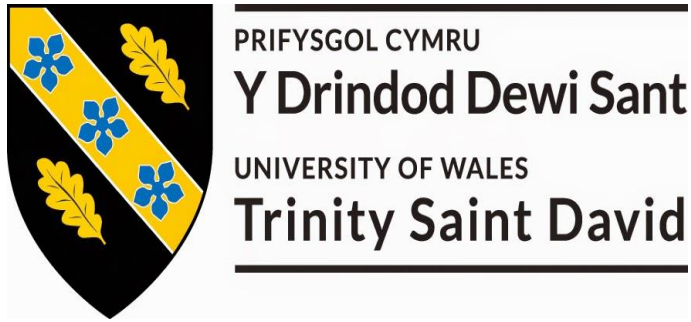




A Dissertation for the Master of Criminal Justice and Policing

University of Wales Trinity Saint David

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

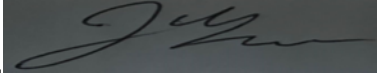
Supervisor: Dr Claudine Young

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DECLARATION

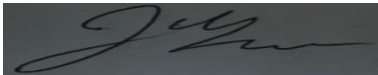
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STATEMENT 1

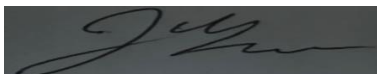
This thesis is the result of my own investigations, except where otherwise stated. Where correction services have been used the extent and nature of the correction is clearly marked in a footnote(s). Other sources are acknowledged by footnotes giving explicit references. A bibliography is appended.

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How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

Abstract

The current framework for 'vulnerable witnesses' is governed by specific provisions under sections 16 to 18 of the *Youth Justice and Criminal Evidence Act 1999* (YJCEA). In theory, these provisions provide a range of 'special measures' that may be made available to vulnerable witnesses to help them to give evidence during criminal proceedings.

The aim of the study was to determine whether the current vulnerable witness approach under section 16 of the YJCEA reasonably accommodates vulnerable persons, by focusing on those with learning disabilities (or similar developmental disabilities) who become involved with the criminal justice system (CJS) in any capacity.

The study set out four research objectives: (1) to critically analyse the existing legislative framework governing the current vulnerable witness approach; (2) to assemble a comprehensive body of high-level case law in England and Wales, the Commonwealth of Australia (Australia), and Canada (along with relevant academic commentaries); (3) to critically analyse the existing legislative framework, and high-level domestic and foreign jurisdiction case law, with a view to identifying structural and operational deficiencies; and (4) to provide cogent law reform recommendations that ensure the balancing of fair trial interests may realistically be achieved.

The research study adopted a black letter law doctrinal (law that is undisputed) approach combined with a law in context approach (law that uses social sciences to give a different perspective) to the subject area. It adopted a research methodology based on undertaking a literature review and a secondary analysis of research materials, which consisted of legislation, law reports, law manuals, law journals, and relevant online legal databases.

The research study adopted a multi-faceted approach to analysing the legislative framework that exists in the United Kingdom (UK). This involved analysing the relevant provisions of the YJCEA, relevant cases, and relevant practice standards and guidance. The findings were then compared to the same type of analysis undertaken in relation to legislative frameworks in Australia and Canada. It was

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

found that although the structural framework was in place to provide special measures for vulnerable persons with learning disabilities, there were still a broad range of problems that such individuals could encounter in the availability and use of such special measures.

Overall, the research study identified a broad range of challenges and problems still exist in practice in the UK CJS. These included, barriers continued to undermine the effectiveness and frequency of use of special measures; low levels of understanding and awareness of the availability of special measures; technology failures; live link facilities not fit for purpose; poor quality interviews; poor operational technology experience; inadequate training and support of the police, legal professionals, advocates, and judges; and significant problems identifying vulnerabilities especially with regards to individuals with learning or similar developmental disabilities.

In light of a broad range of structural and procedural problems identified, the study made fifteen realistic and achievable recommendations based on the existing literature.

Contents

Acknowledgements	1
Abstract	4
Contents	6
Chapter 1: Introduction	8
Vulnerable Witnesses	8
Chapter summary and outline	10
Chapter 2 : Literature review	12
Introduction.....	12
Legal Framework: Legislation	12
Learning Disabilities.....	14
Legal Framework: Case law	15
<i>R v Brown (Christian Thomas)</i> [2004] Crim LR 1034	16
<i>R v Momodou and Limani</i> [2005] EWCA Crim 177	17
<i>R v H</i> [2006] EWCA 853	17
<i>R v PR</i> [2010] EWCA Crim 2741	18
<i>R v Iqbal (Imran) & anr</i> [2011] EWCA Crim 1348	19
<i>R v YGM</i> [2018] EWCA Crim 2458.....	19
Legal Framework: Critical analysis.....	20
Special Measures Literature Review.....	21
Criminal Practitioner Qualitative Study	23
Home Office Special Measures Research Study	25
Chapter Summary	25
Chapter 3: Methodology	27
Introduction.....	27
Research design.....	27
Research aims and objectives	28
Research Aim	29
Research Methods	30
The Research Methodology	31
Chapter Summary	34
Chapter 4: International Comparative	35

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

Canada	35
Australia.....	38
International Vulnerable Witness Frameworks	41
Chapter Summary	44
Chapter 5: The Way Forward	45
Introduction.....	45
Criminal justice system reforms and vulnerable witnesses	45
Vulnerable persons protections for accused persons	46
Vulnerable persons protections for victims/complainants	47
Vulnerable persons witness protections	48
Model jury directions	52
Chapter Summary	54
Chapter 6: Conclusion	55
Chapter 7: Recommendations	57
Reference and Bibliography	60

Chapter 1: Introduction

This dissertation seeks to undertake further research in an attempt to understand to what extent the criminal justice system (CJS) in England and Wales is able to effectively accommodate persons with learning or similar developmental disabilities. This chapter will introduce the reader to the concept of vulnerable witness and how it is interpreted within the United Kingdom (UK). Consequently, the chapter will briefly set out the structure of each chapter, so that the reader understands the overall structure and approach adopted in this dissertation.

Vulnerable Witnesses

In the criminal justice system, the term ‘vulnerable witness’ has both a general and a specific meaning. In general, it refers to victims or witnesses of a crime which may potentially encounter difficulties in relation to the giving of evidence during criminal proceedings, and so may be considered or deemed to be vulnerable or intimidated in some way (Public Prosecution Service, 2021; Ellison, 2002, pp.1-10). As they are believed to be potentially vulnerable within the CJS, they may be protected in some way by the system, meaning they receive special consideration.

The specific meaning of vulnerable witness will be governed by the particular jurisdiction in question. This is because each legal system has a legal framework in place that addresses vulnerable witnesses, in terms of how they are defined, who falls within the categories of vulnerable witnesses, and what special consideration, often referred to as ‘special measures’ or ‘special arrangements’, may be made available for them (Ellison, 2002, p.33; Mitchels, 2016).

It is important to understand that within the CJS in the UK, many defendants and witnesses may all be found to be vulnerable in some way. Such vulnerability may reflect communication challenges; distress; fear; learning disabilities; mental health requirements; physical disabilities or impairments; their immaturity; and their youth

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

(Cooper, 2017, pp.1-2). As a result, such vulnerable people may face a range of barriers to understanding and engaging with the CJS and the contested criminal trial process (Cooper, 2017, p.2).

This vulnerability may ultimately undermine the exercise of the right to a fair trial (e.g., for defendants) and access to justice, and, as observed by Cooper (2017, p.2) "...there are aspects of the experience of the judicial process which potentially threaten the well-being of vulnerable defendants and witnesses". For defendants, learning or similar developmental disabilities may potentially result in them not being able to sufficiently or adequately defend themselves in court.

For victims or complainants with learning difficulties, this may result in witness testimony being taken apart by highly articulate advocates, with the result that such witness loses all credibility in the eyes of the jury. Consequently, the challenge that arises for the CJS, is how to identify, categorise, and treat such potentially vulnerable individuals. According to a study undertaken by Burton *et al.* (2006, p.21), approximately 54% of all witnesses are possibly vulnerable or intimidated.

In direct contrast to this finding, Smith and Tilney (2007, p.2) noted the police had only identified between 3-5% of witnesses as being vulnerable or intimidated, and so they explicitly questioned what was going wrong with the identification and classification process. In the UK, vulnerable witnesses refer to *inter alia* (among other things) minors (i.e., children under the age of 18 years of age), victims of serious crimes or sexual offences, victims that are persistently targeted, and individuals with communication difficulties (Crown Prosecution Service, 2017).

The *Youth Justice and Criminal Evidence Act 1999* (YJCEA) was introduced in order to provide for a series of special measures that could be used to assist vulnerable and intimidated witnesses to give evidence in court (Cooper, 2017 p.2). This contains a statutory test to define which witnesses will be deemed to be eligible for assistance on

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

grounds of age or incapacity (YJCEA, s.16). All minors under the age of 18 are automatically considered vulnerable witnesses (YJCEA, s.16).

However, other witnesses will only be considered to be vulnerable if the court considers that the quality of the evidence that will be given by the witness is likely to be diminished because of specific circumstances (YJCEA, s.16(1)(b)). These circumstances are that the witness: (1) suffers from a mental disorder (within the meaning of the *Mental Health Act 1983*) (YJCEA, s.16(2)(a)(i)); has a “significant impairment of intelligence and social functioning” (YJCEA, s.16(2)(a)(ii)); or (3) has a physical disability or suffers from a physical disorder (YJCEA, s.16(2)(b)).

As it will be seen, the existing approach to vulnerable people and in particular persons with learning or similar developmental disabilities raises a host of challenges and problems regarding the treatment of such individuals. This is especially because there are different definitions and characteristics of learning disabilities; no two people with learning disabilities will have exactly the same profile; and learning disabilities can affect people in many different ways (e.g., in terms of communication skills, social skills and abilities, learning and understanding new information or skills in different environments) (The Advocate’s Gateway, 2015, p.6).

