

The use of special measures in the criminal justice system in Northern Ireland

April 2012

Criminal Justice Inspection
Northern Ireland
a better justice system for all





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Laid before the Northern Ireland Assembly under Section 49(2) of the Justice (Northern Ireland) Act 2002 (as amended by paragraph 7(2) of Schedule 13 to The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010) by the Department of Justice.







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List of abbreviations

| | |
|---------------|--|
| ABE | Achieving Best Evidence (Guidance) |
| CJB | Criminal Justice Board |
| CJI | Criminal Justice Inspection Northern Ireland |
| DoJ | Department of Justice |
| NICTS | Northern Ireland Courts and Tribunals Service |
| NIPS | Northern Ireland Prison Service |
| NIVAWS | Northern Ireland Victims And Witnesses Survey |
| NSPCC | National Society for the Prevention of Cruelty to Children |
| PBNI | Probation Board for Northern Ireland |
| PPS | Public Prosecution Service |
| PSNI | Police Service of Northern Ireland |
| RCSLT | Royal College of Speech and Language Therapists |
| RQIA | Regulation and Quality Improvement Authority |
| SMAG | Special Measures Action Group |
| VIWs | Vulnerable and/or Intimidated Witnesses |
| VIWWG | Vulnerable and Intimidated Witness Working Group |
| VSNIWS | Victim Support Northern Ireland Witness Service |
| YWS | Young Witness Service (in NSPCC) |
| YJA | Youth Justice Agency |



Chief Inspector's Foreword

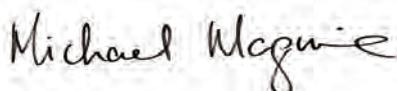
It is widely accepted that many people who are victims of, or witnesses to crimes, find the criminal justice process stressful. Certain classes of witnesses have particular needs by reasons of age, personal circumstances or fear of intimidation. These witnesses may need help to overcome the many anxieties of the criminal justice process and trial. In an acknowledgement of the needs of vulnerable and intimidated witnesses (VIWs) 'special measures' were introduced to assist certain categories of witnesses to give their best evidence in court with as little stress as possible. They include the screening of witnesses in court, the use of closed circuit television, the removal of wigs and gowns, and video evidence. The use of special measures is particularly important in cases involving children and sexual offences.

The Department of Justice (DoJ) has been reviewing the effectiveness of the statutory special measures to assist vulnerable and intimidated witnesses and invited Criminal Justice Inspection Northern Ireland (CJI) to undertake a formal inspection into the area as part of the review process. The aim of the inspection was to examine the use of special measures and its effectiveness in achieving best outcomes for witnesses. The findings and recommendations of Inspectors broadly underpin and reinforce the work of the Departmental Working Group in this area.

The inspection found that special measures are of vital importance in helping vulnerable and intimidated witnesses give their best evidence. Inspectors heard positive feedback from victims and witnesses about the assistance they received and the impact it had on preparing them for giving evidence in court. Witnesses were found to give better evidence when they had a choice about the ways in which it was given. The support to victims and witnesses was regarded as invaluable.

In terms of improvement the inspection found that early identification of those eligible for special measures was important, and that there needed to be greater assessment of individual needs. In addition, there was also a need for improved communication to front-line staff about who is eligible for special measures and the services available. Inspectors found, for example, there was a lack of knowledge among criminal justice staff as to the measures and support available. Many of these issues have been identified by the Departmental Working Group and plans are in place to address the problem areas. A key recommendation arising from the inspection is the need for a Witness Charter in Northern Ireland which would provide clear and transparent information for witnesses on what to expect from the criminal justice system, help in setting out the commitments of the system for witnesses, and provide a readily accessible document which will assist both witnesses and staff.

The inspection was undertaken by Derek Williamson and Rachel Lindsay of CJI. My thanks to all those who participated in the inspection process.



Dr Michael Maguire
Chief Inspector of Criminal Justice in Northern Ireland
April 2012

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Northern Ireland**
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Executive Summary

It is widely accepted that many people who are the victims of, or witnesses to crimes, find the criminal justice process stressful and fear-inducing. Certain classes of witnesses have individual and particular needs either by reason of age, personal circumstances or fear of intimidation. Such vulnerable and intimidated witnesses thus require greater consideration and assistance in giving evidence.

Having acknowledged that vulnerable and intimidated witnesses are in particular need of assistance, 'special measures' were introduced. They were designed to help vulnerable and intimidated witnesses give their best evidence, increase its quality (with as little stress for the witness as possible), and to ensure that their voices were heard in court. Special measures can be summarised as the legal rules allowing witnesses to give evidence in a criminal court in a manner that is different to the more traditional giving of evidence from a witness stand in the courtroom. The principal provisions were introduced in England and Wales by the Youth Justice and Criminal Evidence Act 1999 and in Northern Ireland in the Criminal Evidence (Northern Ireland) Order 1999.

In the application of special measures it is incumbent upon the criminal justice agencies to identify vulnerable and intimidated witnesses, together with appropriate additional support and preparation to help them give the best evidence they can. Accordingly, it is vital that investigators establish at an early stage whether a witness may be entitled to special measures, and if so what measures will best assist. It follows that the consequences of the failure to identify the witness as being vulnerable or intimidated and the failure to address the issue of special measures can be potentially stark. This could ultimately result in victims being unable to access justice, unsuccessful prosecutions and thus impacts on the satisfaction and confidence of victims and witnesses in the criminal justice system, and on public protection.

The aim of this inspection was to examine the use of special measures in Northern Ireland assessing the efficacy of policy, procedure and practice, with a view to achieving the best possible outcomes for witnesses. As part of its methodology in this inspection, CJI conducted a number of interviews with service users. In large measure, the views expressed by those spoken to and who had used special measures to give evidence, was encouraging. That positivity extended from the fact that special measures were regarded as helpful in assisting them to give evidence, and also to largely positive experiences of how they had been treated by the criminal justice agencies.

At the time of inspection a lot of work was ongoing in the area of special measures co-ordinated by the Vulnerable and Intimidated Witness Working Group (VIWWG). Many of the existing issues surrounding special measures had already been identified by this group and work-streams commenced to address these. Consequently, the findings and recommendations of Inspectors broadly underpin, support and reinforce the work of the VIWWG. Similarly, many of the findings from previous research and reviews of the use of special measures are once again replicated and, to that extent, are mutually supporting.



Inspectors distilled the issues requiring priority attention as those surrounding the enhanced identification of vulnerable and intimidated witnesses, greater assessment of individual need and improved communication, including information available publicly.

One of the key difficulties found by Inspectors was with regard to the identification of vulnerable and intimidated witnesses by investigators. It is apparent from some studies¹ that, even on conservative estimates, fewer than half of all vulnerable and intimidated witnesses are identified as such by the criminal justice system agencies. Inspectors found similar identification difficulties in the Northern Ireland context. While the identification of some categories of vulnerable and intimidated witnesses is relatively straightforward (for example children and victims of sexual offences), other vulnerable and intimidated witnesses do not have obvious indicators and accurate identification can depend on training and/or the experience of criminal justice system professionals.

Difficulties with the identification of vulnerable and intimidated witnesses can result from a wide variety of factors, including the inherent difficulties with individuals who have complex mental health issues, which are difficult even for health professionals to diagnose, to symptoms which can be masked. In responding to these difficulties, the most significant challenge for the criminal justice system is to make staff aware of the range of vulnerabilities and to equip them with sufficient understanding to recognise when more expert help and assistance needs to be provided.

Given that it is very likely significant proportions of vulnerable and intimidated witnesses are currently being excluded, the criminal justice system needs to re-double its efforts to ensure that a proper identification of such witnesses is made at the outset. That means the Police Service of Northern Ireland (PSNI) must do more; that the Public Prosecution Service (PPS) must be alert to the possibilities that vulnerable and intimidated witnesses have not been identified; and the Northern Ireland Courts and Tribunals Service (NICTS), the National Society for the Prevention of Cruelty to Children, Young Witness Service (NSPCC YWS) and Victim Support Northern Ireland, Witness Service (VSNI WS) must do likewise. All of this needs to be under-pinned by training and awareness raising efforts.

In terms of communication, Inspectors found that while there were a range of documents and websites indicating the availability of special measures, there were a number of areas where improvements could be made. At the strategic level, the absence of a Witness Charter in Northern Ireland needs to be addressed. At an operational level more detailed information for witnesses on the special measures available, and the meaning of each, would assist in helping individuals to make informed choices. Inspectors found during fieldwork that there was a lack of knowledge amongst many criminal justice system staff as to the measures and support available. Consequently, Inspectors felt that witnesses could be uninformed and unsupported in what might be significant cases. The development of some further policy documents and agreements (such as a police and prosecution protocol for early special measures discussions) will help to ensure a more coherent and connected approach both for practitioners and witnesses.

¹ Speaking Up for Justice - report of the inter-departmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the criminal justice system, Home Office, June 1998.





Effective support and preparation, by providing information about the court process, can help all witnesses to produce better evidence and can influence the witness's decision to proceed with the case in the first place. This may be especially so in cases of intimidation where Inspectors found an appreciably less significant profile for this area of vulnerability. Preparation and support that is planned to fit the needs of individual witnesses can help to prevent and alleviate these problems. Issues regarding a lack of support manifest themselves in a failure to provide bespoke consideration of need (individual needs assessments). Some witnesses told Inspectors that had they been given fuller information on the special measures available and their meaning, they might have taken a different course. Others felt that the particular special measures adopted did not allow them to feel fully engaged in the proceedings.

Inspectors therefore considered that in making further improvements to the process and use of special measures, that an important aspect moving forward is the consideration of individual needs. This arises from findings that there can be a kind of 'default setting' to the use of special measures which focuses on certain categories of vulnerability, or from an implicit focus in policy and hence in practice, on child abuse cases. Furthermore, Inspectors found that there was little consideration of individual need in early decisions in many cases. For example, while accepting the presumptions of the primary rule, in cases involving child witnesses the normal practice of the PSNI was to proceed with a video recorded interview without a considered examination and discussion of the options and alternatives. Conversely, for others who might be regarded as vulnerable by reason of age, they were excluded from consideration of special measures on the basis of offence type. This gives rise to findings that there were some cultures and practices within the criminal justice system which led to a restricted consideration of the individual needs of witnesses. Inspectors consider that the focus of success in terms of the criminal justice system treatment of vulnerable and intimidated witnesses should be measured by the fact that the process takes account of their wishes and of itself does no more harm.

While it is apparent that in the main special measures are well regarded and that much work has been done or is being planned, it is also apparent that supplementary collective action is required across the criminal justice system if the experience of witnesses is to be further improved. The operation of special measures provisions remains problematic. In particular, operational practice fails to recognise the vulnerability of large numbers of people who come into contact with the criminal justice system. Meeting these needs will not automatically require additional resources, nor any fundamental process changes. Rather, it will require a renewed effort, awareness raising and small adjustments to processes.

Inspectors have made a number of recommendations which are aimed at addressing these issues. Principal among those recommendations are additional strategic policies such as a Witness Charter, additional awareness raising and training for the PSNI and improved communication, both with witnesses and the passage of information between agencies.



Recommendations

Strategic recommendations

- Inspectors recommend that the DoJ oversee the development of a Witness Charter for Northern Ireland (Paragraph 2.20).

Operational recommendations

- Inspectors recommend a clear expression in PSNI policy of the need to discuss special measures and complete an individual needs assessment in appropriate cases in any new policy once it is issued (Paragraph 3.26).
- A guide to working with intimidated witnesses for police and criminal justice system practitioners, such as is available in England and Wales, is not available in Northern Ireland. Inspectors therefore recommend that the DoJ oversee the development of such a guide, with consultation and contributions from all relevant agencies, which should inform all criminal justice system practitioners and the public alike of the criminal justice system processes and of the help and support available. When developed, such guidance may act as a reference for criminal justice organisations internal policies and an addendum to the ABE Guidance (Paragraph 3.47).
- Bearing in mind the significant difficulties with the identification of VIWs, it may be helpful to provide a suitably short appendix within the ABE Guidance specifically to inform and assist operational Police Officers. This and other guidance material can then be made more widely available via electronic media for reference as required (Paragraph 3.60).
- Inspectors recommend that the PSNI and the PPS agree a broad structure for case outlines which incorporates the flagging of VIWs, including those who may be assessed as vulnerable by reason of age or offence only (Paragraph 3.66).
- Inspectors recommend that the PSNI issues appropriate instruction to its staff to ensure, that where possible, evidence in support of special measures applications accompanies case files from the outset (Paragraph 3.69).
- Inspectors recommend as part of its ongoing work, that the NICTS should examine the feasibility of providing video-link facilities which would allow witnesses to hear and see what is going on in court in a separate room, and which would maintain the integrity of their separation from the court, but allow vulnerable and/or intimidated witnesses to feel part of the proceedings (Paragraph 3.94).
- Inspectors recommend as part of the Witness Care Unit programme/project plan, a dedicated project work-stream is established aimed at ensuring a clear, comprehensive and auditable system of updates for witnesses regarding the process of special measures applications (Paragraph 3.98).



- Inspectors recommend that a criminal justice system-wide leaflet is developed and made available, which clearly sets out for witnesses, the kind of support available to them, and the organisations who may provide it. This includes on the NI Direct website and that this is also linked via the various criminal justice system agency websites (Paragraph 5.11).
- Bearing in mind that some witnesses who might be eligible for special measures have a change in circumstances (for example where intimidation occurs in the period between initial police investigation and trial), Inspectors recommend such leaflets should be forwarded by the PPS to accompany correspondence concerning the calling of witnesses to court (requirement to attend letters) (Paragraph 5.12).
- Inspectors recommend the programme/project plans for the development of Witness Care Units should include protocols that will ensure it can act as a 'safety net' to the identification of VIWs (Paragraph 5.15).

Areas for improvement

- Inspectors encourage the NICTS to look at the possibility of further remote link facilities which are as close as possible to existing court venues, and utilise the network of video facilities already available in the wider Government estate (Paragraph 3.7).
- Inspectors encourage the PSNI and the Department of Health, Social Services and Public Safety to jointly monitor the numbers and reasons for single agency interviews under the joint protocol, taking appropriate remedial action where necessary (Paragraph 3.34).
- Inspectors encourage a consideration of specific publicly available guidance via the PSNI website to those who are vulnerable as a result of intimidation (Paragraph 3.48).
- Inspectors encourage collaboration and liaison with the RCSLT for all relevant training being delivered/developed within the criminal justice system (Paragraph 3.58).
- Inspectors encourage the requirements of Prosecutors in terms of the evidence in support of special measures applications is incorporated by the PSNI in training and in its policies on the use of special measures. The PPS should assist the PSNI by providing a copy of the guidance it has to Prosecutors (Paragraph 3.68).
- As a matter of improvement the PSNI should consider further reminders to staff on the protocols to follow in the conduct of video recorded interviews (Paragraph 3.70).
- Inspectors consider that the DoJ should keep under review the need for further guidance on the statutory provisions concerning the broad areas of special measures/witness anonymity and other witness protections, such as reporting restrictions, together with the rules making provision for the form of special measures applications (Paragraph 3.84).
- There is a need for common language and understanding across the criminal justice system in support of special measures processes. In particular, the PSNI and the PPS need to ensure that in the transfer of information there is clear and unambiguous understanding (Paragraph 3.87).
- Inspectors encourage that clarity is provided on the issue of briefing court witness supporters in the next revision of the ABE Guidance, and that the NICTS should take responsibility to ensure that such supporters are given appropriate instruction (Paragraph 4.18).

Section



Inspection Report



CHAPTER 1:

Introduction to special measures



- 1.1 It is widely accepted that many people who are the victims of, or witnesses to crimes, find the criminal justice process stressful and fear-inducing. Certain classes of witnesses have individual and particular needs either by reason of age, personal circumstances or fear of intimidation.
- 1.2 Furthermore, those who have been victimised may have special difficulties as witnesses in criminal proceedings. They may need help to overcome the many anxieties of the criminal justice process and trial. For example, people with mental health issues, a physical disability or who are in fear can all find the criminal justice system especially stressful. Such VIWs will need greater consideration and it will be necessary to identify appropriate additional support and preparation to help them give the best evidence they can.
- 1.3 The principle of open justice normally requires that evidence is given in an open court, in other words, in the presence of representatives of the press and members of the public who might wish to attend. However, in responding to the needs and concerns of VIWs, it has been recognised that the interests of justice require extraordinary provisions.
- 1.4 Having acknowledged that VIWs are in particular need of assistance, 'special measures' were introduced to assist certain categories of those witnesses to give their best evidence in court and to ensure that their voice is heard in court. These special measures were designed to help VIWs give evidence in the best way and to increase its quality, with as little stress for the witness as possible. The provisions were introduced in Northern Ireland in the Criminal Evidence (Northern Ireland) Order 1999 (the 1999 Order). For example, this includes the use of video recorded examination and video-link cross-examination, together with other issues such as the use of screens and the removal of wigs and gowns in court. A further fuller description of the special measures provisions available follows post, while a summary of statutory special measures is included at Appendix 1.
- 1.5 As we outline above, the Criminal Evidence (Northern Ireland) Order 1999 makes provisions for physical measures to reduce the stress of giving evidence at trial. These statutory provisions originate from the findings of an England and Wales inter-departmental group review, 'Speaking Up for Justice' published by the Home Office in 1998².

² Speaking Up for Justice, Report of the inter-departmental working group on the treatment of vulnerable or intimidated witnesses in the criminal justice system, Home Office, June 1998.



1.6 The majority of special measures in the 1999 Criminal Evidence (Northern Ireland) Order have been made available to eligible witnesses in all criminal courts. However, some additional measures have only recently been made available in the Justice Act (Northern Ireland) 2011. For example, the Act, amongst other matters, changes the upper age at which children qualify for special measures from 17 to 18 years. In respect of the use of intermediaries, the courts retain an inherent jurisdiction in some venues to grant the use of an intermediary under common law, but once again the Justice Act 2011 provides for the use of intermediaries, both for witnesses and vulnerable accused, if the court is satisfied of certain conditions.

