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DOI:

[10.1111/jols.12100](https://doi.org/10.1111/jols.12100)

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*Document Version*

Publisher's PDF, also known as Version of record

*Citation for published version (Harvard):*

Fairclough, S 2018, 'Using Hawkins's surround, field and frames concepts to understand the complexities of special measures decision making in Crown Court trials', *Journal of Law and Society*, vol. 45, no. 3, pp. 457-485. <https://doi.org/10.1111/jols.12100>

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## Using Hawkins's Surround, Field, and Frames Concepts to Understand the Complexities of Special Measures Decision Making in Crown Court Trials

SAMANTHA FAIRCLOUGH\*

*Adjustments to criminal trial processes, called special measures, are available to vulnerable and/or intimidated witnesses giving evidence. Findings from interviews with 13 criminal practitioners suggest that there are notable variations in the uptake of special measures between prosecution witnesses, defence witnesses, and the accused in Crown Court trials. These extend beyond any inequality in their legal provision. This article uses Keith Hawkins's conceptual framework of surround, field, and frames as a heuristic device to understand this differential uptake. The framework delineates the various factors – including the socio-political, organizational, and attitudinal – which can influence decision-making practices in relation to special measures. In doing so, this article demonstrates two things. First, that changing the legal provision is unlikely to effect much change in practice, absent specific complementary changes to the field. Second, that Hawkins's framework has potential as an explanatory device in decision-making contexts outside his own health and safety setting.*

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With special thanks to Richard Young for invaluable feedback on earlier drafts of this article. Further thanks to Gavin Byrne, Keith Hawkins, Fiona de Londras, Erika Rackley, the anonymous reviewers, and attendees at the Advocate's Gateway Conference 2017 and Cardiff Law School's staff seminar series. Any errors remain those of my own. This work was funded by the ESRC [1367263].

## INTRODUCTION

The special measures scheme enacted by the Youth Justice and Criminal Evidence Act 1999 (YJCEA) provides a series of adjustments to the traditional way of testifying in criminal trials.<sup>1</sup> The aim of this provision is to enable vulnerable and/or intimidated witnesses to give their ‘best evidence’<sup>2</sup> in court. In statutory terms, this means to improve the evidence’s quality with regard to its completeness, coherence, and accuracy.<sup>3</sup> Traditionally, the ‘adversarial package’<sup>4</sup> – the combination of rules requiring a witness to give evidence orally, in open court, in the presence of the defendant – had erected often insurmountable barriers to hearing evidence from children and other vulnerable witnesses<sup>5</sup> in criminal proceedings. This impeded the system’s ability to convict those who offend against these groups.<sup>6</sup>

Special measures enable the vulnerable and/or intimidated to give evidence from behind a screen (out of sight of the dock and public gallery); via a live link (from a room outside the courtroom); and/or with the assistance of an intermediary (a specialist communication expert).<sup>7</sup> Under the YJCEA, vulnerable witnesses include those who are young (under 18) or with a mental health problem or learning disability.<sup>8</sup> Intimidated witnesses, including complainants of sexual offences, are those in fear or distress in connection with testifying in the proceedings.<sup>9</sup>

Vulnerable and/or intimidated witnesses, including the accused, can secure special measures. However, there are some differences in the legal provision of them to the accused when compared to that for non-accused witnesses. The first difference is the source of legal authority for special measures. The accused was initially excluded from the statutory special measures regime.<sup>10</sup> The provision of special measures to them has been

1 For the full history of special measures provision, see R. Marchant, ‘Special Measures’ in *Vulnerable People and the Criminal Justice System*, eds. P. Cooper and H. Norton (2017) 333.

2 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* (1998) para. 1.7.

3 Youth Justice and Criminal Evidence Act 1999 (YJCEA), s. 16(5).

4 J. Spencer and M. Lamb (eds.), *Children and Cross-Examination: Time to Change the Rules?* (2012) 1.

5 J. Spencer, ‘Child Witnesses and Cross-examination at Trial: Must it Continue?’ (2011) 3 *Archbold Rev.* 7.

6 A. Sanders et al., *Victims with Learning Disabilities: Negotiating the Criminal Justice System* (1997) 39, at 57; NSPCC, *Child Abuse Trends in England and Wales 1983–1987* (1989); Lord Pigot, *Report of the Advisory Group on Video Evidence* (1989).

7 This is not a complete list of the special measures provision: see YJCEA, op. cit., n. 3, ss. 23–30.

8 id., ss. 16 and 33A.

9 id., s. 17.

10 id., ss. 16 and 17.

achieved through more gradual, ad hoc – and ‘grudging’<sup>11</sup> – reforms. As a result, the common law largely governs special measures provision for the accused<sup>12</sup> with only one statutory provision (for live link) in force.<sup>13</sup>

A further difference in the special measures provision relates to its extent. The provision to the accused is often inferior to that for non-accused witnesses, as the following three examples indicate. First, unlike for witnesses, the live link provision for the accused is not available to those with physical disabilities<sup>14</sup> or those in fear or distress in connection with testifying in the proceedings. Second, unlike child witnesses, child defendants are not automatically entitled to give evidence by live link. Instead, there must be a causal relationship between their age and their inability to participate effectively as a witness in the proceedings.<sup>15</sup> Third, the provision of intermediaries to the accused has long been plagued with funding and resource issues.<sup>16</sup> A more recent tightening of their availability in law, under the *Criminal Practice Directions*<sup>17</sup> and by the Court of Appeal in *R v. Rashid*,<sup>18</sup> makes the disparate provision yet further pronounced.

11 Hoyano argues that the government has given ‘only grudging recognition [to the needs of defendant witnesses] when forced to do so on ECHR art. 6 grounds’: see L. Hoyano, ‘Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants’ [2015] *Criminal Law Rev.* 107, at 126–7.

12 Screens via *R v. Waltham Forest Youth Court* [2004] EWHC 715 (Admin) [31]; intermediaries via *C v. Sevenoaks Youth Court* [2009] EWHC 3088 (Admin); and other measures such as the removal of wigs and gowns via the *Criminal Procedure Rules* and *Criminal Practice Directions*.

13 YJCEA, op. cit., n. 3, s. 33A for live link as inserted by the Police and Justice Act 2006, s. 47. There is also an unimplemented statutory provision for intermediaries for the accused (s. 33BA, YJCEA, inserted by s. 104, Coroners and Justice Act 2009).

14 Though the Court of Appeal in *R v. Hamberger* [2017] EWCA Crim 273, para. 12 noted that, despite this, the courts can make various of adjustments in accordance with the Criminal Procedure Rules to ensure the trial is fair. This approach was criticized in P. Cooper’s Case Comment [2017] *Criminal Law Rev.* 708, at 710.

15 See, further, S. 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 *International J. of Evidence and Proof* 209, at 211.

16 See E. Henderson, ‘A Very Valuable Tool: Judges, Advocates and Intermediaries discuss the Intermediary System in England and Wales’ (2015) 19 *International J. of Evidence and Proof* 154; P. Cooper and D. Wurtzel, ‘A Day Late and a Dollar Short: In Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales’ [2013] *Criminal Law Rev.* 4, at 16.

17 Ministry of Justice (MoJ), *Criminal Practice Directions* (October 2015 edn., amended April 2016) 3F.12. For critical discussion, see L. Hoyano and A. Rafferty, ‘Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction’ [2017] *Criminal Law Rev.* 93.

18 See *R v. Rashid* [2017] EWCA Crim 2; D. Wurtzel, ‘Intermediaries for Defendants: Recent Developments’ [2017] *Criminal Law Rev.* 463 at 469–70.

