

**SPECIAL MEASURES FOR CHILD WITNESSES:
A SOCIO-LEGAL STUDY OF CRIMINAL
PROCEDURE REFORM**

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Abstract

This thesis is a socio-legal study of police and prosecutorial decision-making in the context of special measures support for child witnesses in criminal proceedings. It presents the findings of an empirical research project conducted with the Crown Prosecution Service which examined the implementation of Part II of the Youth Justice and Criminal Evidence Act 1999. Under that Act children may be assisted to testify in criminal proceedings through any feasible combination of: video-recorded evidence; live television link; screens; communication aids; intermediaries; and giving evidence in private. Using a small-scale, primarily qualitative, study involving semi-structured interviews with Crown Prosecutors, this thesis investigates how the attitudes, beliefs, motivations and work practices of the police and prosecutors affect the provision of special measures to children. It does so in the context of a highly directive legal framework which purports to curtail prosecutorial and judicial discretion. The thesis explores the problems that child witnesses encounter within the criminal justice system and the legislative and policy response to their difficulties. It then presents the findings of the current research study in relation to, first, the video-interviewing patterns of police officers and, second, the rate of prosecutors' applications for special measures. In addition to the statistical data, the thesis explores prosecutors' own reflective accounts of the factors which shape police and prosecutors' decision-making. The thesis concludes that where the rules on special measures are highly prescriptive, we have witnessed a radical expansion in their use for children, but that the rigid system has drawbacks which raise pressure for reform. Reform proposals must be carefully considered in the light of infrastructural weaknesses in inter-agency liaison and information-management identified in this thesis. We might also be wary that reform will undermine the criminal justice system's recently consolidated cultural acceptance of special measures for child witnesses.

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In memory of Vida Kate Barnes MBE

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Chapter 1

Introduction

Children's involvement with the criminal justice system as victims and witnesses poses a series of challenges for the criminal justice system. This thesis examines one way in which the criminal justice agencies are able to respond to those challenges, the use of 'special measures' to support children whilst giving evidence. Special measures are available to defined categories of witnesses, including children, under the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999). Primary responsibility for the use of these measures falls to the police and Crown Prosecution Service (CPS). This thesis explores, through original empirical research, how, on the one hand, the objectives of special measures are complicated by the pragmatic realities of criminal proceedings, and, on the other, how the practical implementation of special measures bears on the normative ideals of criminal justice. Throughout, the overarching theme of the thesis is to question how and why the law in practice conforms with or deviates from doctrinal law.

The research presented in this thesis is, therefore, a socio-legal study of criminal procedure reform. It examines criminal justice professionals' decision-making processes and investigates their responses to a statutory framework which significantly curtails their discretion. The research was conducted using a small-scale, primarily qualitative study with the Crown Prosecution Service (CPS). The thesis begins with a review of the problems that the legislation seeks to address. Chapter 2 examines the role of children as victims and witnesses in criminal proceedings. It attempts to quantify the numbers of children potentially eligible for special measures assistance in court and outlines the particular challenges that children face during adversarial criminal proceedings. It grounds the discussion of children's problems in the wider context of the criminal justice

system's recognition of victims' and witnesses' interests, distinguishing between the victim as a party with a grievance to be satisfied and the witness as a party with a legitimate interest in humane treatment.

Chapter 3 explores the legislative response to children's difficulties. It reviews the historical development and detailed provisions of the current statutory scheme, which creates strong presumptions in favour of special measures use by children. The YJCEA 1999 is a highly complex piece of legislation, made all the more opaque by its protracted and convoluted implementation. The chapter outlines significant statutory amendments and case-law since the 1999 Act's initial implementation, in particular the challenge to the normalisation of primary rule special measures for children in *Camberwell Green Youth Court*. Finally, Chapter 3 describes relevant policy guidance and assesses how the legislative provisions have been translated into operational protocols.

Chapter 4 defines the methodology for the empirical research constituting the core of this thesis. A mixed, but primarily qualitative, methodology rooted in an interpretive account of social knowledge was employed. Chapter 4 identifies the research questions for the empirical phase of the research project and justifies the choice of a qualitative approach. It describes the research methods used to acquire and analyse qualitative data from interviews with Crown Prosecutors and concludes by discussing the steps taken to mitigate the potential limitations of the research design.

Chapter 5 presents research findings on the police use of video-interviewing. Having first summarized previous research, it presents this study's findings on the extent of video-interviewing for children. Empirical investigation reveals considerable variation across different categories of child witness. Turning to the possible reasons for such discrepancies, offence type is the most obvious

explanation. However, the relative specialisation of investigating officers turns out to provide a superior rationalization. The last section of the chapter examines in detail the issues that affect generalist officers in their dealings with children.

Chapter 6 examines prosecutors' use of special measures. Extending the approach of Chapter 5, it first reviews existing research on special measures under the YJCEA 1999 before presenting this study's empirical findings. The analysis combines statistical data on special measures applications and prosecutors' own reflective accounts of the factors shaping their decision-making. The chapter concludes with an examination of the advantages and drawbacks of the mandatory nature of the special measures process as it applies to children.

Chapter 7 begins to consider broader structural issues, in the light of the difficulties revealed in Chapter 6. The discussion is organized around three significant policy issues which emerged from the empirical research: (i) the scope of discretion; (ii) infrastructural weaknesses in inter-agency liaison and information-management; and (iii) the putative role of the prosecutor as an advocate for victims and witnesses. In conclusion, Chapter 8 summarizes the findings of the research study and canvasses options for reform, with particular attention to the specific proposals incorporated into the Coroners and Justice Bill, currently (September 2009) proceeding through Parliament.

Chapter 2

CHILDREN AS VICTIMS AND WITNESSES

2.1 INTRODUCTION

This chapter outlines the problems children typically encounter when they act as witnesses in criminal proceedings. The chapter begins with a description of how children become involved in the criminal justice process. It goes on to quantify children's exposure to criminality and to estimate how many of those children ultimately become officially involved in criminal justice proceedings. It will then pause, briefly, to explore the criminal justice system's recognition of victims' and witnesses' interests, distinguishing between the victim as a party with a grievance to be satisfied and the witness as a party with a legitimate interest in humane treatment. The chapter concludes with an overview of the myriad difficulties that child witnesses in particular encounter in, firstly, giving their accounts to the police and to the courts and, secondly, in negotiating the adversarial processes which seek to test those accounts. The aim of this chapter is to set the scene for the remainder of the thesis, which examines the legislative response to children's problems and the practical implementation of the law by the police and the Crown Prosecution Service.

2.2 CHILDREN'S EXPERIENCE OF CRIME

2.2.1 Children as Victims and Witnesses

Children become embroiled in police investigations for many reasons. However, when we think about children and their involvement in criminal trials, most of us instinctively think of 'child abuse'. Child abuse is the archetypal offence against children, and the debate over the proper role for children in the criminal justice

process tends to focus on the experiences of the child abuse victim.¹ The issue is commonly framed in the following terms: How can we best protect child abuse victims from the trauma of giving evidence in a criminal court whilst also ensuring that they receive justice for their appalling experiences?

Although there is no universally accepted definition of 'child abuse',² criminal justice agencies in England and Wales appear to have settled upon a shared working definition that covers sexual or physical assault upon a child in a familial setting or where there is a relationship of trust between the child and the alleged abuser.³ *Working Together to Safeguard Children*, the inter-agency guidance on children's welfare and protection from abuse and neglect,⁴ recommended that all police forces should operate specialist Child Protection Units (hereinafter CPUs) which, as a minimum, should include within their terms of reference all child abuse allegations within the family or committed by a carer against a child under eighteen years-of-age. Although some CPUs would also regard sexual offences committed outside the family as crimes of child abuse, few, if any, seem to include physical assaults carried out by non-familial offenders.

Child abuse constitutes a significant proportion of crime against children. Even in the context of recorded crime the number of reported child abuse offences is considerable. Police-recorded crime statistics reveal that in the period 2006-2007 there were 4918 instances of cruelty or neglect of children and 1344

¹ See, for example, John R. Spencer, 'Child Witnesses and Video-Technology: Thoughts for the Home Office' (1987) 51 *Journal of Criminal Law* 444; HH Judge Thomas Pigot QC (Chair) *The Report of the Advisory Group on Video Evidence* (London: Home Office, 1989); Caroline Keenan, Gwynn Davis, Laura Hoyano and Lee Maitland, 'Interviewing Allegedly Abused Children with a View to Criminal Prosecution' [1999] *Crim LR* 863; Laura Hoyano and Caroline Keenan, *Child Abuse: Law and Policy Across Boundaries* (Oxford: Oxford University Press, 2007).

² Hoyano and Keenan (2007) 7.

³ In particular, sexual or physical assault by a person charged with caring for a child in place of the child's natural parents, including where the care is provided in an institutional setting.

⁴ The Department of Health, The Home Office and The Department for Education and Employment, *Working Together to Safeguard Children* (London: TSO, 1999).

instances of incest or familial sexual offences.⁵ There were also 5096 reported instances of rape against children, 5486 instances of sexual assault on a child under 13 and 5147 instances of sexual activity involving children,⁶ many of which would also fall under the working definition of child abuse adopted in this chapter. However, the involvement of child witnesses in the criminal justice system extends considerably beyond the victims of child abuse. Firstly, secondary witnesses in child abuse cases are often also children. Where a child makes allegations of sexual or physical abuse in the family home, siblings of the complainant are often called upon to corroborate or sometimes to refute the charge. Child abuse, particularly when it is sexual in nature, is rarely carried out in circumstances where it may be observed by other adults, yet abusers often perceive other children in the house as less threatening to their detection. Where abuse occurs outside the family home, but is nevertheless perpetrated by someone in a position of trust, friends of the complainant or children of the alleged abuser can also sometimes shed light on events.

Secondly, children are vulnerable to the type of criminal offending that occurs in public places, all too often committed by other youths. Schools and public transport as well as public parks and streets are places where children gather and socialise. Empirical research confirms that children experience crime in these locations, most notably robbery, theft and personal assault. Data on the extent and patterns of child criminal victimisation are presented in the Home Office report, *Young People and Crime: Findings from the 2006 Offending, Crime and Justice Survey*.⁷ This research, based upon a sample size of nearly 5000 young people aged between ten and twenty-five, found that more than 50% of

⁵ *Recorded Crime Statistics 2002/03 – 2006/2007*: <<http://www.homeoffice.gov.uk/rds/pdfs07/recorded-crime-2202-2007.xls>> (accessed 21 Nov 2008).

⁶ *Ibid.*

⁷ Stephen Roe and Jane Ashe, *Young People and Crime: Findings from the 2006 Offending, Crime and Justice Survey* Home Office Statistical Bulletin 09/08 (London: Home Office, 2008) 32.

thefts and personal assaults against children under 16 years-of-age took place at school.⁸ Other research studies have confirmed the school as a locus of criminal activity both by and against children. In MORI's survey for the Youth Justice Board around half of the incidents in each offence category took place in school.⁹ The Howard League for Penal Reform's survey of school children's experiences as victims made similar findings.¹⁰ Predictably, children's experiences of crime at school are at the hands of other children. The Home Office research reported that over 80% of assaults against children in the 10 to 15 age bracket were committed by fellow pupils or friends of the victim.¹¹ In addition to school, the streets and parks figure highly in victimisation studies. In contrast to the other victimisation studies, Deakin's research found that the street was the most common location for crime against children, followed by school and parks/playing fields.¹² Although the other surveys found school to be the prime site, they nonetheless acknowledged the street and parks as significant spaces where child victims are targeted for criminal activity.¹³

Children frequent these public spaces often openly carrying personal possessions such as bicycles, mobile telephones or audio equipment. Children's vulnerability to robbery and theft in such circumstances is well documented. In a research study conducted by the Design Council on behalf of the Home Office, 31% of children who had fallen victim to a so-called 'hot-product' theft in the previous

⁸ Offences measured by the research were robbery, theft from the person, theft involving no personal contact between victim and offender, assault resulting in injury and assault resulting in no injury. Data on these offences was presented for two age ranges, 10 – 15 and 16 – 25.

⁹ MORI, *MORI Youth Survey 2004* (London: Youth Justice Board (2004) 55.

¹⁰ Howard League for Penal Reform, *Children as Victims: Child-Sized Crimes in a Child-Sized World* (London: Howard League for Penal Reform, 2007).

¹¹ *Roe and Ashe (2008) 33.*

¹² Jo Deakin, *Dangerous People, Dangerous Places: The Nature and Location of Young People's Victimization and Fear* (2006) 20 *Children and Society* 376, 383.

¹³ *Roe and Ashe (2008) 32; MORI Youth Survey 2004, 55.*

three years had been listening to music on headphones, talking or texting on a mobile telephone or playing games on a console when it was stolen.¹⁴

This substantial body of the research demonstrates the ample opportunities for children to fall victim to criminal offending outside of the home. In addition, a child may simply have the misfortune to witness a criminal offence. Spencer and Flin give a number of examples of children who played pivotal roles in the successful prosecution of very serious offences,¹⁵ but equally, their presence on the streets and in public places means children are likely to witness mundane crimes such as theft and low level assault. In such circumstances the child's involvement with the criminal justice process is totally unconnected with her youth. There are thus many opportunities for a child to become a victim of, or a witness to, criminal offending beyond the traditional conception of 'child abuse'.

2.2.2 Children's Exposure to Criminal Offending

We have already seen in the recorded crime statistics annual reports of around 5,000 instances of physical abuse and more than 1,000 instances of sexual abuse within the family.¹⁶ There were also more than 15,000 other reported instances of sexual assault against or sexual activity with young children. The number of offences of child cruelty and neglect and the volume of sexual offending against children is discernible because an element of the offence is that the victim is a child. Other offences are not so conveniently framed, and the figures on recorded crime do not assist us in determining the number of child

¹⁴ Design Council, *Designing Out Crime: Hot Products – How Can Design Cut Out Crime From Systems and Products*, available at: <http://www.designagainstcrime.com/files/Designing_Out_Crime_Hot_Products.pdf> (accessed 20 Jan 2009).

¹⁵ John R. Spencer and Rhona Flin, *The Evidence of Children: The Law and The Psychology* 2nd edn. (London: Blackstone Press, 1993) 1.

¹⁶ Note that these crime statistics relate to sexual offences under the Sexual Offences Act 2003 which was implemented in May 2004. This Act introduced a set of new familial child sex offences which, prior to the 2003 Act, would have been charged as, for example, rape or indecent assault.

victims to offences that we might term 'street-crime'. Other surveys, however, may allow us to make an approximation of the size of this group of victims.

The most authoritative survey of criminal victimisation in England and Wales, the Home Office conducted *British Crime Survey* (BCS), has, until recently, excluded children under 16 years-of-age from its scope.¹⁷ Figures on children's criminal victimisation are included, however, in *Young People and Crime*.¹⁸ This Home Office research found that 30% of young people between the ages of 10 and 15 had experienced a personal theft or assault in the 12 months prior to the research. This research is designed to be nationally representative. Thus, we may scale up these percentages to the child population of England and Wales to gain at least a rough indication of the absolute numbers of children who experience some form of personal crime each year.

The 2001 Census identified 12,614,000 children aged under sixteen living in England and Wales, of whom 5,408,000 were aged between ten and sixteen.¹⁹ Assuming that around 30% of children in the 10 to 16 age range have been the victim of a personal crime, this would equate to 1,622,400, well over 1½ million, child victims of assault or theft each year. These figures, of course, relate to victimisation rather than involvement with the criminal justice system, and in that regard they are both under- and over-inclusive. The figures are under-inclusive in that they relate to a limited set of criminal offences and include only the victims of those offences. A good number of child witnesses are simply that;

¹⁷ Since January 2009 the BCS has included children aged between 11 and 16. See *Consultation on the British Crime Survey extension to cover under 16s* (London: Home Office, 2008), available at: <<http://www.homeoffice.gov.uk/rds/pdfs08/bcs-consultation-0508.pdf>> (accessed 21 Jan 2009).

¹⁸ Above note 7.

¹⁹ Data from 2001 census reported in Aleks Collingwood Bakeo and Lynda Clarke, *The Health of Children and Young People* (Office for National Statistics, 2004), available at: <http://www.statistics.gov.uk/chidlren/downloads/child_pop.pdf> (accessed 21 Jan 2009).

they witnessed rather than experienced the offence under investigation.²⁰ The figures are over-inclusive in that not all offences are reported to police²¹ and, of the offences that are reported, not all result in a trial requiring the child to appear as a witness in court. Nevertheless, it is clear that hundreds of thousands of children fall victim to street crime each year. Moreover, though direct comparisons are not possible, the scale of the numbers suggests that child victims of street crime by an order of magnitude outnumber the popular stereotype of the child victim of crime, the child abuse victim. Less easy to estimate is the number of child victims of crime who then go on to become a witness, or at least a potential witness, in formal criminal proceedings.

2.2.3 Children as Witnesses in Criminal Proceedings

Whilst the extent of child victimisation to crime can be estimated in broad terms, the number of children who annually are cast in the official role of witness to a criminal offence is harder to ascertain. There are no official published statistics on how many children give evidence in criminal proceedings each year. Some unpublished data are available from Victim Support, whose records show that, in the period April 2003 to March 2004, some 28,500 young people under eighteen years-of-age were assisted at court by Victim Support's Witness Service.²² Of these, around 6,000 were thirteen years-of-age or under and 22,500 witnesses were between the ages of fourteen and seventeen. CPS monitoring data identified around 4,500 young people aged under seventeen years-of-age who appeared as prosecution witnesses in the same period.²³ There is obviously a

²⁰ Home Office research has previously shown that 12% of all child witnesses were not the alleged victims of the offence. See Graham Davies and Helen Westcott, *Interviewing Child Witnesses under the Memorandum of Good Practice: A research review: Police Research Series Report 115*, (London: Home Office) (1999), 4.

²¹ The British Crime Survey estimates that only 40% of all crime included in the survey is reported to the police. See Sian Nicholas, Chris Kershaw and Alison Walker, *Crime in England and Wales 2006/2007* Home Office Statistical Bulletin 11/07 (London: Home Office, 2007), 7.

²² Figures provided to author by Victim Support.

²³ Debbie Cooper and Paul Roberts, *Special Measures for Vulnerable and Intimidated Witnesses: An Analysis of Crown Prosecution Service Monitoring Data* (London: CPS, 2005), Table 2-A.

considerable discrepancy between these two sets of figures. Some of the discrepancy can be attributed to acknowledged under-reporting in the CPS monitoring data. Though purporting to be a 100% sample of all CPS prosecutions within the relevant twelve month period, the authors suggested that their study effectively omitted four CPS Areas, implying that some 23.5% of CPS prosecutions were excluded from the Monitoring database.²⁴ We might therefore estimate that the number of children actually appearing as prosecution witnesses in the relevant period was nearer to 6,000.

A further incongruity between the two sets of figures is that the Victim Support data include young people aged between seventeen and eighteen whilst the CPS monitoring data excluded anyone over seventeen years-of-age. Another likely difference is that the Victim Support figures include an unknown number of defence witnesses, which the CPS research excluded. Although one could reasonably speculate that young people in the seventeen-to-eighteen year age group are disproportionately represented amongst the total figures, that alone is unlikely to account for the entire discrepancy. Neither is it likely that the omission of defence witnesses from the CPS research is significant, as Victim Support acknowledges that currently only around 2% of their referrals are for defence witnesses.²⁵ Lastly the Victim Support figures relate to support provided to witnesses at court whilst the CPS research looked at all cases resulting in charge. Accordingly, it is impossible to provide a confident estimate of the number of children annually involved as witnesses in criminal proceedings. What we can say, however, is that it is a significant number, at least 6,000 and likely to be considerably more, especially given that there are presumably also a substantial number of children interviewed by the police as potential witnesses in investigations that do not lead to charge.

²⁴ *Ibid*, 7.

²⁵ Victim Support, *Annual Report and Accounts 2006* (London: Victim Support, 2006) 6.

The difficulties that children face in participating in criminal proceedings are well rehearsed,²⁶ but the starting point for considering the issues that confront child witnesses is to consider the concerns of witnesses more generally. Accordingly, the next section briefly examines the extent to which victims' and witnesses' rights and interests in the criminal justice process are officially recognised. Section 2.4 then discusses the additional challenges that the criminal justice process poses specifically for young witnesses.

2.3 THE VICTIM AND WITNESS PERSPECTIVE IN CRIMINAL PROCEEDINGS

Many commentators have observed that giving evidence in English criminal proceedings is almost always perceived as a negative experience.²⁷ It is hardly likely that victims or witnesses could ever fully embrace a process which, for many, is necessarily associated with some form of personal harm or loss, but there is a general consensus that the Criminal Justice System could do better in its treatment of victims and witnesses. Then Director of Public Prosecutions, Sir Ken MacDonald, speaking at a seminar hosted by the Centre for Criminal Justice Studies in May 2006 said:

[I]t is perfectly true that victims have traditionally fared badly within our criminal justice system. They have not been thought of very much and their needs are often ignored. It has very much been a process of turn up at court to give your evidence and that's it. There is a traditional inadequacy in our system which gives the impression that trials are about '*getting off*' and that justice is a game in which no-one takes the community's side... The perception that no-one looks out for [victims and witnesses] and that it's only defendants whose rights are taken seriously is not wildly wrong.²⁸

²⁶ Spencer and Flin (1993); Jenny McEwan, *Evidence and the Adversarial Process* 2nd edn. (Oxford: Hart Publishing, 1998) Chapter 4; Louise Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford: Oxford University Press, 2001); Hoyano and Keenan (2007) Chapters 8 and 9.

²⁷ Paul Rock, *The Social World of the English Crown Court* (Oxford: Clarendon Press, 1993); McEwan (1998) Chapter 4; Andrew Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure' in Adam Crawford and Jo Goodey (eds.), *Integrating a Victim Perspective Within Criminal Justice* (Aldershot: Dartmouth Publishing, 2000).

²⁸ Ken Macdonald QC, *Building a Modern Prosecuting Authority*, available at: <<http://www.kcl.ac.uk/deptsa/rel/ccjs/pubs.html>> (accessed 04 Feb 2009).

In essence the issue boils down to the extent to which the Criminal Justice System can and does recognise that victims and witnesses have interests in 'their cases' which need to be respected and addressed. The grounds on which victims', and by extension witnesses', rights in the criminal justice process should be recognised is under-theorised,²⁹ but it does attract instinctive support.³⁰ In understanding the diversity of victim and witness interests in criminal proceedings it is helpful to distinguish between the interests of the victim as a 'victim', that is the primary injured party, and the interests of the victim as a 'witness', that is a person upon whom the state calls to provide evidence to assist in the prosecution of the alleged criminal. Witness issues are significantly different from victim issues, which largely revolve around requests for a substantive role in the criminal justice process that is currently lacking.

2.3.1 Victims' Rights and Interests

Despite their undoubted importance in framing a successful prosecution case, victims have a somewhat marginal role in criminal proceedings in England and Wales. They are not formally a party to the case. Moreover, victims have no legally enforceable rights which criminal justice agencies must respect.³¹ Indeed,

²⁹ The question that victims' rights advocates frequently fail to answer is why victims of crime have any greater claim to government support than other individuals who have suffered non-criminal injury or hardship at the hands of another? Roberts proposes a deontological theory which sees support for the victim, possibly to the point of restoration, as a corollary of the State duty to allocate blame and censure for intentionally inflicted wrongs. In reserving the right to criminalise and officially censure certain behaviours, the State has a corresponding duty to attempt to restore the victim of those behaviours, or, if it cannot restore, then support: Paul Roberts, *Restorative Justice and International Laws: Realising the Limits of Reconciliation* (unpublished). See also, Andrew Ashworth, 'Punishment and Compensation: Victims, Offenders and the State' (1986) 6 *Oxford Journal of Legal Studies* 86 and S.E. Marshall and R.A. Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian Journal of Law and Jurisprudence* 7.

³⁰ Sanders asserts that though victims have no formal stake in criminal prosecutions, on a pragmatic basis it is simply unrealistic to deny that victims have no special interests worth considering: Andrew Sanders, 'Prosecution Systems' in Mike McConville and Geoffrey Wilson (eds.), *The Handbook of the Criminal Justice Process* (Oxford: Oxford University Press, 2002) 161.

³¹ Sections 32 – 34 of the Domestic Violence, Crime and Victims Act 2004 provide for a *Code of Practice for Victims of Crime* (London: OCJR, 2005) - available at: <<http://www.homeoffice.gov.uk/documents/victims-code-of-practice>> - which took effect from 03 April 2006. Under the *Code of Practice* victims are entitled to various services, primarily but not exclusively relating to the receipt of information, from the criminal justice agencies. However, paragraph 1.3 of the Code, which is modelled on s.67 PACE 1984, states 'Where a person fails to comply with this Code, that does not, of itself, make him or her liable to any legal proceedings. The Code is, however, admissible in evidence in both criminal and civil proceedings and the court may

it is only recently that the idea that victims could have any rights or interests over and above those of other witnesses has gained currency. In Shapland's terms, victims have been seen as little more than information providers,³² and Ashworth has gone so far as to describe them as 'court fodder'.³³

The introduction of schemes to allow victims to make Victim Personal Statements prior to sentencing³⁴ and Parole Board decisions,³⁵ CPS commitments to 'Direct Communication with Victims'³⁶ and, most recently, to allow CPS prosecutors to conduct pre-trial interviews with witnesses³⁷ mark some limited movement towards victim participation in criminal proceedings. There are questions as to whether such schemes are truly participatory. Victim Personal Statements were introduced into English criminal trials to give the victim a sense of inclusion in the criminal process, and offer the victim an opportunity to furnish the police and the court with details of the physical, emotional or financial impact of the crime.³⁸ Such statements have been

take failure to comply with the Code into account in determining a question in any such proceedings.' It is difficult to see how any breach of this code could be relevant and therefore admissible evidence in proceedings against the defendant in the case and on that basis, a victim's remedy for breach of the commitments made under the Code is restricted to a complaint initially to the service provider and ultimately to the Parliamentary Ombudsman.

³² Joanna Shapland, 'Victims and the Criminal Process: A Public Service Ethos for Criminal Justice?' in Sean Doran and John Jackson (eds.), *The Judicial Role in Criminal Proceedings* (Oxford: Hart Publishing, 2000) 151.

³³ Ashworth (2000) 199.

³⁴ Home Office, *Making a Victim Personal Statement*, available at: <http://www.cjsonline.gov.uk/victim/coming_forward/victim_personal_statement/> (accessed 06 Feb 2009).

³⁵ Domestic Violence, Crime and Victims Act 2004, s.35.

³⁶ Direct Communication with Victims is a CPS protocol initially launched in 2001, and restated in October 2005 in the Prosecutors Pledge, in which the CPS undertook to notify victims in writing whenever a charge was withdrawn or substantially altered. In April 2006 the DCV protocol was incorporated into the new *Code of Practice for Victims of Crime* and expanded to provide commitments to provide, upon request, information about other key decisions and processes. The *Code of Practice* also obliges the CPS to offer to meet with the victims of specified serious charges to explain any decision to withdraw or substantially alter the original charge.

³⁷ See Crown Prosecution Service, *Pre-Trial Witness Interviews: Code of Practice*, available at: <http://www.cps.gov.uk/victims_witnesses/resources/interviews.html> (accessed 11 June 2009). See, Paul Roberts and Candida Saunders, 'Introducing Pre-Trial Witness Interviews: A Flexible New Fixture in the Crown Prosecutor's Toolkit' [2008] Crim LR 831.

³⁸ *Making a Victim Personal Statement* (above note 34).

criticised, however, on the grounds that they raise unreasonable expectations that the information provided will influence the sentencing decision.³⁹ Similarly, although the CPS commitment to notifying victims of, generally adverse, decisions regarding 'their cases' is laudable, the CPS does not consult with the victim before the decision is taken.⁴⁰ Pre-trial Witness Interviews, too, may seem to give victims some involvement in pre-trial decision making, but this is to misconceive their primary purpose, which is to allow the prosecutor to assess the reliability of a witness's evidence or better understand its complexities.⁴¹ There is thus a strong argument that current participatory rights are illusory and amount to little more than the right to be informed of criminal justice agency decisions.⁴² Victims continue to be denied any influence over charge and are not legally represented at any hearing. Ashworth describes these so-called participatory schemes as 'sweeteners': designed to persuade victims that their contribution to the criminal justice process is valued in order to ensure their cooperation as witnesses.⁴³ There is an obvious link between governmental

³⁹ Andrew Sanders, 'Victim Impact Statements: Don't Work, Can't Work' [2001] Crim LR 447. For a contrary view see Edna Erez, 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice' [1999] Crim LR 545.

⁴⁰ By statute, the CPS must follow the *Code for Crown Prosecutors* (London: CPS, 2004) when making prosecution decisions. Under the code prosecutors must apply a two stage test to each case which comprises the 'Evidential Test' and the 'Public Interest Test'. The Evidential Test is an objective assessment of whether the evidence is sufficient to provide a 'realistic prospect of conviction' against each defendant on each charge. In the absence of sufficient evidence a prosecution cannot proceed, regardless of the views of the victim. Thereafter, however, when considering whether to discontinue a prosecution in the public interest, the code states that prosecutors should always take into account the consequences for the victim of whether or not to prosecute, and any views expressed by the victim or the victim's family.

⁴¹ In the consultation exercise for pre-trial witness interviews the Attorney-General commented that a collateral benefit of the interviews would be that prosecutors could 'explain the criminal process and procedures to the witness'. See: <http://www.cps.gov.uk/legal/p_to_r/pre_trial_witness_interviews/pre_trial_witness_interviews_guidance_for_prosecutors/#a02> (accessed 11 June 2009).

⁴² The *Code of Practice for Victims of Crime* (above note 31) now imposes an extensive set of obligations on the criminal justice agencies, primarily to notify the victim of key events in the prosecution of an offender. The code also includes some procedural requirements relating to the identification of vulnerable and intimidated witnesses, the completion of needs assessments for victims, liaison with Victim Support and consideration of victim representations about licence conditions or supervision requirements for prisoners released on parole.

⁴³ Ashworth (2000) 197. See also Helen Fenwick, 'Procedural Rights of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?' (1997) 60 MLR 317.

agendas to improve the treatment of victims and witnesses and to improve the criminal justice system's record of successful prosecutions.⁴⁴

We might question whether greater rights of participation are an appropriate response to victims' complaints that their interests in criminal proceedings are not sufficiently recognised. Particularly challenging is the notion of meaningful victim participation in adversarial systems. Adversarial process proceeds on the assumption that truth finding is best advanced by a judicial arrangement in which the two parties, the State and the defendant, select the relevant issues for adjudication and argue their merits before an impartial tribunal.⁴⁵ This system is so fundamentally structured around a two-party contest that it is hard to see how the interests of a third party could be accommodated.⁴⁶ Moreover, English criminal process is retributive and, though certain aspects might have a restorative character,⁴⁷ its primary function is to punish those who, having been subject to a fair trial, are convicted of criminal behaviour. The avoidance of wrongful conviction dictates that defendants' fair trial rights will always be a fundamental concern in such a system and victims' rights must, therefore, play a subsidiary role. This is not to deny victims' feelings of injustice at minimal involvement in criminal justice decision-making; it is, however, an injustice of a

⁴⁴ John Jackson, 'Justice for All: Putting Victims at the Heart of Criminal Justice' (2003) 30 *Journal of Law and Society* 309, 311.

⁴⁵ Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (Oxford: Oxford University Press, 2004) 45.

⁴⁶ Sanders [2001] 456. Sanders comments that jurisdictions that have achieved some measure of success in giving victims meaningful involvement in criminal proceedings are systems with an inquisitorial tradition.

⁴⁷ For instance the possibility that a court will, as part of sentence, make a compensation order against the defendant in favour of the victim (s.130 of the Powers of Criminal Courts (Sentencing) Act 2000). Note that since April 2007 offenders have also been required to make reparation to victims more generally through a 'victim surcharge' which is used to fund victims' services: Sections 161A and 161B of the Criminal Justice Act 2003, as inserted by s.14(1) of the Domestic Violence, Crime and Victims Act 2004, imposes a duty on the court to order a convicted offender to pay a surcharge except where the offender is absolutely discharged, is convicted under the Mental Health Act 2003 or in prescribed cases. Under the Criminal Justice Act 2003 (Surcharge)(No 2) Order 2007/1079, prescribed cases are those where the court does *not* impose a fine and the surcharge is set at £15. By s.161A, if a court has made a compensation order against the offender but the offender does not have sufficient means to pay both the compensation order and the surcharge, the court must reduce the amount of the surcharge, if necessary to nil.

different order to that of a wrongfully convicted defendant and it is this which renders dubious a central role for the victim of the alleged crime.⁴⁸

Rejection of a formal participatory role for victims does not mean, however, that victims' interests should be disregarded. Indeed, a sense of inclusion within the criminal justice process may be entirely fostered through measures which fall short of full participation. Many victims' feelings of disempowerment⁴⁹ could be significantly overcome if decisions were better notified and, perhaps more importantly, explained.⁵⁰ If personal involvement with the prosecution process cannot be achieved through participation, it may be possible to move some way towards it through dialogue.⁵¹ We can take the view that systems put in place to keep victims informed are primarily instrumental in that they encourage victim cooperation as witnesses,⁵² but equally we can see such systems as vehicles for ensuring that victims feel valued: a process which may have at least a partially restorative effect.

2.3.2 Witnesses' Interests

Accommodating victim interests turns on the mechanisms by which the criminal justice system acknowledges that the victim of the alleged offending has a legitimate interest in the conduct and outcome of the prosecution process. This

⁴⁸ Jackson (2003) 315.

⁴⁹ Sanders [2001] 452.

⁵⁰ See Becky Hamlyn, Andrew Phelps, Jenny Turtle and Ghazala Sattar, *Are special measures working? Evidence from surveys of vulnerable and intimidated witnesses*. Home Office Research Study 283 (London: Home Office, 2004) 36, where the authors reported that being kept informed of the progress of a case is associated with overall feelings of satisfaction with the criminal justice agencies.

⁵¹ Progress is being made in this direction. As part of the National Victim and Witness Care Programme, *No Witness, No Justice*, joint police and CPS Witness Care Units were rolled out nationally in April 2004 with the aim of providing support and on-going communication to witnesses involved in criminal trials. See <http://www.cjsonline.gov.uk/victim/your_case/>.

⁵² Literature produced to support *No Witness, No Justice*, states: 'Many victims and witnesses do not receive the level of information and support they need when participating in the criminal justice process. This neglect can often lead to a withdrawal of support for the prosecution, non-attendance at court and dissatisfaction with the process, which can result in failed cases and a reluctance by witnesses to re-engage in the criminal justice process on future occasions.'

is to focus on the victim's role as the injured party with a sense of grievance to be satisfied. Analytically, we can separate these interests from the interests of Crown witnesses: that is the interests of those, including victims, whom the state calls upon to provide evidence to assist in the prosecution of the offender. Witness (including victim *qua* witness) interests are frequently discussed in terms of 'process rights'⁵³ or 'service' rights,⁵⁴ and efforts to assist witnesses have concentrated on easing the traumas associated with the information-giver role. These measures are largely responses to the accusation that the criminal justice system is indifferent to, even negligent of, witness needs; possibly to the point of inhumanity.⁵⁵

Some witness complaints are easier to address than others. Grievances about the 'administrative arrangements' for trials are more straightforward to resolve than complaints about witnesses' treatment during testimony, though use of that term is perhaps to underplay the significance of some of these issues. In many respects, witnesses could be forgiven for believing that the criminal justice system is unconcerned about their needs; that administrative convenience is the pre-eminent concern. Historically, court schedules were set to accommodate the courts and the lawyers and paid little heed to the inconvenience or disruption caused to witnesses.⁵⁶ Although witnesses may now claim expenses for loss of earnings and additional childcare costs caused by attendance at court, reimbursement may not be in full.⁵⁷ Witnesses also have long-standing anxieties

⁵³ Jackson (2003) 318.

⁵⁴ Fenwick (1997).

⁵⁵ Roberts and Zuckerman (2004) 21, assert, as one of the five principles of criminal evidence, the principle of humane treatment, which applies to witnesses equally as to defendants.

⁵⁶ Note that the CPS and court staff now work towards a target of ensuring that witnesses wait no more than two hours at court to give their evidence. See *Code of Practice for Victims of Crime*, para. 8.6. However, though Witness Care Units endeavour to ascertain dates on which witnesses are unavailable to attend court, literature distributed to all witnesses states, 'You are expected to go to court even if the date clashes with your holiday plans. You could try to rearrange your holiday'. See *Witness in Court*, available from www.cjonline.gov.uk.

⁵⁷ *Ibid*, 17.

about meeting the defendant or the defendant's supporters in the public areas of court buildings. Though most courts now have separate waiting areas for prosecution witnesses, main access to the court building and other facilities such as refreshments may still involve passage through public spaces with the potential for confrontation with the defendant or defence witnesses. Finally, witnesses might reasonably complain that they have been unsupported at court, and that the difficulties witnesses face in testifying about often harrowing experiences before strangers and in a public arena have gone unacknowledged. Though the Government now distributes a wide range of literature to explain the court process and witness experience, a (government-funded) charity continues to be the prime provider of personal support.⁵⁸

The potential solutions to these logistical problems are, on the whole, uncontroversial. Where the issues remain unresolved, the barriers are largely financial or resource related. Witness complaints about their treatment in court at the hands of judges and lawyers are intrinsically harder to address as they 'flow from the logic of the adversarial model'.⁵⁹ These are matters of principle not commitment. Giving live testimony in an oral trial is intimidating and embarrassing and the expectation of a confrontation with the accused creates considerable anxieties. Inherent to adversarial process is a pervading sense of scepticism that, from the very beginning, throws doubt over the veracity of the witness' testimony. A common theme in witnesses' complaints, including even expert witnesses who are the nearest we might get to professional witnesses, is the resentment witnesses feel when, as it often is, their reliability and honesty is challenged.⁶⁰ Moreover, in establishing a crude contest between the parties, we

⁵⁸ Victim Support runs a Witness Service in every criminal court in England and Wales staffed largely by volunteers. See: www.victimsupport.org.uk.

⁵⁹ Ashworth (2000) 187.

⁶⁰ Paul Roberts and Chris J. Willmore, *The Role of Forensic Science Evidence in Criminal Proceedings: Royal Commission on Criminal Justice Research Study No. 11* (London: HMSO, 1993) 133.

see a heightened emphasis on character that frequently leads to degrading questioning in court.⁶¹ Little wonder that witnesses in criminal proceedings complain of their mistreatment at the hands of the criminal justice system. A vital question is whether the witness is under a public duty to bear that mistreatment in order to further the public good of ensuring justice.

We should not resort too quickly to the argument that these perceived mistreatments are an inevitable consequence of adversarial argument. Ashworth, for example, is not persuaded by the reluctance of criminal justice professionals to accept that the treatment of victims and witnesses could be improved.⁶² He views as complacent and insensitive the argument that humiliating and degrading cross-examination is an unfortunate by-product of the defence advocate's duty to protect the defendant's best interests. Ellison shares his concern:

In a real sense the adversary system has been allowed to become its own excuse. The degradation of prosecution witnesses is more or less presented by advocates as an unfortunate but unavoidable consequence of fulfilling the 'ethical' responsibilities of a defence lawyer within an adversarial system.⁶³

Ellison is sceptical about the possibility of making sufficient accommodation within the adversarial process for witnesses' legitimate expectations of greater respect.⁶⁴ Ashworth is more hopeful, and suggests that greater judicial intervention to curtail inappropriate and overly aggressive questioning, greater care in assessments of relevance and greater consideration of the role that stereotypical assessments play in jurors' determinations of appropriate

⁶¹ Though note the restrictions now placed upon the admissibility of evidence of the non-defendant's bad character imposed by s.100 of the Criminal Justice Act 2003. Such evidence is admissible only if it is (a) important explanatory evidence and (b) has substantial probative value in relation to a matter which is in issue and is of substantial importance in the context of the case as a whole.

⁶² Above note 59.

⁶³ Ellison (2001) 106.

⁶⁴ *Ibid*, 107.

behaviour would go some way to improving the witness experience.⁶⁵ Human rights jurisprudence now acknowledges that states should strive to achieve some form of balance between the rights and needs of witnesses during criminal trials and traditional criminal procedures. Although there is no explicit recognition of witness rights in the European Convention on Human Rights, the European Court of Human Rights recognised the protective duties of states towards witnesses in the seminal case of *Doorson v Netherlands*.⁶⁶ In that case two anonymous prosecution witnesses gave evidence during inquisitorial proceedings against an alleged drug trafficker. The Court held that the trial had been fair, and in a key passage stated:

It is true that Article 6 does not explicitly require the interests of witnesses in general and those of victims called upon to testify in particular, to be taken into account. However, the right to life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the convention ... Against this background, principles of fair trial require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.⁶⁷

The case established within European human rights law the principle that the rights of a defendant may properly be restricted in order to protect the rights of the victim or witness, provided that the restrictions are off-set by safeguards to counter-balance any resulting unfairness to the defendant.⁶⁸

⁶⁵ Ashworth (2000) 188.

⁶⁶ (1996) 23 EHRR 330.

⁶⁷ Para. 70.

⁶⁸ In this case identification of the witnesses to the judge and the ability of defence counsel to question the witnesses and observe their demeanour were deemed adequate measures. The lack of opportunity to observe witness demeanour proved decisive in *Van Mechelen v Netherlands* (1988) 25 EHRR 647, where the Court found a criminal trial unfair because neither the defendant nor defence counsel were permitted to observe judicial questioning of 11 anonymous police officers, thus depriving the defence of any opportunity to observe the witnesses' demeanour. Compare to *SN v Sweden* (2004) 39 EHRR 13, where the Court was satisfied that the defence had been given adequate opportunity to examine a witness's evidence even though defence counsel's questions had been put to the witness by police. Most recently, in *Al-Khawaja and Tahery v UK* (2009) 49 EHRR 1, the Court found a breach of the applicants' Article 6 rights where the conviction had been solely or decisively based upon the statement of an absent witness read to the court which the defence had been unable to challenge at any stage of the proceedings. The Court in *Al-Khawaja* distinguished the line of cases relating to anonymous witnesses on the ground that in the previous cases none of the witnesses' evidence had been decisive and that the evidence had been subject to examination in some form: (2009) 49 EHRR 1 [37] – [38].

The ECHR jurisprudence seems to have been significant in fostering a more considerate domestic attitude towards victims and witnesses' experiences in court. It coincided with a change of government and a new administration that had made firm manifesto commitments to providing greater protection for certain categories of particularly vulnerable victims.⁶⁹ Since the mid 1990s two White Papers⁷⁰ focusing extensively on victims' and witnesses' needs have been published, both leading to legislative reform. Official policy statements and dialogue consistently reflect the need to treat victims and witnesses with dignity and respect in their dealings with criminal justice professionals and the courts.⁷¹

In his analysis of the victim and witness-orientated reforms enacted in, and prior to, the Criminal Justice Act 2003,⁷² Jackson distinguishes between 'outcome-related' measures, designed to bring confidence in the criminal justice system by improving justice outcomes, and 'process-related' measures, designed to ameliorate the problems of giving evidence in court. The former might be said to benefit all victims and witnesses, though Jackson questions whether measures presented as provisions which 'rebalance the system' against defendants and in favour of victims do, in fact, advance the rights of victims at all.⁷³ Process-related measures, by contrast, have to date largely been restricted to witnesses thought to be particularly vulnerable. Unless we include the rights included in

⁶⁹ One of the key commitments of the 1997 Labour Party General Election Manifesto was to provide, greater protection for 'victims in rape and serious sexual offence trials and for those subject to intimidation, including witnesses'.

⁷⁰ Home Office *Speaking Up for Justice*. The Report of the Home Office Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System (London: Home Office, 1998); The Secretary of State for the Home Department, The Lord Chancellor and The Attorney General, *Justice for All*, Cm. 5563 (London: TSO, 2002).

⁷¹ See, for example, the Victims of Crime section of the Home Office website: www.homeoffice.gov.uk/crime-victims/victims/.

⁷² Jackson (2003).

⁷³ Specifically Jackson identifies increased defence disclosure obligations, the admission of defendants' bad character evidence, greater admissibility of hearsay evidence and abolition of the double jeopardy rule as measures which impinge upon defendant's rights for no benefit to the victim if one discounts as a benefit the dubious advantage of rendering conviction easier but also potentially unsafe.

the *Code of Practice for Victims of Crime*,⁷⁴ the only evidential reform designed to assist all witnesses is the recent provision to restrict the admissibility of evidence relating to the bad-character of non-defendant witnesses.⁷⁵ Beyond that, changes to the law to reduce the victimising effects of the criminal prosecution process have been narrowly targeted. Defendants in person may no longer cross-examine adult sexual offence complainants and child complainants to sexual or violent offences⁷⁶ and the admissibility into evidence of the previous sexual history of sexual offence complainants is now highly restricted.⁷⁷ Special measures, designed to ease the pressures of testifying and so improve the quality of the evidence that the court receives, are available only to children and vulnerable or intimidated adults.⁷⁸ Despite the rhetoric, practical assistance for witnesses in the English criminal justice system is diluted because it is accessible for certain categories of witness only.

This thesis investigates how procedural law makes accommodations for one of those categories of witness, children, and how the legislative provisions ultimately translate into practice. To inform that investigation, we need to identify the special problems encountered by child witnesses which recent reforms have sought to address.

⁷⁴ Which, as we have seen, are not legally enforceable rights. See note 31 above.

⁷⁵ Section 100 of the Criminal Justice Act 2003. The provision in s.137 of the CJA 2003, to allow for the use of video-recorded evidence where a video-recorded interview has been conducted and the court is of the opinion that the witness's recollection of the events in question is likely to have been significantly better when he gave the recorded account than it will be when he gives oral evidence in the proceedings, has yet to be brought into force.

⁷⁶ Sections 35 – 37 of the Youth Justice and Criminal Evidence Act 1999 (hereinafter YJCEA 1999).

⁷⁷ Section 41 of the YJCEA 1999. There is, however, continuing debate as to whether this provision as formulated is able to achieve its aim of reducing the extent of humiliating and degrading cross-examination of rape and serious sexual assault complainants without violating the rights of the accused. See Diane J. Birch, 'Rethinking Sexual History Evidence: Proposals for Fairer Trials' [2002] Crim LR 531; Jennifer Temkin, 'Sexual History Evidence: Beware the Backlash' [2003] Crim LR 217; Diane J. Birch, 'Untangling Sexual History Evidence: A Rejoinder to Professor Temkin' [2003] Crim LR 370; Neil Kibble, 'Section 41 Youth Justice and Criminal Evidence Act 1999: fundamentally flawed or fair and balanced?' (2004) 8 *Arch News* 6.

⁷⁸ Part II of the YJCEA 1999.

2.4 CHILDREN'S DIFFICULTIES WITH THE CRIMINAL JUSTICE SYSTEM

It is perhaps an obvious point, though one that is sometimes overlooked, that the experience of crime itself causes the greatest amount of stress for a child. However, there is significant potential for further trauma at the hands of the criminal justice process. It is widely accepted in common law jurisdictions that the inherent vulnerabilities of youth render children's difficulties particularly acute. Children encounter problems with the criminal justice system along two dimensions: (i) in their abilities to describe their experiences to the criminal justice agencies and (ii) in the criminal justice system's attempts to determine whether those descriptions are reliable. It is the second that raises the most contentious issues, where we find the stereotypes of deceitful, fantasising children whose evidence cannot be relied upon frequently invoked.⁷⁹ The first is less controversial, and it is here that we have seen the most progress in creating an interrogative framework which allows coherent stories to emerge.

2.4.1 Listening to Children

2.4.1.1 In the Police Station

Standard police procedure is to take a written statement detailing the specifics of the allegation being made, or, if the witness is not the complainant, the acts that the witness has seen or heard and the circumstances in which the alleged incident took place.⁸⁰ Normally that statement is given to a police officer or civilian statement-taker, either at the witness's home or at the police station. A written record of the witness's account is made by interviewer and signed by the witness as a true and accurate record of what she has said. This is a vital stage in the criminal justice process. Although much of the evidence presented in court

⁷⁹ Spencer and Flin (1993) Chapter 11.

⁸⁰ If the criminal proceedings result in a trial, a person who knows the defendant may also be asked to appear as a character witness. Those with expert knowledge of certain matters may also be asked to appear as an expert witness. It is unlikely that children will be asked to fulfil either of these roles.

takes the form of real evidence, e.g. finger-prints, DNA samples, weapons, damaged possessions and so forth, the initial police statement forms the bedrock of the evidence that the witness will personally give to the court at a later date. Although the statement itself is not normally admitted as evidence,⁸¹ any deviations from it will almost certainly be used in court as possible indicators of mistake or mendacity.⁸²

There is an extensive cross-disciplinary literature on problems children face giving testimony in court, and these are discussed in the following sub-section. The difficulties children encounter in giving their first account of an incident to the police are less widely canvassed in this jurisdiction, though we can draw on North American literature to supplement our understanding of the problems. Hoyano and Keenan in their comparative text on legal and policy responses to child abuse summarize the problems for both the child and the police:

There can be no doubt that conducting a forensic interview of a young child witness as part of an investigation into alleged wrongdoing is an extraordinarily difficult task. The interviewer will be constrained by the linguistic, cognitive, motivational and emotional characteristics of the child. She must contend with the general linguistic problem of obtaining detailed information from a child who is likely to be unaccustomed to providing elaborate verbal narratives about his experiences. Inevitably there are cognitive problems where a child is asked to recall events which happened long before the interview. Moreover, reporting information about stressful, embarrassing, and painfully intense events may be very difficult.⁸³

Hoyano and Keenan describe the issues from the perspective of the child abuse victim, who is likely to bear some psychological trauma as a result of her abuse which may lead to an understandable reluctance to relive the experience. Other

⁸¹ In the general course of events previous statements which are consistent with the oral evidence that a witness gives are not admissible as evidence of the truth of what the witness has said, though exceptions are laid down in s.120 of the Criminal Justice Act 2003 to: (i) rebut an allegation of recent fabrication; (ii) allow the witness to refresh her memory; (iii) provide evidence of a previous identification; (iv) to provide evidence of matters which the witness has forgotten and cannot reasonably be expected to remember and (v) provide evidence of a recent complaint. An out of court statement may be admitted as proof that the witness has previously made a statement that is inconsistent with her oral testimony: s.119 Criminal Justice Act 2003.

⁸² See discussion in Sections 3.4.1, 5.6.3 and 6.4.2.

⁸³ Hoyano and Keenan (2007) 490 (internal citations omitted).

pressures, however, stem from the process of giving the account; pressures that apply irrespective of the nature of the crime the child has experienced or witnessed. The first hurdle is in encouraging disclosure. The process and surroundings may well be intimidating. Fear and anxiety do not make for a good interviewing environment and children anyway are naturally reticent to talk to strangers. Moreover, many children will construe a police interview as an indication of their own wrongdoing. For some, previous contact with the police may generate a distrust that discourages open and honest conversation. Others may be frightened about the consequences of cooperating with the police. Children instinctively focus first and foremost on the consequences of their actions for themselves. Thus, describing a contentious incident may be particularly challenging for a child who fears rebuke for her part in it or who fears revenge on her or her friends and family. In short, there are many aspects of immaturity that work to prevent disclosure in the first instance.

Persuading a child to cooperate with the police is, of course, not the end of the matter. The imperative is then to ensure that the account the child gives is clear, coherent and accurate. Investigative interviewing is no easy task, as Spencer and Flin observe:

Interviewing, sometimes described as a “conversation with a purpose”, is not a natural or innate ability, nor is it as easy as this definition implies... It is widely acknowledged that the validity of the interview depends on careful preparation, clear objectives and specialised communication skills, including the under-valued ability to listen.⁸⁴

If interviewing in its generic sense is difficult, then forensic interviewing poses particular challenges, not least because the consequences of a poorly conducted interview could be serious. Officers’ proficiencies are put under greater pressure when the interviewee is a child, particularly if the allegation is one of abuse. Interviewers must reconcile three, competing, objectives: (i) determining

⁸⁴ Spencer and Flin (1993) 337.

whether a criminal offence has taken place; (ii) determining whether a child is in need of protection; and (iii) generating an evidential narrative acceptable to a court.⁸⁵ This is no easy task. Research shows that police interviews with child witnesses continue to display problematic or poor interviewing techniques.⁸⁶ Police officers face considerable obstacles in their attempts to elicit full and detailed accounts from children without compromising accuracy.

Perhaps because of the on-going legal reform in this area, the perceived inadequacies in children's accounts have been researched extensively.⁸⁷ In summary, and in as far as it is possible to generalise about any group of people, this research shows that children have the capacity to be as accurate as adults in their descriptions of their experiences.⁸⁸ However, young children make for more difficult interviewees because they are unable to concentrate for as long as adults and find it harder to stay focused on the task at hand. They are less articulate than adults and have less sophisticated powers of expression.⁸⁹ Without prompting, children's accounts are less coherent, comprehensive and

⁸⁵ Gwynn Davis, Laura Hoyano, Caroline Keenan, Lee Maitland and Rod Morgan, *An Assessment of the Admissibility and Sufficiency of Evidence in Child Abuse Prosecutions* (London: Home Office, 1999) ix.

⁸⁶ Becky Milne and Ray Bull, 'Interviewing Victims of Crime, Including Children and People with Intellectual Disabilities' in Mark Kebbell and Graham Davies (eds.), *Practical Psychology for Forensic Investigations and Prosecutions* (Chichester, West Sussex: John Wiley & Sons, 2006) 11; Helen Westcott, 'Interviewer Practice in Investigative Interviews for Suspected Child Sexual Abuse' (2006) 12 *Psychology, Crime and Law* 367.

⁸⁷ See the summaries provided in Helen Westcott, 'Child Witness Testimony: What Do We Know and Where Are We Going' (2006) 18 *Child and Family Law Quarterly* 175; Karen J. Saywitz, Gail S. Goodman and Thomas D. Lyon, 'Interviewing children in and out of court: Current research and practice implications' in J. Myers, L. Berliner, J. Briere, C.T. Hendrix, C. Jenny and T. Reid (eds.), *The APSAC Handbook on Child Maltreatment* 2nd edn. (Thousand Oaks, CA: Sage, 2002); Davies and Westcott (1999).

⁸⁸ Robin Fivush, Carole Peterson and April Schwarzmuller, 'Questions and Answers: The Credibility of Child Witnesses in the Context of Specific Questioning Techniques' in Mitchell Eisen, Jodi A Quas and Gail S. Goodman (eds.), *Memory and Suggestibility in the Forensic Interview* (Mahwah, New Jersey: Lawrence Erlbaum Associates, 2000) 336; Westcott, 'Child Witness Testimony: What Do We Know and Where Are We Going' (2006) 175; Debra Ann Poole and Stephen D. Lindsay, 'Children's Suggestibility in the Forensic Context' in Mitchell Eisen, Jodi A Quas and Gail S. Goodman (eds.), *Memory and Suggestibility in the Forensic Interview* (Mahwah, New Jersey: Lawrence Erlbaum Associates, 2000) 368.

⁸⁹ Saywitz *et al.* (2002) 356.

detailed than adults'.⁹⁰ Furthermore, children's patterns of disclosure differ in significant respects from those of adults. Children typically disclose different facts on different occasions,⁹¹ and tend to disclose in line with their perceptions of the particular salience of facts.⁹²

The psychological evidence is that children are most accurate when they structure their own accounts. As a result, psychologists recommend interview strategies that rely on children's free recall of events. Although free recall has consistently been shown to produce the most accurate reports of events, in children these reports tend to be succinct.⁹³ Interviewers are often forced to use specific questioning techniques to access the kinds of detail that criminal proceedings demand,⁹⁴ with the concomitant risk that the cues provided by the questioner will influence the child's responses.⁹⁵ The possibility that children's memories can be corrupted is widely accepted.⁹⁶ However, research shows that suggestibility is an issue primarily for very young children. Studies demonstrating contamination of children's memories have generally focused on children up to the age of eight, and their findings are not necessarily generalisable to older groups of children.⁹⁷ Much of the research has relied on suggestive interrogation practices to induce children into giving false reports or

⁹⁰ Westcott, 'Child Witness Testimony: What Do We Know and Where Are We Going' (2006) 177; Amanda Wade, Anna Lawson and Jan Aldridge, 'Stories in Court - Videotaped Interviews and the Production of Children's Testimony' (1998) 10 *Child and Family Law Quarterly* 179, 184.

⁹¹ Fivush *et al.* (2002) 337; Westcott, 'Child Witness Testimony: What Do We Know and Where Are We Going' (2006) 178; Milne and Bull (2006) 20.

⁹² Fivush *et al.* (2002) 338 - 339.

⁹³ Saywitz *et al.* (2002) 353 - 355.

⁹⁴ Gail S. Goodman and Jennifer M. Schaff, 'Over a Decade of Research on Children's Eyewitness Testimony: What Have We Learned? Where Do We Go From Here?' (1997) 11 *Applied Cognitive Psychology* 5, 7.

⁹⁵ Saywitz *et al.* (2002) 351 - 352.

⁹⁶ Poole and Lindsay (2000); Jodi A. Quas, William C. Thompson and K. Alison Clarke-Stewart, 'Do Jurors "Know" What Isn't So About Child Witnesses?' (2005) 29 *Law and Human Behaviour* 425, 429.

⁹⁷ Poole and Lindsay (2000) 377; Saywitz *et al.* (2002) 353.

incorporating false details into their accounts.⁹⁸ Nonetheless, children's accounts can be distorted through less explicit means. In contrast to adults, who generally are robust in defence of their accounts, children are much more likely to defer to the adult questioner's perception or interpretation of events.⁹⁹ Young children, in particular, may feel pressure to acquiesce to interviewer suggestions¹⁰⁰ or to respond even if they are unsure of the answer to the question.¹⁰¹ Equally, children may interpret repeated questions as an indication that their first answer was wrong¹⁰² or may be reluctant to challenge interviewer distortions of their answers.¹⁰³

There is some suggestion in the literature that the worst of these effects can be countered if interviewers adopt supportive behaviours.¹⁰⁴ Children, it would seem, develop the confidence to resist misleading questions if the interviewer adopts a warm, friendly and encouraging demeanour. At the very least, interviewers are urged to avoid techniques which are known to influence, even corrupt, a child's recall of events. Controlling interviewer behaviour, psychologists say, is the key to maintaining the integrity of children's accounts.

It is not so much a question of children's memory per se, as the way in which memory is elicited in the interviewing context. The question is not how credible are child witnesses; the question is how careful are forensic interviewers.¹⁰⁵

⁹⁸ Poole and Lindsay give examples of the types of highly suggestive interview techniques used in the studies: incorporating suggestion into misleading questions; evoking negative stereotypes of the alleged offender; creating an atmosphere of accusation; reinforcing children's comments that correspond to the interviewer's pre-conceptions about what happened; using peer pressure to seek confirmation of suggestions.

⁹⁹ Saywitz *et al.* (2002) 353.

¹⁰⁰ Milne and Bull (2006) 17-18.

¹⁰¹ Poole and Lindsay (2000) 364.

¹⁰² Fivush *et al.* (2002) 332.

¹⁰³ Westcott, 'Child Witness Testimony: What Do We Know and Where Are We Going' (2006) 183.

¹⁰⁴ Suzanne L. Davis and Bette L. Bottoms, 'The Effects of Social Support on the Accuracy of Children's Reports: Implications for the Forensic Interview' in Mitchell Eisen, Jodi A Quas and Gail S. Goodman (eds.), *Memory and Suggestibility in the Forensic Interview* (Mahwah, New Jersey: Lawrence Erlbaum Associates, 2000).

¹⁰⁵ Fivush *et al.* (2002) 350.

The police station is the first setting in which children encounter forensic interviewers. As we will see, considerable efforts have been made to refine police interviewing techniques to avoid the pitfalls described within this section. However, children are also interviewed in the courtroom, and it is to the nature of this experience that we now turn.

2.4.1.2 *In the Courtroom*

It is generally accepted that children, by dint of their youth and immaturity, struggle with the procedural requirements of giving evidence in criminal trials. This is true of children who have witnessed abuse or any other criminal offences.¹⁰⁶ The Pigot Committee, whose report was the catalyst for the first major legislative change to procedures for children's evidence, described the experience for a child as 'harmful, oppressive and often traumatic.'¹⁰⁷ Although adult witnesses also find the process difficult,¹⁰⁸ the emotional frailties of youth can markedly accentuate the problems that adversarial procedures cause for witnesses generally. Spencer and Flin, in their systematic consideration of children's evidence, list the considerable stresses that children face.¹⁰⁹ These 'stressors' fall broadly into five groups which relate to: (1) the anticipation of proceedings; (2) lack of legal and procedural knowledge; (3) the effects of the courtroom environment; (4) confrontation with the accused and (5) questioning and cross-examination.¹¹⁰

¹⁰⁶ Ellison (2001) 14.

¹⁰⁷ HH Judge Thomas Pigot QC (Chair), *The Report of the Advisory Group on Video Evidence* (London: Home Office) (1989) para. 2.10.

¹⁰⁸ See *R v Momodou* [2005] EWCA Crim 177 [62] where Judge LJ acknowledged the nervous tension that the experience of giving evidence in court engenders in witnesses generally.

¹⁰⁹ Spencer and Flin (1993) Chapter 13.

¹¹⁰ Spencer and Flin also discuss a further cause of stress for child abuse complainants which occurs pre-trial, repeated interviewing by child-protection professionals.

Waiting for the case to come to trial and then, when it does, to be called as a witness makes children anxious and apprehensive.¹¹¹ This strain is compounded for children with limited knowledge of what they will face in court.¹¹² Symptoms include sleeplessness, bedwetting, depression and, in severe cases, self-harm.¹¹³ Delays in bringing cases involving children to trial have been severely criticised.¹¹⁴ Though the criminal justice system has reduced the period between charge and sentence in some circumstances,¹¹⁵ significant cross-agency co-ordination and commitment is required to do so. Furthermore, the dictates of due process mean that some delay between the report of a potentially criminal incident and any resulting trial is inevitable.¹¹⁶ There are also complaints about the duration and circumstances of a child's wait at court. The Crown Prosecution Service (CPS) has a policy of phasing witnesses¹¹⁷ to minimise waiting times at court. Additionally, for child witnesses the CPS recommends that:

Prosecutors should consider using a warning system by pager or text message so that a child can wait until shortly before needed to give evidence, either at home or somewhere away from the court where he or she is likely to feel more relaxed.¹¹⁸

¹¹¹ Spencer and Flin (1993) 384; Saywitz *et al.* (2002) 360.

¹¹² Although the Government and criminal justice agencies have made considerable efforts in recent years to improve the information available to both young and adult witnesses about what they might expect to happen in the course of the prosecution and at court. See www.cjsonline.gov.uk/witness/the_case/going_to_court/.

¹¹³ Joyce Plotnikoff and Richard Woolfson, *In Their Own Words: The Experiences of 50 Young Witnesses in Criminal Proceedings* (London: NSPCC, 2004) Chapter 2; *Going to Court: Child Witnesses in Their Own Words* (London: NPSC, 1996).

¹¹⁴ Joyce Plotnikoff and Richard Woolfson, *Prosecuting Child Abuse: An Evaluation of the Government's Speedy Progress Policy* (London: Blackstone Press, 1995); Gwynn Davis, Laura Hoyano, Caroline Keenan, Lee Maitland and Rod Morgan, *An Assessment of the Admissibility and Sufficiency of Evidence in Child Abuse Prosecutions* (London: Home Office, 1999) 51 – 53; Plotnikoff and Woolfson (2004) 10 – 11.

¹¹⁵ For instance the criminal justice system has achieved particular success with the Persistent Young Offenders pledge, which sets a target of no more than 71 days between charge and sentence for repeat young offenders. See Section 5.6.2.3.

¹¹⁶ CPS guidance instructs prosecutors to ask the court to give any case involving a child witness priority in respect of the times and dates of hearings, but notes that the court may be unable to do so if it is not in the best interests of the defendant. See: www.cps.gov.uk/legal/v_to_z/witness_charter_cps_guidance/.

¹¹⁷ See www.cps.gov.uk/legal/v_to_z/phasing_of_witnesses/.

¹¹⁸ See www.cps.gov.uk/legal/v_to_z/safeguarding_children_as_victims_and_witnesses/.

Such systems reduce witnesses' waiting time in the courthouse and reduce the opportunity for contact with the defendant or the defendant's supporters, another issue which causes children particular anxiety.¹¹⁹ It is therefore evidently possible both to minimise the duration of children's drawn-out anxieties and, to some extent, ameliorate their concerns. Giving evidence against someone at risk of a criminal conviction is a serious undertaking and it is difficult to envisage that a witness, particularly a child, could ever be completely relaxed at the prospect. However, there is a growing consensus that, perhaps for all witnesses but certainly for those who are vulnerable and particularly fretful, it is inappropriate for the criminal justice system to exacerbate their natural level of anxiety. Measures to reduce delay and improve waiting facilities are positive developments in this regard.

A further potential source of stress is the courtroom environment, where the issue is not the child's ability to tell a story, but her ability to tell that story in the specific environment. Two traditional elements of criminal trials that test children are the public nature of the proceedings and the requirement for oral evidence. These particular facets of English adversarialism then sit within a process which is rich in formalism, ritual and authority. Notwithstanding popular exposure to dramatic representations of the criminal trial on television and in film, young people may be overawed, even frightened, by the real-life experience. Standing alone without support in the witness box is an isolating experience for many children.¹²⁰ Some, though by no means all, are intimidated by the formal attire of the judge and counsel.¹²¹ A more universal challenge is to

¹¹⁹ Mandy Burton, Roger Evans and Andrew Sanders, *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies*. Home Office On-Line Report 01/06 (2006) 63 - 54; Spencer and Flin (1993) 367; Diane J. Birch, 'Children's Evidence' [1992] Crim LR 262, 275; Graham Davies and Elizabeth Noon, *An Evaluation of the Live Link for Child Witnesses* (London: Home Office, 1991) 33.

¹²⁰ Spencer and Flin (1993) 370.

¹²¹ Burton *et al.* (2006) 58.

speak loudly and confidently in front of the defendant, of whom the witness may be afraid, with large numbers of strangers, including the defendant's family, friends and supporters, looking on. In Plotnikoff and Woolfson's study¹²² children and their parents expressed disbelief the child could be observed from the public gallery whilst giving evidence. Their complaints were particularly acute when the offence charged was a species of sexual assault and the child's evidence was intimate in nature. The mother of a 13-year-old witness to a sexual offence made clear her feelings of impartial treatment:

'By law, her name is protected, but the strangers in the public gallery, they had access to all the information. That was wrong. She should've been protected from them as well. I wasn't allowed in, because I was a witness. I still don't know what's been said. It is wrong that all these people are walking around knowing more than I know. They've seen her face. They know her name. They know where she goes to school. There were other members of the family on the defendant's side and friends of theirs, about eight or nine of them, and it's wrong for them to know intimate details.'¹²³

The possibility that a child can give good quality oral testimony in such an emotionally testing environment is questionable. In *T and V v United Kingdom*,¹²⁴ the European Court of Human Rights acknowledged the difficulties that children face when attempting to follow and understand adult-focused adversarial proceedings. Although primarily addressing the fair trial rights of child defendants in the English criminal courts, Lord Reed observed that witnesses, too, would find this environment intimidating:

The setting was highly formal... The judge was raised on a dais. There was a jury of 12 adults. The judge and counsel wore the customary court dress. The court itself appears to have been a large and imposing room. The public benches were filled with members of the public and representatives of the media. This was in my opinion a setting which, in itself, a child of 11 would be likely to find intimidating, whether he was involved as a witness or as a defendant.¹²⁵

¹²² Plotnikoff and Woolfson (2004) 18.