1.7 It must be emphasised that special measures for VIWs can be authorised only by the court, and then only if they are likely to improve the quality of a witness's evidence. Quality encompasses coherence, completeness and accuracy in the evidence. In deciding eligibility, the courts must consider witnesses' own views about the need for special measures.

1.8 In effect, a three stage test is applied to special measures. These are:

- Is the witness vulnerable/intimidated?
- If the witness is potentially vulnerable/intimidated is this likely to affect whether they will be willing to testify, to affect their capacity to give their 'best evidence' in court, and to cause undue stress in or before court?
- If the answer to the above are 'yes', what type of support or assistance will be most likely to alleviate these difficulties?

1.9 The eligibility criteria for special measures is set out in the Criminal Evidence (Northern Ireland) Order 1999 and in summary comprises the following categories:

- age;
- mental disorder;
- significant impairment of intelligence;
- physical disability; and
- fear or distress about testifying.

However, it is important to note that a witness may be both vulnerable and intimidated, and that these two categories are not mutually exclusive.

Young witnesses

1.10 A witness under the age of 18 is always eligible for consideration of special measures. There is a 'primary rule' in the case of child witnesses (a presumption) that the court must give a special measures direction providing:

- video evidence is to be admitted; and
- where evidence is not given by means of a video recording, a direction that evidence is given by live link.

The above are subject to some limitations. In addition, directions shall cease to have effect once the witness reaches the age of 18. The primary rule thus creates a strong presumption that child witnesses should have access to video recorded evidence in chief and the use of live link special measures for cross-examination.

1.11 Given the tests applied to special measures, it is imperative that investigators establish at an early stage whether a witness may be entitled to special measures, and if so, what measures will best assist. Inevitably, this will need to be discussed with the witness in order to ascertain their views.



1.12 It must be regarded as self-evident that the consequences of the failure to identify the witness as being vulnerable or intimidated, and the failure to address the issue of special measures, are potentially stark. This could ultimately result in unsuccessful prosecutions and thus impact on public protection. A central tenet of the special measures provisions is that appropriate provision for eligible witnesses is made in advance and that this in itself will ease the difficulties faced by such witnesses. Where a witness has been identified as potentially vulnerable or intimidated, the investigator should discuss the availability of special measures with them. In the period leading up to, and during the trial, Police Officers and others involved in the criminal justice

system, must take account of the needs of witnesses and ensure their protection and support, in particular, where the intimidation of witnesses is a risk. As such, one crucially important aspect of the use of special measures is that full and accurate information about special measures and other arrangements required to assist vulnerable and intimidated witnesses, is needed to inform decision-making and pre-trial planning.

The proportion of vulnerable and intimidated witnesses (VIWs)

1.13 With regard to the numbers and nature of special measures applications, the NICTS, provided the following table for the three calendar years 2007, 2008 and 2009.

| Document Code | 2007 | 2008 | 2009 | Total | Percentage of overall number |
|--|------|------|------|-------|------------------------------|
| SMART 11 - Screening witness from the accused | 54 | 53 | 43 | 150 | 6.35% |
| SMART 12 - Evidence by live link | 584 | 609 | 606 | 1799 | 76.22% |
| SMART 13 - Evidence given in private | 6 | 4 | 5 | 15 | 0.63% |
| SMART 14 - Removal of wigs and gowns | 3 | 0 | 15 | 18 | 0.76% |
| SMART 15 - Video-recorded evidence in chief | 136 | 112 | 105 | 353 | 14.95% |
| Other | 6 | 12 | 7 | 25 | 1.05% |
| Grand Total | 789 | 790 | 781 | 2360 | |

NB* This table cannot be replicated for later years due to changes in the way data is recorded.





1.14 The following data, representing special measures applications dealt with during 2010-11, was also supplied by the NICTS.

| | Application Granted | Application Refused | Other Disposal | Total Applications |
|-----------------------------------|---------------------|---------------------|----------------|--------------------|
| 2010-11 Magistrates' Court | 540 (72.7%) | 21 (2.83%) | 181(24.3%) | 742 |
| 2010-11 Crown Court | 129 (45.1%) | 9 (3.14%) | 148 (51.7%) | 286 |
| 2009-10 Magistrates' Court | 328 (75.2%) | 17 (3.8%) | 91 (20.87%) | 436 |
| 2009-10 Crown Court | 108 (48%) | 4 (1.7%) | 113 (50.2%) | 225 |

NB* The majority of 'other' disposals in both the Crown Court and Magistrates' Courts are applications which are withdrawn. However, the categorisation 'withdrawn' includes cases which are a change of plea or where witnesses are not called. The data for 2010-11 is un-validated. The above table indicates that there was a sizeable increase in the numbers of applications across both court tiers between 2009-10 and 2010-11. The increase is in the order of 36%.

1.15 Estimates of the numbers of VIWs are extremely problematic. Justice organisations in Northern Ireland do not routinely keep data on the numbers of witnesses, nor of the sub-categories of VIWs. Consequently, it is also difficult to make any assessment of the exclusion of certain categories of witnesses in terms of fairness and equality. However, arising from estimates in England and Wales, the Home Office Report 01/06 stated, '...researchers found that, on a very conservative estimate, 24% of witnesses were probably VIW.' The report also notes however, that the proportion of VIWs identified by agencies was 9%.

This gap is described as 'considerable'. However, of the overall total of VIW's in England and Wales, the categories were estimated in the Home Office Report 01/06³ to be broadly as follows:

| | |
|--|-----|
| Children under 17 | 50% |
| Intimidated | 16% |
| Victim of a sexual offence (adult) | 11% |
| Aged under 17 suffering fear or distress | 8% |
| Aged under 17 and the victim of a sexual offence | 8% |
| Other: physical disability, mental disorder, learning disability etc (adult) | 7% |

³ Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies, Home Office Online Report 01/06, Mandy Burton, Roger Evans, Andrew Sanders.



1.16 While Inspectors were unable to conduct a similar study in Northern Ireland due to the absence of detailed data, we can conclude from evidence heard that the majority of special measures cases are those involving children and sexual offences. To that extent, the findings in England and Wales seem to be mirrored. Research elsewhere and the findings of Inspectors also demonstrate that some categories of VIWs are more readily identified. This has been referred to as a ‘hierarchy of identification’ and this further indicates that, for example, child victims of sexual offences are much more likely to be identified as a VIW than are adult witnesses to violent offences. Together with the failure to identify VIWs in the first instance, these are assessed to be among the most significant of factors in effective service provision and consequently challenges for the criminal justice system.

1.17 In terms of intimidation we can draw some conclusions from the following data which suggests that intimidation is a real and ongoing problem in the criminal justice system. The PSNI records the numbers of crimes of intimidation as follows:

| | 2009-10 | 2010-11 |
|---------------------|------------|------------|
| Intimidation | 580 | 519 |
| Detected | 59 (10.2%) | 60 (11.6%) |

1.18 Given that crime is significantly under-reported generally, there is no reason to doubt that this will not also be the case for intimidation. Indeed, experience would indicate that under-reporting of intimidation will be even more significant for this crime category.

1.19 All the above data can be further considered alongside the numbers of video-recorded witness interviews conducted by police under the Achieving Best Evidence (ABE) Guidance. The latter document is issued to criminal justice system practitioners and provides guidance on interviewing victims and witnesses, the use of special measures and the provision of pre-trial therapy. The numbers of interviews conducted by the PSNI under the guidance is as follows:

| Calendar Year | Number of recorded interviews |
|--------------------------------|-------------------------------|
| 2006 | 1,160 |
| 2007 | 1,117 |
| 2008 | 946 |
| 2009 | 1,407 |
| 2010 | 1,428 |
| 2011 (until 21 September 2011) | 1,114 |

1.20 The table above strongly suggests, despite a contrary perception in some quarters, that the numbers of such interviews are in fact increasing, albeit slightly. With the changes contained in the Justice Act (Northern Ireland) 2011 (including an increase in age eligibility from 17 to 18 years), these numbers are likely to rise further. The extent of that rise is yet to be established and will depend on how PSNI policies are fixed and implemented on matters such as the ‘opt-out’ clause in the Justice Act 2011. This ‘opt-out’ clause allows child witnesses to opt-out of the use of special measures. Thus it will be especially significant for child witnesses who previously would have automatically been entitled to special measures (video recorded evidence and the use of live-link).





Methodology

- 1.21 The aim of this inspection was ‘to examine the use of special measures in Northern Ireland assessing the efficacy of policy, procedure and practice with a view to achieving the best possible outcomes for witnesses.’
- 1.22 The full Terms of Reference are included at Appendix 2. A detailed methodology for the inspection is included at Appendix 3. A high level process map is also included at Appendix 4, which sets out the progress of special measures and seeks to identify the opportunities for the criminal justice agencies and others to identify vulnerability. This process map shows that there are significant opportunities to do so.
- 1.23 As part of the inspection methodology, Inspectors were keen to uncover user perspectives and spoke to a number of witnesses who had used special measures. Individuals who had used special measures were accessed via court observations and also via a case file sample from the PPS (discussed post). The sample included children, older people and vulnerable witnesses. Inspectors wish to take this opportunity to thank all of those with whom they spoke for sharing their experiences to inform this report.
- 1.24 While this report deals with both victims and witnesses, most victims who give evidence in court may also be described as witnesses. Consequently, the term witness is used throughout this report and this should be taken to mean all witnesses, including victims. As special measures apply largely to vulnerable and intimidated witnesses the abbreviation VIWs is used for concision.
- 1.25 Having set out an introduction to special measures, including some of the key issues in their use, and the volumes of both special measures in the courts and of VIWs, this report proceeds to describe and evaluate the policy surrounding, and the application of, practice and processes with regard to special measures.

CHAPTER 2:

Special measures policy, strategy and governance



The Criminal Justice Board (CJB) and Vulnerable and Intimidated Witness Working Group (VIWWG)

- 2.1 The DoJ has a range of devolved policing and justice functions, set out in the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010. However, the main role of the Department is to support the Minister of Justice to help keep the people of Northern Ireland safe.
- 2.2 In addition to its statutory functions, the DoJ provides resources and a legislative framework for its agencies and arms length bodies (which together constitute most of the justice system in Northern Ireland). Together with these organisations the Department is responsible for ensuring there is a fair and effective justice system in Northern Ireland, and for increasing public confidence in that system. The Department also has overall responsibility for co-ordinating the development of a victims and witnesses policy within the criminal justice system in Northern Ireland. It further has accountability for the funding arrangements of most of the statutory and voluntary agencies involved in service delivery. In the context of special measures this includes

accountability for the funding of the NSPCC Young Witness Service (YWS) and of Victim Support's WS. It also extends, for example, to the co-ordination and development of the proposed intermediaries service (discussed post).

- 2.3 At the time of inspection the DoJ were in the process of developing a future five year strategy for victims and witnesses in order to replace the previous five year 'Bridging the Gap' strategy due to end in early 2012. It had been anticipated that the new strategy would be in place by April 2012, however, in view of the Northern Ireland Assembly Justice Committee's decision to hold its own enquiry into victims and witnesses, the development of a new strategy has been deferred. Inspectors consider it likely that such a new strategy when published will deal significantly with issues concerning the experience of witnesses in the criminal justice system. Inspectors have been provided access to early proposals and among the emerging themes identified by the DoJ and endorsed by the Justice Committee will be a work strand addressing, '*providing additional support for victims and witnesses who need it*'. Inspectors thus hope to see the inclusion of specific matters concerning special measures within this work strand.



The CJB

- 2.4 Issues of cross-cutting criminal justice service delivery, including the provision of care for victims and witnesses, is strategically co-ordinated and managed through the work of the CJB. This comprises the heads or senior representatives from:
- the PSNI;
 - the PPS;
 - the NICTS;
 - the PBNI;
 - the NIPS; and
 - the YJA.

The CJB is chaired by a senior civil servant at the DoJ. It is assigned a central role in managing cross-agency interests and co-ordinated service delivery throughout the criminal justice system.

The VIWWG

- 2.5 In order to deliver effective services, policy and practice in the area of victim and witness care, the CJB is supported among other groups by the VIWWG. While the principal strategic forum for inter-agency working is the Board, the vehicle for the co-ordination and delivery of inter-agency working and policy in the specific area of special measures is the VIWWG. The Terms of Reference for the group indicate its role as including:
- addressing issues concerning the operational effectiveness of special measures;
 - finalising the revised ABE Guidance;
 - establishing an intermediaries service; and
 - the implementation of the special measures provisions in the Justice Act (Northern Ireland) 2011.

- 2.6 Inspectors found several examples of good inter-agency working, most being co-ordinated by the VIWWG and some were of a bi-lateral nature. Some work ongoing and being co-ordinated by this group includes:
- the research of assessment tools for VIWs;
 - revision of practices regarding the recording of witness needs and the transfer of relevant information across criminal justice agencies;
 - additional special measures guidance for Police Officers; and
 - special measures protocols between the PSNI and the PPS.

- 2.7 Further evidence of some good inter-agency working at local level and on a case-by-case basis were apparent, and this was replicated in the area of training, with, for example, PPS staff delivering ongoing PSNI training (and vice-versa).

- 2.8 The VIWWG feeds into the CJB on the development of policy initiatives aimed at providing consistent and co-ordinated delivery of services surrounding special measures. Inspectors did not hear any significant concern regarding the operation of this group and many considered it to be an active and committed group who had the capacity to make significant differences in driving forward its agenda and Terms of Reference. However, while some suggestions were made that the group's work could be further enhanced by the inclusion of additional third sector representatives, Inspectors understand that there is a consensus to maintain focus on the operational delivery of issues surrounding special measures.

The Code of Practice for Victims of Crime

2.9 Among the principle over-arching strategic documents, setting out how the criminal justice system will deal with victims, is the Code of Practice for Victims of Crime. It explains how a victim should expect to be treated by the criminal justice system. An outline of its main elements is provided post. In addition, the Guide to Northern Ireland's Criminal Justice System for Victims and Witnesses of Crime builds on and complements the Code of Practice by providing a step-by-step guide through the criminal justice process, explaining what a victim or witness can expect at every stage, with specific attention to the identification of vulnerable witnesses, and the application and use of special measures in court. This and the Code of Practice are available via the NI Direct and DoJ websites.

2.10 The NI Direct website and the Guide to the Northern Ireland Criminal Justice System for Victims and Witnesses explains eligibility for special measures and the nature of the measures available. These helpfully point out some of the issues in each which might concern individual witnesses dependant on their circumstances, and assist in decision making. However, as Inspectors discuss later the awareness of such information needs to be raised internally within the criminal justice system and externally for service users (enhanced communication as referred to post).

Joint protocol procedures

2.11 Part of the landscape in terms of over-arching policy guidance concerns two major joint protocol procedures agreed between the Department of Health, Social Services and Public Safety and the PSNI. The first is the Protocol for Joint Investigation by Social Workers and Police Officers of Alleged and Suspected Cases of Child Abuse in Northern Ireland⁴. The second is the Protocol for Joint Investigation of Alleged and Suspected Cases of Abuse of Vulnerable Adults⁵. The latter was first published in 2003 and updated in July 2009. The former has been in existence for a considerably longer period of time. Each sets out the joint working arrangements for the referral and investigation of abuse for children and vulnerable adults. A key part of these protocols is the need to conduct interviews under the Achieving Best Evidence Guidance (discussed below).

2.12 A recent joint review was conducted by the Regulation and Quality Improvement Authority (RQIA) and CJI on the protocol surrounding the abuse of vulnerable adults. Many of the findings of that review are relevant to consider alongside the findings in this report. For example, key amongst its recommendations, which underpins and supports the further findings of this report was the following: *'The PSNI should develop a training package to ensure that all operational Officers are aware of the need to involve specialist assistance when dealing with vulnerable adults.'*

⁴ Protocol for Joint Investigation by Social Workers and Police Officers of Alleged and Suspected Cases of Child Abuse in Northern Ireland, September 2004.

⁵ Protocol for Joint Investigation of Alleged and Suspected Cases of Abuse of Vulnerable Adults, Health and Social Care, PSNI and Regulation and Quality Improvement Authority, July 2009.



ABE Guidance

2.13 Another principle strategic and overarching policy document addressing special measures is the Achieving Best Evidence (ABE) in Criminal Proceedings Guidance. Although previously available it was last published by the DoJ in January 2012. It sets out good practice regarding interviewing witnesses, including victims, for both the prosecution and defence. It considers good practice in preparing and planning for interviews with witnesses, and also provides guidance on decisions about whether an interview should be video recorded or whether it might be more appropriate for a written statement to be taken. Overall, the guidance is intended to support professionals in the Northern Ireland criminal justice system to improve the quality of treatment for victims and witnesses, so that they have an opportunity to provide their best evidence. The Northern Ireland ABE Guidance largely mirrors similar guidance in England and Wales published in 2007.

2.14 Although not an issue of strategy in itself, it is relevant to highlight here that Inspectors found a patchy awareness and application of the ABE Guidance contained in it. This was principally the case with Police Officers. While specialist Police Officers were more likely to demonstrate a knowledge and understanding of it, generalist Officers seemed particularly unaware of the mainly very helpful and comprehensive guidance contained within it. These issues are discussed in further detail at Chapter 3.

DoJ consultation

2.15 The DoJ conducted a pre-policy consultation on the issue of special measures during early 2009. The summary of responses, later published by the DoJ indicated that:

- in general the special measures legislation had been a significant step forward in helping to obtain the best evidence;
- the special measures available could be improved in some ways; and
- there were some practical issues about the implementation of special measures.

2.16 Among areas of concern were:

- putting in place court listing arrangements to give priority to cases involving special measures;
- the examination of why applications are not granted; and
- that there should be legislative provision for prioritising cases where children or vulnerable witnesses are involved so as to lessen the length of time before trial.

