

CAJ's submission no. S371

CAJ's submission to Evidence to Committee for Justice Victims and Witnesses of Crime Inquiry

November 2011

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.

Evidence to the Committee for Justice Inquiry into the criminal justice services available to victims and witnesses of crime in Northern Ireland

1. CAJ is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its international and national human rights obligations.

2. The Committee for Justice at the Northern Ireland Assembly issued a call for evidence to the above inquiry in October 2011. This is in the context of the Department of Justice (DoJ) intention to develop a new strategy for victims and witnesses of crime. The aim of the inquiry is to identify the outcomes that a new strategy should deliver and make recommendations on the priorities and actions that need to be included in such a plan. The Terms of Reference for the inquiry are to:

- Review the effectiveness of the current approach and services provided by the criminal justice agencies to victims and witnesses of crime;
- Identify the key issues impacting on the experiences of victims and witnesses of crime of the criminal justice system and any gaps in the services provided;
- Identify and analyse alternative approaches and models of good practice in other jurisdictions in terms of policy interventions and programmes;
- Consider what priorities and actions need to be taken to improve the services provided to victims and witnesses of crime;
- Report to the Assembly on its findings and recommendations by February 2012.

3. CAJ is grateful for the invitation to submit evidence to the Committee on this issue. CAJ has made a number of submissions in recent years to various reviews and consultations undertaken by the Northern Ireland Office (NIO), Department of Justice (DoJ) and Northern Ireland Law Commission (NILC) relevant to the issue of criminal justice services that are available to victims and witnesses of crime. By way of our contribution to the Committee's inquiry this submission will provide brief summaries of the contents of these submissions, links to the full submissions and an outline of some of the actions that have been taken following the various reviews and consultations to which CAJ has responded.

Response to ‘Special Measures Policy’ consultations

4. In May 2009 CAJ responded to a pre-policy consultation undertaken by the NIO in relation to the special measures provisions contained in the Criminal Evidence (NI) Order 1999.¹ Here, CAJ stated that the special measures offered in the 1999 Order fall short of the international human rights standards contained in the UN Model Law on Justice in matters involving Child Victims and Witnesses of Crime.² CAJ further recommended that the 1999 Order should include provision for prioritizing cases where witnesses are vulnerable or under 18, so as to lessen the length of time before trial, which may contribute to the distress witnesses suffer. CAJ expressed concerns at the confusion surrounding when and how the use of special measures would be initiated, as well as the lack of procedural guidelines as to the identification of vulnerable witnesses.

5. A summary of responses to the pre-policy consultation was published by the DOJ in the full consultation document.³ In relation to CAJ’s concerns that the special measures offered in the 1999 Order fall short when measured against international human rights standards, it stated that the UN Model Law on Justice in Matters involving Child Victims and Witnesses of Crime, which was published in 2009, is intended as a tool to assist States adapt their national legislation where they do not already have provisions similar to those contained in the Guidelines. In response to CAJ’s concerns over the lack of procedural guidelines as to the identification of vulnerable witnesses, it stated that guidelines on the definition of vulnerable witnesses would be contained in the Achieving Best Evidence guidance. In relation to CAJ’s suggestion that cases involving vulnerable witnesses, or witnesses under the age of 18, should be prioritized, the summary of responses stated that a broad, multi-faceted programme was currently underway in an effort to eradicate, where practicable, avoidable delay from criminal case processing in general. The summary of responses stated that this was being driven on behalf of Ministers by the Criminal Justice Board. Aside from this consolidated programme, the DoJ noted that as part of their duty as public service providers, the respective criminal justice agencies have a formal commitment to the service which they have pledged to deliver to the public in general and to deal with all cases carefully, sensitively and as expeditiously as possible to ensure a best service provision for all. The Criminal Justice Inspection Northern Ireland published a

¹ S231 CAJ Submission to the Northern Ireland Office Special Measures Policy an Evaluation and Review, May 2009, <http://www.caj.org.uk/contents/368>

² Available at: http://www.unodc.org/pdf/criminal_justice/Guidelines_E.pdf

³ Department of Justice ‘Consultation on the statutory special measures to assist vulnerable and intimidated witnesses give their best evidence in criminal proceedings’ March 2010.

report in June 2010 which recognised the effect avoidable delay has on victims and witnesses generally:

