The Vulnerable and Intimidated Witness: a study of the Special Measure Practitioner

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Abstract

Special Measures (SM) were introduced under the Youth Justice and Criminal Evidence Act (YJCEA, 1999), forming part of measures used to assist Vulnerable and Intimidated Witnesses (VIW). *Speaking up for Justice* (Home Office, 1999) recognised that being a witness in a Criminal proceedings can be a stressful affair; Leveson (2015) highlighted the need for consistent judicial case management where SM are concerned. In the current study of 70 practitioners, it was found that the YJCEA provides sufficient legal gateway for VIW's. However, there remains an area for development in the early identification of VIW's, and there is an inefficient infrastructure around case-file management. This results in some SM being denied, applied incorrectly, or forgotten altogether. The majority of practitioners feel there is inadequate training around VIW's, and a lack of adequately trained specialist investigators for video interview procedures. Witness assessment is shown to be sporadic with some Constabularies excelling where others do not. Funding in this area does not appear to be a hurdle in the application of SM; many practitioners agreed that there is a problem with identification between the two *'gateways'* (s.16 and s.17) under the 1999 act, and witnesses *'needs'* are often assumed and not assessed. There appears to be no standardised assessment for witnesses despite the requirement that a *'needs assessment'* be conducted under the Code of Practice for Victims of Crime (Ministry of Justice, 2015). Although '*Identifying vulnerability in witnesses and defendants'* (Cooper et al., 2014) does contain a toolkit for collectively assessing vulnerability making reference to a number of key areas of research and law (Bradley, 2010; Bull, 2010; Young, 2013; Gregory & Bryan, 2011; Gudjonsson, 2010; Criminal Practice Directions, 2013) this kind of assessment does not appear to be reflected in practice although practitioners do purport that SM has a positive impact on witnesses.

Keywords: Vulnerable and Intimidated Witness, Criminal Investigation, Special Measures.

Witnesses, the Act and the Court

Witnesses in criminal trials, both as victim and non-victims, are often relied upon for their knowledge of a particular event or circumstance; their knowledge, which is primarily elicited by the Police as investigators, can be recorded and retained in a variety of different formats (Cook & Tattersall, 2010). Durston (2011) purports upon measures to manage witnesses evidence in criminal cases as being a relatively complex but crucial affair for both counsels; it is 'normal' for the witness to orally relay their account of a particular circumstance to an Investigator, and for it to be noted down in the form of a written witness statement[1]. The witness must agree to this procedure; this creates a difficulty within itself. In the case of *R v Davis and Ellis [2006] 2 Cr App R 32, CA* the recorder notes one Detective Constable as relaying to the court:

> *"Most people opt not to co-operate and do not get involved. Doors are not opened, arranged meetings result in a witness not turning up, telephone messages go unanswered and messages left at home addresses and work, although discrete are ignored. This is not a problem that exists on an occasional basis . . . it is a problem that exists in practically every investigation in one way or another. Such problems exist on a daily basis. I have spoken to witnesses about a reluctance to give evidence. The common factor between all of them is fear".*

The cyclical event that is crime, victimisation and cohesion between the Police, the Courts and the Public relies heavily on the ability of a *trust* between the witness and the court process (Cook & Tattersall, 2010; Hoyle & Zedner, 2007). The Youth Justice and Criminal Evidence Act (YJCEA, 1999) was designed, in part, to assist in that trust, placing between witnesses and the court a support mechanism to alleviate fear and enable some witnesses with psychological vulnerability, or those victim to sexual crimes, and witnesses to knife crime, measures such as screens and video recorded evidence which can be played in the court[2]. Birch (2000) highlights that the measures under the YJCEA enables witnesses to give evidence which may otherwise not be entered into the Criminal Court; either because the witness is too afraid, or they are unable to offer evidence in the witness box without, for example, an intermediary or aids to communication. The YJCEA caters for Vulnerable and

[1] In compliance with Criminal Justice Act 1967, s.9; Magistrates Court Act 1980, ss.5A(3)(a) and 5B; Criminal Procedure Rules 2005, Rule 27.1

[2] A full list of measures can be found at p. 407-41; Durston, G. (2011). Evidence: text & materials. Oxford University Press.

Intimidated Witnesses (VIW) alike and measures offered to each of these 'types' of witnesses are done so on an individual basis and through application to the court (Durston, 2011). It is a well-recognised fact that there are inherent issues within the identification of witnesses who may benefit from measures under the YJCEA; many of those are discussed in Ewin (2015). Other research highlights a failure between the process of identification, communication and the court (Burton et al., 2007; Burton et al., 2006; Charles, 2012; CJJI, 2009). O'Mahony et al. (2011) highlights the need for a full assessment of witnesses to be accurately obtained and communicated throughout the investigation and the court process, not only in relation to Video Recorded Evidence (VRE) but of all witness evidence. With this in mind, the aim of the following study was to investigate practitioner reactions to research publications and understand the value of that research as a reflection of current practice. The study itself forms part of a wider piece of research and much of the background to this can be found in Ewin (2015).