Notwithstanding this legal disparity, the position adopted in this article is that the existing provision of live link, screens, and intermediaries<sup>19</sup> to the accused is sufficiently established<sup>20</sup> for them to be invoked by (at least some) vulnerable defendants giving evidence in criminal trials. This is particularly so given the evidence that shows the prevalence of vulnerability among defendant and offender populations. For instance, the Children's Commissioner Report highlighted that 60–90 per cent of the offending population suffer from communication disorders compared with just 5–7 per cent of the general population.<sup>21</sup> Furthermore, Cunliffe et al. found that 36 per cent of surveyed prisoners had a disability and/or mental health problem.<sup>22</sup> This research thus explores an insight into the use of special measures in practice, using data from interviews with 13 criminal practitioners on their experiences of special measures use in Crown Court trials. These data provide the first insight into special measures practice for the accused and other witnesses for the defence.<sup>23</sup>

The practitioners experienced a stark disparity (going far beyond the legal disparity<sup>24</sup>) in the use of special measures. It was much less likely, in their experience, that the defence would invoke special measures, whether for the accused or a defence witness. In seeking to understand why they had experienced this notable inequality in practice, this article adopts Keith Hawkins's conceptual framework of surround, field, and frame<sup>25</sup> as an analytical tool. The framework helps us to delineate the various factors, outside of the legal provision itself, which affect prosecutorial and defence

19 The empirical research on which this article is based predates the April 2016 tightening of the availability of intermediaries to the accused.

20 This is not to say that this provision is, itself, sufficient: see S. Fairclough 'Speaking up for Injustice: Reconsidering the Provision of Special Measures through the Lens of Equality' [2018] *Criminal Law Rev.* 4–19.

21 N. Hughes et al., *Nobody Made the Connection: The Prevalence of Neurodisability in Young People Who Offend* (2012) 23.

22 C. Cunliffe et al., 'Estimating the prevalence of disability amongst prisoners: results from the Surveying Prisoner Crime Reduction (SPCR) survey' (2012) 141. See, further, J. Jacobson et al., *Structured Mayhem: Personal Experiences of the Crown Court* (2015) 19; A. Wigzell et al., *The Youth Proceedings Advocacy Review: Final Report* (2015); J. Jacobson with J. Talbot, *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children* (2009) 7; J. Talbot, 'Fair Access to Justice?' (2012) Prison Reform Trust briefing paper.

23 Previous studies have focused on prosecution witness uptake. For example, see P. Roberts et al., '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 J. of Evidence and Proof* 269; C. Charles, *Special Measures for Vulnerable and Intimidated Witnesses: Research Exploring the Decisions and Actions taken by Prosecutors in a Sample of CPS Case Files* (2012).

24 Discussed further in Section II.

25 K. Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (2002).

special measures decision making. By using Hawkins's framework in this way, the article demonstrates its potential as an explanatory device in contexts outside of Hawkins's own research setting of health and safety regulation.

It is argued that the socio-political context in which the law developed and operates, as well as the way in which the criminal justice system is organized, affects the extent of discretion that prosecution and defence practitioners have over special measures decisions. This, in turn, affects the primacy of the law itself in the way that these practitioners frame matters as they move towards a decision. This is an important finding, particularly given the Law Commission's recommendations for statutory parity in the provision of live link and intermediaries to the accused.<sup>26</sup> If, as this article argues, the legal provisions are not the sole driving force behind defence special measures decisions, then it follows that changing the law is unlikely to be sufficient to effect change in practice. In order to change current practice, it is argued that the implementation of any legal reform will need to be accompanied by additional changes to the way in which the legal field is organized.

The structure of this article is as follows. The first section outlines the methods employed in this research, including an overview of how Hawkins's conceptual framework serves as an analytical tool in this context. The findings from the interviews with criminal practitioners are then discussed in section II. To understand the disparate practices highlighted in the interviews, the main body of the article uses Hawkins's surround, field, and frames concepts to understand special measures decision making and its implications in Crown Court trials.

## I. METHODOLOGY

This research is based on 13 semi-structured interviews with criminal practitioners practising in various Crown Court centres across the Midlands circuit. Interviews were conducted between November 2014 and April 2015. The research project sought to gain an insight into the use of special measures by all vulnerable and/or intimidated participants involved in Crown Court trials. For the purposes of this article, the data are analysed with regard to the apparent differences in the decision-making process of advocates when the vulnerable/intimidated individual is a witness for the prosecution or is the accused.

Access to the criminal practitioners interviewed in this study was obtained through two gatekeepers – a legal gatekeeper and an academic gatekeeper

<sup>26</sup> Law Commission, *Unfitness To Plead. Volume 1: Report* (2016) Law Com no. 364, paras. 1.33–1.35.

**Table 1. Respondents' characteristics**

Identifier	Queen's Counsel	Prosecution/defence workload split	PQE
B1		50/50	22
B2		80/20	14
B3	YES	40/60	20
B4		40/60	21
R1	YES	85/15	35
R2	YES	80/20	13
R3		50/50	18
R4	YES	50/50	19
DS1		0/100	15
DS2		0/100	34
DS3		0/100	18
CPS1		100/0	9
CPS2		100/0	6

with contacts in the profession. The provision of 'purposive selection criteria'<sup>27</sup> ensured the sample included respondents with a range of post-qualified experience (PQE), from different parts of the profession, with experience of prosecuting and defending serious criminal offences including sex, violence, drugs, and murder. The sample comprised five solicitors, four barristers, and four recorders (barristers who also sit as part-time judges).<sup>28</sup> Of these eight barristers, four were Queen's Counsel. The PQE of the respondents ranged from six to 35 years. Their collective PQE totalled 244 years, with a mean experience of 18 years and 9 months. Table 1 shows the characteristics of each individual respondent.

The data from these interviews provide an insight into the working lives of these practitioners and the operation of the law of special measures in Crown Court trials. The sample of those interviewed, whilst not sufficient in size to make generalizations to the entire legal profession,<sup>29</sup> is able to ground an exploratory analysis. Similarly to Temkin's research on prosecuting and defending rape, in which she interviewed just 10 barristers, the small sample in this research remains 'sufficient to reveal a number of important issues'<sup>30</sup>

27 J. Ritchie et al., 'Designing and Selecting Samples' in *Qualitative Research Practice*, eds. J. Ritchie and J. Lewis (2003) 97.

28 Comments are attributed to the respondents using identifiers (see Table 1) to keep their identities anonymous while providing sufficient information so that their views can be evaluated.

29 L. Webley, 'Qualitative Approaches to Empirical Legal Research' in *The Oxford Handbook of Empirical Legal Research*, eds. P. Cane and H. Kritzer (2010) 934.

30 See J. Temkin, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27 *J. of Law and Society* 219, at 221.

surrounding special measures decision making for Crown Court trials. The data should thus be regarded as providing merely a ‘snapshot of ... practitioners’ experiences’.<sup>31</sup>

Hawkins’s theoretical framework of surround, field, and frames is adopted in this article as a tool of analysis for understanding practitioners’ decisions regarding special measures. This article does not claim that Hawkins’s framework is the only, or even the best, way of making sense of the respondents’ experiences. However, its accessibility as a theoretical device, coupled with its inclusion of the macro-, micro-, and meso-level factors at play in decision making make it an attractive choice.

The theoretical perspective underpinning Hawkins’s framework is one grounded in naturalism. It is thus acknowledged 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 and works.’<sup>32</sup> For Hawkins, this framework helped to unpack the decision-making processes of those regulating health and safety breaches and, in particular, to understand when and why they chose to prosecute such breaches. In the special measures context, its use helps us to understand when, and if so which, special measures are applied for, and why (or why not).

The three layers of Hawkins’s framework – the surround, the field, and frames – are in ‘mutual interaction’,<sup>33</sup> meaning that changes in one level can affect the operation of the others in a non-linear and non-hierarchical way. The surround is the broad social, political, and economic context in which decision making takes place.<sup>34</sup> The decision field is set within the social surround, and is the ‘legally and organisationally defined setting in which decisions are made.’<sup>35</sup> For the purposes of this article, therefore, the field is the criminal justice system and, more specifically, the parts of it which relate to the preparation for and realities of Crown Court trials. Relevant issues thus include the structure of the legal profession; the available resources; and the bureaucratic processes and guidance with which practitioners should comply.

