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# **The consequences of unenthusiastic criminal justice reform: A special measures case study**

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## **Abstract**

This paper explores the consequences of unenthusiastic criminal justice reform through the case study of special measures provision in England and Wales. These measures provide assistance to vulnerable people giving evidence in criminal trials. For witnesses other than the accused, the law's development followed a standard process: public concern; governmental inquiries; legislation; and a period of inception to prepare for its implementation. The development of special measures for the accused did not follow this same pattern. Instead, it was gradual, ad hoc, and somewhat reluctant. This paper argues that the way and the context in which special measures developed for the accused has had a negative impact on the extent to which they are embedded within the criminal justice system. This, in turn, has negatively affected their uptake in practice. It is concluded that the way in which the law is reformed is important to its success in practice.

## **Keywords**

Criminal justice reform, special measures, vulnerability, witnesses, defendants, fair trials

## **Introduction**

Special measures provide adjustments to the traditional way of giving evidence in criminal trials (Youth Justice and Criminal Evidence Act ((YJCEA)) 1999). They were enacted in response to two related sets of concerns: the system's ability to convict those who offend against vulnerable groups and the humane treatment of such vulnerable individuals within the criminal justice system (*Pigot Report*, 1989; Home Office, 1998). The adaptations special

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measures provide include permitting a witness to give evidence from behind a screen (s. 23); via the live link from a room outside of the courtroom (s. 24); with the assistance of an intermediary (s. 29) or communication aids (s. 30); or via pre-recorded testimony to the jury in the witness' absence (s. 27 and s. 28). They are statutorily available to witnesses who are vulnerable (young or with a mental, physical, or learning disability) or intimidated (in fear or distress in connection with testifying), whose quality of evidence would otherwise be diminished (see s. 16 and s. 17).

The accused was initially excluded from the provision of special measures (Home Office, 1998: para 3.28; YJCEA 1999, s. 16). The law has since developed on the basis of concerns about equality and Article 6 European Convention on Human Rights (ECHR) fair trial rights such as the accused's ability to effectively participate as a witness (Fairclough, 2018a). This means that the accused can now access a range of special measures provisions to assist them to give evidence in their defence should they choose to testify. Insights from a small-scale empirical study into criminal practitioners' experiences of special measures use in the Crown Court indicate that the uptake of special measures in practice is far greater for non-accused witnesses than for the accused (see Fairclough, 2018b). While some of this disparity is a natural result of the more limited provision to the accused (Fairclough, 2018a, 2018b) it is argued that alone this does not sufficiently explain the notable disparity of uptake in practice.

This paper explores the potential relevance of the way—and the enthusiasm with which—the provision of special measures has developed for accused and non-accused witnesses on the success of the law in practice. References to success should be understood to mean its implementation and uptake by those who are vulnerable or intimidated and in need of assistance. The success of the law in practice is important in light of Fuller's principle of congruity (Fuller, 1969: 81). This is one of his eight 'principles of legality', which requires that there is congruence between the law as announced and its actual administration. Given

that the expansion of special measures to the accused is rooted in concerns for equality and Article 6 fair trial rights, their accessibility and use in practice is vital to ensure that these standards are upheld. Understanding the role that the law's development may have had on its use in practice, therefore, can help us to better foster the principle of congruity and protect the accused from unfairness and discrimination.

The article begins with an examination of the way in which the law developed for non-accused witnesses and how it has become embedded in practice. This followed what one might consider the 'typical' pattern of criminal justice law reform. The second section of the paper compares this to the way the provision of special measures to the accused has developed. The main body of this article then focuses on the legal and broader reaching consequences of the unenthusiastic expansion of special measures to the accused. This latter part draws on insights from interviews with 13 criminal practitioners on the operation and use of special measures in Crown Court trials. It is concluded that the reluctance with which the law developed for the accused has negatively affected its clarity and implementation in practice, leaving vulnerable defendants less able to secure special measures assistance to give a good quality account in their defence.

### **Typical criminal justice reform process**

Smith (2005) highlights that the criminal justice reform process is typically made up of four stages. It should be noted that Smith's discussion of the 'typical' cycle of reform was used illustratively, and not intended as a 'prescriptive or normative model' (2005: 123-124). Despite this, this paper demonstrates that law reform in accordance with this 'typical' process can (and has) facilitate(d) thoughtful and thorough law development and implementation.

The four stages of this cycle are as follows. First, ‘a series of controversial incidents ... give rise to public concern and raise questions with ... the existing ... system’ (Smith, 2005: 125). The second stage sees the government launch inquiries into these issues, which is followed by legislative reform (the third stage). The final stage is ‘inception’, which is the period in which the legal field—the criminal justice system—is prepared for the implementation of the new legislation.