Method

Design

This study was designed to form part of a larger project around the subject of managing VIW's in criminal proceedings. Byrne and Lurigio (2009) describe how Criminal Justice agencies can be sceptical about research of their practice conducted away from their control. Nutley et al. (2007) purports that one of the most influential ways to inform public debate and policy is to study the problem from within the organisation in which the research seeks to transform. The epistemological position was that there is a failure to identify witnesses who would benefit from measures under the YJCEA. Therefore, this study aimed to gather qualitative and quantitative data and use a ground theory methodology to categorise and code qualitative data (Bryant & Charmaz, 2007). The data itself was gathered through the use of an electronic questionnaire. At the end of the quantitative questions, participants were invited to leave a qualitative response through the use of an open text space. The questions were based around specific research outputs and used a Likert scale to direct participant response (questions can be seen in the Results section below). The Likert options were forced choice on a scale of 1 (strongly disagree) to 5 (strongly agree).

Participants and Inclusion Criteria

Participants for this study must have some knowledge of the YJCEA, have dealt with VIW's, or have an academic interest in this field. Those who indicated they had no

knowledge of the YJCEA were assessed against the probative value of their response coupled with their occupation or involvement in this field of work. Each of the participants were asked to categorise themselves as: Police – Uniform (*n*=27), Police - Specialist Investigations/CID (*n*=18), Crown Prosecution Service/State Prosecution Agency (*n*=4), Defence - Advocate/Solicitor/Barrister (*n*=2), Judiciary/Magistrate (*n*=1), Court Clerk/Court Staff (*n*=1), Government Department (Home Office, Local Government) (*n*=1), Educational (College of Policing, University, Academic) (*n*=7), Witness Care Service/Voluntary Witness Support Service (*n*=2), Intermediary/Witness Supporter/Specialist Witness Support (*n*=3) or 'other' (*n*=4). Within the category of 'other' participants recorded themselves as: retired officer - independent consultant, Ex Detective Sgt New South Wales Police (Organised and Major Crime) - Academic with PhD, Lecturer in Criminology and Policing, and Expert witness & interviewer. Participants were informed that their participation was voluntary and that they could exit at any time, they were also informed that the study was part of a wider body of work being conducted in this field.

Participants did not have to specify their organisation and were invited to leave their response anonymously. This ensured they could speak freely about their experience, rather than feel an allegiance to an organisational or institutions values, or that such would be identified. This method was selected as Nutley *et al* (2007) and Reason (1989) suggest this increases a free and individual response. A maximum number of participants was not specified; however, the sample should have been sufficient enough to provide a purposeful sample of data for analysis. Participants were not asked to comment on 'live' or sensitive criminal cases and any data on this has been sanitised from any publication. Participants could be of any age, ethnicity or gender and were not asked to specify any of this data or the length of time they had been working in this field. Again, this was to ensure participants could write freely about their involvement without any fear they could be identified. In total there were 70 participants.

Distribution

Distribution of the electronic questionnaire was through a number of different methods. In each of these methods of distribution a total number of potential participants were identified, and the link to the survey itself was open for a six month period from July 2015 to January 2016. The link to the questionnaire was mainly distributed via social networks Linkedin (*n* = 1,150), Twitter (*n*=250), closed social networks - Police Online

Knowledge Community (POLKA) and Facebook (*n*=1,250), and individual internal Constabulary newsletters (*n*=4,445). It is recognised that the response rate is relatively low compared with the number of potential participants listed. However, not all may have fallen into one of the inclusion criteria or have knowledge in the field required.

Results

The electronic data was collected using Bristol Online Survey. Each of the responses was checked against the value indicated by the software and then produced as follows. The results here give an indication of the entire participant response. Individual breakdowns of the data have been created and are discussed within the discussion section of this research.

Table 1

Quantitative response generated by the question: The Youth Justice and Criminal Evidence Act (1999) present sufficient number of opportunities for Vulnerable and Intimidated witnesses to be eligible for Special Measures under the 1999 act. In your experience would you agree or disagree that eligibility, under the 1999 act, is an area of concern? Question generated in reference to: Neild et al., (2003)

Likert Scale	*n*	%
Strongly Disagree	2	2.9%
Disagree	27	38.6%
Neither agree nor disagree	16	22.9%
Agree	21	30%
Strongly Agree	4	5.7%

Table 2

Quantitative response generated by the question: There is a failure to identify witnesses early enough in the investigatory process and opportunities are missed to deploy specialist interview techniques, under the Achieving Best Evidence principles, which later impacts on witness eligibility for some measures under the Youth Justice and Criminal Evidence Act (1999). Do you agree or disagree with this statement as a reflection of current practice? Question generated in reference to: Cooper and Roberts, (2005)

