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SPEAKING UP FOR JUSTICE

Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System

June 1998

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Chapter 1: **Introduction**

Background

1.1 The Labour Party manifesto stated that "greater protection will be provided for victims in rape and serious sexual offence trials and for those subject to intimidation including witnesses".

1.2 This commitment arose from concerns that while measures are in place to assist child witnesses, many adult victims and witnesses find the criminal justice process daunting and stressful, particularly those who are vulnerable because of personal circumstances, including their relationship to the defendant or because of the nature of certain serious crimes, such as rape. Some witnesses are not always regarded as capable of giving evidence and so can be denied access to justice. Others are in fear of intimidation, which can result in either failure to report offences in the first instance, or a refusal to give evidence in court.

1.3 In 1996, media reports of the Ralston Edwards rape trial drew attention to the trauma experienced by rape victims when the defendant is not legally represented and so is able to cross-examine his alleged victims. In 1997, the reporting of another case highlighted the problems relating to disabled witnesses with communication difficulties when seeking to give evidence in court.

1.4 Another area of concern relates to people with learning disabilities. The 1989 report[1] of the Advisory Group on Video Evidence chaired by Judge Pigot recommended that once the recommended changes to the child evidence measures had been introduced, those should be extended to adult vulnerable witnesses, at the discretion of the court. (Pigot recommendations 9-11). As a follow up to these recommendations, the Home Office commissioned research into witnesses with learning disabilities. This was carried out by Andrew Sanders and a team from Oxford University, and their report was completed in 1996.[2]

1.5 A further area concerns witness intimidation. This is recognised as a growing problem, particularly on large housing estates, and is likely to affect both crime reporting as well as making some witnesses unwilling to give evidence in court. This was the subject of a Home Office research study by Warwick Maynard, a member of the Police Research Group, who published a report in August 1994, "Witness Intimidation Strategies for Prevention"[3]. In response to growing concerns about this problem, the Association of Chief Police Officers, (ACPO), Crime Committee took witness intimidation as one of its themes for 1997. During the past year, national guidance on measures to deal with witness intimidation has been developed which has now been endorsed by ACPO Crime Committee.

1.6 To take forward the manifesto commitment Jack Straw MP, the Home Secretary, announced on 13 June 1997 that he was establishing an interdepartmental working group to undertake a wide-ranging review.

Terms of reference

1.7 The Government gave the working group the following terms of reference:

- Having regard to the interests of justice: the importance of preventing and detecting crime, the needs of witnesses and cost effectiveness,

[1] *(1989) Report of the Advisory Group on Video Evidence: London: Home Office*

[2] *Sanders A, Creaton J, Bird S, and Webster L, (1996) 'Witnesses With Learning Disabilities - A Report to the Home Office' Unpublished.*

[3] *Maynard, W (1994) Witness Intimidation Strategies for Prevention Police Research Group Crime Detection and Prevention Series Paper 55, London: Home Office*

- and taking into account the National Standards of Witness Care in England and Wales
- to identify measures at all stages of the criminal justice process which will improve the treatment of vulnerable witnesses, including those likely to be subject to intimidation;
- to encourage such witnesses to give evidence of crime and enabling them to give best evidence in court;
- to consider which witnesses should be classified as vulnerable;
- to identify effective procedures for applying appropriate measures in individual cases;
- and to make costed recommendations.

1.8 A parallel Group was established in Scotland, chaired by the Scottish Office, to examine these issues in the context of Scottish law, procedure and practice.

Membership

1.9 The Working Group, was chaired by the Home Office with representation from the Crown Prosecution Service, Department of the Environment, Transport and the Regions, the Department of Health, Legal Secretariat to the Law Officers, Lord Chancellor's Department, the Department of Social Security (Women's Unit), the Northern Ireland Office, the Northern Ireland DPP's Office, Local Government Association, Victim Support and the Association of Chief Police Officers. Representatives of the Scottish Group, from the Crown Office and the Scottish Courts Service, provided a link between the two Groups and a channel for the exchange of information and ideas.

The work of the group

1.10 The Working Group met for the first time on 1 August 1997, and on approximately a monthly basis thereafter until March 1998. The Working Group, recognising that its remit was very wide, considered that it was important to seek information and views on the issues that needed to be addressed, both from existing research and also from interested organisations and individuals. To this end, the Working Group commissioned a Literature Review which was conducted by Robin Elliott from the Home Office Research and Statistics Directorate, and a member of the Working Group. Her report is attached at Annex A to this report, and covers developments both in the United Kingdom and overseas.

1.11 The Working Group also wrote to 84 individuals and organisations inviting them to submit written comments to the Group. Approximately 50 responses were received and a summary of these is attached at Annex B.

1.12 In order to test out some of the ideas being considered by the Working Group, the Home Office Special Conferences Unit organised two criminal justice conferences. These were held in Chester on 18/19 November, and Cheltenham on 1/2 December 1997. Members of the judiciary, the legal profession, the magistracy, and a wide range of non-governmental organisations were able to discuss with members of the Working Group some of the more difficult issues that the Group was seeking to address. The Working Group found this to be an extremely valuable exercise which greatly assisted their work.

General principles

1.13 The terms of reference do not distinguish between prosecution and defence witnesses. Therefore, the Working Group's considerations covered both and the remainder of this report should be read on the basis that the term witness refers to both.

1.14 The review was also required to have regard to the interests of justice. Thus, when developing its proposals, the Working Group was mindful of the need to balance the rights of the defendant to a fair trial against the needs of the witness not to be traumatised or intimidated by the criminal justice process. When developing specific proposals, the Working Group also took account of the United Kingdom's obligations under the European Convention on Human Rights.

1.15 The terms of reference also required the Working Group to take into account the National Standards of Witness Care in England and Wales.

These were developed in 1996 by the Trials Issues Group which is an inter-agency group with a co-ordinating role in taking forward criminal justice policies and initiatives. Local Trials Issues Groups are now implementing the National Standards in the form of Local Service Level Agreements in which each agency sets out its particular local commitment. A system of monitoring on both a national and local basis is being put in place shortly.

1.16 The aim of the project is summed up in the guiding principles which appear at the beginning of the document, namely:

- witnesses will only be required to attend court to give evidence if this is essential in the interests of justice;
- every effort will be made to arrange trial dates that are convenient to witnesses, including victims, defendants and others involved in the proceedings. The time witnesses are kept waiting at court will be kept to a minimum;
- witnesses will be given as much notice as possible of the date and time they are required to attend court;
- provision will be made for the special needs of witnesses, for 'standby arrangements' and for pre-trial court familiarisation visits;
- priority will be accorded to preparing and listing cases involving child witnesses and those at risk of being intimidated;
- special arrangements will be made for witnesses at risk of being intimidated;
- all witnesses will be dealt with sensitively, with regard being given to the differences in language, expression, religion and customs of those from ethnic minority groups;
- witnesses will be given timely information about the progress of cases and their enquiries will be dealt with promptly and helpfully. They will be given information, on request about the outcome of cases and;
- expenses claims submitted by witnesses will be dealt with promptly.

1.17 The National Standards apply to all witnesses including those who are defined as vulnerable or intimidated, whether they are specifically mentioned as such in a particular Standard or not. There are, however, a number of National Standards which refer in terms to the needs of vulnerable or intimidated witnesses. These cover the following subjects:

Preliminary contact with witnesses;

According priority to cases;

Case file preparation;

Preparing the case for court;

Taking account of witnesses' standby requirements and special needs;

Witnesses from ethnic minority groups;

Court familiarisation visits;

Police special arrangements for protecting intimidated witnesses;

Case management;

Court accommodation arrangements;

Non-disclosure of witnesses' names and addresses;

Communication with witnesses;

Reprisals against witnesses who have given evidence

1.18 A review of the National Standards began in Autumn 1997.

The Disability Discrimination Act 1995

1.19 The Working Group also noted the provisions of the Disability Discrimination Act 1995 which give disabled people new rights in areas of employment; access to goods, facilities and services; and buying or renting land or property. Since 2 December 1996, service providers have had a duty not to discriminate against disabled people. These duties, in Part III of the 1995 Act, have only been partially

implemented, but the Government indicated on 1 October that it intended to implement the remaining provisions of Part III, although a timetable has yet to be announced.

1.20 Once implemented, in the case of access to facilities and services, this means that where any service is impossible or unreasonably difficult for a disabled person to use, service providers will have to take reasonable steps to change practices, policies or procedures which make it impossible or unreasonable for disabled people to use a service; overcome physical features which make access to a service impossible or unreasonably difficult by either removing them; or altering them; or providing a reasonable means of avoiding them; or providing the service by a reasonable alternative method; or providing an auxiliary aid or service which would enable a disabled person to use a service.

