2	2	6

Interviews covered the following areas: knowledge and understanding of VSs and the VS scheme in general; whether VSs are always placed in the prosecution file and what happens to them thereafter; the nature and content of VSs; their use and usefulness in decision-making; the extent to which they are challenged and challengeable in court; and what problems are perceived with the scheme and how might it be improved. The rest of this report is organised along these broad lines of enquiry.

2. PRACTITIONERS' KNOWLEDGE AND UNDERSTANDING OF VICTIM STATEMENTS AND THE VICTIM STATEMENTS SCHEME

The police civilians who administer the scheme, CPS lawyers, most of the magistrates' court officials (though Sussex was an exception in this respect) and some of the Crown Court judges were aware of the pilot projects. None of the defence lawyers (all of them solicitors) and only a small minority of the magistrates (including the single London stipendiary magistrate interviewed) knew of them, although a minority were aware of the existence of VSs. Most judges had experience of at least one VS over the last year or so, but even those few magistrates who could be identified as having tried cases in which we knew there to have been a VS had no recollection of them. Similarly, most defence solicitors who we knew had dealt with cases in which there was a VS were unaware of the fact. In practically all interviews with defence solicitors and groups of magistrates it was necessary to explain what a VS was and what the pilot site arrangements were.

Every interviewee was asked (generally following an explanation of the kind of information a VS might contain) what they thought the purpose of VSs was or might be. Most thought, or assumed, that they were to help with sentencing (including, for most interviewees, compensation). Most judges and magistrates initially welcomed the idea in principle on the grounds that sentencing should take account of the impact of a crime:

"If you don't see a victim it brings a human element into it to have something written down." (London magistrate)

"It is particularly helpful for inexperienced judges to see the real consequences of a given crime ... how certain crimes are viewed in the community and how certain crimes affect real people's daily lives." (Bedfordshire judge)

"It would give another dimension ... it would balance the PSR." (Bedfordshire magistrate)

"The more information the better ... We should be seen to be listening to victims more than we do." (Merseyside magistrate)

"It could only be of help to know as much as there was to know about the circumstances of the offence and the situation of the victim." (Sussex magistrate)

However, as our conversations progressed, doubts typically began to creep in. A substantial minority of magistrates and most judges were keen to emphasise that, in practice, the situation is not so straightforward and there are important objections to admitting VS information or allowing that information to impact on decision-making (see Chapter 7). It emerged that there is a substantial gap between the general welcome which is given by judges and magistrates to the idea of VSs, and the reservations which many hold about allowing them to affect decisions.

As noted in Chapter 1, VSs were not unknown in the UK (but probably only in Crown Courts) prior to the VS experiment. Sometimes VSs were provided at the initiative of the prosecution, and sometimes at the initiative of the judge. In Sussex one judge told us that he often asked at plea and directions hearings if a VS could be obtained and occasionally asked of the CPS if the victim had been

consulted in the event of charges being downgraded or dropped. In Luton there had been a specific scheme for providing VSs in sensitive and serious Crown Court cases. Judges in all of our four areas told us that they sometimes requested that some sort of VS be collected in cases where there is none, usually because they wish to have recent information on some particular issue. We have also observed this happening informally in court. In one case the victim had been punched in the face, injuring his eye. The case was adjourned for five minutes while the police found out from the victim whether or not his eye injury was permanent and, if so, how his vision was affected. In this case, as in all others, the purpose was for sentencing (including compensation) alone.

No respondents referred, without being prompted, to the relevance of VSs for decisions relating to bail or the level of charge. Very few considered VSs to be even potentially useful for these decisions. A London prosecutor voiced the view of many when she said, *"I have never considered using it for bail"*. In a Bedfordshire case (B3)² concerning a 15-year-old victim of assault by a boy at her school, the VS recorded *"I no longer go out of school at lunch time, and stay in a room at the school instead. This is because I am scared of S. and his family"*. It also reported that the offender ('S') on several occasions called her a *"tramp"* and asked her *"What are you fucking looking at?"* in spite of bail conditions prohibiting him from intimidating her or coming within 50 yards of her. The prosecutor, rather than viewing the VS as potentially useful in challenging the continued bail of the offender, said that the VS *"strayed into the area of bail conditions, which it is not supposed to do"*. The few interviewees who did consider VSs to be theoretically valuable for bail or charge decisions identified major practical obstacles to their use (see Chapter 5).

Other purposes of VSs, which were identified without prompting, were few in number and voiced by only a few interviewees. One or two respondents identified a cathartic function:

"It gives victims the feeling that their concerns are being taken into account." (London magistrate)

"VSs have PR value and may be favoured by victims — to the extent that they do, they should be retained." (Sussex judge)

A Merseyside magistrate considered that VSs gave victims an opportunity to *"speak through the VS to the court"*. He speculated that victims probably *"felt that they were being heard"*. What if they did not feel that they were being heard? *"Ah,"* he replied, *"they wouldn't know that and we shouldn't tell them — they wouldn't know whether the decision had been affected or not"*. Not all interviewees took so cynical a view, however. Some thought that VSs could be useful for evidential purposes, but this view was often qualified by the suggestion that *"if they have evidential weight they should be evidential statements"* (London prosecutor). This is a view to which we return in Chapter 7. Another prosecutor said *"In relation to public interest criteria³, that could be where the VS comes in. What might be like a trivial incident to us could change when we see the VS"* (London CPS). A solicitor thought that VSs were good in bringing home to offenders the real harm they did, thus having a crime preventive function on the lines of restorative justice processes.

² Cases are numbered sequentially by pilot area.

³ Deciding whether or not to prosecute, or to drop the charge(s), even when there is sufficient evidence.

3. THE COMMUNICATION OF VICTIM STATEMENTS

We encountered no case directly where the VS, which we knew to have been collected, was absent from the CPS file. In this minimal sense the system works, although we were told of one case by the CPS in London in which it had been apparent that a VS had been made (because of a linked case) but it was not on the file. It appears, therefore, that in virtually all cases where VSs are completed and returned to ASUs, they are transmitted by the ASUs to the CPS and incorporated within prosecution files. In one pilot area, Merseyside, we noted that the outside of some prosecution files was stamped '*Victim Impact Statement*' in red to indicate the inclusion of the document. This had been done by the ASU.

The time taken to transmit VSs to prosecution files varies. In the MPD the linking of papers (including VSs) to files often took place several days, and sometimes several weeks, after their arrival at the CPS Branch. Thus, in one case, the VS was made on 4 August 1998, stamped as received by CPS on 10 August, and arrived on the file sometime after 1 October. The final hearing in the case was on 28 September. There appeared to be no comparable problems of administrative delay in the other three pilot areas, as far as we could ascertain.

Even where the paperwork is processed speedily, however, VSs still sometimes arrive after a guilty plea is taken. This is because VSs are never collected until after an accused has been arrested and charged. Under proposals made in a recent Home Office review of delay in the criminal justice system, this problem could be exacerbated. The review recommended that the police and CPS should work together in ASUs to prepare the file for uncontested cases (Home Office, 1997). The aim is that, where these cases are straightforward, a guilty plea would be taken at the first available court hearing following charge. This would often be the next day. Many of the defendants in these cases would be sentenced at that hearing. In virtually all cases where sentencing was immediate there would be no time to seek a VS. This scheme has recently been piloted in six areas of the country (Ernst and Young, 1999) and will be implemented nationally from November 1999. The implications of this for the working of a VS scheme need to be carefully considered, although we accept that greater speed is generally in the interest of the victim as well as everyone else, subject to the need for safeguards for defendants.