The negative impact of avoidable delay can be severe for victims and witnesses and can undermine the quality of justice. It is known that the quality of evidence declines with time, which can put victims and witnesses under additional pressure in court. This can also undermine confidence in the justice system and contribute to a reluctance to report crime or act as a future witness.⁴

6. In May 2010 CAJ responded to the formal public consultation on special measures.⁵ Our response noted with pleasure that many of the recommendations made to the NIO during the pre-policy consultation were taken on board in the DoJ proposals. CAJ strongly agreed with the proposal to bring the 1999 Order in line with other aspects of national law, which recognise the ‘child’ as being all young people under the age of 18. CAJ notes that the Justice Act (Northern Ireland) 2011⁶ amends the 1999 Order to recognize a ‘child’ as being a person under the age of 18. CAJ would strongly urge that this section be commenced without delay, so that Northern Ireland law can concur with international standards contained in instruments such as the United Nations Convention on the Rights of the Child (UNCRC). CAJ also agreed with a proposal to permit young people to have a say in how they give their evidence and as to whether they want to avail of special measures at all. CAJ believed that this proposal would further compliance with the UNCRC, which effectively guarantees a child’s right to be heard to participate in any judicial or administrative proceedings affecting them. The 2011 Act⁷ amends

⁴ Criminal Justice Inspection Northern Ireland ‘Avoidable Delay’ June, 2010 p. 63.

⁵ S259 CAJ’s Response to Department of Justice’s Special Measures Consultation, May 2010
<http://www.caj.org.uk/contents/395>

⁶ Justice Act (Northern Ireland) 2011, s. 7

⁷ Justice Act (Northern Ireland) 2011, s. 8. It amends the 1999 Order at ss. (4) and states ‘In paragraph (4)—

(a) omit the “and” at the end of sub-paragraph (b), and

(b) after sub-paragraph (b) insert—

“(ba) if the witness informs the court of the witness’s wish that the rule should not apply or should apply only in part, the rule does not apply to the extent that the court is satisfied that not complying with the rule would not diminish the quality of the witness’s evidence; and”.

(5) After paragraph (4) insert—

“(4A) Where as a consequence of all or part of the primary rule being disapplied under paragraph (4)(ba) a witness’s evidence or any part of it would fall to be given as testimony in court, the court must give a special measures direction making such provision as is described in Article 11 for the evidence or that part of it.

(4B) The requirement in paragraph (4A) is subject to the following limitations—

(a) if the witness informs the court of the witness’s wish that the requirement in paragraph (4A)

the 1999 Order to allow a child witness to inform the court that they do not wish special measures to apply and allows the court to limit the application of special measures if it is satisfied that this would not diminish the quality of the child's evidence. This amendment appears to place the onus on the child witness to inform the court of their wish for special measures not to apply to them, rather than on the court to enquire with the child as to whether they wish the special measures to apply. As CAJ stated in the response to the pre-policy consultation 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. Whilst CAJ would recommend that this section be commenced in order to further compliance with the UNCRC, we would urge that in practice the decision as to whether special measures should not be applied would occur as a result of an inquiry undertaken by the court, without the child necessarily having to bear responsibility for instigating it.

7. CAJ agreed with a proposal to amend the 1999 Order to enable a supporter to accompany a witness when giving evidence *via* live link room. The 2011 Act⁸ amends the 1999 Order to allow a specified person to accompany the witness. However, this section has also not yet been commenced. CAJ also requested clarification as to who could qualify as an intermediary through whom the examination of a witness could be conducted. In the summary of responses to this consultation published in September 2010 by the DoJ it was accepted that work needed to be done in relation to recruiting and training intermediaries, producing codes of practice or ethics for intermediaries and setting up a register of intermediaries.⁹ The DoJ indicated

should not apply, the requirement does not apply to the extent that the court is satisfied that not complying with it would not diminish the quality of the witness's evidence; and

(b) the requirement does not apply to the extent that the court is satisfied that making such a provision would not be likely to maximise the quality of the witness's evidence so far as practicable (whether because the application to that evidence of one or more other special measures available in relation to the witness would have that result or for any other reason).

(4C) In making a decision under paragraph (4)(ba) or (4B)(a), the court must take into account the following factors (and any others it considers relevant)—

(a) the age and maturity of the witness;

(b) the ability of the witness to understand the consequences of giving evidence otherwise than in accordance with the requirements in paragraph (3) or (as the case may be) in accordance with the requirement in paragraph (4A);

(c) the relationship (if any) between the witness and the accused;

(d) the witness's social and cultural background and ethnic origins;

(e) the nature and alleged circumstances of the offence to which the proceedings relate.”.