Chapter summary and outline

Chapter 1 has provided an introduction to the concept of vulnerable witness, how this may affect trial fairness within the CJS, and the driving rationale behind the introduction of the ‘special measures’ framework under the YJCEA. It was seen that the concept of vulnerable witness is problematic, because it may apply to so many different categories of individual. Chapter 2 will set out a literature review of the relevant law governing this area, as well as a critical legal analysis of relevant cases pertaining to vulnerable witnesses and special measures.

Chapter 3 will set out the research methodology that was adopted overall to carry out this research study. Chapter 4 will set out a comparison of international standards for vulnerable witnesses in two other Commonwealth jurisdictions, namely Canada and the Commonwealth of Australia. Chapter 5 will set out an analysis of proposed and potential reforms in relation to the legal framework and the treatment of vulnerable witnesses. Chapter 6 will seek to tie together and summarise the relevant findings from the previous chapters in order to provide succinct conclusions and Chapter 7 will provide recommendations for this research study.

Chapter 2 : Literature review

Introduction

This chapter will adopt a multifaceted approach to the literature review, which consists of a critical analysis of the literature in three parts. The first part will look at analysing the legislative framework that governs special measures for witnesses. The second part will look at analysing the case law that has shaped the principles touching upon this area, and also interpreted the relevant legislative framework in practice. Following that, the third part will provide a critical analysis of the legal framework in practice.

Legal Framework: Legislation

Most of the special measures for witnesses under the *Youth Justice and Criminal Evidence Act 1999* (YJCEA) (as amended by the *Coroners and Justice Act 2009*) took effect in July 2002 (Durstun, 2011, p.409). According to Durstun, (2011, p.409), some care is needed, as the YJCEA provisions are drafted “in particularly dense, obscure and unclear fashion”, which makes understanding the legislation quite difficult. Section 16 of the YJCEA contains provisions governing ‘witnesses’ eligible for assistance on the grounds of incapacity. A witness refers to any person that is called, or proposed to be called, to give evidence in criminal proceedings (YJCEA, s.63).

In criminal proceedings, any witness (except for the accused) is eligible for assistance provided that they are either: (1) under 18 years old at the time of the hearing; or (2) the court considers that the quality of evidence given “is likely to be diminished” by Specified Circumstances (YJCEA, s.16(1)) (*Quality of Evidence Test*). When determining whether a witness falls within the parameters of the Quality of Evidence Test, the court must consider any views that are expressed by the witness (YJCEA, s.16(4)). There are also statutory principles set out in relation to the Quality of Evidence Test, these refer to the quality “in terms of completeness, coherence and

accuracy”, and the term “coherence” in this respect is taken to refer to “A witness’s ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively” (JCEA, s.16(5)).

The Specified Circumstances stated are that:

- (1) the witness has a physical disability, or suffers from a physical disorder (YJCEA, s.16(2)(b)) (Ground 1); or
- (2) the witness suffers from a “mental disorder” (YJCEA, s.16(2)(a)) (Ground 2); or
- (3) the witness “has a significant impairment of intelligence and social functioning” (YJCEA, s.16(2)(b)) (Ground 3).

In relation to Ground 2, mental disorder is derived within the meaning to be found in the *Mental Health Act 1983 (MHA)*, which refers to any disorder or disability of the mind (MHA, s.1(2)). However, it should be noted that a ‘learning disability’ is *not* considered to qualify as a mental disorder with respect to certain specified provisions under the MHA (MHA, s.1(2A)(a)). Learning disability is defined therein as meaning “a state of arrested or incomplete development of the mind which includes significant impairment of intelligence and social functioning” (MHA, s.1(4)).

These provisions form part of new ‘special measures’, that were specifically enacted in order to enable witnesses that were deemed to be vulnerable to provide improved evidence in court (Cooke and Davies, 2001, p.84). Macpherson (2001, p.230) states that previously, witnesses in criminal proceedings had not always received the help they deserved when giving evidence in court. Gradually, measures to make the court

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

process less intimidating, and more accessible, were introduced (e.g., familiarization visits, live-links) (Macpherson, 2001, p.230).

The YJCEA was intended to consolidate all these measures in one piece of legislation, in order to encourage greater consistency in the way they were applied, and also to demystify criminal proceedings for vulnerable and intimidated witnesses (Macpherson, 2001, p.230). In practice, special guidelines were published which provided additional guidance in how these new provisions functioned in practice (Home Office Communication Directorate, 2002). The first edition of these guidelines was updated in 2007 (Criminal Justice System, 2007), and then subsequently updated further in 2011 (Ministry of Justice, 2011) (2011 Guidelines).

The special measures that are available in practice include: (1) screening of witnesses (i.e., to prevent the witness and defendant seeing each other) (YJCEA, s.23); (2) evidence given by live television link (YJCEA, s.24); (3) evidence given in private (YJCEA, s.25); (4) removal of judiciary wigs and gowns (YJCEA, s.26); (5) video recorded interviews admitted as evidence in chief (YJCEA, s.27); (6) video recorded cross-examination or re-examination (YJCEA, s.28); (7) examination of witnesses through intermediaries (YJCEA, s.29); and (8) allowing witness use of communication aids (YJCEA, s.30) (McLeod *et al.*, 2010, pp.4-5; Evans, n.d.).

Learning Disabilities

It is recognised that a learning disability is not the same as a learning difficulty, and that these terms are often used interchangeable which can lead to confusion (McConnell and Talbot, 2013, p.14). Learning difficulties include conditions such as attention deficit disorder (ADD), attention deficit hyperactive disorder (ADHD), and dyslexia, and behavioural symptoms for these difficulties may often be similar to those for learning disabilities (McConnell and Talbot, 2013, p.14). For instance, people with ADD may not follow through with instructions, they may be easily distracted, they may

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

be unable to finish tasks, and they may appear not to listen to what is being said (McConnell and Talbot, 2013, p.20).

However, a learning disability is a condition that combines a low intelligence quotient (IQ) (i.e., less than 70, *impaired intelligence*) with “a reduced ability to cope independently and to adapt to the daily demands of a normal social environment” (i.e., *impaired social functioning*) (McConnell and Talbot, 2013, p.14). In the United Kingdom (UK), a learning disability is a protected characteristic under the *Equality Act 2010*, which protects people with disabilities from being discriminated against (McConnell and Talbot, 2013, p.14). In practice, people with learning disabilities present significant challenges in relation to the giving of evidence as witnesses stemming from a combination of difficulties in identifying what is often referred to as a ‘hidden disability’, and the characteristics of such people.

Example characteristics of people with learning disabilities highlight why they may encounter difficulties within the legal system and in court. These include: (1) limited language ability, comprehension and communication skills (i.e., difficulty understanding and responding to questions); (2) difficulty recalling and processing information; (3) tendencies to be acquiescent and suggestible (e.g., may try to appease people under pressure by changing their answers if they think their first answer was ‘wrong’); (4) difficulties following instructions; (5) unable to concentrate for extended periods; (6) difficulties understanding social norms; and (7) find new situations highly stressful (e.g., appearing in court) (McConnell and Talbot, 2013, p.14).

Legal Framework: Case law

Some case law generally concerning special measures was developed prior to the implementation of the YJCEA. For instance, in *R v Taylor* [1995] Crim LR 253 the Court of Appeal, Criminal Division (CoA (CD)), held that the right of the accused in a criminal trial to face his accusers should only be denied in ‘rare circumstances’, such as the granting of an anonymity order (*Watford Magistrates’ Court, ex parte Lenman*

[1993] Crim LR 388). The Court set out guidance in relation to the making of anonymity orders, including that the trial judge must be satisfied that there has been a thorough investigation of the suitability of the witness, and also full disclosure that is consistent with anonymity (*Okuwa v Regina* [2010] EWCA Crim 832, para.[25]).

The granting of total anonymity, in terms of what is now recognised as a special measure, was originally developed on a non-statutory, improvised basis (Durstun, 2011, p.413). However, Durston (2011, p.413) believes that this initial approach was unexpectedly curtailed by the House of Lords in *R v Davis* [2008] 3 WLR 125, where it was held that in most circumstances, witnesses could not be granted total anonymity. Special measures therefore constitute a statutory exception to the right of a defendant to be able to face his alleged accuser/victim. All evidence provided under a special measure's direction is treated as if given as direct oral testimony (YJCEA, s.31; Durston, 2011, p.412).

R v Brown (Christian Thomas) [2004] Crim LR 1034

Section 32 of the YJCEA states that in the case of a trial on indictment evidence is to be given further to a special measure's direction, the judge is required to give the jury such warning as the judge considers to be necessary to ensure that the special measures direction in relation to a witness does not prejudice the accused. Although this requirement might seem simple to understand, in actuality it requires careful analysis and use of discretion by the judge. In *R v Brown* two prosecution witnesses chose to give evidence shielded by screens, and the trial judge's direction to the jury warning them not to allow the use of screens to prejudice them against the defendants was approved by the CoA (CD) (Durstun, 2011, p.412). However, it was also stated that if this direction was emphasised in the summing-up, it might in some cases place too much emphasis in the minds of the jurors than was intended (Durstun, 2011, p.412).

R v Momodou and Limani [2005] EWCA Crim 177

The case of *R v Momodou and Limani* the CoA (CD) set out basic rules with respect to the coaching of witnesses applicable to both the defence and prosecution. The Court unequivocally stated that there exists a “dramatic distinction” between witness familiarisation, and witness training/coaching which would not be permitted (para.[61]; *R v Richardson* [1971] CAR 244; *R v Shaw* [2002] EWCA Crim 3004). The 2011 Guidelines (p.101) explain that all vulnerable witnesses may require support prior to trial, and this includes an explanation of their role in court and assistance to enable them to give their best evidence.

However, the 2011 Guidelines state (p.101) this should *not* include any discussions or rehearsals of evidence, or coaching before trial, except for pre-trial familiarisation visits are allowed, e.g., to view the courtroom, live link room. Taking into account the vast range of problems associated with learning disabilities, and the need for clarity when carrying out discussions with witnesses with learning disabilities, it is extremely difficult to clearly identify the line between discussions of evidence and/or coaching and rehearsals.