All respondents who had experience of VSs, and recalled the experience, agreed that some or all of their contents were routinely provided to the court — although in practice it appeared that some VSs were not read out or handed in. Indeed, in one area it is reported that VSs are not communicated to the Crown Court "*if there is nothing to support what is said: e.g. if the victim says he is taking tablets as a result of the incident and no supporting medical evidence*" (CPS communication). This is done only after a plea or finding of guilt. One consequence of this is that there is uncertainty and confusion as to whether VSs should or should not form part of the committal bundle in Crown Court proceedings. In Bedfordshire the judges indicated that VSs should not form part of the committal bundle. In London the judges said that they supposed that VSs would generally not be included because they were not part of the evidence. But in Sussex and Merseyside we learned from both prosecutors and judges that practice varied. Some prosecutors considered that the VS should be included, others did not. One Merseyside prosecutor said that he sometimes included the VS and sometimes excluded it, depending on whether he judged the VS added anything to the evidential statement. In all four areas it was not the practice to disclose the VS to the defence in magistrates' court proceedings. When it emerged that there was a disjunction between prosecutors' practices in

magistrates' court and Crown Court proceedings in Merseyside and Sussex, interviewees agreed that there was no logic in not disclosing the document to the defence in the lower courts but including it in the committal bundle for the higher courts.

Prosecutors universally reported that they showed the VS to the defence lawyer before presenting it to the court, though some defence lawyers alleged that this was not always done in advance (and some magistrates said that defence lawyers occasionally made this objection). If the defence objected to all or some of the contents (which appears to happen rarely — see Chapter 6), they would try and compromise on what was read to the court. Most prosecutors said that they occasionally also handed the VS into the court (as opposed to reading out part or all of the contents) and this seems commonly to be the practice in the Crown Court. However, in all four pilot areas, many prosecutors weaved all or some of the contents of the VS into their general oral summary of the case, not drawing attention to the source of the information. Thus, it is often not apparent to the court (or people, including the victim or victims, in the public gallery) that there is a VS or that the VS is being read or drawn upon. This partly explains the fact that several defence solicitors and magistrates, who we knew to have dealt with cases involving VSs, were entirely unaware of the fact. Either the prosecutor did not refer to the VS or hand it in or, to the extent that the VS was drawn on in the oral summary by the prosecution of the case, the VS was not explicitly referred to. Clearly there is a good deal of variation in practice, often as a result of disorganisation and the absence of clear policies, in relation to the advance disclosure of VSs to the defence and the handing in and reading out of VSs to the court.

Prosecutors said that, when they read VSs out, they read only what was *relevant*. Generally this is unproblematic. In case B4, for example, the VS, which was very short, stated (in full):

“As a result of the assault I re-attended B. hospital on ... To see a specialist in relation to a possible fracture to my left wrist. On seeing this, the doctor informed me that I had a minor fracture to a bone in my wrist, which required my arm to be placed in plaster for seven weeks. This is very inconvenient as the wrist area is still painful at times. I am also taking pain-killers to ease the pain.”

The prosecutor considered that the fact that the arm was plastered and painful was relevant and added to the seriousness of what might otherwise have been a case of actual bodily harm (ABH) at the lower end of the spectrum. Likewise, in case S22, which involved a shop assistant who suffered injuries to her throat and damage to a necklace during the course of apprehending a shoplifter, both the prosecutor and the barrister who conducted the case in the magistrates' court thought that the brief VS details were very useful:

“Continuously feeling sick whenever I have to go to work ... cannot walk through shops to take children to their grandma's ... have to go a different way ... if I walk outside at night I break out in a hot sweat.”

However, in case B1 a man was convicted of harassing a teenage woman. The victim stated in her VS that she took stones to bed at night in case she was attacked and had had a personal alarm issued to her by the police. The prosecutor said that these effects on the victim were *not* relevant. Likewise, in case M6 the victim of an attempted robbery, who had been set upon, kicked and punched by two assailants, stated:

“Suffering nightmares (hot sweats) ... I won't go out at night ... reluctant to go out on my own ... I would rather have my wife with me.”

The prosecutor had not submitted the material for Crown Court proceedings on the grounds that it was not relevant. He could not see how it could seriously affect the sentencing decision. There seems to be little agreement between prosecutors as to when VS information is relevant: much the same sort of information is judged relevant and worth citing by some and irrelevant and not worth citing by others. This lack of consensus no doubt reflects as much what prosecutors think *is likely* to affect sentencing as what they personally consider *is* relevant.

4. THE CONTENTS OF VICTIM STATEMENTS

Vs cover all or any of the physical, financial, psychological, social or emotional effects on victims. They can also cover family members, and may be made by a parent in respect of a child. B6, for example, involved an assault by a man on his partner's three-year-old son. The injury was a cut lip.

"As a result of the incident my son changed his behaviour. For about four weeks afterwards he began to ask people whether they liked him and whether they were going to hit him ... He also burned holes in the living room carpet ..." [the VS continued to detail other similar incidents].

Vs tend to be short, whether written on a pro forma or compiled with the assistance of an officer (in which case they are virtually indistinguishable in appearance from an evidential statement). The VS in case B4, (reproduced in Chapter 3), was only a few lines long and was unusually short, but most are not much longer. This VS concerned only the physical effects of the assault. Others cover several dimensions. Thus S8, which involved a burglary, covered matters financial, social and psychological. This is the complete VS:

*"3 Damaged VC doors £2300
Husband's wages — 4 days £280
My two older children had a fear of going upstairs on their own and could not sleep in their own beds and both were very tearful as was I ... I was very nervous of coming back to an empty house and also found it very difficult to sleep for about three weeks after the burglary, thinking the person might come back. At first my husband and I felt like moving as we both felt like everything we had really worked hard for had been ruined by an uninvited person going through all our personal things. My two children still often talk about it. Luckily my third child is too young to have any ill effects."*

S10, concerning an assault by an intruder, also covered practically every angle, but even so is brief:

*"Replacement of damaged cordless telephone (BT) £89.00
Travelling expenses — medical centre and Dr (3 visits) £1.50
Ditto — (inc. car park) X Hospital (3 visits) £6.00
Ditto — projected visits £6.00
Telephone calls (local and National) to Family £20.00*

Bruising and soreness to left side of head and face and upper left arm. Deep cut, including severance of tendon, to right little finger.

Headaches, inability to sleep, tension, irritability. Wearing of splint to right little finger to continue for further 10 weeks.

Continuing sleepless or broken sleepless nights ... Awareness of seemingly excessive presence of assailant in front garden and drive of house where he lives, 75 yards away at right angles to my house. Incapable of walking past assailant's house. Short-term memory loss.

No threats but severe tension and concern for safety since original bail conditions imposed upon assailant were revoked thereby permitting assailant to return to his home."

Many VSs make factual claims which are either significant in themselves (fractures, plastering) or substantiate the major claim (the offender made threats, the police issued a personal alarm). These factual claims can, in principle, be checked. Not all VSs provide such concrete or verifiable material, however. This is particularly the case regarding fears and anxieties resulting in psychologically self-imposed restrictions on movement. Furthermore, the causal connection between the crime and the outcome can be difficult to establish, as in case B6 (cited earlier in this chapter). Here a four-year-old child was reported to have burned holes in the carpet, the implicit suggestion being that his behaviour had become disturbed as a result of the offence. Case L1 provides another such example. The victim had her credit card stolen and the offender ran up a large bill totalling several hundreds of pounds. In addition to the financial hardship caused, the VS stated that:

“This crime has in fact left me homeless ... I have been depressed and am currently receiving anti-depressants from my GP and also counselling from my psychologist.”