Naughton (2005: 214) similarly illustrates this process with regards to legal developments around miscarriages of justice. The *Confait* case (1975)<sup>1</sup> caused public concern (stage one) and led to the establishment of the Royal Commission on Criminal Procedure (who undertook an inquiry – stage two). Their recommendations (1981) led to (stage three – legislation) the enactment of Police and Criminal Evidence Act 1984, which formalised guidelines on police practice. This was followed by various Codes of Practice to ensure that the police abide by the new law (stage four – inception). The same cycle of criminal justice law reform can be seen in relation to the creation of the Criminal Cases Review Commission. The high profile release of the *Birmingham Six* (1991) led to the formation of the Royal Commission on Criminal Justice. Their report (1993) formed the basis of the establishment of the Criminal Cases Review Commission as per the Criminal Appeal Act 1995.

The development of special measures provisions for non-accused witnesses followed this typical pattern of reform. A series of events led to a loss of public confidence in the criminal justice system’s ability to convict those who offend against children (Spencer, 2011). These included the publication of NSPCC (1989) figures showing the prevalence of child abuse and the ineffectiveness of the criminal justice system in dealing with such abuse;<sup>2</sup> high profile child abuse cases (for example the deaths of Jasmine Beckford and Kimberley Carlisle); the Cleveland Child Abuse Scandal (1987); and the creation of Childline (1986). In response to

this growing public concern, the government launched the Pigot inquiry (1989). Their recommendation, for children's evidence to be pre-recorded, was then partially enacted via the Criminal Justice Act 1991 (s. 54 inserted s. 32A into Criminal Justice Act 1988).

This cycle continued, since public concern prevailed in relation to children and vulnerable adults with learning disabilities or as victims of sexual offences.<sup>3</sup> This led, among other things, to Home Office Commissioned research into the treatment of those with learning disabilities (Sanders et al., 1996, 1997). This was followed by an interdepartmental inquiry into the treatment of all vulnerable and intimidated witnesses in the criminal justice system, which culminated in the report *Speaking up for Justice* (Home Office, 1998). Following this report came the enactment of the YJCEA in 1999. This extended eligibility for special measures to all children and vulnerable or intimidated adults and expanded the range of special measures support available.

A period of 'inception' followed this. Best practice guidance was written for practitioners on the use of various special measures (Ministry of Justice, 2011). Live link and video recording infrastructure was built into all courtrooms. Pilot studies were conducted for measures such as intermediaries (2004) and pre-recorded cross-examination (2015). In addition, the Home Office and Ministry of Justice commissioned a series of evaluation studies (see, for examples, Burton et al., 2006a; Hamlyn et al., 2004; McLeod et al., 2010) to examine the implementation and uptake of various special measures. These helped to ascertain how they were used, their suitability for vulnerable and intimidated individuals, and to identify any further training needs.

## Reform for defendants

The development of special measures to those accused of a criminal offence did not follow the same pattern. There was a distinct absence of a ‘crisis’ to stimulate public concern about the non-provision of special measures to the accused. In fact, their exclusion from eligibility under the YJCEA, as recommended and discussed in just one paragraph of the *Speaking up for Justice Report*, attracted no criticism or comment from Parliament as the Bill progressed. The political context, centring on the protection of victims and the need to prosecute ‘criminals’ (see Garland, 2001; Jackson, 2003; Roach, 1999), does not provide fertile ground for concerns around the exclusion of defendants from special measures to develop.

The highest profile case concerning the issue of defendant participation (and thus special measures) was *T and V v United Kingdom* (1999) 22 EHRR 330, involving two 11 year old boys on trial for the murder of two year old Jamie Bulger. The case provoked public outrage about the ‘evil nature’ of the boys, meaning that there was limited public sympathy or concern for their ability to participate effectively in their trial as witnesses (*The Guardian*, 1999; *The Independent*, 1999). There was not—and is yet to be—any politically credible impetus for the government to launch an inquiry into the exclusion of defendants from special measures. This has meant that there is an absence of a basis from which to launch new legislation to reform the law in this area for the accused.

Despite this, the law has developed for the accused over the last 20 years. The nature of this legal reform is very different to the ‘typical’ cycle seen for non-accused special measures. A certain discomfort was felt with the implications of the unequal provision of special measures support to the vulnerable and intimidated. This was evident through the operation of the ‘parity principle’ (*R (on the application of DPP) v Redbridge Youth Court* [2001] EWHC Admin 209; Burton et al., 2006b) whereby practitioners would prevent non-accused witnesses from

using special measures when a comparably vulnerable accused could not do so as well. Furthermore, some defence lawyers and members of the judiciary demonstrated concerns for a vulnerable and/or intimidated defendant's ability to effectively participate as a witness absent the provision of special measures (see, for example, *R v Waltham Forest Youth Court* [2004] EWHC 715). This led to the provision of some special measures to the accused via the common law, for defendants recognised as occupying a disadvantaged position in comparison to their non-vulnerable counterparts. An underlying concern for the law's consistent commitment to the equal treatment of vulnerable people giving evidence (Fairclough, 2018a) was thus powerful enough to overcome the initial exclusion of the accused from the provision of special measures.

