

Speaking up for Injustice:

Fairclough, Samantha

License:

Creative Commons: Attribution-NonCommercial-NoDerivs (CC BY-NC-ND)

Document Version

Peer reviewed version

Citation for published version (Harvard):

Fairclough, S 2018, 'Speaking up for Injustice: Reconsidering the provision of special measures through the lens of equality', *Criminal Law Review*, vol. 2018, no. 1, pp. 4-19.

[Link to publication on Research at Birmingham portal](#)

General rights

Unless a licence is specified above, all rights (including copyright and moral rights) in this document are retained by the authors and/or the copyright holders. The express permission of the copyright holder must be obtained for any use of this material other than for purposes permitted by law.

- Users may freely distribute the URL that is used to identify this publication.
- Users may download and/or print one copy of the publication from the University of Birmingham research portal for the purpose of private study or non-commercial research.
- User may use extracts from the document in line with the concept of 'fair dealing' under the Copyright, Designs and Patents Act 1988 (?)
- Users may not further distribute the material nor use it for the purposes of commercial gain.

Where a licence is displayed above, please note the terms and conditions of the licence govern your use of this document.

When citing, please reference the published version.

Take down policy

While the University of Birmingham exercises care and attention in making items available there are rare occasions when an item has been uploaded in error or has been deemed to be commercially or otherwise sensitive.

If you believe that this is the case for this document, please contact UBIRA@lists.bham.ac.uk providing details and we will remove access to the work immediately and investigate.

Speaking up for Injustice: Reconsidering the provision of special measures through the lens of equality

Subject: Criminal evidence. **Other related subjects:** Criminal procedure

Keywords: Criminal proceedings; Effective Participation; Equality; Special measures; Vulnerable defendants

Legislation:

Youth Justice and Criminal Evidence Act 1999

*This article examines the commitment within the law to equality in the provision of special measures to vulnerable and/or intimidated witnesses, including the accused. This commitment is explored first in the development of special measures legislation for vulnerable and/or intimidated witnesses other than the accused, which culminated in the enactment of the Youth Justice and Criminal Evidence Act 1999. The justifications from the Speaking up for Justice Report for excluding the accused from the remit of this legislation are then assessed from perspective of equality. The final section of the article looks at the current law on special measures for vulnerable and/or intimidated defendants who chose to give evidence at their trial from that same perspective.**

Introduction

This article considers the rationale underpinning the enactment of special measures for vulnerable and/or intimidated non-defendant witnesses (i.e. witnesses other than the accused). It then assesses whether defendant witnesses (i.e. those who choose to give evidence in their own trial) have an equal opportunity to give evidence by comparison to defendants who are not vulnerable or intimidated. The final section of this article evaluates the law of England and Wales' commitment to equality in the current special measures provisions for all vulnerable and/or intimidated witnesses, including the accused.

* With thanks to Professor Penny Cooper and Professor Richard Young for their insightful comments on an earlier draft of this paper.

Background

The comprehensive special measures scheme, enacted in the Youth Justice and Criminal Evidence Act (YJCEA) 1999, modifies the conditions in which vulnerable (s.16) and intimidated (s.17) non-defendant witnesses (i.e. witnesses other than the accused) can give their evidence. This seeks to secure their most complete, coherent and accurate evidence.¹

The measures, in brief, enable the removal of wigs and gowns; closing the court to the public; the provision of screens, live link, intermediaries and communication aids; and the ability to have evidence pre-recorded and played at trial in the witness' absence.²

The initial statutory scheme excluded defendants.³ Though eligibility for some special measures has now been extended to vulnerable defendants, a marked disparity remains in the available provision. This presents three immediate dangers. The first is that some vulnerable defendants will give evidence unaided, but do so badly. This risks them making a bad impression on the jury, which may affect its decision as to the defendant's culpability. The second danger is that some will not give evidence because they do not feel sufficiently capable to do so unassisted. As a result, jurors may be at liberty to draw adverse inferences from their silence⁴ which can legitimately contribute to a finding of guilt.⁵ The third danger is that, in order to avoid both of these unfavourable outcomes, some vulnerable defendants will plead guilty.⁶ This is most obviously problematic if the defendant is factually innocent, since the lack of support to them will mean they are convicted and punished for a crime they did not commit. But a guilty plea produced from a lack of support to a defendant is problematic

¹ Youth Justice and Criminal Evidence Act 1999 (YJCEA), s.16(5). This is also referred to as their 'best evidence'.

² YJCEA 1999, s.23-s.30.

³ YJCEA 1999, s.16.

⁴ Criminal Justice and Public Order Act 1994, s.35(3) subject to the safeguards set out in *R v Cowan* [1996] QB 373, affirmed by the House of Lords in *R v Becouarn* [2005] UKHL 55.

⁵ *Murray v DPP* [1994] 1 WLR 1.

