

THE ROLE OF EQUALITY IN THE PROVISION OF SPECIAL
MEASURES TO VULNERABLE AND/OR INTIMIDATED
COURT USERS GIVING EVIDENCE IN CROWN COURT
TRIALS

by

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ABSTRACT

Vulnerable and/or intimidated court users are able to give evidence with the assistance of special measures. This thesis examines the role of equality in the provision of such measures to those giving evidence in Crown Court trials. I adopt Keith Hawkins' conceptual framework of surround, field and frames to analyse the multitude of factors relevant to understanding its role. The standard of equality I invoke is that which underpinned the initial development of special measures for non-defendant witnesses. This is used to assess whether the law remains committed to equal treatment despite the unequal provision of special measures between vulnerable and/or intimidated defendant and non-defendant witnesses. Furthermore, using findings from interviews undertaken with 18 criminal practitioners, I consider the role that the principle of equality appears to play in the use of special measures. I conclude that the principle of equality is not consistently upheld in the provision of special measures in law and practice. Barriers to its more prominent role include the way, and the socio-political context in which, special measures law developed; the legal field in which they are invoked; and the way that criminal practitioners appear to frame decisions about their use.

DEDICATION

My parents – William and Maria Fairclough

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List of abbreviations

ADHD –	Attention deficit hyperactivity disorder
CJPOA –	Criminal Justice and Public Order Act 1994
CPS –	Crown Prosecution Service
ECHR –	European Convention of Human Rights
ECtHR –	European Court of Human Rights
PACE –	Police and Criminal Evidence Act 1984
RQ –	research question
YJCEA –	Youth Justice and Criminal Evidence Act 1999

CHAPTER 1: INTRODUCTION

1.1. Introduction

Some participants in criminal trials (whether the alleged victim, a witness, or the accused) are vulnerable because of their age, a mental health condition or a learning disability. Others are intimidated by the court process. It is vital that when such individuals give evidence they are adequately supported by the courts to do so to the best of their ability. Special measures were introduced to this end. They are ‘a range of measures that can be used to facilitate the gathering and giving of evidence’¹ by adjusting the trial setting and the mediums through which evidence can be received. This thesis explores whether the provision of these measures fosters equality between all vulnerable and/or intimidated participants in Crown Court trials.

Under the current law the legal provision and practical availability of these special measures varies depending upon whether the witness giving evidence is a non-defendant (a witness for the prosecution or defence) or a defendant. The provisions for defendants are much less extensive than those for non-defendants. This means that vulnerable and/or intimidated individuals who are accused of a crime receive less support by way of special measures when giving evidence in their defence than would similarly vulnerable and/or intimidated prosecution or defence witnesses testifying in the same trial. Curen² highlights the absurdity of this:

A person’s vulnerability should not be ignored when they become a defendant. Just as accessibility considerations, such as ramps for wheelchair users, would be made available to a defendant who uses a wheelchair, so [too should] special

¹ See http://www.cps.gov.uk/legal/s_to_u/special_measures/.

² Curen was the deputy CEO of the charity RESPOND, which aims to support individuals with learning disabilities. See <http://www.respond.org.uk/who-we-are/>.

measures that improve understanding of the criminal justice [system] and what is being asked of them.³

A bizarre effect of the unequal provision of special measures between these groups has also been pointed out by Hoyano and Rafferty:

[A] person with communicative difficulties testifying for the prosecution would automatically be eligible for an intermediary [a type of special measure explained in section 1.2 below], but if she then appeared in another trial as the defendant, she would not – a scenario which has occurred.⁴

The prevalence of vulnerability among the general population renders the differential provision of special measures an important issue to explore. It is estimated that over 1 million people have learning disabilities in England;⁵ that 1 in 6 people have symptoms of a common mental disorder;⁶ and that almost 1 in 5 people aged 16 and over in the UK show symptoms of anxiety or depression.⁷ Moreover, in 2004 10% of children had a clinically diagnosed mental disorder,⁸ and it is estimated that 10% of children and young people have a speech, language or communication need which is likely to be long term or persistent.⁹ These figures support the claim that many of those involved in criminal trials, including the accused, will suffer from some sort of vulnerability. The treatment of the vulnerable in court matters; Honourable Justice Green stating that ‘how the courts treat those who are exposed and weak is a barometer of our moral worth as a society’.¹⁰

³ Richard Curen, ‘Vulnerable Adults and the Criminal Justice System in England and Wales: Some Proposals for Reform’ (2005) *Criminal Lawyer* 3, 4.

⁴ Laura Hoyano and Angela Rafferty, ‘Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction’ [2017] *Criminal Law Review* 93, 94. The authors’ information was provided by Joyce Plotnikoff on 6 October 2016.

⁵ Eric Emerson and others, ‘People with Learning Disabilities in England 2011’ (Department of Health 2012) 2.

⁶ Sheila McManus and others (eds), *Mental Health and Wellbeing in England: Adult Psychiatric Morbidity Survey 2014* (Leeds: NHS Digital 2016) 44.

⁷ Office for National Statistics, *Personal Well-being in the UK: 2015-2016* (Statistical Bulletin, ONS 2016) 14.

⁸ Hazel Green and others, *Mental Health of Children and Young People in Great Britain, 2004: Summary Report* (National Statistics 2005) 8.

⁹ I CAN, *Speech, Language and Communication in Secondary Aged Pupils* (I CAN Talk Series, Issue 10 2011) 7.

¹⁰ Quoted in Jacqueline Wheatcroft, ‘Witness Assistance and Familiarisation in England and Wales: The Right to Challenge’ (2017) 21(1/2) *International Journal of Evidence and Proof* 158, 158.

The differential provision of special measures is of further significance given the status of equality as a basic and fundamental principle of liberal democracy.¹¹ Dworkin expresses this as treating people as equals, by ensuring that we have equal concern and respect for all¹² and treat people accordingly. If special measures are a mechanism through which equality of opportunity to give evidence for vulnerable and/or intimidated witnesses is sought (which in section 3.3 I show to be true) then it is vital to assess whether the restrictive provision of special measures to vulnerable and/or intimidated defendants giving evidence is defensible. This requires an evaluation of the relevance of any differences between defendants and non-defendants which might justify this disparate provision.

This is of yet further significance when one has regard to the importance of the law's internal consistency in its treatment of vulnerable and/or intimidated court users. If such non-defendant witnesses are provided with special measures support to help them to give evidence, then the law should ensure that vulnerable and/or intimidated defendant witnesses also receive adequate support to do so. This is the normative position adopted throughout this thesis: that the law should be consistent in its treatment of and assistance to vulnerable and/or intimidated court users who can and do give evidence in Crown Court trials.

1.2. Key terms

Special measures are contained within the Youth Justice and Criminal Evidence Act (YJCEA) 1999.¹³ Adjustments to the trial include the removal of barristers' and judges' wigs and gowns; the clearance of the public gallery (save for a member of the press) while the witness gives evidence; and the provision of a screen to segregate a witness giving evidence in court from view of the public gallery and defendant(s). Alterations to the medium through

¹¹ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000).

¹² Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press 1977) 370. See also Ronald Dworkin, *A Matter of Principle* (first printed 1985, Clarendon Press 1986) 207-13.

¹³ See YJCEA, s 23-30.

which evidence is given come in the form of the live link, which enables witnesses to give evidence from outside of the courtroom while still being seen and heard in court via a large television screen. Alternatively (or additionally) a witness can use pre-recorded witness testimony (evidence in chief and cross-examination) which is played at the trial in the absence of the witness. Furthermore, a witness may use an intermediary to enhance their effective communication throughout the evidence giving process and can also use communication aids, such as prompt cards, alphabet charts and drawings, to the same effect.

In order to use special measures, a witness or defendant must be considered vulnerable and/or intimidated. For the purpose of invoking special measures, vulnerability is defined with reference to young age and/or the existence of physical, mental or learning difficulties or disabilities.¹⁴ Intimidation is an umbrella term for various factors (for example religion) which may cause the witness fear or distress in connection with testifying in the proceedings.¹⁵

Similarly to Jacobson et al, the term 'court user' in this thesis comprises non-defendant witnesses for the defence, defendants, and all witnesses for the prosecution.¹⁶ Alleged victims are subsumed in the category of prosecution witnesses unless otherwise stated. Prosecution and defence non-defendant witnesses (herein referred to collectively as non-defendant witnesses) are considered together in the initial chapters, with defendants separately, mirroring the categories contained in the 1999 Act.

1.3. Ambit of the research

The restriction of this thesis to Crown Court trials serves to limit its direct relevance to criminal proceedings more broadly, since over 90% of all criminal cases are dealt with in the

¹⁴ See YJCEA, s 16 and s 33A. See sections 3.2.1. (p45-46) and 4.2.3. (p114) respectively.

¹⁵ See YJCEA, s 17. See section 3.2.2. (p46-47).

¹⁶ Jessica Jacobson, Gillian Hunter and Amy Kirby, *Inside Crown Court: Personal Experiences and Questions of Legitimacy* (Policy Press 2015) 3.

magistrates' court.¹⁷ This leaves just 10% of court business in the hands of the Crown Court. According to the latest CPS figures, 71.9% of prosecutions brought¹⁸ in the Crown Court conclude in the defendant pleading guilty, meaning that there is no trial.¹⁹ Although CPS statistics do not include prosecutions brought by other agencies, these sources combined clearly highlight two things. First that a very small percentage of criminal work is heard in the Crown Court, and second that the proportion of those cases which are contested is even smaller. However, like Roberts and Zuckerman,²⁰ I reject the inference that caseload statistics render considerations of Crown Court trials unimportant. For the three main reasons outlined below, the narrow focus of my thesis is justified.

First, despite the relatively low number of cases that are tried in the Crown Court, the option to be tried there is available on a much greater scale. For instance, all accused persons entering a guilty plea in the Crown Court could instead plead not guilty and stand trial there. Similarly, defendants charged with indictable 'either way' offences²¹ choosing to be tried in the magistrates' court could instead have opted for a Crown Court trial.²² There is, then, at least the potential for the Crown Court to host a much bigger proportion of trials than it currently does. Second, regardless of the court in which the case will ultimately be tried (if at all), Roberts and Zuckerman highlight that evidence laws are relevant to the preparation of all cases, all decisions to prosecute or discontinue, and may also influence an accused's plea decision.²³ Thus, the provision of special measures to vulnerable and/or intimidated court

¹⁷ Ministry of Justice, *Criminal Court Statistics Quarterly, England and Wales: January to March 2016* (Ministry of Justice 2016) 2.

¹⁸ Excluding discontinuances, where the CPS drop or discontinue proceedings any time before the start of the trial. See Crown Prosecution Service, *Annual Report and Accounts 2014-15* (HC20, London: The Stationary Office 2015) 68-70.

¹⁹ *ibid* 70, chart 7.

²⁰ Roberts and Zuckerman note that omitting to conduct research in the Crown Court is analogous to failing to conduct medical research into bowel cancer due to the more prevalent issue of in-growing toenails. See Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, OUP 2010) 45.

²¹ *ibid*.

²² Magistrates' Courts Act 1980, s 20.

²³ Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, OUP 2010) 45.

users may be an important factor in these pre-trial decisions. These issues combined make a consideration of practices in Crown Court trials markedly more significant than their relatively low occurrence may, at first glance, suggest.

Third, the Crown Court is where the most serious offences are tried. This is relevant in light of Roberts and Zuckerman's suggestion that it is in the Crown Court that evidence laws receive the most sustained attention because of the gravity of the charges against the accused.²⁴ It is thus in this setting that the provision of special measures should be the subject of closest scrutiny. Furthermore, the availability of special measures under the YJCEA is, in some instances, tied to the offence to which the charges relate. For example, serious sexual offences are tried in the Crown Court, and for the alleged victims of these crimes special measures provisions are automatically available.²⁵ In addition, special measures are available to some court users when they are 'in fear or distress in connection with testifying in the proceedings'.²⁶ This is arguably more likely to be the case in the context of Crown Court trials because it is probable that the seriousness of the offences tried, combined with the daunting environment of the Crown Court,²⁷ will increase the fear or distress experienced by those required to give evidence. Therefore, it is in the Crown Court that special measures are more likely to be needed, and are presumably more likely to be invoked.

A final explanatory note relates to child defendants. Most of them will stand trial in the Youth Court. Only children charged with an offence which is punishable by more than 14 years' imprisonment if committed by an adult will be tried in the Crown Court.²⁸ The focus in this thesis on Crown Court trials means that these are the only circumstances in which the use of special measures by child defendants is considered in this work.

²⁴ *ibid* 43.

²⁵ YJCEA, s 17(4).

²⁶ YJCEA, s 17.

²⁷ See section 3.3.2. (p50) for a fuller discussion of the nature of the courtroom.

²⁸ As per the Magistrates' Court Act 1980, s 24.

1.4. The principle of equality

It is important to be clear what is meant by equality. The underlying presumption adopted in this thesis is that if there is no convincing reason for unequal distribution, the only option which remains is that of equal distribution.²⁹ In the context of this thesis, therefore, the distribution relates to the provision of special measures to vulnerable and/or intimidated court users giving evidence in Crown Court trials.

Equality is a highly contested concept.³⁰ It is not the aim of this thesis to explore in detail the precise differences and merits of the various conceptions of equality, and to then apply them to the special measures context. Instead, this thesis evaluates the law of special measures according to the notion of equality upon which this law was developed: one of procedural equality of opportunity (see section 3.4). It also falls outside the scope of this thesis to investigate whether this conception of equality was the best version upon which to base the provision of special measures.

This thesis explores the law's commitment to its own 'principle of equality' in the provision of special measures to different vulnerable and/or intimidated court users. The normative claim underpinning such an exploration is that the law should be internally consistent in the protection and provision of assistance to vulnerable and/or intimidated court users.³¹ The first step in assessing this in relation to the law of special measures is to identify the differences

²⁹ Stefan Gosepath, 'The Principles and the Presumption of Equality' in Carina Fourie, Fabian Schuppert and Ivo Williamn-Helmer (eds), *Social Equality: On What it Means to be Equals* (OUP 2015) 177.

³⁰ For instance, Gosepath notes that '[b]oth equality and inequality are complex and multifaceted concepts' in Stefan Gosepath, 'The Principles and the Presumption of Equality' in Carina Fourie, Fabian Schuppert and Ivo Williamn-Helmer (eds), *Social Equality: On What it Means to be Equals* (OUP 2015) 168. Other examples of work on the various conceptions of equality include, but are not limited to Richard Wollheim and Isaiah Berlin, 'Equality' (1955-1956) 56 *Proceedings of the Aristotelian Society* 281; Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000); Catherine Barnard and Bob Hepple, 'Substantive Equality' (2000) 59(3) *The Cambridge Law Journal* 562; Mane Hajdin (ed), *The Notion of Equality* (Ashgate 2001).

³¹ That the law ought to be consistent is a well-established principle in jurisprudence, see Ronald Dworkin, *Law's Empire* (Hart Publishing 1998) 219-224. See also Lon Fuller, *The Morality of Law* (Yale University Press 1964) 39; Kenneth Kress, 'Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions' (1984) 72 *California Law Review* 369; Joesph Raz, 'The Relevance of Coherence' in Joesph Raz, *Ethics in the Public Domain* (Clarendon Press 1994).

between defendants and non-defendants which result from their structural positions in the criminal trial. The second step is to consider whether these differences provide a sufficient basis from which to justify the restrictive provision of special measures to vulnerable and/or intimidated defendant witnesses.

The thesis then goes beyond this normative enquiry to look at the role that equality appears play in practice in the provision of special measures to vulnerable and/or intimidated court users giving evidence in Crown Court trials. This is examined through a small exploratory study involving interviews with a sample of the legal profession (see Chapter 2). This provides an insight into whether the legal profession is internally consistent in its application of the available law for vulnerable and/or intimidated court users in practice.

1.5. Research questions

The primary research question (RQ) answered in this thesis is:

- What role does equality play in the provision of special measures to vulnerable and/or intimidated court users giving evidence in Crown Court trials?

In order to address this research question, I posed a series of subsidiary research questions. Tackling these contributes to the answer of the primary research question. These subsidiary research questions are as follows:

- RQ1: To what extent was the development of the law of special measures for vulnerable and/or intimidated non-defendant witnesses underpinned by a concern for equality?
- RQ2: Was the exclusion of vulnerable and/or intimidated defendant witnesses from special measures consistent with the law's commitment to the equality principle?

- RQ3: To what extent did (and does) a commitment to the equality principle, and a desire to achieve internal coherence in the law, guide the development of the law of special measures for vulnerable and/or intimidated defendant witnesses?
- RQ4: How frequently are special measures invoked in practice as per my respondents' experiences?
- RQ5: Are there any barriers to the role of equality in the uptake of special measures among vulnerable and/or intimidated court users as per my respondents' experiences?
- RQ6: If so, why do these barriers exist?

The research undertaken in order to answer these questions has been analysed using Hawkins' conceptual framework of surround, field and frames. The next section of this chapter outlines what this framework is, what it does, and why it is utilised in this doctoral thesis.

1.6. Conceptual framework: Hawkins' surround, field and frame

Hawkins' conceptual framework³² is used in this thesis to clearly delineate the different factors which are relevant when situating the role of equality in the provision of special measures in its wider context. It provides a language to use throughout my analysis. In addition, and on a more substantive level, Hawkins' framework is a tool which provides a comprehensible way to link together the different layers of analysis in my thesis. This section provides an overview of Hawkins' framework and how it is applicable in this project on special measures.

Hawkins identifies that 'legal decisions ... are not made in a vacuum, but in a broader context of demands and expectations arising from the environment in which the decision-maker lives

³² Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002).

and works'.³³ Hawkins' framework conceptually splits macro and micro level forces into three areas: surround, field and frame. These 'areas' do not have a simple one-way and/or linear relationship. Instead, each level can and does influence each of the others; the layers are in 'mutual interaction'.³⁴ This means that the surround, field and frame interrelate and may sometimes overlap.

The application of this framework in this thesis is helpful to understanding why the law has developed in the ways that it has and the role that equality has played in this. The reality is complex and the use of Hawkins' framework as a heuristic device helps to make sense of the various factors which are at play in the provision of special measures both in law and practice. Such factors include, inter alia: politics; public pressure and expectation; the economic recession and resulting cuts to public spending (particularly with regards to legal aid); the conditions in which lawyers work; the processes to which criminal practitioners must conform within their particular profession; the knowledge and awareness of those working within the criminal justice system about vulnerability and special measures use; and their attitudes and beliefs about special measures and different court users. The influence of each of these on each other is more easily explored through the use of Hawkins' framework as this facilitates an examination of the relationship between the various layers at play.

This particular framework was selected due to the similar nature of the research undertaken. Hawkins focused on decision-making by the prosecution with regards to health and safety breaches. This thesis examines prosecutorial/defence decision-making with regards to special measures for vulnerable and/or intimidated court users. Furthermore, the way in which Hawkins found decision-makers framed their decisions maps neatly on to my findings with

³³ *ibid* 31.

³⁴ *ibid* 52.

regards to the legal profession and special measures. This is made more evident in the brief overview of the three concepts – surround, field and frames – which follows.

1.6.1. Surround

The surround is the social, political and economic environment within which decisions are made. There are several elements of the surround which are considered to be influential to the law of special measures in this thesis. These include the changing political climate surrounding the treatment of defendants and victims in the criminal justice system; the economic recession and its impacts on funding to those working within the criminal justice system; the development of academic knowledge and a more general concern for the treatment of the disabled and mentally unwell; and technological advances which have enabled the creation of measures such as the live link and pre-recorded evidence. Hawkins notes that the surround is not static since ‘political and economic forces may shift’.³⁵ An appreciation of this can help to understand why laws continually develop and the approach to a particular issue may change over time.

1.6.2. Field

The decision field is set within the social surround. It is the ‘legally and organisationally defined setting in which decisions are made’.³⁶ For the purposes of this thesis, the decision field is the criminal justice system, and more specifically the parts of it relating to Crown Court trials. The statutes and appellate decisions; organisation of the system (as defined by the Criminal Procedure Rules, for example, or the codes of practice); resources (including case load pressures and legal aid fees); the structure of the legal profession; and the ideology inherent within the profession are all of relevance to a consideration of contextual decision-making about special measures.

³⁵ *ibid* 48.

³⁶ *ibid* 27.

1.6.3. Frames

The decision-making frame is the final strand of Hawkins' framework. A frame is 'a structure of knowledge, experience, values, and meaning that decision-makers employ in deciding'.³⁷

The way a criminal practitioner frames special measures decisions will affect the outcome of their decision. For example, a particular way of framing the situation and the available options can alter a criminal practitioner's view on whether special measures are needed, useful, deserved and worth applying for on behalf of a witness or client. Hawkins identified four frames – instrumental, organisational, symbolic and legal. These are adopted in this thesis, and their meaning is further expanded and adapted in Chapters 6 and 7.

In summary, Hawkins' framework is used as an analytical device which helps to organise and analyse the various factors at play in the development of the law of special measures and in criminal practitioners' special measures decisions. It is through doing this that an appreciation and understanding of the role in which equality plays, and the commitment to this principle in law and practice, is ascertained. The surround, field and frame are in a symbiotic relationship. This means that changes in the surround can result in changes in the way practitioners frame decisions and the organisation of the legal system, just as the way the profession frame decisions can affect the organisation of the legal field and vice versa. This is demonstrated throughout this thesis and summarised in the conclusion.

1.7. Thesis plan

In the next chapter of this thesis I discuss the way that this research project was designed. This includes an exploration of the methods adopted and how these are appropriate to answering the research questions. Chapter 3 moves on to look at the role of equality in the development of the law of special measures up to the enactment of the YJCEA. This starts by

³⁷ *ibid* 52.

highlighting the notion of equality which underpinned the development of special measures for vulnerable and/or intimidated non-defendant witnesses. It then goes on to assess whether the exclusion of such defendants from special measures in the YJCEA was justified according to the principle of equality which is inherent within this area of the law. In considering these questions, the chapter begins to lay the foundations for Hawkins' framework to be used by depicting the organisation of the legal field around the legal provisions in existence and how they came to be enacted.

Chapter 4 explores the extent to which the initial concern for equality has influenced the development of the law of special measures for vulnerable and/or intimidated defendant witnesses. This is primarily conducted through an analysis of case law and the Parliamentary debates around the enactment of new provisions for defendant special measures. This provides a further insight into the way in which the legal field is organised. The chapter also begins to explore how the way the legal profession frames special measures issues can influence the law of special measures, and how this, in turn, can result in bigger changes in the surround through legislative intervention. The chapter concludes with a summary of the law's commitment to equality in the current provision of special measures in law.

The first part of Chapter 5 commences with an insight into the frequency with which special measures are used by vulnerable and/or intimidated court users as per my respondents' experiences. The majority of this chapter, along with Chapters 6 and 7, focus on an identification and exploration of the barriers to special measures use that my respondents identified, and a consideration of why they exist. This part of the thesis relies heavily on Hawkins' conceptual framework. It draws on the context in which the law of special measures has developed (the surround) and the way that this has shaped the organisation of the legal field to understand why the law seems to operate in this way. Furthermore, it requires the application of Hawkins' various frame devices to the attitudes and approach of

criminal practitioners. These layers of analysis are linked together to show how these different factors interact and may affect the role that equality plays in the socio-legal provision of special measures to vulnerable and/or intimidated court users.

Chapter 8 is the concluding chapter of this thesis. Here, the role that the principle of equality plays in the provision of special measures to vulnerable and/or intimidated court users giving evidence in Crown Court trials is summarised. It is concluded that the principle of equality is not upheld between all vulnerable and/or intimidated defendant and non-defendant witnesses. This means that the law of special measures lacks integrity, since it does not consistently protect and support vulnerable and/or intimidated court. The only context in which the non-provision of special measures to vulnerable and/or intimidated defendants is considered justified is in relation to those which require evidence to be obtained from defendants pre-trial. Otherwise, there should be equal provision of special measures to vulnerable and/or intimidated court users, so that the law embodies internal consistency in its commitment to the principle of equality. The thesis ends with a presentation of various options for reform which could improve the law's consistency in the provision of special measures to the vulnerable and/or intimidated who are required to give evidence in Crown Court trials. These are continued judicial reform, 'piggybacking' on a current political issue that is likely to be the subject of Parliamentary debate and legislation, and targeting the legal field.

1.8. Conclusion

It is a fundamental principle of liberal democracy that people should be treated as equals absent a good reason for doing otherwise. That the law should demonstrate internal consistency in its treatment of individuals before it is just as axiomatic. My thesis is that examining the legal and practical provision of special measures in light of these principles is illuminating and highlights areas in need of reform.

In this chapter I have sketched out how this thesis is developed in what follows. I have also introduced Keith Hawkins' conceptual framework which is adopted in this thesis. This, as discussed, helps to organise the various aspects which are relevant to understanding the development and provision of the law of special measures both in law and practice, and the commitment to equality in this.

In the next chapter I examine the design of this project and the methods that were adopted. I demonstrate how this research has been designed to ensure that the questions are addressed in a way that is appropriate to determining the role that equality plays in the provision of special measures to vulnerable and/or intimidated court users. Furthermore, the reflective account of the research process highlights issues encountered throughout the course of the research and the actions taken to overcome them.

CHAPTER 2: RESEARCH DESIGN AND METHODS

2.1. Introduction

In this chapter I outline the research design of this project and the methods adopted. I provide a justification for the methods chosen and show why they were appropriate to answer my research questions. I also discuss the way I obtained access to the legal profession and how I selected the sample of criminal practitioners involved in my research. The majority of the chapter delineates the research process, involving a discussion of my actions before, during and after the interviews, in terms of preparation, data analysis and writing up. The final sections of the chapter acknowledge the ethical challenges I faced and how they were overcome, as well as highlighting potential criticisms of this study and the approach taken.

2.2. Research Design

Examining the commitment to the principle of equality in the provision of special measures to vulnerable and/or intimidated court users in England and Wales requires analysis at both the legal and socio-legal levels. This thesis was thus designed using a qualitative approach, which enables a consideration of both the ‘law in books’ and the ‘law in action’. It seeks to understand the reasons underlying the provision of special measures to vulnerable and/or intimidated court users and the context of the law’s development. It also seeks to develop an understanding of how the law works – what the processes are for securing special measures

for a vulnerable and/or intimidated court user and why they are this way. These are aims which Hennink et al categorise as most suited to a qualitative research design.¹

Ritchie highlights that qualitative research can be used to explore a new or underdeveloped subject matter in order to begin to build knowledge around it.² This made it the most appropriate approach in this thesis since the use of special measures by all vulnerable and/or intimidated court users, in particular such defendant and non-defendant defence witnesses, is a phenomenon that is little known about. Therefore, by conducting an exploratory, qualitative enquiry, I was able to start to uncover ‘what exists,’ through ‘unpack[ing]’ how the law operates as per the experience of the respondents.³

Although qualitative findings rarely provide a measure of frequency in the way that quantitative methods can, what they do provide is an ‘insight into a phenomenon and the extent to which it is present or absent’⁴ by ‘engag[ing] law’s subjects on the ground’.⁵ By using qualitative methods, this thesis begins to highlight some reasons why the law might operate in the way the respondents reported by exploring ‘what lies behind, or underpins, a decision, attitude, behaviour or other phenomena’.⁶ This research, therefore, begins to ‘develop theories with both descriptive and explanatory power’.⁷ A quantitative approach was inappropriate since identifying the relevant issues at play is a necessary prerequisite to attempting to quantify their prevalence.

¹ See Monique Hennink and others, *Qualitative Research Methods* (SAGE Publications 2011) 16, table 2.1.

² Jane Ritchie, ‘The Applications of Qualitative Research Methods’ in Jane Ritchie and Jane Lewis (eds), *Qualitative Research Practice* (SAGE Publications 2012) 40.

³ *ibid* 27-28.

⁴ Lisa Webley, ‘Qualitative Approaches to Empirical Legal Research’ in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (first published in 2010, OUP 2012) 935.

⁵ Victoria Nourse and Gregory Shaffer, ‘Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?’ 95 *Cornell Law Review* 61, 75.

⁶ Jane Ritchie, ‘The Applications of Qualitative Research Methods’ in Jane Ritchie and Jane Lewis (eds), *Qualitative Research Practice* (SAGE Publications 2012) 27-28.

⁷ Sharlene Nagy Hesse-Biber and Patricia Leavy (eds), *Approaches to Qualitative Research: A Reader on Theory and Practice* (OUP 2004) 13.

Baldwin's typology of research conducted in the criminal courts indicates that my study serves two main purposes. It begins to 'demythologize' practices around special measures; identifying that 'the procedures adopted in the criminal courts fall short of what one would expect from reading the standard legal texts'.⁸ It also looks to the pre-trial 'shaping' of cases, recognising that to 'understand decisions taken within the criminal courts, the influence of pre-trial decision-making needs to be considered'.⁹ All importantly, by engaging with my research questions in this way, the research design adopted fosters a 'context-specific' understanding¹⁰ of the law.

2.3. Methods

In the same way that the research design is driven by the research questions asked in this thesis, there exists an equally vital link between the questions asked and the methods adopted to answer them. In order to establish the role that the principle of equality has played in the development of special measures, an analysis of secondary data sources such as statutes, case law, policy documents and Hansard records was appropriate.¹¹ Addressing how the principle of equality operates in practice involves examining the attitudes and experiences of practitioners and means that use was also made of the interview method.¹² Each of these methods is outlined in more detail below.

⁸ John Baldwin, 'Research on the Criminal Courts' in Roy King and Emma Wincup (eds), *Doing Research on Crime and Justice* (OUP 2000) 244.

⁹ *ibid* 246.

¹⁰ Nahid Golafashani, 'Understanding Reliability and Validity in Qualitative Research' (2003) 8(4) *The Qualitative Report* 597, 600.

¹¹ As advocated by Braun and Clarke, who provide examples of types of research questions and the suitable data which can be used to answer them. See Virginia Braun and Victoria Clarke, *Successful Qualitative Research* (SAGE Publications 2013) 45-46, table 3.1.

¹² *ibid*.

2.3.1. Desk-based research

Documentary research ‘involves the study of existing documents ... to understand their substantive content or to illuminate deeper meanings’.¹³ Such documents can include legislation and case law and are categorised as primary legal sources.¹⁴ This is referred to in this thesis as the doctrinal element of the desk-based analysis.

The doctrinal analysis in this thesis primarily focuses on ascertaining what the law is and how it has developed. The primary sources of doctrine relied on are provisions contained in the YJCEA relating to special measures and the competency of witnesses. Appellate decisions of the High Court, the Court of Appeal and the House of Lords/Supreme Court are also analysed, along with those of the European Court of Human Rights (ECtHR), in order to ascertain the role of the courts in the development of defendant special measures. It is through a consideration of the judicial reasoning in these cases that the role that the principle of equality has played in the development of the law is understood.

In addition, the Criminal Procedure Rules and Criminal Practice Directions of England and Wales are considered, which issue further guidance on the provision of special measures and the related procedures.¹⁵ In order to assist the doctrinal analysis, other documentary sources were also studied. These included ‘Best Practice’ documents, produced by and for agents within the criminal justice system (for example The Advocate’s Gateway toolkits¹⁶), which highlight the common conceptions of and procedures for best practice.

¹³ Jane Ritchie, ‘The Applications of Qualitative Research Methods’ in Jane Ritchie and Jane Lewis (eds), *Qualitative Research Practice* (SAGE Publications 2012) 35.

¹⁴ Lisa Webley, ‘Qualitative Approaches to Empirical Legal Research’ in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (first published in 2010, OUP 2012) 938.

¹⁵ These are a form of delegated legislation. The Criminal Procedure Rules Committee makes the Criminal Procedure Rules under power from the Courts Act 2003, s 69. The Criminal Practice Directions are issued by the Lord Chief Justice of England and Wales under power from the Courts Act 2003, s 74, as amended by the Constitutional Reform Act 2005, Sch 2. For further discussion of the legal status of the Criminal Practice Directions see section 4.3.(note 232).

¹⁶ See <http://www.theadvocatesgateway.org/>

It was not simply a doctrinal analysis of the law that was sought in this project. The social, economic and political context in which the law of special measures was enacted and operates was also considered.¹⁷ This contributes to understanding why the law has developed in the ways pinpointed through the doctrinal analysis described above and any effect that this has on the role of equality in the provision of special measures. While some of the reasons for the development of special measures provisions are legal (and thus identifiable through purely doctrinal analyses) a more contextual analysis identifies other social, economic and political influences. Thus, a documentary analysis was carried out of various policy documents, political documents, and through an extensive review of the existing literature. Hawkins' conceptual framework was then used to organise and link the various layers of this analysis together to create a fuller picture of the context in which the law has evolved and the possible effects of this on its current state.¹⁸

The desk-based research was ongoing in the sense that the process of gathering and analysing new, updated and amended documentary and doctrinal sources took place throughout the study. It was iterative in that I analysed some documents on multiple occasions as my perspective changed and my understanding of the law deepened throughout the research project.

2.3.2. Semi-structured, in-depth interviews

Statistics on the use of special measures in Crown Court trials are not collected centrally by the Ministry of Justice or locally by individual court centres. Studies have examined the use of special measures by vulnerable and/or intimidated non-defendant prosecution witnesses

¹⁷ McConville and Chung describe such a non-doctrinal approach as being 'socio-legal'. See Mike McConville and Wing Hong Chung, *Research Methods for Law* (Edinburgh University Press 2007) 5.

¹⁸ See further section 1.6 (p9-12).

and various attitudes towards them,¹⁹ but there has been no attempt to mirror this research with regards to vulnerable and/or intimidated defendants²⁰ and there is only very limited data available on non-defendant defence witnesses.²¹ Accordingly, I undertook a small-scale, empirical study to gain an insight into how special measures are used in practice for *all* vulnerable and/or intimidated court users in Crown Court trials. This enabled me to identify and explore various factors which may affect their use and the realisation of equality within this.

This small-scale empirical study was conducted through interviews with 18 members of the legal profession. The data collated from them highlights many practical and conceptual barriers which seem to affect the frequency with which special measures are invoked. It was through these interviews that the reasons for the existence of various barriers to the equal use of special measures (outside of their legal provision) were uncovered. Identifying and evaluating the actual and perceived differences between various vulnerable and/or intimidated court users that the respondents considered relevant has enabled a richer, three-dimensional exploration of the overarching research question of what role the principle of equality plays in the provision of special measures.

¹⁹ For example, see Graham Davies and Elizabeth Noon, 'An evaluation of the live link for child witnesses' (Home Office 1991); Paul Roberts, Debbie Cooper and Sheelagh Judge, 'Monitoring Success, Accounting for Failure: The Outcome of Prosecutors' Applications for Special Measures Directions under the Youth Justice and Criminal Evidence Act 1999' (2005) 9 *International Journal of Evidence and Proof* 269; Mandy Burton, Roger Evans and Andrew Sanders, 'Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales' (2007) 11(1) *International Journal of Evidence and Proof* 1; Matthew Hall, 'Children Giving Evidence Through Special Measures in the Criminal Courts: Progress and Problems' (2009) 21(1) *Child and Family Law Quarterly* 65; Corrine Charles, *Special Measures for Vulnerable and Intimidated Witnesses: Research Exploring the Decisions and Actions taken by Prosecutors in a Sample of CPS Case Files* (Crown Prosecution Service Research Team, April 2012); Lisa Bunting, David Hayes and Gillian Clifford, *Special Measures for Vulnerable Witnesses in Northern Ireland* (Department of Justice, Northern Ireland 2013).

²⁰ Save for a small amount of data on the use of intermediaries by vulnerable defendant witnesses, see Penny Cooper and David Wurtzel, 'A day late and a dollar short: In search of an intermediary scheme for vulnerable defendants in England and Wales' [2013] *Criminal Law Review* 4, 16; Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants* (Policy Press 2015) 249.

²¹ Although McLeod et al found that defence witnesses are less well supported in court than prosecution witnesses, see Rosie McLeod and others, *Court Experiences of Adults with Mental Health Conditions, Learning Disabilities and Limited Mental Capacity Report 1: Overview and Recommendations* (Ministry of Justice Research Series 8/10, Ministry of Justice 2010) 20. See further section 5.6 (p189).

Interviews were the appropriate method for these purposes as they enable the collation of ‘empirical knowledge of a subject’s typical experiences’.²² In this instance, this was their experiences of the application for and use of special measures in Crown Court trials. The interviews were semi-structured. I used an interview guide²³ recording a series of questions that I tried to ask all respondents to ensure a basic level of consistency between each interview, whilst also pursuing the points made by respondents which were of potential interest and value.²⁴ The data collected provides an indication of my respondents’ experiences of the frequency of applications and the subsequent use of special measures. It also provides insights into their experiences of how, when, and why special measures were (or were not) invoked.

Similarly to Jennifer Temkin’s research on prosecuting and defending rape, this research does not ‘aim or claim’ to be quantitatively representative.²⁵ Despite this, it is ‘sufficient to reveal a number of important issues’²⁶ about the use of the special measures by vulnerable and/or intimidated court users in Crown Court trials. In much the same way as Garland and McEwan’s research on the operation of the overriding objective²⁷ in criminal trials, the interviews that have been conducted for this research provide a mere ‘snapshot of ... practitioners’ experiences’²⁸ of the use of special measures, which highlight areas of potential significance. The findings from this research, therefore, are not generalisable to all court centres and those working within them. Nevertheless, such an ‘exploratory study’²⁹ does

²² Svend Brinkman and Steiner Kvale, *InterViews: Learning the Craft of Qualitative Research Interviewing* (3rd edn, SAGE Publications 2015) 132.

²³ See Appendix 1.

²⁴ Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) 471.

²⁵ Jennifer Temkin, ‘Prosecuting and Defending Rape: Perspectives from the Bar’ (2000) 27(2) *Journal of Law and Society* 219, 221.

²⁶ *ibid.*

²⁷ The overriding objective of criminal proceedings is that ‘criminal cases be dealt with justly’ as per the Criminal Procedure (Amendment No. 2) Rules 2017, Part 1: The Overriding Objective, CPR 1.1(1).

²⁸ Fae Garland and Jenny McEwan, ‘Embracing the Overriding Objective: Difficulties and Dilemmas in the New Criminal Climate’ (2012) 16(3) *International Journal of Evidence and Proof* 233, 239.

²⁹ Similar, again, to that of Penny Darbyshire, ‘Judicial Case Management in Ten Crown Courts’ (2014) *Criminal Law Review* 30.

provide valuable insights into some of the factors which may be affecting the use of special measures by vulnerable and/or intimidated court users in practice.

2.3.2.1. *Sample*

The sample was drawn from two cities in England and comprised eight barristers (four of whom also sat as part-time judges, called recorders), five trial judges, and five solicitors. These cities were selected on a practical basis, as they were the two in which I had contacts from networking at events previously. Since this research sought to gain an insight into the experiences of the legal profession in relation to the law of special measures, and I was not attempting to produce statistically generalisable findings,³⁰ it was not important that the sample was demographically representative of the entire legal profession. This was reflected in the variety of sampling techniques used to obtain my sample.

Primarily, my sample was a convenience sample. This involves taking ‘a selection of the most accessible subjects’.³¹ While the principal method was one of convenience, it did also feature an element of purposiveness, and a very small element of snow-balling. Purposive sampling enabled me to keep the goals of the research in mind when selecting respondents,³² ‘so as to maximise the richness of information obtained pertinent to the research question’.³³ Thus, in constructing my sample, I chose a variety of ‘purposive selection criteria’, which indicated the ‘constituencies [that] need[ed] to be represented and with what level of diversity’.³⁴ These included respondents:

- from different parts of the legal profession (eg solicitors and barristers)

³⁰ Lisa Webley, ‘Qualitative Approaches to Empirical Legal Research’ in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (first published in 2010, OUP 2012) 934.

³¹ Martin Marshall, ‘Sampling for Qualitative Research’ (1996) 13(6) *Family Practice* 522, 523.

³² Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) 418.

³³ William Miller and Benjamin Crabtree, ‘Depth interviewing’ Sharlene Nagy Hesse-Biber and Patricia Leavy (eds), *Approaches to Qualitative Research: A Reader on Theory and Practice* (OUP 2004) 191.

³⁴ Jane Ritchie, Jane Lewis and Gillian Elam, ‘Designing and Selecting Samples’ in Jane Ritchie and Jane Lewis (eds), *Qualitative Research Practice* (SAGE Publications 2003) 97.

- with a variety of backgrounds in prosecution/defence work
- with a range of post-qualified experiences (PQE)

Snowball sampling was used in a minority of cases, where ‘participants propose[d] other participants who ha[d] ... the experience or characteristics relevant to the research’.³⁵ The specific demographics of the sample are set out in Table 2.1. The left hand column indicates the identifier that is used for each respondent throughout this thesis. They are descriptive of the part of the legal profession to which the respondent belongs. This is so that following direct quotes or paraphrasing of their views the respondents’ roles can be quickly identified by the reader and an interim assessment of their comments and standpoint can be made.

³⁵ Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) 424.

Table 2.1: Respondents' characteristics

Identifier	Part of Profession	Prosecution/ defence workload split	PQE	Age	Gender
B1	Barrister	50/50	22	40-50	M
B2	Barrister	80/20	14	30-40	F
B3	Barrister	40/60	20	40-50	M
B4	Barrister	40/60	21	40-50	F
R1	Barrister / Recorder	85/15	35	50-60	M
R2	Barrister / Recorder	80/20	13	30-40	F
R3	Barrister / Recorder	50/50	18	40-50	F
R4	Barrister / Recorder	50/50	19	40-50	M
J1	Judge		38	60+	M
J2	Judge		39	60+	M
J3	Judge		33	50-60	M
J4	Judge		35	60+	M
J5	Judge		37	60+	F
DS1	Defence Solicitor	0/100	15	30-40	M
DS2	Defence Solicitor	0/100	34	40-50	M
DS3	Defence Solicitor	0/100	18	40-50	M
PS1	Prosecution Solicitor	100/0	9	30-40	M
PS2	Prosecution Solicitor	100/0	6	30-40	F

Although the findings from this research are not statistically generalisable to the entire legal profession or to practices in all Crown Court trials, Lewis and Ritchie highlight that there are

different types of generalisation. They state that qualitative research findings should not be held to the same standards as quantitative research findings.³⁶ Instead, representational generalisation is ‘the extent to which findings can be inferred to the parent population that was sampled’ and involves making inferences about the content or range of views and experiences and the circumstances that shape and influence them.³⁷

In my fieldwork, I encouraged the respondents to share their direct experiences of special measures used in trials in which they had participated as well as times they were aware of colleagues using special measures in trials when they themselves had not been directly involved. Given the respondents’ collective PQE of over 400 years, adopting this approach has enabled me to gain an insight into practices surrounding special measures which goes well beyond the personal working lives of the 18 criminal practitioners I interviewed. This further validates the findings from this study. Furthermore, I would argue that the insights gained into the use of special measures and various barriers to their use can, cautiously, be attributed to a wider population than to this specific sample.³⁸

2.3.2.2. Access

Members of the legal profession are ‘elites’. A person can be categorised as elite with regards to their ‘social position relative to the researcher ... or relative to the average citizen’; both of which are applicable where the legal profession is concerned.³⁹ Odendahl and Shaw note that access to elite populations is difficult and ‘typically requires extensive preparation, homework and creativity on the part of the researcher, as well as the right credentials and

³⁶ Jane Lewis and Jane Ritchie, ‘Generalising from Qualitative Research’ in Jane Ritchie and Jane Lewis (eds), *Qualitative Research Practice* (SAGE Publications Ltd 2003) 263.

³⁷ *ibid* 268-69.

³⁸ Although a significant body of literature points to courtroom workgroups having different norms and practices, which could further affect the applicability of my findings to other courtroom workgroups. For a summary of this work see Richard Young ‘Exploring the Boundaries of the Criminal Courtroom Workgroup’ (2013) 42 *Common Law World Review* 203.

³⁹ Neil Stephens, ‘Collecting Data from Elites and Ultra Elites: Telephone and Face-to-Face Interviews with Macroeconomists’ (2007) 7(2) *Qualitative Research* 203, 205.

contacts'.⁴⁰ I accessed the vast majority⁴¹ of my sample through two gate-keepers; a legal gatekeeper and an academic gatekeeper. These were a recorder from a barristers' chambers and a colleague from Birmingham Law School with established links to the legal profession. Gatekeepers provide 'entry point[s] into a specific community' and have "inside" information' which helps to identify who would be most appropriate to interview.⁴² While this method of recruitment has obvious benefits when attempting to penetrate a community of elite professionals, it also places limits on the extent of a researcher's control over sample selection. In light of this, Harvey notes the importance of 'pursuing multiple avenues for gaining access to circumvent the danger of only speaking to people from within a particular social network'.⁴³ I have minimised this risk by having two independent gatekeepers and by providing them with a list of purposive selection criteria.

A further benefit arising from the use of gatekeepers is that they 'help ... to access the community through introductions'.⁴⁴ The fact that my respondents were either approached by one of their colleagues from within the legal profession or by an external contact with whom they had worked closely in the past helped to establish my credentials as a competent researcher. In essence, I had been 'vouched for' by the gatekeepers, resulting in respondents perceiving me positively.

⁴⁰ Teresa Odendahl and Aileen Shaw, 'Interviewing Elites' in Jaber Gubrium and James Holstein (eds), *Handbook of Interview Research: Context and Method* (Sage 2002) 306.

⁴¹ Three respondents were obtained via the snowball technique discussed in the sampling section 2.3.2.1. (p23).

⁴² Devon Jenson, 'Access' in Lisa Given (ed), *The SAGE Encyclopaedia of Qualitative Research Methods* (SAGE Publications 2008) 2.

⁴³ William Harvey, 'Methodological Approaches for Interviewing Elites' (2010) 2(6) *Geography Compass* 1, 4.

⁴⁴ Devon Jenson, 'Access' in Lisa Given (ed), *The SAGE Encyclopaedia of Qualitative Research Methods* (SAGE Publications 2008) 2.

2.4. Research process

2.4.1. Pre-interviews: preparation

I commenced my PhD studies in October 2013. In the initial months, I conducted a literature review as well as beginning to analyse policy documents, the legislation and relevant case law. This helped me to gain a firm understanding of what the law of special measures is and how it has developed. Alongside this, I sought to make contacts within the legal profession. In March 2014 I met with the Resident Judge at Birmingham Crown Court to discuss observing trials featuring special measures use by those giving evidence. I also made contact with my legal gatekeeper. I was able to attend several trials in which special measures were used. In addition, I contacted one of the court centres trialling a special measure which enables pre-recorded cross-examination (s 28 YJCEA).⁴⁵ I was permitted to observe two such hearings in the early stages of the pilot scheme.

Attending court regularly in these early months of my doctoral studies enhanced my understanding of Crown Court proceedings. Through ad hoc encounters with members of the legal profession, I was able to informally share and test my emerging ideas with them, while also gaining exposure to their views. Collectively, these experiences enabled me to familiarise myself with the legal terminology, referred to by Kvale as ‘master[ing] the technical language’.⁴⁶ This was useful for the development and expansion of my substantive knowledge. The experience of interacting with the legal profession also served to increase my confidence and ability to do so effectively prior to the commencement of my interviews.

The legal gatekeeper was an invaluable contact in these early stages of my research. As well as securing my access to trials involving special measures, they were able to confirm and

⁴⁵ A 10 month pilot scheme was conducted May 2014-March 2015 in Crown Courts in Leeds, Liverpool and Kingston-upon-Thames. See John Baverstock, *Process Evaluation of Pre-Recorded Cross-Examination Pilot (Section 28)* (Ministry of Justice 2016).

⁴⁶ Svend Brinkman and Steiner Kvale, *InterViews: Learning the Craft of Qualitative Research Interviewing* (3rd edn, SAGE Publications 2015) 171.

explain parts of the procedure with which I was unfamiliar. When interviewing an elite, a researcher needs to be ‘well-prepared ... [and] have a thorough knowledge of [their] whole field of research’.⁴⁷ Furthermore, ‘the more professional and well informed you appear to your interviewee, the more likely you are to gain his/her respect and with it the whole tone of the interview will be improved’.⁴⁸ Checking procedural information with the gatekeeper helped me to ensure I was adequately prepared for the interviews. For example, I had asked the legal gatekeeper if I could attend a Plea and Case Management Hearing (PCMH), where I had assumed that special measures applications would be orally made and contested. I learned from the legal gatekeeper that special measures applications are made on paper, ahead of the PCMH, and that they are rarely contested.⁴⁹ This enabled me to tailor my interviews accordingly.

The legal gatekeeper also assisted with the formulation of interview questions. I first prepared an interview guide with the assistance of my supervisors, before meeting with the gatekeeper to discuss the appropriateness of the questions I was proposing. This enabled me to avoid phrasing questions in a way which might have seemed misconceived to the respondents.⁵⁰ This was important to avoid the respondents feeling as though their time was being wasted by an inexperienced doctoral researcher. To this end, I also conducted a pilot interview with the legal gatekeeper. This helped me to identify questions which may not have worked well in the interview setting and to amend them accordingly. Furthermore, it was an opportunity to

⁴⁷ David Richards, ‘Elite Interviewing: Approaches and Pitfalls’ (1996) 16(3) *Politics* 199, 202.

⁴⁸ *ibid.*

⁴⁹ Worthy of note here is that, despite my reliance on the legal gatekeeper in the initial stages of my research, I was equally cautious of an over-reliance on their view in the project more generally. I treated the views of the gate-keeper (who essentially doubled as my ‘informant’) in the same way I treated interview data; ‘assess[ing] its meaning, relevance and value in terms of the informant’s social position, frame of reference...’ See Lewis Dexter, *Elite and Specialized Interviewing* (ECPR Press 2006) 6.

⁵⁰ Legard et al note that ‘asking relevant questions which are seen as meaningful by the participant and based on an understanding of the research subject’ is an important part of establishing credibility. See Robin Legard, Jill Keegan and Kit Ward, ‘In-depth Interviews’ in Jane Ritchie and Jane Lewis (eds), *Qualitative Research Practice* (SAGE Publications Ltd 2003) 143.

practice my interview technique, which increased both my confidence and competence before the fieldwork commenced.

Once the interview guide was completed and ethical clearance had been secured from the University of Birmingham, I began to make contact with my respondents. My legal and academic gatekeepers approached potential respondents who matched (as closely as possible) the purposive selection criteria stipulated. Following their verbal agreement with the gatekeeper to participate their names and contact details were passed on to me. I then emailed them individually to confirm their willingness to take part in the research and to arrange a convenient time and place to conduct the interview. Attached to the email were a research summary, a consent form, and a respondent questionnaire.⁵¹ This questionnaire enabled the collation of information about their professional background prior to the interview. Copies of this paperwork can be found in the appendices.

2.4.2. Interviews

The interviews took place between November 2014 and April 2015. I slightly adapted my interview guide depending upon the part of the profession to which the respondent belonged. For example, I rephrased some of the questions if the respondent was a barrister versus a solicitor, or if their background was one of defence, prosecution, or a mixture of both. This meant that the questions were appropriate for each respondent in my diverse sample. The majority of the interviews took place in chambers. Those with solicitors, however, took place in coffee shops as they did not have adequate facilities to host the interviews in their firms. The interviews were scheduled to last for one hour – the shortest was 42 minutes and the longest was 1 hour 55 minutes. They were all recorded using a password protected electronic

⁵¹ See Appendix 4.

device and I also took intermittent notes. Fully informed consent⁵² was obtained from all respondents prior to the interview starting.

I dressed smartly and was always punctual for arranged interviews in order to demonstrate my professionalism.⁵³ The existence of a tripartite relationship between me, the gatekeeper, and the respondents they had recruited on my behalf meant that a familiarity with the gatekeeper was an area of common ground shared with the respondents. Richards identifies the interviewer establishing common interests with interviewees as important to building rapport.⁵⁴ While I organised and distributed the relevant documents to the respondent for the interview and set up my recorder, conversation between the respondent and I often centred on how we each knew the gatekeeper and how they had come to be involved in the project. This created a relaxed atmosphere in the lead up to the interview starting.

Throughout each interview I was friendly but assertive, having initially set out the areas the interviews would cover⁵⁵ and how long it would take. A careful balance was maintained between demonstrating a sufficient level of knowledge about the areas of law under discussion to establish some credibility with the respondents⁵⁶ and possessing a ‘deliberate naiveté’ by remaining open to new and unexpected insights.⁵⁷ McDowell’s reflections on her strategies of self-presentation seem apt to demonstrate my own approach, as I manoeuvred between the personas of ‘whizz kid’ and ‘naïve laywoman’ throughout the interview.⁵⁸ At the start of the interview, the respondents were given a brief outline of the areas of the law for

⁵² A copy of a blank consent form can be found in Appendix 2.

⁵³ Goffman identified that factors such as appearance are important to creating and sustaining a particular perception of oneself. See Erving Goffman, *The Presentation of Self in Everyday Life* (first published 1959, Penguin 1990).

⁵⁴ David Richards, ‘Elite Interviewing: Approaches and Pitfalls’ (1996) 16(3) *Politics* 199, 203.

⁵⁵ The respondents were asked questions about bad character evidence and special measures, but only data from the latter is used in this thesis.

⁵⁶ Robin Legard, Jill Keegan and Kit Ward, ‘In-depth Interviews’ in J Ritchie and J Lewis (eds), *Qualitative Research Practice* (SAGE Publications Ltd 2003) 143.

⁵⁷ Svend Brinkman and Steiner Kvale, *InterViews: Learning the Craft of Qualitative Research Interviewing* (3rd edn, SAGE Publications 2015) 33.

⁵⁸ Liz McDowell, ‘Elites in the City of London: Some Methodological Considerations’ (1998) 30(12) *Environment and Planning A* 2133, 2138.

discussion.⁵⁹ I explained that these were for their reference as there was no expectation that they could remember the legal provisions verbatim. This sought to make the respondents feel more at ease, as well as, I think, contributing to their perception of me as a credible and well-organised researcher.

To an extent, and as is appropriate in semi-structured interviewing, I ‘let the interviewee teach [me] what the problem, the question and the situation is’.⁶⁰ I did this by ensuring that the questions asked were mostly open ended, to provide respondents ample opportunity to engage in in-depth discussions.⁶¹ This was the most desirable approach since it allowed for a degree of flexibility in the flow of the conversation while retaining a degree of interviewer control. This willingness to digress from the interview guide enabled me to clarify and enrich my understanding,⁶² whilst eliciting specific examples of the respondents’ experiences, and not just general opinions.⁶³ Such a ‘relatively fluid’ approach was desirable in this exploratory research project, as it allowed the research to unfold and develop as I learned more about the field.⁶⁴

The respondents were unlikely to feel inferior to me as the researcher.⁶⁵ This was for several reasons, including, inter alia, their elite position as members of the legal profession, the fact that I am not professionally qualified, and that I am a young (at the time of the interviews I

⁵⁹ See Appendix 3.

⁶⁰ Lewis Dexter, *Elite and Specialized Interviewing* (ECPR Press 2006) 5.

⁶¹ Joel Aderbach and Bert Rockman, ‘Conducting and Coding Elite Interviews’ (2002) 35(4) *Political Science and Politics* 673, 674.

⁶² Jane Ritchie, ‘The Applications of Qualitative Methods to Social Research’ in Jane Ritchie and Jane Lewis (eds), *Qualitative Research Practice* (SAGE Publications Ltd 2003) 37.

⁶³ Svend Brinkman and Steiner Kvale, *InterViews: Learning the Craft of Qualitative Research Interviewing* (3rd edn, SAGE Publications 2015) 33.

⁶⁴ Lisa Webley, ‘Qualitative Approaches to Empirical Legal Research’ in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (first published in 2010, OUP 2012) 932.

⁶⁵ As respondents in other types of interview setting are perhaps very likely to, for example, see Virginia Braun and Victoria Clarke, *Successful Qualitative Research* (SAGE Publications 2013) 88-89, who note that the ‘relationship between researcher and participant is typically conceived of as a hierarchical one ... with the researcher in control’.

was 23/24 years old), female, doctoral researcher.⁶⁶ According to Brinkman and Kvale, the absence of interviewee inferiority makes it possible to challenge respondents' statements.⁶⁷ The type of knowledge generated in an elite interview can therefore be 'that [which] has been found to be valid through conversational and dialectical questioning'.⁶⁸ Having established a good rapport with the respondents, I felt comfortable challenging inconsistencies I had perceived in their responses. This was done in two ways.

First, I proved my own knowledge to the respondents, and on occasion revealed my own views about matters in discussion, to prompt further justification from respondents. This led to the generation of much richer and more detailed data. Second, throughout this dialogue with respondents, I took the opportunity to 'cross-check sources'.⁶⁹ I did this by referring to some general views obtained in previous interviews⁷⁰ to which current respondents could agree, disagree and/or expand upon. These techniques were very useful in developing the responses of those interviewed as well as enhancing my own understanding of the practices experienced in Crown Court trials. This approach thus added to the respondents' perception of me as a credible researcher, whilst doubling as a process of 'member checking' or 'respondent validation'; a method of checking the conclusions you have reached with future respondents.⁷¹

The fluidity fostered within interviews was also adopted between interviews. I transcribed the interviews myself throughout the fieldwork process and kept a research journal of my

⁶⁶ Several advantages and disadvantages of being a young, female researcher are noted by Lois Easterday and others, 'The Making of a Female Researcher: Role Problems in Fieldwork' in Robert Burgess (ed), *Field Research: A Sourcebook and Field Manual* (Routledge 2003) 94-103. I did not feel that being a young, female researcher was detrimental to my encounters with the legal profession, but I do think it was a likely contributor to my inferiority to the respondents, meaning I had to work hard to achieve and maintain credibility as a competent researcher.

⁶⁷ Svend Brinkman and Steiner Kvale, *InterViews: Learning the Craft of Qualitative Research Interviewing* (3rd edn, SAGE Publications 2015) 172.

⁶⁸ *ibid* 41. This is referred to by Brinkman and Kvale as 'knowledge in the sense of *episteme*'.

⁶⁹ David Richards, 'Elite Interviewing: Approaches and Pitfalls' (1996) 16(3) *Politics* 199, 203.

⁷⁰ I was conscious when doing this to keep individual respondents' data confidential as per my ethical agreement. See section 2.6. (p39) for further expansion on this issue.

⁷¹ Pat Bazeley, *Qualitative Data Analysis: Practical Strategies* (SAGE Publications 2013) 408.

observations. On the basis of these reflections, the interview guide was adapted for future respondents as new information was obtained and my perspective changed. This resulted in my ‘simultaneous involvement in data collection and analysis’, which enabled me to pursue emerging interests and themes.⁷² Charmaz suggests that self-transcription is the best way to study your data from the start⁷³ by noting points of interest and adapting the interview guide in light of such. Kvale describes this as a process of ‘getting wiser’ in exploratory studies; where new understandings and discoveries are used and explored in the remaining interviews by adapting the interview guide accordingly.⁷⁴ These techniques were adopted throughout my fieldwork and were the key to its success. For example, prior to my interviews, I had expected that the respondents would reveal that, despite the seemingly unequal statutory provision of special measures to vulnerable and/or intimidated court users, in practice they were invoked on a more equal basis in criminal trials. I learned early on that, as per my respondents’ experience, this was not the case. It was, therefore, vital that I embraced this fluid approach to my interviews.⁷⁵

The interviews seem to have been a positive experience for many of the respondents involved. I believe that the conversational nature of the interview as well as my willingness to challenge their views contributed to this. The respondents showed that they had ‘obtain[ed]

⁷² Kathy Charmaz, ‘Grounded Theory’ in Sharlene Nagy Hesse-Biber and Patricia Leavy (eds), *Approaches to Qualitative Research: A Reader on Theory and Practice* (OUP 2004) 500.

⁷³ *ibid* 505.

⁷⁴ Svend Brinkman and Steiner Kvale, *InterViews: Learning the Craft of Qualitative Research Interviewing* (3rd edn, SAGE Publications 2015) 139.

⁷⁵ For example, after interview 7, I stopped asking Q5 on the interview schedule (Are applications for special measures for vulnerable witnesses still made, and successful, in cases where the defendant is also vulnerable?). I had included this on the basis of research by Burton et al on the ‘parity principle’, in which they found that criminal practitioners seemed less likely to secure special measures for vulnerable prosecution witnesses when the defendant was also vulnerable (see Mandy Burton, Roger Evans and Andrew Sanders, ‘Protecting Children in Criminal Proceedings: Parity for Child Witnesses and Child Defendants’ (2006) 18(3) *Child and Family Law Quarterly* 397). This is discussed further in section 4.2.3 (p106-109). The answer I got when I asked my respondents was always a (slightly puzzled) yes – they did still secure special measures for non-defendants despite a defendant’s vulnerability. I noted in my research journal that asking the question ‘made the respondents look at me like I was a bit mad’. I felt that this undermined my credibility in the interview. The flexible approach I took to my interviews permitted me to avoid this problem in future.

new insights into their life situation',⁷⁶ as is demonstrated from the two quotes below. B3 reflected on the interview following its conclusion, stating:

[The interview] has actually been quite informative because it's a very useful stone to look under. We are sort of stuck on hamster wheels in a sense and although we do, all of us, like to think that on a good day we are really good at our jobs ... I take particular pride in getting immersed in whatever case I'm doing and looking after the people I represent ... but actually, I have to say that, I've not applied my mind to many of the things you've said; particularly with special measures on the defence side. ...It's a really good thing to consider. Thank you.

Similarly, DS1 said:

It is though, having discussed it, something [the availability of special measures] I perhaps ought to give more thought to generally. If I think I have a particularly vulnerable defendant, should I be trying to get special measures? ...it's given me some food for thought.

2.4.3. Post-interviews: analysis

I followed up each interview with a brief 'thank you' email. Having reflected on the interview, a small number of respondents replied to this with further information or comments that they wished to add to our discussion. With their consent, I added this to their interview transcript (noting that it was from further email correspondence). Some of the respondents also offered to approach their colleagues to ask if they too would participate in my research. This is further evidence to suggest that they found the interview to be a positive experience.

I transcribed the interviews within two working days of each being conducted. I anonymised them instantaneously, replacing respondents' names with the appropriate identifier, and removing any references to specific court centres, colleagues, and names of clients or witnesses. Once the interviews had been transcribed, I deleted the recordings.

Following the conclusion of all of the interviews, I conducted a thematic analysis of the complete data set. Clark and Braun highlight that this method of analysis is one which

⁷⁶ Svend Brinkman and Steiner Kvale, *InterViews: Learning the Craft of Qualitative Research Interviewing* (3rd edn, SAGE Publications 2015) 35.

‘provid[es] a systematic approach for identifying, analysing and reporting patterns – themes – across a dataset ... not tied to a particular theory’.⁷⁷ In my project, it was used as a ‘contextualist’ method; exploring ‘the ways individuals make meaning of their experiences, and, in turn, the ways the broader social context impinges on those meanings’.⁷⁸ I was able, therefore, to analyse the respondents’ experiences, and to consider how they approached and framed particular situations, whether considerations of equality affected these decisions, and if so, whether they did so consistently. This was then set alongside the seeming influence that the legal system and the wider political, economic and social context had on their experiences. This all drew heavily upon, and fitted well into, my conceptual framework using Hawkins’ concepts of surround, field and frames.⁷⁹

The NVivo computer program was used to code, organise, manage, and store the data.⁸⁰ Coding is the process of reviewing the data and ‘giving labels to component parts that seem to be of potential theoretical significance’.⁸¹ It brings together data that is indicative of similar actions, ideas or processes,⁸² segregating patterned responses into themes.⁸³ Bryman notes that coding is in a ‘constant state of potential revision and fluidity’ since the codes and the data within them are subject to continual comparison against other codes.⁸⁴

I adopted an inductive approach to identifying themes. This means that the coding was ‘data-driven’, whereby the codes are identified from within the data itself.⁸⁵ Coding the data ‘without trying to fit it into a pre-existing coding frame’ has thus ensured there is a strong

⁷⁷ Virginia Braun and Victoria Clarke, *Successful Qualitative Research* (SAGE Publications 2013) 178.

⁷⁸ Virginia Braun and Victoria Clarke, ‘Using Thematic Analysis in Psychology’ (2006) 3(2) *Qualitative Research in Psychology* 77, 81. Braun and Clarke note that this is characterised by theories of critical realism, see Joseph Maxwell, *A Realist Approach for Qualitative Research* (SAGE 2012).

⁷⁹ Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002).

⁸⁰ Graham Gibbs, *Qualitative Data Analysis: Explorations with NVivo* (Open University Press 2002) 11.

⁸¹ Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) 569.

⁸² Graham Gibbs, *Qualitative Data Analysis: Explorations with NVivo* (Open University Press 2002) 31.

⁸³ Virginia Braun and Victoria Clarke, ‘Using Thematic Analysis in Psychology’ (2006) 3(2) *Qualitative Research in Psychology* 77, 82.

⁸⁴ Alan Bryman, *Social Research Methods* (4th edn, OUP 2012) 569.

⁸⁵ Svend Brinkman and Steiner Kvale, *InterViews: Learning the Craft of Qualitative Research Interviewing* (3rd edn, SAGE Publications 2015) 228.

link between the themes and the data.⁸⁶ I combined semantic and latent levels of thematic coding.⁸⁷ Semantic coding begins with an examination of the explicit or surface meanings of the data.⁸⁸ Latent level analysis goes beyond this, to explore ‘*underlying* ideas, assumptions and conceptions’.⁸⁹ Initially, when beginning the analysis of the first few transcripts, I adopted a semantic approach. This enabled me to focus on what the respondents said and the surface meanings of such, which increased my familiarity with the data. This type of analysis was useful to collate descriptive information regarding the frequency with which each respondent had experienced particular special measures being used, and by whom. I combined this with latent level coding in order to examine any insights into why special measures were invoked for some vulnerable court users and not others, by looking beyond what the respondents said and delving deeper in order to theorise about what may be driving such practices.