Strategy and guidance

2.17 In reviewing the available material, including practitioner guidance, Inspectors considered that this seems to implicitly focus on child abuse cases. Some third sector groups referred to the criminal justice system having to 'catch up' in terms of policy and awareness in the context of special measures with other vulnerable groups, for example, those suffering mental health impairments. That is not to say that other issues are excluded in policy and guidance, rather that the focus tends towards children. Examples are highlighted at paragraphs 3.65 and 3.96



post. Indeed the RQIA and CJI review report into the protocol for the joint investigation of the abuse of vulnerable adults found, ‘...the review team considered that vulnerable adults would not have the same priority as child abuse cases.’ The consequence and danger is that practice then tends to follow, and there is not the same consideration given to other vulnerable groups such as for those individuals with a mental health impairment or learning disability. Such a contracted focus is propagated in the thinking and practice of criminal justice system professionals. This in turn may lead to a kind of ‘default setting’ which fails to consider individual need, and which is seen by Inspectors as a vitally important element of improving practice.

- 2.18 From the point of view of strategy and policy, one significant issue in terms of the criminal justice system treatment of witnesses (and consequently the use of special measures) is the fact that there is no Witness Charter in Northern Ireland, such as is the case in England and Wales. The England and Wales Charter, at various stages, draws attention to issues concerning special measures and links this with matters such as:
- initial needs assessment by police;
 - identification as a VIW;
 - action on intimidation;
 - the outcome of special measures applications;
 - follow-up needs assessment by the Witness Care Unit if the case is proceeding to court;
 - meeting witness needs (including special measures);
 - giving priority to cases involving vulnerable and intimidated witnesses; and

- information about the court processes.

2.19 Inspectors acknowledge that some such relevant matters are addressed in the Victims Code for Northern Ireland. However, this is less detailed and fails to address issues specific for witnesses, or to codify the obligations of the criminal justice system for all witnesses. The Code of Practice in England and Wales does have a statutory footing while the Witness Charter does not. In Northern Ireland the Code of Practice has not been given a statutory footing. However, the DoJ plan to do so at the next available opportunity. At the time of inspection the Department had no current plans to implement a Witness Charter, however, were in the process of developing a new five year strategy in which this issue may be considered.

- 2.20 While Inspectors drew attention to the absence of a Witness Charter in their December 2011 report looking into the care and treatment of victims and witnesses, **Inspectors recommend that the DoJ oversee the development of a Witness Charter for Northern Ireland.** Such a document would have the advantages of:
- providing clear, coherent and transparent information for witnesses on what to expect from the criminal justice system;
 - codifying the commitments of the criminal justice system to witnesses; and
 - providing a readily accessible document which will assist both witnesses and criminal justice system professionals.



CHAPTER 3:

The operational delivery of special measures



The principle special measures

3.1 Prior to discussing the current practice surrounding special measures it will first be necessary to understand their application. While the principle statutory special measures set out in the 1999 Order are summarised at Appendix 1, further descriptions and analysis are also set out below by way of context.

Article 11 - Screening

3.2 Screens may be authorised to shield an eligible witness from seeing the defendant. The screen is normally erected around the witness rather than the defendant. It must not prevent the judge or jury, and at least one legal representative of each party to the case (i.e. the prosecution and each defence representative) from seeing the witness, or the witness from seeing them.

3.3 During fieldwork Inspectors heard evidence of some concerns regarding the use of screens. Indeed one legal practitioner postulated that he would object to the use of screens in every case since this might be seen to prejudice the defendant. Some other concerns of the practical arrangements in the use of screens was also apparent. This ranged from issues such as a

witness being seen coming into court, to the practicalities of getting a witness into court and behind screens without compromising that witness in any other way. On occasion, that meant clearing the court to allow the witness to come into the screened area without being seen. The practicalities of the screening process were thus largely concerning the logistics of getting a witness to and from the witness box.

Article 12 – Live link

3.4 ‘Live link’ usually means a closed circuit television link, but also applies to any technology with the same effect. The essential element of a live link is that it enables the witness to be absent from the courtroom where the proceedings are being held, but at the same time to see and hear, and be seen and heard by, the judge or jury, and at least one legal representative of each party to the case.

3.5 Consideration should normally be given to whether use of a live link away from the court house where the trial is taking place could be used for a witness. This could be at another court or a separate remote facility which has live link capability (normally referred to as a remote link). In all cases, this will need to be agreed by the court. There is widespread support for the use and



development of remote link facilities. However, while this may reduce stress on a witness, it does not entirely eliminate it.

- 3.6 The research evidence of Plotnikoff and Woolfson (2004⁶) found that children generally expressed a preference for giving evidence in this way (remotely), rather than being in the courtroom. However, a limited number of children prefer to go into court and found that they felt they had been given no choice, and some may not have chosen a video-link had they been fully informed of its import. However, as we note elsewhere in this report the Justice Act 2011 has now provided an ‘opt-out’ clause to the primary rule for children. On a similar note, Inspectors found that some service users would have preferred to be given a choice, based on full information. The live link does not prevent the defendant from seeing the witness, and this could upset witnesses who are not fully informed that this will be the case. One further possible disadvantage concerns the fact that some witnesses may be unsettled by the fact that rather than looking at the Judge during cross-examination, they will be looking directly at defence counsel on their monitor.
- 3.7 Inspectors visited the remote link facility at Londonderry/Derry operated by the NSPCC and VSNI, and were impressed with what they saw and the benefits to witnesses who might be in fear or distress. It appeared to Inspectors that such remote link facilities could be further developed and used, subject to

the direction of the court in individual cases. However, Inspectors also heard concern from legal professionals regarding the difficulties created by remote links when exhibits had to be shown (as is often the case). Where remote link facilities are concerned, the proceedings would have to be suspended and a court official would go from the court to the remote facility to present the exhibit to the witness, allowing the court proceedings to resume. This worked reasonably smoothly in Londonderry/Derry as the remote link facility is very close to the court, albeit in another building. A second remote link facility is available in Old Townhall, Belfast which again is very close to the Laganside courts in Belfast. Once again, Inspectors heard concerns from legal practitioners at the interruptions caused when exhibits had to be shown. Notwithstanding these difficulties where the needs of a witness require the use of remote link facilities because of exceptional fear or distress, then these should be given due consideration in every case and as part of an individual needs assessment. It appears to Inspectors that greater consideration of remote link facilities would have the considerable advantage of ensuring that a witness does not come into contact with a defendant or their supporters. **Inspectors encourage the NICTS to look at the possibility of further remote link facilities which are as close as possible to existing court venues, and utilise the network of video facilities already available in the wider Government estate.**

6 Measuring Up? Evaluating and implementation of Government commitments to young witnesses in criminal proceedings, Plotnikoff J and Woolfson R, July 2009 www.nspcc.org.uk/inform.

Live link -v- screens

3.8 The views of the witness are likely to be of great importance in deciding which of these two special measures is most suitable. A witness who is greatly distressed at the prospect of being in the same room as the defendant is likely to give better evidence if permitted to use the live link. However, this requires to be carefully explained to the witness, that the defendant will be able to see them on the television screen in the court. This should normally be explained during initial investigation and during a pre-trial visit to enable witnesses to make early and informed choices. Inspectors found there can be a patchy provision of information in this regard and several witnesses told Inspectors that they had not been given full information and/or a choice in the special measures which might be applied.

Article 13 - Evidence given in private

3.9 As we outlined earlier, the principle of open justice normally requires that evidence is given in an open court, in other words, in the presence of representatives of the press, and members of the public who might wish to attend. Nonetheless, there are statutory restrictions on attendance and reporting in the youth court for the protection of children and young people. In sexual offences cases some further exceptions are justified. Measures such as this might be particularly useful in cases where the witness might be impeded in relating matters of intimacy with members of the public present. Inspectors found very broad support for this as a special measure. No specific concerns in its use were raised.

Article 14 - The removal of wigs and gowns

3.10 This measure is plainly more often used in cases involving children, and many told Inspectors that it has become a customary measure used in such cases with the court often automatically taking the measure. Inspectors heard evidence from a number of voluntary groups operating in the area of victim support and advocacy, that the atmosphere of courts is discouraging, and some referred in particular to the wearing of wigs and gowns. This was stated to add to the anxiety and feelings of power imbalance on the part of victims in particular. To the contrary, Inspectors also heard that this requires careful assessment as for some particularly vulnerable individuals/children, the certainty of knowing who is who in a courtroom can be empowering in itself. This dichotomy clearly illustrates, once again, the need for an individual assessment in each case and for each witness, rather than any kind of blanket approach to special measures.

Article 15 - Video evidence (in chief)

3.11 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 control of the courts and prosecution. In addition to its use in court, a video recorded interview also functions as a tangible reminder to Prosecutors that the witness may be eligible for special measures. It is therefore something of a gateway to the other measures available.



3.12 Investigators in effect exercise a veto over the use of video recorded evidence in chief. Whilst PPS 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 can counteract the absence of video recorded evidence.

3.13 One of the negative consequences of the use of video recorded evidence is that in the case of a child witness, normally that evidence must be used as evidence in chief, even though the child's performance in the video may not be the best evidence they are capable of giving. Indeed Inspectors heard of one case having to be abandoned in similar circumstances and this is referred to further at paragraph 3.34 post. It may also be considered less advantageous as the video interview is generally conducted for investigative purposes and the questions asked may not be those that counsel would ask or in the order they might ask in court. It may also be considered a disadvantage that witnesses go into cross-examination 'cold', in other words without the benefit and experience of examination in chief. Additionally, given the gap between the recording of the video evidence in chief and the eventual cross-examination of a witness, discrepancies in the witnesses recall can be exposed as undermining their credibility. This can be despite the ability of witnesses to have their memory refreshed by way of viewing their video prior to giving evidence.

3.14 While such difficulties will always be extant, it remains the case that the use of video recorded evidence is infinitely more preferable in the vast majority of

cases, and with careful planning such difficulties may be overcome.

Article 16 - Video recorded cross-examination and re-examination

3.15 The advantages of video recorded cross-examination include reducing the stress involved when a witness has to come to court to give evidence, and minimising the delay between evidence in chief and cross-examination. The witness is also not affected by postponement or adjournments in the trial itself. The matters with which the witness will be expected to deal will be the same as those dealt with in cross-examination at the trial in the normal way. Witnesses who have had their cross-examination video recorded will (other than in exceptional cases where it is necessary to put further questions at a later stage) be able to put the experience behind them and take advantage of therapy, without the risk of a claim being made that this has distorted their evidence.

3.16 The above provision exists in Northern Ireland but had not been enacted at the time of inspection. However, Inspectors understand there are proposals to incorporate this in the next victims and witnesses strategy. Even when implemented procedural constraints, such as the rules governing disclosure of material to the defence, may lead to such cross-examinations being conducted some time after the evidence in chief is recorded. Research in other jurisdictions suggests that the availability of pre-recorded cross-examination may still have the advantage that the witness's evidence is completed significantly earlier than if it were given at trial.

Article 28 - Restrictions on evidence of the sexual behaviour of a complainant

3.17 While this matter falls outside of the strict definition of ‘special measures’ as contained in the 1999 Order, such issues as are broadly calculated to assist witnesses in giving evidence can be considered analogous and thus are worthy of reflection here. The circumstances in which the defence can bring evidence about the sexual behaviour of a complainant in cases of rape and other sexual offences may be restricted by the courts. However, this is a matter which is solely at the discretion of the court, and it is therefore not possible to provide witnesses with assurances that their sexual history will not be subject of cross-examination. For example, claims that a defendant has had a relationship with the complainant are very likely to be explored. Ultimately, these are matters for consideration by the court and the trial Judge to determine in each individual case. There will of course be issues of interpretation and of the extent to which some witnesses may see some matters of cross-examination as inappropriate. However, Inspectors found consistency in the issue of inappropriate cross-examination being raised and reported, for example in their July 2010 report on sexual violence and abuse⁷ some concerns were highlighted as to the treatment of victims, language used in the courtroom and the ability of Prosecutors to challenge inappropriate cross-examination of victims by the defence. These matters are referred to further at paragraph 3.21 post.

⁷ Sexual Violence and Abuse – a thematic Inspection of the handling of sexual violence and abuse cases by the criminal justice system in Northern Ireland, CJI, July 2010.

Defendants

3.18 Although a defendant may be a witness for the defence, the special measures provisions of the 1999 Order do not apply to a person who is on trial. Article 4 (1) of the 1999 Order specifically excludes accused persons from the use of special measures. While witnesses, including defence witnesses may, subject to the direction of the court, be entitled to special measures in the same way as prosecution witnesses, defendants are in a slightly different position since the range of special measures available under the 1999 Order are not all available. However, vulnerable accused may apply for the use of video link. During the course of this inspection it was clear to Inspectors, from a variety of sources, that while the numbers of defendants who might be considered vulnerable is relatively high, it was extremely rare to see defendants make application for, or use any kind of special measure. Part of the explanation for this may lie in the fact that relatively few defendants will give evidence. Another significant explanation lies in the lack of awareness of special measures provisions among legal practitioners. In framing the legislation it had been considered that sufficient other protections are afforded to defendants in the criminal process. However, it is arguable that this position may infringe Article 6 of the European Convention on Human Rights. Indeed, Inspectors heard from some legal professionals that this position should be regularised. Given that the matter has been considered by legislators Inspectors consider that no recommendation is consequently necessary in this regard.



Other measures

3.19 While the thrust of this report concerns the special measures provisions available under the 1999 Order, Inspectors recognise some other statutes provide additional measures which can be considered analogous to those in the 1999 Order. One such matter is referred to above at paragraph 3.17.

Some others include:

- Restrictions on reporting by the media of information likely to lead to the identification of children under 18 and certain adult witnesses in criminal proceedings. These are contained in the Youth Justice and Criminal Evidence Act 1999 (the 1999 Act).
- Further restrictions on reporting are contained in the Sexual Offence (Amendment) Act 1992. This imposes mandatory reporting restrictions for both adult and child complainants lifetimes once an allegation of a sexual offence has been made.
- The Coroners and Justice Act 2009 sets out the circumstances in which witness anonymity may be considered. Guidance to Prosecutors, for example, set out that applications should only be made in strict accord with the statutory provisions, where such an application is consistent with a fair trial, and only in cases where such is considered absolutely necessary.
- Protection of witnesses from cross-examination by the accused and restrictions on questions regarding sexual behaviour.
- A defendant is restricted under the Police and Criminal Evidence (Northern Ireland) Order 1989 from cross-examining a child witness

in certain types of cases. The restrictions extend to child witnesses who were children at the time they gave their evidence in chief, even if they have passed that age by the time of cross-examination. In Article 22 of the 1999 Order defendants charged with rape or other sexual offences are prevented from personally cross-examining the complainant (victim).

3.20 The responsibilities of Judges to protect the interests of VIWs may require the making of special measures directions in appropriate cases, but may also be exercised in other ways. For example, some witnesses may need breaks while giving their evidence (as a result of distress or because they have a limited span of concentration). The responsibilities of Judges also extends to the prevention of improper or inappropriate questioning by legal representatives or by a defendant who represents themselves.

3.21 The sort of questioning likely to be ruled out is anything that lacks relevance, or is repetitive, oppressive or intimidating. Questioning may be intimidating because of its content, or because of the tone of voice employed. A young witness, or a witness with learning disabilities for example, may easily be confused by questions that contain double negatives ('Is it not true that you were not there?'). These are also referred to as 'tagged questions'. Some of the evidence heard by Inspectors focused on what was seen by some as an inappropriate latitude allowed to defence practitioners in questioning. Similar issues were referred to in the research by Hayes et al⁸ in respect of young witnesses. However,

⁸ The Experiences of Young Witnesses in Criminal Proceedings in Northern Ireland, A Report for the Department of Justice (NI), Hayes D, Bunting L, Lazenbatt A, Carr N and Duffy J, Queens University Belfast and NSPCC, May 2011.



encouragingly of the young witnesses spoken to in that study, 62.9% recalled the Judge asking the defence lawyer to change how they asked questions, while 42.6% recalled the prosecution lawyer complaining about the questioning. Clearly, the matter of appropriate questioning is taken seriously by the Judiciary.

The identification of vulnerable and intimidated witnesses

3.22 The PSNI Policy Directive No. 05/2006 made available to Inspectors charts how Officers should take all reasonable steps to identify vulnerable or intimidated victims. The policy states, *'Vulnerable and intimidated witnesses are entitled to an enhanced level of service'*.

3.23 In addition, at the time of inspection, CJI were given access to a proposed new service procedure, Witness Services at Criminal Courts in Northern Ireland. The aim of the procedure is to give Officers information on the services provided in support of prosecution witnesses, particularly those who are young, vulnerable or intimidated. There were also a number of other policy revisions/developments under consideration. These included new service procedures on vulnerable witnesses and adult safeguarding joint investigations. The major existing policy (12/06) on VIWs - implementation of the Criminal Evidence (Northern Ireland) Order 1999 had been cancelled to address further revisions, including changes introduced by the Justice Act 2011. The other principle PSNI policy (05/06) Dealing with Victims and Witnesses was pending amendment and re-issue taking account of the development of Witness Care Units, as

previously recommended by CJI.

3.24 Currently the policy on dealing with victims and witnesses explains the need to deal sensitively, and on an individual basis with victims and witnesses, taking account of their individual needs. The policy highlights specific areas such as:

- hate incidents;
- victims whose first language may not be English;
- vulnerable victims;
- older victims;
- children and young people; and
- victims of domestic abuse.

3.25 There appeared, to Inspectors, to be a current absence of practical guidance on the identification of VIWs, and where more specialist advice and support may be obtained. However, Inspectors have learned that there are plans to introduce measures to support Officers and to provide additional training which includes the development of an aid-memoire and a Police Service guide to vulnerable and intimidated witnesses which will be available electronically on the police intranet website. The PSNI hope is that this guidance will also become available as 'fingertip guidance' on individual Officers Blackberry handsets. Inspectors welcome these positive developments/plans being overseen by the joint Special Measures Action Group (SMAG). This is a joint bi-lateral group established by the PSNI and the PPS. It first met in September 2011.

