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Fairclough, Samantha

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Special measures for vulnerable defendants: the who, what, when, where, why, and how

Samantha Fairclough

The Youth Justice and Criminal Evidence Act (YJCEA) 1999 saw the introduction (or rather, expansion and codification[1]) of the special measures scheme for vulnerable and intimidated witnesses testifying in criminal trials. The eligibility for special measures, and the extent of the measures themselves, is well-trodden ground. Training courses and materials, judicial guidance, and toolkits are abound on these measures and appropriate questioning techniques for vulnerable witnesses.[2] Also well-known is the fact that the 1999 statutory special measures scheme explicitly excludes the accused from eligibility. What is less well-versed is the (piecemeal) eligibility for special measures that has ensued for defendants; when this could be beneficial to defendants; and why its use might be important to uphold the principles of justice and maintain fairness in criminal proceedings.

History

Defendants, as witnesses, were excluded from the statutory special measures scheme on the basis of one paragraph in the 273-page *Speaking up for Justice* report[3] that preceded its introduction. Three reasons were given. First, the existence of special procedures for interviewing vulnerable suspects at the police station (no further detail was given, but presumably this was a reference to appropriate adults). Second, that 'considerable safeguards in the proceedings as a whole … ensure a fair trial', such as legal representation and non-compellability. Third, that special measures – so the working group believed – are there to shield witnesses from the defendant and so would not be of material use to defendants themselves. I have argued elsewhere that these reasons, neither individually nor collectively, form a justifiable basis to exclude vulnerable or intimidated people accused of a criminal offence from support when testifying in criminal trials.[4] In brief, the need for special procedures (appropriate adults) pre-trial supports the need for additional support at trial, rather than justifying the denial of it. As for safeguards in the proceedings, legal representation is not a substitute for measures that can, for example, remove an anxious defendant from the courtroom (as live link could), or help an individual with severe communication difficulties to communicate (as an intermediary could).[5] The fact that defendants are not compellable does not affect a) their right to testify if they wish to (for which they should be supported if need be)

[1] For the history of the development of the provision of special measures into its current form see Ruth Marchant, 'Special Measures' in Penny Cooper and Heather Norton (eds) *Vulnerable People and the Criminal Justice System* (OUP 2017) 333.
[2] The Advocate's Gateway toolkits: https://www.theadvocatesgateway.org/; National Training Programme Advocacy and the Vulnerable (Crime), 'The 20 Principles of Questioning: A Guide to the Cross-Examination of Vulnerable Witnesses' (ICCA 2022); *R v Barker* [2010] EWCA Crim; etc.
[3] Home Office, *Speaking up for Justice* (1998) para 3.28.
[4] Samantha Fairclough, 'Speaking up for Injustice: Reconsidering the Provision of Special Measures Through the Lens of Equality' [2018] *Criminal Law Review* 4, 11-16.
[5] Though cf *R v Rashid* [2017] EWCA Crim 2 [73] but see also David Wurtzel, 'Whatever happened to Rashid competence?' (2021) 5 *Archbold Review* 4.

or b) the consequences of not testifying if they do not (adverse inferences drawn from their silence[6]). And finally, special measures are designed to achieve best evidence, which is about much more than their potential use as a buffer between witnesses and the accused. As we will see, they can be (and have been) useful to defendants in a variety of ways.

Concerns brewed within the legal professions, that surfaced in appeals that reached the House of Lords and the European Court of Human Rights (ECtHR), about the treatment of vulnerable defendants in trials and the inequality between the accused and other vulnerable witnesses. For instance, the issue of the effective participation of child defendants in Crown Courts was examined in the ECtHR in *T v UK*[7] and *SC v UK.*[8] The Divisional Court considered the issues facing intimidated defendants (the facts involved a 14-year-old defendant with a 'cut-throat' defence who was scared to testify in the presence of her co-defendants) and the support that could properly be available.[9] The Court of Appeal in *R v SH*[10] first considered issues around the provision of intermediaries to defendants with communication needs. And the denial of live link to vulnerable witnesses – on the basis that it was not also available to comparably vulnerable defendants – was a topic that landed before the House of Lords in *R v Camberwell Green Youth Court.*[11] The net result of these – and other – cases is the (somewhat ad hoc and piecemeal)[12] availability of a range of special measures to vulnerable (and intimidated) defendant witnesses.

Who, what, how?

