

CAJ's submission no. 265

**CAJ's Response to the
Northern Ireland Law Commission:**

Vulnerable Witnesses in Civil Proceedings

June 2010

Promoting Justice /
Protecting Rights

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What is the CAJ?

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.

c/o Clare Irvine, Principle Legal Officer
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30 June 2010

Dr Iyer,

Thank you for the invitation to the Committee on the Administration of Justice (CAJ) to respond to the consultation paper *Vulnerable Witnesses in Civil Proceedings*. As you may 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.

We commend the Law Commission's undertaking to make the legislation, which relates to giving evidence in civil proceedings, more accessible and understandable to 'the average court user'.

The proposals in the consultation document present the competing rights of defendants/respondents with the rights of complainants/witnesses/victims. Given that CAJ has supported the use of special measures for vulnerable and intimidated individuals in criminal cases CAJ is, in principle, agreeable to the proposals outlined in this consultation paper provided that some special measures are also available to eligible defendants/respondents.

Given the significance of the principle of orality to common law, CAJ believes that departures from this principle should be carried out in a 'coordinated and consistent approach' and it is therefore necessary to codify the relevant legal regime.

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The principle of orality helps to ensure the right to fair trial and the right to examine witnesses (European Convention on Human Rights - ECHR Article 6) by requiring witnesses to be seen openly in court and allowing their evidence to be tested. In light of the International Covenant on Civil and Political Rights (ICCPR Article 14) which states that 'All persons are equal before the law', CAJ recognises that the principle of orality may in some instances be altered in order to allow certain individuals extra assistance in presenting evidence to the court so as to ensure the principle of 'equality of arms' between the complainant and respondent. CAJ therefore welcomes the proposals to make special measures available for vulnerable witnesses in civil proceedings.

Additionally, we offer the following comments relating to Eligibility for Special Measures

CAJ agrees that court proceedings are considered complicated and unpleasant to *anyone* who is not familiar with the legal system (para. 5.5) and as such the CAJ agrees that special measures available to 'witnesses' should also be made available to 'all parties to proceedings...to improve the quality of their evidence' (para 5.4). Claimants and respondents may suffer from similar characteristics as witnesses in criminal proceedings, and in order to ensure the fulfilment of the ICCPR that 'all persons [are] equal before the courts and tribunals' (Article 14) it is necessary to extend special measures in civil proceedings to all parties to civil proceedings who by reason of age, mental [capacity], significant impairment of intelligence and social functioning, physical disabilities, communication difficulties or language difficulties may be confronted with additional complications in any court proceedings. Extending certain special measures to all parties in civil proceedings will further serve to strengthen compliance with ECHR (Article 6), which guarantees the right to a fair trial in both criminal *and* civil proceedings.

We welcome the proposal to make special measures available to all individuals under the age of eighteen (para. 5.15), as required by international standards, notably the United Nations Convention on the Rights of the Child (UNCRC) which defines 'the child' as a person under the age of 18 (Article 1) and requires that the child's 'best interest' be of 'primary consideration' in all actions concerning the child and explicitly makes references to those actions in 'courts of law' (Article 3). The UNCRC (preamble) further recognises the vulnerable nature of a child 'by reason of his physical and mental immaturity' and as such requires 'special safeguards and care, including appropriate legal protection'. In light of the characteristics particular to children as recognised

under the UNCRC, CAJ agrees that children may have specific needs whilst giving evidence in court [para. 5.13] and may require additional protection and assistance in order to preserve their ‘best interests’. Furthermore the explanatory memorandum to the Council of Europe’s Committee of Ministers’ *Recommendation 97 (13)* states that ‘the welfare of the child must in general, be the paramount concern over other interests, even the interests of justice’ and as such highlights the vulnerable position of children. CAJ is of the opinion that children giving evidence in civil proceedings may experience similar difficulties to those in criminal proceedings, such as a difficulty in understanding what is required of them in legal proceedings, and that they may also require assistance in communicating their evidence.