Likert Scale	***n***	**Percentile**
Strongly Disagree	2	2.9%
Disagree	12	17.1%
Neither agree nor disagree	12	17.1%
Agree	29	41.4%
Strongly Agree	15	21.4%

Table 3

Quantitative response generated by the question: Failures within inter-agency infrastructures and partnership referrals results in some witnesses, and applications for Special Measures, being denied because of weaknesses in case-file evidence and case management. Do you agree or disagree with this statement as a reflection of current practice? Question generated in reference to: Cooper (2010)

Likert Scale	***n***	***%***
Strongly Disagree	3	4.3%
Disagree	8	11.4%
Neither agree nor disagree	21	30%
Agree	30	42.9%
Strongly Agree	8	11.4%

Table 4

Quantitative response generated by the question: There is inadequate training for investigators around the use of specialist interview techniques and Special Measures under the Youth Justice and Criminal Evidence Act (1999). Do you agree or disagree with this statement as a reflection of your experience? Question generated in reference to: Bull (2010)

Likert Scale	***n***	***%***
Strongly Disagree	5	7.1%
Disagree	9	12.9%
Neither agree nor disagree	6	8.6%
Agree	39	55.7%
Strongly Agree	11	15.7%

Table 5

Quantitative response generated by the question: Some investigations limit the use of Special Measures because of concerns surrounding how an oral testimony would be otherwise cross-examined. Do you agree or disagree with this statement as an accurate reflection of your experience? Question generated in reference to: Burton et al., (2007)

Likert Scale	***n***	***%***
Strongly Disagree	5	7.1%
Disagree	10	14.3%
Neither agree nor disagree	29	41.4%
Agree	22	31.4%
Strongly Agree	4	5.7%

Table 6

Quantitative response generated by the question: There are delays in adequately identifying, gathering and disseminating the need for specialist witness support and this leads to delays at trial stage which could have otherwise been resolved at the point of charge or in the early investigative process. Do you agree or disagree with this statement as a reflection on current practice? Question generated in reference to: CJJI (2012)

Likert Scale	***n***	***%***
Strongly Disagree	1	1.4%
Disagree	11	15.7%
Neither agree nor disagree	18	25.7%
Agree	31	44.3%
Strongly Agree	9	12.9%

Table 7

Quantitative response generated by the question: There is a lack of funding available for witness support services, outside of the Police and Crown Prosecution Service, for vulnerable, intimidated, key and significant witnesses. This prevents the effective use of Special Measures under the Youth Justice and Criminal Evidence Act (1999). Do you agree or disagree that this statement reflects your experience? Question generated in reference to: Spencer (2008)

Likert Scale	***n***	***%***
Strongly Disagree	1	1.4%
Disagree	15	21.4%
Neither agree nor disagree	27	38.6%
Agree	22	31.4%
Strongly Agree	5	7.1%

Table 8

Quantitative response generated by the question: The use of Special Measures under the Youth Justice and Criminal Evidence Act (1999) has an adverse effect for defendants on the right to a fair trial under Article 6 of the European Convention on Human Rights. Do you agree or disagree that this is an area of concern? Question generated in reference to: Finch (2005)

Likert Scale	***n***	***%***
Strongly Disagree	14	20%
Disagree	33	47.1%
Neither agree nor disagree	14	20%
Agree	8	11.4%
Strongly Agree	1	1.4%

Table 9

Quantitative response generated by the question: There is a lack of understanding around the correct 'gateway' (s.16- Witnesses eligible for assistance on grounds of age or incapacity/s.17- Witnesses eligible for assistance on grounds of fear or distress about testifying. (YJCEA, 1999) under which Special Measures could be implemented. This affects the correct use of Special Measures. Do you agree or disagree with this statement as being a reflection of current practice? Question generated in reference to: the case of R v PR [2010] EWCA Crim 2741

Likert Scale	***n***	**%**
Strongly Disagree	1	1.4%
Disagree	11	15.7%
Neither agree nor disagree	14	20%
Agree	38	54.3%
Strongly Agree	6	8.6%

Table 10

Quantitative response generated by the question: In the case of R v Iqbal (Imran) & anr [2011] EWCA Crim 1348 it was only identified that the victim had 'significant impairment of social functioning, intelligence and communication' once the witness had begun to give evidence in the witness box at Crown Court. In your experience do you agree or disagree that the use of intermediary or specialist witness support is correctly identified and implemented? Question generated in reference to: In the case of R v Iqbal (Imran) & anr [2011] EWCA Crim 1348

Likert Scale	***n***	**%**
Strongly Disagree	3	4.3%
Disagree	19	27.1%
Neither agree nor disagree	20	28.6%
Agree	26	37.1%
Strongly Agree	2	2.9%

