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## An evaluation of the use of special measures for vulnerable and intimidated witnesses

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The report *Speaking up for Justice* (Home Office, 1998) made 78 recommendations to improve the treatment of vulnerable and intimidated witnesses (VIWs) within the criminal justice system and to enable them to give best evidence in criminal proceedings. Some of these recommendations required administrative action and some legislation. The Youth Justice and Criminal Evidence Act 1999 contained a range of special measures designed to assist vulnerable and intimidated witnesses which were mostly implemented in the Crown Court in July 2002. This Findings outlines the results of evaluative research which examined the effectiveness of criminal justice agencies in implementing the administrative and special measures.

### Key points

- When telephone screening interviews with a random sample of witnesses were combined with information on 'categorical' VIWs, the proportion of possible intimidated witnesses was estimated at around 54%. On a conservative estimate 24% were probable vulnerable and intimidated witnesses. This is significantly higher than the proportion estimated by *Speaking up for Justice* (7–10%) or identified by the criminal justice agencies in this research (3–6%).
- The police continue to experience difficulties identifying vulnerable and intimidated witnesses (VIWs) and the Crown Prosecution Service (CPS) rarely identify VIWs unless the police have already done so. Often VIWs were first identified by the Witness Service when they arrived at court. This makes it extremely difficult to arrange for special measures if they are needed.
- Court familiarisation visits are potentially the most useful of the non-statutory measures available in the pre-trial phase but were rarely offered. Video recordings were made of only a minority of VIW interviews, including children, and no examples of strategy meetings between the CPS and the police were found during the case tracking.
- Video recorded evidence and the live television link (CCTV) are highly regarded by the police, CPS, the courts and Witness Services and the VIWs who use them. The use of screens is less highly regarded by agencies, although they have advantages for witnesses. The removal of wigs and gowns and clearing the public gallery were rarely used, although they could be very helpful for some witnesses.
- The research used ten criteria against which to gauge the successful operation and impact of special measures. Performance is good in relation to two measures (use of special measures and increased satisfaction with the court process), poor for five (for example, criminal justice agencies were often not informed about their poor performance in identifying VIWs due to the absence of good monitoring systems and information-sharing between agencies) and variable for three.

The evaluation reported here should be considered in conjunction with the results of a related research project consisting of satisfaction surveys with VIWs (Hamlyn et al., 2004a and Hamlyn et al., 2004b).

**The views expressed in these findings are those of the authors, not necessarily those of the Home Office (nor do they reflect Government policy)**

### The Witness Service

The Witness Service is a national service provided by Victim Support. With staff based in every Crown and magistrates' court in England and Wales, it aims to provide help and support to witnesses attending court.

The special measures contained in the Youth Justice and Criminal Evidence Act 1999 are screens, video-recorded evidence-in-chief, live television link, clearing the public gallery, removal of wigs and gowns, the use of communication aids, video-recorded pre-trial cross- and re-examination and the use of intermediaries. Other forms of assistance require administrative action, for example, training, guidance, early police/CPS strategy meetings and separate waiting areas. Those eligible for special measures are:

- children under 17
- witnesses with a learning disability or mental disorder
- witnesses with a physical disability or physical disorder diminishing the quality of their evidence
- witnesses likely to suffer particular distress including victims of sexual offences and witnesses who suffer or fear intimidation.

### Methods

The research was conducted in two phases: Phase 1 before special measures were introduced in 2000/01 and Phase 2 afterwards in 2003/04. The response rates for the four agencies are shown in Table 1. Four police force areas were identified from the survey data for more detailed research.

**Table 1 Response rates for the national survey**

Agencies	Phase 1	Phase 2
	2000/01	2003/04
	%	%
Police	98	88
CPS	93	76
Crown Court witness service	51	52
Crown Court	80	94

At least one representative from the four agencies was interviewed in each area in both phases – a total of 69 interviews. Key survey aims were to find out what agencies said they were doing:

- in relation to VIWs generally
- specifically about their preparation for, and implementation of, the introduction of administrative and special measures.

An estimate of the potential number of VIWs was made by:

- taking a random sample of 500 prosecution witnesses involved in indictable or triable-either-way prosecuted cases from each area
- then conducting a telephone screening interview with a sample of prosecution witnesses (excluding children and victims of sexual offences or so-called 'categorical' VIWs – see Methodological note).

There were 536 completed screening interviews in Phase 1 and 319 in Phase 2.

In Phase 2, a random sample of 'live' prosecution case files from each area was also tracked through the decision-making process, providing a total of 191 files. Practitioners were interviewed if the basis of decisions was not clear from these files. Twenty-six contested cases were observed in court. A key aim of the case tracking and observations was to compare the survey information about what agencies said they were doing with their actions and decisions in practice.