The final level of Hawkins’s conceptual framework is decision frames. These are ‘structure[s] of knowledge, experience, values, and meaning that decision-makers employ in deciding.’<sup>36</sup> The decision frames applied in the special measures context are the instrumental, moral, organizational, and

31 F. Garland and J. McEwan, ‘Embracing the Overriding Objective: Difficulties and Dilemmas in the New Criminal Climate’ (2012) 16 *International J. of Evidence and Proof* 233, at 239.

32 Hawkins, *op. cit.*, n. 25, p. 31.

33 *id.*, p. 52.

34 *id.*, p. 27.

35 *id.*

36 *id.*, p. 52.



legal frames. These are conceptualized at the relevant junctures of this article. The use of just four frames in this analysis should not be interpreted as a claim that these ways of framing matters relating to special measures decisions are exhaustive. Rather, and in the same vein as Hawkins, these four frames are considered the ‘leading examples of disparate forms of framing’<sup>37</sup> as indicated by the respondents.

## II. FINDINGS

The interview findings that relate to the use of live link, screens, and intermediaries are discussed in this article. Pre-recorded video testimony is omitted from the analysis, since there are significant issues in terms of its utility and practical accessibility for the defence that do not exist for the prosecution.<sup>38</sup> Figures 1 and 2 display the findings. The references to ‘direct use’ in Figure 1 are to trials in which the respondents participated, throughout their careers, where a vulnerable and/or intimidated witness/accused used special measures. Figure 2 depicts the respondents who were aware of trials in which a vulnerable and/or intimidated witness/accused has used special measures, but in which they had no direct involvement. The data in Figure 2 provides an indication of broader practices outside of the respondents’ own direct experiences and should be treated with caution.

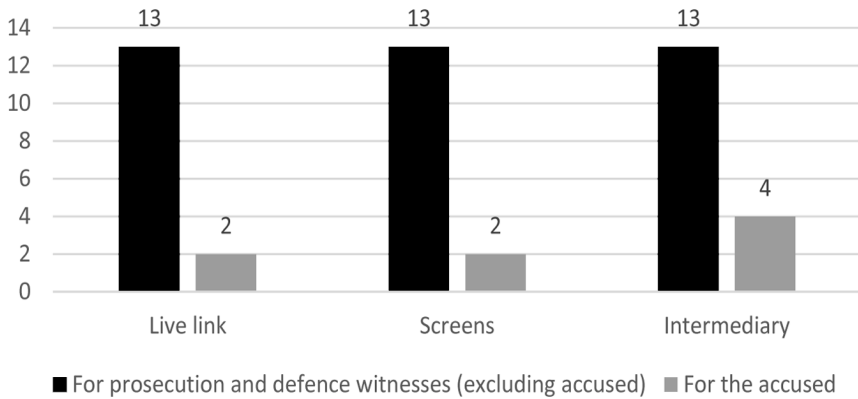
Prosecution and defence non-accused witnesses are grouped together in this initial presentation of these findings, since this mirrors the way they are treated under the YJCEA. The difference in the 13 respondents’ experiences of trials in which non-accused witnesses had used special measures, compared to when the accused had, is clear. Special measures were invoked much less frequently for the accused.

As illustrated in Figure 1, only two respondents had been involved in trials where there was successful implementation of the live link for the accused (B1 and B4) and two where the accused gave evidence from behind a screen (B4 and DS1). Four respondents had been involved in a trial where a vulnerable defendant gave evidence with the assistance of an intermediary (B1, B3, R1, and R3). There were only two other respondents, as shown in Figure 2, who knew of a trial (in which they did not participate) where the defendant gave evidence by live link (R3 and DS1), and a further two who knew anecdotally of an intermediary assisting a defendant (R2 and B2). By contrast, all of the respondents recalled their involvement in multiple trials where witnesses other than the accused used special measures. They were also aware of multiple cases, in which they were not personally instructed, where the same was true.

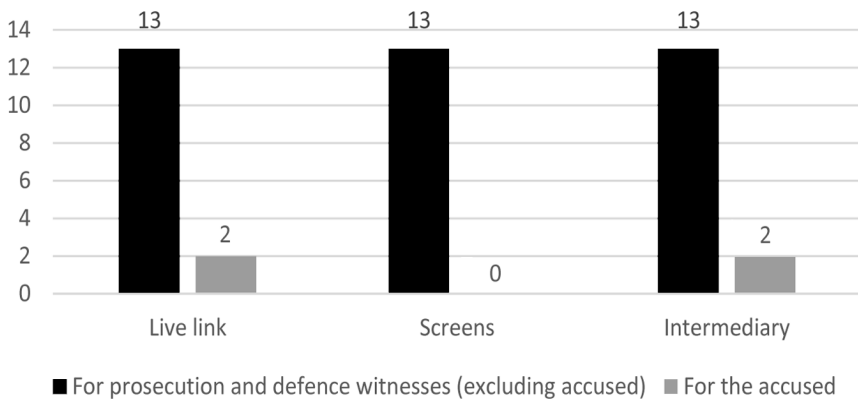
<sup>37</sup> *id.*, Preface, p. x.

<sup>38</sup> This is discussed further in Fairclough, *op. cit.*, n. 20, p. 16, fn. 94.

**Figure 1. Number of respondents recalling direct use**



**Figure 2. Number of respondents aware of use in other trials**



Some of the differential uptake is likely to be attributable to the unequal legal provision of special measures to accused/non-accused participants. Another plausible reason for the differential uptake is the fact that defendants are not compellable as witnesses, which reduces the number of them who give evidence (and so can use special measures). Notwithstanding these differences, the provision of special measures to the accused, and the frequency with which they do give evidence in their defence,<sup>39</sup> are still

39 Zander and Henderson found that 70 to 74 per cent of defendants gave evidence in their defence even before the erosion of the right to silence (Criminal Justice and Public Order Act 1994): see M. Zander and P. Henderson, *The Crown Court Study*

sufficient to reasonably expect a higher uptake of special measures among this cohort. It is thus argued that the substantial disparity in uptake between accused and non-accused witnesses, as experienced by the respondents in this research, requires an explanation which extends beyond the narrower legal provision of special measures to the accused.

The need for such an explanation is further indicated by a distinction which emerged within the interviews regarding special measures use by prosecution witnesses and non-defendant defence witnesses. For these witnesses, there is legal parity in their provision. However, the experiences of those interviewed indicate that this is not reflected in practice. For prosecution witnesses, the use of special measures was reported as somewhat routine:

I think they are now regarded, certainly by judges and advocates, as an anodyne commonplace now. [R4]

... they are considered to be usual measures rather than special measures these days. [CPS1]

They are routinely applied for. [DS1]

The experience was not the same regarding defence witness use:

[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 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]

In summary, not only is the uptake of special measures between the accused and non-accused notably disparate (where there is disparity in the law), but this is also the case between prosecution and defence witnesses (for whom the law is equal). Again, it is probable that there are fewer defence witnesses called (in the same way that there are fewer accused giving evidence), and so some difference in uptake is to be expected. However, as evidenced from the above quotations, the disparity the respondents experienced in the use of special measures between non-accused witnesses in practice, is sufficiently striking to suggest that an explanation for this is needed which extends beyond these quantifiable differences.

The remainder of this article seeks to develop just such an explanation, using Hawkins's conceptual framework of surround, field, and frames. The analysis concentrates on a comparison between making decisions about special measures for the accused and for prosecution witnesses. The data

(1993). Now that adverse inferences can be drawn from silence, the number of defendants testifying in their trials may be greater still.

also shed some light on the position occupied by non-accused defence witnesses, but since this was underexplored in interview, a complete assessment of their position is not undertaken. The frames concept is explored first, drawing specifically on the insights provided in the interviews. It is following this, when considering why practitioners may frame their decisions in these ways, that the significance of the legal field and socio-political surround come into focus.