Table 11

Quantitative response generated by the question: All too often the complex needs of witnesses are assumed and the correct identification of vulnerable, intimidated, key and significant witnesses within the definition of the Youth Justice and Criminal Evidence Act (1999) and Guidance on Achieving Best Evidence are overlooked. Do you agree or disagree with this statement as a reflection of current practice? Question generated in reference to: Burton et al., (2006)

Likert Scale	***n***	**%**
Strongly Disagree	1	1.4%
Disagree	14	20%
Neither agree nor disagree	9	12.9%
Agree	37	52.9%
Strongly Agree	9	12.9%

Qualitative data

The qualitative data collated within this study is significant. The responses have therefore been coded using a grounded theory methodology. In total there were 70 qualitative responses, this was a required field at the end of the questionnaire. Where responses have contained variables or multiple coding these have been recorded equally, so one response may have more than one code.

Table 12

Coding and meanings applied

Code	Meaning Applied
Training Not Sufficient	Value applied where respondents indicated that training, be it in any profession, was not sufficient or of a poor standard.
Court Process	Value applied where the respondent indicated that the court either lacked facilities or the staff required to facilitate a Special Measure being put in place.
Crown Prosecutor Concern	Value applied where the respondent indicated that the Crown Prosecutor(s) in the case were responsible for mishandling a Special Measures application or that assessment was not performed in a timely fashion.
Police Investigation Concern	Value applied where the respondent indicated that the Police Investigation or assessment of a witness was performed inadequately, too late, or not at all by Police investigators.
Vulnerability Definition	Value applied where the respondent described the definition of vulnerability or enhanced the understanding of how vulnerability is assessed or gave advice on how guidance should be applied.
Forms/Communication/MG Documents	Value applied where respondents indicated that forms used to assess witnesses were out of date, inadequate or alternative to the MG2 assessment or that communication was poor because of this.

Positive Response	Value applied where respondent's indicted current process and measures were adequate, efficient or where measures had a positive impact on a case or a particular witness.
Miscellaneous or other	Value applied indicating little or no meaningful data.

Table 13

Coded data separated by respondent category – Police

Profession Indicated		**Code(s) applied**	***n***
Police – Uniform	(*n*=27)	Training not sufficient	6
		Crown Prosecutor Concern	1
		Police Investigation Concern	3
		Forms/Communication/MG Documents	3
		Positive Response	8
		Miscellaneous or other	9
Police –		Training not sufficient	9
Specialist Investigations/CID	(*n*=18)	Court Process	2
		Crown Prosecutor Concern	2
		Vulnerability Definition	2
		Forms/Communication/MG Documents	2
		Positive Response	4
		Miscellaneous or other	1

Table 14

Coded data separated by respondent category – Counsel

Profession Indicated		**Code(s) applied**	***n***
Crown Prosecution Service/	(*n*=4)	Training not Sufficient	1
State Prosecution Agency		Police Investigation Concern	2
		Forms/Communication/MG Documents	1
		Miscellaneous or other	1
Defence - Advocate/Solicitor/Barrister	(*n*=2)	Court Process	1
		Police Investigation Concern	2

Table 15

Coded data separated by respondent category – Court Staff

Profession Indicated		**Code(s) applied**	***n***
Judiciary/Magistrate	(*n*=1)	Training not Sufficient	1
		Court Process	1
		Crown Prosecutor Concern	1
		Police Investigation Concern	1
		Forms/Communication/MG Documents	1
Court Clerk/Court Staff	(*n*=1)	Court Process	1
		Crown Prosecutor Concern	1
		Police Investigation Concern	1

Table 16

Coded data separated by respondent category – Education (note – there are no recorded qualitative responses for Government professions)

Profession Indicated		**Code(s) applied**	***n***
Educational	(*n*=7)	Training not sufficient	3
(College of Policing,		Court Process	1
University, Academic)		Police Investigation Concern	1
		Vulnerability Definition	2
		Miscellaneous or other	1

Table 17

Coded data separated by respondent category – Witness Services

Profession Indicated		**Code(s) applied**	***n***
Witness Care Service/Voluntary	(*n*=2)	Police Investigation Concern	2
Witness Support Service		Forms/Communication/MG Documents	2
Intermediary/Witness Supporter/	(*n*=3)	Training not sufficient	1
Specialist Witness Support		Police Investigation Concern	3
		Vulnerability Definition	1
		Positive Response	2

Table 18

Coded qualitative data summary

Code(s) applied	Total Number
Training not Sufficient	19
Court Process	6
Crown Prosecutor Concern	5
Police Investigation Concern	13
Vulnerability Definition	4
Forms/Communication/MG Documents	8
Positive Response	14
Miscellaneous or other	12

In each of the aforementioned quantitative responses the respondent was answering the question of: *Your comments and experiences of the Youth Justice and Criminal Evidence Act (1999), the use of Special Measures, or the use of any victim and witness interviewing methods are an important part of this study. What are your experiences of these areas of Criminal Investigation?* In relation to the category of 'other' - the responses specified that they were retired Police Officers (including Detective positions) and now occupy a position in the professional field of training, investigative consultancy, or were involved in academia and expert witness interviewing. In relation to coding these responses they were included in the coding within the categories of Police, Education and Witness Services respectively. Within the qualitative data one respondent indicated that the training they had received was sufficient and this respondent indicated that they were a uniform Police Officer.