R v H [2006] EWCA 853

In *R v H* a 14-year-old boy (aged 12-13 at the time of the offence) had been convicted on four counts of rape by oral penetration contrary to section 1 of the *Sexual Offences Act 2003*. The victim (E) was aged 5 or 6 at the time of the offences, a witness T was aged 10 or 11, and another witness D was aged 12 or 13. The interviews of the witnesses were video recorded by the police and were used as evidence, the witnesses were then questioned further, cross-examined, and re-examined by live link (Durstun, 2011, p.412).

The case initially demonstrated how recorded videos could be used to support the giving of evidence by vulnerable children as witnesses. However, it also showed, as

was specifically acknowledged in the case (*R v H*, para.[39]), the clear difference in treatment afforded to the children witnesses (“the young witnesses were protected from the formidable atmosphere of the courtroom”) and the position of the appellant during the trial. The court stated that this difference in treatment underlined that “...the court must adapt its procedures to ensure that a young defendant is not wrongly prejudiced by it” (*R v H*, para.[39]).

Although the appellant was convicted, he appealed on the grounds *inter alia* (among other things that) : (1) the Judge had unfairly and prejudicially interrupted the cross-examination of T; (2) that he had been unfairly treated, and his right to a fair trial and equal treatment had been violated; and (3) that the evidence was “...so weak and tenuous because of inconsistencies that no reasonable jury could properly have convicted on it, and the case should have been withdrawn from the jury” (*R v H*, para.[27]). By dealing with these issues the court was able to provide future guidance on how these types of arguments would be assessed in relation to a balancing of rights between a defendant, victim-witnesses, and witnesses.

R v PR [2010] EWCA Crim 2741

In *R v PR* a nine-year old female had been abused between 1997 and 2004 by her father, and at trial special measures were deployed under a different ‘fear and distress’ gateway (YJCEA, s.17) (Ewin, 2016, p.1). In the case it was not identified that the victim-witness had a learning disability and was unable to comprehend complex questions, and whilst an intermediary was clearly required to aid witness participation, one was not available under that specific gateway (Ewin, 2105, p.36). Ewin (2015, p.36) argues that both *R v PR* and *R v Iqbal* (the next case), demonstrate that two main issues with special measures are the initial identification of witnesses who are vulnerable and thus eligible, and also the misidentification of witnesses between the s.16 and the s.17 gateways. Erwin (2018, p.27) believes that this area relating to communication, cross-examination, and linguistics has received little coverage in the literature.

R v Iqbal (Imran) & anr [2011] EWCA Crim 1348

Ewin (2015, p.33) states the case of *R v Iqbal*, where the victim was assaulted, provides a clear example of procedural deficiencies inherent in the YJCEA system. In the case, the victim who was to provide witness evidence, was not identified as requiring specialist support during in the initial evidence gathering phase of the Police, despite the scene of the assault being near the victim's school which was one catering for people with learning difficulties (Ewin, 2015, p.34). In 2010, the initial trial at Crown Court was halted by the Judge because the Judge was concerned about learning and communication difficulties that became obvious to the Court (Ewin, 2015, p.33).

The Court later was informed that the victim had been identified as having significant impairment of communication, intelligence, and social functioning, and procedurally required screening from the defendant and an intermediary to take part in the proceedings (Ewin, 2015, p.34). For Ewin (2015, p.34), there were missed opportunities surrounding the use of a specialist interviewer and the use of 'Visually Recorded Evidence' (VRE). The evidence provided a clear indication that the Crown had not made an assessment for its case in this regard, and that the vulnerability of the victim-witness had not been addressed early enough in the investigation (Ewin, 2015, p.34). Ewin (2015, p.34) observed that:

Without doubt this would have been a humiliating affair for the victim-witness once stood in the witness box which brings into question the value of the written statement in this case.

R v YGM [2018] EWCA Crim 2458

In *R v YGM* the CoA (CD) set out best practice in relation to cross-examination of a vulnerable witness. This included identifying any limitations on cross-examination at

an early stage (i.e., ground rules hearing), and the court discussing with advocates the nature and extent of any limitations, and whether these relate to style, or also to content (para.[21]). Trial judges are to give the standard special measures direction and also direct the jury in general terms regarding limitations on the defence advocate (para.[21]). The judge may also direct the jury with regards to any content issues identified that a cross-examiner cannot explore (at summing-up and possibly also after cross-examination) (para.[21]). The court concluded by stating ‘...we should add that every advocate (and trial judge) is expected to ensure that they are up to date with current best practice in the treatment of vulnerable witnesses.’ It will be seen that it is difficult in practice to understand clearly what the court means in this respect.

Legal Framework: Critical analysis

It is particularly important to understand from the outset that people with intellectual disabilities do not form a clearly identifiable group – impairments vary considerably, so does the level of severity, and also the extent to which impairments can inhibit normal social functioning (Cusack, 2017, p.434). This means it is almost impossible to authoritatively identify the full range of biomedical or ontological factors that might impair the testimonial performance of such individuals (Cusack, 2017, p.434). For example, it has been found that people with intellectual disabilities sometimes have wide deficits in encoding, storage, and retrieval of memory (Cusack, 2017, p.434; Ternes and Yuille, 2018, p.519).

Cusack (2017, p.435) identified that they also have trouble in giving spontaneous accounts of events they witnessed previously (Perlman *et al.*, 1994, p.171), and they may be more suggestible, more acquiescent, and more likely to confabulate (Clare and Gudjonsson, 1993, p.295). These difficulties with respect to acceptance, discussion, and suggestibility mean that unless people with learning disabilities are carefully interviewed, they may seemingly change their stories, either in police stations or in court rooms (Murphy and Clare, 1998, p.179). The practical challenges are extensive, because people with learning disabilities vary significantly in terms of the

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

degree of severity of the impairment. This means without identifying what the particular learning disability is, it is difficult to identify and assess what problems may be encountered in terms of the narrative told by the witness.

Also, even if the particular learning disability is known, it is still necessary to practically assess the extent of the difficulty in practice in relation to any particular individual. From a legal perspective, Cusack (2017, p.435) states that their knowledge of legal processes may be poor, and they may struggle to understand legal terminology (Ericson and Perlman, 2001, p.529). This is understandable given the complexity of legal processes and terminology present within the criminal justice system (CJS). It was also seen that they are more susceptible to questioning strategies that are coercive or constraining used by lawyers, as these negatively impacted their witness testimony (Kebble *et al.*, 2001, p.98; Cusack, 2017, p.435).

However, there is evidence that can establish that persons with learning disabilities can provide reliable evidence, reasonably accurate accounts of events, and can also resist questions designed to alter witness testimony accounts (Beail, 2002, p.129; Gudjonsson, 2003, p.334; Cusack, 2017, p.435). With this in mind, in principle it seems logical that any analytical approach in this area should seek to take into consideration any available evidence from relevant studies. The difficulty that arises almost immediately however, is it becomes apparent that it is actually the lack of significant research studies or other empirical evidence in this area, that currently forms a major barrier to any comprehensive objective analysis of the existing legal framework.

Special Measures Literature Review

In July 2020 Dr Samantha Fairclough, the Victims' Commissioner for England and Wales, published her literature review of special measures (Fairclough 2020). Dr. Fairclough found a distinct absence of information on the use of special measures,

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

and especially for Wales which had received no individual attention at all in the literature (Fairclough, 2020, p.37). Dr. Fairclough stated that a systematic and comprehensive review of special measures applications, including about which ones were used, was “desperately needed”, and this was particularly the case for witnesses who are not automatically eligible for their use (Fairclough, 2020, pp.37-38).

The study also found that despite guidance to the contrary, instead of being consulted some witnesses were told how they would be giving evidence; others did not receive the information they needed; and others did not have time to practice (e.g., on the live link) so as to be in a position to make a special measures decision in a timely and informed manner (Fairclough, 2002, p.37). Dr. Fairclough identified issues that undermined the effectiveness of special measures, and barriers to more frequent use of such measures (Fairclough, 2002, p.37). These were failures in live link technology; poor quality Achieving Best Evidence (ABE) interviews; poor operational experience working with screens and live link cameras; poor quality visual and audio quality for video-evidence feeds; lower awareness of special measures and benefits; and issues with identification of vulnerability (Fairclough, 2002, p.37).

Dr. Fairclough also found that even though the police hold primary responsibility for identification of vulnerability, the evidence suggested they were not adequately trained and supported in this regard, and neither were advocates and judges (2020, p.37). This is despite the best practice direction in *R v YGM* that all advocates and judges were expected to ensure they kept up to date with the latest best practices in the treatment of vulnerable witnesses. This finding is also concurred with the findings of a research study conducted on behalf of The Equality and Human Rights Commission (2017), into people with learning disabilities and the CJS.

It was found that existing evidence highlighted a lack of an established routine procedure for identifying people with learning disabilities, and there was a lack of awareness and practical training on this issue available throughout the CJS (The Equality and Human Rights Commission, 2017, pp.3-4). Overall, the Commission was

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

found that the research study reflected findings from existing evidence, and it confirmed there had been little improvement in recent years in addressing challenges and disadvantages faced by persons with learning disabilities in the CJS (The Equality and Human Rights Commission, 2017, p.11).

Further problems identified by Dr. Fairclough, included that evidence showed that some confusion still remained regarding the role of the intermediary amongst criminal justice professionals; that live link facilities were not fit for purpose and were often found to be unwelcoming; and that there were insufficient numbers of registered intermediaries (Fairclough, 2002, p.37). Dr. Fairclough (2002, p.37) also conjectured that a lack of awareness generally existed as to the benefits of special measures for defence witnesses, because special measures were considered to be measures for the prosecution. Another study sought to investigate this area further.