3.26 In addition to the above matters, while there are links to other specific policies in some of these areas, the policy does not address the need to discuss special measures with VIWs and to complete an individual needs assessment.



Inspectors recommend a clear expression in PSNI policy of the need to discuss special measures and complete an individual needs assessment in appropriate cases in any new policy once it is issued.

- 3.27 The PSNI are usually the first criminal justice system agency to have contact with a victim or witness. Consequently, they carry the main responsibility for the identification of VIWs. In addition to internal policy compliance, police have a number of obligations set out in their Code of Practice for Victims of Crime published in March 2011. Specifically this states, *'If you are a vulnerable or intimidated victim, [we] aim to identify your needs, try to meet those needs when dealing with your case, and pass information about your needs to the Public Prosecution Service so that they can continue to support you.'*
- 3.28 The police must also take all reasonable steps to identify vulnerable or intimidated victims, and to record relevant information on the Witness Details Form under the section marked Witness Care Report. Inspectors learned this is a standard form used by the police. However, during the course of inspection it became apparent that such information is not routinely transmitted to the PPS. The findings of Inspectors in a number of areas, underscored this lack of information transfer. The effective undertaking of an initial needs assessment by the police, prior to a statement being written or a video interview recorded, should establish critical information relevant to the investigation, and about support needs up to and including the trial. Inspectors

have previously highlighted the need for individual witness assessments in their December 2011 report 'The care and treatment of victims and witnesses.'⁹ The existing difficulties with information transfer have been recognised by the criminal justice system agencies and in particular the PSNI and the PPS are working together under the auspices of the SMAG to resolve these. Among the issues it is addressing is the transfer of information in support of witness assessments and the use of special measures.

- 3.29 It is also important to note that the requirement for special measures needs to be continually assessed as the circumstances of witnesses often change, from the time of initial report of a crime through to trial. Not only may witnesses circumstances change (for example, as a result of intimidation), but the eligibility for special measures may also change (for example, as a result of increasing age or an improvement in medical condition). Accordingly, the assessment of a witness and any change of their circumstances needs to be borne in mind by those criminal justice system professionals who may be dealing with their case.
- 3.30 As Inspectors reported in their examination of these issues (in its report mentioned previously looking at the care and treatment of victims and witnesses, published in December 2011), it was clear that difficulties with special measures and the early identification of potential VIWs is in large part due to a lack of police knowledge, awareness and training. This lack of awareness also manifests itself in further difficulties with

⁹ The care and treatment of victims and witnesses in the criminal justice system in Northern Ireland, CJI, December 2011.



some Officers providing victims and witnesses with an understanding that they will be provided with special measures, whereas this is clearly a decision for the court in very strictly defined circumstances. One legal professional, for example, commented that “*special measures are not a bag of sweets to be handed around*”. In practice, special measures are not being identified at the early stages and many Officers do not have sufficient understanding of special measures to explain these appropriately to victims and witnesses.

3.31 Despite this CJI also found during the course of inspection foreboding concern at the ability of some PSNI Officers to assimilate the legislative backdrop to the issue of special measures and indeed the guidance which is provided, for example in the ABE Guidance. This was most apparent among Response Officers and some Criminal Investigation Department Officers. The more specialist Officers in Public Protection and Rape Crime Units, and in Major Investigation Teams were more likely to be able to demonstrate appropriate knowledge and responses. The concerns were perceptible in a number of different ways which validated Inspectors findings and these included:

- the evidence in responses from victims and victims groups;
- the evidence heard from criminal justice partners; and
- the findings from the information provided in police focus groups.

3.32 The PSNI also need to consider, at a very early stage in the investigation, whether a video recorded interview should be conducted. The decision could lead to special measures becoming unlikely, especially in a case

where police first record a written statement. However, the need to consider a video recorded interview may not always be apparent, for example, with intimidated witnesses. However, Inspectors found that very often, either no consideration was given to the nature of how evidence would be recorded, or indeed that for certain types of cases, the ‘default setting’ was to conduct a video recorded interview. In both cases this could have implications for the later conduct of the case and the use of special measures. By way of example, Inspectors heard of one case where police recorded a video interview and when advised by the Prosecutor that this could not be admitted in evidence, returned to the witness and recorded a second video interview of this witness adopting the evidence of the first. It was clear that neither could be admitted. Further, Inspectors found that in a number of cases and examples, Officers failed to consider the views and feelings of witnesses prior to making decisions regarding the best method of securing their evidence.

3.33 Victim Support’s WS staff also informed Inspectors of perceived difficulties with special measures which were said not to be widely considered. This was said to be due to police inexperience at identifying special measures/needs or an inherent reluctance by other criminal justice agencies to consider special measures, anticipating that the court will not look favourably on such applications.

3.34 Of even more concern is the evidence heard by Inspectors of some cases where Officers having identified vulnerabilities, are conducting video interviews in circumstances where disclosures are at best unlikely, and this



leads to vulnerable witnesses being denied access to justice. An example of this was provided to Inspectors in the case of a young autistic witness who was taken to be interviewed on video by Officers who had no training in autism awareness or the difficulties in communication. There was no consideration given to the fact that the perpetrator had instilled in this young witness a fear of people in uniform. The child was unable to disclose what had happened to her and despite police trying on a second occasion to interview her at her home, the child still had the fear of people in uniform, and did not make any disclosures to them. While Officers were not in fact in uniform the perception and association of police was such that disclosures were highly unlikely. The case did not proceed following these two attempts at interview. There are many potential lessons from this case, but the outcome is that this young witness was denied access to justice and public protection was potentially eroded by the perpetrator remaining at large. In addition, Inspectors heard concerns that increasingly, resulting from resourcing pressures, single agency interviews (largely police) were being conducted - contrary to best practice and the Protocol for Joint Investigation by Social Workers and Police Officers of Alleged and Suspected Cases of Child Abuse in Northern Ireland¹⁰. Inspectors consider that this issue will need to be closely monitored given the potential impacts, particularly concerning the individual needs of witnesses in terms of communication and support. **Inspectors**

encourage the PSNI and the Department of Health, Social Services and Public Safety to jointly monitor the numbers and reasons for single agency interviews under the joint protocol, taking appropriate remedial action where necessary.

- 3.35 Police generally find it easiest to identify child witnesses, however it was apparent to Inspectors that not all child witnesses were considered as vulnerable. Response Officers in particular considered that special measures were matters dealt with only by other policing specialists, such as those in the Public Protection Units and/or Rape Crime Units. Inspectors also found, in the course of focus groups conducted with PSNI Officers that unless the offence was regarded as serious, Officers would tend to record witness statements, regardless of the age of the witness. Research on the use of special measures in England¹¹ has demonstrated that a majority of child witnesses to criminal activity are asked to give written statements rather than video statements. Once again, in the Northern Ireland context Inspectors find that this can also be the case here (with the exception of cases where child abuse is concerned).
- 3.36 For other types of cases where there may be underlying mental or physical disability or impairment, Officers found it difficult to make the kinds of identification necessary. Many did not have the levels of training or awareness necessary to do so. Officers spoken to by Inspectors, for example, expressed

¹⁰ Protocol for Joint Investigation by Social Workers and Police Officers of Alleged and Suspected Cases of Child Abuse in Northern Ireland, September 2004.

¹¹ 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).



concerns about probing and asking questions of witnesses to find out if there were any vulnerabilities. In the area of intimidation Officers were largely reliant on self-identification and with the exception of specialist Officers (in for example the PSNI's Serious Crime Branch), demonstrated a lack of awareness of both the indicators and of the implications of intimidation.

3.37 The lack of police awareness amongst Response Officers in particular can mean that they are unable to help witnesses make informed choices about the best route to follow in the use of special measures or to signpost specialist support and assistance. Once again this can have an impact in a number of different ways from the adequacy of the special measures applied, and therefore the best evidence available, and ultimately the outcome of the case. It can also impact negatively on the confidence of victims and witnesses to proceed with cases. For example, Inspectors heard of victims, especially in sexual abuse cases, withdrawing support for a prosecution because of a lack of information and support at the initial investigation and pre-trial support stages. Inspectors consider there are consequently significant gaps in the knowledge and understanding of sizeable numbers of Officers.

3.38 By way of illustration of the issues Inspectors heard from one victims group regarding the case of a 19 year old man who suffered from severe autism and was due to give evidence in court. The man's mother, who was acting on his behalf, was advised to contact the police. However, when she did so the Officer concerned advised that she

should ask the Judge for special measures on the morning of the hearing. Clearly, no initial identification of vulnerability had been made and this was compounded by a failure to provide appropriate follow-up advice and assistance.

3.39 Inspectors found that the most commonly used special measure was that of video recorded evidence in chief, leading to the use of video link. The early decision of PSNI Officers to pursue this route will inevitably have consequences. While it is ultimately the decision of the PPS to make application for this video evidence to be used, and for the courts to make the final decision on its use, if the court should not agree, a statement will then need to be produced to allow the case to proceed. The resultant uncertainty and disruption to the witness could have a catastrophic effect, meaning that some may decline to give evidence without special measures and thus withdraw from the criminal justice process. This may be a contributory factor to attrition rates in these kinds of cases.

3.40 Inspectors found that in many instances there was a tendency towards a kind of standardised approach to special measures. This included the police use of video and a lack of consideration to the full range of special measures (or combinations thereof) for individual witnesses. While the volumes with regard to this finding are difficult to ascertain as central and validated data are not routinely kept, it is possible to determine this from previously available data which indicated that during the three year period from 2007-09 over 66% of applications were in respect of the use of video recorded evidence.



The next nearest in terms of frequency was screening at just over 5%. While Inspectors consider that video recorded evidence (and hence applications for the use of this video link) will always remain to be the bulk of applications, once again, Inspectors encourage a broader consideration of individual need. This should be linked to clearly defined assessments of individual need. The current assessment process is extremely limited and entails a simple check box for operational Officers indicating whether a witness is vulnerable or intimidated. As Inspectors found (and discuss further post) it was evident that there was a paucity of further qualitative information to support adequate individual assessments.

Intimidated witnesses

3.41 Although witnesses may be willing to report or give information about an offence, this does not mean that they do not fear reprisals. Intimidated witnesses may be reluctant to provide a formal statement, preferring instead to merely tell the police about the offence they have experienced or witnessed. Some witnesses may explicitly claim that they have been or are likely to be intimidated, but others will not, fearing reprisals.

3.42 Research has shown that assaults, domestic violence, stalking (which by its nature involves repeated victimisation) and racially motivated crimes are particularly likely to lead to intimidation. Victims of sexual offences are also particularly vulnerable to intimidation. This vulnerability is heightened when the victim is a child and is even more keenly felt when they do not have strong family support structures in

place. It is not only the nature of the offence that may indicate the possibility of intimidation however. Investigators need to be aware of the culture and the lifestyles of not only the witness but those who live with and around them. For example, anti-police feeling or criminal behaviour in the area. More specific factors might give rise to actual or perceived intimidation risks for the witness, such as the witness's age, gender, sexual orientation, disability, cultural or ethnic background, religious and political beliefs. Substantive indicators of risk may concern the nature of the relationship between the witness and the accused. For example, it may be that the alleged perpetrator is in a position of authority over the witness (such as a carer in a residential home) or a violent ex-partner. Police need to be aware of whether the witness has been intimidated in the past, and whether the alleged perpetrator or their relatives and associates have a history of intimidation and violent behaviour. Again, Inspectors refer to related issues in their December 2011 report on the care and treatment of victims and witnesses and have learned that the PSNI intend to introduce software to assist in addressing problems in the area of repeat victimisation.

3.43 Inspectors found evidence during the course of fieldwork that issues of intimidation had an appreciably less significant profile to those of other areas of vulnerability, and this was apparent in terms of both policy and practice. Bearing in mind the insidious nature of intimidation and its impacts, it is important that intimidated witnesses are provided with the necessary information and reassurance regarding what may be available to them. This can be important



for a number of reasons, however, it is especially important to enable witnesses to make informed decisions and secondly to reassure them that support, including special measures, is available within the criminal justice system to assist them. This may include such issues as:

- the availability of a supporter during interview;
- the special measures that might be available to assist a witness in giving their best evidence;
- the protection measures that might be available, including in extreme cases Witness Protection Schemes, to provide security to a witness; and
- the availability and methods of contact with other supporting agencies.

Protected Person Programmes (Witness Protection)

3.44 The PSNI's Organised Crime Branch is responsible within the Service for the administration and operation of the Protected Person Programmes. Inspectors spoke with the head of the PSNI's Organised Crime Branch and learned the programme is, in practice, a two tier scheme into which victims/witnesses may be admitted dependant upon a threat and risk analysis. The Scheme is generally reserved for the most difficult cases where the potential threat to a witness is severe as a result of their intention to give evidence. The Scheme can, in the most difficult cases which are assessed as level one, result in removal from Northern Ireland, and a new identity. At level two for less serious cases, this

could mean a bespoke package of measures designed to assist the witness in dealing with any potential risks and, where appropriate, in conjunction with special measures. In both cases the scheme may continue post the victim/witness giving evidence.

3.45 In the Northern Ireland context most, but not exclusively all, of the tier one cases have previously concerned paramilitary related matters, such as extortion. Increasingly however, such schemes are being applied to other organised crime and, for example, offences such as human exploitation and drugs. The implications of entering the Witness Protection Scheme for individual witnesses are enormous and the Scheme is consequently reserved for a very small number of the most complex and high risk based cases. Given the sensitivity of such cases it was inappropriate to consider detailed examples or individual feedback from such witnesses. It was apparent in these kind of extreme cases that individual assessments were central to practice - a matter Inspectors considered could be extended to other areas.

3.46 For some victims, specific *risk* assessments (as opposed to needs assessment) may be necessary and additional support for the victim provided. For the police the guidance contained in 'Working with Intimidated Witnesses: a manual for police and practitioners responsible for identifying and supporting intimidated witnesses'¹² (Office for Criminal Justice Reform, 2006), may provide some practical assistance, but it is not available in

¹² Working with Intimidated Witnesses, A manual for police and practitioners responsible for identifying and supporting intimidated witnesses, Criminal Justice System, November 2006.



Northern Ireland. However, Inspectors found that there was a clear gap in the knowledge of some Police Officers regarding how to handle incidents of intimidation. This was again apparent from focus groups and was brought into sharp contrast when Inspectors spoke to one victim during court observations. In that particular case post the initial incident in which police became involved, there was a series of over a dozen separate incidents of intimidation in various forms ranging from masked men appearing in the witnesses house, to being encircled in a car park by the defendants relatives who constantly drove a series of vehicles around the outskirts of the same car park. According to the witness, police failed to link any of these incidents and the witness was only offered special measures when their doctor provided a letter regarding their health which had been affected by anxieties surrounding the case.

3.47 A guide to working with intimidated witnesses for police and criminal justice system practitioners, such as is available in England and Wales, is not available in Northern Ireland. Inspectors therefore recommend that the DoJ oversee the development of such a guide, with consultation and contributions from all relevant agencies, which should inform all criminal justice system practitioners and the public alike of the criminal justice system processes and of the help and support available. When developed, such guidance may act as a reference for criminal justice organisations internal policies and an addendum to the ABE Guidance.

3.48 Inspectors conducted checks of the PSNI website and found that there was a paucity of information on intimidation or publicly available guidance in relation to this important aspect of the support available for witnesses. Issues such as domestic abuse, drugs, hate crime and rape and sexual assault are all specifically addressed. **Inspectors encourage a consideration of specific publicly available guidance via the PSNI website to those who are vulnerable as a result of intimidation.**

Difficulties in VIW identification

3.49 In practice, the identification of vulnerabilities means that police must be alert to the kinds of vulnerabilities which may present, and where necessary, give consideration to seeking medical or other equivalent professional evidence to support subsequent applications for special measures. The dilemma in this is that the identification of needs is problematic and while in many cases the evidence found by Inspectors pointed to a lack of identification of need, this remains critical insofar as the PSNI act as the principle ‘gatekeepers’ to special measures.

3.50 However, Inspectors found there are real and practical difficulties in the identification of certain categories of VIWs. Part of the difficulty Police Officers face in identifying VIWs is that there is no formalised, agreed or accepted process to do so. At a practical level, there is no agreed risk assessment tool that could provide operational front line Officers with the help to make appropriate identifications. In many cases the identification of VIWs turns on the training and experience of individual Officers. However, the



VIWWG have set out to research appropriate assessment tools.

3.51 It also needs to be borne in mind that some people, for example, with a learning disability, will be reluctant to reveal it and will present as quite articulate. This is among the most difficult of categories to identify for support and Inspectors heard evidence that this caused ongoing difficulties even for health professionals. However, a learning disability or mental health issue does not preclude a witness from giving reliable evidence. Similarly, witnesses with a mental health issue may show some of the behaviour seen in witnesses with a learning disability, such as confusion, memory loss and impaired reasoning.

3.52 Recognition of physical disabilities may present less of a problem, however, some disabilities can remain hidden. Examples include hearing impairments, visual impairments and communication difficulties. Nonetheless, once again criminal justice system professionals should be alert to the needs of such witnesses and with careful questioning such disabilities can often be recognised.

3.53 Speech and language difficulties may be relatively obvious in many cases. However, for some the difficulties may be less apparent, misinterpreted or mistaken for something else. Inspectors consulted with the Royal College of Speech and Language Therapists (RCSLT) during fieldwork and heard that where there is any doubt, it is recommended that an assessment by a registered speech and language therapist is conducted prior to the interview of a witness.

3.54 Once again, where there is doubt, and where practicable, the ABE Guidance provides that a Police Officer must consider an early assessment by an expert, such as a clinical psychologist, a speech and language therapist or a psychiatrist, to avoid compromising any evidence obtained during the interview. However, Inspectors had little confidence from a number of meetings and examples that this was being carried through in many cases. Once again, it was more likely that specialist Officers would be aware of the necessity to engage other experts, but for Response Officers it was the case that few even understood the nature of special measures let alone the need to engage experts.