Discussion

The aim of this study was to investigate practitioner reactions to research publications and understand the value of that research as a reflection of current practice. The study itself forms part of a wider piece of research and much of the background to this can be found in

Ewin (2015). Table one follows the response to a question around access to the YJCEA itself as currently witnesses must fall into two categories – either vulnerable (s.16 YJCEA) or intimidated (s.17 YJCEA). Irrespective of each of these categories the court must be satisfied that the measure, *or any combination of them, would, in its opinion, be likely to improve the quality of evidence given by the witness* and *be likely to maximise so far as practicable the quality of such evidence* (s.19(2) YJCEA). Since the publication of Neild et al. (2003) some offence types have increased, such as sexual offences and knife crime (ONS, 2015), and these have an impact on s.17 of the YJCEA[3]. Table one shows that a small majority (41.5%) of participants disagree that eligibility is an area of concern under the YJCEA; 22.9% indicated that they neither agreed nor disagreed with eligibility being an issue. However, of the 35.7% who indicated that they agreed or strongly agreed that eligibility was an area of concern, respondents were Police Officers (including specialist investigators), Crown and Defence Counsel, Judicial or Court Staff and Specialist Witness Supporters. Given that Paragraph 2.21 (B) of the Code of Practice for Victims of Crime (the Victims' Code; MOJ, 2015) requires consideration of the victims wishes for Special Measures, it is important to explore in further research whether witnesses who request measures are simply unable to acquire them through current legal framework. However, of the sample of participants who indicated that eligibility was an issue, these were mainly professionals who interact most with witnesses when discussing eligibility – uniform Police Officers.

Table two highlights the data gathered in relation to so called *'missed opportunities'*; these are described Cooper and Roberts (2005) as where the Police or the CPS have simply 'missed' that the witness is vulnerable, intimidated or would require a Video Recorded Interview (VRI) as opposed to a written statement, or were not identified at all. In total 62.8% of participants agreed or strongly agreed that opportunities were missed in this area and all professions formed part of that 62.8% response. A Specialist Police Investigator said *"I find that quite often inexperienced uniform officers don't look at the bigger picture when attending a crime and there is a lack of thought surrounding the best and most appropriate way to record the victims/witness evidence".* A professional within Education also said *"Police officers sometimes forget to involve the witness in the decision making process and think they know what is best for the witness without taking into consideration the witness views".* However, this response can be linked to the strongest area indicated as a concern within this study – training. Without foresight as to the effect taking a piece of evidence, in

[3] Considered also more generally as the most psychologically distressing crimes (Heaton-Armstrong, 2006)

one format or another, has on applications under the YJCEA, there is little analysis which can be made as to what effect the evidence delivery may have on the witness. Reference can be made to other data within the study which partly explains this, 71.4% agreed or strongly agreed that training was inadequate (Table four), 62.9% agreed or strongly agreed that gateways (those between s.16 & s.17 YJCEA, 1999) were also misunderstood (Table nine) and that 65.8% of professionals agreed that the needs of witnesses are assumed and not properly assessed (Table eleven). Within the qualitative data a Uniform Police Officer did however say that *"vulnerable victims are identified at an early stage".* What is clear in the qualitative coding of *'positive responses'* is that it indicates, of those opportunities and evidential gathering methods which are correctly applied, the results are a positive impact on witnesses[4]. Hamlyn et al. (2004) supports that assessment as this research purports that victims approach the court process feeling less fearful or intimidated where a full and proper assessment has been made and provisions provided.

The process of sharing information between the Police and the CPS is a defined process and should comply with the Manual of Guidance, often referred to as the MG series (NPIA & ACPO, 2011). This terminology is contained in the qualitative data as one Witness Care Officer said: *"I often see that the back of MG11's[5] has not been completed and there are no contact details for witnesses either";* there would appear to be a theme here as another Witness Care Officer indicates: *"[Police] Officers need to fully complete the back of the MG11 otherwise I can't do my job very well".* A Crown Prosecutor also said *"I think there becomes an issue where officers assume the needs of the victim or in some cases don't even assess it at all, and then try and cobble together an MG2 which is full of waffle and does not contain sufficient detail to allow applications to be considered and granted"*. This is a popular theme in the data as a Uniform Police Officer said *"In the past three years of my career I have filled out an MG2 once and that was only because I was directed to by a Detective".* The so called 'MG2' is a central form in the application for Special Measures and is designed to be completed by investigators and shared with the CPS and witness services as a comprehensive assessment as to the reasons for the application and the measures required

[4] Sed v R [2004] EWCA Crim 1294 – successfully applied SM in case of female victim to sexual offence who suffered from Alzheimer's disease.