Topics

1.21 The Working Group began by considering how a vulnerable or intimidated witness might be defined and then went on to look at measures that might be available to assist such witnesses at all stages in the criminal justice process, from the reporting of crime, through the investigation stage, the trial and beyond. The Working Group concluded that while many of the measures that might be made available both pre-trial and at the trial could assist both vulnerable and intimidated witnesses, these two groups are reasonably distinct. Therefore, the report considers them separately, at the reporting and investigation stage, but for purposes of clarity it is intended that the report should be read as a whole. The Working Group has also considered the implications of its proposals for child witnesses.

Chapter 2: **Summary of recommendations**

Introduction

2.1 The Working Group's aim has been to improve access to justice for vulnerable or intimidated witnesses, including children. To this end it has made a total of 78 recommendations for improvements to the criminal justice system including the reporting of crime, identification of vulnerable or intimidated witnesses, and measures to assist witnesses before, during and after the trial.

2.2 The Working Group proposes a scheme which would involve the identification of a vulnerable or intimidated witness and their needs at an early stage in the police investigation. This would enable decisions to be taken on appropriate methods of interview and investigation and ensure that there is appropriate pre-trial preparation. The prosecution and defence would be able to apply to the court for special measures to be made available to assist the witness during the trial. Decisions on the measures to be used would be made by the court at a pre-trial hearing and this would be binding so as to ensure that the witness knows in advance of the trial what assistance s/he will be receiving, including the way in which they will be giving their evidence.

2.3 The recommendations cover the following broad areas:

- Definition of a vulnerable or intimidated witness
- Encourage reporting of crime
- The identification of intimidated and vulnerable witnesses
- Measures to provide protection and reassurance to intimidated witnesses
- Communication between the police and CPS about a witness' needs
- Ensuring appropriate interview methods are used
- Investigative and pre-trial support measures
- Procedures for applying for special measures to be available at the trial
- A range of measures available for use at the trial to assist vulnerable or intimidated adults and children
- Continuation of any necessary measures after the trial.

2.4 This chapter lists the recommendations and then sets out in a matrix of the measures and their possible applicability to different types of witness.

Definition - Chapter 3

In the text L means legislation is required for implementation.

Recommendation 1 (paragraph 3.29)

Witnesses (excluding the defendant) who are vulnerable as a result of personal characteristics which may relate to the effects of a disability or illness (category (a)) should automatically attract the provision of special measures. The particular measure(s) ordered would depend upon the circumstances of a particular case. Those witnesses (excluding defendants) whose vulnerabilities depend upon circumstances (category (b)) should be able to receive assistance by means of special measures at the discretion of the court. In both cases the prosecution or defence would apply to the court for particular measures to be made available.

Category (a)
The court should be required to make available one or more of a range of measures, (which would be listed in the legislation): - if the witness by reason of significant impairment of intelligence and social functioning/mental disability or other mental or physical disorder, or physical disability, if the witness requires the assistance of one or

more special measures to enable them to give best evidence.

Category (b)
The court should have discretion to make available one or more of a range of measures (which would be listed in the legislation) if the court is satisfied that the person:

- would be likely to suffer such emotional trauma, or

- would be likely to be so intimidated or distressed as to be unable to give best evidence without the assistance of one or more of the measures available/listed in the legislation.

In reaching a decision the court would be required to take into account:

(1) a person's age, culture/ethnic background, or relationship to any party to the proceedings;

(2) the nature of the offence: or

(3) the dangerousness of the defendant or his family or associates in relation to the witness;

(4) any other relevant factor

There should be a rebuttable presumption that a **victim** who is a witness for the prosecution for offences of rape and other serious sexual offences, should have special measures made available to her/him.

When considering applications for special measures to be available for a witness the court must have regard to the views of the witness on whose behalf the application has been made. L

Witness intimidation - chapter 4

Recommendation 2 (paragraph 4.18)

As part of their new community safety responsibilities, the police and local authorities should take account of the need to develop measures to tackle the problem of witness intimidation, if this is identified as an issue of concern in the local crime and disorder audits.

Recommendation 3 (paragraph 4.21)

The Trials Issues Group should develop a national framework for inter-agency protocols for dealing both with witness intimidation and vulnerable witnesses. This could then be developed through Local Service Level Agreements.

Recommendation 4 (paragraph 4.24)

The police should deploy the prompts developed by ACPO to assist the police identify intimidated witnesses (paragraph 4.23), provided that they are not used in a mechanistic way but rather as a tool and as a means of raising awareness of witness intimidation within the criminal justice system.

Recommendation 5 (paragraph 4.27)

The police should deploy the criteria developed by ACPO for providing Tier 1 Witness Support (formal witness protection) as set out in paragraph 4.26.

Recommendation 6 (paragraph 4.33)

Good practice guidance should be developed by ACPO and the Local Government Association in relation to the arrangements needed to provide formal witness protection.

Recommendation 7 (paragraph 4.36)

The recommendations in Warwick Maynard's 1994 Study on changes to police procedures (paragraph 4.35) should be adopted by police forces.

Recommendation 8 (paragraph 4.37)

The Group recommends that the following measures should also be adopted:

Action against the perpetrator
1. The initiation of criminal proceedings against those carrying out the intimidation (where known), for example under Section 51 of the Criminal Justice and Public Order Act 1994, should be given priority.

2. Courts considering bail applications from defendants should be supplied by the police and CPS with full information about actual or potential witness intimidation.

3. Where witness intimidation is a possibility, courts should consider imposing conditions (under existing bail legislation) which restrict the defendant's contact with the witnesses.

4. In accordance with the National Standards of Witness Care, when bail conditions are imposed the court should inform the police immediately of bail granted to a defendant who was previously in custody together with details of any conditions attached to the bail.

5. Where witness intimidation is considered likely, breaches of bail conditions should be reported to the police and acted upon immediately.

6. When appropriate, the relevant authorities should consider taking action against perpetrators by applying for the new anti-social behaviour order in the Crime and Disorder Bill, or other civil remedies such as under the Housing Act 1996, and also to action under the Protection from Harassment Act 1997.

Measures to assist witnesses

7. The witness should be provided with information about intimidation and what action they should take if confronted by such circumstances. Some forces issue a small booklet to all police officers outlining measures for witness support. Others use a pre-printed tear off sheet as part of the statement form, this is given to the witness. ACPO should disseminate this as good practice.

8. The witness will also need information about any court bail conditions imposed on the defendant and what to do if these are breached and details of the civil orders that are available. However, the Working Group recognises that it is important to provide balanced information to witnesses and to avoid the risk of frightening them unnecessarily when witness intimidation is unlikely.

9. In appropriate circumstances, the police should consider installing panic alarms. This will avoid the need for the witness to have to dial 999 and allows the witness to wear the alarm around their neck.

10. There should be one police contact point for witnesses, when an immediate response is not required.

11. Consideration should be given by the police, in appropriate cases to installing outside security lighting or home-based CCTV (currently on trial in Darlington).

12. The police should consider operating a mobile closed circuit television system. For example, the London Borough of Hillingdon own and operate the systems, but their deployment is managed jointly with the local police to help decide priorities.

13. Consideration should be given by local housing authorities to offer the witness a transfer to alternative accommodation, either permanent or temporary for the duration of the trial.

14. Consideration should be given by the police and local authorities to utilising the support offered by Neighbourhood Watch, residents' groups or other community-based schemes, for example, the CAPE scheme in Northumbria and the 'Cocoon Group' in Leicester City.

15. In accordance with paragraph 3.1 of the Statement of National Standards of Witness Care in the Criminal Justice System, priority should be given to cases in which witnesses are at risk of being intimidated.

16. The use of witness forms or witness support packages, which may include a selection of leaflets from varying agencies including the Police, Court Service, Victim Support and Mediation should be encouraged.

Recommendation 9 (paragraph 4.40)

Consideration should be given by the Home Office to a national publicity campaign, including education about the criminal justice process and the support measures available to witnesses.

Recommendation 10 (paragraph 4.46)

When in a particular area the crime and disorder audit points to the need to develop strategies to tackle witness intimidation which might involve the development of a community based scheme, the following factors should be taken into account:

1 Key indicators of a Witness Intimidation Problem

- Housing problems, large numbers of requests from tenants to move away from particular housing estates.
- Local knowledge (from existing community police officers and housing officers).
- Information obtained from local authority/police crime and disorder audits.
- Residents experiencing difficulties in getting insurance cover.
- Groups that have been subject to particular harassment such as ethnic minorities.

2 Establishing a scheme

- There should be a multi-agency co-operative approach.

Methods of involving the local community will vary from one area to another but it is important to ensure that a few self-appointed people who may not represent all the residents do not dominate any scheme.

Recommendation 11 (paragraph 4.51)

Good practice guidelines for the use of "professional witnesses" in criminal cases should be developed by the Local Government Association in conjunction with ACPO.

Recommendation 12 (paragraph 4.53)

Notwithstanding the terms of reference of this review, the measures recommended above to protect witnesses from intimidation in criminal proceedings should be considered for potential use for proceedings in the civil courts.