Barriers to communication

3.55 Inspectors heard evidence that difficulties in communication can be grouped into two areas. The first is in respect of criminal justice system professionals, and the second relates to the inability of the witness to have their voice heard.

3.56 In terms of criminal justice professionals, Inspectors assessed the main barrier to be a lack of awareness and insight into communication complications. Many criminal justice professionals have a limited understanding of the range of issues apparent for VIWs. In respect of witnesses with communication difficulties it can be the case that without specific assistance they are simply unable to tell their story. That could include the reporting of a crime, the articulation of the story and hence an inability to have their voice heard in court. In addition, such witnesses often have a lack of contextual knowledge leading to



increased anxiety and a decreasing ability to communicate.

3.57 All of this may add further to a gap in terms of the identification of vulnerable individuals. However, as we discuss elsewhere in this report, the introduction of an intermediaries service to Northern Ireland could have significant positive impacts in the future.

3.58 Inspectors learned that the RCSLT is developing training for criminal justice system professionals. **Inspectors encourage collaboration and liaison with the RCSLT for all relevant training being delivered/developed within the criminal justice system.**

3.59 Despite some of the complications highlighted it is also apparent that early identification is not always possible for a number of other very logical reasons. Among these are the fact that some vulnerabilities may be hidden and some witnesses may indeed mask their own vulnerabilities. Furthermore, a witness's circumstances may change. This might include, for example, the occurrence of intimidation at any stage after initial police contact. Hence the need for special measures may only become apparent as the trial date approaches.

3.60 Inspectors are conscious that the VIWWG and the PSNI are currently addressing issues surrounding identification of vulnerability. However, **bearing in mind the significant difficulties with the identification of VIWs, it may be helpful to provide a suitably short appendix within the ABE Guidance specifically to inform and assist operational Police Officers. This and other guidance material can then be**

made more widely available via electronic media for reference as required. The emphasis in this

guidance should be on early identification, supporting criteria for identification and the support and assistance available both for operational Officers and for witnesses.

3.61 In view of Inspectors findings, including the complexities of identification, it seems clear that the necessary significant understandings will be difficult to impart to the very large numbers of professionals involved across the criminal justice system. Instead, Inspectors view the focus and thrust of energy and effort must be placed on a tiered approach. At the first tier practitioners (unless themselves working in a specialist area) should be given sufficient awareness and understanding to enable them to recognise that further help and assistance is required. At the second tier, specialist practitioners who are working in areas where dealing with vulnerable witnesses is common, should be trained to a high standard and be enabled to provide advice and assistance to those at tier one. At the third tier, a small number of practitioners should be trained to a standard which would allow them to be regarded as experts. An example of the latter will be the police Interview Advisors who are already trained to a very high standard. Such people should be able to provide advice and support in those most difficult cases where their expertise can provide further value to the outcomes. Tier 1 awareness training should not be confined to police and needs to be embedded across the criminal justice system where professionals may interact with potentially vulnerable witnesses.



This is represented in figure 1 below.



Police training

3.62 Inspectors noted that student Officers are trained in special measures provisions and that all Detectives receive more in depth training on special measures. However, Officers themselves expressed a lack of confidence in the training provided to them concerning special measures. Many could not remember having received any training, and those that did, felt this did not equip them to deal with the issues. The exception was, once again, in respect of specialist Officers who were invariably subject to more in depth training and were more confident about their role and responsibilities. Inspectors heard that while student Officer training has now ceased (due to a recruitment freeze), matters of special measures were in fact incorporated in lesson timetables. However, this seemed to be limited to the extent that there was a focus on law and procedure and excluded the practical issues surrounding the awareness of vulnerability. In terms of ongoing post-foundation training, again Inspectors learned that until very recently this topic had not been included. Arising from the matters referred to earlier, it is apparent that this training has not been adequately assimilated. The gaps

in terms of awareness and knowledge are consequently apparent.

3.63 Inspectors were also made aware of additional training now being provided specific to special measures, which will address issues including the awareness of vulnerability and provide some practical training on interviews. This new course aimed at specialist Officers will take place over an eight day period and train circa eight Officers at a time. Inspectors were pleased to learn that the PPS are participating and delivering training to District Trainers and Officers within this - a further welcomed development. In addition, significant efforts are now being made to raise awareness via District Trainers who have themselves been provided with briefings and awareness training. These Officers will be used to cascade this training in their districts. The training will be delivered primarily to front line operational Officers at Constable and Sergeant rank and at the time of writing the expectation was that it will be completed by Spring 2012. Once again, Inspectors welcomed this as a positive development.

PSNI records checks

3.64 As part of the inspection process, CJI examined a sample of cases on the PSNI computer system (NICHE) in order to assess the level of information recorded with respect to witness assessment/vulnerability and the transfer of information via Causeway to the PPS. After examining a small number of cases the following became apparent to Inspectors:

- The witness assessment of vulnerability entailed a simple tick box which was very often not backed





up with additional detail. Inspectors saw a number of examples where witnesses were assessed as either vulnerable or intimidated but there was no qualitative information which indicated the reasons for such an assessment either in the case outline or in statements. This can mean that Prosecutors will often have to search for such information and in most cases issue either a Decision Information Request or Post-Decision Information Request, seeking clarification.

- The information on witness vulnerabilities is transferred to the PPS. However, it was apparent from Inspectors case file reviews, case management system checks and discussions with Prosecutors that this information was difficult to retrieve. This could mean that vulnerable witnesses may be overlooked for consideration of special measures.
- There was no clear consistent structure to case outlines with some very well structured and dealing with all relevant issues, while others were poor and contained only scant information. Importantly, bearing in mind the specific subject of the inspection it was commonplace to find that no mention of witness vulnerability was made in the case outline. If included, this would immediately flag-up to Prosecutors and others the need for further consideration of these issues.

3.65 The ABE Guidance is clear on this latter issue and states, *'Reports to the PPS should always include clear information about the wishes of the child – and those of their parents or carers – about going to court. The PPS may in any event need to seek additional information from the joint*

investigating team.' However, Inspectors found a patchy compliance with this in terms of their file reviews. There was, in fact, no real evidence of compliance in practice.

3.66 The PSNI are aware of the shortcomings in respect of case preparation, and at the time of inspection were meeting with the PPS in order to address these and other issues. This is among the issues being addressed and actioned by the SMAG. Indeed, Inspectors learned that some pilot work in terms of streamlined case outlines is ongoing in the Antrim area. Notwithstanding the ongoing work in this area, for the purposes of clarity **Inspectors recommend that the PSNI and the PPS agree a broad structure for case outlines which incorporates the flagging of VIWs, including those who may be assessed as vulnerable by reason of age or offence only.**

3.67 It is possible that the PPS can make prosecution decisions in cases where there are VIWs if these have not been identified and flagged by the PSNI. Inspectors findings from case file reviews and from other evidence gathered, supports the view that the identification of VIWs is patchy and too dependant upon individuals. It was also apparent that the transfer of information in a number of areas could be improved including:

- in the case outlines provided by the PSNI;
- in the provision of the witness care forms; and
- in the completeness of information exchanged from the PSNI to the PPS and the accessibility of same on the PPS case management system.

3.68 Inspectors found evidence to suggest that the PSNI could adopt a more pro-active approach to the provision of information and evidence to support special measures cases. For example, in those cases where it is clear that a witness is a VIW, then the evidence supporting an application for special measures should be submitted (by way of a separate statement) along with the police file to the PPS. However, police Officers had little understanding of the information/evidence required by Prosecutors in support of decisions regarding special measures. This would invariably require a greater understanding of the needs of Prosecutors. ***Inspectors encourage the requirements of Prosecutors in terms of the evidence in support of special measures applications is incorporated by the PSNI in training and in its policies on the use of special measures. The PPS should assist the PSNI by providing a copy of the guidance it has to Prosecutors.*** In this way, the police and the PPS should be considering similar matters and police Officers understanding of the requirements will be enhanced.

3.69 The evidence gathered by Inspectors suggests that in many cases the PSNI are largely waiting for the PPS to issue instructions regarding special measures before either discussing with witnesses or gathering further evidence in support of special measures applications. Where there may be doubt about the eligibility of witnesses for special measures this approach may be fitting. However, for the vast majority of cases it will be apparent early on that a witness should be considered for special measures. In such cases, evidence should be contained on the case file to support

applications. In other words the PSNI should be more pro-active in gathering relevant evidence and presenting that in their case files sent to the PPS. Addressing this issue may also have an impact on avoidable delay. Inspectors understand that the PSNI and the PPS are actively addressing these issues and for example in additional training best practice examples of the evidence required have been provided. In addition to and supporting the recommendations outlined above, **Inspectors recommend that the PSNI issues appropriate instruction to its staff to ensure, that where possible, evidence in support of special measures applications accompanies case files from the outset.** In doing so the PPS should be consulted to ensure appropriate needs are met.

The quality of video recorded evidence

3.70 During the course of fieldwork, Inspectors heard concern in a number of quarters regarding the quality of some video recorded evidence. This ranged from misplaced microphones making audibility less clear, to extraneous noise either because of open windows or the fabric of the building. In addition, concerns were also raised that, on occasion, witnesses could not be clearly seen on camera. While such issues are not new and have been raised previously, it remains vitally important that sufficient planning and preparation is undertaken by investigators to ensure that the witnesses evidence is not diminished by issues which can be avoided. Inspectors were unable to assess the volume of such issues and thus to give an insight into the impacts. However, given that legal practitioners and Judges all indicated issues of quality



were “... *not uncommon*” this is an area the PSNI will want to keep under continual review. The instructions provided in the ABE Guidance appears sufficient and detailed enough, if followed, to address these difficulties. ***As a matter of improvement the PSNI should consider further reminders to staff on the protocols to follow in the conduct of video recorded interviews.***

Police and Prosecution Service liaison

3.71 Where there is any doubt regarding the course of action to pursue in any specific case, the police investigator should in the first instance seek advice from their supervisor. Where uncertainty remains regarding the application of the legislation to a particular witness in terms of special measures, prosecutorial advice may be sought from the PPS electronically or by telephone. An early special measures meeting between the PSNI and the PPS may be helpful in cases of complexity or doubt. Police investigators are responsible for calling an early special measures meeting during the investigation. As with other areas of practice in respect of special measures, Inspectors found that specialist Officers were aware of the need and facility to conduct early discussions with Prosecutors. Other Officers in response roles were particularly uninformed and unaware of the benefits to early consultation. Part of the difficulty in this area surrounds the absence of a written protocol between the two organisations about early special measures discussions such as is the case in England and Wales. Systems there are underpinned by

specific practice guidance ‘Early special measures discussions between the Police and the Crown Prosecution Service’¹³. Inspectors understand that advice on early special measures discussions are being considered as part of a service level agreement again being overseen by the SMAG.

- 3.72 It is vital that the Police and the PPS identify any witnesses who may be eligible for special measures and discuss which measure(s) would most assist them to give evidence. It will also assist the Police to record evidence in the most appropriate format to secure a witness’s best evidence. Special measures discussion may be as early in the investigation as pre-statement or video-recorded interview and before pre-charge advice.
- 3.73 Inspectors are conscious that the need for a protocol underpinning such early special measures discussions has been recognised by the PPS and the PSNI. Joint work was ongoing at the time of writing to develop a working protocol similar to that in place in England and Wales. Consequently, Inspectors make no recommendation with regard to this but would hope to see that this addresses the needs of the PPS in terms of a realistic assessment of the kinds of cases in which such discussions will be necessary; and the quality and timeliness of information supplied to the PPS alongside the needs of the PSNI in respect of timely advice.
- 3.74 Discussions between the police and the PPS will also need to consider any requirement for formal assessment of

¹³ ‘Early special measures discussions between the Police and the Crown Prosecution Service, Practice Guidance, Criminal Justice System, Office for Criminal Justice Reform, January 2009.



the witness. It is essential that the police, social care agencies, the prosecution and defence, and also court officials, take account of the individual circumstances of each witness, together with their expressed needs and wishes, in order to provide support sufficient to enable witnesses to give their best evidence.

The process of special measures applications

3.75 Once a witness has been identified as requiring special measures, it is necessary to bring this to the attention of the PPS so that Prosecutors can consider the submission of relevant applications. In respect of the Prosecution Service, the Code of Practice for Victims of Crime states, *'If you are a vulnerable or intimidated victim the Public Prosecution Service for Northern Ireland will apply to the court for special measures (if you qualify and you want to use them to give your evidence). In some cases, the Public Prosecution Service for Northern Ireland will apply for your identity not to be revealed, or reporting restrictions which prevent some details from being reported in the press.'*

3.76 Inspectors were provided with a comprehensive set of PPS instructions on the use of special measures. Key among the departmental instructions and law and practice notes was an instruction from senior management issued to all Prosecutors on 14 July 2011 in which the PPS commitment to meeting the needs of victims and witnesses was set out. Among its key directions was included:

- the need for special measures to be considered in all cases;
- where police have not made the

PPS aware of a witness' 'particular needs', but it becomes apparent at any stage that an application for special measures may be required, appropriate enquiries should be made with the police;

- that PPS files should contain a documented rationale for not following special measures; and
- there should be clear file recording in relation to special measures issues.

3.77 In addition, a helpful and user friendly guide was issued to all Prosecutors in relation to special measures.

3.78 The PPS departmental instruction 15/08 seen by Inspectors refers to informing victims and witnesses of the grant of special measures. Issued in June 2008 following a recommendation by CJI, this outlines PPS policy that its Community Liaison Teams inform witnesses of the grant of special measures in the Magistrates' Courts. For the Crown Courts the PPS policy is that Prosecutors instruct investigating police to notify witnesses of the grant of special measures. A further instruction issued in December 2011 included a revised letter template to be sent to all victims and witnesses who have been granted special measures. These issues are commented upon further post.

3.79 It is at this stage, post-initial investigation (as trial approaches), that other criminal justice system agencies including the PPS or partners, can uncover witness vulnerabilities. This may include the PPS Community Liaison Teams, the NSPCC YWS or the VSNI WS. Again as in the case of police, it is important that those who may come into contact with VIW's in the pre-trial phase are alert to their needs and indeed to the protocols



surrounding special measures. Arising from Inspectors discussions with Prosecutors it was found that there can be an intermittent consideration of individual needs at this stage. Many Prosecutors based decisions on special measures applications solely on the information provided on file without recourse to either consultations or indeed to further consideration of individual needs. Inspectors considered, for example, that it may be helpful in assisting witnesses to provide their best evidence by arranging a pre-trial court visit when special measures can be demonstrated in practice before decisions are made as to which, if any, special measures applications are to be made. It will be helpful if PPS policy sets out a range of options to assist potential witnesses and Prosecutors in decision making. In terms of training and awareness, Inspectors learned that all barristers and solicitors are already subject to mandatory continuing professional development. The PPS, were also at the time of inspection, preparing to roll-out additional training for staff in respect of special measures and concentrated on the changes in the Justice Act 2011. Priority was given to Community Liaison Team staff and to new or newly promoted legal staff. The PPS also produces its own training plan each year to address changes in the law, policy and practice. The care and treatment of victims and witnesses is also included in that training plan. All such training courses are accepted for continuing professional development schemes.

Late identification

3.80 New information about a VIW may become available after the pre-trial

hearing/review and before the trial. Such information may concern, among other matters, the condition of the witness (for example, an improvement in, or a degeneration of, the witness's health) or the occurrence of relevant events (for example, an act of intimidation directed at the witness, or the fact that the witness has had a birthday - which is relevant to the age limits for eligibility for special measures). A witness's view may also change over time, for example a witness may become more apprehensive about confronting the defendant as the trial approaches. This means that procedures must be in place for channelling relevant information to the PPS.

3.81 In practice the PPS rely on police to identify VIWs in the case papers. That is entirely appropriate. However, the existing PPS Community Liaison Teams who are in contact with witnesses may occasionally identify VIWs and where they do so will flag any potential difficulties with the Prosecutor. There is consequently a key role for the PPS Community Liaison Teams/Witness Care Units in identifying vulnerable and intimidated victims and witnesses, if identification has not taken place at an earlier stage. In addition, it is the case that Prosecutors themselves occasionally pick up witnesses who have not previously been identified; either as a result of police failure to do so or a change in circumstances such as intimidation. Largely, such identifications will result from case consultations with witnesses.

3.82 The late identification of VIWs can also occur in the court setting by the Prosecutor, by Witness Service staff or more infrequently by other court staff.



It is usual in these cases for the PPS to make 'late' applications to the court for special measures.

Legislation and administrative processes

3.83 There are set timescales for making special measures applications and this is a tension insofar as it is apparent, for example, despite the best efforts of criminal justice agencies some witnesses will not present until a late point in proceedings. That can be as a result of intimidation arising at a late stage or a gap in identification. There are also some further issues with regard to how the process of special measures work in practice. Inspectors heard for example, that in terms of committal proceedings, that child witnesses may not be called and their video evidence is used instead. The situation for adult witnesses is different and such witnesses may be called to be cross-examined (using special measures, where granted by the court). In addition to the burden to witnesses different applications will have to be made both in the Magistrates' Court for the use of special measures, and if the case is committed for trial to the Crown Court, a further application will have to be made for the same witness's use of special measures in the Crown Court. In other words, the process of special measures applications do not extend from one court to another and neither do they extend to appeals processes. Each time a witness gives evidence their eligibility will have to be re-assessed and an application made on its own merit.