[5] The MG11 is the formatted document used to record written statements from witnesses. The front section contains details of the statement and name of the witness itself, the rear contains the witness's details and this is non-disclosable to the defence and exists as a communication between the Police, CPS and Witness Care services in order to effectively manage witnesses. It also contains a question around the witnesses' feelings towards Special Measures. For further guidance see NPIA & ACPO (2011) The Prosecution Team Manual of Guidance For the preparation, processing and submission of prosecution files (Incorporating National File Standard 2015). London.

(NPIA & ACPO, 2011; Cooper, 2010; HMIC, 2015). The qualitative data almost explains the quantitative responses in this area as table three shows that the majority (54.3%) agree or strongly agree that partnership referrals fail, in part, because of weaknesses in case-file evidence and case management[6]. Her Majesty's Inspectorate of Constabulary (HMIC; 2015) indicated in its assessment of Police case files that *'there was found to be no difference when a vulnerable or intimidated victim or witness was involved in the case and, in some instances, it was slightly worse'* (p.10). There are however other ways in which the Police assess vulnerability outside of the MG series documents. An open access Lancashire Constabulary Guidance Document on the procedure for Vulnerable and Intimidated witnesses highlights the use of an 'ABE1' document when assessing need (Lancashire Constabulary, 2005).

Participant responses refer to this ABE1 document; a Uniform Police Officer said *"Cumbria Police have introduced ABE1 forms which are fantastic for identifying if a victim/ witness falls into a particular category, prior to their evidence being recorded. It also provides the opportunity to establish if the victim/ witness has any other specific needs that would improve their evidence in court".* This type of document is not explicitly discussed in the HMIC (2015) report. However, it does appear as a measured assessment process which is perhaps not reflected in the MG series documents; this maybe the case for other assessments conducted outside of the MG procedure. Although using additional documents in this way or amending some MG documents has seen some success (NAO et al.,2012) these cases appear to remain limited and are not a panacea to resolving the issues of incomplete or missing vulnerability assessments. There is evidence of good practice within the area of vulnerability assessment. HMIC (2015a) has made assessments under its police effectiveness, efficiency and legitimacy (PEEL) programme and found that Merseyside Police, amongst others: *"effectively assesses risk, and identifies repeat and vulnerable victims at the first point of contact"* and *"Officers attending incidents complete an initial risk assessment form for all vulnerable victims. The form includes contact details for partner organisations that provide support to vulnerable victims. HMIC found that the initial risk assessment is widely known by staff, consistently completed by officers, and victims are provided with support contact details"*. It cannot be identified from the data in this study whether officers were from Merseyside Police; however, it cannot be said that the Merseyside example is replicated in all Police force areas and it is not explicitly referenced here to include intimidated witnesses.

[6] See NAO (2016) *Police and CPS do not always exchange good-quality, timely advice and parties do not communicate effectively with witnesses.*

HMIC (2015) found that thirty one forces either required improvement or were inadequate in protecting vulnerable people from harm[7]. In, for example, Derbyshire Police' PEEL assessment on *'vulnerability in case files'* the HMIC said *"vulnerability issues are identified at an early point in the investigation, however this was more apparent in those crimes traditionally associated with vulnerability, for example domestic abuse, but was overlooked in other cases"* (HMIC, 2015b). This would indicate that unlike Merseyside there is some assessment process, but one which is not standardised for all crime types, and in such cases instances may occur such as purported in *R v Iqbal (Imran) & anr [2011] EWCA Crim 1348*[8]. However, as one Academic respondent added *"Assessments are viewed as a hurdle not an attribute. Special measures are operationally viewed as complicating the judicial process".*

One of the most provoking responses in this study was that afforded to training. This area, covered in table five with reference to Bull (2010), also received the majority of responses in the qualitative data as nineteen responses were coded as under the heading *'Training not Sufficient'*. This is supported by the 71.4% who agreed or strongly agreed that there is inadequate training for investigators around the use of specialist interview techniques and measures under the YJCEA (Table four). One Uniform Police Officer said *"There is insufficient training for police officers in terms of identifying the needs for special measures in the first instance and the procedure in the application".* A former Detective Trainer said *"In relation to front line staff who deal with many witnesses and victims I think they have a very limited and poor understanding of Special Measures or that many of their victims and witnesses are indeed Vulnerable or Intimidated".* One Academic highlighted the disparity in interview training, purporting: *"As a trainer in this area... in various police forces I have experienced very disparate levels of training for 'specialist witness interviewers".* This was clearly an area of concern for the participants and along with training quality, lay the issue of sufficiently trained specialist staff, this was accurately summarised by one Detective as *"There are not enough trained uniform officers and this often leads to a statement being taken over ABE's being planned as some uniform officers don't even think about this".* However, the issue of training does not simply sit within the Police Service. Research by the Advocate Training Council (2011) identified that training in this area should include both