Criminal Practitioner Qualitative Study

In a later study qualitative interviews were carried out with 18 criminal practitioners (5 trial judges, 8 barristers, 5 solicitors) who collectively had over 400 years of post-qualified experience (Fairclough, 2017, p.214). The study found that in situations where a defendant was sufficiently vulnerable to qualify for the use of live link, the provision was rarely invoked in practice (Fairclough, 2017, p.209). The main barriers identified were: (1) lack of awareness of the defendant provision; (2) identification of defendant vulnerability; and (3) the perception that live link was not beneficial to defendant witnesses (Fairclough, 2017, pp.215-219).

The study on conclusion found that there was a highly significant discrepancy between the YJCEA special measures protections afforded to non-defendant witnesses and vulnerable defendant witnesses (Fairclough, 2017, p.226). Hoyano (2018) says it is disconcerting that defendants with the same learning difficulties are often seen as not requiring special measures, especially as they are also subjected to distinct pressures.

This may also derive from misplaced impression of the adverse effect measures may have on the jury, thereby limiting its uptake (Fairclough, 2002, p.37). Consequently, Hoyano (2018) believes that the 'distancing myth' (i.e., special measures distancing effect on jurors) needs to be dispelled.

In practice the special measures framework identifies a clear tension between the rights of the accused to a fair trial, and the interests of other participants (i.e., victims, witnesses). The study findings show that there is a clear resulting imbalance that still exists in practice against defendants. Article 6 of the *European Convention on Human Rights (ECHR)* govern the right to a fair trial. Article 6(1) of the *ECHR* states that every individual is entitled to a fair and public hearing, within a reasonable time frame, and by a tribunal established by law that is independent and impartial.

Article 6(3)(d) of the *ECHR* states that every individual that is charged with a criminal offence has certain minimum rights, including the right to examine (or have examined) witnesses against him or her, and also to obtain the attendance and examination of witnesses on his or her behalf (under the same conditions). In light of these specific obligations, Emson (2004, p.504) believes that the use of special measures for prosecution witnesses will not necessarily mean the accused is prevented from having a fair trial. The interests of the defence must be balanced against the interests of witnesses or victims called to testify, so as not to unjustifiably imperil their interests (Emson, 2004, p.504; *Doorson v Netherlands* (1996) 22 EHRR 330, p.358).

The *YJCEA* preserves the right of the accused to have witness evidence challenged by cross-examination, and also requires a warning to be given to the jury, when necessary, against the drawing of an assumption against the accused, if a special measure has been used (Emson, 2004, pp.504-505). With this in mind, Emson states that "...it is difficult to see how an effective challenge on the fairness of the trial can be made if the sole argument is that there has been an infringement of Article 6(3)(d)" (2004, p.505). Indeed, challenges under Article 6(3)(d) have previously failed (*R v Camberwell Green Youth Court, ex parte D* [2005] 1 All E R 999).

Home Office Special Measures Research Study

Another research study carried out by the Home Office before and after implementation of the YJCEA reforms, on vulnerable and intimidated witnesses (VIWs) (Hamlyn *et al.*, 2004, p.ix). During phase one (P1) (between November 2000 and February 2001) 552 witnesses were interviewed (with a net response rate of 80%), and during phase two (P2) (between April and June 2003) 569 witnesses were interviewed (with a net response rate of 81%) (Hamlyn *et al.*, 2004, pp.x-xi). The study found the many of the witnesses were affected by intimidation, either directly or because they feared intimidation, and that most witnesses found being a witness stressful, especially seeing the defendant or their associates, or upon cross-examination (71% in P2 found this “upsetting”) (Hamlyn *et al.*, 2004, pp.xii-xiii).

The value of special measures was highlighted by the findings that witnesses using special measures in P2 rated them highly (e.g., 9 in 10 witnesses found the live TV link useful); 33% of witnesses said they would not have been willing and able to give evidence without special measures; and around 3/5 of witnesses who gave evidence but did not use special measures, said that they would have found them useful (e.g., 64% said the use of pagers or mobile phones would have been useful (Hamlyn *et al.*, 2004, pp.xiii-xiv). The study concluded that when measures were used, they were very highly valued, and although satisfaction with special measures had improved “there is still some way to go before the needs of VIWs are fully met” (Hamlyn *et al.*, 2004, p.xv).

Chapter Summary

This chapter provided a multifaceted approach to the literature review, by providing a critical analysis of the legislative framework, case law, and the legal framework in practice. It was seen that the YJCEA provisions are somewhat obscure and unclear which makes comprehension quite difficult. Whilst the cases have attempted to provide some legal guidance on how provisions are to be interpreted and applied in

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

cases, the guidelines and best practices are difficult to understand, interpret, and apply in practice. There were also a range of problems identified in relation to persons with learning disabilities acting as witnesses and especially as defendants. The special measures framework continues to identify a clear tension between the rights of the accused to a fair trial, and the interests of other participants (i.e., victims, witnesses).

Chapter 3: Methodology

Introduction

In this chapter the research design and methodology used for this research study will be outlined. There will be discussion of research design and qualitative research approach, setting out aims and objectives and a discussion of research methods used and description of research methodology used for the study.

Research design

A research design refers to the overall design of a study that incorporates the research approach, any cases to be studied, the timing and arrangement of data collection (Gorard, 2013, pp.3-7). Applied to this research study, the research design will describe the research approach used, the aims and objectives of the study, and the research methodology. Gorard (2013, p.3) has stated that paying attention to research design at an early stage is necessary to enable a researcher to undertake rigorous social research.

This is an important part of research design as it involves thinking about the kinds of conclusions that a researcher may wish to draw (Gorard, 2013, p.3). In order to carry out a good research design will involve interpreting how the different parts of a research process are most suited for each other. A clear research design is also central to pursuing the stated aims and objectives of a research study (Creswell & Creswell, 2018, p.4-15). When considering designing a research study there are three commonly accepted approaches to research that can be used, these are quantitative designs, qualitative designs, and mixed methods designs (Creswell, 2014, p.3).

Quantitative designs tend to reflect scientific approaches based on analysis of numerical data, for example survey research using quantitative questionnaires, or experimental research such as randomised true experiments (Creswell, 2014, pp.12-13). Qualitative designs focus more on exploring or understanding a situation, for example case studies can focus on developing an in-depth qualitative analysis of a case, such as an event, activity, or process (Creswell, 2014, pp.13-14). Mixed methods involve combining quantitative and qualitative designs.

This research study will adopt a qualitative research approach which can provide complex textual descriptions of how individuals may experience a given research issue (Mack *et al.*, 2005, p.1). Qualitative research is primarily used for research situations where it may be necessary to identify abstract factors (e.g., roles of individuals, social norms, socioeconomic status) which may not be readily apparent (Mack *et al.*, 2005, pp.1-2). The objectives in this type of research include describing group norms, describing individual experiences, describing relationships, describing variations, and exploring causal relationships (Mack *et al.*, 2005, p.3).

Research aims and objectives

The research aim refers to the main goal, or overarching purpose, of a research study or project, and is typically broad in nature (Thomas and Hodges, 2010, p.38). The research aim is customarily accompanied by a number of statements describing the research objectives, which will provide more details about the research topics, or issues, that the study plans to investigate (Thomas and Hodges, 2010, p.38). Thomas *et al.* (2010, p.38) have stated that good practice would require the topics to be numbered so they can be referred to throughout the study.

When interpreting and applying the research aims and objectives, it is accepted that the criminal justice system (CJS) is not a cure for all of society's ills (Rosenberg 2009, pp.1, 5). In this present research context, the vulnerable witness protections

available under the *Youth Justice and Criminal Evidence Act 1999* (YJCEA 1999) may not always function as intended, and so whilst accused persons are not entitled to a 'perfect' trial, they must objectively receive a 'fair' one (Fairfax, 2009, p.435).

Research Aim

The aim of this research study is to determine whether the current vulnerable witness approach under section 16 of the YJCEA 1999 reasonably accommodates vulnerable persons, by focusing on those with learning disabilities (or similar developmental disabilities) who become involved with the CJS in any capacity.

In order to support the overall research study aim, there are three research objectives set out:

Objective 1: to critically analyse the existing legislative framework governing the current vulnerable witness approach;

Objective 2: to assemble a comprehensive body of high-level case law in England and Wales, Australia, and Canada, along with relevant academic commentaries;

Objective 3: to critically analyse the existing legislative framework and high-level domestic and foreign jurisdiction case law with a view to identifying structural and operational deficiencies; and

Objective 4: to provide cogent law reform recommendations that ensure that the balancing of fair trial interests may ultimately be achieved in practice.

Research Methods

According to McConville and Hong Chui (2017, p.1) legal research and scholarship has followed two main traditions. The first is 'black-letter law' (law that is not in dispute), which focuses upon the law itself 'self-sustaining set of principles', and which is determined through study of court judgments and statutes (McConville and Hong Chui, 2017, p.1). In this approach, values and principles are derived from cases and develop into a comprehensible framework bounded by order, rationality, and theoretical cohesion (McConville and Hong Chui, 2017, p.1).

The second is 'law in context' as described by Selznick (2003, p.177). This approach broadens the study of law by examining the nature of law within society, and incorporating materials from other areas such as humanities, social sciences, and other disciplines, to help to explain the operation of law in practice within a particular legal field (McConville and Hong Chui, 2017, p.1). McConville et al, (2017) have considered that this can also involve consideration of law within cultural, economic, environmental, political, social, and technological contexts

Chynoweth (2008, p.672) has said that Pure 'doctrinal' legal research seeks to define legal 'doctrines' by analysing legal rules, i.e., systematic formulations of the law within a particular context. These doctrines, such as the doctrine of consideration within the law of contract, seek to clarify uncertainty within rules, and develop logical and clear structures for them, and also describe relationships to other rules (Chynoweth, 2008, p.672). As legal rules are standardising in character the doctrinal research process is typically one of analysis, rather than data collection (Chynoweth, 2008, p.678).

As a result, Chynoweth (2008, p.678) states that "no purpose would be served by including a methodology section within a doctrinal research publication". The dilemma with this traditional legal approach is that few studies focus solely on doctrinal

research. Indeed, most authors and researchers have criticised a pure doctrinal analysis research approach as being inflexible and insular, in terms of how it aims to provide understand of the law and how the legal system operates (McConville and Hong Chui, 2017, p.5; Vick, 2004, p.163).