### Estimates of the proportion of VIWs

#### Random samples

The police or CPS initially identified 3.4%, 5.4% and 5.8% respectively in three of the four '500' samples as VIWs. When those cases identified as VIW by the researchers from the police and CPS files were added to this total, the proportion of agency-identified VIWs was 9% for all four areas. This was within the 7–10% range estimated in *Speaking Up For Justice* (Home Office, 1998).

#### Telephone screening interviews

Around 45% of the witness sample were identified by their responses as potentially vulnerable and intimidated during telephone screening interviews. When added to those eliminated as 'categorical' VIWs, the total proportion of all witnesses in the samples who were possibly VIW was 54% (see Table 2). In practice, decision-makers have to apply a three-stage test (see Box 1).

The researchers tried to apply a similar test using relevant data from the screening interviews. The telephone interview was an adaptation of the approach used by Gudjonsson et al. (1993) to identify vulnerable suspects. The interviews were carried out by BMRB Social Research. The questions in the interview were very closely aligned with the 'official' criteria used to identify VIWs so it is thought to be a valid measurement instrument. The results were similar in Phases 1 and 2 suggesting that it is not only valid but reliable. One of Burton et al's. recommendations

**Table 2 Estimated percentage of possible VIWs based on agency and screening data from Phase 2**

	Agency identified VIW	Screening identified VIW (possible)	Totals (possible)
Child	6	0	6
Mental disorder/learning disability	1	6	7
Physical disability	0	11	11
Fear and distress (including sex offences)	2	25	27
Communication problems	0	3*	3*
Totals	9	45	54

Note: \* Percentage who said they had difficulties in understanding or communicating with people.

**Box 1 The three-stage test for VIWs**

1. Is the witness potentially vulnerable/intimidated?

If yes:

2. Is this vulnerability/intimidation likely to affect whether they will be willing to testify in court, to affect their capacity to give their 'best evidence' in court (i.e. evidence that is complete, coherent and accurate), and to cause them undue stress in or before court?

If yes:

3. What type of support or assistance will be most likely to alleviate these difficulties?

(2006) is that some of these prompt questions could be used by investigating officers in situ to better enable them to identify vulnerable and intimidated witnesses. On a very conservative estimate, 24% of witnesses are probably VIW (i.e., met the first and second stage of the three-stage test – those who were 'possibly' met the first stage). The gap between this and the official estimate (between 7–10%) is considerable.

**The identification of VIWs**

Early identification by the police and the CPS is vital as some special measures (e.g. the video recording of interviews) operate from the start of the investigation. It is clear from the evidence above, and from surveys and case tracking, that the police continue to have difficulty in identifying VIWs, particularly those with learning disabilities, mental disorders or those who are intimidated. The police recognise this but believe they are getting better. However, the CPS, courts and Witness Service suggest that the police over-estimate their performance. This is confirmed by the research evidence. There is little evidence that the distance-learning training officers have received has been effective.

The CPS rarely identifies witnesses as vulnerable and intimidated if they have not been identified by the police, even those that are categorically VIW. This is partly due to the low priority given to VIWs and misunderstanding of the concept of vulnerable and intimidated witnesses.

Many VIWs are identified for the first time by the Witness Service when they arrive at court which is often too late for them to benefit from measures. Witness Service staff are often the focal point for information sharing in courts and they are particularly effective in courts with VIW officers.

There is a hierarchy of identification, whereby some categories of VIW (particularly children and victims of sexual offences) are more likely to be identified as vulnerable and intimidated than others. The operating factors appear to be offence seriousness, criteria of eligibility for special measures (it is usually clear whether a witness is a child) and traditional notions of the 'ideal victim'. This is partly because officers find the legislation hard to understand and partly cultural and resource-related.

**Pre-trial support and decision-making**

The police are usually the first agency to provide VIWs with information about the measures available to them and ascertaining their views. They often pre-judge the answer to the third question in the three-stage test (what type of support or assistance will be most likely to alleviate these difficulties). They do not flag up the vulnerability of the witness to other agencies, thus preventing agencies from making their own assessment.

Pre-court visits are potentially the most useful of the non-statutory measures available but are not often offered to VIWs. Early pre-court visits would:

- ease anxiety for a large proportion of VIWs
- alleviate many of the problems uncovered in this research e.g. non-identification of VIWs, pre-judgement of VIW needs and inaccurate information from the police about special measures.

Video-recordings were made of only a minority of VIW interviews, even with child witnesses. This may have been in part because some magistrates' courts did not have the facilities to use videos as evidence during the Phase 2 fieldwork. There is also some evidence to suggest that the decision not to interview often relates to the features of the case.

Police and CPS working in the areas included in this research claimed that they held strategy meetings and other criminal justice agency discussions for difficult cases where appropriate. However, no examples of such meetings between the CPS and the police were found during the case tracking.

CPS prosecutors rarely meet vulnerable and intimidated witnesses, even when this would help the witness and/or the progress of the case. CPS also made little use of recorded interviews with VIWs in prosecution decisions. Instead, prosecutors often appear to base decisions on assumptions related to 'ideal victims' and other conventional categories.