In S18, another case of assault, the victim reported feelings of depression which had *“placed a strain on her marriage.”*

It such cases it is difficult for the reader to evaluate the connections that are stated or implied. This makes it hard for agencies whose decisions might be influenced by VSs to know how to respond. As several of our respondent judges observed, Court of Appeal guidance on this is not at all helpful (see Chapter 5).

How much do VSs add to what is already in the prosecution file? We addressed this question in Phase 1 of this research. At least a third of victims recalled including information additional to their witness statement in their VS. On the basis of scrutinising a small sample of VSs and witness statements we came to the conclusion that the majority of VSs added *“something, but often far less than one might have expected”* (Hoyle *et. al.* 1998, p 28). This was a judgement with which most of the CPS lawyers with whom we spoke agreed. Most could cite examples of VSs which added a little information to the evidential statement. But it was judged rare for a VS greatly to add to the concrete information available from other sources. When the VS did add information, it was often considered appropriate by the prosecutor for the police to collect a further evidential statement. This was often the case, for example, when a delayed VS revealed that the medical repercussions of the offence had been more serious or long-lasting than the initial evidential statement recorded or anticipated. Even so, VSs sometimes add evidential material without prompting the taking of a further evidential statement. For example, a Merseyside prosecutor pointed out that victims’ accounts of their physical injuries are often more complete than the under-stated accounts of medical doctors who quite properly describe clinically only what they can observe and verify, often shortly after the injury has been sustained. And the Bedfordshire judges cited two examples of cases where the VS provided them with relevant information which would not otherwise have been available. In one, the victim of an indecent assault stated that she was still upset. The offender’s probation conditions therefore included not going near the victim’s journey to work. In the other, the victim had a fractured skull which required further surgery.

CPS lawyers from all pilot areas agreed that VSs rarely provide information relevant to decisions other than sentencing (consistent with the prevailing view about the function of VSs), though many thought that this happened occasionally. Some, such as the prosecutor interviewed about case B34, failed to see the relevance of VS information because of their narrow view of what VSs are for (in that case, not seeing it as relevant for bail). Consistent with the findings of other research (see Sanders, 1999), when prosecutors consider that VSs add relevant information it is generally because something unusual is being said. This is most believable when the victim is atypical: generally when the victim is particularly vulnerable. This was the case in B1 — where the victim was a 15-year-old schoolgirl said to be behind with her GCSE work — and B2 — where the assaulted victim was an elderly man suffering from epilepsy. It appeared from the VS that his problems were exacerbated by the attack:

4 Cited in Chapter 2. The case involved an assault on a schoolgirl by a fellow pupil who continued to harass her in contravention of bail conditions.

“This experience has put me under unnecessary pressure, stress and a strain on my health.”

He went on to detail his fear of being attacked, especially when in the city centre, where he saw the offender who had been given bail. However, even in this case the VS added little or no new substantive information: the victim’s vulnerability was evident from other information in the file. This pattern was considered by most prosecutors to be the norm, thereby lending support to the view of the London judge who said:

“If you are experienced you don’t need a statement to say that an elderly woman was upset by a burglary.”

As indicated earlier, not all VSs contain information which is easily verifiable. How far do practitioners believe that victims accurately state the effects of crimes on them? All respondents thought that most victims were honest, although around half (from all categories of interviewees) conceded that some victims probably exaggerated. The prosecutor in case M1, for example, thought there may have been exaggeration here, but conceded that it was, as in many cases, difficult to make even an educated guess. A common response was that of the prosecutor in case B6 (discussed at the start of this chapter: the victim was a three-year-old with a cut lip): he would simply not be drawn on this issue. Most prosecutors, magistrates, judges and solicitors felt that they had seen too few VSs or could remember too few to make a judgement about the degree to which exaggeration occurred, although one prosecutor said that defence solicitors often complained about exaggeration. According to one Bedfordshire prosecutor: *“You can take some of them with a slight pinch of salt”*, and a colleague from Merseyside thought that too many had the Criminal Injuries Compensation Board in mind. Bedfordshire judges were particularly concerned about VSs made by parents in relation to children, which they believed were sometimes more vengeful than factual. But some prosecutors and judges considered that the greater problem was many victims’ inarticulateness or lack of understanding of what the VS asks for: they were often so badly written or phrased that they were difficult to interpret. This echoes the finding from Phase 1 of the study and the findings of other research (e.g. Erez, 1999) that some VSs under-state the effects of the crime and others simply provide little, if anything, of value.

5. EFFECTS OF VICTIM STATEMENTS ON DECISION-MAKING

There are five criminal justice decision-making stages at each of which VSs can, in principle, exert an influence. The first — the initial decision of the police to charge or summon — is inapplicable in the Victim's Charter pilots because VSs are only sought in cases in which the police have already decided to charge or summon. The fifth — the decision to parole — is not relevant to this particular study because victim enquiries in parole decisions are administered by a separate process which has not been evaluated here (but for a brief discussion see Sanders, 1999). We will examine in turn the other three stages: bail, dropping cases or changing individual charges, and sentencing. There are also very occasional miscellaneous — and often unexpected — effects of VSs. In one case the victim said in his witness statement that the injury had caused him depression. The VS disclosed that he had already been suffering depression. The CPS therefore disclosed this to the defence as it might materially affect the prosecution case. At trial the defence did try to make something of this information, but without success. In another case, the victim said in the witness box that she had suffered blackouts after the crime. The defence cast doubt on this by pointing out that her two witness statements failed to mention the fact. The prosecutor rescued her credibility by bringing into her testimony the fact that she had mentioned this in her VS.

Bail

One rationale for VSs is that they could reveal information, such as fear on the part of the victim, which might justifiably lead to a decision to remand the accused in custody or to impose bail conditions. Otherwise, a decision might have been taken to release the accused on bail or to impose no bail conditions. However, remands in custody, in the absence of a breach of bail conditions or further offending, almost never occur if a decision to release on bail has already been taken. It follows that VSs are only likely to lead to custody decisions if they are received prior to the initial bail/custody decision, or provide evidence of a later breach of bail (for example, evidence of intimidation or failure to keep away from prohibited locations). Our survey data suggest that in most cases VSs are received by the CPS *after* police and court decisions to bail or detain in custody have been taken. This is inevitable, given that, under this particular scheme, VSs are sought only after the alleged offender is charged. In the Crown Court VSs are generally not included in the committal papers, and so again could not easily be used in connection with decisions to vary bail conditions.

However, it appears that few prosecutors would in any event be encouraged to seek extra bail conditions or a remand, or try to change a bail decision, as a result of the contents of a VS, because they do not see VSs as having this purpose. Case B3 (discussed in Chapter 2) was a particular case in point. This case also illustrates why VSs cannot easily be used for this purpose even if the prosecutor considers it appropriate. The offender pleaded guilty at his first court appearance, which was the day after the VS was made, and three days before the VS was received by the CPS. It is largely for this reason that in none of the cases in our sample were bail decisions affected. However, we encountered many prosecutors who thought (after some prompting) that VSs *could* affect bail decisions in unusual circumstances. An example of such a situation was a case in Sussex, which the prosecutor had dealt with only the day before our interview with him. A VS revealed serious intimidation which could have led to re-consideration of bail or even new charges. The police were to look into the matter, but we do not know what happened thereafter.

Magistrates, court legal advisers and judges rarely (and then only following some prompting) saw VSs as relevant to bail decisions. None could recall a VS having been cited at a bail hearing, which suggests, since our six respondent court advisers sit in court practically every day, that it never or rarely happens. Nevertheless one Bedfordshire JP spoke for a few when he suggested that if a VS revealed that a victim felt in danger *“you would have to give great thought to that”*. On the other hand a London magistrate, when pressed, took the view that, although a VS could in theory affect bail conditions:

“I’m afraid the victim’s fear — OK it goes to the question of further offences — is not relevant ... The only ground for refusing bail is the nature and seriousness of the offence.”