[7] It should be noted that within these inspections, Police forces are judged on a number of areas of 'vulnerability', which includes the management of missing people and the handling of repeat victims of anti-social behaviour and are not explicitly focussed on vulnerability assessment within the realm of the YJCEA.
[8] The case of a child on his way home from a school for those with special educational needs who was assaulted and later appeared as a witness in court only to be found incapable or understanding and answering questions and requiring an intermediary- both of which not identified at investigation phase.

online methods and cascade training, inclusive of inputs from professional bodies and possess a structure which reflects the practice of *'on the job'* professional development. In a number of publications by reviewing bodies (HMIC, HMCPSI, 2013; IPCC, 2013; CJJI, 2012) there is a strong reference as to the need for joint training between the Police, CPS, Court staff and Witness Care. However, it is purported that training is often ill-equipped, inadequate and takes place 'in house' without professional or academic experiences to guide participants (Ragavan, 2013). This may explain why one Expert Witness Interviewer said *"it is not a case of systematic over or under use, just inadequate analysis and decision making".*

HMIC (2015) identify that Police Officers receive an initial intensive training programme along with a two year probationary period[9] where some officers receive further extended training[10]. This is in addition to the College of Policing provision of *'online'* based training programmes for all officers and training for supervisors. Crucially, and despite these measures, the HMIC report that many supervisors '*do not understand or routinely check case files for compliance with the vulnerability measures'*. Conclusions and concerns over training have been raised in a number of different reports (Bull, 2010; Cooper & Roberts, 2005; HMIC & HMCPSI, 2010; IPCC, 2014; Ragavan, 2013) although training should not be viewed as a panacea to solve all concern in this area. Other responses in the survey – such as the 62.9% who agreed that there is a lack of understanding around the correct *'gateway'*[11]; this affects the correct use of Special Measures. One Defence Advocate highlighted *"In my experience our local courts tend to grant the use of special measures even if the prosecution have not identified the right gateway and/or have applied at a very late stage of proceedings".* It does however remain the responsibility of the court to ensure measures are applied fairly and of course based on a firm legal requirement, as laid out in the YJCEA. There is evidence within this study of some frustration in this area as one Crown Court Judge highlights *"Officers and the CPS should think deeply about the application they are making...the communication between the Police and the CPS is woeful. I also wonder what*

[9] For an analysis of inexperienced Police Officer perceptions see Dando, C., Wilcock, R., & Milne, R. (2008). The cognitive interview: Inexperienced police officers' perceptions of their witness/victim interviewing practices. *Legal and Criminological Psychology,* 13(1), 59-70.

[10] See also Santarcangelo, M. (2006). *Investigative interviewing: rights, research, regulation,* Edited by TOM WILLIAMSON, Foreword by the HONOURABLE JUSTICE PETER CORY, Cullompton, Devon: Willan Publishing (2005), pp. 370, ISBN 1-84392-124-3. *Journal of Investigative Psychology and Offender Profiling,* 3(3), 193-196.

[11] There are two main gateways under the YJCEA - s.16- Witnesses eligible for assistance on grounds of age or incapacity or s.17- Witnesses eligible for assistance on grounds of fear or distress about testifying. These differences have an effect on the measures available to witnesses; see the case of R v PR [2010] EWCA Crim 2741.

some witnesses are told in relation to their involvement in a Criminal Trial". The objective standard for the court procedure is laid out in The Criminal Procedure Rules (CPR) 2014 (1.1) 'the overriding objective' is that cases are 'dealt with justly'. CPR makes specific reference to the planning and preparation of cases which should of course be an overriding factor: *'In order to prepare for the trial, the court must take every reasonable step— to encourage and to facilitate the attendance of witnesses when they are needed; and to facilitate the participation of any person, including the defendant.'* (CPR 3.9(3)). Arguably the preceding measure to this is of course assessment and the Victims Code (MOJ, 2015) is clear: *"All victims of a criminal offence are entitled to an assessment by the police to identify any needs or support required, including whether and to what extent they may benefit from Special Measures*[12]*"* (p.13).

