



CAJ's submission to the NIO

Special Measures Policy: an evaluation and review

May 2009

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The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, Human Rights First (formerly the Lawyers Committee for Human Rights) and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights.

CAJ however would not be in a position to do any of this work, without the financial help of its funders, individual donors and charitable trusts (since CAJ does not take government funding). We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Hilda Mullen Foundation, Joseph Rowntree Charitable Trust, Oak Foundation and UNISON.

The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

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Winner of the Council of Europe Human Rights Prize

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18 May 2009

Re: Special Measures: an evaluation and review

Thank you for your letter of 23 February 2009 inviting the Committee on the Administration of Justice (CAJ) to present our views on the 'Special Measures' provision of the Criminal Evidence (NI) 1999. As you will know, CAJ is an independent non-governmental human rights organisation that was established in 1981. CAJ's activities include - publishing reports, conducting research, holding conferences, monitoring, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws, criminal justice, equality and the protection of rights. The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

General Comments

The report by the Criminal Justice Inspectorate *Improving the Provision of Care for Victims and Witnesses within the Criminal Justice System in Northern Ireland* (July 2005) found that the 'embedding and application of special measures needs to be more clearly understood by all stakeholders' and recommended that the Criminal Justice Board evaluate at the effectiveness of the working of the Special Measures. The present NIO consultation document begins by saying that a first step in the evaluation process is this consultation. CAJ commends the NIO for beginning to evaluate the application and workings of the Special

Measure provisions offered in the Criminal Evidence (NI) Order 1999. To this end, CAJ has comments and concerns specific to the questions raised in the 'evaluation and review document' as well as general comments regarding Special Measures provisions.

Overall, when measured against the *UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* the Special Measures offered in the *Criminal Evidence (NI) Order 1999* falls short. **Greater attention should be paid to ensuring the right to treated with dignity and compassion; the right to be protected from discrimination; the right to be informed; the right to be heard and to express views and concerns; the right to effective assistance; the right to privacy; the right to be protected from hardships during the justice process; and the right to safety not only of children, but of otherwise vulnerable witnesses.**

Additionally, CAJ recommends that the Criminal Evidence (NI) Order 1999 should also include provisions for prioritising cases where witnesses are vulnerable or under 18 so as lessen the length of time before trial, which may contribute to the distress of the witness.

Application of Special Measures

There seems to be confusion in relation to when and how the use of Special Measures is initiated, and by whom:

Articles 4 indicates that the judge ('the court') has the ability to determine if a witness is eligible for assistance on grounds of age or incapacity and that in determining whether a witness falls into any of these eligible categories 'the court must consider any views expressed by the witness' (Article 4(4)).

Similarly, Article 5 states that the court must consider a number of clearly described factors in order to determine if a witness is eligible for assistance on grounds of fear or distress, including any views expressed by the witness (Article 5(3)).

The NI Direct Government Services website (www.nidirect.gov.uk) states:

Vulnerable people, like children under the age of 17, people with learning disabilities and victims of sexual offences, sometimes need help giving evidence in court. If this applies to you, you may

be allowed to use 'special measures' to help you to give evidence...*You should tell the police* before attending court if you feel that you may need to use any of these special measures.'

The phrase 'you should' indicates that the responsibility for identifying a vulnerable witness is on the witness him/herself. Clearly, this may not be feasible for a vulnerable individual to do.

The Criminal Justice System Northern Ireland website states:

If a police officer considers that you might be eligible for the use of special measures, he may arrange for you to make your witness statement by video recording...If your case is passed on to the PPS, and you become a prosecution witness, the prosecutor will also consider the use of any additional special measures to assist you when giving evidence in court. If you are eligible, he/she will apply (make an application) to the court at a preliminary hearing. If you are a witness for the defence, the defence solicitor will apply for any special measures which you may need. It is up to the Judge at that hearing to decide whether you should be allowed to use special measures at court.

If a special measure application has been granted, you will be informed by the prosecutor or the defence, depending on whichever party you have been asked to be a witness for. They will explain to you how the special measure/s will be used, in practical terms, at court.

The problem here lies in the fact that the legislation states that although the court must consider the views of the witness, clearly both the police and prosecutor have the ability at various stages of the investigative and prosecution process to decide whether the witness warrants special measures.

There appears to be too much leeway for authorities to use their discretion, which may not always be consistent, without having strict procedural guidelines as regards to the identification of vulnerable witnesses. This seemingly would permit such individuals to fall through the cracks as regards support assistance. This ties-in with (although not focused specifically on Northern Ireland) the NSPCC UK-wide research *In their own words: the experiences of 50 young witnesses in criminal proceedings* which is still relevant today.

The legislation and related information available to individuals needs to be clear and consistent.

Moreover, CAJ recommends that the NIO put forth a tender for an independent research project which examines the experience of children and otherwise vulnerable witnesses in Northern Ireland similar to the NSPCC report referred to above.

Re specific Special Measures:

Article 4 - Witnesses eligible for assistance on grounds of age or incapacity

The best interests of the child, as enshrined in Article 3 of the United Nations Convention on the Rights of the Child, should be the primary concern when reviewing or enacting legislation that affects children. To this end CAJ would have concerns about several aspects of the Special Measures provisions.