⁶ And in the process secure a sentence discount as per the Criminal Justice Act 2003, s.144.

irrespective of their guilt. A defendant – vulnerable or not, guilty or not – should have a real opportunity to have the State prove their guilt beyond reasonable doubt.⁷

What makes these concerns more pressing is that vulnerability among defendant and offender populations is pervasive. Jacobson and Talbot note that mental illness and a learning disability/difficulty often co-exist among accused persons.⁸ This is supported by Cunliffe et al, who found that 36 per cent of surveyed prisoners had a disability and/or mental health problem.⁹ Children have been described as “doubly vulnerable”¹⁰ due to their age and other mental, intellectual and emotional problems from which they may suffer. The Children’s Commissioner Report highlighted the prevalence of neurodisability (conditions of the nervous system such as cerebral palsy and autism) in young people who offend. It found, for example, that 60-90 per cent of the offending population suffer from communication disorders versus 5-7 per cent of the general population.¹¹ Lord Carlile’s Report into the Youth Courts revealed further the prevalence of communication difficulties (60 per cent of offenders); of special educational needs (one-third of those in custody); and of those with an IQ below 70 (one-quarter of offenders).¹²

The initial exclusion of defendants from the 1999 Act, and the still limited provision of special measures to them, roused dissatisfaction among both academics and the judiciary.

Hoyano and Keenan noted that “a certain insouciance” surrounded the reasons offered for

⁷ See also Samantha Fairclough, “‘It doesn’t happen ... and I’ve never thought it was necessary for it to happen’: Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials” (2017) 21(3) *International Journal of Evidence and Proof* 209, 213.

⁸ Jessica Jacobson and Jenny Talbot, *Vulnerable Defendants and the Criminal Courts: A Review of Provision for Adults and Children* (Prison Reform Trust 2009) 7.

⁹ 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.

¹⁰ Jessica Jacobson and Jenny Talbot, *Vulnerable Defendants and the Criminal Courts: A Review of Provision for Adults and Children* (Prison Reform Trust 2009) 37.

¹¹ Nathan Hughes and others, *Nobody Made the Connection: The prevalence of Neurodisability in Young People Who Offend* (Children’s Commissioner Report 2012) 23.

¹² Lord Carlile, *Independent Parliamentarians’ Inquiry into the Operation and Effectiveness of the Youth Court* (June 2014) 15. See also Ali Wigzell, Amy Kirby and Jessica Jacobson, *The Youth Proceedings Advocacy Review: Final Report* (Institute for Criminal Policy Research 2015).

why defendants do not need special measures;¹³ reasons which Birch also branded “as muddled as they are unconvincing”.¹⁴ Curren persuasively highlights the importance to assist all vulnerable people:

“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 measures that improve the [defendant’s] understanding of the criminal justice [system] and what is being asked of them.”¹⁵

Several academics expected the exclusion of defendants would leave the government vulnerable to challenges on Article 6 grounds.¹⁶ Furthermore, Lord Justice Auld highlighted in his review of the criminal courts that the lack of special measures provision to defendants was “a disparity that concerns many judges”.¹⁷ This was evident in the House of Lords in *R v Camberwell Green Youth Court*.¹⁸ When considering the issue of the exclusion of vulnerable defendants from special measures, Baroness Hale noted that “child defendants are often among the most disadvantaged and the least able to give a good account of themselves”.¹⁹

¹³ Laura Hoyano and Caroline Keenan, *Child Abuse: Law and Policy Across Boundaries* (OUP 2010, first published 2007) 673.

¹⁴ Diane Birch, ‘A Better Deal for Vulnerable Witnesses’ [2000] *Criminal Law Review* 223, 242.

¹⁵ Richard Curren, ‘Vulnerable Adults and the Criminal Justice System in England and Wales: Some Proposals for Reform’ (2005) *Criminal Lawyer* 3, 4.

¹⁶ See, for example, 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; Laura Hoyano, ‘The Child Witness Review: Much Ado about too Little?’ [2007] *Criminal Law Review* 849, 865; 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; 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.

¹⁷ Sir Robin Auld, *Review of the Criminal Courts of England and Wales* (Ministry of Justice 2001) [126].

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

¹⁹ *ibid* at [56] (Baroness Hale).

Interestingly, in Scotland and Northern Ireland, the introduction of special measures for the vulnerable has included provisions for vulnerable defendants.²⁰

While the original exclusion of defendants from the 1999 Act (and the continued disparity in the current provision of special measures²¹) has been criticised, there is an absence of a more wide-ranging critique of the reasons originally provided for their exclusion. These reasons still seem to hold some significance when the courts consider the unequal provision of special measures to vulnerable and/or intimidated defendants involved in criminal trials (as is highlighted below). It is thus important that they are directly engaged with in order to assess their validity from the perspective of equality.

The development of non-defendant special measures: the role of equality

The enactment of special measures for vulnerable and/or intimidated non-defendant witnesses can be understood as premised on a concern for equal treatment of the vulnerable. An appetite for adaptations to be made to trial processes for child complainants developed among those working with children and within the criminal justice system.²² Children were often excluded from the criminal trial process. This was, in part, because of strict rules of evidence

²⁰ See Vulnerable Witnesses (Scotland) Act 2004, s.271F; Justice Act (Northern Ireland) 2011, s.12. See also Penny Cooper and David Wurtzel, 'Better the Second Time Around? Department of Justice Registered Intermediary Schemes and Lessons from England and 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); Scottish Executive Central Research Unit, *Vulnerable and Intimidated Witnesses: Review of Provisions in Other Jurisdictions* (Crime and Criminal Justice Research Findings No. 60) 2, where it was noted that "[m]any provisions *excluded* defendants (although there seemed no clear reason for this)."