However, one London solicitor suggested that:

“Magistrates will impose conditions at the drop of a pin; they don’t need these things to persuade them.”

We conclude, therefore, that VSs are not being used for one of the purposes for which they were introduced — namely, to inform bail/custody decisions. However, it seems possible that, very occasionally, a VS may trigger investigations leading to reconsideration of bail or bail conditions.

Dropping cases or changing individual charges

In no case in our sample did a VS lead directly to a case being dropped or a charge being altered. However, some prosecutors in the MPD said that it might have happened very occasionally. In the single specific case that was recalled, consideration was given to dropping a case on evidential grounds. In view of the powerful VS, the case was adjourned so that the victim could be consulted. Our interviewee could not recall the result of this case. Whether the public interest consideration which was in mind could have over-ridden the evidential consideration is doubtful (certainly it should not do so, according to the Code for Crown Prosecutors). According to a Branch Crown Prosecutor: *“Victim Statements are taken into account in applying the evidential and public interest tests. However, I cannot identify any particular cases in which it can be said that Victim Statements have made a significant difference to the review decision”* (CPS Communication). Another Branch Crown Prosecutor also said that VSs could influence the application of the public interest test, although no examples were given.

VSs can have various indirect effects, albeit only in rare cases. First, VSs are sometimes read at the time that prosecutorial decisions are made and occasionally serve to give prosecutors increased confidence in their decisions. A case in point is S7. In this rather unusual case a rape was alleged. The victim, aged 17, was to be married on the Saturday following the alleged offence. While the groom, with whom the victim already lived, was out, she invited an ex-boyfriend to visit her. Sex took place and the issue was whether it was consensual or not. There was no evidence of rape and the victim had previously made an allegation of rape, which she had subsequently withdrawn. However, the witness statement was taken on the same day as the alleged rape, so it was a case of recent complaint. The prosecutor initially reviewed the case almost a month later and provisionally decided that there was insufficient evidence to proceed. She passed the case to her line manager at the same time that the VS arrived. She thought that the contents of the VS were incongruous. The VS incorporated a claim for £500 for damage to clothing and a settee, to which there had been no reference in the witness statement. The prosecutor formed the view that the victim was trying to obtain money. Her line manager confirmed her decision to discontinue the case. The VS did not decide the matter, but it served to confirm a decision already formulated. Another such case, where the influence worked in the opposite direction, was B6 (see above) where the apparently trivial injury to the child victim (a cut lip) had, it was claimed, a significant effect on his confidence and behaviour. The prosecutor said that the VS confirmed his feeling that the prosecution should proceed.

A second indirect effect is illustrated by case S20 in which, somewhat unusually, the victim submitted a VS some six months after the offence. This was because the alleged assailant disappeared and was not apprehended for five to six months, at which point the victim was invited to complete a VS. The VS revealed that the long-term injuries were much more serious than the initial witness statement indicated. The police were requested to take a second witness statement, following which the charge was up-graded. Several prosecutors expressed the view that VSs could have this effect, even though most had not used VSs in this way or seen them used in this way. None recalled or envisaged VSs having an effect on charges without further police enquiries being made first.

A third indirect effect, which prosecutors conceded was theoretically possible, though none could recall an instance, is that of helping prosecutors to assess the victim's likely performance as a witness. This could affect decisions as to the particular charge used, or even whether to proceed at all.

As with bail, the interviews revealed that VSs have some potential, albeit in only a few cases, to affect charge decisions, but this potential appears not to be tapped, possibly because of a lack of imagination on the part of prosecutors. In case B1, for example (cited in Chapter 3), where the charge was one of harassment, the VS revealed considerable fear on the part of the victim. This is integral to the offence of harassment, yet the prosecutor did not think the VS provided any relevant information.

Since *none* of our interviewees, from all groups, could recall ever having heard of a VS being referred to in relation to charge decisions, it seems clear that VSs are not being used for another of the purposes for which they were introduced. However, in view of cases such as S20, it seems that VSs *very occasionally* trigger further investigations which, in turn, lead to the reconsideration of charges. The lack of VS impact in this sphere is a little more surprising than it is in relation to bail. For, unlike bail, some decision-makers feel that victims should have a role in relation to prosecutorial decisions. The judges in Bedfordshire, for example, said that they insist that the CPS discuss proposals to lower or drop charges with victims before presenting their proposals to the court. A judge in Sussex indicated that his practice was similar. It may be that direct discussions are a better way of consulting victims than reading VSs, which have a multi-purpose and often dimly perceived function.

Sentencing: generally

It is clear from everything said so far that, apart from the few interviewees who perceived VSs as having a public relations or cathartic role alone, the majority of interviewees thought that, if VSs had a role in relation to decision-making at all, it was in relation to sentencing. Discovering how far VSs *actually* affect sentencing is, however, virtually impossible in most cases. Even when magistrates and judges could recall cases where there had been VSs (of which there were few), they could rarely isolate the aggravating and mitigating factors. And, in practically all cases, neither prosecutors, court legal advisers or defence lawyers were in a position to do anything other than speculate wildly about their influence.

During our interviews with Crown Court judges we were referred to several Court of Appeal and Divisional Court judgements which were concerned, wholly or in part, with victim statements. The judges were universally of the opinion that these judgements were largely confusing and unhelpful and that the resulting law was unclear. Before examining our empirical evidence we should briefly discuss what the state of the law appears to be.

Sentencing: the case law

As stated in Chapters 1 and 2, Victim Statements in one form or another had been used occasionally in the UK prior to the introduction of the Victim's Charter⁵. It follows that the introduction of VSs

⁵ At this time, such statements were sometimes referred to as 'Victim Impact Statements'. For the sake of consistency, the term 'Victim Statement' will continue to be used here for any statement in which victims describe the effects of the crime upon them.

did not require legislation. Nonetheless, the precise effect of victim impact information on sentencing has to be legally regulated in some way, and this is done through Appeal Court judgements. A distinction is made, in Britain as elsewhere, between the *opinions* of victims or their families about sentence, and information — *facts* — from victims or their families, which could affect sentence. Contrary to practice in some American states, opinions have consistently been held to be inadmissible. Thus, the views of relatives of the deceased were rejected as irrelevant to the sentencing decision in both *Hird* (1998), where the Court of Appeal was asked not to reduce the sentence, and in *Nunn* (1996), where the relatives asked for the sentence to be reduced. This approach was affirmed in *Attorney-General's Reference (No. 72 of 1998)*, where the judge listened to the plea for leniency by the aged victim, the great-grandmother of the offender. The Attorney-General claimed that the sentence passed was too lenient, and the Court of Appeal stated that the views of victims should not be allowed to affect sentence.

A basic principle of sentencing law is that, all other things being equal, the more serious the offence the heavier the sentence. Thus, an assault resulting in a painful broken arm or a permanent disability is more serious than an assault resulting in a pain-free broken arm or a temporary disability. It has long been recognised that seriousness need not only be measured in terms of physical effects. In *Billam* (1986) it was said that rape is aggravated where “*the effect upon the victim, whether physical or mental is of special seriousness.*” ‘Psychological’ suffering was cited as relevant in *Attorney-General's Reference (No 1 of 1989)*, a case of incest. Thus, when in *Attorney-General's Reference (No 2 of 1995)* the trial judge refused to look at a VS on the grounds that it might aggravate the evidence of the impact of the offence, the Court of Appeal admonished him. Similarly, the Court of Appeal endorsed the judge’s approach in *Doe* (1995), where a VS indicated great mental suffering on the part of a rape victim. As a consequence, what was, in physical terms, a ‘normal’ rape, which would have attracted a sentence of five years’ imprisonment, was regarded as a serious case attracting six years’ imprisonment. It would seem to follow from this that, if information about the impact of the crime revealed that the victim suffered less than most victims would have suffered, this should be a mitigating factor. There is no case law directly on this point, however.