The reforms which followed, however, are piecemeal, inconsistent, and (one would hope) incomplete. Their development has been driven almost entirely by the courts (see *T and V v UK*, (1999); *R v Waltham Forest Youth Court*, [2004]; *SC v UK* [2005] 40 EHRR 10; *C v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin)). The government has played only a minimal role in the provision of special measures to the accused, giving 'only grudging recognition [to the needs of the accused] when forced to do so on ECHR art.6 grounds' (Hoyano, 2015: 126-7; see also Plotnikoff and Woolfson, 2015: 248). Their involvement, therefore, has been to legislate to appease the European Court of Human Rights (ECtHR) rather than to address the situation as a whole and properly reform the law.

### **Consequences of gradual, ad hoc, unenthusiastic reform**

This paper now explores the consequences of the way in which the provision of special measures to the accused has developed. The potential merits of the typical cycle of reform are



particularly apparent when looking at the comparatively ad hoc approach to law reform which has ensued for special measures provision to the accused. The absence of a ‘crisis’ generating public concern around the treatment of the vulnerable or intimidated accused in criminal trials, and the resulting absence of an inquiry into this matter, has meant that a holistic legislative programme has not come to fruition. This also means that a period of ‘inception’ to ensure the workability of the legal changes has not occurred.

Evidence from a small-scale empirical study—discussed in more depth below—indicates that the accused’s uptake of the available special measures provision is inferior to that by non-accused witnesses. This paper argues that this is caused, at least in part, by the way in which the law has developed. In other words, that the absence of a statutory scheme and a period of inception has negatively affected the success of the provision of special measures to the accused in practice. While the law’s development for accused and non-accused witnesses is the focus of this paper, it must be highlighted that it is not the only factor which influences their uptake. Instead, this should be considered alongside the way in which practitioners frame their decisions, the organisation of the legal field, and the socio-political context in which the law operates (see Fairclough, 2018b).

### ***The absence of a statutory scheme: Legal consequences***

#### *Motley collection of legal authority*

For non-accused witnesses, the entire scheme for special measures is contained within the YJCEA s. 16 – s. 30. This means that there is one place in which legal practitioners are required to look in order to ascertain which witnesses qualify as vulnerable or intimidated and what support is available. The absence of a comparable statutory scheme for the accused—

and instead the gradual, ad hoc, piecemeal reforms to the law on special measures for them—means there are various sources of law which deal with their provision.

The decision in *T and V v UK*, that the 11 year old defendants could not effectively participate in their trial in the Crown Court, led to the first development of special measures for the accused. A Practice Direction [2002] All E.R. 285 was issued, which permitted adaptations to future criminal proceedings to remove wigs and gowns and to close the court to the public while a child defendant testified. This is now enshrined in the consolidated Criminal Practice Directions [2016] EWCA Crim 1714. Permission for the court to use communication aids to assist an accused person to give evidence is found elsewhere, in the Criminal Procedure Rules (Criminal Procedure (Amendment No 2) Rules 2017, Part 3: Case Management, CPR 3.9(3)(b)).

The legal authority for a vulnerable or intimidated accused to give their evidence from behind a screen is derived from the case law. It was in the early case of *R v Waltham Forest Youth Court* that the Divisional Court ruled that an inherent power exists to provide screens for the accused, despite their exclusion from the legislative scheme [31]. It was also held that no such inherent power existed for the provision of live link to the accused [71], (since affirmed in *R v Ukpabio*, [2007] EWCA Crim 2108). Further judicial deliberation on (and dissatisfaction with) the exclusion of the accused from eligibility for live link ensued (*R v Camberwell Green Youth Court*, [2005] UKHL 4; *SC v UK*, [2005]). This was ultimately addressed by the government's late insertion of a clause into the Police and Justice Bill 2006 to statutorily authorise live link for the accused (now YJCEA, s. 33A).

The power for the use of an intermediary for vulnerable defendants has something of a more complex history. Its use was first authorised by the courts—as obiter in *R v SH* ([2003] EWCA Crim 1208)—and confirmed in *C v Sevenoaks Youth Court* and *R (on the application*

*of AS) v Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin). At a similar time, the government's Coroners and Justice Bill 2009 contained a clause for the provision of intermediaries to vulnerable defendants. Its enactment inserted s. 33BA and s. 33BB into the YJCEA, which permit vulnerable defendants to give evidence with the assistance of an intermediary if it is 'required to ensure that the accused receives a fair trial' (YJCEA, s. 33BA(2)(b)). This legislative provision is yet to be implemented, despite Lord Carlisle (2014: 28) and the Law Commission's (2016: para 2.37) recommendations to address this. This means that authority for intermediary provision to vulnerable accused persons still lies within the common law.