¹²³ *Ibid*, 19.

¹²⁴ (2000) 30 EHRR 121.

¹²⁵ *Per* Lord Reed in his concurring opinion to the main opinion of the Court, (2000) 30 EHRR 121, 196.

The Court commented in particular on the pressures of public scrutiny and held that it can be appropriate, in view of the age and other characteristics of the child, to curtail public access to proceedings, notwithstanding the legitimate public interest in the open administration of justice.¹²⁶ Interestingly, the Court raised the prospect that young witnesses' rights to privacy could legitimately be considered as a factor justifying reduced public access to trials.¹²⁷

Beyond the courtroom environment, however, the issue that appears to cause the most stress for children is the realisation that they will give evidence in direct view of the defendant.¹²⁸ There are two separate aspects to children's concerns. The first is that, in being asked to make their accusations under the gaze of the defendant, children will be so unnerved that they may be rendered speechless,¹²⁹ or at least hesitant and faltering.¹³⁰ The key issue for the child here is not that the defendant is able to observe the child testifying, but rather that the child can see the defendant doing so and is overawed as a result. The child's distress may be a direct result of the defendant's demeanour, but equally, particularly for sensitive children, it may not.

The second objection that children have about giving evidence in the presence of the accused is the potential for intimidation or retaliation after the trial,¹³¹ either by the accused or the accused's associates: 'I'm completely dead if I see his

¹²⁶ (2000) 30 EHRR 121 [83] and [87]. Open justice is also of course a requirement of Article 6(1) of the Convention.

¹²⁷ (2000) 30 EHRR 121 [77] and [83]. Although a theme not fully developed in its opinion, the Court referred to 'the international tendency towards the protection of the privacy of child defendants', an interest which might reasonably be extended to child witnesses.

¹²⁸ *Saywitz et al.* (2002) 360.

¹²⁹ *Spencer and Flin* (1993) 278.

¹³⁰ *Plotnikoff and Woolfson* (2004) 39.

¹³¹ The issue of recognition following a public appearance at court becomes an issue only for children who are not known to the defendant before trial.

friends – they all saw me at court’.¹³² In this they are joined by their parents, as the mother of one child indicated to Plotnikoff and Woolfson on discovering that her son’s evidence was to be seen by the defendant:

We’d said from the start that we wouldn’t go to trial if he was going to be seen... I was furious. The judge had to come and see me. She said the defendant had the right to see Paul. They kept saying that Paul didn’t want to see the defendant but that wasn’t so. It was that Paul didn’t want the defendant to see him.¹³³

Children’s concerns at being required to give evidence in the presence of the defendant raise serious issues regarding the defendant’s so-called ‘confrontation rights’, which are discussed fully in Chapter 6. For the purposes of this chapter, however, it is sufficient to highlight the anxieties that a face-to-face encounter with the defendant, inherent in the adversarial criminal trial, engenders in young witnesses.

2.4.2 Testing Children’s Evidence

Cross-examination, famously described by Wigmore as ‘the greatest legal engine ever invented for the discovery of truth’,¹³⁴ occupies a central position in common law criminal justice systems. It is the iconic mechanism for testing the evidence of witnesses; specifically, to question the factual accuracy of testimony and the general credibility of the witness. Despite its historically hallowed status, cross-examination has recently seen something of a fall from grace. A number of commentators now contend that cross-examination’s ability to expose the truth is over-stated and that its suggestive questioning techniques distort rather than reveal the truth.¹³⁵ It is further suggested that cross-examination lends itself to abuse by over-zealous counsel who use aggressive, coercive and insulting forms of questions which undermine the criminal justice system’s respect for the

¹³² Plotnikoff and Woolfson (2004) 40.

¹³³ *Ibid.*

¹³⁴ 5 *Wigmore on Evidence* (Chadbourne Revision, 1974) section 1367.

witness. Efforts to impugn witnesses' moral character and make comparisons against 'normal' victim behaviour are tools of the trade for lawyers trying to discredit witnesses' evidence. However, even those who argue that all witnesses suffer indignities during cross-examination acknowledge that the experiences of certain types of witness sit at the extreme end of the spectrum.¹³⁶ There is, for instance, a large literature on the perceived mistreatment of rape complainants and other victims of sexual assault.¹³⁷

It is interesting to compare the courtroom experiences of sexual offence complainants and children. Both experience the process of giving evidence more keenly than other types of witness because, as McBarnet observed many years ago, though the experience of cross-examination is generally degrading, the particular form that the degradation takes is influenced by the circumstances of the offence or the witness.¹³⁸ Although all witnesses are likely to feel embarrassment and humiliation at the questioning of their credibility, the strategies routinely used to suggest that children and sexual offence complainants are not to be believed are particularly objectionable. Cross-examining counsel ask questions of rape complainants that require discussion, in open court, of highly personal and intimate details and then use those details to cast doubt on the complainant's moral character. In the context of the offence, a degree of embarrassment and humiliation is inevitable but, critics claim, in the guise of a robust defence, cross-examination of sexual assault complainants has

¹³⁵ Roberts and Zuckerman (2004) 215; Spencer and Flin (1993) 270; Ellison (2001) Chapter 5.

¹³⁶ David Brereton, 'How Different are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials' (1997) 37 *British Journal of Criminology* 242; Louise Ellison, 'Cross-Examination in Rape Trials' [1998] *Crim LR* 605.

¹³⁷ See Sue Lees, *Carnal Knowledge: Rape on Trial*, Rev and updated ed. (London: Womens' Press, 2002); Jennifer Temkin, 'Prosecuting and Defending Rape: Perspectives from the Bar', (2000) 27(2) *Journal of Law and Society* 219; Zsuzsanna Adler, *Rape on Trial* (London: Routledge & Keegan Paul, 1987); Vera Baird, *Rape in Court* (London: Society of Labour Lawyers, 1998); Ellison (2001) 88 - 93; McEwan (1998) 126 - 127.

¹³⁸ Doreen McBarnet, 'Victim in the Witness Box: Confronting Victimology's Stereotype' (1983) 7 *Contemporary Crises*, 293.

become abusive and regularly goes beyond what is necessary to test the complainants' claims.¹³⁹ Children similarly are subject to abusive cross-examination. Though the research tends to focus on the treatment of sexual abuse victims, it is implied that child witnesses to a much wider range of offences are also mistreated during cross-examination. The cross-examination strategies employed for young children are shaped by stereotypical notions of youth and immaturity which, it is claimed, distort the fact-finder's assessments of an individual child's capacity to tell and retell a story accurately. The precise mechanisms used to do so are considered below.

2.4.2.1 Probing Children's Credibility and Reliability

The criminal justice system's scepticism towards children as trustworthy witnesses was, until the late 1980s, a matter of official policy. Child witnesses were required to demonstrate their competency before testifying and corroboration requirements were imposed on their evidence.¹⁴⁰ We have subsequently seen a more receptive attitude to children's evidence, based on academic research demonstrating that the alleged inadequacies of children's capabilities as witnesses, and the claimed superiority of adult testimony, have been overplayed.¹⁴¹ However, although the courts no longer allow perceptions of unreliability to operate as a categorical barrier to receiving children's evidence, those perceptions continue to inform cross-examination strategies. Whilst the courts are more open to children's testimony, its reliability remains contentious. We should not be surprised by the polarised attitudes towards children's testimony. The issues are emotionally charged and the stakes are very high.¹⁴² The prevention of abuse is a matter of great public interest, but so too is

¹³⁹ See Temkin (2000) 235; Brereton (1997) 242; Victim Support, *Women, Rape and the Criminal Justice System* (London: Victim Support, 1996) 39.

¹⁴⁰ Birch [1992].

¹⁴¹ Above note 88.

¹⁴² Goodman and Schaff (1997) 6.

guarding against false conviction of the innocent. The latter generates a somewhat heightened anxiety about the accuracy and honesty of children's accounts.

At the risk of stating the obvious, we know that child witnesses can be accurate and inaccurate, consistent and inconsistent, honest and dishonest... [A]s soon as we start considering children as a separate category from other witnesses, namely adults, then questions about accuracy, consistency and honesty become somehow uniquely or peculiarly associated with children's evidence.¹⁴³

The particular paranoia which the criminal justice system takes, or at least took, towards children's evidence is based upon the assumption that the inherent vulnerabilities of youth render children as a category peculiarly unreliable. As we shall see, much of the research into children's capabilities as witnesses has demonstrated that this depiction is inaccurate. The research has also shown that potential jurors' understanding of children's capabilities is highly variable and frequently inaccurate.¹⁴⁴ Anticipating jurors' likely misperceptions, defence counsel persist in their attempts to appeal to the myth that children, like sexual offence complainants, are disproportionately deceitful.¹⁴⁵

The literature highlights a number of commonly used devices to undermine children's credibility in the witness box. Although most discussion concentrates on child victims of sexual abuse, these techniques can easily be extended to children appearing in court in other contexts. In summary, counsel attempt to undermine children's credibility by appealing to stereotypical notions of how and when abuse occurs, and of the characteristics of a truthful account.¹⁴⁶ Standard

¹⁴³ Westcott, 'Child Witness Testimony: What Do We Know and Where Are We Going' (2006) 175.

¹⁴⁴ Quas *et al.* (2005).

¹⁴⁵ Ellison (2001) 91.

¹⁴⁶ Louise Ellison, 'Closing the Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases' (2005) 9 *International Journal of Evidence and Proof* 239; Emma Davies, Emily Henderson and Fred W. Seymour, 'In the Interests of Justice? The Cross-Examination of Child Complainants of Sexual Abuse in Criminal Proceedings' (1997) 4 *Psychiatry, Psychology and Law* 217.

critical assumptions are that allegations not immediately disclosed are false; that delayed disclosure is atypical; that minor discrepancies in accounts are indicative of uncertainty or deception; that lack of peripheral detail is a sign of fabrication; that allegations are the result of suggestion; and that allegations are motivated by attention seeking, a desire for revenge or a wish to deflect attention from the child's own wrong-doing.¹⁴⁷ Research has cast considerable doubt on the validity of almost all of these propositions.

Delayed disclosure of sexual abuse is now known to be a common phenomenon.¹⁴⁸ Children keep abuse secret for many reasons. They may be threatened, reluctant to cause trouble for the perpetrator, blame themselves or simply fail to understand the significance of their experiences.¹⁴⁹ Children may also demonstrate remarkably good memories of significant incidents. Studies have shown that, when exposed to appropriate interviewing techniques, even very young children are able to recall past events accurately and retain those memories for periods up to several years.¹⁵⁰ Research has also demonstrated that minor inconsistencies between descriptions of the same event are to be expected, not just from children but from adults too.¹⁵¹ Human memories are not static truths waiting to be revealed and remembering is not a linear process which retrieves information stored in the human mind in its original form.¹⁵² Rather, memory retrieval is a dynamic process which involves both recall and reconstruction. The amount of information recalled and the way it is described

¹⁴⁷ Ellison (2005); Davies *et al.* (1997). For examples from children's own experiences of some of these techniques see: Plotnikoff and Woolfson (2004) Chapter 11.

¹⁴⁸ Penney Lewis, *Delayed Prosecution for Childhood Sexual Abuse* (Oxford: Oxford University Press, 2006) 5.

¹⁴⁹ *Ibid.*

¹⁵⁰ Above note 88.

¹⁵¹ S. Anderson, G. Cohen and S. Taylor, 'Rewriting the Past: Some Factors Affecting the Variability of Personal Memories' (2000) 14 *Applied Cognitive Psychology* 435.

¹⁵² Ellison (2005) 242.

are affected by many factors. So, in addition to the interviewee's assessment of the importance of individual details, which may change over time, the perceived perspective of the interviewer and the techniques used to prompt or facilitate recall will influence the format and content of a witness's narrative.¹⁵³ Psychologists have further observed that a failure to observe detail is not necessarily a sign of a fabricated account. Research has established that a consequence of the normal focus on central, pertinent, issues is a degree of uncertainty about peripheral matters.¹⁵⁴

One of the most intensively researched facets of children's capabilities as witnesses is their suggestibility. Whilst free recall is recognised as the superior mechanism for eliciting information from children, the demands of the criminal process mean that police interviewers are inevitably forced to resort to some form of targeted or directive questioning to obtain the required level of detail.¹⁵⁵ The fear is that in resorting to specific questioning techniques the interviewer will influence and distort children's accounts. The prevailing view is that although children are less susceptible to suggestion than it was once thought, the possibility cannot be excluded. As described above,¹⁵⁶ the general conclusion of the research seems to be that highly coercive techniques are required to alter a child's memory, but more benign techniques have the potential to persuade children to acquiesce to suggestive questioning.¹⁵⁷ However, these concerns should not inevitably lead us to conclude that children are more prone than other types of witness to fabricate entire allegations of criminal conduct.¹⁵⁸ Quas

¹⁵³ Above note 91.

¹⁵⁴ Poole and Lindsay (2000) 360; Ellison (2005) 247.

¹⁵⁵ Westcott, 'Child Witness Testimony: What Do We Know and Where Are We Going' (2006) 177.

¹⁵⁶ See Section 2.4.1.1.

¹⁵⁷ Goodman and Schaff (1997) 7; Fivush *et al.* (2002) 340; Quas *et al.* (2005) 429.

¹⁵⁸ An accusation which is equally applied to adult sexual offence complainants. See Lord Lane's notorious comment in *R v Goodwin* (1989) 11 Cr App R (S) 194, 196 that, 'As everybody knows, rape is an easy allegation to make and may be very difficult to refute'.

et al. estimated that false reports account for around 10% of young children's allegations, yet in a research project examining jurors' beliefs about children's reactions to abuse they found that 75% of their research sample believed the rate of false allegations was higher than the estimated true figure, with 17% believing that more than half of all such allegations are false.¹⁵⁹

2.4.2.2 *Inappropriate Questioning Techniques*

One of the most persistent complaints from children about their treatment in court is the way they are spoken to. Their complaints relate both to the form of words used and to counsel's attempts to shape and control a child's answers to questions. The first is less easily defended than the latter. Lawyers are articulate people. They are highly educated and used to speaking in public. Complex sentence structures,¹⁶⁰ obscure language, and legal jargon - or legalese - are the hallmarks of counsel's discourse with witnesses, but are particularly difficult for children to understand and respond to. Questioning techniques inappropriate to the linguistic capabilities of the child can of course feature in both examination-in-chief and cross-examination. However, the recent policy focus on enabling children to give their best evidence in court has led to guidelines for prosecutors that should minimise these techniques.¹⁶¹ Moreover, counsel has nothing to gain from confusing their own witness. Inappropriate questioning therefore tends to be of greater concern during cross-examination.¹⁶² That examination-in-chief is generally conducted using developmentally appropriate language could be taken as an indicator that cross-examiners are not simply poorly skilled when it comes to adapting their questioning techniques but that there is some advantage in

¹⁵⁹ Quas *et al.* (2005) 448.

¹⁶⁰ E.g. multifaceted questions and the use of double negatives.

¹⁶¹ See www.cps.gov.uk/legal/v_to_z/safeguarding_children_as_victims_and_witnesses/.

¹⁶² Louise Ellison, 'The Mosaic Art?: Cross-Examination and the Vulnerable Witness' (2001) 21 *Legal Studies* 353; Rachel Zajac, Julien Gross and Harlene Hayne, 'Asked and Answered: Questioning Children in the Courtroom' (2003) 10 *Psychiatry, Psychology and Law* 199.

refusing to do so. It is entirely possible that jurors will view as unreliable evidence from an inarticulate child unsure in her answers. Plotnikoff and Woolfson reported that half of the child witnesses interviewed in their study complained that they did not understand the language cross-examining counsel used or were confused by counsel's questions.¹⁶³

The other aspect of cross-examination to which children strongly object is the strategic control defence lawyers exercise during cross-examination.¹⁶⁴ Many children in the Plotnikoff and Woolfson study complained that a questioning style dependent upon closed and leading questions distorted their stories, as appears from the following illustration:

'The defence one... he twisted my story and got a bit aggravated as I kept telling him that his story wasn't right... he was picking at what I'd said, trying to get me confused...' (Colin 16)¹⁶⁵

Such complaints are not confined to children. Interactions where one party so closely controls the narrative are not common in normal social discourse and are challenging for most people. Children, however, generally lack the linguistic capabilities and self-confidence to risk embarrassment and correct misrepresentations.¹⁶⁶ Because young people are unlikely to have a developed understanding of the benefits of adversarial process, they may also feel greater frustration, and even injustice, at being closed down in their attempts to speak.

Deliberately abusive cross-examination is unacceptable. The Bar Council Code of Conduct prohibits questions intended only to create scandal or vilify, insult or

¹⁶³ Plotnikoff and Woolfson (2004) Chapter 11. An earlier study in the Scottish courts made similar findings. See Rhona Flin, Ray Bull, Julian Boon and Anne Knox, 'Children in the Witness Box' in Helen Dent and Rhona Flin (eds.), *Children as Witnesses* (Chichester: J. Wiley & Sons, 1992).

¹⁶⁴ Ellison, 'The Mosaic Art?: Cross-Examination and the Vulnerable Witness' (2001) 358.

¹⁶⁵ Plotnikoff and Woolfson (2004) 48.

¹⁶⁶ Ellison, 'The Mosaic Art?: Cross-Examination and the Vulnerable Witness' (2001) 356; Zajac *et al.* (2003) 207.

annoy the witness.¹⁶⁷ Nevertheless, party control over the conduct of criminal proceedings is a fundamental feature of English adversarial process.¹⁶⁸ The motivation of cross-examining counsel in controlling the witness' testimony is clear: it is to prevent the witness from giving evidence that might harm the defendant's case.¹⁶⁹ The appropriate response if a party feels that the opposing side has distorted evidence is to correct the distortion through re-examination. The difficulty is that although re-examination can do much to correct factual inaccuracies, it may not be able to repair the damage to the witness' credibility that highly coercive cross-examination can inflict. The issue then becomes whether it is fair and just to use such techniques to undermine a child's credibility and thereby reduce the testimonial value of the child's evidence.¹⁷⁰ It is legitimate to question whether coercive questioning of children truly serves the purpose of effectively testing the child's veracity, or whether it destroys the child's capacity to supply the court with information and, in the process, inflicts unnecessary emotional distress. Many witnesses complain about the limits that cross-examination places upon their narrative freedom. For children, cross-examination further reduces the scope for witnesses whose ability to communicate effectively is already limited to clarify misrepresentations and reject accusations of dishonesty.

2.4.3 Welfare and Evidential Issues

The concern at involving children in an adult-oriented court process is that they are, at best, unreasonably stressed and, at worst, emotionally injured as a result. The evidence is that children who testify in court experience adverse effects, but it is not clear whether these effects are long-lasting or indeed

¹⁶⁷ General Council of the Bar of England and Wales, *Code of Conduct of the Bar of England and Wales* 8th edn (London: Bar Council, 2004) para. 708(g).

¹⁶⁸ Roberts and Zuckerman (2004) 48.

¹⁶⁹ Ellison (2001) 98.

¹⁷⁰ Ellison, 'The Mosaic Art?: Cross-Examination and the Vulnerable Witness' (2001) 361.

permanent.¹⁷¹ One might doubt whether it is possible to isolate the effects of the crime from prior emotional injury or either of these from the trauma caused by the legal process. On one view, the extent of the harm is irrelevant. The state's obligation to ease the trauma of the child witness, based on a fundamental duty of common humanity, would now appear to be both well made out and commonly accepted.¹⁷² There are intrinsic reasons to treat with appropriate concern and respect those who cooperate with the criminal justice system to secure the conviction of wrongdoers, and these reasons apply with particular force to children who are inherently more vulnerable than the general run of witnesses in criminal proceedings. Moreover, there are instrumental reasons for minimising the trauma that already-vulnerable witnesses face in court, for these witnesses, in particular, may find it especially difficult to testify effectively, or even to bring themselves to testify at all. Lack of concern for the experiences of children has consequences both for the welfare of the child and, by extension, for the quality of the child's evidence.

The emotional toll that the criminal justice system exacts will clearly vary from person to person. Even amongst children, some have better emotional resources than others to deal with the stresses that testifying entails. Nevertheless, acceptance of that emotional toll requires a degree of insight into the public aspects of the criminal justice system that few young people are likely to possess. It is doubtful whether many children perceive, let alone fully appreciate, the justifications for the processes which, in their minds, cause such extreme ordeal, as a child in Plotnikoff and Woolfson's research illustrates:

'She kept trying to put words in my mouth and tried to make me out as a liar. If I was the victim, why was she trying to accuse me of doing something wrong?' (Lara, 15)¹⁷³

¹⁷¹ Spencer and Flin (1993) 388; Ellison (2001) 12 – 14.

¹⁷² See The United Nations Convention on the Rights of the Child (1989) Articles 3 and 12, discussed, along with other human rights instruments, in Hoyano and Keenan (2007) 615.

¹⁷³ Plotnikoff and Woolfson (2004) 49.

Children have limited exposure to the workings of the adult world generally, and to the criminal justice system in particular. They are unfamiliar with the justice and bureaucratic issues that shape the process and do not readily comprehend why cases take so long to get to court, why they are kept waiting at court and why they have to repeatedly tell their stories. However, it is the processes in court which children appear to find the hardest to accept, and of these it is the confrontation with the defendant and the experience of cross-examination that cause the most resentment.

In fact confrontation and cross-examination are the two issues that most distress all witnesses,¹⁷⁴ but that distress is less easily borne by children, particularly young children. Few understand the imperative to give evidence in front of the defendant and consequently see it as an unnecessary and frightening ordeal.¹⁷⁵ Fear of retaliation, particularly when the witness is not known to the defendant, as is often the case in relation to low level disorder or property offences, is a real concern. So, too, is cross-examination, or more specifically cross-examining counsel's familiar accusation that the witness has not told the truth. Almost all children and young people detest being called a liar. Again, such resentment is not restricted to children, but young people are perhaps less robust in passing off the accusation as part of the system. A child is unlikely to have the emotional maturity to understand the burden of proof issues that arise within the criminal justice system. Children, and indeed many adults, fail to appreciate that an adversarial system brings with it a focus on the credibility of all witnesses which means that veracity is overtly and thoroughly tested. In overlooking the wider benefits to society of a criminal justice system that places a premium on avoiding unjust conviction, children take questions as to their honesty or trustworthiness as an indication that the 'adult-world' has

¹⁷⁴ Hamlyn *et al.* (2004) xiii.

¹⁷⁵ Plotnikoff and Woolfson (2004) 40.

rejected their version of events with potentially serious implications for the child's emotional health.

2.5 CONCLUSION

In this chapter we have seen that children experience many types of criminal offending. Accurate estimates of the number of children who fall victim to crime each year elude us, but it is clear that we are talking about hundreds of thousands of children. Furthermore, of those, the stereotypical child victim of crime, the child abuse victim, is in the minority. Street crime is by far the most prevalent type of offending committed against children. We know that only a small proportion of criminal offences are reported and, in this, children's experiences appear not to differ from adults. Accordingly far fewer children appear as witnesses in criminal proceedings than experience crime. Again, accurate estimates are hard to make, but child witnesses are not an insignificant group. Their numbers are at least in the thousands and, when we include children interviewed by police in connection with offences that do not ultimately lead to charge, the numbers may well run to tens of thousands. The criminal justice system clearly cannot ignore children's constituency amongst the wider group of witnesses on whom it depends to achieve criminal justice.

This chapter looked very briefly at the extent to which victims in particular have a stake in criminal proceedings, and the extent to which witnesses have a right to procedural protection from the worst effects of adversarial process. Special measures are one, possibly the main, means by which English adversarial process seeks to mitigate the stresses, possibly harm, that witnesses in criminal proceedings experience. To date, children have been the prime beneficiaries of special measures support. It is clear from the brief review in this chapter that children face very real challenges in navigating the requirements of criminal justice proceedings. They struggle to give good accounts to the police and to the

courts, and they experience particular distress during the procedures used to test their evidence. Children's evidence is thus an excellent context in which to examine the criminal justice agencies commitment to protecting witnesses' interests. However, before we turn to consider police and CPS attitudes towards special measures support for children, we must first examine its legal framework.

Chapter 3

THE LEGISLATIVE AND POLICY RESPONSE

3.1 INTRODUCTION

Having summarized the problems confronting child witnesses in an adversarial system, we turn now to consider the legislative solutions proposed and implemented over the last two decades. This chapter will begin by outlining the origins of special measures legislation. It will trace its development through the early statutory schemes for video-recorded evidence and live TV link to the current statutory framework, the Youth Justice and Criminal Evidence Act 1999 (hereinafter YJCEA 1999). The YJCEA 1999 is highly complex, both in its drafting and in its implementation, and highly prescriptive in its terms. We will, therefore, also consider the Act's interpretation in the courts and significant amendments made since its initial implementation.

The chapter also analyses the policy interpretation of the YJCEA 1999 and the methods chosen to effect its full implementation. Interpretation of the legislation in the relevant guidance has resulted in distinct policy approaches by the police and the CPS. It will be argued that police policy on selecting children for video-interviewing, together with the phased implementation strategy for introducing special measures, has undermined the radical potential of the YJCEA 1999 to extend video-interviewing to all child witnesses. It has, in fact, perpetuated the previous legislative focus on child abuse. In contrast, CPS policy on the application of the statutory 'primary rule' radically extends special measures support to children who, though eligible for special measures under the previous statutory scheme, were not guaranteed access in practice.

We must begin, however, by examining how the modern statutory framework for special measures support has evolved since the late 1980s.

3.2 SPECIAL MEASURES LEGISLATION IN ITS HISTORICAL CONTEXT

Statutory 'special measures' support for children, as currently conceived, originated in legislation initially designed to enable overseas witnesses in fraud trials to give evidence using live satellite television links.¹ The Government amended the Criminal Justice Act 1988 as originally drafted to include a provision allowing child witnesses to give evidence in criminal proceedings using a live CCTV link. In response to pressure to take more radical steps to support children in the criminal courts, it also commissioned the Pigot Committee to investigate the possibility of admitting video-recorded pre-trial interviews with children as evidence in criminal proceedings.²

The Pigot Committee took the view that children should never be required to appear in public as witnesses unless a particular child expressed a wish to do so.³ It recommended a procedure, since informally known as 'Full-Pigot', whereby the entirety of a child's evidence, including cross-examination, would be taken pre-trial. The Committee's scheme envisaged a pre-trial hearing before a judge and counsel for the prosecution and defence at which the video of the child's police interview, if one had been made, would be played. The child would then be asked to adopt the contents of the video, and prosecuting counsel would be free to ask the child any supplementary questions deemed necessary. If the child's disclosure interview with the police had not been recorded, prosecution counsel would instead conduct examination-in chief along traditional lines,

¹ John R. Spencer and Rhona Flin, *The Evidence of Children: The Law and The Psychology* 2nd edn. (London: Blackstone Press, 1993) 103.

² HH Judge Thomas Pigot QC (Chair) *The Report of the Advisory Group on Video Evidence* (London: Home Office, 1989) para. 2.10 (hereinafter, *The Pigot Report*).

³ *Ibid*, para. 2.25.

except that proceedings would take place in the judge's chambers rather than in open court. In either situation, defence counsel would subsequently cross-examine the child and, in either case, the whole of the pre-trial hearing would be video-recorded and later shown at trial.⁴ The Pigot Committee additionally recommended that the judge should have the discretion to direct that an intermediary rather than counsel question very young or very disturbed children.⁵

To the chagrin of many commentators and child protection professionals, 'Full-Pigot' was not, and has never been, implemented. The Home Office, and subsequently the House of Lords, was not persuaded that pre-recorded cross-examination was an entirely practical proposition or that the fair trial rights of the defendant could be guaranteed if cross-examination occurred before trial.⁶ The Criminal Justice Act 1991 instead implemented a system under which a video of the police interview with the child was shown directly to the court at trial and the child witness appeared in person in the court-room, or via live television link, to undergo cross-examination. Although falling short of the Pigot Committee's proposals, the 1988 and 1991 Acts did introduce important measures which, at the time, provided significantly more support to children than had ever been available at common law.

3.2.1 Early Statutory and Common Law Accommodations

The facility for children to give their evidence in private was an early statutory measure which recognised children's vulnerabilities, though the English judiciary

⁴ Para. 2.31.

⁵ Para. 2.32 – 2.34. Note that this is the only recommendation on which the Pigot Committee did not achieve unanimity, with Anne Rafferty, the Barrister on the Committee, dissenting.

⁶ John R. Spencer, 'Reforming the Law on Children's Evidence in England: The Pigot Committee and After' in Helen Dent and Rhona Flin (eds.), *Children as Witnesses* (Chichester: J. Wiley & Sons, 1992) 126.

proved reluctant to use it.⁷ Section 37 of the Children and Young Persons Act 1933 allowed the court, in any proceedings for an offence against morality or indecency, to clear the court of everyone except court officials and the parties to the case⁸ when a child or young person⁹ was giving evidence.

The common law also showed itself willing to accommodate the particular frailties of children. In the days before technology made it possible for witnesses to give evidence from outside the courtroom, the courts made some, necessarily limited, attempts to protect the child witness from the accused through the use of physical screens. Their use at common law was an illustration of the court's inherent power to vary the physical arrangement of the court.¹⁰ Initially, this power was used to remove the defendant from the dock to a part of the courtroom out of sight of the child witness.¹¹ Subsequently, the Court of Appeal approved the use of screens to prevent the witness from seeing the defendant as she gave evidence.¹² In addition to screens, the Court of Appeal approved the practice of allowing a social worker to sit beside the testifying child, though communication was limited to providing comfort and reassurance.¹³ A final common law accommodation, never given formal appellate approval but generally agreed to be a matter of judicial discretion, was the removal of wigs and gowns to reduce the overt formality of the proceedings.

⁷ Spencer and Flin (1993), 113.

⁸ The court could neither exclude representatives of news organisations or the press.

⁹ Defined by s.107, CYPA 1933, as being a person under the age of 18.

¹⁰ Ian Dennis, *The Law of Evidence* 3rd edn. (London: Sweet & Maxwell, 2007) 630.

¹¹ *Smellie* (1919) 14 Cr App R 128.

¹² *R v X, Y and Z* (1990) 91 Cr App R 36.

¹³ *Smith* [1994] Crim LR 458.

3.2.2 The Criminal Justice Act 1988

Children were first enabled to give evidence via live television link by s.32 of the Criminal Justice Act 1988 (hereinafter CJA 1988).¹⁴ 'Live TV link' is an arrangement whereby:

a child is televised when giving evidence in a separate room, and the child's image and voice are transmitted to a series of television monitors in the courtroom... [The] system also televises the courtroom for the child to see and hear... [T]he communication link is 'live': the witness is televised in the act of giving evidence, and the court sees the witness's live performance.¹⁵

With the leave of the court, the 1988 Act made live TV link available to young witnesses, but not young defendants,¹⁶ subject to age- and offence-related qualifications. The offence gateway in s.32 restricted access to live TV link to child witnesses (including complainants) to specified offences of physical or sexual abuse tried on indictment.¹⁷ This was not a closed list of offences. The Court of Appeal took the view that for the purposes of the 1988 Act an offence involving a 'threat of injury' should be broadly construed, in the light of the sound policy reasons for promoting the use of measures designed to protect child witnesses.¹⁸ An offence was deemed to present a threat of injury if, assessed objectively, a consequence of the defendant's criminal behaviour involved a real possibility of injury to another person.¹⁹ The witness need not be the person threatened with injury. Neither must the threat of injury be part of

¹⁴ As amended by s.55 of the CJA 1991.

¹⁵ Spencer and Flin (1993) 101.

¹⁶ Section 32(1).

¹⁷ The precise range of offences categorised as physical or sexual abuse was defined in s.32(2), which stipulated that the offence must be one involving: physical assault or injury, or the threat of injury; cruelty under section 1 of the Children and Young Persons Act 1933; a sexual offence under the Sexual Offences Act 1956, the Indecency with Children Act 1960, the Sexual Offences Act 1967, section 54 of the Criminal Law Act 1977, or the Protection of Children Act 1978; attempting or conspiring to commit any of the previously specified offences; or aiding, abetting, counselling, procuring or inciting the commission of any of these offences. A case is on indictment if it is heard in the Crown Court or if it is heard in the youth court but would be heard in the Crown Court but for the age of the defendant: s.32(1A) YJCEA 1999.

¹⁸ *R v McAndrew-Bingham* [1999] 1 WLR 1897, 1904.

¹⁹ *R v Lee* (1996) 2 Cr App R 266.

the *actus reus* of the offence: it could arise indirectly out of the general circumstances in which the offence was committed.²⁰ Consequently, child witnesses to a wide range of offences were entitled to use live TV link, subject to an additional age criterion which varied according to the offence charged. Witnesses were eligible for live TV link if they were under 14 years-of-age at the time of giving evidence in cases of violence or cruelty, or under 17 years-of-age at the time of giving evidence in cases of sexual assault.²¹

Aside from the age- and offence-related hurdles, s.32 also made live TV link subject to the leave of the court. The 1988 Act contained no formal statutory presumption in favour of live TV link and no statutory guidelines for the exercise of this judicial discretion. Judicial practice appeared to be to balance the risk of harm to the child from giving live evidence against the risk of prejudice to which live TV link might expose the accused,²² an approach given appellate approval in *R (DPP) v Redbridge Youth Court; R (L) v Bicester Youth Court*.²³ In *Bicester Youth Court* the District Judge had granted leave for live TV link for three children, the two younger on the ground of extreme fear and the older child on the ground that it was convenient for all three children to give evidence by the same method. In upholding the DPP's application for judicial review in relation to the oldest child, Latham LJ emphasised that live TV link is a departure from normal adversarial trial procedure and, as such, could be in the interests of justice only when the prosecution provides a good reason in line with the

²⁰ Diane Birch and Roger Leng, *Blackstones Guide to the Youth Justice and Criminal Evidence Act 1999*, (London: Blackstone Press, 2000) 50.

²¹ Section 32(6); s.32A(7).

²² Spencer and Flin (1993) 105.

²³ [2001] EWHC Admin 209. In two separate applications for judicial review the Court considered first, the courts' powers to admit a video recording of an interview with a child in place of her evidence-in-chief and, second, the courts' powers to permit a child to give evidence by live television link.

legislative purpose for doing so.²⁴ Latham LJ analysed the legislative purpose underlying section 32 in terms of evidential quality:

The procedures are intended to provide a mechanism whereby a child witness who might otherwise be upset, intimidated or traumatised by appearing in court is not as a result inhibited from giving a full and proper account of the events of which he or she was a witness.²⁵

The Divisional Court's ruling stopped short of imposing a requirement for emotional harm, but did require the prosecution to demonstrate a real risk that without live TV link the child would be compromised in her ability to testify or be unable to do so at all. Birch suggests that the Court's ruling may have been motivated more by considerations of equality of arms than any desire to discourage the use of live TV link,²⁶ and this is a theme which continued to recur despite significant legislative change.²⁷ It may be that the particular vulnerability of the defendant in this case influenced the Divisional Court in its assessment of the balance of interests.²⁸ Ultimately, however, the extent to which prosecutors would be required to demonstrate prejudice if a child were to be denied the live TV link was not further tested in the courts. Section 32 of the 1988 Act was soon superseded by the provisions of the YJCEA 1999, which created a much stronger presumption in favour of live TV link.

Once an order for live television link had been made under s.32, a child was precluded from giving evidence by any other means except with the leave of the

²⁴ *Ibid* [17].

²⁵ *Ibid* [15]

²⁶ [2001] Crim LR 473, 477. See also Laura Hoyano, 'Striking a Balance Between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial?' [2001] Crim LR 948, 962.

²⁷ Though the issue has now been resolved, at least in part, by s.47 of the Police and Justice Act 2006. See Section 3.3.3 below.

²⁸ See also *R (On the Application of DPP) v Acton Youth Court* [2002] Crim LR 75, where the Youth Court adopts a similar line of reasoning at first instance.

court. Leave could be granted only if there had been a material change in circumstances since the order was originally made.²⁹

3.2.3 The Criminal Justice Act 1991

Following the success of the live TV link initiative,³⁰ and modelled, at least in part, on the recommendations of the *Pigot Report*, the Criminal Justice Act 1991 (hereinafter CJA 1991) included provisions to allow video-recorded interviews with children conducted pre-trial to be adduced in criminal proceedings in lieu of a child's evidence-in-chief.³¹ Alongside the 1991 Act, the Home Office and Department of Health jointly published guidance intended to govern the conduct of police and social services in their investigative interviews with children. The *Memorandum of Good Practice*³² recommended a five stage interview, progressing through the following stages: rapport; free narrative; open-ended questions; closed but specific questions; and closure. The *Memorandum* also contained two appendices, providing advice on how to keep questioning within the rules of evidence, and on the production of a technically acceptable video.

As with live TV link, video-recorded evidence was specifically denied to the accused.³³ The age and offence related gateways for video-recorded evidence mirrored those applied to live TV link, with the addition that the child had also to be under the age of 18 when the video was shown in court.³⁴ Crucially, although the leave of the court was still required before the video could be admitted as

²⁹ Section 32(3C)-(3E) of the 1988 Act as inserted by 62(1) of the Criminal Procedure and Investigations Act 1996.

³⁰ See Graham Davies and Elizabeth Noon, *An Evaluation of the Live Link for Child Witnesses* (London: Home Office, 1991).

³¹ Section 32A of the Criminal Justice Act 1988, inserted by s.54 of the 1991 Act.

³² The Home Office and The Department of Health, *The Memorandum of Good Practice on Video Recorded Interviews with Child Witnesses for Criminal Proceedings* (London: HMSO, 1992).

³³ Section 32A(2)(a).

³⁴ Section 32A(7).

evidence, s.32A(3) contained a presumption in favour of leave.³⁵ This presumption could be rebutted in specified circumstances: if it appeared that the child witness would not be available for cross-examination,³⁶ if rules of court regarding disclosure of the circumstances of the recording had not been complied with,³⁷ or if the court took the view that, in the circumstances of the case, it would not be in the interests of justice to admit the tape, in whole or in part.

The first two considerations were narrowly drawn, but the third invited the exercise of judicial discretion. The 1991 Act contained some limited statutory guidance on the exercise of this discretion, aimed at discouraging excessive editing of video-tapes. In considering whether any part of the tape should be excluded, the courts were directed to consider whether any prejudice caused to the accused by showing that part would be outweighed by the desirability of showing the whole, or substantially the whole, of the recording.³⁸ Appellate guidance on the interests of justice test followed, initially centred on the evidential quality of the video. Breaches of the *Memorandum of Good Practice* were treated by the courts as persuasive³⁹ factors in deciding whether or not to exclude video-evidence.⁴⁰ The Court of Appeal also held that it was not in the interests of justice to admit a video recording of an interview with a child when it

³⁵ The presumption in favour of leave was also subject to any other power of the court to exclude otherwise admissible evidence. The power to exclude such evidence exists both at common law, see the House of Lords decision in *R v Sang* [1980] AC 402, and in statute, see sections 78(1) and 82(3) of the Police and Criminal Evidence Act 1984. In practice s.78 of PACE largely governs the practice of excluding otherwise admissible evidence.

³⁶ Though note *R v Cameron (Leon)* [2001] EWCA Crim 562, where the Court of Appeal approved the conduct of a judge who effectively operated as an intermediary and took over cross-examination of a child who had become uncooperative and refused to answer questions.

³⁷ Crown Court Rule 23C as inserted by Crown Court (Amendment) Rules 1992, SI no. 1847.

³⁸ s.32A(4).

³⁹ *R v Dunphy* (1994) 98 Cr App R 393. Though lacking in statutory effect, the courts' respect for the *Memorandum* was such that in *R v Naylor* the Court of Appeal endorsed the approach of a trial judge who applied the interviewing guidelines to a child witness whose evidence was recorded in written statement form: *The Times*, 8 February 1995.

⁴⁰ *G v DPP* (1997) 2 Cr App R 78.

was known that the child intended to retract her allegations in court.⁴¹ In both situations the Court was motivated to avoid 'putting unreliable evidence before a jury'.⁴² After these early decisions, however, applications of the interests of justice test widened to embrace 'equality of arms' arguments.

In *R v Redbridge Youth Court*⁴³ the Divisional Court considered the Youth Court's refusal of an application for two 14-year-old girls to give their evidence against a 14-year-old boy charged with indecent assault via video and live TV link. In refusing the application, the Youth Court justices were influenced by the similarity in age of the defendant and witnesses. They were anxious to 'ensure that as far as possible both prosecution and defence should be afforded an opportunity to present their evidence under conditions that did not substantially advantage or disadvantage either party, thus ensuring equality of arms'.⁴⁴ The Divisional Court held that trial judges must balance the interests of witnesses and defendants, taking into account the legislative purpose of the statutory provisions to enable children to give early, full and proper accounts of the events in question. Agreeing with the Youth Court, Latham LJ held that, should the defendant be able to establish sufficient risk of prejudice, the presumption in favour of video-recorded evidence would be displaced in the interests of justice.⁴⁵ The defendant would need to show more than merely being deprived of the opportunity to face the witness across the courtroom, which is an inevitable feature of live TV link in every case. For its part, the prosecution must establish that oral testimony in open court would adversely affect the quality of the child's evidence:

⁴¹ *R v Parker* [1996] Crim LR 511.

⁴² See commentary to *Redbridge Youth Court* [2001] Crim LR 473.

⁴³ [2001] EWHC Admin 209.

⁴⁴ *Ibid* [3].

⁴⁵ [2001] EWHC Admin 209 [16].

If the injustice alleged is simply the fact that the witness will not be giving live evidence, it is unlikely that that could ever prevail if there was material which established that the witness could be upset, intimidated or traumatised by appearing in court as a result of which there was a real risk that the quality of the child's evidence would be affected or that no evidence would be forthcoming. To permit such an argument to succeed would defeat the legislative purpose.⁴⁶

Thus, mirroring live TV link, Latham LJ identified a probative burden on the prosecution to show that if the child was required to appear in court, she would give no or incomplete testimony. Moreover, despite the statutory presumption in favour of protective measures for child witnesses, the Divisional Court held that the prosecution must discharge this burden before the defendant's onus to establish prejudicial effect was activated. On the facts of the case, Latham LJ decided that the witnesses' concerns over giving live evidence were not sufficient 'to give rise to a real risk that the quality of their evidence would be affected'.⁴⁷ He acknowledged that the only prejudice asserted by the defendant was that he would be 'deprived of the benefits of seeing and hearing the witnesses live in court',⁴⁸ but held that this was sufficient where 'the legislative purpose would not be compromised by not making the order'.⁴⁹

Underlying the decision of the Divisional Court in *Redbridge* is a judicial assumption that video-recorded evidence is inherently prejudicial, particularly to a young defendant. This restrictive judgement is clearly counter to the view of legislators and is surprising when the stronger provisions of the YJCEA 1999 were already on the verge of enactment. As we shall see, judicial reluctance to accept video-recorded evidence as the norm for child witnesses has been defeated under the new legislative scheme.

⁴⁶ *Ibid.*

⁴⁷ [2001] EWHC Admin 209 [20].

⁴⁸ [2001] EWHC Admin 209 [18].

⁴⁹ [2001] EWHC Admin 209 [20].

In line with the protective rationale underlying the 1988 and 1991 Acts, s.32A allowed prosecutors little scope to vary children's testimonial arrangements once a court had granted leave. The relevant video had to be submitted in evidence and the witness was unable to give evidence by any other means without the permission of the court, which could be granted only if there had been a material change in circumstances.⁵⁰ Neither was prosecution counsel permitted to re-examine the child in court on any issue that had already been adequately dealt with in the child's pre-recorded testimony.⁵¹

Given the permanent nature of a child's video-recorded evidence it was inevitable that some juries, presented with this novel form of testimony, would ask to see the video again. Conscious of the risk that a jury might place too much reliance on the video-recorded evidence in comparison to the oral cross-examination of the child and the oral evidence of defence witnesses, the Court of Appeal directed that tapes should rarely be re-played.⁵² In *Rawlings and Broadbent* Lord Taylor CJ issued guidelines for replaying videotaped interviews: (i) replays should be in open court in the presence of all relevant parties; (ii) the judge should warn the jury against giving undue evidential weight to the recording; (iii) the judge should remind the jury from his notes of the details of the child's cross-examination.⁵³ Subsequently, the Court of Appeal accepted a measure of flexibility in the application of these guidelines,⁵⁴ though the general tenor of Lord Taylor CJ's judgment was maintained. The Court of Appeal

⁵⁰ CJA 1988, s.32A(6A)-(6D), inserted by s. 62(2) of the Criminal Procedure and Investigations Act 1996.

⁵¹ Section 32A(5)(b), as amended by section 50 of the Criminal Justice and Public Order Act 1994.

⁵² *R v M* (1996) 2 Cr App R 56.

⁵³ (1995) 2 Cr App R 222.

⁵⁴ *R v Saunders* (1995) 2 Cr App R 313. See also *R v B and Others* [1996] Crim LR 499.

consistently applied the same approach in other situations where a jury might be left with an unbalanced view of the evidence.⁵⁵

The appeal courts also recognised that transcripts of videotapes, if they are made available to jurors during their deliberations, pose the risk of over-reliance. However, in deference to their usefulness in assisting the jury to follow the child's account, the appellate courts allowed transcripts, if they were available, to be given to the jury.⁵⁶

This is where matters stood on the eve of the introduction of comprehensive legislation aimed at facilitating children (and other vulnerable and intimidated witnesses) to give their 'best evidence' in court.

3.3 THE YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999

Government commitment to assisting vulnerable witnesses accelerated markedly at the end of the twentieth century with the radical expansion of what came to be known as 'special measures' provision. The YJCEA 1999 extended the categories of vulnerable witness entitled to use special measures in court to include vulnerable and intimidated adults in addition to children.⁵⁷ It also extended the range of special measures available.

The roots of the YJCEA 1999 may be traced to the 1997 manifesto commitment of the Labour Party to provide greater protection during criminal trials for certain categories of particularly vulnerable victims. In June 1997 the new Home

⁵⁵ *R v McQuiston* [1998] Crim LR 69.

⁵⁶ Subject to a judicial direction to focus primarily on the child's oral evidence (*R v Welstead* (1996) 1 Cr App R 59) and a requirement to secure defence consent to the transcript being taken into the jury room (*R v Coshall*, *The Times*, 17 February 1995).

⁵⁷ Adult witnesses eligible for support are witnesses suffering from a mental disorder, impairment or physical disability likely to diminish the quality of the witness's evidence and witnesses experiencing fear or distress likely to diminish the quality of the witness's evidence: ss.16(2) and 17(1) YJCEA 1999.

Secretary, Jack Straw, announced the establishment of an inter-departmental working party to review the matter. The Report of this working party, *Speaking Up for Justice*,⁵⁸ was published in June 1998. The introduction to *Speaking Up for Justice* acknowledged the 1997 manifesto pledge and its underlying motivations:

Many adult victims and witnesses find the criminal justice process daunting and stressful, particularly those who are vulnerable because of personal circumstances, including their relationship to the defendant or because of the nature of certain serious crimes, such as rape. Some witnesses are not always regarded as capable of giving evidence and so can be denied access to justice. Others are in fear of intimidation, which can result in either failure to report offences in the first instance, or a refusal to give evidence in court.⁵⁹

Prominent in the Government's thinking was the media concern that arose prior to its election in May 1997 over the rape trial of Ralston Edwards in which the unrepresented defendant spent six days cross-examining his alleged victim.⁶⁰ Also relevant were the concerns expressed in the *Pigot Report* about the experiences of witnesses with learning disabilities,⁶¹ and in the Maynard report on witness intimidation.⁶² No mention was made of the specific needs of children in the working group's terms of reference, but they were included in the report's recommendations.

The review produced seventy-eight specific recommendations, mapping out the parameters of an ambitious programme of reform. An entire programme of legislation, operational policy development and staff training developed under the umbrella of the 'Speaking up for Justice' brand. The first step was to

⁵⁸ *Speaking Up for Justice*. The Report of the Home Office Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System (London: Home Office, 1998).

⁵⁹ Para. 1.2.

⁶⁰ Para. 1.3. The victim, Judith Mason, later waived her right to anonymity and described her ordeal: 'At least when a barrister is asking the questions he is doing it to get to the truth. When a rapist is asking the questions he knows what he's done and he's furthering the act. From the moment he opened his mouth the filth and degradation of my ordeal was replayed in violent and vivid detail.' *The Telegraph*, 05 Jun 2001

⁶¹ *The Pigot Report*, Chapter 3.

⁶² Warwick Maynard, *Witness Intimidation - Strategies for Prevention*. Police Research Group, Crime Detection and Prevention Series Paper No 55 (London: Home Office, 1994).

establish, in Part II of the YJCEA 1999, an enabling legislative framework for 'vulnerable and intimidated witnesses' (hereinafter VIWs). The 1999 Act consolidates, extends and refines the patchwork of common law and statutory provisions that had developed piecemeal during the previous years. Like the legislative scheme it replaced, the Act is also accompanied by a set of non-statutory guidance notes on interviewing witnesses eligible for special measures support. *Achieving Best Evidence in Criminal Proceedings*⁶³ is, however, more expansive than the old *Memorandum of Good Practice* and is much richer in detail, as befits a document written with the benefit of nearly a decade's practical experience of developing interviewing guidelines.

To the disappointment of practitioners and commentators alike, the YJCEA 1999 is intricate and complex, perhaps more so than it strictly needed to be. Its complexity is further exacerbated because not all of the relevant sections were brought into force at the same time, or for all courts. Indeed, as is discussed further below, an important VIW provision remains unimplemented. Nevertheless, although the most radical reforms of *Speaking Up for Justice* were directed at vulnerable and intimidated adult witnesses, who had never previously qualified for statutory modifications of traditional criminal procedure, the YJCEA 1999 also enhanced the position of children.

On the face of the Act, special measures support for children improved in three significant ways. Firstly, the 1999 Act moved away from offence-based qualification criteria to embrace child witnesses to any type of criminal offence (though, as we shall see, offence categories continued to play a role in rationing

⁶³ Home Office, Lord Chancellor's Department, Crown Prosecution Service, Department of Health and National Assembly for Wales, *Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, including Children* (London: Home Office, 2002). This is the version of *Achieving Best Evidence* which applied during the period of this research and which is referenced in this thesis. A new and substantially reformatted version was subsequently issued: See CJS, *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Using Special Measures* (2007 revision), on-line at: <http://www.cps.gov.uk/publications/docs/achieving_best_evidence_final.pdf>.

access to special measures support). Secondly, it made special measures available in all courts. Thirdly, it extended the special measures available to children to include communication aids, intermediaries and pre-recorded cross-examination. In addition, the Act consolidated statutory provision for video-recorded evidence, live TV link, screens and testifying in private (in camera). Before turning to examine the individual measures, and the ways in which they address the problems that child witnesses typically encounter, this section outlines the structural framework of the YJCEA 1999 and explains the overarching 'primary rule'.

3.3.1 Children as VIWs

The YJCEA 1999 stipulates a list of qualifying vulnerable⁶⁴ or intimidated witnesses,⁶⁵ and a range of 'special measures' for which particular categories of witness may be eligible. Child witnesses qualify for special measures support as 'vulnerable' witnesses. All witnesses under 17 years-of-age at the time of the hearing qualify for special measures support as of right.⁶⁶ Children are not required to satisfy any individualized qualification criteria; they qualify for special measures assistance merely on the grounds of youth. As initially conceived, special measures support for children was denied to child defendants.⁶⁷ However, as discussed below, live TV link has subsequently been made available to certain young defendants.

Witnesses who qualify as VIWs under one of the relevant sections of the Act are assisted through the mechanism of a 'special measures direction' (SMD). The

⁶⁴ Section 16.

⁶⁵ Section 17.

⁶⁶ Section 16. Note that in Clause 88 of the Coroners and Justice Bill (2009), as amended in Committee, the Government proposes to amend s.16 so that any person under 18 years-of-age qualifies for special measures as a child witness.

⁶⁷ Section 17(1).

legislation is framed in highly directive terms. Indeed, if a party to the proceedings neglects to make an application in appropriate circumstances the court is empowered to consider of its own motion the eligibility of the witness for special measures assistance.⁶⁸ Where a witness is deemed a VIW, within the meaning of the Act, the court must issue an SMD making provision for 'those measures (or combination of them) [which] would, in its opinion, be likely to maximise so far as practicable the quality of [the witness's] evidence.'⁶⁹ Child witnesses eligible for an SMD may benefit from any practically feasible combination of the following special measures: screens (s.23); live TV link (s.24); exclusion of members of the public from the courtroom (s.25); removal of the judge's and barristers' wigs and gowns (s.26); pre-recorded evidence in-chief (s.27); pre-recorded cross-examination (s.28); assistance by an intermediary (s.29); and artificial communication aids (s.30).⁷⁰

The YJCEA 1999 provisions are at their most prescriptive in their application to children. For adult VIWs the statute provides an opportunity to avoid an SMD. Section 19(3) states that a direction should not be given unless the court is persuaded that the special measures applied for would be likely to improve or maximize the quality of the witness's evidence. In making this determination, the court must consider two factors in particular: whether the witness has expressed the wish to give evidence without the support of special measures and whether the special measures applied for would tend to inhibit effective testing of the witness's evidence. These routes to the avoidance of a special measures direction are generally unavailable to children, by virtue of the so-called 'primary rule'.⁷¹

⁶⁸ Section 19(1)(b).

⁶⁹ Section 19(2).

⁷⁰ Sections 18(1)(a) and 23-30.

⁷¹ Section 21(3).

3.3.2 The Primary Rule

Section 21 of the YJCEA 1999 crafts a 'primary rule' which sets up a presumption in favour of special measures use for child witnesses. In so doing, the section creates three categories of child witness:

- (i) Child witnesses to a sexual offence
- (ii) Child witnesses to a violent offence
- (iii) Child witnesses to non-sexual and non-violent offences.

Categories (i) and (ii) are deemed to be children 'in need of special protection' and by implication category (iii) children are *not* 'in need of special protection', as that concept is employed in the Act.⁷² Pursuant to the primary rule, child witnesses⁷³ automatically qualify for an SMD mandating that they will (1) give their evidence-in-chief in the form of a pre-recorded video; and (2) present the remainder of their evidence via live TV link.⁷⁴ Where a child is *not* 'in need of special protection', however, it is possible to displace the presumption with evidence that video and live TV link are *not* likely to maximise the quality of the child's evidence.⁷⁵ One of the factors that the court must take into account when deciding on this matter is any view expressed by the child.⁷⁶ But, for children 'in need of special protection,' those special measures presumptively apply *regardless of whether this would be likely to maximize the quality of the child's evidence.*⁷⁷ Thus, the child's opinion of how she should give evidence is legally

⁷² Section 21(1)(b).

⁷³ Including, for these purposes, young persons under 17 years-of-age at the time when a video of their evidence was made and under 18 years-of-age at the date of the trial. These are deemed 'qualifying witnesses' pursuant to s.22.

⁷⁴ Section 21(3).

⁷⁵ Section 21(4)(c).

⁷⁶ Section 19(3)(a).

⁷⁷ Section 21(5), emphasis supplied. Note, however, that in Clause 90 of the Coroners and Justice Bill (2009), as amended in Committee, the Government proposes to remove the current distinction between children in need of special protection and children not so in need. The presumption in favour of video-recorded evidence and live TV link will remain in place, but crucially for all children it

irrelevant where the child has witnessed a sexual or violent offence. Furthermore, in any sex offence case where an SMD directs that a child witness in need of special protection is to give their evidence in-chief via prerecorded video, the SMD must also direct pre-recorded cross-examination.⁷⁸

The effect of the primary rule contained within s.21 is to preclude any application to the YJCEA 1999 of Latham LJ's ruling in *Redbridge* that the prosecution must demonstrate a real risk that the child would give no, or incomplete, evidence before an SMD will be granted.⁷⁹ The 1999 Act allows the judge no discretion to refuse an application for live TV link on the ground of evidential quality if the child is a witness to sexual or violent offence. There remains a judicial power to refuse live TV link for other types of offence if its use would not maximise the quality of the witness's evidence.⁸⁰ However, this might be interpreted as subtly different to Latham LJ's *Redbridge* test. Maximising the quality of a child's evidence implies a concern that the child should be able to give her *best* evidence. The test in *Redbridge*, by contrast, contemplates the child's evidence falling below a certain threshold of adequacy before she will be permitted to take advantage of the protective effect of live TV link.

The court must decide, prior to the admission of the child's evidence, whether the evidence is admissible in the form proposed. The words of s.21(4)(c) imply

will be possible to displace the presumption if: (i) the witness informs the court that she does not wish to use the primary rule special measures; or (ii) the court is satisfied that the primary rule special measures would not be likely to maximise the quality of the child's evidence. The Bill contains some protective measures to ensure that the child has made a reasonable decision. The court may only displace the primary rule if it is satisfied that in not using video and TV link the quality of the child's evidence will not be diminished, and the Bill lists a number of factors to be taken into account in this determination. Further, if a child elects to give evidence in court, the court must normally give a direction under s.23 for the child to be screened, unless, again, the child chooses not to take advantage of the measure or if the court is not satisfied that screening would maximise the quality of the witness's evidence.

⁷⁸ Section 21(6). Though note that this section has never been commenced. See Section 3.4.2 below.

⁷⁹ Confirmed by Baroness Hale in *R(D) v Camberwell Green Youth Court* [2005] UKHL 4 [45].

⁸⁰ Note 75 above. In addition to children not in need of special protection, by s.19(2) this discretion also applies to adult vulnerable or intimidated witness.

that the court must of its own motion 'satisfy' itself that the relevant special measure(s) would or would not maximise the quality of the child's evidence. The Act is entirely silent regarding which party, if any, should bear the burden of producing evidence to assist the judge in the exercise of this discretion.⁸¹ At first glance, the court's duty to consider whether a particular measure will improve the quality of a witness's evidence appears to be an example of what Pattenden describes as pre-verdict judicial fact-finding.⁸² However, as Pattenden points out in her discussion on the burden of proof that applies to such facts, many instances of judicial discretion involve no fact-finding at all.⁸³ Where a judge is required to perform an evaluative judgment there may be no 'facts' in their normal sense to base the judgment on. The discretionary judgment required under s.21(4)(c) is like this. There are no facts capable of proof which can contribute to the judge's decision. It is essentially a counter-factual judgement about how a child's ability to testify would be affected, with or without the measure(s) requested. In such situations no party can bear a burden of proof. It is more accurate to speak in terms of a burden of argument or persuasion.⁸⁴

Although this helps us better understand the judicial approach to s.21(4)(c), it offers no assistance on the precise nature of the roles that the judge and opposing parties must adopt during the decision-making process. The special measures decision takes place in the context of an adversarial criminal process. In adversarial proceedings, procedures are structured such that one party bears responsibility for raising issues relevant to that party's case and the opposing party bears a responsibility to object if it disapproves of the course of action

⁸¹ The discretion in s.19(2) uses similar wording, requiring the court to 'determine whether any of the special measures... could, in its opinion, be likely to improve the quality of the evidence given by the witness.'

⁸² Rosemary Pattenden, 'Pre-Verdict Judicial Fact-Finding in Criminal Trials with Juries' (2009) 29 *Oxford Journal of Legal Studies* 1.

⁸³ Rosemary Pattenden, 'The Proof Rules of Pre-Verdict Judicial Fact-Finding in Criminal Trials by Jury' (2009) 125 *LQR* 79, 89.

⁸⁴ *Ibid*, 95.

proposed. In the case of special measures, this process is subject to a judicial backstop to raise the matter if the opposing party fails to do so.⁸⁵ We would therefore expect argument about special measures to arise where the defence object to prosecution special measures applications and vice versa, and for the judge to ask both parties to seek to persuade him of their desired outcome. It is true that prosecutors are under a duty to act 'in the character of ministers of justice assisting in the administration of justice'.⁸⁶ It is unrealistic, however, to expect this duty to be an effective check on inappropriate uses of special measures, if for no other reason than that prosecutors are committed to the special measures regime for children.⁸⁷ Practice will be dictated by the extent to which courts accept that special measures are the norm for children. If it is accepted that special measures are the preferred procedure, it is difficult to envisage the circumstances in which advocates could argue that the primary rule special measures, at least, would not maximise the quality of a child witness's evidence.

The normalisation of primary rule special measures for children was challenged in the House of Lords in *R(D) v Camberwell Green Youth Court*,⁸⁸ where it was argued that the seemingly irrebuttable presumption that children in need of special protection will use video-recorded evidence, if it exists, and live TV link for cross-examination was contrary to the defendant's fair trial rights guaranteed by Article 6 of the European Convention on Human Rights. On an application for judicial review of a number of Youth Court decisions regarding special measures for child witnesses in need of special protection, the Divisional Court asked the

⁸⁵ Sean Doran highlighted the 'invisible burden' on judges to raise matters not raised by the parties in Sean Doran, 'Alternative Defences: The "Invisible Burden" on the Trial Judge' [1991] Crim LR 878. Doran concludes that: 'The judge's responsibilities extend beyond those of a passive umpire and include a duty to enter the realms of the evidence in an active yet unobtrusive way.'

⁸⁶ *R v Banks* [1916] 2 KB 621.

⁸⁷ See Section 7.4.

⁸⁸ [2005] UKHL 4.

House of Lords to consider whether the lack of individualised consideration of the necessity for an SMD was compliant with Article 6 ECHR. There were three bases for challenge in the appeal: first, that there was no opportunity to displace the primary rule if its operation led to a risk of injustice; second, that the special measures directed by the primary rule prevent any face-to-face confrontation between the accused and the witness, so depriving the defendant of the opportunity to adequately test the evidence against him; third, that it is unfair to the child defendant that he is not able to give evidence under the same conditions as the witnesses against him.

The House of Lords held unanimously that s.21 YJCEA 1999 is compliant with Article 6.⁸⁹ Their Lordships concluded that Parliament is entitled to decide upon the normal procedure for children to give evidence in court and, having done so in the light of good policy reasons, justification for utilising special measures in each individual case was not necessary.⁹⁰ Whilst Article 6 provides a right to challenge and question the witnesses against him, it does not guarantee face-to-face confrontation.⁹¹ Baroness Hale in particular acknowledged the difficulties that some child defendants face. However, she reasoned that the answer 'cannot be to deprive the court of the best evidence available from the other child witnesses'.⁹² Rather, the appropriate response is for the judge, on a case by case basis, to determine what the court may do to ensure that the defendant is not placed at a substantial disadvantage.⁹³ On this basis, the primary rule survived its challenge in the House of Lords.

⁸⁹ For full discussion of the case see Rhonda Powell, 'R (D) v Camberwell Green Youth Court - child witnesses deemed to be in "need of special protection" and the European Convention' (2006) 18 *Child and Family Law Quarterly* 562.

⁹⁰ [2005] UKHL 4 [45].

⁹¹ [49].

⁹² [57].

⁹³ *Ibid.*

3.3.3 The Availability of Particular Special Measures

The primary rule is not conclusive of the status of young witnesses and their access to special measures. Firstly, although the primary rule directs the use of video-recorded evidence and live TV link, it does not preclude the use of any additional special measures in appropriate circumstances. Secondly, and not so clearly apparent on the face of the relevant sections of the statute, special measures for all witnesses – adult or child – were originally subject to the availability of particular measures at the relevant court centre, as designated by the Secretary of State.⁹⁴

Unusually, implementation of each special measure was achieved not through the conventional means of a Commencement Order⁹⁵ but rather through a system of notification letters. Special measures were made available in four separate phases under this system of notification until in 2008 in *R v R*⁹⁶ the Court of Appeal ruled invalid the Secretary of State's reliance on the power of executive notification created by s.18(2) of the YJCEA 1999 to restrict a court's use of primary legislation. In *R*, the defendant appealed against his conviction for rape and assault occasioning actual bodily harm on the ground that video-recorded evidence was wrongly admitted in place of the adult complainant's evidence-in-chief. Although s.27 of the YJCEA 1999 had been brought into effect by commencement order, the Secretary of State had not notified the relevant trial court of its availability for adult complainants to sexual offences.⁹⁷ Delivering the judgment of the Court, Thomas LJ rationalized section 18(2) as doing no more than giving each court 'a clear means of knowledge that the

⁹⁴ Sub-sections 18(2)-(5).

⁹⁵ A form of Statutory Instrument used to bring an Act of Parliament, or specific parts of it, into force if the provisions of the legislation commence at a date not specified in the text of the Act of Parliament.

⁹⁶ [2008] EWCA Crim 678.

⁹⁷ Eligible for special measures under s.17 of the YJCEA 1999.

necessary equipment was available and the necessary training had taken place, without the court making its own enquiries'.⁹⁸ He further stated that Parliament had simply been 'providing for what is known as "good administration" by making sure the courts had the requisite information before considering whether to make directions under a section which was in force.'⁹⁹

The Government's intention in making the availability of particular measures subject to the designation of the Home Secretary was to facilitate a policy of phased implementation. Thomas LJ concluded that this could have been achieved by commencement order. The intention of the Ministry of Justice (then the Home Office) was to allow staged implementation which would also vary by court, geographical region and category of witness.¹⁰⁰ Thomas LJ found the stated intentions of government departments irrelevant: 'what is material is the intention of Parliament'.¹⁰¹ In the Parliamentary debates on the YJCEA 1999, the Minister of State for the Home Office explained the policy of phased implementation on the basis of a need to develop adequate training schemes and equipment in each court area.¹⁰² He made no mention, however, of the possibility that the eligibility of witnesses identified in the primary legislation as the intended beneficiaries of specified special measures might be restricted through executive order. More importantly, Parliament did not use clear language in the 1999 Act indicating that such a power was to be available to the executive. Accordingly, Thomas LJ held that once s.27 had been commenced it applied in all Crown Courts in all proceedings.¹⁰³

⁹⁸ [2008] EWCA Crim 678 [31].

⁹⁹ *Ibid.*

¹⁰⁰ As is evidenced by the Home Office circulars giving notification of each different phase of special measures availability. See note 107 below.

¹⁰¹ [2008] EWCA Crim 678 [24].

¹⁰² See statement of Paul Boateng, Youth Justice and Criminal Evidence Bill, Standing Committee E, 17 June 1999.

¹⁰³ [2008] EWCA Crim 678 [32] – [33].

The position today is that all special measures, with the exception of s.28 pre-trial video-recorded cross examination,¹⁰⁴ are available in all courts in England and Wales, including the magistrates' courts and the Youth Court. Prior to *R v R*, however, the implementation schedule in operation differentiated special measures availability by category of witnesses and by trial venue.¹⁰⁵ The consequence in the first six years of special measures operation was considerable variability in children's access to special measures in the Crown Court, magistrates' courts, and the Youth Court.