Notably, the *Criminal Evidence (Northern Ireland) Order* states that those witnesses under the age of 17 are eligible for assistance (article 4(1)(a)). Article 1 of the *UN Convention on the Rights of the Child* (CRC) defines a 'child' as a person below the age of 18 and **CAJ recommends that the Special Measures provisions be available to all children under the age of 18, thus bringing Northern Ireland in line with international standards in its definition of a 'child', and make it consistent with the cut-off age of the 'Young Witness Service' provided by the NSPCC.**

Article 9 – Special provisions relating to child witnesses

Although the inability of a child to opt out of special measures is not actually explicit in the *Criminal Evidence (NI) Order 1999*, it is interpreted in such a way. While not allowing any child witness to opt out of the use of Special Measures provisions or to choose the way in which they give their evidence may be seen as in the best interest of the child, this is at odds with the right to be heard and to express views and concerns as permitted in Article 12 of the CRC and Article VIII of the *UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*. **It would seem that the presiding judge should weigh the relevant evidence, including the views of the witness, before deciding that Special Measures are required for a child witness (and provided that the necessary information regarding special measure**

provision options and repercussions are made very clear to the witness and his/her guardian or other ‘appropriate adult’).

Article 11 - Screening witness from accused

Article 11 of the Criminal Evidence (Northern Ireland) Order states that a witness will be prevented from seeing the accused. The terminology therefore *may* allow for the defendant to see the witness. The article also does not state that the accused will be prevented from seeing or being seen by the public gallery. The NI Court Service ‘Victims and Witness Policy’ however states that the screening allows the witness to be prevented from seeing the accused and the public gallery and says nothing about not allowing the defendant to see the witness. The Criminal Justice System Northern Ireland website however states that ‘A screen will be placed around the witness box which prevents you from having to see the defendant and the defendant from seeing you’. This inconsistency in public information raises concerns about what information witnesses may be given and how that information measures against what happens in reality (misinformation in this regard was noted in the NSPCC report).

The *Customer Service Standards* for ‘vulnerable victims and intimidated witnesses’ published by the Court Service Northern Ireland gives very basic information and does not give substantial information about special measures and how to access them. The *Customer Service Standards* uses language that is not consistent with the legislation and other documents (i.e. ‘special arrangements’ rather than ‘special measures’ and ‘vulnerable victims and intimidated witnesses’ as opposed to ‘vulnerable or intimidated witnesses’) which may cause confusion for some individuals.¹

The *Partnership Protocol* states under ‘Special Measures’ that ‘it has been common practice over a number of years for the NSPCC to fulfil the role of accompanying officer, where an appropriate crown court order has been made in respect of a child’. Yet there is little information regarding the duties expected of the accompanying officer. Both the *Customer Service Standards* and the *Partnership Protocol* should be more explicit as should regarding the role of the accompanying officer and to ensure a consistent application of provisions available to children and vulnerable witnesses. **CAJ suggests that it be clearly stated that the**

¹ The *Partnership Protocol* also uses that term ‘vulnerable victims and intimidated witnesses’ which is not entirely accurate.

accompanying officer shall be (unless requested otherwise) in the live-link room when the witness is providing evidence, for example.

The *Partnership Protocol* states that ‘while each organisation agrees that it is preferable to provide a vulnerable victim or intimidated witness with support from either [VSNI] WS or NSPCC, there will remain a number of situations where NICTS staff will be required to fulfil the role of the accompanying officer.’ However, neither the *Partnership Protocol* nor the *Customer Service Standards* give an indication of what type of situation might arise which would require the NICTS staff to fulfil the role of accompanying officer. **It is hoped that the NICTS staff member stepping in for such a situation would be someone specifically trained in dealing with and supporting children or otherwise vulnerable witnesses, and to this end CAJ recommends that the *Partnership Protocol* and/or the *Customer Service Standards* give explicit assurance that the NICTS staff member will be suitably trained so as to diminish any further anxiety which may be caused to the witness.**

Article 15 - Video recorded evidence in chief

Regarding video recorded evidence in chief, nowhere is it made explicit that the videotaped statement would be shown to the witness prior to the trial so as to possibly diminish distress that viewing it at trial may cause; this was noted as an issue of concern in the report *In Their Own Words*. Measures should be in place to ensure that children and vulnerable witnesses are able to review their evidence (watch their video or see their written statement) in advance of the trial.

Article 17 – Examination of Witness Through Intermediary

Article 17 states that the examination of the witness may be conducted through an intermediary who is described as an ‘interpreter or other person approved by the court’. However, no information is given as regards who can qualify as an ‘intermediary’ (‘communicator or interpreter’ according to the CJSNI website). The *UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* states,

In order to avoid further hardships on the child interviews, examinations and other forms of investigation should be conducted by trained professionals who proceed in a sensitive, respectful and thorough manner (Article V(13)).

Incorporation of such principles should be made explicit in the relevant documents.

Thank you for permitting CAJ to submit our views and we look forward to seeing the NIO analysis of the Special Measures evaluation and review.

Yours sincerely,

Aideen Gilmore
Deputy Director