It is straightforward to state that *facts* which aggravate the seriousness of the offence should lead to a heavier sentence. But, what are judges and magistrates to do about allegations which may not be *facts* — that is, the information is contested — and *facts* which have a possibly tenuous link to the offence? In *H* (Court of Appeal, 9 February 1999) the offender had committed serious sexual offences against several girls some years previously. Five out of six made Victim Statements. Some felt that the sexual abuse damaged their sex lives and made them over protective of their children. Even more tenuous was the statement by one that the misery caused by the still birth of a child was exacerbated by the offences committed against her. The Court of Appeal commented: “*Such statements will be approached with proper balance. They necessarily reflect one side only of a complex situation. We would be very surprised if the experienced judge in this case did not approach them in that way, although he did not perhaps make it as clear as he might have done the limited extent to which the sad history of the still birth could be relevant.*” Concerning VSs which make untested claims in general, the only guidance which the Court offered was that: “*Statements of that kind may be useful, but of course they must be approached with some care.*” As we have seen (see Chapter 4), VSs which raise these problems are not unusual.

Sentencing: the actual effect of victim information

We asked CPS lawyers whether they *thought* that, in any of the cases in our sample, the use of VS-derived information might have influenced the sentence. In only a few cases did our interviewees think that the VS *might have* had an effect on sentencing: they said that they were merely speculating and that it was difficult if not impossible to tell. One case in which the VS was thought to have had an impact was S22 (see Chapter 3). Here, a shoplifter assaulted the shop assistant who had apprehended him. The prosecutor thought that the compensation awarded was possibly greater than might have been expected if the other case papers alone were considered — suggesting that the VS probably had influenced the decision. However, even in this case the magistrates were probably unaware of the source of the influence since it appears that the prosecutor did not cite the VS in

court: she merely wove material from the VS into her oral summary of the case. Similarly, in case S6, involving an assault on a taxi driver, a broken nose secured a two-month jail sentence. This was a severe sentence for this injury, and its severity may have been partly due to the VS. Equally, it may have been due to the racial overtones involved and/or the fact that the victim was a cab driver on duty at the time. Once again, however, if the contents of the VS (which the prosecutor reported using in court) were influential, the informational source of the influence was unknown to the defendant's solicitor and, by implication, the court. The solicitor concerned said that no reference was explicitly made to a VS; indeed, he was unaware of their general use or that Sussex was a pilot area.

Other examples of possible influence about which we heard included a Merseyside case (not in our sample) recalled by a prosecutor and in which the schoolboy victim suffered a broken jaw. The VS was unusually long and eloquent and detailed numerous effects upon him and his family (the prosecutor thought that the victim's psychiatrist father might have played a part here). The offender was imprisoned and ordered to pay compensation. Since it is unusual for compensation to be coupled with imprisonment, the prosecutor thought that the VS played a part. A Merseyside clerk recalled a case (again, not in our sample) where a 16-year-old youth had been robbed on his way to school. The chairman of the magistrates read out the relevant part of the VS when passing sentence and used it to explain why the bench took a serious view of the crime, which he considered to be reflected in their sentence.

Despite these occasional cases, our prosecutor interviewees believed that only very concrete information (which is rarely found in VSs) was likely to influence sentence. As a Merseyside prosecutor put it, *"How can a judge take into account a statement about being afraid to go out at night?"* The same prosecutor asked rhetorically, in relation to a different case, what the magistrates could have made of the victim's assertion that he suffered from post-traumatic stress. A few judges and magistrates (a small minority of both groups) endorsed this view. As one London magistrate put it, because most of the contents of a VS cannot be tested, *"I don't think that these statements have made a difference as far as sentencing is concerned."*

The view that VSs rarely influence sentencing was given substance by the existence of several cases in which it was clear that, had the VS been accepted at face value, the sentence and/or compensation would have been greater. This was true of B6 (the child victim with the cut lip), for example, where the offender received a conditional discharge. Similarly, in case L5 the VS detailed cuts, bruises and psychological damage. Despite this, the ABH charge was reduced to common assault and the offender was conditionally discharged, although he had to pay the victim £100 compensation. In this case the prosecutor thought that this would have been the outcome had there been no VS. He said that when he spoke to the victim about the sentence she was upset at what she perceived to be the leniency of the court. In L11 the victim was scarcely injured in objective terms, but the VS claimed he was very upset. The offender was conditionally discharged and the compensation was minimal.

Given that judges sometimes *seek* victim impact information it was not surprising to find that judges (and magistrates) stated that the contents of VSs did affect, or at least had the potential to affect, sentence. At magistrates' court level this was usually expressed as affecting the *quantum* of a sentence (e.g. the amount of a fine, the level of compensation, or the number of hours in a CSO). It was seen as unlikely to affect the type of sentence (custody as opposed to non-custody), except in borderline cases. A minority of judges and magistrates took the view that they would not be influenced, even in such borderline cases. *"We all know what it's like to be burgled"* (a Merseyside magistrate) and it is *"blindingly obvious"* that victims of burglary, for example, will be unsettled by their experience (a Sussex judge). A common view was that, as noted earlier, the impact on vulnerable victims would and should be reflected in the sentence, but it was usually further observed that vulnerabilities would be apparent from other information in the file and that the VS would generally be superfluous in this respect.

Earlier in this chapter we observed that, if seriousness is relevant, it should in principle lead to less severe sentences where the seriousness is less than one would expect, as well as higher sentences where the reverse is true. It should not matter whether the information is provided in a VS or by

other means. There was no evidence to suggest that this outcome ever occurred, although one solicitor said that he thought it was a possibility in domestic violence cases, for example, where a prison sentence could adversely affect the victim. This example may be academic, however: it would be a rare victim who completed a VS with the aim of saying that she or he suffered little! When this possibility was floated with magistrates and judges, however, they took the view that whereas a VS could aggravate a sentence it could not mitigate it. Although prosecutors and court officials were not asked directly about this, when they were asked for examples of cases where VSs could have influenced the sentence, none gave examples of sentences less severe than the norm. This finding contrasts with that of Erez (1999). She argues that impact information does affect sentence, but does not affect the overall level of sentencing because the greater severity generated by the additional information in some cases is balanced by the greater leniency generated in others. It is possible that Erez's findings are valid for the jurisdiction in which her research was conducted (South Australia), but not for England and Wales. This is unlikely since both are common law jurisdictions with similar sentencing laws and legal cultures. However, Erez's findings consist of claims by two prosecutors and one judge, which we do not believe is a sufficiently solid foundation on which to base her finding (or hypothesis). Although it is true that our sample size is insufficiently large, and our method insufficiently rigorous, to disprove Erez's finding, the sample sizes and methods of the two studies are very similar. Our findings and those of other researchers (see Sanders, 1999) show that many prosecutors and sentencers claim that they were influenced by this type of material, but they actually find it difficult to substantiate these claims. We therefore feel justified in concluding that impact information influences sentencers in the direction of leniency even less often than in the direction of greater severity.

Our principal conclusion, however, is that VSs seldom influence sentencing decisions in any direction. Nonetheless, it is *only* in relation to sentencing that VSs have any significant effect. This is ironic, given the belief and hope of many advocates of victim involvement in the UK that VSs should primarily influence earlier decisions (Victim Support, 1995), and given the objectives set out in the Victim's Charter (see Chapter 1). A London prosecutor characterised the situation well as follows: "*You don't see impact statements having much of an impact*".