### III. HAWKINS'S DECISION FRAMES

As noted in section I, framing is a prerequisite to deciding how to act and why. Decision frames are 'a means by which factors are selected and their meaning in decision-making is organised'.<sup>40</sup> Analysis of the data indicated that four decision frames were especially influential in practitioners' decisions regarding whether to apply for special measures. Three mirror those used in Hawkins's work on health and safety regulation: the instrumental frame, organizational frame, and legal frame.<sup>41</sup> The fourth is the moral frame, which Oakley developed when using Hawkins's framework in her doctoral work to understand the complexities of decision making in the context of policing missing persons.<sup>42</sup>

#### 1. *Instrumental frame*

Hawkins states that decision makers who 'seek to achieve *instrumental effects* frame problems ... in terms of the expected likelihood of correction, repair, or other indicators of reductive effectiveness.'<sup>43</sup> Instrumental frames in the special measures context thus relate to the impact of special measures on the evidence elicited. Two matters arise in relation to this. The first is criminal practitioners' perceptions of the purpose of special measures (and thus whom they might assist). The second brings tactical concerns about evidence quality and jury perceptions to the fore.

#### (a) General purpose of special measures

Despite the legislative purpose of special measures as improving the evidence's quality, it became apparent in interview that criminal practitioners viewed the purpose of special measures, at least some of the time, as simply to secure witness attendance:

40 Hawkins, op. cit., n. 25, p. 48.

41 id., pp. 282, 305, 380.

42 E. Oakley, 'Policing the Missing: Negotiating Absence' (2014) PhD thesis, University of Bristol, 88.

43 Hawkins, op. cit., n. 25, p. 282 (emphasis added).

It's always easier to get a witness there if you tell them that they've got special measures. [CPS2]

They're [special measures] certainly useful at securing a witness's attendance in the first place. And so I guess by definition they have to improve their evidence because it exists. [R4]

Securing defendant attendance does not present the same challenges, since the accused is ordinarily present at their trial.<sup>44</sup> Framing special measures as tools to get witnesses to court – in order to secure any evidence from them – can render them superfluous for an already present accused:

[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]

However, the accused's presence in court does not mean they will give evidence. A vulnerable accused might opt out of testifying out of fear or anxiety. As shown in the next section, few respondents seemed to view the live link and screens as tools to secure evidence from an already present defendant.

#### (b) Specific purpose of special measures

The respondents in this research often framed the live link as a measure that keeps a witness out of the courtroom.<sup>45</sup> This made it difficult for many to recognize the potential value of the live-link provision for a vulnerable and/or intimidated accused:

[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 [defendants] are [in court] anyway then something like live link would be irrelevant. [B3]

Examples of when the live link could be beneficial include when an accused person is suffering from (among other things) ADHD or an anxiety disorder. Giving their evidence via a live link, away from the multiple stimuli in the courtroom, has obvious benefits here.<sup>46</sup> However, only two of the respondents had secured live link for their clients (B1 and B4). Despite prompting in interview, only one other respondent recalled thinking that a vulnerable defendant in a case in which they were involved 'would [have been] much

44 *Criminal Practice Directions*, op. cit., n. 17, 14E.3 requires that trials on indictment are only continued in the absence of a defendant if it is a step which is unavoidable.

45 Mirroring findings from M. Hall, 'Children giving evidence through special measures in the criminal courts: progress and problems' (2006) 21 *Child and Family Law Q.* 65, at 67.

46 See, further, Fairclough, op. cit., n. 15, p. 219.

more at ease if he could have given his evidence from somewhere that wasn't in open court' [CPS1].

The majority of the respondents in this research viewed the accused's presence in court throughout the trial as nullifying any potential need to leave to give evidence by live link. Underpinning this belief was an assumption that a familiarity with the courtroom and those within it, obtained by sitting through the prosecution case, would negate any such need:

... 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]

Sitting in the dock [defendants] get used to the court atmosphere and the people in court. [R1]

To sit passively<sup>47</sup> in court is a markedly different task, however, from that of giving evidence. This difference is no doubt magnified if the accused is vulnerable and/or intimidated. It is probable that this remains true even if the accused is a repeat player in the courtroom.<sup>48</sup> Yet, because of the attitudes documented above, many vulnerable and/or intimidated defendants are likely to be left to (attempt to) give evidence in their trial without assistance.

Criminal practitioners also seemed to frame screens in a way that minimized their perceived utility for the accused. They were seen as a measure that primarily shields the dock (and thus defendant) from the witness' view:

I don't think screens would help [defendants] because the whole idea of screens is you're screened from the defendant. [R2]

There's no need to screen the defendant from the dock ... [B4]

Most practitioners interviewed seemed unaware of the potential value of shielding the accused from the public gallery. This could be warranted in a variety of situations due to, for instance, the attendance of the complainant's family or rival gang members making testifying more difficult, particularly for those suffering from anxiety disorders. The fact that screens are often<sup>49</sup> framed as tools to keep a witness out of sight may shape a judge's decision to refuse an application for screens for an accused. This was DS3's experience:

47 And often also disengaged: see A. Bottoms and J. McClean, *Defendants in the Criminal Process* (1976) 66; A. Kirby et al., 'Effective participation or passive acceptance: how can defendants participate more effectively in the court process?' (2014) *Howard League What is Justice?* WP 9/2014, 6–10; Jacobson et al., *op. cit.*, n. 22, p. 12.

48 Bottoms and McClean, *id.*, p. 56.

49 The notable exception to this is where one co-defendant testifies against another (B4 had applied for a screen for the accused in this situation).

I have applied [for screens] and failed for a defendant ... 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 some criminal practitioners frame, first, the purpose of special measures generally – as tools to secure witness attendance and testimony; second, the purpose of the live link – as a measure to keep witnesses out of the courtroom; and third, the purpose of screens – to protect a witness from the defendant, means that often they may be seen as irrelevant to the accused.

Intermediaries, however, have been framed as the measure which is 'more obviously useable' [B1] by the accused. They are viewed as suitable for addressing communication difficulties among all vulnerable participants:<sup>50</sup>

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]

I've got no issue with the intermediary scenario because if some people are vulnerable and have problems then they require assistance. [CPS2]

### (c) Tactical impact of special measures

Another way in which special measures decisions are instrumentally framed is with regards to their perceived impact on the jury's perception of a witness or accused. For example, the accused's presence in court gave rise to a clear concern among those interviewed that their use of the live link – requiring them to leave the courtroom to give evidence – 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]

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]

50 Mirroring findings in Henderson, *op. cit.*, n. 16.

These concerns arise because, as discussed in the previous subsection, the live link is framed as a measure which keeps witnesses out of court, and screens as a measure which keeps witnesses out of complete sight of the dock and public gallery. Structural differences in the trial proceedings (resulting in the accused sitting in court throughout the trial) mean that this is more frequently a live issue for the defence. Prosecution counsel can manage the situation by advising witnesses not to sit in court if they have given evidence by live link or screens. The same is not true of the defence where the accused is concerned. Given the central role of the jury in Crown Court trials, lawyers are naturally keen to avoid creating a negative impression of their witnesses or clients.<sup>51</sup> For the defence, this can mean avoiding these measures.