As advocated by Braun and Clark, I continually coded and re-coded my data, identifying themes and trends and exploring any relationships between them. This was in pursuit of the production of a ‘thematic map’; within which the themes should ‘capture the contours of the coded data’ and ‘accurately reflect the meanings evident in the data as a whole’.⁹⁰ On occasion, some of the data did not fit with the themes identified. To deal with this ‘deviant case analysis’ was used to further analyse such outliers.⁹¹ This ensured that important nuances were not overlooked when developing my research findings.

⁸⁶ Virginia Braun and Victoria Clarke, ‘Using Thematic Analysis in Psychology’ (2006) 3(2) *Qualitative Research in Psychology* 77, 83 (authors’ emphasis). This is not to say that the themes ‘emerged from the data’ as this would deny my role as an active researcher in identifying patterns and themes and selecting them, see page 80.

⁸⁷ *ibid* 84.

⁸⁸ *ibid*.

⁸⁹ *ibid* (authors’ emphasis).

⁹⁰ *ibid* 91.

⁹¹ Jane Lewis and Jane Ritchie, ‘Generalising from Qualitative Research’ in Jane Lewis and Jane Ritchie (eds), *Qualitative Research Practice* (SAGE 2003) 275.

2.5. Ethical challenges

Due to the use of gatekeepers in obtaining the sample, the anonymity of respondents could not be guaranteed. This is because the gatekeepers knew who had participated and may thus be able to attribute comments quoted in this thesis to the individual respondents using the information in Table 2.1. It is also possible that the respondents themselves could figure out who else has (or may have) participated in the research in the same way. This risk was discussed with the respondents prior to the interview. I have still tried to protect their identities as much as possible. For example, I have not attributed comments or views to named participants⁹² and have removed other identifying details from their transcripts such as the names of cases, clients, and other criminal practitioners with whom they have worked.

As noted by Braun and Clark, when doing qualitative research, ethics are more complicated and the situation is ‘potentially more uncertain, complex and nuanced ... partly because of the fluidity of qualitative research designs’.⁹³ On occasion, the respondents would probe me on who else I had interviewed. I dealt with this by reminding them that, just as their identity would be kept confidential, so would the identity of other participants. Other questions that respondents asked included which other chambers or firms I would be interviewing people from. I decided that to share this information with the respondents would risk the identification of other participants or at least the arousal of suspicion as to who else was involved in the project. For this reason, I declined to disclose the information and instead would typically respond in one of two ways. I either said I had not finished recruiting yet (and asked if they had any suggestions for where to seek further respondents), or told them that I could not remember off the top of my head, and politely reminded them that even if I could, I could not share the information with them so as to minimise the identifiability of the

⁹² Jane Lewis, ‘Design Issues’ in Jane Lewis and Jane Ritchie (eds), *Qualitative Research Practice* (SAGE 2003) 67.

⁹³ Virginia Braun and Victoria Clarke, *Successful Qualitative Research* (SAGE Publications 2013) 64.

other respondents. These responses were accepted and demonstrated my commitment to the promise to be discrete with regards to research participation.

Earlier in the chapter, I noted that I checked the validity of the conclusions reached from early interviews by ‘cross-checking’ them with respondents later in the fieldwork process. In doing so, I was careful to remain ethically sensitive, and not breach the promised confidentiality of the participants involved. I made sure that the views I shared were general and not specifically attributed to any individual respondent or particular part of the legal profession, but rather to an anonymous majority. Furthermore, I was careful not to tell the respondents how many others had been interviewed. Instead, I kept things vague by saying, for example, ‘I have done quite a few interviews now, and it seems that a rather common view of the live link provision is that ...’ I avoided the alternative approach, of saying, for example ‘a defence barrister I interviewed last week said that...’ because I felt that this heightened the risk that this hypothetical defence barrister could be identified.

2.6. Potential criticisms of the research design

2.6.1. Limitations of interview data

Despite the distinct advantages of using semi-structured interviews for this project, it is a method which is not without criticism. Miller and Glassner state that, while knowledge of the social world beyond the interview interaction can be obtained,⁹⁴ there are fears that respondents may be ‘concerned to bring the occasion off in a way that demonstrates his or her competence as a member of whatever community is invoked by the interview topic’.⁹⁵ It is clear from previous studies that what respondents say they do in interview is not always consistent with what they actually do in reality. For example, in Newman’s study of defence

⁹⁴ Jody Miller and Barry Glassner, ‘Interviews and Focus Groups’ in David Silverman (ed), *Qualitative Research* (3rd edn, SAGE Publications 2011) 132.

⁹⁵ Robert Dingwall, ‘Accounts, Interviews and Observations’ in Gale Miller and Roger Dingwall, *Context and Method in Qualitative Research* (SAGE Publications 1997) 59.

lawyers he first observed the lawyer's practices before interviewing them.⁹⁶ Despite having conducted the period of observation with their knowledge, the lawyers still claimed when questioned in interview to behave in ways quite different to those that Newman had himself observed.⁹⁷ The risk that my respondents behave differently to the way they presented to me in interview seems particularly acute in my research for two reasons.

First, I did not conduct a period of observation in my study. I had initially planned to do so, but later decided that this would not be a realistic endeavour. Since applications for special measures are made on paper ahead of the trial and due to the time constraints inherent in doctoral study, it would have been very difficult to observe the special measures process from start to finish in a Crown Court trial.⁹⁸ The absence of ethnography in my research, therefore, means I have no observation data against which to test the validity of the responses elicited in interview. The second reason that the risk of dishonest or inaccurate answers from respondents may be problematic in this project arises from the involvement of the legal gatekeeper. This may have affected the interviews because the respondents could still have felt in some way accountable to the legal gatekeeper (who was often senior to the respondents that they had recruited). Given the likelihood that the legal gatekeeper could probably, if they desired, work out who had said what in the interviews (as discussed in section 2.5), this may have affected the answers that some respondents chose to give.

Despite these concerns, I would argue that the nature of the insights I obtained goes some way to affirming their validity. The interviews showed, as is discussed in section 5.2, that the respondents rarely apply for special measures for vulnerable and/or intimidated defendant

⁹⁶ Daniel Newman, *Legal Aid Lawyers and the Quest for Justice* (Hart Publishing 2013).

⁹⁷ *ibid* 39.

⁹⁸ This is particularly given the number of cases that are ineffective (relisted for a later date because it is not ready), 'cracked' (withdrawn on the day due to start and not relisted) or vacated (removed from the list ahead of schedule as it is unlikely to go ahead as scheduled). From September 2014-15, only one-third of cases were effective, thus going ahead as planned. See Ministry of Justice, *Efficiency in the Criminal Justice System* (National Audit Office 2016) paras 1.13-1.14.

and non-defendant defence witnesses. Many respondents also revealed their lack of awareness that such measures are available in law to these court users. It seems unlikely that a respondent would falsely claim in interview not to know and use the law (when they arguably ought to), when actually, in practice, they do invoke the provisions that they claimed not to know existed. Furthermore, by demonstrating my commitment to maintaining confidentiality when probed by respondents, I hope to have abated any respondents' potential concern regarding the disclosure by me of their responses to the gatekeeper and any potential repercussions.

Where the issue of 'why' the special measures are not invoked is concerned, the validity of the respondents' comments is perhaps more problematic. As is discussed in later chapters of this thesis, however, my findings often reflect and complement those from pre-existing studies. Furthermore, I have presented various findings from these interviews at The Advocate's Gateway conference and the Socio-Legal Studies Association conference. Both of these conferences were well attended by criminal practitioners, and the feedback I received was positive. This is not to suggest that all of the respondents have provided entirely accurate accounts in their interviews. However, the combination of the above factors gives me the confidence that, provided the findings from my research are interpreted in the context of lawyers' working conditions and are not overstated, they are both valid and defensible.

2.7. Conclusion

This chapter has outlined the design of this research project and the methods adopted to ensure that this thesis answers the research questions set out in Chapter 1. This is a qualitative research project, combining documentary analysis with 18 semi-structured interviews with members of the legal profession. The empirical element should be viewed as providing an insight into the provision of special measures to vulnerable and/or intimidated court users in

practice, in the absence of the availability of more widely collected data. Despite the small sample, this chapter has provided reasons for why the findings of this project should be regarded as significant.

The next chapter begins to explore the development of the law of special measures. The conception of equality that underpinned the development of special measures for vulnerable and/or intimidated non-defendant witnesses is uncovered. The remainder of Chapter 3 then assesses whether the exclusion of defendant witnesses from the initial special measures provision consistently upheld this principle of equality. This is done by exploring the differences between vulnerable and/or intimidated defendants and non-defendants and assessing whether these justify the differential provision of special measures.

CHAPTER 3: SPECIAL MEASURES DEVELOPMENT (UP TO YJCEA 1999)

3.1. Introduction

In this chapter I focus on the development of the law of special measures up to the point of the enactment of the Youth Justice and Criminal Evidence Act (YJCEA) 1999. I first look at the provision of special measures to vulnerable and/or intimidated non-defendant witnesses to determine the nature of the principle of equality that underpinned these provisions. I then turn to consider the exclusion of vulnerable and/or intimidated defendant witnesses from this legislation to assess whether their exclusion was in keeping with the law's commitment to the equality principle on which the 1999 Act was built. This involves identifying the differences between the defendant and non-defendant witness cohorts and evaluating their relevance in relation to special measures. This enables a conclusion to be reached about whether the exclusion of defendants from the 1999 special measures scheme renders the law of special measures internally incoherent. The final section of this chapter outlines the potential consequences, both in principle and practice, of the exclusion of vulnerable and/or intimidated defendant witnesses from the provision of special measures in Crown Court trials.

Before all of this commences, the first section of this chapter provides an outline of the current eligibility for special measures for non-defendant witnesses as per the YJCEA.

3.2. Non-defendant witnesses: eligibility

Special measures are available to vulnerable and/or intimidated non-defendant witnesses under the YJCEA 1999. This legislation was enacted following *Speaking up for Justice*, a report considering the treatment of vulnerable and intimidated witnesses in the criminal justice system.¹ The measures, as outlined in section 1.2, include screens², the removal of wigs and gowns³, evidence in private⁴, live link⁵, pre-recorded evidence in chief⁶ and cross-examination,⁷ and the assistance of an intermediary⁸ and/or communication aids.⁹ The broad purpose of these special measures is to facilitate best evidence (referred to in the Act as the most ‘complete, coherent and accurate evidence’¹⁰) from a vulnerable and/or intimidated witness.

The 1999 statutory special measures scheme was applicable to all non-defendant witnesses, whether for the prosecution or defence, including the complainant. All defendant witnesses were excluded.¹¹ The reasons for this are discussed later in this chapter (section 3.5) and the development of the law for defendant witnesses is the subject of Chapter 4. With regards to non-defendant witnesses, section 16 and section 17 of the YJCEA define respectively ‘vulnerability’ and ‘intimidation’ for the purposes of the Act.

¹ Home Office, *Speaking up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (Home Office 1998) (*Speaking up for Justice*).

² YJCEA, s 23.

³ YJCEA, s 26.

⁴ YJCEA, s 25.

⁵ YJCEA, s 24.

⁶ YJCEA, s 27.

⁷ YJCEA, s 28. This is the only measure which is yet to be fully implemented. A ten month pilot scheme of this provision recently concluded in Crown Courts in Leeds, Liverpool and Kingston-upon-Thames. The full process evaluation was largely positive, see John Baverstock, *Process Evaluation of Pre-Recorded Cross-Examination Pilot (Section 28)* (Ministry of Justice 2016). See also Hayden Henderson and Michael Lamb, ‘Pre-recording Children’s Testimony: Effects on Case Progression’ [2017] *Criminal Law Review* 345. The measure is scheduled to be implemented nationally late in 2017 see Simon Drew and Linda Gibbs, ‘A United Approach’ (March 2017) *Counsel Magazine*; Samantha Fairclough and Imogen Jones, ‘The Victim in Court’ in Sandra Walklate (ed), *Handbook of Victims and Victimology* (2nd edn, Routledge 2017) ch 11 (forthcoming).

⁸ YJCEA, s 29.

⁹ YJCEA, s 30.

¹⁰ YJCEA, s 16(5).

¹¹ See YJCEA s 16.

3.2.1. *Vulnerable witnesses*

Eligibility for special measures based on vulnerability differs according to the age of the witness. Children, ie those under 18¹² at the time they are required to give evidence, automatically qualify for special measures since the sole criterion for their eligibility is age.¹³ For adult witnesses, eligibility for special measures is dependent on the court considering that the quality of their evidence is likely to be diminished.¹⁴ This can be for three reasons: that they are suffering from a mental disorder as per the Mental Health Act 1983;¹⁵ a significant impairment of intelligence or social functioning;¹⁶ or a physical disability or disorder.¹⁷

The full range of special measures is available to witnesses qualifying under any of the above criteria.¹⁸ The Act is clear that decisions about whether a witness should have special measures, and which ones, should take the witness' views into account.¹⁹ That said, for child witnesses in sexual or violent cases, the primary rule is that any relevant recording is admitted under section 27 as evidence in chief, and further evidence elicited from the witness through cross-examination is done via the live link.²⁰ However, if the child witness wishes to give evidence in an alternative way, the court may permit this so long as it will not result in the diminution of the witness' evidence.²¹ Usually, this requires screens to be used instead²² but this can be further challenged by a witness who wishes to give evidence in court

¹² As amended by Coroners and Justice Act 2009, s 98 (under the original enactment of the YJCEA it was aged 17).

¹³ YJCEA, s 16(1)(a).

¹⁴ YJCEA, s 16(1)(b).

¹⁵ YJCEA, s 16(2)(a)(i).

¹⁶ YJCEA, s 16(2)(a)(ii).

¹⁷ YJCEA, s 16(2)(b).

¹⁸ YJCEA, s 18(1)(a).

¹⁹ YJCEA, s 16(4); s 19(3)(a).

²⁰ See YJCEA, s 21(3).

²¹ See YJCEA, s 21(4)(ba). This has not always been the case. The original enactment of the YJCEA categorised child victims of sexual and violent offences as 'in need of special protection' (s 21(1)(b)). The primary rule dictated, with no discretion, that when a relevant recording was available it should be admitted as the child victim's evidence in chief, followed with cross-examination by live link. The Act was amended (Coroners and Justice Act 2009, s 100) and now the child's views should be taken into account.

²² YJCEA, s 21(4A).

unaided.²³ Decisions to eschew the primary rule should be decided on the basis of the witness' wishes and the factors contained in section 21(4C); such as the witness' age and maturity and the nature and alleged circumstances to which the proceedings relate. In summary, although there remains a presumption that evidence from a child complainant of particular offences is received in a particular way, subject to quality safeguards this is now rebuttable.

3.2.2. Intimidated witnesses

Intimidated witnesses are those whose quality of evidence is likely to be diminished due to their fear or distress in connection with testifying in the proceedings.²⁴ In determining this, the nature and circumstances of the offence to which the proceedings relate;²⁵ the age of the witness;²⁶ and the behaviour of the accused or their supporters towards the witness are relevant factors.²⁷ Furthermore, the witness' social and cultural background; ethnic origins; domestic and employment circumstances; religious beliefs; or political opinions are considered.²⁸ Finally, a complainant of a sexual offence who is required to give evidence is automatically eligible for special measures assistance unless they do not wish to use them.²⁹ For witnesses who qualify for special measures under section 17, all measures are available with the exception of provisions for intermediaries and communication aids.³⁰ This is because these latter measures are designed to facilitate the communication of those who are vulnerable.

²³ YJCEA, s 21(4B)(a).

²⁴ YJCEA, s 17(1).

²⁵ YJCEA, s 17(2)(a).

²⁶ YJCEA s 17(2)(b).

²⁷ See YJCEA, s 17(2)(d)(i)-(iii).

²⁸ See YJCEA, s 17(2)(c)(i)-(iii).

²⁹ YJCEA, s 17(4).

³⁰ YJCEA, s 18(1)(b).

3.3. Motivations underpinning special measures development

Special measures were not an entirely new creation when the current statutory scheme was enacted in 1999. Already in existence were statutory provisions for the court to be closed to the public while children give evidence;³¹ for some children to be cross-examined by live link;³² and for pre-recorded evidence to be admitted as their evidence in chief.³³ Furthermore, the judiciary had authorised the use of screens by some witnesses in criminal trials.³⁴ Thus, in part, the YJCEA codified the existing law and made it more accessible through the ‘standardisation of language and approach’.³⁵ The 1999 Act also expanded both the range of special measures and to whom they are available. To understand why special measures were initially enacted and have developed, it is necessary to look back to the late 1980s. This was when the rules of evidence were first amended to allow vulnerable witnesses, historically excluded from the criminal process, to give evidence, and the mediums through which they could give it were first expanded. It is through this examination that the extent to which equality influenced the development of special measures law is uncovered.

3.3.1. Corroboration and competency

Spencer notes that the rules of evidence in the 1980s ‘conspire[d] to ensure that child witnesses either went unheard, or if they were heard, were disbelieved’.³⁶ The competency and corroboration rules were particularly problematic in this regard. Witnesses were required to give evidence under oath, and to do so they needed to understand the nature of the oath. The Court of Appeal stated that this required that the witness had:

³¹ Children and Young Persons Act 1933, s 37.

³² Criminal Justice Act 1988, s 32.

³³ Criminal Justice Act 1988, s 32A (inserted by Criminal Justice Act 1991, s 54).

³⁴ See, for example. *R v Smellie* (1919) 14 Cr App R 128; *R v X, Y, Z* (1990) 91 Cr App R 36.

³⁵ Diane Birch, ‘A Better Deal for Vulnerable Witnesses?’ [2000] *Criminal Law Review* 223, 240.

³⁶ John R Spencer, ‘Child Witnesses and Cross-examination at Trial: Must it Continue?’ (2011) 3 *Archbold Review* 7.

[A] sufficient appreciation of the solemnity of the occasion, and the added responsibility to tell the truth ... over and above the duty to tell the truth which is an ordinary duty of normal social conduct.³⁷

If a child witness surpassed this hurdle, they could give sworn evidence. The common law then presented further obstacles. A judicial warning to the jury was required to the effect that it is 'dangerous' to convict on a child's sworn, but uncorroborated, evidence.³⁸ This meant that for a sound prosecution case involving a child's evidence it was often necessary that there were multiple sources of admissible evidence.

If a witness was not considered as sufficiently mature to understand the nature of the oath, then they could only give their evidence unsworn.³⁹ Convictions solely based on unsworn evidence were prohibited.⁴⁰ The unsworn evidence of one child could not corroborate the unsworn evidence of another child. The combination of these rules presented serious barriers to prosecuting those alleged to have offended against children. This came to be seen as problematic, especially in the light of an increasing number of high profile child abuse cases in which the defendant was acquitted or even not prosecuted.⁴¹ Thus, following a Home Office paper reviewing existing psychological research on children's evidence and its reliability,⁴² Parliament amended the legislative provisions to repeal the rule that unsworn evidence must be corroborated.⁴³ They also abolished the need for a judicial warning about the supposed dangers of sworn, uncorroborated evidence.⁴⁴ These amendments were the first to alter the way that children, and their evidence, were received in court.

³⁷ *R v Hayes* [1977] 1 WLR 234, 237.

³⁸ For a more detailed discussion of the corroboration rules, see: John R Spencer and Michael E Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (Hart Publishing 2012) 2-4.

³⁹ Children and Young Persons Act 1933, s 38.

⁴⁰ *ibid.*

⁴¹ John R Spencer, 'Child Witnesses and Cross-examination at Trial: Must it continue?' (2011) 3 *Archbold Review* 7.

⁴² Carol Hedderman, *Children's Evidence: The Need for Corroboration, Home Office Research and Planning Unit Paper 41* (Home Office 1987).

⁴³ Criminal Justice Act 1988, s 34(3).

⁴⁴ Criminal Justice Act 1988, s 34(2). A few years later the corroboration warning for evidence of a complainant of a sexual offence was also abolished via Criminal Justice and Public Order Act 1994, s 32.

3.3.2. *The Pigot Report (1989)*

An appetite for adaptations to be made to trial processes developed.⁴⁵ In 1988 an advisory group was set up, headed by HHJ Pigot, to consider the use of video recordings as a method of obtaining evidence from children and other vulnerable witnesses. The *Pigot Report* attributed the desire for adaptations to be made to criminal trial proceedings to emerging evidence indicating that cases of child abuse were increasing in both severity and frequency.⁴⁶ Research conducted by the NSPCC in the mid-1980s⁴⁷ indicated that known cases of sexual abuse had increased eight-fold and the number of children registered with serious or fatal injuries as a result of physical abuse had doubled.⁴⁸ The NSPCC also found that prosecutions were planned in only 9% of the physical abuse cases and 28% of the sexual abuse cases that they had trailed throughout their research.⁴⁹

The NSPCC explained these low prosecution figures to the Pigot committee as evidence of the ‘unwillingness by the children to give evidence and an unwillingness by parents to put their children through a traumatic court experience’.⁵⁰ This assumes that the children in these cases were competent to testify. Although the corroboration requirement for unsworn evidence had already been abolished, the burden of proof was on the party calling a witness to demonstrate that, if they were younger than 14, the witness understood the oath and importance of telling the truth sufficiently well to give sworn evidence.⁵¹ Whether evidence was sworn or not remained relevant to the weight the jury might attach to it. The case of

⁴⁵ Spencer notes that ‘police officers, social workers, paediatricians, child psychiatrists, psychologists, judges, academic lawyers and even a number of practising lawyers raised their voices to say that the rules needed to be changed’ in John R Spencer and Michael E Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (Hart Publishing 2012) 1.

⁴⁶ Lord Thomas Pigot, *Report of the Advisory Group on Video Evidence* (Home Office 1989) para 1.2 (*Pigot Report*).

⁴⁷ NSPCC, *Child Abuse Trends in England and Wales 1983-1987* (NSPCC 1989).

⁴⁸ See discussion of NSPCC research in *Pigot Report*, para 1.3.

⁴⁹ *ibid* 1.6.

⁵⁰ *Pigot Report*, para 1.6.

⁵¹ Criminal Justice Act 1988, s 34.

*Wallwork*⁵² was particularly damaging for the perceived capability of child witnesses to give even unsworn evidence. The Court of Appeal ruled that relying on evidence of a five year old was ‘ridiculous’.⁵³ This resulted in ‘the abandonment of prosecutions for a large number of serious violent and sexual offences against children’.⁵⁴ The Pigot committee thus recommended that the competency requirement was abandoned, and that relevant understandable evidence from all witnesses should be heard where possible.⁵⁵

If a child was competent to testify, then an additional set of barriers to securing the conviction of those committing offences against children still existed. This is what Spencer described as the ‘adversarial package’:⁵⁶ the combination of rules necessitating a witness giving evidence orally, in open court, in the presence of the defendant. As highlighted by McEwan, problems are clearly evident where victims and witnesses ‘cannot or will not give evidence’ due to their vulnerabilities not being catered for by the system.⁵⁷ Criminal courtrooms were intentionally designed to be grand and somewhat intimidating environments.⁵⁸ In Crown Court trials, the presence of the judge, several lawyers, members of the press and public, the jury and the defendant can mean that the very notion of publically giving oral evidence is challenging.⁵⁹ Caution should be exercised when labelling a complainant a victim prior to the conviction of an individual because it may be deemed to ‘inappropriately prejudge the outcome of the prosecution case’.⁶⁰ That said it is of course true

⁵² *Wallwork* (1958) 42 Cr App R 153.

⁵³ *ibid* [161].

⁵⁴ *Pigot Report*, para 5.8.

⁵⁵ *ibid* 5.13.

⁵⁶ John R Spencer and Michael E Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (Hart Publishing 2012) 1.

⁵⁷ Jenny McEwan, ‘In Defence of Vulnerable Witnesses: The Youth Justice and Criminal Evidence Act 1999’ (2000) 4(1) *International Journal of Evidence and Proof* 1.

⁵⁸ See Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge 2010).

⁵⁹ Andrew Sanders and Imogen Jones, ‘The Victim in Court’ in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Willan Publishing 2007) 282.

⁶⁰ Laura Hoyano, ‘Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants’ (2015) 2 *Criminal Law Review* 107, 107. Doak also notes that doing so would risk ‘giv[ing] rise to an inherent implication that the allegations made ... ought to be accepted as the historical truth’. See Jonathan Doak,

that many alleged victims will, in fact, be victims in the lay sense of the word (ie they will actually be the victim of a crime).⁶¹ As a result, recalling past traumatic events in evidence is likely to be particularly distressing for such individuals, irrespective of the environment in which this is done. The combination of these issues relating to a witness' experience in court can be referred to as 'secondary victimisation'.⁶²

In response to these problems, the Pigot committee highlighted that 'quite radical changes are ... required if the courts are to treat children in a humane and acceptable way'.⁶³ It advised that video-recorded evidence in chief should be permitted in criminal trials in addition to the existing provision for evidence by live link. It also recommended a series of other courtroom adaptations to better accommodate child victims/witnesses. These included pre-recording cross-examination in a preliminary hearing and admitting it as video evidence, and possibly an 'interlocutor' (now known as an intermediary) to relay questions between counsel and a very young child. The Advisory Group recommended that the measures be available to witnesses of violent offences under the age of 14, and to witnesses of sexual offences under the age of 17.⁶⁴

The Advisory Group also recommended that video recorded evidence be made available to adult 'vulnerable' witnesses who 'would be likely to suffer an unusual and unreasonable degree of mental stress if required to give evidence in open court'.⁶⁵ They stated that the test for vulnerability should 'have regard to the age, physical and mental condition of the witness,

Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties (Hart Publishing 2008) 20.

⁶¹ Even if it is accepted that the complainant is truly a victim, the trial is still, of course, required. Two practical reasons for this are that it needs to be ascertained that it was the defendant who was the perpetrator (and not someone else) and, that even if it was the defendant, they are legally culpable (ie they had the mens rea for the offence and there is not a defence available to them which can fully or partially excuse or justify their actions). These elements need to be proved to a high standard of proof in line with the rules of evidence and procedure before the complainant can be labelled a victim in the legal sense to maintain the State's legitimacy.

⁶² Carolyn Hoyle and Lucia Zedner, 'Victims, Victimisation and Criminal Justice' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *Oxford Handbook of Criminology* (4th edn, OUP 2007) 468-70.

⁶³ *Pigot Report*, para 2.14.

⁶⁴ *ibid* 2.29-2.37.

⁶⁵ *ibid* 3.5.

the nature and seriousness of the offence charged and of the evidence which the witness was to give'.⁶⁶ Furthermore, they recommended a rebuttable presumption that alleged victims of sexual offences are vulnerable witnesses.⁶⁷

It is evident from these recommendations that the Advisory Group was driven by concerns relating to the well-being and humane treatment of young and vulnerable witnesses. In part, these issues were considered to emanate from the failure of the criminal justice system to bring to justice those who offended against such individuals. They also related to, and were intrinsically linked with, their treatment in criminal trial proceedings. The Advisory Group recognised that to remedy these issues required the differential treatment of disadvantaged (children and vulnerable adult) witnesses. For witnesses of all ages and abilities to be afforded humane treatment, some would need additional assistance at trial. Though not referred to explicitly, this embodies the sentiment of equality as espoused by Aristotle, achieved by treating 'like people in a like manner, and different cases differently'.⁶⁸ This conception of equality involves a principle of equity,⁶⁹ to achieve a standard of equal treatment through justified differential treatment. In the special measures context, the disadvantaged position in which children found themselves under the then law justified their differential treatment through the provision of special measures. I discuss this notion of equality further in section 3.4

The influence of developments in the surround – 'the broad setting in which decision-making activity takes place'⁷⁰ – on the adaption of criminal procedures is evident in this context. For example, awareness grew of the prevalence of particular offences against children and the difficulties faced by these children if they were required to give evidence in court. The social

⁶⁶ *ibid* 3.5.

⁶⁷ *ibid* 3.5.

⁶⁸ Morris Ginsberg, *On Justice in Society* (Penguin Books 1965) 56-57.

⁶⁹ Wolfgang von Leyden, *Aristotle on Equality and Justice: His Political Argument* (Palgrave Macmillan 1985)

2.

⁷⁰ Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 48.

and political dissatisfaction with the treatment of children arising from this increased awareness and the assumed failure of the criminal justice system to convict those offending against children affected the agenda and the debates within the legal field. This sparked challenges to assumptions about children's evidence and its perceived unreliability which were affecting CPS decisions to prosecute and judicial decisions regarding witness competence. Alongside these developments, technological advances in the surround, which enabled video evidence to be developed, strengthened the case that evidence could be obtained from children via an alternative method to the traditional in-court approach.

3.3.3. Post-Pigot

Following the publication of the *Pigot Report*, section 32A was inserted into the Criminal Justice Act 1988⁷¹ to permit video recorded evidence to be admitted as a child's evidence-in-chief. Furthermore, Pigot's advice in relation to the competency of witnesses was acted upon through the insertion of section 33A into the Criminal Justice Act.⁷² This allowed children's evidence to be unsworn and admitted at the judge's discretion regardless of the child's age. The other recommendations, for example that existing measures be made available to vulnerable adult witnesses, were not acted on immediately. Neither were the recommendations for pre-recorded cross-examination or 'interlocutors'.

The Home Office did, however, commission research into the difficulties of witnesses with learning difficulties.⁷³ Similarly to child witnesses, learning disabled witnesses were also subjected to arbitrary competency rules. For example, in order to give sworn evidence, a witness must understand the oath.⁷⁴ If they did not, they were unable to give evidence at all, since (unlike for children) there was no provision to allow adult witnesses to give unsworn

⁷¹ By the Criminal Justice Act 1991, s 54.

⁷² By the Criminal Justice Act 1991, s 52. This permitted children over 14 to be treated as adults and give sworn evidence, and children under 14 to give unsworn evidence.

⁷³ Andrew Sanders and others, *Victims with Learning Disabilities: Negotiating the Criminal Justice System* (Occasional Paper No.17, University of Oxford Centre for Criminological Research 1997).

⁷⁴ *R v Hayes* [1977] 1 WLR 234 [237].

evidence. Sanders et al. noted that these competency rules negatively affected decisions to prosecute⁷⁵ and also that, at trial, cases were prone to collapse due to the judge ruling key witnesses suffering from learning disabilities as incompetent.⁷⁶

Sanders et al also found that ‘many of the [common law] measures that ha[d] been introduced to make court appearances less terrifying for children [were] sometimes appropriate for adults with learning difficulties’.⁷⁷ These measures included the removal of wigs and gowns, the presence of a support person for the duration of a witness giving evidence, and the use of screens. Though the provisions for live link and video-recorded evidence were only statutorily available to child witnesses, the researchers also viewed these as ‘potentially a useful means for many people with learning disabilities to give evidence’⁷⁸ in addition to those recommended by the Pigot committee which had not yet been enacted.⁷⁹ Sanders et al made no explicit references to equality in their report. Its sentiment, however, remained apparent in the acknowledgement that adaptations to criminal proceedings would assist disadvantaged adults to participate, in the same way that they had helped child witnesses. The presence of a learning disability was thus viewed as a convincing reason for unequal distribution.⁸⁰

As well as an increase in knowledge regarding various disabilities, research had also been conducted regarding other categories of witnesses. For example, research on the different types of intimidation to which some witnesses were subjected and its potential effects was

⁷⁵ Andrew Sanders and others, *Victims with Learning Disabilities: Negotiating the Criminal Justice System* (Occasional Paper No.17, University of Oxford Centre for Criminological Research 1997) 39.

⁷⁶ *ibid* 57.

⁷⁷ Andrew Sanders and others, *Witnesses with Learning Difficulties* (Home Office Research and Statistics Directorate, Research Findings No. 44 1996) 3.

⁷⁸ *ibid* 4.

⁷⁹ Andrew Sanders and others, *Victims with Learning Disabilities: Negotiating the Criminal Justice System* (Occasional Paper No.17, University of Oxford Centre for Criminological Research 1997) 73.

⁸⁰ As per Stefan Gosepath, ‘The Principles and the Presumption of Equality’ in Carina Fourie, Fabian Schuppert and Ivo Williamn-Helmer (eds), *Social Equality: On What it Means to be Equals* (OUP 2015) 177.

carried out.⁸¹ Offences punishing the intimidation of witnesses were legislated for in 1994.⁸² Furthermore, an understanding of the particular difficulties encountered in court by rape complainants began to develop.⁸³ Hawkins' work provides us with a useful way to conceptualise these developments.⁸⁴ Knowledge in the surround grew about the difficulties and capabilities of those with learning disabilities, rape victims and intimidated witnesses in the criminal justice system. This expansion of knowledge began to transform the way that those working and researching in the legal field viewed these categories of witnesses, in the same way that it had for children. This all contributed to heightened dissatisfaction with treatment of individuals in, and often their exclusion from, criminal trials.

3.3.4. Speaking up for Justice (1998)

The 'New' Labour government in 1997 set up an interdepartmental Working Group to further address these concerns. The Group was to assess the treatment of 'vulnerable and intimidated witnesses' throughout the criminal justice system, including at trial. The terms of reference from the government to the Working Group specified that it should consider, inter alia, the treatment of 'witnesses' and their ability to give best evidence.⁸⁵ The categories of witnesses that should be included were not specified. The Working Group proceeded on the basis that its recommendations would apply to all non-defendant witnesses, excluding only the defendant.⁸⁶ The reasons offered for this in their *Speaking up for Justice* Report are discussed later in the chapter in section 3.5. With regard to non-defendant witnesses, the Working

⁸¹ See, for example Warwick Maynard, *Witness Intimidation: Strategies for Prevention* (Police Research Group Crime Detection and Prevention Series Paper 55. London: Home Office 1994); Lizanne Dowds and Tracey Budd, *Victim and Witness Intimidation: Findings from the 1994 British Crime Survey* (Unpublished Report for the Home Office Research and Statistics Directorate 1997).

⁸² Criminal Justice and Public Order Act 1994, s 51.

⁸³ For examples, see Sharon Grace, Charles Lloyd and Lorna Smith, *Rape: From Recording to Conviction* (Research and Planning Unit Paper 71, Home Office 1992); Sue Lees, *Carnal Knowledge: Rape on Trial* (Penguin 1996); Victim Support, *Women rape and the criminal justice system* (Victim Support 1996); David Brereton, 'How Different are Rape Trials? A Comparison of the Cross-examination of Complainants in Rape and Assault Trials' (1997) 37(2) *British Journal of Criminology* 242; Jessica Harris, *The Processing of Rape Cases by the Criminal Justice System: Interim Report* (Unpublished, Home Office 1997).

⁸⁴ See section 1.6 (p9-12).

⁸⁵ *Speaking up for Justice*, para 1.7.

⁸⁶ *ibid* 3.28.

Group noted four main areas of concern. These were rape trials, disabled witnesses, learning disabled witnesses and intimidated witnesses.⁸⁷

The role of equality with regard to non-defendant witnesses was more apparent at this juncture. The report highlighted the potential relevance of the Disability Discrimination Act 1995. This Act set out the requirement that ‘reasonable steps are taken to change policies or procedures which make it impossible or unreasonable for disabled people to use a service’.⁸⁸ Under this Act, disabled people were considered as those with ‘a physical or mental impairment’.⁸⁹ The Working Group’s reference to the Disability Discrimination Act in their report demonstrates that the criminal trial, and specifically the ability to give evidence in it, was considered to potentially fall within the remit of this legislation. McLeod et al confirm this, stating that ‘as a government agency, [Her Majesty’s Courts and Tribunals Service] is bound by the Act, so courts must provide the same service to a disabled person as they would to a non-disabled person’.⁹⁰ The arbitrary competency rules and lack of support to disabled victims and potential witnesses would thus fall short of the Act’s requirements.

In order to remain compliant with Disability Discrimination Act, therefore, it seems that the provision of special measures was considered to constitute a ‘reasonable step’ that enabled disabled people to give evidence. Though not couched in the language of equality, the requirement that adaptations are made to normal proceedings to assist those with disabilities embodies a principle of equality. That is to say that it highlights the need to treat materially different people (in this context the disabled) differently in order to achieve equality of opportunity.

⁸⁷ *ibid* 1.2-1.5.

⁸⁸ *ibid* 1.20.

⁸⁹ Disability Discrimination Act 1995, s 1(1).

⁹⁰ Rosie McLeod and others, *Court Experiences of Adults with Mental Health Conditions, Learning Disabilities and Limited Mental Capacity Report 1: Overview and Recommendations* (Ministry of Justice Research Series 8/10, Ministry of Justice 2010) 6.

The debates surrounding special measures for non-defendant witnesses were to an extent, therefore, premised on equality. This is further evident from the Working Group's declaration that 'failure to recognise and compensate for inequalities between witnesses seems both inhumane (when this results in stress or trauma for the witness) and unjust'.⁹¹ This was the only direct reference to (in)equality in the report, but it highlights the important role that equality played in the debate.

The Working Group was clearly indicating that to treat all witnesses as if they are the same, and to fail to eliminate inequalities between them, may result in the inhumane treatment of those left disadvantaged. Furthermore, that sustained inequality can also affect the ability of particular witnesses to give their best evidence. To remedy these issues, young and otherwise vulnerable witnesses (ie disabled witnesses, rape victims or intimidated witnesses) may require additional assistance. The notion of equality to which the Working Group, and others, aspired was universally accepted without challenge. The provision of a variety of special measures was recognised as meeting this end.

3.3.5. Youth Justice and Criminal Evidence Act (1999)

The YJCEA enacted many of the recommendations from *Speaking up for Justice*. The competency rules were amended further. Under section 53, all witnesses regardless of age are to be presumed competent. The Act also specifies that in determining competency (if it is doubted by a party to the proceedings or the court) the availability of special measures should be considered.⁹² This means that special measures can tip the balance in favour of judging a witness to be competent.

⁹¹ *Speaking up for Justice*, Literature Review 105.

⁹² YJCEA, s 54(3).

This is important because victims and prosecution witnesses are considered as ‘gate-keepers to the mobilisation of criminal justice agencies’⁹³ due to the systemic reliance on their voluntary reporting of crime and their assistance in securing convictions where it is required.⁹⁴ Lord Mackenzie highlighted this through a football match analogy, stating that ‘we can send off a jury member or two, replace counsel or even the judge, but without the witness the game has to be abandoned’.⁹⁵ Enabling more witnesses (particularly those for the prosecution) to be competent to testify at trial, therefore, marked a significant development to enabling convictions.

The YJCEA also enacted the full range of special measures discussed in the *Pigot Report*, following further support for them in the *Speaking up for Justice* Report. This meant the introduction of provisions for intermediaries and pre-recorded cross-examination, commonly referred to as the ‘full-Pigot’ scheme.⁹⁶ In addition, new categories of witness to whom special measures are available were created. These included intimidated witnesses and vulnerable adult witnesses, the definitions of which were discussed at the beginning of this chapter.

The prevalence of vulnerability and/or intimidation among prosecution witnesses has become ever more apparent in recent years. A Victim Support study highlights that people with learning disabilities are almost three and a half times more likely to suffer serious violence, and approximately 1.5 times more likely to be a victim of theft.⁹⁷ In 2014/15 the police

⁹³ Helen Fenwick, ‘Procedural ‘Rights’ of Victims of Crime: Public or Private Ordering of the Criminal Justice Process’ (1997) 60(3) *Modern Law Review* 317, 320.

⁹⁴ The title of the CPS paper *No Witness, No Justice* highlights the importance of witnesses to securing justice. See CPS, *No Witness, No Justice (NWNJ) Pilot Evaluation – Final Report* (Criminal Justice System 2004).

⁹⁵ Hansard, HL Deb 15 December 1998, vol 595, col 1275.

⁹⁶ This terminology was noted by Laura Hoyano, ‘Variations on a Theme by Pigot: Special Measures Directions for Child Witnesses’ [2000] *Criminal Law Review* 250.

⁹⁷ Polly Rossetti, Tamar Dinisman and Ania Moroz, *Insight Report: An Easy Target? Risk Factors Affecting Victimisation Rates for Violent Crime and Theft* (Victim Support 2016) 4.

recorded 2,508 disability hate crimes,⁹⁸ and it is estimated that the true figure is an annual average of 70,000.⁹⁹ Children were reported to be the victim in 844,000 crimes (not including sexual offences) in 2014-15, and it is estimated that approximately 13 in 100 of those aged 10-15 were the victim of at least one crime.¹⁰⁰ As discussed at the beginning of this chapter, complainants of a sexual offence are automatically categorised as intimidated witnesses.¹⁰¹ This is significant in terms of the number of witnesses potentially eligible for special measures, since estimates from the Crime Survey of England and Wales (formerly the British Crime Survey) data indicate that there are 473,000 victims of sexual offences per year.¹⁰² Furthermore, Hamlyn et al. found that approximately 70% of witnesses participating in an early study on whether special measures were ‘working’ felt intimidated.¹⁰³

Since the enactment of the YJCEA, the role that special measures play in realising equality in criminal trials has become more apparent. A developing body of law requiring equal treatment has resulted in an explicit acknowledgement of the contribution special measures make to this end. For example, the Judicial College Equal Treatment Bench Book highlights the need to adapt normal trial procedures to facilitate the effective participation of all.¹⁰⁴ The Equalities Act 2010 is cited as the authority for this, which protects a range of characteristics, including age¹⁰⁵ and disability.¹⁰⁶ Disability is defined under the Equalities Act as a ‘physical or mental impairment’.¹⁰⁷ Furthermore, and similarly to the Disability Discrimination Act,¹⁰⁸

⁹⁸ Hannah Corcoran, Debroah Lader and Kevin Smith, *Hate Crime, England and Wales, 2014/15* (Statistical Bulletin 05/15, Home Office 2015) 4.

⁹⁹ *ibid* 21.

¹⁰⁰ Office for National Statistics, *Crime in England and Wales: Year Ending Mar 2016* (ONS July 2016) 8.

¹⁰¹ Although they can still opt-out of special measures use despite this, see YJCEA, s 19(3)(a).

¹⁰² Ministry of Justice, Home Office and the Office for National Statistics, *An Overview of Sexual Offending in England and Wales: Statistics Bulletin* (MOJ, HO, ONS 2013) Table 2.2, 13.

¹⁰³ Becky Hamlyn and others, *Are Special Measures Working? Evidence from surveys of vulnerable and intimidated witnesses* (Home Office Research Study 283, Home Office 2004) 19.

¹⁰⁴ Hallett LJ, *Equal Treatment Bench Book*, Children and Vulnerable Adults (Judicial College 2013, with 2015 amendments) 5-2, [35] (Equal Treatment Bench Book).

¹⁰⁵ Equalities Act 2010, s 5.

¹⁰⁶ Equalities Act 2010, s 6.

¹⁰⁷ Equalities Act 2010, s 6(1)(a).

¹⁰⁸ This was repealed and replaced by the Equalities Act 2010.

it requires that ‘reasonable adjustments’ are made to existing processes to accommodate those with disabilities who would otherwise be ‘put at a substantial disadvantage ... in comparison with persons who are not disabled’.¹⁰⁹ The adaptations suggested in the Equal Treatment Bench Book to meet these demands are special measures. The definition of disability under the Equalities Act directly overlaps the eligibility criteria for special measures, making them a suitable tool to assist those in need.

A similar reliance on special measures in this regard can be seen in a paper by the Equality and Human Rights Commission. It focuses specifically on disability, identifying special measures as ‘steps that can be taken, provisions or adjustments to ensure equal access in court for giving evidence’.¹¹⁰ Furthermore, the adjustment of criminal proceedings is also required under Article 13 of the UN Convention on the Rights of Persons with Disabilities (2006). It states that ‘effective access to justice for persons with disabilities on an equal basis with others’ should be ensured ‘... through the provision of procedural and age-appropriate accommodations, in order to facilitate their role as ... witnesses’.¹¹¹ Special measures equate to such ‘procedural and age-appropriate accommodations’. As discussed, they can be invoked to help affect changes necessary to ensure equal access to justice for those with disabilities, in keeping with the Convention’s requirements. Indeed, Australian academics have celebrated the benefits of the intermediary scheme in England and Wales as ‘a promising approach’ to the ‘significant problem’ of compliance with disability legislation where witnesses with intellectual disabilities are concerned.¹¹² Thus, although special measures may not have been

¹⁰⁹ Equalities Act 2010, s 20(5).

¹¹⁰ Equality and Human Rights Commission, *Hidden in Plain Sight: Inquiry into Disability-Related Harassment* (April 2016) 230.

¹¹¹ UN Convention on the Rights of Persons with Disabilities 2006, Art. 13(1).

¹¹² Ilana Hepner, Mary Woodward and Jeanette Stewart, ‘Giving the Vulnerable a Voice in the Criminal Justice System: The Use of Intermediaries with Individuals with Intellectual Disability’ (2015) 22(3) *Psychiatry, Psychology and Law* 453, 456. The same is true in New Zealand and Israel, for example, see Emily Henderson, ‘“A Very Valuable Tool”: Judges, Advocates and Intermediaries discuss the Intermediary System in England and Wales’ (2015) 19(3) *International Journal of Evidence and Proof* 154.

borne out of explicit concerns for equality, it is evident from their role in giving effect to the demands of equality legislation that they are (and always were) underpinned by it.

3.4. Summary of the principle of equality

As discussed in section 1.4, this thesis is not seeking to assess whether the notion of equality which underpins the law of non-defendant witness special measures is the best ‘version’ of equality to which to subscribe. Instead, the purpose of the first part of this chapter was to show that a concern for equality has underpinned the law’s development and to conceptualise it. What will be explored later in this thesis is whether the disparate provision of special measures to vulnerable and/or intimidated defendant witnesses versus non-defendant witnesses is justified according to the law’s own standard. In other words, does the law demonstrate internal inconsistency in its commitment to its own standard of equality?

The principle of equality underpinning the development of non-defendant witness special measures is premised on the belief that people are ‘entitled to equal consideration and that differential treatment requires justification in terms of relevant differences between them or in the circumstances’.¹¹³ In other words, all people should be treated with ‘equal respect’ and ‘equal concern’.¹¹⁴ The differential treatment of vulnerable and/or intimidated non-defendant witnesses versus ‘normal’ non-defendant witnesses, to assist them to give evidence, is thus justified on the basis of the differences between them. Guest helps to unpack this approach from Dworkin’s work, showing how treating people ‘as equals’ requires sensitivity as to the differences between people, for example, as to the differences between ‘a handicapped person

¹¹³ Morris Ginsberg, *On Justice in Society* (Penguin Books 1965) 13.

¹¹⁴ See, inter alia, Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1978) 273; Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000) 2; John Finnis, ‘Equality and Difference’ (2012) 2(1) *Solidarity: The Journal of Catholic Social Thought and Sexual Ethics* 1, 9.

as to someone who was not handicapped'.¹¹⁵ To put it another way, '[e]qual consideration for all may demand very unequal treatment in favour of the disadvantaged'.¹¹⁶

The law of special measures for vulnerable and/or intimidated non-defendant witnesses embodies this notion of equality. It is a principle of procedural equality – ensuring that the laws of evidence provide each witness with an equal opportunity to give evidence in court to the best of their ability.¹¹⁷ As I have shown, special measures, by design, give additional support to the disadvantaged (young, those suffering from mental health problems or learning disabilities, or those who are intimidated). It is the law's commitment to this principle of equality which is used as the standard from which to judge the provision of special measures to all vulnerable and/or intimidated court users both in law and practice in the remainder of this thesis. My thesis is that the law should be consistent in its approach to assisting vulnerable and/or intimidated court users to give evidence, and thus coherent in its approach to ensuring procedural equality of opportunity.

This thesis is limited to considering equality of opportunity rather than the quality of evidence that is elicited as a result of special measures use (equality of outcome). An entirely different question is whether the special measures granted are actually effective in facilitating best evidence from such witnesses. Some studies have been conducted into the effectiveness of special measures at delivering their aims rendering largely positive results.¹¹⁸ For the

¹¹⁵ Stephen Guest, *Jurists: Profiles in Theory: Ronald Dworkin* (Edinburgh University Press 1997) 185.

¹¹⁶ Amartya Sen, *Inequality, Re-examined* (OUP 1992) 1.

¹¹⁷ See Charles R Beitz, 'Procedural Equality in Democratic Theory: A Preliminary Examination' (1983) 25 *Liberal Democracy* 69, 69.

¹¹⁸ Existing research on non-defendant witness special measures indicates that if the appropriate special measure is applied for and granted, special measures are viewed as effective at facilitating a witness' best evidence and protecting their well-being. See, for example, Becky Hamlyn and others, *Are Special Measures Working? Evidence from Surveys of Vulnerable and Intimidated Witnesses* (Home Office Research Study 283, Home Office 2004); Paul Roberts, Debbie Cooper and Sheelagh Judge, 'Monitoring Success, Accounting for Failure: The Outcome of Prosecutors' Applications for Special Measures Directions under the Youth Justice and Criminal Evidence Act 1999' (2005) 9 *International Journal of Evidence and Proof* 269, 287-8; Mandy Burton and others, *Are Special Measures for Vulnerable and Intimidated Witnesses working? Evidence from the Criminal Justice Agencies* (Home Office Online Report 01/06, Research Development and Statistics Directorate, Home Office 2006) 63; Rosie McLeod and others, *Court Experiences of Adults with Mental Health*

purposes of this thesis it is assumed that special measures succeed at improving the quality of evidence.

This chapter now turns to consider the denial of special measures to defendant witnesses under the original YJCEA scheme. I consider whether, according to the principle of equality which underpinned the development of the law for non-defendant witnesses, the exclusion of vulnerable and/or intimidated defendant witnesses from eligibility for special measures can be justified. This involves an evaluation of the reasons offered in the *Speaking up for Justice* Report for the exclusion of defendants to assess whether they are convincing.

3.5. Exclusion of defendants from YJCEA

As highlighted previously in this chapter, defendants were (and remain) excluded from the original special measures scheme under the YJCEA.¹¹⁹ Academic (and judicial – see Chapter 4) commentary reveals unease with this exclusion. Birch stated that ‘it really is something of a farce’ that vulnerable and/or intimidated witnesses can benefit from special measures and the accused cannot.¹²⁰ In addition, Hoyano stated:

If we value the presumption of innocence, and the premise that the search for truth demands that witnesses must give their best evidence and are fairly tested in

Conditions, Learning Disabilities and Limited Mental Capacity Report 1: Overview and Recommendations (Ministry of Justice Research Series 8/10, Ministry of Justice 2010) 23; Ramona Franklyn, *Satisfaction and willingness to engage with the Criminal Justice System. Findings from the Witness and Victim Experience Survey, 2009-10* (Ministry of Justice Research Series 1/12, MOJ 2012); Penny Cooper and David Wurtzel, ‘A Day Late and a Dollar Short: In Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales’ [2013] *Criminal Law Review* 4, 4; Emily Henderson, ‘“A Very Valuable Tool”: Judges, Advocates and Intermediaries discuss the Intermediary System in England and Wales’ (2015) 19(3) *International Journal of Evidence and Proof* 154; Jessica Jacobson, Gillian Hunter and Amy Kirby, ‘Structured Mayhem: Personal Experiences of the Crown Court’ (Criminal Justice Alliance 2015) 19; Brian Leveson, *Review of Efficiency in Criminal Proceedings*. Judiciary of England and Wales (2015) 69; Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants* (Policy Press 2015); Judiciary of England and Wales, *The Lord Chief Justice’s Report* (Judicial Office 2016) 9.. Cf Louise Ellison, *The Adversarial Process and the Vulnerable Witness* (OUP 2001); Jonathan Owen and Jamie Campbell, *Court Responses to Rape and Sexual Assault in the UK* (Institute for Policy Research, University of Bath, Policy Brief 2015) 2.

¹¹⁹ The law has since developed regarding defendant witnesses and special measures. This is the subject of Chapter 4.

¹²⁰ Diane Birch, ‘Evidence: Evidence via Television Link and Video Recording of Interview with Child’ [2001] *Criminal Law Review* 473, 477.

cross-examination, then the case for withholding special measures from children accused of crimes must be made, not assumed.¹²¹

Hoyano was also seemingly unpersuaded by the Working Group's justifications for the exclusion of defendants from special measures,¹²² given that she still argued that the case for their exclusion needed to be made. McEwan also expressed dissatisfaction with the reasons provided by the Working Group for the exclusion of defendants, noting that 'much of the research evidence used to support the introduction of special measures highlights the negative impact of stress and delay on the quality of *children's evidence per se*'.¹²³ In other words, the evidence highlights that the difficulties special measures address are encountered by child defendants as well as non-defendant child witnesses. Despite this, Hoyano and Keenan note that 'a certain insouciance' surrounded explanations offered for why defendants do not need special measures¹²⁴ explanations which Birch also branded 'as muddled as they are unconvincing'.¹²⁵

Soon after the implementation of the YJCEA Birch claimed that the 'Government has been told, time and time again, that this [the non-provision of video-link/live link to defendants] is unacceptable, but has so far not budged'.¹²⁶ Furthermore, Lord Justice Auld highlighted in his review of the criminal courts that the 'lack of corresponding provision ... [of special measures to defendants was] a disparity that concerns many judges'.¹²⁷ Doak has suggested that the exclusion of the accused from special measures was, and would remain 'a

¹²¹ Laura Hoyano, 'Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?' [2001] *Criminal Law Review* 948, 968.

¹²² See also Laura Hoyano, 'Coroners and Justice Act 2009: Special Measures Directions Take Two: Entrenching Unequal Access to Justice?' [2010] *Criminal Law Review* 345, 366.

¹²³ Jenny McEwan, 'Youth Court: Whether Legislative Provisions Requiring Special Measures Direction to be Given in Relation to Child Witness in Need of Special Protection in Manner Compatible with Convention Requirement for a Fair Trial' [2005] *Criminal Law Review* 497, 500 (author's emphasis).

¹²⁴ Laura Hoyano and Caroline Keenan, *Child Abuse: Law and Policy Across Boundaries* (OUP 2010, first published 2007) 673.

¹²⁵ Diane Birch, 'A Better Deal for Vulnerable Witnesses' [2000] *Criminal Law Review* 223, 242.

¹²⁶ Diane Birch, 'Evidence: Evidence via Television Link and Video Recording of Interview with Child' [2001] *Criminal Law Review* 473, 478. Unfortunately, Birch did not cite who had told the government that the exclusion of defendants was unacceptable. As is highlighted later in this chapter, there was no objection to the special measures scheme (including the exclusion of defendants from it) in the Parliamentary debates.

¹²⁷ Sir Robin Auld, *Review of the Criminal Courts of England and Wales* (Ministry of Justice 2001) [126].

contentious issue, having already been subject to an array of criticism'.¹²⁸ This was echoed by Hoyano, who noted that 'the government built several perilous traps for itself' in the YJCEA, including 'the denial of [special measures] to vulnerable defendants'.¹²⁹ Furthermore, Burton et al noted that it was 'anticipated that the exclusion of defendants from a special measures regime might contravene the guarantees of a fair trial in Article 6'.¹³⁰

The 'asymmetry' in the provision of special measures to vulnerable court users remains a 'cause for concern'.¹³¹ More recent commentary, despite the developments to the law (discussed in Chapter 4), continues to look unfavourably upon the restrictive provision of special measures to defendants. Ellison and Munro highlight that 'as a matter of equality of arms within the trial environment, it is simply unfair to afford [special measures] to the complainant but not the defendant'.¹³² Further, that the special measures scheme 'create[s] an imbalance in the procedures by which competing accounts are provided'.¹³³ Research from the Prison Reform Trust and the Bradley Report has recommended that the provision of special measures to vulnerable court users is made 'equitable in law'.¹³⁴ Interestingly, a different approach to special measures law in Scotland and Northern Ireland is taken to that in the YJCEA, to include the provision of special measures to vulnerable defendants.¹³⁵ It is

¹²⁸ Jonathan Doak, 'Child Witnesses: Do Special Measures Directions Prejudice the Accused's Right to a Fair Hearing? – R v Camberwell Green Youth Court, ex p. D; R v Camberwell Youth Court, ex p. G' (2005) 9 *International Journal of Evidence and Proof* 291, 295.

¹²⁹ Laura Hoyano, 'The Child Witness Review: Much Ado about too Little?' [2007] *Criminal Law Review* 849, 865. See also Laura Hoyano and Angela Rafferty, 'Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction' [2017] *Criminal Law Review* 93.

¹³⁰ Mandy Burton, Roger Evans and Andrew Sanders, 'Protecting Children in Criminal Proceedings: Parity for Child Witnesses and Child Defendants' (2006) 18(3) *Child and Family Law Quarterly* 397, 397.

¹³¹ Jessica Jacobson and Jenny Talbot, *Vulnerable Defendants and the Criminal Courts: A Review of Provision for Adults and Children* (Prison Reform Trust 2009) 50.

¹³² Louise Ellison and Vanessa Munro, 'A 'Special' Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials' (2014) 23(1) *Social and Legal Studies* 3, 14.

¹³³ *ibid.*

¹³⁴ Lord Bradley, *The Bradley Report: Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (Department of Health 2009) 61; Jenny Talbot, 'Fair Access to Justice? Support for Vulnerable Defendants in the Criminal Courts' (Prison Reform Trust 2012) 3.

¹³⁵ Vulnerable Witness (Scotland) Act 2004, s 271F. See also Penny Cooper and David Wurtzel, 'Better the Second Time Around? Department of Justice Registered Intermediary Schemes and Lessons from England and

against the backdrop of this wide-ranging critique that this chapter looks afresh at the validity of the Working Group's reasons for the denial of special measures to defendants. This is the first in-depth, systematic review of the justifications that it provided.

3.5.1. Speaking up for Justice

The Working Group devoted just one paragraph of its 273 page report to justifying its decision to exclude defendants from consideration for special measures:

[T]he Working Group's considerations and recommendations apply to both prosecution and defence witnesses (paragraph 1.13). However, the Group considered whether the measures should also be available to defendants who may give evidence in court and so act as defence witness. As recognised in paragraph 3.2 above, the law already provides for special procedures to be adopted when interviewing vulnerable suspects. Also the defendant is afforded considerable safeguards in the proceedings as a whole so as to ensure a fair trial. For example, a defendant has a right to legal representation which the witness does not and the defendant has a right to choose whether or not to give evidence as s/he cannot be compelled to do so. Also, many of the measures considered in Chapters 8 and 9 below are designed to shield a vulnerable or intimidated witness from the defendant (e.g. live CCTV links, screens and the use of video-recorded evidence in chief and pre-trial cross-examination) and so would not be applicable in the case of the defendant witness. This is recognised in the existing child evidence provisions which do not apply to defendants. In these circumstances, the Working Group concluded that the defendant should be excluded from the definition of a vulnerable or intimidated witness.¹³⁶

Taking these in turn, the first reason the Working Group gave for excluding defendants was that special procedures were already in existence for interviewing vulnerable suspects.¹³⁷ The second was that 'considerable safeguards in the proceedings as a whole ... ensure a fair trial' for defendants.¹³⁸ The final reason offered was that, by design, special measures shield vulnerable and/or intimidated witnesses from the defendant, meaning that their use by defendants would not be required.¹³⁹ These reasons were not offered independently of one another, but instead put forward as a collective justification for the exclusion of defendants

Wales' (2014) 65(1) *Northern Ireland Legal Quarterly* 39; Department of Justice Northern Ireland, *Northern Ireland Registered Intermediary Schemes Pilot Project: Post-Project Review* (Department of Justice 2015).

¹³⁶ *Speaking up for Justice*, para 3.28.

¹³⁷ *ibid.*

¹³⁸ *ibid.*

¹³⁹ *ibid.*

from special measures. In providing these reasons, the Working Group highlighted differences between defendants and non-defendants which it considered to justify their differential treatment. In effect, therefore, the Working Group had applied a principle of equality and concluded that differential treatment of court users was justified on the basis of these differences. Under this approach, therefore, the Working Group presumably viewed the law as internally consistent in its commitment to the equality principle.

In assessing the validity of the differences between defendants and non-defendants in relation to the provision of special measures, there are two distinct but related issues with which to contend. The first is whether the reasons offered by the Working Group were sufficiently convincing to justify the non-provision of special measures to vulnerable and/or intimidated defendants when their abilities are compared with those of 'normal' defendants. The second is whether the differences between defendants and non-defendants can justify the non-provision of special measures to vulnerable and/or intimidated defendants as compared to vulnerable and/or intimidated non-defendant witnesses. It is unclear whether the Working Group considered these distinctions. The exclusion of defendants with regards to both of these issues is examined in the remainder of this chapter.

3.5.1.1. Special procedures already exist

The first reason the Working Group offered for the exclusion of defendants from special measures was that special procedures already existed for interviewing vulnerable suspects. The procedures to which the Working Group referred are contained within the Codes of Practice under the Police and Criminal Evidence Act (PACE) 1984.¹⁴⁰ Code C requires, for example, that a registered medical practitioner is called to assess a mentally disordered or

¹⁴⁰ *ibid* para 3.2.

otherwise vulnerable suspect.¹⁴¹ This should ensure that the suspect receives appropriate care while in custody and is considered fit to be interviewed. Code C also requires that an ‘appropriate adult’ is present for the interview of a juvenile, mentally disordered or otherwise mentally vulnerable suspect.¹⁴² An appropriate adult can be a parent, guardian or social worker. Their role involves providing support, advice and assistance to the detainee at the pre-trial stage; ensuring that the police act fairly and respect the detainee’s rights; and assisting communication between the detainee and others.¹⁴³

The effectiveness of these special procedures in protecting vulnerable suspects pre-trial is questionable. With regards to the medical assessment of suspects, the practitioners enlisted often have no psychiatric training.¹⁴⁴ Their views on a suspect’s mental health, therefore, are of limited value. In addition, research indicates that the implementation of the appropriate adult scheme is defective. This is, in part, due to the police failing to sufficiently identify vulnerability in all cases where an appropriate adult should be present.¹⁴⁵ It is also because when vulnerability is identified an appropriate adult is not always sought by the police.¹⁴⁶ Even when an appropriate adult is engaged, however, they are rarely trained to deal with a suspect’s vulnerability. Conversely, they may even make matters worse for the suspect.¹⁴⁷ This evidence, which highlights the poor practical application of the appropriate adult

¹⁴¹ Police and Criminal Evidence Act 1984, Revised Code C Detention, Treatment and Questioning of Persons by Police Officers (2013) 17, para 3.16.

¹⁴² *ibid* para 3.15.

¹⁴³ Home Office, *Guide for Appropriate Adults* (Home Office 2011).

¹⁴⁴ Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4th edn, OUP 2010) 203; Roxanna Dehaghani, ‘He’s just not that vulnerable: Exploring the Implementation of the Appropriate Adult Safeguard in Police Custody’ (2016) 55(4) *Howard Journal of Crime and Justice* 396, 401.

¹⁴⁵ Roxanna Dehaghani, ‘He’s just not that vulnerable: Exploring the Implementation of the Appropriate Adult Safeguard in Police Custody’ (2016) 55(4) *Howard Journal of Crime and Justice* 396, 401-404.

¹⁴⁶ Criminal Justice Joint Inspection (CJJI), *A Joint Inspection of the Treatment of Offenders with Learning Disabilities within the Criminal Justice System – Phase 1 from Arrest to Sentence* (HM Inspectorate of Probation 2014) para 3.19.

¹⁴⁷ For example, some parents acting as appropriate adults for their children encourage them to confess to the officers in interview, see David Dixon and others, ‘Safeguarding the Rights of Suspects in Police Custody’ (1990) 1 *Policing and Society* 115, 119. See also National Appropriate Adults Network, *There to Help: Ensuring Provision of Appropriate Adults for Mentally Vulnerable Adults Detained or Interviewed by the Police* (Institute for Criminal Policy Research 2015) Paper A: Literature Review 8; Charlie Taylor, *Review of the Youth Justice System in England and Wales* (Ministry of Justice 2016) para 65.

scheme, suggests that it may offer ‘more of an illusion of protection than the reality’,¹⁴⁸ meaning that vulnerable suspects often remain inadequately supported at the pre-trial stage.

Even if these special procedures were implemented correctly, it is not clear how they negate a defendant’s need for special measures. As discussed earlier in this chapter, special measures provide adaptations to the traditional mode of giving evidence in criminal trials for vulnerable and/or intimidated witnesses. Pre-trial special procedures are not adopted for an accused complaining that they are intimidated (ie in fear or distress) and so do not respond to their potential need for special measures. Furthermore, the special procedures for vulnerable suspects do not appear to eradicate any potential need for such adaptations in relation to vulnerable defendants at trial. They do not provide a vulnerable accused with the option to give their evidence from outside of the courtroom, from behind a screen, or in private as special measures do. Nor do they give a vulnerable accused the opportunity to give evidence with the assistance of an intermediary and/or communication aids. In fact, the provision of pre-trial support to the accused is likely to have little, if any, bearing on their ability to testify in their trial.