This section, then, outlines the special measures that are available to defendants (what); which defendants can secure this support (who); and the legal authority for securing them (how). The first thing to note is that there is (unhelpfully) no set or common definition of vulnerable or intimidated when it comes to defendants.[13] As such, we must consider defendants' eligibility for each available special measure discretely. The conceptualisations of vulnerability and intimidation for defendants – and thus their eligibility for special measures support – is usually more restrictive than it is for non-defendant (prosecution and defence) witnesses under the full 1999 scheme.[14]

Closure of court to public/removal of wigs and gowns/communication aids

In the case of *T v UK,* the ECtHR ruled that child defendants (aged 11) on trial for murder in the Crown Court could not effectively participate in the proceedings, in part as a result of the formalities and the large attendance of press and the public.[15] As a result, the Lord Chief Justice

[6] As per Criminal Justice and Public Order Act 1994, s 35(3).
[7] *T v UK* (1999) 30 EHHR 121.
[8] *SC v UK* 40 EHRR 10.
[9] *R v Waltham Forest Youth Court* [2004] EWHC 715 (Admin)
[10] [2003] EWCA Crim 1208 [25].
[11] *R v Camberwell Green Youth Court* [2005] UKHL 4.
[12] See Samantha Fairclough, 'The Consequences of Unenthusiastic Criminal Justice Reform: A Special Measures Case Study' (2021) 21(2) *Criminology and Criminal Justice* 151.
[13] Or indeed witnesses, see S Drew and L Gibbs, 'Identifying and Accommodating Vulnerable People in Court' (2019) 10 *Arch Rev* 7.
[14] See further Samantha Fairclough, 'Speaking up for Injustice: Reconsidering the Provision of Special Measures Through the Lens of Equality' [2018] *Criminal Law Review* 4.
[15] *T v UK* (1999) 30 EHHR 121 [86]

issued a Practice Direction which permitted the removal of wigs and gowns and the closure of court to the public when child defendants testified.[16] This has since extended to include 'vulnerable defendants' generally (so including vulnerable adult defendants),[17] but a definition of 'vulnerable defendants' is omitted.

The power for communication aids to be used by vulnerable defendants, such as 'models, plans, body maps or similar aids' to help with communication in testimony is found under the Criminal Procedure Rules.[18] Defendants who are eligible for this are those that the court deems to require directions for the appropriate treatment and questioning to facilitate their participation.[19]

Screens

The Divisional Court in the appeal of *R v Waltham Forest Youth Court* ruled that defendants are eligible for screens under the court's inherent jurisdiction, notwithstanding their exclusion for eligibility under the 1999 Act.[20] This was on the basis of intimidation (in this case from co-accused) that affected the appellant's ability to testify in the proceedings, but no firm criteria for eligibility going forward was laid out by the court. Presumably, the criteria for its use will be where it is 'appropriate and necessary for facilitating a fair trial process' as per the Administrative Court,[21] and thus part of ensuring the defendant is able to effectively participate in the trial as a witness (and give their best evidence).[22] Oddly, this measure does not feature in the Criminal Procedure Rules or Criminal Practice Directions as a specific adaptation available for vulnerable (or intimidated) defendants, but it remains good law.

Live Link

The Divisional Court in *R v Waltham Forest Youth Court* also considered the availability of a live link, stating that no comparable inherent power existed for the provision of live link to the accused.[23] This was because it was a measure born from legislative origins rather than common law ones (unlike screens which date back to at least *R v Smellie*).[24] The Court of Appeal (Criminal Division) affirmed this in *R v Ukpabio*.[25] Despite these decisions, however, the accused is now entitled to testify via live link as per the insertion of section 33A to the YJCEA 1999.[26] This is available to defendants under 18 whose ability to participate effectively in the proceedings as a witness is compromised by their level of intellectual ability or social functioning (and the live link would enable more effective participation), and adult witnesses who have a mental disorder or other significant impairment of intelligence and social function that renders them unable to participate in the proceedings as a witness (and the live link would

[16] Practice Direction: Trial of Children and Young Persons in the Crown Court [2000] 2 All E.R. 285.
[17] Criminal Practice Directions 2015 (consolidated with amendment no.12 [2022] EWCA Crim 367) Crim PD 3G.12 and 3G.13.
[18] Criminal Procedure Rules 2020, Part 3: General Rules, Case Preparation and Progression, Crim PR 3.8(7)(b)(vii).
[19] ibid Crim PR 3.8(6).
[20] [2004] EWHC 715 (Admin) [31].
[21] ibid.
[22] As per Crim PD 3D.2.
[23] *R v Waltham Forest Youth Court* [2004] EWHC 715 (Admin) [71].
[24] (1919) 14 Cr App R 128
[25] The Court of Appeal found an inherent power for video link to enable participation during the trial, but not for the purposes of giving evidence *R v Ukpabio* [2007] EWCA Crim 2108 [17].
[26] Inserted via the Police and Justice Act 2006, s 47.

enable more effective participation).[27] It must additionally be considered in 'the interests of justice' that the accused testifies in this way.[28]