This brief overview shows that the provision of special measures to the accused is made up of a motley collection of statutory power (which is both implemented – live link, and dormant – intermediaries), the common law – screens, and inherent powers of the courts contained within the Criminal Procedure Rules – communication aids, and Criminal Practice Directions – wigs and gowns/evidence in private. This makes the legal position on special measures for the accused less readily ascertainable for busy criminal practitioners.<sup>4</sup>

### *Uncertainty as to legal position*

Much of the common law authority for special measures for the accused leaves the legal position more susceptible to change, meaning that the strength of the protection provided by the courts has varied over the years. This, of course, makes it more difficult for criminal practitioners to keep abreast of the legal position so that they might appropriately secure special measures for the accused. This is especially evident when looking at the provision of intermediaries to the accused.

The Court of Appeal's regard for the importance of intermediaries for vulnerable defendants has yo-yoed. In *R (AS) v Great Yarmouth Youth Court*, the Court of Appeal stated that the provision of an intermediary to assist a defendant to give evidence, who would otherwise be unable to have a fair trial, amounted to 'a right, which may in certain circumstances amount to a duty' [6]. Just a short time later, this protection was diluted by the Court of Appeal in *R v Cox* [2012] EWCA Crim 549. In this case, an intermediary had been granted to assist the vulnerable defendant, but an appropriately qualified intermediary could not be found. Contrary to the position taken in *Great Yarmouth Youth Court*, the Court of Appeal held that while intermediaries may 'improve' the process, their role is not one on which the fairness of the proceedings rests [29], and that instead the trial judge can play the part of the intermediary if one is not available [22]. Yet more recently still, the Court of Appeal in *R v Rashid* [2017] EWCA Crim 2 held that the provision of an intermediary to an accused giving evidence would 'be rare' [73]. This marks a significant U-turn in the appellate court's view of the importance of intermediaries for a vulnerable defendant's fair trial over a six year period.

The dynamic nature of the common law can also generate precedents that do not always sit comfortably side-by-side. The High Court in *R (on the application of OP) v Secretary of State for Justice* [2014] EWHC 1944 (Admin) considered the type of intermediary support a defendant should receive. Due to the lack of statutory power for intermediaries for the accused, the defendant in this case was denied a registered intermediary to assist him to give evidence, and was instead granted a non-registered intermediary.<sup>5</sup> The High Court held that the inferiority of non-registered intermediaries risked violating the principle of equality of arms, and required the Secretary of State to reconsider his refusal to grant a registered intermediary to the accused [196].

This decision saw the High Court place significant emphasis on the quality of intermediary provision to the accused. This must be sat alongside the Court of Appeal's decisions to limit their availability. The common law position on the provision of intermediaries to vulnerable defendants is thus that if an intermediary is granted (which will be rare, as per *Rashid*) it is not essential for a fair trial that one is actually employed, as the judge can play the role the intermediary would otherwise play (*Cox*). However, if an intermediary *is* (successfully) sought, then the interests of fairness require that it should be a registered intermediary, as non-registered intermediaries are not as good (*OP*). While not directly in conflict, these points of law are difficult to reconcile in principle.

A different source of uncertainty as to the provision of special measures to the accused is derived from the source of law, specifically in relation to the Criminal Practice Directions. This is because their legal status is somewhat difficult to ascertain. They are issued by the Lord Chief Justice, with the agreement of the Lord Chancellor, under power from the Courts Act 2003 (s. 74 as amended by the Constitutional Reform Act 2005). Under 'General Matters' the Criminal Practice Directions indeed cite this as the legal authority underpinning their creation. This, as Bennion (2005) notes, makes them a form of delegated legislation. However, the waters are somewhat muddled by the fact that they are published with a case citation. This may indicate that they may have the effect of a guideline case issued by the Lord Chief Justice under the inherent powers of the court (Lyndon Harris, 2017, personal communication).

For the most part their legal status is not problematic, since the Criminal Practice Directions often collate and summarise the existing statutory and common law rules. However, in relation to the provision of intermediaries to the accused, Lord Chief Justice Thomas

seemingly departed from the existing law in the Criminal Practice Directions. The October 2015 guidance in relation to the provision of intermediaries to the accused read:

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

In the April 2016 amendment to the Criminal Practice Directions, Lord Chief Justice Thomas' guidance changed:

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

The new guidance indicated that although the power to grant an intermediary for the purpose of giving evidence exists, it is a power which should be seldom used. This, as Hoyano and Rafferty (2017: 98) highlight, marked a 'remarkable change in tone and content'. This change may also have lacked a legal basis, since Hoyano and Rafferty (2017: 100) also note that they are unaware of any court judgment that 'ever stated that appointments for [intermediaries for] defendants should be rare'. The Court of Appeal in *Cox* had downplayed this significance of an intermediary in the event that one appropriate to the accused's needs could not be found, but had never stated that appointments should be rare. In fact, Hoyano and Rafferty (2017: 104) argue that this change in approach is one which is 'clearly inconsistent with the Criminal Procedure Rules ... the Equal Treatment Bench Book, the Equalities Act 2010, and the United Nations Convention on the Rights of Persons with Disabilities'.