⁸ Justice Act (Northern Ireland) 2011, s. 10

⁹ Department of Justice 'Summary of responses to the consultation on the statutory special measures to assist vulnerable and intimidated witnesses give their best evidence in criminal proceedings', September, 2010.

that they intended to proceed by including an action to develop a model for the provision of an intermediaries service for vulnerable witnesses as part of its Strategic Action Plan 2010-11. This action was included in the eventual Action Plan¹⁰ and responsibility for its delivery was given to the DoJ. The Action Plan 2011-12 states that DoJ was to have an implementation plan in place by September 2011 for the provision of an Intermediaries Service to help vulnerable witnesses.¹¹ CAJ is not aware if such an implementation plan has since been put in place and clarity on this issue would be welcomed.

8. CAJ stated that the provisions provided for in the 1999 Order permitting video recorded cross-examination or re-examination of witnesses raised serious questions, as these could lead to conflict between the rights of victims and witnesses and the rights of defendants. CAJ noted that the application of these special measures, once commenced, would need to weigh these rights. CAJ would support the use of such special measure in exceptional circumstances only, such as cases involving the very young, those with certain mental incapacity or those with terminal or a degenerative illness. However, we stated that the DoJ should assess whether the pre-recording impacted on the right to a fair trial. The summary of responses referred to above noted the concerns in relation to the commencement of these provisions. It indicated that work would begin on commencing them once an intermediaries service had been put in place. CAJ is not aware of any proposal made since then to commence this provision and clarity as to its status would be welcome.

9. Similarly, CAJ also believed that the DoJ should review whether the proposal that witnesses in proceedings relating to allegations of offences involving firearms, knives and offensive weapons have automatic eligibility for special measures would impact on the right to a fair trial for the defendant. In the summary of responses referred to above, the DoJ stated that it was not inclined to take the proposal forward at that time, but would keep the situation under review.

10. In relation to sexual offences CAJ accepted that the proposal to allow the admission of video recorded statements as evidence in chief could lead to fewer instances of complainants refusing to give evidence. However, CAJ believed that it was vital that the rights of the victim were balanced with and did not undermine the rights of the defendant. The summary of responses referred to above indicated an intention to proceed to amend the 1999 Order, to make provision to admit the video recorded statement of complainants who

¹⁰ Department of Justice 'Victim and Witness Strategic Action Plan 2010-2011'.

¹¹ Department of Justice 'Victim and Witness Annual Action Plan 2011-12.'

were over 18 years of age in respect of sexual offences tried in the Crown Court, only unless that requirement would not maximise the quality of the complainant's evidence. The 2011 Act¹² amends the 1999 Order to provide that a court must admit a video recorded statement of the complainant as evidence in chief, unless the court is of the opinion that in all the circumstances of the case, it would not be in the interests of justice for the recording, or part of the recording, to be admitted. The court can also refuse to admit the recording in evidence if the court is satisfied that this would not maximize the quality of the complainant's evidence. This section has yet to be commenced.

Response to Offender Levy and Victims of Crime Fund consultation

11. CAJ responded in May 2010 to the DoJ consultation¹³ on introducing an Offender Levy and Victims of Crime Fund.¹⁴ CAJ agreed in principle with the proposal to create an offender levy and a victim of crime fund in order to deliver better services to victims. However, we believed the DoJ proposals as to how this would be achieved were vague. In accordance with the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power¹⁵ CAJ agreed that offenders should pay compensation for victims and that government should endeavour to establish, strengthen and expand available national funds. The summary of responses published by the DoJ for this consultation stated that the principle of using the revenue from the levy exclusively for funding victim's services would be maintained.¹⁶ Decisions relating to the allocation of funding from the levy are to be made by the Victims and Witnesses Task Force. The 2011 Act introduced an offender levy for sentences imposed by a court and also for certain fixed penalty offences.¹⁷ These provisions have yet to be commenced.

Response to consultation on Vulnerable Witnesses in Civil Proceedings

12. In June, 2010 CAJ responded to the Northern Ireland Law Commission's consultation in relation to Vulnerable Witnesses in Civil Proceedings.¹⁸ Whilst this submission related to civil proceedings, it raised a number of issues of

¹² Justice Act (Northern Ireland) 2011, s. 9.