Recommendation 13 (paragraph 4.54)

The offence of witness intimidation in Section 51 of the Criminal Justice and Public Order Act 1994 should be amended to apply it to intimidation in civil proceedings. L

Recommendation 14 (paragraph 4.56)

When developing LSLAs, under the TIG Statement of National Standards of Witness Care, any arrangements for dealing with intimidated witnesses should complement and dovetail with arrangements for protection both before and after the trial.

Vulnerable witnesses - Chapter 5

Recommendation 15 (paragraph 5.4)

Consideration should be given to providing better education for professionals, carers and service users involved in the care of those who are potentially vulnerable or intimidated witnesses about recognising the symptoms of victimisation to enable them to be better able to recognise acts that may be criminal. This should be taken forward by the Department of Health, in consultation with the Association of Directors of Social Services, Local Government Association and relevant professional bodies.

Recommendation 16 (paragraph 5.9)

The ADSS proposals in relation to the abuse of vulnerable adults should be implemented taking into account the following factors:-

(a) the inter-agency consultation should include representatives from the police and NHS

(b) that national guidelines should include a recognition that when abuse occurs a crime may have been committed and that there should be clear policies about reporting such incidents to the police as soon as practicable and in consultation with the victim.

(c) that crime reporting policies should include the following components:

- clear definitions of abuse and types of mistreatment and criminal offences
- indicators of abuse
- what should be reported to the police and at what stage and assisting the client to do so
- outline of the purpose and conduct of any internal investigation and arrangements for assisting a police investigation
- clear policies and procedures for reporting and dealing with allegations of abuse/offences by a member of staff.

Recommendation 17 (paragraph 5.11)

The police should aim to identify a vulnerable witness as early as possible in the investigation process.

Recommendation 18 (paragraph 5.14)

Police forces should identify individuals who would have responsibility for either making the identification of a vulnerable witness and/or seeking assistance in doing so e.g. Kent Constabulary has specialist officers for dealing with vulnerable witnesses.

Recommendation 19 (paragraph 5.17)

To assist the police in identifying a potentially vulnerable witness a series of prompts should be developed by ACPO in consultation with the Department of Health, and the Disability Policy Division at the Department for Education and Employment. These should not be used as questions to be put to the witness but be regarded as a **guide only** and should be considered in conjunction with the series of prompts proposed for the identification of intimidated witnesses. The prompts should be used as an aid in making an overall assessment of an individual witness' needs.

Recommendation 20 (paragraph 5.21)

In the first instance, the police should consult the vulnerable witness and those who know the witness best to seek advice on communicating with him/her provided that they are not party to the crime under investigation.

Recommendation 21 (paragraph 5.23)

The Trials Issues Group, Witness Care Sub Group, in consultation with the Department of Health, the Local Government Association, the legal profession, the CPS and other organisations with relevant knowledge and expertise, should determine the best mechanism for delivering advice and assistance on the most appropriate means of interviewing and providing support for the witness.

Further investigative and pre-trial measures - Chapter 6

Recommendation 22 (paragraph 6.7)

While being interviewed, a vulnerable witness, particularly someone with learning disabilities, should be able to benefit from being accompanied by someone, preferably someone familiar to them. This "supporter", whose role would need to be clearly defined, would need to be independent of the police and not a party to the case being investigated. The police should have responsibility for ensuring that a support person is present. L

Recommendation 23 (paragraph 6.9)

When deciding where interviews with vulnerable or intimidated witnesses should take place account should be taken of the needs and wishes of the individual.

Recommendation 24 (paragraph 6.12)

The witness' own views on pre-trial and trial measures should be obtained, with the assistance of their supporter where relevant and that the best means of doing so should be considered by ACPO in consultation with interested parties.

Recommendation 25 (paragraph 6.18)

Information about the needs of the witness and the witness' own views on the requirements for assistance in court should always be passed on by the police to the CPS. Confidential form MG 6 might be a suitable vehicle for achieving this.

Recommendation 26 (paragraph 6.19)

While recognising the distinction between the role of the police, who have responsibilities as the investigator and the CPS, there should be an early strategy meeting between the investigating officer and the CPS to discuss and agree the form in which the statement should be taken, and what measures might be needed to assist the witness before and during the trial, taking into account the witness' own views and preferences.

Recommendation 27 (paragraph 6.28)

Meetings between the Prosecutor and certain vulnerable or intimidated witnesses could benefit the conduct of the case and provide reassurance to

the witness. Subject to any recommendations made by the Glidewell Review, further detailed consultation should be given to this issue by the CPS in consultation with other relevant parties.

Recommendation 28 (paragraph 6.35)

Vulnerable or intimidated witnesses should not be denied the emotional support and counselling they may need both before and after the trial and the approach adopted by the CPS in developing Good Practice Guidance relating to pre-trial therapy is endorsed.

Recommendation 29 (paragraph 6.40)

The Home Office should develop further material to assist vulnerable or intimidated witnesses prepare for their attendance at court.

Recommendation 30 (paragraph 6.45)

The TIG Witness Care Sub Group should consider the issue of the preparation of the vulnerable or intimidated witness for court, including both the provider(s) of the service and the co-ordination role, with a view to developing national guidance which would be taken forward on the basis of Local Service Level Agreements.

Recommendation 31 (paragraph 6.48)

The Court Service should appoint a liaison officer to ensure that measures ordered by the Court to assist vulnerable or intimidated witnesses at Court are in place on the day of the trial.

Recommendation 32 (paragraph 6.50)

Consideration should be given by the Home Office to developing a memorandum of good practice for adult vulnerable witnesses, similar to that for child witnesses, to provide a national framework of guidance.

Court procedures - Chapter 7

Recommendation 33 (paragraphs 7.4 - 7.10)

The following procedures should be introduced for considering applications for special measures to assist vulnerable or intimidated witnesses:

- Applications by prosecution or defence considered at plea and directions hearing (PDH) or pre-trial hearing.
- Decision of the court would be binding; reasons given in writing.
- Court to consider need for giving the jury a warning to ensure no prejudice to the defendant.
- No right of appeal against decision, but could form part of appeal against conviction. L

Recommendation 34 (paragraph 7.12)

The needs of the witness should be kept under review by the prosecution or defence, as appropriate between the pre-trial hearing and the trial.

Recommendation 35 (paragraph 7.15)

While recognising that staged implementation may be necessary, all these measures should be available to assist vulnerable and intimidated witnesses in cases tried in the Crown Court, youth court and magistrates' courts except where the recommendation is that the measure should apply only to specified offences. e.g. mandatory prohibition on defendant cross - examination (recommendation 58, paragraph 9.39). L

Court measures - Chapter 8

Recommendation 36 (paragraph 8.7)

Live CCTV links should be available to enable vulnerable or intimidated witnesses give evidence to the court, either from another room within the court building or from a suitable location outside the court. L

Recommendation 37 (paragraph 8.10)

A vulnerable or intimidated witness should have the option, if they wish, of being accompanied in the CCTV link room by a supporter.

Recommendation 38 (paragraph 8.17)

Screens should be available on a statutory basis to be used as measure to assist vulnerable or intimidated witnesses. L

Recommendation 39 (paragraph 8.24)

The court should have power to order that the press and media should not report details likely to lead to the identification of a witness in cases where press reporting is likely to exacerbate witness intimidation. These restrictions should apply to English and Welsh criminal proceedings reported throughout England, Wales, Scotland and Northern Ireland and procedures should enable an application for such a restriction to be made to the court before the PDH or pre-trial hearing if the circumstances of the particular case warrant it. L

Recommendation 40 (paragraph 8.25)

The existing provisions imposing reporting restrictions should be amended as follows:

(a) the restrictions on reporting the identity of complainants in cases of rape and other serious sexual offences which are the subject of proceedings in England and Wales should be extended to apply to the reporting of such proceedings in Scotland and Northern Ireland

(b) the restrictions on reporting the identity of juveniles should make it clear that these apply from the point of complaint and should be extended to apply to the reporting of English and Welsh proceedings in Northern Ireland.

Recommendation 41 (paragraph 8.48)

Video recorded interviews conducted by police officers, social workers or those involved in the investigation of crime and/or appropriate defence representative should be available in the first instance for those vulnerable or intimidated witnesses that meet the criteria for category (a) in the definition in Recommendation 1 (paragraph 3.29) and should be admissible as evidence. Videos should be recorded in accordance with an updated memorandum of good practice. Such evidence should be admitted as the witness' evidence in chief. L

Recommendation 42 (paragraph 8.49)

Once the above measure is in place, consideration should be given by the Government to extending its availability to vulnerable or intimidated witnesses who meet the criteria for category (b) in the definition in Recommendation 1. L

Recommendation 43 (paragraph 8.53)

Witnesses are performing a public duty and should be treated with dignity and respect when giving evidence in court. While recognising the need to ensure that defence counsel is able adequately to test the evidence against their client, the Lord Chief Justice should be invited to consider issuing a Practice Direction giving guidance to barristers and judges on the need to disallow unnecessarily aggressive and/or inappropriate cross-examination.