First phase measures were brought into force by statutory instrument commencing on 24 July 2002.¹⁰⁶ The effect of this initial implementation¹⁰⁷ was to give all child witnesses in the Crown Court access to almost the full range of statutory special measures. As is discussed further below, pre-recorded cross-examination and the use of an intermediary during questioning – the 1999 Act's two most radical measures, and those which were central to the recommendations of the *Pigot Report* over 20 years earlier – were initially unavailable. As a result, although the range of special measures made available to children in the Crown Court appeared impressive,¹⁰⁸ all of the initially available measures with the exception of communication aids had been available to children in the Crown Court under the previous mixed statutory and common

¹⁰⁴ Which has never been the subject of a commencement order.

¹⁰⁵ Notably, adult victims of rape and serious sexual offences became eligible for video-recorded evidence-in-chief only for investigations commencing on or after 1 September 2007, some five years after the initial implementation of YJCEA 1999 special measures, and then only in the Crown Court. Live TV link, though available to all vulnerable and intimidated adult witnesses in the Crown Court from initial implementation, became available in the magistrates' courts on 3 October 2005.

¹⁰⁶ Youth Justice and Criminal Evidence Act 1999 (Commencement No 7) Order, SI 2002/1739.

¹⁰⁷ See Home Office Circular 06/2002, Appendix A 'Implementation of Special Measures'. This timetable has been revised or updated on several occasions, see Home Office Circulars 058/2003, 012/2004, 031/2004, 048/2004 and 39/2005. These circulars are available from www.circulars.homeoffice.gov.uk. Prior to the Court of Appeal decision in *R v R* the last version of the implementation schedule was available in Ministry of Justice Circular 25/06/2007 available from www.frontline.cjsonline.gov.uk/guidance/better-trials/.

¹⁰⁸ Screens (s.23); live TV link (s.24); exclusion of members of the public from the courtroom (s.25); removal of the judge's and barristers' wigs and gowns (s.26); pre-recorded evidence in-chief (s.27); and artificial communication aids (e.g. an alphabet/sign-board or a voice synthesiser) (s.30).

law legislative scheme. The main immediate impact of the YJCEA 1999 in the Crown Court was to widen the availability of special measures to *all* child witnesses, extending eligibility beyond the previous categories of child witnesses to sexual or violent offences. The impact of the YJCEA 1999 for child witnesses in the magistrates' courts and Youth Court was much more restricted. The measures directed by the primary rule, video-recorded evidence-in-chief and live TV link, were made available but only to children 'in need of special protection'. During the initial implementation phases of the YJCEA 1999, children *not* 'in need of special protection' had access to none of the Act's special measures.

The second phase of special measures implementation improved the lot of children not 'in need of special protection' in the lower courts. From 6 June 2004 the use of screens, the exclusion of members of the public from the courtroom and the use of artificial communication aids became available to all witnesses, including children, in the magistrates' courts and Youth Court.¹⁰⁹ The next significant implementation of special measures took effect on 3 October 2005 when live TV link became available to all witnesses in the magistrates' courts and Youth Court.¹¹⁰ The consequence for children was that all child witnesses, and not just those 'in need of special protection', could for the first time take advantage of this facility. A further implementation phase made video-recorded evidence-in-chief available as a special measure for adult complainants of sexual offences¹¹¹ in the Crown Court from 1 September 2007, but had no impact upon the special measures available to children.¹¹² The last round of implementation,

¹⁰⁹ Home Office Circular 31/2004, Appendix 1 'Youth Justice and Criminal Evidence Act 1999: Special Measures Implementation (England & Wales)'. Note that prior to this second, nationwide, implementation, the use of s.29 intermediaries and s.30 communication aids was piloted in Merseyside from 23 April 2004. See Home Office Circular 12/2004.

¹¹⁰ Home Office Circular 39/2005, Appendix 1.

¹¹¹ Eligible under s.17 YJCEA 1999.

¹¹² Ministry of Justice Circular 25/06/2007.

in April 2008, enabled children and vulnerable adults¹¹³ to use intermediaries in court to facilitate communication between counsel and the witness.¹¹⁴ However, pre-recorded cross-examination remains unavailable to any category of witness in any trial forum.¹¹⁵ Legislative provision for special measures under the enabling framework of the YJCEA 1999 has therefore been in a continual state of flux,¹¹⁶ but over time, and in no small measure as a result of the intervention of the Court of Appeal, its potential has been almost fully realized.

The cases included in this empirical study were all finalized prior to the introduction of any further special measures beyond those included in the initial phase of implementation in 2002. For the duration of this study, a clear hierarchy of eligibility applied. Those children who had witnessed a sexual or physically violent offence sat at the pinnacle with the greatest access to special measures; those who witnessed a non-sexual and non-violent offence that was ultimately charged in the Crown Court occupied the middle ground of primary rule eligibility; and those who witnessed a non-sexual and non-violent offence that was ultimately charged in the magistrates' courts or in the Youth Court populated the base of the pyramid with no access to statutory special measures.

3.3.4 Special Measures Use by the Child Defendant

Special measures as originally conceived did not extend to youth defendants. Enacted as part of government efforts to assist vulnerable and intimidated

¹¹³ Adult witnesses suffering from a mental disorder, impairment or physical disability likely to diminish the quality of the witness's evidence are eligible for special measures under s.16(2) YJCEA 1999.

¹¹⁴ Section 29 was commenced by statutory instrument on 23 February 2004 and was piloted initially in six areas and then extended to two more. National roll-out of the intermediary scheme followed in April 2008 and was completed in September 2008. Notification letters for s.29 intermediaries were not published but an updated implementation schedule was made available on-line (see note 107 above). Following the Court of Appeal decision in *R v R* the implementation schedule was withdrawn.

¹¹⁵ Debbie Cooper, 'Pigot Unfulfilled: Video-recorded Cross-Examination under Section 28 of the Youth Justice and Criminal Evidence Act 1999' [2005] Crim LR 456.

¹¹⁶ John R. Spencer, 'Special Measures and Unusual Muddles' (2008) *Arch. News* 7.

witnesses to give their best evidence in court,¹¹⁷ there was apparently little appetite to increase, what seemed to many, the already extensive procedural protections in place for defendants, even where the defendant was a child.¹¹⁸

Predictably, however, the apparent unfairness of excluding youth defendants from a scheme designed to protect the young from the rigours of criminal process attracted appellate attention.¹¹⁹ Whilst acknowledging that access to the entire special measures scheme would be inappropriate, Baroness Hale commented in *Camberwell Green Youth Court* that, though it would rarely be necessary for a child defendant to give evidence using live TV link, the case of a younger child defendant required to give evidence in the presence of an older co-accused might be an example of a situation where it could be appropriate.¹²⁰ Two adverse findings from the European Court of Human Rights seem to have forced legislators' hands.¹²¹ Both cases concerned young defendants' abilities to understand and participate fully in their criminal trials. Although a new practice direction¹²² modifying court procedures followed the first of these cases, the judgment in the second suggests that the modifications did not go far enough.¹²³ As a result, the Government conceded the need to extend special measures

¹¹⁷ *Speaking Up for Justice*, 2.

¹¹⁸ See John Jackson, 'Justice for All: Putting Victims at the Heart of Criminal Justice' (2003) 30 *Journal of Law and Society* 309.

¹¹⁹ Commentators were also critical of the denial of special measures support to children. For discussion see Diane Birch's commentary of Redbridge [2001] Crim LR 473 and Hoyano [2001], above note 26, both of whom Baroness Hale cited in *Camberwell Green Youth Court*.

¹²⁰ [2005] UKHL 4 [63]. However, because it was not necessary in the instant case, Baroness Hale declined to hold that the Divisional Court had been wrong in *R v Waltham Forest Youth Court* [2004] EWHC 715 to deny that the court had an inherent power to allow the accused to use live TV link. The House of Lords has not given the matter further consideration, but in *R v R* [2008] EWCA Crim 678 the Court of Appeal (Criminal Division) followed *Waltham Forest Youth Court*. The issue is now moot as a result of government intervention to resolve the matter through statute. For further discussion of *Camberwell Green Youth Court* see case commentaries by Laura Hoyano (2005) 69 *Journal of Criminal Law* 488 and Jonathan Doak (2005) 9 *International Journal of Evidence and Proof* 291.

¹²¹ *T and V v United Kingdom* (2000) 30 EHRR 121; *SC v United Kingdom* (2005) 40 EHRR 10.

¹²² Practice Direction (Crown Court: Young Defendants) [2000] 1 WLR 659; [2000] 2 All ER 285; [2000] 1 Cr App R 483. See now: The Lord Chief Justice of England and Wales, *The Consolidated Criminal Practice Direction* (2005) Part III.30.

¹²³ Powell (2006), above note 89.

support, albeit in limited fashion, to child defendants. Thus, s.47 of the Police and Justice Act 2006¹²⁴ allows vulnerable defendants to use live TV link. A defendant under the age of 18 is deemed vulnerable where:

(a) his ability to participate effectively in the proceedings as a witness giving oral evidence in court is compromised by his level of intellectual ability or social functioning, and

(b) use of a live link would enable him to participate more effectively in the proceedings as a witness (whether by improving the quality of his evidence or otherwise).¹²⁵

The court may only grant the defendant's application if 'it is in the interests of justice for the accused to give evidence through the live TV link'.¹²⁶

The wording of the new provision begs the question as to whether all child defendants are presumptively assumed to have a reduced ability to participate effectively in proceedings by virtue of their youth. The provision is silent on whether the child defendant must demonstrate a reduced level of intellectual ability and social functioning in comparison to an adult or in comparison to other children of the same age and/or level of maturity. There is no case law to date, but judicial interpretation will clearly have a significant bearing on the number of child defendants ultimately able to utilize the support that live TV link provides.

If the policy behind the legislation is to respond to the criticism of the European Court of Human Rights, we may see live TV link granted to limited numbers of child defendants. In *SC v United Kingdom*,¹²⁷ an 11 year-old defendant stood trial in the Crown Court for the attempted robbery of an elderly woman. There

¹²⁴ Inserting a new s.33A into the YJCEA 1999.

¹²⁵ Section 33A(4). Note that by s.33A(5) an adult accused may be deemed vulnerable if he (a) suffers from a mental disorder (within the meaning of the Mental Health Act 1983) or otherwise has a significant impairment of intelligence and social function, (b) is therefore unable to participate effectively in the proceedings as a witness giving oral evidence in court, and (c) live link would enable him to participate more effectively in the proceedings as a witness (whether by improving the quality of his evidence or otherwise).

¹²⁶ Section 33A(2)(b).

¹²⁷ (2005) 40 EHRR 10.

was medical evidence that the defendant's mental age was somewhere between six and eight, and that he comprehended neither the situation he was in nor the consequence of his custodial sentence. By majority, the ECHR indicated that the defendant should have been tried in the specialist Youth Court, which could have made proper accommodation for his disability. Failure to do so persuaded the Court that the defendant came close to being unfit to plead.¹²⁸ The key issue for the ECHR was therefore that children are tried in circumstances appropriate to their age, level of maturity, and emotional and cognitive abilities.

The newly inserted s.33A makes live TV link available to eligible youth defendants in both the Crown Court and the magistrates' courts. The location of the proceedings will clearly be relevant to a court's assessment of a youth defendant's ability to participate effectively in those proceedings. Far more children are tried in the Youth Court than in the Crown Court. Criminal statistics for 2007 record that 126,534 young accused appeared in the Youth Court compared to 3,630 in the Crown Court.¹²⁹ Around 20% of the accused in the Youth Court and 10% in the Crown Court are aged under 15.¹³⁰ Crown Court formalities and procedures present the greatest challenge to children charged with criminal offences and one would imagine that courts are likely to look sympathetically on requests for assistance. We might therefore expect the Crown Court to authorise the use of live TV link for child defendants who have difficulty participating in proceedings designed primarily for adults, but who can be assisted to participate more effectively by measures short of transfer to the specialist environment of the Youth Court.

¹²⁸ See Andrew Ashworth's case commentary at [2005] Crim LR 130.

¹²⁹ Supplementary Tables to *Criminal Statistics, England and Wales 2007* (London: Ministry of Justice, 2008) available at <<http://www.justice.gov.uk/publications/criminalannual.htm>>.

¹³⁰ *Ibid.*

The greatest pool of potential beneficiaries for s.33A assistance is to be found in the Youth Court. It is conceivable that live TV link may additionally assist children who struggle even in that specialist arena, though, as Hoyano and Keenan point out in their comment on *SC v UK* which predated the new s.33A, the assistance of an intermediary, which is not currently available to the accused under the YJCEA 1999, might be the more appropriate course of action.¹³¹ However, Youth Court proceedings are specifically designed to accommodate the needs of young defendants. We might therefore expect the Court to assume that relatively few young people are unable to engage with its procedures. On that basis, live TV link is unlikely to become routine for young defendants in the Youth Court.

3.4 SPECIAL MEASURES AVAILABLE UNDER THE YJCEA 1999

3.4.1 Video-Recorded Evidence

Undoubtedly the most helpful special measure from the child's perspective is video-recorded evidence. A video-recorded interview allows a child to give her account in circumstances that encourage active and spontaneous recall,¹³² and to an interviewer specially trained to deal with vulnerable victims and witnesses. A video-interview further spares the child the difficulties involved in re-telling her story many months down the line in court. The demands on a child's memory are reduced and she is able to avoid the stresses associated with giving her evidence-in-chief in the formal and public environment of the courtroom. Excused from a personal appearance in the courtroom, the witness avoids any

¹³¹ Laura Hoyano and Caroline Keenan, *Child Abuse: Law and Policy Across Boundaries* (Oxford: Oxford University Press, 2007) 675. Note, however, that by Clause 94 of the Coroners and Justice Bill (2009), as amended in Committee, the Government proposes to insert a new s.33BA into the YJCEA 1999 which would allow the court to appoint an intermediary for a vulnerable accused, who, by dint of youth or significant impairment of intelligence or social functioning, is unable to participate unassisted in oral proceedings. Before issuing an SMD for an intermediary, the court must be satisfied that it is necessary to ensure that the accused receives a fair trial.

¹³² Fiona E. Raitt, "'Robust and Raring to Go?' - Judges' Perceptions of Child Witnesses' (2007) 34 *Journal of Law and Society* 465, 480.

visual contact with the defendant, which, as we have seen, can be highly distressing.

There are also clear advantages to the court in having access to a child's first account of an incident. The child's recall is likely to be at its peak and her memories less likely to have been degraded by the passage of time. The opportunity for the account to be corrupted through multiple interviewing is reduced, if not eliminated, and it is elicited using techniques thought to maximise its potential accuracy.¹³³ Even if there are doubts about the forensic utility of those techniques, a video-recorded interview offers a relatively transparent process which allows courts and jurors to examine not just the substance of a child's allegations but also the reliability of the methods used to elicit them. Using video images to convey to the fact-finder the circumstances in which allegations are disclosed is a potentially powerful way of establishing (or, as the case may be, undermining) the credentials of the witness' testimony as spontaneous, unrehearsed, and freshly narrated from recent memory.

For the prosecutor, video-recorded evidence also has certain strategic advantages over oral testimony, though it is not without its drawbacks. A major concern from the prosecutor's perspective is that a video-recording eliminates any opportunity to subsequently superimpose a structure upon the child's initial account.¹³⁴ Crafting a narrative to support the prosecution case is a central

¹³³ The narrative style of evidence presented in a pre-recorded investigative interview stands in contrast to the 'carefully managed and highly stylised' evidence traditionally obtained through examination-in-chief. For a comparison of video-recorded and court-based children's testimony see Amanda Wade, Anna Lawson and Jan Aldridge, 'Stories in Court - Videotaped Interviews and the Production of Children's Testimony' (1998) 10 *Child and Family Law Quarterly* 179. For the comparative accuracy of video-recorded interviews and written statements, see Michael Lamb, E., Yael Orbach, Kathleen J. Sterberg, Irit Hershkowitz and Dvora Horowitz, 'Accuracy of Investigators' Verbatim Notes of Their Forensic Interviews with Alleged Child Abuse victims' (2000) 24 *Law and Human Behaviour* 699.

¹³⁴ See Gwynn Davis, Laura Hoyano, Caroline Keenan, Lee Maitland and Rod Morgan, *An Assessment of the Admissibility and Sufficiency of Evidence in Child Abuse Prosecutions* (London: Home Office, 1999) ix - x; Louise Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford: Oxford University Press, 2001) 46 - 57.

function of the advocate in court, and many see the elimination of that step as a notable disadvantage. However, there are also significant benefits to the prosecutor in having the child witness's evidence 'in-the-can'. The prosecutor knows in advance the precise nature of the evidence that will be placed before the court, allowing her to better gauge the strength of the case. An assessment can be made of the child's credibility, and prosecutors' fears that the child's evidence will not 'come up to proof' in court are eliminated. Lastly, a defence counsel strategy typically used to cast doubt on the credibility of child witnesses is undermined.

It is a main stay of English criminal law that counsel may challenge a witness during oral evidence with the contents of a previous inconsistent statement for the purpose of undermining the witness's credibility.¹³⁵ In practice, the previous inconsistent statement is 'one of defence advocacy's chief weapons'.¹³⁶ If a child has given a written statement to police, defence advocates, under a duty to present the best possible defence to the charges laid, seek to use any discrepancies between the statement and oral testimony to raise doubt about the reliability or veracity of the prosecution witnesses.¹³⁷ Video, eliminates the opportunity for inconsistencies between accounts (though not for inconsistencies within an account) and so reduces the potential for prosecution evidence to be challenged in this way.

¹³⁵ Under ss.4 and 5 of the Criminal Procedure Act 1865 (Denman's Act). Pursuant to s.119 of the Criminal Justice Act 2003, previous inconsistent statements may be admitted as evidence of the truth of their contents.

¹³⁶ Anthony Heaton-Armstrong and David Wolchover, 'A plea for better JSB model directions on inconsistency' [2009] 3 Arch News 7.

¹³⁷ Heaton-Armstrong and Wolchover express some scepticism as to whether such discrepancies are genuine indicators of dishonesty, describing many as 'the result of built-in deficiencies in the process by which most statements are still produced'. Written statements are produced by a police officer in response to the witness's verbal account of events. Although witnesses sign the statement to verify its accuracy, the statement is ultimately a police construction of the witness's description which frequently has little correlation to the witness's original words.

A video-recording of an interview with a witness is admitted in place of the witness's evidence-in-chief under s.27 of the YJCEA 1999. However, the s.21 primary rule imposes no obligation on the police to video-interview a child witness. It simply mandates that the courts use any video in existence if the case comes to trial.¹³⁸ The legislation states that a special measures direction for a child witness:

must provide for *any* relevant recording to be admitted under section 27 (video-recorded evidence in chief).¹³⁹

The YJCEA 1999 therefore leaves the decision on whether or not to video-record a child's police interview to the discretion of the officer in the case.¹⁴⁰ That the creation of the video lies outside the control of the prosecutor or the courts has significant implications for the scope of special measures directions. The police are in a pivotal position in the special measures process, effectively holding a practical veto over the use of s.27 video-recorded evidence.¹⁴¹

The judge's discretion under s.27(2) to decline to admit all or part of a video if it is not in the interests of justice to do so replicates the equivalent provision in the CJA 1988.¹⁴² The House of Lords in *Camberwell Green Youth Court* made clear that 'there is nothing intrinsically unfair in children giving their evidence' by video.¹⁴³ The interests of justice test is, therefore, confined to specific claims of

¹³⁸ Provided the court is satisfied under s.27(2) that it is in the interests of justice for the video to be admitted and under s.27(4) that the witness is available for cross-examination and that the circumstances in which the video was made have been adequately disclosed.

¹³⁹ s.21(3)(a). Emphasis supplied.

¹⁴⁰ Although the section's broadly inclusive reference to 'any relevant recording' clearly opens up the possibility that a recording of an interview made by someone outside of the criminal justice system, such as a psychiatrist, may be admitted, in practice special measures applications relate to video-recordings of police interviews only. Police officers in some forces do jointly interview with social workers but retain control over the interviewing process. A defence lawyer wishing to admit a video of a child witness might choose to use a recording of an interview with a psychiatrist or a therapist, but to date there is no published evidence of defence use of s.27.

¹⁴¹ See Chapter 5.

¹⁴² See Section 3.2.3 above.

¹⁴³ [2005] UKHL 4 [46].

unfairness. The CJA 1988 provision was considered by the Divisional Court in *G v DPP*,¹⁴⁴ which ruled that breaches of the *Memorandum of Good Practice* would not necessarily render the resulting video-evidence inadmissible. In *Achieving Best Evidence*, *G v DPP* was interpreted as requiring that a court consider the nature and extent of any breaches of the guidelines and the extent to which the evidence affected by the breaches is supported by other evidence in the video-interview or in the case as a whole. In *R v K*¹⁴⁵ the Court of Appeal considered the exclusion of video-recorded evidence under the 1999 Act, and held that the key issue is the reliability of the evidence. The Court endorsed the test applied in *R v Hanton*:¹⁴⁶ 'Could a reasonable jury properly directed be sure that the witness had given a credible and accurate account on the video tape, notwithstanding any breaches?'. Hooper LJ in *R v K* emphasized that the prime consideration when considering admissibility is the reliability of the video-recorded evidence, which will normally be assessed by reference to the interview itself, the conditions under which it was held, the age of the child, and the nature and extent of any breach of the (*Achieving Best Evidence*) guidelines.¹⁴⁷ However, he further held that whilst it is possible to consider other evidence in the case when assessing the reliability of the video-evidence, a court should exercise caution in doing so, as it is rare that other evidence will be able to assist in determinations of the credibility, accuracy or completeness of the evidence in the video.¹⁴⁸ In the instant case, though the child's mother had been present during the child's interview, and had intervened to encourage the reluctant child to make a disclosure, the Court of Appeal held that the video had been properly admitted.

¹⁴⁴ (1997) 2 Cr App R 78.

¹⁴⁵ [2006] EWCA Crim 472.

¹⁴⁶ [2005] EWCA Crim 2009.

¹⁴⁷ [2006] EWCA Crim 472 [25].

¹⁴⁸ [29].

3.4.2 Pre-Recorded Cross-Examination

Pre-recorded cross-examination was an integral part of Pigot's original scheme to take the entirety of a child's evidence at a pre-trial hearing.¹⁴⁹ The intended benefits to the child were that she would give her evidence, and be cross-examined on it, whilst events were still fresh in her mind. Furthermore, the child would testify in smaller-scale, less formal proceedings, more easily adaptable to the needs of a particular child.

The YJCEA 1999 appears to contemplate cross-examination taking place at a pre-trial hearing, but divorced from the presentation to the court of the child's video-recorded interview and any supplementary evidence-in-chief. Section 28 stipulates that the persons present during the cross-examination are to be specified in rules of court or the special measures direction. The accused may not be present, though he must be able to see and hear the cross-examination and communicate with his legal representative. The judge or justices and legal representatives may or may not be physically present, but if not they must be able to see, hear and communicate with the persons in whose presence the recording is being made, potentially, one assumes, through live TV link.¹⁵⁰ Section 28 therefore leaves open the possibility that the pre-recorded cross-examination, though conducted outside of the trial proper, may take place some considerable time after the child's initial police interview and potentially close to or even alongside the trial itself.¹⁵¹ Much of the criticism directed at s.28 has been related to the impracticality of requiring the defence to cross-examine a witness, particularly a pivotal witness, prior to full prosecution disclosure.¹⁵² Section 28 is therefore unlikely to realise any benefit to the child in terms of

¹⁴⁹ See Section 3.2 above.

¹⁵⁰ Diane Birch and Rhonda Powell, *Meeting the Challenges of Pigot: Pre-Trial Cross-Examination under s.28 of the Youth Justice and Criminal Evidence Act 1999* (February 2004).

¹⁵¹ *Ibid*, para. 50.

¹⁵² *Ibid*, para.s 123 – 130.

concluding her evidence early, whilst her memory of events is still good, though it retains some benefits in removing the child from the formal and public environment of the courtroom.

Under s.28 of the YJCEA 1999 video-recorded cross-examination cannot stand alone as a special measure. A special measures direction for video recorded cross-examination may be granted only if there already exists a special measures direction for video-recorded evidence-in-chief.¹⁵³ Beyond that constraint, where the witness is a child in proceedings for a sexual offence, there is a presumption in favour of video-recorded cross-examination that can be rebutted only by the express wishes of the child.¹⁵⁴ Crucially, however, s.28 has yet to be commenced, and for a considerable time there have been growing doubts as to whether it will ever be implemented.¹⁵⁵

Partly in the light of CPS policy advice and a briefing to the Home Office¹⁵⁶ written by Diane Birch and Rhonda Powell,¹⁵⁷ and having taken account of concerns expressed by criminal justice professionals and other interested parties, Baroness Scotland issued a statement in December 2004 to the effect that s.28 would not be introduced in its original form, pending another thoroughgoing review of the whole area of children's evidence.¹⁵⁸ The Review Group's Consultation Paper, *Improving the Criminal Trial Process for Young*

¹⁵³ YJCEA 1999 ss.21(6) and 28(1).

¹⁵⁴ YJCEA 1999 s.21(7)(b).

¹⁵⁵ Cooper [2005].

¹⁵⁶ Above note 150.

¹⁵⁷ Respectively, JC Smith Professor of Law and (then) LLM candidate, in the University of Nottingham School of Law. For further discussion, see Cooper [2005].

¹⁵⁸ A review of children's evidence was formally launched on 1 December 2004: see Press Release, 'Giving Child Witnesses the Support They Need', on-line via www.cjsoline.gov.uk.

Witnesses,¹⁵⁹ was published in 2007 and the Government's response to the consultation in February 2009.¹⁶⁰ The Consultation Paper recommended that 'section 28 should be retained and implemented for use by the most vulnerable witnesses if this is the only way in which they would be able to give evidence'.¹⁶¹ The Government accepted this recommendation, 'subject to the successful development of rules of procedure and practitioner guidance',¹⁶² though it has yet to confirm the eligible categories of witness or the expected commencement date. Thus, for the time being, children continue to appear at trial, albeit at some remove from the courtroom itself, for the purposes of cross-examination.

3.4.3 Live TV Link

The most obvious benefit to children giving evidence over the live TV link is their removal from the formality of the courtroom environment and from the direct gaze of the accused. There may also be less evident advantages. As a matter of practicality, an adult must accompany a child in the live TV link room to operate the technology and ensure the propriety of the process. A by-product of their presence is that the person accompanying the child will be in a position to provide emotional support to the child, should that be required.

The Criminal Procedure Rules state that a witness giving evidence by live TV link shall be accompanied by a person approved by the court.¹⁶³ *Achieving Best Evidence* reiterates that it is for the judge to decide who should accompany the

¹⁵⁹ OJCR, 2007. Available at: <<http://www.justice.gov.uk/consultations/young-witness-consultation.htm>>. For a critical discussion of the Consultation Paper see: Laura Hoyano, 'The Child Witness Review: Much Ado About Too Little' [2007] Crim LR 849.

¹⁶⁰ *Government Response to the Improving the Criminal Trial Process for Young Witnesses Consultation* (London: Ministry of Justice, 2009). Available at <<http://www.justice.gov.uk/consultations/young-witness-consultation.htm>>.

¹⁶¹ *Above note* 159, Recommendation 1, 45.

¹⁶² *Above note* 160, 7 - 12.

¹⁶³ Criminal Procedure Rules 2005 (SI 2005 No. 384) r. 29.6.

witness.¹⁶⁴ These guidelines further specify that the person should be someone who is not involved in the case, has no knowledge of the evidence and has not discussed the evidence with the witness. They should have received suitable training and be a person with whom the witness has a relationship of trust.¹⁶⁵ This advice accords with the Practice Direction issued by the Lord Chief Justice in 2002 confirming a degree of flexibility in the choice of witness supporter,¹⁶⁶ and replacing the previous advice that the witness supporter should normally be a court usher.¹⁶⁷ Some concern remains, despite the current guidance, about the choice of supporter and their ability to provide sufficient emotional support to the child.¹⁶⁸ Nonetheless, a reassuring presence clearly has the potential, if implemented appropriately,¹⁶⁹ to assist children using the live TV link, and there is evidence that children welcome the support it can and does provide.¹⁷⁰

A further potential benefit to a child in using the live TV link is that, in comparison to courtroom testimony, it creates a degree of emotional distance between the child and questioner. There is a considerable literature on the perceived disadvantages of televised testimony in terms of its reduced emotional impact on juries.¹⁷¹ If there is any truth to the contentious claim that televised

¹⁶⁴ *Achieving Best Evidence* (2002) Appendix F, para. F2.

¹⁶⁵ *Ibid.*

¹⁶⁶ *The Consolidated Criminal Practice Direction Pt III.29* (2005).

¹⁶⁷ Deputy Lord Chief Justice Watkins, 21 October 1991.

¹⁶⁸ See *Improving the Criminal Trial Process for Young Witnesses* (2007) Chapter 10.

¹⁶⁹ In Clause 92 of the Coroners and Justice Bill (2009), as amended in Committee, the Government proposes to amend s.24 of the YJCEA 1999 to allow the court to specify a named witness supporter in any special measures direction for live TV link and to require the court to consider the child's wishes in the choice of that person.

¹⁷⁰ Joyce Plotnikoff and Richard Woolfson, *In Their Own Words: The Experiences of 50 Young Witnesses in Criminal Proceedings* (London: NSPCC, 2004) Chapter 10.

¹⁷¹ For good summaries, see: Graham Davies and Helen Westcott, 'Videotechnology and the Child Witness' in Helen Dent and Rhona Flin (eds.), *Children as Witnesses* (Chichester: J. Wiley & Sons, 1992); Graham Davies, 'The Impact of Television on the Presentation and Reception of Children's Testimony' (1999) 22 *International Journal of Law and Psychiatry* 241; Natalie Taylor and Jacqueline Joudo, *Impact of Pre-Recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study*. Research and Public Policy Series No. 68 (Canberra: Australian Institute of Criminology, 2005).

testimony is somehow 'deadened', then a parallel effect might equally apply to the interplay between advocates and witnesses. Practitioners suggest that the physical distance the technological barrier separating questioner from child creates enables the child to reflect on the questions put to her and take time over her answers. As a result, children gain confidence and find themselves better able to answer difficult or complex questions and to resist suggestion.

Section 24 of the YJCEA 1999 states that once a special measures direction for live TV link has been issued, the witness may not give evidence in any other way without the permission of the court.¹⁷² The court may grant such permission if it is in the interests of justice to do so, either of its own motion or on application by a party to the proceedings, where there has been a material change in circumstances since the special measures direction for live TV link was issued. In *Camberwell Green Youth Court* Baroness Hale suggested a number of circumstances where a variation might be in the interests of justice (including a strategy previously identified by prosecutors as a means of circumventing the primary rule to give effect to a child's preference for live oral evidence).¹⁷³

According to Baroness Hale, s.24(3):

must contemplate a time after the live link direction has been made. Usually it will be at the trial, for example where the machinery is not working properly or where the child is sliding down so as to be invisible to the camera. Another possibility might be where the child was positively anxious to give evidence in the courtroom and the court considered that it would be contrary to the interests of justice to require her to use the live link.¹⁷⁴

It therefore appears that there is a safety-valve within s.24 to allow a special measures direction for live TV link to be set aside, albeit in exceptional circumstances.¹⁷⁵

¹⁷² Section 24(2).

¹⁷³ Hoyano (2005), above note 120, 491. Note that the prosecutors interviewed for the research presented in this thesis confirmed the use of this strategy when a child expresses a strong preference to give evidence in the courtroom.

¹⁷⁴ [2005] UKHL 4 [35].

¹⁷⁵ *Ibid*, [37].

3.4.4 Screens

Section 23 of the YJCEA 1999 allows for a screen to be erected around the witness with the purpose of preventing the witness from seeing the accused. Depending upon the arrangement of the screen, it may also shield the witness from the wider courtroom and public gallery, but the screen must not prevent the judge, justices or jury, and the legal representatives of each party from seeing and being seen by the witness.¹⁷⁶

Screens are rarely an option for child witnesses. The primary rule in s.21 YJCEA 1999 directs that children in need of special protection must give evidence using the live TV link. Live TV link is also presumed to be the most appropriate choice for children not in need of special protection, though a court could direct the use of screens if it concludes that live TV link would not improve the quality of the child's evidence. As we have just seen, this is most likely to occur when a child expresses a strong preference for giving evidence in open court.¹⁷⁷

3.4.5 Wigs and Gowns

Section 26 of the YJCEA 1999 allows the party calling a child witness to apply for a special measures direction requiring the judge and counsel to remove their wigs and gowns for the duration of the witness's evidence. Formal court attire is not something that children frequently encounter in their everyday lives. *Speaking Up for Justice* suggested that some children are intimidated and over-awed in their interactions with adults wearing such arcane clothing.¹⁷⁸ The courts' general approach to children involved with criminal proceedings is that wigs and gowns should, in the normal course of events, be dispensed with.

¹⁷⁶ Section 23(2).

¹⁷⁷ In clause 90 of the Coroner's and Justice Bill (2009), as amended in committee, the Government proposes to introduce some flexibility in the primary rule. If enacted, all children will be able to opt out of using the live TV link and benefit instead from a presumption in favour of a screen, subject, again, to a child's agreement to its use.

¹⁷⁸ *Speaking Up for Justice*, para. 8.79.

Thus, the current practice direction on the trial of children and young persons in the Crown Court states that where the defendant is a young person, 'Robes and wigs should not be worn unless the court for good reason orders that they should'.¹⁷⁹

3.4.6 Evidence in Private

Excluding members of the public and the press from court proceedings is a way of responding to children's concerns that strangers and associates of the accused are allowed access to intimate details revealed during children's evidence. Not only is the witness likely to be embarrassed at speaking in public about such matters but also, as we saw in Chapter 2, 'the presence of the defendant's supporters or of members of the public with a prurient interest in the proceedings may make the giving of evidence exceptionally difficult'.¹⁸⁰ Prohibiting the attendance of associates of the accused may also assist in combating witness intimidation. To these ends, s.25 of the YJCEA 1999 provides that specified members of the public and the press (with the exception of one named person as a press representative) may be excluded from the court whilst a witness testifies, where the proceedings relate to a sexual offence or where the court is satisfied that there are reasonable grounds for fearing that someone 'other than the accused' has or will seek to intimidate the witness.¹⁸¹

3.4.7 Communication Aids and Intermediaries

The special measures described so far in this section assist children, amongst other vulnerable and intimidated witnesses, to cope with the stresses that an adversarial criminal process entails. Communication aids and intermediaries, by contrast, are designed to assist witnesses who, by dint of language or

¹⁷⁹ *The Consolidated Criminal Practice Direction* (2005) Part III.30.

¹⁸⁰ *Achieving Best Evidence* (2002), para. 5.56.

¹⁸¹ Section 25(4).

communication difficulties, otherwise would be unable to understand the questions put to them or make themselves understood to the court. Prior to the introduction of the YJCEA 1999, it was unlikely that these witnesses would have been able to appear to give evidence in criminal proceedings.¹⁸²

By s.30 of the YJCEA 1999, children and vulnerable adult witnesses may use an interpreter or some other communication aid or technique to assist in the delivery of their evidence to the court. Interpreters may be required for children whose first language is not English and for children who communicate using an alternative communication system such as Blissymbolics, Rebus, Makaton or British Sign Language.¹⁸³ Potential communication aids include sign and symbol or alphabet boards, Braille oath cards, Loop systems to aid those with hearing loss and text-to-speech technology.

Interpreters and communication aids under s.30 must be distinguished from the provision of an intermediary which is authorised by s.29. In broad terms, communication aids and interpreters facilitate direct conversion from one communication system or language to another. Intermediaries, by contrast, facilitate communication by either highlighting comprehension issues with the phrasing of a question and/or by reinterpreting questions and answers in order to make them understood. Crucially, however, intermediaries must facilitate communication without changing the substance of the question or the answer that the witness gives. Examples of people who may act as intermediaries are speech and language therapists, psychologists and social workers.¹⁸⁴

¹⁸² For a discussion of the difficulties that disabled children encounter in criminal proceedings see, Jennifer Temkin, 'Disability, Child Abuse and Criminal Justice' (1994) 57 MLR 402.

¹⁸³ *Achieving Best Evidence* (2002), para. 2.37.

¹⁸⁴ The Intermediary Registration Board maintains a national register of approved intermediaries who may appear in criminal proceedings.

Although s.29 of the YJCEA 1999 makes the support of an intermediary during the investigative interview or trial available to all children, this measure (like communication aids) is designed to assist only those with communication difficulties. Intermediaries may be able to assist very young children whose communication skills are yet to develop fully, or older children with specific disabilities such as learning difficulties or speech problems. Under s.29, however, all child witnesses are eligible as of right to use an intermediary and do not have to demonstrate particularised need.

The intermediary special measure finally became available nationwide in September 2008.¹⁸⁵ Criminal justice professionals should consider involving an intermediary at an early stage in the proceedings, if necessary prior to police interview.¹⁸⁶ Where an intermediary has been used during the investigative stage of the proceedings, the corresponding special measures application may be made retrospectively.¹⁸⁷

3.5 THE POLICY FRAMEWORK

This review of the legislation and its interpretation by the courts demonstrates that the YJCEA 1999 is a complex piece of legislation, rendered all the more opaque by its phased implementation. Moreover, it makes provision for measures which impact significantly upon established working practices within the criminal justice system. It is common practice in such situations to publish policy guidance to assist criminal justice professionals, and the YJCEA 1999 is supported by a co-ordinated series of policy documents which explain the objectives of the legislation and translate its provisions into specific practices.

¹⁸⁵ For a generally positive appraisal of the use of s.29 in the 6 pilot Areas see, Joyce Plotnikoff and Richard Woolfson, 'Making the Best Use of the Intermediary Special Measure at Trial' [2008] Crim LR 91.

¹⁸⁶ *Intermediary Procedural Guidance Manual* (London: Home Office, 2005) Chapter 3.

¹⁸⁷ *Ibid*, para.s 1.7 and 3.7.10.

This section will outline the main publications and consider their implications for police and prosecutors' working practices. In particular, it will examine how the policy guidance has interpreted the legislative qualification criteria for special measures to generate operational categories of children deemed eligible for support.

3.5.1 The Published Guidance

To complement the implementation of first phase special measures, guidance on the identification and treatment of VIWs, including children, was set out in considerable detail in various policy documents and procedural protocols.¹⁸⁸ The following guidance continued to apply during the period of this study:

- *Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, including Children;*¹⁸⁹
- *Vulnerable Witnesses: A Police Service Guide;*¹⁹⁰
- *Early Special Measures Meetings between the Police and the Crown Prosecution Service and Meetings between the Crown Prosecution Service and Vulnerable or Intimidated Witnesses: Practice Guidance.*¹⁹¹

The CPS also issued internal guidance to its prosecutors on the use of special measures for children under the YJCEA 1999.¹⁹² First phase policy documents were later supplemented, as the implementation of the YJCEA 1999 progressed,

¹⁸⁸ Policy guidance relating to the provision of therapy for both child and adult VIWs was also published, though these documents had no immediate relevance for the use of special measures: Home Office, Crown Prosecution Service and Department of Health, *Provision of Therapy for Child Witnesses Prior to a Criminal Trial: Practice Guidance* (Home Office, 2001); Home Office, Crown Prosecution Service and Department of Health, *Provision of Therapy for Vulnerable or Intimidated Adult Witnesses Prior to a Criminal Trial: Practice Guidance* (Home Office, 2001).

¹⁸⁹ *Achieving Best Evidence* (2002).

¹⁹⁰ London: Home Office, 2002.

¹⁹¹ London: Home Office, 2002.

¹⁹² Sheelagh Morton, Part II The Youth Justice and Criminal Evidence Act 1999: Guidance - Children's Evidence (unpublished guidance) (York: CPS, 2003).

by further guidance relating to the treatment of intimidated witnesses and the use of intermediaries:

- *Working with Intimidated Witnesses: A Manual for Police and Practitioners*;¹⁹³
- *Intermediaries: Procedural Guidance Manual*.¹⁹⁴

However, neither of these documents was available to criminal justice professionals during the period of this study, and so exerted no influence over their behaviour during that time.

Whilst the 1999 Act itself is the final arbiter of criminal justice practitioners' responsibilities and duties under the law, published policy documents have major operational significance. This study considers how that policy advice might affect the working practices of police officers in undertaking video-interviews and CPS prosecutors in their selection of children to benefit from special measures applications.

3.5.1.1 Policy Guidance on Video-Interviewing

Like the *Memorandum of Good Practice* which preceded it, *Achieving Best Evidence* recommends¹⁹⁵ a phased approach to interviewing children,¹⁹⁶ but is much richer in detail regarding the planning of interviews and effective interviewing techniques. It is a bulky document which encompasses all aspects of the criminal justice system's treatment of vulnerable and intimidated

¹⁹³ London: Home Office, 2006. This guidance contained in this document is now supplemented by *Action Dispels Fear: Solving the Problem of Witness Intimidation* (London: CJS, 2009) and a *Risk Assessment Intimidation Scorecard* aimed at helping the police identify witnesses at risk of intimidation.

¹⁹⁴ Above note 186.

¹⁹⁵ In its introduction the guidance states that the document is 'advisory and does not constitute a legally enforceable code of conduct.'

¹⁹⁶ Para. 2.29.

witnesses. To supplement its advice on interviewing practice, police officers are also referred to *Vulnerable Witnesses: A Police Service Guide*. This well-conceived document contains appropriate advice on how to identify vulnerable or intimidated witnesses, summarizes the special measures available under the YJCEA 1999, and gives a clear and concise summary of the presumptions that apply to both child and adult witnesses. The introduction informs police officers, in forceful language, of their pivotal role in identifying VIWs who may require special arrangements and assistance in court:

This guidance is designed to assist you through a number of processes that will afford a vulnerable or intimidated witness equal access to the criminal justice system. *You are the gateway* to the system and it is imperative that these witnesses are identified and assisted by officers from the very first point of contact, otherwise they will not have access to the special measures they might need.¹⁹⁷

Police officers are also directed to liaise with the CPS regarding potential special measures support once potentially eligible witnesses have been identified. *Speaking Up for Justice* advocated 'an early strategy meeting between the investigating officer and the CPS to discuss and agree the form in which the [witness's] statement should be taken and what measures might be needed to assist the witness before and during the trial, taking into account the witness' own views and preferences.'¹⁹⁸ This recommendation was followed-up by new arrangements for holding Early Special Measures Meetings (ESMMs) in cases involving VIWs, as a forum in which investigating officers and CPS lawyers could 'discuss and agree what special measures directions should be the subject of a prosecution application to the court'.¹⁹⁹

¹⁹⁷ Above note 190, 3 (emphasis supplied).

¹⁹⁸ *Speaking Up for Justice*, para. 6.19 and Recommendation 26.

¹⁹⁹ *Early Special Measures Meetings between the Police and the Crown Prosecution Service* (above note 191) para. 6. In practice this policy advice is almost never implemented. See Debbie Cooper and Paul Roberts, *Special Measures for Vulnerable and Intimidated Witnesses: An Analysis of Crown Prosecution Service Monitoring Data* (London: CPS, 2005) 75 – 76.

3.5.1.2 CPS Policy on Special Measures for Children

Achieving Best Evidence is primarily directed towards encouraging good practice in interviewing vulnerable and intimidated witnesses. Although it contains chapters on pre-trial support for witnesses and the availability and appropriate use of special measures, it does not identify the specific responsibilities of CPS prosecutors and case workers in making special measures applications. This lacuna was addressed by CPS internal policy guidance interpreting the YJCEA 1999's primary rule and clarifying prosecutors' responsibilities towards special measures support for children.²⁰⁰ Prosecutors also have access to CPS legal guidance on special measures,²⁰¹ which goes into some detail on accepted CPS practice for identifying eligible witnesses, the legislative presumptions that apply and the processes and timescales for making special measures applications. As qualified lawyers, CPS prosecutors are additionally expected to refer directly to relevant provisions of the YJCEA 1999 to resolve any outstanding issues of witness classification or eligibility.

These are the primary sources of advice and guidance for police officers and CPS prosecutors in their dealings with child witnesses. The next two sections, examine their detailed provisions with a view to determining official expectations of how the legislation would be put into practice.

3.5.2 Video-Interviewing: Narrowing the Legislative Provision

3.5.2.1 The Public Message

Public access to criminal justice policy on matters which the public might think it has a legitimate interest has traditionally been, if not restricted, then at least not readily accessible. The internet has changed all that. There now exists a government website specifically aimed at non-professional people who might

²⁰⁰ Morton (2003), above note 192.

come into contact with the Criminal Justice System of England and Wales, be it as a victim of crime, a witness, defendant, convicted offender or a juror.²⁰² For victims and witnesses the site contains 'Virtual Walkthroughs': interactive tours that aim to guide the reader through the criminal justice system from the time a crime is reported, through the police investigation and prosecution decision-making stages, to the court process and sentencing.²⁰³ The Victim's Virtual Walkthrough is emphatic on the issue of video-recorded interviews for children:

If a person under the age of 17 gives a statement in a case which is likely to go to court, *they will almost always* be video-interviewed. The police officer who carries out the interview will explain how the interview is carried out at the start of the interview, to ensure the young person and their appropriate adult understand the procedure.²⁰⁴

In striking contrast, video-interviews for witnesses are barely mentioned on the Witness's Virtual Walkthrough. This states baldly and without reference to the characteristics of witnesses who may qualify to be video-interviewed:

If you have been a witness to any part of a crime, the police may ask you to make a statement. A statement is a written or video-recorded account of what happened.²⁰⁵

Thus, although the policy as expressed on the CJS website does not exclude the use of video-interviews for non-complainant 'bystander' witnesses, it seemingly downplays the expectations of these witnesses, especially when viewed in contrast to the strongly worded guarantees of support for child victims.

²⁰¹ Available from www.cps.gov.uk.

²⁰² www.cjsonline.gov.uk.

²⁰³ <<http://www.cjsonline.gov.uk/victim/walkthrough/index.html>> and <<http://www.cjsonline.gov.uk/witness/walkthrough/index.html>> (accessed 12 Dec 2006).

²⁰⁴ <http://www.cjsonline.gov.uk/victim/walkthrough/police_procedures/index.html>, emphasis supplied. For the purposes of the 1999 legislation, an appropriate adult is a person who accompanies a young person or mentally vulnerable adult during police questioning or any associated searches to ensure that the accused understands what is happening. The role of the appropriate adult was created in the Police and Criminal Evidence Act (PACE) 1984 and the responsibilities of the appropriate adult are detailed in the PACE Codes of Practice, which provide the regulatory framework for police powers relating to stop and search, arrest, detention, investigation, identification and interviewing of persons accused of a criminal offence.

²⁰⁵ <http://www.cjsonline.gov.uk/witness/walkthrough/police_procedures/index.html>.

3.5.2.2 Guidelines for CJS Professionals

This distinction is not replicated in *Achieving Best Evidence's* discussion of the circumstances in which it would be appropriate to video record an interview and when it would be more appropriate to take a written statement. In identifying the criteria for video recording interviews with children,²⁰⁶ it faithfully reflects the 1999 Act in picking out (i) children giving evidence in sexual offence cases and (ii) children giving evidence in cases involving an offence of violence, abduction or neglect, for the highest level of assistance.

It is proposed that video-recorded interviews should take place in *all* category (i) and (ii) child witness cases, unless the child objects, and/or there are insurmountable difficulties which prevent the recording taking place (this may include that the child has been involved in abuse involving video-recording or photography).²⁰⁷

All other cases involving child witnesses, i.e. non-sexual and non-violent cases, are included in category (iii). Here the police should exercise discretion in conducting video-interviews. This operational guidance is evidently offence-based. It implies that there is little room for discretionary decisions regarding video-interviewing when the child has witnessed a sexual or violent offence, but that in all other instances the officer in the case should make a more considered decision. However, this initial clarity soon begins to waver. Although further guidance for sexual and violent offences is not provided – presumably on the ground that it is not necessary given officers' almost negligible discretion on the matter – the detailed guidance for non-sexual and non-violent offences places a heavy focus on one type of offending that seems not even to fit within the category: child abuse.

²⁰⁶ Para.s 2.26 – 2.29

²⁰⁷ Para. 2.26, emphasis supplied.

Thus, if we look at the guidance in paragraph 2.27 relating to children who have witnessed a category (iii) offence, it is suggested that the police consider the following factors when deciding on a video-interview or written statement:

- The needs and circumstances of the child (e.g. age, development, impairments, degree of trauma experienced, whether the child is now in a safe environment).
- Whether the measure is likely to maximise the quality of that particular child's evidence.
- The type and severity of the offence.
- The circumstances of the offence (e.g. the relationship of the child to the alleged abuser).
- The child's state of mind (e.g. likely distress and/or shock).
- Perceived fears about intimidation and recrimination.²⁰⁸

In this and further paragraphs which discuss category (iii) children, there are repeated references to abuse, abusers and factors which typically arise in the context of domestic child abuse.²⁰⁹ Paragraph 2.29, for instance, confusingly makes extensive reference to domestic or intra-familial abuse of children:

Discussion on the planning stage about category (iii) cases will thus enable the investigating team to decide whether a video-recorded interview or an interview for the purposes of taking a written statement is appropriate for any particular individual. It is likely that a video-recorded interview will be considered if a child makes a clear allegation of abuse, or if someone has witnessed the child being abused. A video-recorded interview may also be appropriate, subject to the deliberations of the investigating team, if the child is emotionally distressed or has a psychiatric disorder. Where the child has made no verbal allegation of abuse, then the interviewing team may decide that other specialist help or assessment of the child is more appropriate to the needs of the child than a video-recorded interview.²¹⁰

Yet one might imagine that all offences covered by the term 'child abuse' would be either sexual or violent in nature, particularly given the expansive approach to sexual or violent offences under the YJCEA 1999.²¹¹

²⁰⁸ Para. 2.27.

²⁰⁹ Para 2.28 and 2.29.

²¹⁰ Para. 2.29.

²¹¹ See Section 3.2 above.

There are a number of potential consequences of this internal inconsistency. Firstly, there is almost no discussion about the type of sexual or violent offending that qualifies a child witness for a video-interview, and, furthermore, when such offending is referred to at all, it is discussed only in terms of child abuse. It overlooks the large number of criminal offences against children that fall outside the ambit of intra-familial abuse yet remain sexual or physically violent in nature. In particular, the guidance is noticeably sparse in its advice on whether to video-interview victims of non-domestic violent offences, including 'street crime'. Secondly, by highlighting issues relating to abuse in the context of discretionary decision-making, *Achieving Best Evidence* runs the risk of confusing police officers as to the extent of their discretion regarding children who have been sexually or physically assaulted. Lastly, the guidance is almost completely silent on the issue of which interview technique is best suited to child witnesses to non-sexual and non-violent crimes. As we will see in Chapter 5, when the prosecutors in this study were asked to give examples of non-sexual or non-violent offences where children are witnesses they almost all mentioned theft or criminal damage. Yet *Achieving Best Evidence* does not address property offences as the type of crime that children might either experience or witness.

3.5.2.3 Redefining Crime Against Children as Child Abuse

Published policy on the priorities for video-interviewing effectively redefines the issue of support for child witnesses in terms of support for the victims of domestic child abuse. This is perhaps unsurprising, given that the criminal justice system's accommodation for children was originally developed within the child protection context. Notwithstanding a general rhetorical commitment to improving the experience of all crime victims and witnesses, published information on what they can expect from criminal justice agencies prioritizes support for victims over support for bystander witnesses. Policy directed at the

CJS professionals responsible for conducting video-interviews focuses almost exclusively on child witnesses to domestic child abuse.

First, the policy guidance establishes that those children specially selected by the legislation for the highest level of protection take priority in terms of access to video-interviews. Secondly, it narrows that selective group of children even further by implicitly redefining sexual or violent crimes against children as child abuse. Third, and finally, it imports an additional barrier to access by promoting the use of video for victims over bystander witnesses. These policy choices are probably best explained by the fact that the guidance was drawn up around the existing organisational structure of the police. *Achieving Best Evidence* focuses on a constituency of witnesses that the Child Protection Units or similar were specifically created to target.

Making video-interviewing available to all child witnesses would have considerable cost implications.²¹² Video-interviews are expensive. They are carried out by specialist officers and require access to specialist interviewing suites. Each interview ties up at least two police officers and tends to take considerably longer than an interview for the purposes of taking a written statement. Once the interview is complete, additional resources are required to produce a transcript of the taped interview. Playing a video-recorded interview at trial consumes more court time and resources than if the witness gave evidence in person. When resources are limited, as they always are, a degree of rationing is inevitable. Unfortunately, the criminal justice system in England and Wales has gained a reputation for treating its victims and witnesses poorly.²¹³ In

²¹² When video-interviewing of children was first introduced Tony Butler outlined the significant start up costs involved. 'The cost of equipping video suites, up to June 30 [1993], has been estimated at about £2.5 million... A total of 2,478 police officers have been trained in the new procedure, at an 'opportunity' cost of £1.6 million.' See Tony Butler, 'Spare the Child' (1993) 101 *Police Review* 14.

²¹³ See Chapter 2.

such circumstances the denial of services like video-interviewing, which were introduced for the express purpose of easing the plight of victims and witnesses, can only enhance that reputation. Clarity and transparency in decision-making are essential if the public is to accept that video-interviewing children on a universal scale is not a practical option.

3.5.3 A 'Near Mandatory' Special Measures Scheme for Children

Whereas operational guidance on video-interviewing has perpetuated the narrow approach to children's eligibility that existed under the Criminal Justice Acts 1988 and 1991, the special measures guidance adopted by the CPS indicates a perceptible change of direction. Internal CPS guidance to prosecutors in relation to children in need of special protection states that prosecutors must always make a special measures application for live TV link at a minimum, and for video-recorded evidence if a video exists, and they should do so at the earliest possible opportunity.

The primary rule is that a child witness in need of special protection shall give evidence by live link, with or without a video recording. The court on application by a party, or of its own motion *is required* at a preliminary stage to make such an order.... In view of the requirement for the court to direct special measures for video and/or live link in relation to children in need of special protection, applications should be made at the earliest possible stage in the proceedings. There is no power for the court to refuse at this stage and if the parties do not make an application the court is required to 'act of its own motion'.²¹⁴

Special measures for this group of child witnesses are stated to be mandatory.²¹⁵

Not only do prosecutors have no discretion to disregard the presumption imposed by the primary rule, but neither does the child.

The mere fact that the child has expressed a preference to give evidence in open court with or without screens will not in itself be sufficient to avoid the deeming provisions of section 19. The legislation does not seek to give children a choice as to how they will give their evidence, it creates a new scheme by which their evidence will be heard.²¹⁶

²¹⁴ Morton (2003) paras.12, 21 (original emphasis).

²¹⁵ Para. 10.

²¹⁶ Para. 17.

The guidance makes clear that prosecutors are not so restricted if the child witness is not in need of special protection. It suggests that it is acceptable for prosecutors to choose not to make a special measures application for such children, whilst cautioning that:

if the party presenting the witness is not seeking a special measures direction in accordance with the primary rule it is their responsibility to satisfy the court that a special measures direction for video and/or live link will not be likely to maximise the quality of evidence.²¹⁷

CPS policy therefore interprets the legislative framework as imposing a mandatory scheme for video-recorded evidence and live TV link on child witnesses to all sexual and violent offences, not just those offences conventionally characterized as 'child abuse'. It further reinforces the strong presumption that children who have witnessed other, non-sexual, non-violent, offences will also use those special measures, subject to the possibility of persuading the court that to do so would not improve the quality of the child's evidence. This is entirely justified. The CPS guidance does not read into the legislation any stronger assumptions than it already contains, but it does spell out their full implications.

3.6 CONCLUSION

This chapter has charted the gradual evolution, over the last two decades, of legislation to accommodate children's difficulties in giving evidence in criminal proceedings. The YJCEA 1999 now offers a sophisticated range of measures designed to provide support and enable children to give their best evidence. The current framework, though clearly rooted in the recommendations of the *Pigot Report*, still falls somewhat short of what, in retrospect, was a radical and far-sighted vision for managing children's needs. By introducing live TV link and video-recorded evidence, the Criminal Justice Acts 1988 and 1991 made

²¹⁷ Para. 18.

significant strides, but it was clear from *Redbridge Youth Court* that more radical steps were necessary if the new measures were to be fully embraced by the criminal justice agencies. The YJCEA 1999 represented a new dawn, though its latent potential has only gradually been revealed, not least because of its protracted and complex implementation. In *Camberwell Green Youth Court*, the House of Lords removed any vestigial doubt that televised testimony for children should in principle become the norm.

Official policy guidance presents a more mixed picture. Although the YJCEA 1999 potentially offers video-interviewing to all children, the policy guidance in force during this study suggested that there would be little expansion in its use beyond child victims of domestic abuse. By contrast, the policy guidance for CPS prosecutors appeared to signal a significant extension of live TV link and video-recorded evidence for children, albeit that the latter could be achieved only with the cooperation of the police.

A major objective of this thesis is to examine how, and to what extent, the legislation on the statute books has been translated into the law in action, and, in this translation, policy guidance plays a pivotal role. The following chapters examine how the policy on special measures use for children has been put into practice, firstly in the police station, and subsequently as part of the prosecution process.

Chapter 4

METHODOLOGICAL FRAMEWORK

4.1 BACKGROUND TO THE RESEARCH

The challenges which children face in their role as witnesses in criminal proceedings have been taxing the criminal justice system for the past twenty-five years. The overriding objective of legislative intervention to ease those problems was, and remains, to break down the barriers to children's access to justice in the courts. Legislators in this and most other common-law jurisdictions have chosen to pursue a strategy of accommodation with adversarial procedures.¹ Rather than divert the child from routine process, legislators have provided additional support mechanisms which, they hope, will allow children to comply with the broad tradition of oral evidence, subject to a few technologically-inspired adjustments. In England and Wales this accommodation strategy has evolved over time through two successive legislative schemes, resulting in the current framework of 'special measures' support.²

Broadly speaking, special measures pit the interests of children in securing participation against the public interest in criminal due process. Early research on the special measures framework under the Criminal Justice Acts 1988 and 1991 focused on the measurement of outcomes. Home Office sponsored research into live TV link³ and video-recorded evidence⁴ evaluated their success in terms of usage, compliance with agreed protocols and perceived effectiveness. Similarly, the only major research study examining children's evidence under the

¹ Louise Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford: Oxford University Press, 2001) Chapter 3.

² See Chapter 3, Sections 3.2 and 3.3.

³ Graham Davies and Elizabeth Noon, *An Evaluation of the Live Link for Child Witnesses* (London: Home Office, 1991).

⁴ Graham Davies, Claire Wilson, Rebecca Mitchell and John Milsom, *Videotaping Children's Evidence: An Evaluation* (London: Home Office, 1995).

Youth Justice and Criminal Evidence Act 1999,⁵ published as this study commenced, focused on the contribution that video and live TV link made to the successful prosecution of child abuse. This body of research demonstrated the contested nature of special measures use amongst criminal justice professionals. Two notable findings emerged: widespread dislike of televised testimony and concern that the unstructured accounts generated by video-recorded interviews were unsuitable for use as an evidential narrative in court.

In light of these findings, the present study set out to gain an in-depth understanding of the decision-making processes that underpinned the discretionary use of special measures. Its main focus was expected to be on the strategies employed by criminal justice professionals to navigate around or (as the case might be) to embrace special measures. The influence of professional ideologies and values, and of competing conceptions of justice, would be central. However, before the research questions for this thesis were finalised, the YJCEA 1999 became law. For children, the 1999 Act replaced a scheme under which prosecutors and judges had wide discretion to disregard special measures with a highly directive scheme in which their discretion was almost, if not quite, eliminated. The focus of this research thus expanded beyond an examination of criminal justice professionals' decision-making processes to include investigation of their responses to the new statutory framework. What was originally conceived as a socio-legal study of discretionary decision-making became a socio-legal study of criminal procedure reform.

4.2 THE AIM AND OBJECTIVES OF THE RESEARCH

This research project investigates the implementation of the special measures provisions of the YJCEA 1999, with particular focus on how the attitudes, beliefs

⁵ Gwynn Davis, Laura Hoyano, Caroline Keenan, Lee Maitland and Rod Morgan, *An Assessment of the Admissibility and Sufficiency of Evidence in Child Abuse Prosecutions* (London: Home Office, 1999).

and working practices of the police and prosecutors have affected its practical operation. It is set against the broad theoretical backdrop of a liberal, due process concept of criminal justice based upon a retributive rationale for punishment.⁶ The research topic is of interest because it puts the due process philosophy under strain. It is also of interest because the Crown Prosecution Service (CPS), which bears a significant responsibility for implementing the special measures provisions, is a notably under-researched organisation. The working practices of the CPS thus merit greater publicity and scrutiny in their own right. Additionally, the examination of prosecutor attitudes towards special measures presents a valuable opportunity to investigate, from an institutional perspective, how the issues and difficulties presented by a changing legal landscape are managed. Broadly stated, the research questions considered in this thesis are:

- How do criminal justice professionals perceive and perform their role in relation to child witnesses?
- How do the attitudes, motivations and work practices of the legal professionals involved affect the provision of special measures to children testifying in court?

With these objectives in mind, the study set out to investigate the following specific issues:

1. The factors that influence police and prosecutors in the selection of children for special measures support and the specific measures used to deliver that support.

⁶ As espoused, for example, in Andrew Ashworth and Mike Redmayne, *The Criminal Process* 3rd edn. (Oxford: Oxford University Press, 2005) Chapter 2.

2. The consequences for policy and practice of the statutory obligations imposed by the special measures provisions of the YJCEA 1999, in particular criminal justice professionals' acceptance of rigid rules on a matter previously characterised by discretionary judgements.
3. The impact of special measures on the pre-trial preparation of cases, including the demands of the application process and the implications for interactions between agencies and the discharge of their respective responsibilities.

4.3 PHILOSOPHICAL PRESUPPOSITIONS

This thesis is inspired by an interpretive account of social knowledge. The overriding aim of academic research is to improve our knowledge of the world. In the social sciences, this poses two key questions: Whether there is such a thing as a social reality and whether there are any practical means by which we can access and learn about that reality? The first is a question of ontology and the second a question of epistemology. The interpretive approach to social knowledge is generally described in contrast to the positivist approach.⁷ Positivism posits a rough equivalence between the natural and social world in that both can be known through objective and direct scientific enquiry. Positivist approaches to social enquiry assume that human behaviour can be described in objective, measurable terms, and that causal explanations can be inferred by observing correlations between events.⁸ Interpretivism rejects the idea of an unproblematically objective, value-free, social reality. Interpretive approaches seek to understand social behaviours by looking to the actor's intentions and

⁷ Presenting two, largely competing, positions on the nature of social reality is to engage in the much criticised practice of presenting ideals as if there is no possibility of compromise, which of course there is. However, for the purposes of this chapter, this juxtaposition offers an effective means to illustrate the starkly different approaches that can be taken to the ontological and epistemological issues that lie at the heart of the debate about appropriate methodologies.

⁸ See John Hughes and Wes Sharrock, *The Philosophy of Social Research* 3rd edn. (London: Longman, 1997) Chapter 2.

motivations, and to the social rules and conventions that shape those behaviours.⁹ Rules and conventions are constitutive of behaviour because they infuse human action with meaning. To fully understand meaning, however, the objectives of the community or system under consideration must be understood, not just the rules and conventions that ostensibly govern it.¹⁰ Legal systems clearly lay themselves open to interpretive enquiry. The rules of the legal game, and the actions of criminal justice professionals, make sense only when the purpose of the legal system is understood as a means of pursuing justice.¹¹

It is important to establish the philosophical underpinnings of a piece of research because they have implications for its intellectual authority. The reader must be persuaded that the research setting has been authentically depicted and that the findings of the research are persuasive. Success in this respect must be judged against the researcher's conceptualisation of social knowledge and how it can be acquired. Although interpretivists reject the notion of an 'objective' picture of the social world, this does not necessarily entail an 'idealist' stance.¹² A modified idealist view disengages with the debate about correspondence between perceptions and the 'real' world, and focuses instead on the possibility of representing shared interpretations of social phenomena. This is to accept that 'there is an order and regularity to be found, particularly by concentrating on the typical, the everyday and the routine in a social setting'.¹³ Provided that we are

⁹ See Martin Hollis, *The Philosophy of Social Science: An Introduction* 2nd edn. (Cambridge: Cambridge University Press, 2002) chapter 7; Hughes and Sharrock (1997) Chapter 5.

¹⁰ Hollis (2002) Chapter 7.

¹¹ *Ibid.*

¹² The view that social reality is created in the mind within the context of the individual's personal values and experiences, generally associated with the post-modernist movement. Constructionist and relativist are terms also used to describe this position.

¹³ See Elizabeth Murphy, Robert Dingwall, David Greatbatch, Sue Parker and Pamela Watson, 'Qualitative research methods in health technology assessment: a review of the literature' (1998) 2 *Health Technol Assessment* 2.

explicit about the cultural and temporal location of sociological accounts,¹⁴ it is possible to uncover similar patterns and trends in behaviour and, furthermore, we can, within limits, generalise about that behaviour without rejecting the notion that social situations are at some level unique. Neither need researchers in the interpretive tradition abandon all notions of objectivity. If we interpret it to mean a well-informed, critical stance in which multiple perspectives can be taken into account, then objectivity is a virtue in interpretive research. It reinforces the authority of the research findings. It allows the interpretivist researcher to assert that the recognition of multiple perspectives does not imply an acceptance that all are equally valid. The former is an epistemological argument that involves the researcher in description. The latter is a political claim that requires the researcher to engage in rational and reasoned argument to determine why one perspective is to be preferred over another. Engagement with moral and ethical claims cannot be avoided: it is simply a condition of academic inquiry.

Reflection on one's philosophical approach to social science research is therefore necessary to lend the research epistemological respectability and critical purchase. Interpretive research is generally qualitative. A qualitative methodology is adopted to gain insight into people's attitudes, behaviours, value systems and motivations. It is used when we wish to understand why research participants behave in the way they do.¹⁵ Descriptions of qualitative methods frequently invoke a contrast to quantitative methods, which are generally aligned with positivist attempts to measure social phenomenon, or establish links between action and outcomes. Despite the broad equivalence between philosophical perspectives and choice of methodology, many social scientists

¹⁴ Nancy Fraser and Linda Nicholson, 'Social Criticism without Philosophy: An Encounter Between Feminism and Postmodernism' (1988) 5 *Theory, Culture & Society* 373.

¹⁵ Although qualitative research is generally inductive, in that the research data generate theories or explanations, it can also be used deductively to test established theories in new circumstances: Murphy *et al.* (1998) 2.

endorse a mixed methodology which highlights the relevance and practicality of the chosen research method in addition to its philosophical credentials.¹⁶ A mixed methodology recognises that though one methodological approach may uncover the bulk of the research site's meaning for a researcher, other perspectives are not necessarily invalid and, indeed, may provide useful, complementary, information which enhances understanding. A qualitative methodology was planned for this thesis. In practice, for reasons outlined in the following section, a mixed methodology was adopted. However, the methods and techniques chosen remained primarily qualitative as the best strategy for developing an understanding of how prosecutors' perspectives shaped their actions in relation to special measures.

4.4 A QUALITATIVELY DRIVEN METHODOLOGY

This research project was initially designed as a small scale, qualitative, study to examine the decision-making processes that underpin the use of special measures for child witnesses within the criminal prosecution process. Its primary focus was on the motivations and reasoning of the prosecutors who make decisions on special measures, with particular attention to the influence of professional ideologies and values, and of competing conceptions of justice, on the decision-making process. Three CPS Areas were selected for inclusion in the research to highlight both differences and common patterns of behaviour across different locations. The research aimed to identify the factors influencing the use of special measures that could be attributed to regulatory frameworks, national or local policy, occupational and professional values and ideologies, and personal idiosyncrasy.