According to Langbroek *et al.* (2017, p.1), the traditional legal research is now confronted with the challenge of making its methodology much more clear-cut. Considering the type of legal analysis undertaken in any modern research study may vary significantly in terms of the types of cases, primary and secondary legislation, and academic books and articles researched and referenced, it is crucial that a legal researcher expressly documents the legal analysis approach used.

As legal research is qualitative in nature this increases the overall reliability of the research, this means that, another legal researcher could apply the same research methodology and achieve the same conclusions (Golafshani, 2003). However, where the law in context approach is adopted, such as socio-legal studies (Banakar and Travers, 2013, p.xi), the research methodology that is finally employed can provide a detailed process methodology that details the approach and methods used to analyse and interpret the law.

The Research Methodology

Divakaranachari (2014, p.21), has said that research methodology refers to a way to systematically solve the stated research problem. It is the procedure of research techniques that are to be used, and it provides guidelines about how research is to be done, i.e., the actual procedure of collecting and ordering the data (Daniel and Sam, 2011, pp.39-40). For a researcher this means knowing how to apply particular research methods or techniques, and also “which of these methods or techniques, are

relevant and which are not, and what they would mean and indicate and why” (Divakaranachari, 2014, p.21).

Research methods are all methods or techniques that are set out in the research methodology that will be used to carry out the research study (Divarkaranchari, 2014, p.19). For example, for library research undertaken as part of a research study, research methods might consist of analysis of historical records and/or analysis of documents (Divarkaranchari, 2014, p.19). The research techniques used to carry out the research methods, might include recording of notes, content analysis, statistical compilations, and use of reference and abstract guides (Divarkaranchari, 2014, p.19).

The research study will adopt a research methodology that is based on undertaking a literature review and an analysis of secondary research materials. Boslaugh, (2009, p.1), describes primary data as data that is made up of data that is collected by a researcher for a specific purpose, for example, data that may be collected from interviews carried out directly with witnesses in civil proceedings). Secondary data refers to data that already exists, or data that may already have been collected by another research team (Boslaugh, 2009, p.1).

The qualitative analysis of secondary data to be used in this study will analyse existing secondary data in order to achieve the overall research aim and objectives (Long-Sutehall, Sque, & Addington-Hall, 2010, p.336). The advantages of secondary analysis when carrying out a research study include that it can provided access to extremely high-quality data (e.g., data obtained with rigorous sampling procedures) and it also has the advantage that it saves costs and time, (Bryman and Bell, 2011, pp.313-314).

This approach may be useful when dealing with a topic which is sensitive in nature and has a research population that is elusive, for example, vulnerable witnesses (Long-Sutehall, Sque, & Addington-Hall, 2010, p.336). It can be used to apply a new perspective to research issues, and to analyse contemporary behaviour of individuals (e.g., vulnerable witnesses); groups, (e.g., criminal defence lawyers, the Crown Prosecution Service); and societies or organisations (e.g., courts, CJS) (Long-Sutehall, Sque, & Addington-Hall, 2010, p.336). The secondary research methodology will research, identify, review, and critically appraise both primary and secondary research materials.

Within the context of law, primary research materials consist of legislation (i.e., primary statutes, secondary statutory instruments) and law reports (i.e., cases), and secondary research materials consist of academic and practitioner textbooks, encyclopaedias (e.g., Halsbury's Laws), law manuals, and journal articles. Professional electronic legal materials will also be accessed from online legal databases such as JSTOR; LexisNexis professional; Sage Journals (e.g., The International Journal of Evidence & Proof, Journal of English Linguistics); and Westlaw. A literature review refers to a relatively systematic way of collecting and synthesising previous research (Snyder, 2019, p.333).

According to Snyder (2019, p.333) there are a range of strategic advantages that the literature review can achieve firstly, it creates a firm foundation for advancing knowledge and further the development of theory; secondly, it can address research questions that cannot be answered by other studies); thirdly, it can help to provide an overview of areas where research is disparate and interdisciplinary; and finally, it can incorporate research findings to show evidence and to uncover areas where more research may be needed. This research study adopts a multifaceted approach to the literature review, consisting of an analysis of the legislative framework; and analysis of case law; and critical analysis of the legal framework in practice.

Chapter Summary

This chapter has discussed what a research design seeks to achieve in practice as well as details of the research design used for this study. It was identified that the study will adopt a qualitative research approach. The chapter also set out the research aim and supporting research objectives to be achieved. Research methods for law were briefly discussed to provide contextual background to the legal approach and research methodology adopted for the purposes of this study. It was seen that the research methodology will consist of a literature review and an analysis of secondary research materials, which consist of both primary (e.g., legislation, cases) and secondary research materials (e.g., journal articles).

Chapter 4: International Comparative

This chapter will provide a critical comparative analysis of international standards for vulnerable witnesses by analysing the relevant legislative framework of two comparator Commonwealth common law jurisdictions. These are Canada and the Commonwealth of Australia (Australia). It is expected that these particular common law jurisdictions will be able to provide alternative perspectives of jurisdictional approaches currently adopted, relating to the provision of special protections available for vulnerable witnesses within each criminal justice system (CJS). The international standards reviewed are particularly apt for comparing different approaches adopted by the courts in relation to balancing essential rights, against the potential rights and needs of vulnerable witnesses.

Canada

Canada's previous vulnerable witness framework has been updated and modernised via Bill C-2, *An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act*, this took effect on 2 January 2006. This provided expanded use of testimonial aids for vulnerable witnesses under section 486 of the *Criminal Code*. Section 486(1) of the *Criminal Code* provides that, although there is a presumption that criminal proceedings against an accused are to be held in open court, the judge or justice may order the public to be excluded from all or part of the proceedings.

There are six grounds upon which a court may make such an order. However, for present purposes the court may make such an order on the ground that it is of the opinion that such an order is necessary for the "proper administration of justice" (*Criminal Code*, s.486(1)). This term is characterised to include, ensuring that the interests of witnesses under 18 years are safeguarded, and ensuring justice system

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

participants involved in proceedings are protected (*Criminal Code, s.486(2)(a)-(b)*). The 2006 amendments were enacted in order to ensure that testimonial aids *must* be made available for adult witnesses with mental or physical disabilities, provided they would interfere with the proper administration of justice, i.e., presumptive orders (Presumptive Orders) (Department of Justice, 2016).

An example where this may occur is, the witness or the prosecutor may apply for a support person of the witness' choice to be present and close to the witness while the witness testifies (*Criminal Code, s.486.1(1)*). For other types of witness (i.e., not minors or those with disabilities), the court can make such an order if the court believes that an order is "necessary to obtain a full and candid account from the witness of the acts complained of", i.e., discretionary orders (Discretionary Orders) (*Criminal Code, s.486(1)(2)*).

For Discretionary Orders (for example relating to support persons), the court is required to consider age; any other circumstances considered relevant; nature of any relationship (witness and accused); nature of the offence; and whether the witness has a mental or physical disability (*Criminal Code, s.486.1(3)*). Mary T Ainslie Q.C. argues that "It is arguably problematic that both the presumptive and discretionary schemes refer to adults with a "physical or mental disability" (Ainslie, 2013, p.7).

The assumption asserted by Ainslie seems to be that the schemes may be criticised on the basis that they may unfairly discriminate against people with mental or physical disabilities, i.e., one is a presumptive group, and another is a discretionary group. It is true that at first sight it seems somewhat odd that both schemes refer to people with disabilities. Nevertheless, if a legislative purposive approach is adopted, it may be argued that both orders seek to operate independently, so that if an individual fails to secure the Presumption Order, evidence of mental or physical disability may still be offered and considered within the Discretionary Order.

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

For instance, individuals with certain learning or similar developmental disabilities, they may not automatically be classified as people with a mental disability under current Canadian law and policy. It may consequently be the case that the discretionary scheme seeks to provide a fall-back catch all provision, which would allow the court to take into consideration evidence of such mental disability. However, even if this approach is adopted, it still does not deal sufficiently with the issue of the criteria as to what constitutes a disability with respect to each scheme, as people with mental and learning disabilities are not a homogenous group (*R v Billy* [2006] BCPC 203 Ainslie, 2013, p.7).

Presumptive Orders are also available when testimony is secured outside of the court room (*Criminal Code*, s.486.2(1)). The constitutionality of such orders was challenged in the case of *R v C.N.H* [2006] BCJ No 782, on the grounds that they *inter alia* (among other things) breached fundamental rights under sections 7 (right to life, liberty and security of person) and 11(d) (presumption of innocence) of the *Canadian Charter of Rights and Freedoms of 1982*. In evaluating this case, the court reviewed, and took into consideration, Parliamentary objectives, case law on the efficacy of testimonial aids at trial, and case law on the constitutional merits of legislation permitting testimonial aids (*R v C.N.H*, para.[11]).

The court first evaluated authorities on video witness testimony (*R v Heyman et al* [2000] YJ No 6; *R v Gibson* [2003] BCJ No 812; *Bradley v Bradley* [1999] BCJ No 2116 (SC)), and testimonial aids (*R v L.D.O.*) (1993) 85 CCC (3d) 289; *R v Levogiannis* (1993) 85 CCC (3d) 327). Following this it found that constitutional rights had not been infringed (*R v C.N.H*, para.[36]). Nor was the court willing to accept that the availability of testimonial aids by definition unfairly shifted the burden on the accused (i.e., to show an order would interfere with the proper administration of justice) (*R v C.N.H*, paras.[37] and [41]). In *R v Alam* [2006] ONCJ 59 the court noted that in practice the accommodation of people with disabilities as witnesses had to be carefully balanced with the right to a fair trial (para.[34]).