Significantly, CAJ notes that by extending special measures to children in civil proceedings, Northern Ireland will further comply with international standards relating the rights of the child.

The UNCRC also recognises the ‘evolving capacities’ of a child (Article 5) whilst also guaranteeing a child’s right to be heard in ‘any judicial and administrative proceedings affecting the child’ (Article 12). Accordingly we agree with the proposal that children should be able to ‘opt out’ of using special measures (para. 5.18) where suitable safeguards regarding the capacities and welfare of the child are in place. This serves to guarantee a balance between the need to protect the child under international human rights law, but also secure their position as rights-bearers.

We endorse the comments made by Disability Action in their consultation response, most notably, the concern about the use of the term and definition of mental disorder as defined in the Mental Health (NI) Order. On this point, we look forward to the anticipated ‘mental capacity’ legislation (para 5.22) and take this opportunity to stress that the proposed legislation and mental health reforms should aim to bring Northern Ireland in line with the provisions under the *UN Convention on the Rights of Persons with Disabilities* (UNCRPD).

The UNCRPD guarantees that ‘all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law’ (Article 5) and prohibits ‘all discrimination on the basis of disability and guarantee[s] to persons with disabilities equal and effective legal protection against discrimination on all grounds’ (Article 5). It is noted however that under the UNCRPD, *capacity is presumed* and in light of this CAJ agrees that ‘it is important to avoid assumptions that every person who is experiencing a mental disorder or who has an impairment of intelligence and social functioning will need or want to avail of special measures’ (para 5.24).

CAJ would re-emphasise the question posed by Disability Action as to why only 7.5% of the civil courts users consider themselves to be disabled, as defined in the Disability Discrimination Act (DDA), when a significantly greater percentage of the population meet the definition of the DDA. Like Disability Action, we also suggest that related research is carried out.

In view of the statement in the consultation document that ‘courts in Northern Ireland are well equipped to offer interpreters and the Commission is unaware of any criticism of the process of interpretation’ (para 5.33) we would like to take the opportunity to draw attention to our response to the recent Northern Ireland Courts and Tribunals Services (NICTS) consultation on Proposals for Provisions of In-Court Interpretation Services which in fact does raise a number of concerns in relation to the interpretation process and available services.

We also draw your attention to our response to the Department of Justice Special Measures Consultation from May 2010, which may also be relevant in relation to civil cases, notably to the comments regarding the need to re-evaluate the current provisions for defendants who have speech, language and communication needs (SLCN). There is a need to consider accommodating defendants (and witnesses) with SLCN in order to assist in them giving their best evidence, particularly given that subsequent implications may arise in relation to the right to a fair trial, as guaranteed under the ECHR (Article 6).

In keeping with the principle of access to justice, all procedures in relation to identifying individuals who are eligible for special measures should be clearly understood by all relevant and adequately trained staff (as required by UNCRPD Article 13, for example) and should be consistently applied. Eligible witnesses and respondents should be informed of their rights in a manner that is understandable to them and have the ability to opt out of special measures if they so chose. Clarification as to who will identify an eligible individual and how they will do this is required.

CAJ accepts that witnesses giving evidence in civil proceedings may experience fear, distress or intimidation to a similar extent to those giving evidence in criminal cases. CAJ also recognises that the quality of evidence given by witnesses may be diminished due to fear or distress. Accordingly we agree that additional factors must be taken into account when determining eligibility for special measures (para. 5.30). Feelings of stress and anxiety about giving evidence in court may vary according to the offence in question and this is equally applicable to civil proceedings, particularly those which may

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provoke and re-ignite feelings of distress or trauma such as personal injury cases involving matters of sensitivity. While the 'nature of the offence' has been identified by the Law Commission as a factor which may be subject to some difficulty regarding the application of special measures to civil proceedings (para. 5.29), CAJ feels that the nature and alleged circumstances of the offence can be of considerable importance in civil cases and should be considered in the decision making process as to whether a witness should be eligible for special measures.