²¹ Samantha Fairclough, "'It doesn't happen ... and I've never thought it was necessary for it to happen': Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) 21(3) *International Journal of Evidence and Proof* 209; Law Commission, *Unfitness To Plead Volume 1: Report* (Law Com No 364, Law Commission 2016) 1.31; Laura Hoyano and Angela Rafferty, 'Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction' [2017] *Criminal Law Review* 93; 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; Laura Hoyano, 'Coroners and Justice Act 2009: Special Measures Directions Take Two: Entrenching Unequal Access to Justice?' [2010] *Criminal Law Review* 345.

²² 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.

relating to the corroboration of testimony and the competency of witnesses.²³ It was also as a result of what Spencer termed “the adversarial package”.²⁴ This is the combination of rules which traditionally require a witness to give evidence orally, in open court, in the presence of the defendant. These rules have been said to risk a person’s “secondary victimisation”²⁵ in court as a result of the combination of the intimidating court environment²⁶; the difficulty of giving oral testimony in public²⁷; and the recall of traumatic events in evidence.²⁸

In response to these concerns, the Home Secretary established the Pigot Committee to consider the use of video recordings as a method of obtaining evidence from children and other vulnerable witnesses.²⁹ The recommendations contained within their report for special measures and categories of vulnerability³⁰ were underpinned by a principle of procedural equality. They sought to ensure that all witnesses, regardless of their age or vulnerability, were able to give evidence in court to the best of their ability. Though this principle³¹ of equality was not referred to explicitly, the Pigot Committee’s recommendations embodied the sentiment of equality as espoused by Aristotle, achieved by treating “like people in a like manner, and different cases differently”.³² This conception of equality involves a principle of

²³ See Carol Hedderman, *Children’s Evidence: The Need for Corroboration, Home Office Research and Planning Unit Paper 41* (Home Office 1987); John R Spencer and Michael E Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (Hart Publishing 2012) 2-4.

²⁴ John R Spencer and Michael E Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (Hart Publishing 2012) 1.

²⁵ 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.

²⁶ See Linda Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge 2010).

²⁷ Andrew Sanders and Imogen Jones, ‘The Victim in Court’ in Sandra Walklate (ed), *Handbook of Victims and Victimology* (Willan Publishing 2007) 282.

²⁸ Assuming, of course, that a complainant or witness is telling the truth.

²⁹ See Carolyn Yates, ‘The Pigot Committee Report: Children, Evidence and Videotape’ (1990) 2(3) *The Journal of Child Law* 96.

³⁰ Lord Thomas Pigot, *Report of the Advisory Group on Video Evidence* (Home Office 1989), see, inter alia, para 2.14; 2.29-2.37; 3.5.

³¹ See Charles R Beitz, ‘Procedural Equality in Democratic Theory: A Preliminary Examination’ (1983) 25 *Liberal Democracy* 69, 69.

³² Morris Ginsberg, *On Justice in Society* (Penguin Books 1965) 56-57.

equity³³ – achieving equal opportunity through justified differential treatment. In the special measures context, the disadvantaged position in which children and other vulnerable individuals³⁴ find themselves within the criminal justice system, versus other ‘non-vulnerable’ individuals, justifies their differential treatment through the provision of special measures.

Prior to the enactment of the YJCEA, the ‘New’ Labour government commissioned an interdepartmental Working Group to assess the treatment of ‘vulnerable and intimidated witnesses’ throughout the criminal justice system, including at trial. The approach in the *Speaking up for Justice* Report³⁵ remained consistent with that of the Pigot Committee’s; embodying a concern for equal treatment. For example, the Working Group highlighted the potential relevance of the Disability Discrimination Act 1995 in its report.³⁶ This legislation 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”.³⁷ This again embodies notions of procedural equality of opportunity, ensuring that vulnerable individuals can give evidence effectively in criminal trials despite their disabilities.

The recommendations in the Report were largely accepted by the government and special measures were enacted in the YJCEA. The role that special measures play in realising equality for vulnerable and/or intimidated non-defendant witnesses in criminal trials has become more apparent following this legislation. A developing body of law requiring equal

³³ Wolfgang von Leyden, *Aristotle on Equality and Justice: His Political Argument* (Palgrave Macmillan 1985)

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

³⁴ See Andrew Sanders and others, *Witnesses with Learning Difficulties* (Home Office Research and Statistics Directorate, Research Findings No. 44 1996); 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).

³⁵ 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*).

³⁶ *Speaking up for Justice* paras 1.19-1.20.

³⁷ Disability Discrimination Act 1995, s.1(1).

treatment has resulted in an explicit acknowledgement of the contribution that 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.³⁸ The Equalities Act 2010 is cited as the authority for this, which protects a range of characteristics, including age³⁹ and disability.⁴⁰ Disability is defined under the Equalities Act as a “physical or mental impairment”.⁴¹ Furthermore, and similarly to the Disability Discrimination Act,⁴² 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”.⁴³ 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 the latter a suitable tool to assist those in need.