In further reference to the CPR (3.9(3)) it was within the scope of this study to consider fairly the evidence of Finch (2005) which highlighted concerns around the application of Special Measures[13] within the context of the defending council[14]. In this study 67.1% of participants either strongly disagreed or disagreed that the use of Special Measures under the Youth Justice and Criminal Evidence Act (1999) has an adverse effect for defendants on the right to a fair trial under Article 6 of the European Convention on Human Rights. Of the participants who were defence advocates there was a 50 % split between agreement and disagreement. A defence advocate said *"Magistrates courts are woefully underprepared to deal with video evidence and the Police often assume the needs of the witness rather than considering what the evidence that witness would give to a case"*. This links back to the evidence seen in table eleven as 65.8% agreed that needs are assumed and not assessed. Referring again to the defence advocate comment in the previous page surrounding late applications; Leveson (2015) highlights that applications should be considered by the Crown Court at Plea and Case Management Hearing (PCMH) with accurately identified measures identified by the proposing counsel[15] (p.12). Whilst the

[12] Pursuant to section 33 of the Domestic Violence, Crime and Victims Act 2004.
[13] Finch (2005) also examined where the defendant is either a child or vulnerable themselves. In these cases Leveson (2015) highlighted that a Plea and Case Management Hearing (PCMH) should be applied along with those cases where witness measures were also being considered. It would be pursuant to consider this area further, out with any discussions here around the YJCEA being applied to witnesses. Consider also; R v Camberwell Green Youth Court, ex p. D; R v Camberwell Green Youth Court, ex p. DPP (G, FC) [2005] UKHL 4, [2005] 1 WLR 393.
[14] The Advocates Gateway (2011) *Raising the Bar: the Handling of Vulnerable Witnesses, Victims and Defendants in Court* –provides guidance on how measures should be interpreted and applied.
[15] Early application may also mean assessment by the Justices Clerk, see The Justices' Clerks Rules 2005, No. 545 (L.10). Leveson (2015) this is limited to those measures which relate to the manner in which evidence is given such as the giving of evidence from behind a screen or via live link. The powers of a Justices' Clerk do

majority disagreed with the fairness of the YJCEA and its impact upon a fair trial there would be delay should measures need to be granted at late stages in proceedings (Leveson, 2015). This may become an issue where there is a Custody Time Limit[16] or where preparations for the witness assessment are incomplete or commenced too late to offer a full assessment. Dunn and Shepherd (2006, p.363-380) highlight that where these concerns exist the defence should also have sufficient information to decide whether they wish to examine a particular witness at all. Clearly this relies on a consideration of how the witness could be examined. The CPR (Part 15) imposes the time limits on defence statements and sets out information which should be offered; however, the application of measures for a particular witness would have effect on the proposed examination, as would be the case that the measures would need to be applied well in advance of cross-examination and PCMH[17].

Summary

The responses here emphasise the need for further examination, definition of *need* and ethical consideration to affect the consequentialist reference. In this study the ideas of individual professionals, who've sought to have an input into the debate around the YJCEA, give emphasis to an imperfect system. The deontological position is clearly laid in statute, this places a responsibility upon those involved with victims and witnesses to adhere to a rule – that rule is to consider the *needs* and *ability* of victims and witnesses; and where appropriate, apply measures to assist them in the interests of fair justice inclusive of the need to act with fairness to defendants. There are some positive qualitative reference (n=14) however these are outweighed by those who's response emphasised the need for more concise, and available training, a better understanding of what a witness *needs* assessment is, and clarity around when and what measures are appropriate under the YJCEA; each being communicated throughout the legal journey. Although it was highlighted in the HMIC evidence that some forces, with similar training commitments, fair better where different systems are in place. The next stage of this research aims to explore this further along with assessments of need. Since the publication of *'Speaking up for Justice'* (Home Office, 1998) the aetiology of *need* has not been so finely determined as to have effect upon the application

not extend to directions such as directing that a video interview is admissible as examination in chief or the appointment of an intermediary.

[16] The statutory time limit for keeping a defendant in custody awaiting trial.

[17] This would also be a consideration where pre-recorded cross-examination (s.28 YJCEA) were to be applied.

of measures, not only does this disadvantage many witnesses but it remains a problem within western countries when it comes to investigations around vulnerable and intimidated people; particularly those with learning difficulties (Luckasson, 1992). This is evident from the 37.1% of respondents who indicated that special measures were limited because of concerns as to how witnesses would otherwise be cross-examined (table five).

This study does not break down individual geographical areas nor was it designed to assess electronic communications methods or vulnerability outside of the VIW remit. However, it should be recognised that the PEEL vulnerability assessments (HMIC, 2015) do highlight some good practice in relation to the assessment of vulnerability and VIW. It is clear that Constabularies who identify vulnerability from *'first contact'* and then follow this up with a standardised assessment are rated more successful than others who do not. Heaton-Armstrong et al. (2006) purports a very comprehensive assessment of the psychological, investigative and evidential perspectives for witness testimony and steers away from traditional examinations of what the 'system currently offers'. Within this are the hallmarks of the relationship between initial identification and contact management through to efficient assessment and communicative fluidity. These relationships are not simple and require some thought. However, as with the participants in this study, Heaton- Armstrong et al. embarks on the same assessment of witness testimony, in that, it is fundamental to consider and record physiological, environmental and psychological assessment of *need* and consider the risks posed and the harm inflicted upon the witness.

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