In general, much police and CPS decision-making is focused on special measures. Cases that are not eligible, or where an application is not thought appropriate, are not treated as VIW cases even though issues such as bail and listing can be important. Agencies generally thought that it was important for VIWs that their cases were in a fixed list and not subject to last minute changes, although this did not always happen.

**The use and effectiveness of special measures**

When the CPS applied for special measures it did so at a late stage in many cases, including on the day of the trial. Sometimes this is because of late identification. In other cases, it is because this is accepted practice in relation to measures such as screens, clearing the public gallery and the removal of wigs and gowns. This ignores the value to witnesses of being able to know what will happen in court well in advance of the hearing.

Sometimes, applications for special measures were not made because the CPS either considered the VIW did not need them (e.g., because the witness was an older child) or because the defendant was a VIW too and parity of treatment was sought. Judges generally grant applications and trial judges very rarely disagree with decisions made in earlier stages of their cases. Video recorded evidence and the live television link (CCTV) were highly regarded by all practitioners and the VIWs who used them. Some practitioners had reservations about their effectiveness in the sense that evidence given in these ways sometimes seems to be less convincing than evidence given 'live' and 'in the flesh'. However, there is no evidence to indicate that acquittals were more likely using these methods. Set against this are the benefits of more VIWs giving evidence than otherwise would be willing and the reduced stress of giving evidence in these ways.

Screens are less highly regarded by most agencies. However, for VIWs themselves there are advantages that the Witness Service appreciated – mainly that screens, at their best, shield VIWs from defendants at all times, whereas CCTV does not. Other special measures, though used infrequently, can be very useful for those VIWs who are assessed as likely to benefit from them. Criminal justice system agencies make too many assumptions about their applicability instead of utilising the three-stage test.

As this research did not include a matched control sample, only limited data could be gathered on the effectiveness of measures. Moreover, witnesses themselves were not interviewed as this was undertaken in the related research of Hamlyn et al. (2004a, 2004b). The current investigation showed that agencies and VIWs broadly agreed on the most and least useful measures. Measures such as the removal of wigs and gowns could not be written off because they are useful for a small number of VIWs. Significantly, some of the most useful (pre-court visits and separate waiting areas) are not in the Youth Justice and Criminal Evidence Act. Others, such as pagers, could be used more if they were given greater consideration by the courts.

Overall, the agencies believed that VIWs were, and felt, better assisted than before the Youth Justice and Criminal Evidence Act and this finding is consistent with Hamlyn et al. (2004a, 2004b). Nonetheless, both studies show that there is a significant unmet need. Some of this is due to the inadequacies of performance highlighted here, while some is due to problems that *Speaking up for Justice* did not address – and perhaps cannot be addressed within the adversarial system.

### Conclusion

Table 3 shows the ten process and outcome measures used in this evaluation. This initiative was found to work poorly (shown by a ‘-’ sign) for five, well (+) for two and variable for three (+/-). Some areas were identified as capable of improvement

without radical change, some require significant cultural change and others require major legislative and structural change. Greater use could be made of the Witness Service. This would be extremely beneficial as it was, in many ways, the criminal justice agency that performed best. The focus of discussions about VIWs tends to be the courts, as successful court cases are the ultimate objective of most criminal justice processes. This research has shown, however, that effort should now be directed at the investigation and pre-trial processes as much as at the court processes, for these court cases to be successful.

**Table 3 Positive and negative results for the key processes/outcome measures used in the evaluation**

Process measures	
Appropriate training for all agencies comprehensively deployed	-
Deployment of guidance to enable better identification of VIWs	-
Video suites for ABE interviews available and used appropriately	+/-
Implementation of VIW monitoring systems	-
Good levels of VIW file completion and endorsement	+/-
Accurate advice to witnesses about special measures	+/-
Information-sharing, liaison and strategy meetings between criminal justice agencies	-
Outcome measures	
Increase in proportion of VIWs identified by the police	-
Use, where appropriate, of special measures in court and other measures	+
Increase in satisfaction of VIWs with the court process	+

### Methodological note

Decisions regarding the provision of support can be based on two approaches: the categorical approach, by which specified categories e.g. ‘mentally disordered’ and ‘learning disabled’ are defined as eligible and the approach where a witness is assessed as having one or more specified characteristics, such as communication difficulties, or trauma as a result of the crime. Thus, for some witnesses there is a presumption of vulnerability (‘categorical’ VIWs), others have to meet a threshold determined by a judge.

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For a more detailed report of the evaluation see *Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies* by M. Burton, R. Evans and A. Sanders (2006). Home Office On-Line Report No. 01/06. London: Home Office. Copies are available on the Home Office RDS website <<http://rds.homeoffice.gov.uk/rds/onlinepubs1.html>>

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