Recommendation 44 (paragraph 8.54)

In the case of multi-defendant cases, in order to reduce the trauma of repeated examination on the same points, once a particular point has been made during cross-examination counsel for the co-accused should be encouraged to say "I adopt the challenge of previous counsel on point x but wish to question you on additional point y."

Recommendation 45 (paragraph 8.59)

Video recorded pre-trial cross-examination should be available for use in appropriate cases where the witness has had their statement recorded on video and could particularly benefit from cross-examination outside the court room. In such cases, any further cross-examination should also be conducted on video away from the court room. L

Recommendation 46 (paragraph 8.60)

Once video recorded pre-trial cross-examination has taken place, there should be a rebuttable presumption that no further cross-examination will be permitted unless:

new material comes to light after the initial cross-examination, which could not have been ascertained with reasonable diligence by the party seeking to re-open cross-examination and which is likely to be material to the overall evidence given by the witness. L

Recommendation 47 (paragraph 8.77)

The courts should have statutory power to require use of means to assist the witness in communicating, whether through an interpreter, a communication aid or technique, or communicator or intermediary where this would assist the witness to give their best evidence at both any pre-trial hearing and the trial itself, provided that the communication can be independently verified.

Recommendation 48 (paragraph 8.78)

The Trials Issues Group Witness Care Sub Group should take forward the development of a scheme for the accreditation of communicators/ intermediaries, including drawing up appropriate criteria.

Recommendation 49 (paragraph 8.80)

The court should have statutory power to require the removal of wigs and gowns when the court considers that this will assist a vulnerable witness give their best evidence. L

Recommendation 50 (paragraph 8.82)

Consideration should be given to the need to provide an escort for the witness to and from the court.

Recommendation 51 (paragraph 8.85)

Consideration should be given to the use of pagers so that witnesses can wait outside the court building and be called only when they are needed to give evidence.

Recommendation 52 (paragraph 8.87)

Further consideration should be given by courts to re-locating the witness box so that the witness cannot be directly observed from the public gallery.

Further measures in relation to rape and other serious offences - Chapter 9

Recommendation 53 (paragraph 9.9)

Chief Officers of Police, in consultation with the NHS and relevant local voluntary organisations should review the provision of examination facilities in their force area in respect of both female and male complainants in relation to both the availability and standard of facilities and with a view to providing separate facilities for the examination of suspects and victims.

Recommendation 54 (paragraph 9.12)

Victims (both male and female) of rape or serious sexual offences should have a realistic choice of being examined by a female doctor.

Recommendation 55 (paragraph 9.18)

In the case of victims of rape or serious sexual offences pre and post-trial support should be provided by an agency other than the police, such as Victim Support.

Recommendation 56 (paragraph 9.24)

The present rule on severing indictments should be reviewed as a whole, taking into account concerns about the effects of severing indictments in the case of multiple allegations of rape and sexual offences against children.

Recommendation 57 (paragraph 9.27)

The courts should have the power on a statutory basis to clear the public gallery in cases where the victim is giving evidence in a trial for an offence of rape, serious sexual offences and cases involving Tier 1 witness intimidation. While the press should normally be permitted to remain, the court would be able to accompany this order with a reporting restriction (Recommendation 39, paragraph 8.24). L

Recommendation 58 (paragraph 9.39)

There should be a mandatory prohibition on unrepresented defendants personally cross-examining the complainant in cases of rape and serious sexual assault.

Recommendation 59 (paragraph 9.41)

In the case of other witnesses and other offences, especially those where intimidation is an important factor such as stalking, the Court should have discretion to impose a prohibition on defendant cross-examination. When considering an application from the prosecution the Court should take into account the following factors:

- the consent of the witness
- the interests of justice
- the questions to be asked/ facts at issue/ line of defence
- the conduct of the accused
- the relationship between the witness and the accused L

Recommendation 60 (paragraph 9.44)

Where an unrepresented defendant is prohibited from personal cross-examination he should be granted legal aid, without means testing, to obtain legal representation for cross-examination purposes only. L

Recommendation 61 (paragraph 9.46)

Consideration also should be given to including in legislation a provision which indicates that in these circumstances (prohibition on defendant cross-examination) a barrister appointed to conduct cross-examination only, would be expected to proceed regardless of his professional duty.

Recommendation 62 (paragraph 9.54)

Where a prohibition on defendant cross-examination applies automatically; or has been imposed at the discretion of the Court and the defendant refuses legal representation either for the conduct of his whole case or for cross-examination purposes the Court should have discretion to assess whether it is necessary in the interests of justice for the defendant's case to be put and, if so, have power to appoint a person to undertake this task. L

Recommendation 63 (paragraph 9.72)

In cases of rape and other serious sexual offences the law should be amended to set out clearly when evidence on a complainant's previous sexual history may be admitted in evidence. Possible models may be found in Sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995, or the New South Wales legislation. The Scottish approach is preferred but the precise formulation should be the subject of consultation. L

Child witnesses - Chapter 10

Recommendation 64 (paragraph 10.6)

Child witnesses (both prosecution and defence, but excluding the defendant) should be treated in the same way as adult vulnerable witnesses who meet the criteria for category (a) of the definition set out in paragraph 3.29 (Recommendation 1) and thus automatically attract the provision of special measures. L

Recommendation 65 (paragraph 10.9)

The definition of a child for the purposes of automatically attracting special measures should be under 17 years, as is presently the case for child witnesses in sexual offence cases. L

Recommendation 66 (paragraph 10.15)

All the measures to assist child witnesses (both existing and those proposed by the Working Group) should be available in magistrates' courts in addition to the Crown Court and youth courts. L

Recommendation 67 (paragraph 10.18)

The Home Office, in consultation with ACPO and other relevant Departments, should develop criteria to assist the police decide whether to video-record an interview with a child. L

Recommendation 68 (paragraph 10.25)

All the measures proposed in Chapter 8 (Recommendations 36-52) should be available to child witnesses on the same basis as adult vulnerable witnesses who meet the criteria for category (a) of the definition in Recommendation 1. L

Recommendation 69 (paragraph 10.26)

CCTV links should be available for child witnesses on the basis of a rebuttable presumption that this measure should be provided in cases where the child is required to give oral evidence to the court. L

Recommendation 70 (paragraph 10.30)

The Working Group recommends that the existing mandatory prohibition on the defendant personally questioning child witnesses should be extended to include the offences of false imprisonment, kidnapping and child abduction and that the proposals for a discretionary prohibition in the case of other offences (Recommendation 59, paragraph 9.41), as well as the procedural arrangements (Recommendations 60-62), paragraphs 9.44, 9.46 and 9.54,) should also apply in respect of children. L

Recommendation 71 (paragraph 10.31)

The other recommendations in Chapter 9 should apply to children as well as to vulnerable or intimidated adults (Recommendations 53-57 and 63). L

Admissibility of evidence and alternative forms of evidence - Chapter 11

Recommendation 72 (paragraph 11.28)

The law on competency should be changed along the lines of one of the following 3 options:

(1) Unsworn evidence should be admitted in respect of all adults with learning disabilities

(2) Unsworn evidence should be admitted if the witness is unable to understand the oath

(3) In the case of all witnesses over the age of 14 years, there should be a presumption that all evidence would be called to be tested by the jury. The evidence could be given unsworn if necessary, but the need to tell the truth would be explained to the witness who would need to acknowledge this.

The Working Group commends option 3 but considers that views on the proposals should be canvassed more widely as part of a consultation exercise before a decision is reached on which option to adopt. L

Recommendation 73 (paragraph 11.29)

Such a consultation exercise should canvass views on whether there is a need to retain the existing law on competency relating to children under 14 years on the grounds that a uniform law applying to all witnesses would be simpler to operate.

Recommendation 74 (paragraph 11.44)

Where a witness refuses to testify through fear, the admission of their written statement should be governed by similar criteria to that proposed by the Working Group for the use of other measures proposed by the Working Group for the use of other measures i.e. that the court must be satisfied that the person would be likely to be so intimidated or distressed as to be unable to give best evidence and that the fear could not be overcome by issuing any of the other measures the Working Group has recommended should be made available.

Recommendation 75 (paragraph 11.49)

The Law Commission's Report on the law on hearsay should be considered in the broader context and taken forward by a separate working group. This group should take account of the proposals in this report, the comments offered on the Law Commission's proposals and Recommendation 74.

Recommendation 76 (paragraph 11.63)

In the case of vulnerable or intimidated witnesses the police should pay particular attention to obtaining alternative forms of evidence with a view to reducing the need for such witnesses to attend court to give evidence.

Training - Chapter 12

Recommendation 77 (paragraph 12.14)

Where practicable the agencies working in the criminal justice system should undertake joint training programmes to raise the awareness and, where relevant, to provide specialist knowledge of vulnerable and intimidated witness issues.

Recommendation 78 (paragraph 12.17)

A Steering Group should be established by the Home Office to carry out a costed training needs analysis of the Working Group's recommendations and this Steering Group should develop co-ordinated guidance and training templates for those working in the criminal justice system. The group should include training professionals from the relevant agencies.