(d) ‘Best evidence’

With regards to the live link, further tactical concerns exist relating to the quality of the evidence when elicited in this way. The predominant belief among the respondents in this research is that ‘best evidence’ constitutes that which is elicited live, in court, in front of the jury. This is because it is believed to have the most impact. The respondents in this project thus saw the live link – removing a witness from the courtroom to give his or her evidence – as diminishing the evidence’s impact:<sup>52</sup>

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 jury can actually get a sniff of her; smell her. It’s much more impactful. [B2]

Research into the accuracy of the legal profession’s perception regarding the impact of live-linked evidence remains inconclusive.<sup>53</sup> Nevertheless, the way that the perception manifests itself is that the use of live link in Crown Court trials is often avoided where possible, by advocates for both the prosecution and the defence:

I don’t think defence barristers would ever consider giving evidence via live link because you lose that personal connection ... you want your client to ... have that connection with the jury and have them feel some form of empathy. [R2]

51 This may be addressed with a judicial direction.

52 For similar findings, see Temkin, *op. cit.*, n. 30, p. 237; Roberts et al., *op. cit.*, n. 23, pp. 285–6; M. Burton et al., ‘Protecting children in criminal proceedings: parity for child witnesses and child defendants’ (2006) 18 *Child and Family Law Q.* 397, at 404.

53 Discussed further in L. Ellison and V. Munro, ‘A “Special” Delivery? Exploring the Impact of Screens, Live-Links, and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials’ (2014) 23 *Social and Legal Studies* 3, at 8.



I doubt that many lawyers will apply for defendants to give evidence by live link ... there's something very useful in humanising the defendant ... And sometimes, the best way to do that is stick them in the witness box opposite the jury and have them be themselves. [DS3]

... 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]

When deciding for which special measure to apply, the 'best evidence' frame is an important consideration. An advocate may decide that they will apply for special measures yet, on these tactical grounds, still seek to avoid the live link specifically.

## 2. Moral frame

Evidence from interviews in this research suggests that Oakley's moral frame<sup>54</sup> may also be applied by some criminal practitioners when making special measures decisions. This concerns the type of support (if any) that it is felt a vulnerable and/or intimidated court user deserves.

Some of the respondents in this research indicated the existence of a presumption of guilt within the legal profession. This can mean that the accused is treated as if they have committed the crime with which they are accused, rather than the inverse as the presumption of innocence requires.<sup>55</sup> This finding is consistent with existing research. For instance, McConville et al. argued that 'the presumption of guilt ... assume[s] a universalistic character and is unthinkingly applied to the client population at large.'<sup>56</sup> Newman's observations of legal aid solicitors mirrored these findings. He noted that clients were 'routinely discussed and approached ... as if they were guilty.'<sup>57</sup> Alge's research into defence barristers similarly revealed that some members of the legal profession exhibited a dismissive attitude towards defendants and perceived them as guilty in interview.<sup>58</sup>

In the context of special measures decisions, it appears that the existence of a presumption of guilt can manifest itself in two ways. The first is that it may act as a barrier to viewing an accused as vulnerable:

54 Oakley, *op. cit.*, n. 42.

55 See H. Packer, 'Two Models of the Criminal Process' (1964) 113 *University of Pennsylvania Law Rev.* 1, at 12; A. Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10 *International J. of Evidence and Proof* 241, at 243.

56 M. McConville et al., *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (1994) 140–1.

57 D. Newman, *Legal Aid Lawyers and the Quest for Justice* (2013) 47.

58 D. Alge, 'The Effectiveness of Incentives to Reduce the Risk of Moral Hazard in the Defence Barrister's Role in Plea Bargaining' (2013) 16 *Legal Ethics* 162, at 175.

... if it's in the Crown Court then [judges are] 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]

Brown argues that transgressive activity or behaviour can potentially lead to the withdrawal of vulnerability status,<sup>59</sup> or even difficulty attaining the status of vulnerable at all.<sup>60</sup> If the reason for the criminal trial is perceived to be the accused's own misconduct, then criminal practitioners may struggle to view the accused as vulnerable.<sup>61</sup>

The second way that the presumption of guilt can manifest itself is that practitioners may view the accused as undeserving<sup>62</sup> of special measures, regardless of perceptions as to their vulnerability status:

But obviously, if [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 ... [CPS2]

R3 also indicated the existence of the view that an accused is undeserving of special measures support even where that accused is a child:

The problem with special measures [for defendants] is ... 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]

If such attitudes towards young and otherwise vulnerable defendants exist – meaning they are not seen as deserving of special measures support due to their position as the accused – then framing special measures decisions morally may result in an absence of adequate support to them if they give evidence.

The impact of the presumption of guilt can also affect the way decisions about special measures for prosecution witnesses are made:

... it's easier for the prosecution to prove [vulnerability], because they can say 'this is what happened to my client'. [B2]

Presuming the accused is guilty may thus serve to bolster a prosecution witness's (particularly a complainant's) application for special measures.

59 K. Brown, *Vulnerability and Young People: Care and Social Control in Policy and Practice* (2015) 86.

60 *id.*

61 This has also been found of police officers: see R. Dehaghani, 'Vulnerable by law (but not by nature): examining perceptions of youth and childhood "vulnerability" in the context of police custody' (2017) 39 *J. of Social Welfare and Family Law* 454, at 462–3.

62 Brown, *op. cit.*, n. 59, p. 86.

### 3. *Organizational frame*

Organizational frames are those which define what is expected of a criminal practitioner and thus how they demonstrate their competence within the confines of the available resources.<sup>63</sup> The organizational frames seemingly at play in special measures decision making are quite different for the prosecution and the defence, because the context in which they operate means they are subject to different expectations.<sup>64</sup> For the defence, the use of special measures may demonstrate incompetence, whilst the converse is true for the prosecution. These organizational frames are discussed in turn, starting with the defence.

#### (a) ‘Insurance-net’ frame

One defence solicitor interviewed in this research suggested that competent defence advocates should not need to outsource support for a vulnerable client by applying for special measures. Instead, and in order to demonstrate their competence, they should adequately prepare their clients for trial themselves:

... special measures are an insurance net, just in case [the defendant isn'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]

If special measures are framed as devices for incompetent defence lawyers, this may result in defence lawyers avoiding making such applications. Framing special measures in this way was seemingly endorsed in Lord Chief Justice Thomas's decision in *R v. Rashid*.<sup>65</sup> He ruled that, ‘in the overwhelming majority of cases’, the defendant can be assisted to give his or her best evidence through ‘competent legal representation and good trial management’.<sup>66</sup>

The expectation, therefore, is perhaps that defence advocates will ensure that special measures are not needed. A ‘failure’ to do so, evidenced by an application for special measures, may thus signify their own (alleged) incompetence as a defence lawyer.

#### (b) Bureaucratic frame

The expectations on prosecution lawyers regarding witnesses are markedly different to those relating to the defence. The expectation, from external

63 Hawkins, *op. cit.*, n. 25, p. 305.

64 See Section V below.

65 *R v. Rashid* [2017] EWCA Crim 2.

66 *id.*, para. 73 (Lord Thomas).

sources as well as from within the criminal justice system,<sup>67</sup> is that special measures are applied for and secured when a prosecution witness is vulnerable and/or intimidated. Indeed, the legislative provisions for special measures themselves contain some powerful presumptions that special measures will be secured for children and complainants of sexual offences.<sup>68</sup>

The application process for special measures for witnesses other than the accused starts with the police, who are prompted to consider whether the witness requires special measures when completing their witness statement form (MG11). If they decide that such support is needed, the police must then complete an MG2 form detailing why special measures are required and which ones(s). In doing so, the police should seek the witness's view. This information is then passed onto the Crown Prosecution Service (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 about vulnerable and/or intimidated witnesses and their special measures preferences. 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'.<sup>69</sup>

The existence of these forms, and the prompts for special measures consideration on them, reminds practitioners of the expectation that they will secure special measures where required. It is through adequate completion of the forms, and the resulting application for special measures for prosecution witnesses ahead of the Plea and Trial Preparation Hearing, that criminal practitioners acting for the prosecution demonstrate their competence. This has led to practitioners for the prosecution framing special measures decisions bureaucratically, through the lens of these various administrative processes created to ensure special measures are sought ahead of the trial:

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. [R2]

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 will be discussed later in section V, the early bureaucratic processes simply do not exist for the defence.