Similarly, special measures are identified in a paper by the Equality and Human Rights Commission focusing on disability, as “provisions or adjustments to ensure equal access in court for giving evidence”.⁴⁴ 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”.⁴⁵ Again, special measures are appropriate tools to make such adjustments. Indeed, Australian academics have celebrated

³⁸ Hallet LJ, *Equal Treatment Bench Book*, Children and Vulnerable Adults (Judicial College 2013, with 2015 amendments) 5-2, [35].

³⁹ Equalities Act 2010, s.5.

⁴⁰ *ibid.* s.6.

⁴¹ *ibid.* s.6(1)(a).

⁴² This was repealed and replaced by the Equalities Act 2010.

⁴³ Equalities Act 2010, s.20(5).

⁴⁴ Equality and Human Rights Commission, *Hidden in Plain Sight: Inquiry into Disability-Related Harassment* (April 2016) 230.

⁴⁵ UN Convention on the Rights of Persons with Disabilities 2006, art.13(1).

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.⁴⁶ Thus, although special measures may not have been 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.

To summarise, the principle of equality underpinning the development of non-defendant witness special measures is premised on the idea that people are “entitled to equal consideration”.⁴⁷ This means that “[e]qual consideration for all may demand very unequal treatment in favour of the disadvantaged”.⁴⁸ It is thus a principle of procedural equality which underpinned the enactment of special measures for vulnerable and/or intimidated witnesses – ensuring that the laws of evidence and procedure provide each witness with an equal opportunity to give evidence in court to the best of their ability.

The exclusion of defendants from special measures

The exclusion of vulnerable and/or intimidated defendant witnesses from the full special measures regime requires consideration from this equality perspective. The normative claim underpinning such an exploration is that the law should be internally consistent in the protection and provision of assistance to all vulnerable and/or intimidated court users.⁴⁹ Thus,

⁴⁶ 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.

⁴⁷ Morris Ginsberg, *On Justice in Society* (Penguin Books 1965) 13. See also, 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.

⁴⁸ Amartya Sen, *Inequality, Re-examined* (OUP 1992) 1.

⁴⁹ 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; Joseph Raz, ‘The Relevance of Coherence’ in Joseph Raz, *Ethics in the Public Domain* (Clarendon Press 1994).

the principle of procedural equality of opportunity on which the law of special measures for non-defendant witnesses is based should also be upheld in their provision to vulnerable and/or intimidated defendants. It is thus important to examine the justifications offered for the initial exclusion of defendants from special measures eligibility and the defendant's current position as the law has developed.

When considering eligibility for special measures, the Working Group responsible for the *Speaking up for Justice* Report, on which the YJCEA was based, dedicated just one page of their 273 page report to justifying the exclusion of defendants from their recommendations for special measures:

... [T]he 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 ... 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.⁵⁰

⁵⁰ *Speaking up for Justice*, para 3.28.

The Working Group thus highlighted differences between defendants and non-defendants which it considered to justify excluding the former from special measures legislation. Taking these in turn, the first was that special procedures were already in existence for interviewing vulnerable suspects.⁵¹ The second was that “considerable safeguards in the proceedings as a whole ... ensure a fair trial” for defendants.⁵² The final reason the Working Group 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.⁵³ These reasons were put forward as a collective justification for the exclusion of defendants from special measures. Their validity needs to be established to ensure that, notwithstanding the law’s disparity, there is overall equality of opportunity for vulnerable and/or intimidated people to give evidence. For the reasons to be valid, these differences must thus bridge the gap between vulnerable and/or intimidated defendants and non-vulnerable and/or non-intimidated defendants when giving evidence. If they do not, then those with vulnerabilities or experiencing intimidation are unjustifiably treated less favourably if they are the accused in a criminal case.⁵⁴

Reason 1: Special procedures for interviewing vulnerable suspects already exist

These procedures are contained within the Codes of Practice under the Police and Criminal Evidence Act 1984. Code C requires, for example, that a medical practitioner is called to assess a mentally disordered or otherwise vulnerable suspect, and that an ‘appropriate adult’ is present for the interview of a juvenile, mentally disordered or otherwise mentally

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ *ibid.*

⁵⁴ This is particularly alarming given that the ‘victim-offender overlap’ means these populations are often interchangeable, and thus that a person victimised in one case could be the accused in another and treated differently as a result. 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 issue has also been referred to by Laura Hoyano and Angela Rafferty, ‘Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction’ [2017] *Criminal Law Review* 93, 94.

vulnerable suspect.⁵⁵ 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.⁵⁶

It is not clear how these pre-trial adaptations negate a vulnerable and/or intimidated defendant's need for special measures at trial. Special measures provide adaptations to the traditional mode of giving evidence in the courtroom. Conversely, 'special procedures' do not provide a vulnerable and/or intimidated accused with the option to testify from outside of the courtroom or from behind a screen. Nor do they give a vulnerable accused the opportunity to give evidence with the assistance of an intermediary. It is thus difficult to see how the provision of a medical practitioner and appropriate adult at the pre-trial stage eradicates the need for adaptations at trial. Instead, affirmation from a medical practitioner that a suspect is vulnerable and requires additional pre-trial support ought to pave the way to yet further assistance at trial, not support the denial of it.