¹⁶ Alan Bryman, 'Integrating Quantitative and Qualitative Research: How is it Done?' (2006) 6 *Qualitative Research* 97; Jennifer Mason, 'Mixing Methods in a Qualitatively Driven Way' (2006) 6 *Qualitative Research* 9; Martyn Hammersley, 'Deconstructing the Quantitative-Qualitative Divide' in Martyn Hammerlsey (ed) *What's Wrong with Ethnography?* (London: Routledge, 1992).

This core project was undertaken, using documentary analysis and semi-structured interviews as the primary research methods. Once research commenced, however, the opportunity became available to supplement the core qualitative data with additional quantitative data regarding the extent of special measures use under the YJCEA 1999. It was initially thought that in order to generate a case sample the researcher would need to identify cases involving child witnesses in the CPS Areas included in the study. In practice this lengthy identification process was avoided because the CPS made available a large database of cases reported to CPS Policy Directorate as part of a national CPS monitoring exercise (hereinafter 'CPS Monitoring Database'). This database purported to be a 100% sample of all CPS prosecutions involving a witness eligible for special measures finalised between April 2003 and March 2004.¹⁷ The availability of this database had implications for case selection (see Section 4.5 below) and, more fundamentally, for the scope of the research. The database contained a record of all cases involving child witnesses reported by participating CPS Areas. Firstly, this simplified the selection process for the case sample. Secondly, it made possible a previously unplanned inquiry into the patterns of special measures use under the YJCEA 1999.¹⁸ As a result, quantitative techniques – analysis of survey data - were added to the research design. This blending of qualitative and quantitative research methods generated a more comprehensive account of the special measures process. The mixed methodology additionally contributed to the internal coherence of the study by facilitating triangulation of research findings.

¹⁷ In practice it was known that there were significant geographical omissions from the sample. See Debbie Cooper and Paul Roberts, *Special Measures for Vulnerable and Intimidated Witnesses: An Analysis of Crown Prosecution Service Monitoring Data* (London: CPS, 2005) Chapter 1, Section 1.5.

¹⁸ Such an enquiry was not originally contemplated on the ground that it was infeasible given the resource constraints inherent in a PHD research project.

4.5 RESEARCH DESIGN

4.5.1 Sample Selection and Access

Access to the CPS as a research site was secured through CPS Policy Directorate, who appointed a sponsor for the research. Three CPS branches in three different CPS Areas were approached to take part. Branches were selected on the grounds that (i) each fell under the control of a different Chief Crown Prosecutor, to allow for the effects of any local variations in policy; (ii) there was sufficient volume of cases involving child witnesses in the branch to suggest that some expertise in making special measures applications existed; and (iii) they were geographically suitable for the researcher to visit. The CPS sponsor secured the agreement of the Chief Crown Prosecutor in each Area to participate in the research.

The study comprised two case samples, both drawn from the CPS Monitoring Database described above.¹⁹ The first, the CPS Monitoring Sample, comprised 342 cases which were finalised between April 2003 and March 2004. Strictly speaking this was not a statistical sample: it comprised all cases finalised in the three branches included in the study in the relevant period (154 cases in Area A, 66 cases in Area B and 122 cases in Area C).²⁰ In total those 342 cases involved 581 child witnesses. This sample yielded survey data only, derived from the CPS Monitoring Database, and was used to generate information regarding the rate of special measures applications under the YJCEA 1999.

The second case sample, the 'Monitoring Sub-Sample', comprised 45 cases involving child witnesses that had been finalised during March 2004. The main

¹⁹ This database was compiled prior to the researcher's entry into the field. CPS Policy Directorate controlled the design of the monitoring exercise, its data-collection instrument (a Vulnerable and Intimidated Witness Monitoring Form), data-collection arrangements and database generation.

²⁰ In view of the fact that the data purported to be a 100% representation of child witnesses encountered within the branch in the defined period there are no issues around confidence levels or sampling bias. There was clearly an element of selection in that only three branches were included in the study. Branches were not selected on the ground that they were 'representative' though, as discussed in Section 4.6.2, key features of their context may be replicated in other CPS branches and Areas.

objective was to identify the reviewing lawyer for each case, who could then be interviewed to generate the qualitative data for the research. To maximise the likelihood that reviewing lawyers would remember the details of their cases, the most recent prosecutions reported by each of the participating CPS branches were selected. However, no effort was made to control selection by offence type or location of trial. Furthermore, at the point of case selection, no personal details were available about the child witnesses involved in the cases.

To generate the 45 cases for the Monitoring Sub-Sample, 60 cases were initially identified from the CPS Monitoring Database, 20 from each Branch. Case files were requested to allow confirmation that they were suitable for inclusion in the sample and to allow identification of the reviewing lawyer in each case. Some case files could not be found, disproportionately from Area C. The initial recall of 60 cases generated a final sample of 45 cases, 16 from Area A, 16 from Area B and 13 from Area C.

The Monitoring Sub-Sample was used to generate a pool of lawyers for a series of interviews (the 'Follow-Up Interviews'). Owing to staff changes, some of the reviewing lawyers identified from the case review were unavailable for interview. In addition, some prosecutors had been responsible for several cases in the sample. Ultimately thirty-two lawyers were asked if they would be willing to be interviewed for the research and all agreed.

4.5.2 Research Methods

Three research methods were utilised for data collection, two qualitative techniques (documentary analysis of case files and semi-structured interviews) and one quantitative technique (numerical analysis of survey data). The former supported the primary objective of the research, to uncover prosecutor perspectives on and experiences of special measures use. Case file analysis

allowed the researcher to gather preliminary facts about specific instances of special measures use to support a semi-structured interview with the lawyer responsible for making the special measures application in the particular case. These semi-structured interviews were augmented by more general discussions with CPS prosecutors and managers that occurred as the researcher became accepted in the research field. Interviews were chosen as the primary qualitative technique because, notwithstanding concerns (discussed in Section 4.6 below) that people's accounts do not always fully accord with their experiences of events, there is no better way to begin to understand actors' motivations, perceptions and experiences than to ask those actors to describe them in their own words. Efforts were made to ensure the validity of prosecutors' accounts by rooting their discussions in actions recorded on completed cases files. Quantitative analysis of data drawn from the CPS Monitoring Database, by contrast, was used to uncover broad patterns of special measures use. The quantitative data allowed measurement of the take up of special measures but gave no understanding of dynamic processes. Nevertheless, indications of broad trends in usage were useful for highlighting potentially interesting avenues for qualitative investigation. Furthermore, combining quantitative and qualitative methods allowed methodological triangulation²¹ and enabled cross-verification of findings.

Of the three methods described above, the semi-structured interview was the main vehicle for data-collection. Prior to interview, each participating prosecutor was given an outline of the topics to be discussed. Prosecutors were asked to consider: their use of special measures in the sample case(s); the motivations for their actions; the pre-trial processes required to facilitate special measures; the implications of special measures for other pre-trial processes; and their broader reflections on special measures in the instant case and for children

²¹ N. K. Denzin, *The Research Act in Sociology* (Chicago: Aldine, 1970).

generally. Interviews lasted between one and two-and-a-half hours. Some interviewees were able to review the case file(s) ahead of the interview, but others were not. All of the interviews produced valuable data. Interviews were recorded to guarantee the accuracy of write-ups, which included extensive verbatim quotations from prosecutors.

4.5.3 Data Analysis

Data obtained from each Monitoring Sub-Sample case file were distilled into tabular format to provide summaries relating to: the information passed from the police to prosecutors to support special measures applications; the content of special measures applications forms; the judicial process used to consider the application; and the special measures selected, broken down by witness age, offence type and case disposition.

The survey data available for the CPS Monitoring Sample cases had already been analysed and summarized in spreadsheet form by CPS Policy Directorate. This information was supplemented in this study with additional information derived from the case files: offence type; trial location; case disposition; status as complainant or witness; and special measures used. These data were then manipulated to provide information on special measures use by offence type.

Analysis of the data generated from the semi-structured interviews occupied the greater part of data-analysis stage of the project. Analysis of the interview data was a three-stage, inductive process. Each interview was first written-up.²² Interview transcripts were then manually coded and key statements drawn together into clusters around a number of themes that emerged from the interview process. Finally seven thematic reviews were compiled in which the

²² Full verbatim transcription was not attempted because it was not necessary. The researcher paraphrased many of the prosecutors' comments but transcribed in full key statements that provided an insight into prosecutors' actions and their perceptions of those actions. Even on that basis, a typical interview write-up ran to 25 pages of A4 text.

categorised comments were gathered together to form a loose narrative around each theme. These themes were: (i) Selecting vulnerable and intimidated witnesses; (ii) Children's participation in criminal proceedings; (iii) Presenting and evaluating children's evidence; (iv) Information flow between criminal justice agencies; (v) Defence use of special measures; (vi) Implications for adversarial process; and (vii) Taking responsibility for victims and witnesses.

4.6 LIMITATIONS OF THIS RESEARCH DESIGN

Whilst qualitative research is an established methodology in the social sciences, it is appropriate to acknowledge the potential limitations of this study's research design. Specifically, we must address concerns relating to the accuracy of prosecutors' accounts, the ability of prosecutors to describe the motivations of their police officer colleagues, and the generalisability of research findings.

4.6.1 Accuracy of Prosecutors' Accounts

Although the interview is the method best suited to gaining information regarding participants' intentions, beliefs and motivations, a reflective researcher must always remain sceptical about the level of confidence she may have in participants' accounts. The participant may be unwilling or unable to articulate the meanings that shape her actions.²³ Furthermore, any account which is provided is a constructed account in which the pressure to render the event both meaningful and acceptable to the researcher has the potential to obscure the participant's actual reasoning at the time of the decision.²⁴ We must also acknowledge that the researcher's interpretation of the participant's perspective is itself a constructed account, shaped by the researcher's own interests and directed towards a particular academic audience²⁵.

²³ Murphy *et al* (1988) 77.

²⁴ *Ibid.*

Although these issues cannot in principle be avoided, practical steps can be taken to minimise distortion. In the first place, it is worth stressing that though prosecutors might be expected to present an acceptable account of their behaviour, many of the prosecutors in this study revealed information which they acknowledged might expose them to criticism. Prosecutors seemed entirely willing to admit to mistakes and make critical comments about the CPS and other criminal justice professionals. Equally they were quick to praise good practice and acknowledge sympathies with both witnesses and defendants. The range of attitudes prosecutors displayed suggested that, in general, they were open, candid and truthful. Prosecutors' confidence in speaking frankly was bolstered by assurances of anonymity in publication and researcher detachment from CPS management. Nevertheless steps should be taken to check the validity of prosecutors' accounts and, in this study, prosecutors' responses to questions about their actions were cross-checked to facts derived from the case files. In practice this checking mechanism was less effective than anticipated. It became clear that following the implementation of the YJCEA 1999 special measures applications had been transformed from an exceptional to a routine procedure for prosecutors. The details of the sample cases were frequently insufficiently distinctive to allow prosecutors to recall their reasons for acting in a particular case. Accordingly in this study less cross-verification of prosecutors' assertions was possible than was originally envisaged.

A second potentially distorting influence on the accuracy of participants' accounts is the researcher's values and interests. Any researcher begins her project with a specific set of theoretical assumptions and political interests which cause her to be selective in her interpretations. This is no more than a candid admission that certain aspects of the social setting will be of greater interest to the researcher than others. Steps can be taken to adopt an objective stance and

²⁵ Alan Bryman, *Quantity and Quality in Social Research* (London: Unwin Hyman, 1988) 80.

to conceal the researcher's preconceptions from the interviewees, but the interviewer's success in this regard is largely dependent upon her personal skills. Ultimately, it is inherent in this type of research that its quality is judged in the data. To that end, in my extensive use of verbatim quotes, I have tried, so far as possible, to allow the prosecutors to 'speak for themselves'.

4.6.2 Prosecutor Perceptions of Police Behaviours

The original focus of this research project was on the decision making processes of the prosecutors who control special measures applications for child witnesses. However, as described in Section 4.4 above, the unanticipated availability of CPS Monitoring data on special measures rendered possible further enquiry into the patterns of special measures use and, in particular, the levels of video-interviewing by police. This quantitative data provided a valuable and previously unavailable insight into the pattern of video-interviewing across offence types, and to that extent its inclusion in this thesis is unproblematic. There is no reason to believe that the data relating to the police use of video-interviewing is any less accurate than the data relating to CPS special measures applications. Although the Monitoring Database was generated by the CPS rather than the police, the data was drawn from prosecution files that are jointly constructed by the two criminal justice agencies. As will be seen in Chapter 5, the quantitative data on video-interviewing rates reveal some notable variations between offence types which, in turn, raise fundamental questions about the factors which influence police officers in their choice of interviewing method for children.

Had the original focus of this research been to explore explanations for police behaviour, interviews with police officers would have been central to its methodology. Clearly the best source when seeking to explain any decision making process is the decision-maker herself. However, availability of the data subsequent to negotiation of research site access meant that additional

interviews could not be arranged within the timeframe of the research. Thus, within this research study, qualitative data to inform our understanding of police officers' video-interviewing decisions was derived from a secondary rather than a primary source. To use a legal analogy, that part of the thesis which seeks to explain the motivations of police officers depends to a significant extent on the 'hearsay evidence' of prosecutors. And as with hearsay evidence in criminal proceedings, we must consider the reliability of prosecutors' accounts of police behaviour if they are to be accepted.

In so doing we can assert that, though not the best source of information regarding police behaviour, prosecutors are able to speak with some authority. Reviewing CPS lawyers routinely have contact with investigating officers to discuss *ad hoc* queries in particular cases and when attending court as advocates in summary proceedings. Furthermore, they have access to case files in which police decisions on special measures are recorded and frequently explained or justified. Accordingly prosecutors felt confident in commenting on the factors that outwardly appear to influence police decision-making regarding video-interviewing. Secondly, we may observe that the validity of prosecutor observations was frequently reinforced by the quantitative data on video usage. Nevertheless, it must be acknowledged that prosecutors' conclusions as to the factors which influence police officers in deciding whether or not to video-interview children are to be treated with caution. At best they are tentative indicators of the likely explanations for police behaviour and are clear candidates for confirmation through further research.

4.6.3 Scope for Generalisation

Qualitative research is frequently criticised as generating results which are so specific to location or context that its findings cannot be generalised. In fact, the strength of qualitative research is in its demonstration that real understanding of

social processes and phenomena requires the acknowledgement of context. Context is revealed as part of the explanation. Generalisability remains possible if we can demonstrate that key features of the context – such as policy influences, rules and conventions, organisations and administrative processes, professional ethics - are likely to be replicated elsewhere.

CPS Areas are both organised locally and part of a national bureaucracy. Prosecutors are lawyers who might be thought to be guided by a common professional ethic and occupational culture. They are subject to a common legal framework and central government initiatives but also exposed to local policy and crime pressures. The choice of the research sites for this thesis is therefore central to claims that its findings have implications beyond the researched Areas.

The research was conducted in three separate CPS Areas managed by three different Chief Crown Prosecutors. The branches selected were all city based and the main office in each Area. In addition to their geographical convenience, they were chosen to maximise the volume and variety of offences dealt with and to give access to cases across court centres. It was further expected that the branches would contain sufficient expertise in making special measures applications to generate good quality data on the special measures process. It is therefore possible that findings may not be transferable to rural Areas or to offices dealing with lower volumes of cases involving child witnesses. Findings which are attributable to local policy will almost certainly not be transferable to Areas in which that policy was not effective.

Without assuming that its findings would be precisely replicated in all 42 CPS Areas in England and Wales, this study seeks to identify and explain the relevant structural and systemic pressures that produce patterns and trends in the

behaviour of criminal justice professionals, specifically prosecutors and – less directly – police officers. To the extent that such structural and systemic factors can be identified it seems likely that their influence extends beyond the specific research sites, an hypothesis that might be confirmed or refuted by further research employing similar qualitative methods. In this regard, we should note that in-depth qualitative interviews with experts in their field typically produce very rich and detailed information which rapidly achieve congruence. Other qualitative researchers have demonstrated that data saturation - the point at which no new information or themes are observed in the data –occurred within the first twelve interviews and basic elements for over-arching themes were present as early as six interviews.²⁶ This study included interviews with 32 prosecutors, which gives us confidence that the explanations of prosecutors in the three Areas selected for the research will have wider relevance across CPS Areas.

²⁶ Greg Guest, Arwen Bunce and Laura Johnson, 'How Many Interviews are Enough?' An Experiment with Data Saturation and Variability (2006) 18 *Field Methods* 59.

Chapter 5

VIDEO-INTERVIEWING: POLICE AS GATEKEEPERS

5.1 INTRODUCTION

As we saw in Chapter 3, video-recorded evidence is one of seven special measures available to support children¹ testifying during criminal proceedings. Video-recorded evidence stands apart from other special measures in one significant respect, being the only measure dependent on preparatory measures taken in the police station. As such, it lies outside the exclusive control of courts and prosecutors. In addition to its use in court, a video-recorded interview also functions as a tangible reminder to prosecutors that the witness is eligible for special measures. It is therefore something of a gateway to the other measures available to children. This chapter considers the extent to which the police elect to video-record interviews with children, and identifies the factors which appear to influence police officers' decision-making.

We will see that access to video-interviewing facilities is almost exclusively controlled by the police, and police officers consequently exercise a *de facto* negative veto over the use of s.27 video-recorded evidence-in-chief.² Whilst CPS prosecutors and defence solicitors are responsible for making special measures applications to the court, and the courts retain the power to order special measures on their own initiative, neither is in a position to compensate for the absence of a video. That said, police discretion is not unchecked. The categories of witness eligible for video-interviewing is ostensibly controlled by the legal rules laid down in the YJCEA 1999. The central question of this chapter is,

¹ Amongst other vulnerable and intimidated witnesses.

² In theory all child witnesses, prosecution or defence, may be video-interviewed. However, there are no reports in the literature of video-interviews with child defence witnesses and neither had the professionals interviewed for this research study seen or heard of such a strategy.

therefore, whether, and how, those legal rules operate to constrain and control the behaviour of the police in making video-interviewing available to children.

We saw in Chapter 3 that although the relevant legislation in principle extends special measures to all child witnesses, subsidiary practitioner guidance implicitly focuses on 'child abuse' cases, or, at the least, fails to provide clear criteria for taking video-statements in other types of case. In this chapter we will see that this narrow focus is perpetuated in police practice. Though the statute-book tells us that child witnesses to any type of sexual and/or violent offence are the priority for video-interviewing, the police priorities for video-interviewing have long been, and continue to be, children somehow involved in intra-familial abuse, either sexual or physical. The legislative categories of children eligible for special measures have been filtered, first through written policy guidance and then through the working practices of the police, to generate a series of operational categories for video-interviewing shaped to fit organisational imperatives. These categories have been institutionalised to the extent that long-standing working rules regarding video-interviewing continue to operate, even in the face of significant legislative reform.

The existing literature suggests that considerations such as offence type, age and the status of the witness as a complainant or bystander influence police practice. Prosecutors in this study endorsed some of those explanations, but questioned whether the police were actually taking reasoned decisions, or merely following institutionalised habit or expediency. This study supports a multi-factorial explanation. We will see that there are marked discrepancies between video-interviewing rates for witnesses to different types of offence. Superficially, an explanation based upon offence category is entirely plausible. However, more searching analysis extending beyond the headline statistics indicates that the patchy implementation of s.27 is driven by investigating

officers' relative specialisation. Virtually all children who come into contact with officers from the Child Protection Unit (CPU) are video-interviewed.³ Comparatively few children who come into contact with generalist police officers similarly benefit. Generalist officers are apparently less constrained by official policy on vulnerable and intimidated witnesses than their specialist colleagues. This finding is all the more significant because, it seems, between twice and three times as many children are interviewed by generalist as by specialist officers. Prosecutors suggested that a wide range of operational policing demands inevitably impacts upon a generalist officer's willingness to undertake the additional work that video-interviewing entails. Other policy initiatives also have an impact, as do certain aspects of police culture. In summary, nearly two decades after video-recorded evidence was first introduced into English law, and despite on-going expansion,⁴ implementation of s.27 remains uneven and fails to recognise the vulnerability of large numbers of children who come into contact with the criminal justice system as witnesses.

The chapter begins by examining the existing research on the extent of video-interviewing for children. It then presents this study's findings across three CPS Areas, demonstrating the variations in video-interviewing rates for different categories of child witness. Having explored the possible reasons for observed police practice, the last section considers contextual factors affecting generalist officers in their dealings with children. It is these officers who consistently fail to conduct or to arrange video-interviews for young witnesses to criminal activity. A unifying theme of the chapter is to question how and why the law in practice deviates from the law on the statute-book.

³ The specialist units that deal with crimes against children are commonly labelled Child Protection Units, but some forces use the terms Public Protection Investigation Units, Child and Public Protection Units or Family Protection Units to describe the teams responsible for child protection.

⁴ See Section 3.3.3.

5.2 VIDEO-INTERVIEWING: THE EXISTING RESEARCH

Although the legislative framework governing video-interviewing has undergone significant overhaul, the basic issues regarding take-up in the police station remain consistent: How many children are video-interviewed and who are they? Why do the police focus their resources on certain categories of children? Whilst the quality and effectiveness of video-recorded evidence have also received some critical attention, the following discussion focuses on the threshold decision to make a video.

Four major research studies have examined the impact of the video-interviewing provisions of the CJA 1991 or the YJCEA 1999. These studies give an indication of the prevalence of video-interviewing and some, albeit limited, information on the type of children most likely to benefit.

5.2.1 Patterns of Video-Interviewing

Early studies suggested widespread take-up of video-interviewing under the CJA 1991, but produced limited comparative information on the proportion of children video-interviewed or making written statements. Later studies examining implementation of the YJCEA 1999 are more comprehensive, but still did not quantify levels of usage across different categories of child witness.

Two research studies considered relevant provisions of the CJA 1991. The first, *Videotaping Children's Evidence: An Evaluation*,⁵ specifically investigated the merits of video-recording. The second, *An Assessment of the Admissibility and Sufficiency of Evidence in Child Abuse Prosecutions*,⁶ evaluated video-recorded evidence as part of a broader examination of evidential sufficiency in child abuse

⁵ Graham Davies, Claire Wilson, Rebecca Mitchell and John Milsom, *Videotaping Children's Evidence: An Evaluation* (London: Home Office, 1995).

⁶ Gwynn Davis, Laura Hoyano, Caroline Keenan, Lee Maitland and Rod Morgan, *An Assessment of the Admissibility and Sufficiency of Evidence in Child Abuse Prosecutions* (London: Home Office, 1999).

cases. Neither study set out to determine the extent to which the police had adopted video-interviews for children in place of written statement taking. Both reports sought to evaluate the quality of the video-interview as an evidential device and the extent of practitioners' adherence to the interviewing guidelines and standards of the day. Nevertheless, the studies provide some indication of the willingness of the police to use the new procedures.

Videotaping Children's Evidence presented data showing that, between 1 October 1992 and 30 June 1993, the police conducted 14,912 video-interviews with children and submitted 3,652 (24%) to the CPS for use in potential prosecutions.⁷ However, without comparative figures for the number of children who gave written statements to the police in the same period, it is impossible to gauge relative proportions. *An Assessment of the Admissibility and Sufficiency of Evidence in Child Abuse Prosecutions* reviewed a sample of recent and on-going cases across three CPS offices. Out of 103 interviews with children, 74 (72%) were video-recorded.⁸ Predictably, given the focus of the research, the majority of the children in the sample were witnesses to alleged sexual offences. We cannot, therefore, confidently generalise from this study's findings to the wider class of children who witness criminal offences.

The post-YJCEA 1999 research proved more fruitful in substantiating researchers' suspicions of offence-based selection bias in video-interviewing. The Home Office sponsored two related research projects into the effectiveness of the YJCEA 1999 provisions. The first, from Hamlyn *et al.*, comprised a series of surveys gauging satisfaction with special measures amongst all types of vulnerable and

⁷ Association of Chief Police Officers, *Survey of the Use of Videotaped Interviews with Child Witnesses by Police Forces in England and Wales* (Gloucester Constabulary, 1993), reported in Davies *et al.* (1995) 17.

⁸ Davis *et al.* (1999) 19.

intimidated witnesses (VIWs).⁹ The second, from Burton *et al.*, considered the extent to which the new legislation had been implemented by the criminal justice agencies and sought to evaluate its effectiveness.¹⁰ Both reports commented upon police take-up of the video-interviewing procedures for child witnesses. A further research project by Cooper and Roberts reported CPS monitoring data indicating the prevalence of video-interviewing of children.¹¹

Hamlyn *et al.* compared the percentage of witnesses using video-recorded evidence when its admission was controlled by the CJA 1991 with the position after the YJCEA 1999, which created stronger presumptions promoting its use. Following implementation of the 1999 Act, 42% of the 239 child witnesses in the sample gave a video-recorded statement. This compares to 30% of child witnesses under the previous legislative regime.¹² The children in the surveys had experienced or witnessed a variety of criminal offences. In their complementary research, Burton *et al* also considered the experiences of VIWs. But in their case-tracking sample of 60 adult and 116 child witnesses, video-interviews were conducted with only around one-third of adult VIWs and little more than a quarter of children.¹³ Reporting roughly contemporaneous data, Cooper and Roberts found that the CPS made applications for video-recorded evidence for 1,857 out of 4,508 child witnesses (41%) during the year-long monitoring period.¹⁴

⁹ Becky Hamlyn, Andrew Phelps, Jenny Turtle and Ghazala Sattar, *Are special measures working? Evidence from surveys of vulnerable and intimidated witnesses*. Home Office Research Study 283 (London: Home Office, 2004).

¹⁰ Mandy Burton, Roger Evans and Andrew Sanders, *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies*. Home Office On-Line Report 01/06 (2006).

¹¹ Debbie Cooper and Paul Roberts, *Special Measures for Vulnerable and Intimidated Witnesses: An Analysis of Crown Prosecution Service Monitoring Data* (London: CPS, 2005), 80.

¹² Hamlyn *et al.* (2004) 66.

¹³ Burton *et al.* (2006) 53.

¹⁴ Cooper and Roberts (2005) 80. The authors had some methodological concerns with the base data which might limit the level of confidence attached to this figure. The CPS Areas reported a total of 1593 videos in the period which failed to tally with the 2032 special measures applications for

From these broadly convergent studies we may conclude that, at most, the police conduct video-interviews with 40% of children involved in formal criminal proceedings. The clear implication is that a majority of child witnesses to criminal activity is asked to give written statements rather than video-statements. Given that the legislation makes all children presumptively entitled to video-interviewing, this is a surprising, even disconcerting, conclusion.

5.2.2 Police Support for Video-Interviewing

One conceivable explanation for the patchy implementation of video-interviewing is police hostility or indifference. Two previous studies, however, suggest that the police are, and always have been, highly supportive of this initiative.

Davies *et al.* conducted a two-stage survey of child protection professionals completed pre-and post-implementation of the CJA 1991.¹⁵ Although not specifically stated in the report, it is likely (given the study's focus on child protection professionals and detailed questionnaire) that specialist CPU officers were targeted. An overwhelming majority (98%) of the officers surveyed supported video-interviews for children, though rather fewer agreed that the provisions as formulated would serve the interests of justice (60%) or the interests of the child (65%). The advantages of video-interviewing most commonly cited were a reduction in stress for the child (52% pre- and 39% post-implementation) and greater opportunity to observe the child's demeanour close to the time of the alleged offence (45% pre- and 37% post-implementation). Officers expressed some reservations about the effectiveness and drawbacks of video-interviewing, but on the whole supported it as a surrogate for the child's live testimony-in-chief.

video-recorded evidence in the same period. However, it seems more likely that the number of videos made was under-reported rather than the number of special measures applications made being over-stated. *Ibid.*, 86.

¹⁵ Davies *et al.* (1995) 5 – 10.

Following implementation of the YJCEA 1999, Burton *et al.* surveyed criminal justice professionals to ascertain the effectiveness of special measures.¹⁶ The report does not disclose whether any, or all, of the respondents had specialist child protection responsibilities. Nevertheless, 32 out of 37 police respondents rated video-recorded evidence as very effective (26) or effective (6). One rated the measure ineffective and four failed to respond to the question.¹⁷ This research thus reinforces Davies *et al.*'s earlier findings. However, though the police display generally positive attitudes towards video-interviewing children, this endorsement in principle does not translate into systematic video-interviewing on the ground. There must be other reasons why video-interviewing rates for children are low.

5.2.3 Factors Influencing Police Discretion

Previous research has established that video-interviewing, even within a recognised vulnerable group like children, is selective. The 1991 legislation made video-interviewing available to all child witnesses to a sexual or physically violent offence, yet Davies and Westcott concluded that victims or witnesses to sexual offences, particularly sexual abuse within the family, predominated.

As surveys have repeatedly demonstrated, *Memorandum* interviews are conducted overwhelmingly in sexual abuse cases, much less frequently in physical abuse cases, and rarely in instances where children are witnesses to domestic violence or street crime.¹⁸

Davies and Westcott drew on the CPS Inspectorate's thematic review of child witness cases.¹⁹ The CPS Inspectorate reviewed 252 cases across six CPS branches. Over 95% of cases included an application to use video-recorded

¹⁶ Burton *et al.* (2006) 53.

¹⁷ *Ibid*, 60.

¹⁸ Graham Davies and Helen Westcott, *Interviewing Child Witnesses under the Memorandum of Good Practice: A Research Review*. Police Research Series Report 115 (London: Home Office, 1999) 36.

¹⁹ The Crown Prosecution Service Inspectorate, *Report on the Thematic Review of Cases Involving Child Witnesses* (London: CPS Inspectorate, 1998).

evidence at trial. Around 70% of those cases featured a sexual offence charge. A further 15% involved a physically violent charge, though these cases were not further categorised as cases of 'physical abuse' or 'street violence'.²⁰ Sexual offending therefore outweighed any other type of offence by a considerable margin. The CPS Inspectorate also found that age, witness status and type of interviewing officer influenced interviewing practice:

The police do not conduct a video-recorded interview of child witnesses in all cases where the statutory triggers apply. They may choose not to do so where the child is a witness, but not a victim; where the child is at the older end of the age range; or where the victim and defendant are of a similar age. We found that a video-interview may be overlooked where a non-specialist police department investigated the offence.²¹

Later studies confirm that age is a relevant consideration. Burton *et al.* identified age, especially when it raises 'equality of arms' issues between victim and defendant, as a significant factor impacting upon a police officer's choice to video-interview a child.

It seems that the older the child, the less likely a video-interview would take place, especially if the defendant was also a child of a similar age to the victim witness... However, even in cases of "younger" child witnesses, the issue of parity between the victim and defendant may influence whether the police decide to record an interview for use as evidence-in-chief.²²

Like the CPS Inspectorate, Burton *et al.* observed that the police may regard children at the upper end of the age range, or who are of a similar age to the defendant, as less in need of the support that video-interviewing provides. Burton *et al.* discount the possibility that police fail to identify child witnesses as potential candidates for video-interviewing. Whilst critical of criminal justice

²⁰ *Ibid*, Appendix C.

²¹ CPS Inspectorate (1998) Para. 8.37.

²² *Ibid*, 40. When this research was conducted, the legislation expressly excluded young defendants from the ambit of special measures. Under s.33A of the YJCEA 1999, as inserted by s.47 of the Police and Justice Act 2006, youth defendants whose ability to participate effectively as a witness in court is compromised by limited intellectual ability or social functioning may now give evidence by live TV link (but remain ineligible for video-interviews). See Section 3.3.4.

agencies' abilities to identify VIWs in general,²³ they recognize that class-based identification, i.e. by age or offence, is easier for the police than identification based upon the witness's personal characteristics, which is often dependent upon some degree of self-identification by the witness.²⁴ Furthermore, systems for the identification and protection of child witnesses pre-date the provisions of the YJCEA 1999.²⁵ Burton *et al.* conclude that uneven patterns of video-interviewing reflect positive exercises of police discretion rather than mere oversight. They specifically reject variations in local policy, limited availability of video suites or inadequate resources as explanations for police decisions, concluding that case-specific factors are the primary influences over the video-interview decision.²⁶

In summary, the existing literature clearly establishes that video-interviews are conducted more frequently with certain types of child witness than others. At least three factors appear to be relevant: offence type, witness age and the relative age of the defendant and witness. There is also some suggestion that victim or witness status and degree of specialism of the investigating officer may be relevant. There are limited data describing the variability between video-interviewing rates for different categories of children. The CPS Inspectorate's review revealed a considerable bias towards sexual offence complainants and witnesses, but quantitative measures of disparity are otherwise sparse. Addressing this gap in the existing literature, this study sought to determine which of the previously identified factors, or any others, impact upon the decision-making processes of the police and to further explore the significance of those influences.

²³ Burton *et al.* (2006) 24 - 37; See also Mandy Burton, Roger Evans and Andrew Sanders, 'Implementing Special Measures for Vulnerable and Intimidated Witnesses: The Problem of Identification' [2006] Crim LR 229, 236 - 239.

²⁴ Burton *et al.* (2006) 24.

²⁵ *Ibid*, 25.

²⁶ *Ibid*, 40.

5.3 PATTERNS OF VIDEO-INTERVIEWING: FINDINGS FROM THIS STUDY

To assess the extent to which the police conducted video-recorded interviews for different categories of children and/or offence in three CPS Areas, this study employed a triangulated methodology with three principal strands; (i) a quantitative analysis of the cases in the 'CPS Monitoring Sample'; (ii) documentary analysis of the 'Monitoring Sub-Sample' (45 cases); and (iii) qualitative analysis of the 'Follow-Up Interviews' with reviewing lawyers.²⁷ Of particular interest were the levels of video-interviewing rates experienced by children witnessing each of the legislatively-differentiated offence categories: sexual offences, violent offences and the residual category of non-sexual, non-violent offences.

5.3.1 The CPS Monitoring Sample

The CPS Monitoring Sample cases yielded 581 potential child witnesses for the prosecution, of whom 342 were complainant witnesses and 239 non-complainant (bystander) witnesses. The police conducted video-interviews with 212 (36%) of these 581 child witnesses, 45% of complainants and 25% of bystander-witnesses. These headline figures on video-interview usage do, however, mask considerable variation by offence-type.

5.3.1.1 Sexual Offences

Less than a quarter of child witness in the sample, 123 out of 581, had witnessed a sexual offence. The police video-interviewed 103 (84%) of this group. Table A describes the number of child witnesses to sexual offences who gave video-interviews and written statements, broken down by complainant and non-complainant (bystander) witnesses.

²⁷ For full details of the research methodology see Chapter 4.

Table A: Child Witnesses to Sexual Offences

	Child Witnesses	Written Statement	Video	% Video
All Sexual Offences	123	20	103	84%
• Complainants	100	13	87	87%
• Bystander-witnesses	23	7	16	70%

The range of sexual offences reported were: rape; indecent assault; gross indecency with a child or incitement to gross indecency with a child; and unlawful sexual intercourse with a child under 16.²⁸ Tables B to D break down the aggregate data presented in Table A for each of these charges.

Table B: Child Witnesses to Rape

	Child Witnesses	Written Statement	Video	% Video
Rape	24	1	23	96%
• Complainants	18	1	17	94%
• Bystander-witnesses	6	0	6	100%

Table C: Child Witnesses to Indecent Assault

	Child Witnesses	Written Statement	Video	% Video
Indecent Assault	84	19	65	77%
• Complainants	67	12	55	82%
• Bystander-witnesses	17	7	10	59%

Table D: Child Witnesses to Other Sexual Offences

	Child Witnesses	Written Statement	Video	% Video
Indecency/Unlawful SI	15	0	15	100%
• Complainants	15	0	15	100%
• Bystander-witnesses	0	0	0	0%

²⁸ At the time of the study, rape was charged as contrary to s.1(1) and schedule 2 of the Sexual Offences Act 1956, indecent assault as contrary to s.14(1) of the same Act, gross indecency or incitement thereof as contrary to s.1(1) of the Indecency with Children Act 1960 and unlawful sexual intercourse with a child under 16 as contrary to s.6(1) of the Sexual Offence Act 1956. Now see the Sexual Offences Act 2003.

Of all sexual offences, witnesses to indecent assault were proportionately least likely to be video-interviewed (77%). Of the 84 child witnesses to indecent assault, 65 gave a video-interview and 19 gave written statements. Proportionately, bystanders gave more written statements (41%) than complainants (18%). The rate of video-interviewing for child witnesses to rape was higher, at 96%; only one complainant gave a written statement. The video-interviewing rate was highest of all (100%) in charges of gross indecency or unlawful sexual intercourse, where all the child witnesses were complainants.

The aggregate pattern of video-interviewing in sexual offence cases was broadly consistent across all three CPS Areas. However, a markedly lower video-interviewing rate was achieved amongst the 21 witnesses to indecent assault scheduled to appear in the youth court (43%) than those scheduled to appear in the Crown Court (89%) or magistrates' courts (100%).

5.3.1.2 Violent Offences

Over three-quarters of the child witnesses in the sample, 443 out of 581, witnessed a violent offence. Table E describes the number who gave video-interviews and written statements, broken down by witness type.

Table E: Child Witnesses to Violent Offences

	Child Witnesses	Written Statement	Video	% Video
All Violent Offences	443	336	107	24%
• Complainants	234	169	65	28%
• Bystander-witnesses	209	167	42	20%

There were broadly equal numbers of complainants (234) and non-complainant witnesses (209). The police conducted video-interviews with 107, giving a video-interviewing rate of just 24%. Bystander-witnesses were only marginally less likely to be video-interviewed than complainants.

Violent offences fell into one of four categories: offences against the person;²⁹ robbery offences;³⁰ public order offences³¹ and physical child abuse.³² Offences against the person comprised the bulk of the violent offences, with 278 out of 443 child witnesses. Tables F to I show how the aggregate video-interviewing rate of 24% masks significant variation between specific types of violent offence.

Table F: Child Witnesses to Offences Against the Person

	Child Witnesses	Written Statement	Video	% Video
Physical Assaults	278	237	41	15%
• Complainants	133	108	25	19%
• Bystander-witnesses	145	129	16	11%

Table G: Child Witnesses to Robbery or Attempted Robbery

	Child Witnesses	Written Statement	Video	% Video
Robbery Offences	127	69	58	46%
• Complainants	77	43	34	44%
• Bystander-witnesses	50	26	24	48%

Table H: Child Witnesses to Public Order Offences

	Child Witnesses	Written Statement	Video	% Video
Public Order Offences	36	30	6	16%
• Complainants	22	18	4	18%
• Bystander-witnesses	14	12	2	14%

²⁹ Common assault (s.39 Criminal Justice Act 1988); actual bodily harm (s.47 Offences Against the Person Act 1861); unlawful wounding (s.20 OAPA 1861); grievous bodily harm with intent (s.18 OAPA 1861); assault with intent to rob (s.8(2) of the Theft Act 1968); False imprisonment (contrary to the common law); making threats to kill (s.16 of the OAPA 1861); and murder (contrary to the common law).

³⁰ Robbery (s.8(1) of the Theft Act 1968) and attempted robbery (s.1(1) of the Criminal Attempts Act 1981).

³¹ Affray (s.3(1) of the Public Order Act 1986); threatening words or behaviour (s.4 of the POA 1986); harassment (s.2 of the Protection from Harassment Act 1997); violent disorder (s.2 of the POA 1986); witness intimidation (s.51 of the Criminal Justice and Public Order Act 1994); possession of a firearm (s.16A of the Firearms Act 1968); possession of an offensive weapon (s.1(1) of the Prevention of Crime Act 1953); and arson being reckless as to the endangerment of life (s.1(2) of the Criminal Damage Act 1971).

³² Abduction of a child, at the time of the study charged under s.20(1) of the Sexual Offences Act 1956 and cruelty to a child, contrary to s.1 of the Children and Young Persons Act 1933.

Table I: Child Witnesses to Physical Child Abuse

	Child Witnesses	Written Statement	Video	% Video
Physical Child Abuse	2	0	2	100%
• Complainants	2	0	2	100%
• Bystander-witnesses	0	0	0	N/A

The video-interviewing rate was highest (100%) for offences specifically charged as some form of physical abuse by a parent or person in a position of trust. However, the number of cases in the CPS Monitoring Sample was extremely small. Furthermore, as we will see later in this chapter, analysis of the Monitoring Sub-Sample and discussion with CPS lawyers suggests that most incidents of intra-familial violence are charged as offences against the person. The true video-interviewing rate for cases of physical child abuse in the sample is therefore probably lower than 100%.

Of the remaining violent offences, the police video-interviewed more child witnesses to robbery (46%) than any other offence. However, there is a significant variation between the video-interviewing rates for robbery in each of the Areas in the study. Table J illustrates that Area A accounted for nearly 70% of robbery cases witnessed by a child and had the highest video-interviewing rate at 57%. Area C accounted for less than 5% of reported cases and police officers in that Area video-interviewed none of the child witnesses involved.

Table J: Child Witnesses to Robbery by Area

Robbery Offences	Child Witnesses	Written Statement	Video	% Video
Area A	84	36	48	57%
Area B	37	27	10	27%
Area C	6	6	0	0%
Total	127	69	58	46%

It is not entirely clear what might account for this striking discrepancy. We will see later that some prosecutors attributed the higher incidence of video-interviewing in robbery cases to the influence of the Government’s Street Crime Initiative.³³ It is possible that the police forces in the study Areas gave differing priorities to that initiative, or implemented it differently, producing the observed discrepancies in reported video-interviewing rates. Trial venue also appeared relevant. Table K demonstrates that most video-interviews occurred for violent offences scheduled to be heard in the Crown Court.

Table K: Child Witnesses to Violent Offences by Trial Venue

All Violent Offences	Child Witnesses	Written Statement	Video	% Video
Crown Court	114	63	51	45%
Magistrates’ court	24	18	6	25%
Youth court	305	252	53	17%
All court centres	443	333	110	25%

The only significant deviation from this general pattern across court centres was in cases of robbery, where some 55% of child witnesses against Youth Court defendants were video-interviewed.

5.3.1.3 Non-Sexual, Non-Violent Offences

Only 15, or less than 3%, of the 581 children in the CPS Monitoring Sample had witnessed non-sexual, non-violent offences. Table L shows that the police conducted video-interviews with three, or 20%, of those children.

Table L: Child Witnesses to Non-Violent, Non-Sexual Offences

	Total Witnesses	Written Statement	Video	% Video
All Other Offences	15	12	3	20%
• Complainants	8	6	2	25%
• Bystander-witnesses	7	6	1	14%

³³ See Section 5.6.2.3.

Most of the 15 child witnesses to non-sexual, non-violent offences were involved in cases of dishonesty.³⁴ A minority witnessed road traffic³⁵ or public nuisance³⁶ offences. Tables M to O break down the aggregate data presented in Table L for these sub-categories of offence.

Table M: Child Witnesses to Dishonesty Offences

	Total Witnesses	Written Statement	Video	% Video
Dishonesty Offences	11	10	1	9%
• Complainants	6	5	1	17%
• Bystander-witnesses	5	5	0	0%

Table N: Child Witnesses to Road Traffic Offences

	Total Witnesses	Written Statement	Video	% Video
Road Traffic Offences	3	2	1	33%
• Complainants	1	1	0	0%
• Bystander-witnesses	2	1	1	50%

Table O: Child Witnesses to Public Nuisance Offences

	Total Witnesses	Written Statement	Video	% Video
Nuisance Offences	1	0	1	100%
• Complainants	1	0	1	100%
• Bystander-witnesses	0	0	0	N/A

These data seem to indicate that perceived offence seriousness is a factor in the video-interviewing decision for non-sexual, non-violent offences, though we will see that the position is more complex than first appears. It should also be

³⁴ Theft (s.1(1) of the Theft Act 1968); attempted burglary (s.1(1) of the Criminal Attempts Act 1981); burglary (s.9(1) of the Theft Act 1968); and handling stolen goods (s.22 of the Theft Act 1968).

³⁵ Dangerous driving (s.2 of the Road Traffic Act 1988); causing danger to a road user (s.22A of the Road Traffic Act 1988); and failure to stop (s.170(2) of the Road Traffic Act 1988).

³⁶ Causing a public nuisance contrary to the common law.

acknowledged that these numbers are too small to support confident generalizations.

5.3.2 The Monitoring Sub-Sample

The Monitoring Sub-Sample comprised 45 cases and 87 child witnesses, divided between 44 complainants and 43 bystander-witnesses. The police conducted video-interviews with 35 of the 87 witnesses, giving an overall video-interviewing rate of 40%. As in the CPS Monitoring Sample, the police video-interviewed more complainants (23 out of 44, or 52%) than bystanders (12 out of 43, or 28%). Also reflecting the CPS Monitoring Sample, these headline rates mask marked differences between offences. In contrast to the CPS Monitoring Sample, however, qualitative analysis of case files allowed for further enquiry into the police decisions for each witness.

5.3.2.1 Sexual Offences

Eleven cases involving 20 child witnesses, 15 complainants and 5 bystander-witnesses, alleged some form of sexual offence. Table P shows that the police conducted video-interviews for 18 of the 20 witnesses. Officers presumably took written statements from the remaining two.

Table P: Child Witnesses to Sexual Offences

	Child Witnesses	Written Statement	Video	% Video
All Sexual Offences	20	2	18	90%
• Complainants	15	0	15	100%
• Bystander-witnesses	5	2	3	60%

In this group, 8 children had witnessed rape and 12 had witnessed indecent assault or unlawful sexual intercourse. The reviewing lawyer in **CASE 11** inferred the police officer's likely motivation in taking written statements from the two children involved in that case, neither of whom was a complainant. The children

were listed as prosecution witnesses on the List of Witnesses for Court (LWAC) but the case file contained no details of their anticipated evidence, implying a somewhat peripheral role in the prosecution. Although **Prosecutor C6** was unable to recall these witnesses, she explained that there are circumstances when it is appropriate to take a written statement from a child even in relation to sexual offences:

'It may well be that what we wanted from them was something very succinct, or even just a negative... in which case a statement is absolutely fine because they are quite unlikely to have to give any evidence in person... [Their evidence] might well have been agreed... One of the reasons within the context of a case like this one, why you would take statements from a child not in video form, is because you didn't expect it to produce anything evidentially worthwhile [apart from] just closing down some lines that the defence might require you to close down, or that the court require you to.'
(**Prosecutor C6**)

CASE 11 involved multiple sexual offences including rape, indecent assault and the indecent making of pseudo photographs of children. The case file identified five child witnesses, three of whom were video-interviewed: the two complainants and the defendant's daughter. So the investigating officers in this case were clearly prepared to video-interview non-complainant witnesses, lending credence to the prosecutor's suggestion that the other children's evidence must have been tangential to the prosecution's case.

5.3.2.2 Violent Offences

The majority of the cases in the Monitoring Sub-Sample, 32 out of 45, were prosecutions for violent offences. Table Q illustrates that the proportion of children video-interviewed in these cases is dramatically lower (25%) than the corresponding figure for child witnesses to sexual offences (90%).

Table Q: Child Witnesses to Violent Offences

	Child Witnesses	Written Statement	Video	% Video
All Violent Offences	65	49	16	25%
• Complainants	28	20	8	29%
• Bystander-witnesses	37	29	8	22%

A marked difference in the video-recording rates between offences again appears, paralleling the CPS Monitoring Sample. The Monitoring Sub-Sample comprised 20 offences against the person, eight robberies or attempted robberies and four public order offences. At 38%, the police video-interviewed proportionately more child witnesses to robbery than any other type of violent offence.

Twenty cases involving 42 child witnesses in the Monitoring Sub-Sample concerned offences against the person: 12 cases of common assault,³⁷ five cases of actual bodily harm,³⁸ one case of unlawful wounding³⁹ and two cases of grievous bodily harm with intent.⁴⁰ Table R demonstrates that, of all the categories of violent offence, witnesses to these physical assaults were least likely to be video-interviewed.

Table R: Child Witnesses to Offences Against the Person

	Child Witnesses	Written Statement	Video	% Video
Physical Assaults	42	34	8	19%
• Complainants	18	14	4	22%
• Bystander-witnesses	24	20	4	17%

Indeed, the rate of video-interviewing in cases charged as offences against the person is probably even lower than these raw data initially suggest. On their face, none of the charges laid within the Monitoring Sub-Sample could readily be identified as incidents of intra-familial violence, more commonly termed physical child abuse. A review of the case files showed, however, that the defendant in two of the physical assaults in the Monitoring Sub-Sample was a family member or carer. **CASE 45** was charged as grievous bodily harm and **CASE 12** as actual

³⁷ Contrary to s.39 Criminal Justice Act 1988.

³⁸ Contrary to s.47 OAPA 1861.

³⁹ Contrary to s.18 OAPA 1861.

⁴⁰ Contrary to s.20 OAPA 1861.

bodily harm. These cases involved two complainants and a single bystander-witness, and the police video-interviewed all three children.

The prosecution did lay a child cruelty charge in a further case (**CASE 22**), but the predominant charge was indecent assault, which was classified as sexual abuse in this study. If **CASE 22** were alternatively categorised as physical child abuse, it would contribute two additional complainants to the tally of witnesses, both of whom were video-interviewed. On either view, the police video-interviewed 100% of child witnesses involved in intra-familial physical child abuse cases.

Tables S and T demonstrate that, if the physical child abuse cases are removed, the rate of video-interviewing for non-familial violence decreases from 25% to 21% and the rate for offences against the person decreases from 19% to 13%.

Table S: Child Witnesses to Non-Familial Violent Offences

	Child Witnesses	Written Statement	Video	% Video
All Violent Offences**	61	48	13	21%
• Complainants	26	20	6	23%
• Bystander-witnesses	35	28	7	20%

Table T: Child Witnesses to Non-Familial Physical Assault

	Child Witnesses	Written Statement	Video	% Video
Physical Assaults**	39	34	5	13%
• Complainants	16	14	2	13%
• Bystander-witnesses	23	20	3	13%

** Excluding intra-familial violence charged as an offence against the person.

In the non-familial assault category, two cases accounted for all five child witnesses with a video-interview. Four youths aged fifteen or over were witnesses to alleged grievous bodily harm in **CASE 24**. One eleven year-old child

in **CASE 27** gave evidence on a s.39 common assault charge. This pattern is consistent with both the seriousness of the offence and the age of the child influencing police decisions to utilise video-interviews in non-familial violence cases.

GBH was the most serious of the physical assault charge in the Monitoring Sub-Sample. An unlawful wounding charge under s.20 OAPA 1861 was also laid, and the bystander-witness in that case gave a written statement. The majority of the remaining cases (12 out of the 16) were s.39 common assault charges. Four involved allegations of s.47 actual bodily harm.

The great majority of child witnesses (31 out of 34) who gave written statements were aged between thirteen and sixteen (inclusive). The three youngest child witnesses who gave written statements were twelve years-of-age. The defendant's age also appeared to influence police video-interviewing in physical assaults cases. None of the 23 witnesses scheduled to give evidence against youth defendants charged with physical assault were video-interviewed in the Monitoring Sub-Sample.

Eight cases in the Monitoring Sub-Sample were charged either as robbery⁴¹ or attempted robbery.⁴² Video-interviewing rates for the 16 children identified as potential witnesses in these cases are detailed in Table U.

Table U: Child Witnesses to Robbery or Attempted Robbery

	Child Witnesses	Written Statement	Video	% Video
Robbery Offences	16	10	6	38%
• Complainants	6	4	2	33%
• Bystander-witnesses	10	6	4	40%

⁴¹ Contrary to s.8(1) of the Theft Act 1968.

⁴² Contrary to s.1(1) of the Criminal Attempts Act 1981.

One child was twelve years-old, the remainder were aged thirteen or over. The child’s age does not, therefore, appear to be a relevant factor in these cases. However, once again child witnesses testifying against youth defendants tended to make written statements. Of the six video-interviewed children, five were scheduled to appear in the Crown Court and only one was scheduled to appear in the Youth Court, although the robbery cases in the sample were fairly evenly distributed between the Crown Court and the Youth Court.

The Monitoring Sub-Sample also contained a small number of public order offences: two charges of affray,⁴³ one charge of harassment⁴⁴ and one charge of using threatening words or behaviour.⁴⁵ As Table V demonstrates, the police conducted video-interviews for only two child witnesses to public order offences, both of whom were complainants.

Table V: Child Witnesses to Public Order Offences

	Child Witnesses	Written Statement	Video	% Video
Public Order Offences	7	5	2	29%
• Complainants	4	2	2	50%
• Bystander-witnesses	3	3	0	0%

Both video-interviewed complainants featured in **CASE 38** and both were 11 years-of-age. All of the child witnesses who gave written statements were aged 14 or over. Four out of five of the cases were scheduled to be heard in the Youth Court, including the case with the video-interviews. The clear implication is that, for the one case in which the police decided to conduct video-interviews, the relative youth of the child witnesses was the decisive factor. However the

⁴³ Contrary to s.3(1) of the POA 1986.

⁴⁴ Contrary to s.2 of the Protection from Harassment Act 1997.

⁴⁵ Contrary to s.4 of the POA 1986.

reviewing lawyer in that case pointed out that the incident was particularly upsetting:

‘Yes, that was quite a bad incident... For a 10- or 11-year-old you would normally expect a video... though it depends on the circumstances. I mean this was a really nasty incident involving a group of youths running riot in the centre of [suburb of Area A]... It was a very frightening experience.’ **(Prosecutor B11)**

5.3.2.3 Non-Sexual, Non-Violent Offences

Only two of the 45 Monitoring Sub-Sample cases involved a non-sexual, non-violent offence. Both were cases of theft scheduled for the Crown Court, one involving a child complainant and the other a child bystander-witness. Table W shows that the police video-interviewed the sixteen year-old bystander-witness whilst the fifteen year-old complainant gave a written statement. The case-files shed no further light on these decisions.

Table W: Child Witnesses to Non-Sexual, Non-Violent Offences

	Child Witnesses	Written Statement	Video	% Video
Other Offences	2	1	1	50%
• Complainants	1	1	0	0%
• Bystander-witnesses	1	0	1	100%

5.3.3 The Two Case Samples: Summary of Findings

In summary, the two study samples produced broadly consistent results. In both, around 75% of child witnesses witnessed a violent offence and 25% a sexual offence. Yet, despite the preponderance of child witnesses to violence, the police were far more likely to video-interview witnesses to sexual offending. Table X summarizes the comparative video-interviewing rates for both case samples for each legislatively-defined category of offence.

Table X: Summary of Video-Interviewing Rates for All Offences

Offence Type	CPS Monitoring Sample		Monitoring Sub-Sample	
	Witnesses	% Video	Witnesses	% Video
Sexual Offences	123	84%	20	90%
Violent Offences	443	24%	65	25%
Other Offences	15	20%	2	50%
Total	581		87	

In this study, the vast majority of witnesses to sexual offences were video-interviewed whilst around three-quarters of witnesses to violent offences gave a written statement. There was less congruence between the two samples when the offence charged was not sexual or violent in nature, though the small number of witnesses to such offences may be responsible for random variation. For children who are, in the language of the legislation, 'in need of special protection', however, there is a clear divide. Proportionately speaking, far more child witnesses to sexual offences populate police video-interviewing suites than child witnesses to violent crime.

5.3.3.1 Sexual Offences

Video-interviewing rates in both the CPS Monitoring Sample and Monitoring Sub-Sample were high for all sexual offences, but further analysis of the CPS Monitoring Sample revealed that indecent assault attracted the lowest video-interviewing rate (77%). A marked discrepancy appeared within this group between children video-interviewed for indecent assault charges in the Youth Court (43%) and those video-interviewed in relation to indecent assaults tried on indictment (89%).⁴⁶

The Monitoring Sub-Sample also revealed a variation in video-interviewing rates between complainants and bystanders to charges of rape and indecent assault.

⁴⁶ In this study, the only sexual offence charge heard in the Youth Court was indecent assault.

The disparity in rape cases is relatively small (94% of complainants as against 100% of bystanders)⁴⁷ but for indecent assault 59% of bystanders were video-interviewed in comparison to 82% of complainants.

5.3.3.2 Violent Offences

The majority of child witnesses in both samples had witnessed an offence of violence, yet these children experienced lower rates of video-interviewing than the much smaller group of children involved in sexual offence cases. The only exceptions were that all children definitively identified as physical abuse victims gave video-interviews, and almost half of the child-witnesses to robbery were video-interviewed.

Around 25% of child witnesses to an offence of violence gave a video-interview. Broken down by charge, Table Y shows that fewer than one in five child witnesses to physical assault are offered video-interviews, but the figure is closer to one in two for child witnesses to robbery.

Table Y: Summary of Video-Interviewing Rates for Violent Offences

	CPS Monitoring Sample		Monitoring Sub-Sample	
	Witnesses	% Video	Witnesses	% Video
Violent Offences	443	24%	65	25%
Physical Assault	278	15%	39	13%
Robbery	127	46%	16	38%
Public Order	36	16%	7	29%
Child Abuse	2	100%	3	100%

5.3.3.3 Non-Sexual, Non-Violent Offences

Only 15 out of the 581 child witnesses in the CPS Monitoring Sample and only 2 out of the 87 child witnesses in the Monitoring Sub-Sample qualified as

⁴⁷ Furthermore these rates are derived from a sample of only 24 child-witnesses to rape.

witnesses *not* 'in need of special protection'. Although a significant proportion of these witnesses did benefit from a video-interview, the small number of cases cautions against drawing any firm conclusions from these results.

5.3.4 The Follow-Up Interviews

Semi-structured interviews were conducted with CPS prosecutors identified from the Monitoring Sub-Sample case files. At the time of the study, prosecutors were not consulted by the police on whether or not to conduct a video-interview with a child.⁴⁸ Although prosecutors work primarily from the paper file passed to them by the police, they have intermittent contact with investigating officers to discuss *ad hoc* queries in particular cases and when attending court as advocates in summary proceedings. Accordingly prosecutors felt confident in commenting on the factors that outwardly appear to influence police decision-making regarding video-interviewing.

Prosecutors turned first to offence-related explanations. They overwhelmingly cited the offence under consideration as the most reliable predictor of whether or not a child will be video-interviewed. Prosecutors in this study had very strong expectations that they would see video-interviews for child complainants and witnesses to sexual offences and familial physical abuse. Their expectations for children who had witnessed non-familial violent offences were somewhat lower, though not insignificant. By contrast, prosecutors did not expect to see video-interviews for children witnessing non-sexual, non-violent offences. Prosecutors' experiences therefore reinforced this study's quantitative findings.

⁴⁸ Since the study the pre-charge advice system has been implemented nationally, which requires the police to seek CPS advice prior to laying a charge. In an environment of greater pre-charge collaboration, prosecutors reported that it is becoming more common for the police to seek CPS advice on whether a video-interview is the most appropriate choice for a witness.

5.3.4.1 Sexual offences

Child witnesses to sexual offences are legally entitled to use video-evidence in lieu of giving oral evidence-in-chief.⁴⁹ The only pre-condition is that the police have first video-recorded the child's interview. Prosecutors in all three CPS Areas opined that the police invariably video-interview children in sexual offence cases: 'In sexual offences I'd say they always do it.' (**Prosecutor A3**); 'even if they have to wait' (**Prosecutor C3**). Prosecutors in Area B concurred:

'The offence is the trigger. If it's a sex case they'll all get video-interviewed, it'll all be done properly as far as the videoing is concerned. There may be other issues about their video evidence, but in terms of the mechanics of it they will get that right.' (**Prosecutor B4**)

'I can't recall a case that I've touched where there was an allegation of a sexual offence where it wasn't videoed.' (**Prosecutor B1**)

Prosecutors uniformly said that child witnesses to sexual offences form the majority of those video-interviewed, even though such cases constitute only a minority of prosecutions involving child witnesses.

5.3.4.2 Violent Offences

Although the YJCEA 1999 depicts child witnesses to both sexual and violent crime as witnesses 'in need of special protection' who are presumptively entitled to use video evidence,⁵⁰ the prosecutors interviewed in this study all said that the police video-interview complainants and witnesses to violent offences far less frequently than complainants and witnesses to sexual offences. Prosecutors also believed that police officers distinguished between physical child abuse and other types of violent offence. The police were thought to be much more likely to

⁴⁹ See Section 3.3.2.

⁵⁰ Strictly speaking child witnesses to sexual offences benefit from a higher level of protection in that s.21(6) directs a court to grant a special measures direction for s.28 video-recorded cross-examination when a child is a witness to a sexual offence. However, this higher level of protection is subverted by the continued unavailability of s.28 in the courts of England and Wales. See Section 3.3.3.

video-interview victims of 'child abuse'⁵¹ than a child who has witnessed or experienced a physical assault by a stranger or non-familial acquaintance.

'I would think you've less chance of them thinking of it for a witness than a victim, and less chance in either case if it isn't to do with child abuse... I think the police only think of it when it's violence or sex... I think it is almost as if they think of it in "child abuse" terms, you know, adults on children.' (**Prosecutor B12**)

Indeed, the police were almost guaranteed to video-interview this group. **Prosecutor A7**, for example, asserted: 'I am hard pushed to think of a file recently where, if the child was of an age to give evidence in a physical child abuse case, they haven't videoed the child.'

In stark contrast, none of the prosecutors in this study expected to see video-interviews as often, if at all, in cases involving non-familial violence against children. A significant factor is that much non-familial violence against children is apparently perpetrated by other children. Prosecutors perceived that the police regard this type of violence as significantly less serious than other forms of violent crime.

'A lot of violent offences, [the police] tend to take them in their stride... They are often more willing to say, "Oh well, it was an incident, everybody was involved"... Initially they weren't video-interviewing them.' (**Prosecutor A4**)

The police viewed robbery more seriously, even when committed by youths against youths. Several prosecutors reported that the number of video-interviews for witnesses to robbery was increasing, if slowly, and certainly relative to the norm for Youth Court proceedings.

'In the Youth Court now we get a lot of robberies that are video-interviewed, which is obviously the right thing to do. But quite a lot of assaults, things like that, which we do get a lot of in the Youth Court, are generally just normal statements.' (**Prosecutor A13**)

⁵¹ See Section 2.2.1.

Once again, prosecutors' individual experiences reinforced this study's quantitative analysis. The incidence of video-interviewing for child witnesses to violent crime is considerably lower than the incidence for child witnesses to sexual offences, though physical child abuse and, to a lesser extent, robbery, are notable exceptions to this general rule.

5.3.4.3 Non-Sexual, Non-Violent Offences

There is little on the face of the legislation to discourage the police from conducting video-interviews with all child witnesses to criminal conduct. We saw in Chapter 3 that, should the police decide to conduct a video-interview with any child, the effect of the primary rule is to create a presumption of admissibility at trial. However, for children *not* 'in need of special protection' the presumption may be rebutted by countervailing factors.⁵²

Prosecutors were hard pressed to think of many circumstances where a child would be called as a witness that did not involve some aspect of sexual or violent behaviour. Accordingly, the practical opportunities for video-interviewing children in such situations are slim. **Prosecutor C7** observed that, 'violence, as I say, is defined broadly... All it wouldn't cover really would be theft... I think that is pretty much all I can think of'. Other prosecutors concurred:

'There are other areas that are a bit woollier, for example theft. In fact there aren't that many. Usually we are able to interpret burglary as an offence of violence,^[53] so there are very few cases where you are going to run into this problem.' (**Prosecutor B11**)

Theft, criminal damage and motoring offences were the sum total of the non-violent, non-sexual offences which prosecutors suggested might involve child

⁵² See Section 3.3.2.

⁵³ YJCEA 1999, s.35(3)(d) defines 'violent offence' as 'an assault on, or injury or threat of injury, to any person'. **Prosecutor B11** felt that, in addition to robberies, many burglary offences fit this definition. Two variants of burglary defined by section 9 of the Theft Act 1968 are: entering a building as a trespasser with the intent to inflict grievous bodily harm or commit rape; and entering a building as a trespasser and subsequently inflicting or attempting to inflict grievous bodily harm on any person therein.

witnesses. There are of course a considerable number of criminal offences that have no sexual or violent element. Fraud, forgery, perjury and public health or trading offences all spring to mind. Prosecutors' experience, however, is that children rarely witness such crimes or, if they do, that they have insufficient knowledge of the alleged activities to be effective witnesses. However, **Prosecutor C7** asserted that even where children do witness such crimes, the police view them as unlikely to have been traumatised by their experiences and consequently are unlikely to conduct a video-interview.

'What they might not do is video-interview if there are lots of child witnesses, say, to a theft or to an offence that is less likely to have a traumatic effect on the victim.'
(**Prosecutor C7**)

In this study the police failed to video-interview a potentially eligible child witness in **CASE 36**. That case involved multiple charges tried in the Crown Court, one of which was a theft witnessed by a child. It was characterised by **Prosecutor B3** as one of those typical 'run-of-the-mill cases, when it is dealt with by ordinary police constables'. Interestingly, this prosecutor was entirely happy with the police decision to take a written statement in this case:

'I can't say whether the officer made a rational decision by not videoing... I can't even say whether he made a rational decision to say, "Well I think [*witness name*] should give evidence through live TV link, as opposed to giving his evidence via video", but I think by default that it was the right decision.'
(**Prosecutor B3**)

Most prosecutors in this study agreed that, in a resource limited environment, children involved in sexual offences should be accorded the highest priority, followed by witnesses to serious offences of violence. With a few notable exceptions, prosecutors were less concerned to encourage the police to video-interview for what they saw as low level youth violence or 'non-traumatic' crimes involving no personal assault.

5.4 EXPLAINING POLICE PRACTICE I: OFFENCE CATEGORY AS A FIRST APPROXIMATION

A first approximation of the findings presented in this study is that offence-category underpins police video-interviewing decisions. Using a triangulated methodology, this study reveals a clear pattern to police video-interviewing practice with children: video-interviews are generally perceived as 'mandatory' in cases of sexual offending; familial physical abuse against children is prioritised over other types of violent crime; video-interviewing rates for child victims of and witnesses to 'street crime' are generally low, though there are notable exceptions; and finally, there are almost no videos for children who have witnessed non-sexual and non-violent crime. However, although offence-based explanations account for the majority of police video-interviewing decisions, anomalies remain which ultimately demand an alternative rationalization. Section 5.5 will consider why offence-based patterns hold for the majority of cases but not for them all. First, however, this section will explore the evidence that prima facie suggests offence-category as the main determinant of police behaviour.

5.4.1 'Mandatory' Interviewing for Sexual Offences

The quantitative data presented earlier in this chapter indicate that the video-interviewing rate for child witnesses to sexual offences is high, but does not quite attain the universal coverage recounted by prosecutors. The Monitoring Sub-Sample and Follow-Up Interviews allow us to explore this apparent incongruity further.

Police failed to video-interview only two out of 20 child witnesses to sexual offences in the Monitoring Sub-Sample, a video-interviewing rate of 90%. Although technically witnesses to a sexual offence, the police apparently judged that these children were unlikely to have significant involvement in any future criminal proceedings. This decision is clearly distinguishable from the judgement

that a child is not in need of a video-interview because she will be able to cope with the traditional trial process. If these two witnesses are disregarded, the video-interviewing rate for child witnesses to sexual offences in the Monitoring Sub-Sample rises to 100%.