67 This relates to Hawkins's concepts 'surround' and 'field' and is discussed fully in section V below.

68 YJCEA, op. cit., n. 3, ss. 21, 22A.

69 R. Young, 'Will Widgery Do?: Court Clerks, Discretion, and the Determination of Legal Aid Applications' in *Access to Criminal Justice: Legal Aid, Lawyers and the Defence of Liberty*, eds. R. Young and D. Wall (1996) 146.

#### 4. Legal frame

The legal frame concerns whether an issue can be transformed into a matter the law deems relevant.<sup>70</sup> In other words, is a witness' or client's vulnerability such that they can legally qualify for special measures? Similarly to the organizational frames, the legal frame appears to operate rather differently for the prosecution and defence. For the prosecution, the legal frame is somewhat embedded within the bureaucratic frame, via the 'MG' forms.

The defence does not have a comparable bureaucratic frame within which the legal frame sits. Instead, defence practitioners are required to turn directly to the legal framework to see whether a client is eligible for special measures support. The legal provisions are scattered between statute and various common law sources. This, by comparison, makes the legal frame less readily accessible to those representing the accused.

Evidence from the interviews with criminal practitioners highlighted a further issue in relation to the legal frame for the defence. Some criminal practitioners were not aware that the legal provision for special measures existed for the accused.<sup>71</sup> Two notable examples derive from respondents with 34 years' PQE and 21 years' PQE respectively:

I didn't think [special measures] were available [to defendants]? [DS2]

I think the live link should be available [to defendants]. [B4]<sup>72</sup>

Of course, a logical prerequisite to applying the legal frame is that practitioners are aware of the available legal provisions. This insight highlights that in some cases defence practitioners may not know there is a decision to make regarding special measures, because they are not aware of the available legal framework<sup>73</sup> for their vulnerable client.<sup>74</sup>

70 Hawkins, *op. cit.*, n. 25, p. 380.

71 This issue is discussed further in Fairclough, *op. cit.*, n. 15, pp. 215–17. The lack of awareness is despite the fact that the available provisions are set out in *Criminal Practice Directions*, *op. cit.*, n. 17, referring practitioners to the Advocate's Gateway toolkits for further guidance.

72 B4's comment was particularly interesting since she had been involved in a trial where the accused had given evidence by live link, but did not know the statutory provision to do so existed. Instead, she secured its use at trial under the judge's inherent power (the existence of which was expressly denied in *R v. Waltham Forest Youth Court* [2004] EWHC 715 (Admin), para. 82, and affirmed in *R v. Ukpabio* [2007] EWCA Crim 2108, para. 14).

73 This mirrors findings from the *Youth Proceedings Advocacy Review*: see Wigzell et al., *op. cit.*, n. 22, p. 31.

74 Existing research also indicates a more prevalent problem with the identification of vulnerability: see Fairclough, *op. cit.*, n. 15, pp. 217–18.

#### IV. FRAMING OVERVIEW

The previous section illustrates how Hawkins's decision-frame concept is useful in understanding the ways in which decision makers (criminal practitioners) make sense of and organize factors in decision making when faced with a vulnerable and/or intimidated participant. The way these frames interact appears to be rather different for the prosecution and the defence, thus explaining their differential uptake.

Prosecution decision frames appear to independently lean towards positive special measures decisions. For instance, it is clear how special measures can be instrumental in assisting a witness (whether by getting them to court and securing their evidence or, more specifically, keeping them out of the courtroom/out of sight of the defendant). Prosecution witnesses may also be viewed as more morally deserving of such additional support due to their oppositional position to the accused. Further, the organizational frame – within which the legal frame is embedded – renders securing special measures for vulnerable/intimidated prosecution witnesses an essential part of demonstrating competence as an advocate. There is, therefore, some positive alignment of the decision frames. While this alignment is not necessary for a special measures application to be made, its existence does mean that it is much more likely that it will be. This is because each of the ways a special measures decision may be framed serves to mutually reinforce that opting for special measures is preferable.

The defence is not expected to apply for special measures; in fact, the reverse is true – special measures may instead be perceived as demonstrating professional incompetence. Other than in the case of intermediaries (which is plagued with resource issues<sup>75</sup>), the practical utility of special measures such as live link and screens is much less obvious for an accused. This, combined with a perception that the jury would treat defence evidence given in these ways suspiciously, further deters applications for special measures. The way the matters relevant to special measures decisions for the defence are framed appear to present reasons *not* to apply, and less obvious reasons *to* apply. This negative alignment of the defence decision frames makes special measures applications for the accused less likely.

It is thus argued that even if the law were changed for the accused – to make the provision of special measures the same as that for non-accused witnesses – it would be unlikely to affect the way decisions on special measures for the accused are made. This is because the legal framework is only one of the causal influences at play. Unless a defence practitioner can see positive reasons to do so, it seems unlikely that the legal frame will be applied at all.

Using Hawkins's frame concept provides valuable insights into the complexity of special measures decision making. Alone, however, the frame

75 See section V below.

concept lacks sufficient explanatory power to help us understand, for example, why the expectations placed on the defence and prosecution (and thus the organizational frames and priority of the law within them) are different. What Hawkins's surround and field concepts allow for is the practitioners' decision making to be set in its wider context.

## V. THE SIGNIFICANCE OF THE SURROUND AND FIELD

The YJCEA was enacted at a time when the government was keen to position itself as the champion of victims' interests.<sup>76</sup> Responding to lobbying from 'victim movement' groups,<sup>77</sup> and media and public concern about the system's ability to reliably convict the guilty,<sup>78</sup> it both legislated to improve the position for victims and took steps to ensure the legislation was put into practice. A series of evaluation studies, conducted by the Ministry of Justice and the Home Office,<sup>79</sup> thus scrutinized the implementation of the YJCEA. These studies placed external pressure from the surround on those working within the system to ensure that they applied for special measures.

The failure to provide special measures for those who qualify has also been scrutinized when things have gone wrong. For example, a Serious Case Review investigated the suspected suicide of a complainant of sexual assault (Mrs A) after she refused special measures and gave evidence at her abuser's trial.<sup>80</sup> The review cast shadows on the CPS and the trial judge, stating that special measures should have been put in place even against the complainant's will.<sup>81</sup> The expectation that special measures are secured for qualifying prosecution witnesses is thus enforced through this intense scrutiny from within the surround.

76 The New Labour government's 1997 election manifesto highlighted that 'victims of crime are too often neglected by the criminal justice system'. Government policy thus centred increasingly on 'putting victims at the heart of the criminal justice system': Labour Party, 'New Labour: because Britain deserves better' (1997); Home Office, *Justice for All* (2002; Cm. 5563).

77 C. Lewis and J. Tapley, 'Victims' Rights or Suspects' Rights?' in *Debates in Criminal Justice: Key Themes and Issues*, eds. T. Ellis and S. Savage (2012) 219.

78 See Spencer, *op. cit.*, n. 5, p. 7; D. Garland, *The Culture of Control* (2001) 154.

79 See, for example, B. Hamlyn et al., *Are Special Measures Working? Evidence from surveys of vulnerable and intimidated witnesses* (2004); M. Burton et al., *Are Special Measures for Vulnerable and Intimidated Witnesses working? Evidence from the criminal justice agencies* (2006); R. McLeod et al., 'Court Experiences of Adults with Mental Health Conditions, Learning Disabilities and Limited Mental Capacity Report 1: Overview and Recommendations' (2010) MoJ Research Series 8/10.

80 See P. Walker, 'Frances Andrade killed herself after being accused of lying, says husband' *Guardian*, 10 February 2013.