6. CHALLENGES BY THE DEFENCE

It is a fundamental principle of justice that anything presented by or on behalf of the prosecution in court should be open to challenge by the defence. Unless the defence accept evidence, it is subject to examination and cross-examination. In principle this is true of evidence submitted for sentencing and bail purposes, as well as that which bears on guilt and innocence. Where facts which bear on sentencing but not guilt are disputed (such as the extent of an injury in an assault, or the value of goods stolen in a theft), there is provision for a *Newton* hearing: that is, a mini-trial in relation to the disputed facts. *Newton* hearings are actually rare, especially in the magistrates' courts, because the prosecution and defence usually agree upon a compromise. It follows that, in principle, the contents of a VS, like any other factual material relevant for sentencing, can be disputed. Unless the prosecution and defence can agree on a compromise, there should be a *Newton* hearing. We asked our interviewees: whether the contents of VSs were often disputed; how disputes were dealt with; and, where arguments were avoided, why this was so.

All respondents agreed that the contents of VSs were rarely disputed, and only a few could recall one or more occasions when they were. A typical example was a dispute over the extent of loss in a burglary, although as the London magistrates' court clerk who mentioned this case pointed out, this was not an unusual argument in such a case, and could well have arisen without a VS. A Sussex magistrate recalled a dispute over the extent of financial loss in an argument between neighbours. The charge was contested, and in the course of the trial it emerged that some household items had been broken. The VS, which was read out at the sentencing stage, claimed that many more items were broken than had been the subject of the trial. The defence solicitor objected to this, and the magistrates decided that compensation should be based on what had been proven during the trial, not what was claimed in the VS. The solicitor in this case agreed that, on his reading of their sentence, the magistrates appeared not to have been influenced by the VS. A Luton judge reported one case where the VS alleged a racial aspect (which the offender disputed) in a robbery: the victim alleged in his VS that he was subjected to racial taunts while being robbed. This claim was checked with the help of CCTV footage and a recording of the incident, which substantiated the victim's claim. The racial element aggravated the offence considerably, leading to a four-year, instead of a two-year, sentence. In another case, in a Sussex magistrates' court, the father of a child victim claimed in a VS that the child had been medically affected. This assertion was attacked by the defence who argued that the father was not medically qualified. In a Sussex Crown Court case the judge refused to take into account the injuries claimed in a VS because, he said, the CPS should have sought proper medical evidence (both cases are from CPS communications).

It appears, in cases where the prosecution intend to make explicit use of the contents of a VS at the sentencing stage, to be more common for defence and prosecution to reach an agreement about the use of the material than to have an open dispute about it. It is sometimes agreed that some VS material will be omitted. An example cited to us was the name which an offender called the victim (London clerk). One London magistrate reported that it was his impression that the CPS generally gave way to defence pressure on these points, although he was unable to say whether or not they were justified in doing so. Sometimes open disputes are avoided without agreement being reached, leaving the magistrates or judge to make up their own minds, as in the Sussex Crown Court case cited above. Another example is case B6, where the defence solicitor tried to argue that the effect on the victim (the boy with the cut lip) was less serious than the VS indicated, but without overtly challenging it.

Solicitors could very rarely recall challenging VSs because they could rarely recall seeing them. It follows that most of our interviews had a largely hypothetical quality to them. Some of our respondents expressed concern at the idea of vigorous challenge:

"I would have difficulty in it ... I avoid Newton hearings like the plague ... It would be a difficult thing to contest. It would make matters worse for the victim, cost a lot of money and antagonise the sentencers." (London solicitor)

"I would certainly challenge the content of a Victim Statement if I thought that would have a beneficial effect. You always have to think about the effect on the sentencing tribunal. If a victim said they suffered from, for instance, anxiety that is not something which you could effectively challenge, you would just have to take it on the chin." (London solicitor)

One Bedfordshire prosecutor echoed these feelings, saying of such claims as depression brought on by the offence: *"I think they [defence solicitors] are often put in a very difficult position by them"*. A Bedfordshire solicitor spoke for many in saying that she would not dispute the contents of a VS *"unless it is an extreme reaction to the crime"*. On the other hand, other respondents said the issue was no different to any cross-examination of a victim, and had to be judged according to all the circumstances.

It appears that defence solicitors are generally cautious about antagonising the court by challenging the contents of VSs. This raises the question of what sentencers do if they are dubious about the contents of some or all of an unchallenged VS. The London judges with whom we spoke were concerned about this, but gave a rather confusing response. In their view a court was entitled to conclude that anything that was not challenged was true and that competent barristers would not be afraid of acting in their clients' best interests. But if the defence did challenge a VS, one judge said, with the agreement of his colleagues, *"You couldn't put them [the victims] in the witness box in those circumstances — it would increase their trauma yet further"*. But some magistrates said that they could, in theory, ask a victim to substantiate what he or she said if they doubted it, even if it was unchallenged by the defence. One expressed some concern that what could be important sentencing factors were generally untested. Many judges and magistrates fell back, rather lamely, on the view that, as one put it, *"You use your nose to see if it is OTT"* (London judge). Another said that when the two sides were in dispute the magistrates would have *"to interpret it ourselves"* (Luton magistrate). This harks back to the Court of Appeal judgement in *H* (see Chapter 5), which said that when the contents of VSs are difficult to evaluate they *"must be approached with some care"*.

7. AGENCIES' VIEWS OF THE VALUE OF VICTIM STATEMENTS

If VSs, as currently collected and used, have little impact on sentencing (and virtually no effect on other decision-making), the question remains as to whether they should have an impact. First we examine the views of magistrates, then those of judges and other practitioners, in relation to sentencing. We then look at the issue more generally. We noted in Chapter 2 that in our discussions with magistrates most of them initially welcomed the idea of VSs, arguing that sentencing should take account of the impact of the crime and assuming that VSs provide an avenue for doing so. However, as our discussions progressed a minority of our magistrate respondents, which included the more senior and experienced members, expressed doubts about whether the contents of VSs *should* influence sentencing. None of these justices referred to Court of Appeal decisions and it is reasonable to assume that they were unaware of that fragile jurisprudence. Rather, they voiced their instinctive doubts: instinctive because most had never dealt with a case (or could not recall doing so) in which they had had to decide whether, and to what degree, to respond to the contents of a VS. They argued that the repercussions for a particular victim of a typical crime — for example, a burglary, a street robbery or an assault — would necessarily be individual and subjective. As one Merseyside magistrate put it: *“Some people are very affected psychologically, others get on with it”*. These individual and subjective impact differences did not have a bearing on the gravity of the offence, and should not. The offender (particularly in a crime committed against a stranger) could not know in advance whether the victim was a fragile or resilient personality. In any case, it would be difficult, if not impossible, to graduate the sentence on the basis of such nuanced, subjective and largely unverifiable information.

Moreover, it was sometimes argued, magistrates did not have much room for sentencing manoeuvre: they were largely constrained by the ‘going rate’ for such serious crimes, and that was as it should be. However, when we pointed out that, in fact, magistrates had rather a lot of sentencing room for manoeuvre — being able to award anything from an absolute discharge to a six month custodial sentence — some magistrates took a contrasting view of this issue. One Sussex magistrate, for example, pulled out her sentencing manual notes and pointed out that the individual circumstances of the case, including the impact of the offence on the victim, were relevant. When we put the case of two burglaries identical in all relevant respects (such as the age and sex of the victim and the previous record of the offender) except the reported resilience of the victim, one Merseyside magistrate, in response to her colleagues’ suggestion that the sentence should be the same, argued that sentencing never conforms to such hypothetical circumstances. Each case, she argued, is dealt with individually and separately and she had no doubt that if a panel of magistrates learned, through a VS or from any other source, that the crime had had unusually serious repercussions for the victim, that knowledge would almost certainly influence the sentencing decision. Moreover, another Merseyside magistrate argued, repeated evidence through VSs of the serious repercussions of a particular type of crime was likely, eventually, to affect the ‘going rate’ for that crime.