Intermediaries

There is – an as yet inactive – statutory provision for vulnerable defendants to testify with the assistance of an intermediary.[29] The eligibility criteria for this are identical to that for live link, save for the replacement of the interests of justice test with a requirement that the intermediary direction is 'necessary in order to ensure that the accused receives a fair trial'.[30] In practice, the power for an intermediary is derived under the common law, first given the go-ahead in obiter comments made by the Court of Appeal in *R v SH*,[31] and formally recognised in *C v Sevenoaks Youth Court.*[32] The extent to which this measure is available – and indeed how enthusiastic the Court of Appeal is about the employment of defendant intermediaries – is a convoluted tale.[33] At present, the approach adopted is that defendant intermediaries (historically non-registered intermediaries, but now the HMCTS Approved Intermediaries Service (HAIS))[34] should be used rarely.[35]

Pre-recorded evidence – in chief and cross-examination

There is no legal authority for the use of pre-recorded methods to secure defendants' evidence, whether as evidence-in-chief or cross-examination.[36] The issue of evidence-in-chief recordings arose in case law back in the early 00s but was disregarded as impractical and difficult to regulate.[37] This was because the accused's video would not have to be disclosed, meaning multiple versions could be filmed,[38] and – more pressingly – the fact that, should the defendant testify, they would need to answer the prosecution case, making pre-recording any evidence in advance of this undesirable and unhelpful.[39] Though not (yet) discussed in the appellate courts, the issue of pre-recorded cross-examination of the accused would probably also be unworkable in practice given the role of the defendant and the structure of the trial.[40]

Where and when?

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[27] Section 33A(4) and 33A(5) respectively.
[28] Section 33A(2)(b).
[29] YJCEA, s 33BA, as inserted via Coroners and Justice Act 2009, s 104.
[30] YJCEA, s 33BA(2)(b) as yet unimplemented.
[31] [2003] EWCA Crim 1208 [25].
[32] [2009] EWHC 3088 (Admin).
[33] See John Taggart, 'Intermediaries in Criminal Proceedings – A Role in Need of Clarification?' (2021) 1 *Archbold Review* 6.
[34] As of 1st April 2022, all intermediaries working in the criminal justice system must be approved by HMCTS as either individual Approved Service Providers (ASPs) or Managed Service Providers (MSPs). See https://www.gov.uk/guidance/hmcts-intermediary-services.
[35] *R v Rashid* [2017] EWCA Crim 2 [73].
[36] As a measure born from statutory origins, the precedent in *R v Waltham Forest Youth Court* – that there is no inherent power to grant it – would presumably apply here unless overturned.
[37] *R v SH* and *R v Camberwell Green Youth Court*.
[38] R v SH [135].
[39] Camberwell Green [58].
[40] Though perhaps if the only other witness evidence were pre-recorded, then it would be possible to pre-record the accused's testimony as well.

The measures outlined above are available for the purposes of giving evidence in criminal trials across the Crown Court and magistrates' courts, including the Youth Court.[41] With regard to intermediaries, there is some – very limited – scope for their use for defendants for the duration of trial and not just for evidence.[42] On a somewhat ad hoc basis they have been used in police interviews with suspects (in addition to an appropriate adult) and conferences with advocates where necessary.[43]

The limited data available on defendant use of special measures indicates that it happens infrequently.[44] The fact that the full 1999 scheme is only for non-defendant witnesses, and that the political rhetoric around it – and indeed much of the legal professions' training on vulnerability and special measures – centres specifically on witnesses for the prosecution, provides some explanation for why this might be.[45] As a result, a defendant's vulnerability, and their eligibility for special measures, may not be (as quickly) identified.

But in fact, defendants are often vulnerable in multiple ways. Jacobson and Talbot highlight that mental illness and learning difficulties often co-exist among accused people.[46] Similarly, Cunliffe et al found that 36% of surveyed prisoners (who at one point will have been the accused) had a disability and/or a mental health problem.[47] In particular, children are thought to be 'doubly vulnerable' due to their age and other intellectual and emotional issues.[48] There is a significantly higher prevalence of neurodiversity among those convicted of an offence than the general population,[49] as well as a disproportionate number of individuals with communication difficulties and special educational needs.[50]

Why?

There are many reasons for the provision (and use) of special measures for vulnerable and intimidated defendants. Most obviously, defendants have a right to effective participation in their trial[51] and this includes the ability to give their best evidence.[52] The use of special measures, to assist vulnerable defendants who have communication difficulties or problems