Instead, affirmation from a medical practitioner that a suspect is vulnerable ought to pave the way to further assistance in court, not support the denial of it. Equally, the provision of pre-trial support (such as the appropriate adult) to such vulnerable suspects should provide further indications that additional assistance will also be required in court. In relation to non-defendant witnesses, the Working Group recognised the continuous need for support throughout the criminal justice process. It stated that, ‘potentially vulnerable witnesses are

¹⁴⁸ Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4th edn, OUP 2010) 204.

likely to ... require the adoption of special measures both during the investigation and during the pre-trial period as well as at the trial itself'.¹⁴⁹ This is true of defendant witnesses too.

For these reasons, the existence of pre-trial safeguards such as medical assessment and appropriate adults cannot justify the exclusion of vulnerable suspects and defendants from special measures. This is the case regardless of whether those safeguards were thought to nullify a vulnerable defendant's need for support when compared to non-vulnerable defendants, or when compared to vulnerable and/or intimidated non-defendant witnesses. On the basis of this rationale, therefore, the law's approach to vulnerable and/or intimidated participants lacks a coherent commitment to the equality principle.

3.5.1.2. Safeguards to ensure a fair trial

The Working Group's second justification for excluding defendant witnesses from special measures was that safeguards already exist in criminal proceedings to ensure a fair trial. They provided two examples: the provision of legal representation to defendants and their non-compellability as witnesses. Here, the Working Group was comparing defendants and non-defendants, and justifying their decision to exclude defendants on the basis of differences between these two cohorts. For example, in relation to legal representation, the report highlighted that 'a defendant has a right to legal representation which the witness does not'.¹⁵⁰ It is true that differences exist between defendants and non-defendants. It is also true that these safeguards exist to ensure a fair trial (discussed further below). Whether they provide a sound basis from which to justify the non-provision of special measures to defendants requires further consideration, however, since all defendants are privy to them. It thus needs to be established that they offer sufficient support to vulnerable and/or intimidated defendants versus their non-vulnerable counterparts, in the same way that special measures

¹⁴⁹ *Speaking up for Justice*, para 3.7.

¹⁵⁰ *ibid* 3.28.

do for vulnerable and/or intimidated witnesses versus ‘normal’ witnesses. If they do not, then the safeguards are an invalid basis from which to exclude all defendants from special measures.

Legal representation

Dennis highlights that ‘procedural fairness embodies a principle of equality of opportunity for parties to litigation’.¹⁵¹ This is referred to as the principle of equality of arms; an essential component of the right to a fair trial under Article 6 of the ECHR. In Crown Court trials in England and Wales, the parties (the State and the defendant) are unequally matched. This, as Roberts and Zuckerman explain, is an ‘inevitable corollary of the huge material and structural advantages available to the prosecution’.¹⁵² In other words, the existence of the publically funded police and CPS to investigate crime, collect evidence, and prosecute on behalf of the State leaves the accused at a disadvantage. One of the functions of evidence law is to seek to ameliorate this ‘adversarial deficit’¹⁵³ in order to promote equality and fairness in criminal proceedings.¹⁵⁴ One mechanism provided in an attempt to ‘neutralise the worst effects of inequality of arms’ is the provision of legal advice and representation to all suspects and defendants.¹⁵⁵ This operates in tandem with the provision of legal aid to ensure that access to legal representation is affordable, if not free.¹⁵⁶ Usually a solicitor will prepare a case for trial, and a barrister (or, increasingly, a solicitor advocate¹⁵⁷) will represent the defendant in

¹⁵¹ Ian Dennis, *The Law of Evidence* (5th edn, Sweet and Maxwell 2013) 33.

¹⁵² Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, OUP 2010) 15.

¹⁵³ *ibid.*

¹⁵⁴ As per Wall and Young, ‘[o]therwise, what emerges in court may reflect no more than that one side had the time and money to construct a case and that the other did not’. See Richard Young and David Wall, ‘Criminal Justice, Legal Aid, and the Defence of Liberty’ in Richard Young and David Wall (eds), *Access to Criminal Justice: Legal Aid, Lawyers and The Defence of Liberty* (Blackstone Press Limited 1996) 5.

¹⁵⁵ Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, OUP 2010) 59-62. The other ‘procedural techniques and evidential devices which compensate for the inevitable imbalance of resources’ are the allocation of the burden of proof to the prosecution, the asymmetrical standard of proof in favour of the defendant, and asymmetric pre-trial disclosure obligations (see Roberts and Zuckerman, 59-62).

¹⁵⁶ See Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 13-20.

¹⁵⁷ In 2012-13 the proportion of publically funded defence work conducted by solicitor advocates in contested trials was 24%. See A Review by Sir Bill Jeffery, *Independent Criminal Advocacy in England and Wales* (Ministry of Justice 2014) 19.

court. Their role in court¹⁵⁸ primarily involves testing prosecution evidence by cross-examining their witnesses and, if appropriate, conducting the defence case.¹⁵⁹

The relevant question for the Working Group was whether the provision of legal representation to defendants negated any potential need for special measures provision. In other words, does a vulnerable and/or intimidated defendant's access to legal representation serve to protect them from difficulties they may encounter which, as discussed earlier in this chapter, are inherent to the courtroom environment? Further, does the provision of a legal representative enable a vulnerable and/or intimidated defendant to give their best evidence in court? Assuming that legal representation does do these things, an inherent problem still remains. Not all defendants are legally represented in practice. Between April and June 2015, 6% of defendants in the Crown Court represented themselves.¹⁶⁰ Some of these defendants will have chosen to waive their right to a solicitor and, instead, represent themselves. Other such defendants do not qualify for legal aid and/or cannot afford to contribute to defence costs, and so have no choice but to self-represent.¹⁶¹ For this cohort of defendants, the provision of legal representation cannot be said to negate the potential need for special measures. A blanket exclusion of defendants from eligibility for special measures, therefore, is unjustified on this basis.

Even if legal representation is employed, it does not follow that a vulnerable and/or intimidated defendant no longer needs special measures. Hoyano highlights that:

¹⁵⁸ See Nicola Padfield, *Text and Materials on the Criminal Justice Process* (2nd edn, OUP 2008) 240-41.

¹⁵⁹ In theory the defendant need not formulate a defence, and can instead 'put the prosecution to proof'. This is discussed in the 'compellability' section below (p.75-76).

¹⁶⁰ Office for National Statistics, *Criminal Court Statistics Quarterly, England and Wales: April to June 2015* (Ministry of Justice 2015) Annex B, 18.

¹⁶¹ Every legal aid applicant appearing in the Crown Court automatically passes the 'interests of justice' test but will also be subject to 'means' testing. The applicant is ineligible for legal aid if their annual household disposable income is over £37,500. Those with annual household disposable income below £3,398 are entitled to free legal representation. An applicant with annual household disposable income between £3,398.01 and £37,499.99 is required to contribute 90% of their disposable income for a maximum of six months. See Legal Aid Agency, *Criminal Legal Aid Manual: Applying for Legal Aid in Criminal Cases in the Magistrates' and Crown Court* (Ministry of Justice 2016) 49-53.

[D]efence counsel must be able to communicate with their clients in order to obtain instructions, and that defendants with impairments must be able to communicate with the advocates questioning them and with the jury...¹⁶²

For defendants with vulnerabilities which inhibit their communication skills so severely, legal representation clearly does not negate the need for special measures.

For those defendants who can sufficiently communicate with their lawyers, strict rules against witness ‘coaching’ mean that having a lawyer does not improve a defendant’s position when giving evidence. For instance, as per the Conduct Rules, barristers must not ‘rehearse, practice with or coach a witness in respect of their evidence’.¹⁶³ The advice an advocate can give is limited to ‘directing witnesses to speak slowly, to ask for questions to be repeated if they are not understood and not to guess if they do not know the answer’.¹⁶⁴

A defence lawyer’s only other recourse is to refer their client to a witness familiarisation programme¹⁶⁵ where they can receive ‘sensible preparation for the experience of giving evidence’.¹⁶⁶ These provisions do not stem directly from a defendant’s right to legal representation, but responsibility for referring defendants falls on defence lawyers. It seems, however, that very few defendants are referred to the witness familiarisation schemes.¹⁶⁷

What needs to be considered is whether improved implementation of the available support would negate the need for special measures for vulnerable and/or intimidated defendants. In other words, would consistent advice from lawyers about the process of giving evidence and the regular referral of vulnerable and/or intimidated defendants to the witness familiarisation

¹⁶² See also Laura Hoyano and Angela Rafferty, ‘Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction’ [2017] *Criminal Law Review* 93, 93-94.

¹⁶³ Bar Standards Board, *Bar Standards Board Handbook* (includes 9th edn of Code of Conduct, 2nd edn, April 2015) 27, RC9.4

¹⁶⁴ Jacqueline Wheatcroft, ‘Witness Assistance and Familiarisation in England and Wales: The Right to Challenge’ (2017) 21(1/2) *International Journal of Evidence and Proof* 158, 162.

¹⁶⁵ Which does have cognitive benefits to preparing an individual for trial, see Jacqueline Wheatcroft, ‘Witness Assistance and Familiarisation in England and Wales: The Right to Challenge’ (2017) 21(1/2) *International Journal of Evidence and Proof* 158, 163.

¹⁶⁶ *R v Momodou* [2005] EWCA Crim 177 [62] (Judge LJ).

¹⁶⁷ See section 5.6. (p188).

programmes alleviate all defendants' potential need for special measures? Taking defence lawyers first, their advice cannot enhance a vulnerable defendant's communication in cross-examination, or even evidence-in-chief, in the same way that the provision of a trained intermediary can. Nor can a defence lawyer reduce the number of people that a vulnerable and/or intimidated defendant can see when they give their evidence. A special measures direction for live link, screens or to temporarily close the court to the public, however, can.

A defence lawyer's referral of a vulnerable and/or intimidated defendant to a witness familiarisation scheme may reduce such a defendant's nervousness and give them slightly more confidence in court. However, in the moment in which the vulnerable and/or intimidated defendant gives evidence, such a scheme seems to be of limited value if the defendant has difficulty understanding and responding to questions in an intimidating courtroom full of strangers. Furthermore, a vulnerable and/or intimidated non-defendant witness is often privy to pre-trial familiarisation programmes *and* special measures.¹⁶⁸ Their use of the two in tandem indicates that the former, on its own, is insufficient to facilitate a witness' best evidence.

In summary, if a defendant is legally represented, their lawyer is not able to assist their vulnerable and/or intimidated clients to give evidence any more than they can 'normal' clients. A child defendant, an intellectually disabled defendant, a defendant with mental health problems, or a defendant in fear or distress in connection with testifying in the proceedings is thus no more assisted when giving their evidence in court than they would be absent a lawyer. By comparison to vulnerable and/or intimidated witnesses, therefore, they remain disadvantaged despite the provision of legal representation. Similarly, by comparison

¹⁶⁸ The Advocate's Gateway, 'Case Management in Criminal Cases when a Witness or Defendant is Vulnerable' (Toolkit 1a, The Council of the Inns of Court 2017) 12.

to ‘normal’ defendants, legal representation does not alleviate their disadvantaged position in the witness box.

Compellability

The second defendant safeguard to which the Working Group referred was the non-compellability of defendants as witnesses.¹⁶⁹ Generally, non-defendant witnesses are compellable,¹⁷⁰ marking a difference between them and defendants. The Working Group did not elaborate on how or why this difference should negate a vulnerable and/or intimidated defendant’s need for special measures. I thus explore the various possibilities and assess their validity.

Non-defendants called to testify enjoy a privilege against self-incrimination.¹⁷¹ This is a safeguard which protects witnesses from implicating themselves in criminal activity, by permitting them to refuse to answer questions which would have this result. The defendant also benefits from the privilege against self-incrimination. As Roberts and Zuckerman note, the existence of the privilege renders it nonsensical to make a defendant compellable for the prosecution.¹⁷² In at least some cases, compelling a defendant to testify would result in them invoking their privilege every time the prosecution asked them a question.¹⁷³ The defendant, therefore, is not a compellable witness.¹⁷⁴

¹⁶⁹ As per YJCEA s 53(4).

¹⁷⁰ Excepting, for example, the defendant’s spouse or civil partner is not a compellable witnesses as per the Police and Criminal Evidence Act 1984, s 80 unless the offence to which the proceedings relates falls under one of the exceptions contained in s 80(3).

¹⁷¹ Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, OUP 2010) 310-11.

¹⁷² *ibid* 542.

¹⁷³ *ibid*.

¹⁷⁴ This is arguably the simplest explanation for the defendant’s non-compellability, which, for the present purpose, is sufficient. That said, the privilege against self-incrimination and non-compellability of defendants also relates to concerns surrounding humane treatment and some argue is intrinsically linked with the presumption of innocence. See Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, OUP 2010) ch 13; Andrew Choo, *The Privilege Against Self-Incrimination and Criminal Justice* (Hart Publishing 2013); Abenaa Owusu-Bempah, *Defendant Participation in the Criminal Process* (Routledge 2017) 75-102.

A defendant is, however, competent to testify in their defence¹⁷⁵ but is under no obligation to do so. Criminal proceedings are structured in England and Wales so that the burden of proof generally¹⁷⁶ rests with the prosecution, ie the State. Moreover, the standard to which the State must discharge the burden of proof to secure a conviction is high – the jury must be ‘sure’¹⁷⁷ beyond reasonable doubt of the defendant’s guilt. In theory, therefore, the defendant need not run a defence case.¹⁷⁸ They can instead leave the jury to deliberate on the basis of the prosecution evidence alone, in the hope that it will not be sufficiently convincing to warrant a guilty verdict. Alternatively, if they do choose to mount a defence, this need not hinge on their own testimony, and so they can still decide not to give evidence in their defence.

Perhaps, therefore, the Working Group was suggesting that vulnerable and/or intimidated defendants who would find it, at best, difficult to give evidence should simply not testify. The prosecution cannot compel them to, and they are under no legal obligation to do so in their defence. The problem with this is that the defendant has a right to participate in their trial.¹⁷⁹ As per the Criminal Procedure Rules, the court is required to take ‘every reasonable step’ to facilitate the participation of all people, including the defendant.¹⁸⁰ This is expanded in the Criminal Practice Directions to include ‘enabling a ... defendant to give their best evidence’.¹⁸¹ If the defendant wants to give evidence, therefore, they should be able to do so, regardless of the absence of a legal requirement to do so.

¹⁷⁵ Criminal Evidence Act 1898, s 1(a).

¹⁷⁶ Although there are exceptions, see Paul Roberts, ‘Taking the Burden of Proof Seriously’ [1995] *Criminal Law Review* 783.

¹⁷⁷ *R v Stephens* [2002] EWCA Crim 1529 [15] (Keene LJ).

¹⁷⁸ Though ‘a tension between adversarial ideologies and efficient fact-finding’ has resulted from amendments to the law which are designed to secure the defendant’s/defence party’s participation (eg the disclosure rules under the Criminal Procedure and Investigations Act 1996, s 3 as amended by Criminal Justice Act 2003). See Abenaa Owusu-Bempah, *Defendant Participation in the Criminal Process* (Routledge 2017) 72-73.

¹⁷⁹ ECHR, art 6(1).

¹⁸⁰ Criminal Practice (Amendment No 2) Rules 2017 CrimPR 3.9(3)(b).

¹⁸¹ Criminal Practice Directions (October 2015 edition, amended April 2016) CPD 3D.2.

Denying a defendant the opportunity to give evidence in their defence (and not just any evidence, but their ‘best evidence’) due to the lack of support available to them thus undermines their right to effective participation. In addition, it contravenes equality legislation, which also requires ‘reasonable steps’ to be taken to accommodate those who would otherwise be ‘put at a substantial disadvantage ... in comparison with persons who are not disabled’.¹⁸² The implementation of the Working Group’s position – that there is no need for special measures because a vulnerable and/or intimidated defendant can just not testify – would result in a system that does not comply with the law.

This becomes increasingly problematic when it is considered that a defendant’s failure to testify in their defence is not consequence free. Instead, it opens up the possibility for the jury to draw adverse inferences from the accused’s silence at trial.¹⁸³ Such inferences can contribute directly to a finding of guilt.¹⁸⁴ In some criminal proceedings the risk of this materialising is increased. For example in a rape trial, not hearing from the defendant may be particularly damaging since the nature of the offence usually makes it necessary that the jury hears the defendant’s version of events. Thus, even when leaving the issue of effective participation aside, the consequences of opting out of testifying further problematise the Working Group’s insinuation that vulnerable and/or intimidated defendants do not need special measures. It remains true that defendants are not obliged to testify, but they can be penalised if they do not.¹⁸⁵

The only point of mitigation here is that, in limited circumstances, section 35(1)(b) of the Criminal Justice and Public Order Act (CJPOA) 1994 permits a judicial direction to the effect that hearing from a defendant suffering a ‘physical or mental condition’ would have been

¹⁸² Equalities Act 2010, s 20(5).

¹⁸³ Criminal Justice and Public Order Act 1994, s 35(3). This is subject to the safeguards set out in *R v Cowan* [1996] QB 373, affirmed by the House of Lords in *R v Beouarn* [2005] UKHL 55.

¹⁸⁴ *Murray v DPP* [1994] 1 WLR 1.

¹⁸⁵ Abenaa Owusu-Bempah, *Defendant Participation in the Criminal Process* (Routledge 2017) 103-104.

‘undesirable’. This, in theory, prevents the jury from drawing adverse inferences from a vulnerable defendant’s silence at trial.¹⁸⁶ The Working Group may thus have considered that this safeguard justified their suggestion that the non-compellability of defendants as witnesses supported the denial of defendant special measures. However, by definition it is only applicable to defendants suffering physical or mental disorders. This leaves many defendants (those vulnerable by way of young age, those with intellectual disabilities, learning difficulties and those in fear or distress in connection with testifying in the proceedings) exposed to the risk of adverse inferences if they do not testify. For many defendants, therefore, the ‘undesirable’ direction is an inadequate basis from which to exclude them from special measures provisions.

Even for those to whom the direction is available in theory, the ‘restrictive’¹⁸⁷ interpretation of ‘undesirable’ by the courts renders questionable its effectiveness as a safeguard in practice. Initial interpretations focused on the undesirable effect that giving evidence might have on a vulnerable defendant’s health, rather than on their ability to give evidence or the impression they left on the jury as a result of their condition.¹⁸⁸ This jurisprudence has since developed to include potential impacts on the quality of evidence,¹⁸⁹ but interpretations remain generally restrictive.¹⁹⁰ Difficulties giving evidence are instead thought to properly go to the weight of

¹⁸⁶ Though I wonder how effective such a direction is in practice. This is probably impossible to discover in jury research since adverse inferences may still consciously (of even subconsciously) be drawn by jurors despite the direction. Empirical evidence suggests that limiting instructions can produce a ‘backfire effect’, meaning that the jury is actually more likely to rely on information they are told is inadmissible (in this case the defendant’s silence) following such a direction. See Joel Lieberman and Jamie Ardent, ‘Understanding the Limits of Limiting Instructions. Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence’ (2000) 6(3) *Psychology, Public Policy and Law* 677, 689-691. This has also been referred to as a ‘boomerang effect’, see Richard Rakos and Stephen Landsmann, ‘Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions’ (1992) 76(3) *Minnesota Law Review* 655, 661.

¹⁸⁷ Abenaa Owusu-Bempah, ‘Judging the Desirability of a Defendant’s Evidence: An Unfortunate Approach to s.35(1)(b) of the Criminal Justice and Public Order Act 1994’ (2011) 9 *Criminal Law Review* 690, 691.

¹⁸⁸ *R v Friend (No.1)* [1997] 1 WLR 1433 (CA).

¹⁸⁹ *R v Friend (No.2)* [2004] EWCA Crim 2661.

¹⁹⁰ *R v Dixon* [2013] EWCA Crim 465. See also Abenaa Owusu-Bempah, ‘Judging the Desirability of a Defendant’s Evidence: An Unfortunate Approach to s.35(1)(b) of the Criminal Justice and Public Order Act 1994’ (2011) 9 *Criminal Law Review* 690, 697 regarding the restrictive approach taken to young defendants.

the evidence rather than the decision as to whether it is desirable to hear it at all.¹⁹¹ In addition, the type of physical or mental condition which might render a defendant's testimony undesirable has also been interpreted narrowly by the courts. Depression and battered woman syndrome, for example, fail to provide sufficient cause for a direction regarding undesirability.¹⁹² By comparison, if such conditions were likely to result in a diminution of a non-defendant witness' evidence, special measures would be available under section 16 YJCEA.¹⁹³ The courts' decisions render the availability of this judicial direction to vulnerable defendants significantly narrower than the provisions for special measures to vulnerable non-defendant witnesses.

Another barrier faced by defendants seeking that their testimony is ruled undesirable is that the decision does not centre on just the defendant's physical or mental condition and its effects. In *Tabbakh*¹⁹⁴ the Court of Appeal ruled that the more significant the defendant's evidence is in the case, the less likely it will be ruled that to hear from them directly would be undesirable.¹⁹⁵ This shifts the focus of attention away from the defendant's *ability* to give evidence. Instead, desirability is considered with regards to the *importance* of the defendant's evidence. This further undermines this provision as a possible justification for denying special measures to vulnerable defendants.

The European Court of Human Rights (ECtHR) has recently supported the Court of Appeal's approach in *Tabbakh*. It dismissed the appeal of an applicant with an IQ in the bottom 1% of the general population and a six year old's understanding of spoken English whose evidence

¹⁹¹ *R (on the application of DPP) v Kavanagh* [2005] EWHC 820 [18].

¹⁹² See, respectively, *R. (on the application of DPP) v Kavanagh* [2005] EWHC 820 (Admin); *R v Gledhill* [2007] EWCA Crim 1183.

¹⁹³ In *R v Gledhill*, where the defendant was suffering from battered woman syndrome, her testimony would have been against her husband. Had she been a non-defendant witness, special measures would also likely have been available under s 17 YJCEA as she was 'in fear or distress in connection with testifying in the proceedings'.

¹⁹⁴ *Tabbakh* [2009] EWCA Crim 464.

¹⁹⁵ *ibid* [8]-[9].

was not deemed undesirable in a murder trial.¹⁹⁶ In reaching its decision, the ECtHR considered all of the circumstances in the case, including that the weight of the circumstantial evidence against the applicant called for an explanation.¹⁹⁷ Again, weight was placed here on the need for an explanation from the defendant rather than their ability to give it. This weakens the protection offered to vulnerable defendants by section 35(1)(b). The provision of special measures, however, could enable a vulnerable defendant to give the desired evidence while simultaneously assisting them to do so.

Furthermore, Quirk highlights the seemingly high standard of proof to which the defence must prove the undesirability of hearing from the defendant.¹⁹⁸ In *Ensor*¹⁹⁹ the court ruled that it should be left to the jury's judgment when conflicting expert evidence has not resolved the issue of desirability to 'any degree of certainty'.²⁰⁰ This seems to imply a standard of proof beyond the balance of probabilities that is usually required if the defence raises an issue.

Accordingly, this combination of factors renders it unlikely that the court will find it undesirable to hear from a defendant directly, regardless of their objective ability to give evidence and to do so well. Quirk's empirical findings are in keeping with this. In the late 1990s, she interviewed 16 barristers about the right to silence and found that 'only one ... described making tactical efforts to avoid inferences being drawn against defendants for not

¹⁹⁶ See Abenaa Owusu-Bempha, 'Vulnerable Defendants and the Right to Silence: *O'Donnell v United Kingdom* [2015] ECHR 16667/10' (2015) 79(5) *The Journal of Criminal Law* 322, 322.

¹⁹⁷ *O'Donnell v United Kingdom* [2015] 61 EHHR 37 [58]. NB This case concerned Northern Irish law, however their provisions regarding the right to silence and undesirability mirror those under the CJPOA, hence this judgment's importance.

¹⁹⁸ Hannah Quirk, *The Rise and Fall of the Right to Silence: Principle, Politics and Policy* (Routledge 2017) (forthcoming).

¹⁹⁹ *Ensor* [2010] 1 Cr App R 255.

²⁰⁰ *ibid* [262].

testifying'.²⁰¹ The use of section 35(1)(b) as a safeguard which negates the need for special measures for defendants, therefore, seems to lack robustness.

The Working Group has essentially left vulnerable and/or intimidated defendants to make an often damning choice between two unfavourable options. The first is that the defendant chooses not to testify at all. Of course, as discussed, it is likely that the jury will then be at liberty to draw adverse inferences from the accused's silence in court. This may unfairly affect their chances of acquittal. Alternatively, a vulnerable and/or intimidated defendant can proceed to give evidence in their defence. Even before the erosion of the right to silence,²⁰² when not giving evidence was free of any legal consequence, Zander and Henderson found that 70-74% of defendants gave evidence in their defence.²⁰³ It seems likely, given the risk of adverse inferences, that a higher proportion of defendants will now opt to testify.²⁰⁴ However, vulnerable and/or intimidated defendants risk doing so poorly due to the existence of their condition and a lack of support. This could result in them making a bad impression on the jury which, again, may unfairly affect their chances of acquittal. It could also result in them making a bad impression on the judge, which might result in a harsher sentence if convicted.

To summarise, the Working Group's second reason for excluding defendants from eligibility for special measures was that safeguards existed in the system which protect the defendant's right to a fair trial. They referred specifically to the provision of legal representation to the defendant and their non-compellability as witnesses. Indeed, these provisions, and other

²⁰¹ Hannah Quirk, *The Rise and Fall of the Right to Silence: Principle, Politics and Policy* (Routledge 2017) (forthcoming).

²⁰² Prior to the CJPOA curtailment of the right to silence, the prosecution could not comment on a defendant's silence as per the Criminal Evidence Act 1898, s 1(b). For a full discussion, see Abenaa Owusu-Bempah, *Defendant Participation in the Criminal Process* (Routledge 2017) 105-106.

²⁰³ Michael Zander and Paul Henderson, *Crown Court Study* (Royal Commission on Criminal Justice Study No.19 1993).

²⁰⁴ Although research suggests that adverse inferences were drawn from silence even when they were not supposed to be (prior to the CJPOA). It is perhaps, in practice, no more important that a defendant testifies now than it was before. See Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4th edn, OUP 2010) 264.

safeguards, do contribute to ensuring a defendant has a fair trial, but not in every respect. They do not improve the treatment of vulnerable and/or intimidated defendants in criminal proceedings in the way special measures do for witnesses, or help to facilitate their best evidence, and nor were they designed to. These safeguards, therefore, do not constitute a convincing reason from which to justify the denial of special measures to vulnerable and/or intimidated defendant witnesses. Such defendants remain at a disadvantage by comparison to both their non-vulnerable counterparts, and to vulnerable and/or intimidated non-defendant witnesses in receipt of special measures.

3.5.1.3. Special measures are designed to protect witnesses from the defendant

The final reason offered by the Working Group for the denial of special measures to defendants centred on the alleged purpose of those measures. The Working Group contended that ‘many of the measures ... are designed to shield a vulnerable or intimidated witness from the defendant ... and so would not be applicable in the case of defendant witnesses’.²⁰⁵ Even if we confine our attention solely to the particular measures the Working Group had in mind here (live links, pre-recorded video evidence, and screens) this betrays a simplistic conception of their purpose. As has been alluded to throughout this chapter, such measures help to improve the treatment of witnesses in court by protecting them from some of the difficulties they may face when recounting personal, intimate or distressing events. They also adapt proceedings to help facilitate best evidence from witnesses who are young and/or suffering from a range of physical, mental or intellectual disabilities.²⁰⁶ Non-defendant witnesses can also invoke special measures as a result of the nature of the offence to which the proceedings relate or a witness’ personal characteristics such as their social or cultural background.²⁰⁷ It is true that these measures may, on occasion, be invoked to assist a witness

²⁰⁵ *Speaking up for Justice*, para 3.28.

²⁰⁶ See YJCEA, s 16

²⁰⁷ See YJCEA, s 17.

deemed ‘in fear or distress’ due to the ‘defendant’s behaviour towards them’.²⁰⁸ This, however, is far from their only function.

The Working Group further argued that the unavailability of existing child provisions to defendants was evidence of a prior recognition that they would not be useful to defendants.²⁰⁹

The child provisions to which they referred permitted pre-recorded statements as evidence-in-chief and the ability to give evidence by live link.²¹⁰ The motivations underpinning the enactment of these measures were discussed in the first part of this chapter. It was demonstrated that concerns regarding the ability of the system to convict child abusers led to reforms to rules of evidence to enable children to give evidence in criminal trials. The enactment of special measures followed, largely in response to concerns about the inhumane treatment of children in court in the absence of such adaptations. Child defendants simply did not factor in these considerations. The primary concerns were with increasing the criminal justice system’s ability to convict child abusers, and, relatedly, to increasing child witnesses’ ability to give evidence of a high quality. The needs of defendants were not considered at this juncture. The Working Group was thus wrong to rely on the prior non-provision of defendant special measures to support their decision to exclude defendants from its recommendations for a new scheme.

The blanket denial of special measures to defendants meant that vulnerable and/or intimidated defendant witnesses choosing to give evidence in their defence were left without the same assistance as vulnerable and/or intimidated non-defendant witnesses. The assumption underlying the legislative scheme seems to be that defendants are not vulnerable or intimidated. There is no empirical basis for such a belief. In section 1.1, I highlighted the pervasiveness of vulnerability in the general population. Many of the issues which may lead

²⁰⁸ YJCEA 1999, s 17(2)(d)(i).

²⁰⁹ *Speaking up for Justice*, para 3.28.

²¹⁰ Criminal Justice Act 1988, s 32 and s 32A.

to a witness' classification as vulnerable and/or intimidated are also prevalent among the defendant population. The available evidence suggests that such issues may even be disproportionately common among those accused of, and those proved to have been involved in, criminal activity. For example, the recent Children's Commissioner Report highlights that the prevalence of neurodisability in young people who offend is often significantly higher than it is among young people in the general population.²¹¹ Furthermore, Brooker et al found that the percentage of the probation population in Lincolnshire with a current mental illness is 39%.²¹² In addition, a survey conducted in 2012 found that 36% of surveyed prisoners had a disability and/or mental health problem.²¹³

Jacobson et al observed that 'defendants ... struggle on those occasions when they give evidence' due to the 'obvious educational and intellectual disparity between prosecution counsel and the defendant'.²¹⁴ Louck's review of the literature surrounding defendant vulnerability highlighted that many suspects/defendants/offenders suffer from learning disabilities and/or difficulties, although there is no consensus as to the exact numbers.²¹⁵ This may, in part, be due to the fact that the issues facing defendants can be multiple and complex. For example, Jacobson and Talbot identified that many individuals appearing before the courts 'do not have a single or clearly delineated form of intellectual or psychological

²¹¹ For example, 5-7% of the general population suffer from communication disorders versus 60-90% of the offending population and 0.6-1.2% of the general population suffer from autism, compared to 12% of the offending population. See Nathan Hughes and others, *Nobody made the Connection: The prevalence of Neurodisability in Young People who Offend* (Children's Commissioner Report 2012) 23. See also Nathan Hughes, 'Understanding the Influence of Neurodevelopmental Disorders on Offending: Utilizing Developmental Psychology in Biosocial Criminology' (2015) 28(1) *A Critical Journal of Crime, Law and Society* 39.

²¹² Brooker et al also found that almost 50% had past/lifetime mental illnesses, see Charlie Brooker and others, *An Investigation into the Prevalence of Mental Health Disorder and Patterns of Health Service Access in a Probation Area* (Lincoln: Criminal Justice and Health Research Group 2011) 39-41.

²¹³ Charles Cunliffe and others, *Estimating the Prevalence of Disability Amongst Prisoners: Results from the Surveying Prisoner Crime Reduction (SPCR) Survey* (Ministry of Justice 2012) 141. For a summary of findings see Kathryn Thomson, 'Disability Among Prisoners' (2012) 59(3) *Probation Journal* 282.

²¹⁴ Jessica Jacobson, Gillian Hunter and Amy Kirby, *Structured Mayhem: Personal Experiences of the Crown Court* (Criminal Justice Alliance 2015) 19.

²¹⁵ See Nancy Loucks, *No One Knows: Offenders with Learning Difficulties and Learning Disabilities – a Review of Prevalence and Associated Needs* (Prison Reform Trust 2007). See also Jenny Talbot, *Fair Access to Justice? Support for Vulnerable Defendants in the Criminal Courts* (Prison Reform Trust 2012).

difficulty ... mental illness and learning disability (or learning difficulty) may co-exist'.²¹⁶ Furthermore, Lord Bradley noted that some have a 'dual diagnosis' where mental health problems are combined with drug and/or alcohol problems.²¹⁷ Child defendants are deemed 'doubly vulnerable'²¹⁸ due to a combination of their young age and other mental, intellectual and emotional problems from which they may suffer.²¹⁹ This is likely to be particularly problematic for child defendants in the Crown Court, due to the more formal nature of proceedings and the courtroom's grandeur.

The Working Group noted that giving evidence by live link, screens and/or pre-recording their testimony were not designed for defendants. It is in fact the case, however, that these measures hold substantial potential to help to mitigate some of the difficulties faced by vulnerable and/or intimidated defendants.²²⁰ For example, a defendant with attention deficit hyperactivity disorder (ADHD), who is easily distracted by the multiple stimuli within a crowded court, could use the live link to give evidence and thus be able to better focus on their testimony. A defendant with an anxiety disorder may find that it is intensified by the requirement to give evidence in a courtroom filled largely with strangers.

This 'distress' connected with testifying in the proceedings could also be dealt with by allowing the defendant to give their evidence by live link.²²¹ Alternatively the defendant's

²¹⁶ Jessica Jacobson and Jenny Talbot, *Vulnerable Defendants and the Criminal Courts: A Review of Provision for Adults and Children* (Prison Reform Trust 2009) 7.

²¹⁷ Lord Bradley, *The Bradley Report: Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (Department of Health 2009) 21. According to Offender Health Network Research, 78% of the sample with a severe enduring mental illness had a dual diagnosis, see Jenny Shaw and others, *A National Evaluation of Prison Mental Health In-Reach Services* (Offender Health Network Research 2009) 120.

²¹⁸ Jessica Jacobson and Jenny Talbot, *Vulnerable Defendants and the Criminal Courts: A Review of Provision for Adults and Children* (Prison Reform Trust 2009) 37.

²¹⁹ See also Ali Wigzell, Amy Kirby and Jessica Jacobson, *The Youth Proceedings Advocacy Review: Final Report* (Institute for Criminal Policy Research 2015) 4-5 for a summary of research findings on the prevalence of mental health issues/learning disabilities in children in custody.

²²⁰ This has slowly been recognised by the courts and government resulting in the recent expansion of special measures for vulnerable defendants. This is the subject of Chapter 4.

²²¹ The potential benefits of such defendants using the live link are also/further highlighted in Samantha Fairclough "It doesn't happen ... and I've never thought it was necessary for it to happen": Barriers to

distress could be alleviated by permitting them to testify from behind a screen, reducing the number of people who can see the defendant and whom the defendant can see. Provisions for pre-recorded evidence could, in theory, be utilised to secure contemporaneous evidence from, for example, child defendants at the pre-trial stage in the same way that they were envisioned to (and now do) with non-defendant witnesses.²²²

The Working Group did not refer to the use of other special measures by defendants, such as the removal of wigs and gowns, closing the court temporarily to the public, intermediaries or communication aids. Again, this does not mean that they cannot benefit a defendant. For example, a young defendant, one with an anxiety disorder, or one in fear or distress in connection with testifying in the proceedings, could also benefit from the removal of official court attire and closing the court (to minimise the number of on-lookers) while they give evidence. Furthermore, a defendant with a low IQ or with an autism spectrum disorder would also likely benefit from the provision of an intermediary and/or use of communication aids when giving their evidence.²²³ The Working Group's assumption in its report, therefore, that special measures will not benefit defendants because they are 'designed to help witnesses' is flawed. Defendants can be equally as vulnerable as non-defendant witnesses, and special measures can help to alleviate many of the issues they may face. Thus, this final reason offered by the Working Group to justify the exclusion of defendants from special measures is also invalid.

In summary, the three reasons offered by the Working Group (special procedures pre-trial, fair trial safeguards at trial, and the unsuitability of special measures for defendants) were not adequate to justify the exclusion of defendants from special measures eligibility. As noted at

Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) *International Journal of Evidence and Proof* (forthcoming).

²²² Cf discussion of this in section 4.4.5. (p122) and section 5.3.1. (p154).

²²³ See The Advocate's Gateway, 'Planning to Question Someone with an Autism Spectrum Disorder including Asperger Syndrome' (Toolkit 3, The Council of the Inns of Court 2016).

the beginning of this section, the Working Group had intended these reasons to cumulatively justify its denial of special measures to defendants. I have demonstrated that each of the reasons offered is invalid and simply insufficient when taken individually. Thus, even if taken collectively, as the Working Group intended, these three invalid reasons cannot amount to a sufficient basis from which to justify the exclusion of vulnerable and/or intimidated defendants from special measures.

I also noted previously in this section that two distinct but related issues need to be considered in relation to the non-provision of special measures to vulnerable and/or intimidated defendants. The first was whether vulnerable and/or intimidated defendants require more support than the 'normal' defendant cohort if they are to give equally good evidence. The second was whether there are any justifiable grounds to distinguish between vulnerable and/or intimidated defendant and non-defendant witnesses, or whether they should be treated equally and all receive special measures. A consideration of both of these issues follows.

Earlier in this chapter, I showed that the provision of special measures to vulnerable and/or intimidated non-defendant witnesses was premised on a notion of equality. The comparably disadvantaged position of the vulnerable and/or intimidated non-defendant witnesses to other 'normal' non-defendant witnesses when giving evidence justifies the provision of additional support to them. In light of this, it is difficult to resist the argument that special measures should also be provided to vulnerable and/or intimidated defendant witnesses. They too are at a disadvantage by comparison to non-vulnerable defendants who may wish to give evidence. The denial of special measures to such defendants thus runs counter to the principle of equality on which special measures were initially developed. This means that there was an absence of internal coherence in the law of special measures under the 1999 Act.

With regards to distinguishing between defendants and non-defendants, the differences highlighted by the Working Group do not justify denying special measures to vulnerable and/or intimidated defendants. As per the principle of equality, absent any ‘sufficient’²²⁴ or ‘convincing’²²⁵ reason for unequal treatment, the only ‘rational’ option is to proceed on the basis of equality.²²⁶ Speaking extra-judicially on ‘Evidence of Child Victims,’ Lord Judge, the then Lord Chief Justice, argued in a similar vein:

I do not see why the processes which protect the child witness or victim should not be available to the child defendant. To my mind it is not just a question of equality of arms, it is simply that the defendant who is a child is a child like the complainant who is a child.²²⁷

It is concluded, therefore, that all vulnerable and/or intimidated court users, irrespective of their position in the proceedings, should have equal access to special measures. The absence of any valid reason for their exclusion leaves only equality as the justifiable way to proceed. The exclusion of vulnerable and/or intimidated defendant witnesses from such support thus marks an internal inconsistency in the provision of special measures – the law is not adhering to its own standard. This position is pithily summarised by Lawson, who notes that the exclusion of defendants from special measures ‘overlooks the equality-driven requirement for adjustments to be made to court ... to ensure that disabled people (whether they are the accused or the victim) are able to participate on an equal basis with others’.²²⁸

²²⁴ Richard Wollheim and Isaiah Berlin, ‘Equality’ (1955-1956) 56 *Proceedings of the Aristotelian Society* 281, 303.

²²⁵ Stefan Gosepath, ‘The Principles and the Presumption of Equality’ in Carina Fourie, Fabian Schuppert and Ivo Williamn-Helmer (eds), *Social Equality: On What it Means to be Equals* (OUP 2015) 183.

²²⁶ Richard Wollheim and Isaiah Berlin, ‘Equality’ (1955-1956) 56 *Proceedings of the Aristotelian Society* 281, 303.

²²⁷ Lord Judge LCJ, ‘The Evidence of Child Victims: The Next Stage’ (Bar Council Annual Law Reform Lecture, 21st November 2013) 2.

²²⁸ Anna Lawson, ‘Disabled People and Access to Justice: From Disablement to Enablement?’ in Peter Blanck and Eilionoir Flynn (eds), *Routledge Handbook of Disability and Human Rights* (Routledge 2017) 95.

Despite this, none of the issues raised in this chapter were discussed in Parliamentary debates on the Youth Justice and Criminal Evidence Bill in the House of Lords or Commons.²²⁹ The emphasis was entirely on the positive impact that the provisions would have for vulnerable and intimidated witnesses in criminal trials, with absolutely no regard for supporting comparably disadvantaged defendants. The ‘surround’ in which the Bill was debated goes some way to helping us understand why this was. This is discussed in section 5.5.1.

3.6. Consequences of the exclusion of defendants

When unpacking the Working Group’s ‘justifications’, I highlighted some of the potentially negative consequences which may arise for vulnerable and/or intimidated defendants without the provision of special measures. These related to their inability to effectively participate in their trial. This could occur as a result of such a defendant ‘choosing’ not to give evidence because they are unable to do so sufficiently well, or from them giving evidence but doing so poorly due the lack of support available to them. Given that a defendant’s ability to give evidence is a necessary component of effective participation,²³⁰ either of these outcomes is problematic.

Furthermore, Roberts and Zuckerman assert that defendants should be treated ‘as thinking, feeling, human subjects of official concern and respect, who are entitled to be given the opportunity to play an active part in procedures’.²³¹ It thus follows that a failure to ensure this constitutes a lack of protection for the right to humane treatment. As discussed previously in this chapter, protecting against inhumane treatment (and thus promoting equal treatment) was one of the motivations underpinning the development of non-defendant witness special

²²⁹ The Bill was debated in Parliament between 3rd December 1998 and 29th June 1999. (see <http://www.publications.parliament.uk/pa/cm199899/cmstand/e/cm youth.htm> <http://hansard.millbanksystems.com/bills/youth-justice-and-criminal-evidence-bill-hl>).

²³⁰ See notes 179-181 (above p76).

²³¹ Roberts and Zuckerman highlight humane treatment as a key principle which underpins the law of evidence which recognises the importance of the accused having the opportunity to play an active part in the procedures. See, Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, OUP 2010) 21.

measures. It follows, therefore, that the provision of special measures to vulnerable and/or intimidated defendants can help to ensure that they too are treated humanely.

In addition, a lack of support to those giving evidence that need it may also undermine the principle of accurate fact-finding. This has been described as the ‘cornerstone of the rule of law’ as well as the ‘ultimate golden thread tying criminal proceedings to the public interest’.²³² Most defendants, whether guilty or innocent, are likely to be privy to information concerning the events leading up to, during and following the alleged commission of an offence. Given their superior position in this regard it is in the interests of accurate fact-finding and efficiency to assist vulnerable and/or intimidated defendants to give their best evidence if they wish to testify.²³³

As well as breaching a vulnerable and/or intimidated defendant’s right to effectively participate in their trial, the non-provision of special measures arguably contravenes the principle of equality of arms. The ECtHR has ruled that Article 6(1) of the ECHR requires that ‘each party should be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent’.²³⁴ This means that ‘both parties should be treated in a manner ensuring that they have a procedurally equal position to make their case’.²³⁵ As discussed this is, in part, facilitated through the provision of certain legal rights or entitlements to defendants designed to redress the structural imbalance between them and the State.²³⁶

²³² *ibid* 19.

²³³ Though Owusu-Bempah rightly notes her discomfort with the provision of special measures to vulnerable defendants contributing to a finding against undesirability unless such a defendant *wants* to give evidence, see Abenaa Owusu-Bempah, ‘Judging the Desirability of a Defendant’s Evidence: An Unfortunate Approach to s.35(1)(b) of the Criminal Justice and Public Order Act 1994’ (2011) 9 *Criminal Law Review* 690, 691.

²³⁴ *Salov v Ukraine* App no 65518/01 (ECHR 9 September 2005) [87].

²³⁵ Stefani Negri, ‘The Principle of “Equality of Arms” and the Evolving Law of International Criminal Procedure’ (2005) 5 *International Criminal Law Review* 513, 513.

²³⁶ See note 155 (above p71).

A concern for equality of arms should also encompass measures which enable witnesses for both parties to give evidence effectively. Though often supplemented by documentary, physical, or scientific evidence, oral witness testimony remains a feature of many criminal trials.²³⁷ This oral evidence can be a vital component of a prosecution or defence case, making the witnesses that give this evidence a key resource for the parties to employ. It seems essential, therefore, that all vulnerable and/or intimidated witnesses are assisted in equal measure to give evidence if required. Since the defendant can be a witness in their own defence, they too should be assisted to give evidence if they are vulnerable and/or intimidated. As highlighted by one of my respondents:

...it's an adversarial system, and the pursuit of best evidence has to apply to both sides.
[B3]

Failing to provide special measures assistance to such defendants can leave the defence at a substantial disadvantage vis-à-vis the prosecution when presenting their case to the jury. This arguably falls foul of the ECtHR interpretation of the principle of equality of arms.

The non-provision of special measures to vulnerable and/or intimidated defendants absent strong justification also risks contravening the presumption of innocence. This is an express right contained within the ECHR.²³⁸ Disagreement exists as to what exactly constitutes the presumption of innocence.²³⁹ As Lippke notes, 'a bewildering variety of claims have been made about the meaning and implications of the presumption of innocence in the criminal law'.²⁴⁰ In a narrow way, it is considered to mean that the State must prove the defendant's

²³⁷ Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, OUP 2010) 291.

²³⁸ ECHR, Article 6(2) 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'.

²³⁹ See, for example, Volume 8, Issue 2 of the *Journal of Criminal Law and Philosophy* (2014) which focuses entirely on conceptualising the presumption of innocence. Contributions by Paul Roberts; Hamish Stewart; Richard Lippke; Magnus Ulvang; Thomas Weigend; Carl-Friedrich Stuckenberg; Patrick Tomlin; and Victor Tadros demonstrate its complexity.

²⁴⁰ Richard Lippke, *Taming the Presumption of Innocence* (OUP 2016) 11. In chapter one, Lippke divides claims made about the presumption of innocence into seven categories: the meaning of 'innocence'; the context in which the presumption applies; whether it is a substantive or procedural right; the strength of the presumption; the conduct and/or attitudes it requires of public officials and citizens towards suspects/defendants; and its relationship with other aspects of criminal procedure.

guilt;²⁴¹ the burden and standard of proof reflecting the system's commitment to protecting the innocent from conviction.²⁴² However, Roberts claims that while it is true that the burden and standard of proof find their normative justifications in the presumption of innocence, it is a 'tempting fallacy' to conclude that these evidential burdens alone are all that needs to be said about the presumption of innocence.²⁴³ Instead, properly conceived, the presumption of innocence is more than merely a factual presumption; it is a moral and political principle²⁴⁴ which protects the liberty, security and privacy of all individuals.²⁴⁵ In other words, placing the burden of proof on the prosecution combined with the steeply asymmetrical standard of proof marks the State's 'unequivocal commitment to the importance of avoiding wrongful conviction' of the innocent to keep 'its liberal credentials ... intact'.²⁴⁶ As Young and Wall put it, it concerns 'the normative issue of how the state ought to behave in its relations with individuals'.²⁴⁷

Some interpretations of the presumption of innocence go even further than this. For example Ashworth notes that it 'appears to operate at two different levels'; the trial (as discussed above) and the criminal process more generally.²⁴⁸ This latter conception of the presumption of innocence requires 'pre-trial procedures [to] be conducted, so far as possible, *as if* the defendant were innocent'.²⁴⁹ The 'so far as possible' provides an important caveat, since presuming suspects to be factually innocent at the pre-trial stage would risk rendering the

²⁴¹ For example, see Federico Picinali, 'Innocence and Burdens of Proof in English Criminal Law' (2014) 13(4) *Law, Probability and Risk* 243.

²⁴² Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, OUP 2010) 248.

²⁴³ Paul Roberts, 'Loss of Innocence in Common Law Presumptions' (2014) 8 *Criminal Law and Philosophy* 317, 318.

²⁴⁴ Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, OUP 2010) 221.

²⁴⁵ *ibid* 244.

²⁴⁶ *ibid* 251.

²⁴⁷ Richard Young and David Wall, 'Criminal Justice, Legal Aid, and the Defence of Liberty' in Richard Young and David Wall (eds), *Access to Criminal Justice: Legal Aid, Lawyers and The Defence of Liberty* (Blackstone Press Limited 1996) 8.

²⁴⁸ Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10(2) *International Journal of Evidence and Proof* 241, 243.

²⁴⁹ *ibid*. See also Thomas Weigend, 'Assuming that the Defendant is not Guilty: The Presumption of Innocence in the German System of Criminal Justice' (2014) 8 *Criminal Law and Philosophy* 285, 287 (author's emphasis).

criminal justice system unworkable in its crime control pursuits. If suspicion of guilt was viewed as unjustified,²⁵⁰ arrests on the basis of ‘reasonable suspicion’²⁵¹ could not be made, and prosecutions could not be brought on the basis of ‘a realistic prospect of conviction’.²⁵² However, Packer notes that in this context, the presumption of innocence is ‘a direction to officials how they are to proceed, not a prediction of outcome’.²⁵³ It thus requires that ‘until there has been an adjudication of guilt ... the suspect is to be treated, for reasons which have nothing to do with the probable outcome of the case, as if his guilt is an open question’.²⁵⁴ Essentially, therefore, it is ‘a normative *counterforce* or *counterweight* in opposition to factual suspicions or reasonable presumption of guilt’.²⁵⁵

On the basis of this interpretation of the presumption of innocence, any unfavourable treatment of the accused is unjustified since criminal justice agents should instead be mindful of the fact that the suspect’s/defendant’s guilt has not been proved. In the absence of convincing reasons for the exclusion of defendants from special measures the only difference remaining on which their exclusion may be based is their very position as the accused. This violates the presumption of innocence, since a presumption of guilt based on the evidence collected pre-trial should not exclude a defendant from special measures eligibility. Instead, an assessment as to their vulnerability and/or whether they are in fear or distress in connection with the proceedings (ie are intimidated) should be made on the basis that they, at minimum, may be innocent.

²⁵⁰ Carl-Friedrich Stuckenberg, ‘Who is Presumed Innocent of What by Whom?’ (2014) 8 *Criminal Law and Philosophy* 301, 308.

²⁵¹ As per the Police and Criminal Evidence Act 1984, s 24 (as amended by Serious Organised Crime and Police Act 2005, s 110).

²⁵² CPS, Code for Crown Prosecutors (CPS 2013) 6.

²⁵³ Herbert L Packer, ‘Two Models of the Criminal Process’ (1964) 113(1) *University of Pennsylvania Law Review* 1, 12.

²⁵⁴ *ibid.* de Jong and van Lent also conceive of the presumption of innocence as relating to ‘the *treatment* of suspected individuals, both during the pre-trial phase and during the trial phase of criminal proceedings’, see Ferry de Jong and Leonie van Lent ‘The Presumption of Innocence as a Counterfactual Principle’ (2016) 1(12) *Utrecht Law Review* 32, 37.

²⁵⁵ Ferry de Jong and Leonie van Lent, ‘The Presumption of Innocence as a Counterfactual Principle’ (2016) 1(12) *Utrecht Law Review* 32, 41 (authors’ emphasis).

The combination of the potential consequences arising from the non-provision of special measures to vulnerable and/or intimidated defendants may cause some such defendants to give up their right to put the prosecution to proof. McConville et al's research on criminal defence work highlighted that barristers may exploit a defendant's vulnerability and use fear to put pressure on clients to plead guilty.²⁵⁶ This was demonstrated through an exchange he observed between a barrister and 13 year old client, Wayne. The barrister told Wayne that the criminal trial is 'pretty scary', in a 'vast court', and that he would be asked questions and called 'a liar'.²⁵⁷ The absence of support to such defendants may mean that some of them decide to plead guilty. It may leave others susceptible to pressure from their lawyer to do so. By pleading guilty, the vulnerable defendant is able to avoid the ordeal of testifying while also securing a sentence discount.²⁵⁸ A plea of guilty tendered in such circumstances is most obviously problematic if the defendant is factually innocent. Even if the defendant is factually guilty, however, the lack of support available to vulnerable defendants should not result in them feeling situationally compelled to enter a guilty plea. A defendant, vulnerable or not, guilty or not, has a right to have the State prove their guilt.²⁵⁹

3.7. Conclusion

In this chapter I have exposed the principle of equality that underpinned the development of special measures legislation for non-defendant witnesses. This was one of procedural equality of opportunity – treating disadvantaged people (those vulnerable and/or intimidated) differently (through the provision of special measures) in order to improve their ability to give their best evidence. I demonstrated that while the language in which discussions

²⁵⁶ Mike McConville and others, *Standing Accused* (Clarendon Press 1994) 258.

²⁵⁷ *ibid* 258.

²⁵⁸ Criminal Justice Act 2003, s 144.

²⁵⁹ I also raise these issues in Samantha Fairclough, "It doesn't happen ... and I never thought it was necessary to happen": Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) *International Journal of Evidence and Proof* (forthcoming).

surrounding the treatment of vulnerable and/or intimidated witnesses were framed was rarely that of equality, equality was universally accepted within the terms of the debates. This was evident with regard to concerns about the inhumane treatment of potential witnesses, particularly children and the learning disabled, due to their inability to engage in the criminal process. In order for these individuals to be treated more humanely, there was a recognition that adaptations would need to be made to standard procedures to accommodate their needs when giving evidence.

Initially the principle of equality underpinning the enactment and development of special measures provisions may not have been recognised by those involved in the debates. However its role has become increasingly transparent following the proliferation of equality legislation. For example, the Equal Treatment Bench Book, citing the Equalities Act 2010, advocates adapting trial proceedings for the vulnerable through the use of special measures. This demonstrates that special measures do help to achieve equality, even if this has not always been explicitly acknowledged.

This chapter has also examined whether the denial of statutory special measures to vulnerable and/or intimidated defendants is consistent with the law's commitment to the principle of equality underpinning the non-defendant special measures provisions. I have shown that the differences between defendants and non-defendants, arising from their structural positioning in the criminal trial, do not negate the need for special measures for vulnerable and/or intimidated defendants. In fact, the exclusion of such defendants from the statutory scheme has potentially serious consequences for these defendants. For example, it jeopardises their ability to participate effectively in the proceedings as well as potentially violating the principle of equality of arms and the presumption of innocence. Ultimately, the lack of support available to them has real potential to unfairly affect the outcome of the case. This means that the exclusion of vulnerable and/or intimidated defendant witnesses from

eligibility for special measures marks an internal inconsistency in the approach the law takes to the treatment of court users suffering from vulnerability and/or intimidation.

Establishing the place of equality as an underlying rationale for the enactment of special measures provides a strong justification for their continued existence and use. The equal treatment of all potential witnesses, regardless of their age, disabilities and/or circumstances, thus improving the internal coherence of the law in this area, is a strong basis from which to develop law and practice in this area. The next chapter explores how defendant special measures have developed since the enactment of the 1999 Act, and the role that the principle of equality has played in this. An assessment is then made as to whether these developments mean that the law of special measures is now internally consistent in its approach to vulnerable and/or intimidated court users giving evidence.

CHAPTER 4: THE DEVELOPMENT OF SPECIAL MEASURES FOR DEFENDANT WITNESSES

4.1. Introduction

This chapter examines the development of special measures for vulnerable and/or intimidated defendant witnesses following the statutory exclusion of defendants from the YJCEA special measures scheme. An inquiry into the way in which this body of law came to fruition accomplishes two things. First, it uncovers the motivation(s) for the expansion of special measures to vulnerable and/or intimidated defendants and, in particular, the extent to which the principle of equality was one of those. This means that the law's consistency in this regard can be assessed. Second, it enables an exploration of the way in which the law developed – ie via statute or common law – and the potential relevance of this to be considered. The current legal provision of special measures to vulnerable and/or intimidated court users is summarised in the latter part of this chapter. So too is the status of the principle of equality within this and an evaluation of the law's coherence in this area.

Hawkins' sociological framework highlights how changes or developments from within the legal field can influence the surround. In addition, changes in the legal field can alter the way that agents working within it frame particular situations and individuals.¹ This chapter shows specifically how developments in the courts have had some, albeit limited, influence on the

¹ See Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 143-205.

political surround. These have resulted in the enactment of some legislative provisions for defendant special measures. It also demonstrates how the arguments made by members of the legal profession who have framed defendants as vulnerable and/or intimidated and in need of support have helped to shape the legal landscape.

Before examining the development of the special measures law for defendant witnesses, an explanatory note is required. Criminal Practice Direction 3G provides various adaptations which should be made to the trial process if a defendant is considered vulnerable. These include ensuring that the courtroom is all one level;² taking regular breaks; and ensuring the use of clear language throughout the trial and particularly through cross-examination.³ Such adaptations mark admirable steps taken to improve the treatment of vulnerable defendants in court. The label of ‘special measures’ should be reserved for those adaptations to the trial which are contained within the YJCEA for non-defendant witnesses.⁴ These include the use of screens, live link, closing the court to the public, the removal of wigs and gowns, pre-recorded evidence, intermediaries and communication aids.⁵ It is the development of these measures for vulnerable and/or intimidated defendant witnesses, therefore, that is the focus of this chapter. A discussion of them is undertaken in the order in which they developed.

4.2. The law’s development: how and why?

4.2.1. Wigs and gowns/evidence in private

The development of these provisions for defendant witnesses arose out of the ECtHR decision in *T v United Kingdom*.⁶ The court ruled that the two 11 year old child defendants (T

² Criminal Practice Directions (October 2015 edition, amended April 2016 and October 2016) CPD I General Matters, 3G: Vulnerable Defendants CPD 3G.7.

³ *ibid* CPD 3G.10.

⁴ In *R v Waltham Forest Youth Court* [2004] EWHC 715 (Admin) [30] ‘special measures’ was held to be a ‘statutory term of art’.

⁵ See YJCEA s 23-s 30.

⁶ (1999) 30 EHHR 121.

and V) could not participate effectively in their trial for murder.⁷ The appeal to the ECtHR on the grounds of Article 6(1) was conceived on three bases – the defendants’ young age; the post-traumatic stress from which they suffered; and the intimidating nature of the courtroom, caused largely by the volume of people in attendance at the boys’ trial.⁸

On the subject of the effective participation, a consultant child and adolescent psychiatrist highlighted that:

...the post-traumatic stress disorder suffered by the applicant, combined with the lack of any therapeutic work since the offence, had limited his ability to instruct his lawyers and testify adequately in his own defence.⁹

Neither T nor V testified in their defence. The ECtHR noted that:

In his memorial to the court the applicant stated that, due to the conditions in which he was put on trial, he was unable to follow the proceedings or take decisions in his own best interests. He had been severely intimidated and caused feelings of anxiety and oppression by the procedures followed.¹⁰

The government argued, however, that several steps¹¹ were taken prior to and during the trial to accommodate the child defendants. The pre-trial steps included familiarisation visits to the courtroom with a social worker and the provision of a ‘child witness pack’ to introduce them to trial procedure.¹² The trial proceedings themselves were modified so that the defendants sat in a specially raised dock so that they could see, were alongside a social worker, and within close proximity to their parents and lawyers.¹³ In addition, the court day was shortened to reflect the length of the school day, and ten minute breaks were scheduled every hour where

⁷ As noted in Chapter 1, the Magistrates’ Court Act 1980, s 24 requires that children charged with an offence punishable by more than 14 years’ imprisonment if committed by an adult are tried in the Crown Court.

⁸ *T v UK* (1999) 30 EHHR 121 [56].

⁹ *ibid* [80].

¹⁰ *ibid* [17].

¹¹ The ECtHR refers to these steps as ‘special measures’ (*ibid* [76]), but, as noted, it is not true that they constitute ‘special measures’ in the context of domestic law (ie they are not equivalent to the special measures found under the YJCEA).

¹² *ibid* [9].

¹³ *ibid* [9].

the defendants could spend time in a play area with their parents and social workers.¹⁴ The judge also ruled that there was to be no publication/broadcasting of the defendants' names, addresses or photographs.¹⁵

However, the Grand Chamber of the ECtHR held that:

[T]he formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven, in particular with the raised dock which ... had the effect of increasing the applicant's sense of discomfort during the trial, since he felt exposed to the scrutiny of the press and public.¹⁶

Lord Reed emphasised further that '... a trial held under [these] conditions ... could be expected to remain a highly intimidating experience for most eleven-year-old children'.¹⁷ The ECtHR accordingly decided that the child defendants' right to effectively participate under Article 6(1) had been violated notwithstanding the adaptations that the trial judge had made in an attempt to accommodate the defendants in the Crown Court. As discussed in section 3.5.1.2, a defendant's ability to participate in their trial includes the ability to give their best evidence.¹⁸

Following this ruling, the Lord Chief Justice issued a practice direction which governed the trial of children in the Crown Court.¹⁹ This provided further adjustments to trial proceedings in addition to those adopted in the trial of T and V. Examples included allowing young defendants to sit with parents; the use of courtrooms where everyone is situated on one level (ie no raised platforms); and a simplification of the language used to assist child defendants' understanding and thus their ability to participate. In addition, the practice direction recommended that barristers and judges refrain from wearing wigs and gowns in trials of

¹⁴ *ibid* [9].

¹⁵ *ibid* [10] as per Children and Young Persons Act 1933, s 39.

¹⁶ *ibid* [86].

¹⁷ *ibid* [46] (Lord Reed).

¹⁸ See Criminal Practice Directions (October 2015 edition, amended April 2016) CPD I General Matters. 3D: Vulnerable People and the Courts 3D.2.

¹⁹ Practice Direction: Trial of Children and Young Persons in the Crown Court [2000] 2 All E.R. 285

children and young persons, and for restrictions to be placed on public access to the courtroom to permit only those with an immediate and direct interest in the case. This guidance now forms part of the consolidated Criminal Practice Directions.²⁰

At the centre of these reforms was the recognition that child defendants may be unable to participate effectively in their trials due to both their vulnerability and the intimidating nature of Crown Court proceedings. In section 3.3 I highlighted, in relation to non-defendant witnesses, that the provision of extra support to disadvantaged witnesses (vulnerable and/or intimidated) was premised on a principle of equality. This is because for there to be equality the differential treatment of materially different individuals is required. The same is true here with regards to young, intellectually disabled or intimidated defendants versus other non-vulnerable, non-intimidated defendants. Adaptations may need to be made for the former group of defendants in order that they can participate as effectively as the latter group. When viewed in this way, a concern for the effective participation of vulnerable and/or intimidated defendants is, at least implicitly, premised on a concern for equality.

4.2.2. Communication aids

Communication aids include prompt cards, alphabet charts, dolls and other props which help a vulnerable person to express their evidence and understand questions asked under examination.²¹ The provision of them to vulnerable defendants has not arisen as an issue in the courts or Parliament. Instead, the court's inherent power to make adjustments to the proceedings to ensure the effective participation of all involved, as emphasised in the Criminal Procedure Rules,²² has come to include the provision of communication aids.

²⁰ Criminal Practice Directions (October 2015 edition, amended April 2016 and October 2016) CPD I General Matters, 3G: Vulnerable Defendants. See, in particular, CPD 3G.12 - 3G.14.

²¹ The Advocate's Gateway, 'Using Communication Aids in the Criminal Justice System' (Toolkit 14, The Council of the Inns of Court 2015)

²² Criminal Procedure (Amendment No 2) Rules 2017, Part 3: Case Management, CPR 3.9(3)(b).

4.2.3. Live link

As explained in section 1.2, the live link provision enables live evidence to be obtained from a witness from outside of the courtroom while they are still seen and heard by the judge, jury and legal representatives in court.²³ The development of the defendant live link provision commenced with the case of *R (on the application of DPP) v Redbridge Youth Court*.²⁴ The case involved the trial of a 14 year old defendant charged with the indecent assault of two 14 year old girls. Applications for the complainants to give their evidence by pre-recorded statement and live link, made under the Criminal Justice Act 1988,²⁵ were denied in the Youth Court.²⁶ Having had regard to the similar age of the defendant and complainants; the nature of the proceedings (the indecent assault charge arose from a slap on the bottom over clothes); and the lack of evidence as to the complainants' trauma²⁷ the decision to deny special measures was upheld on appeal by the Divisional Court.²⁸ The prevailing assumption underpinning this decision was that evidence given in court is superior, (based on the perception that special measures diminish the quality of the evidence and the defendant's ability to challenge it)²⁹ and thus that it was not in the interest of the court to allow their use.

Birch suggests that the *Redbridge* decision can also be interpreted as 'the court ... faced with a situation of inequality of arms'.³⁰ She considered the conditions under which evidence is given to be relevant to the principle of equality of arms.³¹ Thus, the importance the court placed on the similar age of the children involved in the trial may be evidence of 'judges

²³ YJCEA, s 24(8).

²⁴ [2001] EWHC Admin 209.

²⁵ Section 32A and s 32 respectively.

²⁶ The case was heard before the YJCEA provisions were in force. Had they been, the trial judge would have had no discretion (until the 2009 amendments) with regards to the provision of special measures to the complainants, as s 21 YJCEA conceives of children complaining of sexual assault to be 'in need of special protection'. See section 3.2.1. (p45-46) for this discussion.

²⁷ *R (on the application of DPP) v Redbridge Youth Court* [2001] EWHC Admin 209 [8].

²⁸ *ibid* [20].

²⁹ *ibid* [17].

³⁰ Diane Birch, 'Evidence: Evidence via Television Link and Video Recording of Interview with Child' [2001] *Criminal Law Review* 473, 477.