Matrix of Court Measures

This table indicates which measures might assist particular types of vulnerable or intimidated witnesses. It is intended to be illustrative only.

Measure	*Characteristics of Witness/Offence*
Live CCTV Links	Witnesses likely to be intimidated and distressed by being present in the court room itself and also face the defendant e.g. child witnesses, witnesses with learning disabilities, witnesses with a relationship with defendant, dangerous defendant, victims of rape or serious sexual offences.
Screens	Witnesses likely to be intimidated or distressed by having to face the defendant but able to cope with being present in court e.g. child witnesses, witnesses with learning disabilities, intimidated witnesses, witnesses with relationship with defendant, dangerous defendant, victims of rape or serious sexual offences.
Restrictions on press reporting	Intimidated witnesses.
Removal of Wigs and Gowns	Witnesses likely to be intimidated or distressed by formal court surroundings e.g. some child witnesses some witnesses with learning isabilities.
Video-recorded evidence-in-chief	Child witnesses and those adult witnesses who fall within category (a) of the definition, particularly those likely to be distressed by having to give evidence in a formal court setting or suffer from communication problems and including some witnesses with learning disabilities.
Videoed pre-trial cross-examination	Those witnesses who have had their evidence-in-chief video-recorded and who would be particularly distressed by being cross-examined in court either via live CCTV link on in the court room itself, e.g. child witnesses and those adult witnesses who fall within category (a) of the definition including witnesses with learning disabilities and some witnesses with communication difficulties.
Communication Aids	Those witnesses who, in their normal life, require assistance with communication and thus fall into category (a) of the definition e.g. the deaf, some witnesses with learning disabilities, those with disabilities which affect communication such as some suffers of multiple sclerosis etc.

Measure	*Characteristics of Witness/Offence*
Questioning by an Intermediary	Witnesses who have had their statement video-recorded **and** are undergoing videoed pre-trial cross-examination **and** need assistance in understanding defence questions e.g. very young or disturbed children, adult witnesses with comprehension problems.
Escorts to and from court	Intimidated witnesses
Pagers	Intimidated witnesses, where there are no separate court waiting rooms for prosecution witnesses and the defence.
Moving witness box	Witnesses likely to be distressed and intimidated by giving evidence in proximity to the public gallery full of defence supporters.
Clearing the public gallery	Victims giving evidence in trials for offences of rape and serious sexual offences.
Mandatory prohibition on defendant cross-examination	Adult victims of rape and serious sexual assault all child witnesses in a trial for offences of violence, cruelty, neglect sex, plus false imprisonment and kidnapping.
Discretionary prohibition on defendant cross-examination	In cases where intimidation is a factor and the witness is likely to be particularly distressed by being questioned by the defendant such as stalking, taking into account the factors in recommendation 59.

Chapter 3: **Definition**

Introduction

3.1 The terms of reference required the Working Group to consider which witnesses should be classified as vulnerable, and thus qualify to be assisted by special measures to enable them to give best evidence in court. The Group recognised that this definition was the key element in any scheme to assist vulnerable or intimidated witnesses as the definition would act as a "gateway" regulating the numbers who would qualify for assistance.

The present position

3.2 The Working Group noted that the criminal justice system has long recognised the need for the criminal law to provide protection for particular groups, such as children, because of their vulnerability. This has taken the form of the creation of particular offences[4] and special procedures for interviewing suspects,[5] but special statutory provisions for witnesses generally only apply in respect of children (e.g. video recorded evidence in chief and CCTV link in the court room - sections 32 and 32A of the Criminal Justice Act 1988). The existing law on evidence also provides assistance in the case of intimidated witnesses. Section 23(3) of the Criminal Justice Act 1987, in conjunction with Section 25 and 26, provides for witness statements to be admitted as documentary evidence, in certain circumstances, when a witness is in fear. This is considered in Chapter 11. It is also an offence to intimidate a witness or juror (Section 51 of the Criminal Justice and Public Order Act 1994).

[4] *In addition to the creation of sexual offences against children, sections 79 and 27 of the Sexual Offences Act 1956 created offences relating to sexual intercourse with a woman who is defective.*

[5] *Codes of Practice (under the Police and Criminal Evidence Act 1984 (PACE)) makes special provision for interviewing both children and adults who may be mentally disordered or mentally handicapped, or mentally incapable of understanding the significance of questions put to them or their replies.*

Role of a Witness

3.3 A witness to a crime is expected, as a civic duty, to report the crime to the police and eventually they may be asked to give evidence in court. This process will involve the witness identifying that a crime may have occurred; being able (with or without assistance) to contact the police and describe and/or respond to questions about what has happened; and then to make a witness statement. At a later date the witness may be asked to give oral evidence in court about what they have seen, and answer questions during cross-examination by the defence. A witness will be expected to tell the truth and give a clear and full account of the facts of which he or she has direct knowledge in response to questions. This requires an ability to understand and recall events which may have been witnessed some time in the past; an ability to distinguish between truth and falsehood and an ability to communicate this both to the police in the first instance and later, orally in court if a prosecution goes ahead.

3.4 However, while a witness may be vulnerable for a variety of reasons, not all those who fall into a particular category will necessarily need special measures to assist them give evidence. This was recognised in the Report of the Advisory Group on Video Evidence (Pigot Report) in 1989[6] which said "For example, not all elderly people will find it hard to give evidence in open court, although some younger adults might suffer an unreasonable degree of stress when doing so" (para 3.3 of the Report).

Criteria for a Definition

3.5 Bearing these factors in mind, the Working Group considered that any definition would need to identify first, which group or category of witnesses are eligible for consideration for special provisions to assist them give best evidence, and

[6] *Op Cit footnote 1*

secondly, to guide the court on how to exercise its discretion in selecting from that group those needing assistance. The definition should be clear and understandable and it should encompass those witnesses who are likely to require special provisions, while excluding the vast majority who do not need such assistance.

3.6 The Group also considered whether the definition should relate solely to the trauma and stress caused by giving oral evidence in court, or whether account needs to be taken of trauma caused to the witnesses at earlier stages in the criminal justice process.

3.7 The Group recognised that potentially vulnerable witnesses are likely to need assistance at earlier stages in the criminal justice process and require the adoption of special measures both during the investigation and during the pre-trial period as well as at the trial itself. Thus the definitions would need to be framed in such a way as to assist those, such as police or other agencies, who come into contact with such witnesses at the beginning of the process who will need to identify those who may require special measures at various stages in the process.

What Makes a Witness Vulnerable or Intimidated?

3.8 While giving evidence in court is a stressful experience for most adults, some may find it particularly traumatic. As indicated in Section 1 of the Literature Review, a witness may be particularly vulnerable or intimidated for a number of reasons. For example, an individual witness may have a mental or physical disability or illness. Although certainly not all those with a disability will be vulnerable as witnesses, or would wish to be regarded as such, it will depend upon the nature of the disability and whether it affects their ability to perform the functions of a witness as set out in paragraph 3.3 above. Others may be vulnerable because of circumstantial factors such as the nature of the offence, for example: rape, domestic violence, attacks as a result of race, cultural grouping or sexual orientation; the witness' relationship with the defendant and the dangerousness of the defendant, his family or associates.

3.9 A person may be vulnerable for more than one reason. In the Law Commission's consultation paper on public law protection of mentally incapacitated and other vulnerable adults[7] the Commission stated in paragraph 7.2:

> "Vulnerable people are, of course, not an homogeneous group and arriving at a definition of vulnerability which is neither under - nor over - inclusive presents some difficulties. Vulnerability is, in practice, a combination of the characteristics of the person concerned and the risks to which he is exposed by his particular circumstances."

This view that vulnerability is a combination of characteristics and factors was endorsed by MENCAP in its submission to the Working Group which included the following:

> "Vulnerability is an individual thing, related to one or more of age, sex, experience, social and emotional maturity, disability, communication difficulties, dependence on those you are minded to criticise, misunderstanding of what is at issue, anxiety to please, a misplaced sense of guilt, general fears of unknown consequences, lack of experience of anyone wanting your opinion, cognitive disability, etc. However, someone with a learning disability of any degree is likely to suffer from more than one of these vulnerability factors, and quite often most of them."

3.10 Various circumstantial or situational factors may, either alone, or in combination with personal characteristics, make a witness vulnerable or liable to intimidation. This may relate to the nature of the offence, the dangerousness of the defendant or his family or associates, the relationship of the witness to the defendant and whether the witness lives in the same neighbourhood as the defendant. Other factors may include whether the offence is racially motivated, or the victim is the subject of a hate crime against a sexual minority. The issues raised by such special offences are discussed in Section 4 of the Literature Review.