The broad conclusion to which we came as a result of these discussions is that magistrates are split roughly equally on the question of whether VS information regarding the psychological impact of crime *should* influence sentencing decisions. Practically all magistrates are agreed that financial and straightforward medical repercussions should affect the level of compensation awarded in those cases in which compensation is considered appropriate. However, of those magistrates who are in

favour of VS-derived information generally influencing sentencing, most would confine that influence to the *quantum* within a particular sentence and not the choice *between* types of sentence. The latter, it would seem, is a tariff decision which practically all magistrates agreed should not be affected.

Our discussions with judges revealed the same initial welcome, in principle, from most. But several of them expressed unease about the possible influence of VSs. The judges were aware of the case law and (as we remarked earlier) of its inadequacy. Their unease about letting impact material influence them was for some a matter of principle. For others it stemmed from anxiety about inconsistency (in that VSs were available for some cases but not others). Some were concerned about how far to trust the contents of VSs, and others feared that it is *“the thin end of the wedge”* and that victims’ *opinions* would gradually begin to be expressed and be considered significant (something which all judges thought unacceptable). Our finding that there is a spread of views among judges is supported by communications from the CPS which report welcomes from some judges, but refusals from others to handle them at all, leading to cases having to be scheduled with this in mind in one or two areas. Located within this spectrum are the bulk of judges who, explicitly or implicitly, welcome VSs vocally but take notice only of the most concrete information, and then only when it is supported evidentially. The London judges captured the dilemma well. For most cases, impact information only told them what they knew or expected anyway. For unusual cases or claims of unusual impact, *“You don’t want to take it on board if it is a really unusual claim. You discount it a bit”*.

In summary, most of our small sample of judges and magistrates were broadly in favour of a VS-type system, but wanted both the provision of statements and the information within them to be more systematic and verifiable. Up-to-date information was desired: most VSs are out-of-date if there is a contested trial, especially in the Crown Court. Many wanted VSs in all cases or none, although some thought they should be reserved for only serious cases and/or cases with vulnerable victims so that their value was not reduced and so that information was only collected in cases where it could make a difference. The views of prosecutors, and indeed of solicitors, ranged across a similar spectrum, and they often advocated similar safeguards. Again, most prosecutors, in particular, expressed support for the idea of a VS-type system, but nonetheless often expressed doubts about the value of the information collected and, therefore, how far it should influence decisions. Practitioners tended to be sanguine: *“Courts ... can use the valuable information and sift out the rubbish”*, said one London solicitor.

Regarding other aspects of the scheme, some concerns were expressed about the two methods of providing VSs. In relation to officer-assisted statements, the police were the subject of suspicion from some defence lawyers and judges. It was felt that sometimes the police ensured the VS said what they wanted it to say. *“They may put words into the mouth of victims”*, said one Bedfordshire Magistrate. A Bedfordshire solicitor said that the police sometimes persuade victims to *“over egg the pudding”* and *“put their own spin on it”*. In relation to the pro forma, both the design of the form and the capacity of many victims to fill it in were queried by many respondents from all groups. This confirms the findings of Phase 1 of this research (Hoyle *et al*, 1998). There was support from some respondents for victims being given a choice of mode of completion, and for Victim Support or the Witness Service assisting victims who sought assistance, instead of the police doing this.

Some of our findings appear, at first sight, to be contradictory. On the one hand, most decision-makers welcome VSs, but on the other hand take little or no notice of them. We think that there are two explanations for this. First, there is no doubt that *certain kinds* of impact information are used by judges and magistrates (but, rarely, by prosecutors). We have noted (see Chapter 2) that judges in Crown Courts frequently ask for information about the impact of the crime on victims at the sentencing stage, largely in crimes of violence (both sexual and non-sexual). The information sought is largely physical or of the most verifiable psychological kind. Claims of generalised anxiety, for example, or behavioural problems with tenuous causal links, are not welcomed. This indicates that VSs in some cases do, or have the potential to, influence sentence — but not in most cases. Further, judges do (and perhaps magistrates would) prefer to seek specific information which is up-to-date, rather than to use information collected some time before for more generalised and unspecified purposes. As one London magistrate, who strongly supported victim involvement in principle, put it

in a particularly forthright way: VSs are not useful under the present scheme because it seemed like *“something that a civil servant had devised in order to make the Home Office look good”*. In short, VS information is usually either expected and hence changes nothing, or is unexpected and needs to be ‘evaluated’ or ‘sifted’. However, this needs to be done on the basis of ‘expertise’, which takes us back to what decision-makers expect, as Erez (1999) has also found.

The above explanation cannot account for the *general* welcome given to impact information, for it shows that it is sought and used in only a very small minority of cases. We think that there is a second, additional, explanation. Magistrates and prosecutors, in particular, often feel aggrieved that speeches in mitigation and Pre-Sentence Reports give the defendant’s ‘side’ while there is little said on behalf of the victim. Now that it is commonplace to endorse the idea of rights for victims, practitioners are reluctant to deny victims an opportunity to be ‘heard’. We saw (in Chapter 2) that some prosecutors, magistrates and judges see the opportunity to be ‘heard’ as the principal function of VSs (often coupled with an assumed cathartic effect). However, we suggest that most would see it as too cynical to endorse a system with no instrumental value, a system in which victims would be heard but thereafter ignored. Thus, we believe, many decision-makers convince themselves that their practice *does* take account of VSs when it clearly does not, thereby bridging the gap between their rhetorical attachment to the principle of victims’ rights and their practical appraisal of reality in concrete cases. In Chapter 5 we discussed a case (L11) in which the perpetrator of a minor assault received a conditional discharge and was ordered to pay a small amount of compensation. The stipendiary magistrate who heard the case could not recall the VS or anything else about the case, but, when shown the case papers, insisted that the VS would have influenced the sentence and compensation. Asked how this was possible given the minimal level of both, he was unwilling to concede the point. Similarly, while a Branch Crown Prosecutor said that *“VSs have a significant value in the sentencing process and should be obtained routinely”*, this statement immediately followed his view that *“we have no evidence that VSs are leading to increased sentences”* (CPS Communication).

We conclude, in short, that VSs are supported by most decision-makers at the level of rhetoric but not at the level of action. This should, perhaps, not be surprising as it is consistent with the findings of other studies of impact statements (see especially, Henley et al, 1994). Even Erez, who argues that impact information has both a mitigating and an aggravating effect on sentences, also argues that, in the main:

“Practitioners resist reform initiatives which are inconsistent with their own world views and institutional priorities ... contemporary VIS practices in Australia and elsewhere are successful in maintaining the time-honoured tradition of excluding victims from criminal justice with a thin veneer of being part of it” (Erez, 1999, p.234-5).