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

This means that the court's discretion to deny the use of a special accommodation under the presumptive scheme can be exercised if such accommodation would interfere with the accused's right to a fair trial (*R v J.Z.S.* [2010] SCC1; Ainslie, 2013, p.9). For example, cases where the court has denied applications include those where there was a reluctance to use technology because of its potential impact on credibility (*R v D.(C.)* [2010] OJ No 4351 (CJus), para.[19]), or because of potential prejudice on a jury (*R v Kerr* [2011] ONSC 1231, para.[16]; *R v Saheli* [2011] ONCJ 39, para.[26]) (Ainslie, 2013, p.9). This demonstrates that the Canadian courts continue to carefully monitor and supervise the exercise of Presumptive and Discretionary Orders.

Australia

Australia consists of a number of states (e.g., New South Wales (NSW), Queensland, South Australia (SA)), internal territories (e.g., Australian Capital Territory), and external territories (e.g., Ashmore). Therefore, although in practice each state or territory has implemented different civil and criminal law frameworks within each jurisdiction, such frameworks are often similar and consistent in nature. In this respect, it has been observed that courts in SA, in common with many other Australian jurisdictions, may exercise a wide discretion with respect to measures that can be drawn upon to assist vulnerable witnesses in giving evidence (Bowden *et al.*, 2014, p.548).

For instance, in SA such measures are available under sections 13 (*special arrangements for protecting witnesses*) and 13A (*special arrangements for protecting vulnerable witnesses*) of the *Evidence Act 1929* (SA). A vulnerable witness is defined to include a witness who is cognitively impaired (*Evidence Act 1929* (SA), s.4(1)). Cognitive impairment is broadly defined to include a mental illness, an acquired disability (e.g., dementia, neurological disorder), or a developmental disability (e.g., intellectual disability) (*Evidence Act 1929* (SA), s.4(1)).

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

The discretion to implement special arrangements must be exercised in favour of an applicant if: (1) a vulnerable witness is to give evidence; (2) facilities for special arrangements are readily available to the court, and it is practicable to put them in place; and (3) the special arrangements can be made without prejudicing any party to proceedings (*Evidence Act 1929* (SA), s.13A(1)(a)-(c)). The SA approach therefore seems to adopt a common-sense approach to special arrangements for persons with learning disabilities, that focuses on accommodating the individual if at all possible.

In Western Australia (WA), section 106R of the *Evidence Act 1906* (WA) empowers the court to declare any person who is giving evidence to be deemed to be a special witness. In order to treat an individual as a special witness, the court must form the opinion that, because of the individual's physical disability or mental impairment, such individual would be unlikely to be able to give evidence, or alternatively, to give evidence satisfactorily (*Evidence Act 1906* (WA), s.106R(3)(a)). A mental impairment is defined to include brain damage, intellectual disability, mental illness, or senility (*Evidence Act 1906* (WA), s.106A; *Criminal Law (Mentally Impaired Accused) Act 1996*, s.8).

There is an alternative route, which is if the court forms the opinion that the individual would be likely to suffer severe emotional trauma, or would be so intimidated or distressed, that the individual would be unable to give evidence, or give evidence satisfactorily (*Evidence Act 1906* (WA), s.106R(3)(b)(i)-(ii)). Such intimidation or distress must be assessed by the court taking into account age; cultural background; nature of the evidence subject matter; relationship to any party to proceedings; or any other factor the courts considers to be relevant (*Evidence Act 1906* (WA), s.106R(3)(b)(ii)).

Once a witness is deemed to be a special witness, a range of additional measures (e.g., use of a communicator, video links, screening arrangements, visually recorded evidence) can be put in place to assist the witness with the giving of evidence, thereby mitigating the stress for the witness and increasing evidence quality (Supreme Court

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

of Western Australia, 2009, para.[4.4.4]). However, it should be noted that in order for special witnesses to benefit of a support person, the support person must be approved by the court (*Evidence Act 1906 (WA)*, s.106R(4)(a)).

This position in WA contrasts greatly with the position in SA, where the court has powers to make an order enabling witnesses to be accompanied by a friend, relative, or other person, in order to provide “emotional support” (*Evidence Act 1929 (SA)*, s.13A(2)(e)(i)). In practice, Bowden *et al.* (2014, p.543) have argued that, despite the fact that the special measures are well intended, they have actually had limited practical effect “because they fail to address the underlying problems that arise from the adversarial system itself.”

As a result, they contend that Australia would benefit and should implement a framework across all Australian jurisdictions for witnesses with intellectual disabilities, which will entrust to an independent interviewer with specialist qualifications, the questioning of such witnesses (Bowden *et al.*, 2014, p.543). They consider that this model may offer the biggest potential for such vulnerable witnesses to be able to participate effectively and equally in criminal trials (Bowden *et al.*, 2014, p.544).

This line of reasoning seems to be rational. When we talk about persons with learning or similar disabilities effectively participating in the CJS, what is the fundamental overall objective that we are seeking to secure? Are we talking about the right of interrogating barristers to be able to tear the evidence or testimony of the vulnerable witness apart, or are we really talking about securing the truth? In principle, the adversarial system of justice that exists seems to be based purely on the historical approach adopted. In terms of special measures, the prevailing approach adopted seems to reflect trying to fit a round peg into a square hole, rather than thinking about the fundamental design of the system itself.

Viewed from this perspective, the current approach to special measures seems to be focused on damage control, or on mitigating the negative effects and impact of witness testimony on such vulnerable witnesses. This approach seems to be affirmation on the belief that the existing legal system is perfectly acceptable, and it only needs to be slightly adapted to accommodate such issues, challenges, and problems. The evidence seems to have shown that this minimalist approach to special measures has not worked.

International Vulnerable Witness Frameworks

The problem is that all the available evidence seems to point to the opposite conclusion, that special measures have in actuality failed to address barriers to obtaining justice faced by vulnerable witnesses (Bowden *et al.*, 2014, p.544). Hepner *et al.* (2015, p.453) analysed the Witness Intermediary Scheme in use in England and Wales (E&W), and they proposed that in practice, the implementation of such a scheme across Australian jurisdictions is necessary to facilitate access to justice by people with intellectual disability as vulnerable witnesses.

Cooper and Mattison (2017) carried out a comparative study of intermediaries, intermediary schemes, and vulnerable people across three versions of the English intermediary model, i.e., E&W, Northern Ireland, and NSW. In terms of volumes, they found that since August 2009, there had been 15,274 witnesses which were either seen or assisted in some way by an intermediary in E&W, with a total of 5,772 requests for intermediaries noted between 1 April 2015 and 31 March 2016 (Cooper and Mattison, 2017, p.360).

In NSW, a pilot scheme for intermediaries available for children only was set up, and between 4 April 2016 and 31 May 2017 it had received 751 intermediary referrals (Cooper and Mattison, 2017, p.360). This demonstrates a strong take up of intermediary services in the Australian pilot scheme. According to Cooper and

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

Mattison (2017, p.366) the intermediary role continues to garner support from police, judges, and lawyers, and in E&W the scheme was reported to be highly successful, and the role of intermediaries was believed to have become integral to the CJS (Plotnikoff and Woolfson, 2015).

It was noted that other Australian jurisdictions (Victoria, Tasmania) had shown interest in the intermediary model, yet the authors found it striking that very little research “...had been conducted into the completeness, accuracy and coherence and evidence that intermediaries facilitate” (Cooper and Mattison, 2017, p.367). This is a concern as in practice, intermediary schemes have huge potential to offer help and assistance to vulnerable witnesses, especially with regards to helping accommodate persons with learning or similar developmental disabilities (Cooper and Mattison, 2017, p.367).

The clear issue is that without the backing of scientific research demonstrating and linking the positive impact of intermediaries on the quality of evidence of vulnerable witnesses, justification of costs may prove to be elusive (Cooper and Mattison, 2017, p.367). The comparative analysis of intermediary schemes helps to provide contextual application of schemes to assist and accommodate persons with learning disabilities. The vulnerable witness framework analysed in Canada demonstrates a more modern and progressive approach to accommodating vulnerable witnesses.

The distinction between Presumptive Orders and Discretionary Orders had been implemented to clearly reflect the intention of the legislature to support and facilitate easier access to justice for particular types of vulnerable witnesses. In addition, the balancing of constitutional rights, vulnerable witnesses, and testimonial aids by the court in the case of *R v C.N.H.*, showed that this approach can still accommodate persons with learning disabilities in the CJS, whilst adhering to fundamental procedural and due process rights.

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

In Australia, it was seen that the SA approach to special arrangements was pragmatic and facilitative in nature. For example, if a witness has a cognitive impairment, an order can direct that evidence be taken in a particular way that may facilitate the taking of evidence, or that minimises the embarrassment or distress of a witness (including if a witness has complex communication needs) (*Evidence Act 1929* (SA), s.13A(2)(e)(ii)). Words such as embarrassment, distress, and emotional support, all seem to reflect a more humanistic and empathetic approach to vulnerable witnesses.

This approach does not lose sight of the need to ensure justice. For instance, it is stated that if a person with learning disabilities is accompanied by a person to provide emotional support, or communication assistance, that person still has to remain clearly visible to the judge and jury while the witness is giving evidence (*Evidence Act 1929* (SA), s.13A(5)). There are consequently built-in mechanisms to guard against potential abuse of special arrangements provided. It is, however, submitted care must also be taken when analysing such procedural action, as often culture and context are just as important as any implemented measures.

The Australian Human Rights Commission (1989) explains that many individuals with intellectual disabilities are often prevented from giving evidence in court because of their perceived lack of capacity. In Australia, the law requires that a witness has sufficient understanding to know what it means to tell the truth (*R v Hayes* (1977) 64 Cr App R 194; *R v Bellamy* (1986) 82 Cr App R 222), that not telling the truth is against the law, and that a witness has sufficient memory and capacity to express such memory (*Ranieri v Ranien* (1973) 7 SASR 418) (Australian Human Rights Commission, 1989).

However, it also states that a female client of a residential service in the Sydney metropolitan area had reported that she had been sexually assaulted, but the police had refused to report the complaint, because they believed that it would be a waste of their time, as no court would believe such a person, and she would not be able to give evidence anyway (Australian Human Rights Commission, 1989). This demonstrates

the importance of analysing accommodations for persons with learning or similar developmental disabilities, not simply within the context of the CJS, but also within the prevailing approach of the particular society in question.