The video-interviewing rate for sexual offences in the larger CPS Monitoring Sample (84%) was somewhat lower than in the Monitoring Sub-Sample. In the CPS Monitoring Sample, written statements by child witnesses to sexual offences were largely confined to allegations of indecent assault. This finding merits further investigation. What, if anything, distinguishes indecent assault from other types of sexual offence? If indecent assault charges are relevantly different from other sexual offences charges video-interviewing might still plausibly be regarded by police and prosecutors as effectively mandatory for sexual offences.

5.4.2 Prioritising Familial Physical Abuse

Prosecutors saw video-interviewing as near mandatory for child witnesses to physical child abuse. The quantitative data produced in this study are consistent with this impression. Of the 45 cases in the Monitoring Sub-Sample, only two could be categorised as allegations of physical child abuse.⁵⁴ The police video-interviewed all of the child witnesses in those cases, but the numbers were so small as to provide only tentative confirmation of the hypothesis. Nor does the CPS Monitoring Sample take us any further in this regard. Of 278 CPS Monitoring Sample cases classified as offences against the person, only two cases could definitively identified as child abuse, though there were probably many more in the sample. Prosecutors confirmed that many assaults on children that occur within the family environment are charged as common assault or a more serious charge under the Offences Against the Person Act 1861. However, it was not

⁵⁴ See Section 5.3.2.3 above.

possible to extract assault cases involving defendant-complainant familial relationships from the CPS Monitoring Sample.

We are thus left with the possibility, raised by prosecutors, that physical abuse by a family member or carer is an exception to this study's general finding that police video-interviewing rates for violent offences are generally low. As with sexual offences, we need to explore the possibility of some distinguishing factor for this irregularity which would reinforce the conclusion that witnesses to violent offences are, generally speaking, a low priority for video-interviewing.

5.4.3 Non-Familial Violence as a Low Priority

Even in the context of low video-interviewing rates for violence, the extent of video-interviewing in cases of non-familial violence revealed in this study is likely to be an over-estimate. As described above, an unknown number of the reported offences against the person might, were more relevant information available, be better classified as physical child abuse offences that occur within the family environment.

The rates at which the police conducted video-interviews for each type of violent offence were broadly congruent across the two samples. The police video-interviewed 16% of child witnesses to public order offences in the CPS Monitoring Sample compared to 29% in the Monitoring Sub-Sample; 15% of child witnesses to offences against the person in the CPS Monitoring Sample compared to 13% in the Monitoring Sub-Sample; and 46% of child witnesses to robbery offences in the CPS Monitoring Sample compared to 38% in the Monitoring Sub-Sample. The police therefore conducted proportionately fewer video-interviews for child witnesses to non-familial violent offences than for any other category of witness designated by law as worthy of special protection. Child witnesses to physical assault by a stranger or an acquaintance are the

least likely to be video-interviewed. Robbery was the only exception. Nearly half of all child witnesses to robbery or attempted robbery gave video-interviews, a significantly greater proportion than for any other violent offence. Yet again, we find that one offence within a broader category stands out, and once more we must look to see if there is a convincing explanation for this difference.

5.4.4 Exclusion of Non-Sexual, Non-Violent Crime

Few cases in this study involved child witnesses to non-sexual, non-violent crimes. Prosecutors suggested that the numbers of children who witness such offences are low and so the police have limited opportunities to conduct video-interviews. Alternatively, some commentators argue that the very absence from the sample of child witnesses to non-sexual, non-violent offences raises questions about the validity of the sampling technique.⁵⁵ Is it simply that few children actually witness such offences or is it that the criminal justice agencies fail to identify them because they do not automatically qualify for special measures? This latter possibility must be taken seriously, especially in relation to those types of vulnerable and intimidated witness for whom the indicators of vulnerability are less obvious. However, the identification of child witnesses is more straightforward than the identification of other types of vulnerable and intimidated witness, such as those suffering from learning disorders or experiencing witness intimidation. In this study, identifying child witnesses *without* video-interviews does not appear to be a significant problem. The vast majority of witnesses to violent offences were not video-interviewed yet were still included in the reporting mechanisms set up by the CPS.

We must therefore look to some other explanation for the extremely low numbers of children in the two case samples who witnessed non-sexual, non-violent offences. It must surely be significant that, for the duration of this study,

⁵⁵ See Burton *et al.* (2006) 24.

video-evidence was inadmissible for this group of children in the lower courts. Although admissible for these children in the Crown Court, the extent of its use in that trial venue will be dependant upon the number of property or motoring offences that are sufficiently serious to be heard on indictment.

5.5 EXPLAINING POLICE PRACTICE II - SPECIALISM AS THE BETTER EXPLANATION

The quantitative data from this study seem to imply that offence type determines whether or not a child witness will be video-interviewed. However, we have seen some significant exceptions to that rule. The qualitative aspects of this study shed further light on this lacuna in our understanding. They demonstrate that although prima facie the offence under investigation accounts for the video-interviewing patterns of children, the better explanation is the type of investigating officer. The major exception to this hypothesis is robbery, which is discussed further in Section 5.6 below.

5.5.1 Specialists vs Generalists: The Case Samples

Analysis of the Monitoring Sub-Sample cases suggests that although in theory a generalist officer may conduct a video-interview with a child, provided she has been appropriately trained, relatively few do so. Where generalist officers did arrange video-interviews, they referred the child on to a CPU officer to conduct it. CPU officers video-interviewed 35 of the 87 children in the Monitoring Sub-Sample: nine because the offence fell within the remit of the CPU and 26 who were referred by a generalist officer. Generalist officers took written statements from the remaining 52 children. Overall, when the OIC was a generalist officer, twice as many children in the Monitoring Sub-Sample gave written statements as were referred for video-interview.

The CPS Monitoring Sample did not facilitate identification of the type of investigating officer in each case. However, given our knowledge of the types of

crimes investigated by CPUs, some educated guesswork is possible. Since CPUs investigate only violent crime perpetrated by a parent, carer or someone in a position of trust, we can assume that the majority of the 443 child witnesses to violent offences were dealt with by generalist officers. Even on the conservative assumption that all 123 child witnesses to sexual offences were interviewed by CPU officers, we can estimate that somewhere between twice and three times as many children came into contact with generalist officers than specialists. The data do not show how many of the child witnesses in the CPS Monitoring Sample were referred on to specialists for a video-interview. However, prosecutors believed referral is the exception rather than the norm.

5.5.2 Specialists vs Generalists: The Follow-Up Interviews

The Follow-Up Interviews provided further evidence that an institutionally differentiated explanation for video-interviewing patterns is appropriate. Prosecutors consistently observed that specialist CPU officers video-interview children in far greater numbers than generalist officers who also come into contact with children as witnesses. Prosecutors told us that child witnesses to sexual offences are most frequently video-interviewed because CPU officers deal with most, though not all, of the sexual offending against children. CPU officers similarly investigate virtually all intra-familial violence against children, which accounts for the high video-interviewing rates in such cases. Prosecutors consistently praised the 'video-centric' approach of CPU officers:

'I think it's generally because the police have a child abuse unit, so they have officers who are specially trained. If you have a victim who is alleging some sort of child sexual abuse I think it is then referred to a specialist team and they are trained to think: video-recording.' (**Prosecutor C4**)

'When you are dealing with sexual cases, sexual abuse, or child abuse, you tend to deal with specialised officers. Those officers are fully aware of the vulnerability of the children, and they [implement] as a matter of practice the guidance provided by the statute and its instruments.' (**Prosecutor B3**)

In contrast, generalist officers were thought to display significantly less awareness of the special measures regime, particularly those new to the force. The lack of video-interview trained officers outside of the specialist units was a recurrent theme in prosecutors' conversations. As **Prosecutor B8** put it, 'Most of the uniformed officers aren't trained to do it and wouldn't know how to do it'.

At any one time there inevitably will be a significant proportion of uniformed officers who are new and relatively inexperienced. Some of them are bound to find themselves dealing with children who have witnessed a crime falling outside the scope of the CPU. In those circumstances, prosecutors asserted, special measures get overlooked:

'It is the officer who is first on the scene, who will be under intense pressure, who has to make a difficult decision on legislation that is hard to understand and it's likely to be the uniformed officers, some of whom are very inexperienced. (**Prosecutor B7**)

'This force has got difficulties because it has... probably the highest proportion of probationers in the country and they simply don't understand that you might need to do video interviews with child witnesses. I bet nine out of 10 cases with child witnesses they will do statements rather than video interviews.' (**Prosecutor C2**)

Prosecutors C1 and **C2** both acknowledged that lack of special measures awareness amongst generalist officers was a particular problem in Area C where, at the time of our interview, the local force contained an unusually high proportion of probationer officers. **Prosecutor C2** referred to a case she was presenting in court at the time of the interview to illustrate the problems:

'I'm part-way on a special measures assault trial at the moment where the officer in the case – well that was an eleven-year-old victim of Tourette's – had taken a witness statement rather than do a video-interview, which rather disadvantaged me. His thirteen-year-old sister, who also had learning difficulties, again a statement. And he said, "I'd only been in the job six weeks."... They just don't realise.' (**Prosecutor C2**)

Prosecutor B6 highlighted that it is not just uniformed constables who lack specialist skill and experience with child witnesses. She described a (non-sample) case where CID officers had taken written statements from children.

'I've got this murder case that starts next week, and it was a sixteen-year-old and a seventeen-year-old, the defendant and the victim, and some of those witnesses even, they've all made statements.' (**Prosecutor B6**)

Prosecutors can speak authoritatively about the types of officers most likely to video-interview because they deal with witness evidence on a daily basis and see the form that it takes. We can therefore be reasonably confident that prosecutors are well placed to describe patterns of police interviewing practice. However, our confidence in prosecutor explanations is bolstered in this context by further evidence from the case samples. Analysis of the deviant cases shows that the most significant influence over whether a child witness is video-interviewed is not the offence type, but the type of investigating officer.

5.5.3 The Exceptions that Prove the (Revised) Rule

In this study video-interviewing rates were very high for child witnesses to sexual offences, with the exception of indecent assault. Rates were generally low for child witnesses to violent offences, with the exception of physical child abuse and robbery, and for child witnesses to non-sexual, non-violent offences. The common denominator when video-interviewing rates are high is the involvement of a specialist CPU. The common dominator when video-interviewing rates are low is the involvement of a generalist officer.

5.5.3.1 Indecent Assault

We have seen that witnesses to indecent assault are less likely to be video-interviewed by the police than witnesses to other types of sexual offence. A potential explanation for this difference is that allegations of indecent assault outside of the family unit may be investigated by Divisional rather than CPU officers. Although it was not possible to tell in the CPS Monitoring Sample whether the investigating officer in the cases with written statements was a specialist CPU officer or a divisional officer, we can gain some insight from the Monitoring Sub-Sample cases.

In the three indecent assault cases in the Monitoring Sub-Sample where the accused was a family member, the recorded investigating officer was attached to a specialist CPU. In the 10 indecent assault cases where the accused was a stranger, friend or acquaintance of the complainant, the recorded investigating officer was attached to a divisional police station and differed from the officer who conducted the video-interview. In all of the Monitoring Sub-Sample cases with a generalist officer in the case (OIC), the OIC nevertheless referred the child on to the relevant CPU for a video-interview. It is not possible to judge whether this practice was widely adopted throughout all police divisions in the three CPS Areas examined for the period of the study, though the lower video-interviewing rate in the CPS Monitoring Sample does suggest that for almost a quarter of witnesses it was not. What we can conclude with some certainty, however, is that a referral is required in many cases of indecent assault. Thus, referral by divisional officers to the CPU is a potential point of breakdown in the police system for ensuring that witnesses to sexual offences are video-interviewed.

5.5.3.2 Physical Abuse Within the Family

It would appear that for sexual offences the involvement of a specialist officer is a more significant influence in the police decision to video-interview than a general acceptance that video-interviewing is particularly apt in such cases. The same may be true of physical child abuse. Although few in number, every child witnesses to physical child abuse in this study gave a video-interview compared to less than 25% of child witnesses to non-familial violence. Clearly one must be wary of making generalisations about police practice on video-interviewing from small scale studies, but the Follow-Up Interviews did endorse the pattern identified in this admittedly very small number of cases. The conclusion seems to be that the police are more reluctant to conduct video-interviews with witnesses to non-familial offences of violence than they are with witnesses to child abuse.

We can explain this by looking to the type of investigating officer. Physical child abuse, like sexual abuse, is generally dealt with by specialist CPU officers.⁵⁶

5.5.3.3 Robbery

Robbery is a second exception to the generally low levels of video-interviewing for child witnesses to violence. In the CPS Monitoring Sample, 46% of child witnesses to robbery were video-interviewed whilst the corresponding percentage in the Monitoring Sub-Sample was 38%. In both samples, the proportion of child witnesses to robbery who gave video-interviews was considerably greater than the corresponding proportion of child witnesses to other types of physical assault or public order offences, which coalesced at around 15%.⁵⁷ In the Monitoring Sub-Sample all six of the child witnesses to robbery who had been video-interviewed were referred to a CPU officer for the interview by the generalist OIC. The remaining 10 child witnesses to robbery in the Monitoring Sub-Sample gave written statements to the OIC.

Prosecutors did not on this occasion attribute the increased willingness to arrange video-interviews for children to the type of investigating officer. Prosecutors suggested that the explanation is to be found in the policy pressure exerted by the 'Street Crime Initiative' which was in effect during the period of this study. We will return to discuss this initiative and the impact of the broader policy context on child witnesses and video-interviewing in Section 5.6 below.

5.5.4 Conclusion

We saw in Chapter 3 that the law takes a harmonised approach to special measures support for child witnesses to sexual and violent offences. Under s.21

⁵⁶ See Section 2.2.1.

⁵⁷ With the exception of child witnesses to public order offences in the Monitoring Sub-Sample, where police video-interviewed 29% of children. Note however that only 7 of the 84 children included in this sample witnessed public order offences.

of the YJCEA 1999 these children benefit from a presumption that a video-recorded interview, if it exists, will be admitted in place of the child's evidence-in-chief. Although the legislation does not mandate a video-interview with these child witnesses, deemed to be 'in need of special protection', it sets up an expectation that this group will be targeted for assistance. Furthermore, the legislation specifically equates the needs of child witnesses to sexual offences with those of child witnesses to violent offences. Yet, despite this statutory equality, this study detected a dichotomy in the police approach. Superficially, it might appear that the police operate a hierarchy of need in their use of video-interviews, with child witnesses to sexual offences coming before child witnesses to violent offences in their access to limited resources. However, closer examination of the instances which did not conform to this general pattern revealed that the operative distinction is the type of interviewing officer. Officers from specialist CPUs video-interview almost exclusively, resulting in videos for all child abuse victims, sexual or physical. Generalist officers conduct or refer witnesses for video-interview far less frequently, resulting in video-interviews for a minority of the child witnesses these officers encounter in routine police work.

Existing research supports this conclusion. Previous research studies suggested that, in principle, the police support its use for children but questioned whether this support extends beyond specialist officers. Davis *et al.* found that CPU officers followed child protection guidance closely.⁵⁸ The authors had concerns, however, that the carefully developed procedures of the CPU, which included video-interviews, did not encompass all of the children who, at the time, fell under the auspices of the legislative protection. Of the 94 cases included in the Davis *et al.* study, 24 (25%) had no CPU involvement. Although some instances could be attributed to lapses in established practice,⁵⁹ Davis *et al.* found that

⁵⁸ Davis *et al.* (1999) 17.

⁵⁹ In some instances uniformed officers, lacking a full understanding of the role and remit of specialist CPUs, referred cases to CID. In others, a CPU officer was not available when needed.

lack of CPU involvement in many cases was a matter of policy. The CPS Inspectorate drew similar conclusions in its thematic review of cases involving child witnesses, commenting that non-specialist officers frequently failed to recognise the circumstances in which the, then new, special measures provisions might apply.⁶⁰ Most recently, Burton *et al.*, whilst not limiting the point directly to video-interviewing, observed that specialist officers were consistently more skilled than their generalist counterparts in identifying VIWs and communicating relevant information about VIWs to the CPS.⁶¹

Prosecutors in this study repeated the growing consensus that CPU officers are better trained and more experienced at applying the special measures criteria than their generalist colleagues. Given the specialist focus of their units, they might also be expected to be more understanding of the difficulties children face and more persuaded that special measures assist children in court. This study has clearly shown that non-CPU officers who come into contact with children as potential witnesses to criminal offences do not provide the same levels of special measures support as their colleagues within the CPUs. It is by no means the case that video-interviewing is the sole preserve of CPU-officers. There is clear evidence in this study that a significant number of non-CPU officers do refer child witnesses on to specialist interviewers for the sole purpose of conducting a video-interview. Nonetheless, it continues to be the case that the majority of children who come into contact with generalist police officers give written statements. Prosecutor perceptions are that, when it comes to non-specialist officers, the decision on whether to video-interview a child is very much more dependent upon the skill and experience of the individual officer than on the operational dictates of formal police policy.

⁶⁰ CPS Inspectorate (1998) para. 5.3.

⁶¹ Burton *et al.* (2006) Chapter 4.

5.6 INSTITUTIONAL STRUCTURE AND THE SPECIALIST/GENERALIST DIVIDE

The clear implication of the low video-interviewing rates amongst generalist officers is that, for the non-specialist, video-interviewing children is a matter of police discretion. Prosecutors endorsed this conclusion. **Prosecutor A11** described how in her experience the presumptions in favour of video-interviewing in the legislation have little effect on generalist officers' decisions on the ground.

'Sometimes I don't think they realise that there is no real discretion involved in it and that they should be, if it is an offence of violence, doing a video. I see a lot [of cases] where children aren't videoed but they are still flagged up for special measures.'
(**Prosecutor A11**)

What then are the factors which affect generalist officers' exercise of this discretion? Analysis of the case samples and discussion with prosecutors indicates that the factors are many and varied. Some are situational, being directly related to the circumstances of the child or the case. The relative age of the child in comparison to the defendant emerges as a particularly strong influence. Structural or institutional pressures also emerged as factors which impinged upon police attitudes, not merely resource and access issues but also the competing demands of broader police policy. Lastly, there were lingering effects of the initially restricted availability of special measures and the phased implementation of the legislative framework. This section examines each of those factors before we move on, in Section 5.7, to review the reinforcing effect of police culture and the resulting implications for policy and training.

5.6.1 Situational Factors

5.6.1.1 Ability to Disclose to the Police

Many prosecutors commented that non-specialist police officers are reluctant to make a video if a child seems capable of making a statement: 'We often get them saying, "Oh she was very switched on for her age" or, "She is very bright

for her age”, so they do not bother’ (**Prosecutor A6**). Prosecutors insisted, however, that a longer term view is required. As **Prosecutor A13** pointed out, the police focus on a child’s ability to give a written statement conflates the child’s ability to withstand a police interview with a child’s ability to withstand questioning by counsel.

‘In the past I’ve had [officers] say, “Well the witness seemed very capable of giving a statement, so I just took a statement”, which is fine but generally there is a perception that we should be videoing vulnerable people who might struggle to give evidence. So it’s not really about that.’ (**Prosecutor A13**)

This focus on the child’s abilities in the police station reflects the differing professional perspectives and priorities of police and prosecutors. Prosecutors have an eye to matters beyond obtaining the witness statement. They are looking to the quality of the statement and its forensic utility. Prosecutors are concerned that generalist police officers fail to look beyond the investigation to the child’s later experiences in court and the impact on the quality of the prosecution case.

Officers and prosecutors alike were aware that the specialist approach to questioning implicit in the video-interview process may prompt disclosure where the traditional police interview fails. But this is only limited recognition of the contribution that the video-interview can make to improving the quality of the child’s evidence at trial. In concentrating on the child’s ability to give a clear account to the police, officers are ignoring the impact that the stress and trauma which accompanies a courtroom appearance may have on a child. There is an implicit assumption that the child will be able to give evidence at trial consistent with the statement, but this cannot be guaranteed. Prosecutors complained that generalist police officers often fail to appreciate the value to the prosecution case of getting a child’s evidence-in-chief ‘in the can’.

'I think from a practical point of view [the police] don't always appreciate the implications of video-interviewing. They don't appreciate that it is better in some senses for the witnesses to be video-interviewed because the video can go in. They just think, "Oh well, you'll be able to use the live link at court" but they don't appreciate that you can actually get the evidence in as a whole, as it were, to start off.' (**Prosecutor A13**)

Videos are popular with prosecutors to the extent that recorded evidence removes the risk that a child will fail to come up to proof in court. Generalist officers do not seem to appreciate this longer term evidential benefit. As **Prosecutor A13** succinctly put it, 'it's just that they don't have the same agenda as us!' The police 'agenda' is limited to the initial phases of investigation and evidence gathering, whereas prosecutors tend to take a more holistic view of the process.

5.6.1.2 Proximity to the Offence

There are some limited indications from this study that proximity to the offence might play a part in generalist officers' video-interviewing decisions. We saw in Section 5.3 that police officers may choose not to video-interview a child, even in a serious case, if the child has not witnessed the main incident under investigation. **Prosecutor A13** suggested that the police may properly distinguish between the needs of witnesses in the same case depending upon the extent of their victimisation or trauma:

'I think really we should be more concerned about what they have actually witnessed, whereas we quite often just focus on the name of the offence. We think, "Oh it was a robbery so therefore we must have special measures"... I think we should look more not just at the offence itself but the involvement with it... If someone is just an alibi witness, or that kind of thing, or they're on the periphery, and... we're fairly happy that they've not had any great trauma or anything like that, then it may be a situation when I would advise somebody not to video-interview, and I have done that in the past.' (**Prosecutor A13**)

In making a judgement that even in serious cases the experiences of some witnesses are qualitatively distinct from others, police officers are distinguishing between formal offence labels and the underlying facts and circumstances of specific cases. In some circumstances the police may decide that the likelihood

of the child being required to attend court and give evidence in person is insufficient to justify the expense involved in setting up a video-interview.

It is unrealistic to expect that cost and resource pressures will never operate to restrict the use of video-interviews. Prosecutors agreed that if the police are forced, through resource constraints, to take written statements from some children, the obvious candidates are those who are only tangentially connected to the main incident involved in the charge. On that basis, differential decision making regarding children who, in formal terms, are witnesses to the same offence is appropriate.

5.6.1.3 Witness Age

Existing research has commented that very young witnesses are more likely to be video-interviewed or offered other special measures support than child witnesses in their teens.⁶² This study bears out those conclusions. The CPS Monitoring Sample did not allow an analysis by age of the child witnesses. The Monitoring Sub-Sample did provide that information and revealed that police video-interviewed all child witnesses aged eleven or under, around half of the twelve year olds, but only a third of the teenagers. As evidence of police bias towards video-interviewing children yet to enter their teenage years, these data must be treated with caution. As Table Z demonstrates, only 14 out of the 87 child witnesses in the Monitoring Sub-Sample were under the age of thirteen. However, amongst the larger group of teenage children we can see that around two-thirds gave written statements to generalist officers.

⁶² See Section 5.2.3 above.

Table Z: Type of Interview by Age of Witness

Age Group	Total	Video - CPU Investigated	Video - Referred to CPU	Written Statement
Aged 5 - 11	7	4	3	0
Aged twelve	7	0	3	4
Aged 13 - 16	73	5	20	48
All Children	87	9	26	52

Thus it appears that, for the generalist police officer, the age of the child bears on the video-interviewing decision. In this small sample, non-CPU officers were more likely to conduct a video-interview with a young witness. Up until the age of 11, age seems to have been the predominant factor and there was near automatic video-interviewing of very young witnesses. Indeed, this is probably the closest we can come to an operable rule in terms of generalist officers' video-interviewing habits. From the age of twelve video became less of an automatic choice. However, other factors, most obviously offence seriousness, came into play to persuade generalist officers that video-interviewing was still appropriate.

5.6.1.4 Offence Seriousness

In the Monitoring Sub-Sample, generalist officers were more likely to refer for video-interview children of all ages who had witnessed a more serious offence: sexual assault, robbery or a serious incident of affray. Of the 26 children referred to a CPU officer for video-interview, 13 witnessed a sexual offence, 10 witnessed robbery or attempted robbery, two witnessed affray⁶³ and one witnessed theft. Of the 52 children that generalist officers did not refer for video-interview, two witnessed rape,⁶⁴ 36 witnessed some form of physical assault, 13 witnessed

⁶³ See discussion concerning **CASE 38** in Section 5.3.2.2 above. It is likely that the relative youth of the children (11 years-old) and the severity of the public order offence they witnessed persuaded the officer to refer the witnesses to a CPU for a video-interview.

⁶⁴ But these witnesses were thought to play a peripheral role in the investigation. See Section 5.4.1 above.

robbery or attempted robbery and one witnessed theft. Children who gave written statements had generally witnessed physical assaults at the less serious end of the scale, though there was a significant group of child witnesses to robbery who also gave written statements. The majority of the witnesses interviewed by generalist officers for a written statement were teenagers, and teenagers also made up the entire group of witnesses to physical assault. So, in this study, it would appear that generalist officers are ambivalent about video-interviews for older children unless the child has witnessed a 'serious offence'.

The video-interviewing rates observed in the CPS Monitoring Sample also indicate that offence seriousness is a relevant factor. Fewer child witnesses to indecent assault were video-interviewed than child witnesses to rape: 77% of child witnesses to indecent assault compared to 96% for rape. Of the child witnesses to indecent assault more complainants were video-interviewed (82%) than bystander-witnesses (59%). We might consider indecent assault to be less serious than other sexual offences, to the extent that it is possible to categorise any sexual assault as a minor offence. Indecent assault charges are laid to cover a broad range of activity from the relatively minor, such as touching intimate areas of the body over clothes, to much more serious incidents that fall only just short of rape. In some circumstances, therefore, generalist officers may perceive that the trauma the child has suffered during the incident does not warrant a video-interview.

We can also detect disparities in the video-interviewing rates for different species of violent crime. In the CPS Monitoring Sample, 15% of child witnesses to physical assault and 16% of child witnesses to public order offences were video-interviewed in contrast to 46% of child witnesses to robbery. It is by no means clear that in general terms either the police or the public regard robbery as a more serious type of criminal offending than physical assault. Many factors

impinge upon an individual's assessment of the gravity of an offence, almost all of which will vary according to the circumstances of the incident in question.⁶⁵ However, as has already been observed and is discussed further below, the police forces in the three Areas in this study were at the time of this study subject to policy pressure to target robbery as a serious offence. Furthermore, the distribution of physical assault charges observed in the Monitoring Sub-Sample tended towards the lower end of the charging scale. More than 90% of the child witnesses to offences against the person had witnessed offences charged as common assault or assault occasioning actual bodily harm. So, as with sexual offences, this study would appear to indicate that a generalist officer's judgement as to the gravity of a violent offence contributes to the decision on whether or not to refer a child witness for video-interview.

To the extent that offence seriousness may seem to influence only generalist officers, we should observe that it is a factor which may already have been implicitly addressed for CPUs. It is probable that offences falling within the remit of the CPU are generally accepted to be serious and warrant specialist attention. The range of offences dealt with by divisional officers is considerably more varied than that dealt with by the CPUs. Officers consequently have greater scope to make discretionary assessments about the relative gravity of the offences they are investigating. However, prosecutor comments and further analysis of the case sample data indicates that an offence-based explanation is too simplistic. The relative age of the defendant and complainant is also significant. It may not, however, be a stand-alone factor. It appears that the relative age of the defendant and complainant may be an implicit yet significant part of the officer's assessment of the gravity of the offence.

⁶⁵ The complexity of attempts to grade and rank the seriousness of offences is amply demonstrated by the guidelines issues by the Sentencing Guidelines Council. See www.sentencing-guidelines.gov.uk.

5.6.1.5 Reticence to Video in Youth on Youth Crime

Generalist officers in this study displayed a reticence to video-interview children who had witnessed a crime committed by another youth. For example, in the CPS Monitoring Sample, markedly fewer child witnesses to allegations of indecent assault in the Youth Court made video-interviews (43%) than child witnesses to allegations in the Crown Court (89%) or magistrates' courts (100%). Reluctance amongst generalist officers to video-interview children who have witnessed violent acts by other youths is also discernible in this study. The very lowest video-interviewing rates of all occurred for young witnesses to physical assaults committed by a youth defendant. In the CPS Monitoring Sample, 208 of the 278 children were witnesses against youth defendants. Only 8% (17) of those 208 had given a video-interview, a figure markedly lower than even the 15% over-all rate for offences against the person. Moreover, the police video-interviewed 19 (56%) of the 34 child witnesses to physical assault scheduled to give evidence in the Crown Court, meaning that, in this study, child witnesses to serious incidents of violence committed by adults were seven times more likely to be video-interviewed than child witnesses to violence committed by other youths. The Monitoring Sub-Sample data also support the conclusion that the police are reluctant to video-interview child witnesses against youth defendants charged with physical assault. None of the 22 witnesses scheduled to give evidence against youth defendants charged with an offence against the person had been video-interviewed.

This analysis does not conclusively establish whether generalist officers are deterred from video-interviewing in these circumstances because they regard the offence as less serious or because the defendant is a youth. The likelihood is that these factors are mutually dependent. Although the Youth Court has the power

to deal with some very serious offences,⁶⁶ the majority of the Youth Court physical assault cases in the CPS Monitoring Sample involved charges of s.39 common assault or s.47 assault occasioning actual bodily harm. By contrast, less than half of the cases scheduled for the Crown Court concerned s.39 or s.47 charges. The remainder involved more serious offences: s.20 unlawful wounding or s.18 grievous bodily harm; assault with intent to rob; threats to kill; or murder. Certainly the specialist Youth Court prosecutors in this study intimated that generalist officers tend to regard 'kiddie upon kiddie' crime as less serious than crime committed by adults against children:

'I had this officer telephone to say that they were still investigating an assault from three months earlier... but his view was, is it worth the resource because it's just "a kiddie upon kiddie"? So I said to him that if that had been adult assault on a child you would have had a different view, and I was actually quite cross... It's because it's a child defendant. It's almost as if because it's child upon child it is not as serious. But the child is still a victim of a violent offence.' (**Prosecutor C4**)

There is another possibility which could explain the lower rates of video-interviewing when the defendant is a youth. At the time of this study youth defendants were unable to access the same measures as youth witnesses.⁶⁷ Police officers may have believed this to be unjust and so, in the interests of fairness, denied those measures to youth witnesses. The 'equality of arms' question is much discussed in the literature,⁶⁸ but it is not an explanation for police behaviour that was put forward by the prosecutors involved in this study. Without further research into police officers' decision-making processes, it is not possible to say whether police are reluctant to video-interview child witnesses who are broadly similar in age to the defendant because they regard it as unfair

⁶⁶ Magistrates and district judges sitting in the Youth Court have the power to impose a maximum sentence of 2 years in custody: s.74(3) Crime and Disorder Act 1998.

⁶⁷ See Section 3.3.4. Youth defendants are now eligible for limited special measures assistance in court, though they continue to be ineligible for video-recorded evidence.

⁶⁸ See, for example: Laura Hoyano, 'Striking a Balance Between the Rights of Defendants and Vulnerable Witnesses: Will special measures directions contravene guarantees of a fair trial?' [2001] Crim LR 948; Mandy Burton, Roger Evans and Andrew Sanders, 'Protecting children in criminal proceedings: parity for child witnesses and child defendants' (2006) 18 *Child and Family Law Quarterly* 397; Jonathan Doak, 'Child Witnesses: do special measures directions prejudice the accused's right to a fair hearing?' (2005) 9 *International Journal of Evidence and Proof* 291.

to the defendant or because they do not take youth-on-youth crime as seriously as crime committed by adults against youths.

5.6.2 Institutional Disincentives to Video-Interview

It is not simply the circumstances of the witness or the case that influence generalist officers' video-interviewing decisions. Structural factors also play a role. In this study three issues emerged that dissuaded officers from taking the additional steps necessary to set up a video-interview: ease of access to video-interviewing facilities; other policing priorities; and the specific influence of other high profile policies.

5.6.2.1 Access to Video-Interviewing Facilities

Problems with access to facilities and the added complexity that arranging a video-interview brings to the investigative process are matters which, in a working environment less constrained by published policy on child witnesses than the specialist CPUs, can actively discourage video-interviewing. Prosecutors stressed the importance of a general awareness of the video-interviewing procedures in the relevant station and on the relevant shift, and of the willingness of the local CPU to accommodate requests for assistance:

'I think it is very much left to the officer's own personal view, whether he has got a supervisor who is prepared to point him in the right direction, whether the Child Protection Unit that's operating is busy or is helpful towards them.' (**Prosecutor B2**)

Permanent video-interviewing facilities are located in specialist CPU centres. As a consequence, video-interviewing priorities are, to a large extent, already set because CPU officers control access to the facilities. The non-specialist officer with a child to interview consequently enjoys fewer options than her specialist colleague, as **Prosecutor B7** pointed out: 'Certainly I've had officers who've said they've tried to get video-interviews but someone's said, "No".' The creation of specialist units to deal with certain offending against children inevitably

relegates offences dealt with by non-specialist officers to the back of the queue for facilities. Prosecutors perceive that when video-interviewing suites and equipment and specialist interviewers are in demand, witnesses to what are generally accepted as less serious offences will be turned away.

'They will obviously have to prioritise because there are only so many suites and there are only so many video trained officers... If they need a video trained officer to do a rape file and another one to do a more minor offence, and they've only got limited time, obviously they're going to do the more serious one, they have to prioritise. '
(**Prosecutor C3**)

Prosecutors felt that non-specialist officers face hurdles in accessing video-interviewing facilities sufficient to dissuade them from even trying. Less experienced officers with fewer established contacts within the force are the most likely to fall back on to the traditional witness interview process.

'It depends upon the experience of the officer and who he or she knows. I think it's easy if one officer is experienced and you know officers who are on that unit who will do it quickly. If you're new and fairly inexperienced they don't know who to go to. Often their sergeants don't know who to go to!' (**Prosecutor C2**)

However, the failure of generalist police officers to video-interview child witnesses is not solely attributable to poor access to facilities. It is also a matter of convenience and the efficient use of staff.

5.6.2.2 Efficiency Pressures

Prosecutors recognised that the police, like other criminal justice agencies, are under considerable pressure to deal with cases quickly. A desire for efficiency, particularly outside the specialist units where child witnesses are not specifically prioritised and where equipment and expertise are not readily available, is perhaps to be expected. **Prosecutor A8** suggested that:

'Officers who perhaps don't deal with that sort of thing every day because they are dealing with lots of other things on the streets don't have the resources, the time or perhaps the training to be able to deal with a case when it drops on them.'
(**Prosecutor A8**)

Prosecutors were sympathetic to the resource pressures that the police face. One prosecutor suggested that the problems were particularly acute in Area C.

'I understand the figures are something like, for recorded crime, each officer records forty-seven crimes in [Area adjoining Area C] and sixty-seven crimes in [Area C]. So it's half as much again and they've got slightly fewer officers. So, yes, they are dead pushed.' (**Prosecutor C5**)

However, the view that divisional officers see video-interviewing as a barrier to the efficient investigation of a case was prevalent amongst all prosecutors, and was evidenced in this study by a case in the Monitoring Sub-Sample. In **CASE 20** the reviewing lawyer, **Prosecutor A1**, queried why the police had not conducted video-interviews for two child witnesses to a violent offence. The officer in the case wrote to **Prosecutor A1** using efficiency considerations to justify her course of action:

'The reason [*witness names*] had their evidence taken by statement was due to operational reasons and the need to get the matter dealt with expediently in the first instance.' (*OIC CASE 20*)

Many other prosecutors observed that speed and ease of process are determinative factors for the police. The additional steps involved in arranging a video-interview both elongate and complicate the evidence-gathering process.

'For the police I think the practical implications of actually going and getting somebody videoed at a special designated unit, and getting an officer who is trained to do it, is quite a big consideration. So they speak to someone, think, "Right, take a statement, and it's done then. Our job's done".' (**Prosecutor A13**)

Prosecutors also speculated that the additional cost in arranging a video-interview may be significant. **Prosecutor C4** observed that, 'Often the victims are seen, or witnesses are seen, at home'. An immediate written statement completes the evidence-gathering process in one visit. A video-interview consumes considerably more resources and generates more work for the investigating officer and any specialist interviewer, as **Prosecutor C4** also explained: 'There has to be two officers present and there are the resources in

setting up the video and taping and three copies of the disclosure and so on.'

Prosecutor B10 further explained that police officers can delegate part of the work involved in taking a written statement:

'With statements, they've got to take the first report but then they can send out the gatherers of the evidence from the [Criminal Justice Support Unit] can't they, the statement takers who aren't police officers? So it may involve more work for them if they had to do a video-interview.' (**Prosecutor B10**)

Such considerations become more acute when an officer forms the opinion that a case is unlikely to proceed. It is entirely plausible that if an officer believes that there is no future in a prosecution she may be disinclined to go to the trouble of arranging a video-interview:

'I think also that sometimes they do pre-judge a case... If they haven't got any great expectations of a case they are much more inclined to take a quick statement than to go through the procedure, with the time that's involved in taking a video-interview from someone.' (**Prosecutor B2**)

As in other circumstances where an officer might decide to forgo a video-interview, this is an essentially unreviewable decision which has potentially serious consequences for the child, and for the administration of justice, if the officer's assumptions prove unfounded and the child is later required to give evidence at trial.

5.6.2.3 Broader Policy Contexts

The imperative towards efficiency is also reinforced by national policing priorities. Prosecutors interviewed in this study repeatedly commented upon the impact of government initiatives and targets. During the period of this study, the Persistent Young Offenders pledge, which sets a target of no more than 71 days between charge and sentence for repeat young offenders,⁶⁹ was particularly influential. The Persistent Young Offender's pledge was a key Labour Party

⁶⁹ The Government announced the Persistent Young Offender Pledge in 1997. It is now over-seen by the Youth Justice Board. See www.yjb.gov.uk.

manifesto commitment prior to the 1997 election and remains an on-going target for criminal justice agencies.⁷⁰ Accordingly, the pledge is prominent in the minds of police and prosecutors. Particularly in cases with numerous child witnesses, the need to bring the offender swiftly before the courts is a higher priority for the police than ensuring video-interviews for child witnesses. As **Prosecutor A10** said: 'In some circumstances they are forced, in order to get speedy prosecutions, not to video all the witnesses.' **Prosecutor C2** also stressed the need for the police to deal with youth defendants quickly: 'with youth cases you have to deal with them quickly, so if there's a queue for the video suites to do video-interviews... they'll do a statement because they'll be able to get it in the system quicker'.

In this instance, a competing policy initiative appears to be acting against the wider take up of video-interviewing. Speed of process is at the heart of the Persistent Young Offenders Pledge but video-interviewing and haste are not natural bed-fellows, particularly where children are involved. It is to be expected that, in the absence of steps to address this operational conflict, one policy will predominate in its influence over police working practices. Here, prosecutors said, police accorded the Persistent Young Offenders Pledge a higher priority than special measures support for children. Policy initiatives are not always in conflict, however, and this study demonstrates that wider policy initiatives can also work in concert, rather than against, special measures.

Section 5.3 demonstrated that the video-interviewing rate for children was considerably higher for robbery than for any other type of violent offence. Even for child witnesses in the Youth Court, who experienced lower video-interviewing rates than children in any other trial venue, the rate was an impressive 55%.

⁷⁰ The Ministry of Justice publishes monthly statistics on the progress of the criminal justice agencies against this target: <<http://www.justice.gov.uk/publications/averagetimearresttosentencepyo.htm>>.

During the period of this study, something was acting to bolster police willingness to video-interview child witnesses to robbery in comparison to other types of violent offence. Prosecutors suggested the Street Crime Initiative, which was implemented on 17 March 2002⁷¹ in response to a rise in reported street robberies.⁷² The Street Crime Initiative targeted the 10 police forces which, at that time, accounted for the bulk of reported robberies.⁷³ This overlapped with the three CPS Areas covered by this study. A key aspect of the initiative was to introduce specific protocols to assist and support the victims of and witnesses to robbery. Although the measures were not mandated, the protocols reiterated the requirement to identify witness vulnerability and highlighted the potential for using video-recorded witness statements.⁷⁴

Prosecutors regarded the Street Crime Initiative as particularly influential in casting robbery as a serious offence in which victims and witnesses should be given extra support to encourage their co-operation with criminal investigations and prosecutions. **Prosecutor A6**, commenting on the absence of a video-interview for a child witness to robbery in **CASE 17**, suggested that had the case been investigated later, when the Street Crime Initiative was in place, the police would have conducted a video-interview:

'I think [the police] are more aware that these are now Street Crime Initiative matters... When [**CASE 17**] was done... about 18 months ago, they were less switched on about robberies and the Street Crime Initiative and more focused on sexual matters.' (**Prosecutor A6**)

It is difficult to resist the conclusion that the Street Crime initiative had a positive effect on the number of child witnesses to robbery who were video-

⁷¹ Home Office Press Release 074/2002, available from www.press.homeoffice.gov.uk.

⁷² See Her Majesty's Inspectorate of Constabulary, *Streets Ahead: a joint inspection of the street crime initiative* (London: Home Office Communication Directorate, 2003).

⁷³ Information obtained from <<http://www.homeoffice.gov.uk/crime-victims/reducing-crime/robbery> on 25 January 2007>.

⁷⁴ *Streets Ahead* (2003), Chapter 4, para 3.9.

interviewed. What is not clear, and what prosecutors did not feel able to comment on, was whether this increase can be attributed to a police perception that video-interviewing assists in clearing up street crime or rather that, because those offences have a higher profile, lack of compliance with special measures policy is likely to become more apparent.

5.6.3 Limits Imposed by the Legislative Framework

The phased implementation of the legislation also restricted police use of the video-interviewing procedure. Video-recorded evidence was not admissible for some child witnesses in some trial venues during the period of the study. Moreover, the changing legislative landscape gave rise to a degree of confusion amongst police officers as to whether video-interviewing could and should be used in differing circumstances.

For the period of this study, video-recorded evidence was available in proceedings in the magistrates' court and the Youth Court only to children in need of special protection.⁷⁵ Accordingly, prosecutors felt that the police, in the knowledge that a video-interview would ultimately be inadmissible in the lower courts, declined to video-interview child witnesses in non-sexual and non-violent cases likely to be heard in the magistrates' courts or the Youth Court. As **Prosecutor A10** put it, 'obviously you don't need to video-interview a child if it is not a sexual or violent offence because we can't use the video in the magistrates' court.'

From the police perspective, making inadmissible videos is simply a waste of resources. From a prosecutor's perspective the issue is more complex. A video which cannot be admitted as evidence in court is nevertheless still an out-of-

⁷⁵ Youth Justice and Criminal Evidence Act 1999 (Commencement No 7) Order, SI 2002/1739. For full details of the current stage of implementation of Special Measures see Appendix 2 to Ministry of Justice Circular 25/06/2007, *Youth Justice and Criminal Evidence Act 1999: Special Measures Implementation (England & Wales)* available from www.frontline.cjonline.gov.uk.

court statement made by the witness. Prosecutors see benefits from video beyond its use in court as the witness's evidence-in-chief. Video allows the prosecutor to assess the capabilities and credibility of the witness and her evidence whilst reviewing the case and preparing it for court. However, prosecutors insisted that any advantage that a video-interview brings in this respect is outweighed by the potential for inconsistency between the child's testimony at trial and his or her previous out-of-court statement. Prosecutors were conscious that, particularly with child witnesses, defence advocates present even minor discrepancies between in- and out-of-court statements as evidence of a witness's unreliability.⁷⁶ For this reason, prosecutors were comfortable with the approach being taken by the police, albeit for entirely different reasons.

Prosecutors acknowledged, nonetheless, that the drip-feed implementation of special measures caused considerable problems on the ground. To further complicate the asymmetry in the rules for admitting video-evidence across court centres, there were regular changes to the rules as a result of the phased implementation of special measures.⁷⁷ The resulting problems have not escaped commentators. Spencer has been particularly critical, describing the introduction of video-recorded evidence as a story of muddle and confusion.⁷⁸ Prosecutors agreed:

'And of course there are so many special measures. And they are introduced in this phased manner... People become confused. It's hard to keep track of what's in force for what court at what time.' (**Prosecutor B7**)

Prosecutors confessed their own difficulties in maintaining a working knowledge of which special measures are available for which type of witness in which court

⁷⁶ For further discussion, see Section 6.4.2

⁷⁷ See Section 3.3.3.

⁷⁸ John R Spencer, 'Special Measures and Unusual Muddles' [2008] 6 *Arch News* 7.

at any one time, and so were sympathetic to the problems that the changing legislative arrangements causes the police.⁷⁹

'[I]t is difficult for the police... to keep in touch with it... We are doing it every day. It is our job to make the applications and it's not necessarily their fault that they are not aware of what is going on, because it is a tiny part of their job whereas for us it is more important.' (**Prosecutor A13**)

As the Court of Appeal accepted in *R v R*⁸⁰ there are good reasons for piloting new measures before full-scale implementation, but the system of implementation by notice proved to be overly complex even for those professionals used to dealing with difficult evidential provisions. That non-specialist police officers might struggle to keep abreast of the current rules regarding the availability of video-recorded evidence should come as no surprise. Police officers' uncertainty as to the admissibility of video-recorded statements will almost certainly have affected their willingness to invoke procedures already regarded as cumbersome and resource hungry.

5.7 THE CULTURAL RESILIENCE OF POLICE WORKING PRACTICES

The institutional pressures on officers described above arise from the interactions between the policies, organisational structures, rules and procedures that lay down the terms of police officers' daily activities. These influences continue to flourish, even in the face of significant attempts at procedural reform, because of the reinforcing effects of 'police culture'.⁸¹ This section explores those aspects of police culture which appeared, in this study, to act as a brake on attempts to reform interviewing practices for children. It then goes on to examine why, in this specific instance, those cultural issues were not

⁷⁹ A failure to video-interview is not the only problem caused by the uncertainty surrounding the availability of special measures. **Prosecutor A9** reported that videos are also made inappropriately, causing the sort of problems with inconsistency already described.

⁸⁰ [2008] EWCA Crim 678. See Section 3.3.3.

⁸¹ McConville *et al.* described the resilience of police working practices in the face of attempts at reform through legal regulation in their seminal work on police and CPS decision making: Mike McConville, Andrew Sanders and Roger Leng, *The Case for the Prosecution: Police Suspects and the Construction of Criminality* (London: Routledge, 1991) Chapter. 10.

overcome. The section finalises by considering the implications of the hurdles identified for training and policy dissemination.

5.7.1 The Influence of Police Culture

The impact of police culture on police behaviour is a prominent feature of the debate on police and policing.⁸² Although the surrounding narrative is complex, at its most basic police culture is a reference to the characteristic patterns of behaviours, attitudes and beliefs that police officers tend to share.⁸³ Police culture is normative in that it sets standards for behaviour and accepted practices. It also provides a series of 'recipes' to achieve policing tasks.⁸⁴ In this way police culture influences, if not the activities of the police, then the manner in which those activities are conducted. In this study two particular aspects of police culture emerged as particularly relevant: (i) the deep-rooted nature of established working methods; and (ii) the persistence of existing practice regarding child witnesses.

5.7.1.1 Established Working Methods

Existing rules and procedures have deep roots in police officers' dealings with witnesses. This study suggests that established ways of achieving police tasks, in this case taking witness statements, are sufficiently entrenched to present a serious challenge to attempts at reform. Conventional police procedure when collecting evidence from a witness is to produce a written statement based upon

⁸² See Robert Reiner, *The Politics of the Police* 3rd edn. (Oxford: Oxford University Press, 2000) Chapter 3.

⁸³ Commentators have criticised an approach which sees police culture as a single, monolithic entity, arguing that multiple cultures exist which are differentiated by jurisdiction and type of officer, e.g. command, management or 'street cop'. See J Chan, 'Changing Police Culture' (1996) 36 *British Journal of Criminology* 106, 111. The discussion in this chapter relates to the prevailing culture of the lower ranks of the police in England and Wales who carry out day-to-day policing tasks.

⁸⁴ Clive Coleman and Clive Norris, *Introducing Criminology* (Cullompton, Devon: Willan Publishing, 2000) 138.

the account that the witness gives during interview.⁸⁵ The statement then becomes a formal piece of evidence against the defendant and is added to the prosecution file. It appears from this study that, outside the specialist units, taking a written statement from a witness is still very much the established police routine, even when that witness is a child. **Prosecutor B12** described the attraction of familiar processes for busy officers.

'It's easier to just get a quick statement rather than take the witness to [CPU in Area B] which is where they have to go to be interviewed. It would be new ground for them and quite hard work, much easier to just do it in the ordinary way and get a statement.' (**Prosecutor B12**)

Prosecutors suggested that generalist officers, who are not influenced to the same extent as specialist officers by the policy considerations promoting special measures, find it difficult to break away from the long-established practice of taking a written statement. The triggers which should generate a different response to a child are simply not strong enough to overwhelm standard police procedure.

5.7.1.2 Perpetuation of Existing Practice

Some police officers, particularly those with experience of previous legislative scheme for special measures for children, are aware that it is not appropriate to take a written statement from a child. Prosecutors believe, however, that for the non-specialist officer, offering a video-interview is more a matter of routine than a careful assessment of need in the individual circumstances.

'I don't think there is any considered decision. Well there may be a considered decision, but I think their primary consideration is, we've been told we have to do this and therefore that's the way we do it.' (**Prosecutor B5**)

Prosecutor C6 suggested that the video-interviewing procedure had become well established for certain categories of children under the CJA 1991, particularly complainants of sexual abuse, and current use was no more than a

⁸⁵ See Section 2.4.1.1.

perpetuation of that practice. **Prosecutor C6** commented on **CASE 10**, a rape case where the police chose to video-interview two child complainants:

'Before the special measures thing became general, we had the ability to take video in cases of sexual abuse against children... So this followed on from the established process that we had already got in [Area C]. We would expect it to have been videoed because that's the way it had been for the previous two or three years... It was no more than a continuation of what we'd already got.' (**Prosecutor C6**)

Prosecutors had been able to use video and live TV link for child witnesses to sexual or violent offences for the previous decade. Video-interviewing children subject to serious assault, for experienced officers at least, was therefore an established working practice for the police. In prosecutors' eyes, it was this prolonged exposure to the previous legislation that persuaded many officers to video-interview children.

'Well I'll be absolutely candid with you, I think it's probably the fact that they feel the system is imposed from the earlier legislation, which has been in place since the beginning of the 90s basically... So in large measure, it will simply be received practice to do it that way.' (**Prosecutor A7**)

For those officers who had broken away from the written statement as the primary method of recording children's accounts of criminality, established procedure became that created under the video-interviewing provisions of the CJA 1991. The CJA 1991 scheme was in place sufficiently long to become embedded in the routine working practices, albeit of a minority, of generalist officers. Prosecutors doubted whether many of those officers had appreciated the YCEA 1999's impact on the legislative landscape. The lingering influence of the previous legislative categories of eligible child witnesses is discernible in this study. Although all children are now eligible to use video-recorded evidence, prosecutors sense that the police continue to see sexual and (serious) violent incidents as the trigger offences.

'I think they just think, children, offence of violence or sex, we video-interview. You know, that's the way it's done, I'm not sure they think about what they are trying to achieve... That's your ordinary, kind of bog-standard uniformed officer... I don't think they think about any sort of strategy, they just think, "That's what we do".' (**Prosecutor C7**)

'It's probably a bit hard on the police, but I think they do it because their mindset is such that, "Oh this is a violent case, this is the way we do it".' (**Prosecutor B10**)

The persistence of established routines and procedures should not be underestimated in any organisation. The special measures experience demonstrates that this applies to the police as much as to other professional groups, even in the face of considerable legislative change. It is of course possible to introduce new working practices into an organisation, even where the culture is resistant to change, but to do so requires a conscious consideration of the structural issues that impede the adoption of new procedures. The resilience of traditional witness interviewing practices becomes more understandable when we consider that generalist officers have only intermittent contact with child witnesses.

5.7.1.3 Lack of Regular Interaction with Children

Proficiency with any tool of the job is a factor not just of initial training but also of experience. The prosecutors in this study asserted that divisional officers' skills in special measures use are hampered by lack of exposure to child witnesses on a regular basis. Officers who deal with children on a sporadic basis do not automatically 'think special measures'.

'The Child Protection Unit, they deal with children all the time... When you get PC Plod on the beat who goes out there and has an eleven-year-old witness to a robbery, I don't think it occurs to them that we should be videoing this witness.' (**Prosecutor B5**)

'These are officers dealing with robbers regularly... and it wouldn't be their first thought to do it... Child witnesses are not the run of the mill witnesses, as key witnesses. (**Prosecutor B12**)

Officers who deal intermittently with children do not have the special procedures at the forefront of their minds. Referrals for video-interviewing are not a daily activity for generalist officers and so do not become entrenched in normal police procedure. When divisional officers do exceptionally encounter a child witness,

they react as they would to any other type of witness by taking a written statement.

If video-interviewing does not become an established method of working through regular use, we must depend upon training and effective policy initiatives to promote its use. Police officers will continue to behave in the way they always have with child witnesses unless they can be taught or required to behave differently. This study revealed weaknesses in the training of generalist officers and weak policy influence outside of the specialist CPUs. Accordingly the cultural barriers to the wider adoption of video-interviewing remain intact.

5.7.2 Implications for Training and Policy

5.7.2.1 Training for Generalist Officers

Prosecutors in this study suggested that special measures awareness amongst generalist officers was limited and, consequently, police officers were as likely to fail to video-interview through lack of knowledge as through conscious choice. On one level at least, the gap between the skills of specialist CPU and other police officers is entirely understandable. Specialist training in dealing with crime against children is largely restricted to CPU officers, and officers outside of those units cannot be expected to demonstrate the same levels of expertise. As **Prosecutor C3** observed, CPU officers are trained in far more than the mechanics of video interviewing: 'There's a lot more to it than that!'

A small number of uniformed officers have been trained to conduct video-interviews. Prosecutors reported that video-interview training is increasingly reaching beyond CPU officers to encompass uniformed officers in recognition of the fact that many offences involving child witnesses fall outside the remit of the CPUs. In the time that special measures have been available, knowledge has gradually broadened.

'Generally speaking you will see, certainly from the more experienced officers, videos being taken as matter of course. Not just CPU officers, now also the more experienced beat officers have got used to the idea that these options are available.' (**Prosecutor A2**)

However, more widespread appreciation within the general policing population of the value of special measures for children, and the rules surrounding their use, is typically restricted to experienced, longer-serving, officers and to the few non-specialist officers who have been put-forward for video-interview training. Several prosecutors expressed concerns that the more inexperienced, public-facing, officers have limited knowledge of the measures available for child witnesses. The issue for these officers is less one of their willingness to conduct a video-interview as it is their lack of awareness that video-interviewing is even a possibility.

'On Division... things can vary, and you tend to find it varies according to the individual experiences of police officers, of their supervisors, or of their inspectors. Some of them will be aware that they can contact the Child Abuse Unit and ask them to conduct video-interviews on their behalf... but you will sometimes find that people have taken statements from witnesses who could otherwise have been video-interviewed, simply because they have no knowledge of how they go about getting a video-interview.' (**Prosecutor C1**)

In an environment where only a minority of generalist officers are qualified to conduct video-interviews themselves, the remainder need to be sufficiently trained to recognise the situations when a specialist referral to the CPU is required. In theory, a two-tier system of training is entirely feasible but the evidence is that it has failed to translate into practice. This study indicates that non-specialist police officers arrange video-interviews for a minority of the child witnesses they encounter. Prosecutors suggested that this systemic failure is largely caused by ineffective training at the lower tier of officers who deal with children.

Some of the prosecutors interviewed as part of this study had previously contributed to police training in special measures. They took the view that the

problem in training generalist officers lay with the delivery rather than the content of the training courses available.

'When special measures first came in I trained jointly with the police trainer all the inspectors. They were then meant to devolve that training down to their sergeants and front line officers. Sergeants and front line officers received from the police some e-learning material, but the reality with computer-based learning is that people don't do it, or they down-load it and throw it in the bin, or put it in a pile somewhere to hide. You can't beat classroom training, even if it is only an hour.' (**Prosecutor C3**)

The systems for delivering training to 'front-line' officers are now much improved, but the early experiences go to show how easily operational issues can undermine the implementation of a strongly supported policy initiative. In the absence of effective training, officers are left to acquire knowledge through experience alone. Whilst 'learning on the job' is one, entirely valid, method of acquiring the skills necessary to fulfil policing functions, there is a danger that the policy message underpinning the special measures training will be diluted or misinterpreted. A less than thorough understanding of the policy issues surrounding special measures support for children is likely to translate into a somewhat hesitant commitment to implementing special measures on the ground.

5.7.2.2 Weak Policy Influence

As we saw in Chapter 3, police policy on the accommodation of child witnesses is robust. Although there are some issues around the definition of the intended beneficiaries of support, the policy has, by and large, successfully translated into effective operational guidance. However, the specialist CPUs are the primary targets of this guidance. We can expect senior CPU officers to reinforce the documented strategy for child witnesses through the delivery of a consistent message that children are to be presumed vulnerable and offered appropriate support. There is reason to doubt that senior divisional officers similarly emphasise official policy on special measures support for children to their junior officers.

That the behaviour of front line CPU officers is shaped by policy is borne out by research. In their 1999 study Davis *et al.* observed that CPU officers were mindful of their wider child protection responsibilities and endorsed the welfarist principles that informed their criminal investigation work.⁸⁶ The CPU officers in that study achieved high video-interviewing rates and, when they rarely chose not to video-interview, cited child welfare reasons for their decisions.⁸⁷ It is doubtful whether these policy pressures operate to the same extent outside the specialist units. Davis *et al* found that officers with general rather than specialist policing duties were less committed to protecting the welfare of the child and more committed to their criminal investigation objectives.⁸⁸

This study also suggests that generalist officers are less constrained than their specialist colleagues by the policy considerations promoting special measures use. Lack of exposure to the strong policy messages pertaining in the specialist units is likely to be a significant factor in the much lower rates of video-interviewing amongst generalist officers. The absence of an expectation from senior officers that video-interviewing will take place makes it easier for an officer to fall back on traditional methods of witness-interviewing. The combination of weak policy influence and lack of effective training mean that the steps which have been taken to widen the new special measures regime to all of the children targeted by the legislation have been less effective than policy-makers would have hoped.

5.8 CONCLUSION

Video-interviewing has the potential to assist all child witnesses giving evidence in criminal proceedings but which in practice assists fewer than half. This is

⁸⁶ Davis *et al.* (1999) 17.

⁸⁷ *Ibid*, 19 – 20.

⁸⁸ *Ibid*, 17.

despite an extended period of legislative reform in which we might have expected to see the proportion of children given the assistance of a video-interview increase. It now seems clear that a system of support initially developed in the child protection context has failed to evolve into a system capable of making adequate provision for child witnesses other than the victims of or witnesses to 'child abuse'. This chapter has shown how, in the absence of an effective strategy to implement legislative change, the legal category of children in need of special protection has been reinterpreted into an operational category. Children targeted for video-interviewing are not the child witnesses to sexual or violent offences identified by statute. Rather they are the child witnesses who come into contact with the CPUs. With the implementation of the special measures provisions of the YJCEA 1999, what we have seen is a move away from the law on the statute-book to the law in action, mediated through the institutional working practices and routines of the police.

We know from the existing research that fewer children give video-recorded interviews to police than give written statements. The literature also points to a predominance of witnesses to sexual offences amongst video-interviewed children. Less clear from the research is the extent of the gap between video-interviewing rates for sexual and non-sexual offences. Nor have the reasons for the differences been fully explored. Witness age, defendant age and victim status seem to play a role but the existing research sheds little light on whether any of these factors has been or is now more significant than the others.

This chapter has shown that the difference between the video-interviewing rates for sexual and non-sexual offences is vast. Eight out of 10 witnesses to sexual assault are video-interviewed in comparison to fewer than three out of 10 witnesses to violent offences. When we isolate physical assaults committed by a non-family member, we find that the video-interviewing rate drops to only

slightly more than one in 10. Such a substantial gap between the video-interviewing rates for child witnesses to sexual and violent offences is incongruous when, to all intents and purposes, the legislation treats them equally. This study has shown that although on its face an offence-based explanation seems appropriate, in fact the critical issue is whether the witness is interviewed by a specialist CPU or a generalist police officer. This hypothesis is confirmed when we look at the deviant cases within the broader categories of offence, which are in fact exceptions to the normal pattern of investigating officer. Sexual offending against children is generally investigated by CPU officers, but where it is not, for instance in cases of indecent assault, video-interviewing rates drop. Violent offending against children is normally investigated by generalist officers, but where it is not, for instance in cases of intra-familial abuse, video-interviewing rates rise. Robbery is a genuine exception to this rule, but there is no mystery. Prosecutors identified a specific policy pressure which accounts for its atypically high video-interviewing rate amongst the broader category of violent offences.

Why do generalist officers continue to take written statements from children when specialists are firm supporters of the video-interview procedure? Prosecutors perceived that generalist officers are less bound than their specialist colleagues by the policy guidance on the appropriate candidates for video-interview, and data from the case samples bear that out. There are a number of reasons for this. Prosecutors suggested that ineffective training and a lack of regular contact with child witnesses has prevented video-interviewing from becoming part of established police practice. Officers not immersed in the culture of a CPU then find it hard to break away from long established attitudes towards children and from working practices which serve them well in other contexts. Officers' personal views about the capabilities and deservedness of children for

special measures then play a role and the institutional pressures promoting efficiency, from which CPUs are more insulated, come to the fore.

Police policy on special measures has been well developed but its reach is curtailed. Once this is appreciated, the factors that discourage video-interviewing come into much sharper focus. This study has confirmed the general tenor of the existing research that a multi-factorial explanation for the low take up of the video-interviewing procedure for children is correct. It is an explanation that applies, however, to only one sector of the police population. Outside of the specialist CPUs, where the specific policy influence is weak, other factors prevail. Firstly, situational factors are influential. Although a child's communication abilities and role in the case seem to exert some weight, the predominant factors are the child's age and the police officer's perception of the seriousness of the offence. Most significantly, prosecutors report, and the figures from this study confirm, that generalist officers are reluctant to video child witnesses to crime committed by other children. Whilst not conclusive, the view of prosecutors is that the police are less influenced by concerns that special measures disadvantage the youth defendant than by a perception that 'kiddie on kiddie' crime is somehow less serious than crimes against children committed by adults.

Beyond the specific circumstances of the case and witness, we need to look to institutional and cultural factors to explain generalist officer's behaviour. The evidence is that even where officers are open to the idea of video-interviewing, they are more likely to be influenced by working practices which have been shaped by the previous legislation and have had time to become embedded in their operational procedures. The consequence is that the old (CJA 1991) legislative categories are perpetuated. The lesson is that practice takes time to catch up with legislative innovation and, furthermore, that progress is easily derailed by structural obstruction to change. The experience with video-

interviewing is that matters as straight-forward as difficulties in accessing appropriate facilities and pressures on officers from other, competing, policing objectives are sufficient to disrupt the adoption of new working methods. This is not to suggest that change within rank-and-file policing cannot be achieved. The Street Crime Initiative stands out as a significant success in terms of persuading generalist officers to adopt video-interviews as the preferred method of taking statements from young people. Nevertheless, this chapter demonstrates that there is some way to go before s.27 of the YJCEA 1999 is fully effective in its aim of extending the potential of video-recorded evidence to all children who have had the misfortune to witness a criminal offence.

How then should reform be approached? The message from this chapter is not that more generalist officers need to be trained in video-interviewing. Prosecutors were insistent that the ability to conduct an effective video-interview is but one of the skills needed to support a child making an allegation of criminal offending. It is unrealistic to expect generalist officers, amongst their myriad other duties, to acquire the range of skills necessary to deal effectively with children's participation in criminal proceedings let alone to cultivate the more specific set of skills necessary to conduct a video-interview. Nevertheless, many, if not the majority, of children who come into contact with the police as witnesses to criminal events do so via front-line generalist officers. Consequently the issue is not *per se* the skills gap between specialists and generalists. Rather it is a matter of general awareness. Generalist officers need to be sufficiently trained to recognise if and when a referral to a specialist officer is required. We must recognise that it is the organizational structure that is responsible for the police failure to video-interview on a wider-scale. It does not make policy sense to train all officers in video-interviewing. It is too expensive given that the average officer encounters a child only rarely. The argument must therefore be for better and more effective referral and access to resources.

Chapter 6

USING SPECIAL MEASURES

6.1 INTRODUCTION

Although the police bear an initial responsibility for identifying child witnesses, the CPS is ultimately responsible for ensuring that they benefit from an application for any appropriate special measures. For the police and CPS alike, identifying child witnesses should be easy. It is essentially a fact-based assessment, though the phased implementation of special measures complicates matters to the extent that some children in some courts have at times been ineligible for special measures support. Identifying the special measures available to eligible children is also, in effect, a routine process. We have seen that the police are the gatekeepers controlling access to video-recorded evidence, whilst legislation and policy are highly effective in directing the practice of lawyers in respect of other measures. But this is not quite the end of the story. This chapter will show that, although there have been considerable benefits to the near-mandatory system of special measures for children, it has not been without its difficulties.

The highly prescriptive nature of the legislation has been replicated in everyday practice. We will see that prosecutors have developed a working rule that mandates a special measures application for video-recorded evidence and live TV link for every child witness to sexual or violent offending. This working rule operates, conversely, to exclude children not in need of special protection, although there is some debate about the number of children who might fall into that class. Moreover, the rule is so dominant as to discourage prosecutors from considering other, discretionary, special measures when the witness is a child. The research presented in this chapter will show how evidential issues and ethical concerns create dilemmas for prosecutors attempting to balance

compelling, but ultimately competing, interests. It will also show how these factors combine to discourage use of special measures other than those prescribed by law. In summary, the criminal justice system has embraced a system of support for child witnesses based upon an inflexible rule which lends itself to routine application and which, in the main, brings children considerable benefits. As we might expect, however, the rigidity of the system has some drawbacks, and it is simultaneously criticised for its over- and under-inclusiveness.

The chapter begins with an outline of the special measures application process. It then proceeds to examine the pattern of special measures applications. The triangulated methodology employed in Chapter 5 to analyse police video-interviewing practice is used in this chapter to support a similar analysis of prosecutor decisions regarding special measures use. It will look first at the existing research on special measures under the YJCEA 1999 and then present the findings of this study. In order to better understand prosecutor behaviour, the chapter explores not only the statistical data on special measures applications but also prosecutors' own reflective accounts of the factors which shape their decision-making and ultimately their ability to respond to children's problems and concerns with the evidence giving process. The chapter concludes with an examination of the advantages and drawbacks of the mandatory nature of the special measures process as it applies to children.

6.2 THE SPECIAL MEASURES APPLICATION PROCESS

Responsibility for identifying which prosecution witnesses might benefit from a special measures application is divided between the police and the CPS. In Chapter 7 we will consider the apparent contradiction of imposing a system of application onto measures which, for children, are effectively mandatory. For now, it is sufficient to observe that the application process requires, first, that

witnesses potentially eligible for special measures are marked out from their prosecution witness peers and, second, that special measures applications for those witnesses whom prosecutors judge to have satisfied the legislative criteria are completed and submitted to the courts.