¹³ Department of Justice 'Offender Levy and Victims of Crime Fund: A Northern Ireland Consultation' March, 2010.

¹⁴ S260 CAJ's Commentary to the Department of Justice's Offender Levy and Victims of Crime Fund Consultation May 2010, <http://www.caj.org.uk/contents/137>

¹⁵ Available at: <http://www.un.org/documents/ga/res/40/a40r034.htm>

¹⁶ Department of Justice 'Offender Levy and Victims of Crime Fund: A Consultation Summary of Responses and Way Forward' October, 2010.

¹⁷ Justice Act (Northern Ireland) 2011, s. 1 - 6

¹⁸ Northern Ireland Law Commission 'Consultation Paper on Vulnerable Witnesses in Civil Proceedings' NILC 4 (2010).

general application to both civil and criminal proceedings. These included the applicability of international standards relating to vulnerable witnesses, such as the United Nations Convention on the Rights of Persons with Disabilities.

Response to Proposals to Achieve Best Evidence in Criminal Proceedings

13. In October 2010 CAJ also responded to the DoJ consultation¹⁹ on Proposals to Achieve Best Evidence in Criminal Proceedings.²⁰ Here CAJ commended the DoJ for the work put into the guidance, but we strongly suggested that mechanisms for monitoring the implementation of the procedures be put in place. CAJ recommended that a review by practitioners and other suitable stakeholders be undertaken at an appropriate time after commencement. We also recommended that training for all those involved in the legal process be provided. In the summary of responses to this consultation the DoJ recognised the need for initial and on-going training for all potential users of the guidance, as well as the need to monitor the guidance's implementation in practice.²¹ Plans for training and monitoring were stated as being priorities for the Vulnerable and Intimidated Witnesses Working Group. The 2011–12 Action Plan referred to above indicates that this Working Group and DoJ will complete a review of the practitioner guidance by December 2011. CAJ hopes that the contents of this review will be made public and be open to comment.

Response to Code of Practice for Victims of Crime consultation

14. In January 2011 CAJ responded to the DoJ Consultation²² on a Code of Practice for Victims of Crime.²³ CAJ welcomed the commitment shown by the DoJ to victims of crime, as illustrated by the consultation. We stated that the provision of appropriate and adequate services to victims could improve public confidence in the criminal justice system and contribute to a more peaceful society. CAJ suggested that the name 'Code of Practice' was inaccurate, as the document was in fact an outline of the service provision

¹⁹ Department of Justice 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, Using Special Measures and Provision of Pre-Trial Therapy Consultation on Best Practice Guidance for Practitioners', July 2010.

²⁰ S267 CAJ's Submission to the Consultation on Proposals to Achieve Best Evidence in Criminal Proceedings, October 2010 <http://www.caj.org.uk/contents/719>

²¹ Department of Justice 'Summary of responses to the consultation on best practice guidance for practitioners on achieving best evidence in criminal proceedings: guidance on interviewing victims and witnesses, using special measures and provision of pre-trial therapy' March, 2011.

²² Department of Justice 'Consultation on a Code of Practice for Victims of Crime', October, 2010.

²³ S276 CAJ's Response to the Consultation on the Code of Practice for Victims of Crimes, January 2011 <http://www.caj.org.uk/contents/792>

victims can expect, rather than a 'Code of Practice' *per se*. We also suggested that a similar document be disseminated to practitioners within the criminal justice system, given the need to understand the policies and practices relating to services for victims. CAJ believed that the Code fell short of human rights standards and best practice, most notably in relation to the rights of victims, co-ordination of agencies, complaints, language and monitoring. In relation to these concerns, the DoJ indicated in its summary of responses that it had submitted the Code to the Plain English Campaign for comments and suggestions and that most of these were taken on board.²⁴ The other concerns that CAJ expressed were not fully addressed. The 2011-12 Action Plan referred to above indicates that the DoJ and Victims and Witness' Support Group will monitor the implementation of the Code of Practice for Victims of Crime, place it on a statutory footing and commence a 12-month review of its content in March 2012. CAJ would hope that the contents of this review will be published.

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²⁴ Department of Justice 'Summary of responses to the public consultation on a code of practice for victims of crime'.