Chapter Summary

This chapter provided an overview of the different approach to vulnerable witnesses in Canada, where the courts adopt a bilateral approach consisting of the use of both Presumptive Orders and Discretionary Orders. This comparative analysis was then developed further by analysing the legislative frameworks of two Australian states (SA and WA). The approach adopted in SA provided an approach which arguably reflected a more humanistic and empathetic approach to vulnerable witnesses, whilst still providing protections against procedural abuse by witnesses and court users.

Chapter 5: The Way Forward

Introduction

This chapter will seek to provide a discussion of reform proposals with respect to the vulnerable witness framework that exists in the criminal justice system (CJS) in the United Kingdom (UK). It will begin by providing an overview of proposed modernisation reforms of the CJS in relation to vulnerable witnesses. It will then discuss reforms within the context of vulnerable witness protections for accused persons, victims/complainants, and witnesses, and then will comment on potential model jury directions.

Criminal justice system reforms and vulnerable witnesses

In its 2016 publication entitled *Transforming Our Justice System*, the Ministry of Justice set out bold new proposals to modernise and update courts and tribunals in the UK. It was stated that the UK Government had committed to investing more than £700 million to modernise the courts service and over £270 million more in the CJS (Ministry of Justice, 2016, p.3). The stated vision was to provide a justice system with people's needs and expectations place at the heart of the system, and built on three core principles, namely that it is: (1) just; (2) proportionate; and (3) accessible (Ministry of Justice, 2016, p.5).

Further to this central vision by the Ministry of Justice (2016), it was proposed that: (1) vulnerable witnesses are to "be supported by clear and effective processes" (p.5); (2) the number of locations from where victims and witnesses can give evidence was to be increased; (3) statements (including victims' personal statements) are to be made available across a digital case management system across Crown Court centres; (4) pre-trial cross examination has been rolled out since 2017 and will continue to be rolled

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

out; and (5) the entire CJS is being digitised, in partnership with the Crown Prosecution Service (CPS) and the police (p.8).

Vulnerable persons protections for accused persons

Fairclough (2018, p.21) states that the current law on special measures provisions has failed to provide procedural equality for both victims and vulnerable defendants. Special measures such as communication aids and screens are available to accommodate persons with learning disabilities (*T and V UK* (1999) 30 EHHR 121; *Waltham Forest Youth Court* [2004] EWHC 715; Fairclough, 2018, p.21).

However, the provisions on live link evidence for defendants and intermediaries are more restrictive, and the eligibility criteria for defendants are still more difficult than for non-defendants (Hoyano, 2010; Hoyano and Rafferty, 2017, p.95; Fairclough, 2018, p.21; Fairclough, 2019). Fairclough (2018, p.24) indicates that this has therefore resulted in vulnerable defendants (including those with learning difficulties) from being provided with equal opportunity of protections compared to other vulnerable witnesses.

This not only breaches the principles set out in equality legislation (i.e., Disability Discrimination Act 1995; Equality Act 2010), but also the defendant's fair trial rights (Fairclough, 2018, p.24). Hoyano (2015, p.127) however, asserts that vulnerable defendants have to be provided with the same access "to the full panoply of special measures available to prosecution witnesses, to ensure equality of arms with the Crown and the right to effective participation in his trial."

Vulnerable persons protections for victims/complainants

In reality, there are many facets of emotional, behavioural, cultural, and practical challenges that vulnerable witness victims/complainants may face, that may be overlooked, underemphasised, or inadequately addressed (Kirby, 2017; Hoyano, 2018b). In the face of such ambitious statements of transformational intent by the UK Government with respect to proposed CJS reforms, it is all too easy to believe that such reforms will automatically lead to improvements in terms of protections available for victims/complainants.

Unfortunately, the history of structural reforms of the justice system in the UK have proved this to be a false expectation. It is therefore submitted that there needs to be a much more comprehensive approach to reviewing and implementing protections for victims/complainants to facilitate cultural and structural change. The legislative support for victims and witnesses set out in the provisions of the *Youth Justice and Criminal Evidence Act 1999* (YJCEA), was supported by additional developments, such as Victim Personal Statements (2001), the *Code of Practice for Victims of Crime* (2015), and the piloting of pre-recorded cross-examination (YJCEA, s.28) (Kirby, 2017, pp.1-2).

However, Kirby (2017, p.20) asserts that some aspects of current "court culture" hinder legislative and policy changes aimed at facilitating constructive involvement of vulnerable witnesses, victims, and complainants. These features are the ritualised and formalistic nature of court proceedings, the "them and us" relationship between legal professionals and court users, and the "organised yet chaotic nature of criminal proceedings" (Kirby, 2017, p.20). Kirby (2017, p.13) identifies a clear divide between legal professionals and court users, with an unfamiliarity and unease with the court environment experienced by court users.

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

Combative and sarcastic styles of cross-examination, combined with belittling and theatrical gestures used by barristers, exacerbate differences in communication styles, and transgress into personal remarks about demeanour and lifestyle of complainants (Kirby, pp.14-15). Cross-examination techniques have increasingly been questioned by academics and the judiciary and have been the subject of appeals involving vulnerable witnesses (*R v Barker* [2010] EWCA Crim 4; *R v Lubemba*, *R v JP* [2014] EWCA Crim 2064; Kirby, 2017, pp.14-15). Such humiliating treatment has resulted in victims being made to feel small, as if everyone hates them, and sometimes in them running out of court rooms (Kirby, 2017, pp.16).

This negative treatment has been passed off as barristers fulfilling a professional duty, or being part of the job, but it would seem to be that such behaviour is tolerated because it is a product of borderline toxic court culture which is hidden from public view because of public access restrictions in criminal courts (Kirby, 2017, p.14). According to Hoyano (2018a), "The way the case is put must be tailored to any specific vulnerability of the witness, particularly any learning difficulty or mental illness or frailty." It is difficult to see how previous negative perspectives can in any way reflect such recommended practice.

Vulnerable persons witness protections

It is suggested that the difficulty that currently arises, is the complex and somewhat disconcerting array of information regarding the availability of special measures for witnesses. Currently, not only is the current system not easily accessible, but it is particularly inaccessible for vulnerable witnesses, and especially those witnesses with learning or similar developmental disabilities. It is incredibly difficult and challenging for such individuals to understand their position, or what to expect from the court process, or even if their particular learning or developmental disability will be taken into account and accommodated within the court process.

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

This is in contrast to the position in Canada where there is a presumption that individuals will be accommodated (i.e., Presumptive Orders), and therefore they have greater advance notice and warning to prepare themselves. The framework governing special measures and people with learning disabilities participating in the CJS is far from easy to comprehend. For instance, in order to understand the relevant framework an objective viewer has to digest:

- (1) the legal framework under the YJCEA;
- (2) YJCEA case law;
- (3) the Criminal Procedure Rules 2015 (*Part 18, Measures to Assist a Witness or Defendant to Give Evidence*);
- (4) parts of the *Criminal Practice Directions (CPD)* [2015] EWCA Crim 1567 (3D.1-3D.8, 3G.10);
- (5) relevant Advocate's Gateway Toolkits (2019) (1-19);
- (6) the *Witness Charter* (Ministry of Justice, 2013); and
- (7) *Vulnerable and Intimidated Witnesses A Police Service Guide* (Ministry of Justice, 2011).

This applies only to the substantive framework, it does not cover the criminal procedural framework, such as making applications for a special measure's direction (*Criminal Procedure Rules (CPR), rule 29.3 and 29.10*). An application for a special

measures direction requires among other things an applicant to explain how a witness is eligible for assistance; why special measures are likely to improve the quality of evidence; propose which measures would be likely to maximise the quality of evidence (so far as practicable); and identify any views a witness has expressed about eligibility for assistance, likelihood the measures would improve the quality of evidence, or on the measures proposed by the applicant (*CPR, rule 18.10*).

If the CJS is undertaking a digitalisation programme, it makes sense to modernise and consolidate the approach to special measures to make witness protections as transparent, efficient, and accessible as possible. The Civil Justice Council (CJC) proposed a number of recommendations for special measures and vulnerable witnesses relating to the civil procedure system (CJC, 2020). It is submitted that by adopting certain of these recommendations by analogy, the CJS could be improved. These include (CJC, 2020):

- (1) updating the 2015 *CPD* to reflect modern best practices (*Recommendation 1*, p.125);
- (2) streamlining court forms, responses, directions questionnaires and online access to enable digitisation of forms to cover and track the applicability and use of special measures (*Recommendation 2*, p.125);
- (3) capturing data in relation to vulnerability of court users for future statistical and research use (*Recommendation 3*, p.126);
- (4) mandatory training for judges covering standardised core elements (detecting/assessing vulnerability; case management for a vulnerable party/witness; conduct of hearings (questioning of witnesses) (*Recommendation 4*, p.126);

- (5) training for legal representatives covering standardised core elements of vulnerability and questioning of vulnerable witnesses) (*Recommendation 5*, p.126);
- (6) standardised guidelines for the use of intermediaries for judges and legal representatives and separate guidelines for use of intermediaries by vulnerable witnesses (*Recommendation 9*, p.127);
- (7) vulnerable court users' modernisation programme impact assessment monitoring and audit programme (*Recommendations 11 and 12*, p.128);
- (8) assisted digital criminal court access (i.e., easily accessible, adequately resourced, comprehensive assistance to avoid risk of court users suffering disadvantage) (*Recommendation 13*, p.128);
- (9) updating of court protocols to reflect vulnerable persons modern best practices (*Recommendation 14*, p.128);
- (10) information for court users (i.e., easy access to highly comprehensive and modern guidance relating to vulnerable witnesses and vulnerable (and other) court users) (*Recommendation 16*, p.129).