[7] *Law Commission (1993) Consultation Paper 130. Mentally Incapacitated and Other Vulnerable Adults: Public Law Protection*

Existing Models

3.11 The Working Group was able to consider several different definitions of vulnerable witness either proposed or enacted in other jurisdictions. These are set out in Section 1 of the Literature Review. The models fall into three categories in the way they approached the problem of a definition:

(a) Limited categories

3.12 One approach is to adopt a fairly narrow definition by focusing on categories of individuals whose own personal characteristics make them obvious candidates for the possible use of special provisions. This approach was adopted in the Crime and Punishment (Scotland) Act 1997 where section 29 extends the existing child evidence provisions in Scotland to adult vulnerable witnesses over 16 years who are subject to a court order under the Mental Health Acts on the grounds that they are suffering from a mental disorder, plus anyone who otherwise appears to the court to suffer from significant impairment of intelligence and social functioning. A similar approach was adopted in Australia in the Queensland Evidence Act 1997 (Example 1 in the Literature Review).

3.13 The **advantage** of this approach is that it is clear, uses recognised definitions and also that it limits the category and therefore the number of cases which might be subject to special provisions. The **disadvantage** is that it excludes some categories of witness who may be vulnerable for example those who may be mentally ill and would benefit from special provisions but are not subject to a hospital order, as well as those who may be vulnerable for other reasons, such as a physical handicap, or because of the nature of the offence or their relationship to the defendant, or those who are likely to be subject to intimidation.

3.14 In the case of those with learning disabilities, this type of approach was rejected by Andrew Sanders in his report "Witnesses with Learning Disabilities"[8] , on various grounds. These include the fact that an IQ test would normally be applied to determine whether a person fitted the category, but IQ tests do not take account of other factors such as cognitive capacity, ability to concentrate, educational history, social experiences or physical factors such as speech, co-ordination etc., which affect a person's capacity to be a good witness more than intelligence itself.

(b) Characteristics

3.15 An alternative approach is to set out a list of individual characteristics which the court must take into account when determining whether special witness provisions should be applied. The Pigot review envisaged that the court would have regard to the age, physical and mental condition of the witness, the nature and seriousness of the offence charged and of the evidence which the witness was to give.

3.16 The Scottish Law Commission recommended this approach and proposed similar factors but with the addition of:

- the relationship between the witness and the accused;
- the possible effect on the witness if required to give evidence in open court;
- the likelihood that the witness may be better able to give evidence if not required to do so in open court."

3.17 Under the new Scottish legislative provisions, when considering an application (which is limited to those subject to a hospital order and those with learning disabilities), the court may take into account:

- the nature of the alleged offence;
- the nature of the evidence which the vulnerable person is likely to be called upon to give;
- the relationship, if any, between the person and the accused.

3.18 This approach has the **advantage** of enabling a witness to be assessed on the basis of his or her individual characteristics, or the nature of the crime, without being limited to those who fall in the category of those with mental illness, learning or physical disabilities. But it has the **disadvantage** of a potentially very large pool of witnesses who may be eligible for consideration with consequential delays to trials, incurring extra costs. Also, there would be some uncertainty on

[8] *Op Cit footnote 2*

the part of the witness as to whether s/he would qualify for special measures.

(c) Combined Approach

3.19 A third option is to combine options (a) and (b) with some groups being required to meet a higher test than others before qualifying for special measures. The Western Australia Acts Amendment (Evidence of Children and Others) Act 1992, which amends earlier legislation enables a court to declare a witness a "special witness" if the witness, "by reason of mental or physical disability", is "unlikely to be able to give evidence or to give evidence satisfactorily", or be likely to suffer severe emotional trauma, "or to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily, by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject- matter of the evidence, or any other factor that the Court considers relevant."

3.20 This combined approach has the **advantage** of identifying those who, because of their personal characteristics, would be considered for special measures, whether or not they are likely to suffer stress from giving evidence, while also enabling these measures to be applied to others who may be vulnerable for other reasons but who must satisfy the additional criteria that they are likely to suffer trauma or stress from giving evidence in the usual way. The **disadvantage** of this approach is again the very wide potential pool of witnesses that might be the subject of applications to the court, for example, on the basis of a doctor's certificate that they are suffering from stress, which could present the court with problems in assessing applications, although the prosecution might act as a filter in the case of prosecution witnesses.

Gateways

3.21 The Working Group also considered the option of adding another element to the definition which would have the effect of reducing the size of the pool of potential witnesses qualifying for special measures. These could be achieved by limiting the provisions to certain categories of offence, as in the case of the child evidence provisions. Section 32(2) of the Criminal Justice Act 1988 provides that the use of live TV links and video-recorded evidence in chief in respect of child witnesses may be used only in cases of sexual offences and offences of violence and cruelty.

Selecting cases from the pool: Judicial Discretion

3.22 When determining whether a witness eligible for consideration should receive special treatment, the court is bound to have to exercise discretion within the parameters set by law. Sanders considered that there was a disadvantage in giving judges extensive judicial discretion because it can be used unpredictably. Certainly the experience of the child evidence provisions is that these are not being used as extensively as originally envisaged.

3.23 Various factors could be incorporated in the legislation to guide the judges in the exercise of their discretion, such as requiring particular importance to be placed on the need to ensure that the witness is facilitated in communicating his or her evidence to the court by the most appropriate and effective means available and to take account of the views of the witness.

3.24 *Pigot* concluded that in the case of vulnerable adult witnesses, there should be a rebuttable presumption that all alleged victims of serious sexual offences are vulnerable witnesses. "The general evidence on this point seems to us to be overwhelming." Thus a further variation on the options available considered by the Working Group was to consider whether there should be a rebuttable presumption that witnesses who are victims of certain specified offences such as rape and serious sexual assault, should qualify for special measures.

Conclusions

3.25 The Working Group considered that an approach based on **limited categories** was too restrictive. The second possible approach, based on **characteristics**, had a more immediate appeal but would in fact result in great uncertainty among witnesses as to whether or not special measures would be forthcoming - the preferred approach would have to offer a greater degree of certainty. The Group concluded that those witnesses who were vulnerable as a result of their personal characteristics, and could be defined in terms of a limited category, should automatically attract the assistance of special measures to enable

them to give best evidence; although the particular measures provided would need to depend upon the circumstances of the particular case. Those witnesses falling into this category would include those with a learning disability and those with a mental or physical disorder or disability. However, in the case of those witnesses who may be vulnerable for circumstantial or situational reasons, their need for special measures was likely to vary, according to both the circumstances and the personal characteristics of the witness. The Group concluded that the court should have discretion to make special measures available, if it was satisfied that such measures were needed, after considering appropriate criteria. It was agreed that a **combined approach** would achieve this. The Group rejected the option of an offence gateway as a general principle, on the grounds that a witness was either vulnerable or s/he was not and that the offence was relevant to the extent to which it helped to inform the assessment of vulnerability. However, the Working Group also concluded that because of particular concerns relating to prosecutions for rape and serious sexual offences, special measures were needed to address these problems. These are discussed in Chapter 9.

Views of the Witness

3.26 The Working Group also considered how and to what extent the views of the witness should be taken into account. While the Group agreed that it was important that the witness' own views on the measures s/he felt would assist her/him should be made known to the court, these should not be paramount, although the Group felt that the court would be unlikely to force measures upon the witness against his or her wishes. It should be for the judge to decide, balancing the interests of the defendant and the prosecution.

Rebuttable Presumption

3.27 The Group also favoured the idea of a rebuttable presumption that certain types of offence led to vulnerability - for example, where the witness concerned is a rape victim. The rebuttable presumption itself should probably reflect closeness to the offence - the vulnerability of a rape victim could be expected to be greater than that of a witness to a rape, for example.

The defendant as a witness

3.28 As indicated in Chapter 1, the Working Group's considerations and recommendations apply to both prosecution and defence witnesses (paragraph 1.13). However, the Group considered whether the measures should also be available to defendants who may give evidence in court and so act as defence witness. As recognised in paragraph 3.2 above, the law already provides for special procedures to be adopted when interviewing vulnerable suspects. Also the defendant is afforded considerable safeguards in the proceedings as a whole so as to ensure a fair trial. For example, a defendant has a right to legal representation which the witness does not and the defendant has a right to choose whether or not to give evidence as s/he cannot be compelled to do so. Also, many of the measures considered in Chapters 8 and 9 below are designed to shield a vulnerable or intimidated witness from the defendant (e.g. live CCTV links, screens and the use of video-recorded evidence in chief and pre-trial cross-examination) and so would not be applicable in the case of the defendant witness. This is recognised in the existing child evidence provisions which do not apply to defendants. In these circumstances, the Working Group concluded that the defendant should be excluded from the definition of a vulnerable or intimidated witness.

Recommendation 1

3.29 The Working Group recommends that witnesses (excluding the defendant) who are vulnerable as a result of personal characteristics which may relate to the effects of a disability or illness (category (a)) should automatically attract the provision of special measures. The particular measure(s) ordered would depend upon the circumstances of the particular case. Those witnesses (excluding defendants) whose vulnerabilities depend upon circumstances (category (b)) should be able to receive assistance by means of special measures at the discretion of the court. In both cases the prosecution or defence would apply to the court for particular measures to be made available.