81 H. Brown, *The death of Mrs A: A Serious Case Review* (2014) for Surrey Safeguarding Adults Board, 49.

This pressure from the surround has shaped the organization of the legal field. The expectation that special measures are secured for prosecution witnesses is placed on both the organizations involved (such as police and CPS) and the individuals working within those organizations. One consequence of this has been the production of extensive best practice guidance and training opportunities.<sup>82</sup> Another is the production of the MG forms,<sup>83</sup> with embedded special measures prompts, which need to be completed by the police and CPS as cases progress through the system.<sup>84</sup>

The scrutiny of special measures uptake limits the discretion available to the prosecution when making decisions. So too does the paper trail of ‘MG’ forms. The requirement that the police and CPS comply with these bureaucratic processes helps to ensure cases are set up along a track on which special measures will be secured.

The fact that the application process starts so early for the prosecution makes it a process of ‘serial decision-making’.<sup>85</sup> This is because the power to make the decision about special measures is dispersed across different 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.<sup>86</sup>

There appears, then, to be an element of ‘prosecutorial momentum’<sup>87</sup> at play in the special measures process, whereby counsel for the prosecution essentially becomes a decision *confirmer* rather than a decision *maker*. The momentum arises because it is more difficult to reverse an early decision made by the police/CPS than it is to reach a different decision in the first place. Early decisions made may thus ‘close off or profoundly restrict the choices open to a later decision maker’.<sup>88</sup> One of the respondents in this research attested 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 the selection of specific special measures. Early discussions between a witness, the police and the CPS regarding special measures preferences can dictate which special measures

82 For example, MoJ, *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures* (2011); The Inns of Court National Training Programme 2016–2018.

83 This is an example of a ‘communication format’, which functions to shape activity: see K. Haggerty and R. Ericson, *Policing the Risk Society* (1997) 31–8.

84 The CPS itself commissioned research into compliance with these MG forms and processes, see Charles, *op. cit.*, n. 23.

85 Hawkins, *op. cit.*, n. 25, p. 32.

86 *id.*

87 A. Sanders and R. Young, *Criminal Justice* (1994) 228.

88 Hawkins, *op. cit.*, n. 25, p. 34.



counsel applies for at trial. This is further reinforced through witness conversations with agencies such as Victim Support and the Witness Service.<sup>89</sup> Counsel for the prosecution may find that their witness has been ‘promised’ various special measures support ahead of trial:

Well it’s very easy isn’t it? If 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 . . . The best thing for them to do is to turn round and go ‘well actually we can offer you special measures’. [CPS2]

I think [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 organization comes is sometimes, unless it’s patently obvious, we do not think about the special measure we are trying to obtain. [CPS1]

All of this serves to severely limit a prosecution advocate’s level of discretion in relation to special measures. It also helps us to understand why many vulnerable and/or intimidated prosecution witnesses still give their evidence by live link,<sup>90</sup> despite the large consensus among barristers that the best, most impactful evidence is that which is delivered live in court. Agents working at various stages of the serial decision-making process have different priorities. At the early stages of the process, the priority is to get a solid case to the CPS, in part by securing willing witness testimony via whichever means are available, with little (if any) regard for the impact of a particular special measure on the perceived impact of evidence at trial.

For the defence, the socio-political surround and the organization of the legal field are very different. The concern for victims coincided with a frustration with the system’s ability to convict the accused.<sup>91</sup> According to Jackson, there is a ‘clear instrumental connection between concerns for victims and concerns about catching and punishing offenders.’<sup>92</sup> The plight of the victim came to be exploited as a political tool to increase the punitiveness of the system.<sup>93</sup> The use of ‘(re)balancing’<sup>94</sup> in criminal justice policy depicted defendants’ and victims’ rights as in conflict with each other,

89 One effect of these conversations is to create an additional level of expectation on a prosecution advocate to secure special measures, which comes directly from the witness.

90 Though there are other reasons. The respondents in this research were keen to note that when very young children are involved, it is accepted and understood that the live link might be the only means necessary to secure evidence.

91 I. Edwards, ‘An Ambiguous Participant: The Crime Victim and Criminal Justice Decision Making’ (2004) 44 *Brit. J. of Criminology* 967, at 970.

92 J. Jackson, ‘Justice for All: Putting Victims at the Heart of Criminal Justice?’ (2003) 30 *J. of Law and Society* 309, at 311.

93 See K. Roach, ‘Four Models of the Criminal Process’ (1999) 89 *J. of Criminal Law and Criminology* 671, at 703–6; Jackson, *id.*; Edwards, *op. cit.*, n. 91, p. 970.

94 Home Office, *op. cit.*, n. 76.

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’,<sup>95</sup> resulted in the perception that accused’s due process rights run contrary to the popular concern for protecting victims, and keeping the public safe.<sup>96</sup> 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 surround today.

It is therefore unsurprising that the accused was excluded from the remit of special measures legislation. Special measures provisions have since been awarded to vulnerable defendants on the grounds of human rights.<sup>97</sup> In contrast to the MoJ-led research regarding the uptake of special measures for prosecution witnesses, there has been a distinct lack of research on their implementation for the accused. In fact, the present study proffers the only available insight into the use of live link and screens by vulnerable accused witnesses.

As a result, the organization of the legal field for issues pertaining to defence special measures is entirely different. Training courses and materials for judges and barristers do not focus on the potential for special measures use with the accused, being centred instead on witness vulnerability.<sup>98</sup> There are no pre-court bureaucratic processes with which the defence should comply. Nor do external agencies such as the Witness Service discuss special measures options with accused parties. There is thus no expectation on the defence – from the surround, the field, or from vulnerable clients themselves – to secure special measures. This leaves the defence with untrammelled discretion over how to proceed, meaning that tactical concerns over the presentation of the defendant’s evidence can be prioritized over concerns for the accused’s welfare at trial.<sup>99</sup>

Two additional points of relevance regarding the organization of the defence lawyer’s legal field relate to resources. The first concerns intermediaries. The legal provision for intermediaries is via the common law,<sup>100</sup> since the legislative provision is yet to be implemented.<sup>101</sup> This has given rise to difficulties both in terms of funding and sourcing an appropriately qualified intermediary to match the needs of a vulnerable accused.<sup>102</sup> The Ministry of Justice has no obligation to provide funds in the absence of

95 D. Garland, ‘The Culture of High Crime Societies: Some Preconditions of Recent “Law and Order” Policies’ (2000) 40 *Brit. J. of Criminology* 347, at 351.

96 Garland, *op. cit.*, n. 78, p. 180.

97 Hoyano, *op. cit.*, n. 11.

98 The Advocate’s Gateway toolkits are notable exceptions.

99 Though, of course, some defence advocates remain very proactive about vulnerability and seeking special measures support – as evidenced through, among other things, the existence of appeals cases – not withstanding this legal landscape.

100 *C*, *op. cit.*, n. 12.

101 YJCEA, s. 33BA; s. 33BB, inserted by Coroners and Justice Act 2009, s. 104.

102 See Cooper and Wurtzel, *op. cit.*, n. 16, p. 16.

statutory power.<sup>103</sup> Furthermore, the Court of Appeal disallowed payment for defendant intermediaries from the central funds.<sup>104</sup> This means that securing intermediary funding for a vulnerable accused is difficult:

... funding is an issue, sadly. I've seen it before where people we think are vulnerable and [judges] say no you're fine get on with it – issues about defence paying for it or the court paying for it. [R2]

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. [B1]

This is compounded by the fact that the Witness Intermediary Service, which provides registered intermediaries to witnesses eligible via the statutory scheme, does not serve the accused.<sup>105</sup> Instead, the accused can only secure non-registered intermediaries operating outside of this scheme. This is despite the Divisional Court ruling that the defence should have access to registered intermediaries, due to concerns that the quality of support provided by non-registered intermediaries is inferior to that of registered intermediaries.<sup>106</sup> This is because the former are an unregulated entity, not subject to a code of practice, code of ethics, or required to undertake continual professional development as registered intermediaries are.<sup>107</sup>

The second point relating to resources concerns the typical defence lawyer's working conditions. McConville et al. and Newman independently found in their studies of defence solicitors that resource and financial pressures result in discontinuous representation of clients.<sup>108</sup> These strains are magnified in times of austerity.<sup>109</sup> Lawyers often juggle multiple cases at once and may have to return briefs<sup>110</sup> which other lawyers must pick up at short notice. This means that a client may spend minimal, if any, time with the solicitor or barrister who ultimately represents them at trial. They may

103 C, op. cit., n. 12, para. 24.

104 id., para. 23.