This amendment to the Criminal Practice Directions thus left uncertain the legal provision of intermediaries to the accused. Given the ambiguous status of the Criminal Practice Directions themselves (Bennion, 2005) it is unclear whether criminal practitioners were to follow the case law of the High Court and Court of Appeal, or the Lord Chief Justice's guidance in the Criminal Practice Directions.

It so happens that in this instance the matter was swiftly resolved following the Court of Appeal's decision in *R v Rashid*. In this judgment, Lord Justice Thomas took the opportunity to reassert his earlier Criminal Practice Direction: that there 'may be rare cases where what ... [is] required is an intermediary' [73]. This means that the Criminal Practice Direction and the case law on this matter are now harmonious. However, it shows how the scattered provision of special measures to the accused, and their unfixed legal position, can cause uncertainty among criminal practitioners regarding what is available and to whom. By contrast, such issues have not arisen in relation to the provision of special measures to non-accused witnesses, which is governed by a coherent statutory scheme.

#### *Incomplete and thus unequal provision*

A further consequence of the way in which the law on special measures for the accused has developed is that the provision to them is arguably left incomplete. The nature of the reforms—as largely court driven—means that judges are limited in their ability to expand the provision of special measures. Their power to do so is dependent on the specific facts of the cases which come before the courts, the particular conditions of the defendants, and the arguments posed by the lawyers involved. Furthermore, the unenthusiastic legislative intervention is also partial and incomplete.

This incomplete provision of special measures to the accused means that there are notable inequalities when it is compared to that which is available for all other witnesses. This was demonstrated above with regards to ‘rare’ intermediary provision to the accused, which is not mirrored for non-accused witnesses. Another clear example of a persistent disparity in the provision of special measures is derived from the legal availability of the live link provision (see also Fairclough, 2017: 211). For non-accused child witnesses, the use of live link to give evidence is automatically available on the basis of their young age alone (YJCEA, s. 16). However, for children accused of criminal offences, the use of live link is dependent upon whether their ability to participate effectively as a witness is ‘compromised by [their] level of intellectual ability or social functioning’ (YJCEA, s. 33A(4)(a)).

Similar disparities exist with the eligibility criteria for adults. Adult witnesses can secure the live link if they have a relevant vulnerability which will cause the quality of their evidence to be diminished (YJCEA, s. 16(1)(b)). An adult defendant, however, may only secure the live link for the more onerous reason that they are *unable* to participate as a witness (YJCEA, s. 33A(5)(b)). More generally, the live link is not available to accused witnesses of any age for reason of physical disability or intimidation (confirmed in *R v Hamberger* [2017] EWCA Crim 273), though these are valid grounds for adult witnesses.

Furthermore, the accused is still excluded from eligibility for measures which permit pre-recorded testimony (whether examination-in-chief or cross-examination) to replace live testimony at trial. Their suitability for such adaptations, given their different structural position in the trial, is perhaps questionable, but at present only minimal consideration has been given to the issues arising in relation to this (see *R v SH*: [23]; *R v Camberwell Green Youth Court*: [58]; Birch, 2000: 242).



The consequences of the unequal provision of special measures to the accused are significant (see Fairclough, 2018a). It risks undermining the principle of procedural equality, whereby reasonable adjustments are made for those who would otherwise be disadvantaged in the proceedings (as per the Equalities Act 2010, s. 20(5) and the Judicial Bench Book, 2013: para 35). It also means that some of those accused of crimes are left unable to effectively participate in the proceedings against them, which is interpreted in the Criminal Practice Directions to include the ability to give their best evidence (CPD 3D.2). These mark significant breaches of Article 6 and equality legislation. A complete legislative overhaul of the provision of special measures to the accused, rather than the current piecemeal approach, would help to ensure that gaps in their availability are avoided.

### ***The absence of a period of inception: Broader consequences***

The final section of this article explores the broader consequences of the gradual and piecemeal provision of special measures to the accused. This hones in on the practical consequences emanating from the way in which the law has developed and the resulting absence of a period of inception.

In order to consider such issues, empirical insights from interviews with 13 criminal practitioners are used. These interviews, which were semi-structured in nature, sought to ascertain the experiences of a small sample of those working in Crown Court trials on the use of special measure by all vulnerable or intimidated witnesses, including the accused. The sample (see Table 1) comprised eight barristers (four of whom were recorders, meaning they also sat as part-time judges), and four solicitors – two defence solicitors and two for the CPS. Access to the respondents was secured via two gatekeepers, a barrister and an academic colleague with links to the profession. Purposive selection criteria were used to ensure that

the sample included respondents with a range of post-qualified experience (PQE) and from different parts of the profession.