Category (a)
The court should be required to make available one or more of a range of measures, (which would be listed in the legislation): - if by reason of significant impairment of intelligence and

social functioning/mental disability or other mental or physical disorder, or physical disability the witness requires the assistance of one or more special measures to enable them to give best evidence.

Category (b)
The Working Group recommends that the court should have discretion to make available one or more of a range of measures (which would be listed in the legislation) if the court is satisfied that the person:

- would be likely to suffer such emotional trauma, or

- would be likely to be so intimidated or distressed as to be unable to give best evidence without the assistance of one or more of the measures available/listed in the legislation.

In reaching a decision the court would be required to take into account:

(1) a person's age, culture/ethnic background, or relationship to any party to the proceedings;

(2) the nature of the offence;

(3) the dangerousness of the defendant or his family or associates in relation to the witness;

(4) any other relevant factor

There should be a rebuttable presumption that a **victim** who is a witness for the prosecution for offences of rape and other serious sexual offences, should have special measures made available to her/him.

When considering applications for special measures to be available for a witness the court must have regard to the views of the witness on whose behalf the application has been made.

Chapter 4: **Witness intimidation**

Introduction

4.1 As indicated in Chapter 1, the Working Group took as its starting point, the Home Office Police Research Group Study "Witness Intimidation - Strategies for Prevention". It also benefited from the participation in the Working Group of representatives from the Local Government Association and the Association of Chief Police Officers (ACPO). The ACPO Crime Committee has developed, in parallel, its own national guidelines on ways to tackle witness intimidation.

4.2 Witness intimidation may involve threats to harm someone, acts to harm them, physical and financial harm; and acts and threats against a third party (such as a relative of the witness), with the purpose of deterring the witness from reporting the crime in the first instance or deterring them from giving evidence in court.

Background to the problem

4.3 The role of the witness remains a crucial element of the Criminal Justice System. However, it was only in the 1990s that real concern was raised about the intimidation or harassment of victims of, or witnesses to, crime. The only recognition of this particular problem was in a small number of forces who had introduced Witness Support Units to deal with the most severe cases of intimidation, where it was necessary to relocate individuals.

4.4 The true scale of the problem was extremely difficult to assess. However, media coverage in 1993 provided some anecdotal evidence that intimidation occurred against people who assisted the police. These occasions are distinct from, but may lead to the same problems as, those where witnesses to criminal acts suffer intimidation in an attempt to prevent them giving evidence in court. Although this anecdotal evidence did not suggest that the problem was particularly widespread, it was recognised that the knock-on effect could actually be to raise the fear of intimidation, leading to an increased reluctance of people to come forward with information to the police.

4.5 At an early stage, it was realised that the problem of intimidation and harassment could be experienced in two sets of circumstances. The harassment of those who assist the police out of a desire to improve their community was considered more likely to be local in nature. Therefore, solutions were likely to lie with the community itself. The fostering of increased community spirit, and the development of police/community liaison, would help to outlaw local criminal elements and provide reassurance to those helping the police. However, it was recognised that in reality this was harder to put into effect on the ground.

4.6 The second category was the intimidation of witnesses in an attempt to prevent them giving evidence in court. The need to protect witnesses in court has, though, to be balanced against the right of the defendant to know the full case against him or her. For example, allowing witnesses to give evidence incognito presents difficulties where so much rests on the jury's ability to assess the credibility of the witness under cross-examination. It was, therefore, recognised that the onus remained with the police to offer, where they considered appropriate, protection to witnesses before, during and after the trial.

4.7 As a result of the need to discover the facts about the extent, nature and severity of witness intimidation, the Police Research Group were commissioned to conduct appropriate research. Early discussions with the metropolitan forces, where intimidation was thought to be most severe, revealed three different tiers to the problem:

Tier 1 - A small inner core of individuals who needed the high level protection afforded by the Witness Support Schemes;

Tier 2 - A middle ring of victims of and witnesses to crime, and those who had helped the police in other ways, who had subsequently suffered not necessarily life threatening intimidation or harassment;

Tier 3 - An outer ring, comprising members of the general public whose perception of the possibility of being threatened or harassed was such that they were not prepared to come forward with evidence to the police, even when they themselves were the victims of crime.

4.8 Although the traditional view of witness intimidation had tended to centre on the problems of looking after the 'inner core', who need high level protection, the number of clients actually protected was very small. The police can go to great lengths to protect witnesses whose lives may be in danger. The investment in terms of both direct costs and police personnel, and the need for the consent of witnesses to undergo possible identity changes and relocation, makes such a response prohibitive for the majority. However, the number of forces who have identified significant problems within their force area has led to an increase in the number of specialist Witness Support Units. Some local authorities have also established special units. Although the remainder of forces might not have dedicated Units, the majority now undertake these measures when required.

4.9 The consequences for an individual subject to Tier 1 intimidation are by far the most serious and extreme. However, the numbers involved and net impact on the whole of the Criminal Justice System is far less. Far more damaging to its long term effectiveness are the cases of intimidation in Tier 2 and the fear of intimidation in Tier 3. The Police Research Group, therefore, concentrated its research on the lower level intimidation suffered by victims of, and witnesses to, high volume crime such as burglary and motor vehicle crime.

4.10 A survey on a sample of high crime estates around the country found that 13% of incidents reported by victims to the police were followed by intimidation, as were 9% of incidents reported by witnesses. This included verbal abuse and threats, damage to property and physical violence. Fear of intimidation was more likely to deter witnesses from reporting incidents to the police than victims. Of incidents not reported to the police by victims and witnesses, 6% and 22% respectively were not reported due to fear of reprisals.

4.11 On the circumstances in which intimidation occurs, the research found that intimidation of the victim is difficult to prevent where the offender knows the identity of the victim. Also, intimidation actually began immediately after police contact was made with the witness, thus necessitating minor changes in the way the police respond to an incident or proceeded with the investigative process.

4.12 The research was also able to show that the disclosure of case material to the defence, in low level intimidation, was not linked to the timing of the intimidation. It also showed that the response to intimidation did not rest solely with the police. The most effective way to reduce the incidence of intimidation required the strengthening of working relationships between the police and other agencies such as the courts, the Witness Service, the Crown Prosecution Service, the Prison Service, Victim Support and Local Authorities.

4.13 The findings of the British Crime Survey reinforced the Police Research Group Report. Although overall harassment of witnesses was rare, it found that the intimidation rate of those who reported crimes to the police was notably higher. 11% of those who reported an assault to the police were subsequently harassed, compared with 3% of those who did not report. It was also more likely if the original offence was already part of a series of similar offences, being either racially motivated, having a sexual element, or if the original incident occurred in or around the victim's home. These findings therefore linked the problems of witness intimidation with those suffered as part of repeat victimisation.

4.14 Although it is still difficult to assess accurately the scale of the problem, the effect of ignoring the numbers who suffer either real or perceived instances of intimidation could have serious long term consequences for the future of the Criminal Justice System. It would appear that more 'normal' criminals (i.e. those not involved in large scale or serious crime) are intimidating witnesses, especially as the increasing use of forensic and scientific evidence means that the witness is fast becoming one of the only accessible

links for the defendant in an attempt to influence the trial.

4.15 A more detailed analysis of the research into this problem is discussed in Section 2 of the Literature Review.

Anti-Social Behaviour

4.16 The Government's manifesto included a commitment to protect communities from unacceptable anti-social behaviour and crime and to harness efforts to tackle local crime and disorder. A major theme of the Crime and Disorder Bill, currently being considered by Parliament, is the introduction of a range of measures to meet these commitments:-

- placing a joint responsibility on local authorities and the police to develop and implement local strategies to reduce crime and disorder;

- placing local authorities under a duty to consider the crime and disorder implications of their policies; and

- creating a new anti-social behaviour order which will prohibit behaviour which would cause harassment, alarm or distress. Breaching the terms of the order will be a criminal offence.

4.17 The Working Group concluded that witness intimidation is another aspect of anti-social behaviour and the Government's new measures, which will be dealt with by the magistrates' court as a civil procedure enforced by a criminal sanction, will assist in tackling this.

Recommendation 2

4.18 The Working Group recommends that, as part of their new community safety responsibilities, the police and local authorities should take account of the need to develop measures to tackle the problem of witness intimidation, if this is identified as an issue of concern in the local crime and disorder audits.

Inter-agency co-operation

4.19 Crime may be reported direct to the police by the victim or witness but other agencies may well be the first to be aware that a crime has been committed and also that witness intimidation may be a factor. For example, the local authority Social Services Department, the local hospital or the GP may be aware that a domestic violence incident is one of a long series of assaults on an individual, which previously were unreported to the police. Also the local authority housing department may be aware that a criminal charge has arisen in the context of long-standing anti-social behaviour.

4.20 This points to the need for inter-agency co-operation involving the various criminal justice agencies including the police, local authority (housing, social services and education), NHS and voluntary and community groups to ensure that the police, the CPS and the courts are aware of the circumstances surrounding the crime that has been reported to them, including the possibility of witness intimidation. The same need applies in respect of vulnerable witnesses.