Reason 2: Existing safeguards ensure a fair trial

The Working Group provided two examples of defendant safeguards in the criminal trial which they viewed as negating a vulnerable and/or intimidated defendant's need for special measures: the provision of legal representation and their non-compellability as witnesses.⁵⁷ These safeguards do signify a marked difference in proceedings and rights between defendant and non-defendant participants. However, all defendants are privy to these safeguards, whether vulnerable and/or intimidated or otherwise. Unless they provide sufficient support those who are vulnerable and/or intimidated so as to eradicate any additional need for special

⁵⁵ Police and Criminal Evidence Act 1984, Revised Code C Detention, Treatment and Questioning of Persons by Police Officers (2013) 17, paras 3.15 – 3.16.

⁵⁶ Home Office, *Guide for Appropriate Adults* (Home Office 2011).

⁵⁷ *Speaking up for Justice*, para 3.28.

measures, then these safeguards are also an invalid basis on which to exclude all defendants from special measures.

The provision of legal representation to suspects and defendants is one of the remedies designed to “neutralise the worst effects of inequality of arms”⁵⁸ between the State (with its vast resources) and the accused. The relevant question for the Working Group was whether the provision of legal representation to defendants negated any potential need for special measures provision. Even if it does (an issue discussed further below) there is an inherent problem with this, since not all defendants are legally represented in practice. Between April and June 2015, 6% of defendants in the Crown Court represented themselves.⁵⁹ 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 is, therefore, unjustified on this basis.

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

[D]efence counsel must be able to communicate with their clients in order to obtain instructions, and ... defendants with impairments must be able to communicate with the advocates questioning them and with the jury...⁶⁰

Legal representation will not negate the need for special measures for defendants with vulnerabilities which so severely inhibit their communication skills for these purposes.

Even for those defendants who can sufficiently communicate with their lawyers, a lawyer cannot effect the same changes to proceedings for defendants that special measures can for all

⁵⁸ Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, OUP 2010) 59-62.

⁵⁹ Office for National Statistics, *Criminal Court Statistics Quarterly, England and Wales: April to June 2015* (Ministry of Justice 2015) Annex B, 18. See also Penelope Gibbs, *Justice Denied? The Experience of Unrepresented Defendants in the Criminal Courts* (Transform Justice 2016) 4.

⁶⁰ See also Laura Hoyano and Angela Rafferty, ‘Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction’ [2017] *Criminal Law Review* 93, 93-94.

other witnesses. They cannot reduce the number of people that a particularly anxious defendant can see in the courtroom in the way that live link or screens can. Nor can a defence lawyer conduct a thorough assessment of the nature of their client's vulnerability in order to ensure that questions and proceedings are modified appropriately for their needs in the way that an intermediary can. A legally represented vulnerable and/or intimidated defendant remains in a disadvantaged position when compared to their non-vulnerable and/or non-intimidated counterparts.

The second safeguard to which the Working Group referred was the non-compellability of defendants as witnesses.⁶¹ Generally, non-defendant witnesses are compellable.⁶² In contrast defendants are competent to testify in their defence,⁶³ but under no obligation to do so. 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. The validity of the most feasible possibilities thus requires consideration.

The Working Group may have been suggesting that defendants who would, at best, find it difficult to give evidence due to their status as vulnerable and/or intimidated should simply not testify. The prosecution cannot compel them to, and they are under no legal obligation to do so in their defence. There are three problems with this. The first is that the defendant has a legal right to participate in their trial.⁶⁴ 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.⁶⁵ This is interpreted in the Criminal Practice Directions to include "enabling a

⁶¹ *Speaking up for Justice*, para 3.28.

⁶² Excepting, for example, that 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).

⁶³ Criminal Evidence Act 1898, s.1(a).

⁶⁴ European Convention of Human Rights, art. 6(1). See further *SC v UK* [2005] 40 ECHR10.

⁶⁵ Criminal Practice (Amendment No 2) Rules 2017 CrimPR 3.9(3)(b).

... defendant to give their best evidence”.⁶⁶ If the defendant wants to give evidence, therefore, they should be able to do so (and to do so well) regardless of the absence of a legal requirement that they do. 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.⁶⁷

The second issue is that failing to support those who are vulnerable contravenes equality legislation. This 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”.⁶⁸ 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 thus result in a system that does not comply with the law.

Finally, further issues arise when it is considered that a defendant’s failure to testify in their defence is not consequence free.⁶⁹ Instead, it opens up the possibility for the jury to draw adverse inferences from the accused’s silence at trial.⁷⁰ Such inferences can contribute directly to a finding of guilt.⁷¹ 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 if consent is in issue, as this usually makes it necessary that the jury hears the defendant’s version of events. In short, defendants are not obliged to testify but they can be penalised if they do not.⁷²

⁶⁶ Criminal Practice Directions (October 2015 edition, amended April 2016) CPD 3D.2.

⁶⁷ Although the Court of Appeal recently asserted that its flexibility means that very few defendants will be unable to give evidence in *R v Hamberger* [2017] EWCA Crim 273 [44]. Though see Penny Cooper’s case comment in [2017] *Criminal Law Review* 707, 710.

⁶⁸ Equalities Act 2010, s.20(5).

⁶⁹ Also noted in Louise Ellison, ‘Case Comment – Youth Court: Whether Legislative Provision Requiring Special Measures Direction to be Given in Relation to Child Witnesses in Need of Special Protection in Manner Compatible with Convention Requirement for a Fair Trial’ [2005] *Criminal Law Review* 497, 500.