³¹ See further my discussion of this in section 3.6. (p90-91).

seek[ing] to restore some even-handedness by depriving other witnesses' of the special measures for which they are eligible.³² This approach embodies the principle of equality that I highlighted in Chapter 3. It requires that all vulnerable and/or intimidated court users are afforded equal support irrespective of their position in the trial. The provision of special measures to non-defendant witnesses when a similarly situated defendant is denied them, therefore, would fall foul of this equality principle, thus rendering the law incoherent. The suitability of this approach to remedying the inequality is discussed later in this sub-section.

The non-provision of live link to vulnerable and/or intimidated defendant witnesses arose again in *R v Waltham Forest Youth Court*.³³ The case involved four co-defendants aged between 13 and 16 years of age each charged with the robbery of two other children. The circumstances in this case differed quite significantly from those in *Redbridge*. The issue concerned the exclusion of a 13 year old defendant with 'serious learning difficulties',³⁴ from special measures who, if she testified, would make allegations against two of her co-accused. This defendant, (S), informed her solicitor that she 'was too scared to do so in the physical presence of her co-defendants' and that 'rather than take that course, she would choose not to give evidence in her defence'.³⁵

The District Judge declined to make a special measures direction for live link for S under the YJCEA because although:

[H]e could understand that there might be very good reasons why a 13 year old defendant such as S might wish to have such protection ... the unambiguous terms of the [YJCEA meant that] there were no powers to make a special measures direction in favour of a defendant.³⁶

³² Diane Birch, 'Evidence: Evidence via Television Link and Video Recording of Interview with Child' [2001] *Criminal Law Review* 473, 477.

³³ [2004] EWHC 715 (Admin).

³⁴ *ibid* [8].

³⁵ *ibid* [2].

³⁶ *ibid* [4].

Following this, an application was made for the District Judge to, instead, ‘exercise common law discretion to permit S to give her evidence by means of a video link’.³⁷ This was also denied. The judicial review of these decisions found, albeit ‘with some reluctance,’³⁸ that the District Judge was ‘plainly right’ to conclude that there was no power under the 1999 Act to grant special measures to defendants.³⁹ It was also held that, despite the YJCEA’s retention of the court’s common law powers,⁴⁰ no common law power existed in relation to the provision of live link and video-recorded evidence since these measures had been governed entirely by legislation since their birth.⁴¹

Despite the unsuccessful nature of the appeal in *Waltham Forest*, the submissions to the High Court highlight the gradual recognition and exposure of the multiplicity of issues caused by the exclusion of defendants from special measures. They argued that the denial of the live link to the applicant (S) prevented the court from sufficiently protecting all vulnerable witnesses (of whom the defendant is potentially one).⁴² The denial of live link to defendants also permitted fear caused by the co-accused’s threats to essentially undermine the defendant’s right to choose whether or not to give evidence.⁴³ Furthermore they argued that it potentially violated the principle of equality of arms, since if prosecution witnesses can use special measures ‘for the purpose of maximising “the quality of their evidence” ... it may be unfair for a vulnerable defendant to be denied comparable facilities’.⁴⁴ The defence further submitted that ‘there is no justification for drawing a distinction between prosecution and

³⁷ *ibid* [6].

³⁸ *ibid* [86].

³⁹ *ibid* [82].

⁴⁰ YJCEA, s 19(6) the Act does not affect ‘any power of a court to make an order or give leave of any description (in the exercise of its inherent jurisdiction or otherwise) – in relation to a witness who is not an eligible witness’.

⁴¹ *R v Waltham Forest Youth Court* [2004] EWHC 715 (Admin) [71]. I further discuss the issue of a common law power for live link later in this section (p119-121).

⁴² *ibid* [42].

⁴³ *ibid* [43].

⁴⁴ *ibid* [44].

defence witnesses and, indeed, no adequate explanation [for doing so] was provided in *Speaking up for Justice*.⁴⁵

In essence, counsel for the appellant had correctly applied the principle of equality in an attempt to secure the law's consistent treatment of vulnerable and/or intimidated court users. They concluded, first, that the position in which vulnerable and/or intimidated defendants (such as S) are left, absent a direction for live link, is inferior to that of comparably vulnerable and/or intimidated witnesses for the prosecution. This was both in terms of their protection in the courtroom, their ability to give evidence, and its likely quality if they did. Second, counsel for the appellant concluded that the reasons offered by the working group in the *Speaking up for Justice* Report are invalid as justifications on which to differentiate in this way between the defendant and other witnesses and that there is no other justifiable basis.

At judicial review, the court was unimpressed by the 'equality of arms' argument.⁴⁶ So too were the 'interested parties' (the CPS and the Secretary of State for the Home Department). Their response maintained instead that 'there is a legitimate and rational basis for discriminating ... between witnesses and the accused'.⁴⁷ This basis mirrored the justifications provided in the *Speaking up for Justice* Report, namely that: the accused does not have to give evidence but witnesses do; the accused has legal representation and witnesses do not; and that 'the giving of evidence in court may be disturbing and traumatic – particularly in the case of victims'.⁴⁸ A discussion of the reasons for why the first two justifications offered are invalid was held in section 3.5.1.2. As for the third justification, I also highlighted in section 3.5.1.3 how defendants may find giving evidence 'disturbing and traumatic' too.

⁴⁵ *ibid* [45].

⁴⁶ *ibid* [86].

⁴⁷ *ibid* [64].

⁴⁸ *ibid* [64].

In summary, counsel for the appellant's arguments, based on the principle of equality, broadly mirrored those I made in sections 3.5 and 3.6, but were not sufficiently persuasive on this occasion. Though the court was 'tempted'⁴⁹ to conclude that an inherent power for defendant live link existed, this was not on the basis of the argument for equality between defendants and non-defendants. Instead, it was on the basis of 'the apparent derogation from the Claimant's right to choose whether or not she gives evidence in her own defence ... [as] she would only do so if able to use the live link facility'.⁵⁰ This marks a concern for vulnerable and/or intimidated defendants' effective participation in their trials as witnesses rather than for equality between court users. As discussed earlier in this chapter, and in Chapter 3, ensuring the effective participation of those who are in some way disadvantaged additionally enhances equality between all court users. Though unsuccessful on this occasion, the arguments for equality were beginning to come through.

Arguments based on equality seemed particularly apparent in practice. Despite the *Waltham Forest* decision, concern in the legal field about the inequality of support between vulnerable and/or intimidated court users continued to gain ground. Sanders et al found evidence of a 'parity principle' in early decisions made by criminal justice agents in relation to special measures for prosecution witnesses.⁵¹ Prosecutors perceived it as 'unfair to provide a measure to help a prosecution witness that is statutorily barred to the defendant even where it would be equally helpful.'⁵² As a result, the researchers found that the application of the 'parity principle' meant that special measures were not always applied for on behalf of prosecution witnesses who legally qualified for their use.

⁴⁹ *ibid* [86].

⁵⁰ *ibid* [86].

⁵¹ Mandy Burton, Roger Evans and Andrew Sanders, 'Protecting Children in Criminal Proceedings: Parity for Child Witnesses and Child Defendants' (2006) 18(3) *Child and Family Law Quarterly* 397, 398.

⁵² Mandy Burton, Roger Evans and Andrew Sanders, 'Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales' (2007) 11 *International Journal of Evidence and Proof* 1, 12.

Evidence of this seemed especially prominent in circumstances where the defendant and the victim/witness were both older children of similar ages; the victim was at the older end of the qualifying age bracket (ie nearing 17 years old); and/or the defendant was particularly young (ie aged 11).⁵³ Other situations in which the ‘parity principle’ was applied included where ‘allegations of mutuality or provocation’ made it difficult to decide who the ‘victim’ is.⁵⁴ If an accused was relying on self-defence, for example, awarding special measures to the ‘victim’ in these circumstances, and not to the accused was thought to risk denying ‘the accused ... of the chance to compete on equal terms, and the court the chance of supervising an equal contest’.⁵⁵

Sanders et al did not find any evidence of the operation of the parity principle in cases involving sexual assault,⁵⁶ perhaps because of the more prescriptive legislative provisions in this area.⁵⁷ However, Birch considered a hypothetical scenario in which both the complainant of a sexual assault (A) and the accused (B) are equally disabled.⁵⁸ She questioned whether, if both A and B claim to be the victim of the sexual assault, it is fair that only the complainant (A) can benefit from special measures, and that B is excluded on the sole basis that he is the accused.⁵⁹ The unfairness of the defendant’s exclusion from special measures in the context of a case involving two learning disabled individuals, particularly given the allegation of mutuality, becomes especially obvious. Applying the ‘parity principle’ to remedy this inequality – and thus denying the necessary (and available) support to the complainant –

⁵³ Mandy Burton, Roger Evans and Andrew Sanders, ‘Protecting Children in Criminal Proceedings: Parity for Child Witnesses and Child Defendants’ (2006) 18(3) *Child and Family Law Quarterly* 397, 402-403.

⁵⁴ *ibid* 403-404.

⁵⁵ See Diane Birch, ‘Evidence: Evidence via Television Link and Video Recording of Interview with Child’ [2001] *Criminal Law Review* 473, 478.

⁵⁶ Mandy Burton, Roger Evans and Andrew Sanders, ‘Protecting Children in Criminal Proceedings: Parity for Child Witnesses and Child Defendants’ (2006) 18(3) *Child and Family Law Quarterly* 397, 405.

⁵⁷ See discussion of YJCEA s 21 ‘children in need of special protection’ in section 3.2.1. (p45-46).

⁵⁸ Diane Birch, ‘A Better Deal for Victims and Witnesses?’ [2000] *Criminal Law Review* 223, 242-43. Birch notes that ‘it is well-documented that a significant percentage of perpetrators of sexual offences against adults with learning disabilities are learning-disabled themselves’.

⁵⁹ See Diane Birch, ‘A Better Deal for Victims and Witnesses?’ [2000] *Criminal Law Review* 223, 242-43.

highlights the problems inherent in this approach. To render two learning disabled court users equally disadvantaged cannot be the most desirable way to ensure ‘equality’.

There is also evidence that the essence of the ‘parity principle’ resonated in the courts. Sanders et al interviewed a prosecutor who attributed the ‘reluctance to apply for the live link ... to the anticipated approach of the courts’.⁶⁰ The way in which criminal justice agents framed the situations with which they were faced, therefore, may have been a direct result of the way in which such situations were approached in the courts within the legal field in which they worked. The case of *R v C*⁶¹ provides an example of arguments that were made for the application of the ‘parity principle’.

The trial judge in *R v C* strongly voiced his concerns for the equality of arms where the complainant in a rape trial, of a similar age to the defendant, gave evidence by live link.⁶² Ultimately he permitted the complainant to give evidence in this way since this had previously been promised to her in a pre-trial hearing by a different judge.⁶³ Nevertheless, he felt that:

... I think it was wrong to agree for that application [for live link] at that stage [the pre-trial stage], because there is no provision for a defendant of the same age [as the complainant] to give evidence other than in front of a jury live, and I certainly think it is arguable that both where there is a complainant and a defendant [in] those circumstances, one would think in terms of them both giving evidence in the same way, having regard to the fact that they are virtually the same age.⁶⁴

⁶⁰ Mandy Burton, Roger Evans and Andrew Sanders, ‘Protecting Children in Criminal Proceedings: Parity for Child Witnesses and Child Defendants’ (2006) 18(3) *Child and Family Law Quarterly* 397, 404.

⁶¹ (2001) EWCA Crim 1054 (unreported).

⁶² *ibid* [7]. The accused was 17 and the complainant was almost 17 at the time of the trial. This case was heard before the prescriptive YJCEA was in force.

⁶³ *ibid* [6]; [12].

⁶⁴ *ibid* [11]. See further [13]-[15].

This clearly shows the influence that the parity principle had on the trial judge's view. The decision to allow special measures on this basis was upheld by the Court of Appeal,⁶⁵ with no reference made to the validity of the trial judge's concerns regarding the equality of arms.

The 'parity principle' came to the fore again in *R v Camberwell Green Youth Court*.⁶⁶ The District Judges' decisions to deny special measures to child witnesses in three cases involving allegations of robbery or assault were the subject of an interlocutory judicial review on the DPP's request. Special measures had been denied as the judges perceived they would 'give rise to substantial inequality between prosecution and defence, contrary to the fair trial provisions of Article 6(1) and the right under Article 6(3)(d) to examine witnesses under the same conditions as witnesses against the defendant'.⁶⁷ This was rejected by the Divisional Court on the basis that 'the fairness of proceedings challenged by reference to Article 6 can only be judged retrospectively by reference to the trial and any appeal, not prospectively before the trial has taken place'.⁶⁸ As a result, the District Judges in the Youth Court had to provide the child witnesses in the trials with special measures.

The case was then heard on appeal in the House of Lords. The issue before the court was whether the then irrebuttable primary rule,⁶⁹ that children 'in need of special protection' are to give evidence by pre-recorded statement and live link, was Article 6 compliant. This arose since the rule prevented an 'individualised consideration of the necessity' of such a direction.⁷⁰ The House of Lords unanimously ruled that the primary rule was not in contravention of Article 6 ECHR.⁷¹ In reaching their decision, the Lords considered the issue

⁶⁵ *ibid* [13], [19].

⁶⁶ [2003] EWHC 227 (Admin).

⁶⁷ *ibid* [15].

⁶⁸ *ibid* [49].

⁶⁹ YJCEA, s 21(1)(b), now abolished by Coroners and Justice Act 2009, s 100. See section 3.2.1. (p45-46) for a discussion of the primary rule.

⁷⁰ *R v Camberwell Green Youth Court* [2005] UKHL 4 [18].

⁷¹ The relevance of this decision is limited following amendments to the YJCEA which now permit an element of judicial discretion on this matter, see YJCEA, s 21(4B).

of equality of arms, as the defence argued that application of the primary rule for non-defendant witnesses left comparably disadvantaged defendants without the same level of support.

In her leading speech,⁷² Baroness Hale acknowledged that ‘child defendants are often among the most disadvantaged and the least able to give a good account of themselves’ and that ‘increasing numbers are being committed for trial in the Crown Court where these disadvantages will be even more disabling’.⁷³ She argued, however, that ‘to deprive the court of the best evidence available from other child witnesses merely because the 1999 Act scheme does not apply to the accused ... would be ... the worst of all possible worlds’.⁷⁴ In other words, ‘the fact that the accused may need assistance to give his best evidence cannot justify excluding the best evidence of others’.⁷⁵ The solution to the unequal provision of special measures to defendant and non-defendant witnesses was not, according to Hale, to deny such support to non-defendants because defendants do not also get it.

Instead, the courts should ‘ensure that the defendant is not at a substantial disadvantage compared with the prosecution and any other defendants’.⁷⁶ Lord Rodger, in agreement with Hale, pointed to the courts’ ‘inherent jurisdiction to make an order, or to give leave, of any description in relation to such defendants who are witnesses’.⁷⁷ Adapting the proceedings for defendants, ie by removing wigs and gowns or providing intermediary support,⁷⁸ would

⁷² With which Lord Nicholls, Lord Hoffman, Lord Rodger and Lord Brown unanimously agreed.

⁷³ *R v Camberwell Green Youth Court* [2005] UKHL 4 [56] (Baroness Hale).

⁷⁴ *ibid* [57] (Baroness Hale).

⁷⁵ *ibid* [63] (Baroness Hale).

⁷⁶ *ibid* [57] (Baroness Hale).

⁷⁷ *ibid* [17] (Lord Rodger).

⁷⁸ As per the Court of Appeal in *R v SH* [2003] EWCA Crim 1208. This is discussed in the ‘intermediaries’ section 4.2.6. (p124-126).

‘ensure that the accused has a fair trial ... [including] a fair opportunity of giving the best evidence he can’.⁷⁹

In summary, the strength of the equality argument as seen through the operation of, and resistance to, the ‘parity principle’ was gaining momentum among criminal practitioners, academics, trial judges and members of the senior judiciary. The emphasis had begun to shift away from the defendant’s ability to effectively participate without special measures, towards the unfair advantage that special measures give a vulnerable and/or intimidated non-defendant witness over a comparably vulnerable and/or intimidated defendant. The more persuasive concern, however, was still that of the effective participation of defendants.

For example, in her judgment, Hale also considered the *Waltham Forest* decision that there is no inherent power to provide live link to defendants. Her obiter musings indicate that she did not agree with that conclusion. She noted ‘with respect ... [that] section 19(6) [YJCEA] makes it clear that the 1999 Act does not purport to make exclusive provision for any of the special measures it prescribes’.⁸⁰ She advised, however, that this point was ‘better taken on an appeal against conviction in which a defendant argues he was not given a proper opportunity to defend himself’.⁸¹ This almost constitutes an invitation for a future appeal on this issue. It also provides an insight into the circumstances under which live link may have been granted for defendants (ie for those unable to effectively participate as a witness) if it had been left within the domain of the common law.

The government stepped in, however, and made a late insertion into its Police and Justice Bill 2006 for a defendant live link provision.⁸² Baroness Scotland of Asthal (then Attorney General) stated that this was ‘the solution that the Government have [sic] been discussing

⁷⁹ *R v Camberwell Green Youth Court* [2005] UKHL 4 [58] (Baroness Hale).

⁸⁰ *ibid* [63] (Baroness Hale).

⁸¹ *ibid*.

⁸² Hansard, HL Deb 11 July 2006 vol 684 col 678-79 (Baroness Scotland of Asthal).

with the senior judiciary to make available to vulnerable defendants the sort of special measures that apply to vulnerable witnesses⁸³ in response to the decision in *SC v UK*.⁸⁴ This was a ECtHR decision regarding the trial of an 11 year old defendant in the Crown Court. The child defendant ‘had very low intellectual ability for his age, showed “a significant degree of learning difficulty” and his ability to reason was “noticeably restricted”, equivalent to that of an average child between six and eight years old’.⁸⁵ In light of this, steps had been taken at trial to make the ‘procedure as informal as possible’.⁸⁶ While it was held that the defendant had been fit to plead, and despite the steps that had been taken at trial, the ECtHR ruled that the defendant was not capable of participating effectively in his trial as per Article 6(1).⁸⁷ It was held that such a young and intellectually limited child should be tried in a ‘specialist tribunal’.⁸⁸

No discussion of the 1999 Act’s special measures regime, the defendant’s exclusion from it, or any concern relating to equality of arms featured in this case. Instead, it centred solely on the child defendant’s ability to participate in the Crown Court in the presence of a jury. The government rejected the ECtHR’s conclusion that child defendants should always be tried in a specialist tribunal because of: the importance of jury trials in the England and Wales; the experience of Crown Court judges at sentencing for serious crimes; and the expense and added complexity to the system that a new specialist court would entail.⁸⁹ Instead, as displayed above, the creation of the defendant live link provision was cited as the solution to the *SC v UK* decision. Baroness Scotland promoted the measure in the House of Lords, stating that ‘giving evidence via a live link from a comfortable room in the courthouse, away

⁸³ *ibid.*

⁸⁴ 40 EHRR 10.

⁸⁵ *ibid* [30].

⁸⁶ *ibid* [30].

⁸⁷ *ibid* [36].

⁸⁸ *ibid* [35].

⁸⁹ See Ben Emerson, Andrew Ashworth and Alison Macdonald, *Human Rights and Criminal Justice* (Sweet and Maxwell 2007) 11.13.

from the formality of the courtroom itself, may be less distracting and difficult than giving evidence in the courtroom’.⁹⁰

There was no objection in Parliament to the defendant live link provision⁹¹ and it was thus inserted into the YJCEA. It had been borne out of a concern for the effective participation of vulnerable defendants in their trial as witnesses. As previously highlighted, the ability to effectively participate includes the ability to give best evidence. This recognises that some defendants require additional support to give evidence when compared with other defendants, and that the live link provision is a mechanism through which this can be provided. It also puts such vulnerable defendants on a more equal footing with vulnerable and/or intimidated witnesses. Although the justification for the enactment of this provision was not explicitly one of equality, its effect is to enhance more equal treatment of vulnerable defendants in the same way that the non-defendant live link provision does for those witnesses.

The insertion of the defendant live link provision demonstrates how the decisions made in the legal field can infiltrate decisions made in the surround.⁹² Difficulties ensuring the effective participation of young defendants became apparent through national and Strasbourg case law. Furthermore, problems arose in ensuring the protection of vulnerable non-defendant witnesses, given the lack of comparable protection for defendant witnesses. The inconsistent approach taken in the law to the treatment of vulnerable and/or intimidated court users was presenting problems in the courts. The defendant live link provision went some way to remedying this inconsistency and those problems.

Furthermore, the insertion of a defendant live link provision into the YJCEA also reduces the likelihood that the application of the ‘parity principle’ at all stages of the criminal process

⁹⁰ Hansard, HL Deb 11 July 2006 vol 684 col 678-9 (Baroness Scotland of Asthal).

⁹¹ Though some of its particular terms were queried in the House of Lords – this is discussed in the context of the legislation itself below.

⁹² Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 52.

will continue to leave non-defendant witnesses without the special measures support to which they are entitled. Although the House of Lords had already condemned this practice there are at least two reasons why it seems likely to have continued. First, early decisions to deny special measures to vulnerable and/or intimidated non-defendant witnesses may result in the collapse of prosecution cases and thus not be the subject of judicial scrutiny. Second, even if the trial did go ahead without special measures, not all such cases would be the subject of a judicial review or an appeal. The enactment of the statutory provision, however, should abate this practice, and instead ensure that more court users are sufficiently protected and assisted in court.⁹³

The live link provision for vulnerable defendant witnesses, section 33A of the YJCEA, provides that:

- (1) This section applies to any proceedings (whether in a magistrates' court or before the Crown Court) against a person for any offence.
- (2) The court may, on the application of the accused, give a live link direction if it is satisfied –
 - (a) that the conditions in subsection (4) or, as the case may be, subsection (5) are met in relation to the accused, and
 - (b) that it is in the interests of justice for the accused to give evidence through a live link
- (3) A live link direction is a direction that any oral evidence to be given before the court by the accused is to be given through a live link.
- (4) Where the accused is aged under 18 when the application is made, the conditions are that –
 - (a) his ability to participate effectively in the proceedings as a witness giving oral evidence in court is compromised by his level of intellectual ability or social functioning, and
 - (b) use of a live link would enable him to participate more effectively in the proceedings as a witness (whether by improving the quality of his evidence or otherwise).
- (5) Where the accused has attained the age of 18 at that time, the conditions are that –

⁹³ And my interview findings indicate that it has done so – I asked 7 respondents if the vulnerability of the defendant would affect special measures decisions for the witnesses in the case, and was met with a unanimous, resounding, and somewhat perplexed, no.

- (a) he suffers from a mental disorder (within the meaning of the Mental Health Act 1983) or otherwise has a significant impairment of intelligence and social function,
- (b) he is for that reason unable to participate effectively in the proceedings as a witness giving oral evidence in court, and
- (c) use of a live link would enable him to participate more effectively in the proceedings as a witness (whether by improving the quality of his evidence or otherwise).

The enactment of a defendant live link provision has improved the support available to some vulnerable defendant witnesses. However, in many ways the provision of live link to defendants remains more restrictive than it is for non-defendant witnesses.⁹⁴ For example, it is not available to intimidated defendants. The only statutory criterion on which a defendant can apply is vulnerability. This is particularly curious given that, in the House of Lords debate on the live link provision, Baroness Linklater specifically highlighted its benefit for intimidated defendants. She stated that, ‘a video link may ... help a child to be less intimidated by the process of giving evidence’.⁹⁵ The omission of such a clause means that, unless all intimidated defendants are also classed as vulnerable as per section 33A, not all intimidated defendants⁹⁶ who may need and could benefit from the live link provision will be eligible for its use.⁹⁷

For adult defendants to secure the use of the live link they must be suffering from either a mental disorder or a significant impairment of intelligence and social function and as a result of this be *unable* to effectively participate in the proceedings as a witness (emphasis added).⁹⁸

This is a higher threshold than for non-defendant adults, where all that it is necessary to show

⁹⁴ See also Laura Hoyano, ‘Coroners and Justice Act 2009: Special Measures Directions Take Two: Entrenching Unequal Access to Justice?’ [2010] *Criminal Law Review* 345, 356-8; Samantha Fairclough, “‘It doesn’t happen ... and I never thought it was necessary to happen’”: Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials’ (2017) *International Journal of Evidence and Proof* (forthcoming).

⁹⁵ Hansard, HL Deb 11 July 2006 vol 684 col 685 (Baroness Linklater of Butterstone).

⁹⁶ Intimidated witnesses under the YJCEA are those in ‘fear or distress in connection with testifying in the proceedings’ (s 17). See section 3.2.2. (p46-47) for the full definition.

⁹⁷ This omission of intimidated defendants is discussed further in section 4.3 (p140-142).

⁹⁸ YJCEA, s 33A(5)(b). This point is raised by Hoyano and Rafferty in Laura Hoyano and Angela Rafferty, ‘Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction’ [2017] *Criminal Law Review* 93, 95.

is that the quality of their evidence ‘is likely to be diminished’.⁹⁹ It is also a more onerous threshold than that for child defendants, where it need only be shown that their ability to participate is ‘compromised’.¹⁰⁰

In addition, unlike for non-defendant witnesses physical disabilities or disorders¹⁰¹ are not a qualifying trigger for defendant live link. This was confirmed in *R (Hamberger) v CPS*,¹⁰² where a defendant was denied access to section 33A for reason of a heart condition, because it did not fall within the ambit of section 33A(5)(a).¹⁰³ Had the application for live link been for a non-defendant witness with the same heart condition, on the wording of section 16 it would likely have been granted. Not only, therefore, is there a cohort of defendants left disadvantaged by comparison to other defendants without physical disabilities or disorders, they may also be left at a disadvantage compared to non-defendant witnesses with the same condition.

Another way in which the defendant live link provision is more restrictive is with regards to children. As highlighted in section 3.2.1, section 16(1)(a) of the YJCEA provides that all non-defendant witnesses under the age of 18 automatically qualify for special measures. This is not the case for child defendants. Instead, in addition to being under 18, their ability to participate as a witness must be compromised by their level of intellectual ability or social functioning;¹⁰⁴ and the live link should improve this ability to participate.¹⁰⁵ As per the YJCEA, therefore, defendants under the age of 18 are not considered as inherently vulnerable, but non-defendant witnesses under the age of 18 are. As discussed in section 3.5.1.3, there is no basis upon which this distinction can be justified. It runs contrary to the

⁹⁹ YJCEA, s16(1)(b).

¹⁰⁰ See YJCEA, s33A(4)(a). Child defendants are discussed below.

¹⁰¹ See YJCEA s 16(2)(b).

¹⁰² [2014] EWHC 2814 (Admin).

¹⁰³ *ibid* [29].

¹⁰⁴ YJCEA, s 33A(4)(a).

¹⁰⁵ *ibid*.

principle of equality and limits the potential of this provision to improve the ability of all children to participate effectively as witnesses in criminal proceedings.

When this provision was debated in the House of Lords, Baroness Linklater proposed that ‘the additional requirement regarding intellectual ability or social functioning be removed ... because it is simply not fair’.¹⁰⁶ Instead, she argued that ‘the criteria for ordering special measures, for all witnesses, should be the same’.¹⁰⁷ Her approach was in keeping with the principle of equality, since making the eligibility threshold more onerous for one cohort of children over another, absent sufficient reason, runs contrary to equality. Baroness Scotland’s response to this, however, was uncompromising. She argued that ‘it should [not] be applied to all children because, if it were, we would have all children giving evidence via a video link’ and that this position would be ‘very difficult to accept’.¹⁰⁸ This response was unconvincing. Not all non-defendant child witnesses give evidence by live link, despite their automatic categorisation as vulnerable witnesses.¹⁰⁹ Thus, it is unlikely that classifying child defendants as inherently vulnerable, in the same way that child witnesses have been, would give rise to all child defendants giving evidence by live link either. Nevertheless, the statutory inequality prevailed. This means that different sections of the 1999 Act conceptualise a child’s vulnerability differently.

Finally, for all defendants (child and adult) it must also be considered as ‘in the interests of justice’ to give evidence via live link.¹¹⁰ This requirement does not exist for non-defendant witnesses. Defendants thus have yet another statutory hurdle to overcome to invoke the use of the live link. The ‘interests of justice’ test for live link use is not defined in the Act and nor

¹⁰⁶ Hansard, HL Deb 11 July 2006 vol 684 col 685 (Baroness Linklater).

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid* col 687 (Baroness Scotland).

¹⁰⁹ For example, Plotnikoff and Woolfson found that only 68% of the children in their sample used live link to give evidence. See Joyce Plotnikoff and Richard Woolfson, *Measuring up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings* (NSPCC 2009) 87-88.

¹¹⁰ YJCEA, s 33A(2)(b).

has it been the subject of discussion in the courts. This leaves the meaning of the phrase uncertain, but it arguably preserves the judge's discretion to deny the use of the live link even if all the other statutory conditions are met. Hoyano notes, however, that 'it is surely inconceivable that when a child's capacity to defend himself under normal procedures of the adversarial trial is so compromised as to meet the statutory threshold, the court would not find the superadded requirement ipso facto satisfied'.¹¹¹ Perhaps, therefore, this additional legislative hurdle for defendants has no real effect in practice.

As highlighted in section 3.5, academic concern with the exclusion of defendants from special measures developed from the enactment of the 1999 scheme.¹¹² It follows from these differences that defendant witnesses will be unlikely to give evidence by live link as frequently as their non-defendant counterparts. Despite this, specific critique of the restrictive defendant live link provision from academics in the legal field has been minimal. The Royal College of Psychiatrists has branded the additional conditions which a child defendant must meet by comparison to a child non-defendant witness as both 'anomalous and unacceptable'.¹¹³ Hoyano noted that, when the provision of live link is considered in relation to a child's capacity to give evidence, the 'differences between child defendants and other child witnesses remain unexplained'.¹¹⁴ The Law Commission has stated in its report on unfitness to plead that '[t]here is no justifiable basis for the inequality' in the provision of live link to defendants versus non-defendants.¹¹⁵ Generally, however, the defendant live link

¹¹¹ Laura Hoyano, 'Coroners and Justice Act 2009: Special Measures Directions Take Two: Entrenching Unequal Access to Justice?' [2010] *Criminal Law Review* 345, 357. In a 2017 article, Hoyano again noted that this is 'surely an otiose requirement'. See Laura Hoyano and Angela Rafferty, 'Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction' [2017] *Criminal Law Review* 93, 95.

¹¹² See section 3.5. (p.63-66).

¹¹³ Royal College of Psychiatrists, *Child Defendants* (Report no OP56, Royal College of Psychiatrists 2006) 55.

¹¹⁴ Laura Hoyano, 'Coroners and Justice Act 2009: Special Measures Directions Take Two: Entrenching Unequal Access to Justice?' [2010] *Criminal Law Review* 345, 357. See also Samantha Fairclough, "'It doesn't happen ... and I never thought it was necessary to happen": Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) *International Journal of Evidence and Proof* (forthcoming).

¹¹⁵ Law Commission, *Unfitness To Plead Volume 1: Report* (Law Com No 364, Law Commission 2016) 1.31. The Law Commission thus recommends that the defendant provision is brought into line with the non-defendant provision so that there is equality between them.

provision is cited as a progressive step towards improving the support available to vulnerable defendants.¹¹⁶ This is notwithstanding the remaining gaps in the protection it provides to vulnerable and/or intimidated defendants both by comparison to ‘normal’ defendant witnesses and vulnerable and/or intimidated non-defendant witnesses who would be able to access the live link.

Following the insertion of section 33A into the YJCEA the courts have treated the defendant live link issue, for the purposes of giving evidence, as legally settled. It is arguable that this should not be the case. In *R v Ukpabio*¹¹⁷ the subject of the appeal was the trial judge’s denial of live link to the appellant both for the duration of his evidence and in order to participate in the trial as a whole. These applications had been denied on the basis that they fell outside of the powers contained in section 33A.¹¹⁸

Counsel for the appellant argued that the court should instead rely on its inherent power to permit the live link. They contended that:

[T]he decision of the Divisional Court in the Waltham Forest case [that there is no inherent power for live link] is one which we should not follow, bearing in mind in particular that the decision was expressly doubted by Baroness Hale in R v Camberwell Green Youth Court [2005].¹¹⁹

This did not persuade the Court of Appeal to find for the appellant on the issue of the first application – live link for giving evidence. Instead, they turned to the effect of the enactment of section 33A, stating that:

[W]e can see no justification for concluding that the special measures provisions in the 1999 Act do not provide the complete statutory scheme by which evidence

¹¹⁶ Laura Hoyano, ‘The Child Witness Review: Much Ado about too Little?’ [2007] *Criminal Law Review* 849, 860; Jessica Jacobson and Jenny Talbot, *Vulnerable Defendants and the Criminal Courts: a Review of Provision for Adults and Children* (Prison Reform Trust 2009) 15; Jenny McEwan, ‘Vulnerable Defendants and the Fairness of Trials’ [2013] *Criminal Law Review* 100, 100; Ali Wigzell, Amy Kirby and Jessica Jacobson, *The Youth Proceedings Advocacy Review: Final Report* (Institute for Criminal Policy Research 2015) 6.

¹¹⁷ [2007] EWCA Crim 2108.

¹¹⁸ *ibid* [9].

¹¹⁹ *ibid* [13].

can be given by video link and which, apart from those statutory provisions, cannot be given by video link.¹²⁰

In other words, they interpreted the insertion of section 33A as eradicating the use of any other potential means by which a defendant can secure the live link *for giving evidence*. With regards to the provision of video link *for the duration of the trial*, however, the Court of Appeal ruled that:

[T]here may be circumstances, exceptionally, where that might [video link] be a sensible method of ensuring participation for a defendant who would otherwise not be able to participate properly in all or some of the trial process. Accordingly, the judge was wrong in the present case to conclude that he had no jurisdiction or power to order that the appellant could avail himself of video link facilities.¹²¹

This conclusion acknowledged the existence of an inherent power to grant the live link for purposes other than giving evidence (eg, to hear the evidence of others). The Court of Appeal's decision to uphold section 33A as the exclusive authority on defendant live link for the giving of testimony left no room for the use of inherent power for the purposes of ensuring a defendant can effectively participate *as a witness*. However, the YJCEA into which section 33A was inserted explicitly preserves the inherent powers of the courts for witnesses who are not eligible for special measures under the Act.¹²²

Given that the ambit of section 33A is much narrower than that of the non-defendant live link provision, some defendants who still do not qualify for the live link may in future claim that they cannot participate effectively as witnesses without it. In these circumstances, a potential challenge could now be mounted on the basis that the Court of Appeal's *Ukpabio* decision (that section 33A contains the only reasons for which the live link can be used to give evidence) is in conflict with the provisions of the YJCEA. The Court of Appeal in *Ukpabio* has essentially overruled the *Waltham Forest* decision that there is no inherent power for live

¹²⁰ *ibid* [14].

¹²¹ *ibid* [17].

¹²² YJCEA, s 19(6).

link, by recognising that an inherent power for live link does, in fact, exist (albeit for the purpose of participating in the whole trial and not just for evidence). The legal basis now exists, therefore, for the courts to use this inherent power to grant live link to vulnerable and/or intimidated defendants giving evidence who fall outside of the ambit of section 33A. Reliance on this inherent power could thus bridge the gaps in protection left by the existing, limited, statutory provision. As the statutory provision stands, however, the law's commitment to the principle of equality remains inconsistent with regards to all vulnerable and/or intimidated court users giving evidence.

4.2.4. Screens

In the *Waltham Forest* case, the Administrative Court confirmed that 'a range of steps ... can be taken where appropriate and necessary for facilitating a fair trial process'.¹²³ One 'familiar example' given was the power to shield a witness using a screen.¹²⁴ As discussed, section 19(6) of the YJCEA protects this inherent power:

Nothing in this [Act] is to be regarded as affecting any power of a court to make an order or give leave of any description (in the exercise of its inherent jurisdiction or otherwise) ... in relation to a witness who is not an eligible witness'.

As per Criminal Procedure Rule 3.9(3)(b),¹²⁵ therefore, the judge can permit a defendant the use of screens in order to ensure their effective participation in the trial. As discussed in section 3.5.1.2, effective participation includes 'enabling a ... defendant to give their best evidence',¹²⁶ and so the use of screens should be granted, when necessary, for this purpose. The legal provision in this area thus upholds a consistent commitment to the principle of equality, albeit through a different source of law (common law versus statute).

¹²³ *R v Waltham Forest Youth Court* [2004] EWHC 715 (Admin) [31].

¹²⁴ Established in *R v Smellie* (1919) 14 Cr App R 128.

¹²⁵ Criminal Procedure (Amendment No 2) Rules 2017, Part 3: Case Management, CPR 3.9(3)(b).

¹²⁶ Criminal Practice Directions (October 2015 edition, amended April 2016) CPD 3D.2.

4.2.5. Pre-recorded evidence in chief

The first recorded case in which the prospect of a defendant admitting a pre-recorded statement as their evidence in chief was raised was *R v SH*.¹²⁷ Evidence from a chartered psychologist revealed at trial that the defendant had an IQ of 51, could not read or write, and ‘would have considerable difficulties in following the thread of questions and in remembering the answers he had already given in his evidence’.¹²⁸ The defence considered that the use of pre-recorded testimony would be ‘less intimidating to him’.¹²⁹ The trial judge denied permission for a vulnerable defendant’s evidence in chief to be heard via a pre-recording.¹³⁰ For reasons which are irrelevant to this issue, the Court of Appeal concluded that they did not have jurisdiction to hear the appeal, but indicated their views on the matter anyway.¹³¹

LJ Kay’s obiter statements noted the concerns for ‘how this appellant with his limitations [was] going to be able to put his account before the jury so that they can adequately consider it’.¹³² This is an issue of effective participation. LJ Kay also highlighted the argument for allowing a defendant’s pre-recorded video evidence: ‘that it was wrong that a prosecution witness with similar disabilities could put forward their evidence in that way, but that the defendant could not’.¹³³ He raised two points in relation to equality. The first was ensuring the defendant is adequately assisted, with regard to his disadvantaged position in the trial due to his disability. The second was the defendant’s disadvantaged position, absent the ability to submit pre-recorded evidence, in contrast with non-defendant witnesses with similar disabilities.

¹²⁷ [2003] EWCA Crim 1208.

¹²⁸ *ibid* [3].

¹²⁹ *ibid* [3].

¹³⁰ *ibid* [5].

¹³¹ *ibid* [20].

¹³² *ibid* [22].

¹³³ *ibid* [22].

With regard to this special measure, however, LJ Kay stated that there are ‘very substantial differences between the situation, so far as a defendant was concerned, and that so far as a prosecution witness was concerned’.¹³⁴ For example, he noted that there would be no requirement that the defence disclosed the defendant’s pre-recorded interview, meaning that multiple attempts could be carried out and then the best version selected to be played at trial.¹³⁵ Furthermore, issues were foreseen in relation to who should interview the defendant and what their responsibilities were in doing so.¹³⁶ Baroness Hale echoed these concerns regarding the practicality of the measure for defendant witnesses in *Camberwell Green*.¹³⁷

As discussed in section 3.5.1, the Working Group’s reasons for excluding defendants from special measures centre on the fact that the defendant is already privy to a series of other protections that non-defendant witnesses are not. The areas which LJ Kay flagged up as problematic do not fit this pattern. Instead, they relate to difficulties providing this measure to defendants due to the logistics of its implementation arising from their different position in the trial. The Court of Appeal stated that ‘before one could conclude that a defendant is in some way disadvantaged in a way that prosecution witnesses are not’ these issues needed to be considered.¹³⁸

If these logistical matters were resolved, then the initial equality based arguments – that the defendant may need the assistance to present his evidence, and that unequal access by all court users with similar disabilities to the same provision would be prima facie wrong – may still stand. The implementation difficulties do not negate a vulnerable and/or intimidated

¹³⁴ *ibid* [23].

¹³⁵ *ibid* [24].

¹³⁶ *ibid* [23].

¹³⁷ *R v Camberwell Green Youth Court* [2005] UKHL 4 [58].

¹³⁸ *R v SH* [2003] EWCA Crim 1208 [24].

defendant's potential need for support, or the potential benefits the measure could provide.¹³⁹ Those difficulties are not, however, suitable for resolution by the judiciary.

Since *R v SH*, the Divisional Court in *Waltham Forest* ruled that no inherent power exists in relation to video link facilities.¹⁴⁰ As discussed, the Court of Appeal in *Ukpabio* found, contrary to this, the existence of an inherent power for live link, though not for the purposes of giving evidence.¹⁴¹ Whether an inherent power does exist to permit a defendant to give pre-recorded evidence is perhaps, therefore, unclear. Even if *Ukpabio* has provided the basis from which to recognise an inherent power for pre-recorded video statements, it is likely that any development of this measure would need to come from legislation so that the practical issues could be addressed by Parliament. If the legislation cannot resolve the practical issues then there is a legitimate reason to treat defendant witnesses unequally.

4.2.6. Intermediaries

Intermediaries, as discussed in section 1.2, enable more effective communication between the defendant and advocates in the trial. Research conducted by Henderson with judges and advocates found that the addition of intermediaries has 'embedded well ... is well respected and causes few problems'.¹⁴² The provision of intermediaries for defendants was first approved by the Court of Appeal in *R v SH*.¹⁴³ At first instance, an intermediary was allowed to assist a severely intellectually challenged defendant.¹⁴⁴ This was approved by LJ Kay who could find 'no reason why such a person in the exercise of the court's inherent powers should not, if the judge finds it necessary and appropriate, be allowed to act in a role equivalent to an

¹³⁹ Birch highlighted that one of the advantages of this measure is 'to capture the detail of events while recollection is relatively fresh;' something she viewed as equally relevant in relation to defendants. See Diane Birch, 'A Better Deal for Vulnerable Witnesses?' [2000] *Criminal Law Review* 223, 242.

¹⁴⁰ *R v Waltham Forest Youth Court* [2004] EWHC 715 (Admin) [87].

¹⁴¹ *R v Ukpabio* [2007] EWCA Crim 2108 [17].

¹⁴² Emily Henderson, "'A Very Valuable Tool': Judges, Advocates and Intermediaries discuss the Intermediary System in England and Wales' (2015) 19(3) *International Journal of Evidence and Proof* 154, 155.

¹⁴³ [2003] EWCA Crim 1208.

¹⁴⁴ *ibid* [5].

interpreter when the defendant is in the witness box'.¹⁴⁵ These obiter comments marked a progressive step, particularly given that the non-defendant witness provision for intermediaries contained in the YJCEA was not yet in force.¹⁴⁶

The Court of Appeal's obiter statements in *R v SH* was cited with approval by the House of Lords in *Camberwell Green Youth Court*.¹⁴⁷ However, in *C v Sevenoaks Youth Court*¹⁴⁸ the application for a 12 year old boy with complex mental health issues and limited intellectual ability¹⁴⁹ to use an intermediary was denied. Two experts at trial had argued that the provision of an intermediary would be the only way in which this defendant would be able to participate effectively in the proceedings and as a witness if required.¹⁵⁰ The District Judge initially granted this measure. He then revoked permission because there was no statutory power for defendant intermediaries under the YJCEA and his clerk (erroneously) advised him that the decision in *Waltham Forest Youth Court* (that there was no inherent power for live link) meant that no inherent power existed in relation to intermediaries for defendants either.¹⁵¹

The High Court quashed this decision, ruling that there is 'nothing in the Waltham Justice case ... which prevents the court from appointing an intermediary for a defendant pursuant to its common law powers'.¹⁵² They cited the obiter statements in *R v SH*, Hale's endorsement of such in *Camberwell Green Youth Court*, and the ECtHR judgment in *SC v UK* as support for the existence of an inherent power in relation to intermediary provision. The High Court also ruled that the inherent power to provide an intermediary went beyond merely providing

¹⁴⁵ *ibid* [25].

¹⁴⁶ The intermediary provision in the YJCEA was piloted for vulnerable non-defendant witnesses in 2004 and implemented nationally in 2007. The provision of intermediaries to vulnerable defendant witnesses thus preceded that for non-defendant witnesses.

¹⁴⁷ *R v Camberwell Green Youth Court* [2005] UKHL 4 [59] (Baroness Hale).

¹⁴⁸ [2009] EWHC 3088 (Admin).

¹⁴⁹ *ibid* [5]-[9].

¹⁵⁰ *ibid*.

¹⁵¹ *ibid* [11].

¹⁵² *ibid* [18].

an intermediary to assist a defendant to give evidence, and also applied for the duration of the trial and beforehand if required.¹⁵³

Plotnikoff and Woolfson claim that the courts extended the intermediary provision to defendants ‘[i]n an effort to redress the imbalance between witnesses and defendants’.¹⁵⁴ As noted above, however, the courts developed the intermediary provision for defendants before it was routinely available to vulnerable non-defendant witnesses. For Plotnikoff and Woolfson to be correct, therefore, would mean the common law provision to defendants was a pre-emptive move to redress a future imbalance which would arise when the non-defendant provision was implemented. However, none of the judges in the *Sevenoaks* case, *R v SH* or *Camberwell Green Youth Court* made reference to this as their rationale, or appeared motivated by a desire to achieve equality between all vulnerable court users.

Instead, the development of the defendant provision seemed to arise out of a concern for the ability of vulnerable defendants to participate effectively in their trials. This includes the ability to give their best evidence as a witness. As previously argued, ensuring effective participation captures the essence of equality since it helps to ensure that disadvantaged defendants are able to participate in proceedings as non-vulnerable defendants can, through the provision of additional support. It does also mean that the treatment of vulnerable defendants giving evidence is in line with that of vulnerable non-defendant witnesses now that their intermediary provision has been implemented.

The next stage of the development of the defendant intermediary provision came in the form of legislation. The Coroners and Justice Bill 2009 contained a defendant intermediary provision. Debate on this in the House of Lords centred on the ability of an intermediary,

¹⁵³ *ibid* [17].

¹⁵⁴ Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants* (Policy Press 2015) 248.

along with the live link (as already enacted), to enhance a defendant's effective participation in light of the ECtHR decision in *SC v UK*.¹⁵⁵ The intermediary provision was similarly introduced in the Commons as a measure which would enable defendants with a disability to participate effectively in the proceedings.¹⁵⁶ In addition, David Howarth (Shadow Secretary of State for Justice) highlighted the 'logic behind the clause ... [was] that the provision already exists to help witnesses in such circumstances, and since defendants are also often witnesses they should be offered the same facility'.¹⁵⁷ Bridget Prentice (Under-Secretary of State for Justice) further emphasised this:

...the intermediary is there to assist with communication when a person is being questioned as a witness. The clause is modelled on the vulnerable witnesses [sic] intermediary provision in section 29 of the 1999 Act, which was rolled out nationally last year after a successful pathfinder phase.¹⁵⁸

In addition to matters relating to the defendant's ability to effectively participate, therefore, there was support for equality between vulnerable court users following the implementation of the non-defendant provision. This was the first time that this particular strand of the equality argument had gained such support with regards to the provision of special measures to defendants. It increased internal coherence in the law's approach to the treatment of vulnerable court users required to give evidence. However, David Howarth noted that 'there are questions to be asked about why the criteria for defendants seem to be much stricter than those for prosecution witnesses'.¹⁵⁹ This was met with no response or justification in the Commons, and the originally proposed measure was enacted.

The Coroners and Justice Act 2009 inserted section 33BA and section 33BB into the YJCEA.¹⁶⁰ This permits vulnerable defendants to give evidence with the assistance of an

¹⁵⁵ Hansard, HL Deb 13 July 2009 vol 712 col 985.

¹⁵⁶ Hansard, Coroners and Justice Bill Deb 10 March 2009 col 587.

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid* col 589.

¹⁵⁹ *ibid* col 587.

¹⁶⁰ Coroners and Justice Act 2009, s 104.

intermediary if it is ‘required to ensure that the accused receives a fair trial’.¹⁶¹ As with the defendant live link provision, the eligibility criteria differ between adult and child defendants:

s 33BA(5) Where the accused is aged under 18 when the application is made the condition is that the accused’s ability to participate effectively in the proceedings as a witness giving oral evidence in court is compromised by the accused’s level of intellectual ability or social functioning

s 33BA(6) Where the accused has attained the age of 18 when the application is made the conditions are that –

- (a) the accused suffers from a mental disorder (within the meaning of the Mental Health Act 1983) or otherwise has a significant impairment of intelligence and social function, and
- (b) the accused is for that reason unable to participate effectively in the proceedings as a witness giving oral evidence in court.

This new provision has been criticised because it is more restrictive than the common law position which enables an intermediary to be used before, and for the duration of, the trial.¹⁶² Nevertheless, the courts maintain their inherent power to provide an intermediary in these latter circumstances. The statutory provision does generally mirror the non-defendant intermediary provision as Prentice claimed in the House of Commons.¹⁶³ The non-defendant provision is also only available to ‘vulnerable’ court users rather than ‘intimidated’ court users. While it is true that all non-defendant child witnesses automatically qualify for the use of special measures, and child defendants do not, a child witness’ prima facie eligibility for special measures does not equate to an automatic entitlement to an intermediary. The

¹⁶¹ YJCEA, s 33BA(2)(b).

¹⁶² See for example Laura Hoyano, ‘Coroners and Justice Act 2009: Special Measures Directions Take Two: Entrenching Unequal Access to Justice?’ [2010] *Criminal Law Review* 345, 359-61; Penny Cooper and David Wurtzel, ‘A Day Late and a Dollar Short: In Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales’ [2013] *Criminal Law Review* 4, 7-10; Laura Hoyano, ‘R (on the application of OP) v Secretary of State for Justice: Intermediaries – Claimant Having Learning Difficulties – Claimant Charged with Criminal Offence’ [2015] *Criminal Law Review* 79, 82; Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants* (Policy Press 2015) 248.

¹⁶³ Though Hoyano has criticised the provision for creating ‘eligibility gaps between child witnesses and child defendants on the one hand, and between child defendants and vulnerable adult defendants on the other hand, which the government has not plausibly justified, and which are susceptible to challenge under the equality of arms principle in ECHR art.6’. Laura Hoyano, ‘Coroners and Justice Act 2009: Special Measures Directions Take Two: Entrenching Unequal Access to Justice?’ [2010] *Criminal Law Review* 345, 366.

suitability of an intermediary for a child witness must still be established,¹⁶⁴ with emphasis on the ability of the witness to communicate their evidence effectively and understand the questions put to them under examination. This is the same for child defendants.

Where adult defendants are concerned, Cooper states that the wording does not go as far as that for adult witnesses in section 16(1)(b), which makes references to the quality of a witness' evidence.¹⁶⁵ However this may be immaterial, since references to a defendant's ability to participate effectively (as in the above provision) should be interpreted to include the ability to give their best evidence, as per the Criminal Procedure Rules.¹⁶⁶ This brings the provision more in line with the existing non-defendant provision. The defendant provision may still be more restrictive than the non-defendant provision, however, since adult defendants with 'reduced cognitive functioning ... or an adult who takes prescribed medication for pain relief, may also have impaired cognitive functioning but may not be so easily categorised for the purposes of making an application to the court for special measures'.¹⁶⁷ Furthermore, the statutory intermediary provision for all defendants must be deemed *necessary* to ensure a fair trial.¹⁶⁸

The legislative provision is yet to be implemented, despite Lord Carlile's¹⁶⁹ and the Law Commission's¹⁷⁰ recommendations to address this. This has resulted in two separate intermediary schemes operating in practice, something Hoyano refers to as the 'new mutation

¹⁶⁴ YJCEA, s 19(2). The child must have communication difficulties.

¹⁶⁵ Penny Cooper and David Wurtzel, 'A Day Late and a Dollar Short: In Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales' [2013] *Criminal Law Review* 4, 11.

¹⁶⁶ Criminal Procedure (Amendment No 2) Rules 2017, Part 3: Case Management, CPR 3.9(3)(b). See also Criminal Practice Directions (October 2015 edition, amended April 2016) CPD 3D.2.

¹⁶⁷ Brendan O'Mahony, Kevin Smith and Becky Milne, 'The Early Identification of Vulnerable Witnesses Prior to an Investigative Interview' (2011) 13 *The British Journal of Forensic Practice* 114, 115.

¹⁶⁸ YJCEA, s33BA(2)(b).

¹⁶⁹ Lord Carlile *Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court* (June 2014) 28.

¹⁷⁰ The Law Commission stated that it is 'essential' to implement the provision to ensure consistency, a more systemised approach and to protect the defendant's article 6 rights. See Law Commission, *Unfitness to Plead Volume 1: Report* (Law Com No 364 2016) para 2.37.

of inequality of arms'.¹⁷¹ The Ministry of Justice 'Witness Intermediary Scheme' matches and funds registered intermediaries to non-defendant witnesses who qualify for support under the 1999 Act.¹⁷² Non-registered intermediaries are available to defendants under the common law. This is an important distinction which affects the funding regimes, the availability and arguably the quality of intermediaries for the defendant,¹⁷³ as is explored in more depth in section 7.3.3.

The provision of intermediaries to vulnerable defendants, therefore, remains governed by the common law. This has continued to develop somewhat inconsistently. In *R (on the application of AS) v Great Yarmouth Youth Court*¹⁷⁴ the young defendant had ADHD and difficulties understanding complex vocabulary. The intermediary's proposed purpose was to draw the court's attention to the difficulties which may arise as a result of the defendant's issues.¹⁷⁵ This District Judge's denial of the provision, on the basis that many other youths appearing before the court also suffer such difficulties,¹⁷⁶ was the subject of judicial review.

The High Court quashed the decision, affirming that:

[T]here is a right, which may in certain circumstances amount to a duty, to appoint a registered intermediary to assist the defendant to follow the proceedings and give evidence if without assistance he would not be able to have a fair trial.¹⁷⁷

Furthermore, that an intermediary should be provided even as just a precaution, since its absence would mean that 'the risk that this claimant would not receive a fair trial would be real'.¹⁷⁸

¹⁷¹ Laura Hoyano and Angela Rafferty, 'Rationing Intermediaries under the April 2016 Criminal Practice Direction' [2017] *Criminal Law Review* 93, 96.

¹⁷² See Ministry of Justice, *The Registered Intermediary Procedural Guidance Manual* (Ministry of Justice 2015).

¹⁷³ See for Penny Cooper and David Wurtzel, 'A Day Late and a Dollar Short: In Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales' [2013] *Criminal Law Review* 4, 18-21; Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants* (Policy Press 2015) 247-79. Internal guidance for court staff is also available, *Registered and Non-Registered Intermediaries for Vulnerable Defence and Prosecution Witnesses: Guidance for HMCTS Staff* (Her Majesty's Courts and Tribunal Service 2014).

¹⁷⁴ [2011] EWHC 2059 (Admin).

¹⁷⁵ *ibid* [5].

¹⁷⁶ *ibid* [7].

¹⁷⁷ *ibid* [6].

The High Court in the *Great Yarmouth* case had further advanced the common law approach without reference to the new, but dormant, legislative provisions. This was the high water mark decision for the provision of intermediaries to vulnerable defendants for the entirety of the trial, including giving evidence. The Court of Appeal in *R v Cox*¹⁷⁹ subsequently downplayed the significance of an intermediary for ensuring a fair trial. Cox, a vulnerable defendant with complex psychiatric difficulties, a learning disability and a personality disorder, had been granted an intermediary at trial. Despite the defence's best efforts, however, an appropriate intermediary could not be found to assist the defendant.¹⁸⁰ The trial judge allowed the trial to continue without an intermediary, and personally 'play[ed] "part of the role which an intermediary, if available, would otherwise have played."' ¹⁸¹

The basis of the appeal was that the deprivation of an intermediary meant that the appellant had been unable to play a proper and effective part in the trial.¹⁸² The absence of an intermediary was, according to counsel for the appellant, a contributing factor to Cox's decision not to give evidence in his defence.¹⁸³ The Court of Appeal dismissed the appeal. They considered that '[i]t would, in fact, be a most unusual case for a defendant who is fit to plead to be found to be so disadvantaged by his condition that a properly brought prosecution would have to be stayed'.¹⁸⁴ While intermediaries may 'improve' the process, their role is not one on which the fairness of the proceedings rests.¹⁸⁵ In other words, the Court of Appeal felt

¹⁷⁸ *ibid* [9].

¹⁷⁹ *R v Cox* [2012] EWCA Crim 549.

¹⁸⁰ *ibid* [14]. The reasons for this, and other practical issues regarding intermediary provision, are discussed in section 7.3.3. (p245-52).

¹⁸¹ *R v Cox* [2012] EWCA Crim 549 [22].

¹⁸² *ibid* [15].

¹⁸³ *ibid* [25].

¹⁸⁴ *ibid* [30].

¹⁸⁵ *ibid* [29].

that the trial judge had ‘distinguished between the best practice and an acceptable sufficiency’.¹⁸⁶

On the issue of the defendant’s failure to give evidence, the trial judge had ‘carefully reminded the jury of ... the appellant’s difficulties’ when directing them on the adverse inferences that could be drawn from his silence.¹⁸⁷ Seemingly this was sufficient for the Court of Appeal. As discussed in section 3.5.1.2, a trial judge can direct the jury that adverse inferences cannot properly be drawn from the defendant’s silence, since to have heard from the defendant directly would have been undesirable due to his ‘mental condition’.¹⁸⁸ This option was at the judge’s disposal in Cox’s trial, but not invoked. The Court of Appeal did not recommend it as an additional step that could be taken to ensure fairness at trial in the absence of an intermediary. This lends further support to the conclusion reached on this issue in section 3.5.1.2 – that this legislative safeguard may be seldom used.

The decision reached in *Cox* dilutes the protection guaranteed to vulnerable defendant witnesses. The Court of Appeal advanced the view that an intermediary is merely a desirable and not a necessary measure. This runs contrary to the High Court’s view in the *Great Yarmouth Youth Court* case, where they regarded the provision of an intermediary as highly important for ensuring a fair trial. Furthermore, the Court of Appeal has endorsed the view that an intermediary’s contribution can be sufficiently fulfilled by a judge. This contradicts the High Court’s view in *C v Sevenoaks Youth Court* that ‘it is in the highest degree unlikely that [the] level of help [given by an intermediary] can be given by a lawyer’.¹⁸⁹ The reality is

¹⁸⁶ *ibid* [23].

¹⁸⁷ *ibid* [25].

¹⁸⁸ CJPOA 1994, s 35(1)(b).

¹⁸⁹ *C v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin) [17]. Henderson notes, for example, that a ‘belief that experience with ordinary children in normal life qualifies one to conduct a forensic examination, especially of a very young child, safely is, with respect to the judges and advocates involved here, problematic’. See Emily Henderson, “‘A Very Valuable Tool’: Judges, Advocates and Intermediaries discuss the Intermediary System in England and Wales’ (2015) 19(3) *International Journal of Evidence and Proof* 154, 167. This is also discussed in section 7.3.2. (p242-45) in relation to my interview findings.

likely to be the same where judges are concerned, no matter how well-intentioned they may be. Thus, Cooper and Wurtzel warn against the dangers of ‘extract[ing] a binding precedent’ from the facts in *Cox*, as although it may have been sufficient to allow the judge to assist the defendant on this occasion, on others it may not be.¹⁹⁰

In *Cox*, the Court of Appeal showed no interest in the argument that the ability to participate effectively should include the ability to give best evidence as a witness. Intermediary provision for non-defendant witnesses, however, is premised on exactly that. It is likely, therefore, that a gap remains in practice between the quality of evidence elicited from vulnerable defendants and other vulnerable court users as a result of the narrow interpretation of the defendant intermediary power.

The provision of intermediaries to defendants was also the issue in *R (on the application of OP) v Secretary of State for Justice*.¹⁹¹ The appellant had been granted a non-registered intermediary for the duration of the trial, but not a registered intermediary. It was specifically the Secretary of State’s denial of a registered intermediary to the defendant that formed the basis of judicial review, as it was submitted that this risked the defendant receiving a sub-standard service.¹⁹² The reasons for this relate to differences in training and supervision between registered and non-registered intermediaries, as discussed further in section 7.3.3.¹⁹³

The High Court directed the Secretary of State to reconsider his decision to deny the accused a registered intermediary for the purpose of giving evidence,¹⁹⁴ when ‘it is unarguable that an

¹⁹⁰ Penny Cooper and David Wurtzel, ‘A Day Late and a Dollar Short: In Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales’ [2013] *Criminal Law Review* 4, 22.

¹⁹¹ [2014] EWHC 1944 (Admin).

¹⁹² *ibid* [27].

¹⁹³ In short, the registration process for non-defendant intermediaries ensures better consistency in their abilities and the standard of their work (see p247-48).

¹⁹⁴ Rafferty LJ limited her judgment to a defendant’s testimony and not the duration of the trial, see Laura Hoyano, ‘R (on the application of OP) v Secretary of State for Justice: Intermediaries – Claimant Having Learning Difficulties – Claimant Charged with Criminal Offence’ [2015] *Criminal Law Review* 79. The Court of Appeal has affirmed that the provision of an intermediary for the duration of the defendant’s evidence, and not for the whole trial, is not illogical in *R v R* [2015] EWCA Crim 1870 [21].

individual in jeopardy should be put in the best position to do himself justice'.¹⁹⁵ Rafferty LJ continued:

We are not reassured that an arguable inequality of arms has not been revealed by a review of the legal framework and supporting information in this case. In any event, there is either a risk of unfairness or at its lowest a perceived risk of unfairness. At the point, should he elect to do so, at which he goes into the witness box, the system in place should offer the Claimant the best opportunity to do himself justice.

A moment's reflection shows why. Leaving aside the jeopardy in which he is and which crystallises at that point, the scheme as currently operated would allow a witness for the Crown to be supported by a [registered intermediary] matched by the WIS [Witness Intermediary Service] but the defendant against whom he gave evidence denied one under the same scheme. The intelligent observer would be puzzled as to why that were so.¹⁹⁶

This position is undoubtedly underpinned by the principle of equality and a concern for the law's consistency in its approach to assisting vulnerable court users giving evidence. The provision of a non-registered intermediary was considered insufficient. Registered intermediaries are, at least perceived, to provide superior support to non-registered intermediaries,¹⁹⁷ and should thus be available to vulnerable defendants who qualify for intermediary use.

The provision of a registered intermediary to a vulnerable defendant is thus important, as per Rafferty LJ's judgment, for two reasons. First, to ensure that a defendant can 'do himself justice' when giving evidence, through the provision of the best available support. Second, because vulnerable non-defendant witnesses already have access to the best support available, and there is no reason for differentiating between them and vulnerable defendants. The

¹⁹⁵ *R (on the application of OP) v Secretary of State for Justice* [2014] EWHC 1944 (Admin) [41].

¹⁹⁶ *ibid* [46] - [47].

¹⁹⁷ This was supported in Henderson's research by two judges who 'suggested that unregistered intermediaries appointed for defendants are less experienced, less qualified and of less assistance than their registered counterparts'. See Emily Henderson, "A Very Valuable Tool": Judges, Advocates and Intermediaries discuss the Intermediary System in England and Wales' (2015) 19(3) *International Journal of Evidence and Proof* 154, 165. This issue is further discussed in section 7.3.3. (p245-52).

defendant's right to legal representation, their non-compellability and other adjustments available to the court did not affect her view that vulnerable defendants should be treated the same as vulnerable witnesses. In short Rafferty LJ had concluded that all vulnerable court users should have equal access to intermediaries of the same calibre, via the same scheme.

Rafferty LJ's judgment indicates the existence of disagreement within the appellate courts as to the necessity of an intermediary for vulnerable defendants. Rafferty placed central importance on the ability of defendants to 'do themselves justice' when giving evidence with the assistance of an intermediary. It is implicit in her argument that an intermediary of some description is required. This runs contrary to the binding authority from the Court of Appeal in *Cox*; that an intermediary is desirable rather than necessary.¹⁹⁸

The law on defendant intermediaries is left in a complex state. As discussed, in *Cox* the Court of Appeal downplayed the importance of an intermediary for defendants. This was followed by the High Court in *R(OP)* ruling that it should be registered intermediaries which are provided to eligible defendants, with the emphasis placed on the importance of comparable support between vulnerable court users. The current law, therefore, is that even if an intermediary is granted in principle it is not essential for a fair trial that one is actually employed, as the judge can play the role an intermediary would otherwise have played. If an intermediary *is* (successfully) sought, however, then the interests of fairness require that it should be a registered intermediary, as non-registered intermediaries are not as good. These two points of law, while not directly in conflict, are difficult to reconcile.

The Lord Chief Justice has provided guidance on the issue of defendant intermediaries in the Criminal Practice Directions. This has recently been the subject of some amendments. The October 2015 guidance regarding the provision of intermediaries to defendants was that:

¹⁹⁸ The Defendant (the Ministry of Justice) relied on *R v Cox* in their response to the case (at [30]), but this authority was not referred to again in the High Court decision.