3.84 During the course of this inspection CJI heard some evidence that special measures legislation caused some difficulty in understanding due to the

fact that some of the provisions were spread over a number of statutes and, secondly, given their incremental implementation. It was suggested that it would be helpful if this matter was to be rationalised, leading to greater lucidity, transparency and ease of understanding and application. While Inspectors agree that codification of all relevant statutory provisions would be the optimum position, and should be considered in time, there was no existing or strong evidence of any significant impediment to the effectiveness of special measures as a result. ***Inspectors consider that the DoJ should keep under review the need for further guidance on the statutory provisions concerning the broad areas of special measures/witness anonymity and other witness protections, such as reporting restrictions, together with the rules making provision for the form of special measures applications.***

PPS case file reviews

3.85 In order to assess the processes involved in special measures information transfer and compliance with policy, Inspectors conducted a review of a sample of case files made available by the PPS. A total of 26 case files were selected randomly including some files from both the Magistrates' and Crown Courts, across a broad range of cases. In addition, the sample included some cases in which special measures had been refused and some cases involving children. The findings from this case file review can be summarised as follows:

- Formal communication with witnesses regarding special measures was absent from the sample. In none of the case files seen did Inspectors find any letters confirming the fact



that special measures had been granted. This finding is linked to Inspectors comments regarding the need for certainty on the part of witnesses and may impact adversely on some witnesses. Inspectors make a related recommendation at paragraph 3.98.

- The recording of consultations with witnesses regarding special measures was varied - ranging from very good to poor or absent.
- The police recording of witness vulnerability and thus the need for special measures is varied and without any clear structure. It was generally left to the PPS to consider special measures, based on the sometimes scant information provided. In other words, unless it was apparent by reason of age or the fact that a video recorded statement had been included with the file, the PPS were left to consider vulnerability.
- There was some evidence of very good practice on the part of individual Prosecutors who took the initiative to contact witnesses and record same on file. One Prosecutor recorded, for example, 'I gave her [named witness] my direct line number and told her to contact me should anything occur...'
- As Inspectors have identified in other inspections the practice in the Belfast Crown Room differs from other areas, and Inspectors found a particular lack of recording of issues concerning special measures from that quarter in this case file sample.
- The 'particular needs' section of the PPS case management system which contains information provided by police relating to each witness seems to be largely unused and Inspectors

found that it had not been completed in the vast majority of cases.

- 3.86 In addition, each of the witnesses from this file sample (excluding cases of domestic violence) were written to by Inspectors and asked to voluntarily participate in a qualitative survey of their experience. The outworking of this is reflected in various comments throughout this report and specifically in Chapter 5.
- 3.87 Inspectors also noted there was a divergence of approach in some small areas between agencies. This was apparent, for example, in the use of some language which while minor in some respects, can mean that witnesses needs are overlooked. The PPS for example refer to 'particular needs' as including issues such as special measures, whereas the PSNI refer to 'particular needs' as meaning issues such as disabled access etc. ***There is a need for common language and understanding across the criminal justice system in support of special measures processes. In particular, the PSNI and the PPS need to ensure that in the transfer of information there is clear and unambiguous understanding.***

Special measures in the court setting

- 3.88 Court Service staff should normally assist in co-ordinating the provision of facilities and will liaise with other agencies in order to do so. They should also provide a range of assistance which may include pre-trial familiarisation visits, liaising with the Judge to ensure that the cases progress speedily, undertaking the practical arrangements on the day of trial, meeting the witness



and liaising with Witness Services to arrange separate waiting areas where possible. The NICTS Case Progression Officers are central to the delivery of these arrangements. NICTS staff will be aware of the need to co-ordinate via the receipt of special measures applications. A specific member of Court Service staff should also ensure that the video and television link equipment is set up and working effectively and will be available to respond to any technical difficulties. However, Inspectors heard concerns from a number of quarters that difficulties with technical equipment often arises leading to some small elements of delay.

- 3.89 As witnesses are only too well aware, and Inspectors have continually highlighted in several key inspections, a long period of time usually elapses before a court hearing takes place. Such delays can add significantly to the attrition of witnesses and cases. During this time, preparation and support needs to focus on pre-trial arrangements and preparation for any court hearing.
- 3.90 Providing witnesses with information about the investigation and court case is crucial if their anxieties and expectations are not to be raised and their support to the criminal justice system is not to be damaged. Where cases proceed to court, additional support will also be required during the court hearing.
- 3.91 It is apparent that despite the responsibilities of police and the PPS, the courts may also identify the need for special measures, and Inspectors heard of a number of occasions in which this was the case. While in some cases this meant a short delay, in others it inevitably leads to adjournments and

further delay. Once again, this highlights that the focus should be on early identification, where possible.

- 3.92 One of the greatest practical difficulties surrounding special measures and their use, is that in and of themselves, special measures will not prevent a witness coming into contact with a defendant or his/her supporters in the court setting. This will be the case both inside and outside the court environment. Inside the court environment it is imperative that criminal justice system agencies, the NSPCC YWS and the VSNI WS work in collaboration to ensure that such events are avoided. This can cause real difficulty for witnesses and to the process of any future applications where they may be necessary. For example, some applications may be contested on the basis that the witness is, or has already been in contact with a defendant. In common with Inspectors findings, Hayes et al (2011) found in their work that there was a significant degree of concern about seeing a defendant in the court setting. Hayes et al state, for example, '*...given that much of the impetus for developing such measures [special measures] is to prevent young witnesses from facing the defendant, 41.9% of the young witnesses who gave evidence via TV link still saw the defendant on the screen at some point. Equally, 62.2% saw the defendant either while going in and out of the court or in and around the court building...*' All criminal justice system agencies need to work collaboratively to ensure that the needs and fears of witnesses in coming into contact with defendants are addressed in court.
- 3.93 In addition to the concerns Inspectors heard regarding meeting a defendant in the court environs, CJL also heard from a



number of witnesses that they were prevented in a sense from getting access to justice as a result of being unable to hear what was happening in court. This arose for a number of witnesses seen by Inspectors who were granted special measures and were then prevented from attending court as a result. For example the mother of a child witness told Inspectors, *“She wanted to hear his evidence and wasn’t allowed into court. It should be possible to reverse the video-link. I still think she needed to hear him for her recovery. He told lies in court and she needs to hear that.”* A further example of this problem manifests itself when a witness who has been granted special measures in attending court to hear the verdict would have to sit in the public gallery in view of the defendant(s) and possibly among his/her supporters.

of the case and the location of the court, bearing in mind the facilities available to provide special measures. This could mean a case being administratively listed for a different court. Inspectors have examined the NICTS assessments of its facilities and, for example, Lisburn courthouse does not have video link facilities and hence could not hear cases involving the use of video evidence. In some other locations while there may be several courts, only one courtroom will have the relevant facilities and scheduling will have to take account of that. While Inspectors heard concerns on a number of occasions of cases involving special measures having to be delayed, it was apparent that the considerations of Judges in determining which cases get priority as regards listing, can be complex and detailed.

3.94 Inspectors recommend as part of its ongoing work, that the NICTS should examine the feasibility of providing video-link facilities which would allow witnesses to hear and see what is going on in court in a separate room, and which would maintain the integrity of their separation from the court, but allow vulnerable and/or intimidated witnesses to feel part of the proceedings. Such facilities have been provided in a number of recent high profile trials, but should be regularly considered as part of an individual witness assessment. Inspectors recognise that such a facility would have to be endorsed by the court in each individual case.

3.96 Delay within the criminal justice process can add disproportionately to the stress on witnesses who are deemed vulnerable. For example, people with learning disabilities might have particular difficulty understanding the basis and reasons for a delay. For this reason, and because delay is likely to adversely affect the memory of a person with a learning disability, criminal justice agency decision-makers should be reminded of the need to treat such cases as a priority. To prevent delay, cases need to be managed robustly by criminal justice agencies to ensure that they are ready for trial. Inspectors learned there is a commitment to giving high priority to child abuse cases. Child witness cases are to be given the earliest available fixed date, and trial dates should only be changed in exceptional circumstances. Legal representatives, in consultation with the Judiciary, should normally consider the order and timing of witness

Scheduling special measures cases

3.95 If special measures are granted, the NICTS should examine the scheduling



attendance so as to minimise inconvenience. Such an approach will benefit VIWs. The issue of priority for such cases is highlighted as among the issues being addressed by the VIWWG and consequently Inspectors simply encourage that ongoing work. In addition, the Lord Chief Justice has also issued Practice Directions impacting on these matters in respect of child cases. Inspectors are also conscious and acknowledge the Lord Chief Justice's Practice Direction on the subject of listing trials which was referred to and published as an appendix in the CJI report on 'The care and treatment of victims and witnesses in the criminal justice system in Northern Ireland' (December 2011).

Witness contact

3.97 Bearing in mind Inspectors findings at paragraph 3.87 with specific regard to the absence of any communication with victims in the PPS file sample and feedback from some victims, it was clear to Inspectors at the time of inspection that communication with witnesses would normally fall to police (by default). This was somewhat problematic and the passage of information in these kinds of cases can be erratic. Inspectors found, for example, that there was a patchy awareness amongst Police Officers of the need to keep witnesses informed regarding special measures and a lack of structured systems to allow them to do so, albeit there was no formal requirement for them to do so. While the results of special measures applications are provided via Causeway, there is no system which prompts Police Officers to update witnesses.

3.98 The issue of a standard letter only in cases where special measures have been granted is regarded as insufficient to meet the needs of witnesses with regard to the subject of information in these types of cases and bearing in mind the particular vulnerabilities concerned. Inspectors understand that the PPS are currently reviewing the content of letters. However, as a minimum Inspectors would wish to see formal communication of the outcome of all special measures applications to the witness, in order to provide the kind of certainty they require, but further to ensure that such vulnerable witnesses feel part of the criminal justice process. **Inspectors recommend as part of the Witness Care Unit programme/project plan, a dedicated project work-stream is established aimed at ensuring a clear, comprehensive and auditable system of updates for witnesses regarding the process of special measures applications.**

Reluctance to use special measures

3.99 Inspectors heard evidence of PPS Prosecutors (including Counsel) persuading witnesses against the use of special measures. Inspectors are unable to assess the reality and impact of this situation without discussing the specifics of individual cases with each of the parties involved. It may well be that some discussion with witnesses regarding the best route, balancing the needs of the witness and the interests of justice, is entirely appropriate. Inspectors did not hear any direct evidence of witnesses being persuaded on a course of action which was inappropriate. However, Inspectors did hear direct evidence from Prosecuting



Counsel that it remained a preference to have witnesses testify openly in court and that some persuasion of the merits of doing so were often employed. Once again, that is not necessarily inappropriate but a reflection of the reality of the circumstances.

3.100 In addition, Inspectors considered that there remains within the legal professions some doubt about the efficacy of the use of special measures. This stems principally from the long accepted principle which is that witnesses must give evidence in an open court, except in extraordinary circumstances. This is a tension which can lead to some victims, victims groups and others perceiving a reluctance on the part of some legal professionals to use special measures. However, these kind of preferences (to have a witness testify in court) extend beyond the legal profession. Some research also indicates that juries too prefer a witness to give evidence ‘live’.¹⁴ This same research also identified that these preferences do not influence the jury’s decision making and that other studies examined showed there was no impact on the proportion of guilty verdicts arising from the method of evidence presentation. Indeed, Inspectors referred to this matter in their July 2010 report on sexual violence and abuse when we stated, ‘...some, from both the criminal justice system and victims’ groups, stated they felt victims who gave evidence in person had greater impact on the jury than those who gave evidence by video link.’ Inspectors also then referred to

research conducted by the Crown Prosecution Service in England and Wales¹⁵ which found that the use of television link or video recorded evidence in chief had no adverse effect on the number of guilty pleas or convictions after trial. Interestingly, the latter research also indicated that the provision of special measures assisted witnesses who otherwise might not have given evidence at all.

3.101 Research by Davies (1999) has concluded that whilst jurors show a preference for ‘live’ evidence, they do not appear to allow that preference to influence their decision-making. Davies has also reported that the medium of evidence presentation (for example video recorded evidence) had no overall effect on the proportion of guilty verdicts.

3.102 Overall, Inspectors concluded that the issue of resistance or reluctance on the part of the criminal justice system to use special measures is largely perceptual and not borne out by strong evidence of negative outcomes. The impacts in terms of individual witnesses giving evidence from the witness stand is a much more subjective matter and, for this reason, more problematic to assess.

14 The impact of television on the presentation and reception of children’s testimony, International Journal of Law and Psychiatry, 22, 241-256 quoted in Home Office Report 01/06 Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies.

15 Special Measures for Vulnerable and Intimidated Witnesses: An Analysis of Crown Prosecution Service Monitoring Data, Cooper D and Roberts P, University of Nottingham, School of Law, June 2005.

CHAPTER 4:

Witness support and preparation



- 4.1 At the outset it is important to note that witness preparation is clearly distinct from witness coaching. The latter is a practice which should never be undertaken in any circumstances as this could lead to a miscarriage of justice. Coaching entails a form of training, instruction or tuition on giving evidence. Effective witness preparation on the other hand takes the form of familiarising witnesses with the format of legal proceedings, the surroundings and/or the additional measures which will be put in place to support them. Such steps might assist to reduce the witnesses anxiety and distress, and also help to reduce the need for particular special measures. In a practical sense the most common form of witness preparation is a pre-trial court visit and/or the provision of information on the court processes, including special measures.
- 4.2 Inspectors have found, and experience has shown, that witnesses appreciate support given after the close of proceedings, a time when they may otherwise feel isolated and may have difficulty coming to terms with the court verdict. Part of the difficulty faced by witnesses is that the criminal justice system agencies tend to disengage at this juncture, albeit that there are currently a number of post-conviction information schemes. It remains important that

some post-trial support and signposting occurs. Witness services have a clear remit to provide post-trial support to victims and witnesses and moving forward, Inspectors would expect that Witness Care Units will ensure adequate understanding and signposting for witnesses.

Young Witness Service (YWS) and Victim Support Northern Ireland Witness Service (VSNI WS)

- 4.3 VSNI's WS and the NSPCC YWS can arrange pre-trial visits for prosecution witnesses. The defence can make similar arrangements for defence witnesses by contacting the NICTS.
- 4.4 Support during the court process itself, in the live link room or when giving remote live link evidence is also provided when it is necessary. Since there are evidential constraints that apply to the person providing such support, the identity of a supporter in the live link room or at the remote location must be made known to the court. It is normal practice in Northern Ireland courts for supporters from the VSNI WS or the NSPCC YWS to accompany witnesses in the live link room. Where a supporter from either witness service is not available, a suitably trained member of Courts Service staff normally provides this



service to accompany child witnesses in the live link room. Inspectors understand that a working protocol extending the use of NICTS staff for adult witnesses is about to be brought into effect.

4.5 Witness Service reported that in many of the cases referred to it, special measures did not appear to have been considered. If the VSNI WS staff believe that special measures are necessary they will informally discuss this with the Police Officer in charge or the PPS. For a variety of reasons early notification of special measures and applications is essential in assisting WS staff to provide the best possible service to witnesses. Part of the difficulties experienced concerns evidence heard by Inspectors of witnesses turning up at the WS without any prior notification. There were also difficulties with trials which had been adjourned without the WS being notified. Indeed while visiting the WS, Inspectors experienced one case which was due for trial on a Monday but had been deferred the previous Friday. WS staff were expecting a number of witnesses who did not turn up as no notification had been received by them of the trial cancellation. Consequently, despite a referral system being agreed and implemented in June 2011, Inspectors considered there were some gaps remaining.

4.6 The position for the YWS is not materially dissimilar insofar as a protocol exists for referral. However, the NSPCC report that this is not always complied with, and that some referrals can come late or young witnesses who are in need of support are picked up by their staff later in the process. These issues were highlighted

by Inspectors recently in their December 2011 report on the care and treatment of victims and witnesses. Inspectors then recommended as follows: ‘... together with VSNI and NSPCC, PSNI and PPS re-visit referrals to the witness schemes to ensure that gaps can be narrowed and that the service to victims is as seamless as possible.’ This recommendation was accepted in the action plan which followed.

4.7 For the YWS the process is slightly different, and special measures are always a consideration due to the age of its clients. In almost all cases video evidence will already have been recorded, and special measures considered/applied for by the PPS. It would not however be unusual for YWS staff to bring the needs and concerns of witnesses to the attention of both police and the PPS prior to trial. Inspectors also spoke with VSNI WS staff as part of their inspection and heard staff relate that the need to highlight witness vulnerabilities was “not uncommon”. Indeed, VSNI WS staff were asked to collate during 2009-10 the numbers of witnesses who had come to their attention where special measures had been granted, or where witnesses were considered eligible, but the issue of special measures had not been discussed with them. Of a total of 66 cases seen by VSNI, in 56 (84.8%) Victim Support raised issues regarding special measures either with police or prosecutors. In seven of these cases an adjournment was sought to make a special measures application, and in 16 cases special measures were ultimately granted, including on the day of the hearing. This seems to further underscore the findings of Inspectors that considerable numbers of VIWs are

not identified in the initial stages.

Supporters

- 4.8 It is normal practice in Northern Ireland courts for supporters from the VSNI WS or the NSPCC YWS to accompany witnesses in the live link room without the need for a member of the NICTS to be present.
- 4.9 Supporters need to distinguish between providing practical emotional help and support to the witness generally to reduce anxiety or stress which is a key part of their role, and therefore enable the witness to give their best evidence, and on the other hand expressing their own views and beliefs concerning the evidence of the witness, which is not permitted. Supporters working with child and vulnerable adult witnesses should be subject to current Enhanced Disclosure Procedures through Access NI in line with the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003. Research has demonstrated that the presence of a supporter known to the witness may reduce the witness's anxiety and improve the accuracy of their recall.
- 4.10 Victims of sexual violence and abuse may have multiple support and safety needs because of the nature of these crimes. Similarly, victims of domestic abuse will also have particular support and safety needs. In criminal proceedings, VSNI WS will have a lead role in supporting victims and witnesses in conjunction with other specialist services such as Nexus, Women's Aid and many others. VSNI volunteers will engage with, or direct witnesses to, further specialist support where necessary. In addition, the criminal

justice agencies signpost services in a number of ways, including the distribution of leaflets at various key points and via the internet.