The interviews were conducted face-to-face between November 2015 and April 2016 and lasted, on average, an hour in length. The major areas and themes of discussion included the respondents' use of special measures throughout their practice, the reasons for their use (or non-use) and their perceived effectiveness. Of course, given the small sample size, the findings from this study are not generalizable but they do indicate a range of relevant issues

Table 1: Respondents' characteristics			
Identifier <sup>6</sup>	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

for consideration (similarly to Temkin, 2000).

The insights obtained from the criminal practitioners interviewed highlight that special measures are used much less frequently by the accused than other witnesses. All 13 respondents had multiple experiences of using live link, screens, and intermediaries for non-accused witnesses. In relation to the accused, just two had been in a trial in which the accused gave evidence by live link, two where the accused gave evidence from behind a screen, and four where the accused testified with the assistance of an intermediary.

The legal consequences of the different way in which the law developed for the accused versus non-accused witnesses go some way to explaining this notable disparity in practice. The scattered, uncertain, and unequal provision of special measures to these vulnerable groups can have a negative effect on their use in criminal trials. However, this is not the full story. It is deduced from the data that there are further consequences which emanate from the way in which the law has developed which contribute to the overall disparity reported in use.

#### *Unresolved practical issues*

As discussed, the way in which the provision of special measures to the accused has developed means that there was no ‘inception’ stage to prepare the relevant areas of the criminal justice system for the application of the new law and procedure. What this means is that, while (primarily) the courts have expanded the legal provision of special measures to the accused, the required changes in the legal system to accompany this and bring it to fruition have not always occurred. Several examples of this follow.

The first relates to live link. The live link infrastructure is in place in all the courtrooms following the YJCEA for vulnerable witnesses. However, following the statutory provision

for live link to the accused, there was no preparation of the legal field to address specific issues in relation to its use by defendants. For instance, a barrister who had used the live link for a vulnerable accused noted that she had:

...a massive problem because we couldn't get anyone from Witness Services to go and sit with [the defendant in the live link room] and operate the machinery. In the end I think it was the court usher who did it. [B4]

The arrangements for a vulnerable witness who wishes to testify via the live link, are that a person from The Witness Service or Victim Support will sit in the live link room with them while they give their evidence. However it appears that in some cases, some such individuals are unwilling to do so for the accused:

You understand why there are security concerns and for those in custody it's perhaps slightly different... [B4]

If you're in custody it's going to be extremely difficult [to give evidence by live link]. I think the practicalities aren't really there. [B2]

The fact that the defendant is accused of a potentially serious crime, and may be in police custody, means that other arrangements need to be made for accompanying the accused in the live link room. To date, there is no official court guidance for criminal practitioners on procedures to be followed if an accused person qualifies to give evidence by live link. Furthermore, the room from which they would give evidence is often so small that the attendance of a security officer in addition to other court personnel might be impractical. The lack of an inception period means that these practical issues are yet to be centrally resolved.

A second matter arises in relation to funding intermediaries. Following the implementation of the statutory intermediary scheme for non-accused witnesses, a Ministry of Justice run

‘Witness Intermediary Service’ was created in order to train, fund, and source appropriately qualified individuals to act as registered intermediaries. Initially, this service extended to provide intermediaries to accused persons who qualified for assistance under the common law. However, the Court of Appeal in *C v Sevenoaks* was clear that the Ministry of Justice had no obligation to do so in the absence of a statutory power for defendant intermediaries [24]. Furthermore, it disallowed payment for the costs of an intermediary out of the courts’ central funds [23].

The Ministry of Justice subsequently withdrew funding for defendant intermediaries in August 2011 ‘because of the pressure of requests for witnesses’ (Plotnikoff and Woolfson, 2015: 251). This has left the provision of intermediaries to vulnerable accused witnesses plagued with resource issues:

...funding is an issue, sadly ... issue 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... [B1]

...it comes down to funding – who is going to pay for it? [B4]

Intermediaries ... it’s not cheap. Criminal Justice Services have to survive on scraps of funding as it is. There’s a huge imbalance there. So even if they want to make intermediaries available to defendants and non-defendants equally, the problem of funding will still inhibit this regardless of the status of the law. [R4]

The fact that the provision of intermediaries to the accused did not follow the typical pattern of criminal justice reform has arguably contributed to these difficulties. The absence of an inception period, to formalise the practicalities of intermediary provision to the accused, left the issue of funding intermediaries for the accused unresolved. As a result, a messy mismatch

of limited funding sources are cobbled together in an attempt to operationalise the common law provision.

A secondary consequence of the exclusion of the accused from the statutory Witness Intermediary Service is that only non-registered intermediaries are available to the accused. These intermediaries are thought to provide an inferior service to registered intermediaries, as they are not subject to a Code of Practice, Code of Ethics, or required to undertake Continuing Professional Development (Ministry of Justice, 2015: 8-16). Again, it can be deduced that the absence of a period of ‘inception’ for the defendant intermediary provision has affected its organisation, this time as a result of the scheme through which intermediaries are provided. The assumption that the common law provision would be served in the same way as the statutory provision proved not to be viable. An inception period, as part of a more systematic expansion of intermediaries to the accused, would have increased the likelihood that a more appropriate system was in place for their provision in practice.