3F.3 A court may use its inherent powers to appoint an intermediary to assist the defendant's communication at trial (either solely when giving evidence or throughout the trial) and, where necessary, in preparation for trial.¹⁹⁹

The equivalent direction in the April 2016 version, which has remained unchanged in the October 2016 update, now seeks to regulate when this inherent power can be used:

3F.13 The court may exercise its inherent powers to direct appointment of an intermediary to assist a defendant giving evidence or for the entire trial ... Directions to appoint an intermediary for a defendant's evidence will ... be rare...²⁰⁰

The new guidance in the Criminal Practice Directions indicates that, although the power to grant an intermediary for the purposes of giving evidence exists, it is a power which will be seldom used.²⁰¹ This reasserts the Court of Appeal's authority in *Cox* but marks a change in tone²⁰² and an emphasis on the rarity of circumstances in which an intermediary will be deemed a necessary adaption. Hoyano and Rafferty assert that this Criminal Practice Direction is:

[C]learly inconsistent with the Criminal Procedure Rules requiring the court to take every reasonable step to facilitate the participation of defendants in the proceedings ... clearly dissonant with the *Equal Treatment Bench Book*, the Equalities Act 2010, and the United Nations Convention on the Rights of Persons with Disabilities.²⁰³

Nevertheless, the Lord Chief Justice reasserted the position taken in the 2016 Criminal Practice Direction when handing down judgment in *R v Rashid*.²⁰⁴ The relevant ground of appeal was in relation to the trial judge's refusal to allow the applicant an intermediary for the duration of the trial, and instead merely granting one for the duration of evidence. Leave to

¹⁹⁹ Criminal Practice Directions (October 2015 edition) CPD I General Matters, 3F: INTERMEDIARIES, 3F.3.

²⁰⁰ Criminal Practice Directions (October 2015 edition, amended April 2016 and October 2016) CPD I General Matters, 3F: INTERMEDIARIES 3F.13.

²⁰¹ Hoyano and Rafferty note that they are unaware of any court judgment that 'ever stated that appointments for defendants should be rare'. Laura Hoyano and Angela Rafferty, 'Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction' [2017] *Criminal Law Review* 93, 100.

²⁰² Since this chapter was drafted, Hoyano and Rafferty have independently made a very similar observation, noting the 'remarkable change in tone and content' in the Criminal Practice Directions their 2017 article, Laura Hoyano and Angela Rafferty, 'Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction' [2017] *Criminal Law Review* 93.

²⁰³ *ibid* 104.

²⁰⁴ *R v Rashid* [2017] EWCA Crim 2.

appeal was refused, and the Lord Chief Justice emphasised with regard to intermediary use for evidence that:

In the overwhelming majority of cases, competent legal representation and good trial management will [assist the defendant to give his best quality evidence]. There may be rare cases where what is provided by competent legal representation and good trial management is insufficient because of the defendant's mental or other disability. What may then be required is an intermediary.²⁰⁵

This reiterates two points from previous cases. First, the rarity with which intermediaries can be invoked for vulnerable defendants giving evidence in their defence. Second, the significance placed on criminal practitioners' seeming abilities to ensure that a vulnerable defendant can adequately participate in their trial and give their best evidence.

The Lord Chief Justice's 2016 amendment to the Criminal Practice Directions also indicates that, despite the authority in *R(OP)*, current practice with regards to sourcing defendant intermediaries remains the same.²⁰⁶

3F.15 The WIS [Witness Intermediary Service] is not presently available to identify intermediaries for defendants (although in *OP v Secretary of State for Justice* [2014] EWHC 1944 (Admin), the Ministry of Justice was ordered to consider carefully whether it were justifiable to refuse equal provision to witnesses and defendants with respect to their evidence). 'Non-registered intermediaries' (intermediaries appointed other than through the WIS) must therefore be appointed for defendants. Although training is available, there is no accreditation process for non-registered intermediaries and rates of payment are unregulated.²⁰⁷

Two types of intermediary are thus still operational in the criminal justice system despite Rafferty LJ's decision in *OP*: registered intermediaries for non-defendant witnesses and non-registered intermediaries for defendant witnesses. Presumably this will not change unless the

²⁰⁵ *ibid* [73] (Lord Thomas).

²⁰⁶ A point which, again, has independently been raised by Hoyano and Rafferty in Laura Hoyano and Angela Rafferty, 'Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction' [2017] *Criminal Law Review* 93, 101.

²⁰⁷ Criminal Practice Directions (October 2015 edition, amended April 2016 and October 2016) CPD I General Matters, 3F: INTERMEDIARIES 3F.15

still dormant defendant intermediary provision is implemented by the government so that the Witness Intermediary Scheme can also serve defendants.²⁰⁸

All of this leaves vulnerable defendant witnesses in an unsatisfactory position when giving evidence. The infrequent provision of intermediaries to vulnerable defendant witnesses puts them at a disadvantage by comparison to non-vulnerable defendant witnesses. Several judges and advocates have expressed strong concerns about this.²⁰⁹ Furthermore, even those defendants who successfully secure the use of a (non-registered) intermediary are at risk of receiving a service which is inferior to that received by registered intermediary.²¹⁰ As a result, the quality of the support received by vulnerable court users is potentially unequal, even when an intermediary is provided. The law's commitment to the principle of equality via the intermediary provision is thus inconsistent between vulnerable court users.

4.2.7. Pre-trial cross-examination

The possibility of pre-trial cross-examination of vulnerable defendants has not arisen in the courts or Parliament. This is unsurprising given that the measure was only piloted for child non-defendant witnesses in 2015²¹¹ and its national implementation is expected to begin in late 2017.²¹² Nevertheless, the decision in *Waltham Forest*, that no inherent power exists for 'the use of video facilities,'²¹³ is likely to extend to pre-trial cross-examination.²¹⁴ Similarly to pre-recorded statements for evidence in chief, it is likely that only Parliament can affect change in this area to respond to potential implementation issues.

²⁰⁸ As discussed in section 7.3.3. (p245), this scheme can only provide intermediaries granted under statutory power.

²⁰⁹ Emily Henderson, "'A Very Valuable Tool'": Judges, Advocates and Intermediaries discuss the Intermediary System in England and Wales' (2015) 19(3) *International Journal of Evidence and Proof* 154, 162.

²¹⁰ See section 7.3.3. (p248).

²¹¹ YJCEA, s 28. Judiciary of England and Wales, *Section 28 of the Youth Justice and Criminal Evidence Act 1999: Pre-recording of Cross-examination and Re-examination* (Judicial Office 2014).

²¹² Simon Drew and Linda Gibbs, 'A United Approach' (March 2017) *Counsel Magazine*. Liz Truss, the Secretary of State for Justice, has announced that the measure will be available for rape complainants from September 2017, see Hannah Summers, 'Rape victims to be spared ordeal of cross-examination in court' *The Guardian* (19 March 2017).

²¹³ *R v Waltham Forest Youth Court* [2004] EWHC 715 (Admin) [87].

²¹⁴ Though *R v Ukpabio* [2007] EWCA Crim 2108 [17] could provide grounds for distinguishing from this.

4.3. Summary of current law

The most prominent motivation in both the courts and in Parliament for the expansion of special measures provisions to vulnerable and/or intimidated defendants has centred on the defendant's ability to effectively participate as a witness. As argued in section 3.6, the disadvantaged position in which vulnerable and/or intimidated defendants find themselves by comparison to 'normal' defendants requires redress. The provision of special measures to the former cohort of defendants seeks to put them on a more equal footing with non-vulnerable and/or non-intimidated defendants for the purpose of giving evidence. A concern for effective participation, therefore, can be conceived of as a concern for equality among all defendant witnesses.

Throughout the development of the law, support was also evident for the equal treatment of all vulnerable and/or intimidated court users, whether defendant or non-defendant. This line of argument was ultimately less persuasive to the judiciary, but was still deemed worthy of a hearing in court and Parliament. Ultimately, the extension of some special measures provisions to some vulnerable and/or intimidated defendant witnesses improves the internal consistency of the law of special measures. Overall, however, the law's commitment to the principle of equality remains patchy and thus incoherent.

It is evident that the provision of special measures to vulnerable and/or intimidated defendant witnesses is governed through a motley collection of active and inactive statutory provisions and the courts' inherent power, as acknowledged in the common law, Criminal Procedure Rules and Criminal Practice Directions. Statutory provisions exist for vulnerable defendants to give evidence by live link²¹⁵ or with the assistance of an intermediary.²¹⁶ The defendant intermediary provision has not yet been implemented. The courts have, however, granted

²¹⁵ See YJCEA, s 33A, as inserted by Police and Justice Act 2006, s 47.

²¹⁶ See YJCEA s 33BA, as inserted by Coroners and Justice Act 2009, s 104.

intermediary use to vulnerable defendants using their inherent power.²¹⁷ Following the Court of Appeal's acknowledgement of an inherent power to grant live link in *Ukpabio*, a future appeal may see the limited live link provision under section 33A expanded. The courts' inherent power also permits the removal of wigs and gowns,²¹⁸ the ability to close the court to the public for the duration of a child defendant's evidence,²¹⁹ the provision of communication aids,²²⁰ and the provision of a screen²²¹ from behind which the defendant can give their evidence.

It is unclear whether an inherent power exists to allow the defence to admit a pre-recorded statement as the defendant's evidence in chief.²²² The possibility of pre-trial cross-examination of vulnerable defendants has not arisen in the courts or Parliament. It is likely that new legislation will be required for either of these measures to be provided to vulnerable and/or intimidated defendants.

Prevailing inequalities between defendant and non-defendant special measures have been pinpointed at the relevant junctures in this chapter. One such inequality is the lack of provision of the live link to 'intimidated' defendant witnesses under the YJCEA. Further exploration of this 'intimidated witness' category²²³ reveals that the criteria contained within it could be extended to include defendants.²²⁴ A defendant may be 'in fear or distress in connection with testifying in the proceedings' due to the nature and circumstances of the offence with which they are tried. This was clearly the case in the trial of T and V for the

²¹⁷ *C v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin).

²¹⁸ Criminal Practice Directions (October 2015 edition, amended April 2016 and October 2016) CPD I General Matters, 3G: VULNERABLE DEFENDANTS 3G.12.

²¹⁹ *ibid* 3G.13.

²²⁰ Criminal Procedure (Amendment No 2) Rules 2017, Part 3: Case Management, CPR 3.9(3)(b).

²²¹ *R v Waltham Forest Youth Court* [2004] EWHC 715 (Admin) [57].

²²² *ibid* [87]; *R v Ukpabio* [2007] EWCA Crim 2108 [17].

²²³ YJCEA, s 17. Hall notes how the language of section 17 suggests (erroneously) that a defendant would not need special measures under this provision, see Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan Publishing 2009) 32-33.

²²⁴ Interestingly, under the Victims and Witness (Scotland) Act 2014, s 10(1)(b) the factors the YJCEA separates into vulnerability (s 16) and intimidation (s 17) are amalgamated into one 'vulnerable witness' category. This seems a more apt way to describe the circumstances contained within s 17.

murder of two year old James Bulger.²²⁵ The public outrage at the defendants' acts, which was expressed both outside and within the courtroom, was recognised by the ECtHR as a source of fear and distress for the 11 year old defendants.²²⁶ In addition, just as the age, social, cultural, ethnic, religious, political or employment circumstances of a non-defendant witness could result in their fear or distress,²²⁷ so too could these factors have this same effect on a defendant witness. Finally, a defendant might be intimidated in court by, inter alia, the behaviour of a co-defendant²²⁸ or their supporters; the presence of rival gang members; or, for instance, the aggrieved father of a complainant in the public gallery.

That these criteria are only applicable to non-defendant witnesses under the Act fails to recognise that defendants can find testifying in the proceedings difficult for the same reasons.²²⁹ Furthermore, the victim-centric drafting of the provision means that situational vulnerabilities to which only a defendant may be exposed are overlooked. For example, the gravity of the charges with which the defendant is faced, and the potentially pivotal importance of their evidence with respect to these, may add to their distress and affect their ability to participate effectively as a witness. As one of my respondents told me:

I think it is difficult because when you represent young people, and quite a lot of the kids you represent these days are [accused of] child sexual offences, they [the child defendants] are absolutely shitting themselves. You can tell that they are on the verge of losing control of their dignity they are so frightened. [R3]

These sources of a defendant's distress are not recognised within the YJCEA in the way that they are for non-defendants. The interests of equality require that the different circumstances in which defendants may be vulnerable when giving evidence should be recognised and catered for under the Act. The current failure of the law to do this means that the protective measures contained in the YJCEA are not sufficiently available to intimidated defendant

²²⁵ *T and V v UK* (1999) 30 EHHR 121.

²²⁶ *ibid* [47].

²²⁷ See YJCEA, s 17(2).

²²⁸ As in *Waltham Forest Youth Court*, for example.

²²⁹ This is explored further in section 6.2. (p197-222).

witnesses. This leaves them disadvantaged by comparison to both non-intimidated defendants and to non-defendant witnesses who have the benefit of a special measure; running contrary to the principle of equality and marking yet further incoherence in the law.

The law of special measures for vulnerable and/or intimidated defendant witnesses thus lacks a consistent commitment to the principle of equality that the law for vulnerable and/or intimidated non-defendant witnesses embodies. It is curious, therefore, that McEwan considers the statutory provision of live link and intermediaries (despite the latter provision remaining dormant) to have addressed ‘concerns that child defendants could be at a disadvantage when juvenile witnesses availed themselves of special measures in order to testify against them’.²³⁰

Table 4.1 provides a snap shot of the prevailing inequality, as well as highlighting the various sources of law which govern the availability of special measures. The cells shaded in light grey denote the special measures which are not available for any intimidated court user. The cells in dark grey are those which are only unavailable for vulnerable and/or intimidated defendant witnesses, despite their provision for such non-defendant witnesses.

²³⁰ Jenny McEwan, ‘From Adversarialism to Managerialism: Criminal Justice in Transition’ (2011) 31(4) *Legal Studies* 519, 535.

Table 4.1: Legal provision of special measures

	Non-defendants		Defendants	
	Vulnerable	Intimidated	Vulnerable	Intimidated
Wigs and Gowns	Statute	Statute	Inherent power (CPD)	Inherent power (CPD)
Evidence in Private	Statute	Statute	Inherent power (CPD)	Inherent power (CPD)
Communication aids	Statute	No power	Inherent power (CPR)	No power
Screens	Statute	Statute	Inherent power (case law)	Inherent power (case law)
Live link	Statute	Statute	Statute * Inherent power?	Inherent power?
Intermediaries	Statute	No power	Unimplemented statute – inherent power (case law)	No power
Pre-recorded video statement	Statute	Statute	No power	No power
Pre-trial cross-examination	Statute	Statute	No power	No power

*Excluding physical disability, and child defendants are not automatically eligible.

CPD = Criminal Practice Directions; CPR = Criminal Procedure Rules

Leaving the inequality (temporarily) aside, one might argue that the source of the law is unimportant so long as the ability to secure special measures for vulnerable and/or intimidated defendant witnesses exists. However, from a black letter perspective, the current legal position with regards to defendant special measures is somewhat uncertain. For instance: can an inherent power for live link now bolster the protection offered by section 33A;²³¹ what effect will the implementation of section 33BA (defendant intermediary provision) have, and when, if ever, will this occur; should the Criminal Practice Direction on the provision of non-registered intermediaries to defendants be followed, or should the High Court's judgment in *R(OP)* have eradicated non-registered intermediaries?²³²

From a socio-legal perspective, the scattered provisions and issues relating to their legal effect create problems for the legal profession in ascertaining what the law is – what is available to vulnerable and/or intimidated defendant witnesses? Furthermore, the lack of statutory authority for intermediaries is at the root of the dual-intermediary system currently in operation, since the Witness Intermediary Service serves only those eligible for an intermediary under statutory power. The effect that these matters have on the operation of the law is an empirical question which is explored in the next chapters through an examination of the insights into the operation of special measures law in practice gained through interviews with members of the legal profession on their experiences.

²³¹ The uncertainty of the courts position on this is also evident in a toolkit for the legal profession which states that '[t]he criteria for a live link *may* preclude an application by a defendant who is at risk of intimidation ...' (my emphasis). See The Advocate's Gateway, 'Effective Participation of Young Defendants' (Toolkit 8, The Council of the Inns of Court 2017) para 8.2. These toolkits have been endorsed by the Lord Chief Justice as providing examples of 'best practice' for the legal profession, see Criminal Practice Directions (October 2015 edition, amended April 2016) CPD 3D.7.

²³² On this latter issue regarding the status of Criminal Practice Directions versus case law, the hierarchy is not easily discovered. (See Francis Bennion's 'Practice Directions: A Need for Order?' (8 July 2005) *Justice of the Peace* (Now Criminal Law and Justice Weekly) 508. <<http://www.francisbennion.com/pdfs/fb/2006/2006-029-jpn051a-need-for-order.pdf>> accessed 7 October 2016. Bennion notes that he has even written to the President of the Queen's Bench Division regarding the uncertain status of practice directions). The Lord Chief Justice issues the Criminal Practice Directions under power from the Courts Act 2003, s 74 (amended by the Constitutional Reform Act 2005), making them a form of delegated legislation.

4.4. Conclusion

In this chapter, I have demonstrated how the law relating to special measures has developed for vulnerable and/or intimidated defendant witnesses. I have shown that the primary motivation was (and still is) the desire to ensure that these defendants can effectively participate as witnesses in their trials. This is in keeping with the principle of equality evident in development of the law for vulnerable and/or intimidated non-defendant witnesses. A secondary motivation which underpinned the law's development for such defendants was the unequal position in which they were left absent the provision of special measures, when compared to their non-defendant counterparts. Again, this is in keeping with the principle of equality.

Despite these developments, however, the provision of special measures to vulnerable and/or intimidated defendant witnesses still falls short of that provided to such non-defendant witnesses. Leaving aside the potential implementation issues associated with pre-recorded evidence for defendants, there is no justified basis for the differential provision of special measures to vulnerable and/or intimidated court users. This means that the law remains internally incoherent with regards to its treatment of such court users giving evidence in Crown Court trials.

I have also illustrated in this chapter how the development of the law for vulnerable and/or intimidated defendant witnesses has been largely court driven. Though there has been some legislative intervention, it has been minimal and reactive to the common law developments. This is in stark contrast to the way in which the law developed for such non-defendant witnesses. I have shown, as per Hawkins' framework, how the decisions and views of criminal practitioners have influenced the developments within the legal field with regards to defendant witnesses, and ultimately how this has led to developments from within the surround. This is discussed further in the section 5.5.2.

While the courts are slowly bridging the gap in protection between vulnerable and/or intimidated defendants and similarly disadvantaged non-defendants that special measures provide, the pace of change is determined largely by defence lawyers' willingness and ability to challenge the law through appeals and judicial review. This renders it important to consider defence lawyers' knowledge about, and attitudes towards, vulnerability and intimidation, special measures, and their use in Crown Court trials. In addition, the working conditions in which the legal profession operates become an important part of the story of defendant special measures. There may be, for example, opportunities for law reform that defence lawyers are overlooking, whether inadvertently or deliberately, and appeals that some judges reject on the basis of other priorities.

Looking to the operation of the law also enables an assessment of the effect that the nature of the existing reforms (piecemeal and incomplete) has on the law's accessibility and its implementation by the legal profession. This provides a further reason to examine how lawyers think and act in relation to special measures for defendants. The following chapter accordingly presents a snapshot of my empirical data, which offers an insight into how special measures law operates in Crown Court trials. This provides the basis from which to consider the level and coherence of the commitment to the principle of equality in the provision of special measures in practice.

CHAPTER 5: AWARENESS

5.1. Introduction

The previous chapters have shown the development of the law of special measures and demonstrated the absence of a consistent commitment to the principle of equality within this. This chapter marks a shift away from considering the law in books to explore the use of special measures by vulnerable and/or intimidated court users in practice and the commitment to the principle of equality within this provision. This begins with an overview of the findings from the interviews conducted for this research and an outline of how this data should be regarded going forward.

The main body of this chapter embarks on a more in depth exploration of the findings from my interviews. I explore the extent to which the respondents were aware of the legal provisions for special measures available to vulnerable and/or intimidated court users. This is followed by an analysis of some potential reasons for the different levels of awareness of special measures provisions that my respondents conveyed with regards to non-defendants versus defendants. In the final section of this chapter I evaluate insights into the legal profession's ability to accurately identify vulnerability, and whether this differs depending on the type of witness with which they are faced.

Throughout this analysis I consider the legal profession's commitment to the principle of equality in their approach to the vulnerable and/or intimidated. This enables me to consider whether the treatment of vulnerable and/or intimidated court users giving evidence in Crown Court trials, through the provision of special measures, is approached with any consistency.

5.2. Snapshot of findings

In my interviews I sought to obtain an insight into the operation of special measures law in practice according to my respondents' experiences in Crown Court trials. The nature of the sample and the methods adopted in the interviews were outlined in Chapter 2. Table 5.1 illustrates respondents' experiences of the use of live link, intermediaries, screens and pre-recorded evidence in chief in Crown Court trials. Due to time constraints these were the four measures focused on in interview, as I perceived them to be the more 'intrusive' special measures. In other words, they are the measures which most drastically alter the 'traditional' mode of giving evidence (live, in court). The interviews concentrated in particular on live link and intermediaries. This was because these measures are the two which have been the subject of most debate and development regarding defendants, as illustrated in Chapter 4. I thus asked all 18 respondents directly about their experiences in relation to defendants using the live link and intermediaries.¹

The data relating to the use of pre-recorded evidence and screens for defendants should be treated more cautiously. Due to the semi-structured and fluid nature² of the interviews I allowed the respondents, to an extent, to lead the discussion on special measures so that I could try to understand the various issues that are at play in practice. This meant that there was some inconsistency between the interviews with regards to whether screens and pre-recorded evidence in chief were discussed in depth for all witnesses. As a result of this inconsistency, the data in relation to these two measures in so far as it applies to defendants should be treated as only reflecting the views and experiences of a sub-set of those interviewed. One should, therefore, be cognisant of the possibility that the figures for defendant witnesses may underestimate the use of screens and pre-recorded evidence.

¹ See Appendix 1 for interview guide.

² See section 2.4.2 (p30-35).

The removal of wigs and gowns and the use of evidence in private and communication aids were raised less frequently in interview and so I do not have the breadth of data required to incorporate it in the forthcoming analysis.³ I have also omitted pre-recorded cross-examination from discussion because at the time of my interviews this measure had not been implemented nationally.⁴

The references in table 5.1 to ‘direct use’ are to trials in which the respondent participated where a vulnerable and/or intimidated court user used special measures. ‘Awareness of use by others’ refers to the respondent having heard about other trials in which a vulnerable and/or intimidated court user has used special measures, in which they had no direct involvement.

	Defendant witnesses		Non-defendant witnesses	
	Direct use	Awareness of use by others	Direct use	Awareness of use by others
Live link	2	2	18	18
Intermediary	8	2	18	18
Pre-recorded evidence in chief	0	0	18	18
Screens	2	0	18	18

³ My overall impression from the interviews was that these measures (removal of wigs and gowns, communication aids and giving evidence in private) were used by non-defendant witnesses. With regards to defendants, the removal of wigs and gowns was referred to as ‘uncontentious’ [B1]; the measure invoked for defendants ‘most often’ [R2]; and something experienced ‘loads of times’ [J3]. J4 asserted that there is ‘no disparity’ in relation to the removal of wigs and gowns and aids to communication for defendant and non-defendant witnesses. However, only one respondent disclosed having experienced a defendant giving evidence in private [J5], and B2 and J4 highlighted their concerns for the compatibility of this measure for defendants with the principle of open justice.

⁴ For non-defendant witnesses (though see section 3.2.(p44 note 7) for a discussion of the future plans surrounding this measure for vulnerable non-defendant witnesses). There are no plans for this to be enacted for defendant witnesses.

The difference in the respondents' experiences of trials in which vulnerable and/or intimidated non-defendant witnesses had used special measures as compared to defendants is clear. Special measures were used much less frequently for defendant witnesses:

They're [special measures for defendants] very rare I think, aren't they? [J3]

No defendant I've ever seen has ever used special measures. I haven't even heard of that many, if I'm honest. [PS1]

It [live link for defendants] doesn't happen. I've never had a case where it has happened and I've never thought it was necessary to happen... [J1]

As illustrated in table 5.1, two respondents had been involved in trials where there was successful implementation of the live link for a defendant witness (B1 and B4). In addition, one respondent (R3) had heard about B1's trial involving live link and another (DS1) had heard anecdotally of another case in which a defendant had used the live link provision. These responses represent discrete incidents in which the respondents had experienced the live link used by a defendant to give evidence.

The most frequently used special measure for defendants was the intermediary. Eight of the respondents (R1, B1, B3, R3, J1, J2, J3 and J4) had been involved in a maximum of two trials where a vulnerable defendant gave evidence with the assistance of an intermediary. A further two respondents (R2 and B2) knew of a case in which this had happened, but had no direct involvement.

None of the respondents disclosed knowledge of any use in trials they had participated in, or in trials involving others, of vulnerable and/or intimidated defendants using a pre-recorded statement as their evidence in chief. Only two of the respondents (B4 and DS1) reported participating in a trial in which a defendant used screens to give evidence in their trial. No

other respondent reported having heard even anecdotally of the use of this special measure by defendant witnesses.

The low uptake of special measures by defendant witnesses does not seem, on the evidence, to be the result of denied applications. This is because only one respondent (DS3) reported having applied for, but failing, to secure live link and screens for a vulnerable client. Instead, it seems that applications for defendants are less frequently made:

My experience is that applications for special measures for the defendant are rarely made. [J1]

The application [for defendant special measures] is never made. [J4]

This supports existing research on the success of special measures applications for non-defendant witnesses. Roberts et al found that when special measures were applied for, the overall success rate was 98%.⁵ Furthermore, Charles found that of applications considered by the court, 83% were granted.⁶

In contrast to defendant witnesses, each of the respondents had, on multiple occasions, been involved in trials where special measures were used by non-defendant witnesses in Crown Court trials, and knew of other such trials in which this had occurred. The unequal provision in law of special measures between defendant and non-defendant witnesses was cited by some respondents as the reason for the lower uptake of them by defendants. Given the prevalence of vulnerability among defendants,⁷ however, one might have expected that the respondents would have had more experience of defendants using special measures. The substantial disparity experienced by the respondents seems to require an explanation which

⁵ Paul Roberts, Debbie Cooper and Sheelagh Judge, 'Monitoring Success, Accounting for Failure: The Outcome of Prosecutors' Applications for Special Measures Directions under the Youth Justice and Criminal Evidence Act 1999' (2005) 9 *International Journal of Evidence and Proof* 269, 276. Roberts et al theorised that this high success rate was because the CPS was too conservative in the applications it pursued to court and made only 'sure-fire' applications.

⁶ Corinne Charles, *Special Measures for Vulnerable and Intimidated Witnesses: Research Exploring the Decisions and Actions taken by Prosecutors in a Sample of CPS Case Files* (Crown Prosecution Service Research Team, April 2012) 42.

⁷ See section 3.5.1.3. (p83-86).

extends beyond the narrower legal provision of special measures to vulnerable and/or intimidated defendants.

This is further supported by a distinction that emerged within the interviews between the use of special measures by prosecution and defence non-defendant witnesses. For prosecution witnesses, the use of special measures seems somewhat routine:

I think they are now regarded, certainly by judges and advocates, as an anodyne commonplace now. [R4]

There's become rather a bureaucratic and unthinking attitude towards special measures. Box-ticking. 'You're a witness; you know you can have special measures; which one do you want?' without really thinking about whether they need them. [J2]

They are routinely applied for. [DS1]

...they are considered to be usual measures rather than special measures these days. [PS1]

...special measures are thrown around too often. [PS2]

There is a tick box [for special measures] on the [Plea and Case Management] form; but I think routinely the CPS tick yes and defence tick no, and it's almost become nothing more than a routine now. [DS1]

As evidenced from the last quote from DS1, for non-defendant defence witnesses the respondents had not experienced a comparably high use of special measures:

[I] can't recall a case where special measures have been applied for for defence witnesses. I can envisage circumstances where it would be perfectly proper, but I've not known it arise ... Far more common for prosecution. [R1]

I've never seen a special measures application for a defence witness. [R2]

I don't think I've ever needed to make an application for a defence witness' special measures. [B2]

...I do find it a bit odd that [special measures] haven't been incorporated in the way they might for defence witnesses. [R3]

...I've seen far fewer [special measures applications] from the defence. [R4]

It's very rare [a special measures application for a defence witness]. [J2]

... they don't [the defence] apply by and large for special measures for their own witnesses. [J4]

I think the defence are less prone to apply. [DS3]⁸

Do you know, I don't think I have [seen a defence witness special measures application]. I can't think of any ... Unless you include aids to communication, in which case, yes, interpreters and the like. But nothing beyond that. [J5]

This breadth of quotes indicates that, despite the legal parity in the provision of special measures to all non-defendant witnesses, there is not parity in practice. This is supported by data present in The Advocate's Gateway toolkit on intermediaries. It notes that on average, there are 530 requests for an intermediary per month, mostly for prosecution witnesses with only a handful of these per year for defence witnesses.⁹ This disparate practice was evocatively referred to by one respondent:

...you have a 15 year old witness for the prosecution – it sounds awful to say – but they're sat on their velvet cushion, given Turkish delight and wrapped up in a big old cloak. And if they're on the defence side ... they're just ... they're not forgotten but they're certainly overlooked to a degree. [R3]

It seems, therefore, that there is procedural inequality between non-defendant defence and prosecution witnesses in practice. This is because one group is treated differently (not provided special measures) to the other (who is), presumably absent a sufficient justification. As a result, the law's commitment to the equality principle for non-defendant witnesses in law does not seem consistent in its operation. This is a further indication that an explanation for the differential uptake in special measures is needed which extends beyond their legal provision. An attempt to develop this explanation is undertaken in the remainder of this thesis.

The next section sets the data within the context of the number of witnesses in each cohort. This goes some way to explaining the differential uptake of special measures. In addition, the defendant's structural position means that pre-recorded video evidence is, as per my

⁸ DS3 had, himself, applied successfully for special measures for a defence witness.

⁹ The Advocate's Gateway, 'Intermediaries: Step by Step' (Toolkit 16, Inns of Court College of Advocacy, 10 April 2017) 17.

respondents' views, not workable for defendant witnesses. It is to this latter point that I turn first.

5.3. Practical differences

5.3.1. Defendants: pre-recorded evidence in chief

None of the respondents in this research recalled personal involvement in a trial, or knowledge of another trial, in which pre-recorded evidence in chief was used by a vulnerable and/or intimidated defendant. This is perhaps unsurprising since there is currently no legal basis from which to secure the use of pre-recorded evidence in chief for vulnerable and/or intimidated defendant witnesses.¹⁰ Furthermore, as the Court of Appeal in *R v SH*,¹¹ and Baroness Hale in *Camberwell Green*¹² highlighted, there are practical difficulties in implementing the measure for defendants which would need to be addressed by Parliament.

B4 also highlighted such difficulties:

Re: pre-recorded interviews – not only are there not the resources for defendants but who would they accept as an appropriate person to do the interview? [B4]

Other respondents who discussed this measure in interview highlighted additional problems with defendants using this measure. At trial, the defendant gives evidence once the prosecution case has concluded. It is important that when doing so they respond to the evidence of those who have gone before them. Pre-recording their evidence in chief would deny them this opportunity prior to cross-examination:

...one of the problems is reacting to developments in the trial. ... [pre-recording a defendant's evidence] before the judge has decided if there's even a case to answer – I can see all sorts of complications. [R1]

I think evidence in chief, certainly when calling a client, a lot of it is meeting and getting an explanation for what the prosecution witnesses have said. You can't properly examine in chief and answer the case until you know what the case is, so I just don't think it would work. [R2]

¹⁰ See section 4.2.5. (p122-24).

¹¹ *R v SH* [2003] EWCA Crim 1208 [23]-[24].

¹² *R v Camberwell Green Youth Court* [2005] UKHL 4 [58].

I think you'd be putting the cart before the horse. [J1]

I can see there being an argument for equality but I don't see how pre-recorded evidence could work... [B3]

Structural differences between the defendant and non-defendant witnesses and their different roles in the adversarial trial mean that this measure is not workable for defendants. The structural position of the defendant is a material difference on which the exclusion of defendants from this measure (and thus their differential treatment) is justified. This is a part of equality rather than a violation from it¹³ and renders the law coherent in this regard. For this reason, this measure is not carried through the analysis in the proceeding chapters.

5.3.2. Number of witnesses: defendants versus non-defendants

It is likely that there are a greater number of non-defendant witnesses than defendants in many trials. As a consequence, it is probable that more non-defendant witnesses will qualify for and use special measures. In addition, unlike non-defendants, defendants are not compellable as witnesses in their trials. PS1, who had 'never' seen a defendant use special measures, highlighted this in interview:

[A] defendant has a choice not to give evidence. He doesn't have to. No one says he does – it doesn't work like that ... The defendant is the only person in the whole process who can go [respondent sat back in his chair and held his hands up]: "I don't wanna do this; I don't wanna be a part of it." Fair enough. As you know, adverse inferences can be drawn and all the rest of it, you know, from his silence, but he is the only person who can say "right, I'm out, I don't want to give evidence." [PS1]

The non-compellability of defendants was discredited as a reason for their exclusion from special measures in section 3.5.1.2. However, it remains a potential explanation for why defendants use special measures less frequently than non-defendants. If vulnerable and/or intimidated defendants opt out of testifying, then the size of the cohort of defendants who are eligible to apply for the use of special measures to give evidence is reduced.

¹³ Discussed further in section 3.4. (p61-63).

I asked the respondents whether, in their experience, vulnerable defendants were likely to give evidence in their defence. Some were keen to highlight that they would not discourage such a defendant from giving evidence:

They [vulnerable defendants] aren't encouraged not to testify in my experience. I don't think juries ever liked defendants not giving evidence, even before they were allowed to draw adverse inferences from it. They just don't like it ... I'm forever saying to clients "look you can't pretend to be something you're not, the jury just want to hear from you." [B1]

The expectation is that they ought to and therefore it's quite hard as a defence advocate not to call them. [R2]

I would never advise a defendant not to give evidence ... I think juries expect it. [R3]

I'd have made him [vulnerable defendant] give evidence... [B4]

In some cases, the type of offence with which the defendant was charged influenced the lawyers' decisions to advise clients to give evidence:

I can count on the fingers of one hand the amount of defendants I've not called in the last ten years. Partly that's because most of what I do is sex cases and essentially there's two people in the room. [B1]

There are some cases where a defendant really has to give evidence to explain why he's not there, ie alibi evidence. If the defence is alibi you're more likely to call a defendant, even a vulnerable defendant. [R1]

However, R1 noted that vulnerable witnesses give evidence 'less often than non-vulnerable/borderline defendants'. DS3 highlighted that sometimes vulnerable defendants do not give evidence despite legal advice that they should do so:

I have examples of cases in which I have strongly advised clients to give evidence and said if they didn't do it, it would be tantamount to suicide, who have ignored that advice and not given evidence, and have cited to me that they are petrified of the process of giving evidence and cross-examination. [DS3]

Furthermore, J1 and J2 spoke of occasions in which they had issued a section 35(1)(b) direction¹⁴ to the jury when vulnerable defendants did not give evidence¹⁵:

¹⁴ See CJPOA 1994. This permits a judicial direction to the effect that hearing from a defendant suffering a 'physical or mental condition' would have been 'undesirable'; which is designed to prevent the jury from drawing adverse inferences from their silence (see further section 3.5.1.2. (p77-80)).

I've had this a number of times – “you've seen the psychiatrist report, I'm not going to call him to give evidence, but I don't want you to give an adverse inference direction because he just wasn't capable of giving evidence.” ... I am usually happy to agree to that. [J2]

I've certainly had some cases where vulnerable [defendant] witnesses have not given evidence and I've directed the jury not to infer any adverse inferences therefrom. It is usually supported by medical evidence. [J1]

The evidence, whilst not conclusive, suggests that at least some vulnerable defendants do not give evidence in their defence.¹⁶ This reduces the cohort of defendants giving evidence who are eligible for special measures assistance and so naturally results in a decrease in the number of defendants giving evidence with special measures.

5.3.3. Number of witnesses: prosecution versus defence non-defendant witnesses

In a similar vein, the number of non-defendant prosecution and defence witnesses was also considered by some respondents to contribute to their different experiences of special measures use:

It's a difficult comparison because in the vast amount of cases there are far more prosecution witnesses than defence witnesses, particularly if you adopt the rule of thumb that you don't call a defence witness unless you absolutely have to, 'cause it's just inviting trouble. If the prosecution get a lever under your defence witness then they can go anywhere with it. So often you'll have a defendant and nobody else. So it's not a direct comparison. [B1]

Generally not many defence witnesses are called. [R2]

...in a normal case there are far more witnesses called on behalf of the prosecution. [R4]

The number of both defendant and non-defendant witnesses, and prosecution and defence non-defendant witnesses, thus has an obvious bearing on the frequency with which special measures are invoked for each cohort. From an equality perspective, these differences partly explain the disparate uptake of special measures between defendant and non-defendant

¹⁵ In section 3.5.1.2. (p78-80) I noted that the courts have taken a 'restrictive' approach to when this direction can be invoked. Furthermore, Quirk's interviews with criminal barristers suggested that a s35(1)(b) direction was rarely sought when a defendant did not testify. The comments from J1 and J2 indicate that the direction is invoked in practice, by some, at least occasionally.

¹⁶ I stated in section 3.6. (p89) that one of the consequences of excluding defendants from eligibility for special measures was that some may opt out of testifying because they do not feel capable of doing so. Of course, if special measures were used more frequently more vulnerable defendants might give evidence.

witnesses (and prosecution and defence non-defendant witnesses) and, at least in part, shield the law's operation from accusations of incoherence. The differences in the number of those giving evidence remain, however, insufficient to justify the variations in use completely.

Using Hawkins' concepts of surround, field and frames, this thesis seeks to delve deeper into the disparate uptake of special measures to which my respondents alluded in interview. These conceptual devices, as discussed in section 1.6, help to 'organise thinking about decision-making' and 'show how the making of decisions about individual cases can only be understood in a much wider context'.¹⁷ For present purposes, the surround should be understood as the social, political and economic environment, in which the laws on special measures were drafted and enacted. The organisational field is the legal system, or criminal justice system, in which that law operates.

References have already been made to these concepts throughout Chapters 3 and 4. For example in section 3.3 I highlighted how concern from within the socio-political surround about the treatment of children and learning disabled complainants and witnesses by and within the criminal justice system was increasing. Alongside this, knowledge advances about the ability of such individuals to give reliable and accurate evidence altered the approach taken in the legal field to both their complaints and the evidence they could give in criminal trials. Then in section 4.2, I showed how unease within the legal field surrounding the exclusion of defendants from special measures arose. The perceived implications of this on vulnerable and/or intimidated defendants led to the law's development both within the legal field and within the surround. The specific political context in which the law has developed and its effect on the organisation of the legal field is further discussed later in section 5.5.1.

¹⁷ Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 433.

Decision-frames help us to understand how those involved in special measures decisions approach the issues they face and how they choose to proceed. I showed in section 4.2.3 how the legal profession's dissatisfaction with the exclusion of defendants from special measures manifested itself in the operation of the 'parity principle'. Framing issues are returned to later in this chapter (section 5.6) as well as in Chapters 6 and 7. This forthcoming analysis draws on the different frames (instrumental, moral, organisational and legal) that criminal practitioners adopt in their decision-making about special measures use.¹⁸

The findings presented in the next section of this chapter, however, do not fit well with Hawkins' frame device. This is because they are not related to decision-making per se. Instead, they raise the issue of the legal profession's awareness of the law and vulnerability. If a defence lawyer, for example, does not know about the available special measures for defendants, there is no decision to be made regarding their use. It is thus a 'non-framing' issue. It is to these non-framing 'awareness' issues that this chapter now turns.

5.4. Awareness (or lack thereof)

Throughout the interviews, it became apparent that some criminal practitioners were not aware of the provision of certain special measures to vulnerable defendant witnesses. This was evident in relation to live link and screens. At times this resulted in slightly awkward interview exchanges, as it became necessary to explain the existence of authority for these measures to defendants in order to elicit views about them. The following extract from an interview with a barrister with 21 years of PQE exemplifies this:

B4: I think the live link should be available [to defendants]...

Researcher: There is a provision that's already been inserted into the YJCEA for defendants to use the live link...

B4: Oh, is there?

Researcher: Yes, section 33A. It's more restrictive than the provision for non-defendants though still.

¹⁸ See Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002).

B4: And when was that brought in?

Researcher: The Police and Justice Act 2006 legislated for it.

B4: Oh, ok.

Researcher: I wonder ... well, it doesn't seem to be well known about or used?

B4: No, it's not.

This exchange is interesting for two reasons. First, this respondent was unaware of the existence of the statutory provision for defendants to give their evidence by live link. She was not alone in this regard. Other respondents also revealed their lack of awareness of the provisions throughout the course of the interviews:

It's [live link] certainly a provision which I was really unaware of to be honest. [PS2]

DS2: I didn't think [special measures] were available [to defendants]?

Researcher: There's section 33A – it was a late insertion into the YJCEA for live link for defendants, for example.

DS2: Oh right, OK.

The second reason that the above exchange with B4 is interesting is because she was one of the two barristers who had successfully secured the use of the live link for her client to give evidence. She had thus done so without knowledge of the statutory provision permitting it. Instead, B4 described how the vulnerable defendant in her case was authorised to give evidence via the live link by 'the judge us[ing] his inherent power to ensure a fair trial'. This is curious since, as discussed in section 4.2.3, the Court of Appeal in *Ukpabio* affirmed the earlier decision in the *Waltham Forest Youth Court* case; that an inherent power to permit a defendant to give evidence by live link does not exist.¹⁹

When other respondents were asked why they thought the live link and screens were so seldom used by defendants, some also attributed blame to a lack of awareness of their availability:

It's not on [defence counsel's] radar in my experience. [DS2]

I don't think [defence counsel] would have even considered [live link]. They may not even know that the law permits it, sadly to say ... As far as other special measures are

¹⁹ Though I challenged the validity of this judgment in section 4.2.3. (p119-20).

concerned [excluding intermediaries], I think it really is a question of the advocates and the legal representatives being aware that there are some special measures available to a given defendant. [J1]

I think it would appear that most defence advocates are [unaware] too. I think if there was more of an awareness then it would be used more. [PS2]

Solicitors and defence counsel are quite hot on things like intermediaries now ... [but] in terms of basics [live link/screens] it always seems to pass people by. [B3]

Asking the respondents if they had experienced the use of special measures may have highlighted their existence to those who were otherwise unaware. This makes it difficult to know from the interviews quite how many of the respondents knew of the provision of special measures to defendants. While some respondents openly admitted their lack of awareness, others may have concealed it.

Evidence from the Youth Proceedings Advocacy Review also suggests that there is a lack of awareness of the special measures available to vulnerable defendant witnesses. The review brings together a series of interviews and surveys undertaken with barristers, solicitor advocates and other professionals working within the criminal courts.²⁰ There is no mention in the report of the use of statutory live link provision by defendants or the availability or use of screens for defendants under the common law. Furthermore, one barrister is quoted saying: 'it's only very recently that a lot of advocates even appreciated that you could get special measures for defendants, so I don't think people ask for them'.²¹ These findings support those of my own: that there is an absence of awareness among some criminal practitioners of the available special measures for vulnerable and/or intimidated defendants.

As noted above, Hawkins' conceptual framework is of limited applicability when an advocate lacks awareness of the available provisions. The frame device becomes inapplicable to understanding the uptake of special measures when a lack of knowledge means that they do

²⁰ Ali Wigzell, Amy Kirby and Jessica Jacobson, *The Youth Proceedings Advocacy Review: Final Report* (Institute for Criminal Policy Research 2015).

²¹ *ibid* 31.

not know that there is a decision to be made. This is a point which was not considered by Hawkins, since he had no reason to think that the regulatory agency was unaware of the range of disposals/courses of action available in the event of a health and safety breach. In the context of special measures, however, the evidence suggests that at least some of the legal profession are not aware of the special measures provisions available to vulnerable defendant witnesses. For these criminal practitioners, the frames are not directly relevant²² to explaining why they did not secure special measures use for their clients.

Hawkins' framework is not entirely redundant in this context, however. The data with regards to non-defendant witnesses demonstrates that all respondents knew that special measures existed, since they had all been involved in trials where they had been used by vulnerable and/or intimidated non-defendant witnesses. The concepts of surround and field help to develop an understanding of why the lack of awareness exists with regard to the availability of these measures for defendant witnesses, but not with regard to non-defendant witnesses.

5.5. The awareness deficit: why?

There are several factors which can contribute to an explanation of the legal profession's differing knowledge of special measures for non-defendant witnesses versus defendant witnesses. These are the political context in which the law of special measures has developed; the way this development has occurred; the degree to which special measures use is scrutinised within the surround; and the organisation of the legal field as a result of these issues. In reality these factors are interlinked and overlapping, but for analytical purposes I have presented them separately. The following subsections thus demonstrate how these issues are likely to have shaped the knowledge that criminal practitioners have of special measures.

²² The way in which those who are aware of defendant special measures frame their decisions may have an impact on the perpetuation of unawareness among the profession. This is discussed in section 6.2.2. (p204-205).

5.5.1. The political context / surround of law reform

A look at the political context in which the law of special measures developed does two things. It enables one to better understand why, when the arguments against providing special measures to vulnerable and/or intimidated defendants were so weak (as demonstrated in section 3.5.1), such scant regard was given to defendant special measures in the *Speaking up for Justice* Report and the Parliamentary debates on the subsequent Youth Justice and Criminal Evidence Bill. This in turn helps us to understand why segments of the legal profession lack the requisite knowledge of special measures for defendants to ensure that they are used.

A number of broad trends and salient factors can be identified in the surround at the time of the introduction of the statutory non-defendant special measures scheme in 1999. In the late 20th century, a loss of public confidence in the criminal justice system resulted from a developing awareness of the true extent of victimisation;²³ rising crime rates;²⁴ the perceived failure of the system to convict child abusers, rapists and those who offend against other vulnerable groups;²⁵ and a series of high profile miscarriages of justice.²⁶ The perception, if not reality, that the system was failing to adequately manage the aims of convicting the guilty and acquitting the innocent sparked public concern which resulted in growing pressure for reform.²⁷

In addition, the professionalisation of the criminal justice system over the course of the twentieth century has placed much emphasis on the relationship between the defendant and

²³ See Chris Lewis and Jacki Tapley, 'Victims' Rights or Suspects' Rights?' in Tom Ellis and Stephen Savage (eds), *Debates in Criminal Justice: Key Themes and Issues* (Routledge 2012) 218.

²⁴ David Garland, *The Culture of Control* (OUP 2001) 154.

²⁵ Section 3.3.2. (p49-50).

²⁶ For instance, following the release of the Birmingham Six, an online poll revealed that 52% of those surveyed had 'lost faith' in judicial systems. See News Online Poll, ICM as cited in <http://news.bbc.co.uk/1/hi/uk/1006201.stm> [accessed 9 February 2014].

²⁷ John R Spencer, 'Child Witnesses and Cross-examination at Trial: Must it continue?' (2011) 3 *Archbold Review* 7, 7.

the State.²⁸ This largely relegates victims from the criminal process save for their role as witnesses for the prosecution;²⁹ rendering their private interests ‘subordinate and peripheral’ to the public interest being served by the trial.³⁰ Dissatisfaction with the resulting treatment of victims in the criminal justice system led to the formation of ‘victim’s movement’ groups who lobbied for change.³¹ They were emboldened by the decision in *Doorson v Netherlands*,³² where the ECtHR extended the right to a fair trial under Article 6 to include the interests of third parties (ie victims and witnesses) in the proceedings.³³

Supporting victims of crime thus became ‘politically expedient’ and some argue it ‘diverted attention away from the other failings of the criminal justice system’.³⁴ The New Labour government’s 1997 election manifesto highlighted that ‘victims of crime are too often neglected by the criminal justice system’.³⁵ As a result, government policy increasingly centred on ‘putting victims at the heart of the criminal justice system’³⁶ and creating ‘a better deal for victims and witnesses’.³⁷ Several reforms were made in pursuit of these goals. One way that these issues were addressed was through the provision of rights³⁸ to victims and witnesses. These fell short of ‘procedural rights’ which would enable victims to impact the

²⁸ Chris Lewis and Jacki Tapley, ‘Victims’ Rights or Suspects’ Rights?’ in Tom Ellis and Stephen Savage (eds), *Debates in Criminal Justice: Key Themes and Issues* (Routledge 2012) 218.

²⁹ Jonathan Doak, *Victims’ Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing 2008) 30.

³⁰ Helen Fenwick, ‘Procedural ‘Rights’ of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?’ (1997) 60(3) *Modern Law Review* 317, 318

³¹ Chris Lewis and Jacki Tapley, ‘Victims’ Rights or Suspects’ Rights?’ in Tom Ellis and Stephen Savage (eds), *Debates in Criminal Justice: Key Themes and Issues* (Routledge 2012) 219.

³² (1996) 22 EHRR 330.

³³ *ibid* [70].

³⁴ Chris Lewis and Jacki Tapley, ‘Victims’ Rights or Suspects’ Rights?’ in Tom Ellis and Stephen Savage (eds), *Debates in Criminal Justice: Key Themes and Issues* (Routledge 2012) 220.

³⁵ ‘New Labour Because Britain Deserves Better’ (Labour Party 1997)

<<http://www.politicsresources.net/area/uk/man/lab97.htm>> accessed 17 October 2015.

³⁶ See Home Office, *Justice for All* (Cm 5563, The Stationary Office 2002).

³⁷ See Home Office, *A New Deal for Victims and Witnesses: National Strategy to Deliver Improved Services* (Home Office 2003).

³⁸ Though their enforceability as ‘rights’ is questionable, see Andrew Sanders and Imogen Jones, ‘The Victim in Court’ in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Willan Publishing 2007) 292-8; Jonathan Doak, *Victims’ Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing 2008) 12.

criminal procedure, ie through the provision of legal representation to them.³⁹ Instead, and correctly according to Ashworth, they have been limited to ‘service rights’.⁴⁰ These have included, for example, improvements in the provision of information and support⁴¹ in response to the fact that the absence of such services was at the crux of most victims’ grievances.⁴² The expansion of The Witness Service and the creation of Witness Care Units have assisted this development by enhancing services such as court familiarisation visits and arranging separate waiting rooms for prosecution and defence witnesses.⁴³

The enactment of special measures for vulnerable and/or intimidated witnesses was in keeping with these policy goals of improving the criminal justice system for victims and witnesses. The provision of special measures was framed as an exercise which balanced the treatment of victims and defendants.⁴⁴ Several other reforms contained in the YJCEA also had the victim’s interests in mind. For example, the Act also prohibits a defendant from cross-examining a rape complainant or child witness in person⁴⁵ and limits the admissibility of evidence of their past sexual history.⁴⁶

The Criminal Justice Act 2003 continued the government’s exercise of ‘re-balancing’. One way it did so was by enhancing the protection of victims and witnesses in court. In particular, the rules relating to the admission of bad character and hearsay evidence were altered so as to restrict the ability of the defence to carry out traumatic cross-examinations on non-defendant

³⁹ Helen Fenwick, ‘Procedural ‘Rights’ of Victims of Crime: Public or Private Ordering of the Criminal Justice Process’ (1997) 60(3) *Modern Law Review* 317, 318.

⁴⁰ Andrew Ashworth, *The Criminal Process: An Evaluative Study* (2nd edn, OUP 1998) 34.

⁴¹ See Ministry of Justice *Code of Practice for Victims of Crime* (Ministry of Justice 2015); Ministry of Justice *The Witness Charter: Standards of Care for Witnesses in the Criminal Justice System* (Ministry of Justice 2013).

⁴² Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan Publishing 2009) 27.

⁴³ See CPS, *No Witness, No Justice (NWNJ) Pilot Evaluation – Final Report* (Criminal Justice System 2004).

⁴⁴ Though in reality, it addressed the treatment of vulnerable and/or intimidated witnesses versus ‘normal’ witnesses, as highlighted in section 3.3. (p47-61).

⁴⁵ YJCEA 1999, s 34 and s 35.

⁴⁶ YJCEA 1999, s 41. See also *R v A (No 2)*[2001] UKHL 25.

witnesses⁴⁷ whilst simultaneously increasing the evidence available to the prosecution.⁴⁸ More recent reforms have even enabled witnesses to give evidence anonymously in circumstances where they may otherwise be unsafe.⁴⁹ Furthermore, the appellate courts have been proactive in the protection of vulnerable witnesses by significantly narrowing the scope of the cross-examination permitted against them.⁵⁰

Developing service provisions to all victims and witnesses and amending rules of evidence and procedure has aimed to improve the experience and thus satisfaction of these third party participants. As noted above, many of these reforms have been framed⁵¹ as part of the wider policy to ‘re-balance the criminal justice system in favour of victims and witnesses’.⁵² This was based on an assumption that the system was unbalanced towards defendants⁵³ and thus that victims and witnesses were left disadvantaged.

According to Jackson, there is a ‘clear instrumental connection between concerns for victims and concerns about catching and punishing offenders’.⁵⁴ The plight of the victim came to be exploited as a political tool to increase the punitiveness of the system.⁵⁵ The use of

⁴⁷ Criminal Justice Act 2003, s 100.

⁴⁸ Criminal Justice Act 2003, for example s 116(2)(e) permits documentary evidence to be admitted instead of oral evidence from those in fear.

⁴⁹ Coroners and Justice Act 2009, s 86-89.

⁵⁰ See *R v Barker* [2010] EWCA Crim 4; *R v Wills* [2011] EWCA Crim 1938; Emily Henderson, “‘A Very Valuable Tool’”: Judges, Advocates and Intermediaries discuss the Intermediary System in England and Wales’ (2015) 19(3) *International Journal of Evidence and Proof* 154; Emily Henderson, ‘Bigger Fish to Fry: Should the Reform of Cross-Examination be Expanded Beyond Vulnerable Witnesses?’ (2015) 19(2) *International Journal of Evidence and Proof* 83; Emily Henderson, ‘Taking Control of Cross-Examination: Judges, Advocates and Intermediaries Judicial Management of the Cross-Examination of Vulnerable People’ (2016) 3 *Criminal Law Review* 181.

⁵¹ Hall notes that policy formation and law reform is not a linear process, and that the reality is often more erratic and ad hoc, with a ‘policy chain’ established retrospectively. See Matthew Hall, *Victims of Crime: Policy and Practice in Criminal Justice* (Willan Publishing 2009) 44-94.

⁵² Home Office, *Justice for All* (Cmnd 5563, Home Office 2002).

⁵³ John Jackson, ‘Justice for All: Putting Victims at the Heart of Criminal Justice?’ (2003) 30(2) *Journal of Law and Society* 309, 313.

⁵⁴ *ibid* 311.

⁵⁵ See Kent Roach, ‘Four Models of the Criminal Process’ (1999) 89(2) *The Journal of Criminal Law and Criminology* 671, 703-706; Andrew Ashworth, ‘Victims’ Rights, Defendants’ Rights and Criminal Procedure’ in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice* (Ashgate 2000) 186; John Jackson, ‘Justice for All: Putting Victims at the Heart of Criminal Justice?’ (2003) 30(2) *Journal of Law and Society* 309; Ian Edwards, ‘An Ambiguous Participant: The Crime Victim and Criminal

‘(re)balancing’ in criminal justice policy depicted defendants’ and victims’ rights as in conflict with each other, meaning that to be for victims you have to be against defendants. This zero-sum policy game, where ‘the offender’s gain is the victim’s loss,’⁵⁶ results in the perception that accused’s due process rights run contrary to the popular concern for protecting victims, and keeping the public safe.⁵⁷ This is a perception that has enjoyed longevity – it existed prior to the enactment of special measures for non-defendant witnesses, and arguably remains prevalent in the political realm today.

As well as these reforms made *for* victims and witnesses I have delineated above, reforms were also made *against* defendants in order to redress the alleged imbalance in the system. Curtailments to defendants’ rights were thus delivered under the new face of victims’ rights.⁵⁸ Victims’ groups became ever more frustrated with the ‘privileged legal position of the defendant’ as a result of safeguards within the system which were perceived to unduly insulate guilty defendants from conviction.⁵⁹ Furthermore, an increasingly prevalent view was that courts were acquitting criminals on the basis of ‘legal technicalities’,⁶⁰ thus undermining the protection of the public and future victims. This view was one that Michael Howard endorsed in the mid-90s in his role as the then Home Secretary: ‘professional criminals, hardened criminals and terrorists ... disproportionately take advantage of and

Justice Decision Making’ (2004) 44 *British Journal of Criminology* 967, 970; Jonathan Doak, *Victims’ Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing 2008) 11.

⁵⁶ David Garland, ‘The Culture of High Crime Societies: Some Preconditions of Recent “Law and Order” Policies’ (2000) 40 *British Journal of Criminology* 347, 351.

⁵⁷ David Garland, *The Culture of Control* (OUP 2001) 180.

⁵⁸ Kent Roach, ‘Four Models of the Criminal Process’ (1999) 89(2) *The Journal of Criminal Law and Criminology* 671, 714-15.

⁵⁹ Ian Edwards, ‘An Ambiguous Participant: The Crime Victim and Criminal Justice Decision Making’ (2004) 44 *British Journal of Criminology* 967, 970.

⁶⁰ Lynne Henderson, ‘The Wrongs of Victims’ Rights’ (1985) 37 *Stanford Law Review* 937, 948.

abuse the present system'.⁶¹ The re-balancing agenda thus resulted in the conflation of the desires to improve the position of victims and to curtail the defendant's rights.⁶²

In this vein, criminal justice policy became increasingly oriented towards crime control.⁶³ The defendant's right to silence and to legal representation had become, as Quirk highlights, 'viewed with suspicion by some as a means by which 'criminals' could frustrate justice'.⁶⁴ In the context of this quote, frustrating justice has to be interpreted as (guilty) defendants evading conviction. The belief was that 'prosecutions and convictions were being thwarted by lawyers advising their guilty clients to make no comment interviews'.⁶⁵ The right to silence was thus curtailed in 1994;⁶⁶ a reform supported by Michael Howard who stated that 'the balance in the criminal justice system is tilted too far in favour of the criminal and against protecting the public'.⁶⁷ The white paper *No More Excuses*⁶⁸ paved the way for the abolishment of the defence *doli incapax*,⁶⁹ removing the assumption that children under 14 are 'incapable of evil' so that young defendants could be convicted more easily. Reforms also impacted defence disclosure rules⁷⁰ to prevent 'ambush defences' which were again perceived as enabling criminals to escape conviction.⁷¹ Further, the reforms to the law of bad character meant that, while tightening its admissibility with regards to non-defendant

⁶¹ Hansard, HC Deb 11 January 1994, vol 235, col 26 (Michael Howard).

⁶² Ian Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision Making' (2004) 44 *British Journal of Criminology* 967, 970.

⁶³ David Garland, *The Culture of Control* (OUP 2001) 142.

⁶⁴ Hannah Quirk, 'Twenty Years on, the Right of Silence and Legal Advice: The Spiralling Costs of an Unfair Exchange' (2013) 64(4) *Northern Ireland Legal Quarterly* 465, 465.

⁶⁵ *ibid* 467. See also *ibid* 468-470 discussing the lack of empirical grounds for such a belief.

⁶⁶ CJPOA 1994, s 34-s 38.

⁶⁷ Hansard, HC Deb 11 January 1994, vol 235, col 25 (Michael Howard).

⁶⁸ Home Office, *No More Excuses* (Home Office 1997).

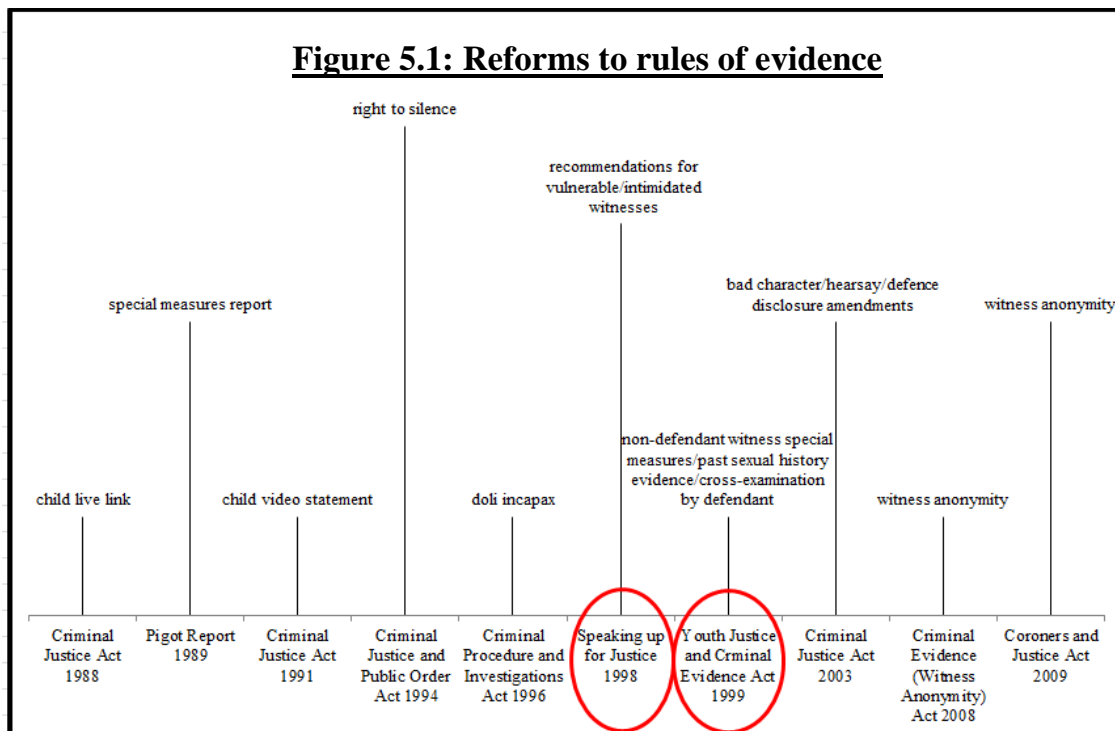
⁶⁹ Crime and Disorder Act 1998, s 34.

⁷⁰ Criminal Procedure and Investigations Act 1996 s 3 as amended by Criminal Justice Act 2003.

⁷¹ See Abenaa Owusu-Bempah, 'Defence Participation through pre-trial Disclosure: Issues and Implications' (2013) 17(2) *International Journal of Evidence and Proof* 183.

witnesses, the Criminal Justice Act simultaneously permitted more of a defendant's bad character evidence to be admitted.⁷²

To understand with more ease this temporal landscape of the reforms *for* victims and *against* defendants, figure 5.1 provides a visual illustration of the depiction above. The *Speaking up for Justice* Report and the enactment of the YJCEA are highlighted to show where they fit in this myriad of reforms.



It is clear from this discussion that the law of special measures was enacted amidst a period of time in which defence interests were looked upon unfavourably. This political context might go some way to explaining why defendants were excluded from provision of special measures under the 1999 Act and why this exclusion was not debated in the Houses of Parliament. Defence rights, and the provision of assistance to them, ran (and still runs)

⁷² Criminal Justice Act 2003, s 101.

counter to the popular policy. Some respondents perceived this as the underlying cause for the unequal commitment to equality in the legal provision of special measures⁷³:

...if you were to stand up in Parliament as David Cameron or whoever and say today I'm going to enact legislation to redress the balance between defendants and victims in criminal trials, there would be absolute uproar. I'm not saying that it's something that should not be considered, but there's no votes in it. Some of this is intensely political.
[PS1]

Successive governments have taken the view that this is all about redressing the balance. Why? Victims, in inverted commas – complainants – win elections. Defendants don't.
[DS3]

Despite the political context, however, the fairness of the reforms to the law of bad character and hearsay for defendants in the Criminal Justice Bill did prompt parliamentary debate. Jones highlights how Parliament was persuaded to go ahead with the reforms on the basis of a different rationale: that the admissibility of more evidence (whether hearsay or bad character evidence) would facilitate truth-seeking.⁷⁴ This same argument could have been made with regards to the exclusion of defendants from the Youth Justice and Criminal Evidence Bill. The provision of special measures to vulnerable and/or intimidated defendants would increase the evidence obtained from them. This, so the argument goes, would enhance truth-seeking; particularly given their privileged position with regards to information.⁷⁵

The provision of special measures could thus have been extended to defendants under the 1999 Act without appearing to go 'against' victims in the zero-sum policy arena; something which would otherwise seem politically difficult to justify. However the truth-seeking argument was not made, and as noted in section 3.5.1.3, nor were any other concerns raised regarding the exclusion of defendants from the special measures scheme. One can only

⁷³ One of the judges in Henderson's study regarding intermediaries commented in a way in keeping with my findings, saying: '[p]rosecution witnesses are given all sorts of assistance and there is none for defendants. It is all political: It is all about children and witnesses but defendants are just there to be convicted'. See Emily Henderson, "A Very Valuable Tool": Judges, Advocates and Intermediaries discuss the Intermediary System in England and Wales' (2015) 19(3) *International Journal of Evidence and Proof* 154, 162.

⁷⁴ Imogen Jones, 'A Political Judgment? Reconciling Hearsay and the Right to Challenge' (2010) 14 *International Journal of Evidence and Proof* 232, 234.

⁷⁵ As discussed in section 3.6. (p90).

assume that the Working Group's position that defendants were already suitably protected in other ways satisfied those involved in drafting the Bill and passing it through Parliament.