105 *Criminal Practice Directions*, op. cit., n. 17, 3F.15.

106 *R (on the application of OP) v. Secretary of State for Justice* [2014] EWHC 1944 (Admin), paras. 46–47.

107 See MoJ, *The Registered Intermediary Procedural Guidance Manual* (2015) 8–16.

108 McConville et al., op. cit., n. 56, pp. 41–4; Newman, op. cit., n. 57, pp. 77–81.

109 See R. Dehaghani and D. Newman, “‘We’re vulnerable too’: An (alternative) Analysis of Vulnerability within English Criminal Legal Aid and Police Custody” (2017) 7 *Oñati Socio-Legal Series* 1199, at 1203–4.

110 48 per cent of defence briefs were returned in the study by Zander and Henderson, op. cit., n. 39, p. 54. Tague (in fn. 25 of his article) notes that criminal practitioners and officials from the the Ministry of Justice with whom he spoke estimated the number to remain at 50 per cent in 2008: see P.W. Tague, “Guilty Pleas or Trials: Which Does the Barrister Prefer?” (2008) 23 *Melbourne University Law Rev.* 242, at 247.

even have been interviewed in the first instance by unqualified staff from the solicitors' office due to resource constraints.<sup>111</sup> These working conditions do not make defence lawyers particularly well placed to identify vulnerability and consider special measures. They may also make it easier for defence lawyers to pass the buck for (failure to make) a special measures application to someone else in the chain of legal representation a client receives.

The likelihood of a defence lawyer applying for special measures – given their unrestricted discretion over the matter, their working conditions, and the limited resources at their disposal – is further minimized if they think that a trial will not go ahead due to the accused entering a guilty plea. Hawkins notes that decisions can have 'a strong anticipatory or predictive character'.<sup>112</sup> If, therefore, it is assumed that a trial will not go ahead, then an application for special measures becomes futile. Since 24 per cent of cases 'crack',<sup>113</sup> an early assumption that a defendant will plead guilty is neither unfounded nor unreasonable. This is particularly so given that existing research suggests that some criminal defence barristers seek to 'crack' cases before trial,<sup>114</sup> sometimes due to financial incentives.<sup>115</sup>

## CONCLUSION

By using Hawkins's theoretical framework, the experiences of the criminal practitioners interviewed in this research is situated within their wider context. This is helpful in understanding the notably different approach taken to addressing issues surrounding vulnerability and trial adjustments for witnesses for the prosecution and the accused. The article demonstrates that special measures decision making is intrinsically bound up with the socio-political surround and organizational field in which it is set. While the disparate legal framework for accused and non-accused participants in criminal trials has some bearing on the frequency with which special measures are invoked, this research shows that several other issues influence such decisions.

The enactment of the YJCEA in the socio-political context of the victims' agenda, and the initial exclusion of the accused from eligibility, has resulted in a perception that special measures are a tool *for* the prosecution. Responsibility for the uptake of special measures for prosecution witness is a

111 McConville et al., op. cit., n. 56, p. 55.

112 Hawkins, op. cit. n. 25, p. 36.

113 This means a trial is withdrawn on the day it is due to start and not relisted. In 80 per cent of such cases, this is because the defendant enters a late guilty plea on the day the trial is due to start: see MoJ, *Efficiency in the Criminal Justice System* (2016) paras 1.13–1.14.

114 See J. Baldwin and M. McConville, *Negotiated Justice* (1977); McConville et al., op. cit., n. 56; Tague, op. cit., n. 110; Newman, op. cit., n. 57; Alge, op. cit., n. 58.

115 M. McConville and L. Marsh, *Criminal Judges: Legitimacy, Courts and State-Induced Guilty Pleas in Britain* (2014) 187.

public sector concern (and is thus subject to public sector forms of accountability). The expectation that they are invoked where necessary, and the subsequent organization of the legal field to ensure this, has served to eradicate much of the discretion a criminal practitioner might have regarding whether to apply for special measures, and if so, which one(s).

The perception that special measures (particularly live link and screens) are *for* the prosecution can result in a view that they are largely irrelevant for the accused. If anything, the defence is disincentivized to apply for special measures, in part due to the perception that reliance on special measures is indicative of incompetence as a defence lawyer. Furthermore, the defence's uptake of special measures is a private matter overseen by independent legal representatives.<sup>116</sup> Absent the scrutiny to which the prosecution is subjected, defence advocates have retained complete discretion over special measures applications.

These findings shed significant light on the extent to which the socio-political surround and the organization of the legal field affect the level of discretion criminal practitioners have over decisions about special measures. This means that changing the legal provision of special measures for accused witnesses, to bring it in line with that for non-accused witnesses, will not necessarily increase the proportion of them giving evidence using special measures. Instead, several other changes to the legal field will need to accompany this legal reform to reduce the extent of the defence's discretion over how to proceed. This will enable vulnerable defendants to participate effectively in their trials as witnesses<sup>117</sup> using available special measures.

The first change to the legal field is specific training for defence practitioners and the judiciary on the potential benefits of special measures such as live link and screens *for the accused*. This will provide them with the knowledge they need to make *informed* decisions about the appropriateness of special measures, absent false assumptions that the accused's presence in court negates their usefulness. This training will also need to address the perceived tensions between the tactical approaches highlighted in this article (and elsewhere) and the facilitation of a vulnerable accused's evidence. The second change to the legal field suggested is a reformulation of the standard special measures direction in line with this new understanding. This will explain the use of special measures by the accused to jurors and should thus begin to erode the defence's reluctance to adopt, and the jury's suspicion of, such practice. While the perceptions and behaviour of advocates and judges are firmly embedded within the system, the sea-change that we have seen regarding vulnerable prosecution witnesses has arguably paved the way to its extension for the accused.

116 This also makes them less easily identifiable as an organization at which to direct criticism for not securing special measures, unlike the police and CPS.

117 As required under *Criminal Practice Directions*, op. cit., n. 17, 3D.2.

Another way to solicit special measures uptake by the accused is through the advent of a comparable series of forms (like the MG forms) for the police and defence solicitors, which prompt them at the pre-court stage to consider the accused's vulnerability and the available special measures provision. These changes to the legal field, along with an increase in resources, would serve to place an expectation on the defence that special measures are considered, something which is missing from the current landscape. They may also encourage judges to question an advocate's failure to apply for special measures if they think the accused is vulnerable.<sup>118</sup> This would mean that special measures decisions are not left solely to the defence legal team, and thus limit the extent of discretion a defence advocate has in this area.

Finally, this article shows the value of Hawkins's framework in unpacking the complexity of decision making within the criminal justice system. Setting special measures decisions in their wider context enables a fuller appreciation of the entanglement of issues at play, thus adding to our understanding of an important but under-researched area of legal practice. As Hawkins notes:

to see legal decisions as guided and constrained solely by existing legal rules ... is to ignore the social, political, and economic contexts in which those decisions are made and the richness, subtlety, and complexity of all the processes involved.<sup>119</sup>

118 This power exists under YJCEA, s. 19(1)(b).

119 Hawkins, *op. cit.*, n. 25, pp. 29–30.