The final points to note in relation to the absence of an ‘inception’ period in the provision of special measures to the accused relates to the available guidance and policies. For non-accused witnesses, reams of best evidence guidance and training materials were produced. Furthermore, MG forms, which record the details of cases from the first police interviews through to charge require that information about witness’ vulnerability and special measures preferences are recorded (see Charles, 2012). This is all notably lacking where the accused is concerned. There are no comparable pre-court administrative processes for completion akin to the MG forms (Fairclough, 2018b). The Inns of Court (The Advocate’s Gateway) provides unofficial guidance for special measures to the accused, rather than the Home Office or Ministry of Justice. Furthermore, there is a dearth of research evaluating the uptake of special measures for the accused and how their provision ought to be facilitated.

### *Awareness of practitioners*

A further consequence of the ad hoc way in which special measures provision for the accused has developed, and the absence of an inception period, relates to the awareness of criminal practitioners about its availability and the benefits of its use. Some of those interviewed indicated that they were not aware of the legal provision of special measures to the accused:

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

I think the live link should be available [to defendants]. [B4]<sup>7</sup>

I think it would appear that most defence advocates are [unaware of special measures provision to the accused] [PS2]

This mirrors findings from the Youth Proceedings Advocacy Review (Wigzell et al., 2015). The review brings together a series of interviews and surveys undertaken with barristers, solicitor advocates and other professionals working in the criminal courts. There is no mention in the report of the statutory live link provision or the common law power for screens for the accused. In fact, one barrister is quoted saying: 'it's only very recently that a lot of advocates even appreciated that you could get special measures for defendants, so I don't think people ask for them' (Wigzell et al., 2015: 31).

The way in which the law developed can help to explain this lack of awareness. For vulnerable non-accused witnesses, the issue of their treatment in criminal trials was (and remains) a hot political topic. As discussed, it was the subject of several wide-ranging inquiries culminating in a big piece of legislation. This was followed by a lengthy inception period (which is ongoing for s. 28 pre-recorded cross-examination), extensive guidance and training (again ongoing, Inns of Court National Training Programme 2016-2018), and several

evaluation studies. It thus seems near impossible that a criminal practitioner would not be aware of the special measures provisions available to vulnerable witnesses, or how they might be of benefit.

The absence of these typical stages of reform for special measures for the accused has created a different context around their existence. Instead of a high profile Act of Parliament, the provision of special measures to the accused is complex, uncertain, and often buried in a myriad of authorities. In fact, the YJCEA itself still states that defendants are excluded from the measures contained within the Act (s. 16), despite the insertion of s. 33A for live link and s. 33BA for intermediaries. The lack of a more general statutory basis for defendant special measures, notwithstanding the common law provision, was cited by R4 in interview as likely to have a negative effect on defence counsel's 'attitudes and understanding' of what is available for vulnerable defendants. This suggests that it is the source of law—and its accessibility as a result—which is important for its success, and not just its substance.

A further strand to this argument relates to the legal profession's understanding of how particular special measures might help a vulnerable accused to give evidence. Insights from the interviews with criminal practitioners highlighted that that criminal practitioners may often frame the measures in relation to their use by witnesses and thus not see how they could be utilised for the accused (see Fairclough, 2018b: 468-470). For instance, the live link was seen as a measure which kept a witness out of the courtroom and screens as one which hid the witness from the defendant's view. As a result, there was a notable lack of understanding relating to why a defendant would give better evidence by live link when they have already been in the courtroom, and from whom they would be screened.

I discuss these findings extensively elsewhere (see Fairclough, 2018b: 468-470) and so will not expand further on them here. Their relevance for the purposes of this article is to suggest



that a period of ‘inception’ for special measures for the accused—had their provision arisen in the ‘typical’ way—could have ensured that the legal profession received appropriate training and guidance on the merits of special measures for the accused. Instead, the guidance and training opportunities have routinely held a prosecution witness focus (cf The Advocate’s Gateway). A defendant focus in such training, as part of an inception period, could have ensured that defence practitioners frame special measures decisions with adequate knowledge and awareness of their potential benefits for vulnerable accused persons.

## **Conclusion**

This paper explores the consequences of unenthusiastic criminal justice law reform using special measures as a case study. It is clear that the provision of special measures to non-accused witnesses followed a more typical process of reform. Public concern grew around the treatment of vulnerable witnesses in the criminal justice system. This led to multiple inquiries, most famously resulting in the *Pigot Report* and *Speaking up for Justice Report*, which recommended a series of adaptations to the traditional way in which witnesses give evidence in court. The result of this was the enactment of a significant piece of legislation, the YJCEA. Its implementation was preceded by a period of ‘inception’, where the criminal justice system and those working within it were prepared for the changes that would follow.