5.5.2. How the law developed

The way that the law developed for vulnerable and/or intimidated court users relates to the political context set out in the previous section. Smith argues that the criminal reform process is typically made up of four stages which lead to legislative intervention. First, 'a series of controversial incidents ... give rise to public concern and raise questions with ... the existing ... system'.⁷⁶ The second stage sees the government launch inquiries into these issues, followed by legislative reform (the third stage). The final stage is 'inception', which is the period in which the legal field is prepared for the implementation of the new legislation.⁷⁷

Naughton similarly illustrates this process with regards to miscarriages of justice. The *Confait* case (1975)⁷⁸ led to the establishment of the Royal Commission on Criminal Procedure. Their recommendations (1981) led to the enactment of PACE (1984), which formalised guidelines on police practice.⁷⁹ This pattern occurred again following the high profile release of the *Birmingham Six* (1991). This led to the formation of the Royal Commission on Criminal Justice. Their report (1993) formed the basis of the establishment of the Criminal Cases Review Commission as per the Criminal Appeal Act (1995).⁸⁰

In the context of the development of non-defendant special measures, this cycle of reform can clearly be seen. As highlighted in section 3.3, a series of high profile acquittals of alleged child offenders and emerging research on the system's perceived failure to convict those who

⁷⁶ Graham Smith, 'A Most Enduring Problem: Police Complaints Reform in England and Wales' (2005) 35(1) *Journal of Social Policy* 121, 125.

⁷⁷ *ibid* 126.

⁷⁸ The murder convictions of three boys were quashed. Their confessions were false and the police were criticised for their handling of the case contrarily to the Judges' Rules. See Sir Henry Fisher, *Inquiry into the Circumstances leading to the trial of three Persons on Charges Arising out of the Death of Maxwell Confait and the Fire at 27 Doggett Road, London SE6* (London Stationery Office 1977).

⁷⁹ See Michael Naughton, 'Miscarriages of Justice and the Government of the Criminal Justice System: An Alternative Perspective on the Production and Deployment of Counter-Discourse' (2005) 13 *Critical Criminology* 211, 214.

⁸⁰ Criminal Appeal Act 1995, s 8.

offend against children led to a loss of public confidence in the criminal justice system (stage one). In response to this, the government launched the Pigot inquiry, and later set up the Working Group who looked into the treatment of vulnerable and intimidated witnesses in the criminal justice system (stage two). The YJCEA was subsequently enacted on the basis of their *Speaking up for Justice* Report (stage 3), and guidance was drawn up and pilot studies conducted for the implementation of each measure contained within the Act (stage four).⁸¹

Where the provision of special measures to vulnerable and/or intimidated defendants is concerned, the political context has meant there has been an absence of a ‘crisis’ or cause for public concern. The highest prolife case concerning the issue of defendant participation (and thus special measures) was *T and V v United Kingdom* in 1999, involving two 11 year old boys on trial for murder of a two year old boy.⁸² The case provoked public outrage about the ‘evil nature’ of the boys and so there was limited public sympathy or concern for their ability to participate effectively in their trial as witnesses.⁸³ There was thus no impetus for the government to launch an inquiry into the exclusion of defendants from special measures. This has remained the case in the almost twenty years which have passed since the enactment of the YJCEA. There is, therefore, a seeming absence of a basis from which to launch new legislation to reform the law in this area.

Despite this, arguments based on the principle of equality, and for the law’s consistent commitment to this for all court users, have bubbled upwards. Some defence lawyers and members of the judiciary have manifested a concern for a vulnerable and/or intimidated defendant’s ability to participate as a witness absent the provision of special measures. Such defendants were recognised as occupying disadvantaged positions by comparison to their

⁸¹ The relevance of stage 4 is returned to in section 5.5.3. (p174-77).

⁸² (1996) 22 EHRR 330.

⁸³ See, for example Tom Sharratt, ‘James Bulger ‘Battered with Bricks’ *The Guardian* (2 November 1993); James Dalrymple, ‘The Dark Vortex that Emerged from this Murder to Destroy so Many Lives’ *The Independent* (16 March 1999); Euan Ferguson, ‘How the Death of Bulger Hardened us to Pity’ *The Guardian* (31 October 1999); ‘A Death that Shocked the Nation’ *BBC News* (16 December 1999).

non-vulnerable counterparts. In addition, the operation of the ‘parity principle’⁸⁴ revealed that some criminal justice agents, lawyers and members of the judiciary felt a sense of discomfort with the implications of providing special measures to vulnerable non-defendant witnesses but not to comparably disadvantaged defendant witnesses. The incoherence of the YJCEA as originally enacted was gradually exposed. An underlying concern for the law’s consistent commitment to the principle of equality was powerful enough to overcome much of the initial resistance (or, at least, indifference) to the provision of special measures to defendants. The reforms which have followed have, however, been piecemeal, inconsistent, and (one would hope) incomplete.

The development of special measures law for vulnerable and/or intimidated defendant witnesses has thus been driven almost entirely by the courts, with the government giving ‘only grudging recognition [to the needs of defendant witnesses], when forced to do so on ECHR art.6 grounds’.⁸⁵ As demonstrated in Chapter 4, it has been (and is) largely left to defence lawyers and the courts, therefore, to ensure that the law develops to enable vulnerable and/or intimidated defendants to participate effectively as witnesses in their trials and to promote equality between all vulnerable and/or intimidated court users. An ability to do this is dependent on the specific facts of the cases which come before the courts, the particular conditions of the defendants, and the arguments posed by the lawyers involved. For this reason, the judgments sometimes appear to be in conflict with one another, causing confusion as to their legal effect and the justification for such. Furthermore, it means that defendants are still not privy to the same level of protection that non-defendant witnesses are; and thus that in some areas inequality prevails. On the occasions that Parliament has stepped

⁸⁴ Discussed in section 4.2.3. (p106-109).

⁸⁵ Laura Hoyano, ‘Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants’ [2015] *Criminal Law Review* 107, 126-7. See also Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants* (Policy Press 2015) 248.

in, it has been to appease the ECtHR rather than to address the situation as a whole and properly reform the law.

The political context and the subsequent ways in which the law of special measures has developed for vulnerable and/or intimidated court users affects the extent to which the legal profession is likely to be aware of the provisions. Those for non-defendant witnesses, emanating from multiple wide-ranging enquiries and ultimately authorised by an Act of Parliament, are likely to be firmly on the legal profession's radar. The ad hoc, gradual development of the law for vulnerable and/or intimidated defendant witnesses however, has left the law in a complex and uncertain state, with provisions for special measures for defendants buried in various authorities.⁸⁶

The fact that many measures are not statutorily available to defendants was cited by B4 as a reason for the lack of awareness of their existence. He stated that although he looks for support for his clients and is 'quite proactive about [special measures] ... not everybody would be'. Furthermore, R4 also felt that the absence of legislative provision for defendant special measures, notwithstanding the inherent power to permit them anyway, was likely to have a negative effect on defence counsel's 'attitudes and understanding' of what is available for vulnerable defendant witnesses. This shows one way in which the source of law does matter, since it can affect the legal profession's knowledge and comprehension of the measures available.

5.5.3. Scrutiny regarding use of special measures

The degree to which the use of special measures in practice is subject to scrutiny from within the surround is another factor which will likely affect the profession's awareness of the provisions. As noted in the previous subsection, following the legislation for special

⁸⁶ See section 4.3. (p144).

measures, pilot studies and implementation plans were put in place. Since then, the provision of special measures to vulnerable and/or intimidated prosecution victims and witnesses has been examined through a series of evaluation studies conducted both independently, and on behalf, of the Home Office.⁸⁷ These have sought to ensure that special measures are used and are effective in improving the quality of victims' and witnesses' evidence and their treatment in trials. This has not only raised awareness of the special measures that are available to these witnesses, but also put the process through which special measures are applied for and secured under scrutiny. There is thus an expectation that special measures are applied for when a witness qualifies for their use,⁸⁸ meaning that criminal practitioners need to know about their existence.

The failure to provide special measures to those who qualify has been scrutinised when things have gone wrong.⁸⁹ For example, a complainant of sexual assault (Mrs A) committed suicide after giving evidence at her abuser's trial.⁹⁰ She had been offered special measures but refused to use them. Instead she gave evidence unaided, out of a concern that using special measures would damage her credibility. The Serious Case Review which followed this case cast shadows on the CPS and the trial judge; stating that special measures should have been put in place even against the victim's will.⁹¹ The importance of securing special measures for

⁸⁷ Examples include, but are not limited to Becky Hamlyn and others, *Are Special Measures Working? Evidence from surveys of vulnerable and intimidated witnesses* (Home Office Research Study 283, Home Office 2004); Mandy Burton and others, *Are Special Measures for Vulnerable and Intimidated Witnesses working? Evidence from the criminal justice agencies* (Home Office Online Report 01/06, Research Development and Statistics Directorate, Home Office 2006); Rosie McLeod and others, *Court Experiences of Adults with Mental Health Conditions, Learning Disabilities and Limited Mental Capacity Report 1: Overview and Recommendations* (Ministry of Justice Research Series 8/10, Ministry of Justice 2010); Corinne Charles, *Special Measures for Vulnerable and Intimidated Witnesses: Research Exploring the Decisions and Actions taken by Prosecutors in a Sample of CPS Case Files* (Crown Prosecution Service Research Team, April 2012). See also section 3.4. (p62 note 118).

⁸⁸ See also section 7.2.1. (p232-235) and section 7.3.1. (p236-42).

⁸⁹ *ibid.*

⁹⁰ See Peter Walker, 'Frances Andrade Killed Herself after Being Accused of Lying, says Husband' *The Guardian* (10 February 2013).

⁹¹ Hilary Brown, 'The Death of Mrs A: A Serious Case Review' (Surrey County Council: Safeguarding Adults Board 2014) 23, 49. This is discussed further in Samantha Fairclough and Imogen Jones, 'The Victim in Court' in Sandra Walklate (ed), *The Handbook of Victims and Victimology* (2nd edn, Routledge 2017) ch 11 (forthcoming).

those prosecution witnesses who qualify is symbolically reinforced through this kind of intense scrutiny from within the surround and the legal field.

Where defendants are concerned, however, no research has been commissioned to measure the implementation of the statutory live link provision.⁹² The intermediary provision still remains dormant eight years after its enactment. As noted in section 2.3.2, there is a dearth of research into the use of special measures by vulnerable and/or intimidated defendant witnesses.⁹³ This means that the use of defendant special measures, the provisions for which are already more sparse and scattered than is the case for non-defendant witnesses, are not subject to any external scrutiny. Defence advocates are thus free of the more pressing level of accountability experienced by those for the prosecution. This, may in turn, negatively affect their knowledge of the provisions available.

It is the way in which the law has developed for vulnerable and/or intimidated court users, as a result of the context of the political surround in which this has occurred, which in part affects the level of scrutiny to which the use of special measures is subjected. For defendants (and defence witnesses), the uptake is largely seen as a private matter overseen by (supposedly) independent legal representatives. Responsibility for the uptake of non-defendant (prosecution witnesses) special measures, however, is viewed as a public sector concern (and is thus subject to public sector forms of accountability). In short, there is a lack of consistency in the ‘policing’ of the implementation of available special measures, and the resulting commitment to equality within the system.

⁹² Though see findings from the data used in this project in Samantha Fairclough “‘It doesn’t happen ... and I never thought it was necessary to happen’: Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials’ (2017) *International Journal of Evidence and Proof* (forthcoming).

⁹³ Save for a small amount of data on the use of intermediaries by vulnerable defendant witnesses, see Penny Cooper and David Wurtzel, ‘A day late and a dollar short: In search of an intermediary scheme for vulnerable defendants in England and Wales’ [2013] CLR 4, 16; Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants* (Policy Press 2015) 249.

5.5.4. Subsequent organisation of legal field

Developments in the surround, as noted in section 1.6, can impact both the legal field as well as directly influencing the way that criminal justice agents frame those with whom they come into contact and the situations they face. The pressure from within the surround, from the public and politicians to protect ‘victims and witnesses’ and the subsequent scrutiny of this through evaluation studies commissioned on the use of special measures, has thus shaped the organisation of the legal field. The absence of this pressure with regards to defendant witnesses has also affected the way the legal field is organised, but in a notably different way. These areas of the legal field are now discussed in turn.

The Victims Code requires the police, the CPS, and other witness support agencies to be proactive in assessing witnesses for special measures eligibility.⁹⁴ The process of applying for special measures for non-defendant witnesses begins with the police. When completing the witness statement form (MG11), the police should assess whether the witness ‘requires Special Measures Assistance as a vulnerable or intimidated witness’.⁹⁵ If they conclude that potential grounds exist for special measures, an MG2 form⁹⁶ is completed and submitted to the prosecutor with the case file. This records information regarding a witness’ vulnerability or the fear or distress (intimidation) they feel; the measures thought to be most appropriate to address these issues; and the views of the witness on these matters.

The police are able, and encouraged, to request an early special measures discussion with the CPS.⁹⁷ This can be carried out before or after charging decision, and even before a vulnerable witness has given their police statement. In the latter case, early special measures discussions

⁹⁴ See Ministry of Justice, *Code of Practice for Victims of Crime* (Ministry of Justice 2015). Created as per Domestic Violence, Crime and Victims Act 2004, s 33.

⁹⁵ See The Prosecution Team, *The Prosecution Team Manual of Guidance: For the Preparation, Processing and Submission of Prosecution Files* (Manual of Guidance 2011, incorporating National File Standard 2015) s 3.

⁹⁶ See *ibid* 49-51.

⁹⁷ See Office for Criminal Justice Reform, *Early Special Measures Discussions between the Police and the Crown Prosecution Service: Practice Guidance* (CJS January 2009).

can ensure appropriate evidence is video-recorded effectively in anticipation of a contested trial,⁹⁸ and can allow for the use of intermediaries in police interviews where required.⁹⁹ If the CPS decides to charge the suspect, they complete an MG3 form with the charge details. On this form, the needs of vulnerable and/or intimidated witnesses should be recorded so that special measures applications can be made.¹⁰⁰ Further meetings can also take place between the CPS and a potential beneficiary of special measures. It is preferable that this takes place before the application has been made, but only once the defendant has been charged and the witness has made their statement.¹⁰¹ This enables the prosecutor to directly obtain the witness' views on special measures and to prepare their application accordingly.

All of this information should then be passed on to counsel for the prosecution in the brief. The completion of such forms and the potential for early meetings about the issue will heighten the legal profession's awareness of the existence of special measures for vulnerable and/or intimidated non-defendant witnesses.

The different agencies to which victims and witnesses are referred are also likely to increase the legal profession's awareness and knowledge regarding the available and suitable special measures support. For instance, once a suspect has been charged with an offence, alleged victims and prosecution witnesses are referred to Witness Care Units (WCU), staffed by the police and CPS.¹⁰² The computer systems used by the CPS and WCU act as check-points for special measures discussions. Staff from both the CPS and the WCU should electronically

⁹⁸ As per Achieving Best Evidence guidance: Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures* (Ministry of Justice 2011).

⁹⁹ Office for Criminal Justice Reform, *Early Special Measures Discussions between the Police and the Crown Prosecution Service: Practice Guidance* (CJS January 2009) 4-5.

¹⁰⁰ Corrine Charles, *Special Measures for Vulnerable and Intimidated Witnesses: Research Exploring the Decisions and Actions taken by Prosecutors in a Sample of CPS Case Files* (Crown Prosecution Service Research Team, April 2012) 16.

¹⁰¹ Office for Criminal Justice Reform, *Special Measures Meetings between the Crown Prosecution Service and Witnesses: Practice Guidance* (CJS January 2009) 7.

¹⁰² These provide a single point of contact for victims and witnesses. See Ministry of Justice, *Code of Practice for Victims of Crime* (Ministry of Justice 2015).

‘flag’ cases involving vulnerable and/or intimidated witnesses.¹⁰³ This helps to ensure that information about the witness is shared between them, and ultimately that the witness is provided with the relevant information and support.

Alleged victims and prosecution witnesses should also come into contact with Victim Support or Witness Services. Victim Support is a charity which supports all victims, including those who are required to testify against an alleged offender.¹⁰⁴ The Witness Service, run by the Citizens Advice Bureau, operates in every criminal court to support witnesses before, during and after trial.¹⁰⁵ Volunteers from both of these organisations will discuss the potential availability of special measures with alleged victims and witnesses, and can communicate the outcome of these discussions with those working within the WCU. In cases where vulnerable and/or intimidated witnesses have not been identified early on,¹⁰⁶ the existence of Victim Support and Witness Services should help to ensure that witnesses are spoken to about special measures and that they are applied for when it is appropriate. Again, this serves to increase the legal profession’s awareness and understanding of the special measures available to prosecution witnesses.

There are four other features of the legal field that also call for comment in this regard. First, the Ministry of Justice has issued *Achieving Best Evidence* guidance for practitioners to assist them to utilise special measures for victims and witnesses in the most effective way. Second, the Criminal Bar Association has produced a training video for the legal profession, designed

¹⁰³ Office for Criminal Justice Reform, *Early Special Measures Discussions between the Police and the Crown Prosecution Service: Practice Guidance* (CJS January 2009b) Annex E, 27.

¹⁰⁴ See <https://www.victimsupport.org.uk/going-court>.

¹⁰⁵ See <https://www.citizensadvice.org.uk/about-us/citizens-advice-witness-service/>.

¹⁰⁶ Research conducted into special measures decisions by prosecutors highlights, for example, that initial police assessments of need for special measures are not always carried out, and the quality of information that is passed to the CPS is not always of a sufficient standard. See Corinne Charles, *Special Measures for Vulnerable and Intimidated Witnesses: Research Exploring the Decisions and Actions taken by Prosecutors in a Sample of CPS Case Files* (Crown Prosecution Service Research Team, April 2012) 7-8. See also Joyce Plotnikoff and Richard Woolfson, *Measuring up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings* (NSPCC 2009) 24.

to improve the questioning of vulnerable witnesses in court.¹⁰⁷ Third, HHJ Rook QC, chair of the working group set up by The Advocacy Training Council in response to the Coalition Government's paper 'Our Commitment to Victims'¹⁰⁸ has designed mandatory training for practitioners on the topic of vulnerable witnesses.¹⁰⁹ Fourth, The Advocate's Gateway has also produced several toolkits for the legal profession on the topic of vulnerable witnesses which offer guidance regarding the available support.¹¹⁰ There is thus a high volume of administration and training which is required in the legal field, thus ensuring first and foremost that the legal profession is aware of the available special measures for non-defendant (particularly prosecution) witnesses.

The organisation of the legal field where defendant witnesses are concerned is not comparable. The absence of bureaucratic 'communication formats'¹¹¹ designed to capture information about defendant witnesses means that defence lawyers are not prompted to apply for special measures for defendants, and ultimately have more discretion about whether or not to do so. Furthermore, the support that is available to non-defendant witnesses through agencies such as Witness Services, Victim Support and Witness Care Units is not comparably available to defendants and defence lawyers. Again this minimises the exposure that defence lawyers and their clients have to external agencies that can raise awareness of available special measures provision.

In addition, work such as Felicity Gerry's article for The Justice Gap, 'Vulnerable defendants and the courts'¹¹² arguably embeds the lack of awareness. Gerry's paper contains a section devoted to considering the measures that are available to assist vulnerable defendants. Within

¹⁰⁷ See <http://www.theadvocatesgateway.org/a-question-of-practice>.

¹⁰⁸ Ministry of Justice, *Our Commitment to Victims* (Ministry of Justice 2014).

¹⁰⁹ The Advocacy Training Council, <<http://www.advocacytrainingcouncil.org/advocacy-the-vulnerable/national-training-programme-2016-18> > accessed 14 December 2016

¹¹⁰ See www.theadvocatesgateway.org.

¹¹¹ Kevin Haggerty and Richard Ericson, *Policing the Risk Society* (Clarendon Press 1997) 31-38.

¹¹² Felicity Gerry, 'Vulnerable Defendants and the Courts' (2012) *The Justice Gap* <<http://thejusticegap.com/2012/04/vulnerable-defendants-and-the-courts/>> accessed 17 June 2015.

this section, she asserts that ‘the courts have consistently refused the use of ... TV link stating that it was Parliament’s clear intention that defendants should be excluded from the provisions of the YJCEA 1999’. Section 33A of the YJCEA permitting defendants to give evidence by live link is entirely omitted from discussion, despite its enactment some six years prior to the publication of this article. So too is the common law power to permit screens to a defendant as per the Divisional Court decision in *Waltham Forest Youth Court*.¹¹³ Those of the legal profession who read this article, written by a high-profile, practising QC, may thus remain unaware of the breadth of support available to vulnerable defendants.

Following the insertion of section 33A into the YJCEA, and the affirmation from the courts that a power exists to permit a defendant to give evidence from behind a screen, there has been an absence of leadership offered by the appellate courts with regard to the use of these measures for vulnerable and/or intimidated defendants.¹¹⁴ In addition, there is a lack of guidance regarding their use in, for example, The Advocate’s Gateway toolkits designed to assist practitioners who are working with vulnerable court users by highlighting best practice and raising awareness of the available measures.¹¹⁵ This is, of course, in stark contrast to the guidance available for non-defendant witnesses. It is likely that these factors all contribute to the legal profession’s inferior awareness of the special measures available to vulnerable and/or intimidated defendant and defence witnesses.

To summarise, the legal field in which the legal profession operates is focused, as far as special measures are concerned, on protecting victims and witnesses in criminal trials. This is largely the consequence of the political surround in which the legal field sits. Special

¹¹³ *R v Waltham Forest Youth Court* [2004] EWHC 715 (Admin) [31].

¹¹⁴ In contrast to the available case law on intermediary provision – see section 4.2.3. (p102-121) and section 4.2.6. (p124-38).

¹¹⁵ See www.theadvocatesgateway.org. However, the updated versions of Toolkits 8 and 10 do make reference to their availability, which were published in March 2017. The absence of guidance and awareness is thus starting to be addressed. See The Advocate’s Gateway, ‘Effective Participation of Young Defendants’ (Toolkit 8, The Council of the Inns of Court 2017); The Advocate’s Gateway, ‘Identifying Vulnerability in Witnesses and Parties and Making Adjustments’ (Toolkit 10, The Council Inns of Court 2017).

measures have not been lauded and promoted in the same way for vulnerable and/or intimidated defendants. Some criminal practitioners are thus unaware of the support that is available to such clients. While they may make decisions about whether their client is fit to plead, or whether ‘reasonable adjustments’ should be made to proceedings (such as taking regular breaks and using clear, simple language), it may not occur to some to consider whether measures such as live link or screens would be a helpful addition for their client. The system’s lack of commitment to the equality principle in the treatment of vulnerable and/or intimidated court users, appears to go much deeper than the substance of the law itself. It is replicated and embedded in the implementation and support structures (or lack thereof) surrounding the special measures that do exist for defendants.

This is not to say that none of the legal profession is aware of the availability of special measures to vulnerable and/or intimidated defendant witnesses. For special measures to be secured for vulnerable and/or intimidated court users, however, it requires more than knowledge of the law. The legal profession must also recognise the vulnerability and/or intimidation from which a court user suffers and thus apply for special measures use on their behalf. The next section of this chapter explores this first issue – the identification of vulnerability and/or intimidation. This is a potential barrier to equal provision which, like awareness of the law, falls outside of Hawkins’ frame device. It is not about decision-making per se, but the awareness of the need to make a decision. The organisation of the legal field and surround remain significant to understanding the issues relevant to this matter.

5.6. Identification of vulnerability

As discussed in section 1.1, vulnerability within the general population is pervasive. One in four people in England suffers from a mental health problem per year; one in five suffers from anxiety or depression; and over one million people have a learning disability. As

discussed in Chapter 3, a significant number of those who are either a victim, a witness to, or accused of, a crime suffer from these conditions. This means that a significant number of victims, witnesses and defendants should qualify for the use of special measures to help them to give their evidence. In 2014-15, Victim Support helped 31,729 vulnerable or intimidated witnesses and 13,881 children to give evidence.¹¹⁶ This is only one set of figures, but they give an indication as to the frequency with which courtroom procedures should be adapted as per the YJCEA. For this to happen, the identification of vulnerability and/or intimidation is first required. Existing research indicates that despite knowledge of the prevalence of vulnerability in theory, the identification of vulnerability in practice remains deficient.¹¹⁷ This is explored in the following section.¹¹⁸

The concept of vulnerability is assigned in both policy and practice in a variety of contexts to individuals and/or groups, and is used to justify their differential treatment. In the context of special measures, a witness' or defendant's status as vulnerable and/or intimidated paves the way to witnesses and defendants securing special measures to assist them to give their evidence in criminal trials. Brown has identified two types of vulnerability – innate and situational vulnerability.¹¹⁹ Innate vulnerabilities include factors such as age, physical or sensory impairments and issues of mental health. Situational vulnerability relates to the

¹¹⁶ Victim Support, *Annual Report and Accounts 2014/15* (Victim Support 2015) 6.

¹¹⁷ See Andrew Sanders and others, *Victims with Learning Disabilities: Negotiating the Criminal Justice System* (Occasional Paper No.17, University of Oxford Centre for Criminological Research 1997); Jessica Jacobson, *No-one Knows: Police Responses to Suspects Learning Disabilities and Difficulties – A Review of Policy and Practice* (Prison Reform Trust 2008) 27-28; Lord Bradley, *The Bradley Report: Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (Department of Health 2009) 20; Jessica Jacobson and Jenny Talbot, *Vulnerable Defendants and the Criminal Courts: a Review of Provision for Adults and Children* (Prison Reform Trust 2009) 5-6, 13-14; Ali Wigzell, Amy Kirby and Jessica Jacobson, *The Youth Proceedings Advocacy Review: Final Report* (Institute for Criminal Policy Research 2015) 46.

¹¹⁸ I do not explore the identification of intimidation since there is no statutory authority for such for defendants, though as discussed in section 4.2.3. (p115) and section 4.3. (p140-41) this is not to say that intimidated defendants do not exist.

¹¹⁹ See Kate Brown, “‘Vulnerability’: Handle with Care” (2011) 5(3) *Ethics and Social Welfare* 313; Kate Brown, ‘Re-moralising Vulnerability’ (2012) 6(1) *People, Place and Policy Online* 41; Kate Brown, ‘Questioning the Vulnerability Zeitgeist: Care and Control Practices with ‘Vulnerable’ Young People’ (2014) 13(3) *Social Policy and Society* 371; Kate Brown, *Vulnerability and Young People: Care and Social Control in Policy and Practice* (The Policy Press 2015).

circumstances in which individuals find themselves as a result of, for example, their own characteristics and their own or someone else's actions. The 'vulnerability' criteria for special measures can be understood as a mixture of innate and situational vulnerability.

Vulnerability for the purpose of special measures eligibility is defined in the YJCEA. Section 16 defines vulnerability for non-defendant witnesses and section 33A for defendant witnesses.¹²⁰ As discussed in section 4.2.3, there are differences between these sets of criteria, but broadly speaking they are concerned with the age of the court user, their mental and physical health, and their social and cognitive function. These are innate vulnerabilities.

For adult¹²¹ non-defendant witnesses and all defendant witnesses to qualify for special measures, these innate vulnerabilities need to be considered to either risk diminishing the quality of their evidence (non-defendant witnesses) or to impede their ability to effectively participate as a witness (defendant witnesses). This requires a judgment to be made by criminal practitioners and ultimately the trial judge about whether or not the witness' innate vulnerability will place them at a further disadvantage by hindering their ability to give evidence or participate effectively. In other words, is their innate vulnerability likely to put them in a position of situational vulnerability? If this is considered to be the case, the witness/defendant is eligible for special measures. The vulnerability criteria contained in section 16 and section 33A of the YJCEA therefore combine markers of both innate and situational vulnerability. The identification of vulnerability thus involves two stages – first identifying the existence of innate vulnerability and second recognising the effect that this will have on the ability of the court user to give evidence/its quality.

¹²⁰ It is unclear whether the criteria in section 33A for defendants are used for eligibility for the other measures from which a defendant witness can benefit from (eg screens and intermediaries – the provision for which has been enacted but is not in force). It is perhaps likely that the legal profession would follow the guidance from Parliament and thus use the statutory definition for all measures.

¹²¹ Child non-defendant witnesses automatically qualify for special measures assistance as per YJCEA, s 16(1)(a).

As outlined above, responsibility for identifying vulnerability and ensuring the appropriate applications for special measures are made falls initially with the police. McLeod et al's research highlights that the police also often find it difficult to identify support needs due to both a lack of training and the combination of mental health problems or learning difficulties with signs drug and alcohol misuse.¹²² It was noted in a Home Office report that '[police] officers are heavily reliant on self-identification, particularly in the case of intimidation ... [and] the pride of witnesses sometimes leads them to conceal their difficulties'.¹²³ The same has been found of defendants, who may try to conceal their vulnerability for fear of ridicule or embarrassment.¹²⁴

While the initial identification of children and complainants of sexual offences may be simple,¹²⁵ it is often more challenging for criminal justice agents and members of the legal profession to identify those with learning disabilities and mental health problems. This is especially so when their condition is undiagnosed. Emerson et al demonstrate that this may be quite common, since of those projected to have learning disabilities it is thought that less than 20% of them are known to disability services.¹²⁶ Furthermore, the 2015 review of advocacy in youth proceedings found that even in the youth court, which by definition only include defendants under the age of 18, the identification of children's needs is deficient.¹²⁷

¹²² Rosie McLeod and others, *Court Experiences of Adults with Mental Health Conditions, Learning Disabilities and Limited Mental Capacity Report 1: Overview and Recommendations* (Ministry of Justice Research Series 8/10, Ministry of Justice 2010) 14.

¹²³ Mandy Burton and others, *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the criminal justice agencies* (Home Office Online Report 01/06, Research Development and Statistics Directorate, Home Office 2006) 25.

¹²⁴ Jenny Talbot, *Fair Access to Justice?: Support for Vulnerable Defendants in the Criminal Courts* (Prison Reform Trust 2012) 17; Ali Wigzell, Amy Kirby and Jessica Jacobson, *The Youth Proceedings Advocacy Review: Final Report* (Institute for Criminal Policy Research 2015) 34.

¹²⁵ Due to their date of birth or the alleged offence on which the case is based.

¹²⁶ Of the 1,191,000 people estimated to have learning disabilities, 189,000 are known to disability services. See Eric Emerson and others, *People with Learning Disabilities in England 2011* (Department of Health 2012) 2.

¹²⁷ Ali Wigzell, Amy Kirby and Jessica Jacobson, *The Youth Proceedings Advocacy Review: Final Report* (Institute for Criminal Policy Research 2015) 47.

That even child defendants may not be identified as vulnerable is indicative that the likelihood that an adult defendant with undiagnosed mental health problems or learning disabilities will be identified is slim. This is particularly so given that some of these problems are absent visual or behavioural cues.¹²⁸ This means that some vulnerable and/or intimidated court users will often lack the provision of support to which they are entitled when giving evidence because their vulnerability has been left undetected.

The evidence seems to suggest, therefore, that the identification of vulnerability and/or intimidation warrants some improvement at each stage of the criminal process. Some of my respondents confirmed this in interview in relation to the identification of defendant vulnerability:

...there's a problem generally about defence lawyers properly assessing the capability of their clients to engage with the trial process. I think there's a real issue there; particularly with youths, but not just youths. [DS2]

I don't think the defendant is given sufficient consideration; because frequently they are young, vulnerable or whatever. [J5]

The absence of sufficient screening procedures means that the police and legal profession are left inadequately supported in the task of identifying vulnerability among court users.¹²⁹ Worryingly, McLeod et al found that legal representatives and members of the judiciary often considered the identification of vulnerability as solely the police's responsibility, and so were 'less inclined to consider identification to be within their remit'.¹³⁰ This can mean that a failure to identify vulnerability at the early stages of the process can leave witnesses without adequate assistance. Evidence from Wigzel et al suggests that, even if barristers are willing to attempt to identify vulnerable witnesses, they often lack the skills required, even in the youth

¹²⁸ *ibid* 34.

¹²⁹ A new Liaison and Diversion scheme is being trialled in 10 areas across England, with the potential for it to be rolled out nationally in 2017. See: NHS England's Liaison and Diversion Standard Service Specification 2015 (version 8C—in draft).

¹³⁰ Rosie McLeod and others, *Court Experiences of Adults with Mental Health Conditions, Learning Disabilities and Limited Mental Capacity Report 1: Overview and Recommendations* (Ministry of Justice Research Series 8/10, Ministry of Justice 2010) 10.

courts where children are inherently vulnerable.¹³¹ Valuable work has been undertaken in recent years to attempt to combat the poor identification of vulnerable court users, by raising awareness of issues of vulnerability, (re)educating criminal practitioners, and highlighting examples of best practice.¹³² The emphasis of this work, however, has often been on vulnerable and/or intimidated prosecution witnesses and complainants rather than defence witnesses and defendants.¹³³

The way that the legal field is organised increases the chances that a prosecution witness' vulnerability will be identified. As discussed in relation to awareness in the previous section, the paper trail of various 'MG' forms and the process of electronic 'flagging' of vulnerable prosecution witnesses helps to ensure that vulnerability is identified among witnesses for the prosecution and applications are subsequently made for special measures support.¹³⁴ Furthermore, there is a multi-agency approach to identifying prosecution witness vulnerability. The police and CPS contribute to this, as well as agents from Victim Support, The Witness Service and Witness Care Units. These prompts at various stages of the process are thus likely to improve the identification of witness vulnerability.

Where defendants are concerned, the organisation of the legal field does not lend itself in this same way to ensure the identification of defendant vulnerability. Comparable communication formats within and between agencies do not exist. The task of identifying defendant and defence witness vulnerability is left largely to defence lawyers,¹³⁵ who already work under

¹³¹ Ali Wigzell, Amy Kirby and Jessica Jacobson, *The Youth Proceedings Advocacy Review: Final Report* (Institute for Criminal Policy Research 2015) 8.

¹³² See for example, the toolkits produced by The Advocate's Gateway: www.theadvocatesgateway.org.

¹³³ For example, HHJ Rook's training programme, discussed in section 5.5.4. (p180) is on vulnerable witnesses.

¹³⁴ Although research conducted by Charles highlights that the process is not always followed – the police do not always complete the MG11 and MG2 forms and early special measures meetings between the police and CPS were rare. See Corinne Charles, *Special Measures for Vulnerable and Intimidated Witnesses: Research Exploring the Decisions and Actions taken by Prosecutors in a Sample of CPS Case Files* (Crown Prosecution Service Research Team, April 2012) 24-25, 28.

¹³⁵ Aside from the initial role of the police in identifying defence witness vulnerability (as per Standard 4 of the Witness Charter, see Ministry of Justice, *The Witness Charter: Standards of Care for Witnesses in the Criminal Justice System* (Ministry of Justice 2013) 11). Where defendants are concerned, police should identify suspect

immense pressures. For instance, McConville et al and Newman independently found in their studies of defence solicitors that resource and financial pressures result in discontinuous representation of clients.¹³⁶ A client thus spends minimal, if any, time with the solicitor who ultimately represents them at trial. They may even have been interviewed in the first instance by unqualified staff from the solicitors' office due to resource constraints.¹³⁷ This means it can be left to such 'articled clerks' (trainee solicitors) to identify a defendant's vulnerability ahead of trial in order for the defence to make a timely special measures application.¹³⁸ If special measures are not applied for before the trial, then the solicitor or barrister often cannot correct many of the deficiencies in case preparation at trial.¹³⁹

McConville et al found that, even when clients did meet a lawyer, they often talked over clients without letting them tell their version of events.¹⁴⁰ If this is considered in the context of special measures, a vulnerable defendant who may have been willing to disclose their vulnerability might not get the opportunity to do so. Furthermore, other vulnerable defendants are unlikely to be identified as such by the lawyer or legal clerk in a meeting in which the client is given little opportunity to speak. This is compounded by the absence of services for defendants comparable to Victim Support, The Witness Service and Witness Care Units to share the burden of identifying vulnerability.

This may also be true where non-defendant defence witnesses are concerned. Studies undertaken exploring the use of special measures tend to focus on witnesses for the prosecution, despite non-defendant defence witnesses being equally eligible under special

vulnerability in the police station for the purposes of securing an appropriate adult and record this in the custody record. However, I discussed the shortcomings of this process in Chapter 3.5.1.1.

¹³⁶ Mike McConville and others, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press 1994) 41-44; Daniel Newman, *Legal Aid Lawyers and the Quest for Justice* (Hart Publishing 2013) 77-81. This is discussed further in section 7.3.1. (p236-42).

¹³⁷ Mike McConville, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press 1994) 55.

¹³⁸ See *ibid* 53.

¹³⁹ *ibid* 161.

¹⁴⁰ *ibid* 136.

measures legislation.¹⁴¹ It is difficult, therefore, to ascertain whether defence witnesses are adequately supported when called to give evidence. However, the available statistics from the Witness Intermediary Scheme indicate that non-defendant defence witnesses are rarely the beneficiary of an intermediary by comparison to prosecution witnesses.¹⁴² Furthermore, McLeod et al found that defence witnesses are less well supported in court than prosecution witnesses.¹⁴³ My own research appears to support this – my respondents reported that it is uncommon to see a defence witness use special measures.¹⁴⁴

The working conditions of lawyers may provide some explanation for this disparity. The absence of communication formats and the lack of inter-agency support mean that, as with defendants, the task of identifying vulnerability among defence witnesses is left to defence lawyers. Though the Witness Charter states that The Witness Service is available to provide free help and support to defence witnesses as well as prosecution witnesses,¹⁴⁵ this seems to occur rarely.¹⁴⁶ The Witness Service has attributed this to their prioritisation of prosecution witnesses, since defence witnesses have ‘the visible support of the defence legal team’.¹⁴⁷

¹⁴¹ For examples see Becky Hamlyn and others, *Are Special Measures Working? Evidence from surveys of vulnerable and intimidated witnesses* (Home Office Research Study 283, Home Office 2004); Paul Roberts, Debbie Cooper and Sheelagh Judge, ‘Monitoring success, accounting for failure: The outcome of prosecutors’ applications for special measures directions under the Youth Justice and Criminal Evidence Act 1999’ (2005) 9 *International Journal of Evidence and Proof* 269; Mandy Burton, Roger Evans and Andrew Sanders, ‘Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales’ (2007) 11(1) *International Journal of Evidence and Proof* 1; Joyce Plotnikoff and Richard Woolfson, *Measuring up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings* (NSPCC 2009); Corinne Charles, *Special Measures for Vulnerable and Intimidated Witnesses: Research Exploring the Decisions and Actions taken by Prosecutors in a Sample of CPS Case Files* (Crown Prosecution Service Research Team, April 2012).

¹⁴² The Advocate’s Gateway, ‘Intermediaries: Step by Step’ (Toolkit 16, The Council of the Inns of Court 2015) 11.

¹⁴³ Rosie McLeod and others, *Court Experiences of Adults with Mental Health Conditions, Learning Disabilities and Limited Mental Capacity Report 1: Overview and Recommendations* (Ministry of Justice Research Series 8/10, Ministry of Justice 2010) 20.

¹⁴⁴ See section 5.2. (p152-53).

¹⁴⁵ Ministry of Justice, *The Witness Charter: Standards of Care for Witnesses in the Criminal Justice System* (Ministry of Justice 2013) 12.

¹⁴⁶ Rosie McLeod and others, *Court Experiences of Adults with Mental Health Conditions, Learning Disabilities and Limited Mental Capacity Report 1: Overview and Recommendations* (Ministry of Justice Research Series 8/10, Ministry of Justice 2010) 20.

¹⁴⁷ *ibid.*

Defence lawyers' working conditions are not conducive to the identification of vulnerable clients and/or witnesses or to ensuring that special measures are applied for and secured for such defendants and defence witnesses ahead of trial. In light of these considerations, one might argue that the poor identification of vulnerable defendants is simply an issue of awareness. In other words, the defence is sometimes unaware of the vulnerability of their clients and witnesses. However, evidence from the interviews adds some nuance to this, indicating that the poor identification of vulnerability might also be the result of the way in which the legal profession conceptualises vulnerability:

People tend to prey on the vulnerable, so victims are more vulnerable than defendants generally. [R4]

...I think we just have a preconception about defendants as being in a certain way and they won't need them [special measures], do you know what I mean? [PS2]

These respondents betray a very simplistic set of stereotypes about offenders and victims. These assumptions bring to mind Nils Christie's work on ideal victims and suitable offenders.¹⁴⁸ He states that an important attribute for the construction of the 'ideal victim' at a social level is weakness.¹⁴⁹ In contrast, Christie describes an ideal offender as someone who 'differs from the victim . . . [and] is, morally speaking, black against the white victim'.¹⁵⁰ Dichotomising victims and defendants in this way is false, since victims are not always vulnerable and defendants often are.¹⁵¹ In reality, victim and offender populations often interchange.¹⁵²

¹⁴⁸ Nils Christie, 'On Society and the Victims of Crime' in Ezzat Fattah (ed), *From Crime Policy to Victim Policy* (Macmillan 1986) 17-30.

¹⁴⁹ *ibid* 19.

¹⁵⁰ *ibid* 26.

¹⁵¹ For example Green discusses how the group most at risk of victimisation are 'the heavily offending, young male, economically disadvantaged,' see Simon Green 'Crime, Victimisation and Vulnerability' in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Willan Publishing 2007) 91-113

¹⁵² This is referred to in the criminological literature as the 'victim-offender overlap', see Mark Berg and others, 'The Victim-Offender Overlap in Context: Examining the Role of Neighbourhood Street Culture' (2012) 50(2) *American Society of Criminology* 359-390; Marie Tillyer and Emily Wright, 'Intimate Partner Violence and the Victim-Offender Overlap' (2014) 51(1) *Journal of Research in Crime and Delinquency* 29-55. This was also alluded to in section 1.1. (p2) with regards to the provision of an intermediary for an individual when they were a witness, but not when they were subsequently in court as a defendant.

The depiction of ideal victims as vulnerable, and suitable offenders as the opposite of victims (and thus not vulnerable), may result in some criminal practitioners overlooking defendant vulnerability. Hawkins' work can help to understand this.¹⁵³ Changes in the surround and the legal field have resulted in the provision of special measures to defendant witnesses; measures traditionally associated with victims and witnesses. The way that some criminal justice agents frame vulnerability and the use of special measures may remain unaligned with the legal expansion in eligibility discussed in Chapter 4. The failure, in some cases, to adequately identify those in need of special measures assistance thwarts attempts to achieve equality among, and thus consistency in the treatment of, all potential and actual witnesses (both defendant and non-defendant) in criminal trials.

The findings from my interviews were not, on their face, entirely discouraging, however. The respondents did confirm, in the abstract, that a cohort of defendants exists who are fit to plead but unable to effectively participate in the proceedings as witnesses. A vulnerable defendant was not, therefore, an alien phenomenon. Furthermore, the fact that several of my respondents had experience, albeit limited experience, of using special measures for vulnerable defendant witnesses provides evidence that vulnerability is, at least sometimes, identified. Most notably, over half of the respondents had used or were aware of others using an intermediary for a defendant witness.¹⁵⁴ The limited available evidence also indicates that intermediary use among defendants is increasing¹⁵⁵ (despite the funding and matching difficulties¹⁵⁶):

Special measures in terms of erm, intermediaries. That is quite common, actually. Well, becoming more common. [J2]

¹⁵³ Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002)

¹⁵⁴ See Table 5.1 above.

¹⁵⁵ See Penny Cooper and David Wurtzel, 'A Day Late and a Dollar Short: In Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales' [2013] *Criminal Law Review* 4, 16; Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants* (Policy Press 2015) 249.

¹⁵⁶ See section 7.3.3. (p245-52) for a discussion of these issues.

Reflection on their own practice also revealed other instances in which defendant vulnerability was identified:

...if the defendant has an obvious vulnerability¹⁵⁷ – if they're very young or obviously not very smart. [J2]

There are people [who are] vulnerable and you question whether they should even be there. [B2]

I represent a very great number of very dim, disadvantaged and damaged defendants. [B1]

It is commendable that these respondents were alert to the vulnerable defendants they had encountered. However, it is also concerning that these same respondents' experiences of defendant special measures were so limited. For example, B1 recalled having applied for and secured an intermediary for a defendant on just one occasion, while B2 and J2 were aware of a case in which a defendant intermediary was sought, but not in a trial in which they were directly involved.¹⁵⁸ In cases where vulnerability is identified, but special measures are not invoked, the next question to ask is why not? This is considered in the next two chapters.

In summary, insights from the respondents on the identification of defendant vulnerability reveal three things. First, that the identification of vulnerability and/or intimidation is deficient across all court users, but seems particularly poor among those acting as defence lawyers. Second, that a defendant's status as the accused might inhibit some criminal practitioners from viewing them as vulnerable. Third, even when defendants are considered vulnerable by criminal practitioners, special measures are not always applied for to assist them to give evidence.

¹⁵⁷ Henderson's findings echoed this. She noted that several of the intermediaries she interviewed 'reported that it became much more difficult to convince judges and advocates [of vulnerability and the need for an intermediary] if a witness was not obviously impaired'. Emily Henderson, "A Very Valuable Tool": Judges, Advocates and Intermediaries discuss the Intermediary System in England and Wales' (2015) 19(3) *International Journal of Evidence and Proof* 154, 162.

¹⁵⁸ In B2's defence, she had an 80/20 prosecution/defence workload split, and so many of the vulnerable defendants of whom she spoke were likely encountered in her capacity as counsel for the prosecution. Her single anecdotal experience of special measures used by defendants, however, indicates that counsel for the defence in the trials in which she was prosecuting did not identify the vulnerability themselves, or did but did not apply for special measures.

5.7. Conclusion

This chapter has presented an overall snapshot of the findings from the interviews on the use of special measures in Crown Court trials, as well as some cautionary notes on how the data should be regarded going forward. Furthermore, I have highlighted that the variations in the number of witnesses in each cohort presents a valid, yet partial, explanation for the differential uptake in special measures experienced by the respondents. This chapter has then turned to the issue of awareness. Evidence from the interviews revealed that not all criminal practitioners are aware of the special measures available in law to vulnerable and/or intimidated defendant witnesses. Hawkins' conceptual framework has helped us to understand the knowledge deficit as a likely effect of the socio-political context (or surround) in which special measures law was enacted; the way the law has developed; the scrutiny of the implementation of that law; and the organisation of the legal field in which practitioners operate.

In addition, the identification of vulnerability is deficient across all witness categories. This is, again, at least in part, an issue of awareness. This problem seems magnified where the defence is concerned. The organisation of the legal field seems a likely contributor to this. The conditions in which defence lawyers work are not conducive to identifying vulnerability and the lack of support from other agencies in identifying vulnerability leaves the responsibility solely on them.

The existence of practical differences and a lack of awareness are not the only reasons, however, for the differential uptake of special measures between vulnerable and/or intimidated defendant and non-defendant witnesses. The respondents knew of the existence of all special measures for non-defendant defence witnesses, and yet uptake for them versus prosecution witnesses was reported as significantly different. Moreover, there were some criminal practitioners taking part in this research that did know that the provision of screens

and live link are available to vulnerable defendant witnesses, but had still neither sought nor witnessed their use. Similarly, some respondents were aware of vulnerability among their clients but still did not invoke special measures to assist them to give evidence. This suggests the existence of other factors which deter the defence from using these measures and thus inhibit the role that equality plays in their provision.

In Chapters 6 and 7 I use Hawkins' frame device to generate further insights from the data. We will explore how the legal profession may be framing special measures decisions and the influence that the legal field and wider surround have had on their attitudes, understanding and perceptions. In chapter 6 I consider the instrumental and moral frames which appear to be employed by members of the legal profession. This helps us to understand further the extent to which criminal practitioner are committed to the principle of equality in the uptake of the special measures that are available.

CHAPTER 6: INSTRUMENTAL FRAMES AND MORAL FRAMES

6.1. Introduction

In this chapter I draw further on the interview data to consider insights obtained into issues which may affect criminal practitioners' decisions about whether or not to apply for special measures for vulnerable and/or intimidated court users. I explore whether, and if so how, decisions can vary depending on the particular special measure and the court user for whom it is considered. I use Hawkins' instrumental and Oakley's moral frame devices (see below) in this chapter to begin to develop an understanding of the competing tensions underpinning the decisions made. This chapter also continues to consider the effects and influences of the organisation of the legal field and the broader political, economic and social surround in which these decisions take place. The implications of all of this for equality and thus for the coherence of the law in practice are also drawn out throughout the chapter.

As mentioned in the previous chapter, for Hawkins, 'framing is a prerequisite to deciding whether a regulatory agency should act, how they should act and for what purpose'.¹ In the context of special measures framing is thus a prerequisite to deciding whether to apply for special measures; why (or why not); and if so, for which one(s). It is thus 'a means by which factors are selected and their meaning in decision-making is organised'.² Hawkins' instrumental and symbolic frames require some reconceptualization for the special measures context. Hawkins noted that a decision maker who 'seeks to achieve instrumental effects frames problems ... in terms of the expected likelihood of correction, repair, or other

¹ Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 249.

² *ibid* 48.

indicators of reductive effectiveness'.³ In other words, the decision-maker (in Hawkins' context the regulatory agency) considers what impact or effect a particular intervention would have on both rectifying the health and safety breach and shaping the company's subsequent behaviour. In this thesis, the instrumental frame embodies the perceptions of those working within the legal profession relating to the purpose of special measures, their effectiveness for different court users, and the impact that special measures use has on the perceived quality of the evidence elicited.

In Hawkins' research, the symbolic frame relates to the level of responsibility or blameworthiness that the decision-maker places on the individual or company responsible for the breach. Furthermore, it addresses the kind of enforcement that is considered to be deserved for the identified breach.⁴ Oakley reconceptualised this in her doctoral thesis as a 'moral frame' to better fit the context of policing missing persons. This addressed decisions about the kind of action that the police felt was deserved when a person was reported missing.⁵ It is her approach that is adopted in this thesis. Thus, references to the moral frame address the kind of special measures support (if any) that actors within the criminal justice system feel a vulnerable and/or intimidated court user deserves when they give their evidence.

This chapter begins with an exploration of the instrumental frames the legal profession appears to adopt when considering special measures. This involves examining their perception of the purpose of special measures and any differences between cohorts of witnesses which the profession views as relevant to their assessment of a witness' or defendant's need for them. In the same way that I did in Chapter 4 with regards to the differences identified as relevant for excluding defendants from special measures in the

³ *ibid* 282.

⁴ *ibid* 333-34.

⁵ Emma Oakley, 'Policing the Missing: Negotiating Absence' (PhD thesis, University of Bristol 2014) 88.

Speaking up for Justice Report, I explore whether the differences to which criminal practitioners attribute importance justify the denial of special measures to some in practice. If not, then the operation of the law lacks a consistent commitment to the equal treatment of vulnerable and/or intimidated court users with regards to special measures use.

6.2. Instrumental frames

6.2.1. General purpose of special measures

I started the interviews with my respondents by asking them what they saw as the purpose of special measures. Common responses consisted of a regurgitation of the policy goal of ‘achieving best evidence’; the legal definition of this from section 16(5) of the YJCEA – ‘complete, coherent and accurate’ evidence; and more general observations including ‘to put witnesses at their ease’ [R4]. Another recurrent response indicated that the job of special measures, at least some of the time, is to accomplish something less ambitious:

It’s always easier to get a witness there if you tell them that they’ve got special measures. [PS2]

There are clearly cases where ... witnesses simply would not come to court unless they can be shielded. [DS3]

There are ... examples where I know people have said they wouldn’t co-operate if there were not special measures, and therefore I infer that special measures have made a critical difference. [J2]

...[sometimes the] circumstances are such that you don’t have a case unless you get their evidence in one way or the other. [R3]

When presented with the problem of a reluctant witness, some practitioners primarily frame special measures as a tool which persuades witnesses to come to court and give evidence. Securing defendant attendance does not present the same challenges. This is because the defendant is on trial, and so is ordinarily present⁶:

⁶ The Criminal Practice Directions require that trials on indictment are only continued in the absence of a defendant if it is a step which is unavoidable, see Criminal Practice Direction 14.E.3 (2015). In circumstances

They [defendants] are there – it's not like 'well if I get the special measures I'll come to court'. That's really why most people have special measures for the prosecution – it's to get the witness there. The defendant has no choice – they're there whether they want to be or not. [B2]

When special measures are framed as a device for securing attendance,⁷ the structural difference between defendants and non-defendants (meaning that defendants are already in court) is viewed as reducing the need for special measures for defendants. The reality, however, is that special measures are actually about more than attendance. The purpose of getting the witness to court is to secure their evidence:

They're [special measures] certainly useful at securing a witness' attendance in the first place. And so I guess by definition they have to improve their evidence because it exists. I know when the police are trying to encourage people to come forward it does seem to be an important part of the dialogue they have – 'look we can apply for special measures' – and people do seem to cling on to that. [R4]

I think when it enables someone to give evidence it is not about enhancing their evidence. If there's someone so terrified to go into court and they know they'll be given screens it can give them the confidence to do it. So it's not actually making their evidence better; it's enabling them to give evidence at all. [B2]

As with non-defendant witnesses the fact that the defendant is already in court does not mean that they will give evidence.⁸ One might think, then, that the legal profession would view special measures as a way of encouraging otherwise reluctant (vulnerable and/or intimidated) defendants to give evidence. This is particularly so since, as discussed in section 5.3.2, in some trials (such as those for sexual offences) hearing from the defendant is seen as vital to the defence case. Curiously, however, the respondents in this research did not seem to view special measures as a tool to secure evidence from an already present defendant in the way that they did for compellable non-defendant witnesses. The approach adopted by criminal practitioners was thus inconsistent in this regard.

where the defendant is absent, the court should consider Lord Bingham's judgment in *R v Jones* [2003] UKHL 5.

⁷ This was also found by Hamlyn et al – a third of witnesses using special measures said they would not have testified without special measures, increasing to 44% for complainants of sex offences. See Becky Hamlyn and others, *Are Special Measures Working? Evidence from surveys of vulnerable and intimidated witnesses* (Home Office Research Study 283, Home Office 2004) 78.

⁸ As discussed in section 3.5.1.2 (p75) defendants are not compellable witnesses.

One reason for above view may be that counsel for the defence does not believe that the defendant will or should give evidence even with special measures, perhaps on the basis of their advice or otherwise.⁹ As highlighted above, however, this certainly is not always the case.¹⁰ Another reason may be that defence barristers know that, if they want their client to testify, it is highly likely that their advice to do so will be followed.¹¹ This means that special measures are not needed as a ‘bargaining chip’ in the way they may be for non-defendant witnesses.¹² This may mean that the defence views special measures – framed as tools to achieve any evidence from a witness – as purposeless.

6.2.1.1. *Guilty pleas*

Another reason why criminal practitioners for the defence might see special measures as redundant is due to an assumption that the trial will not go ahead. A defendant might plead guilty for a range of reasons. These include, but are not limited to: the defendant’s factual guilt and desire to take responsibility for their actions; learning the strength of the evidence disclosed against them; a reluctance to go through the trial process; a decision to take the sentence discount associated with a guilty plea; or the offer of a plea bargain from the prosecution.¹³ Existing research also suggests that criminal defence barristers often seek to crack cases before trial.¹⁴ McEwan notes that ‘[t]he early admission of guilt or plea of guilty

⁹ See section 6.2.1.1. (p199-201).

¹⁰ And see section 5.3.2. (p156) where some of the respondents in this project insisted that persuading a defendant not to testify was not a course of action they were likely to take.

¹¹ It is likely that a client will trust the advice given to them by their lawyer see Mike McConville and others, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press 1994) 257. But see section 5.3.2 (p156) where a defence solicitor (DS3) in this research recounted defendants who had not testified despite his strong advice to do so.

¹² Most non-defendant witnesses are, of course, compellable. However, special measures can still be used a ‘bargaining chip’ to get them to give evidence voluntarily rather than due to a witness summons.

¹³ See further Peter Tague, ‘Guilty Pleas or Trials: Which Does the Barrister Prefer?’ (2008) 23 *Melbourne University Law Review* 242, 242.

¹⁴ This means to get the defendant to enter a guilty plea on the day the trial is due to start. See John Baldwin and Mike McConville, *Negotiated Justice* (Martin Robertson 1977); Mike McConville and others, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press 1994); Peter Tague, ‘Guilty Pleas or Trials: Which Does the Barrister Prefer?’ (2008) 23 *Melbourne University Law Review* 242; Daniel Newman, *Legal Aid Lawyers and the Quest for Justice* (Hart Publishing 2013); Daniele

is widely seen as the salvation of a system under pressure'.¹⁵ Furthermore, McConville and Marsh highlight that some lawyers will 'be subject to financial incentives to persuade their clients to plead guilty ... because they will be paid the same for a trial as for a rapid guilty plea'.¹⁶

24% of cases 'crack'.¹⁷ An assumption, therefore, that a percentage of defendants will ultimately plead guilty is neither unfounded nor unreasonable. Hawkins notes that decisions can have 'a strong anticipatory or predictive character'.¹⁸ The relevance of this for the purposes of this thesis is that the assumption that the case will crack can affect the way a defence lawyer frames the usefulness of special measures. If a trial is assumed not to be going ahead, then an application for special measures for said trial becomes a useless endeavour. This could go some way to explaining the disparate uptake of special measures in practice as evidenced by my respondents.¹⁹

In theory, the same considerations could also be invoked by prosecuting counsel, though the defence might have marginally more control over and foresight about which cases will crack. In other words, the prosecution could proceed on the assumption, in some cases, that the trial would not go ahead, and thus that special measures would be purposeless for their witnesses too. I suggest, however, that the effect of an assumption that the trial will not materialise plays out differently in practice between the defence and prosecution. This is because of the role of the organisational and legal frames in the decision-making process which are discussed in Chapter 7. Furthermore, as discussed in section 5.5.4, the criminal justice system

Alge, 'The Effectiveness of Incentives to Reduce the Risk of Moral Hazard in the Defence Barrister's Role in Plea Bargaining' (2013) 16(1) *Legal Ethics* 162.

¹⁵ Jenny McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31(4) *Legal Studies* 519, 540.

¹⁶ Mike McConville and Luke Marsh, *Criminal Judges: Legitimacy, Courts and State-Induced Guilty Pleas in Britain* (Edward Elgar Publishing Limited 2014) 187.

¹⁷ Ministry of Justice, *Efficiency in the Criminal Justice System* (National Audit Office 2016) paras 1.13-1.14

¹⁸ Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 36.

¹⁹ See table 5.1 above.

is geared to ensure that applications for special measures are made for prosecution witnesses in a timely fashion.

In addition to these more general issues about criminal trials and the purpose of special measures, it is important to consider the way that the legal profession frames the specific purpose of *individual* special measures. As we shall now see, this contributes further to developing an understanding of the disparity in use between defendant and non-defendant witnesses, and prosecution and defence witnesses.

6.2.2. Specific purpose of special measures – live link and screens

The defendant's presence in court influences the way that the respondents frame the usefulness of particular measures for them. The respondents perceived the live link's greatest advantage as keeping non-defendant witnesses out of court.²⁰ This view appears to have resonated with many criminal practitioners, who did not recognise the potential value of the live link provision for vulnerable and/or intimidated defendants:

If the defendant is going to be sitting there through the trial in the dock . . . just trying to think of a situation where, despite sitting there, he would feel more comfortable giving evidence by live link – I don't know. [J3]

[Defendants] never [give evidence] over live link because they're in court for the entirety of the proceedings anyway, so it almost makes a mockery of them being in court and then going out to give their evidence over live link. That's how the courts see it. [R2]

If they [defendants] are there [in court] anyway then something like live link would be irrelevant. [B3]

I mean, of course, they are there anyway. That's the argument . . . I think because they are there and it is thought that it won't be a particular strain on them other than giving evidence is a strain. [J5]

²⁰ Mirroring findings from Matthew Hall, 'Children Giving Evidence through Special Measures in the Criminal Courts: Progress and Problems' (2006) 21(1) *Child and Family Law Quarterly* 65, 67.

Very few respondents²¹ identified the potential benefits of removing some vulnerable and/or intimidated defendants from the courtroom for the purposes of giving their evidence. The possible advantages of the live link for defendants suffering from ADHD or an anxiety disorder, which is magnified by the process of testifying in open court, were discussed in section 3.5.1.3. These issues were overlooked by most of the respondents, due to their belief that the defendant's presence in court throughout the trial often nullified any potential need to leave. This belief was seemingly underpinned by an assumption that a familiarity with the courtroom and those within it, obtained by sitting through the prosecution case, would negate any need for them to leave:

. . . when the defendant won't be giving his evidence until at least half way through a trial . . . he's had to sit and have the family [of the complainant]. . . making sure they get the best seats to stare at him, and so when he gets to the witness box . . . it's almost a given that by then he will be used to all the staring, etc. The tomatoes have been thrown for three weeks; one more isn't going to matter. [R3]

. . . it is different because they [defendants] are there [in court] throughout. By the time it is their time to give evidence they are familiar with how it all works . . . [J5]

Sitting in the dock they [defendants] get used to the court atmosphere and the people in court. [R1]

To sit passively²² in court is a markedly different task, however, from actually giving evidence effectively.²³ This difference is no doubt magnified if the defendant is vulnerable and/or intimidated. It is probable that this remains true even if the defendant is a repeat-player in the courtroom.²⁴ Yet as a result of the attitudes documented above, many vulnerable and/or

²¹ Save for the two who had secured live link for their clients (B1 and B4), and PS1, who recalled thinking that a particular defendant 'would be much more at ease if he could have given his evidence from somewhere that wasn't in open court'.

²² And are often also disengaged, see Anthony Bottoms and John McClean, *Defendants in the Criminal Process* (Routledge 1976) 66; Amy Kirby, Jessica Jacobson and Gillian Hunter, 'Effective Participation or Passive Acceptance: How Can Defendants Participate more Effectively in the Court Process?' (Howard League What is Justice? Working Papers 9/2014) 6-10; Jessica Jacobson, Gillian Hunter and Amy Kirby, 'Structured Mayhem: Personal Experiences of the Crown Court' (Criminal Justice Alliance 2015) 12.

²³ See section 8.5.3. (p274) for discussion of how prompting respondents to think differently about these issues can make a difference to their attitudes.

²⁴ Anthony Bottoms and John McClean, *Defendants in the Criminal Process* (Routledge 1976) 56. This is given, for example, the grandeur of the courtroom, see Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge 2010) and perhaps the nature of their vulnerability. See also Jessica Jacobson,

intimidated defendants are likely to be left to (attempt to) participate in their trial without the assistance to which they are entitled.

The way that criminal practitioners frame the role of screens also seems to be relevant to their uptake. In section 3.5.1.3 I argued that screens could also be used for a defendant suffering from ADHD or an anxiety disorder which was intensified by the presence of multiple people in the courtroom. Another reason a defendant might wish to use screens is if they feel intimidated by the presence of someone in the public gallery when giving their evidence. Screening such defendants from the public gallery may somewhat diminish these concerns and improve their ability to participate effectively as witnesses. Framing screens as a special measure which is primarily to hide the dock from view limits the circumstances in which this measure might be considered suitable for a defendant's or defence witness' use:

I don't think screens would help [defendants] because the whole idea of screens is you're screened from the defendant. [R2]

...screens weren't about the public gallery they were about the dock. [R3]

Hmmm, yeah – screens usually screen from the defendant. [J4]

Screens – usually from the dock, but sometimes from the public gallery. But that's to minimise embarrassment which aren't [sic] often at play for the defendant. [R1]

There's very few instances where ... well, I can't imagine a situation where a defendant would call a witness who he couldn't see, because that's what, in effect, it would be. I think defendants would want to see witnesses giving evidence for them. [J4]

Well, I mean, if screens are used because complainants say we don't want to see and confront this man who's been horrible to us ... I suppose that situation isn't likely to happen for a defendant. [J3]

There's no need to screen the defendant from the dock, unless there's a cut throat defence involved. [B4]

One of the defence solicitors interviewed in this research found that screens being framed in this way acted as a barrier when he tried to secure the measure for a client in these circumstances:

I have applied [for screens] and failed for a defendant. That was a case in which I wanted to screen a young person, who was giving evidence in a case with mixed adults, from the public gallery because they had a lot of hangers on of the complainant. It seemed to me that it was off-putting for the defendant who was utterly petrified of giving evidence in front of the family members. And the answer came back, 'well he's been sat in the dock, he's already been identified, and if there were going to be any repercussions there would have been, I can't see how it makes a difference to his evidence'. [DS3]

In summary, the way that the legal profession seem to frame the purpose of special measures generally – as tools to secure witness attendance and testimony; the purpose of the live link – as a measure to keep witnesses out of the courtroom; and the purpose of screens – to protect a witness from the defendant, means that often they are not viewed as relevant to defendant witnesses. As I have shown, this is often misconceived, and marks a lack of commitment to the principle of equality in the protection and assistance of vulnerable and/or intimidated court users. The view that special measures are not relevant to defendant witnesses perhaps explains why Felicity Gerry (QC)'s article on assisting vulnerable defendants,²⁵ discussed in section 5.5.4, does not discuss the availability of live link and screens.²⁶ The absence of references to these measures may reflect her view (and a more general view) that these measures are of no practical benefit to defendant witnesses.

The absence of guidance generally on when the live link and screens could be invoked for defendant witnesses could thus be a consequence of lawyers framing the measures as of no use to defendants. As per Hawkins' framework, the way in which lawyers frame special measures and their utility can shape the organisation of the legal field.²⁷ This, in turn, can

²⁵ Felicity Gerry, 'Vulnerable Defendants and the Courts' (2012) *The Justice Gap* <<http://thejusticegap.com/2012/04/vulnerable-defendants-and-the-courts/>> accessed 17 June 2015.

²⁶ Presuming, of course, that Gerry herself was aware of the availability of these special measures to defendants herself, and had not fallen victim to the issues surrounding awareness discussed in section 5.5. (p162-82).