⁷⁰ See fn 4 (above).

⁷¹ See fn 5 (above).

⁷² Abenaa Owusu-Bempah, *Defendant Participation in the Criminal Process* (Routledge 2017) 103-104.

It is just possible that the Working Group believed that these consequences of a vulnerable defendant remaining silent at trial could be mitigated by a provision contained in the Criminal Justice and Public Order Act (CJPOA) 1994. In limited circumstances, section 35(1)(b) CJPOA permits a judicial direction to the effect that hearing from a defendant suffering a “physical or mental condition” would have been “undesirable”. This, at least in theory, prevents the jury from drawing adverse inferences from a vulnerable defendant’s silence at trial. The Working Group may have considered, though omitted from the Report, that this provision enabling a judicial direction justified their suggestion that the non-compellability of defendants as witnesses justified the denial of defendant special measures.

However, there are several problems with this. First, the effectiveness of the direction is questionable. 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.⁷³ Second, by definition, the ‘undesirable’ ruling 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 vulnerable or intimidated defendants, therefore, the ‘undesirable’ direction is an inadequate basis from which to exclude them from special measures provisions.

Third, even for those to whom the direction is available in theory, the “restrictive”⁷⁴ interpretation of ‘undesirable’ by the courts renders questionable its effectiveness as a

⁷³ 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.

⁷⁴ 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.

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.⁷⁵ This jurisprudence has since developed to include potential impacts on the quality of evidence,⁷⁶ but interpretations remain generally restrictive.⁷⁷ Difficulties giving evidence are instead thought to properly affect the weight of the evidence rather than the decision as to whether it is desirable to hear it at all.⁷⁸

Fourth, and relatedly, 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.⁷⁹ 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 and/or section 17 YJCEA.⁸⁰ The protection afforded by section 35(1)(b) is thus inferior to that available via special measures legislation for witnesses.

Finally, another barrier faced by defendants seeking that their testimony is ruled undesirable is that the decision does not centre exclusively on the defendant's physical or mental condition and its effects. In *Tabbakh*⁸¹ 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

⁷⁵ *R v Friend (No.1)* [1997] 1 WLR 1433 (CA).

⁷⁶ *R v Friend (No.2)* [2004] EWCA Crim 2661.

⁷⁷ *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.

⁷⁸ *R (on the application of DPP) v Kavanagh* [2005] EWHC 820 [18].

⁷⁹ See, respectively, *R. (on the application of DPP) v Kavanagh* [2005] EWHC 820 (Admin); *R v Gledhill* [2007] EWCA Crim 1183.

⁸⁰ For example in *R v Gledhill* the defendant was suffering from battered woman syndrome and her testimony would have been against her husband

⁸¹ *Tabbakh* [2009] EWCA Crim 464. Supported in *O'Donnell v United Kingdom* [2015] 61 EHHR 37 [58]. See further 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.

directly would be undesirable.⁸² This shifts the focus of attention away from the defendant's *ability* to give evidence. Instead, desirability is measured with regards to the *importance* of the defendant's evidence and the need for an explanation from them. This further undermines this provision as a possible justification for denying special measures to vulnerable defendants.

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. These provisions, and other safeguards, do indeed contribute to ensuring a defendant has a fair trial, but not in every respect. They do not improve the ability of vulnerable and/or intimidated defendants to give evidence in criminal proceedings in the way special measures do for such witnesses, and nor were they designed to.

The existence of these safeguards, therefore, does not justify the denial of special measures to vulnerable and/or intimidated defendant witnesses.⁸³ Such defendants, without the provision of special measures, remain at a disadvantage by comparison to their non-vulnerable counterparts in the witness box. Despite this, strong references were made to these justifications by the High Court in *R v Waltham Forest Youth Court*⁸⁴ and were ultimately persuasive in the denial of the common law expansion of live link to a young defendant.⁸⁵

⁸² *Tabbakh* [2009] EWCA Crim 464 [8]-[9].

⁸³ Perhaps there are other safeguards which might. For example, the anonymous reviewer highlighted the potential significance of the adjustments to formalities which are inherent in Youth Court proceedings (also highlighted by Baroness Hale in *Camberwell Green Youth Court* at [61]). I am, however, dubious as to whether even this negates the need for special measures for child defendants with learning disabilities or mental health problems. It seems that further adjustments are likely to be needed to accommodate such "doubly vulnerable" accused (see text attached to fn 10) notwithstanding the more child-friendly environment of the Youth Court. See further Ali Wigzell, Amy Kirby and Jessica Jacobson, *The Youth Proceedings Advocacy Review: Final Report* (Institute for Criminal Policy Research 2015) 66.

⁸⁴ [2004] EWHC 715 (Admin).

⁸⁵ *Ibid* [64].

Furthermore, the Lord Chief Justice in *R v Rashid*⁸⁶ has suggested that “in all but the rarest of cases” a competent advocate will be able to deal with a vulnerable defendant absent an intermediary.⁸⁷ This may further embed the myth that a legal representative can negate the need for additional special measures assistance.

Reason 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.”⁸⁸ This betrays the Working Group’s narrow comprehension of their potential. While it is true that special measures may, on occasion, be invoked to assist a witness “in fear or distress” due to the “defendant’s behaviour towards them”,⁸⁹ this is far from their only function.