6.2.1 Police Identification of Children's Special Measures Needs

As we saw in Chapter 3, guidance on the identification and treatment of vulnerable and intimidated witnesses (hereinafter VIWs) allocates responsibility for identifying VIWs to the police during the investigation of an offence, and thereafter to the CPS when they assume responsibility for the prosecution. Bulky policy documents do not, however, lend themselves to instant reference when officers are dealing with potential witnesses during on-going criminal investigations. For practical purposes, officers are expected to refer to the information on VIWs contained in the following three standard forms contained in the *Prosecution Team Manual of Guidance*:¹

1. **Form MG6: Case File Information** is used by the police to communicate basic case details to the CPS. It contains the following question-prompts to motivate identification of VIWs at the earliest opportunity, and thereby facilitate timely accommodation of their needs:

- 'Any vulnerable or intimidated adult witnesses. Is a Special Measures Meeting required?'
- 'Are there any child witnesses/victims?'
- 'Is there an application for video link evidence?'
- 'Are there any specific problems/needs of prosecution witnesses, e.g. interpreters?'

¹ On-line at www.police.homeoffice.gov.uk/operational-policing. This manual is used by police officers and Crown Prosecutors as guidance in the preparation, processing and submission of prosecution files.

2. **Form MG11: *Witness Statement*** contains on its reverse the following linked question and instruction:
 - 'Does the person making this statement need additional support as a vulnerable or intimidated witness? If "yes" please enter details on Form MG2.'

3. **Form MG2: *Initial Witness Assessment***² reproduces detailed information on the eligibility criteria for VIWs under the YJCEA 1999. For child witnesses, the officer in the case should indicate:³
 - Under which category of the YJCEA 1999 the witness qualifies for special measures;
 - Which special measure(s) would improve the quality of the witness' evidence;
 - For children not in need of special protection, how the measures applied for will improve the quality of the witness's evidence;
 - The views of the witness as to why the measures sought are required;
 - Why any decision *not* to video-record the child's interview was made.

As can be seen, the MG2 in particular requires the police to provide detailed information about the needs and wishes of witnesses who are potentially eligible for special measures, including children. In the absence of an MG2, prosecutors can still glean pertinent, though rudimentary, information, such as the age of the child and the offence charged, from the standard contents of the case-file. If form MG2 is absent, CPS policy is to make further enquiries of the police, though we will see in Chapter 7 that this practice is, at best, sporadic.

² Note that Form MG2 was introduced in July 2003, part way through the period of this study.

³ For any other category of vulnerable or intimidated witness the officer is required to additionally explain the nature of the witness's vulnerability, fear or distress and show how this is likely to diminish the quality of their evidence. In this the form reflects the structure of the 1999 Act, which assumes that special measures will inevitably improve the quality of a child's evidence.

The fact that detailed guidance and protocols are in place to assist the police to identify children and other vulnerable witnesses, and to communicate the relevant information to the CPS, does not necessarily imply that the procedures are systematically followed or faithfully implemented in practice. Indeed the experience of this study is that the completion of the specified MG forms is far from routine or comprehensive. In the Monitoring Sub-Sample, although forms MG11 and MG6 appeared on most case files, reference to the questions concerning VIWs was patchy. The use of form MG2 was uneven across the CPS Areas in this study, and, as we shall see, was variable in quality. Of the 45 cases in the Monitoring Sub-Sample, 16 case files contained an MG2 form (or equivalent) leaving 29 that did not. Only in Area A did provision of the MG2 form approach anything like routine, being present in 11 out of 16 case files. In Area B an MG2 form, or a local, roughly equivalent 'special measures request form', was provided for a far less impressive 5 out of 16 cases. In Area C police officers failed to complete an MG2 or equivalent form for any of the 13 case files they submitted to the CPS.

6.2.2 Prosecutors and the Special Measures Application Procedure

CPS lawyers are responsible for completing special measures applications and submitting them to the court. The procedures governing the process and a standard application form are now (since 2005) contained in the Criminal Procedure Rules.⁴ Applications for all categories of witness and all types of special measure are made on the same, multi-part, application form.⁵ Part A contains details of the applicant and the special measures sought, and is common to all applications. Part B relates to applications for live TV link. Part C is completed if the applicant wishes to admit a video-recorded interview in

⁴ Originally the Crown Court (Special Measures Directions and Directions Prohibiting Cross-Examination) Rules (SI 2002 No. 1688), amended by SI 2004 No. 185; Magistrates' Court (Special Measures Directions) Rules (SI 2002 No. 1687). Now see Criminal Procedure Rules 2005 (SI 2005 No. 384) r. 29.1.

⁵ At <http://www.justice.gov.uk/criminal/procrules_fin/contents/formssection/formspage.htm>.

evidence. Part D, which is a recent addition to the form, is completed if the applicant wishes to use an intermediary in court. Detailed instructions for its completion are provided throughout the form. The current version makes a clear distinction between applications based upon the applicant's 'automatic eligibility' and applications made on the ground that the quality of the witness's evidence will be reduced unless a direction is given. The information to be provided for each type of applicant is clearly specified. So, for instance, the form directs that where the application is for video-recorded evidence and/or live TV link and the witness is a child in need of special protection, 'information concerning the grounds of application and any views of the witness need not be provided'.⁶ At the time of this study the form was less directive in relation to each category of witness, with the result that prosecutors and caseworkers had to judge for themselves which questions on the form to answer for which types of applicant. We shall see in Chapter 7 that this led to extensive use of 'standardised answers' to questions.

Special measures applications must be submitted early in the case preparation process. It is desirable that children, amongst other vulnerable and intimidated witnesses, are able to know how they will finally give evidence at trial. The Criminal Procedure Rules specify that an application for special measures in the Crown Court must be made within 28 days of:

- The committal of the defendant;⁷

⁶ Page 3 of the prescribed application form. This information is not required because, under s.21 YJCEA 1999, the measures are assumed to maximise the quality of the child's evidence and the child's views are not legally relevant to the court's decision.

⁷ Traditionally defendants charged with offences to be tried on indictment are committed for trial to the Crown Court by the local magistrates. Originally conceived as a safeguard against frivolous and speculative criminal proceedings, committal proceedings required that live witnesses be produced to show that there was a case for the defendant to answer. Contemporary concerns with the efficient administration of justice led to a system of paper committals, whereby the *prima facie* case is submitted on paper and the court decides whether to commit, with or without consideration of the evidence: s.6(1) and (2) of the Magistrates' Court Act 1980. When fully implemented s.41 and Schedule 3 of the Criminal Justice Act 2003 will abolish committals and introduce a new system of 'allocation' of either-way offences. Section 51 of the Crime and Disorder Act 1988 will be extended so that 'allocated' either-way cases will be sent to the Crown Court.

- The consent to the preferment of the bill of indictment;⁸
- The notice of transfer;⁹
- The service of the prosecution papers when the case is 'sent' to the Crown Court under s.51 of the Crime and Disorder Act 1998;¹⁰
- The notice of appeal.

In the magistrates' court, applications must be submitted within 14 days of the defendant's first indication of a not guilty plea. In the Youth Court the deadline for the application is 28 days after the defendant's first appearance in court.

CPS prosecutors' dependence on information supplied by the police means that, in deciding upon the most appropriate special measures for a child, the reviewing lawyer is guided by the police officer's assessment of the witness's capabilities. Failure to provide information about child witnesses' specific requests regarding their preferred special measures and detailed information supporting their concerns and anxieties does not necessarily prevent prosecutors from making special measures applications on their behalf. The primary rule and police initiative in video-recording, or not, a child's interview largely dictate the shape of the special measures application. However, lack of additional information impairs the ability of the CPS to make the best choice of special measures over and above the primary rule measures of video and live TV link, and to make timely provision for those individual needs.

⁸ An exceptional procedure whereby the bill of indictment is preferred with the consent of a high court judge rather than following committal or transfer, or where the case is sent to the Crown Court under s.51 of the Crime and Disorder Act 1998.

⁹ The transfer procedure was introduced by s.53 of the Criminal Justice Act 1991 to allow cases involving child witnesses to sexual or violent offences to be transferred to the Crown Court thereby by-passing committal proceedings.

¹⁰ From 15 January 2001 a procedure to 'send' cases involving indictable only offences for trial in the Crown Court replaced committal proceedings. Cases are 'sent' at the defendant's first appearance in the magistrates' court.

A prosecutor may prepare the application personally or give instructions to a case-worker to prepare it on her behalf. Once signed by the prosecutor, the application is sent to the court and a copy is served on the defence. Applications may be considered in open court or, if there are no contentious issues, in chambers. Consistent with the statutory presumptions in favour of child witnesses, special measures directions are rarely refused for children,¹¹ though courts may decline to grant all of the special measures included in the application. A written direction is therefore almost always issued. Upon receipt, the direction is added to the case file, though it is not brought to the attention of the reviewing lawyer unless there is a problem requiring further action.

Given the policy reasons underlying the time-limits for special measures applications,¹² it is disappointing that the witness appears not to be notified about the outcome of the application at this point. In the CPS Areas in this study, witnesses were notified about the outcome of special measures applications by the Witness Care Units. The procedure in Area B, for instance, is that a Witness Care Unit officer attends a weekly 'special measures meeting' with court service staff and representatives of the Witness Service. The meeting is convened to allow the agencies to discuss each case involving special measures scheduled to be heard in the following two weeks. Following the meeting, Witness Care Unit officers notify the witnesses that special measures have been granted. The result is that, unless the witness contacts the Witness Care Unit, special measures are confirmed with witnesses at most two weeks prior to their appearance at trial.

¹¹ Debbie Cooper and Paul Roberts, *Special Measures for Vulnerable and Intimidated Witnesses: An Analysis of Crown Prosecution Service Monitoring Data* (London: CPS, 2005) 120.

¹² And the disapproval that the judiciary display when applications are made out of time. See Section 7.3.3

6.3 PATTERNS OF SPECIAL MEASURES USE

6.3.1 The Existing Research

Hamlyn *et al.*'s research into witness satisfaction compared rates of special measures use, as reported by the witnesses themselves, before and after the initial implementation of YJCEA 1999.¹³ The authors found that 42% of child witnesses used video-recorded evidence after the introduction of the 1999 Act compared to 30% of child witnesses under the previous legislative regime.¹⁴ The corresponding figures for live TV link were 83% post introduction of the 1999 Act and 43% prior to its introduction.¹⁵ Of the witnesses who used these two measures, 91% found video-recorded evidence helpful and 90% similarly praised live TV link.¹⁶ Witnesses reported much lower usage rates for the other measures available under the YJCEA 1999. Following implementation of the 1999 Act, 25% of child witnesses reported that wigs and gowns were removed during their testimony.¹⁷ Information on the other special measures is not broken down by type of VIW, but it is clear that even for the children in their research sample additional measures were rarely used.¹⁸

Cooper and Roberts' (2005) analysed CPS generated monitoring data rather than witnesses' self-reports. They found that, in the period April 2003 to March 2004, the CPS made applications for video-recorded evidence on behalf of 41% of child witnesses and for live TV link on behalf of 84%.¹⁹ For children for whom a special measures application of some sort had been submitted, 47% of applications

¹³ See Section 3.3.3 for details of phased implementation of the YJCEA 1999.

¹⁴ Becky Hamlyn, Andrew Phelps, Jenny Turtle and Ghazala Sattar, *Are special measures working? Evidence from surveys of vulnerable and intimidated witnesses*. Home Office Research Study 283 (London: Home Office, 2004) 66.

¹⁵ *Ibid*, 70.

¹⁶ *Ibid*, 67 and 70.

¹⁷ *Ibid*, 73. But note that wigs and gowns are worn in the Crown Court only.

¹⁸ For further information and comment, see Section 6.4.2.2 below.

¹⁹ Cooper and Roberts (2005) 80.

contained a request for video-recorded evidence and 96% contained a request for live TV link. Thus, although Hamlyn *et al.* and Cooper and Roberts used different sources for their data on special measures take-up, for the primary rule special measures their findings were remarkably similar. Cooper and Roberts also reported on children’s use of the measures which are available to them but not mandatory under the 1999 Act. Measures facilitating screens, evidence in private, the removal of wigs and gowns, and communication aids were scarcely used, each measure featuring in applications for less than 3% of children.²⁰

6.3.2 The CPS Monitoring Sample

Of the 581 potential or actual child witnesses in the CPS Monitoring Sample, 123 witnessed a sexual offence, 443 witnessed a violent offence and 15 witnessed an offence that was neither sexual nor violent in nature. Thus, 97% of the child witnesses in the CPS Monitoring Sample were, in legislative terms, ‘in need of special protection’. A substantial number were involved in cases that were terminated early, either by early guilty plea²¹ or because the CPS discontinued the case, and so the witness did not attend trial. Table A details the proportion of witnesses for whom a special measures application was submitted, and breaks these figures down by Area and according to how far the case progressed.

Table A: Special Measures Applications by Case Disposition

	Total Witnesses			Case went to Trial			Early Termination		
	No.	With SM App		No.	With SM App		No.	With SM App	
Area		No.	%		No.	%		No.	%
A	268	222	83%	162	156	96%	106	66	62%
B	121	118	98%	54	54	100%	67	64	96%
C	192	166	86%	113	112	99%	79	54	68%
Total	581	506	87%	329	322	98%	253	184	73%

²⁰ *Ibid*, 86.

²¹ An early or timely guilty plea is entered prior to the date the case is listed for trial. A late guilty plea is entered on the first day of trial or thereafter.

The headline rate of special measures applications suggests that, although prosecutors submitted special measures applications for a significant majority of children, a sizeable minority (13%) were denied the opportunity. However, closer scrutiny of the figures shows that almost all cases without special measures applications did not proceed to trial. In this sample, more than 40% of cases involving child witnesses attracted an early guilty plea from the defendant or were discontinued by the CPS in the early stages of the prosecution. In some of these cases special measures applications were nevertheless submitted, but many will have been terminated before the special measures application was prepared or considered by the court.²²

If we exclude such cases and focus on those witnesses whose cases proceeded to trial,²³ the proportion of child witnesses for whom a special measures application was submitted rises to an impressive 98% across all three Areas in the study, and to 100% in two of the three Areas. Prosecutors failed to make a special measures application for seven out of the 328 witnesses who either appeared in court or who would have done so but for a late guilty plea by the defendant: one witness to indecent assault in the Crown Court in Area C and six witnesses in Area A, one witness to each of assault and grievous bodily harm in the Crown Court, one witness to assault in the Youth Court and three witnesses to arson recklessly endangering life in the Youth Court. All of these witnesses were children 'in need of special protection' and so entitled, under the primary rule, to special measures support. It is noteworthy that prosecutors did make special measures applications for all seven of the child witnesses in the CPS Monitoring

²² Generally because the case was terminated prior to the deadline for the special measures application. It might also occur where the prosecutor makes a judgement that the child witness is unlikely to have to give evidence. In one case in this sample the VIW Monitoring Form stated that a decision was made not to submit a special measures application because the child was only four years-of-age and very distressed. Further, the prosecution had not intended to rely on the child's evidence as the defendant had made admissions in interview. The defendant ultimately entered an early guilty plea.

²³ Including witnesses who expected to appear at trial but did not so because the defendant entered a late guilty plea.

Sample who were *not* 'in need of special protection' and whose cases proceeded to court.

The special measures favoured by prosecutors in the 506 special measures applications that were submitted, regardless of the case's ultimate disposition, were those dictated by the primary rule: video-recorded evidence and live TV link. Table B shows the number of applications for primary rule measures and those for discretionary measures such as screens, the removal of wigs and gowns, and clearing the court. Primary rule measures applications are split between applications for video-recorded evidence and live TV link and applications for live TV link alone. Similarly, applications for discretionary special measures are split between applications where the discretionary measure(s) are in addition to primary rule measures and applications for discretionary measures alone.

Table B: Special Measures Applications by Type and Area

	Area A		Area B		Area C	
	No.	%	No.	%	No.	%
Primary Rule, Video + TV Link	115 ²⁴	52%	38 ²⁵	32%	25 ²⁶	15%
Primary Rule, TV Link Only	104	47%	72	61%	137	83%
Primary Rule + Discretionary	3	1%	4	3.5%	3	2%
Discretionary Only	0	0%	4	3.5%	1	< 1%
Total	222	100%	118	100%	166	100%

²⁴ Includes one application which was reported as being for video only. Given that the primary rule requires a court to issue a special measures direction for Live TV link whenever video-recorded evidence is used, it is entirely possible that the monitoring form was completed in error and should have listed both video-recorded evidence and live TV link as the relevant special measures.

²⁵ Includes one application for video only. See note 24 above.

²⁶ Includes three applications for video only. See note 24 above.

Primary rule applications accounted for 97% (491) of the 506 applications submitted to the courts. In only 2% (10) of the applications did prosecutors also consider additional discretionary measures. For six witnesses prosecutors additionally applied for the removal of wigs and gowns, and, for one of those six, permission to clear the court. For a further four witnesses prosecutors applied to use screens in addition to the primary rule measures of video-recorded evidence and/or live TV link. Although at first glance this is a curious combination of special measures, given that screens and live TV link appear to be alternative rather than complementary measures, we will see in Section 6.4 below that prosecutors and child witnesses alike see the combination of these two measures as offering specific benefits to children that were not anticipated by the legislation. In only 1% (five) of the total 506 special measures applications did prosecutors fail to apply for either of the primary rule measures, applying instead for the use of screens. All of these applications were inappropriate given that the five children had witnessed a sexual or violent offence and are thus deemed by the legislation to be in need of special protection. One was a witness to rape, one to murder and three to attempted robbery. The child witness to rape in Area C might be said to be particularly ill-served because the police had conducted a video-interview which prosecutors appear not to have attempted to use in court.²⁷

6.3.3 The Monitoring Sub-Sample

Reflecting the experience of the CPS Monitoring Sample, the over-whelming majority of child witnesses in the Monitoring Sub-Sample were child witnesses in need of special protection. Of the total 87 children, 20 had witnessed a sexual offence, 65 had witnessed a violent offence and only two had witnessed an

²⁷ A decision not to use a video-recorded interview could conceivably be appropriate. For example, prosecutors may take the view that technical difficulties with the video would persuade a judge to refuse to admit it on the grounds that it would not be in the interests of justice to do so. However, the VIW Monitoring Form for this witness contained no information explaining the special measures decision.

offence that was neither sexual nor violent in nature. However, whereas in the CPS Monitoring Sample only just over half the witnesses were ultimately required to attend court, in the Monitoring Sub-Sample 74 of the 87 witnesses (85%) found themselves attending court in the expectation that a trial would proceed. Again, as in the CPS Monitoring Sample, special measures application rates were very high. Table C gives the number and proportion of witnesses for whom a special measures application was submitted, with the figures split by the type of offence that the child witnessed and the stage in proceedings at which the case was finalised.

Table C: Special Measures Applications by Case Disposition

Offence	Total Witnesses			Case went to Trial			Early Terminations		
	No.	SM App		No.	SM App		No.	SM App	
		No.	%		No.	%		No.	%
Sexual	20	18	90%	15	13	87%	5	5	100%
Violent	65	61	94%	57	55	96%	8	6	75%
Other	2	2	100%	2	2	100%	0	0	n/a
Total	87	81	93%	74	70	95%	13	11	85%

Six witnesses in total did not benefit from a special measures application. Case file reviews for these cases allow us to explore further prosecutors' reasoning. For two witnesses, in **CASE 29**, the lack of a special measures application was entirely appropriate. Prosecutors discontinued the case before the special measures application would normally be prepared. The remaining four witnesses without a special measures application were scheduled to appear in cases that went to court, but interestingly each of those cases featured other child witnesses for whom prosecutors did prepare special measures applications.

Two witnesses were scheduled to appear in **CASE 11**, a rape case discussed in Chapter 5 in relation to the police decision to video-interview some but not all

child witnesses.²⁸ Although police officers video-interviewed three key child witnesses, they took written statements from a further two young witnesses. Prosecutors made special measures applications for the three witnesses with videos but not for the remaining two. The reviewing lawyer in the case explained that a decision to take a written- rather than a video-statement from a child can be appropriate, for instance, if there is no expectation that the child will ultimately appear in court. A special measures application is clearly ruled out if that judgement is subsequently confirmed by prosecutors. The reviewing lawyer could not recall the case in sufficient detail to confidently assert that the two children in question were not called to testify. This is not surprising. Special measures applications are a routine rather than exceptional process and prosecutors cannot realistically be expected to remember precise case details some two years later, as was sometimes asked of them in this study. However, the suggestion that there was no special measures application because there was no real expectation that the witnesses in question would be required to testify is a credible explanation for prosecutors' actions in the case. Alternatively, it is equally plausible that prosecutors over-looked the special measures applications because there was no video on file to prompt special measures action. Ultimately we do not have sufficient information to decide which of these explanations, or indeed any other, is the most appropriate as the trial did not proceed. The defendant entered late guilty pleas to some of the charges on the first day of trial, which the prosecution accepted, and therefore none of the listed witnesses was required to appear in court.

The remaining two witnesses without special measures applications whose cases went to trial had witnessed violent offences. The case file for **CASE 2** gave details of two potential child witnesses to common assault. Prosecutors applied for live TV link for the complainant child witness, who went on to testify at

²⁸ See Section 5.3.2.1.

trial.²⁹ However, the remaining child was never listed as a prosecution witness, which explains the absence of a special measures application. **CASE 40** involved three child witnesses to the attempted robbery of a 17-year-old complainant, who did not qualify for special measures on the ground of age. The police video-interviewed two of the child witnesses, and subsequently took a written statement from the third. Prosecutors then made special measures applications for the first two child witnesses, but not the third. The reviewing lawyer in the case, **Prosecutor B2**, acknowledged that this seemed a strange decision. The case file showed that **Prosecutor B2** had queried with the police the lack of a special measures request for the third witness but the case file contained no evidence of a police response. Like **CASE 11** we could speculate that prosecutors decided not to call the witness, but equally we cannot rule out the possibility that prosecutors failed to make an appropriate application. As we have seen, prosecutors depend upon the police to provide much of the information required by the special measures application form. However, at the time of this study, cases did not sit with the reviewing lawyer 'from cradle to grave'. Diary systems were used to ensure timely action in the file preparation process. It is consistent with the facts of this case to suggest that the police failure to respond to the initial query went unrecognised until the deadline for the special measures applications was imminent.³⁰ However, like **CASE 11**, the case did not ultimately result in trial. One defendant entered an early guilty plea, the other entered a guilty plea on the first day of trial. As a result, there was insufficient information on file to discriminate between these possible explanations.

²⁹ At trial the defendant did not appear and the trial proceeded in his absence. The case file records that the complainant then gave evidence in open court rather than via the live TV link. The reviewing lawyer, **Prosecutor C2** was unaware that this had happened as she did not conduct the trial for that case. She was surprised and speculated: 'I would guess that's an agent who's done that, because you shouldn't be doing that'.

³⁰ In fact the special measures applications in this case were submitted out-of-time and the reviewing lawyer explained in her letter to the court that the delay had been caused because 'we have been waiting for details of the video interviews from the police and the wishes of the witnesses and their parents to be able to complete the applications properly... Fortunately the video interviews were served within the time limit and therefore the defendant has not been prejudiced by our failure.'

Turning to the type of special measures applied for, we can see that, as in the Monitoring Sub-Sample, primary rule special measures predominate. Table D shows that 96% (78) of the 81 special measures applications in the Monitoring Sub-sample were for the primary rule special measures of video-recorded evidence and live TV link, or live TV link alone:

Table D: Special Measures Applications by Type and Area

	Sexual		Violent		Other	
	No.	%	No.	%	No.	%
Primary Rule, Video + TV Link	18	100%	14	23%	0	0%
Primary Rule, TV Link Only	0	0%	45	74%	1	50%
Primary Rule + Discretionary	0	0%	2	3%	1	50%
Discretionary Only	0	0%	0	0%	0	0%
Total	18	100%	61	100%	2	100%

Of the 87 witnesses in the monitoring sample only 3 prompted prosecutors to make an application for a discretionary special measure in addition to the primary rule measures. **CASE 45** involved a 13-year-old complainant and seven-year-old witness to a serious physical assault by the complainant’s step-father. **Prosecutor B6**, who was the reviewing lawyer for the case, applied for the use of video-recorded evidence and live TV link, and additionally requested the removal of wigs and gowns. Despite the application, the court did not include the removal of wigs and gowns on the special measures direction. The reviewing lawyer observed that she would never have been made aware of this omission. Administrative staff at the courts, on the instruction of the judge, issue special measures directions to the CPS Area, where administrative staff add them to the case file. Unless there is an obvious issue demanding immediate attention, the file would not be referred back to the reviewing lawyer. **Prosecutor B6** was not unduly troubled by what she suggested was most likely to be an administrative

error because, as we shall see below, the removal of wigs and gowns is a matter which prosecutors see as easily dealt with at trial.

The special measures application in **CASE 36** also included a discretionary special measure. **Prosecutor B3** applied for the use of live TV link and screens for a child witness to theft. The special measures application in this case was submitted out-of-time and only after representations from the Witness Care Unit. It seems reasonable to conclude, therefore, that the witness requested the use of screens in addition to live TV link and that the prosecutor's inclusion of screens on the special measures application was in response to that request. **Prosecutor B3** acknowledged that she is generally reluctant to make live TV link applications in cases where it is not mandatory: 'I personally don't like TV links because I like people to come and give evidence, give live evidence'. Where, however, a child makes a request for a specific special measure she would respect the child's wishes.

In one case in the Monitoring Sub-Sample prosecutors might be judged to have made an inappropriate special measure applications. In **CASE 18** the defendant was charged with numerous offences including multiple counts of theft, taking a conveyance without consent and assault with intent to rob. There were a number of prosecution witnesses, including a 16-year-old who had witnessed one count of theft. The police had conducted a video-interview with the child, which was subsequently disclosed to the defence, but the reviewing lawyer, **Prosecutor A5**, made a special measures application for live TV link alone. **Prosecutor A5** was unable to recall why she had not applied to admit the video-recorded evidence, though she acknowledged that 'if the video was good it should be used'. The child witness in this case was not a child in need of special protection and thus it was open to the court to refuse a special measures direction for video and live TV link on the ground that the measures would not

be likely to maximise the quality of the child's evidence.³¹ However, we might question whether the court would have been alerted to consider this matter if the prosecutor had not made an application to admit the video-recorded evidence. Many special measures applications are decided 'administratively', that is, in judges' chambers. Unless the application is made close to a scheduled pre-trial hearing, or one of the parties requests that the case be listed for mention, the special measures application will not be discussed in open court. The special measures application in **CASE 18** was granted at the Plea and Directions Hearing, but there is no indication on the file as to whether the judge considered the admissibility of the video under the primary rule.

6.3.4 Conclusion

Earlier research on special measures under the YJCEA 1999 found that the primary rule measures are well used for children. Applications for video-recorded evidence are made less frequently than for live TV link, though that is to be expected given that an application can be made only if police have conducted a video-recorded interview, and we saw in Chapter 5 that they do so for only around 40% of children. In stark contrast, it appears, that the special measures not mandated by the primary rule are hardly used at all. Analysis of special measures applications in the current research confirms those general patterns. However, this study also revealed that the overwhelming majority of child witnesses dealt with by the CPS are children in need of special protection. Thus, although the legislation makes significant distinctions between the two categories of child witness, those in need and those not in need of special protection, in practice prosecutors are required to follow only one set of legislative rules. This study also indicates that a head-line rate of 85% still somewhat underplays the reality of the situation. When we discount cases finalised before a special measures application would normally have been

³¹ See Section 3.3.2.

prepared, prosecutors made applications for live TV link for virtually every child in both the CPS Monitoring Sample and the Monitoring Sub-Sample.

It remains not quite true to say that prosecutors made special measures applications in every single case in which that would have been appropriate. Five witnesses to serious offences in the CPS Monitoring Sample (1%) and four witnesses in the Monitoring Sub-Sample (5%) were denied special measures support of any kind. Access to the case files for the Monitoring Sub-Sample allowed for further investigation which suggested that these witnesses may not ultimately have been required to give evidence at trial, but the case files are not conclusive. It is equally possible that these four witnesses were inappropriately denied special measures support. Prosecutors also appear to have made an inappropriate application for live TV link alone for a witness in the Monitoring Sub-Sample who had given a video-interview. In the main, however, the legislation appears to have successfully installed video-recorded evidence and live TV link as the normal system for children's testimony, yet it has been far less successful in promoting the use of the other special measures it makes available. To better understand this, we need to look to the experiences and explanations offered by the prosecutors themselves.

6.4 SELECTION FOR SPECIAL MEASURES: PROSECUTOR PERSPECTIVES

Prosecutors' descriptions of their experiences and understanding of the special measures process can illuminate the major issues and provide far more detailed explanations for prosecutor behaviour than reliance on bald statistics. This section explores two main issues. It first discusses prosecutors' interpretation of the legislation to create a working rule which gives priority to one category of child witness, children 'in need of special protection', and the consequences of the prominence of that rule for children who, in legislative terms, are not in need of special protection. Secondly, it examines the factors that impact upon

prosecutors' choice of special measures for the children selected for assistance. This section highlights the evidential, ethical and structural constraints which restrict prosecutors' abilities to respond to children's seemingly reasonable requests for protection in court.

6.4.1 Automatic Eligibility and Automatic Exclusion?

We saw in Chapter 3 that children's qualification for special measures is very straightforward. All witnesses under 17 years of age at the time of the hearing qualify for special measures support as of right,³² and are not required to satisfy any individualized qualification criteria. Furthermore, the legislation puts a series of presumptions in place. First, that all children will benefit from a special measures direction that they will give their evidence in-chief in the form of a pre-recorded video, if one has been made, and will present the remainder of their evidence via TV link.³³ Secondly, that these measures will be assumed to maximize the quality of the child witness's evidence where the child is testifying about a sexual or violent offence.³⁴ Policy guidance for prosecutors also makes clear that for child witnesses to sexual or violent offences, 'a new statutory scheme is created which is near mandatory as to how their evidence will be presented in court'.³⁵ Analysis of the CPS Monitoring Sample and Monitoring Sub-Sample suggests that, in the main, the legislation and policy have successfully translated into practice. Research interviews with prosecutors reinforced these findings.

The prescriptive nature of special measures legislation as it applies to children was a consistent theme amongst the prosecutors who participated in this study.

³² YJCEA 1999, s.16.

³³ YJCEA 1999, s.21(3).

³⁴ YJCEA 1999, s.21(5).

³⁵ Sheelagh Morton, *Part II The Youth Justice and Criminal Evidence Act 1999: Guidance - Children's Evidence* (unpublished guidance) (York: CPS, 2003) para. 10.

In discussing the factors that shape their decisions on whether children should benefit from special measures support, prosecutors' immediately stressed the obligations that the legislation and allied CPS policy guidance impose: 'the instructions are, special measures - video link - for child witnesses are mandatory and they cannot give evidence in open court' (**Prosecutor C2**). The legislative obligations extend to all criminal justice agencies and the judiciary, too, have reportedly adopted the 'automatic eligibility' mindset:

'When it first came in... it was clear that anyone under seventeen would be deemed vulnerable, full stop. There was no option. If a youth was there as a witness, you had to have special measures, and if we forgot to apply, the court would impose it. Absolutely they do that, they did from day one and they do it on the defence witnesses too. So there is no question... if it was violence or sex and it's a kiddie, you got special measures, no question.' (**Prosecutor C5**)

Prosecutors routinely disavowed the notion that the choice of special measures for child witnesses is, any respect, an exercise of discretion, either for them or the courts. Phrases such as 'eligible as of right', and 'mandatory scheme' peppered prosecutors' conversations, to the extent that they used 'automatic eligibility' as a term-of-art to describe children's access to the two special measures covered by the primary rule. Prosecutors appear to have developed a working rule that mandates a special measures application for video-recorded evidence and live TV link for every child witness to a sexual or violent offence.

Prosecutor B8 encapsulated the essence of this philosophy:

'It was an automatic process for most of the lawyers. We were dealing with a lot of these cases in the Youth Team, and they were just done as a matter of routine.' (**Prosecutor B8**)

Prosecutor B8 was representative of her colleagues in viewing the special measures decision as a routine application of legislative rules with negligible room for derivation. **Prosecutor A6** asserted that she applied for live TV link in **CASE 17** because, 'the child was eligible as of right: it was a matter of violence, she was under 17 and needed special measures protection.' Similarly, in **CASE**

41, Prosecutor B5 explained that the application for video-recorded evidence and live TV link:

'would have been automatic, because she is five-years-old... So automatically eligible because of her age and it's a sexual offence. She is automatically eligible under section 17. The legislation makes her automatically eligible.' (**Prosecutor B5**)

Prosecutor C4 was the reviewing lawyer for six of the 13 sample cases in Area C, all Youth Court cases. She made applications for live TV link for 10 child witnesses in total, and described how she had no personal influence over the choice of special measure:

'Generally the decision has already been made, by the legislation, because if it's a young person and it's a sexual offence or a violent offence, then it is automatic eligibility, so it's television link.' (**Prosecutor C4**)

Prosecutor B11 also reinforced the directive nature of the legislation:

'There are strict guidelines... Either witnesses or victims of offences of violence, or victims or witnesses of offences of a sexual nature, there is no distinction. If you have those offences you apply... That's because of legislation which has been passed by Parliament.' (**Prosecutor B11**)

The stringency of the legislation and its interpretation in CPS policy guidance are mutually reinforcing influences on prosecutors. We would expect lawyers to work to legislative rules: 'That's part of being a lawyer isn't it?' (**Prosecutor C6**). But policy influence has also been pivotal: 'We're civil servants at the end of the day. We just implement policy, government policy or prosecution policy' (**Prosecutor B8**). Several prosecutors spoke of the sense in which the CPS as an organization had come to accept that all children will *de facto* benefit from special measures and, as a result, give a better quality of testimony than would otherwise be possible.

'The approach of the CPS is that we should use that. There is almost a presumption that the witness will be a better witness if we use the special measures.' (**Prosecutor B1**).

Most prosecutors agreed with a mandatory policy for children, but some were unhappy at being denied the opportunity to use their discretion according to the circumstances of the case and the needs of the individual child witness. **Prosecutor A11**, for instance, was frank that had she been able to exercise complete discretion in the matter in **CASE 26**, doubts about the credibility of the witness would have prevented her from making a special measures application. Nevertheless, despite her concerns, **Prosecutor A11** felt obliged by the legislation and CPS policy to apply for live TV link:

'because I felt I had to... I took the view that it was potentially [an offence of] violence. It was one where special measures could be applied for and therefore it was incumbent on me to apply for it.' (**Prosecutor A11**)

That even prosecutors who have personal objections to the mandatory system of special measures for child witnesses to sexual and violent offences are willing to submit to it indicates the extent to which 'automatic eligibility' has permeated the professional psyche of the CPS. However, the corollary of a mandatory rule for a designated class of children appears to be a degree of neglect in considering the needs of other children who do not meet the 'automatic eligibility' criteria.

Prosecutors' remarks suggest that, in Area B in particular, the working rule categorising children as automatically eligible for special measures might have developed in such a way as to exclude children *not* in need of special protection. **Prosecutor B8** explained that child witnesses to offences not involving sex or violence are not excluded from special measures consideration, but their inclusion is not routine. Some prompt from an agency that has had direct contact with the witness, such as the police or the Witness Care unit, would be required for the prosecutor to consider the matter.

'I think the mindset is that if you've got a child witness and it's a sex or violence case then it just goes through and it's automatic, it's never challenged... Short of that we

don't really bother unless there is something particular which is raised by the police.' (**Prosecutor B8**)

'If it's... say a theft or criminal damage, then I wouldn't normally make an application unless information has come from Witness Care... or from the police... that [the witness] wanted special measures.' (**Prosecutor B9**)

The reluctance of Area B prosecutors to pursue special measures support for children not in need of special protection is rooted in the persuasive burden in s.21(4)(c) of the YJCEA 1999 to satisfy the court that the special measures selected would maximise the quality of the child's evidence.³⁶ 'There is nothing to stop you from applying, but it is much harder. Far more hoops to jump.' (**Prosecutor B11**). The sense that there are more barriers to navigate for child witnesses who are not in need of special protection was also discernable in Area C, as is evidenced by **Prosecutor C2's** observation that, 'It is up to the court's discretion and the defence object every time that we do it.' Prosecutors clearly expected to have to argue, on the basis of information personal to the witness, that the specified measure(s) will materially improve the quality of the evidence that the child is able to give.

'We would have to persuade the court that it was going to maximise the quality of their evidence if special measures were given. So we would need some information to support that.' (**Prosecutor B9**)

In fact, **Prosecutor B11** felt that any argument would have to involve something more than generalised difficulties dealing with the trial process to persuade a judge that special measures should be granted.

'It's difficult because obviously we do everything we possibly can in relation to those [witnesses] but applying for special measures in those types of cases, is almost impossible to some extent, unless you can put forward intimidation or fear of reprisals as the basis of your argument.' (**Prosecutor B11**)

The primary rule allows only children in need of special protection to benefit from the class-based assumption that special measures will improve the quality

³⁶ See Section 3.3.2.

of their evidence. For children not so designated, the court must be satisfied that the measures will have a positive effect on the child's testimony in the individual case. Prosecutors in Area B must surely be correct in interpreting the legislation as requiring them to support special measures applications for children not in need of special protection in ways that differentiate the child from their peers. How that might be achieved, beyond relaying any wishes expressed by the child, is not clear. As **Prosecutor B11** suggested, one strategy is to look to arguments unrelated to youth and immaturity. However, there is perhaps a more fundamental difficulty. As noted in Chapter 3, the impact of a given measure on the quality of the child's evidence is a hypothetical matter. Children do not, on the whole, have previous experience of giving evidence, far less of giving evidence with special measures. It is difficult to see how one might provide evidence that a child will be less frightened, more articulate or more robust if the requested measure is granted. Indeed for the one Area B child witness not in need of special protection in the Monitoring Sub-Sample (**CASE 36**), **Prosecutor B3** fell back on the standard arguments used to justify special measures for children generally:

'Due to the age of the witness, leave to use Video Link will assist the witness to give a complete, coherent and accurate account of his observations hence increasing the quality of his evidence.' (**CASE 36**, *Special Measures Application*)

Similarly, in the only other Monitoring Sub-Sample case involving a child not in need of special protection, **CASE 18** in Area A, the prosecutor made limited, relatively superficial, attempts to personalise the justification for special measures for that witness:

'The witness does not wish to face the suspects again and would feel very uncomfortable about having to give evidence in open court. The giving of evidence via Video Link would provide a more secure situation and would enhance the quality of her evidence.' (**CASE 18**, *Special Measures Application*)

Crucially, in neither case does the prosecution appear to have provided any evidence to support these assertions. They have rather resorted to advocacy to persuade the court that their judgement is to be accepted. Nevertheless, the perception in Area B was that this persuasive burden is significant; enough to preclude special measures applications for children not in need of special protection, unless a child's preference for support has been made explicit.

The quantitative data from the case samples appear to paint a different picture, implying that special measures support is routinely extended to children not in need of special protection. We must take care, however, as the numbers are small. In the CPS Monitoring Sample only 15 (3%) of the total 581 child witnesses had witnessed a non-sexual, non-violent offence, including eight children in Area B. Prosecutors made special measures applications in all appropriate cases, declining or neglecting to do so only where the child's case was finalised prior to trial. Moreover, all of the special measures applications prepared for these children were for primary rule special measures. A similarly small number of child witnesses not in need of special protection, two (2%) out of 87, featured in the Monitoring Sub-Sample.³⁷ Prosecutors prepared special measures applications for both witnesses. In both case samples, therefore, primary rule protection was consistently extended to witnesses for whom the protection is not mandated.³⁸

One possible explanation for the discrepancy between the quantitative and qualitative data is under-counting of child witnesses not in need of special protection by Areas during the monitoring period. Burton *et al.* have criticized CPS systems designed to monitor VIWs for overlooking witnesses for whom no

³⁷ **CASE 18** and **CASE 36**.

³⁸ In **CASE 18** there was a discrepancy regarding the type of special measure applied for. Although a video existed, the application was for live TV link only. The application therefore followed the presumptions of the primary rule only in part.

special measures applications were prepared.³⁹ We cannot be certain that the CPS Areas in this study did return VIW monitoring forms for all child witnesses regardless of whether or not a special measures application was submitted. However, analysis of the general VIW database showed that CPS Areas reported significant numbers of adult VIWs eligible for special measures for whom no application was made.⁴⁰ If CPS Areas were prepared to report adult VIWs who did not benefit from special measures, why would they exclude from their reports similarly-situated children? Under-reporting of children, though it cannot be ruled out, seems unlikely to be the main cause of the discrepancy between prosecutor perceptions and reported statistics.

An alternative explanation is simply that few children appear as witnesses in trials for non-sexual, non-violent crimes. We saw in Chapter 5 that prosecutors were able to envisage few offences that children might witness which did not involve some aspect of sexual or violent behaviour.⁴¹ It may be that there is a genuine scarcity of child witnesses to non-sexual, non-violent offending amongst the overall child witness population. Criminal statistics for these categories of offence also demonstrate that they are predominantly heard in the lower courts.⁴² This is significant because children scheduled to give evidence in non-sexual, non-violent offences in the lower courts were not 'eligible' for special measures for the period of this study. Although the CPS monitoring database did not include details of the offence charged, this rationalization would explain why prosecutors seemed more aware of the potential difficulties in securing special

³⁹ Mandy Burton, Roger Evans and Andrew Sanders, *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies*. Home Office On-Line Report 01/06 (2006) 31.

⁴⁰ Cooper and Roberts (2005) 76.

⁴¹ See Section 5.3.4.3.

⁴² For every theft/criminal damage charge tried in the Crown Court, 15 were tried in the magistrates' courts: Supplementary Tables to *Criminal Statistics, England and Wales 2007* (London: Ministry of Justice, 2008) available at <<http://www.justice.gov.uk/publications/criminalannual.htm>>.

measures support for children not in need of special protection than the quantitative monitoring data might imply.

As a result of the Court of Appeal decision in *R v R*, special measures have been made available to all children in the lower courts, including those not in need of special protection.⁴³ We might therefore expect the neglect of that group of child witnesses to become more evident in future research studies if, as Area B prosecutors in particular maintained, the persuasive burden in s.21(4)(c) is sufficient to deter special measures applications on behalf of children not in need of special protection. Moreover, in the Coroners and Justice Bill (2009) the Government now proposes to remove the offence-based distinction between children and with it the provision in s.21(5) that currently *assumes* that for children in need of special protection the primary rule measures will maximize the quality of the child's evidence without demonstration of individualised need.⁴⁴ If and when this amendment to s.21 of the YJCEA 1999 becomes law, the probative burden in s.21(4)(c) to satisfy the court that the special measures selected would maximise the quality of the child's evidence will apply to all children. Hoyano cautions that:

We may be haunted anew by the spectre of an evidential burden on the prosecution to establish that there is a real risk that otherwise the child might give no, or incomplete, evidence, first conjured up by Latham LJ in *R v Redbridge Youth Court*.⁴⁵

This study tends to substantiate the existence of this risk.

6.4.2 Limited Discretion to Re-interview on Video

Although the primary rule is, for prosecutors, the chief factor that controls their choice of video-recorded evidence and/or live TV link for a child, the YJCEA 1999

⁴³ See Section 3.3.2.3.

⁴⁴ The Bill further provides that any child will be able to elect to give evidence in court, with or without a screen, rather than via video-recorded evidence and/or live TV link.

⁴⁵ Laura Hoyano, 'The Child Witness Review: Much Ado About Too Little' [2007] Crim LR 849, 857.

allows the prosecutor some discretion in composing the special measures application. There is a limited sense in which prosecutors can exercise their discretion regarding the use of video-recorded evidence.⁴⁶ We have seen that there is no statutory obligation on the police to video-interview child witnesses. Therefore, where the police have chosen to take a written- rather than a video-statement from a child, it is open to the prosecutor to ask the police to complete a second, video-recorded, interview with a view to admitting it in evidence.

The benefits of a video-recording in reducing the possibility for inconsistency between a child's police interview and the child's evidence in court were discussed in Chapter 2. Heaton-Armstrong and Wolchover describe the zeal with which defence advocates are said to exploit any inconsistencies in a witness's account of an incident:

Defending advocates exploit the deficiency in two ways. First, they seek to cast blame for the inconsistency on the witness and attempt to play down the possibility that an apparent difference may actually be attributable to a recording defect. Second, they seek to blow up out of all proportion what may be no more than a minor difference. Witnesses may be left at the untrammelled mercy of counsel who, after perfectly fairly "cross-examining in" a previous inconsistent statement, will then deliver themselves of unwarranted sophistry on why the witness is to be regarded as entirely untrustworthy.⁴⁷

The prosecutors in this study concurred in this opinion:

'... with an ordinary witness you've got a statement, then you've got their evidence-in-chief. There may be discrepancies between those. They are usually quite minor, but even the minor ones the defence is straight [on them]... The implication is that if you can't get that right you can't get anything right... That's the way it works. I'm not entirely sure that it is fair. Witnesses can be tripped up on very minor things and we lose cases because of it.' (**Prosecutor A10**)

'The defence love inconsistencies. They may come in more softly with a child but it's their job isn't it, to try and make out that the child is confused or can't remember it properly and it's all ammunition for them if she's given a different account earlier.' (**Prosecutor B12**)

⁴⁶ Additionally, under s.27(2) of the YJCEA 1999 a court may decide that it is not in the interests of justice to admit part or all of a video-recorded interview. It is therefore open to a prosecutor to decline to apply to admit the video on the ground that it is unlikely to be acceptable to the court. In practice, in this study, it was not a course of action that prosecutors followed.

⁴⁷ Anthony Heaton-Armstrong and David Wolchover, 'A plea for better JSB model directions on inconsistency' [2009] 3 Arch News 7.

Prosecutors were ever-wary of creating opportunities for defence advocates to exploit even minor inconsistencies in order to undermine children's credibility. This circumspection has significant implications for prosecutors' choice of special measures for children who were not initially video-interviewed by the police. Sympathetic as prosecutors generally were to the benefits of video-recording a child's interview, prosecutors were universally resistant to the idea of asking the police to re-interview on video a child who had, albeit inappropriately, already given a written statement. As one said:

'The downside is that you are risking inadvertent inconsistencies. Where you've had a statement made and then different questions are asked or things are put in a different way and different answers come, then we've got the possibility of them being cross-examined about the first statement.' (**Prosecutor B12**)

Burton *et al.* suggest that this reluctance to ask the police to go back and conduct a video-recorded interview when they have previously failed to do so is a product of prosecutors' general unease with the quality of video-recorded interviews and with the problems that children face going into cross-examination without the benefit of a 'friendly warm-up' by prosecution counsel's examination-in-chief:

While one of the key advantages of a video-interview is that it enables an account to be taken closer in time to the actual event, there are drawbacks to this: the witness is plunged cold into cross-examination and the interview technique of the police officer may not be very effective, or at least the questions may not be asked in the way that prosecuting counsel would like. This may explain why prosecutors and the judiciary are less enthusiastic about video-evidence than the police. As such, it may partially account for why prosecutors are not proactive in seeking video evidence from child witnesses where the police have failed to carry out a video interview.⁴⁸

Without exception, those prosecutors who commented on the matter in this study ascribed their reluctance to re-interview to a concern over introducing possible inconsistencies into the child's evidence.

⁴⁸ Mandy Burton, Roger Evans and Andrew Sanders 'Protecting children in criminal proceedings: parity for child witnesses and child defendants' (2006) 18 *Child and Family Law Quarterly* 397, 402 (internal citations omitted).

'Obviously as soon as you start re-interviewing the witness they can start to say things that aren't consistent with their previous statement, and then you get into inconsistent statements and you have got an issue with credibility.' (**Prosecutor A8**)

'You just end up then building discrepancies into your case because every time you ask somebody about something they are liable to say it in a slightly different way. Then you give the defence a baton to beat [the witness] with before you have even got to court, and I think that's unfair on witnesses.' (**Prosecutor A10**)

'If [the two accounts] were blindingly different we might think we can't put forward a clear case to the court. What is our case if the witness is saying this one minute and that the next? You know we have to prove it beyond reasonable doubt.' (**Prosecutor B12**)

Prosecutor B4 described a situation in which she asked the police to video-interview a child who had already given a written statement. In that case, unfortunately, the prosecutor's fears over possible inconsistency with the written statement were realised.

'I have asked the police to go out and take video interviews and...what happens is you are sat with bated breath because you have the [CJA 1967 s.9 statement] in front of you, you put the tape on, and you hope that the tape mirrors the [statement]. Now in the case that I asked for video interviews to be done, it didn't and so the case collapsed... because they were entirely conflicting accounts.' (**Prosecutor B4**)

In some instances, of course, the failure of a witness to maintain consistency between initial and subsequent accounts might be taken as an indicator of the genuine weakness of a case, which prosecutors would be only too pleased to discover in time to take the appropriate action. The general view, however, was that with vulnerable witnesses, and particularly with children, such conclusions might be premature. **Prosecutor B4** went on to explain why, in the case she described, contrasting interview techniques may have created apparent inconsistencies in the witness's accounts.

'In historical child abuse... it's crucial that you can have times that you can focus in on, and addresses, so that you can make it clear to the jury that this is what happened when... You need absolutely to be able to tie down specifics... What she failed to do in her video interview was corroborate any of the dates and times.' (**Prosecutor B4**)

It appears that in this situation the inconsistencies that the prosecutor referred to were caused by omissions in the second (video-)interview rather than

conflicting accounts. In allegations of historical child abuse, particularly those which involve multiple allegations over long periods of time, some structure to the account – as imposed by an officer who understands the evidential demands of the prosecution – is vital. When a written statement is taken, the police officer has the opportunity to impose a structure on the child’s initial disclosures. A video-interview, which, as we saw in Chapter 3, enables the child to tell the story in her own words, may lack the clarity and coherence that prosecutors perceive are essential to convince a jury in such cases. In circumstances such as these, a prosecutor finds herself in an invidious position. A second interview on video brings benefits to the child, but also increases the possibility that the child will be aggressively questioned in cross-examination or, perhaps worse, that the prosecutor will feel obliged to discontinue the case and remove any hope that the child had of seeing justice done in the case. **Prosecutor B4**’s conclusion illustrates how prosecutors face real dilemmas in such situations and are required to make finely balanced judgements.

‘Certain minor inconsistencies you can explain away to the jury... but what you are faced with... is that you have to decide which horse you are going to back. If you decide to play the tape, then obviously the statement is going to become cross-examination material and you have to disclose it... If there are huge inconsistencies between the two, then you have really then to consider whether you can run the case at all.’ (**Prosecutor B4**)

The result would appear to be a generally risk-averse approach: ‘There are so many pitfalls that we never do that. Well, occasionally we’ve done that actually, but generally it’s a bit too risky’ (**Prosecutor B8**); ‘It is not impossible that I’d run a case where a child did give two accounts, but it’s very unlikely’ (**Prosecutor A10**).

The risk here, as prosecutors perceived it, is that a second interview will generate inconsistencies with the original statement which will irretrievably weaken the prosecution case: ‘What is our case if the witness is saying this one minute and that the next?’ (**Prosecutor B10**). Whether that risk is likely to be

realised is entirely dependant upon the circumstances of the case. Furthermore, given that prosecutors rarely take the risk, it is difficult to assess objectively whether prosecutors' assessments of the severity of the consequences are accurate. What we can say, however, is that prosecutors' concerns are apparently sufficient to rule out second interviews in all but exceptional circumstances.

6.4.3 Neglect of Other Special Measures

The main opportunity for prosecutorial discretion in special measures selection concerns the non-primary rule measures. During the period of this study prosecutors could choose to make applications for the removal of wigs and gowns, for the public gallery to be cleared, for the use of screens and the assistance of communication aids.⁴⁹ Yet, my quantitative data suggest that it is rare for prosecutors to consider these measures for child witnesses, either as alternatives or supplements to the primary rule measures. Prosecutors endorsed this finding in research interviews.

'If you are choosing from a deck of cards, there are not many cards. It is almost pre-programmed. It's evidence-in-chief by video, live link and in essence they are the only ones we use.' (**Prosecutor A9**)

'Parliament says that the presumption is that they have a video and use video link, so no, I don't really apply my mind to anything else, unless there is any evidence to suggest I should.' (**Prosecutor C7**)

Prosecutor C5 was typical of her colleagues in commenting that she would rarely apply for discretionary measures under the 1999 Act for a child, 'because the TV link is enough'. To appreciate why prosecutors have formed this view, we need to examine each of the discretionary special measures individually.

⁴⁹ Intermediaries, though now available to child witnesses, had not at that time been fully implemented. See Section 3.3.3.

6.4.3.1 Wigs and Gowns

The power under s.26 of the YCJEA 1999 to request the removal of wigs and gowns is a measure appropriate only in the Crown Court, since formal attire is not worn in the lower courts. There are few practical obstacles to the removal of wigs and gowns. It requires no technological support or special facilities and places no significant burden on the parties to the case. In fact, it may be even less of a burden than the term suggests: 'Usually it is just wigs that they would remove. It's couched as wigs and gowns in the legislation, but usually they just remove wigs' (**Prosecutor A2**). The Government took the view, in *Speaking Up for Justice*, that some children find the sight of counsel and judges in their wigs and gowns intimidating.⁵⁰ The evidence that the measure is rarely used, even for a proportion of child witnesses, is therefore puzzling.

In their analysis of the broader monitoring database from which the samples used in this study were selected, Cooper and Roberts found that an application for the removal of wigs and gowns was made for only 8% of the children for whom a special measures application had been made in the Crown Court.⁵¹ Although the removal of wigs and gowns was the third most popular measure in the Crown Court, it lagged behind live TV link and video by some considerable distance.

The sample findings for this study reflect similarly low application levels. In the CPS Monitoring Sample, 193 special measures applications were submitted to the Crown Court and only 6 (3%) were for the removal of wigs and gowns. In the Monitoring Sub-Sample 41 special measures applications were submitted to the Crown Court and only 2 (5%) were for wigs and gowns. The case file analysis for the Monitoring Sub-Sample further shows that in two cases the CPS

⁵⁰ *Speaking Up for Justice*. The Report of the Home Office Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System (London: Home Office, 1998) para. 8.79.

failure to make an application for the removal of wigs and gowns flew in the face of police advice.⁵² The officer in the case (OIC) in both **CASE 23** and **CASE 15** had completed an extensive and highly personalised MG2 form for the child witnesses involved in each case. In both cases video-recorded interviews had been conducted with each child and the OIC additionally requested the use of screens, live link and removal of wigs and gowns. The reviewing lawyers, **Prosecutor A12** and **Prosecutor A3**, respectively made applications for the primary rule special measures only.

Unlike video-recorded evidence and live TV link there are no 'rules' to follow in deciding whether wigs and gowns should be removed for the duration of a particular child's testimony. Furthermore, no policy consensus has developed that children will find it easier to testify or give better evidence if formal attire is removed. Use of this special measure is left to the discretion of the prosecutor.⁵³ Prosecutors in this study expressed divergent opinions on whether the removal of wigs and gowns offers any assistance to child witnesses. Some prosecutors took the view that children find formal attire intimidating and would prefer to see it removed. Others saw formal attire as differentiating the important actors in criminal proceedings from everyone else in court and felt that children are reassured by those distinctions. **Prosecutor A4** suggested that policy-makers' concerns had been overstated: 'I don't think wigs and gowns are intimidating actually, it is just part of the process. I think those things are over-estimated a bit really'. In contrast, **Prosecutor B8** felt that formal attire in court did have a negative impact on young witnesses:

⁵¹ Cooper and Roberts (2005) 104.

⁵² In a further case, **CASE 27**, the OIC requested the removal of wigs and gowns in a case that was heard in the magistrates. Although a seemingly illogical recommendation, given that formal attire is not worn in the magistrates' courts, it might not have been clear to officer when she completed the MG2 form which court would ultimately hear the case.

⁵³ Or defence lawyer if the witness in question is appearing for the defence.

'It's the appropriate thing to do because it puts the witnesses more at ease. I would say so, definitely, because I think the whole issue of people in wigs and gowns is quite intimidating for somebody who maybe is twelve, thirteen, fourteen.' (**Prosecutor B8**)

Even given this diversity of opinion, we might nonetheless expect this special measure to account for more than 8% of children's special measures applications. However, prosecutors in all three CPS Areas said that the lack of applications is not an indicator that the measure is rarely used. Prosecutors explained that they rarely applied for the removal of wigs and gowns because it is a matter commonly dealt with by judges in the Crown Court on the day of trial. Where child witnesses are involved, the judge as a matter of course will enquire as to whether or not the child witnesses would like the judge and counsel to remove wigs and gowns.

'That is something that we never consider. That's something that I think the judge would take the lead on.... Funnily enough I was sat in on a case the other day and that's what they did. The judge gives a lead and the advocates follow.' (**Prosecutor B8**)

'If you've got a young witness and the application hasn't been made, the judge will usually... ask whether or not the witness is comfortable with the barristers and himself having on their wigs and gowns.' (**Prosecutor A2**)

The general view was that the question as to whether formal attire should be worn is a matter best investigated by the judge on the day, not because it is unimportant but because it is a question best asked of the child in person.

'There is an element of reassurance that it's not really a problem on the day. You know, the barristers and the judge can just take their wigs off and put them down next to them. It's easily accomplished, let's put it that way.' (**Prosecutor B10**)

Thus the removal of wigs and gowns in Crown Court may be far more prevalent than the statistics on formal special measures applications suggest. Indeed, in their small-scale study of children's experiences in criminal proceedings for the NSPCC, Plotnikoff and Woolfson reported that 25 of the 36 young witnesses who gave evidence at Crown Court were asked if they would like wigs and gowns to

be removed.⁵⁴ Hamlyn *et al.* reported that 25% of children in phase 2 of their study had wigs and gowns removed, though they gave no indication of how many were given the choice.⁵⁵

Burton *et al.* are critical of the criminal justice agencies for not making greater use of this special measure.⁵⁶ The authors accepted that the lack of s.26 applications may be because the issue is best left to the judge, but suggested that equally it may be because police officers and prosecutors consider it an unimportant measure. They attributed the perceived lack of effectiveness of the measure to a prevalent view amongst criminal justice professionals that children prefer to see judges and counsel dressed in the traditional manner. This is a view strongly echoed by the prosecutors in this study. A significant number of prosecutors expressed the view that children in fact prefer to see the judge and counsel in formal attire because that conforms to their preconceptions of how criminal justice professionals dress, a preconception implanted and continually reinforced in the minds of the general public by popular court-based television dramas.

'You tend to find that actually the younger witnesses quite like the fact that there is a wig and a gown there because they can identify a judge. Mentally they've got a picture in their mind of what the judge and the barristers are going to look like... and I think they understand the role of that person and they expect that person to look a certain way.' (**Prosecutor A2**)

'If you are not careful you are being condescending to the witness because they've seen enough on TV. In fact, some of them might feel cheated.' (**Prosecutor C6**)

Plotnikoff and Woolfson report that six of the 25 children in their study who were asked their opinion wanted wigs and gowns kept on.⁵⁷ Beyond that, however,

⁵⁴ Joyce Plotnikoff and Richard Woolfson, *In Their Own Words: The Experiences of 50 Young Witnesses in Criminal Proceedings* (London: NSPCC, 2004) 18.

⁵⁵ Hamlyn *et al.* (2004) 73.

⁵⁶ Burton *et al.* (2006) 58.

⁵⁷ Plotnikoff and Woolfson (2004) 18.

there is scant empirical information on children's attitudes. Prosecutors' decisions on whether or not to apply for the removal of wigs and gown are therefore made in something of an information vacuum.

In the absence of any strong policy steer, the child's view on court attire is the primary influence on prosecutors. Yet, as we have seen, prosecutor access to such information is often limited. There are many reasons for this, not the least of which is that the primary rule creates a system in which, for the most part, a child's personal view of how she might give evidence is legally irrelevant. In relation to discretionary measures such as the removal of wigs and gowns, the child's views *are* relevant. However, if those views have not been communicated, prosecutors, safe in the knowledge that the issue can easily be dealt with on the day, have little motivation to follow them up and risk delaying the application for the remaining special measures.

In summary, this study suggests that the explanation for the paucity of formal applications for the removal of wigs and gowns is less a matter of indifference and more a recognition that the judge is better equipped than the prosecutor to establish the child's views. This is not simply a matter of compensating for inadequate information from the police. Prosecutors suggested that police officers are also in a poor position to decide if the removal of wigs and gowns is appropriate in a particular case. Some matters are likely to concern a child more than others. The possibility of seeing the defendant in court, for instance, may well play heavily on a child's mind from the outset, and so cause the child or her parents to raise with the police the possibility of screening the live TV link monitor.⁵⁸ By contrast, the question of whether or not the judge will be wearing a wig is much less likely to occur to a child until she is physically exposed to the

⁵⁸ See Section 6.5 below.

courtroom environment. The general view, therefore, is that the matter is best left to the judge, who is better placed to ascertain the child's views.

6.4.3.2 Evidence in Private

Research studies concur that formal special measures applications to exclude the public from criminal proceedings to allow the child witness to give evidence in private are rarely made. In Hamlyn *et al.*'s research, the public gallery was cleared for 11% of phase 2 witnesses who characterised themselves as intimidated and for 7% of phase 2 witnesses who had been the victims of a sexual offence.⁵⁹ There is no indication of how many of these witnesses were children. Twenty-nine percent of witnesses in phase 2 of the study for whom the public gallery was not cleared believed that it would have been helpful to them (though this may include witnesses who did not fit the legislatively-defined categories).⁶⁰ Burton *et al.* likewise describe clearing the public gallery as a measure which is neglected by the criminal justice agencies. Prosecutors in their study apparently did not routinely consider the possibility of clearing the public gallery when preparing a case.

There is no evidence from the case files that the possibility of witnesses giving evidence in private was ever considered prior to the day of trial.⁶¹

This study similarly identified few applications to clear the public gallery. The CPS Monitoring Sample contained only one such application for 506 child witnesses. The Monitoring Sub-Sample contained none at all.⁶² Police officers did request 'evidence in private' on the MG2 form for two witnesses to violent offences in the Monitoring Sub-Sample (**CASE 24** and **CASE 26**) but prosecutors

⁵⁹ Hamlyn *et al.* (2004) 72.

⁶⁰ *Ibid.*

⁶¹ Burton *et al.* (2006) 59.

⁶² The Monitoring Sub-Sample included 21 witnesses in 11 cases involving allegations ranging from sexual intercourse with a girl under sixteen years-of-age to rape.

did not act upon those requests. Case file analysis shows, however, that prosecutors were unable to do so. The CPS, in making an application for the witness to give evidence in private, would be required to convince the court that there were reasonable grounds for believing that someone *other than the defendant* had or was likely to make attempts to threaten the witness,⁶³ and there is no indication on either MG2 that this was the case. Furthermore, **CASE 26** was heard in the Youth Court, which always sits in private, and so no application was necessary. Indeed, one prosecutor interviewed suspected that police officers did not always appreciate the implications of their requests for 'evidence in private', believing this to mean that the witness would testify from the 'privacy' of the live TV link room.

In general, prosecutors in this study were reluctant to make applications to exclude the public from the court. **Prosecutor A4** referred to the criminal justice system's 'instinctive tendency to open justice'. Whilst sympathetic to children's fears about giving evidence in public, prosecutors tended to think that anxiety alone is not sufficient reason to displace the presumption in favour of an open justice: 'Clearing the public gallery is quite an extreme measure, in my view' (**Prosecutor A2**). Anticipation of judicial antipathy may also be a factor, as **Prosecutor C1**'s remark implied: 'I made an application a few months ago to clear a court... I thought hmm, because applications to clear a court have seldom been made, but I did get it.'

Section 25 of the YJCEA 1999 permits applications to exclude the public from the court in only two circumstances, where the offence is sexual in nature or where the court is satisfied that someone other than the accused has sought or will seek to intimidate a witness in the proceedings. However, prosecutors seemed disinclined to make routine applications in sexual offence cases. They generally

⁶³ See Section 3.4.6.

wanted the witness to make out a special case beyond general embarrassment why open justice should be compromised. So, **Prosecutor C2** explained that she had been prepared to make an application in a non-study case where:

'Mum had been a victim of domestic rapes, and her two daughters had been sexually abused by the Dad, and they indicated that whilst they were aware that some family members had some knowledge of the case, it was just the briefest of information and they didn't want them to hear the full allegation.' (**Prosecutor C2**)

Similarly, **Prosecutor A2** described how she would want to see evidence of actual or potential intimidation to support an application:

'Usually it is where there is a threat of violence existing, a very apparent and already articulated threat towards any witness.' (**Prosecutor A2**)

One possible reason for the lack of formal applications to exclude the public from court is that the circumstances justifying an application might not become evident until close to or even on the day of trial. **Prosecutor C3** suggested that the police seldom raise the issue: 'Very rarely will there be an indication that the whole family or half the street are coming to court and so you might need to clear the court'. With the introduction of Witness Care Units it is becoming more likely that these issues will be brought to the attention of the CPS, but if a special measures application has already been dealt with a prosecutor may decide that the most practical course of action is to raise the matter directly with the trial judge. However, unlike applications to remove wigs and gowns, prosecutors did not suggest that applications to clear the court were best dealt with on the day. Their reluctance to follow through on child witnesses' requests to clear the public gallery is best explained by a commitment to the principle of open justice.

Both Hamlyn *et al.* and Burton *et al.* suggest that prosecutors should apply for, and judges should direct that, the public gallery be cleared more frequently than they currently do. This implies that prosecutors and the judiciary over-value the principle of open justice when it conflicts with a witness's desire for a degree of

privacy in her testimony. Prosecutors in this study certainly did take the view that it is a measure to be used sparingly, 'because of the justice being seen to be done aspect of the fairness of the trial.' (**Prosecutor A2**). The reviewing lawyer in **CASE 42**, for example, was resistant to clearing the public gallery, even in a rape case, absent very good reason:

'It is a public hearing. Everybody should have a right [to see that] everything is transparent, [that] it's well above board. Unless there is a very good reason not to, we should encourage it.' (**Prosecutor B3**)

Burton *et al.* were disappointed that the infrequent use of s.25 defeats witnesses' expressed wishes.⁶⁴ Whilst this conclusion arguably pays insufficient attention to the value of open justice, prosecutors' lack of personal contact with witnesses may nonetheless lead them to underestimate the desirability of this measure, if only in a minority of cases. One possible example of prosecutors' insensitivity to the depth of children's concerns is their assumption that children using the live TV link will not be troubled by the public gallery. **Prosecutors A1** and **A3** made this assertion, as did **Prosecutor B8**:

'The only situation in which you'd clear the court is where the witness is giving evidence in court from the witness-box as opposed to live link, because if they're giving evidence from live link why do you need to clear the court? They're not aware of people in the public gallery.' (**Prosecutor B8**)

Yet children seem to say otherwise. The prosecutors in this study viewed clearing the public gallery from the conventional perspective, as a means to prevent intimidation or embarrassment from within the court. Children in the Plotnikoff and Woolfson study, however, objected to giving evidence in public on the same ground as they objected to giving evidence in the presence of the defendant: that recognition might later provoke intimidation or retaliation.⁶⁵ In sexual offences, prosecutors assume that clearing the public gallery is to prevent embarrassment. Children and their parents, by contrast, question why those not

⁶⁴ Burton *et al.* (2006) 59.