²⁷ Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002).

then affect the way that other lawyers frame the purpose and utility of special measures. As a result, there is a seeming lack of concern from within the legal field about the disparate provision of, for example, live link to defendant witnesses when compared with non-defendant witnesses. Lawyers will not complain about the unequal provision of a measure which they generally perceive to be unwarranted and/or undesirable for defendant witnesses.

Intermediaries, however, have been framed as the measure which is ‘more obviously useable’ [B1]. They are considered as suitable for addressing communication difficulties among vulnerable court users²⁸:

I’ve got no issue with the intermediary scenario because if some people are vulnerable and have problems then they require assistance. [PS2]

Intermediaries are seen to really help defendants; it’s helping him to understand the question and it’s helping the jury to understand the answer. It’s made us all so aware of what better advocates we’ve got to be. [B2]

This goes some way to explaining why the intermediary was the measure which was most commonly used for defendants by respondents in this research. As per table 5.1, just under half (eight) of the respondents had been personally involved in at least one trial where a vulnerable defendant gave evidence with the assistance of an intermediary. A further two respondents were aware of trials in which this measure was invoked for the defendant, although they had not personally been involved. This was by comparison to only two respondents reporting involvement in trials where screens were used, and the same with live link.

6.2.3. Nature of evidence

Another instrumental frame that feeds into the use of special measures concerns the nature of the evidence that a witness is required to give, with regards to both its content and its ‘type’,

²⁸ Mirroring findings in Emily Henderson, “‘A Very Valuable Tool’: Judges, Advocates and Intermediaries discuss the Intermediary System in England and Wales’ (2015) 19(3) *International Journal of Evidence and Proof* 154.

ie whether (or not) it is confrontational in nature. This was significant to some practitioners' views as to who needs special measures, providing a further indication of their perception that special measures are for the prosecution. The relevance the respondents placed on the content of the evidence is considered first:

The thing you have to look at is what each person is giving evidence about. [B2]

The assumption underpinning some of the respondents' views was that the content of the evidence given by a prosecution witness is more distressing than that given by a defendant witness as it is:

...the type of evidence that people feel uncomfortable about talking about or very frightened about the repercussions of talking about. [B2]

In contrast, some respondents considered that the evidence given by a defendant was different:

[a defendant] shouldn't be embarrassed to say he's done nothing or that he was under duress or intimidation [R1]

...the nature of their [defendants'] evidence is less intimate; less horrible...the evidence they've got to give isn't as awful. [B2]

There are two issues here. First, the assumptions made by some criminal practitioners about the nature of the evidence given by various witnesses are inaccurate. Prior to conducting my interviews I observed a rape trial where the issue was one of consent between a young male defendant (aged 17) and a young female complainant (aged 16). When giving his evidence the defendant was required, both by the defence and prosecution, to recall in detail his sexual encounter with the complainant. This, according to the defendant, was his first sexual encounter. He gave his evidence in open court where the jury, many lawyers, and several spectators in the public gallery (including the defendant's mother) were present. In these circumstances, the content of the evidence that the defendant was required to give was such that it was likely to cause him distress. It was, contrary to B2's quote, 'intimate', and was

also, in contrast with R1's view, likely to have been embarrassing for the defendant. Raising this trial with the respondents prompted the following reflections from respondents:

I can see that there because sometimes you're looking at equality. Talking about something so incredibly intimate ... maybe it would be easier if he didn't have anyone looking at him. [B2]

Where is the balance? ... Yeah I don't know. It's not something you think about. [PS2]

The second issue with the assumptions made in the quotes from R1 and B2 is that, notwithstanding the nature (or more specifically the content) of the evidence given by a witness, a defendant can still be vulnerable. Vulnerability as per the YJCEA should be identified by reference to a number of innate characteristics (for example their age, learning difficulties, mental health problems)²⁹ which are likely to impede a defendant's ability to participate effectively as a witness (and thus give their best evidence). There is no specific recognition in the statute for issues pertaining to the nature of the evidence to be taken into account when practitioners reach a decision on a witness' or defendant's eligibility for special measures.

Some respondents also viewed the content of evidence as relevant to decisions about non-defendant defence witnesses' vulnerability and/or their need for special measures. This relates to the discussion held in section 6.3 on the conceptualisation of vulnerability. Perhaps the reason that vulnerability is seldom identified among defence witnesses and defendants (for special measures purposes) is that the way it is conceptualised excludes them from consideration:

...what is the person likely to be giving evidence about? It is less likely that it is going to be the type of evidence that would require a screen or TV link, because a defence witness is unlikely to be coming on to talk about their rape experience. [B2]

...generally, defence witnesses are, the vast majority are, either alibis witnesses, friends of the defendant who say he was attacked, or character witnesses. [J2]

²⁹ Which are contained within s 16 and s 33A of the YJCEA.

Implicit in the latter quote is the view that giving evidence to provide an alibi or promote the defendant's good character is not onerous or distressing for a defence witness. This may be true to an extent, but it is a fallacy to assume more generally that it is prosecution witnesses who will always have the most arduous time in court. This was illustrated by R3, who recalled acting as a prosecutor in a rape trial in which the complainant's best friend was a witness summonsed by the defence, as her recollection was, in parts, contradictory to that of the complainant's:

This kid looked on the verge of vomiting the whole time ... She was probably quite frightened about [the defendant] and his mates now because she clearly did not want to [participate in the trial] at all. ...nobody even thought about [special measures] and in fairness I didn't even think about it until she started to look really green. [R3]

The content of the evidence given by the child defence witness in this case related to the behaviour of the complainant prior to the alleged rape. Its nature was not intimate or embarrassing and yet she still displayed visible indicators of distress. This demonstrates that the significance of the content of the evidence is over-played by some members of the profession. The content of the evidence is often irrelevant to whether the defendant or witness is vulnerable and requires special measures assistance.

Another element of evidence which a recorder with 13 years' PQE viewed as relevant to perceptions about vulnerability was whether the nature of the evidence a witness was required to give was confrontational. For alleged victims:

...their attacker or rapist, whatever, is in the same room as them... The problem is the confrontation element and not just testifying in court. [R2]

The defendant's presence in the courtroom was considered by R2 as potentially impacting an alleged victim's ability to testify. For alleged victims and other prosecution witnesses the defendant will almost always be present at trial.³⁰ One way in which this confrontation can be

³⁰ See note 6 (above p197).

avoided is through the use of special measures.³¹ While the nature of a defence witness' evidence might also be accusatory, R2 noted that a defence witness is not required to confront the person whom their accusation is against:

...if you're a defence witness and you're accusing someone of doing something or acting in a reprehensible way, the person you are accusing is not going to be in the courtroom; whereas for a prosecution witness the defendant is there throughout... [R2]

Similarly, R2 considered this to be a relevant factor where defendant witnesses are concerned:

When it's the defendant giving evidence there is nobody for them to be scared of – even if they are running self-defence, the person they claim is the attacker is not, by that point, sitting in the same room as them. [R2]

In many cases, this is likely to be accurate. However, there are (at least) two exceptions. First, the person a defence witness or defendant is accusing of a crime may be sat in the public gallery, rendering their evidence confrontational in nature. Second, in cases where one co-defendant testifies against another, they will do so in front of the person they accuse. This latter scenario was one in which one of my respondents had experienced special measures used by a defendant:

...[if] there's a cut throat defence involved. [The defendant] was 14 and had basically told the police in his interview who did it. He was out of the group but was still there on a joint enterprise trial with the group. When it came to him giving evidence he was essentially a prosecution witness. [B4]

This mirrors the argument invoked by defence counsel in the *Waltham Forest* case before the Administrative Court. As discussed in section 4.2.3, the case involved a co-defendant who claimed to be unable to give evidence against her co-defendants while in their presence.

As highlighted in section 5.6, the identification of vulnerability as per the YJCEA requires the recognition of an innate vulnerability which in turn is considered to put them in a position of structural vulnerability (by affecting the quality of their evidence/ability to give it). In

³¹ Another is a hearsay statement, Criminal Justice Act 2003, s 114. This approach is not popular, see Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, OUP 2010) 366.

making this judgment, the nature of the evidence a witness/defendant is required to give could influence a criminal practitioner's decision. A barrister may consider that the quality of the evidence a young witness with learning difficulties gives is likely to be diminished. This belief is all the more likely if the barrister considers that the nature of that evidence is intimate, embarrassing and confrontational. The kinds of misconceptions about this issue discussed above can therefore have implications for decisions over special measures, with the net result that defendants and defence witnesses will tend to lose out.

A further quote from B2 highlights how, even if the profession appreciates that giving evidence can be a difficult experience for defendants (and by extension defence witnesses), instrumental frames about the purpose of special measures can still prevent their use:

...of course the other way round the defendant probably found it very distressing when I was saying 'you did this to the victim,' etc. And I suppose if it wasn't true he could say 'well I was being asked very difficult and intimate questions and I needed some protection'. But the difference is: who is he being protected from? They had screens so they didn't have to see him – he doesn't have to be screened from them and so I think that's why it doesn't work quite in the same way for defendants. [B2]

B2's musings on the distress of the defendant are bound up in a lack of understanding or awareness of which (and why) special measures might be beneficial to a vulnerable defendant in these circumstances. The use of screens to shield the defendant from the gaze of those in the public gallery, or the provision of live link to remove such a defendant from the direct sight of the jury, may help such a defendant to answer difficult and intimate questions absent the additional pressure of a large audience. However, the way that criminal practitioners frame vulnerability, the nature of evidence, special measures, and their purpose serve to mutually reinforce their perception that special measures are not *for* the defence. This is a further unjustified inconsistency in the approach to special measures and the commitment from within the criminal justice system to the principle of equality.

6.2.4. Tactical impact of special measures

Another way in which special measures are instrumentally framed concerns their perceived impact on the quality of the evidence elicited — in many situations it is considered an unwise tactic to use special measures. This belief is common to the prosecution and the defence, but its influence on special measures decisions varies between the parties. Some potential reasons for this are discussed in Chapter 7.

Due to the defendant's presence in court, there was a clear concern among those interviewed that the defendant's use of the live link, to leave the court and give evidence from elsewhere, would ignite jury distrust or misunderstanding of their client:

It's going to look odd if at trial you have a defendant sitting in the dock who then goes out of court to give evidence to the jury. [R1]

. . . the jury would be thinking 'why on Earth has he done that?' [B2]

If they're watching you over a TV screen and they've seen you in court all week, I think the attitude would be 'well what's he playing at, what's going on?' I think that would take years to break down. I don't think you'll find many defence barristers who will be willing to call their client in that way. [J3]

They're in court the whole time anyway, so it would be strange to want live link. [R3]

This concern arises from the legal profession framing the live link as a measure which keeps a witness out of court.³² Given the central role of the jury in Crown Court trials, the defence is naturally keen to avoid creating a negative perception of their client.³³ The concern also stems from the legal profession's seeming belief that they can read a jury, and thus have an indication of the jurors' reactions to a defendant's use of live link. Morison and Leith found that barristers generally accepted that trying to read a jury is 'a dangerous exercise, a most

³² As discussed above in section 6.2.2. (p201-202).

³³ Judy Cashmore, 'The Use of Video Technology for Child Witnesses' (1990) 16(2) *Monash University Law Review* 228, 241.

inexact science...'³⁴ It seems, however, that some defence lawyers are influenced by a concern for the possible impact of their actions on the jury, if nothing else.

Similar tactical concerns were raised when prosecution witnesses gave their evidence by live link, or from behind a screen, and then sat in the public gallery for the remainder of the trial:

I think there would be a perception that it's an odd thing to do. If one of the grounds for using live link is that you don't want to be in court, and then you go and sit in court and watch, it creates a question of how appropriate the use of the special measure was in the first place. [R1]

The [prosecution witnesses] want this special measure, they want that special measure. And then they turn up in the bloody public gallery to watch [the defendant] give evidence. Some public galleries are upstairs and out the way so OK fine, but where the jury can see – urgh. And I swear to god [the jury] thinks 'well what was all that about then? She can't be that scared'. [R3]

...if you have a witness who will sit there and be extremely vitriolic and then a day later sit in the public gallery watching, which happens surprisingly often, then you think 'well why have you had a screen in that case and now you're sat there'. [B2]

It does look absolutely terrible. ... I would rather ... be tipped off that that is what they were planning to do; then you can tell everybody in advance and manage it and expectations accordingly. [B4]

As is evident from these quotes, the legal profession considers the presence of a prosecution witness in court after they have used a measure designed (or perceived as designed) to keep them out of court as undesirable. This is based on the belief that the jury also views the purpose of the live link and screens as keeping witnesses out of the courtroom or from the view of the defendant. It is also based on the profession's belief that they can predict the jury's reaction to this. B4 spoke of how he had managed this issue previously by encouraging two complainants to give evidence live in court after they had disclosed their intention to sit in court for the remainder of the trial:

I had recently ... I did a trial prosecuting where two of the complainants were now adults. It was all about they'd been raped as children. They wanted to come into court after their evidence and watch the rest of the trial. With that in mind, even though they could have had screens ... it would look a bit odd if they gave their evidence behind a

³⁴ John Morison and Philip Leith, *The Barrister's World and the Nature of Law* (OUP 1992) 152.

screen and then sat in court. They did ... evidence in chief as videos [pre-recorded] and in-court cross-examination so that they could sit in court following their evidence. [B4]

This indicates, therefore, that at least some criminal practitioners view the use of live link or screens by any witness who is going to then sit in the courtroom as ill-advised. This is because it is considered to risk kindling the jury's distrust of the beneficiary of a measure in these circumstances. Since some criminal practitioners (the majority in this study) cannot see the benefit of such measures for defendants and defence witnesses anyway, their uptake for defendants is unlikely to be high. This was reflected in the findings of this research, with only two uses of screens and four of live link recalled among all respondents. Even if a criminal practitioner does identify a benefit of these measures for defendant or defence witnesses, however, their perception that the jury will view their use suspiciously may further deter an application for their use.

In relation to the live link, this seems to be further compounded by the legal profession considering evidence received via this medium as diminished in quality.

6.2.4.1. *'Best evidence'*

Some disagreement exists as to what constitutes 'best evidence'.³⁵ In the YJCEA, references to the quality of the evidence are to its 'completeness, coherence and accuracy'.³⁶ Special measures were enacted with a view to improving these attributes of the evidence. However, the predominant belief among the legal profession is that best evidence constitutes that which

³⁵ Henderson highlights this in the context of modern cross-examination. She states that achieving 'best evidence' in cross-examination is not interpreted to mean evidence that is 'most favourable to a party'. Instead it is about the 'reliability of the evidence'. See Emily Henderson, "'A Very Valuable Tool": Judges, Advocates and Intermediaries discuss the Intermediary System in England and Wales' (2015) 19(3) *International Journal of Evidence and Proof* 154, 184.

³⁶ YJCEA, s 16(5).

is extracted live, in court, in front of the jury.³⁷ It was this latter position which was well supported by the respondents in this research:

...the perception by trial lawyers is that the best evidence possible is to have somebody in court, giving evidence, in front of the jury, without a special measure. [J4]

The use of the live link to remove a court user from the courtroom while they give their evidence, so that they are not physically present before the jury, is thought to diminish the evidence's impact³⁸ and thus its quality and persuasiveness. This is true whether the witness involved is for the prosecution or the defence, including the defendant:

A witness giving evidence by TV link doesn't have as much impact as one giving evidence in court. [DS2]

...the cynical approach and the way I sometimes adopt it is you get much more impact when the witness is in the room. The colloquial way of putting it is the jury can actually get a sniff of her; smell her. It's much more impactful. [B2]

In my view we all react when watching a human describe something to us more critically and even more sympathetically the more body language we can observe and the special measure whereby people give evidence on the video link, I think, tends to sanitise and abstract some of the interaction. [J2]

Anything that comes across on a screen is like just watching television and doesn't have the impact of actually seeing the witness in the flesh. [J5]

In my experience I've found that witnesses giving their evidence over live link don't come across well, because juries are desensitised from them. They haven't got a living, breathing person in front of them in the witness box. [R2]

I think when you see someone there and you see the whites of their eyes and the sweat on their palms, it sounds cruel but as a prosecutor there's no way to convey that. [B3]

³⁷ See Graham Davies, 'The Impact of Television on the Presentation and Reception of Children's Testimony. (1999) 22(3-4) *International Journal of Law and Psychiatry* 241, 251; Laura Hoyano, 'Variations on a Theme by Pigot: Special Measures Directions for Child Witnesses' [2000] *Criminal Law Review* 250, 268.

³⁸ In keeping with previous research findings see Jennifer Temkin, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27(2) *Journal of Law and Society* 219, 237; Paul Roberts, Debbie Cooper and Sheelagh Judge, 'Monitoring Success, Accounting for Failure: The Outcome of Prosecutors' Applications for Special Measures Directions under the Youth Justice and Criminal Evidence Act 1999' (2005) 9 *International Journal of Evidence and Proof* 269, 285-6; Council of Her Majesty's Circuit Judges, *Convicting Rapists and Protecting Victims: A Consultation Response of the Council of Her Majesty's Circuit Judges* (Council of HM Circuit Judges 2006); Mandy Burton, Roger Evans and Andrew Sanders, 'Protecting Children in Criminal Proceedings: Parity for Child Witnesses and Child Defendants' (2006) 18(3) *Child and Family Law Quarterly* 397, 404; Sara Payne, *Rape: The Victim Experience Review* (Home Office 2009) 21; Sarah Payne, *Redefining Justice: Addressing the Individual Needs of Victims and Witnesses* (Ministry of Justice 2009) 24-25; Corinne Charles, *Special Measures for Vulnerable and Intimidated Witnesses: Research Exploring the Decisions and Actions taken by Prosecutors in a Sample of CPS Case Files* (Crown Prosecution Service Research Team, April 2012) 33.

The legal profession's perception that the live link reduces the impact of evidence on jurors thus results in practitioners viewing this measure as producing evidence inferior to traditional evidence. It is difficult to discern whether this perception is accurate. Evidence from Ellison and Munro's study of mock jurors indicates that the medium through which a witness testified was rarely referred to by the mock jurors in their deliberations³⁹ and thus presumably had minimal effect. The study had attempted to minimise any variance in the performers' delivery of the evidence, so that the only variable was the condition it was given in.⁴⁰ This contrasts with earlier research which found that child witness credibility and believability is reduced when evidence is given by video link as opposed to live in court.⁴¹

Ascertaining the 'truth' of this matter presents serious challenges, since every case and juror is different, and the subconscious effects of special measures on a juror's perception of a witness and the subsequent impact on their evidence seems near impossible to measure. Either way, as a result of the profession's belief that live link does diminish the impact of evidence it is perhaps unlikely that counsel for the defence will apply for a defendant to give their evidence in this way:

I don't think defence barristers would ever consider giving evidence via live link because you lose that personal connection. What you want your client to do is to have that connection with the jury and have them feel some form of empathy. [R2]

I think there may be a reluctance, however, to make an application because the defendant, however vulnerable he may be, or his lawyers, would perceive there would be a [loss of] impact on the jury because they haven't given their evidence in court. [J1]

³⁹ See Louise Ellison and Vanessa Munro, 'A 'Special' Delivery? Exploring the Impact of Screens, Live-Links, and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials' (2014) 23(1) *Social and Legal Studies* 3, 21. Cheryl Thomas is currently undertaking research on the impact of special measures on jury decision making, see <http://www.nuffieldfoundation.org/impact-special-measures-jury-decision-making>.

⁴⁰ Louise Ellison and Vanessa Munro, 'A 'Special' Delivery? Exploring the Impact of Screens, Live-Links, and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials' (2014) 23(1) *Social and Legal Studies* 3, 8. The video recorded evidence-in-chief, however, contained more repetition and was less well structured to try to mimic the way that the evidence would unfold at this earlier stage of the inquiry.

⁴¹ See Gail S Goodman and others, 'When a Child Takes the Stand: Jurors' Perceptions of Children's Eye Witness Testimony' (1987) 11 *Law and Human Behaviour* 27; Tania Eaton and others, 'Child-Witness and Defendant Credibility: Child Evidence Presentational Mode and Judicial Instructions' (2001) 31(9) *Journal of Applied Social Psychology* 1845.

I used to say to clients when I was defending that if the jury liked them that would be half the battle, and that is true, sentiment plays a huge part in your prospect of being acquitted . . . But if [the idea of live link] does arise [the defence] probably think well I want this person to present themselves sympathetically and it's going to be much harder for them to do that if they do it on a live link. [J2]

I've been pretty firmly of the belief that you best establish someone's credibility by seeing into the whites of their eyes. If someone is giving evidence you want to be able to see their whole body language, the tone of their voice, the way they look at you. Trials are often won or lost on whether they like the defendant and whether they seem truthful or not. I think that comes across much better in open court. [DS1]

I doubt that many lawyers will apply for defendants to give evidence by live link ... Because you are going to – there's something very useful in humanising the defendant and taking them off the page, off the indictment, off the case summary, off the antecedents if those have gone in. And sometimes, the best way to do that is stick them in the witness box opposite the jury and have them be themselves. [DS3]

The perception that the live link diminishes the impact and thus quality of evidence also appears to prevent the defence from opposing prosecution applications for their witnesses to give evidence in this way. Instead, the defence consider it advantageous to their case if prosecution witnesses give evidence by live link:

I don't know what defence practitioners have told you but I've spoken to enough of them to know that they don't really have many issues with [prosecution] live link applications because they think ... that having someone give evidence from a television is remote to a jury, and I think a jury asks itself more questions about why the victim isn't there – 'why are they on TV – can they not be bothered to give evidence in this [court]room?' [PS1]

I would rather they [prosecution witnesses] use the live link. Why? Because it dehumanises people. The complainant on a screen – it's like watching *Eastenders*. It's not like watching the real world. [DS3]

The desire to achieve the best (ie the most impactful) evidence from witnesses, as well as beliefs about the inferiority of live linked testimony, affects decisions about which special measures, if any, are applied for. For counsel for the prosecution, it often seems to result in the encouragement of prosecution witnesses to give evidence from behind a screen instead of via live link:

I think that prosecution advocates, even though they know live link is available, if they can they'd like to persuade their victims to have screens. [R2]

Not that I ever have any sort of definitive ruling on it, but if I'm involved in a case from the start I always say 'any chance he or she [prosecution witness] will be cross-examined with a screen, please'. ... Screen is my preference than live link. Most people I know, if they're prosecuting, prefer screens. [R3]

I know that there are barristers, for example, who will think 'don't give evidence on the live link, it distances you and the power of your evidence is diluted, please go into the witness box and give evidence behind screens'. There definitely is that school of thought – I'm not adherent to it personally – but there definitely are these kind of conversations between barristers and witnesses. [R4]

I always, when I'm prosecuting, go and see them [the witness] and say what I'd like. ... And sometimes what persuades them to come into court as opposed to being on a TV screen is that their motivation is that they don't want the defendant to be able to see them. So obviously if they stay on the TV link the defendant can still see them just like everyone else. So it works quite well. I use that tactically when I think it would be better for them to come into court, and of course it's true, but sometimes that helps motivate them to come in. [B4]

...I sometimes, when you get an application to give evidence by live link, I write back and say 'why won't screens be sufficient?' Because in the flesh they are more effective. [J2]

My personal preference is that they give evidence from behind a screen. [PS1]

Among my respondents, there seemed to be two main exceptions to this general approach.

The first is where there is a difficulty with securing the attendance of a witness at all without the promise of live link:

Now I accept it's a price that's got to be paid [that the evidence's quality is diminished using live link] if it makes the difference as to whether the witness can give evidence or not. But let's not kid ourselves; it isn't as good as if they are in court. [J2]

This fits with the instrumental frame outlined at the start of this chapter – that the purpose of special measures is to secure witness testimony at all. It also consistent with Hoyano and Keenan's finding that in some cases 'live link is the only means to enable many vulnerable witnesses to testify'.⁴² In these cases something of a trade-off is accepted between 'best evidence' (evidence carrying with it the most impact) and 'any evidence'. The second exception to the hard preference for screens over live link was where the victim or prosecution witness is particularly young:

⁴² Laura Hoyano and Caroline Keenan, *Child Abuse: Law and Policy across Boundaries* (OUP 2007) 644.

For children that's [live link] absolutely fine and everyone understands that. [R3]

With youngsters it ... the court is too intimidating – that's fine. [B4]

With youths ... nobody bats an eyelid, and quite rightly so. [PS1]

With children I suspect the balance is in favour of TV link. [J5]

This may be hangover from the, now rebuttable, but still persuasive, primary rule in the YJCEA; that pre-recorded evidence will be used as a child's evidence in chief and they will be cross-examined by live link.⁴³ Furthermore, the legal profession perhaps thinks the jury will have a better understanding of why the measure has been used by a child witness, and thus that it will not damage their case. The fact that it is a child giving evidence may mean that sufficient sympathy will be evoked without needing the extra impact perceived to be attained from live, in court testimony.

These exceptions to the general preference for screens partly explain why all of my respondents had used the live link for vulnerable and/or intimidated non-defendant witnesses, notwithstanding the perceived issues surrounding the evidence obtained as a result. A further reason for why the live link might still be used despite the profession's dislike of it is that the police, CPS and The Witness Service liaise with (prosecution) witnesses with regards to the measure they would like to secure for trial. Thus, if the witness opts for live link, a barrister's attempts to alter this pre-trial might be unsuccessful. As discussed in section 5.5.4., the organisation of the legal field means that the defence lawyer has a much greater role in securing special measures for their clients and witnesses. They may, therefore, have more ability to steer them away from the live link. These issues are returned to in Chapter 7 amidst a discussion of the organisational frames employed by different criminal practitioners.

As my respondents highlighted, the defence are not keen to choose the live link to assist a vulnerable defendant to give evidence. The perception that screens are designed to shield a

⁴³ See YJCEA, s 21.

witness from the dock (as discussed above) means that they are unlikely to be sought as an alternative for defendants/defence witnesses in the way that they are for prosecution witnesses. Instead, the preference is for defendants (and defence witnesses) to give their evidence in court without a special measure. As well as ensuring that the impact of their evidence is not lost, it also means that the defendant's vulnerability is showcased in court:

If you've got a defendant there who is vulnerable and has one difficulty or another – emphasising that to the jury by having them there in front of them for them to see, in open court, may give you another chance at the jury saying 'well he may be technically guilty but we won't convict him because we feel bad for him'. [DS2]

You want to create an impression that excites sympathy . . . I've seen defendants do really badly, be in tears, virtually admit the offence, and the jury feel sorry for them and acquit them. [J2]

I'm forever saying to clients 'look, you can't pretend to be something you're not, the jury just want to hear from you'. . . . and you say to the jury 'he's just dim! Don't convict him because he's stupid'. [B1]

I have won trials based on the fact that clearly the jury and/or court have identified with the defendant and thought, 'no, this woman? Really? I can't see that'. It's that effect that you can achieve. It's much harder when they're on a live link. [DS3]

These respondents discuss various incidents where they would exhibit the defendant's vulnerability by having them testify live in court. This can be used as a ploy to tempt the jury into an acquittal even if the prosecution has discharged the burden of proof beyond reasonable doubt. It can also be used, as in DS3's example, to persuade the jury that the necessary case to convict the defendant has not been made, causing them to acquit. The only special measure open to the defence which is in keeping with this tactical approach is an intermediary:

Researcher: Do you think defence counsel would be more inclined to apply for an intermediary than live link?

J4: Yes, yes I do. They're still in court. And the defendant is presented as vulnerable to the jury but they are still there.

Showcasing vulnerability further with the use of an intermediary may further entice the jury into acquitting a defendant. One barrister highlighted what he suspected to be an example of this from a case in which he (unsuccessfully) prosecuted a vulnerable defendant:

At a trial I prosecuted recently where the defendant had an intermediary, he was acquitted. I think because the jury made more allowances than you might have wanted them to when you're prosecuting. [B1]

Whether there remains a proper place for 'tactics' such as these in criminal trials is debatable. As I have demonstrated, the respondents in this research suggest that the approach adopted in criminal trials is often contingent on the views of the advocates regarding 'best evidence' and its perceived tactical advantages. Given the move towards ensuring that a criminal trial is a well-managed forensic examination of the defendant's guilt,⁴⁴ defence advocates should perhaps avoid using such tactics in an attempt to secure an 'unjustified' acquittal. It certainly seems that this approach runs counter to Lord Justice Auld's view that 'the criminal trial is not a game under which a guilty defendant should be provided with a sporting chance'.⁴⁵ It is also contrary to the overriding objective,⁴⁶ which as McConville and Marsh discuss, results in defence lawyers sharing the task of convicting the guilty as well as acquitting the innocent.⁴⁷

This is further complicated when the purpose of special measures for vulnerable and/or intimidated court users is considered. I have argued throughout this thesis that the provision of special measures is underpinned by a concern for the humane (and thus equal) treatment of all participants. The availability of special measures to vulnerable and/or intimidated court users thus seeks to ensure that each participant has equal opportunity to give their best

⁴⁴ Jenny McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011) 31(4) *Legal Studies* 519; F Garland and Jenny McEwan, 'Embracing the Overriding Objective: Difficulties and Dilemmas in the New Criminal Climate' (2012) 16(3) *International Journal of Evidence and Proof* 233; Penny Darbyshire, 'Judicial Case Management in Ten Crown Courts' [2014] *Criminal Law Review* 30.

⁴⁵ Sir Robin Auld, *Review of the Criminal Courts of England and Wales* (Ministry of Justice 2001) para 154.

⁴⁶ The overriding objective of criminal proceedings is that 'criminal cases be dealt with justly' as per Criminal Procedure (Amendment No 2) Rules 2017, Part 1: The Overriding Objective, CPR 1.1(1).

⁴⁷ See Mike McConville and Luke Marsh, 'Adversarialism goes West: Case Management in Criminal Courts' (2015) 19(3) *International Journal of Evidence and Proof* 172, 176.

evidence in the criminal trial. The conflict between ‘winning’ and protecting witnesses was outlined by a defence solicitor in interview:

... I’m sure they [special measures] do make the ordeal much better for [witnesses], I’m sure they all do. But that has the opposite effect, to an extent, than what they ultimately want from the trial [winning]. That’s the curious paradox of the whole thing, I think.
[DS2]

It is clear that in some cases criminal practitioners place much more emphasis on tactics (winning) rather than forensic examination and/or the well-being of vulnerable defendants/defence witnesses. Whether or not tactics should trump these considerations is debatable, but a full review of this falls outside of the scope of this thesis.⁴⁸

In summary, special measures decisions are instrumentally framed in accordance with both their practical and tactical effects. For defendant witnesses, their presence in court means defence counsel sees the live link and screens as unsuited to them, since the measures’ practical benefits are considered as keeping a witness out of court and/or from the view of the dock. Due to this perception, these measures for defendants are thought to be tactically detrimental, as the legal profession believes that jurors would view it with suspicion. In addition, the nature of the evidence given by prosecution, defence and defendant witnesses also affects the way in which the legal profession perceive their need and suitability.

Finally, the legal profession seems to consistently view evidence given via live link as less powerful than live evidence given in court. Thus, even if the live link was considered to have some practical benefit for a defendant (for example, for a defendant with ADHD) it is unlikely to be invoked. Instead, defence counsel may prefer to showcase the defendant’s vulnerability by putting them on the stand without special measures (or maybe with an intermediary) to increase the impact of their evidence and evoke sympathy among the jury.

For prosecution witnesses, the distaste for live linked testimony results in a preference for

⁴⁸ Though see Mike McConville and Luke Marsh, ‘Adversarialism goes West: Case Management in Criminal Courts’ (2015) 19(3) *International Journal of Evidence and Proof* 172.

screens so that the impact of the evidence is not lost. Counsel for the prosecution seem willing to trade their desire for best (most impactful) evidence with the ability to secure any evidence when the live link is the only way to persuade a witness to attend, or when the witness in question is a young child. The result of these instrumental frames is that the provision of special measures in practice lacks a consistent commitment to the principle of equality.

Evidence from my respondents also suggests that a moral frame may be applied by some criminal practitioners when special measures decisions are made. As outlined at the start of this chapter, the moral frame has regard to the kind of special measures support (if any) that actors within the criminal justice system feel a vulnerable and/or intimidated court user deserves. It is this issue that the remainder of this chapter explores.

6.3. Moral frames

Existing research indicates the prevalence of a presumption of guilt within the legal profession. McConville et al argued that ‘for most advisers the presumption of guilt ... assume[s] a universalistic character and is unthinkingly applied to the client population at large’.⁴⁹ This was mirrored in Newman’s observations of legal aid solicitors. He noted that clients were ‘routinely discussed and approached ... as if they were guilty’.⁵⁰ This was found to remain the case even following meetings with clients who had protested their innocence.⁵¹ Similarly, Alge found that some members of the legal profession she interviewed also exhibited a dismissive attitude towards defendants and perceived them as guilty.⁵²

⁴⁹ Mike McConville and others, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press 1994) 140-1.

⁵⁰ Daniel Newman, *Legal Aid Lawyers and the Quest for Justice* (Hart Publishing 2013) 47.

⁵¹ *ibid* 49.

⁵² Daniele Alge, ‘The Effectiveness of Incentives to Reduce the Risk of Moral Hazard in the Defence Barrister’s Role in Plea Bargaining’ (2013) 16(1) *Legal Ethics* 162, 175.

Consistent with these findings, my respondents also indicated that there is a widespread factual presumption of guilt within the legal profession. They considered it to affect the willingness of the defence to apply for special measures, as well as the (perceived) willingness of judges to permit special measures:

...if it's in the Crown Court then they're [judges] not particularly sympathetic. They're of the view 'well you've committed a serious offence; you can't be that vulnerable'. That's the prevailing view. [R2]

Erm, yeah ... but live link [for defendants] – why not, I suppose? But it's just not. Because they're baddies! [laughs] [J3]

These responses indicate that the presumption of guilt may manifest itself in the view that defendants are undeserving of the vulnerability status and undeserving of special measures. R2's view is that judges see those on trial as guilty ('well you've committed a serious offence') and thus conclude that they 'can't be that vulnerable'. This indicates the relevance of a behavioural dimension to the vulnerability concept in relation to special measures. This was similarly conveyed in J3's quote. It is important to emphasise that J3 was joking when he remarked that defendants are 'baddies' and so his response could be subject to a variety of interpretations. In the context of his interview as a whole, however, it would seem that J3 was not, in fact, joking at all.⁵³ The attitudes of J3 and R2 have similarities with Kate Brown's findings in her research on vulnerability and young people and behaviour.⁵⁴ In an interview with a senior manager of the Youth Offending Services, she found that young offenders are often seen as non-vulnerable and undeserving of welfare support as a result of their criminality.⁵⁵

⁵³ This brings to mind the idiom 'many a true word is spoken in jest'. See also Sigmund Freud, *Jokes and Their Relation to the Unconscious* (translated by James Strachey, WW Norton Company 1960).

⁵⁴ Kate Brown, *Vulnerability and Young People: Care and Social Control in Policy and Practice* (The Policy Press 2015).

⁵⁵ *ibid* 86.

This is also similar to trends identified by Goodey in her work on victimhood. She found that ‘ideas about ... victims are restricted by social constructions of appropriate victimhood’⁵⁶ – to be assigned status as a victim one needs to be viewed as deserving and innocent and in no way blameworthy for the situation resulting in their victimisation.⁵⁷ This may explain why R2’s experience is that defendants are not thought to be ‘that vulnerable’ – because the reason for the criminal trial, within which they may be in a position of vulnerability when giving evidence, is their own (presumed) misconduct. Thus, according to Brown, such transgressive activity or behaviour can potentially lead to the withdrawal of vulnerability status,⁵⁸ or even a difficulty attaining the status of vulnerable at all.⁵⁹ This may further explain the poor identification of defendant vulnerability discussed in section 5.6 – the defendant’s status as the accused may prevent some criminal practitioners from recognising their vulnerability at all.

The second way in which my respondents indicate the presumption of guilt operates among the profession is that, regardless of their vulnerability status, defendants are not viewed as deserving of special measures assistance:

Either he’s guilty of all this [the indictments] and so doesn’t deserve special measures, or he’s innocent in which case he doesn’t need any of this [special measures]. That is, I suspect, the approach. [J3]

The problem with special measures [for defendants] is two-fold. One, he’s the defendant ... ‘If he’s old enough to commit the crime, he’s old enough to do the time’ attitudes. This sort of thing is inescapable, but not enough is done to neutralise it. [R3]

But obviously, if he’s [the defendant’s] been accused of doing something, should he be afforded the benefits of the people who are alleging they have been assaulted or raped or whatever? I’ve a tendency to say no; but maybe that’s because I’m a prosecutor. [PS2]

⁵⁶ Jo Goodey, *Victims and Victimology: Research Policy and Practice* (Pearson 2005) 124.

⁵⁷ See also Nils Christie, who noted that an attribute associated with the status of an ‘ideal victim’ was that they were somewhere they ‘could not possibly be blamed for being’ when they were victimised, Nils Christie, ‘On Society and the Victims of Crime’ in Ezzat Fattah (ed), *From Crime Policy to Victim Policy* (Macmillan Press Ltd 1986) 19.

⁵⁸ Kate Brown, *Vulnerability and Young People: Care and Social Control in Policy and Practice* (The Policy Press 2015) 86.

⁵⁹ *ibid* 68.

J3's understanding of the approach towards defendants was that if they are guilty (which many are presumed to be) they do not deserve special measures and if they are innocent they do not need them. This demonstrates that some members of the profession may misunderstand the purpose of special measures, since a vulnerable defendant, guilty or otherwise, may be both entitled to and need special measures to participate effectively as a witness in their defence. PS2's view of defendants was that they should not be privy to the same assistance as 'victims', even prior to conviction. Their position as the accused was sufficient, in her view, to render them undeserving of special measures support. PS2's position seemed to come with an interesting and yet equally damning caveat:

You could have a vulnerable defendant who has just found himself in the wrong place at the wrong time. [PS2]

The situations in which PS2 may feel that a vulnerable defendant is deserving of special measures assistance were those in which the defendant was wrongly accused or caught up in something unlawful for which she perceived them to have only marginally involvement. For this CPS solicitor, therefore, the innocent, and perhaps those who have 'fallen into' playing a minor role in a criminal offence, deserve special measures. The guilty, or those with more than a minor role in the criminal activity in question, do not.

Another interesting angle to this issue is derived from the following quote:

...the problem is young people of good character where more consideration should be given. [J5]

The inverse of this is that the lack of provision of special measures to defendants of bad character is not as concerning to this respondent. This can be interpreted in two ways. First, the very fact that a defendant has previous antecedents may, itself, render them undeserving of special measures assistance for some criminal practitioners. Second, the existence of a defendant's bad character evidence may contribute to a presumption of their guilt. Bad

character evidence can result in unfair prejudice against the defendant.⁶⁰ For example, it can cause prejudicial reasoning, which involves jurors placing too much weight on bad character evidence and thus concluding that the defendant ‘must have done it this time’ too.⁶¹ Alternatively (or perhaps additionally) bad character evidence can cause moral prejudice, where the jury abandons the commitment to convict the defendant on the evidence presented.⁶² Instead, on the basis of the evidence of bad character, they conclude that the defendant is a ‘bad person’ and convict regardless of the strength of the prosecution case in the present trial.⁶³ These prejudices might also creep into the way that criminal practitioners frame their decisions about whether to apply for special measures for defendants, and affirm the presumption of guilt which is seemingly already present within the criminal justice system.

As discussed in section 3.4, the presumption of innocence requires that the defendant should be treated *as if* s/he is innocent pre-conviction (including pre-trial).⁶⁴ This is irrespective of their previous criminal record. The above quotes indicate quite clearly that this approach is not always adopted and the subsequent effect this has on defendant use of special measures. It is perhaps unsurprising that the defendant’s position as the accused is influential in this negative way in practitioner’s decisions at ‘street-level’⁶⁵ – ie where decisions about vulnerability and special measures are made in practice. This is because the initial exclusion of defendants from special measures legislation was based on an attitudinal presumption of

⁶⁰ Mike Redmayne, ‘The Law Commission’s Character Convictions’ (2002) 6 *International Journal of Evidence and Proof* 71, 72.

⁶¹ Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, OUP 2010) 591.

⁶² *ibid* 590.

⁶³ *ibid* 593.

⁶⁴ See Herbert L Packer, ‘Two Models of the Criminal Process’ (1964) 113(1) *University of Pennsylvania Law Review* 1, 12; Andrew Ashworth, ‘Four Threats to the Presumption of Innocence’ (2006) 10(2) *International Journal of Evidence and Proof* 241, 243.

⁶⁵ Kate Brown, *Vulnerability and Young People: Care and Social Control in Policy and Practice* (Bristol: The Policy Press 2015) 88.

guilt.⁶⁶ The political context has been one in which defendants are viewed as ‘criminals’ attempting to evade conviction in criminal trials.⁶⁷ This shows how, as per Hawkins’ conceptual framework, action and attitudes in the surround can influence the way in which criminal practitioners frame decisions about special measures and vulnerability.⁶⁸

McConville et al have previously identified the existence of the deserving/undeserving dichotomy in relation to the treatment of those accused of crimes. They highlighted the criminal defence’s perception that their legally aided clients did not deserve to go to trial.⁶⁹ This was because the defence viewed them as a particular class of poor people and the fees received from legal aid were not thought to warrant the work associated with a trial.⁷⁰ A large proportion of defence work is still funded by legal aid.⁷¹ If a lawyer is representing a client in a trial that they do not believe they deserve to have (because of their poverty and assumed guilt), then it is yet less likely that they will consider them deserving of special measures to assist them to participate in that trial.

My interviewees also indicated that the presumption of guilt can affect special measures decisions more widely than just with regards to defendants. For example, presuming that the accused is guilty may serve to bolster a prosecution witness’ (particularly complainant’s) application for special measures:

...the court ought to apply the same criteria, but it’s easier for the prosecution to prove it [vulnerability], because they can say ‘this is what happened to my client’. [B2]

⁶⁶ See section 3.6. (p95).

⁶⁷ See section 5.5.1. (p163-71).

⁶⁸ As per Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 50.

⁶⁹ Mike McConville and others, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press 1994) 189.

⁷⁰ *ibid.*

⁷¹ For Crown Court trials between April 2015 and June 2015, approximately 21,000 representation orders were granted. See Legal Aid Agency, *Legal Aid Statistics in England and Wales: April to June 2015* (Ministry of Justice 2015) 15, figure 9.

This demonstrates that it may be easier to make the case for a prosecution witness' need for special measures on the basis of an assumption that the 'victim' or witness is telling the truth. I discussed in section 6.2.3 the role that the nature of a witness' evidence may play in the legal profession's judgment as to whether the quality of that evidence is likely to be diminished if special measures are not used. The structural positioning of the witness in the proceedings may also feed into this decision. This is because an assumption of the defendant's guilt may result in a belief that the victim is telling the truth. Special measures thus become warranted to avoid what would otherwise be an almost inevitable diminution in the quality of evidence elicited from the 'traumatised' victim.

The presumption of guilt may thus have the dual effect of making the defendant undeserving of special measures and the victim and/or prosecution witnesses deserving. Defence witnesses may also be lumped in with defendants in the undeserving category, simply because they are not:

...a 'victim' [said sarcastically] or a friend of a victim... [R3]

The defence witness' association with the (guilty) defendant may further taint the way in which they are viewed by the legal profession. This is evident in reasons offered for why defence witnesses seldom use special measures, including that they are:

...friends of the defendant ... [J2]

...there to help the defendant. [B4]

The implication here may be that defence witnesses are less deserving of special measures as a result of the purpose for which they are giving evidence. If the defendant is presumed guilty, and a witness is giving evidence in their defence, then their cause is not one to which the profession is sympathetic. This may also transpose onto considerations of the defendant's deservingness. If a defendant is giving evidence against a co-defendant, then they may be

considered deserving of assistance. B4 recalled a case in which a child defendant was permitted to use special measures to give evidence:

When it came to him giving evidence he was essentially a prosecution witness. [B4]

I discussed this quote previously in this chapter in relation to the effect that the nature of the evidence may have on way that criminal practitioners instrumentally frame special measures and a witness'/defendant's need for such. In light of considerations about the moral framing of special measures, the profession might additionally view such a defendant, who testifies against a co-defendant, as deserving of special measures assistance to do so.

6.4. Conclusion

In this chapter I have explored insights from my interviews on how the legal profession frames special measures from instrumental and moral perspectives. Instrumentally, some of my respondents framed special measures as tools which secure witness attendance. Among many of the practitioners I interviewed, there seems to be a perception that special measures are *for* the prosecution. There seems to be a difficulty seeing beyond the idea that special measures are to keep a witness outside of the courtroom and/or out of the defendant's sight, which in turn negatively affects the perceived benefit of them for defendant or defence witnesses. This seems to be further embedded by the view that the nature of the evidence given is intrinsically related to one's status as vulnerable and in need of special measures.

In other words, this and other structural differences between the defendant and non-defendant witnesses is used by criminal practitioners as a justification for their differential treatment with regards to special measures. Framing special measures in this way might appear to be premised on the principle of equality — that different groups should be treated differently. However, as demonstrated in this chapter, neither the fact that the defendant is already present in court nor the nature of their evidence diminishes the value of the live link and

screens completely for vulnerable and/or intimidated defendants. The principle of equality is thus erroneously applied by the legal profession in this regard. They are seeing only the differences, and not the similarities, between vulnerable and/or intimidated defendants and other such witnesses. This results in a lack of coherence in the provision of special measures in practice.

The perceived deservingness of a witness or defendant for special measures assistance seems to be heavily influenced by the existence of a presumption of guilt. This affects the way in which criminal practitioners morally frame their decisions on whether or not to apply for special measures. My respondents indicate that a defendant, presumed guilty, is viewed as undeserving of special measures. Thus, even if a defence solicitor is aware of the existence of special measures, has identified their client's vulnerability, and can see how special measures could ensure that the defendant can effectively participate in the trial as a witness, their view that the defendant does not deserve such assistance (due to an attitudinal presumption of guilt) can act as a further barrier to the equal provision of special measures to all court users. The same is true of defence witnesses who may, by extension, be viewed as undeserving of assistance due to their role in assisting 'guilty' defendants.

This chapter has also demonstrated the various ways in which the legal profession may frame special measures decisions with regards to tactics – ie with regards to the effect of special measures on the impact of the evidence elicited and the jury's perception of the beneficiary of the measure. This instrumental frame seems to play a significant role in decisions about defendants and defence witnesses use of special measures, by further deterring the profession from invoking the available assistance. This issue is developed further in the next chapter. As we shall see there, the application of organisational and legal frames feeds into understanding why tactical concerns have a different effect depending upon the party to which the witness relates.

CHAPTER 7: ORGANISATIONAL AND LEGAL FRAMES

7.1. Introduction

This is the final substantive chapter in this thesis. Within it, I continue to draw on my interview data and to apply Hawkins' conceptual framework to explore other issues which appear to affect criminal practitioners' decisions about whether to apply for special measures for vulnerable and/or intimidated court users. This draws on Hawkins' organisational and legal frames. The effects and influences of the broader political, economic and social surround and the organisation of the legal field in which decision-making takes place are vital to understanding the role that the organisational and legal frames play in special measures decisions. All of this serves to further depict the poor commitment to equality that is embodied in the provision of special measures to vulnerable and/or intimidated court users.

Organisational frames relate to the legal profession's desire to meet external expectations and to demonstrate competence within the constraints of the available resources.¹ In Hawkins' health and safety context, organisational frames concern the action that a decision-maker views as expected of them within a regulatory agency, or as personally desirable for them to take.² It is about displaying competence on both an organisational and a personal level by meeting wider expectations from the surround and within the legal field. With regards to decision-making around special measures, organisational frames also relate to what is expected of the legal profession within the legal field and the surround, and how a 'competent

¹ See section 1.6.3. (p12).

² Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 305.

lawyer' is viewed in this environment. The available funding is also relevant to this, as well as how this may shape the expectations of lawyers within the system.

Hawkins' final frame is the legal frame, which for him concerned whether a prosecution for a health and safety breach can be made in accordance with the legal requirements.³ In the context of special measures the legal frame is the eligibility criteria contained within the YJCEA or relevant parts of the common law. These criteria outline when a court user should be considered vulnerable and/or intimidated and thus a special measures is available for use.⁴

It is the legal frame that is discussed in this chapter first. This is followed by a consideration of the various organisational frames which may be relevant to criminal practitioners. It is difficult to truly separate the legal and organisational frames, as in reality they seem to be bound up together in a complex relationship. This becomes evident throughout the chapter.

7.2. Legal frame

The role that the legal frame plays in decisions about the use of special measures appears rather different depending on whether the criminal practitioner in question (and thus the vulnerable and/or intimidated court user under consideration) is for the prosecution or the defence. Understanding why this is requires a look back at the socio-political surround in which the law of special measures was enacted and has developed. This was discussed in depth in section 5.5 to explain why some criminal practitioners were unaware of the special measures assistance available to vulnerable and/or intimidated defendant witnesses. The surround is geared towards protecting victims and prosecution witnesses and enabling them to give their best evidence in court. Special measures for vulnerable and/or intimidated non-

³ *ibid* 380.

⁴ See section 3.2. (p44-47).

defendant witnesses were thus enacted in the YJCEA to achieve these aims.⁵ Defendants were excluded from this statutory scheme. This left it largely to the courts, with occasional ‘grudging’⁶ recognition from Parliament, to try to achieve some equality for vulnerable and/or intimidated defendant witnesses in the provision of special measures.⁷

As a result of the markedly different ways in which the law has developed for non-defendant and defendant witnesses, the implementation of that law is subject to a disparate degree of scrutiny from within the surround.⁸ The level of scrutiny has differed between the prosecution and the defence parties generally, rather than mirroring that of the developmental disparity between defendants and non-defendants. This, of course, reflects the socio-political preference for the prosecution over the defence. The use and effectiveness of special measures for prosecution witnesses has thus been the subject of several evaluation studies.⁹ Furthermore, the failure of the courts to ensure that sexual assault victims use special measures when giving evidence (such as Mrs A)¹⁰ has received public and official criticism. The level of scrutiny to which the provision of defendant and defence witness special measures use has been subject has been comparably negligible.¹¹

As a result of the above variables, the legal frame appears to be prioritised rather differently by the prosecution and defence. It is logical that the primacy of the legal frame is connected to the level of scrutiny of the implementation of special measures to which the parties are subjected (and the subsequent organisation of the legal field). This is because it affects the level of discretion which each party enjoys in this regard. Thus, the legal frame appears to be

⁵ See section 5.5.1. (p165).

⁶ Laura Hoyano, ‘Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants’ [2015] *Criminal Law Review* 107, 126-7.

⁷ See Chapter 4 and section 5.5.2. (p172-74).

⁸ See section 5.5.3. (p174-77).

⁹ See section 5.5.3. (p175 note 87).

¹⁰ See section 5.5.3. (p175).

¹¹ Accordingly, there is a contrast in the way that the legal field has been organised to meet these external demands. These organisational factors are discussed further in section 7.3. (p235ff) and were also discussed in section 5.5.4. (p177-82).

the dominant frame for the prosecution. This means that they first consider the eligibility criteria¹² in the YJCEA¹³ and second whether the ‘victim’ or witness in question meets these criteria. If so, then an application for special measures is likely to be made.

For the defence, I suggest that the legal frame is often, though not always,¹⁴ the penultimate frame that a criminal practitioner applies. The extent of their discretion, due to the absence of scrutiny, permits the instrumental and moral frames to be the dominant frames that a defence practitioner employs.¹⁵ These address, as discussed in Chapter 6, whether the defendant or defence witness needs special measures, whether they are tactically advantageous, and whether they deserve them. If it is concluded that the defendant/defence witness does need and deserve special measures support then the legal frame will be applied. The practitioner will assess whether the court user in question is eligible under the legal test and endeavour to frame the case within the confines of the legal provision of special measures to these groups of court users. Following this, there may then be a consideration of the organisational frame, which is discussed in the next section of this chapter.

The different role that the legal frame plays in the decision for special measures helps us to understand why the instrumental frame regarding guilty pleas may play a more central role for the defence than for the prosecution.¹⁶ Similarly, it may explain why the defence can also give more weight to tactical concerns, such as those for achieving ‘best evidence’ in impact

¹² See section 3.2. (p44-47).

¹³ The organisational ‘bureaucratic frame’ plays an important role here and is discussed in section 7.3.

¹⁴ I return to this later in this chapter in section 7.4. (p252-54).

¹⁵ Prioritising the instrumental frame over the legal frame might, from a more cynical viewpoint, simply mean that the defence lawyer can avoid the additional work that a decision to apply for special measures creates. Tata’s ‘ethical indeterminacy’ concept is useful to understanding this. If there is ‘a range of reasonably defensible ways’ in which a lawyer can approach a situation, Tata argues that ‘the lawyer will tend to advise the client to decide in the lawyer’s own interests’. In the special measures context not using special measures in order to protect the impact of their client’s evidence is in keeping with a lawyer’s own goals of avoiding extra work. The discretion that the defence enjoys in the legal field may thus permit them to act in this way unscathed. See Cyrus Tata, ‘In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and ‘Ethical Indeterminacy’ in Criminal Defence Work’ (2007) 34(4) *Journal of Law and Society* 489, 491-96.

¹⁶ As discussed in section 6.2.1.1. (p199-201).

terms than can the prosecution.¹⁷ The discretion to which the defence is privy leaves them free to take the above issues, and others discussed in Chapter 6, into account in their special measures decisions. The lack of prosecutorial discretion means that such options are not open to them in the same way.

All of this bears strong relation to the organisational frames at play. The organisational frames are discussed in the next section of this chapter. I first outline broadly what the organisational frame is, showing why it is so bound up and intertwined with the legal frame. I then move on to discuss more specific organisational frames which criminal practitioners for the prosecution and for the defence may invoke.

7.3. Organisational Frames

As outlined at the start of this chapter, organisational frames in this context are those which define what is expected of a criminal practitioner and how they demonstrate their competence within the confines of the available resources. I have shown at various junctures in this thesis¹⁸ that there is an expectation that counsel for the prosecution will ensure that special measures are applied for on behalf of vulnerable and/or intimidated witnesses. However there is no comparable expectation on the defence. This is because the way each party frames the expectations of them is intrinsically related to the organisation of the legal field and the wider surround.

In the previous section I recapped the lack of discretion that the prosecution has over special measures use because of the high level of external scrutiny to which their decisions are subjected. The primary application of the legal frame in this context can thus be interpreted as a response to the expectation that they secure special measures for vulnerable and/or

¹⁷ As discussed in section 6.2.4.1. (p213-22).

¹⁸ For example, see section 5.5 (p174-82) and section 7.2. (p232-34).

intimidated witnesses. In turn, one way in which a criminal practitioner for the prosecution demonstrates their competence is by ensuring that special measures are in place for such witnesses ahead of trial. This shows how intertwined the legal and organisational frames are – applying for special measures due to an absence of discretion (applying the legal frame) simultaneously meets the expectations on the prosecution that they do so (thus fulfilling their organisational frame). This relationship between the legal and organisational frames is explored in the next section on the ‘bureaucratic frame’.

7.3.1. Bureaucratic frame

The bureaucratic frame is an organisational frame which is employed to assist the prosecution in demonstrating their competence and meeting those external expectations of them. As discussed in section 5.5.4, the socio-political surround and the scrutiny of special measures implementation has influenced the way that the legal field is organised. In order to ensure that the prosecution meets the external expectations from the surround – by securing special measures for vulnerable and/or intimidated witnesses – various processes have been created for those working in this area.

To briefly recap,¹⁹ the application process for special measures for non-defendant witnesses starts with the police, who are prompted to consider whether the witness requires such support when completing their witness statement.²⁰ If they do think special measures are needed, they then complete an MG2 form detailing why they are required and which one(s). In the process of fulfilling this role, the police seek the witness’ views on their state of vulnerability and/or intimidation and the potential measures available to them. This information is then handed over to the CPS with the case file. If the CPS decides to charge the suspect, then the details of this are recorded on the MG3 form along with any information

¹⁹ See Chapter 5.5.4 for a fuller discussion of this process.

²⁰ On the Witness Statement form (the MG11).

about vulnerable and/or intimidated witnesses and their special measures preferences. This enables special measures to be applied for ahead of trial.

Ericson and Haggerty note that ‘communication formats’ limit police discretion in decision making.²¹ Applying this idea to the special measures context means that the paper trail of ‘MG forms’ will limit the ability of those involved in the application process to decide not to apply the legal frame. The requirement that these forms are completed strengthens the expectations on criminal practitioners, this time emanating from within the legal field, to apply for special measures for eligible prosecution witnesses. This ‘communication format’ is thus likely to ensure that cases are set up along a track on which special measures are secured.

For the prosecution, therefore, the legal frame seems embedded within the bureaucracy frame. The eligibility provisions contained within the YJCEA for non-defendant witness special measures are complex. In reality, those making special measures assessments and decisions are unlikely to ever turn to the legislative provisions themselves. A simplified version of the eligibility criteria contained within the Act is reproduced in the special measures application forms used in practice. Young notes in the context of legal aid that such prompt-laden form-filling ‘focus[es] the attention of [those applying] on the factors which the law states must be taken into account’.²² The bureaucratic process through which special measures are secured mirrors this. The ‘MG’ forms thus flatten the legal criteria making their application more manageable. The legal frame thus becomes subsidiary to the bureaucracy frame.

²¹ Kevin Haggerty and Richard Ericson, *Policing the Risk Society* (Clarendon Press 1997) 31-38.

²² Richard Young, ‘Will Widgery Do?: Court Clerks, Discretion, and the Determination of Legal Aid Applications’ in Richard Young and David Wall (eds), *Access to Criminal Justice: Legal Aid, Lawyers and The Defence of Liberty* (Blackstone Press Limited 1996) 146.

The fact that this bureaucratic process commences so early in the criminal process serves to limit the little choice that counsel for the prosecution has with regards to special measures. For example, counsel may have been of the view that a witness on the cusp of vulnerability could give evidence sufficiently well without the use of special measures.²³ Since the primary responsibility for making such assessments falls on the police and CPS, a decision may already have been made by them contrary to this:

In one sense, special measures, once it gets to counsel, is always a fait accompli. You're instructed to ask... [R3]

This may also be the case in terms of which special measure counsel would choose. The prosecution has a degree of choice, mindful of the witness' preferences,²⁴ as to the special measure for which it applies. The selection may be made without counsel's input, again due to the police and CPS setting the special measures process in motion:

Not usually counsel that applies, usually someone from the CPS ... usually taken out of our hands... [B2]

Not really counsel that applies; usually someone from the CPS. [R3]

As far as the police and CPS go there is an assumption that a particular special measure, usually giving evidence by way of live link, will be applied for . . . [J1]

I don't think it is thought about [which special measure] at an early enough stage. They [prosecution witnesses] have often already been promised something else. [J5]

Once the initial decisions have been made it may be difficult for counsel to reverse them.

This was illustrated by one of my respondents:

I think that whilst special measures can be changed at any stage, once a decision has been made people are very reluctant to readdress it. [J5]

This is in keeping with the unreported case of *R v C* which was discussed in section 4.2.3.

The complainant in this case had been promised special measures, and the trial judge felt he could not reverse this decision as her expectation, based on previous discussions, was that she

²³ As discussed in section 5.6. (p184), the decision about special measures is made in two stages. 1. Does the witness have an innate vulnerability as per section 16? 2. Will that innate vulnerability result in a diminution of the witness' evidence at trial?

²⁴ The witness' views must be taken into account, as discussed in section 3.2. (p44-47).

would be awarded such support to give evidence.²⁵ Early conversations between the police, CPS and the witness as to the special measure(s) they think would be most beneficial may thus make it challenging for a barrister to alter or refuse to make the application ahead of trial. Even when one of my respondents thinks there is no merit in an application, their approach to dealing with the ‘over-promising’ to a witness is ostensibly to keep to the ‘deal’:

The best thing, in practice, to do is to make an application and let the judge refuse it. Because then the practical reality is you can turn round to a witness and say ‘we made that application, we gave it our best shot.’ [PS1]

The division of labour between those who set the special measures application in motion and those who ultimately represent the client in court helps us understand why counsel might wish to change the type of special measures applied for. Securing special measures for vulnerable and/or intimidated non-defendant witnesses is a process Hawkins would describe as ‘serial decision-making’.²⁶ This is because the power to make the decision about special measures is dispersed across individuals in the process:

[A] decision by an individual frequently does not settle matters (though a particular individual may set a case on a particular course which will lead, inexorably, to a particular destination), but merely makes a decision that leads to a case being handed on to another individual or organisation.²⁷

As a result, the ‘decision makers acting at different points might be expected to have different priorities’.²⁸ For instance, the police and CPS appear to operate through a dominant bureaucratic frame to ensure that special measures are secured when needed to meet the external expectation of protecting the vulnerable. While this is a concern that counsel shares, they have additional instrumental factors to consider such as the impact of the evidence secured from a witness.²⁹

²⁵ *R v C* (2001) EWCA Crim 1054 (unreported) [12].

²⁶ Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 32.

²⁷ *ibid.*

²⁸ *ibid* 34.

²⁹ My respondents’ preference was almost unanimously for evidence to be given live in court in order for it to have the most impact. See section 6.2.4.1. (p214).

There appears, then, to be an element of ‘prosecutorial momentum’³⁰ at play in the special measures process; whereby counsel for the prosecution essentially becomes a decision *confirmer* rather than a decision *maker*. This is because it is more difficult to reverse a decision made by the police/CPS than to reach a different decision in the first place. Early decisions made thus ‘close off or profoundly restrict the choices open to a later decision maker.’³¹ This, and the different priorities held by those at the various stages of the serial-decision making process, help us to understand why prosecution witnesses still give their evidence by live link despite the large consensus within the profession that the best, most impactful, evidence is that delivered live in court.³²

An additional factor limiting prosecuting counsel’s discretion with regards to special measures is the role of Victim Support and The Witness Service.³³ A witness’ contact with these agencies acts as a further check to ensure that all vulnerable and/or intimidated witnesses have the support that they need to give their evidence effectively. My respondents showed how this process can, again, mean that counsel for the prosecution finds that their witnesses have been ‘promised’ various special measures support ahead of the trial:

Well it’s very easy isn’t it? If you’re sitting at the end of the phone and you’re employed in a witness care capacity, and you’ve got a domestic violence victim saying I don’t want to come to court and give evidence – what is the biggest thing in their armour? The best thing for them to do is to turn round and go ‘well actually we can offer you special measures’. [PS2]

I think they [prosecution witnesses] can be over promised things by certain agencies, to be honest. I think they are told ‘don’t worry you’ll get special measures, you won’t have to see him, you won’t have to be in the same room as him’ sort of thing. ... I think where our fault as an organisation comes is sometimes, unless it’s patently obvious, we do not think about the special measure we are trying to obtain. [PS1]

In summary, all of these factors hugely limit the discretion counsel for the prosecution enjoys in terms of whether, and which, special measures are applied for. Not only are they

³⁰ Andrew Sanders and Richard Young, *Criminal Justice* (1st edn, Butterworths 1994) 228.

³¹ Keith Hawkins, *Law as Last Resort: Prosecution Decision Making in a Regulatory Agency* (OUP 2002) 34.

³² See section 6.2.4.1. (p214).

³³ As discussed in Chapter 5.6.

constrained because of the scrutiny from within the socio-political surround, but the very existence of that scrutiny and the procedures set up to ensure that it is met further constrain barristers' decisions. This is because the special measures process starts so early, involving meetings with the witness themselves, thus setting cases up along a track on which special measures will be secured. One respondent speculated in interview that:

I think that they [prosecuting counsel] would rather, given a choice, being brutal, they would rather sacrifice the victim to give them the chance of winning. [DS2]

Instead, it seems that counsel for the prosecution must affirm the decision for special measures in order to meet the expectations on them from *within* the legal field. Such expectations come from the police, the CPS, Victim Support, The Witness Service, and the witness themselves. Meeting these expectations is thus one way in which the barrister subsequently demonstrates their competence as a lawyer, and this is so notwithstanding any private misgivings they may have about using special measures.

The absence of scrutiny from the surround on defence uptake of special measures means that the way in which the legal field is organised for the prosecution is not mirrored for the defence. This means that there are no set forms to complete to demonstrate that special measures have been considered. As a corollary, the bureaucratic frame is not relevant when dealing with defendants or defence witnesses. The defence team has sole responsibility, aside from an initial needs assessment conducted by the police,³⁴ for considering special measures for the defendant and defence witnesses³⁵:

I think perhaps we [defence counsel] need to be more acute to the idea of telling the defence witnesses you can have it [special measures assistance] because they don't get sat down by the police and they don't have Witness Services calling them all the time. [B2]

³⁴ See section 3.5.1.1. (p68-69) for a discussion of the effectiveness of the police at identifying suspect vulnerability.

³⁵ Though some defence witnesses are referred to The Witness Service where the possibility of special measures may be discussed with them. It seems, however, that defence witnesses are supported by such services infrequently, as discussed in section 5.6. (p189).

...defence witnesses aren't as easily served by The Witness Services and Victim Support, and that's partly the fault of defence lawyers not putting them in touch with those services. ... If you sit someone down with someone from Witness Services for twenty minutes the question, 'have you applied for special measures?' will get asked. They will tell them, 'these measures exist; do you think you need them?' [DS3]

This leaves the defence with much more discretion over how to proceed. They are able to leave a vulnerable defendant without special measures assistance in favour of instrumental goals such as enhancing the impact of their evidence by ensuring it is heard live, in court in a way that the prosecution cannot. The context in which special measures operate – both within and outside of the legal system – places a disparate emphasis on the importance of special measures for the vulnerable. Such an inconsistent approach in the way that lawyers frame their decisions for special measures in practice thus further embeds the law's incoherence with regards to equality.