- 4.11 Who undertakes the range of support and preparation functions will depend on the needs of the individual witness, the availability of resources and the court's directions. In addition to general considerations, including the views of the witness, it may be appropriate to secure the assistance of a supporter who has a particular understanding of the needs of the witness, for example from the point of view of ethnic or cultural background, communication complications or disability awareness.
- 4.12 It is good practice for special measures and any related matters to be decided on as early as possible, as this enables the pre-trial supporter to plan ahead with greater certainty. Inspectors did not conduct specific fieldwork surrounding the use of supporters, but did not hear any significant concerns regarding their use. On the contrary, one witness told Inspectors, *"I had my own separate room there in the court with some of my family present. I also had a supporter present while giving evidence. That was all pretty good."* It is safe to conclude that there is very broad support for the use of supporters as one of the available special measures.

Intermediaries

- 4.13 Although not available in Northern Ireland at the time of inspection, the use of intermediaries for witnesses was being planned. This will be an important addition to the special measures available. The Justice Act 2011 also introduces the availability of



intermediaries for defendants but this has not yet been enacted. Inspectors heard very broad support for the use of intermediaries and a need for the service to be expedited. While Inspectors understand that plans are being developed to do so, they nonetheless express the clear hope that their use will ultimately extend beyond the courtroom to become commonplace in the investigative setting, as is being planned.

- 4.14 Intermediaries must be approved by the court and declare that they will perform their function faithfully. They have the same obligations as interpreters. They are specialists in assessing communication needs and facilitating communication breakdowns. However, the use of an intermediary is not available to witnesses eligible for special measures on the grounds of fear or distress alone.
- 4.15 Where intermediaries are used at an early stage of an investigation or proceedings, and an application is subsequently made to admit as evidence in chief, a video recorded interview in which they were involved, then a special measures direction to admit the recording can be given despite the Judge or legal representatives not having been present. Before the recording can be admitted however, the intermediary must be approved by the court retrospectively. Inspectors understand that the DoJ hope to deliver an intermediaries scheme for Northern Ireland by early 2013.
- 4.16 The court may have approved the use of an intermediary to help the witness give evidence, although the role of an

intermediary is separate from that of the court supporter who should be available during pre-trial preparation to improve the witness's understanding. An intermediary will usually have undertaken an assessment of the witness at an early stage in the proceedings, and will have produced a written report for the Judge, the prosecution and the defence. That report should highlight matters impacting on understanding and communication, for example, limited concentration spans and particular types of questioning that should be avoided. The intermediary communicates to the witness questions asked by the court, defence and prosecution, and then communicates the answers in the witness reply. The intermediary is allowed to explain questions and answers, if that is necessary, to enable the witness and the court to communicate. The intermediary does not decide what questions to put.

Communication aids

- 4.17 The use of communication aids, such as sign and symbol boards, can be authorised to help vulnerable witnesses overcome physical difficulties with understanding or answering questions. Communication aids can be used in conjunction with an intermediary. The use of a communication device is not available to witnesses eligible for special measures on the ground of fear or distress alone. In common with other findings, Inspectors considered that the use of communication aids needs to be given more broad consideration at the initial investigation stage and as part of a wider individual needs assessment for all witnesses whose cases are proceeding to court.

Other support

- 4.18 Different support functions may be provided at different stages. The same supporter will not normally be used throughout the entire criminal justice process, since this can lead to allegations that the witness is being coached, and also because family members and friends are unlikely to have experience of the courtroom. In exceptional circumstances (such as a witness finding it difficult to adapt to change), the same supporter may be used at more than one stage of the process. When this happens, great care needs to be taken to brief the supporter about the limitations of their role. There needs to be certainty that the supporter will not be called as a witness either by the defence or the prosecution. Inspectors found that it is unclear as to whose responsibility it would be to brief supporters on their role prior to a hearing. While the ABE Guidance provides very detailed and helpful practical advice, it is less than clear who might deliver this. **Inspectors encourage that clarity is provided on the issue of briefing court witness supporters in the next revision of the ABE Guidance, and that the NICTS should take responsibility to ensure that such supporters are given appropriate instruction.**
- 4.19 Accompanying and supporting children, and VIWs can also be helpful during investigative interviews. The supporter may be a friend or relative provided they are not party to the proceedings.
- 4.20 It may often be helpful for a person who is known to the witness to be present during the interview to provide emotional support (the ‘interview

supporter’). They may also be able to offer extra information regarding the particular communication needs of the witness. However, in some circumstances it has been found that the use of a person who is well-known to the witness as an interview supporter can prove counter-productive by inhibiting the disclosure of sensitive or embarrassing information. For this reason, discussions as to the identity of any potential interview supporter should take account of the nature of their relationship with the witness and its potential impact on the interview process. Wherever possible, the views of the witness should be established prior to the interview as to whether they wish another person to be present and, if so, who this should be. Interview supporters must be clearly told that their role is limited to providing emotional support and that they must not prompt or speak for the witness, especially on any matters relevant to the investigation. Once again, this demonstrates the absolute need for individual considerations of the needs of witnesses in each and every case.

- 4.21 Persons who are in police custody and who are potentially vulnerable are provided advice, assistance and support by the Northern Ireland Appropriate Adult Scheme. These are trained volunteers who will step in to provide support in the absence of a parent/ guardian or carer when necessary.

Legal consultations in the court setting

- 4.22 Meeting with the legal representative who is to call the witness to give evidence in chief in a calm environment, may also be considered an effective way of preparing a witness. The PPS legal



representatives have a duty to bear in mind the needs of a VIW who is giving evidence for the prosecution. If the defence seeks an adjournment, the legal representative for the prosecution should draw to the attention of the court any adverse effect this may have on the witness, particularly where the witness is a child or has a learning disability. The legal representative of the prosecution should also be alert to a witness's need for regular breaks, and to the possibility that questioning in cross-examination of the witness may be improper or inappropriate. The prosecution legal representative should seek to protect the witness from such questioning by drawing it to the Judge's attention. In the same way, a defence legal representative should seek to ensure that the court bears in mind the needs of a defence witness while they are giving evidence. This matter is also linked to paragraph 3.17.

- 4.23 In the course of this inspection, Inspectors heard largely positive comments on how Counsel had kept victims and witnesses updated. One victim said, *“Two gentlemen [barristers] came down and they were very good. They kept us informed of everything that was going on in the court.”* However, a remaining concern for many is the nature of some questioning by defence barristers in court.

CHAPTER 5:

The effectiveness of special measures and concluding findings



5.1 Research has shown that special measures do indeed help VIWs to give their best evidence. As we have previously emphasised, to maximise the benefits of special measures, it is important that a witness's eligibility for special measures is identified at an early stage.

5.2 Witnesses have also been found to give better evidence when they have a choice about the way in which it is given. This especially applies to vulnerable witnesses, many of whom need preparation and support in order to be able to make an informed choice.

Wherever possible, vulnerable witnesses should have an active role in choosing how to give their evidence. This is fundamental to further increasing the positive outcomes for VIWs.

CJI findings

5.3 While the findings of Inspectors during fieldwork were broadly positive in nature, some of the comments heard by Inspectors are reproduced below by way of illustrating the feelings of those who had used special measures. Many of the comments also exemplify the issues discussed earlier in this report.

A victim of a serious sexual assault said:

- *“Giving evidence was the scariest thing I’ve ever done in my life.”*
- *“I did think of video but it was my choice to go for screens. I didn’t have to look at anybody but the Judge and the barristers - that was good.”*
- *“I saw the barrister on the day of the court that’s all. I thought you didn’t get a while lot of time with them - all a bit rushed.”*
- *“They (criminal justice agencies) tried their best - that’s all you can ask of them.”*

A victim of a serious sexual assault who gave evidence as a child said:

- *“I was not informed about special measures initially - that developed later.”*
- *“I flew home to consult with the barrister - can’t remember exactly how long before - but that was good - it helped ease my anxieties.”*
- *“Using the special measures felt good - it means I would go forward again.”*

A victim of an aggravated assault who was a child at the time of giving evidence said:

- *“They [police] kept coming down and telling us what was going on. I was interviewed on video right from the start so I knew about special measures from the start.”*
- *“The barrister came down and explained that it was up to me if wigs and gowns were taken off. Everything was well explained.”*



- *“I wouldn’t change anything everything worked very well.”*

The mother of a serious sexual offence victim when she was 13 told Inspectors:

- *“My daughter was treated very well - we were kept up to date right through the [court] process.”*
- *“We felt as if we had no say [regarding the special measures used]. I really did feel we were kept out of the loop.”*
- *“We had a pre-trial court visit but the day we went to the court we couldn’t get into the actual courtroom. We were shown the video link room which was fine - that’s where we were going to be.”*
- *“We were there in the court for five weeks and there were some technical hitches with the equipment.”*
- *“When giving evidence my daughter started crying - they wouldn’t let me go down to her. I tried to say to the police that she wasn’t going to say anything to me that she had not told me already. A child needs consoling and I should have been allowed to do so because of her age.”*
- *“Every day the barrister was in the family room explaining things and I could have asked police too.”*
- *“My daughter felt that [named defendant] could see and hear her - it was there all the time.”*
- *“The PPS called and left a message to say that he’s filed for appeal, but we don’t know whether its for conviction, sentence or whatever.”*

The mother of two children who were the subject of serious assaults said:

- *“Police were very good. They worked very well for the children.”*
- *“There’s a terrible ongoing problem of delay. The case was meant to be heard on the Monday but his [defendants] barrister didn’t turn up and it was adjourned again for the second time.”*
- *“The video was good it worked well but the first time she could see the man [defendant] and that scared her.”*
- *“PPS were very good [named CLT member] kept us fully informed and sought dates that suited us.”*

The mother of a very young child (seven at the time of offence) said:

- *“Police were great - really good.”*
- *“I felt as if nothing was happening at times and I had to do some phoning initially.”*
- *“We were told a video interview was best.”*
- *“The first interview didn’t work so well but the second interview the policewoman was very good with her [victim].”*
- *“Two months before the case the barrister brought me down. At the time I didn’t feel positive anyway, but I came away feeling disheartened. I was later told they didn’t want to get my hopes up. They felt there was a strong case but they didn’t want to tell us that. At the time I didn’t feel positive - but thinking back now I do.”*
- *“The first day of the court when we were taken in he [defendant] was sitting there. The two policewomen didn’t realise and from then on we were taken in the back way in the car.”*
- *“The NSPCC were fantastic they came down and brought a cut out of the court for [named child victim] and showed her where everyone would be.”*

The victim of a case of intimidation said:

- *“When we rang to speak to the investigating officer we were told that he had gone and there had been a change but no-one informed us.”*
- *“Special measures were prompted by Victim Support.”*

- “VSNi were very good - couldn’t have coped without them.”
- “The barrister explained what would happen and explained the TV link.”
- “Anyone with an illness going to court is in an ordeal - it was daunting just walking in there.”
- “When we were shown around the court it was apparent they [defendants] would be an arms length away from me - I couldn’t have coped with that. I couldn’t have given evidence without the use of special measures.”

The victim of a serious assault told Inspectors:

- “The lady detective involved - she was very good with us. She stood by us the whole time right through everything.”
- “I think everything was dealt with very well but we were angry with the waiting about and the changes [adjournments], including the changes of court from Omagh to Enniskillen.”

The victim of an aggravated assault (child at the time) commented:

- “The second time I went to court I just turned up and I hadn’t a clue what to do or where to go - there was nobody there to talk to me.”
- “I had a phone call from the Social Worker and she just wished me good luck.”
- “If I had to change anything it would be to be more informed of what’s happening. Where you would be sitting in the court and that kind of thing.”
- “If I had to do it again I would use the video ok.”

Northern Ireland Victim And Witness Survey (NIVAWS)

- 5.4 The NIVAWS asks a number of questions with regard to special measures and we can conclude from the findings that the majority of those who used special measures see these as helpful. The findings from the NIVAWS is broadly in keeping with the findings of Inspectors which are that, with some exceptions and reservations, special measures are viewed positively amongst witnesses.
- 5.5 The low numbers of respondents to the NIVAWS who used special measures may well be a product of the limitations of the NIVAWS in terms of its exclusion

of all ‘serious’ crime categories, including sexual offences. Despite these low numbers and the exclusion of serious offences, Inspectors consider that the findings elsewhere regarding video evidence and live link being the special measure most often used remains appropriate.

Other evaluations

- 5.6 In the Northern Ireland context there have been some recent evaluations of the experiences of young people in giving evidence. Work by Plotnikoff and Woolfson (2004¹⁶ and 2009¹⁷) has incorporated as part of their methodology a sample of Northern Ireland witnesses. However, more

16 In their own words, The experiences of 50 young witnesses in criminal proceedings, The NSPCC in partnership with Victim Support, Plotnikoff J and Woolfson R, December 2004, http://www.nspcc.org.uk/Inform/publications/downloads/intheirownwords_wdf48193.pdf.

17 Measuring Up? Evaluating and implementation of Government commitments to young witnesses in criminal proceedings, Plotnikoff J and Woolfson R, July 2009 www.nspcc.org.uk/Inform.



recently a report commissioned for the DoJ by Hayes et al (2011)¹⁸ concluded that the key anxieties for young people in giving evidence include the formal adversarial nature of the courts, fear of direct examination, and to a greater extent cross-examination, lack of knowledge and understanding of court processes and most intense a fear of facing the defendant. This research interviewed 37 young people (64.9% female) and 35.1% male whose average age was 14.4 years at trial.

- 5.7 The research conducted by Hayes et al (2011) also demonstrates a series of issues for child witnesses that were also replicated in the findings of Inspectors across both the adult and child witness divide. For example, Hayes et al found issues with regard to:
- contact and information sharing with witnesses (or their parents) and criminal justice agencies need to be improved;
 - avoidable delay needs to be addressed;
 - maintenance of TV-link equipment requires to be addressed; and
 - introduction of intermediaries needs to be expedited.

Conclusions

- 5.8 Overall, Inspectors concluded that special measures are of vital importance to those VIWs who enter the criminal justice system. Secondly, any failure to identify witnesses who may be vulnerable or intimidated may have significant negative consequences. Thirdly, Inspectors found that the phenomenon identified as the hierarchy of identification will also have

potentially negative consequences for some VIWs. Taking account of all the available evidence, Inspectors assessed the current key themes requiring to be addressed in the provision of special measures are encapsulated by the following:

- improved identification of VIWs;
- greater assessment of individual need; and
- enhanced communication, including information available publicly.

- 5.9 Inspectors would point out that these themes are not mutually exclusive and need to be considered as part of a package of measures which must be addressed together in order to provide an improved service. Indeed, in the area of improved identification, for example, further matters such as awareness raising and training are included.
- 5.10 While it is apparent that, in the main, special measures are well regarded and that much work has been done or is being planned, it is also apparent that collective action is required across the criminal justice system if the experience of witnesses is to be further improved. This includes identification, improved information/communication and a continuity of care and support together with more effective transfer of information. Meeting these needs will not automatically require additional resources, rather it will require a renewed effort and awareness raising and small adjustments to processes. To the credit of the criminal justice system, this has already been recognised to a large extent in the establishment of the VIWWG and the various action plans adopted by it.

¹⁸ The Experiences of Young Witnesses in Criminal Proceedings in Northern Ireland, A Report for the Department of Justice (NI), Hayes D, Bunting L, Lazenbatt A, Carr N and Duffy J, Queens University Belfast and NSPCC, May 2011.



5.11 However, Inspectors found during fieldwork that there was a lack of knowledge amongst many criminal justice system staff as to the measures and support available. Consequently, Inspectors felt that witnesses could be uninformed and unsupported in what might be significant cases. It was also apparent to Inspectors that there was no readily available material which could inform witnesses regarding the support available to them. Consequently, **Inspectors recommend that a criminal justice system-wide leaflet is developed and made available, which clearly sets out for witnesses, the kind of support available to them, and the organisations who may provide it. This includes on the NI Direct website and that this is also linked via the various criminal justice system agency websites.** This could be incorporated into or considered as an appendix to a Witness Charter for Northern Ireland (recommended elsewhere). This could also be used by Police Officers when dealing with VIWs and provided by police to vulnerable witnesses at an early stage. Such a leaflet could also act as a reference guide for operational Police Officers. Inspectors were made aware of a similar leaflet 'Vulnerable Witnesses - their right to be heard' which is available in England and Wales.

5.12 **Bearing in mind that some witnesses who might be eligible for special measures have a change in circumstances (for example where intimidation occurs in the period between initial police investigation and trial), Inspectors recommend such leaflets should be forwarded by the PPS to accompany**

correspondence concerning the calling of witnesses to court (requirement to attend letters).

Taken as a whole, this and matters referred to in the preceding paragraph need to be considered as part of the VIWWG work which is considering a review of special measures information in the public domain.

5.13 Effective support and preparation, by providing information about the court process, helps all witnesses to produce better evidence and can influence the witness's decision to proceed with the case in the first place. The additional stress of coping with an unfamiliar situation is likely to reduce the ability of witnesses to participate and to respond to questioning, or to effectively recall events in order to assist the fact-finding process of the criminal justice system. Preparation and support that is planned to fit the needs of individual witnesses can help to prevent and alleviate this problem.

5.14 For the most part, it was apparent to Inspectors that the use of special measures had bedded in well and were generally well regarded by both service users (witnesses) and by criminal justice system professionals. However, Inspectors also found that there were some cultures and practices within the criminal justice system which led to a restricted consideration of the needs of witnesses. In some measure this is due to an over-reliance on the use of video recorded evidence, which puts witnesses on a course which may not always be in accord with their wishes or best interests. Partly this is also due to a lack of clarity within the criminal justice system as to what is a successful outcome. For many in the criminal



justice system the culture and concentration is on a successful prosecution, within the confines of the law. While that of itself is entirely laudable, it may on occasion mask the fact that victims and witnesses can be left with a feeling that they were on the periphery of the process. Another driver of the cultures which Inspectors identified is the concentration of policy and practice on what happens in court, rather than early and appropriate consideration and identification of individual needs. Inspectors consider that success in terms of the criminal justice system treatment of VIWs should be measured by the fact that the process provides timely and relevant information, takes account of their wishes and of itself 'does no more harm'. Positive measures and outcomes need to be considered in terms of:

- individual needs assessments have been completed;
- the views of witnesses are taken into account in needs assessments; and
- appropriate information is provided to witnesses to allow informed choices and decision making.