⁶⁵ Plotnikoff and Woolfson (2004) 40.

directly involved in the proceedings, such as the defendant's family and associates, should have access to such information.⁶⁶

If children's concerns passed unnoticed by the prosecutors in this study, that is only to be expected when one considers the lack of direct contact between prosecutors and child witnesses. Prosecutors continually made the point that any personal interaction with Crown witnesses is limited to a few minutes outside of court immediately prior to the commencement of proceedings.⁶⁷ **Prosecutor B7** made the point, specifically regarding perceptions of CPS reluctance to prosecute cases that the police believe should proceed, that prosecutors are insulated from the raw emotional impact of criminality.

'The police always say that we are too far removed from the victim. Oh, it's a constant criticism. They say that being that one step removed, by the time the case comes to us it is slightly sanitised... We're not the ones dealing with people in distress.'
(**Prosecutor B7**)

By extension, prosecutors are also divorced from the psychological pressures that accompany an agreement to be a prosecution witness. One can only speculate whether greater and more direct exposure to the anxieties and concerns that witnesses feel would prompt prosecutors to re-evaluate their open justice inclinations. Neither is it possible to say whether prosecutors would feel that such considerations deserve greater attention when the witnesses are children rather than adults. Witness-facing agencies, including the police, Witness Service and Witness Care Units, quite rightly see their primary responsibility as being the protection of witness interests, rather than the promotion of the public interest in ensuring transparency and accountability in the criminal justice system. However, the CPS has a statutory responsibility

⁶⁶ *Ibid.*

⁶⁷ At the time of this study, prosecutor pre-trial interviewing of witnesses had not been introduced, though even post-implementation children are unlikely to feature heavily in the witnesses selected for interview. See further Paul Roberts and Candida Saunders, 'Introducing Pre-Trial Witness Interviews: A Flexible New Fixture in the Crown Prosecutor's Toolkit' [2008] Crim LR 831.

under the Code of Crown Prosecutors to act in the interests of justice and not solely with the purpose of obtaining convictions or promoting victims' rights.⁶⁸ As we have seen, open justice considerations are deeply-rooted and difficult to dislodge, for what many take to be good reason.

6.4.3.3 Communication Aids

Only a small number of child witnesses are likely to need the assistance of communication aids under s.30 of the YJCEA 1999. This study identified not a single application for their use as a special measure. Similarly, Burton *et al.* reported no applications in their study, whilst Hamlyn *et al.* identified applications for only 11 witnesses (including child and adult vulnerable witnesses) in their much larger sample.

None of the prosecutors in this study had any relevant personal experience of s.30 applications. Like the other discretionary special measures, prosecutors are dependant upon the need for communication aids being brought to their attention by the police. **Prosecutor C5** acknowledged that, even if a need were to be identified, she would be hampered in her efforts to respond to it by her ignorance of what is available and who might assist in its provision.

'You might get something on the MG6 from the officer to say that this is a person with learning difficulties or is autistic, or is blind or deaf or whatever. Then that just might ring a bell for aids to communication. And although I know they exist, I have no idea how they work in practice... It has never happened to me.' (**Prosecutor C5**)

It is easy to criticise the criminal justice agencies for their perceived incompetence in responding to the needs of witnesses with communication disabilities. Yet it raises the question of how one might plan and train for what inevitably are rare events in the context of a large and bureaucratic organisation such as the CPS. Of course to describe an event as rare does not mean that it is

⁶⁸ See para. 2.3 of the *Code for Crown Prosecutors* (London: CPS, 2004), available from www.cps.gov.uk.

unimportant, but it does present particular challenges to a system structured around common processes and high volume transactions.⁶⁹

6.4.3.4 Screens

The primary rule's directive that any courtroom testimony from a child should be given using live TV link effectively rules out the use of screens for child witnesses. In the main, live TV link and physical screens are seen as alternatives. The intended virtue of a screen is to shield the child witness from an 'eyeball' confrontation with the accused: 'It's the eye contact. The "dead-eye", a big one round here!' (**Prosecutor C5**). As **Prosecutor B4** described, screens shield the witness from the defendant and the wider courtroom, and insulate the child from the more daunting aspects of the experience of giving evidence in a public forum.

'The police tend to see screens as being a sort of comfort blanket for the courtroom. That it's not fair that somebody that something dreadful has happened to should have to confront a courtroom.' (**Prosecutor B4**)

However, the primary rule mandates live TV link for most child witnesses, and this is reflected in the special measures choices made in the samples analysed for this study. We have seen that prosecutors applied for screens for only 5 of the 506 child witnesses in the CPS Monitoring Sample, all seemingly in contradiction of the primary rule. In the Monitoring Sub-Sample there were no applications at all to use screens in preference to live TV link, despite police requests to do so in two cases involving three witnesses, all of whom were in need of special protection. In **CASE 20** the OIC requested either screens or live link: 'Feels video-link or screen would be beneficial as witness is in fear of accused'. In **CASE 37**, the OIC requested screens on the ground that the 'complainant is afraid of seeing the defendants'. In both cases the prosecutor

⁶⁹ At the time of this study, s.29 intermediary support had not been made available to the courts in the study Areas, though s.29 was at that time being piloted in other Areas of the country. The implementation schedule therefore precluded its consideration in this study.

made applications for live TV link in line with the primary rule. In correspondence with the OIC, the reviewing lawyer in **CASE 20** explained her decision:

'Screens are not an alternative to live link for witnesses to offences of sex or violence who are under the age of 17 years. The statutory procedure is to apply for a direction for a live link... I need to know that you have discussed this with the witnesses and they are aware that this is how they will give their evidence.' (**Prosecutor A1**)

The force of the primary rule notwithstanding, the majority of prosecutors favoured the use of Live TV link over screens as a more effective means of ensuring a complete physical separation between the witness and the defendant and between the witness and the courtroom environment. For either or both reasons, we should expect the use of screens for children to be negligible. There is evidence, however, of a pressure to use screens for child witnesses in combination with, rather than as a substitute for, live TV link.

6.5 SCREENS WITH TV LINK AND 'CONFRONTATION RIGHTS'

Prosecutors in this study described how some child witnesses prefer to testify from behind a physical screen rather than by TV link. The explanation for what, at first sight, might seem like a puzzling aversion to modern technology, is that a screen normally prevents the witness from being seen by the accused in the dock whilst simultaneously shielding the witness from having to face the accused (and sometimes the public gallery). When a child testifies using live TV link, however, everybody in court - including the accused - can observe her. As we saw in Chapter 2, children find the requirement to 'confront the accused' in court to be one of the most daunting aspects of giving evidence in criminal proceedings. In order to make sense of the concerns in this area, we need to pause briefly to fill in some background to the debate about 'confrontation rights'.

6.5.1 The Background Law on Confrontation

The US Constitution and European Convention on Human Rights protect the accused's right to challenge the evidence against him, but they differ in the extent to which they guarantee a 'confrontation' between the witness and defendant at trial. The US Constitution can more authentically be said to protect the defendant's confrontation rights. The Confrontation Clause of the Sixth Amendment to the US Constitution declares that 'In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him'. As interpreted in the US courts, the confrontation principle requires that the defendant know the true identity of his accuser, be physically present during his testimony and have the opportunity to challenge his evidence.⁷⁰

The European Convention is less far-reaching, both on its face and in its interpretation by the European Court. Article 6(3)(d) safeguards the right of the accused to 'examine or have examined witnesses against him'. The European Court's jurisprudence interpreting Article 6(3)(d) has robustly preserved the accused's right to test the evidence against him, generally through cross-examination, but has never shown any inclination to develop protection for confrontation rights as understood in the USA.⁷¹ Lord Rodger made this point in *Camberwell Green Youth Court* when he said that the US Supreme Court's jurisprudence 'appears to go much further towards requiring, as a check on accuracy, that a witness must give his evidence under the very gaze of the accused'.⁷² The ECHR raises no requirement for a physical confrontation in the

⁷⁰ See David Lusty, 'Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trials' (2002) 24 *Sydney Law Review* 361, 375 - 385, for an excellent review of the US authorities and the restrictive approach of the US Federal and State courts to witness anonymity.

⁷¹ See Jonathan Doak, 'Confrontation in the Courtroom: Shielding Vulnerable Witnesses from the Adversarial Showdown' (2000) 5 *Journal of Civil Liberties* 296.

⁷² [2005] UKHL 4 [14]. The US Supreme Court has upheld State legislation which provided for a weakened form of confrontation where the witness was a child in allowing the child to give evidence via live link CCTV: *Maryland v Craig* 497 US 836 (US 1990). See further Laura Hoyano and Caroline Keenan, *Child Abuse: Law and Policy Across Boundaries* (Oxford: Oxford University Press, 2007) 652.

courtroom in the 'eyeball-to-eyeball' sense.⁷³ In a number of judgements relating to anonymous witnesses, the Court has allowed adjustments to standard criminal procedures to accommodate witnesses' needs, going so far as to state that it is not necessary in all cases that 'questions be put directly by the accused or his or her defence counsel'.⁷⁴

The European Court has repeatedly held that convictions based on the evidence of anonymous witnesses do not automatically violate the applicants' fair trial rights.⁷⁵ However, in another line of cases commencing with *Doorson v The Netherlands*,⁷⁶ the European Court showed itself willing to give explicit recognition to the rights of witnesses and, importantly, was prepared to balance these against the defendant's fair trial rights, subject to the overriding proviso that steps taken to assist witnesses, such as anonymity, do not result in an unfair trial. Specifically, the Court insists that witness anonymity is counterbalanced by measures which are sufficient to enable the defence to challenge anonymous witnesses' evidence and to attempt to cast doubt on the reliability of their statements.⁷⁷ Moreover, a conviction cannot be based solely or decisively on the evidence of anonymous witnesses.⁷⁸ Thus, whilst prepared to countenance derivations from the norm of face-to-face contact between accuser and accused during trial, the European Court has laid down strict conditions to ensure that the defendant's fair trial rights are respected.⁷⁹

⁷³ Doak (2000) 297.

⁷⁴ *SN v Sweden* (2004) 39 EHRR 13 [52].

⁷⁵ *Kostovski v Netherlands* (1989) 12 EHRR 434; *Windisch v Austria* (1990) 13 EHRR 281; *Ludi v Switzerland* (1992) 15 EHRR 173. For discussion see Lusty (2002) 411 – 412.

⁷⁶ (1996) 23 EHRR 330.

⁷⁷ *Doorson v Netherlands* [75] – [76].

⁷⁸ *Ibid.*

⁷⁹ *Van Mechelen v Netherlands* (1988) 25 EHRR 657; *SN v Sweden* (2004) 39 EHRR 13; *Visser v Netherlands*, Application No 26668/95, Judgment 14 February 2002; *Al-Khawaja and Tahery v UK* (2009) 49 EHRR 1.

English law has historically been ambivalent about a defendant's confrontation rights, and it has certainly never reflected US Sixth Amendment jurisprudence. In the UK legal systems there is no express constitutional protection for the defendant's right to confront his accusers in court, though the courts are obliged to take account of the decisions of the European Court and interpret legislation, as far as possible, in a way which is compatible with the Convention.⁸⁰ Despite its English common law antecedents, historically the confrontation principle has seemingly exerted a relatively weak influence over English courts.⁸¹ In *Smellie*,⁸² where the accused was removed from the dock to ensure that he remained out of sight of his daughter testifying against him on an assault charge, and in *X, Y and Z*,⁸³ where the judge allowed a child witness in a sexual abuse case to give evidence from behind a screen, the English courts demonstrated their willingness to adopt a balanced approach. In two further cases, judges in the criminal courts allowed witnesses to maintain their anonymity, including shielding their appearance from the accused, 'in the interests of justice'.⁸⁴ The Court of Appeal in *R v Taylor*,⁸⁵ held that an accused could be denied the right to see and know the identity of his accusers, albeit in rare and exceptional circumstances.

This approach was subsequently disavowed by the House of Lords, for failing to give sufficient consideration to the impact witness anonymity has upon the defendant's ability to test evidence against him. One commentator asserted that 'domestic case law on witness anonymity in the United Kingdom satisfies

⁸⁰ Sections 2 and 3 of the Human Rights Act 1998.

⁸¹ Lusty (2002) 415; Richard D. Friedman, 'Thoughts from Across the Water on Hearsay and Confrontation' [1998] Crim LR 697, 698; Paul Roberts, Debbie Cooper and Sheelagh Judge, 'Monitoring Success, Accounting for Failure: The Outcome of Prosecutors' Applications for Special Measures Directions under the Youth Justice and Criminal Evidence Act 1999' (2005) 9 *International Journal of Evidence and Proof* 269, 289.

⁸² (1919) 14 Cr App R 128.

⁸³ (1990) 91 Cr App R 36.

⁸⁴ *R v Brindle and Brindle* (unreported, March 31, 1992); *R v Watford Magistrates' Court ex p Lenman* [1993] Crim LR 388.

⁸⁵ [1995] Crim LR 253.

virtually none of the principles laid down by the European Court', and astutely predicted that the issue would have to be revisited.⁸⁶ This the House of Lords did in *Davis*, where the Law Lords reasserted the 'long-established principle of the English common law that, subject to certain exceptions and statutory qualifications, the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence'.⁸⁷ The Lords overruled the Court of Appeal authorities that had approved the practice of allowing witness anonymity in certain circumstances,⁸⁸ and held that any trial which depended solely or to a decisive extent upon the testimony of an anonymous witness was most likely to be unfair and in breach of Article 6(3)(d) of the European Convention.⁸⁹ Lord Bingham suggested that measures allowing witness anonymity, in response to the serious problem of witness intimidation, 'may very well call for urgent attention by Parliament'. Parliament responded and the Criminal Evidence (Witness Anonymity) Act 2008 now abolishes the common law and allows a court to issue a witness anonymity order facilitating measures to ensure the non-disclosure of a witness's identity if: (i) the measure is necessary to protect the safety of the witness (or another) or to prevent serious damage to property; (ii) the measures are consistent with a fair trial; and (iii) the measure is necessary in the interests of justice because it is important that the witness testifies.⁹⁰

⁸⁶ Lusty (2002) 415.

⁸⁷ Per Lord Bingham, *R v Davis* [2008] UKHL 36 [5].

⁸⁸ *Taylor* [1995] Crim LR 253.; *R v Liverpool City Magistrates' Court Ex p. DPP* (1996) 161 JP 43; *R v Jack* (unreported, April 7, 1998).

⁸⁹ For fuller discussion of *Davis* see the case commentaries at [2008] Crim LR 36 and (2008) 12 *International Journal of Evidence and Proof* 333.

⁹⁰ Under s.14 of this Act, witness anonymity orders may not be made under the Act after 31 December 2009, unless that date is extended (for up to one year) by order of the Secretary of State. However, the Government has now included plans to repeal the Criminal Evidence (Witness Anonymity) Act 2008 and re-enact its provisions on a permanent basis in the Coroners and Justice Bill (2009). The Bill also includes provisions to allow the courts to grant Investigative Witness Anonymity Orders in certain gun and knife crime cases, which will prohibit the unauthorised disclosure of information exposing the fact that a witness has been in contact with the police in relation to a particular criminal investigation.

Witness anonymity in English criminal trials is plainly exceptional and, save for serious cases of witness intimidation, will not be tolerated. The position is not so clear in relation to children seeking to avoid giving evidence under the gaze of the defendant. The House of Lords has approved measures which create a physical separation between the witness and the accused, though notably live TV link still allows the accused to see and hear the child's testimony.⁹¹ The issue is whether depriving the accused of the opportunity to see the witness has implications for the defendant's ability to defend himself. The Criminal Bar Association has argued that allowing children to hide their visual image effectively creates the conditions for anonymous testimony:

Allowing what is in effect anonymity of accusation means that the defendant at least is unable to identify his accuser relative to the evidence or his own experience. A defendant may not know the name of an individual but a face prompts memory and recollection. Testing fabrication if the defence instructions are "I don't know these people (or this young person)" is impossible in such circumstances.⁹²

This complaint goes to the substance of the accused's defence. If the defendant cannot identify the witness, how can he confidently assert, for example, that the assault with which he is accused was really self-defence, that the injury complained of pre-dated his interaction with the witness, or that the witness's sight of the incident was impeded in some way? There is also the possibility that the witness's demeanour or response to questions will influence the accused's instructions to his legal representative. Beyond assisting the accused in constructing his defence, face-to-face confrontation is said to have the further instrumental benefit of discouraging false testimony, because 'it is always more difficult to tell a lie about a person 'to his face' than 'behind his back'.⁹³ Lastly, there is a symbolic purpose in requiring a witness to make his accusations in the

⁹¹ *R(D) v Camberwell Green Youth Court* [2005] UKHL 4 [49].

⁹² *Improving the Criminal Trial Process for Young Witnesses – A Consultation Paper: Response by the Criminal Bar Association* (London: Criminal Bar Association, 2007) 21.

⁹³ Richard D. Friedman, 'Face to Face: Rediscovering the right to confront prosecution witnesses' (2004) 8 *International Journal of Evidence and Proof* 1, 16, quoting Scalia J writing for the Supreme Court in *Coy v Iowa*, 487 US 1012 (1988).

presence of the accused, for there seems to be something inherently unfair in refusing to face the person about whom you are making a criminal allegation.⁹⁴

These points have undoubted strength in relation to adult witnesses, as the Law Lords acknowledged in *Davis*. Are they equally as weighty when the witness is a child? Friedman, a staunch supporter of full confrontation rights, recognises that the principles underpinning the confrontation principle apply with less, if any, force, to young children. He points out that confrontation may fail to achieve its purpose because (i) it may cause unacceptable trauma to the child (so violating the principle of humane treatment that Roberts and Zuckerman posit as one of the fundamental principles of evidence law);⁹⁵ (ii) there is a high probability that no worthwhile evidence could be gained from a child under such circumstances; and (iii) children's lack of understanding of the public elements involved in being a criminal witness makes compulsion of a confrontation impractical on 'any morally tolerable terms'.⁹⁶ However, the moral arguments underpinning the confrontation principle surely gain greater purchase as children attain their teenage years and approach adulthood. It seems that for a substantial proportion of child witnesses, confrontation issues cannot easily be dismissed.

6.5.2 Prosecutors' Views on Confrontation

The prosecutors interviewed in this study exhibited considerable sympathy for children's concerns that live TV link is, in this respect, an inferior surrogate for screens. Aware that s.23 of the YJCEA 1999 (authorising screens) is somewhat loosely framed, prosecutors devised a scheme which involves a joint application for both measures, with the specific intention of screening the witness's image

⁹⁴ Friedman (2004) 16; Roberts and Zuckerman (2004) 668.

⁹⁵ Roberts and Zuckerman (2004) 21.

⁹⁶ Friedman [1998] 704. Friedman cites a fourth, more contentious, reason for excusing children from the obligation to confront the accused during testimony: that cross-examination of children is virtually worthless in terms of effectively testing their evidence.

on the TV monitor from the accused's line of vision. Several prosecutors reported this novel strategy becoming acceptable to both the CPS and the courts.⁹⁷

Section 23 of the YJCEA 1999 is framed as a measure to 'provide for the witness, while giving testimony or being sworn in court, to be prevented by means of a screen or other arrangement from seeing the accused.'⁹⁸ It does not specifically approve the use of screens to prevent the accused from seeing the witness, but the accused is conspicuously absent from the list of parties that must be able to see a screened witness giving evidence.⁹⁹ Given the ambiguity of the legislation and witnesses' anxieties, prosecutors became creative in their efforts to maximise a witness's sense of security. **Prosecutor A13** recalled a colleague's (successful) application literally to cover the live TV link monitor with a cloth. A more common practice, however, is the joint application for screens and live TV link, which many prosecutors claimed to have made at one time or another. Prosecutors tended not to see this as stretching legislative intention, rationalizing it as no more than in-court screening: 'If the application had simply been for screens in the first instance, then the actual effect on the accused is no different' (**Prosecutor A2**).

Giving evidence in the sight of the defendant can have a significant 'chilling effect' on witnesses' ability to testify coherently.¹⁰⁰ Indeed, some courts are equipped with giant cinema-style screens which greatly magnify a child's appearance, and possibly exacerbate their feelings of vulnerability. Prosecutors report that some child witnesses, especially the victims of sexual offences, feel keenly that they will be unable to speak out when they know that the defendant

⁹⁷ Plotnikoff and Woolfson (2004) agree that screening the TV link so that the defendant is unable to view the child witness's image during her testimony is accepted practice.

⁹⁸ Section 23(1).

⁹⁹ Section 23(2).

¹⁰⁰ See Section 2.4.1.3.

is watching them, even when the defendant is physically located in another part of the court building.

'Often sexual offence cases, where you have a young victim who is known to the accused and has particular concerns about actually being seen by the accused on the screen while they are going through the ordeal of giving evidence, those are the sort of cases where I think it is appropriate to make the application.' (**Prosecutor A2**)

'If the screen is there and [the witness] is confident that the defendant is unable to see his face then he feels more secure to say his piece.' (**Prosecutor B3**)

This is a problem traditionally associated with child witnesses.¹⁰¹ It was not, however, the complaint that prosecutors predominantly cited as the cause of children's requests to shield their visual image from the defendant. Rather they spoke of screening the live link TV monitor as a way of responding to witnesses' fears of post-trial intimidation. Prosecutors in this study echoed previous research findings that many child witnesses fear that an appearance in court will result in their identification to the defendant or the defendant's associates and leave them open to subsequent retaliation.¹⁰²

'If the witness is not known to the defendant, they don't want their identity to be known... A lot of people are concerned about that.' (**Prosecutor A13**)

'You hear of a number of children that get upset because they suddenly learn that the defendant can see them on the [TV] screen, which they don't like the idea of.' (**Prosecutor C1**)

'We have screened the live link off from the defendant because the concern was the youth would be identifiable from his video or TV link.' (**Prosecutor A8**)

Prosecutors' beliefs that fear of retaliation is a significant issue for children are supported by the police-compiled MG2 forms in the sample cases:

The witness is only 12 years of age, and as such I feel that he would be quite intimidated by the occasion if he has to give evidence in court. He did not initially come forward as a witness, it is thought that he knows the defendants and may be concerned of any reprisals. This may affect the quality of any evidence he may give if he had to give live evidence in court. (*OIC*, **CASE 23**)

¹⁰¹ John R. Spencer and Rhona Flin, *The Evidence of Children: The Law and The Psychology* 2nd edn. (London: Blackstone Press, 1993) 278.

¹⁰² See Section 2.4.1.3.

Witness in fear of giving evidence due to reputation of offender. The witness is afraid of possible future retribution from the offender. The offender has a reputation of being violent and [complainant] is afraid that his identity will be revealed. (OIC, **CASE 24**)

The complainant may feel intimidated by the presence of the defendant as the incident was very threatening/intimidating and the defendant lives very close to the complainant. (OIC, **CASE 26**)

Although many prosecutors discussed the possibility of making a joint application for screens and live TV link, such a strategy was rarely employed in either of the case samples drawn in this current study. In the CPS Monitoring Sample, only 4 out of 506 special measures applications included screens and live TV link. In the Monitoring Sub-Sample prosecutors requested both special measures for only one witness, in **CASE 36**, though it had been requested by police for a further three witnesses. In **CASE 15** and **CASE 23** the OIC indicated the use of screens and the removal of wigs and gowns in addition to the primary rule special measures. In **CASE 26** the OIC marked screens, live link and evidence in private as the preferred special measures. In all three cases, prosecutors applied for the primary rule measures only. The reviewing lawyer in **CASE 15, Prosecutor A3**, explained that she had assumed the request for screens to be an error. Several prosecutors referred to the 'blunderbuss' approach that some police officers take when completing the MG2 forms. This is clearly one explanation for a form which lists almost all the special measures available. An alternative possibility, however, is that the officer was requesting that the TV monitor be screened from the defendant and that the prosecutor ignored it simply because she was unfamiliar with the tactic.

In **CASE 36, Prosecutor B3** made a dual special measures application on her own initiative. She speculated that she had been motivated by contact with a Witness Care officer:

'If you get a request from a witness who says, "Look I'm quite happy to come and give my evidence but I don't want the defendant to see my face again because I know he is from the same area and he is going to target me, or his family or his friends are going to target me", you have to do everything within your power.' (**Prosecutor B3**)

Prosecutors sympathised with children's desires to go about their business unrecognised following their participation as witnesses in criminal proceedings, though a number pointed out the limitations of the measures available to them.

'At the end of the day when you leave court you go back to that estate. How does it help you that in court... the kid in the baseball cap who robbed you six months before can't see you in the courtroom? He knows where you live. He robbed you on your estate.' (**Prosecutor B1**)

Nonetheless, as **Prosecutors A8** and **C2** explained, a surprising number of children, usually bystander witnesses to street crime, are not personally known to the defendant prior to the trial, even if they live in the same area. The families of such child witnesses are usually eager to ensure that the defendant and his supporters cannot easily identify their children following their appearance at court. Children and their parents are generally reassured that shielding their appearance significantly reduces their exposure to intimidation or retribution post-trial. Screening the TV monitor can therefore become a valuable strategy for gaining the agreement of child witnesses, or their parents on their children's behalf, to attend court.

'It is certainly effective, if you can apply for it and get it in advance, in confirming witnesses coming because without it you can almost guarantee that they are not going to bowl up to court.' (**Prosecutor A8**)

Children's enthusiasm for this expedient suggests that they think, incorrectly, that in shielding their appearance they are achieving anonymity from the defendant and his associates. Visual recognition is only one means by which the witness may be identified. The names of all prosecution witnesses are routinely disclosed and witnesses are generally required to state their names in court.¹⁰³ It is a cornerstone of adversarial procedure that the accused be able to investigate and challenge witnesses' allegations against him. This includes the opportunity to investigate and question the witness's character as it bears on his or her

¹⁰³ *Archbold: Criminal Pleadings, Evidence and Practice 2009* (Sweet and Maxwell: London, 2009) para. 8-69.

testimonial credibility. None of this can be achieved if the witness's identity is withheld. The most, therefore, that children can hope to achieve in shielding their image from the accused is to reduce the risk of later, casual or fortuitous, recognition.

Although screening the TV monitor is something that many children appear to want, it is a strategy likely to raise objections from the defence. Live TV link, by design, interferes with a long-standing feature of oral criminal trials, the face-to-face encounter between the defendant (or their advocate) and the witness. Traditionally the defendant and witness appear in the same room, the defendant in the dock and the witness in the witness-box, in sight of each other, the judge and the public gallery. The defendant is able to see and hear the witness, and attempt eye-contact.¹⁰⁴ Live TV link disrupts the physical proximity of the traditional face-to-face encounter between the defendant and the witness. The defendant and the witness can still see and hear each other, but only at one remove and with technological assistance. Reflecting on the consequences of the witness's physical removal from the courtroom when using live TV link, **Prosecutor B1** suggested that screens are preferable precisely because they come closest to preserving the traditional courtroom environment.

'[Screens] are the most normal... and we want to normalise the process as much as possible and make it not too surreal... The nearest you can get it to a normal court scenario the better.' (**Prosecutor B1**)

This prosecutor touched upon the fundamental concern that in removing 'the face-to-face transaction' inherent in traditional oral testimony, we are undermining the 'cultural resonance' of an oral trial which depends upon a physical gathering together in one place of all the relevant actors.¹⁰⁵ This

¹⁰⁴ The opportunity for verbal contact between the witness and defendant is reduced when the witness is a child witness to a sexual or violent offence because the defendant is prohibited from conducting cross-examination in-person: YJCEA 1999, s.35.

¹⁰⁵ Linda Mulcahy, 'The Unbearable Lightness of being? Shifts Towards the Virtual Trial' (2008) 4 *Journal of Law and Society* 464, 466.

concern has not proved fatal to live TV link's acceptance by the English courts as a valid measure to support children during their testimony,¹⁰⁶ but screening the TV monitor from the accused goes much further and eliminates almost entirely the remaining vestiges of human interaction between witness and defendant.

Prosecutors' observations on the acceptability of screening the live TV link monitor need to be understood in the context of this debate. As we might expect, prosecutors' comments reflected the divergent interpretations of what exactly constitutes the defendant's 'right to confrontation'. At on extreme, **Prosecutor A11** was a staunch supporter of the defendant's right to confront his accuser: 'It's a very defence view I know, but it's that "seeing the whites of your eyes". You've got to stand up in court and you've got to give the evidence.' (**Prosecutor A11**). In the main, however, prosecutors tended towards the view that deviations from the norm of face-to-face accusation are justified for children. So, **Prosecutor B1** was entirely comfortable about restricting the defendant's visual access to the witness, provided the defendant's legal representative is able to see the witness at all times (as s.23 of the 1999 Act requires).

'I think at the end of the day, the quality of the testimony isn't reliant on seeing the person's face... Defence counsel should be able to see the witness... We all know body language is important in court, how people are responding to difficult questions put to them. It's a balancing act between rights of defendants, rights to a fair trial, and rights of victims to have their cases progressed without fear of intimidation... You could balance those rights very well through... counsel sees, defendant doesn't, the faces of the witnesses.' (**Prosecutor B1**)

Prosecutor A5 advanced a similarly restricted conception of the defendant's right to a physical confrontation with the witness:

'He can hear what is going on... Counsel can see what is going on. The jury can see what's going on... As long as he can be defended properly and his barrister can do his or her job, I don't see the problem.' (**Prosecutor A5**)

¹⁰⁶ *R(D) v Camberwell Green Youth Court* [2005] UKHL 4.

Allowing the defence, if not the defendant, to observe the witness, and to subject the witness's evidence to cross-examination, seem to be accepted by the ECHR as measures which respect the defendant's fair trial rights.¹⁰⁷ This arrangement has also been endorsed as an appropriate response to children's feelings of fear or distress by the Review Group on children's evidence.¹⁰⁸ However, some prosecutors in this study expressed significant disquiet about making applications to curb the defendant's ability to observe witnesses. **Prosecutor B11** commented on her decision in **CASE 37** to apply for live TV link despite a suggestion from the police that screens be used because the witness did not want to see the defendant:

'The fact is that we have already got them out of the room so there is no direct contact with them... You've got to balance how far you go with regards to it... I think sometimes you can push the boundaries too far.' (**Prosecutor B11**)

Prosecutor B4 meanwhile mentioned fundamental issues about the courts' ability to achieve open justice and secure a fair trial. She was concerned that shielding the witness's identity from the defendant might imply that routine witness anonymity is acceptable.

'Screens can just shelter... the complainant from seeing the defendant, that's normally the police case. If it's the other way round and it's a witness protection issue and we're trying to guarantee the anonymity of the witness, then that's a whole different ball-game because you are then into the realms of public interest immunity. Most evidence has to be given to a court on the basis that you're accountable for it... that everybody knows who you are and your background and why you're there. That is all part of the picture. You have to convince the court that you are a credible witness, that you haven't come to court to stitch the defendant up, that you are not a liar.' (**Prosecutor B4**)

The empathy that CPS lawyers display towards vulnerable witnesses suggests that policy pressures to be more responsive to victim and witness needs have

¹⁰⁷ *Kostovski v Netherlands* (1990) 12 EHRR 434; *Van Mechelen v Netherlands* (1988) 25 EHRR 647; *SN v Sweden* (2004) 39 EHRR 13. See also Lord Rodger, *R(D) V Camberwell Green Youth Court* [2005] UKHL 4 [15]: 'What matters, as *Kostovski v Netherlands* shows, is that the defence should have a proper opportunity to challenge and question the witnesses against the accused.'

¹⁰⁸ See *Improving the Criminal Trial Process for Young Witnesses: A Consultation Paper* (London: OCJR, 2007). Although the Government has now responded to the consultation, it has yet to reach a conclusion on this matter. See *Government Response to the Improving the Criminal Trial Process for Young Witnesses Consultation* (London: Ministry of Justice, 2009) 27 - 29. Both papers are available from <<http://www.justice.gov.uk/consultations/young-witness-consultation.htm>>.

met with a degree of success.¹⁰⁹ However, **Prosecutor B4** worried that efforts to accommodate witness needs in court could distract CPS lawyers from critical attention to fair trial rights:

'Let me give you an example. I had a case last week, senior lawyer, came to see me. It was kidnap, false imprisonment, very serious. But the parties were known to each other, and had been for about ten years... Just as he was setting it up for committal [Lawyer X] said, "We've got to get this girl some special measures... She shouldn't have to look at him", and I said, "Why not? They know each other, is there any issue about witness intimidation?" He said "Well, no, but she's bound to feel frightened" and I said "[Lawyer X], I don't want to give evidence in the Crown Court, it's not a nice experience, but we're not here to make life comfortable, it's not that simple. What on earth makes you think that you're going to get special measures in this scenario?" We couldn't apply there, it just wasn't appropriate.' (**Prosecutor B4**)

This anecdote captures the dilemma facing criminal justice professionals trying to do their best for witnesses in a system that is, by design, a testing experience. Public confidence in the criminal justice system depends in large part on trial procedures which robustly test the prosecution evidence in order to establish guilt beyond reasonable doubt. Some distress seems inevitable, and the key issue is whether laudable efforts to reduce that distress for children can be accommodated without undermining key procedural protections.¹¹⁰

Over the last two decades the recognition of witnesses' legitimate expectations of protection during criminal proceedings has gained much ground, primarily in Europe but also domestically. However, as Lusty points out, the minimum standards established by the ECHR with regard to the anonymous witness cases 'should not necessarily be regarded as setting a sufficiently high benchmark for common law jurisdictions with revered adversarial systems of justice'.¹¹¹ In *Davis*, the Law Lords clearly signalled a stronger line on criminal defendants' confrontation rights: 'the creeping emasculation of the common law principle

¹⁰⁹ *No Witness, No Justice: The National Victim and Witness Care Programme* (London: CJS, 2004).

¹¹⁰ Friedman [1998] 709.

¹¹¹ Lusty (2002) 415.

must be not only halted but reversed'.¹¹² However, *Davis* concerned a case where witnesses had been accorded anonymity. The outstanding question is whether hiding the witness's visual image from the defendant himself but not from the defence lawyers effectively prevents the defendant from identifying the witnesses against him and therefore threatens the fairness of the trial.

The House of Lords has not commented directly on this precise issue. In *Camberwell Green Youth Court* Baroness Hale said that the routine use by children of video-recorded evidence and live TV link did not threaten a defendant's fair trial rights, but commented in that context that 'the accused can see and hear it all'.¹¹³ Furthermore, her Ladyship pointed out that although Parliament had legislated, as it was entitled to do, to provide the normal procedure for child witnesses giving evidence, it was difficult to envisage reasons why the procedure itself might be unjust.¹¹⁴ It is entirely possible, in the light of *Davis*, that the courts will take the view that screening the witness with the specific purpose of hiding the witness's visual image from the defendant *does* create a real risk of injustice. The Criminal Bar Association must be correct in asserting that where the accused's defence rests upon his ability to identify the witness by sight, rather than name, fairness is jeopardised. Lord Carswell in *Davis* suggested that it may be possible to allow departures from the basic principles of open justice and confrontation,¹¹⁵ though the necessity for the departure should be clearly made out. Even then:

An important consideration is the relative importance of the witness's testimony in the prosecution case. If it constitutes the sole or decisive evidence against the defendant, anonymising which prevents or unduly hinders the defendant and his advisers from

¹¹² *Per* Lord Brown, [2008] UKHL 36 [66].

¹¹³ [2005] UKHL 4 [49].

¹¹⁴ Apart from reasons related to 'the quality of the equipment on the day, the content and quality of the video recording, or the unavailability of the recorded witness for cross-examination'. *Ibid* [45] – [46].

¹¹⁵ [2008] UKHL 36 [59].

taking steps to undermine the credit of the witness is most likely to operate unfairly.¹¹⁶

At the very least, routine screening of the witness's image to allay the fear commonly expressed by children that they are unnerved by the defendant watching them is unlikely to be acceptable to the courts, without a particularised demonstration of need.

6.6 SPECIAL MEASURES POLICY: PROSECUTOR PERSPECTIVES

From these descriptions of how prosecutors interpret and apply the primary rule, together with an examination of the issues that shape their attitudes towards the discretionary special measures, a picture emerges of a stringent system which includes all child witnesses to sexual and violent offences, but excludes most others; which makes great use of the special measures presumed by the legislation to benefit children but hardly any use of additional measures that might support them. The CPS and the courts have adopted the policy presumptions contained in the YJCEA 1999 and established a rigid set of norms for child witnesses which has resulted in huge expansion of the use of special measures in court for children. But, as might be expected with any system based upon inflexible rules, it throws up disadvantages and hard cases. This section presents prosecutors' own perspectives on the successes and drawbacks of the YJCEA 1999's impact on children's evidence.

6.6.1 The Advantages of a Near Mandatory Approach

CPS lawyers enjoy considerable discretion in relation to key aspects of their role as prosecutors. At the same time, lawyers are used to working in a rule-bound environment and are comfortable applying the legislative rules that represent settled law. As **Prosecutor C6** reflected, a faithful application of the law is integral to a lawyer's strong sense of professional identity:

¹¹⁶ *Ibid.*

'Well, that's part of being a lawyer isn't it? You'd prosecute crimes for sedition if they gave you the correct file. We work within the parameters of statute and I don't think anyone has a real issue with that.' (**Prosecutor C6**)

However, the blunt application of a general rule will almost always lead to injustice in some circumstances, and some degree of discretion is normally necessary to pre-empt or mitigate the consequences of inflexible application. In the context of special measures for children, prosecutors' discretion is largely, if not entirely, curtailed. But this is not simply a legislative imperative. Prosecutors recognised strong instrumental reasons for having clear rules in relation to special measures for children. **Prosecutor A1** commented that, though the near mandatory application of the primary rule is seen by some as a blunt instrument, there is no denying that it has had the desired effect of significantly increasing usage of special measures for children. In this study, certainty and unanimity of approach were welcomed by many prosecutors: 'I think there is certainty of approach, isn't there? That's the point, there is unanimity' (**Prosecutor A7**). The effect is compounded as the special measures application becomes a high volume transaction for the CPS.

'Our job is easier now that we have a proper structured framework as to how we are going to deal with cases... We have a degree of certainty now in how to deal with the case, which I think is good as we routinely deal with a large number of these sorts of cases.' (**Prosecutor A2**)

Most prosecutors felt that they had been forced to re-evaluate their approach to witness needs, if for no other reason than that special measures now have a much higher institutional profile than they did before. 'There is no doubt that by having a mandatory scheme people are forced to be aware of what the scheme is. Before, I think there was a great deal of ignorance' (**Prosecutor C6**). There is a growing sense within the CPS that a child witness's needs are now as significant a consideration as the evidential objective of presenting the prosecution case in the most effective manner. Moreover, a prescriptive system for children's evidence establishes a prescriptive norm. The potential for

idiosyncratic attitudes about the value of special measures to influence the application process is diminished.

'We're all doing it, we should all be using it, therefore there's no sort of judgement-call really... That's good, I think... You're not having to think that they might have been better [in court] because everyone is accepting that this is how it is.' (**Prosecutor B6**)

'I would say that before mandatory video evidence-in-chief and TV link came in under the Youth Justice and Criminal Evidence Act counsel were giving preference to their own professional choices rather than the views of the child.' (**Prosecutor C3**)

'I think it is good that there is protection there for the child, and that there is no temptation for anybody to think, "Well, we're more likely to get a conviction by using this child in that way". I think it is better that children will be protected... I certainly don't think there should be any abuse of witnesses just to get a trial.' (**Prosecutor B12**)

Certainty and consistency are valued throughout criminal proceedings. A number of prosecutors observed that all criminal justice agencies need to adopt a common approach if policy on child witnesses is to be fully implemented. In this respect, hard-and-fast rules are effective. **Prosecutor B4** took the view that, in this particular context, the only way to overcome the resistance of some judges to new ways of giving evidence was to introduce inflexible rules:

'I mean it is changing, and judges are much more informed than they were, but we still have some judges that believe that victims of rape were asking for it. The idea that children should be afforded special protection by virtue of a video link to those sorts of dinosaurs would be an anathema! They'd want to see the whites of their eyes! So it has been appropriate, in that it has avoided the inappropriate use of judicial discretion... Now they have to do it.' (**Prosecutor B4**)

'I quite like the fact that the legislation is so prescriptive because I think it provides authority. Whether I like it or not, Parliament intended that children shouldn't be in court, and whether the defence like it or not, and whether the magistrates or the judges like it or not, Parliament has done its studies and it has decided that is appropriate. It hasn't allowed, in a way, the courts to get out of doing it. So in that respect, I like the bit with children.' (**Prosecutor A10**)

Not only has a prescriptive system ensured that judges follow the rules, it has to some extent contributed to a cultural shift in judicial attitudes: 'The impression that I've had is that the judges don't really like it, but they are slowly coming round to it because it is not going to go away' (**Prosecutor B2**). **Prosecutor A9**

felt that the mandatory system had been particularly effective in the lower courts, where she questioned the capacity of a non-professional bench to robustly deflect what she regarded as opportunistic attempts by defence lawyers to exploit the uncertainty of a discretionary regime. The mandatory system for child witnesses (in need of special protection) gives magistrates the confidence to implement the law as legislators intended.

'I deal with applications all the time where the defence object strenuously, on what I would say are fairly spurious grounds, and the magistrates don't allow them: all the time, all the time. When they have got a discretion they are very scared, and bullied by defence solicitors quite often I think... So when there is a discretion, often I would say that the magistrates exercise that in favour of the defendant... but when there is a statutory presumption then they have got no real option, or they are limited, so I think that is far better.' (**Prosecutor C7**)

Prosecutor C5 drew a parallel with other circumstances in which magistrates' powers are tightly circumscribed, the system of obligatory disqualification from driving following a conviction for driving with excess alcohol.¹¹⁷ She shared the sense that narrowly-drawn rules are required to ensure that lay justices fully implement the will of Parliament:

'It's a bit like when they made compulsory disqualification for excess alcohol. If it hadn't have been compulsory, no magistrate would have disqualified anybody ever, because they are very swayed by weeping and wailing, I'm afraid.' (**Prosecutor C5**)

The issue is not simply one of certainty and predictability, it is also a broader issue of criminal justice policy and its successful implementation. Prosecutors believe that the presumptions in the YJCEA 1999 deliver the consistency of access to special measures for children which was lacking under the previous, discretionary, scheme. There can be no doubt that the YJCEA 1999, and in particular the primary rule, has contributed to a significant shift in cultural attitudes towards children's evidence. The Act imported a mandatory rule which,

¹¹⁷ See s.5 of the Road Traffic Act 1988 and s.34(1) and Schedule 2 of the Road Traffic Offenders Act 1988.

by and large, has been taken up by criminal justice professionals. Yet, as prosecutors made clear, a mandatory scheme is not without its drawbacks.

6.6.2 The Drawbacks of An Inflexible Rule

Prosecutors drew attention to the primary rule's under- and its over-inclusiveness. It is under-inclusive in that it operates to exclude children not in need of special protection and child defendants.¹¹⁸ It is over-inclusive in its impact on children who either do not wish to use special measures or do not need their protection.

6.6.2.1 Under-Inclusion: Children Not in Need of Special Protection

In its differential presumptions and phased implementation, the YJCEA 1999 replicated the specially privileged position that child witnesses to sex and violence enjoyed under the previous CJA 1988 scheme. Firstly, we can ask whether such a position is justified in principle. Secondly, we must consider whether, as a matter of practice, it was a sensible decision to make.

There was certainly support amongst prosecutors for a common approach to all children: 'I think there's been too much of a distinction between offences... If we are going to have these special measures, we should have them for everything' (**Prosecutor B11**). Although familiar with the offence-based rules for special measures, prosecutors did not necessarily endorse them: 'I assume that the Government thought that witnesses in relation to sexual offences and offences of violence are likely to be more vulnerable' (**Prosecutor C5**). The relative scarcity of child witnesses to non-sexual, non-violent offences meant that their routine exclusion from special measures support did not emerge as a significant issue for prosecutors in this study. Nevertheless, the differences in working practices

¹¹⁸ At the time of this study child defendants were specifically excluded from special measures support. Since then child defendants have become eligible for live TV link, but no other special measures. See further Section 3.3.4.

illustrate the uncertain objectives of the 1999 Act as it applies to children. The primary rule marks out all children as presumptive beneficiaries of special measures, presumably on the ground that youth and immaturity render children vulnerable. But vulnerability is not a simple correlate of age, and children who witness sexual or violent offences are deemed vulnerable whatever their age or circumstances. This implies a strongly victim-orientated approach under which the nature of the offence, rather than the age of the witness, determines judgements of vulnerability.¹¹⁹

We might reasonably ask whether the YJCEA 1999 was designed to help all children or just child victims of serious offences? The obvious retort is—both. But it is far from obvious that easing the courtroom experiences of very young witnesses is a less deserving cause than facilitating the prosecution of sexual or violent offences, as this ranking of legislative priorities appears to imply. This is a particularly pertinent question when one further considers the logic of privileging child witnesses to sexual or violent offences on a cost-benefit basis. The evidence of this study is that few child witnesses fall outside the reach of the ‘child in need of special protection’ classification. Yet in devising different rules for child witnesses to sex and violence and child witnesses to other offences, we have introduced a costly and complex scheme for little apparent benefit. In retrospect, the strategy seems misplaced, all the more so since the Court of Appeal in *R v R* dismantled one of its key pillars.¹²⁰

¹¹⁹ In fact s.28 takes the victim-centred approach further by specifying that only witnesses to sexual offences, most likely to be the complainant, presumptively qualify for the highest level of protection afforded by both video-recorded evidence and pre-recorded cross-examination.

¹²⁰ See Section 3.3.3.

6.6.2.2 Under-Inclusion: Child Defendants

A significant number of prosecutors expressed unease at the youth defendant's lack of access to special measures, particularly in the not uncommon situation where the defendant is of similar age to or younger than the witness.¹²¹

'On Friday, we had seven child witnesses including the defendant who was twelve. All the child witnesses, including the defence witnesses, were fourteen or fifteen and giving evidence by TV link, and the defendant who was only twelve was giving evidence in open court. That is slightly bizarre.' (**Prosecutor C2**)

'If you have got, which is often the case, [defendants and witnesses] who are all from the same school or who have been in the same gang... then I find it difficult to reconcile, I really do.' (**Prosecutor A6**)

Some prosecutors criticised the inherent unfairness of this 'inequality of arms' and the denial of support to defendants who have genuine difficulties dealing with the court process, even in the less formal environment of the Youth Court.

'They are all children and they are all potentially vulnerable, and you do get a lot of kids that have never been in trouble before. I would imagine that is intimidating, to have to come to court and give evidence, coupled with the fact that you are accused of something that you may or may not have done. It must be a big burden.' (**Prosecutor A13**)

'I suppose looking at it with impartiality and not as a prosecutor, then yes I would say... it was very unfair... A young person is bound to be intimidated sitting in a room with three people sitting up on a bench, the prosecution, the defence, the usher in their gown, the court clerk. The proceedings are supposed to be less formal, but it is still a very formal, intimidating room I think, for a defendant.' (**Prosecutor C4**)

Generally, however, prosecutors were sceptical of any need for support amongst the general run-of-the-mill defendants appearing in the Youth Court.

Prosecutor B7 was typical of those who felt that 'the number of defendants who find a court appearance traumatic, even for youths, is few and far between'. She further explained that the majority, outwardly at least, do not appear to be intimidated by proceedings: 'Most of them have an astonishing confidence and most of them know the system very well'.

¹²¹ A concern also expressed by a number of commentators. See Jenny McEwan, 'In defence of vulnerable witnesses: The Youth Justice and Criminal Evidence Act 1999' (2000) 4 *International Journal of Evidence and Proof* 1, 28 – 30; Commentary by Professor Diane Birch to *R v Redbridge Youth Court*, [2001] Crim LR 473, 477; Laura Hoyano, 'Striking a Balance Between the Rights of Defendants and Vulnerable Witnesses: Will special measures directions contravene guarantees of a fair trial?' [2001] Crim LR 948.

It would be both rash and naive to assume that child defendants differ so significantly in character from child witnesses in their need for support. Baroness Hale observed in *Camberwell Green Youth Court* that child defendants are 'often amongst the most disadvantaged and the least able to give a good account of themselves'.¹²² However, many prosecutors in this study took the view that existing adversarial safeguards are adequate. Most obviously, youth defendants are tried before a specialist tribunal and the reduced formality and private nature of the Youth Court is designed to accommodate young defendants' vulnerabilities. **Prosecutor B3**, who perhaps was a little jaded by his experiences, summarized the assistance available to youth defendants:

'The defendants get all the assistance that they can get, and more, in the criminal justice system in this country. They get an appropriate adult, if they require one, during the course of the interview... At the same time, everything is recorded so that nobody can go back and say there was undue pressure... They have free access to legal advice at all stages... If they are unable to make a decision or understand the proceedings a psychiatric report on the Legal Services Commission's expense can be commissioned... Anything that goes towards their vulnerability and their difficulties or their disabilities is mitigation for them. And trust me, they use that to the best of their ability in any event. They don't need any assistance in that respect.' (**Prosecutor B3**)

Since this study was completed, the UK Government has conceded that existing arrangements for child defendants may not always be sufficient and has extended limited special measures support to them.¹²³ In this study, there was limited support for that extension on fair trial grounds, but there was support on another ground. Prosecutors felt that the denial of special measures to the defendant ultimately prejudices the prosecution case:

'I think it is a disadvantage to us. It makes it look to the court like our witnesses are being given an advantage over the defendant, and I think that's why we get more acquittals. It raises the sympathy of the bench to the offender.' (**Prosecutor C2**)

'I think it prejudices the prosecution, you know, we're given too many tools that can make it look like this is too heavy handed on the defendant... I know how [the magistrates'] backs can very easily be got up if they think that their defendants are not being treated absolutely [fairly].' (**Prosecutor B2**)

¹²² [2005] UKHL 4 [56].

¹²³ See Section 3.3.4.

'I think that the jury perception is that if young accused can appear in court, why is it that the young witnesses can't appear in court too? My perception is that juries are more sympathetic to an accused and they are more questioning of a witness who won't come into court.' (**Prosecutor A2**)

This is very much a practitioner's perspective and not one generally discussed in the academic literature. Practitioners have long objected to special measures on the basis that televised testimony degrades the emotional impact of children's testimony.¹²⁴ This is an interesting variation on that perspective. It would advocate universal coverage of special measures rather than levelling down, which, as Baroness Hale pointed out, would be 'the worst of all possible worlds'.¹²⁵

6.6.2.3 *Over-Extension: Failure to Respect Victims' Choices*

The failure of the primary rule to take account of children's objections to using video-recorded evidence and live TV link has been widely criticised.¹²⁶ It is said that significant numbers of children would choose to decline special measures if they were given the chance, and prosecutors in this study endorsed that opinion. Many described instances where children firmly wished to give evidence from inside the courtroom:

'You do get youth witnesses who do want to go into court and give live evidence.' (**Prosecutor A2**)

'I have had youths who have said, "Sorry, this is really weird I'd rather give my evidence in court". I've had that on a couple of occasions.' (**Prosecutor B1**)

'I have had cases where... it was video evidence, and [the child] wanted to come into court and give evidence herself, but she couldn't. Her evidence had to be given by video link and she was quite perturbed about that, I think, because she was, "I'm going to stand up and give it all I've got".' (**Prosecutor B5**)

¹²⁴ Graham Davies, Claire Wilson, Rebecca Mitchell and John Milsom, *Videotaping Children's Evidence: An Evaluation* (London: Home Office, 1995) 42; Gwynn Davis, Laura Hoyano, Caroline Keenan, Lee Maitland and Rod Morgan, *An Assessment of the Admissibility and Sufficiency of Evidence in Child Abuse Prosecutions* (London: Home Office, 1999) 59.

¹²⁵ *R(D) v Camberwell Green Youth Court* [2005] UKHL 4 [57].

¹²⁶ Burton *et al.* (2006) 54, 55; Plotnikoff and Woolfson (2004) 15 – 19; *Improving the Criminal Trial Process for Young Witnesses: A Consultation Paper* (above note 108) para. 4.5.

Prosecutors on the whole could see no good reason for a blanket refusal to respect children's wishes. Particularly for older children who 'wanted to stand up there and say it and for whatever reason it looked like they'd be able to cope with that' (**Prosecutor B6**), or 'in circumstances where you have got a sixteen-year-old who is quite capable and willing and enthusiastic about giving live evidence', (**Prosecutor A8**) prosecutors felt uncomfortable denying their wishes.

'You do get witnesses who say, "I don't want to give evidence by TV link, I want to go into court", and you are not allowed to do that. We have to say, "I'm really sorry but you've got no choice".' (**Prosecutor C2**)

'They don't have our level of understanding of the court process, but I think it would be perverse not to pay some attention to their wishes. To be honest I do think that is a weakness in the legislation.' (**Prosecutor B7**)

As the following examples show, it is not just an issue of respecting the child as an autonomous young person. There can be both ridiculous and serious consequences in insisting that children accept support they do not want.

'I had a trial once where special measures hadn't been applied for and we were all set up to go, the witnesses attended and the court clerk, just as we were about to call the case up, said, "Ah, this is automatic eligibility, we have to adjourn". Even though the victim was saying, "But I'm here and I don't mind and I want to give my evidence, I don't want the case to go off", it had to go off. And from that point of view it seemed a nonsense... Legally the court was right, but from a pragmatic point of view, and certainly from the victim's point of view, it was a shame.' (**Prosecutor C4**)

In this example it appears that no special measures application had been submitted, which is unfortunate, for if it had the magistrates might have varied the special measures direction 'in the interests of justice'.¹²⁷ That the ability of the court to proceed sensibly should depend upon such administrative trifles illustrates the absurdities that sometimes flow from rigid rules. In some circumstances it would be appropriate to halt proceedings where the proper procedures have not been followed. If the witness was unwilling to appear without special measures support, or if there were well-grounded fears that her

evidence would be substantially below-par if given live in court, an adjournment would be appropriate. But where none of the parties is disadvantaged by the violation of the special measures procedure, an adjournment, as **Prosecutor C4** pointed out, is nonsensical.

A second example of the consequences of ignoring a child's wishes had potentially serious consequences for the safety of court staff.

'I had someone who was very nearly seventeen, was a well-known youth offender himself, going ballistic that he was going to give evidence by TV link. Fortunately it got adjourned... but I was very relieved because I was just thinking, "Oh no, what's going to happen?" And the witness support lady was very concerned that she thought he was going to assault her and smash the room up and so I had to keep going back in to speak to him in a vain attempt to calm him down.' (**Prosecutor C2**)

In such circumstances, the need for a residual safety-valve to the primary rules seems almost self-evident.

Some, though by no means all, prosecutors raised the possibility, described above, of applying to vary the special measures direction to allow a child to give live evidence. **Prosecutor A13** admitted she had done this, but acknowledged that it was stretching a point to suggest, as is required under s.24(3)(a), that there had been 'a material change of circumstances' since the original direction was issued. Generally speaking, these children have not changed their minds: they simply never wanted to give evidence over the live TV link to start with. That prosecutors are forced to fall-back on such finely contrived deceptions underlines the desirability of a degree of flexibility in the application of the primary rule.

¹²⁷ Section 24(3). See further comments of Baroness Hale in *R(D) v Camberwell Green Youth Court* [2005] UKHL 4 [35] where she states such a strategy might be used 'where the child was positively anxious to give evidence in the courtroom'.

6.6.2.4 *Over-Extension: Class-Based Decision-Making*

The policy underlying the primary rule is that children, as a class, are deserving of special measures support and that video-recorded evidence and live TV link should be the established norm, without the need to demonstrate individual need. There is a sense that such drastic measures were necessary to overcome resistance amongst criminal justice professionals to children's wider use of these measures. Like the failure to take account of children's wishes, the class-based approach to special measures provision has been criticised. Birch and Powell, in their briefing to the Government on the continued need for pre-recorded cross-examination noted the view that 'where some more able witnesses were concerned the 1999 Act was "bending over backwards to help people who really don't need it".'¹²⁸ Some prosecutors in this study still subscribed to the view that only children specifically in need of special measures support should receive it, whilst children who are able to give evidence in court should do so:

'I don't like systems that are prescriptive... [which say] that because they are youths they have got to do this... If a child has been video-interviewed and has come across very well and is happy to give live evidence... I think we underestimate a lot of these kids who are a little bit more clued-up and are actually okay.' (**Prosecutor A4**)

'The most important factor is the vulnerability of the child. Whether that child would be assisted in giving his or her evidence or not? If that assistance is not required, we should not just draw a blanket [rule] across the country and say whoever is under thirteen, or for whatever offence, should give his or her evidence through video.' (**Prosecutor B3**)

These prosecutors would like greater freedom to decide if special measures are necessary for a witness. **Prosecutor A13** summed up prosecutors strategic objectives: 'Obviously it's about the witnesses but it's also about doing the best that we can to get a case prosecuted'. Prosecutors who were resistant to offering special measures to children who did not 'need' them were generally those who believed that live evidence is more persuasive than television-based evidence. **Prosecutor B6** acknowledged her motivation to take account of a child's wish to

¹²⁸ Diane Birch and Rhonda Powell, Meeting the Challenges of Pigot: Pre-Trial Cross-Examination under s.28 of the Youth Justice and Criminal Evidence Act 1999 (February 2004) para 145.

give live evidence: 'They just don't come across as well as they do standing up and saying it'. Although she was keen to restrict the possibility of live evidence to older children (fourteen-years-of-age and above) **Prosecutor B4** agreed that oral evidence from an able child witness can be a real advantage:

'If by any chance you get to court and she comes across as razor sharp and fully able to withstand the slings and arrows of a defence cross-examination then ask her if she wants to go into court, if she wants to do it, you know, stone the defendant in the eye.' (**Prosecutor B4**)

However, only one prosecutor suggested that she would subordinate the child's interests to the wider interests of justice. In **CASE 29 Prosecutor A11** said that she would not have chosen to apply for special measures for the complainant because she had doubts about her credibility. This prosecutor was generally uncomfortable with the concept of special measures. She asserted that televised testimony is 'dumbed-down - when I say dumbed-down, the emotion and intensity is gone' and, she believed, makes it harder to judge a witness's veracity. Consequently, in **CASE 29**, she wanted the witness in court, where there would be no barriers, physical or emotional, to her credibility being tested.

'If you have got doubts about your witness... I'd have thought no, she'll have to come to court and she'll have to give a good account.' (**Prosecutor A11**)

On the whole, however, it would be unfair to characterise prosecutors as being more interested in the strength of their case than the welfare of the child. Virtually all of the prosecutors who favoured taking children into court qualified their comments with the proviso that the child should be both willing and capable. This prosecutor's comment was typical:

'Don't misunderstand me. If I'd got a thirteen-year-old, I wouldn't make her give evidence, I wouldn't compel her ... All that is doing is consolidating the abuse... You would never do anything that would be calculated to hurt or injure the child or leave them with problems of a psychiatric or psychological nature. Frankly I wouldn't want that on my conscience, and it's not win at all costs at all.' (**Prosecutor A7**)

Nevertheless, the nub of the argument seems to be that if keeping a child out of court is not essential to the child's welfare or the quality her evidence, the prosecution should be able to exploit the advantage that live oral evidence may entail. For these prosecutors, a major drawback of the mandatory scheme is that, in cases of able children, the prosecution is unnecessarily weakened.

6.7 CONCLUSION

The primary rule contained within s.21 of the YJCEA 1999 has contributed to a significant shift in criminal justice professionals' attitudes towards children's evidence. Highly prescriptive legislative rules have successfully translated into practice. Deviations from the rules, though they do happen, are rare. Generating extremely high rates of special measures applications by prosecutors is a significant achievement. Cultural change is difficult to effect. Success in this context has been driven by the almost complete withdrawal of prosecutorial and judicial discretion in deciding how children may testify.

The policy shift towards children's increased use of special measures becomes more questionable when prosecutors are able to exercise some residual discretion. Where special measures are not mandated, usage rates are strikingly low. Child witnesses to non-sexual, non-violent offending rarely benefit from special measures. Just as we have seen the development of a working rule deeming children in need of special protection 'automatically eligible' for special measures, we conversely have a working rule which 'automatically excludes' any other children. Similarly, as video-recorded evidence (when it exists) and live TV link are the mandated special measures for children, discretionary special measures are barely considered. Although there are early indications that intermediaries will be better used,¹²⁹ there is overwhelming evidence that special

¹²⁹ Joyce Plotnikoff and Richard Woolfson, 'Making the Best Use of the Intermediary Special Measure at Trial' [2008] Crim LR 91.

measures applications for non-primary-rule, discretionary, special measures are so infrequent as to barely register in quantitative surveys.

This chapter identified a number of reasons why prosecutors do not ask for discretionary special measures. In the first place, prosecutor reluctance to ask police to conduct supplementary video-interviews is rooted in evidential concerns about inconsistent statements that will persist whilst children continue to give evidence in an adversarial system. The primary rule seems to predominate to the extent that prosecutors do not engage with the additional measures. So oversight accounts for some of the low usage, but there are other systemic and ethical considerations which also discourage greater use of discretionary measures. One significant obstacle is the lack of information from the police on witness's additional needs in court which, in a highly pressured working environment, leads to the assumption that additional measures are not required. Another is the real concern of some prosecutors that routine use of certain discretionary measures, especially screening to preserve anonymity, but also the denial of open justice, could impact adversely on the fairness of trials.

Nevertheless, the predominant message of this chapter is that the YJCEA 1999 has created a system of de facto mandatory special measures support encompassing almost all child witnesses, thereby establishing a new norm for how children testify in criminal proceedings. As we might expect from a system based upon an inflexible rule, its rigidity gives rise to both benefits and drawbacks. The primary rule is criticised for both its under- and over-inclusiveness. With hindsight we can see that the decision to exclude a small group of children from the highest level of support has been complex and inevitably expensive, all the more so since practice suggests that it was probably unnecessary anyway. Under the scrutiny of the European Court of Human Rights the exclusion of child defendants has also proved to be untenable. Conversely,

however, critics are unhappy that the mandatory system includes children who either do not want the support it offers or do not need it. We are now left with an inflexible rule which boasts considerable benefits but also certain downsides. In Chapter 7, we will consider three significant policy issues which impact upon our conclusions as to whether, and if so how, those downsides might be addressed.

Chapter 7

SPECIAL MEASURES AND POLICY ISSUES

7.1 INTRODUCTION

We saw in the previous chapter how video-recorded evidence and/or live TV link, deemed by legislators the most appropriate special measures for children, are now regarded by criminal justice professionals as normal procedure. However, we also noted various drawbacks to the inflexible rules governing children's evidence. If Chapter 6's central narrative concerned the properties of a rule-governed process, the story of this chapter is about how stringent the rules might and can afford to be. To inform that discussion, we need to examine three policy themes which emerged from the Follow-Up Interviews with prosecutors: (i) the potential for misuse of discretion; (ii) the tensions between a mandatory process and an application-based system and; (iii) the extent to which we should view the prosecutor as an appropriate advocate for victims' and witnesses' needs.

We shall see that alongside pressure to give prosecutors and judges greater discretion over the use of special measures for children there is also scepticism that such discretion could be properly controlled. Such fears may be well grounded. Criminal justice professionals implacably opposed to special measures were able to avoid the discretionary provisions of the Criminal Justice Acts 1988 and 1991 with relative ease; an opportunity that the Government clearly intended to restrict with the inflexible provisions of the YJCEA 1999. Pressures to ameliorate the rigidity of 1999 Act scheme are tempered by concerns to ensure that its success in recasting special measures as the preferred procedure for children is not overturned. Indeed we shall see that this success has been achieved not because the prosecutor is well-equipped to identify and respond to the needs of child witnesses but because the system is essentially rule-based.

This chapter will also demonstrate that prosecutors do not take seriously an application process that they perceive as superfluous. Interestingly, the judiciary apparently does not agree and we might speculate that this attitude reflects judges' perceptions of special measures as exceptional rather than routine. In the final section of the chapter we will examine the pressures inherent in the special measures process to cast CPS prosecutors in the role of 'protector' of the child witness's interests in court, but will conclude that, as a wider aim, this project is fundamentally misconceived.

7.2 MANDATORY VS DISCRETIONARY DECISION-MAKING

The legislative scheme for *special* measures does not seek to replace the normal tradition of oral witness testimony in court. Rather, it creates an exceptional process allowing a restricted group of witnesses to deviate in prescribed ways from the standard procedure for securing witness testimony. Those who qualify for that assistance cannot self-certify. They must fall within the carefully defined categories of the Act. Even then, the courts retain the power to withhold special measures that provide no practical assistance to the court because their use would not improve the quality of the witness's testimony.¹ To underline the exceptional nature of the process, there is an application procedure by which witnesses must demonstrate their eligibility for support.² There is, however, a paradox within the 1999 Act. For one class of vulnerable witness, children, the Act contains a series of presumptions which challenge special measures' claim to exceptional status. Special measures support is presumptively established as the standard procedure for all child witnesses. For those deemed 'in need of special protection' it is the mandated procedure.³

¹ Section 19(2).

² Criminal Procedure Rules 2005 (SI 2005 No. 384) r. 29.1.

³ Section 21(3) and (4).

Policy and judicial interpretation of the special measures legislation has reinforced the notion of special measures for children as 'normal'. Almost all child witnesses can be brought within the category of children who need special protection, and the legislative prioritization of video-recorded evidence and live TV link has positioned those two measures as the standard for children. As Baroness Hale stated in *Camberwell Green Magistrates Court*:

The earlier powers in sections 32 and 32A of the Criminal Justice Act 1988 were exceptions to the normal practice of giving evidence in the court room, for which in the case of live link an individual case had to be made each time... By contrast, the 1999 Act provides that the normal procedure for taking the evidence of child witnesses is to be by video recording and live link.⁴

Prosecutors in this study described how there is a cultural acceptance within the CPS of special measures for children:

'I think with children we have finally got to the stage where [special measures] are just normal, and I think that's good.' (**Prosecutor A10**)

'There was that grey area before when people could simply choose or not and people didn't really like it and everybody seemed to be a bit against it. But now [special measures] are what's expected, I think it's working well.' (**Prosecutor B6**)

'People are used to it, they are comfortable with it, everybody has got into a nice little routine about when [special measures applications] should be made... I think the relationship between all the criminal justice parties is nicely bedded in. Everyone knows where they stand with it.' (**Prosecutor A6**)

This acceptance has been reinforced by a strong policy direction from the centre. Predictions that the routine use of special measures would in many cases prove not to be in the interests of justice have not been fulfilled. Indeed, one prosecutor asserted that extending special measures to all witnesses so that they would no longer be 'special' would further the interests of justice:

'We call them special measures, but the sooner we remove any reference to special the better. They ought to be measures, witness measures, not special. They oughtn't to be special because the function of what we are trying to do is to get the material before the court. It's not special to give someone a better opportunity to give evidence, and the longer it is absorbed and the more it is in the system, it's less special.' (**Prosecutor A9**)

⁴ *R(D) v Camberwell Green Youth Court* [2005] UKHL 4 [37].