7.3.2. *Special measures as an 'insurance net'*

Given the comparative absence of expectations on defence advocates to secure special measures for their witnesses and clients,³⁶ some defence lawyers may believe (perhaps correctly) that something different entirely is expected of them within the legal field. One of the defence solicitors interviewed in this research suggested that a competent defence lawyer should adequately prepare their clients for trial without needing to invoke special measures:

I usually have gauged whether my client will be robust and the clients I think will be particularly nervous – I have already assessed that well in advance and talked them through it, reassured them, and explained the process. ... So special measures are an insurance net, just in case they aren't very good and because the lawyer can't deal with [the defendant's vulnerability] personally. So I think that's why I think less about special measures; because I would like to think that any competent defence lawyer will prepare a client they think is vulnerable well for giving evidence. [DS1]

This respondent frames special measures as a device for incompetent defence lawyers. To demonstrate competence, therefore, a lawyer would presumably need to avoid applying for

³⁶ Though this is perhaps beginning to change. There has been a recent increase in the guidance produced by, for example, The Advocate's Gateway toolkits on assisting ALL vulnerable court users in criminal trials, see <http://www.theadvocatesgateway.org/> and see above section 5.5.4. (p181 note 115).

special measures. There are several issues with his view. First, his perception is based on an idealised notion of defence lawyering, whereby there is continuous representation of a client from the beginning of the process through to the trial. He notes how he will ‘have already assessed’ the client and ‘talked them through it, reassured them’. The existing research suggests,³⁷ however, that the reality of defence lawyering is somewhat different. Instead, unqualified legal clerks may be sent to interview clients. Lawyers often juggle multiple cases at once and thus have to return briefs³⁸ which other lawyers must pick up at short notice. As discussed in section 5.6, the discontinuous representation of clients can make it difficult to identify vulnerability. It seems unlikely therefore that these conditions are conducive to lawyers adequately preparing clients with vulnerabilities for trial.

A further issue with DS1’s view is whether lawyers have the expertise to adequately prepare a vulnerable client to give evidence. As discussed in section 4.2.6., a client with a learning disability or mental health problems is best assisted by a trained intermediary. As noted in the Court of Appeal in the *Sevenoaks Youth Court* case, ‘it is in the highest degree unlikely that this level of help can be given by a lawyer, however kind and sympathetic she may be’.³⁹ Hoyano reiterated this, stating that ‘sympathy and compassion cannot compensate for the cognitive deficits of defendants with comprehension as well as communication difficulties’.⁴⁰

It is perhaps unsurprising that lawyers might believe that they can deal with a defendant’s vulnerability themselves given the Court of Appeal’s lead on this in *R v Cox*.⁴¹ The court

³⁷ See Mike McConville and others, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press 1994) 42-44; Daniel Newman, *Legal Aid Lawyers and the Quest for Justice* (Hart Publishing 2013) 77-81. Discussed further in section 5.6. (p188).

³⁸ 48% of defence briefs were returned in the study by Michael Zander and Paul Henderson, *Crown Court Study* (1993) 54. Tague (in note 25 of his article) notes that criminal practitioners and officials with whom he spoke estimated the number to remain at 50% in 2008, see Peter Tague ‘Guilty Pleas or Trials: Which Does the Barrister Prefer?’ (2008) 23 *Melbourne University Law Review* 242, 247.

³⁹ *C v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin) [17].

⁴⁰ Laura Hoyano, ‘R (on the application of OP) v Secretary of State for Justice: Intermediaries – Claimant Having Learning Difficulties – Claimant Charged with Criminal Offence’ [2015] *Criminal Law Review* 79, 82. This issue was also discussed in section 4.2.6. (p132-33).

⁴¹ *R v Cox* [2012] EWCA Crim 549 .

ruled that when an intermediary cannot be obtained for a vulnerable defendant the trial judge can compensate for this by adapting their role.⁴² The Lord Chief Justice went further than this in the case of *R v Rashid*.⁴³ Under the subheading ‘The duties of the competent advocate and of the court’, it was ruled that ‘in all but the rarest of cases’ an advocate will be able to ensure that a vulnerable defendant can fully participate in the trial without an intermediary.⁴⁴

In addition to this, it was suggested that an advocate lacking the requisite competence to do this would be replaced, rather than the alternative of ‘providing an intermediary for the defendant for the whole trial.’⁴⁵ As discussed in section 4.2.6, the suggestion that a (competent) criminal practitioner can negate the need for an intermediary when a defendant has serious communication difficulties is problematic. The position that the Court of Appeal has adopted, however, may reinforce the view that a competent defence lawyer should be able to conduct a case absent the use of special measures. Defence advocates may thus be deterred from making applications for intermediaries (and perhaps other special measures) at risk of it calling their professional competence into question.

Special measures are not framed as an ‘insurance net’ in this way with regards to counsel for the prosecution. As discussed above, to demonstrate competence as counsel for the prosecution, it seems that the complete opposite approach is taken – that they must ensure special measures are secured when required. This dichotomous approach to framing special measures is thus likely to further undermine any attempt to foster a coherent commitment to the principle of equality in the provision of special measures to vulnerable and/or intimidated court users in practice.

⁴² *ibid* [22].

⁴³ *R v Rashid* [2017] EWCA Crim 2.

⁴⁴ *ibid* [82].

⁴⁵ *ibid* [81] (Lord Thomas).

Whether or not a substantial number of defence practitioners frame special measures as an insurance net, as DS1 did (above), is not discernible from the data in this project. This qualitative study merely provides an insight⁴⁶ into the way that some defence lawyers may frame competence and the expectations of them within the legal field. However, it is reasonable to assume, following the guidance from the Court of Appeal in *Rashid*, that DS1 will not be alone in this view.

7.3.3. Resources – funding

There are specific resource issues relating to intermediary provision. These relate to both the funding arrangements and sourcing an appropriately qualified intermediary who matches the needs of the vulnerable court user requiring assistance. It is these matters which are discussed in the remainder of this section.

As highlighted in section 4.2.6, all vulnerable court users with communication difficulties can secure the use of an intermediary for the purposes of giving evidence. I have already discussed the disparities in the frequency of this provision between defendants and non-defendants. I also highlighted that intermediaries for these groups are secured via different means: non-defendants via statute and defendants via the common law.⁴⁷ The Witness Intermediary Scheme is managed by the National Crime Agency on behalf of the Ministry of Justice and provides and funds intermediaries to non-defendant witnesses.

Initially, via the Witness Intermediary Scheme, the Ministry of Justice funded the use of intermediaries for vulnerable defendants on an ad hoc basis. The Court of Appeal in *C v Sevenoaks Youth Court* was clear that the Ministry of Justice had no obligation to do so in the absence of statutory power.⁴⁸ This funding was withdrawn for defendant intermediaries in

⁴⁶ See section 2.3.2. (p20-23).

⁴⁷ See section 4.2.6. (p130).

⁴⁸ *C v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin) [24].

August 2011 ‘because of the pressure of requests for witnesses’.⁴⁹ Furthermore, the Court of Appeal disallowed payment of the costs of an intermediary for a defendant out of the central funds.⁵⁰ A difficulty in sourcing adequate funding for defendant intermediaries has since plagued the provision of them to vulnerable defendants.⁵¹ My respondents affirmed this in interview:

Funding is quite awkward at the moment. It’s a whole chapter in its own right, sadly. [R3]

It’s [funding] a bit of a problem actually, if I’m honest with you. [J2]

Yes there are huge funding issues. [J3]

...funding is an issue, sadly. I’ve seen it before where people we think are vulnerable, and they say no you’re fine get on with it – issue about defence paying for it or the court paying for it. [R2]

As is indicated in the above quotes, the lack of funding in this area is a factor which may diminish a vulnerable defendant’s chance of securing an intermediary to assist them to give evidence. This is particularly so since there seemed to be some uncertainty among the respondents about where funding would be sought in the event that an intermediary was granted for a vulnerable defendant:

...it comes down to funding – who is going to pay for it? [B4]

...they would never get the money [for a defendant intermediary] from the Legal Aid Agency, would they? [J5]

The difficulty you then get is how you fund it. Because it’s not yet in statute form there’s this desperate, stupid fudge where I think the Legal Services Commission pay for the preparatory work (the preliminary interview with the intermediary getting to know you, the intermediary’s report) and when it gets to court the Ministry of Justice have an agreement in place to pay for that chunk of the cost. But I think that’s a pretty informal arrangement; I don’t think it’s set in stone. [B1]

⁴⁹ Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants* (Policy Press 2015) 251.

⁵⁰ *C v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin) [23].

⁵¹ See Penny Cooper and David Wurtzel, ‘A Day Late and a Dollar Short: In Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales’ [2013] *Criminal Law Review* 4, 15-17; Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants* (Policy Press 2015) 247-279.

B1's understanding of funding process seems accurate. In response to a freedom of information request by Cooper and Wurtzel, the Legal Services Commission (LSC) provided the following statement on the issue of defendant intermediary funding:

The LSC have an agreement with the Ministry of Justice (MoJ) and Her Majesty's Court and Tribunal Service (HMCTS) regarding the funding of an intermediary in Crime matters. In publicly funded Crime matters the LSC will bear the cost of an intermediary's initial conference with the client/solicitors whilst HMCTS will pay for an intermediary's attendance at trial. Prior authority can be sought in the usual manner for the fees of an intermediary for the initial work with the client and any conferences prior to the trial ... Prior authority cannot be granted for an intermediary to attend court. Costs for the intermediary to attend court should be submitted to HMCTS in the same manner as any other person attending court to assist a witness, such as an Interpreter.⁵²

The Ministry of Justice guidance on expert witness fees also states that 'where an intermediary is required for **a hearing** an application could be made to HMCTS where appropriate'.⁵³ Triangle, an intermediary provider for children and young adults up to the age of 25, states that it is the Legal Aid Agency (the successor to the Legal Services Commission) which funds intermediary assessments of suspects and defendants.⁵⁴

The funding arrangements for defendant intermediaries are thus complex and vary depending upon for which stage(s) of the process they are required. The subsequent disparity caused in its availability was highlighted by some of my respondents as problematic:

I have difficulty in justifying it. I have difficulty in understanding why there are different regimes that are responsible for the funding of an intermediary regarding a defendant and regarding a prosecution witness. I do believe that the matter needs to be reviewed. [J1]

One matter that struck me when I was thinking in advance before coming to see you is in terms of funding. Intermediaries, for example – it's not cheap. Criminal Justice Services have to survive on scraps of funding as it is. There's a huge imbalance there. So even if they want to make intermediaries available to defendants and non-defendants equally, the problem of funding will still inhibit this regardless of the status of the law. [R4]

⁵² Penny Cooper and David Wurtzel, 'A Day Late and a Dollar Short: In Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales' [2013] *Criminal Law Review* 4, 16.

⁵³ Legal Aid Agency, *Guidance on Remuneration of Expert Witnesses* (Version 4, Ministry of Justice 2015) 6.28 (author's emphasis).

⁵⁴ See <http://www.triangle.org.uk/service/intermediaries>

The denial of intermediaries to defendants via the Witness Intermediary Service creates further problems. The service provides registered intermediaries to witnesses eligible via the statutory scheme (ie non-defendant witnesses), but not to defendant witnesses.⁵⁵ Instead, defendant witnesses can only secure non-registered intermediaries. As discussed in section 4.2.6 in the context of *R(OP)*,⁵⁶ there is a concern that quality of support provided by a non-registered intermediary is inferior to that from registered intermediaries. Registered intermediaries are subject to a Code of Practice and Code of Ethics, as well as required to undertake Continuing Professional Development.⁵⁷ While some registered intermediaries act as non-registered intermediaries for defendants,⁵⁸ many non-registered intermediaries have not had comparable training to those working within the Witness Intermediary Service.⁵⁹ This can mean, for example, that they do not understand the importance of impartiality or professional privilege, potentially jeopardising the fairness of the trial.⁶⁰

The unregulated provision of non-registered intermediaries for vulnerable defendant witnesses may have a further impact in terms of their fee. Henderson found that some of the judges and advocates she interviewed about intermediaries suggested that some non-registered intermediaries were ‘over-charging’.⁶¹ This further accentuates existing difficulties with funding arrangements for the defence and is thus likely to further embed inequalities in their provision.

⁵⁵ Penny Cooper and David Wurtzel, ‘A Day Late and a Dollar Short: In Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales’ [2013] *Criminal Law Review* 4, 17.

⁵⁶ *R (on the application of OP) v Secretary of State for Justice* [2014] EWHC 1944 (Admin).

⁵⁷ See Ministry of Justice, *The Registered Intermediary Procedural Guidance Manual (2015)* (Ministry of Justice 2015) 8-16.

⁵⁸ Penny Cooper and David Wurtzel, ‘A Day Late and a Dollar Short: In Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales’ [2013] *Criminal Law Review* 4, 18.

⁵⁹ Emily Henderson, ‘“A Very Valuable Tool”: Judges, Advocates and Intermediaries discuss the Intermediary System in England and Wales’ (2015) 19(3) *International Journal of Evidence and Proof* 154, 157.

⁶⁰ Henderson found that non-registered intermediaries were viewed as ‘less experienced, less qualified and of less assistance than their registered counterparts’. Emily Henderson, ‘“A Very Valuable Tool”: Judges, Advocates and Intermediaries discuss the Intermediary System in England and Wales’ (2015) 19(3) *International Journal of Evidence and Proof* 154, 165.

⁶¹ Emily Henderson, ‘“A Very Valuable Tool”: Judges, Advocates and Intermediaries discuss the Intermediary System in England and Wales’ (2015) 19(3) *International Journal of Evidence and Proof* 154, 165.

The absence of a regulated scheme for non-registered intermediaries also presents an issue in matching intermediaries to defendants' needs.⁶² Historically, there has been limited guidance available to defence lawyers on securing an intermediary for a vulnerable defendant.⁶³ The establishment of the intermediaries' professional organisation, Intermediaries for Justice, launched in December 2014,⁶⁴ may improve this. It has introduced a defence referral system with the aim of 'creat[ing] a more level playing field, by providing solicitors with access to a range of intermediaries who may be able to assist with their vulnerable clients'.⁶⁵ The existing inequality thus influenced this development. The intermediaries offered have received specialist training from the Ministry of Justice (if they also act as registered intermediaries for non-defendant witnesses), Communicourt or Triangle.⁶⁶ While this improves the accessibility (and training) of intermediaries for defendant witnesses, it seems unlikely to substantially increase their use, since funding the intermediary remains a challenge.

There is no principled justification for these differences, but their existence offers at least a partial explanation for why defendants use intermediaries to assist them in giving their evidence less frequently than non-defendant witnesses. The operation of two intermediary schemes for defendant and non-defendant witnesses arises solely from the different legal

⁶² Penny Cooper and David Wurtzel, 'A Day Late and a Dollar Short: In Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales' [2013] *Criminal Law Review* 4, 17-19.

⁶³ Talbot found that guidance issued by the Ministry of Justice on non-registered intermediaries was outdated and inaccurate, see Jenny Talbot, *Fair Access to Justice? Support for Vulnerable Defendants in the Criminal Courts* (Prison Reform Trust 2012) 16. Furthermore, The Advocate's Gateway website, which provides toolkits to the legal profession on issues surrounding vulnerability and special measures, explicitly states that they are 'not able to recommend any provider of non-registered intermediaries'.

<<http://www.theadvocatesgateway.org/intermediaries#Obtain>> accessed 13 September 2016

⁶⁴ Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants* (Policy Press 2015) 252.

⁶⁵ 'Why has IfJ Introduced the Defence Referral System?' (Intermediaries for Justice)

<<http://www.intermediaries-for-justice.org/why-has-ifj-introduced-the-defence-referral-system/>> accessed 24 November 2016. In addition, intermediary providers such as Communicourt have introduced step-by-step guidance for securing an intermediary for a vulnerable defendant, see '10 Easy Steps to Intermediary Support' (Communicourt) <<http://www.communicourt.co.uk/intermediary-for-vulnerable-witnesses/10-easy-steps-to-intermediary-support/>> accessed 15 January 2017

⁶⁶ See <http://www.intermediaries-for-justice.org/for-suspect-or-defendant/>. Communicourt and Triangle are well-established intermediary providers who cater for vulnerable suspects and defendants as well as non-defendant witnesses. See <http://www.communicourt.co.uk/> and <http://www.triangle.org.uk/>

authorities for their use. This shows that the source of law can have a significant bearing on the support that is available and sought in practice. The piecemeal process through which intermediaries are secured for defendant witnesses, if indeed they can be, may reasonably be assumed to result in a lesser expectation on the defence that they engage with this process. This is particularly so since the appellate courts have said that not securing an intermediary will not necessarily jeopardise the fairness of the trial.⁶⁷

To summarise, the defence and the courts have several practical hurdles to overcome to secure an appropriate intermediary for a vulnerable defendant witness. Defence lawyers funded by legal aid, already overburdened with work, may be disinclined to seek intermediaries because of the additional work that securing funding generates. Different lawyers from different firms (and types of firms) may frame the expectations of them differently. Solicitor at firms which McConville et al would describe as managerial firms⁶⁸ and Newman would describe as ‘sausage factory’ firms⁶⁹ are encouraged to demonstrate competence through efficiency. Spending time applying for (and, in the case of intermediaries, funding and recruiting) special measures for vulnerable defendants when, instead, the lawyer could use that time to deal with another case file is not in keeping with the aim of efficiency or the expectations placed on them to secure the fee for multiple cases.⁷⁰

This seems particularly relevant if the lawyer proceeds on an assumption that the case will

⁶⁷ *R v Cox* [2012] EWCA Crim 549 [22]; *R v Rashid* [2017] EWCA Crim 2.

⁶⁸ Mike McConville and others, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press 1994) 19.

⁶⁹ See Daniel Newman, *Legal Aid Lawyers and the Quest for Justice* (Hart Publishing 2013) 30.

⁷⁰ However, a solicitor from what McConville et al describe as a ‘political firm’ or Newman categorises as a ‘radical firm’ may be expected to engage with the process regardless of the additional work. See Mike McConville and others, *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press 1994) 20; Daniel Newman, *Legal Aid Lawyers and the Quest for Justice* (Hart Publishing 2013) 30. It should be noted, however that Newman concluded his study unconvinced that such a distinction between firms actually exists at all in the modern day context.

crack and the trial will not go ahead.⁷¹ Negotiating the bureaucracy associated with securing an intermediary is an entirely poor use of a lawyer's time for a trial that does not materialise.

In addition, obtaining funding and finding an appropriate intermediary in these circumstances is likely to be a source of delay. This could deter judges who are mindful of their duty to effectively manage cases to ensure 'speedy justice'⁷² from granting an intermediary for a defendant. Furthermore, it could deter defence lawyers themselves from applying for such support in a bid to avoid annoying the judge for causing such a delay in proceedings. The courtroom workgroup concept can help explain this latter point. This concept is used to understand the 'decisions produced by, and dynamics within, criminal trial courts' through an appreciation of 'the relationships and norms that develop between those working repeatedly together in these settings'.⁷³ The four shared goals of courtroom workgroups are: handling cases swiftly; maintaining group cohesion; 'doing justice'; and reducing or controlling uncertainty in the courtroom.⁷⁴

A defence application for a defendant intermediary may thwart the shared goals of the courtroom workgroup. Seeking funding for an intermediary as well as actually finding one with skills that match the defendant's needs will cause an inevitable delay in the proceedings. It could also add uncertainty in the courtroom with regards to when the case should be listed for trial and for how long. These uncertainties and delays may, in turn, diminish workgroup cohesion. Whether the intervention of special measures is viewed as furthering the aim of 'doing justice' is perhaps also a matter of uncertainty following the Court of Appeal's ruling in *Cox* that the absence of an intermediary will not render the trial unfair. In contrast, applications for special measures for vulnerable and/or intimidated non-defendant

⁷¹ As discussed in section 6.2.1.1. (p199-201) and section 7.2. (p232-35).

⁷² See for example Home Office, *Delivering Simple, Speedy, Summary Justice* (Criminal Justice System 2006).

⁷³ Richard Young, 'Exploring the Boundaries of the Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203, 203-204.

⁷⁴ James Eisenstein and Herbert Jacob, *Felony Justice: An Organisational Analysis of Criminal Courts* (Little Brown 1977) 23-28.

prosecution witnesses may be accepted within courtroom workgroups as unavoidable and desirable. Their necessity for the prosecution to demonstrate competence by meeting the expectations from within the surround and the legal field might mean that it is accepted within the courtroom workgroup as normal procedure.

To summarise, inequalities in terms of the primacy of the legal and organisational frames, as discussed throughout this chapter, may affect the norms within courtroom workgroups. As a result, this may further diminish the defence's willingness to apply for defendant intermediaries. Regrettably I do not have any data from my interviews to support this. However, since I did not take this concept into account when designing my interview schedule, absence of evidence does not necessarily mean evidence of absence.

The final section of this chapter explores how the legal and organisational frames may operate with regards to special measures for vulnerable defendant witnesses. This may be problematic in the context of intermediary provision for defendants.

7.4. Potential conflation of legal and organisational frames

It is impossible, certainly from this small study, to discern which frames are dominant for the prosecution and defence when making decisions about special measures. The reality is that the various decision frames I have discussed are part of an entangled web of decision-making. Different cases, defendants and circumstances are likely to produce diverse approaches by criminal practitioners. Furthermore, the way individual practitioners frame their decisions will also vary. Having said this, I have shown how the legal and organisational frames seem to be particularly entwined. For those dealing with prosecution witnesses, the legal frame appears embedded within the dominant bureaucratic frame. For the defence the legal frame is relegated to a position of less significance. This seems strongly correlated with

the starkly different defence organisational frame; where the expectation of a competent lawyer is to prepare their client without special measures.

A conflation of the legal and organisational frames thus seems somewhat inevitable in this regard. However, one area in which I think this conflation may present a real threat to upholding adequate protection and support of defendants is in relation to resources. The available resources (or lack thereof) should not result in a conclusion that a defendant is not eligible for special measures. Henderson highlights that guidance in The Advocate's Gateway toolkit on Intermediaries is that 'cost must not be a factor in deciding whether to request an assessment.'⁷⁵ The legal test should always be considered before resources are taken into account. The following quote may suggest, however, that the available resources influence a decision about eligibility:

They [intermediaries] are horrendously expensive to the public. ...you feel that it's your responsibility to consider [funding] when allowing a defendant to use an intermediary.
[J2]

This approach has seemingly been endorsed by the Lord Chief Justice. In the appeal case *R v Rashid*,⁷⁶ Lord Thomas ruled that the trial judge had been correct to refuse an application for an intermediary for the entire trial⁷⁷ because 'he considered all the relevant matters, including the scarcity of intermediaries and of other resources...'⁷⁸

This marks a subtle, yet important, shift in position from that of the Court of Appeal in *R v Cox*. Here, the court ruled that where an intermediary had been granted, if one was not available, then the intermediary may not be necessary to continue the trial fairly.⁷⁹ The Court of Appeal in *Rashid*, however, seems to factor the lack of resources into the initial judgment

⁷⁵ Emily Henderson, "'A Very Valuable Tool': Judges, Advocates and Intermediaries discuss the Intermediary System in England and Wales' (2015) 19(3) *International Journal of Evidence and Proof* 154, 168.

⁷⁶ *R v Rashid* [2017] EWCA Crim 2.

⁷⁷ An intermediary was granted at trial for the purposes of giving evidence, which is of course the focus of this thesis. However, the precedent the Lord Chief Justice set in this case is relevant to applications for intermediaries generally (and so including for evidence) and is thus relevant to this work.

⁷⁸ *R v Rashid* [2017] EWCA Crim 2 [83].

⁷⁹ See discussion in section 4.2.6. (p131-32).

about whether or not an application for an intermediary should be granted at all. This conflates matters of principle and policy,⁸⁰ thus permitting the judicial denial of an intermediary to a vulnerable defendant for reasons other than their legal ineligibility. The lack of resources for vulnerable defendants thus infects the legal test.

Given the prior discussion in section 7.3.3, this conflation of the legal and organisational frames where defendants are concerned will further diminish the number of successful applications made. This, in turn, may also reduce the number of applications that the defence makes at all given their knowledge of the scarcity of resources. The lack of commitment to equality is again evident here. It is to be regretted that the Lord Chief Justice did not, instead, take this opportunity to condemn the lack of adequate intermediary funding for vulnerable defendants.

7.5. Conclusion

This chapter has highlighted the organisational and legal frames which the defence and the prosecution may apply when reaching their decisions about whether to apply for special measures for a vulnerable and/or intimidated court user. I have shown how the level of scrutiny within the surround seems to relate directly to the primacy of the legal frame in special measures decisions. For the prosecution, the legal frame is embedded within the dominant bureaucratic frame which ensures that special measures are applied for when required. The discretion enjoyed by the defence, due to the absence of scrutiny of their decisions, instead allows them to prioritise instrumental and moral concerns. The lack of coherence in the approach to special measures in the surround has thus impacted the organisation of the legal field and been further embedded in the way the legal profession frames special measures decisions as a result.

⁸⁰ For discussion on how principle ought to prevail over policy in adjudication see Ronald Dworkin, *Law's Empire* (Hart Publishing 1998) 221-224, 243-244, 310-312, 338-339, 381.

I have also shown how the expectations on the defence appear wholly different to those of the prosecution regarding special measures. This again affects the way that such lawyers frame their decisions and the subsequent commitment to equality in special measures provision. Competent defence lawyers are expected to manage their cases effectively without reliance on special measures provisions to help them with vulnerable participants; relegating special measures to nothing more than an ‘insurance net’. The prosecution, however, is expected to apply for special measures to show their compliance with the YJCEA in the protection of vulnerable and/or intimidated witnesses.

At least so far as intermediaries are concerned, there is also a vast disparity in the available resources.⁸¹ The source of this disparity is the source of the authority for intermediary provision: for non-defendants it is via statute and so they are served by the accompanying Witness Intermediary Service from which defendants are excluded due to their authority for intermediaries emanating from the common law. Enacting the dormant statutory criteria for defendant intermediaries may go some way to remedying these issues and promoting equality of access to intermediaries for the vulnerable. Alone, however, it seems unlikely to change the organisational frames adopted or subsidiary role of the legal frame in decision-making.

In the final section of this chapter I highlighted the dangers with conflating the lack of resources for defendants with the legal test for intermediaries. To deny an intermediary to a vulnerable defendant in law on the basis of the scarcity of resources in practice does not adequately protect their right to participate effectively in their trial as a witness if they wish to do so.

⁸¹ Though screens and live link are already available in all court centres at no extra cost, see Samantha Fairclough, “‘It doesn’t happen ... and I never thought it was necessary to happen’”: Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials’ (2017) *International Journal of Evidence and Proof* (forthcoming).

The next chapter is the conclusion, which summarises the answers to the research questions, acknowledges the limitations of this research and the scope for further research. It concludes with some recommendations for reform, which seek to put defendants on a more equal footing with non-defendants in terms of the provision of special measures in both law and practice.

CHAPTER 8: CONCLUSION

8.1. Introduction

This thesis has explored the law's commitment to the principle of equality in the provision of special measures to vulnerable and/or intimidated court users who give evidence in Crown Court trials. In considering this, I adopted a socio-legal approach to uncovering the reality of special measures law in books and law in action. The standard of equality invoked in this thesis was derived from that which underpinned the development of the law of special measures for non-defendant witnesses. As summarised in section 3.4, this notion of equality requires that like people are treated in a like manner and different people are treated differently.¹ It thus follows from this that absent a sufficient reason for unequal treatment the only rational option is to proceed on the basis of equality.²

I subsequently used this principle of equality to assess whether the initial exclusion of defendants from special measures and the existing disparity in their provision to vulnerable and/or intimidated court users in law and practice is consistent with the notion of equality that the law itself has espoused. I then explored the extent of the commitment to equality in the provision of special measures to vulnerable and/or intimidated court users in practice.

This is the first study which has systematically interrogated the law's commitment to this standard of equality in the provision of special measures to vulnerable and/or intimidated court users. This thesis does not argue that equality should be prioritised in the provision of special measures *above all other things* (eg tactics). Nor does it commend the notion of equality to which the law subscribes as the best version of this principle. Instead, it looks at

¹ As per Aristotle, see Morris Ginsberg, *On Justice in Society* (Penguin Books 1965) 56-57.

² Richard Wollheim and Isaiah Berlin, 'Equality' (1955-1956) 56 *Proceedings of the Aristotelian Society* 281, 303.

the role that equality should play in the provision of special measures to *all* vulnerable and/or intimidated court users in order for the law to embody internal coherence in this regard. This is a subtle but important restriction on the normative reach of this thesis.

Equality has been considered in this thesis in two contexts. The first was with respect to a vulnerable and/or intimidated court user's need for special measures to give evidence by comparison to a non-vulnerable and/or non-intimidated court user. The second, and more contentious issue, was equality in the context of a vulnerable and/or intimidated defendant witness' need for special measures by comparison to their non-defendant witness counterparts.

I found that the law's commitment to the principle of equality in the provision of special measures to vulnerable and/or intimidated court users is inconsistent. It is inhibited by a combination of the way the law has developed, the organisation of the legal field, and the way that criminal practitioners frame special measures decisions.

This chapter summarises the answers to the research questions that have been addressed in this thesis. It also makes the limitations of the research clear. This is followed by a consideration of future research projects that could be conducted to meet some of these limitations. In the final section of this chapter I consider how reform could be achieved to overcome the barriers to a more coherent application of the principle of equality in the provision of special measures to all vulnerable and/or intimidated court users.

8.2. Answers to the research questions³

I first sought to ascertain the extent to which the notion of equality played a role in the development of special measures for vulnerable and/or intimidated non-defendant witnesses. I have argued that while the language in which the development of special measures was framed was rarely that of equality, the notion of equality nevertheless underpinned the debates.⁴ The recognition that adaptations would need to be made to the standard way of giving evidence (live, in court) in order to accommodate the needs of the vulnerable and/or intimidated when giving evidence embodies the ideal of equality – treating different people differently in order to achieve overall equality.⁵ The provision of special measures can thus be understood as underpinned by the goal of providing witnesses of different ages and abilities an equal opportunity to give their best evidence⁶ in court.

The exclusion of defendants from the provision of special measures was not in keeping with this goal. I have argued that differences between defendants and non-defendants, arising from their different structural position in the criminal trial, do not negate the need for special measures for vulnerable and/or intimidated defendants.⁷ The exclusion of such defendants from the statutory scheme thus jeopardised their ability to participate effectively in the proceedings; as well as potentially amounting to a violation of the principle of equality of

³ The subsidiary research questions addressed in this thesis are:

1. To what extent was the development of the law of special measures for vulnerable and/or intimidated non-defendant witnesses underpinned by a concern for equality?
2. Was the exclusion of defendant witnesses from special measures consistent with the law's commitment to the equality principle?
3. To what extent did (and does) a commitment to the equality principle, and a desire to achieve internal coherence in the law, guide the development of the law of special measures for vulnerable and/or intimidated defendant witnesses?
4. How frequently are special measures invoked in practice as per my respondents' experiences?
5. Are there any barriers to the role of equality in the uptake of special measures among vulnerable and/or intimidated court users as per my respondents' experiences?
6. If so, why do these barriers exist?

⁴ Section 3.3. (p47-61).

⁵ Section 3.4. (p61-63).

⁶ As defined in the statute as the most 'complete, coherent and accurate evidence'. See YJCEA, s16(5).

⁷ Section 3.5. (p63-89).

arms and the presumption of innocence.⁸ This left the law in an incoherent state with regards to its commitment to equality in the provision of support to vulnerable and/or intimidated court users giving evidence in Crown Court trials.

The notion of equality has, however, underpinned the development of the law of special measures for vulnerable and/or intimidated defendant witnesses in the years following the YJCEA.⁹ Lawyer's concerns about the position in which vulnerable and/or intimidated defendants were left absent the provision of special measures led to a series of judicial review and appeal cases. These related to both vulnerable and/or intimidated defendants' positions by comparison to 'normal' defendants and compared to those of non-defendant witnesses to whom special measures were available. The judiciary, and on occasion Parliament, has thus authorised the provision of special measures to vulnerable and/or intimidated defendant witnesses on these bases, in particular so that they can participate effectively in the trial as witnesses.¹⁰ This captures the essence of equality; since it ensures that disadvantaged defendants are provided extra assistance to give their evidence. The current state of the law, however, leaves the law's commitment to the equality principle inconsistent. An unjustifiable disparity still exists in the legal provision of special measures to vulnerable and/or intimidated court users.¹¹

The initial exclusion of defendants from the statutory special measures scheme can be understood with reference to the surround in which special measures were enacted.¹² With the emphasis on 're-balancing the criminal justice system' a zero-sum policy game dominated the political arena, where defendants were (and remain) pitted against victims in the quest for rights. This means that providing vulnerable and/or intimidated defendants with special

⁸ Section 3.6. (p89-94).

⁹ Section 4.2. (p98-39).

¹⁰ This is summarised in section 4.3. (p139-45).

¹¹ Section 4.3. (p139-45).

¹² Section 5.5.1. (p163-71).

measures was (and still is) not in keeping with the ‘rebalancing’ agenda.¹³ The provision of them to non-defendant witnesses however, and especially to those for the prosecution, was. The context in which special measures were enacted has thus acted as a barrier to achieving equality in the statutory provision of special measures to all vulnerable and/or intimidated court users.¹⁴

The distinct absence of any impetus from within the surround to redress the non-provision of special measures to vulnerable and/or intimidated defendants means that reform is driven by defence lawyers and the courts. This means that the nature of the reform is ad hoc and inconsistent. The pace of change is largely determined by defence lawyers’ willingness and ability to challenge the law through judicial review and appeals.¹⁵ An appreciation of the organisational field in which lawyers work begins to reveal why this process is likely to remain sluggish. The conditions in which lawyers work, as a result of substantial cuts to legal aid and increasingly demanding caseloads, are likely to diminish their motivation to embark on future appeals. This is a further barrier to equality playing a more prominent role in the provision of special measures.

The attitudes of criminal practitioners towards vulnerable and/or intimidated court users and special measures also affect the rate at which the law is challenged and develops, as well as its commitment to equality. The insights I obtained from my interviews with members of the legal profession indicate that the uptake of special measures in practice is even more unequal than the provision of special measures in law.¹⁶ The respondents had been involved in, and had heard of, far fewer trials where special measures were invoked for defendant witnesses by comparison to non-defendant witnesses. In addition, this was true when defence witness

¹³ Section 5.5.1. (p165).

¹⁴ Section 5.5.2. (p171-74).

¹⁵ Section 4.2. (p98-145) and section 5.5.2. (p73-74).

¹⁶ See table 5.1 (p149).

use was compared with prosecution witness use. The respondents had notably less experience of defence witness uptake of special measures despite their statutory parity with prosecution witnesses.¹⁷

The interviews with the criminal practitioners brought to the surface several barriers to the equal uptake of special measures for vulnerable and/or intimidated defendant and non-defendant defence witnesses. The legal profession's awareness of the available special measures to defendants appears to be deficient.¹⁸ At least in part, this likely to be a result of the way in which the law has developed.¹⁹ The scattered authority for defendant special measures in statute, the common law and the Criminal Procedure Rules can make it difficult for overstretched legal practitioners to keep abreast of the changes. I have also shown how the legal field is organised around the importance of securing special measures for prosecution witnesses, meaning that special measures for defendants may not be on all defence lawyers' radars.²⁰

The way that the legal field is organised also affects the likelihood that vulnerability and/or intimidation will be identified in court users so that special measures can be secured.²¹ Well-established communication formats ensure that vulnerable and/or intimidated prosecution witnesses are identified by the police and that this information is passed on to the CPS. Furthermore, the fact that prosecution witnesses come into contact with Witness Care Units and The Witness Service further enhances the chances of the identification of any vulnerability and/or intimidation and a concomitant application for special measures. By contrast, the defence may be notified of any obvious vulnerability in the defendant's custody record but otherwise the onus for identifying vulnerability and securing special measures

¹⁷ Section 5.2. (p152-53).

¹⁸ Section 5.4. (p159-62).

¹⁹ Section 5.5. (p162-82).

²⁰ Section 5.5.4. (p177-82).

²¹ Section 5.6. (p182-93).

rests on defence lawyers.²² Again, the conditions in which defence lawyers work are often not conducive to the identification of vulnerability and the subsequent application for special measures.

This is not to say that the legal profession is entirely unaware of special measures or of the status of some defendant or defence witnesses as vulnerable and/or intimidated. Even when this is appreciated, however, the way that defence lawyers frame special measures decisions can act as a further barrier to achieving equality in their uptake. Many of those interviewed saw special measures as tools which are for prosecution witnesses and thus instrumentally framed them as superfluous to defendants and defence witnesses.²³ Again, I have shown how this is likely to be the result of the surround in which they were enacted, the way in which the law has grudgingly developed for defendants, and the organisation of the legal field. The nature of the evidence that defendants and defence witnesses give²⁴ and the fact that defendants are already in the courtroom for the duration of trial means that defence lawyers cannot always see the benefit of special measures for defendants (and often by extension defence witnesses).²⁵ This misconceived notion of what are relevant bases from which to differentiate between witnesses for the prosecution and the defence is thus a further barrier to the role of equality in the provision of special measures to vulnerable and/or intimidated court users.

Another insight obtained from the interviews was that some criminal practitioners adopt a moral frame when making special measures decisions.²⁶ The defendant's position as the accused and the operation (among some practitioners) of a presumption of guilt may lead some to conclude that the defendant does not deserve special measures assistance. Similarly,

²² Section 5.6. (p186-89).

²³ Section 6.2. (p197ff).

²⁴ Section 6.2.3. (p205-11).

²⁵ Section 6.2.2. (p201-204).

²⁶ Section 6.3. (p222-29).

a perception of defence witnesses as the defendant's 'mates,' scheming to avoid the conviction of 'the guilty,' may render them too as undeserving of assistance to give their evidence.²⁷ These views can thus act as additional barriers to achieving equality in the provision of special measures to vulnerable and/or intimidated court users giving evidence.

In keeping with existing research findings, those interviewed believed that evidence elicited by video-recording is inferior to live evidence in court.²⁸ I have shown that the role that such tactical concerns are able to play in special measures decisions is affected by both the organisation of the legal field and the scrutiny to which special measures decisions are subjected within the surround.²⁹ For the prosecution their organisational frame or, in other words, the expectation on them to apply for special measures combined with the perception that they will otherwise be viewed as incompetent, is likely to trump this tactical (or instrumental) concern. The defence, in the absence of these expectations, has much more discretion.³⁰ As a result, tactical issues such as the belief that special measures have a negative impact on the evidence's quality can play a more dominant role in special measures decisions for defence witnesses (the defendant included) as compared to prosecution witnesses.³¹

The dominance of the bureaucratic organisational frame for the prosecution was clear.³² This is, in part, the result of the surround in which the law was enacted and the continued scrutiny from within it. The legal field has been organised to ensure that special measures are thus secured, which in turn influences the way that criminal practitioners frame special measures decisions for prosecution witnesses. The result of this is that the legal frame has become

²⁷ Section 6.3. (p228).

²⁸ Section 6.2.4.1. (p214).

²⁹ Section 7.2 and section 7.3. (p232-42).

³⁰ Section 7.2 and section 7.3. (p232-42).

³¹ Section 7.2. (p.234).

³² Section 7.3.1. (p236-41).

nested within the bureaucratic frame.³³ It seems rare that this frame would be applied independently, and instead the special measures forms ensure that a simplified version of the relevant statutory criteria is considered.

For the defence, however, there is no corresponding bureaucratic frame. The dominant frames are instrumental and moral, followed by competence and resources frames.³⁴ This is because the absence of scrutiny of the defence's special measures decisions leaves them much more discretion to approach a decision in terms of a court user's need for special measures and their deservingness. In relation to their need for special measures, this is likely to be decided on the basis of assumptions about whether or not the trial will go ahead. The fact that so many cases crack may strongly affect the special measures decision, since to apply for assistance for a defendant or defence witness at a trial which is not going to materialise would be nonsensical.³⁵ The huge disparity in resources for intermediaries is likely a significant cause of inconsistent commitment to equality in their provision.³⁶ This does not, contrary to the approach the senior judiciary appears to be taking, justify the denial of intermediary provision to defendants who might otherwise qualify or the subsequent lack of coherence in the law in this regard.³⁷

To summarise, a combination of the way in which the law has developed (and the surround in which this has taken place), the organisation of the legal field, and the way criminal practitioners frame special measures decisions, has inhibited the law's commitment to equality in the provision of special measures to vulnerable and/or intimidated court users giving evidence in Crown Court trials. The relationship between these different factors is symbiotic – each element influences the others in a non-hierarchical and non-linear fashion.

³³ Section 7.3.1. (p240).

³⁴ Section 7.3.2 and 7.3.3. (p234 and p242).

³⁵ Section 7.3.3. (p251).

³⁶ Section 7.3.3. (p245-52).

³⁷ Section 7.4. (p253-54).

8.3. Limitations of this research

This thesis does not engage in debate about whether or not equality should play a more prominent role in the provision of special measures to vulnerable and/or intimidated court users over and above all other competing issues. Instead, it looks at the law's commitment to equality in the provision of special measures to all vulnerable and/or intimidated court users. Given its role in justifying the development of such support for non-defendant witnesses, the normative position adopted in this thesis is that the law should consistently abide by the principle of equality in the provision of special measures to all.

I have not engaged in questions such as whether the defence's tactical concerns about 'best evidence' should trump welfare concerns addressed by special measures. Furthermore, this project focuses on equality of opportunity to give evidence rather than equality of outcome. As a result the effectiveness of special measures at protecting vulnerable and/or intimidated court users and enabling them to give their most complete, coherent and accurate evidence are issues which are also extraneous to this project.

The empirical element of this research provides an insight into the uptake of special measures in Crown Court trials and the attitudes and views underpinning this. It is the first such study that explores the use of special measures by vulnerable and/or intimidated defendant witnesses. The small sample of 18 criminal practitioners on which it is based, however, means it is not representative, and so the findings cannot be generalised to legal practice more broadly. Some court centres may embody different workgroup cultures³⁸ and thus special measures uptake may vary across England and Wales.

The findings provide a snapshot of a series of barriers which inhibit the commitment to equality in the provision and use of special measures among this set of respondents, and

³⁸ Richard Young, 'Exploring the Boundaries of the Criminal Courtroom Workgroup' (2013) 42 *Common Law World Review* 203.

which may do so more widely among the profession. This study was about uncovering some of the relevant issues. It was something of a learning process – as the interviews progressed I realised that I needed to ask slightly different questions and adapted my approach in future interviews accordingly.³⁹ Even throughout the process of analysis and writing up I identified questions that I wished I had asked but had not. These lessons can now be taken forward in the design of a future project.

8.4. Scope for further research

Further research could be conducted into the issue of whether the concerns for equality which underpinned the initial enactment of special measures should trump other concerns surrounding the impact of evidence in the adversarial context. This would need to explore competing claims to tactics and welfare issues, and perhaps also begin to examine the true impact of special measures on the receipt of evidence by the jury. Another project could examine whether the evidence obtained using special measures with vulnerable and/or intimidated court users is of equal quality to that of ‘normal’ court users. Put differently – it would assess whether special measures promote equality of outcome in terms of the evidence’s quality and the protection of the vulnerable and/or intimidated court user. This would move the focus away from equality of opportunity to give evidence. Another interesting research project would explore whether the conception of equality as espoused in non-defendant special measures law and applied throughout this thesis is the ‘best version’ of equality to which to subscribe.

This small scale qualitative study has set the groundwork for a larger scale study to be conducted. The insights obtained from this research could now be used to broaden the scope of the research (geographically and numerically) in a future project, to uncover trends in the

³⁹ See section 2.4.2. (p30-35).

use of special measures across multiple court centres in England and Wales. Such a project would take a mixed method approach, combining survey, observation and interview data. It would also incorporate additional respondents: the police, Victim Support, and The Witness Service. These agencies can provide first-hand accounts into processes and issues at the beginning of the criminal justice process, which as I have demonstrated, are often influential to later decisions. Such a research project could also go beyond the Crown Court setting and into the magistrates' courts.

The addition of an observational element would strengthen the data collected. This is because, as noted in section 2.6.1, there is often a discrepancy between what people say they do in interview, and what they actually do in practice. An ethnographic study would thus produce a more rounded insight into the uptake of special measures for vulnerable and/or intimidated court users and the factors which affect this.

Further research could also be conducted into the provision of special measures in Scotland and Northern Ireland. The approach in these jurisdictions to the provision of special measures in law has differed to that in England and Wales.⁴⁰ Defendant witnesses are privy to many of the same legal provisions as non-defendant witnesses in these legal systems. It would be interesting to see whether the uptake of special measures in practice has thus been more equality driven, or whether the same barriers exist to the uptake in practice notwithstanding the statutory parity. The result of this type of comparative work could inform the approach taken to reform in England and Wales. This could help to determine whether, for example, statutory change is enough to foster a coherent commitment to equality in the provision of special measures to vulnerable and/or intimidated court users giving evidence.⁴¹

⁴⁰ This was discussed at the end of section 3.5. (p65).

⁴¹ Though on this issue, see section 8.5.3. (p273-75).

The experiences of vulnerable and/or intimidated court users were not obtained in this research project. The focus of this thesis was the role that equality plays in the provision of special measures to vulnerable and/or intimidated court users. This makes the views of those who develop and engage with the law most relevant. It would nonetheless be interesting in future research to ascertain defendants' and defence witnesses' views about the lack of provision of special measures to them relative to that for prosecution witnesses. This non-provision (whether in law, practice, or both) could put the legitimacy of the courts in question in their eyes. Further aspects, such as the ability and willingness of a defendant to give evidence in their trial, and how this might have differed if there was greater availability of special measures, would be another interesting angle to explore. This could be done via a survey to defendants whose trials are complete, asking whether they gave evidence in their trial, whether they used special measures, and if they did not, why not.

8.5. Recommendations for reform

As I have noted, in order for the law of special measures to be internally consistent, the provision of special measures to vulnerable and/or intimidated defendant witnesses should be the same as that for non-defendant witnesses.⁴² This is because many of the arguments deployed to justify the current inequality are bogus.⁴³ Equality should, as a result, play a greater role in the provision of special measures to vulnerable and/or intimidated court users giving evidence in Crown Court trials in practice. Although other goals and aims might legitimately trump concerns for equality at various points, the notion of equality nonetheless seems apt as a broad justification for the provision of special measures to vulnerable and/or intimidated court users. In order that the barriers to equality can be overcome the viability of

⁴² Save for pre-recorded evidence in chief. I highlighted the difficulties the defence faces with this measure due to the structural differences inherent in the criminal trial in section 5.3.1. (p154-55).

⁴³ Section 3.5. (p66-89).

the following models of law reform are considered: continued judicial reform; ‘piggybacking’ on a current issue; and, targeting the legal field.

8.5.1. Continued judicial reform

As demonstrated in Chapter 4, the law of special measures for vulnerable and/or intimidated defendant witnesses has largely developed through the common law. The absence of special measures provisions to such defendants has led to defence lawyers challenging the law on the basis of the defendant’s inability to participate effectively in their trial, the inequality of arms between the prosecution and defence and claims of a violation of the presumption of innocence. Some such appeals have gone all the way up to the ECtHR, and required the government to intervene in order to remain ECHR compliant.⁴⁴ As a result, statutory provisions for defendant live link and intermediaries have been enacted (though the latter remains unimplemented). The common law has bridged other gaps in the provision of special measures to defendants, such as screens, communication aids and the removal of wigs and gowns. As highlighted in section 4.3, however, the provision of special measures to vulnerable and/or intimidated defendant witnesses remains inferior to that for all other witnesses.⁴⁵

This ongoing method of law reform has proved partially effective. The provision of special measures to vulnerable and/or intimidated defendants has improved as a result of judicial law-making. It seems reasonable to speculate that in another, say, twenty years this model of law reform might result in equal legal provision of some special measures to all court users.⁴⁶ However, where intermediaries are concerned the regressive step by the Court of Appeal in

⁴⁴ *T v UK* (1999) 30 EHHR 121; *SC v UK* 40 EHRR 10.

⁴⁵ See table 4.1 above.

⁴⁶ Though continuing cuts to legal aid and worsening working conditions may halt the process eventually, as lawyers may not be willing to embark on appeals.

Rashid calls into doubt the judiciary's commitment to equality in this regard.⁴⁷ Furthermore, problems with funding are likely to persist. The continued lack of statutory authority would leave the issue of funding largely unresolved and it would thus remain somewhat cobbled together by various agencies.⁴⁸ This method of reform also risks leaving the law's development poorly known about among the profession. Defence lawyers cannot invoke special measures for defendants unless they are aware of their existence.⁴⁹ The multiple sources of law for defendants makes keeping up-to-date more challenging.

Perhaps most significantly, this method of law reform risks maintaining an impression that defendant special measures are something of an after-thought. This thesis has shown that the way in which the law has developed for defendant witnesses has impacted the way that the legal profession appears to frame special measures decisions. It has also affected the organisation of the legal field – much of the policy in place in the legal system is the result of the statutory scheme for non-defendant special measures. Continuing law reform through the judiciary thus risks maintaining this problematic context in which the law operates. It does not seem likely that parity in legal provision alone will remedy these attitudinal differences.

8.5.2. 'Piggybacking' on a current issue

The Law Commission's recent report on the law on unfitness to plead includes some recommendations about the provision of special measures to defendants. These are that the statutory provision for defendant intermediaries is implemented; a registration scheme is introduced for defendant intermediaries; and that the eligibility criteria for defendant live link is brought into line with that for witnesses.⁵⁰ The purpose of these recommendations is to facilitate the participation of defendants who would otherwise be unable to do so effectively.

⁴⁷ Section 4.2.6. (p136-37).

⁴⁸ Section 7.3.3. (p245-52).

⁴⁹ As was discussed in sections 5.4 and 5.5. (p159-82).

⁵⁰ Law Commission, *Unfitness to Plead Volume 1: Report* (Law Com No 364, Law Commission 2016) 1.33-1.35.

It is not unduly cynical to suggest that the statutory extension of special measures to vulnerable and/or intimidated defendant witnesses is likely to be better received in the surround if its rationale is not to promote the interests of defendants but rather to increase the likelihood of trials going ahead.

If these recommendations are accepted and the Criminal Procedure (Lack of Capacity) Bill is introduced into Parliament, this could provide the opening from which to advocate for defendant special measures. Presenting my own evidence to the Home Affairs Committee and/or the Justice Committee could help to muster support for these provisions in Parliament.⁵¹ I could suggest further amendments to these Committees such as the inclusion of the statutory provision of measures such as screens and the removal of wigs and gowns to vulnerable and/or intimidated defendant witnesses too.

This kind of ‘piggybacking’ may be necessary given that it seems unlikely that a ‘random’⁵² ‘policy-window’ will open and the issue of defendant special measures be recognised as a problem; extended statutory provision be viewed as a viable solution; and the political climate be ripe for such change to occur.⁵³ Unless (and even if) a general election is called early the independent opening of a policy window on this issue seems unlikely; particularly given the current (and foreseeable) preoccupation with Brexit. The piggyback option is subject to much the same forces of course, and it is worth noting that the interim response from the government to the Law Commission indicates that any accepted recommendations

⁵¹ Evidence, written or oral, would be presented in line with the published guidance: House of Commons, *Guide for Witnesses Giving Written or Oral Evidence to a House of Commons Select Committee* (HC 123, Updated February 2016).

⁵² See Paul Cairney and Michael D Jones, ‘Kingdon’s Multiple Streams Approach: What is the Empirical Impact of this Universal Theory?’ (2016) 44(1) *The Policy Studies Journal* 37.

⁵³ Karin Guldbrandsson and Bjoorn Fossum, ‘An Exploration of the Theoretical Concepts of Policy Windows and Policy Entrepreneurs at the Swedish Public Health Arena’ (2009) 24(4) *Health Promotion International* 434, 434-5; Adam White, ‘The Politics of ‘Privatization’: A Multiple Streams Approach’ (2014) *Criminology and Criminal Justice* 1, 3-5.

are unlikely to be included in the next ‘legislative window’ due to the ongoing implementation of an extensive programme of court reform.⁵⁴

8.5.3. Target the legal field

While legislative change would provide a firmer legal basis from which to apply for special measures (and to acquire funding for such) it is unlikely that it would be sufficient alone to effect the attitudinal change required for equality to prevail in the provision of special measures. This is evident from the low uptake of special measures for non-defendant defence witnesses. Absent the scrutiny from the surround and within the legal field, the defence do not have the same expectations placed on them to apply for special measures for their witnesses. Statutory parity for all vulnerable and/or intimidated court users is likely, therefore, to be of limited effect.

Instead (or as well), the organisation of the legal field should be targeted. Awareness of the available special measures for defendant witnesses, and as importantly how they may benefit a defendant who is already in court is more likely to increase their use. This could be done via a series of training workshops on vulnerable defendants and defence witnesses; similar to those HHJ Rook QC has designed for vulnerable witnesses.⁵⁵ Additional toolkits for The Advocate’s Gateway could also be introduced, highlighting the available special measures to vulnerable and/or intimidated defendants and defence witnesses and their potential benefits for those with particular conditions (eg ADHD, anxiety disorders). Writing articles for *The Justice Gap*⁵⁶ and *The Criminal Law and Justice Weekly*⁵⁷ and other texts circulated among the legal profession would also raise awareness and may alter perceptions.

⁵⁴ Letter from Mike Penning MP to Sir David Bean (30 June 2016).

⁵⁵ See section 5.5.4. (p180).

⁵⁶ <http://thejusticegap.com/>

⁵⁷ <https://www.criminallawandjustice.co.uk/>

Another area to consider is judicial directions.⁵⁸ The direction that is issued if a defendant uses a measure such as live link or screens should be amended, to ensure that the reasons for the use of the measure and its benefits are explained to the jury. This should abate some of the legal profession's concerns that the use of such measures will be tactically detrimental to the defendant. Interestingly, this was an approach suggested by two of my respondents. Once prompted to think about how the live link may benefit a vulnerable defendant, one respondent [J1] considered that they could give a judicial direction to explain that there's a difference between giving evidence in court and 'sitting in the court in the dock doing nothing, saying nothing'. J2 also said that he could ask the jurors to consider:

[H]ow you feel watching the case as compared to the time you had to stand up in front of everyone and give your oath – how much more nervous you felt at that point.

This demonstrates that raising the awareness of criminal practitioners about the potential benefits of live link for defendants could change their attitudes towards its use.

Another way in which the existence and benefits of special measures such as live link and screens for defendants can be promoted to the legal profession is via intermediaries. Additional training of intermediaries (and indeed *any* training of non-registered intermediaries for the defendant) could highlight the availability of these measures in law to intermediaries who may otherwise be unaware. This would increase the likelihood of intermediaries recommending in their initial assessment of a vulnerable defendant that their evidence is given from behind a screen or via the live link. The 'promotion' of screens and live link by intermediaries, who are highly regarded among the legal profession,⁵⁹ could facilitate the increased recognition of other special measures which are available to the

⁵⁸ Perhaps by getting into contact with the Judicial Studies Board.

⁵⁹ Emily Henderson, "A Very Valuable Tool": Judges, Advocates and Intermediaries discuss the Intermediary System in England and Wales' (2015) 19(3) *International Journal of Evidence and Proof* 154.

defence and eradicate some of the barriers to their use. Targeting defendant intermediary groups, such as Triangle, would be a way to begin this work.

Another area of the legal field that could be addressed is the absence of communication formats.⁶⁰ For the defence, they are virtually non-existent. The police could be required to fill out an MG2 equivalent for the suspect and potential defence witnesses for inclusion in the custody record, providing an assessment of their vulnerability and the details of a preliminary discussion with them about special measures. Putting special measures on the defendant's (and defence witness') radar in this way might increase the chance of the defence applying for them, as it may create an expectation from the defendant/witness that they are applied for ahead of the trial. The creation of a 'Defendant Support' organisation, comparable to 'Victim Support', could also help to create an expectation of the defence (comparable to that on the prosecution) to apply for special measures in a similar way. Such a charitable organisation could offer support to the defendant in the form of advice about the special measures which are potentially available.

8.6. Conclusion

This thesis has found that the principle of equality which underpinned the development of special measures for vulnerable and/or intimidated non-defendant witnesses – advocating for treating different people differently – is not consistently adhered to in the legal and practical provision of special measures to **all** vulnerable and/or intimidated court users. Its role is inhibited by a combination of the way the law has developed, the organisation of the legal field, and the way that criminal practitioners frame special measures decisions. The result is that vulnerable and/or intimidated defendant witnesses, and non-defendant defence witnesses, are often left inadequately assisted to give their evidence in Crown Court trials.

⁶⁰ Discussed in section 7.3.1. (p241).

In order to begin to remedy this, there needs to be parity in the legislation for special measures to all vulnerable and/or intimidated court users via identical provisions. The removal of ‘other than the accused’ from sections 16 and 17 of the YJCEA would solve this. Furthermore, the organisation of the legal field would need to be adapted so that processes are set up to ensure that special measures are secured by the defence as well as the prosecution. This would all need to be accompanied by a re-education of the police and criminal practitioners on the uses of special measures and the needs of the vulnerable. This would help to foster a more consistent commitment to the principle of equality in the provision of special measures in both law and practice.

For the law to be compatible with equality and human rights legislation, it is pertinent that these issues of inequality are addressed. This is particularly so given the basic yet fundamental importance of equal respect for all within a democracy.

APPENDIX 1: INTERVIEW GUIDE

Interview Guide

Special measures

1. How much involvement do you have in making applications for SM?
2. Special measures were introduced to help facilitate a vulnerable/intimidated witness' best evidence. The YJCEA considers best evidence to be evidence that is complete, coherent and accurate.
 - Are there any other qualities that you would attribute to a witness' best evidence?
3. How appropriate and/or useful do you consider the use of special measures to be in securing the best evidence from a witness?
 - Can you provide an example of a witness who was greatly assisted by the use of special measures?
4. Do you think that the counsel for the prosecution are motivated to apply (or not) for special measures, or perhaps which special measure(s) to apply for, by anything other than a desire to achieve the most complete, coherent and accurate evidence?
5. The 1999 legislation governing the use of special measures provides parity of access for all non-defendant witnesses, regardless of whether they are testifying for the defence or the prosecution.
 - In your experience, is it as likely that an application is **made** for special measures for a vulnerable or intimidated non-defendant defence witness as it is one for a prosecution witness?
 - How often are SM applied for for defence witnesses?
 - Why do you think that this is?
 - Is it of equal likeliness, in your experience, that an application is **granted** for defence and prosecution non-defendant witnesses?
 - Can you provide any examples to support these claims?

- (Are vulnerable defence witnesses not called because they're vulnerable or because they won't be granted special measures?)
6. In your experience, is decision making about the application for, and resulting success of, applications for special measures for a vulnerable witness affected if the defendant in the case is of comparable vulnerability?
 - Can you provide an example of where this has happened?
 7. Do you find that the counsel for the defence, where the defendant is vulnerable, frequently employs the use of special measures available to them?
 - Have you been involved in a case where a defendant has been assisted by the use of a live-link or intermediary?
 - Are you able to speculate as to why defendants use special measures so infrequently?
 8. How often, in your experience, do vulnerable defendants, who are deemed to be fit to plead, go on to be witnesses in their defence?
 9. Based on your experience, do you think that defendants would be more likely to testify if the special measures provisions available to non-defendant witnesses were available in the same capacity to them?
 - Would counsel be likely to advise the defendant not to testify regardless of the assistance available?
 - What of the situation where counsel would like the defendant to testify, but D is reluctant to – would special measures be likely to assist here?
 10. How do you think it can, or indeed can it, be justified that special measures are more accessible to non-defendant witnesses than to defendant witnesses?

Judicial Directions

1. How effective do you perceive judicial directions about both bad character evidence and its significance, and a non-defendant witness' use of special measures to be in limiting their potentially prejudicial effect?

Is there anything that we have discussed that you would like to expand upon, or anything we haven't discussed that you think is important and should be considered in light of the interview?

If you think of anything else then feel free to email me...

APPENDIX 2: CONSENT FORM

INTERVIEW CONSENT FORM

The Potential for Miscarriages of Justice to Occur as a Result of Non-defendant Witness Biased Evidence Laws

Thank you for agreeing to participate in an interview in relation to this project which has been funded by the Economic and Social Research Council (ESRC) and is being undertaken as part of my doctoral studies. The aim of the project is to explore the effects of the unequal treatment of witnesses in criminal trials and the potential for this to result in miscarriages of justice. I am particularly concerned with the following research questions:

1. How should individual rights be prioritised in criminal trials in order to ensure that justice is delivered?
2. How does the operation of evidentiary rules affect the balance of competing interests in criminal trials?
3. Do evidentiary rules which are 'biased' against defendants increase the possibility of miscarriages of justice occurring and if so, how?

The interviews will be recorded and transcribed so that I can analyse what has been said. The transcripts will be anonymised so that you cannot be identified from them. The recordings will be deleted once the transcripts have been typed up. The research findings will be used alongside policy documents and case judgments to analyse the effects of the laws and their employment within the criminal trial. Quotes will be used from the transcripts to evidence analysis, but you will not be identified by name, pseudonyms being utilised instead.

If you have any concerns about confidentiality issues then please do speak to me about this. Your withdrawal from this project will be granted for up to 2 months from the date of the interview, and in such an event all information already collected from you will be destroyed and removed from any analyses.

Declaration by the Participant

I have read and understood the explanation of the project above and I am willing to participate in the project. I understand that I may withdraw from the project within the 2 months following the interview.

Name _____

Signature _____

Date _____

If you require further information about the project, please don't hesitate to contact me:

Samantha Fairclough, Birmingham Law School, University of Birmingham:

Supervised by:

Dr Imogen Jones, Birmingham Law School: _____

Professor Hilary Sommerlad, Birmingham Law School: _____

_____ [In the original, this gave the name and contact details of my gatekeeper. This is redacted to preserve their confidentiality.]

APPENDIX 3: OUTLINE OF LAW

Special Measures Legislation, YJCEA 1999

Section 16 – Witnesses eligible for assistance on ground of age or incapacity

- (1) For the purposes of this Chapter a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this section –
 - (a) If under 18
 - (b) Quality of evidence likely to be diminished because...
- (2) (a) the witness –
 - (i) Suffers from mental disorder
 - (ii) Otherwise significant impairment of intelligence and social functioning
 - (iii) Witness has a physical disability or is suffering from a physical disorder

Section 17 – Witnesses eligible for assistance on grounds of fear/distress about testifying

- (1) Witness is eligible (other than the accused) if quality of evidence likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying

Non-defendant’s SM

Section 23 – Screens

Section 24 – Live-link

Section 25 – Evidence given in private

Section 26 – Removal of wigs and gowns

Section 27 - Video recorded evidence-in-chief

Section 28 – Video-recorded cross-examination or re-examination

Section 29 – Examination of witness through intermediary

Section 30 – Aids to Communication

Defendant’s SM

Section 33A – Live-link directions

- (4) Accused under 18, conditions are that –
 - (a) His ability to participate effectively in the proceedings as a witness giving oral evidence in court is compromised by his level of intellectual ability or social functioning, and
 - (b) Use of a live link would enable him to participate more effectively in the proceedings as a witness (whether by improving the quality of his evidence or otherwise)
- (5) Accused over 18 –
 - (a) He suffers from a mental disorder, or otherwise has a significant impairment of intelligence and social functioning
 - (b) He is for that reason unable to participate effectively in the proceedings as a witness giving oral evidence in court, and
 - (c) Use of a live link would enable him to participate more effectively in the proceedings as a witness (whether by improving the quality of his evidence or otherwise)

PLUS s33A(2)(b) – it is in the interests of justice for the accused to give evidence through a live link

Section 33BA - examination of the accused through intermediary [not yet in force, common law applies]

- (5) Where D is under 18 the condition is that the accused's ability to participate effectively in the proceedings as a witness giving oral evidence in court is compromised by the accused's level of intellectual ability or social functioning
- (6) where D is 18 –
 - (a) the accused suffers from a mental disorder or otherwise has a significant impairment of intelligence and social functioning
 - (b) the accused is for that reason unable to participate effectively in the proceedings as a witness giving oral evidence in court

APPENDIX 4: RESPONDENT QUESTIONNAIRE

The Potential for Miscarriages of Justice to Occur as a Result of Non-defendant Witness Biased Evidence Laws

QUESTIONNAIRE

It is requested that you complete this short questionnaire to help distinctions be made between the opinions and experiences of professionals from different backgrounds. Your answers will be kept confidential.

Date of interview (*so that I can match up with the confidential transcript of your interview*):

.....

Age: 20-30

30-40

40-50

50-60

60+

Gender:

Ethnicity:

Post-qualified Experience (PQE): years

Length of time practising criminal law:

Judge (recorder)

Barrister

Defence solicitor

CPS solicitor

Do you prosecute and defend? (Please provide a rough estimation of the split between the two):

What are the types of cases you usually work on? (ie sex cases/fraud/murder etc.):
.....

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