Instead, special measures enable a vulnerable and/or intimidated person to benefit from adaptations which can help them to give more complete, coherent and accurate evidence in court. A child or adult defendant with communication difficulties, a learning disability or with an autism spectrum disorder would likely benefit from the provision of an intermediary and communication aids.⁹⁰ A defendant with attention deficit hyperactivity disorder (ADHD) who is easily distracted by the multiple stimuli in the courtroom could use the live link to give evidence so that they can better focus on their testimony.⁹¹ A defendant in particular distress in connection with testifying in the proceedings, perhaps due to the presence of

⁸⁶ [2017] EWCA Crim 2.

⁸⁷ *ibid* [82] (Lord Thomas). David Wurtzel takes issue with this in ‘Intermediaries for Defendants: Recent Developments’ [2017] *Criminal Law Review* 463, 469-470.

⁸⁸ *Speaking up for Justice*, para 3.28.

⁸⁹ YJCEA 1999, s.17(2)(d)(i).

⁹⁰ See www.theadvocatesgateway.org toolkits 2, 3, 4, 5, 6, 12, 14, 15, 16.

⁹¹ See Samantha Fairclough, “‘It doesn’t happen ... and I’ve never thought it was necessary for it to happen’: Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials’ (2017) 21(3) *International Journal of Evidence and Proof* 209, 219.

certain people in the public gallery, could give their evidence from behind a screen where they cannot be seen.

These are just a few examples of scenarios where special measures provision would benefit vulnerable and/or intimidated defendants. The Working Group's assumption, therefore, that special measures will not benefit defendants because they are designed to help witnesses is flawed,⁹² particularly given the prevalence of vulnerability among defendants as outlined at the start of this paper. Despite this, such a view seems to have influenced the legal profession's conception of special measures as tools which are for the prosecution and something which defendants do not need. For example, Baroness Hale noted in *Camberwell Green Youth Court* that "the whole purpose of [screens] is to prevent the witness seeing and being seen by the accused".⁹³ Interviews with criminal practitioners further reveal that such perceptions appear to affect the uptake of special measures among those giving evidence in the Crown Court.⁹⁴

Each of the three reasons offered by the Working Group, as a collective justification for the exclusion of defendants from all special measures, is thus invalid. Despite this, the recommendations were accepted by the government and went without challenge in Parliament⁹⁵ resulting in the exclusion of the accused from the subsequent YJCEA. Instead, vulnerable and/or intimidated defendants were left with a diminished opportunity to give

⁹² Save for the caveat of provisions permitting pre-recorded evidence. The workability of such provisions for defendant witnesses, whose evidence typically responds to the prosecution case, is questionable. See *R v SH* [2003] EWCA Crim 1208 [23] – [24] (LJ Kay); *R v Camberwell Green Youth Court* [2005] UKHL 4 [58] (Baroness Hale). Cf Diane Birch, 'A Better Deal for Vulnerable Witnesses?' [2000] *Criminal Law Review* 223, 242.

⁹³ *R v Camberwell Green Youth Court* [2005] UKHL 4 [27].

⁹⁴ See further Samantha Fairclough, "It doesn't happen ... and I've never thought it was necessary for it to happen": Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials' (2017) 21(3) *International Journal of Evidence and Proof* 209, 219-221.

⁹⁵ A look to the political context in which this all took place enables one to better understand why, when the arguments against providing special measures to the accused were so weak, such scant regard was given to their validity, 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); John Jackson, 'Justice for All: Putting Victims at the Heart of Criminal Justice?' (2003) 30(2) *Journal of Law and Society* 309; David Garland, *The Culture of Control* (OUP 2001).

evidence compared to their non-vulnerable and/or non-intimidated counterparts. This marked an inconsistency in the law's commitment to the equal treatment of vulnerable and/or intimidated people involved in criminal trials.

The current law: procedural equality?

Since the enactment of the YJCEA, gradual developments—driven largely by the courts—have seen many special measures provisions extended to vulnerable defendants. The removal of wigs and gowns and the potential to close the court to the public when a defendant gives evidence is enshrined within the Criminal Practice Directions⁹⁶ following the case of *T and V v UK*.⁹⁷ The use of communications aids has also, without controversy, been extended to defendants under the courts inherent powers.⁹⁸ Furthermore, in *Waltham Forest Youth Court*,⁹⁹ the common law provision of screens to vulnerable and/or intimidated defendant witnesses was retained.¹⁰⁰ These developments are consistent with the principle of procedural equality for the vulnerable and/or intimidated, on which non-defendant special measures were based.

The extension of statutory powers for defendant live link and intermediaries, however, leaves much to be desired. Vulnerable defendants can now give evidence via live link as per section 33A of the YJCEA.¹⁰¹ However, the provision is much more restrictive than that for non-defendant witnesses under section 24. It is not available to those with physical disabilities or intimidated defendants; despite the fact that it is perfectly plausible that a defendant is in

⁹⁶ Initially the Practice Direction: Trial of Children and Young Persons in the Crown Court [2000] 2 All E.R. 285. This guidance now forms part of the consolidated Criminal Practice Directions, see 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.