Overall, as noted by Gerry and Cooper (2017, p.265), this calls for a revised approach to case management and court adaptation, in order to realistically, and fairly, accommodate a disability or other vulnerability in court. This shows a more advanced approach to addressing these issues which, for example, can be seen in Australia (e.g., the highly comprehensive commentary in the *Equal Justice Bench Book*

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

(Supreme Court of Western Australia, 2009), or Canada (e.g., the *Nova Scotia Testimonial Aids Protocol* (Department of Justice Victim Services Programs, 2013).

Model jury directions

The Crown Court Compendium (CCC) for the UK CJS sets out somewhat limited information regarding special measures jury instructions and directions to be used by the court (*Figure 1; Figure 2*) (Judicial College, 2018). On the one hand, the CCC is currently 447 pages in length and so it is understandable that a conservative approach has been employed to further expanding its substantive content. However, on the other hand, with the modernisation and assisted digital criminal court system envisaged by the *Transforming Our Justice System* reforms, it seems counterproductive to continue to rely on accessing such information only via PDF (portable document format).

If the CCC is fully digitised, searchable, and extendable, then it makes sense to significantly expand the content available with respect to model jury directions. Judges would then be able to instantaneously access a range of instructive model jury instructions via computer terminals. As a result, model jury directions that were expanded to cover a broader range of areas, such as those addressing persons with learning or similar developmental disabilities, would be very helpful to the court process and would provide greater instruction to judges over time.

25. If any witness is giving evidence by special measures, the measures should be described to the jury, who should be told that the use of such measures is common-place in criminal trials, that it is simply to put the witness at ease as far as possible, and that their use in this case should not affect the jury's view of the evidence of the witness concerned and is no reflection on the defendant.

Figure 1: Special Measures Directions Example 1 (Judicial College, 2018, p.3-4)

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

Directions

10. In respect of any special measures for witnesses the purpose of a direction is to explain what is to happen or has happened and to ensure that there is no prejudice to the defendant. This should be done before the evidence is presented and a short reminder of this should be given in the summing up.
11. In all special measures cases an explanation should be given about the purpose of presenting evidence with special measures: to permit a witness who may be nervous about giving evidence in open court to give evidence without having to see/be seen by anyone other than those who need to see the witness give evidence (jury, advocates, judge) and to put the witness, so far as is possible, at ease.
12. A transcript of an ABE interview should only be provided to the jury to enable them better to follow the evidence of the witness. If the interview is inaudible, the transcript must not be used as a substitute and the witness may have to give oral evidence at the trial.
13. If the jury are provided with a transcript of an ABE interview, they should be told:
 - (1) This is only so that they can more easily follow the interview. However, it is what they see and hear on the recording which is the evidence not what they read on the transcript. For this reason they must take care to watch the video as it is shown, so that they can assess the manner/demeanour of the witness when giving evidence.
 - (2) [If appropriate:] The transcript will be/has been withdrawn after the playing of the recording because there is no transcript of the cross examination of the witness or any of the evidence of other witnesses and to avoid the danger of concentrating on the transcript, rather than on the evidence as a whole.
 - (3) The transcript cannot be revisited and should not be requested during retirement.
14. The transcript should never normally be retained by the jury after the witness has completed their evidence in chief. If, in an exceptional case it is suggested by one or more of the advocates or by the jury themselves that the jury should retain a transcript after the evidence in chief and/or that the recording should be re-played, the judge must hear submissions of the advocates and decide on the appropriate course. Should the judge permit either course, they must always ensure that the cross-examination and re-examination of the witness concerned are fully summed up, and direct the jury that they must base their verdict(s) on the evidence as a whole and must not be over-reliant on the transcript/recording. The case of *R⁷¹* highlights how much care is called for if a jury are to be given access to transcripts. It is a decision that should never be made without very careful consideration of the relevant authorities and after discussion with the parties.

Figure 2: Special Measures Directions Example 1 (Judicial College, 2018, p.3-28-3-29)

Chapter Summary

This chapter provided a cohesive overview of potential reforms within the CJS relating to vulnerable witness protections. It was seen that the framework for protections (special measures) for vulnerable persons has now grown complex, and it represents a potential minefield for people with learning or similar developmental disabilities. Consequently, a range of proposed and potential substantive and procedural reforms were discussed relating to different areas.

Chapter 6: Conclusion

This dissertation set out four objectives. The first objective was to critically analyse the existing legislative framework governing the vulnerable witness approach. This objective was achieved. It involved critically analysing relevant provisions under the *Youth Justice and Criminal Evidence Act 1999* (YJCEA), the Quality of Evidence Test, and the 2011 Guidelines (*Ministry of Justice*, 2011). A number of problems were identified owing to the characteristics of learning disabilities (e.g., impairment types, severity, effects on memory/recall), and a number of challenges arising when interpreting special measures provisions.

A select range of studies were critically reviewed (i.e., Hamlyn *et al.*, 2004; Fairclough, 2017; Fairclough 2020). These studies generally identified the significance and value of special measures for vulnerable people, as well as significant remaining problems in the legal framework. The second objective was to assemble a comprehensive body of high-level case law in England and Wales (E&W), the Commonwealth of Australia (*Australia*), and Canada, together with relevant academic commentaries.

This objective has been achieved. Chapter 2 critically analysed a range of relevant cases in E&W (i.e., *R v Taylor*; *R v Brown (Christian Thomas)*; *R v Momodou and Limani et seq.*). Chapter 4 critically analysed a range of relevant legislative frameworks and cases in Australia and Canada, including academic commentaries. Therefore, the study was able to formulate a holistic view of the approaches to special measures frameworks adopted in different jurisdictions and countries, and the balancing of interests such as fair trial rights with the interests of other trial participants.

The third objective was to critically analyse the legislative framework with a view to identifying structural and operational deficiencies, by applying domestic and foreign

How effectively does the England and Wales criminal justice system accommodate persons with learning, or similar developmental disabilities?

case law. This objective has been achieved. This analysis continued through Chapters 2, 4, and 5. For instance, it identified more advanced and streamlined approaches enacted in Canada through the use of Presumptive and Discretionary Orders, and more humanistic and empathetic vulnerable witness approaches adopted in Australia.

The fourth objective was to provide compelling law reform recommendations that may ensure that balancing of fair trial interests may be achieved in practice. This objective has been achieved. A range of proposed and potential law reform recommendations were critically reviewed in Chapter 5, and they will also be summarised in the next chapter. By achieving these objectives, the study was appropriately positioned to achieve the overall objective of the study. This was to determine whether the vulnerable witness approach (YJCEA, s.16) reasonably accommodates vulnerable persons, by focusing on individuals with learning disabilities (or similar developmental disabilities) involved with the criminal justice system (CJS).

Overall, it was identified a broad range of challenges and problems still exist. For example, barriers continued to undermine the effectiveness and frequency of use of special measures; low levels of understanding and awareness of accessibility of special measures; technology failures; live link facilities not fit for purpose; poor quality interviews; poor operational technology experience; inadequate training and support of the police, legal professionals, advocates, and judges; and significant problems identifying vulnerabilities, especially with regards to individuals with learning or similar developmental disabilities.

Chapter 7: Recommendations

In light of structural and procedural problems identified, fifteen *realistic and workable* recommendations have been made.

Recommendation 1: A review of vulnerable persons protections (including persons with learning disabilities), for accused persons to ensure they provide procedural equality, to reflect principles laid down in equality legislation.

Recommendation 2: Structural and procedural reforms underlining the importance and availability of special measures for vulnerable persons (including for persons with learning disabilities), to address the negative and ‘toxic’ features within three areas of court culture identified by Kirby (2017).

Recommendation 3: To modernise, streamline, and make accessible for all vulnerable persons (including persons with learning disabilities), the highly complex substantive and procedural frameworks of different legal and information sets identified in Chapter 5.

Recommendation 4: To create standardised guidance to address information regarding vulnerable persons and witnesses; special measures and accommodating persons with learning disabilities; and the impact of such disabilities on vulnerable witnesses and the giving of evidence in criminal trials (based on a format similar to the Advocate’s Gateway Toolkit 4).

Recommendation 5: Update the *Criminal Practice Directions* [2015] EWCA Crim 1567 to mirror modern best practices (CJC, 2020; *Recommendation 1*, p.125).

Recommendation 6: To streamline court forms, responses, directions questionnaires and online access to enable the digitisation of forms to cover and track the applicability and use of special measures (CJC, 2020; *Recommendation 2*, p.125).

Recommendation 7: To capture data in relation to vulnerability of court users for future statistical and research use (CJC, 2020; *Recommendation 3*, p.126).

Recommendation 8: To provide mandatory training for judges covering standardised core elements of vulnerability (detecting/assessing vulnerability; case management for a vulnerable party/witness; conduct of hearings (questioning of witnesses) (CJC, 2020; *Recommendation 4*, p.126).

Recommendation 9: To provide training for legal representatives covering standardised core elements of vulnerability and questioning of vulnerable witnesses (CJC, 2020; *Recommendation 5*, p.126).

Recommendation 10: To create standardised guidelines for the use of intermediaries for judges and legal representatives and provide separate guidelines for use of intermediaries by vulnerable witnesses (CJC, 2020; *Recommendation 9*, p.127).

Recommendation 11: To provide vulnerable court users' modernisation programme impact assessment monitoring and audit programme (CJC, 2020; *Recommendations 11 and 12*, p.128).

Recommendation 12: To provide assisted digital criminal court access within the CJS (i.e., easily accessible, adequately resourced, comprehensive assistance to avoid risk of court users suffering disadvantage) (CJC, 2020; *Recommendation 13*, p.128).

Recommendation 13: To modernise CJS court protocols to reflect vulnerable persons modern best practices (CJC, 2020; *Recommendation 14*, p.128).

Recommendation 14: To provide modern and updated CJS information for court users (i.e., easy access to highly comprehensive and modern guidance relating to vulnerable witnesses and vulnerable (and other) court users) (CJC, 2020; *Recommendation 16*, p.129).

Recommendation 15: Develop and expand CJS model jury guidelines to address vulnerable witnesses, with specific emphasis on persons with learning disabilities that can be used within the Crown Court Compendium that is fully digitised and searchable (Judicial College, 2018).

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