[41] They are also increasingly available in civil courts such as family courts and employment tribunals, see Civil Practice Direction 1A – Participation of Vulnerable Parties or Witnesses.
[42] Crim PD 3F.13.
[43] See John Taggart, '"I am not beholden to anyone … I consider myself to be an officer of the court: A comparison of the intermediary role in England and Wales and Northern Ireland' (2021) 25(2) *International Journal of Evidence and Proof* 141, 151.
[44] Samantha Fairclough, 'Using Hawkins' surround, field and frames concepts to understand the complexities of special measures decision-making in Crown Court trials' (2018) 45(3) *Journal of Law and Society* 457, 465.
[45] There are several, interconnected, reasons – see ibid, 479-482.
[46] Jessica Jacobson and Jenny Talbot, *Vulnerable Defendants and the Criminal Courts: A Review of Provision for Adults and Children* (Prison Reform Trust, 2009) 7.
[47] Charles Cunliffe et al, *Estimating the Prevalence of Disability Amongst Prisoners: Results from the Surveying Prisoner Crime Reduction* (SPCR) Survey (MOJ 2012) 141.
[48] Jessica Jacobson and Jenny Talbot, *Vulnerable Defendants and the Criminal Courts: A Review of Provision for Adults and Children* (PRT 2009) 37.
[49] Nathan Hughes and others, *Nobody Made the Connection: The prevalence of Neurodisability in Young People Who Offend* (Children's Commissioner Report 2012) 23.
[50] Lord Carlisle, *Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court* (June 2014) 15. See also Amy Wigzell, Amy Kirby and Jessica Jacobson, *The Youth Proceedings Advocacy Review: Final Report* (Institute for Criminal Policy Research 2015).
[51] Criminal Procedure Rules 2020 Crim PR 3.8(3)(b).
[52] Criminal Practice Directions (October 2015, amended October 2020) CPD 3D.2.

speaking in public due to anxiety, fear, etc, is an important part of upholding this right. Furthermore, to hear evidence from the accused (if they choose to testify) that is as 'complete, coherent, and accurate'[53] makes it more likely that verdicts are reflective of the actual truth of the matter and so the guilty are convicted and the innocent acquitted.

Another reason to secure special measures for vulnerable or intimidated defendants is the principle of equality of arms. The ECtHR has ruled that Article 6(1) of the ECHR requires that 'each party should be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent'.[54] This means that 'both parties should be treated in a manner ensuring that they have a procedurally equal position to make their case'.[55] Since oral evidence is central to adversarial criminal trials, it is important that all witnesses, including the accused, are assisted to give such evidence to the best of their ability if they need support. Furthermore, failing to make reasonable adjustments in the form of special measures may also contravene the Equalities Act 2010.

Finally, the principle of humane treatment requires that we do not subject individuals to additional distress than that which is necessary and proportionate to the legitimate aims of the system.[56] The denial of special measures to certain vulnerable defendants – and thus the requirement that any evidence from them is given live in court – may cause them heightened stress that contravenes the principle of humane treatment. Procedural justice is about more than the use of reliable procedures to attain factually accurate verdicts; it is about ensuring that individuals are treated as moral equals and shown adequate respect in the process.[57]

What next?

Several changes are needed to improve the assistance given to vulnerable defendants at trial and the initial identification of their vulnerability. An obvious and overriding one is adequate funding of the criminal justice system and those working within it, so that sufficient time and resources can be dedicated to these issues. Three further changes include:

1. A statutory scheme of special measures for defendants (or the inclusion of them in the 1999 scheme) would put the provision of special measures on a comparable legal footing to that for non-defendant witnesses and avoid the scattered provision of special measures for defendants that we currently have.
2. The introduction of mandatory training for the legal professions that focuses specifically on defendant vulnerability and support would leave them better equipped to address any such issues. It is oversimplistic to assume that training undertaken on witness vulnerability is easily transferrable to defendants, whose situation and role in the trial is entirely different.

[53] YJCEA, s 16(5).
[54] *Salov v Ukraine* App no 65518/01 (ECHR 9 September 2005) [87].
[55] Stefania Negri, 'The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure' (2005) 5 *International Criminal Law Review* 513, 513.
[56] See Samantha Fairclough, 'The Lost Leg of the Youth Justice and Criminal Evidence Act 1999: Special Measures and Humane Treatment' (2021) 41(4) OJLS 1066.
[57] See Denise Mayerson and Catriona Mackenzie, 'Procedural justice and the law' (2018) 13 *Philosophy Compass* 1, 9.

3. An update to the Criminal Practice Directions that sees screens included as an available adaptation to the accused and a comprehensive definition of 'vulnerable defendants' outlined would increase awareness among the legal professions.

Conclusion

This article has outlined the special measures support that is available – and the legal authority for its use – to vulnerable defendants who choose to testify in criminal trials. Advocates, judges and external influences on the criminal justice process (politicians, policymakers, academics) are significantly less well-versed in the existence of this support. Furthermore, there is less obvious need for the support for defendants, a category of people who have not always been considered as vulnerable due to the charges against them and the existence of their legal representation. What is emphasised here is the importance of securing special measures support for vulnerable defendants – and indeed the potential consequences of not doing so – in terms of both our commitment to normative principles underpinning the adversarial criminal trial and the real-life consequences for individuals left without sufficient support.