⁹⁷ (1999) 30 EHHR 121.

⁹⁸ Authority for this is found in the Criminal Procedure (Amendment No 2) Rules 2017, Part 3: Case Management, CPR 3.9(3)(b). See also The Advocate's Gateway, 'Using Communication Aids in the Criminal Justice System' (Toolkit 14, The Council of the Inns of Court 2015).

⁹⁹ See fn 84 (above).

¹⁰⁰ Ibid [31]. This is now enshrined in Criminal Procedure (Amendment No 2) Rules 2017, Part 3: Case Management, CPR 3.9(3)(b) to ensure the defendant's effective participation at trial.

¹⁰¹ Inserted by the Police and Justice Act 2006, s.47.

“fear or distress in connection with testifying in the proceedings”.¹⁰² Furthermore, the eligibility criteria for defendants are much more onerous than those for non-defendants. All vulnerable defendants¹⁰³ must be *unable* to participate as a witness.¹⁰⁴ Comparably, the quality of an adult non-defendant’s evidence need only be diminished and a child non-defendant’s ability to participate need only be compromised. Finally, use of the live link by vulnerable defendants must also be deemed “in the interests of justice”.¹⁰⁵

The statutory intermediary provision remains unimplemented,¹⁰⁶ leaving the power for this measure for vulnerable defendants giving evidence within the remit of the common law.¹⁰⁷ However, issues around funding and resources plague the courts’ ability to secure such support for vulnerable defendant witnesses.¹⁰⁸ Furthermore, the Lord Chief Justice, through the tightening of the Criminal Practice Directions¹⁰⁹ and the judgment in *R v Rashid*,¹¹⁰ has sought to further limit the circumstances in which an intermediary will be deemed necessary.

¹⁰² As per the definition in YJCEA, s.17 for intimidated witnesses. Examples of intimidated defendants can be seen in the case law, for example in *T v UK* (fn 97) and *R v Waltham Forest Youth Court* (fn 84).

¹⁰³ I.e. suffering from a mental disorder or a significant impairment of intelligence and social functioning, see YJCEA s.33A(5)(b).

¹⁰⁴ (Emphasis added). See also Laura Hoyano and Angela Rafferty, ‘Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction’ [2017] *Criminal Law Review* 93, 95; Samantha Fairclough, “‘It doesn’t happen ... and I’ve never thought it was necessary for it to happen’: Barriers to Vulnerable Defendants Giving Evidence by Live Link in Crown Court Trials’ (2017) 21(3) *International Journal of Evidence and Proof* 209, 211.

¹⁰⁵ YJCEA, s.33A(2)(b). However, the relevance of this provision in practice has been questioned by academics, see Laura Hoyano, ‘Coroners and Justice Act 2009: Special Measures Directions Take Two: Entrenching Unequal Access to Justice?’ [2010] *Criminal Law Review* 345, 357. Hoyano again noted that this is “surely an otiose requirement” in Laura Hoyano and Angela Rafferty, ‘Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction’ [2017] *Criminal Law Review* 93, 95.

¹⁰⁶ YJCEA, s.33BA.

¹⁰⁷ *C v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin).

¹⁰⁸ Largely as a direct consequence of the lack of statutory authority, 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; 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.

¹⁰⁹ Criminal Practice Directions (October 2015 edition, amended April 2016 and October 2016) CPD I General Matters, 3F: INTERMEDIARIES 3F.13. See Laura Hoyano and Angela Rafferty, ‘Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction’ [2017] *Criminal Law Review* 93.

¹¹⁰ [2017] EWCA Crim 2.

These prevailing inequalities in the provision of live link and intermediaries to vulnerable and/or intimidated defendants wishing to give evidence in their defence mark sustained procedural inequality. Lawson notes that this:

“[O]verlooks 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”.¹¹¹

Absent justification, the support available to a vulnerable and/or intimidated person diminishes if that person is the accused, despite the laudable developments which have taken place thus far.

Conclusion

This article has explored the law’s commitment to ensuring that all of those potentially giving evidence have an equal opportunity to do so in criminal trials. The development of non-defendant special measures was underpinned by a principle of procedural equality – treating the vulnerable and/or intimidated differently through the provision of special measures in order to foster overall equality of opportunity. This is important given the status of equality as a basic and fundamental principle of liberal democracy.¹¹²

The exclusion of vulnerable and/or intimidated defendant witnesses from eligibility for special measures was not in keeping with this principle. The reasons provided in the *Speaking up for Justice* Report were not sufficient to justify denying vulnerable and/or intimidated defendant witnesses special measures assistance. Whilst the law has subsequently developed to reduce procedural inequality, those vulnerable and/or intimidated defendants who still do

¹¹¹ 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.

¹¹² Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000).

not qualify for special measures (with the exception of pre-recorded provisions¹¹³) are denied an equal opportunity to give evidence in their defence when compared to vulnerable and/or intimidated witnesses or other non-vulnerable defendants. The disparate provision of special measures is thus in violation of equality legislation and significantly jeopardises the defendant's fair trial rights. In order for this to be rectified, and for the principle of procedural equality to prevail, the provision of live link and intermediaries to vulnerable and/or intimidated defendant witnesses should be brought in line with that for such non-defendant witnesses.

¹¹³ See fn 92 (above).