This entire process was absent where the development of special measures for the accused was concerned. Instead, the provision of special measures to those accused of criminal offences was driven largely by the courts. The legislative provisions which do now exist for the accused were late insertions into existing Bills on wide-ranging issues, and their enactment was not followed by a period of inception to prepare for its implementation.

This paper has explored the multiple consequences of this ad hoc, piecemeal reform of special measures to the accused. The provisions for special measures to the accused come from a range of legal sources, including legislation (some of which is yet to be implemented), case law, and the courts' inherent powers. As a result, there is some uncertainty as to the legal position, due to both the malleability of the common law and the sometimes seemingly conflicting judgments which must be followed. Furthermore, the courts are naturally limited by the facts of the cases which come before them, meaning that the provision of special measures to the accused remains incomplete when compared to that which is available to their non-accused counterparts under the YJCEA.

In addition, the absence of an inception period means that the practical decisions and guidance needed to give effect to the provisions available have not been executed. This makes the accessibility of special measures more challenging for the accused. This is particularly so in relation to funding for defendant intermediaries, something which the courts are left to muddle through with no real assistance from the Government. In addition, the piecemeal way in which special measures have developed for the accused, and the lack of guidance accompanying it, means that there is a seeming lack of awareness among the legal profession as to what exactly is available and how it might be useful.

This paper argues that the ultimate consequence of all of this is that special measures are used much less frequently by the accused than they are for other witnesses under the YJCEA scheme. This paper does not proffer that the way the law has developed is the only reason for the disparate uptake. Instead it argues that the law's ad hoc development and the consequences of this as discussed are significant contributory factors in understanding how the law operates in this area of criminal justice, and thus why the respondents in this research experienced such notably disparate use of special measures in criminal trials.

The findings from this research are significant. The expansion of special measures to the accused emanated out of concerns for their ability to effectively participate in their trials as witnesses. It also arose due to equality concerns, relating to their treatment as vulnerable individuals when compared to vulnerable non-accused witnesses. In order for the provision of special measures to make any material difference to these issues we know it must actually be available and utilised in practice. They indicate that the currently disparate and uncertain legal provision of special measures, and their limited availability in practice, may routinely leave vulnerable defendants inadequately assisted to give evidence in their defence. This risks adverse consequences on the outcome of their case, compliance with equality legislation and Article 6, and the perceived legitimacy of the criminal justice system as a whole. The government's seeming indifference towards the treatment of the accused, and the resulting inaccessibility of the ad hoc legal provision of special measures to them, marks a significant failure in the congruence of the law (Fuller, 1969: 81).

This paper concludes that a more systematic process of reform, akin to the 'typical' process seen in the development of special measures to non-accused witnesses, may have avoided many of these consequences. This is an important finding, particularly given that many other jurisdictions, such as Scotland, Northern Ireland, New Zealand and Australia are looking to us for a blueprint on how to adapt their criminal proceedings for vulnerable participants. It shows that the way the law is enacted, and the source of law, are perhaps as important as its substance to its success.

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Samantha Fairclough is a Lecturer at Birmingham Law School, University of Birmingham. She has published widely on the provision of special measures and their use in practice. She has a particular interest in the disparate provision of special measures to the accused and its implications on their fair trial rights.

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## Notes

<sup>1</sup> The murder convictions of three boys were quashed. Their confessions were false and the police were criticised for their handling of the case contrarily to the Judges' Rules. See Fisher (1977)

<sup>2</sup> NSPCC research found that prosecutions were planned in only 9% of the physical abuse cases and 28% of the sexual abuse cases it tracked from 1983-1987.

<sup>3</sup> This was particularly acute in relation to Julia Mason's pending case at the ECtHR against the UK, following her cross-examination by her accuser in his rape trial. Julia Mason dropped her case against the UK following the enactment of the YJCEA (Hall, 2017: 54).

<sup>4</sup> The Criminal Practice Directions do some of the work of bringing the provision of special measures to the accused together. However, it is argued that this is not always clear – for instance, the legal provision of screens to the accused is not obviously available under this guidance.

<sup>5</sup> A registered intermediary is one which is registered under the Witness Intermediary Scheme. This means that they are subject to a Code of Ethics, Code of Practice, and must undertake Continuing Professional Development. Non-registered intermediaries are not subject to these same requirements, and thus are not registered under this scheme. See MOJ (2015: 8-16).

<sup>6</sup> Identifiers are assigned to the comments made by the respondents such as B (barrister), R (recorder), DS (defence solicitor), CPS (CPS solicitor) and a number. This is to keep the identities of the respondents anonymous as per the confidentiality agreement.

<sup>7</sup> Interestingly, B4 had used the live link for a vulnerable client, but did not know the statutory power to do so existed. Instead, she had secured its use under the inherent power of the judge.