Due to the fact that a large number of individuals (most frequently women) are exposed within the home to crimes of a civil nature (domestic abuse), CAJ recommends that the nature and alleged circumstances of the offence be considered relevant in determining whether special measures are available and hope that organisations which have the expertise in these areas are specifically consulted. Women's Aid has highlighted the difficulties with which women are confronted within the legal process and the courts have often failed to understand the full range of emotional, psychological and practical difficulties facing women in the application for civil protection against domestic violence.

The process of going to court is often exacerbated by having to confront an abuser and is a reason for the high attrition rate in cases involving protective measures for victims of domestic violence. Although a court under the Family Homes and Domestic Violence (Northern Ireland) Order 1998 is permitted to make *ex parte* non-molestation or occupation orders where it considers it 'just and convenient to do so', a full hearing must be followed in order to give the respondent the opportunity to make representations and, as such, the victim may be likely to face her abuser. Women's Aid has further noted the difficulty that women face when confronting abusers in court and note practical difficulties encountered within the legal process (such as being forced to share the same waiting space with the abuser). In light of this, CAJ insists that the nature of the offence may be particularly relevant and should be taken into account in determining the availability of special measures in a civil context. Furthermore General Recommendation No 19 on the *Convention on the Elimination of All Forms of Discrimination Against Women* requires States to 'act with due diligence to prevent violations of rights' by both public and private actors and, as civil remedies are often used in cases of domestic violence, the nature of the proceedings must be considered so as to ensure compliance with international standards.

CAJ is of the opinion that an individual's linguistic or cultural background or belief may be a determining factor as to whether they are, in the particular circumstances of the case, vulnerable and therefore eligible for special

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measures (para 5.51-5.32). We do not, however, believe that the provision of a translator and/or interpreter should be considered a 'special measure', but rather a duty of the Northern Ireland Courts and Tribunals Service. (Again, please refer to our consultation response *Proposals for Provisions of In-Court Interpretation Services*).

General Comments regarding Types of Measures Available:

Sufficient protection for all vulnerable witnesses, considering the wide variant in age, maturity and levels of understanding and intelligence of individuals, is needed. Specifically, *The UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime* (Article IX) states that child witnesses should be provided with assistance to enable them to participate effectively at all stages of the judicial process and suggests that 'child victims and witnesses should receive assistance from support persons, such as child victim/witness specialists'.

CAJ suggests that the special measures available should be determined in regard to the specific case and/or witness and believes that the range of measures provided for by the Criminal Evidence (NI) Order 1999 are also suitable to civil cases (though all measures are not relevant to eligible defendants/respondents). It would be better to have a wide range of measures available (even if not used) rather than a limited range of measures which may prove to be insufficient.

Research from the Children's Legal Centre in Britain has documented some of the difficulties which children experience when presenting evidence in court. These include fears relating to seeing the defendant in court, speaking in front of a number of people, understanding the questions posed to them and a difficulty in recalling facts due to the delay between the date on which they give evidence and the occurrence of the initial event.

We support the use of intermediaries/facilitators. However, so as to ensure that the rights of both witnesses and defendants are upheld, we suggest that a code of practice, as well as a mechanism professional regulation, be devised (paras 6.32-6.40). (We again ask that you to revert to the CAJ response to the *Proposals for Provisions of In-Court Interpretation Services*).

The Council of Europe *Recommendation No. R(85)11 on the Position of Victims in the Framework of Criminal Law and Procedure* supports the use of intermediaries for children for 'whom assistance services should be created, developed, and extended' and advocates that children should be questioned

in the presence of persons who may support and help them (such as parents or guardians or other persons qualified to assist them).

Finally, we suggest that a subsequent review of the application and impact of special measures be undertaken in the future so as to ensure that there have not been unanticipated consequences and that they are applied in a consistent manner.

Thank you again for permitting us to respond to this consultation and we look forward to the ensuing changes to present legislation and practice.

Yours sincerely,

Jacqueline Monahan
Criminal Justice Programme Officer