This vision of assisting witnesses to the point where testifying in the courtroom becomes the exception rather than the rule was not widely promulgated. As we saw in Chapter 6, several prosecutors had concerns about the over-extension of special measures. **Prosecutor B11** summed up prosecutors' objections to usurping the privileged status of oral witness testimony in criminal trials:

'At the end of the day, in the majority of cases, giving your evidence in court is the most appropriate way of conducting the trial... It's the accused being able to stand face-to-face with the person who is saying that they've done this, in the same room and under the same conditions, under the same stresses. I think that's partly symbolic.' (**Prosecutor B11**)

Nevertheless, **Prosecutor A9's** comment is an illustration of the extent to which some prosecutors have taken up the cause of witnesses in criminal proceedings. A further indication of the effectiveness of the culture change that has occurred within the CPS is that almost no prosecutors favoured a return to the situation where special measures for children were genuinely exceptional. We saw in Chapter 6 that hard rules can make for hard cases, and a core of the prosecutors in this study bemoaned the absence of a residual discretion to deal with such cases. Significantly, however, none proposed a return to the system under the Criminal Justice Acts 1988 and 1991, which invested lawyers with untrammelled discretion to decide whether or not to apply for special measures and judges with similarly broad discretion to decide whether or not to allow them. Indicating the extent to which video-recorded evidence and live TV link have become normalised throughout the criminal justice system, **Prosecutor C6** remarked: 'I think they are a useful tool. If they weren't the police wouldn't lie to people and tell them they can have special measures would they?'. Nevertheless, this prosecutor identified how the previous legislative scheme lent itself to misuse:

'What I am saying is that I think there should be a mandatory scheme that you have the discretion to override, which isn't quite the same as when you have the discretion to choose what you want to go for, where you may not because of ignorance, idleness or prejudice.' (**Prosecutor C6**)⁵

⁵ We can draw a parallel here with proposals for a system of presumed consent to organ donation, where it is automatically assumed that someone has consented to their organs being used after death unless they formally opted out of the system during their lifetime.

Prosecutor C6 was not alone in suggesting that there are occasions justifying flexibility. The preference appeared to be for retention of the presumption in favour of special measures coupled with greater freedom to depart from it.

'I think there is nothing wrong with the initial presumption in the 1999 Act that children are in need of special protection. I think there is nothing wrong with that in principle, but I think there ought to be some leeway.' (**Prosecutor A7**)

'It is a question of balance between having the facilities and using them in every case or using them in those cases where they are really needed.' (**Prosecutor A8**)

We saw in Chapter 6 that some prosecutors would prefer to see capable and willing witnesses testify in the courtroom rather than from the live TV link room.

Prosecutor B3 suggested that the child witness to theft in **CASE 36** was typical of witnesses whose evidence would not be improved by special measures, but who would have no difficulty in expressing themselves well in court:

'I don't know if you've read his statement, but he is quite confident. He tells you exactly what has happened, and he tells you how he challenged the defendant and his friends. In fact there were quite a few of them and he just didn't want to let go of his scooter. So in that sense he wasn't vulnerable.' (**Prosecutor B3**)

Prosecutor B3's assessment of the child's capabilities raises a number of issues. Firstly, we might question the accuracy of an assessment made solely on the papers. The police had not video-interviewed the child. The case file contained no MG2 and the MG6 contained no information regarding the witness's needs or capabilities. **Prosecutor B3's** primary source of information was the child's witness statement. We know, however, that witness statements are written by interviewing police officers and are a mediated version of the child's description of events.⁶ They are consequently questionable documents from which to infer a child's communication abilities.⁷ Moreover, **Prosecutor B3**

⁶ Section 2.4.1.1. See also, Eric Shepherd and Rebecca Milne, 'Full and Faithful: Ensuring Quality Practice and Integrity of Outcome in Witness Interviews' in Anthony Heaton-Armstrong, Eric Shepherd and David Wolchover (eds.), *Analysing Witness Testimony: a Guide for Legal Practitioners and other Professionals* (London: Blackstone Press, 1999).

⁷ **Prosecutor B12** gave a good example of police officers' influence over the contents of a witness' statement: 'There is often phraseology that is a bit "policey" and obviously is not the words that a child would use... "Were his eyes glazed, did he smell of alcohol, was he unsteady on his feet?"... It would be far more convincing if there was, "He seemed pissed to me" or something like that.'

acknowledged that her preference is for children to give live evidence because 'it is far more convincing for the jury to hear, to see, to feel, and at the same time the child will get the formality of the whole thing'. **Prosecutor B3** also took the view that child witnesses to non-violent and non-sexual offences were generally less traumatised by their experiences of the offence than child witnesses to sexual and violent offences. They tend, she asserted, to have experienced only minimal damage to their personal integrity or self-esteem. We might, therefore, question whether **Prosecutor B3** was making an informed judgement about the personal capabilities of the child witness in **CASE 36**. Indeed, the case file analysis for **CASE 36** shows that **Prosecutor C3** did, in fact, decide against applying for any special measures and was persuaded otherwise only by the intervention of the Witness Care Unit.

We cannot tell whether the Witness Care Unit Officer in **CASE 36** was motivated by a specific request from the child or by an ethical concern to extend special measures to all children, but it does cast suspicion over **Prosecutor B3's** initial assessment that this particular child was sufficiently robust to testify in court. This case demonstrates that any decision can only be the best decision in the circumstances, given the information available. Once (we presume) better information became available, **Prosecutor B3** adjusted her conclusions on the child's support needs. **CASE 36** illustrates the difficulties that prosecutors face in making informed decisions about individual witnesses, an issue discussed further in Section 7.4.1 below. For now it may be observed that requests for flexibility to deal with able children could mask other motivations.

We have already seen that prosecutors who valued the certainty of the mandatory system were wary that any changes would play into the hands of criminal justice professionals who are in principle opposed to special measures.⁸

⁸ See Section 6.5.2.3.

Prosecutor A8, for example, recognised that the mandatory rules applicable to the CPS mitigate the potential effects of any inappropriate uses of the police officer's discretion not to video-interview a child:

'The system that operates is geared up to protect the witness... so if the police officer makes a mistake about that, there is still a method of enabling that witness to give evidence in an environment which is not going to be oppressive.' (**Prosecutor A8**)

Video and live TV link might be the preferred special measures for children, but live TV link is used for almost all child witnesses whilst video-recorded evidence is used by less than half of them.⁹ The YJCEA 1999 does not constrain police officers' discretion regarding video in the same way that it constrains prosecutors' decisions regarding special measures applications, producing a striking contrast. Where discretion remains, special measures usage has remained relatively low. Whilst there may be good policy reasons for mandating live TV link and not video,¹⁰ we saw in Chapter 5 that police decisions regarding video-interviews were influenced by a number of factors, many of which had little to do with policy rationales.

The motivations of other criminal justice professionals are similarly complex. As **Prosecutor C3** put it, 'Even amongst the judiciary there are differing views on this. So, in the end, it might be safer to keep it mandatory'. **Prosecutor A12** recalled the position prior to the primary rule, where the interests of lawyers and judges often took precedence over the interests of the child:

'The problem is this would get you back to the position we were in when it first came in [under the CJA 1991], that if counsel and judge do not like sitting down and watching it then pressure would be put upon you not to use the video.' (**Prosecutor A12**)

⁹ See Chapters 5 and 6.

¹⁰ Most significantly, the resource implications of requiring all police to conduct video-interviews with all child witnesses. See further Chapter 5.

Prosecutors' comments betray concerns about the quality of discretionary decision-making in this context. They are also worried about the additional workload that a reintroduction of discretion would inevitably entail: 'There would be yet more applications before the magistrates. I mean we spend our whole lives before the magistrates, applications for hearsay, bad character, and all the rest of it' (**Prosecutor C5**). Like special measures, new statutory schemes to control the admission of hearsay and bad character evidence are application-based systems.¹¹ Where once counsel or the advocate in court would take the lead in deciding on the selection and presentation of evidence, increasingly prosecutors are required to consider these issues pre-trial, frequently requiring the prosecutor to engage in court-based argument. **Prosecutor C5** predicted an increase in the number of disputed special measures applications if the mandatory system for children were replaced:

'If it was taken away... we would probably lose our... excellent system, because it goes through on the nod and there are no problems. But the moment it becomes discretionary... it just gives the defence another way of beating us down. So, please God, no!' (**Prosecutor C5**)

Many prosecutors described the reduction in defence challenges post-*Camberwell Green Youth Court*, in which the House of Lords conclusively established that 'there is nothing intrinsically unfair' in children's routine special measures use.¹² **Prosecutor C5's** comments should be read in this context as deploring a return to the days of objection for objection's sake.

In summary, over the five years of the special measures framework's operation, prosecutors have adapted to and come to appreciate the benefits of a predictable system firmly rooted in clearly articulated policies. Whilst there is undeniable frustration at the sometimes absurd consequences of the current, inflexible rules, prosecutors also remembered the ease with which criminal justice

¹¹ Criminal Justice Act 2003, ss.101 and 114.

¹² *R(D) v Camberwell Green Youth Court* [2005] UKHL 4 [46].

professionals were able, under the previous legislative framework, to subvert support mechanisms for children. There is consequently less enthusiasm for reintroducing prosecutorial discretion than one might have anticipated.

7.3 AUTOMATIC VS APPLICATION BASED PROCESSES

The inherent tension in apprehending special measures as a normalised 'exceptional' procedure for children's evidence was also reflected in prosecutors' views on the superfluity of an applications procedure. **Prosecutor A11** encapsulated the contradictions of attaching an application-based system to a mandatory process:

'Why are we not really deciding what we want, what needs to be done? Why are we having automatic eligibility and then still making applications.' (**Prosecutor A11**)

The exceptional status of special measures is reinforced by the application process that underpins it. The coherence of an application-based system begins to unravel, however, when in practice applications cannot be refused. The consequence is that criminal justice professionals (with the possible exception of the judiciary) do not take the application procedure seriously when the applicant is a child. We can see this in the following sub-sections which discuss the quality of the information that the police pass to the CPS to support the applications, the cursory approach of the CPS in completing them and judicial insistence on the formalities of the application procedure.

7.3.1 Unreliable Indicators of Witness Need

We saw in Chapter 6 that the MG2 form is the primary vehicle for conveying information on child witnesses' special measures needs.¹³ The instructions for completion specifically point out that the form must record the views of the

¹³ See Section 6.2.1.

witness and identify witnesses in need of special protection.¹⁴ Completion of MG2 forms was patchy in this study, but where an MG2 was provided the quality of the information was generally good. CPU officers consistently provided detailed and individualised descriptions of the child's fears and concerns about giving evidence. Generalist officers tended to be less thorough: 'It is quite often done in haste so that they can say they submitted it' (**Prosecutor A3**); 'They are often not very detailed, they are not very personalised' (**Prosecutor A4**). Neither are police officers' indications of the appropriate special measures for a child consistently reliable.¹⁵ However, prosecutors are not dependant upon the MG2 to complete a special measures application for a child witness.¹⁶

Prosecutors' choice of special measures is largely controlled by the existence, or otherwise, of a video-interview and the dictates of the primary rule. Prosecutors did not disparage the value of good information about children's wishes and capabilities, but felt no imperative to pursue an officer for missing information for a number of reasons. Firstly, prosecutors cannot direct the police to act: 'we are dangerously dependent on goodwill' (**Prosecutor B7**). Neither do generalist officers see collecting and communicating witness information as a prime function: 'Their priority is not in filling in the MG2, it is in talking to the witness and getting some sort of statement, whether it is video or not' (**Prosecutor A8**). Closer to home, prosecutors are themselves short of time: 'You have to bear in mind the pressures under which we work... Some of these things may be relatively low on your list of priorities' (**Prosecutor A12**). In fact, many prosecutors recognised that the police, too, work under considerable pressure and found it hard to criticise hard pressed officers for failing to provide information not essential to the application process. Prosecutors can make

¹⁴ The instructions further explain that for witnesses in need of special protection it is important to record the witness's views as 'the admission of a visually recorded interview is mandatory, so it is essential to canvass the views of the witness before deciding how to take his/her evidence.'

¹⁵ See Section 6.4.2.2.

¹⁶ See Section 6.2.2.

applications with only superficial information about child witnesses and, for efficiency and other reasons, are content to do so.

7.3.2 A Cursory Approach to Children's Applications

Practice varied both between and within the three Areas in this study as to whether prosecutors or case-workers completed the special measures application form. Prosecutors routinely give detailed written instructions to case-workers to prepare papers for committal or indictment. The inclusion of the special measures application within these instructions is, therefore, unremarkable. Some prosecutors chose to draft the application form themselves, facilitated by increased access to automated case management software, but the author's formal job description did not appear to influence the style of the forms in the Monitoring Sub-Sample. A copy of the form was attached to the case file for 75 of the 81 special measures applications reviewed, and analysis of their contents revealed the use of brief stock phrases to justify applications to be common practice. **Prosecutor C7** summed up the prevalent approach: 'With children it is much easier because you only have to put in their personal details and then... "automatic eligibility". You know, it's quite easy.' Thus, in response to the request to state the grounds for the application, prosecutors employed variants on the following formulations:

'Automatic eligibility due to age and deemed in need of special protection due to age and nature of offence.' (**CASE 1**)

'Child witness automatic eligibility due to age and nature of offence.' (**CASE 14**)

'Automatic eligibility as the witness is under 17. Section 16.' (**CASE 15**)

's.21 YJCEA 1999 - mandatory' (**CASE 33**)

'The child is under 17 and is automatically eligible for assistance.' (**CASE 40**)

Even where prosecutors were more expansive, the information provided was consistent: the age of the witness, the type of offence and a rehearsal of the child's automatic eligibility for special measures. The following wording appeared on the application for all three of the child witnesses in **CASE 5**:

'[Witness] is 14 years old and a witness to an offence of violence. Therefore he is automatically eligible for special measures.'

And in **CASE 16**, although more legislative detail was provided, the explanation followed the same pattern:

'The victim is 13 years old. She is eligible for special measures as a vulnerable witness under s.16(1)(a) of the YJCEA 1999. The offence alleged is of a sexual nature and the witness is in need of special protection under s.21(1)(b)(i) of the Act. The primary rule applies and automatic eligibility is sought.'

Prosecutors were candid that because there is so little discretion in the choice of special measures for children they viewed applications for young witnesses as very much an exercise in standardised drafting.

'All my forms are the same. I've got a standard form. This child is such and such an age, witness to... I've got one for violence, one for sex, I've got one for [CPU A], I've got one for [CPU B]. Templates, all filled in and then I just go through and change ages, change name, change the case details, print it off.' (**Prosecutor A10**)

'Our team has certainly got the pro-forma with all of it filled out bar the name and case, the name of the victim and the case. You know, "Automatic eligibility" because they tend to be always the same.' (**Prosecutor C2**)

'You can see on [application for **CASE 44**]... I've just put the standard sort of phrase. I've put in, "By virtue of the age and the nature of the charge the witness is eligible for special measures and deemed to be in need of the special protection applied for herein..." I would have filled in numerous applications in exactly the same way.' (**Prosecutor B8**)

Where children are entitled to the measures by law, prosecutors saw no necessity to engage in persuasive argument. Accordingly, 'if I think, particularly with video, that I'm fairly certain I will get it, I will just do a perfunctory filling in' (**Prosecutor C6**).

This attitude similarly informed prosecutors' approach to other questions on the special measures application form. Around 75% of applications contained no response to the question concerning the witness's views, on the ground that the matter is legally irrelevant for a child in need of special protection. Similarly, 60% of applications contained no response to the question on how the measures applied for would improve the quality of the witness's evidence or else simply stated 'n/a – Section 21(3) applies' (**CASE 22**). In a significant number of cases where prosecutors or case-workers did provide answers to these questions, they duplicated information already provided elsewhere. So, for example, prosecutors gave the following replies to questions regarding the witness's views and how the measures applied for would maximise the quality of the child's evidence:

'The witness is 13 years old and is a witness to an offence of a sexual nature. She is therefore in need of special protection.' (**CASE 16**)

'He is 11 years old.' (**CASE 27**)

'Witness falls into the category of being vulnerable.' (**CASE 30**)

'He is 12 years old and alleges 7 years of abuse at the hands of his stepfather. He requires protection at court.' (**CASE 45**)

In general, prosecutors in this study complained that the completion of special measures application forms is a time-consuming and overly complex task given the straightforward nature of the legal rules. Nonetheless, around a quarter of the applications reviewed contained information which the court is unable by law to consider.¹⁷ For 20 of the 75 Monitoring Sub-Sample applications reviewed, prosecutors commented on the witness's views.¹⁸ For 18 of the 75 applications, prosecutors took time to explain how the measures applied for would improve the quality of the witness's evidence. The following examples are typical:

¹⁷ As described in Section 6.2.2, the instructions for the completion of the special measures form are now much clearer than they were at the time of the study that 'information concerning the grounds of application and any views of the witness need not be provided'.

¹⁸ For 12 of those 20 applications, the information had been supplied by the police on the MG2 form.

'The witness does not wish to face the suspects again and would feel very uncomfortable about having to give evidence in open court. The giving of evidence via Video Link would provide a more secure situation and would enhance the quality of her evidence.' (**CASE 18**)

'The offence is serious and violent and the complainant is frightened of appearing in court and seeing the defendant. The live link facility will hopefully alleviate the fear of giving evidence. The complainant will be more relaxed and be able to give a comprehensive account of the incident.' (**CASE 26**)

'It is considered by those concerned with the welfare of the witness/victim that to give evidence in a courtroom would be both traumatic and stressful.' (**CASE 35**)

'The witness is very worried about giving evidence in court. Use of her initial video account and enabling her to give evidence by TV link will allow the court to hear her first account and she will be more at ease outside the courtroom and thus better able to answer questions in cross-examination.' (**CASE 40**)

Interestingly, in only two instances,¹⁹ were prosecutors repeating information supplied by the police.²⁰ For the remaining 16 witnesses, the police had not indicated how video and/or live TV link might assist. Given the lack of personal contact between the prosecutor and the child witness, the implication appears to be that prosecutors put forward largely theoretical arguments. This is not to suggest that the arguments prosecutors used are invalid: rather, prosecutors have tended to make the kind of general point regularly put forward in the debate about the value of special measures to children. Prosecutors' strategy in this regard seems entirely reasonable. The better question is why prosecutors felt the need to make the arguments at all when the issue has already been settled by legislation.

The fact that a significant number of prosecutors provided some sort of response suggests the influence of systemic pressures rather than (only) idiosyncratic errors. In representing the special measures system for children as a process of application, the criminal justice system encourages prosecutors to construct the strongest possible case for the grant of special measures. These pressures are

¹⁹ **CASE 15** and **CASE 17**

²⁰ We cannot rule out the possibility of informal contact between the prosecutor and the officer, but the experience in this study was that, given the practical hurdles involved in making telephone

exacerbated by the use of a single application form for all types of vulnerable and intimidated witness even though different factors are legally relevant to each category. Ultimately, this lack of clarity left prosecutors with the sense that, for children, special measures application forms serve no substantive purpose beyond alerting the court to the need for special measures facilities.

This attitude was also reflected in prosecutors' comments on the technical information requested for video-recorded evidence applications. The application form requires extensive information about the type of equipment used. The guidance notes on the application form state:

Give a description of the equipment used for recording: The description must include the following information – number and type of cameras used (fixed or mobile); the number and location of microphones; the video format used; and whether it offered single or multiple recording facilities and if it did which were used.

Prosecutors in this study generally took one of three alternative approaches to answering this question: a list of the equipment used with precise details of model/serial numbers; a list of the equipment used in lay terms; or a prosaic description of the recording facility. At one extreme, the information was highly detailed:

'1 x Clearview Twin Deck Video Recorder: Model No VIC 100, serial No. 6570503
1 x Hitachi TV Monitor: Model No. CPX 1498M5-300, Serial No. V20907020
2 x Video Cameras: 1 x Subject Camera CCD HUNT CCTV V3030 APT VICON, TV Zoom Lens 1/3" F1.2.6/6-36 mm, Bar Code 012vPH55E280024; 1 x Wide Angle Lens CCD Camera HUNT TV Lens F1.4 2.8m
1 x NORTEK PTZ 60/1 Zoom/Pan/Tilt Control: Serial No. 7180802D
2 x Wall Mounted Microphones'
(CASE 15)

At the other extreme, information was perfunctory: 'Standard police equipment at [Area B police station] Child Protection Unit' (**CASE 41**). Most steered a middle course: '2 x Digital Colour Cameras: 1 fixed lens, 1 zoom lens, 2 x fixed microphones. 3 x video recorders housed within a fixed unit with combined

contact with shift-based officers, communication was invariably written and recorded on the case file.

monitor' (**CASE 26**). In **CASE 27** the application form simply stated 'Not Known' but this had no apparent bearing on the conduct of the case. **Prosecutor B6** was typical in querying the need for detail on every special measures application form: 'Then you've got to trawl through these special measures forms and fill in stupid stuff about tilting and panning cameras'. Indeed, two prosecutors conceded that they had previously supplied incorrect or assumed information and thus expressed scepticism that either the courts or the defence use or verify the information provided.

'I filled one in completely wrong, sent it in and it was granted because it is automatic. I got what I wanted with completely spurious information.' (**Prosecutor A9**)

Information about the recording equipment is meant to reassure the court and the opposing party that the recording has been made in an appropriate setting, with suitable equipment, and that all copies of the video-tape are accurate duplicates of the original. Although virtually all video-tapes admitted by the prosecution are made by the police in officially approved video-interviewing suites or using approved mobile video-recording systems, videos of prosecution witnesses are occasionally made in health service or social services settings which are not under the control of criminal justice professionals. Furthermore, there are no specifically approved facilities for use by defence solicitors who wish to record interviews with defence witnesses.²¹ Prosecutors point out, however, that although there are theoretically a variety of possible sources, in practice almost all interviews are made by the police using Home Office approved equipment in Home Office approved installations. In these circumstances, they see little benefit in repeating the same, often lengthy, descriptions of the precise features of the video-recording equipment. Their scepticism is given substance when incorrect or ambiguous information is accepted unnoticed by the courts.

²¹ Though there is no evidence that video-recorded evidence is a measure ever used by the defence.

Prosecutors displayed very little concern about errors on the special measures application form or, indeed, the resulting special measures direction. Most are minor. Of the 29 applications in the Monitoring Sub-Sample for video-recorded evidence and live TV link, 12 listed only live TV link as the required measure in Part A of the application.²² In each case, Part C of the form, which relates to applications for video-recorded evidence, was completed, so indicating to the court that that measure was also required. Other minor mistakes occurred when the current application was based on a version of the form used for a previous case. For example, in **CASE 35**, two special measures applications for live TV link stated that an application for video-recorded evidence was 'pending' and full details of the equipment used to make a video were supplied in Part C of the application form. **Prosecutor B1** explained what had occurred:

'It was just a sloppy application... That's not good practice, but that's when people use an existing form. They don't copy the blank one, they copy the one they fill in... That's just rushing your work. Of course it matters. We look terrible as an organisation. It looks like we are not taking it seriously. Any application that is filled out in that manner reflects very badly.' (**Prosecutor B1**)

Yet the courts apparently take an equally casual attitude to the detail of applications. A written special measures direction was attached to the case file for 22 of the cases within the Monitoring Sub-Sample,²³ and 50% of those directions were inaccurate or unclear. In all three Areas in this study, the practice was to issue one special measures direction to cover all applications for the same case. In three instances²⁴ the direction failed to specify the special measure(s) granted or failed to clarify which measure had been granted for which witness. In four instances²⁵ the special measures application had been

²² Part A requests information which must be supplied regardless of the type of special measure(s) sought, including a list of the special measures applied for on that occasion.

²³ In a further 15 cases the file suggested that a special measures direction had been issued but no written copy was attached. It is not clear whether the courts failed to issue the written direction or whether the CPS failed to match the direction with the appropriate case file following receipt from the court.

²⁴ **CASES 2, 20 and 25.**

²⁵ **CASES 31, 33, 34 and 37.**

made out of time, and though the correspondence from the court confirmed that the application had been considered out of time, it gave no details of the special measures granted. In two cases²⁶ the special measures directions listed video-recorded evidence and live TV link as the measures granted in response to applications for live TV link alone. In one case²⁷ the direction listed only two of the three measures applied for. Finally in **CASE 35** the special measures direction stated that 'the application has been granted/refused' with no indication of the decision actually taken. Upon receipt by the CPS, the notation 'Granted I assume!' had been added to the direction. In all of these examples of clerical errors, CPS prosecutors simply assumed that the measures applied for were in reality approved.

Neither the courts nor the CPS were particularly concerned about the level of ambiguity and inaccuracy routinely found in the special measures directions issued by the courts. For **Prosecutor B1**, prosecutors' nonchalance illustrated the futility of a formal system of application where 'applications' must be granted.

'Doesn't that just support what I said that this is a huge paper trail which is absolutely rubbish, no-one takes it seriously, no-one considers anything other than extending out-of-time and granting, so why are we doing this? Occasionally [defence solicitors] have written, "Because this is mandatory anyway", you know, slightly stropky. So I think they are also aware that this is a colossal waste of trees and everyone's time.'
(**Prosecutor B1**)

The process was, in fact, widely regarded as one of notification rather than genuine application. As **Prosecutor C7** put it, 'Certainly with children with automatic eligibility it is effectively rubber-stamping it'. A number of prosecutors questioned the need for an application at all:

²⁶ **CASES 21** and **28**.

²⁷ **CASE 45**.

'If the measures are there and the rules say they should be used then unless there is a good reason why you are not using them, it seems a bit odd that you have to apply. I mean we don't make an application to serve the committal papers, we just do it.' (Prosecutor B10)

'We put in stock things like "sexual offence", "victim of violence", "automatic eligibility". You put down a form of words that doesn't help anyone... So let's just accept that it is automatic and get on with it. Why fill a form in? I don't believe that the forms fulfil any purpose.' (Prosecutor A9)

'What is the point in doing a special measures application for children when it is automatic eligibility? I think it is ridiculous... The special measures are there by legislation. It's all in force, it's all automatic. We shouldn't have to do an application form.' (Prosecutor B5)

Many prosecutors were angered by what they saw as a waste of scarce resources:

'We do spend a lot of time on them, which could be very usefully spent doing something else... They do make us jump through hoops... In these cases that are absolutely dead certs, why waste time?' (Prosecutor B2)

'It's just a waste of time and effort really. For me to write to you that you are supposed to give this anyway... I think that it's a pointless exercise. I'd prefer for them to be given automatically... We could do it at the Plea and Case Management Hearing... Every single application you just put down exactly the same thing... It really doesn't matter what you write.' (Prosecutor B3)

An oral application would, as **Prosecutor A10** put it, 'save us faffing around with forms' and was a solution repeatedly suggested by prosecutors. There are issues around the workability of an oral process,²⁸ but the arguments for some form of streamlining of the process as it applies to children seem compelling.

7.3.3 Judicial Insistence on the Application Procedure

Despite the laxity of the courts in ensuring the accuracy of their special measures directions, prosecutors did not sense a judicial appetite to do away with the application process. Most prosecutors recognised the need for some process, even for child witnesses: 'The judges want to see something in front of them so they can decide whether it is appropriate or not' (**Prosecutor B5**). This

²⁸ For example, in maintaining records of cases for which applications have been made and in providing adequate documentation for the defence in cases where they wish to mount a challenge to the application.

is, perhaps, a recognition that, in a party based system, a process which is exceptional, even on a class rather than individual basis, must leave open the possibility for formal challenge.

Prosecutors reported that some courts are sticklers for formality: 'If you haven't ticked the right box or signed and dated it, then they always send them back, always' (**Prosecutor B6**). Prosecutors also described how, although not typical of all courts, judges in one court in Area B were openly critical of prosecutors who suggested that they had no discretion to refuse an application for a child witness:

'Where we apply the Crown Court judges have told us that there is no automatic eligibility, which isn't my understanding of the legislation... They don't necessarily want evidence; they just don't want to see an application where you say it is automatic... I don't know whether they'd refuse [the application]. I suspect they'd just ask for it to be redrafted... If that's how they want it I don't really see that we have any choice but to comply.' (**Prosecutor B7**)

This suggests that some judges, at least, do not accept the removal of their authority to refuse to allow adjustments to normal criminal procedures.²⁹ Whilst the example given may appear pedantic and trivial, it does underline the resilience of judicial attachment to live oral evidence.

Courts also sometimes exert their authority to ensure that applications satisfy the appropriate deadlines. The Criminal Procedure Rules state that where an application is to be made out-of-time:

The application must be accompanied by a statement setting out the reasons why the applicant is or was unable to make the application within that period and a copy of the application and the statement must be sent to every other party to the proceedings.³⁰

²⁹ Which is still preserved, in residual form, in the interests of justice tests in sections 20(2), 24(3) and 27(2).

³⁰ Criminal Procedure Rules 2005 (SI 2005 No. 384) r. 29.2.

In **CASE 39**, where the prosecutor neglected the additional formalities involved in an out-of-time application, the court returned the application stating: 'The Court will not consider out-of-time applications without a written explanation as to delay.' Judges do not actually refuse applications for children on the grounds that they are out-of-time. As **Prosecutor A2** observed, 'I certainly would not expect a judge to effectively prejudice a witness because of an administrative error on our part'. Prosecutors nonetheless expected to have to explain the delay. Judicial insistence that prosecutors 'jump through the hoops' is another indication of judicial resistance to the idea that applications are unnecessary. One plausible explanation is that judges like to see applications properly made to underline the point that special measures are an exceptional rather than routine matter.

7.4 THE PROSECUTOR AS AN ADVOCATE FOR WITNESSES' NEEDS

Cast in the role of advocate, or champion, for victim and witness needs, Crown Prosecutors want to do their best for witnesses. They repeatedly affirmed the importance of effective special measures support in signalling to children that their input into the criminal justice process is valued. **Prosecutor A2** asserted that 'special measures have taken us forward in terms of our treatment of witnesses'. They are a visible sign that the criminal justice system recognises their support needs:

'I think... that it is hugely psychological. I think people feel they are being protected and their needs and their wants are being taken into account.' (**Prosecutor C7**)

'For children it helps enormously... They need the protection, and their parents see that perhaps there is a more caring system if they are getting that protection.' (**Prosecutor A6**)

'It can almost be like a psychological cushioning. The system is showing that it is trying to accommodate them... It is very important that we do have that, so it doesn't look as if the system has failed them.' (**Prosecutor B11**)

Special measures are not the only context in which we can detect pressures for prosecutors to become victims' champions. Similar considerations arise in relation to pre-trial witness interviews³¹ and the appointment of specialist prosecutors.³² In accepting at least some degree of responsibility for witnesses' needs, the CPS is fulfilling a social welfare function collateral to the traditional business of the criminal justice agencies. The House of Commons Justice Committee recently pinpointed the CPS's lack of 'a proactively defined strategic place in the criminal justice system'³³ and drew attention to recent institutional changes³⁴ which blur the boundaries between the functions of the CPS and other criminal justice agencies.³⁵ Special measures likewise blur the boundaries of the prosecutor's role. The Justice Committee was critical that piecemeal expansion of the prosecutor's role potentially creates conflicting demands and unclear expectations.³⁶ For example, 'telling a victim that their views are central to the criminal justice system, or that the prosecutor is their champion, is a damaging misrepresentation of reality'.³⁷

Even within the narrower context of special measures we can see that structural and systemic issues seriously compromise prosecutors' efforts to champion victims' interests. Though victims and witnesses might have a reasonable expectation of support during their interactions with the criminal justice agencies, that support can never translate into partisan claims for maximum

³¹ Paul Roberts and Candida Saunders, 'Introducing Pre-Trial Witness Interviews: A Flexible New Fixture in the Crown Prosecutor's Toolkit' [2008] Crim LR 831.

³² The CPS is increasingly utilising specialist prosecutors in prosecutions judged to require particular experience or expertise, such as rape, domestic violence and terrorism. See, for example, *CPS Domestic Violence Good Practice Guidance Summary* (London: CPS, 2008), available from www.cps.gov.uk.

³³ House of Commons Justice Committee, *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System, Ninth Report of Session 2008 - 2009*, HC Paper No.186 (London: TSO, 2009) 3.

³⁴ Statutory charging, plea bargaining, conditional cautioning and CPS advocacy.

³⁵ Para.s 12 - 13.

³⁶ *Ibid*, para. 5.

protection incompatible with fair trial norms.³⁸ *The Code for Crown Prosecutors*³⁹ clarifies that the primary role of the prosecutor is to act in the public interest:

The Crown Prosecution Service does not act for victims or the families of victims in the same way as solicitors act for their clients. Crown Prosecutors act on behalf of the public and not just in the interests of any particular individual.⁴⁰

However, whilst the underlying normative framework did not go unnoticed,⁴¹ it was the organisational and systemic barriers to a closer relationship with child witnesses that emerged most strongly in research interviews with prosecutors.

7.4.1 Institutional Distance from the Witness

In the normal course of events the CPS prosecutor has no personal contact with the witness. As a result, the reviewing lawyer is entirely dependant upon the police and Witness Care Unit staff to provide an indication of the child's wishes and abilities. Although organisational arrangements vary, in most CPS Areas case files pass through many hands during the pre-trial preparation process, with the consequence that no single person retains responsibility for ensuring that a child's special measures needs are addressed. The fractured nature of responsibility for witness needs is not a matter of policy. It is an unfortunate consequence of organisational structures which have developed over time in response to concerns over efficiency and the most effective use of scarce resources.

'It's all about time. You know you can't give every case that special treatment because we don't have file ownership anymore... Because we don't have file ownership you don't get involved in a case, it just gets passed from pillar to post and that's the way that our structure is here.' (**Prosecutor B5**)

³⁷ *Ibid*, para. 83.

³⁸ See Section 2.3.1.

³⁹ (London: CPS, 2004). Available at <<http://www.cps.gov.uk>>.

⁴⁰ Para. 5.12.

⁴¹ 'We are not lawyers on behalf of a client we are lawyers on behalf of the state, and you have got a responsibility at the end of the day to the court' (**Prosecutor A8**).

The result is that prosecutors do not identify with witnesses, far less establish relationships with them.

'It sounds awfully cold but we just don't give a second thought to it... As prosecutors it's just one case after another. Warn the witness and that's it. Someone else liaises with the witness. We just don't give it a second thought. It sounds awful but it's the way things work.' (**Prosecutor B8**)

We saw in Section 7.3, however, that information regarding the child witness's attitude towards, and the need for, special measures is frequently missing from the case file. In primary rule cases, the grant of video-recorded evidence and live TV link depends simply on membership of a specified class, not assessed need. Here the rigid rule compensates for weaknesses in the system. When making applications for discretionary measures, however, prosecutors are entirely dependent upon the police to prompt an application, which, as we have seen, they rarely do.⁴² The reality of the situation is that if police do not build a case for a specific discretionary special measure on the MG2, there is no other impetus or facility for the prosecutor to make an application.

A further weakness of prosecutors' dependence upon police officers for information is illustrated by prosecutors' concerns about child witnesses' reportedly declining special measures support. Prosecutors were wary of accepting at face value police officers' claims that children not 'in need of special protection' wish to give their evidence in the courtroom. Prosecutors doubted whether children had been appropriately counselled. As **Prosecutor C2** pointed out 'It's difficult for a thirteen-year-old to have an informed opinion ... I mean they don't know what the court proceedings are going to be like'. **Prosecutor C1** elaborated:

'You do get a few who say, "No. I want to face him in court."... In the heat of the moment, I think those sort of assertions can be made. Whether a child, and a victim, could appreciate the ramifications of actually being in court and what the ordeal is going to be like, and actually seeing the defendant maybe for the first time since

⁴² See Section 6.4.3.

they've made their disclosure to the police, I don't know. I do think that you have to be very, very careful... I think there's an element of bravado, you know because you do come to court fired up, determined that you are going to get through it, that you want to see justice done. Maybe you've seen so many TV dramas where the victim is in court and is very bold and brave and asserts what's happened to them. But whether they can actually appreciate the difference for them between giving their evidence from a TV link room as opposed to giving it from court? I don't think any of us could, could we?... Perhaps it is that desire to be a little bit more grown-up about it, and in their minds perhaps grown-ups always go into court and testify.' (**Prosecutor C1**)

Whilst prosecutors were keen to respect children's wishes, many said that they would need firm evidence that a child fully understood the implications of her request before attempting to arrange it: 'If we actually had a statement from a witness, not just the MG2, but if we had a section 9 statement... something that was signed' (**Prosecutor A13**). This prosecutor explained the institutional context of her scepticism:

'It's not that we don't trust the police, it's just that they don't have the same agenda as us... and you sometimes get the feeling that it has not been properly discussed with the witness.' (**Prosecutor A13**)

Police officers are at a temporal distance from the trial, by which point responsibility for the witness has passed to other agencies. There is no real consequence for the police officer if the witness's testimonial support needs are not adequately addressed. The police officer's comments on the MG2 are consequently no substitute for more direct interaction with the witness.

'What I would like to happen is for us to say, "Well I can understand your reasons for that, but perhaps you'd like to come into another case and see it happen before you make that decision because it can be quite intimidating"... 'I wouldn't want them to do it and there's bravado there and then it all goes wrong on the day.' (**Prosecutor B10**)

The reality is, however, that prosecutors are unlikely ever to have contact on a wide enough scale to enable them to draw first-hand conclusions about witnesses' needs and abilities,⁴³ whilst the police are too removed from the issues that children face in court. Some prosecutors doubted whether a child could make an informed decision about the best means of testifying without a pre-trial visit. One possibility is that Witness Care Units, with their dedicated

⁴³ Notwithstanding the introduction of pre-trial witness interviewing. See Chapter 6, footnote 67.

focus on witness support, might ultimately be better placed to act as conduits for witnesses' special measures needs, but there remain unresolved issues with the timing and quality of their involvement with witnesses.⁴⁴ It would appear therefore, that within the current institutional framework, full and accurate pre-trial assessments of child witnesses' needs is something of a utopian ideal.

7.4.2 Resource Constraints

For the prosecutors in this study, a major obstacle preventing greater engagement with witnesses was lack of time:

'We are dead pushed. We are way, way, way past any degree of efficiency, way past it. We are fire-fighting all the time because there are just not enough of us.'
(**Prosecutor C5**).

'We're just being pulled in too many directions really to have regular contact with complainants or witnesses in criminal cases.'
(**Prosecutor B8**)

'I think witnesses are treated appallingly by all the agencies. With the police and us I think, it is more resources. We are just strapped and we can't do what we should do.'
(**Prosecutor C2**)

A constant refrain amongst prosecutors was the impact on front-line staff of successive new initiatives, such as statutory charging and CPS advocacy, which take prosecutors out of the office and so reduce the time available for case preparation. One prosecutor who operated mainly in the lower courts explained:

'Because of the heavy court commitments and because of the commitments required for the charging centres... we are out of the office for eight sessions out of ten.'
(**Prosecutor C1**)

Prosecutor C5 painted a particularly colourful picture of 'life on the front-line', and its implications for worthy, but ultimately dispensable, tasks such as witness care:

⁴⁴ One respondent in this study frankly observed that it remains to be seen whether Witness Care Units are able to develop into anything more than 'glorified witness warning units'. In at least one Area included in this study, Witness Care Unit officers did not contact witnesses until the trial date had been fixed and then by telephone, making them less well placed than police officers, who have face-to-face contact with witnesses, to ascertain witness support needs.

'Some people in this organisation just get to go to meetings and therefore they are not in the court fodder... You are up to your elbows in muck and bullets and you have no idea why it is going on, you just know it is. There are not enough folks to do the work... Every time you go to court you pick up a file, and every time it's shit and you've got to sort it out as best you can at the last minute. All this nonsense about looking after witnesses is just not true. We just don't because we don't have time.' (**Prosecutor C5**)

Special measures, though integral to the case preparation process, have put additional strain on resources. For prosecutors, the main administrative burden stems from the video-interview, or as **Prosecutor A11** put it, 'from a case work point of view videos are an absolute nightmare!':

'Videos would not be a problem at all if we had time... to view them properly. But because you know you haven't, you are there thinking, "Oh my God it's a video case, I haven't got time to look at this properly, a statement would be far easier" and that's appalling, but it is the position we find ourselves in.' (**Prosecutor A11**)

Watching a video-recorded interview is a more time efficient means of assessing a witness's capabilities than a personal meeting, but in comparison to prosecutors' normal file-based approach to assessing witness evidence it is far more time-consuming (albeit often qualitatively superior). As **Prosecutor A11** described:

'The video is rambling. You've got all the truth and lies being established... You are not getting to the heart of the matter... You've got to go to the video room, there are going to be a few videos and you have got to keep going backwards and forwards to find that information. ROVIs^[45] never tell you the whole story. I'd far rather deal with statements than anything else.' (**Prosecutor A11**)

Prosecutors naturally make direct comparisons: 'If you conduct a forty-five minute video interview with a child, it takes forty-five minutes to watch. If you take a statement, five or ten minutes' (**Prosecutor C1**). **Prosecutor A12** echoed her colleague's sentiments:

'The first thing about a statement is that it is nice, short and concise. It runs to about four or five hand-written pages more often than not. A video you may be looking to two hours... I hesitate to say you fall asleep in them but certainly it can at times be difficult maintaining concentration.' (**Prosecutor A12**)

⁴⁵ The Record of Video Interview (ROVI) is a written summary, rather than a verbatim transcript, of the video-interview prepared by the police.

There are also more elaborate administrative arrangements for videos which prosecutors have to negotiate before embarking on the substantive process of assessing the video-evidence.⁴⁶ Youth Court prosecutors in particular complained about the increase in workload. For the specialist Youth Court prosecutors, watching children's videos has become a high-volume job.

'I would say easily 50% are youth cases, I expect it's probably more, probably 60%... It is something we argue about because of resources and how many staff we get. They don't take into account the fact that an awful lot of our cases are special measures and an awful lot of our cases have video interviews which take a lot longer to deal with.'
(Prosecutor C2)

This additional workload is all the more significant because lower court prosecutors have considerable out-of-office duties in relation to statutory charging and court appearances.

Complaints about excessive workloads are typical of many workplaces. However, the consequences of the expansion of CPS duties for 'the bedrock function' of case preparation are beginning to generate broader concerns.⁴⁷ The Parliamentary Justice Committee noted that CPS resources are increasingly organized by function and that the notion of case ownership is diminishing.⁴⁸ Such arrangements are not conducive to increased engagement with witnesses.

7.5 CONCLUSION

The automatic eligibility rule has troubling issues around rigidity which gives rise to pressure for a milder form of the rule. This chapter has considered three significant issues to emerge from this study which have implications for the nature of any reform: concern about widened discretion; weakness in

⁴⁶ 'The first advantage is that the statement will be on the file, whereas the videos will be in a cabinet, which may be locked. The girl with the key may be there, she may not' **(Prosecutor B7)**.

⁴⁷ *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System, Ninth Report of Session 2008 - 2009*, above note 33, para 71.

⁴⁸ *Ibid*, para 71 - 75.

infrastructure; and the positioning of the prosecutor as a champion for victims and witnesses.

Prosecutors in this study were split on how broad a discretion they should ideally retain in making special measures applications. Those who felt that televised testimony is detrimental to the quality of the child's evidence, and, by extension, the strength of the prosecution case, naturally advocated greater freedom to put capable children on the stand. These prosecutors were joined by a smaller, but not insignificant group, who would elect to keep capable child witnesses in court because the traditional trial model is fundamental to the legitimacy of criminal proceedings and thus should be preserved whenever possible. All qualified their comments with the proviso that open court testimony can be an option only for capable children. The remaining prosecutors displayed fewer concerns about departing from conventional trial arrangements. These prosecutors, generally newer to the profession and less steeped in the oral tradition, tended to regard televised testimony, whilst qualitatively different from oral evidence, as nevertheless 'up to the job'. This group supported greater prosecutorial discretion only to accommodate children who did not wish to use special measures or to cater for unusual circumstances. These prosecutors also expressed concerns about the reintroduction of more extensive prosecutorial and judicial discretion. The wider use of special measures for children brought about by the YJCEA 1999 has fostered greater, though not universal, acceptance within the CPS and judiciary. In contemplating a greater role for discretionary judgements, prosecutors expressed a well-founded fear that recent progress would be undermined.

These divergent views reflect the fundamental question whether 'special measures' should be regarded as normal or exceptional for children's evidence. This tension is further evidenced by the apparent contradiction of mapping an

application procedure onto a mandatory process. Front-line prosecutors saw special measures applications for children in need of special protection (who accounted for almost all child witnesses in our case samples) as an essentially pro-forma exercise. The level of error in both applications and special measures directions, and the blasé attitude of most prosecutors towards them, clearly demonstrates the routinisation of the special measures application process; at least as it applies to children. The entire apparatus begins to look like superfluous bureaucracy. But more fundamentally, prosecutors' complaints about time-wasting and needless complexity betray a conceptualisation of special measures as 'normal procedure' for children, even amongst prosecutors who have concerns about their routine use. Whether the judiciary has experienced the same level of attitudinal change is beyond the scope of this study to assess systematically, but we did encounter traces of judicial resistance to the idea that applications are unnecessary. This perhaps betrays a residual view that special measures, even for children, must be treated as a departure from the prevailing orthodoxy of live oral evidence.

The application process functions on a routine basis not because applications are well-drafted and properly evidenced (though in some cases they undoubtedly were) but because the rules say that the applications must be granted. 'Automatic eligibility' is convenient and predictable. The system consequently does not break down if the police neglect to provide details of a child witness's needs or abilities, or if the prosecutor includes perfunctory or even inaccurate details on the application form. It does not even matter if the criminal justice professionals fail to confirm with a witness that a special measures direction has been issued because, in the words of **Prosecutor B1**, 'The witness will be told that it is a matter of course that they will be giving their evidence that way'. The system works not because information is properly acquired and exchanged but because most decisions are made as a matter of course.

We finally saw in this chapter that the special measures process as currently implemented puts the onus on prosecutors to be the 'protectors' of children in court, yet that project is fundamentally misconceived. There are principled objections to fostering closer relations between prosecutors and victims and witnesses. The prosecutor's duty to act in the public interest will inevitably disrupt any attempt to make prosecutors the ultimate protectors of victims and witnesses' interests in court. Furthermore, even if it is accepted that there are limits to prosecutors' abilities to act in witnesses' best interests, a lack of infrastructure undermines prosecutors' efforts to support witnesses, adult or child. Prosecutors' lack of personal contact with witnesses and their dependence upon third party information to prompt and support special measures applications is revealed in this chapter as a weak point in the special measures system. High workloads then moderate any motivations prosecutors might have to work against these constraints and improve the quality of information regarding witness needs and capabilities. When we examine carefully the special measures application process for child witnesses, we see that the system functions largely on the basis of assumption and convenience. If we weaken the assumptions on which it is based, we must take seriously the possibility that the system will no longer function effectively. This is a matter that we will consider as part of the conclusion to this thesis, when we discuss the implications of the themes developed in this chapter for specific reform proposals.

Chapter 8

CONCLUSION

8.1 THESIS OVERVIEW

This research study set out to gain an in-depth understanding of the decision-making processes that underpin the use of special measures for children in criminal proceedings within the framework of the Youth Justice and Criminal Evidence Act 1999. It focused, in particular, on how legislation is filtered through the attitudes, beliefs and work practices of police and prosecutors to shape its practical implementation. Specifically, this thesis investigated: (i) the factors that influence police and prosecutors when selecting children for special measures support and the specific measures used to deliver that support; (ii) the consequences for policy and practice of the statutory obligations imposed by the special measures provisions of the YJCEA 1999, in particular the rigid rules that apply to children; and (iii) the impact of special measures on the pre-trial preparation of cases, including the demands of the application process and the implications for interactions between agencies. A small-scale, primarily qualitative study in three Crown Prosecution Service Areas was employed to investigate these issues.

Chapter 2 of this thesis first examined the extent of children's involvement with the criminal justice system as witnesses. It demonstrated that children fall victim to a variety of criminal offences and that, in numerical terms, child victims of street crime significantly outnumber the stereotypical child abuse victim. Fewer children appear as witnesses in criminal proceedings than experience crime as victims, but it is clear that the criminal justice system depends each year upon large numbers of child witnesses, possibly in the tens of thousands, to achieve criminal justice. These children encounter significant difficulties with the adversarial system of criminal justice. Chapter 2 outlined the

major obstacles to child witnesses providing good accounts to the police and the courts, and in coping with the procedures used to test their evidence.

Special measures are the primary mechanism used in England and Wales to try and mitigate the worst effects of adversarial process. There are serious questions to be asked about how far special measures are capable of resolving the problems that children face in court. There is growing consensus amongst commentators that the adversarial process and cross-examination, rather than the physical environment of criminal trials, constitutes the main challenge for child witnesses.¹ Although special measures may blunt the impact of cross-examination, a longer term question for legal research and policy is whether cross-examination is the best procedural mechanism for testing the evidence of children. To date, the legislative response has not been so radical. Chapter 3 described the current legal framework for special measures, and traced its roots to the Pigot report and the live TV link and video-recorded evidence provisions of the Criminal Justice Acts 1988 and 1991.

The YJCEA 1999 is a complex piece of legislation made all the more troublesome by its convoluted implementation. In relation to children, it is highly prescriptive. Chapter 3 recapitulated the presumptions contained within the 'primary rule', the system of notification originally used to effect its implementation, and the pivotal judicial ruling by the House of Lords in *Camberwell Green Youth Court*. The chapter concluded that policy guidance for video-interviewing has perpetuated the previous legislative focus on child abuse and, as a result, undermined the potential of the YJCEA 1999 to extend video-interviewing to all child witnesses. In contrast, CPS policy on the application of the statutory

¹ e.g. Louise Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford: Oxford University Press, 2001); Mandy Burton, Roger Evans and Andrew Sanders, 'Vulnerable and Intimidated Witnesses and the Adversarial Process in England and Wales' (2007) 11 *International Journal of Evidence and Proof* 1.

'primary rule' creatively extends special measures support to children who, in practice, tended to be marginalised under the previous statutory schemes.

The remainder of the thesis presents and analyses original empirical research. Chapter 4 addressed methodological issues. Chapter 5 presented research findings on police use of video-interviewing. Videos were made with less than half of all child witnesses, but there was significant variation amongst different categories of children. An ostensibly offence-based selection bias turned out to reflect the activities of specialist Child Protection Unit Officers. Complex motivations deter generalist officers from using the video-interviewing procedures. In addition to situational factors, such as the child's age, the accused's age and the officer's perception of the seriousness of the offence, weak policy influences, poor training, established working practices and efficiency pressures all play a role in persuading the generalist officer to take a written statement from a child. The lesson of Chapter 5 would appear to be that practice takes time to catch up with legislative innovation and, furthermore, that progress is easily derailed by structural obstructions to change.

Chapter 6 afforded more positive signs of change for children. The near-mandatory system for children, established by the legislation and given full effect in policy guidance, has been notably effective in increasing the numbers of children using special measures in court. We detected a significant shift in criminal justice professionals' attitudes towards children's evidence, which has been driven by the almost complete withdrawal of prosecutorial and judicial discretion in deciding how children may testify. Highly prescriptive legislative rules have successfully translated into practice and deviations from the rules are rare. However, Chapter 6 also noted continuing difficulties. The working rule that mandates a special measures application for video-recorded evidence and live TV link for every child witness to sexual or violent offending operates, implicitly, to

exclude child witnesses to non-sexual, non-violent offending. It also discourages prosecutors from considering other, discretionary, special measures for children. Well-founded evidential concerns about inconsistent statements dissuade prosecutors from requesting video-interviews when a child has already given a written statement. Ethical commitments and systemic issues, particularly lack of information on children's specific needs, discourage use of the other, discretionary measures available under the YJCEA 1999. There are serious fair trial implications of using special measures to shield the witness's image from the defendant. Nevertheless, Chapter 6 demonstrated that, in the main, a new norm of video-recorded evidence and live TV link seems to have been established for children testifying in criminal proceedings. The primary rule appears to have achieved substantial, perhaps unexpected, cultural change in criminal justice professionals' acceptance of special measures for children.

Chapter 6 concluded by observing that 'automatic eligibility' has drawbacks as well as benefits. Excessive rigidity spawns pressure for reform. There are concerns that the rules for eligibility have not been properly pitched; that some children are needlessly excluded whilst others receive support regardless of individual need. Chapter 7 considered three significant policy issues which emerged during this study and which might influence future reforms: concern about widened discretion; weaknesses in infrastructure; and the prosecutor's putative role as a champion for victims and witnesses. Prosecutors were split on how broad a discretion they should ideally retain in making special measures applications. Almost all favoured some measure of discretion, but several harboured serious concerns that a greater role for discretionary judgements might undermine the relatively fragile cultural acceptance within the CPS of special measures for children. Chapter 7 also crucially revealed that the existing 'mandatory rules' for children play a significant role in supporting an otherwise weak infrastructure for the special measures application process. The system

works not because information is properly acquired and exchanged but because most decisions are made as a matter of course. Finally, we saw that prosecutors are not well-placed, institutionally or practically, to act as victims' and witnesses' advocates or champions. Ultimately, the special measures application process for child witnesses appeared to function largely on the basis of supposition and convenience.

In the light of this analysis, we must consider whether any prospective adjustments to overcome difficulties with the existing scheme might fall prey to unintended consequences. Cultural change in favour of special measures is, we might think, too recent to have become securely embedded in criminal practice. This poses the question whether it is possible to devise any defensible and sustainable halfway house which achieves the aim of maintaining robust special measures support for children short of a mandatory scheme. We conclude by briefly surveying available reform options before considering, in more detail, the implications of the government's current proposals in the Coroners and Justice Bill (2009). As preliminary theoretical groundwork, however, we first examine more closely the notion of discretion in the regulation of criminal justice procedure.

8.2 RULES AND DISCRETION

When we talk about discretion within legal systems we generally mean the structured decision-making processes by which criminal justice professionals apply a series of rules or standards to a set of material facts or circumstances in order to come to a decision about a legal matter or procedure.² Very often the rules also include a list of considerations to guide decision-makers in their conclusions. All of the criminal justice agencies make discretionary decisions on

² See Dennis Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986); Rosemary Pattenden, *Judicial Discretion and Criminal Litigation* 2nd edn. (Oxford: Clarendon Press, 1990).

a daily basis. Most obviously, the police decide whether or not to arrest, CPS prosecutors decide whether or not to prosecute, and judges decide whether or not to admit evidence. Specifically, in the special measures context, the police, prosecutors and the judiciary all exercise some degree of discretion. In Chapter 5 we saw that the police use their discretion to decide whether to video-interview child witnesses. Chapter 6 described how prosecutors exercise differing levels of discretion to decide whether to make applications for different categories of children and different types of special measure. As we have seen, some of the special measures rules are more directive than others, and accordingly decision-makers have correspondingly more or less freedom to choose. As Tapper summarizes:

The basic distinction is between mandatory rules which, upon their antecedents being found to exist, exclusively require a conclusion; and discretions, which upon their antecedents being found to exist, may also inclusively permit that conclusion, but do not then require it.³

This theoretical dichotomy closely tracks the distinction between the mandatory use of video and live TV link for children in need of special protection and the permissible use of video and live TV link for other categories of children and other special measures generally. Discretion imports flexibility, which is necessary because it is impossible to foresee all of the circumstances in which a rule might come to be applied and linguistic ambiguity can never be eliminated entirely.⁴ By allowing decision-makers some discretion, it is assumed that they will apply the rules in line with their underlying policy rationalizations.⁵ The downside of flexibility is reduced predictability and certainty. However, the appropriate balance between flexibility and certainty will vary. Some rights and interests call for firmer protection than others. Gauging how stringent a rule can afford to be before it leads to injustice requires context-specific judgements that

³ *Ibid*, 69.

⁴ Colin Tapper, 'The Law of Evidence and the Rule of Law' (2009) 68 *Cambridge Law Journal* 67, 68.

⁵ *Ibid*.

cannot be made in the abstract. Discretionary decisions are vulnerable to manipulation, inconsistency and idiosyncratic rather than principled choices. Discretionary decision-making consequently requires scrutiny and mechanisms for remedial corrections. In this, the quality of drafting is important. Where the factors controlling the exercise of discretion are clearly defined, the potential for misuse is reduced. In the main, however, control over the use of discretion is retrospective. Judicial discretion is subject to the control of the appellate courts. The discretionary decisions of front-line practitioners are much harder to police. Complaints mechanisms exist and judicial review is sometimes an option, but many contentious decisions inevitably go unchallenged.

8.3 REFORM OPTIONS

There are a number of ways in which special measures legislation in the YJCEA 1999 could be adjusted to deal with the issues identified in this thesis. Firstly, the existing strong presumption in favour of children in need of special protection could be weakened to allow the presumption in favour of video-recorded evidence and live TV link to be displaced if (a) the measures would not maximise the quality of the child's evidence or (b) the child expressed a wish not to use the measures. Secondly, the existing presumption could be retained but with the addition of a tightly defined 'safety valve' discretion to deal with the difficult cases described in Chapter 6. This would be a more narrowly-targeted scheme to deal with absurdities whilst retaining an essential level of support for children. Such a scheme might, for example, take the form of a rule of mandatory use, 'except where it would be manifestly contrary to the interests of justice to do so'. The safety-valve solution has been used elsewhere and was, for example, adopted in the Criminal Justice Act 2003 which contains an inclusionary discretion to allow the admission of otherwise inadmissible hearsay 'in the interests of justice'.⁶ The challenge lies in whether it is possible to draft

⁶ Section 114(1)(d).

this type of rule tightly enough to prevent its use beyond the truly meritorious cases.⁷ Thirdly, we could assert that hard cases are the inevitable price we pay to achieve an effective working rule which protects children. This last approach is to accept that the drawbacks are sufficiently few to be regarded as a tolerable burden justified by the benefits the system delivers for the great majority of children.

8.4 CURRENT REFORM PROPOSALS

In 2004 Baroness Scotland announced plans to review how children's evidence is taken and presented in the criminal courts,⁸ including consultation on 'providing more flexibility in the range of measures that are available to young witnesses with the aim of giving them more choice'. Baroness Scotland also declared 'our aim of enabling measures to be more tailored to the individual witness's needs'.⁹ The Review Group's Consultation paper in particular canvassed whether (i) the distinction between children in need and children not in need of special protection should be removed and special measures granted on the basis of the assessed need of each child; and (ii) children should be given the choice of testifying in the courtroom rather than from the live-link room.¹⁰ The Government decided to act on both of these suggestions, and subsequently included amendments to the YJCEA 1999 in the Coroners and Justice Bill (2009).

⁷ The hearsay safety-valve is a classic example of the consequences of wide drafting. Although the Law Commission recommended a limited inclusionary discretion, s.114(1)(d) is drafted in wide terms: Ian Dennis, *The Law of Evidence* 3rd edn. (London: Sweet & Maxwell, 2008) 747. Subsequently, the Court of Appeal has upheld the broad use of the discretion. Section 114(1)(d) potentially applies to all out-of-court statements, but in *R v Y* [2008] EWCA Crim 10 Hughes LJ emphasised that the purpose of s.114(d) is not to facilitate routine admission. Each case must be carefully judged on its merits to determine whether admission is in the interests of justice. See David Ormerod's commentary on the case in [2008] Crim LR 466 and Tom Worthen, 'The Hearsay Provisions of the Criminal Justice Act 2003: So Far, Not So Good?' [2008] Crim LR 431.

⁸ *Hansard*, HL Vol.664, col.47WS – 48WS (July 22, 2004).

⁹ In their briefing paper on s.28 pre-recorded cross-examination, Birch and Powell made recommendations on the issues of witness choice and increased flexibility in the use of video-recorded evidence and live TV link, particularly in relation to older children. See Diane Birch and Rhonda Powell, *Meeting the Challenges of Pigot: Pre-Trial Cross-Examination under s.28 of the Youth Justice and Criminal Evidence Act 1999* (February 2004) 61.

¹⁰ (London: OCJR, 2007). See also *Government Response to the Improving the Criminal Trial Process for Young Witnesses Consultation* (London: Ministry of Justice, 2009). Both papers are available from <<http://www.justice.gov.uk/consultations/young-witness-consultation.htm>>.

There are two key proposed changes to s.21 of the YJCEA 1999. Firstly, the witness will, subject to the court's approval, be able to opt out of using the primary rule special measures in favour of live oral evidence in court, preferably, but not definitively, from behind a screen.¹¹ Secondly, the probative burden in s.21(4)(c) to satisfy the court that the special measures selected would maximise the quality of the child's evidence will be widened to apply to all children.¹² In proposing these changes, the Government declared an intention to 'allow courts to base their decisions on special measures on the informed views of the witness and the judgment of the prosecutor'.¹³ This reform route follows the pattern of the first option outlined above. It weakens the rules applicable to most children by allowing the presumption in favour of video-recorded evidence and live TV link to be displaced for children in need of special protection where previously this was not possible. The court's discretion to allow a child to opt out of the primary rule special measures is to be subject to a set of guidelines intended to ensure that the child's decision is reasonable, but there are no guidelines to assist the judge in deciding whether the primary rule measures will maximise the quality of the witness's evidence.

8.5 IMPLICATIONS OF THE PROPOSED REFORM

Will the reintroduction of discretion into the special measures decision-making process undermine the recently cultivated cultural acceptance of children's need for support in court? The issue is not simply about appropriate uses of discretion. This study has shown that there are likely to be structural shortcomings in supporting a discretionary system.

¹¹ Clause 90(4)(b).

¹² Clause 90(2).

¹³ *Government Response to the Improving the Criminal Trial Process for Young witnesses Consultation* (2009) 26.

8.5.1 The Proper Use of Discretion?

Hoyano has queried whether a system based upon particularised need will herald a return to *Redbridge*, requiring children to demonstrate that without the measures sought there is a real risk that they will be unable to testify or provide only partial testimony.¹⁴ The proposed changes are not a return to the very wide discretion that previously existed under the CJA 1991's interests of justice test. Even as amended, s.21 of the YJCEA 1999 will contain a presumption in favour of video-recorded evidence and live TV link that should apply unless displaced. As discussed in Chapter 3, it is not entirely clear who would or should take up the persuasive burden of displacing that presumption,¹⁵ but Hoyano's concern is that in practice judges will reverse the emphasis of that burden and rule out special measures in the absence of demonstrable need.

A further question is who bears the responsibility to invoke non-mandatory special measures. This study shows that some prosecutors persist in the view that special measures have a detrimental effect on the quality of a witness's evidence. Prosecutors may, therefore, decline to make special measures applications in the absence of information establishing need. Whilst appellate control of judicial discretion is conceivable, effective scrutiny of prosecutorial discretion is much harder to achieve. Section 19(2) of the YJCEA 1999 includes a power for the court to consider the matter of its own motion should the relevant party fail to make an application, but it is far from clear that this duty is an effective remedy for prosecutors' lack of initiative. We saw in this study that where the court possessed a discretion under the YJCEA 1999 to decline to issue a special measures direction, application rates remained low. This finding lends support to Hoyano's speculation that increased discretion under s.21 of the

¹⁴ Laura Hoyano, 'The Child Witness Review: Much Ado About Too Little' [2007] Crim LR 849, 857. See also Sections 3.3.2 and 3.3.3.

¹⁵ See Section 3.3.2.

YJCEA 1999 would erode the underlying policy of making special measures presumptively available to all children.

Hoyano's concern was expressed prior to the publication of detailed reform proposals in the Coroners and Justice Bill. The Government's declared intention was to:

provide a more flexible approach, enabling young witnesses to opt out of video recorded evidence in chief and live links, whilst providing appropriate safeguards, including the approval of the court.¹⁶

Notably there are no explicit legislative requirements for auditing the accuracy of a prosecutor's decision that a child does not need special measures support. Whereas the proposed new version of s.21 does contain checks to ensure that a child's expressed wish to give evidence without special measures support is reasonable. The child must inform the court that she does not wish to use the primary rule measures, and the court must be satisfied that as a result the quality of the child's evidence will not be diminished.¹⁷ In making that judgement, the court must consider the age and maturity of the witness and the witness's understanding of the consequences of her choice.¹⁸ If the child in addition declines to use a screen, the court must also consider the witness's relationship to the accused, her social and cultural background and ethnic origin, and the nature and circumstances of the alleged offence. The court must therefore satisfy itself that the child's decision is properly considered before allowing the child's wishes to take effect.

It remains to be seen, in the absence of an application to use special measures, how the court will secure access to the necessary information. Even if the

¹⁶ *Government Response to the Improving the Criminal Trial Process for Young witnesses Consultation*, above note 13, 26.

¹⁷ New s.21(4)(ba) inserted by clause 90(4) of the 2009 Bill.

¹⁸ New s.21(4C) inserted by clause 90(6) of the 2009 Bill.

information were to be made available, how could the court at the pre-trial stage assure itself that the information was a reflection of the child's rather than the criminal justice professional's views? Such procedural details are key to ensuring that a system reinvested with discretion is appropriately used. Moreover, there is every reason to suspect that courts will be unable to assure themselves of the validity of children's view until the trial commences, surely a retrograde step when a prime motivation for requiring early special measures applications is to provide early confirmation to the witness of how she will testify at court.

8.5.2 Weak Infrastructure

The second potential problem with a discretionary system of special measures for children is that the existing procedural infrastructure is poorly designed to cope with the demands of a rule that requiring pre-trial exercises of discretion. This study shows that the systems in place to determine children's wishes and assess their special measures needs are ill-adapted to support evidence- rather than rule-based decision-making.

We have seen that existing arrangements require prosecutors to make decisions about witnesses' capabilities based upon information supplied by third parties, usually the police. Although this information is of variable quality, the de-facto presumption of automatic eligibility has allowed that inadequacy to pass largely unnoticed and without serious detriment. It became visible when we searched for explanations for the extremely low application rates for discretionary special measures. Although prosecutors sometimes refrained from making discretionary applications on evidential grounds, they also said that with better information on children's needs and views they would use discretionary measures more often. In summary, there are substantial grounds for doubting the efficacy of the existing systems for recording and communicating children's needs and wishes.

If the changes proposed in the Coroners and Justice Bill (2009) are implemented, judges will be required to make decisions based upon the stated wishes or the assessed need of the child. That scheme would depend upon the ability of the CPS to present individualised information about witness needs and capabilities, which would in turn depend upon the abilities and willingness of the police to provide such information. This study suggests that the prosecutor is not well placed or sufficiently resourced to compensate for the inadequacies in information flow that would become more pronounced should the special measures decision become more personalised than it is at present. Taken together, concerns over inadequate control of discretion and inadequate information flows make the prospects for maintaining the current high levels of special measures support for children look highly uncertain.

8.6 CONCLUSION

With the benefit of Chapter 7's empirically-grounded analysis of the application process for special measures for children, this chapter considered two potential options for reform. First, a general weakening in the presumptions for children; and secondly, the introduction of a safety-valve discretion to cater for difficult or unusual cases. The possibility of maintaining the status quo, on the ground that occasional anomalies are a price worth paying for an effective working rule for children, was also canvassed.

The Government has opted for a general weakening of the primary rule, a reform strategy that may prove ill-judged in the light of this study. Reintroduction of a wide discretion to withhold assistance from children who, in Birch and Powell's words, 'do not really need it' may, in practice, have the unintended consequence of undermining the recently consolidated cultural acceptance of special measures for child witnesses. Moreover, the systems currently in place to determine children's wishes and assess their special measures requirements seem

inadequate to support the conversion from a rule-based to an evidence-based process. In the meantime, this study richly substantiates the socio-legal truism that institutional frameworks and criminal justice professionals' attitudes and working practices condition the successful implementation of broader policy objectives.

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