8. SUMMARY AND CONCLUSION

The research examined a sample of VSs in four out of six pilot areas. Interviews about these VSs were carried out with a small sample of police officers and police ASU administrators, prosecutors, court clerks, legal advisers and administrators, defence solicitors, magistrates and judges. The main findings were as follows:

- A relatively small proportion of victims in cases in which offenders are identified and proceeded against choose to complete a VS, but in those cases in which they do, the VS appears routinely to be forwarded by the police ASU to the CPS and becomes incorporated in the prosecution file. In this minimal sense the system works.
- VSs rarely, if ever, influence CPS decisions to alter charges or not to proceed with a case. Nor do VSs influence the way in which the CPS approaches applications for bail or requests for remands in custody. This is partly because VSs are not invited from victims, submitted by victims and seen by prosecutors, until *after* proceedings against defendants have been initiated and police and court bail decisions have been taken. It is also because most prosecutors appear not to have envisaged, or to think it appropriate, that VSs should be used for these purposes.
- Practitioners perceive many VSs as containing no ‘relevant’ information. Although these evaluations are often valid, the type of information which one practitioner regards as relevant is often not so regarded by others. VSs are therefore used and evaluated inconsistently.
- VSs are seldom considered by prosecutors to add significantly to the information already available from evidential statements. To the extent that they do add significantly to that evidence, they sometimes trigger requests from the prosecution to the police that further evidential statements be gathered.
- VSs are considered by almost everyone concerned to be most relevant for sentencing purposes, and it appears that the majority are *in some sense* brought to the attention of the court at the sentencing stage. In the Crown Court they *may* be included — practice varies — in the committal papers. In both the magistrates’ court and Crown Court they are often drawn on by prosecutors when summarising the case prior to sentencing, although this is not always done explicitly. VSs are occasionally handed to the bench to read for themselves. It follows that victims observing cases will not always know that their VSs have been noted and used.
- Despite VSs being seen as intended for sentencing, they rarely influence the sentence. When they do, it is always to increase their severity. Most impact information which influences sentences is of the type which is, or should be, in the file already or is of the type which Crown Court judges often seek at the sentencing stage anyway. Support for VSs is largely at the level of rhetoric as distinct from practice.
- Information is only likely to influence sentence if it makes the impact *unusual*. Anything *unusual* would normally have to be verified if it is to be believed and acted upon. Otherwise, sentencers simply fall back on their ‘experience’ — which they could do without the help of a VS.

- Challenges to the content of VSs are rare. This is, in part, because solicitors are reluctant to antagonise sentencers. It is also because prosecutors and defence solicitors often reach an agreement on what is, and is not, acceptable.
- In principle, most practitioners welcomed VSs. In practice, however, most are influenced by impact information only rarely. This is for three principal reasons. Firstly, attachment to victims' rights in principle is difficult to operationalise in practice; secondly, in most cases *this particular scheme* collects the wrong information in the wrong form at the wrong time; and, thirdly, in most cases the impact revealed is only what the decision-maker would have expected anyway.

Evaluation of the system

When one sifts the reality out of the rhetoric, one finds that among virtually all practitioners VSs are seen as valuable, if at all, for two reasons. The first is for public relations, as one judge put it or, as some respondents put it less cynically, to enable victims to feel that they have a voice. This could be seen as a cathartic function and need have no instrumental function. However, as Phase 1 of this research found, many victims feel cheated if the VS has no impact. They feel slighted if their efforts are ignored for their expectations are raised and then dashed. Some would have preferred not to have completed a VS had they known that it would have no effect (Hoyle *et al*, 1998).

The second reason for general support for VSs is the desire, in serious cases, for concrete information. But if VSs are taken solely for this instrumental purpose, the particular experiment being evaluated in this study is unnecessary, for judges can and do seek the information they want anyway. When they do this they secure up-to-date information from sources they regard as reliable. Thus, the Merseyside judges, like other judges, reported sometimes seeking up-to-date information about injuries — presumably because they see this as relevant for sentencing purposes — yet could not recall any VS being useful for sentencing purposes.

It follows that if the VS experiment is to be extended and made permanent its purposes need to be clarified, and procedures altered accordingly.

- *Cathartic purpose*: if this is the sole purpose of the scheme, this should be made clear to victims. In particular, victims should be told the opposite of what the Victim's Charter currently says, namely, that what victims say may not be taken into account by criminal justice agencies.
- *Instrumental purposes — procedural*: if bail decisions are to be affected, the VS needs to be made prior to the offender being charged. This could only be done in most cases at the time of the offence being reported. It could lead to a vast increase in workload for the police or whoever takes the statements. This will be of no instrumental purpose in most cases, because in most cases no offender is arrested and prosecuted. If charges are to be affected it would be more effective to require the CPS to consult victims prior to making changes to charges, as VSs are rarely made with a view to the support of a specific charge. However, this would be both onerous for the CPS, and a cause of further delay in the criminal process. Even the Macpherson report into the Stephen Lawrence Inquiry (1999) recommended only that the CPS consult (presumably in serious cases) where it was proposed to discontinue. Currently, the CPS only undertakes to explain major changes to charges or discontinuances to those affected by homicide, or indirectly (via the police) in other cases. The Glidewell Report on the CPS (1998) recommended that the CPS should explain its decisions by communicating directly with victims. The CPS and Government accept this recommendation in principle, but will not implement it until resources are available. There is a fundamental difference, however, between the provision of information about a decision (the Glidewell suggestion) and giving victims an opportunity to influence that decision, which is what the VS scheme and Macpherson recommendations aim to do.

- *Instrumental purposes — sentencing*: if sentencing decisions are to be affected, the VS needs to be taken both at an early stage and up-dated if the final hearing is more than, say, a month or two afterwards. Police ASUs could put in place systems for up-dating VSs, but again only at some cost. The contents need to be verified, or the CPS placed under an obligation to seek such verification. If the sole purpose of the scheme is to affect sentencing it might be more effective to oblige the CPS to seek impact information immediately prior to the sentencing hearing. This would give victims their ‘voice’, be the best way of securing useful verifiable information, and put an end to the problems of officer-assisted/pro forma choice and how to establish systems in police ASUs for up-dating VSs.

At this point we feel that we should develop a point made in Chapter 3. The Government, quite rightly, is seeking to speed up the passage of cases through the courts. However, the ‘fast tracking’ method chosen, following the recommendations of the Home Office (1997) review of delay in the criminal justice system, will secure the appearance in court and, where possible, sentence within a few days or less of the defendant being charged. This will make it impossible in most of these cases for VSs to be used. The only way of reconciling the desire to use VSs with the desire for speed is for VSs to be collected soon after the offence is reported. Desirable as this may be in principle (subject to the greater need for up-dating old VSs that this system would produce), it must be remembered that most reported offences are never dealt with in court because the offender is not arrested and charged. VSs in most cases would therefore be collected at a considerable aggregate cost to no instrumental effect.

We suggested above that, if the VS scheme is continued solely in order to assist with sentencing, it might be better to seek impact information immediately prior to the sentencing hearing than to continue with the scheme in its present form. This will not usually be possible where cases are ‘fast tracked’. However, our findings suggest that impact information would be sought and found useful in only a minority of cases. It could be made open to magistrates adjudicating on ‘fast tracked’ cases to adjourn for impact information just as they will continue to be able to adjourn for pre-sentence reports. This would be a workable system but it would involve a switch of emphasis from the current VS scheme. Currently the VS scheme is one where a VS is made if the *victim wishes the courts* to learn more about the offence and its impact. What we are proposing is that a VS be made if the *courts* decide that they want to learn more about the offence and its impact.

Whether the provision of impact information should be triggered by victims themselves or by courts is a matter of policy. We are not in a position to decide this, but in our opinion it should flow from a decision about what the purpose of any information-provision scheme should be. If the primary purpose is victim satisfaction, there is a strong argument for such a scheme being triggered by the victim. If the primary purpose is instrumental for the courts, it is more logical for it to be triggered by the courts. We doubt whether one scheme can effectively fulfil more than one purpose, and our empirical findings give some weight to this view.

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