5.15 Given that it is very likely that significant proportions of VIWs are currently being excluded, the criminal justice system needs to re-double its efforts to ensure that a proper identification of VIWs is made as soon as possible. The process chart at Appendix 4 clearly demonstrates that there are significant opportunities to identify need, but the quality of those interactions and identification opportunities can be improved. That means police must do more, that the PPS must be alert to the possibilities that VIWs have not been identified and the NICTS, the NSPCC YWS and the VSNI WS must do

likewise. All of this needs to be underpinned by training and awareness raising efforts. However, more importantly, **Inspectors recommend the programme/project plans for the development of Witness Care Units should include protocols that will ensure it can act as a 'safety net' to the identification of VIWs.**

5.16 On the whole, Inspectors consider that following on from the phased implementation of the 1999 Order some issues remain. These are largely in the areas of identification, individual assessment and communication. In particular, operational practice fails to recognise the vulnerability of large numbers of people who come into contact with the criminal justice system as witnesses.

5.17 While Inspectors are confident that the work of the VIWWG will further aid the position of VIWs, all of the evidence tends to suggest that more effort, energy and consideration now needs to be given to the investigation and pre-trial preparation stages. This could have the effect of further enhancing the confidence of service users and the prospect that more VIWs will be identified and enabled to successfully use special measures. Inspectors encourage a return to policy and practice which concentrates to a greater degree on the third stage of the test for special measures (set out in the introduction) and specifically to identifying the type of support or assistance that will be most likely to address the needs of individual witnesses (needs assessments). Inspectors have made a number of recommendations throughout this report which are, in the main, aimed at achieving that.

Section



Appendices



Appendix 1: The special measures

Special measures available in the Criminal Evidence (Northern Ireland) Order 1999 include:

- Article 11: Screens may be placed around the witness box to stop the witness seeing the defendant.
- Article 12: A live link can enable the witness to give evidence during the trial from outside the court through a live televised link (live link) to the courtroom. The witness may be either accommodated within the court building or in a suitable location outside the court.
- Article 13: Evidence given in private. Exclusion from the court of members of the public and the press (except for one named person to represent the press) may be considered in cases involving sexual offences or intimidation.
- Article 14: Removal of wigs and gowns by Judges and barristers in the Crown Court to make the courtroom appear less formal.
- Article 15: The police interview can be visually recorded and played at the trial as the witness's evidence in chief.
- Article 16: Cross-examination and re-examination may be recorded in advance of the trial and then played at the trial.
- Article 17: Examination of a witness through an intermediary. An intermediary may be appointed by the court to assist a witness, who has difficulty understanding questions and/or framing answers coherently, to give their evidence at court. This measure is available only to vulnerable witnesses.
- Article 18: Aids to communication may be permitted to enable a witness to give best evidence whether through a communicator or interpreter, or through a communication aid or technique, provided that the communication can be independently verified and understood by the court. This measure is only available to vulnerable witnesses.
- Articles 22* and 23: Mandatory protection of witness from cross-examination by the accused in person. An exception has been created which prohibits the unrepresented defendant from cross-examining vulnerable child and adult victims in certain classes of cases involving sexual offences.
- Article 24*: Discretionary protection of witness from cross-examination by the accused in person. In other types of offences, the court has discretion to prohibit an unrepresented defendant from cross-examining the victim in person.
- Article 28*: Restrictions on evidence and questions about complainant's sexual behaviour. The 1999 Order restricts the circumstances in which the defence can bring evidence about the sexual behaviour of a complainant in cases of rape and other sexual offences.

* These articles are not included in Part 11 of the 1999 Order and are not strictly 'special measures'. However, Inspectors consider such matters as analogous to special measures in assisting vulnerable witnesses in giving evidence.



Appendix 2: Terms of Reference

Thematic inspection of the use of ‘special measures’ in the criminal justice system in Northern Ireland

Introduction

Special measures are provided to a range of witnesses in the courts in Northern Ireland to assist them in giving their best evidence. This varies, for example, from the provision of screens, the use of live link and video technology and to the removal of wigs and gowns. These provisions are primarily legislated for in the Criminal Evidence (Northern Ireland) Order 1999. Before granting an application for special measures, a court must be satisfied that the use of special measures provisions generally and the particular special measure(s) applied for is/are likely to maximise the quality of the witness’s evidence.

Criminal Justice Inspection will plan to undertake a thematic inspection of the use of special measures by the criminal justice organisations in Northern Ireland. This will include cross-departmental working and the role of the community and voluntary sector in supporting and assisting the core criminal justice agencies.

Context

The Department of Justice in its ‘Bridging the Gap’ strategy set out a commitment to formally evaluate the effectiveness of special measures provisions and in its consultation launched March 2010 posed a specific question on this matter as follows: Do you consider that after the revised best practice guidance has bedded in, a review by the Criminal Justice Inspection on the operation of special measures would be a good way of assessing organisations’ performance? If not, can you suggest an alternative way to assess performance?

It was broadly agreed by all that a review by CJI would be a good way of assessing organisations’ performance in relation to special measures, albeit some respondents expressed concern regarding the scope of such an approach.

Following an approach from the Department of Justice the Chief Inspector of Criminal Justice in Northern Ireland has agreed to conduct an inspection of the topic.

Scope and Definition

The aim of the inspection is to examine the use of special measures in Northern Ireland assessing the efficacy of policy, procedure and practice with a view to achieving the best possible outcomes for witnesses.

The inspection framework will follow accepted CJI practice with the three main strategic elements as follows:

- strategy;
- delivery; and
- outcomes.



The primary focus and objectives for this follow-up inspection are as follows:

Strategy and Governance

- Assess the current structure and effectiveness of governance arrangements;
- consideration of strategy, policies and procedures;
- comparative analysis, where feasible and relevant, will be used by Inspectors to assess practice in Northern Ireland;
- agency self-assessment; and
- management information systems and procedures.

Delivery

- Determine the scope of progress in implementation of the Achieving Best Evidence Guidance;
- examine the extent and efficacy of training;
- assess the effectiveness of inter-agency working and liaison; and
- assess the current effectiveness of processes and working practices used in special measures, including the processes used for the identification of those requiring special measures.

Outcomes

- Stakeholder consultation in order to determine the current experiences of victims/witnesses and practitioners concerning special measures. This will include police officers, health and social care staff, community and voluntary sector staff, PPS staff, Courts Service staff and the Judiciary; and
- examine and assess management information data against targets and outcomes.

In addition, Inspectors will seek to identify improvements and/or development opportunities in relation to the use of special measures.

Methodology

Preparation

The preparatory phase will include:

- Preparation of the Terms of Reference.
- Identification of any relevant research, studies, audits and inspections on the use of special measures.
- Determination of information and data needs (including exploratory meetings with key organisations).
- Requesting documentation and statistics from the justice organisations and other relevant stakeholders such as the NICTS.
- Agency self-assessments.
- Appointment of agency liaison officers.

Research and review of documentation

A desktop review of all relevant documentation will be conducted as the inspection unfolds. Agencies will be asked to provide relevant documents which underpin their work in the area of 'special measures' and this will be reviewed as the inspection progresses.



Fieldwork

The actual fieldwork of the inspection (interviews and meetings with key staff in the justice organisations) is scheduled to commence in June 2011 and (bearing in mind the holiday period), extend into September 2011. CJI will agree with each stakeholder an outline programme detailing dates, times and people. Fieldwork will consist of interviews with appropriate individuals or staff at various grades and an examination of appropriate documentation including policies, records, files and management information.

Stakeholder consultation in order to determine the current experience of both victims and witnesses and practitioners will be central to the inspection. Qualitative analysis will be conducted with victims who have been subject to special measures where possible. This will require the active co-operation of agencies and the community and voluntary sectors in order to help identify a relevant sample. In addition, it is proposed that a review of a sample of criminal cases (where special measures were used) will be undertaken to assess the quality of same from a victim perspective (including issues of avoidable delay). Inspectors will determine a sample of cases in conjunction with the relevant organisation(s).

Writing up report

The drafting of the inspection report will commence immediately following fieldwork in September/October 2011.

Reporting and action plan

CJI aim to produce a final report for publication in late 2011 or early 2012.



Appendix 3: Methodology

Desktop research

The inspection commenced with desktop research of literature and guidance documentation which was reviewed in relation to both the policies of the main criminal justice agencies and the wider application of practice for victims and witnesses. Among the literature reviewed were the following:

- Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses, and guidance on using special measures, Ministry of Justice, March 2011.
- Advice on the structure of visually recorded witness interviews, National Investigative Interviewing Strategic Steering Group, August 2010.
- Are special measures for vulnerable and intimidated witnesses working? Evidence from the criminal justice agencies, Home Office Online Report 01/06, Mandy Burton, Roger Evans Andrew Sanders.
- Autism Guide for Criminal Justice Professionals.
- Citizen Focus: A practical Guide to improving police follow-up with victims and witnesses, March 2007.
- Consultation on the statutory special measures to assist vulnerable and intimidated witnesses give their best evidence in criminal proceedings, Department of Justice, 2010.
- Early Special Measures Discussions between the Police and the Crown Prosecution Service, Practice Guidance, Criminal Justice System.
- Joint Review by RQIA and CJI of the Protocol for Joint Investigation of Alleged and Suspected cases of Abuse of Vulnerable Adults, Overview report, November 2011.
- Judicial College Bench Checklist: Young Witness Cases, May 2011.
- Measures to assist vulnerable or intimidated witnesses in the criminal justice system, Home Office 2001.
- Report Vulnerable Witnesses in Civil Proceedings, Northern Ireland Law Commission, July 2011.
- Special Measures for Vulnerable and Intimidated Witnesses: An Analysis of Crown Prosecution Service Monitoring Data, Cooper D and Roberts P, University of Nottingham, School of Law, June 2005.
- The Experiences of Young Witnesses in Criminal proceedings in Northern Ireland, A Report for the Department of Justice (Northern Ireland), Hayes et al, May 2011.
- Views and Experiences of People with Learning Disability in relation to Policing Arrangements in Northern Ireland Final Report 31 May 2011, Police Ombudsman for Northern Ireland, Northern Ireland Policing Board.
- Vulnerable and Intimidated Witnesses A Police Service Guide, Ministry of Justice, March 2011.
- Working With Intimidated Witnesses A Manual For Police And Practitioners Responsible For Identifying And Supporting Intimidated Witnesses, CJS, 2006.
- Young witnesses in criminal proceedings: A progress report on *Measuring up?* (2009), Joyce Plotnikoff and Richard Woolfson, Lexicon Limited, June 2011.

The literature review conducted by CJI also included criminal justice agency documentation with key agencies being asked to supply CJI with all relevant policies, strategy documents, action plans, reports, protocols and relevant management information. All the above were used also to inform interview questions during the fieldwork phase.



Fieldwork

Fieldwork during the course of this inspection was conducted during August, September and October.

The questions used during the fieldwork for this inspection were informed by the areas of investigation undertaken during desktop research. The agencies were additionally asked to 'self-assess' and were provided with a number of example questions.

A number of focus groups and one to one interviews were conducted with a range of personnel within the relevant agencies. Interviews were also conducted with stakeholders who had a key interest in special measures.

Representatives from the following areas were interviewed during the fieldwork:

Stakeholders:

- Royal College Of Speech And Language Therapists;
- Vulnerable and Intimidated Witness Working Group;
- PPS Policy;
- PSNI focus groups;*
- PSNI Policy Lead;
- PSNI Crime Training;
- LCJ Office;
- DoJ;
- PPS case file reviews;
- Court Observations/hearings;
- Children's Law Centre;
- DHSSPS;
- VSNI;
- PPS focus group;
- NICTS;
- PSNI IT checks;
- Adult Safeguarding Hub launch;
- Trauma Counsellor;
- Judges;
- Alzheimer's Society;
- Association for Real Change;
- Mindwise;
- NSPCC; and
- Women's Aid

* A wide range of PSNI focus groups were included across a range of disciplines and areas.

The following organisations did not respond to CJI invitations to participate:

- Age NI;
- Barnardo's;
- Human Right's Committee; and
- NICEM.



Service Users

Stakeholder consultation and engagement with witnesses in order to determine their experiences was central to the inspection. To that end, Inspectors conducted a number of meetings with victims representative groups and also conducted a number of direct interviews with witnesses who had used special measures. Witnesses were accessed through a number of third party contacts, however, the main sample of witnesses were contacted via a sample of cases highlighted by the PPS. This included 10 witnesses in 9 cases. Importantly, the sample included a number of young witnesses, but who had since the time of the original incident reached the age of 18. In a small number of other cases the parents of some children who had used special measures were interviewed.

Case File Review(s)

A review of PSNI computer records (NICHE RMS) was undertaken to assess the level of recording of witness vulnerability. This entailed randomly selecting a small sample of cases.

Further, a review of 26 PPS case files was undertaken by Inspectors to assess information on special measures available to PPS and the issue of avoidable delay. The sample included a range of types of case, across the various PPS Regions and also incorporating cases in both the Magistrates and Crown courts. The sample also contained 3 cases which had proceeded to appeal.

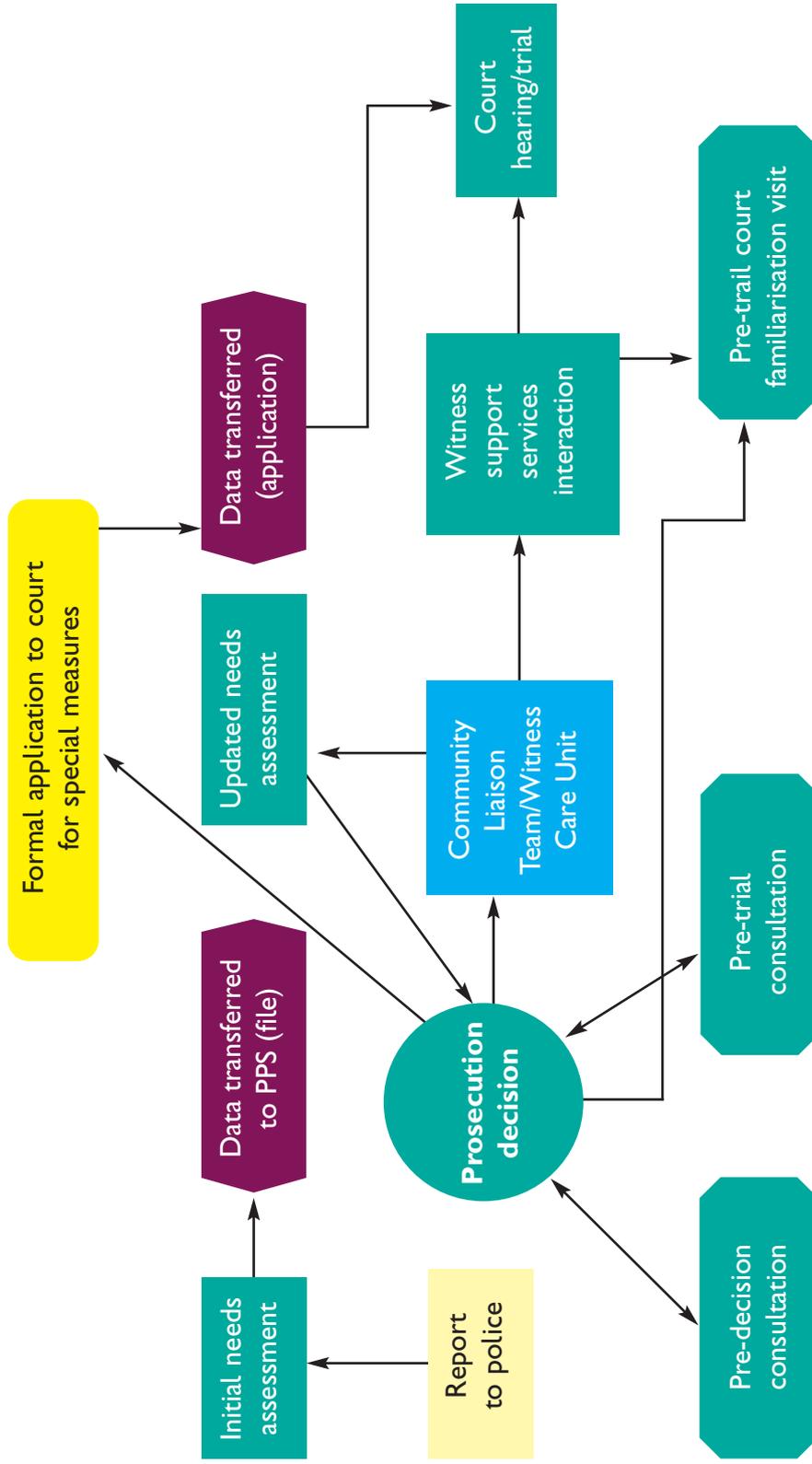
PSNI

A number of focus groups comprising officers from Constable to Superintendent and from a range of disciplines were conducted during the course of fieldwork.

PPS

Inspectors conducted a number of meetings with PPS Policy section and conducted a focus group with prosecutors and senior prosecutors across a range of PPS Regions and disciplines.

Appendix 4: High level process map – special measures



KEY:
 GREEN: REPRESENTS
 AN OPPORTUNITY
 FOR IDENTIFICATION
 OF VULNERABILITY









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First published in Northern Ireland in April 2012 by
CRIMINAL JUSTICE INSPECTION NORTHERN IRELAND
14 Great Victoria Street
Belfast BT2 7BA
www.cjini.org

ISBN 978-1-905283-74-3

Typeset in Gill Sans
Printed in Northern Ireland by GPS Colour Graphics Limited
Designed by Page Setup