Recommendation 3

4.21 The Working Group recommends that the Trials Issues Group should develop a national framework for inter-agency protocols for dealing both with witness intimidation and vulnerable witnesses. This could then be developed through Local Service Level Agreements.

Identification of Intimidated Witnesses by the Police

4.22 Before appropriate action can be taken to assist intimidated witnesses, the police need to be able to identify those witnesses who are or are likely to be subject to intimidation. Once identification has been made, the police will need to explore with the witness, the nature of the potential intimidation or the intimidation actually being experienced, with a view to agreeing on the most appropriate action to take to assist the witness before the trial, together with the measures most likely to assist the witness at the trial.

4.23 ACPO Crime Committee has developed the following list of prompts to assist the police or

other members of the criminal justice system to identify individual witnesses in need of, or likely to be in need of protection, assistance or reassurance in respect of witness intimidation:

1. The witness tells the Police Officer or other member of the Criminal Justice System (for example Witness Service, Victim Support, CPS etc.) that intimidation has occurred or is likely to occur. (Not a prerequisite).

2. The witness, although giving information about the offence, is reluctant to provide a statement, there being, therefore, an implicit fear of the consequences of giving evidence. One of the reasons could be fear of intimidation.

3. The witness lives on a medium to high density housing estate where there is a history of anti-social behaviour and conflict with the police, or indeed a small, close knit community where, for example, an extended family network exists, resulting in the witness living alongside, or in close proximity to, relatives of the offender.

4. The incident occurred in or around the witness's home (not likely to be sufficient on its own).

5. The nature of the offence could indicate an increased likelihood of intimidation. Research has shown that sexual offences, assaults, particularly domestic violence, vandalism and racially motivated crimes are more likely to give rise to intimidation.

6. The relationship between the defendant and witness should be considered, e.g. a personal relationship where the defendant is in authority over the witness such as a carer in a residential home.

7. The offence is one of a series of incidents, and there might be evidence of repeat victimisation.

8. The witness is a 'vulnerable' witness who might perceive an increased risk of intimidation or victimisation.

9. Where there is evidence that intimidation might occur on account of the cultural or ethnic background of the witness.

10. The defendant has a previous history of witness intimidation, or there is intelligence which suggests that witness intimidation has occurred in the past.

11. The defendant, and/or their relatives or associates, have the intention and ability to influence or interfere with the witness.

12. The violent nature of the defendant, relative or associate could suggest an increased likelihood of intimidation.

13. The influence of the defendant(s) within the criminal fraternity; however, this should be more than just anecdotal evidence.

14. The fact that the witness is also the victim might give rise to an increased likelihood of intimidation (not sufficient on its own).

Recommendation 4

4.24 The Working Group endorses these prompts, provided that they are not used in a mechanistic way but rather as a tool and as a means of raising awareness of witness intimidation within the criminal justice system.

Formal Witness Protection Schemes (Tier 1)

4.25 Responsibility for providing formal witness protection schemes rests with individual police forces. The number of dedicated Witness Support Units has increased over recent years with the Metropolitan Police Service, Greater Manchester Police, Northumbria, West Yorkshire, Hampshire, Strathclyde, Merseyside and the RUC all having such units. Many other forces who do not have a similar scale problem have identified and trained officers to provide witness support on an ad hoc basis.

4.26 Each force has developed its own strategy for formal witness support and ACPO has developed a national template which has been endorsed by ACPO Crime Committee. This includes the following proposed criteria for providing Tier 1 Witness Support:

The police may consider "assisting" a person who can provide essential evidence, generally in

relation to the most serious of offences, and to whose safety a substantial threat exists. That is:

a) The witness must be giving evidence in respect of a serious crime; or

b) the witness must be giving evidence against a "target" criminal; and

c) there must be a clear indication that the life of the witness, or a member of their family, will be in danger as a result of him/her giving evidence, or that threats or revenge attacks are likely in an effort to prevent the witness testifying; and

d) the witness has made a written statement before any welfare or security is afforded; and

e) the witness has not been offered any incentive or inducement to provide a statement of evidence, and no promises have been made; and

f) the witness (and family) are fully prepared to abide by conditions expected under the Scheme and they acknowledge that any breach of the conditions or advice given, may remove any support that is being offered/provided.

"Assistance" may amount to maintaining a witness's welfare/security by way of relocation into a safe area and, where appropriate, a change of identity.

However, the degrees of "assistance" in each case will differ and depend on all the circumstances.

<u>Definitions</u>

Witness - will include complainant.

Serious crime - Murder, attempted murder, wounding with a firearm in connection with organised crime, major or organised crime where a term of five years can reasonably be expected upon conviction, including serious sexual and 'hate' crimes.

Target criminal - A persistent criminal who is causing serious long term problems

Danger/threats - These must be "real" and not "perceived".

Essential - The evidence to be given by the witness must be **crucial, decisive** and **critical** to the case. In other words, the police are unable successfully to take the matter before the courts without the evidence of the witness believed to be at risk.

Recommendation 5

4.27 The Working Group endorses these proposed criteria.

4.28 The Working Group understands from ACPO that difficulties have arisen in both relocating witnesses and changing their identities.

(a) Re-location

4.29 Police forces can find it difficult to re-locate witnesses because of the limited availability of local authority housing stock and the legislation governing local authority housing policy, and the use of the points system.

4.30 While relocation can be one element of a formal witness protection package, the need to move a witness from their normal place of residence can also arise in cases of lower level (Tier 2) harassment. The media has publicised cases of this type and the difficulties that can arise.

4.31 Part VI of the Housing Act 1996 requires a local authority to have an allocation scheme for determining priorities in allocating accommodation to new tenants. An authority is also required, in framing its scheme, to give `reasonable preference' to certain categories of household in housing need (families with dependent children and the homeless, for example). This requirement does not prevent an authority from having special procedures within its scheme for dealing quickly and confidentially with the small number of cases referred to them by the police involving witnesses and victims. The Department of Environment, Transport and the Regions is considering revising existing guidance to local authorities later in the year which will emphasise the point. Additionally, ACPO and the Local Government Association are in the process of developing liaison

arrangements on these issues, including cross-boundary arrangements.

(b) Change of identity

4.32 Changing a witness' identity is currently undertaken by the police on the basis of informal arrangements with the relevant agencies (e.g. Passport Agency, Child Support Agency, credit agencies, Department of Social Security) and there is no legal basis.

Recommendation 6

4.33 The Working Group recommends that good practice guidance should be developed by ACPO and the Local Government Association in relation to the arrangements needed to provide formal witness protection.

(c) Legislation

4.34 Some other jurisdictions such as the USA and Canada have legislated to provide for a formal witness protection scheme. However, the Working Group concluded that the present non-statutory informal arrangements are working satisfactorily in England and Wales and considered that legislation of this nature was not necessary.

Measures to protect those subject to harassment (Tier 2)

Police Procedures

4.35 Warwick Maynard's 1994 Study recommended the following changes to police procedures to prevent the identity of the witness becoming known to the suspect:

1. The minimum information necessary should be given to officers over the radio to allow them to respond to an incident. This information should not include details of the names and address of any witness, unless it is essential that he or she be **visited** in order to respond effectively.

2. A police visit to a witness' home **immediately** following a crime should be avoided, unless it is absolutely necessary as may be the case with a victim.

3. The police should consider the following alternative procedures, with the choice wherever possible, being left to the witness:

   (i) inviting the witness, by telephone, to visit the police station to make a statement; or

   (ii) delaying the visit to the witness' premises until the next day, preferably by a plain clothes officer; or

   (iii) conducting a number of house-to-house calls on adjacent properties, so that the witness is not picked out.

4. Arrangements for the witness to visit the police station should aim to avoid encounters between the witness and the suspect.

5. Identification of suspects by witnesses should make use of identification suites with screens and identification by means of confrontation should be avoided.

6. The police should develop strategies to enable the witness to cope with the threat of possible reprisals and give the witness appropriate information and advice.

Recommendation 7

4.36 The Working Group endorses these recommendations and recommends that they should be adopted by police forces.

Recommendation 8

4.37 The Group recommends that the following measures should also be adopted:

Action against the perpetrator

1. The initiation of criminal proceedings against those carrying out the intimidation (where known), for example under section 51 of the Criminal Justice and Public Order Act 1994, should be given priority.

2. Courts considering bail applications from defendants should be supplied by the police and CPS with full information about actual or potential witness intimidation.

3. Where witness intimidation is a possibility, courts should consider imposing bail

conditions (under the existing bail legislation) which restrict the defendant's contact with the witnesses.

4. In accordance with the National Standards of Witness Care when bail conditions are imposed, the court should inform the police immediately that bail has been granted to a defendant who was previously in custody, together with details of any conditions attached to the bail.

5. Where witness intimidation is considered likely, breaches of bail conditions should be reported to the police and acted upon immediately.

6. When appropriate, the relevant authorities should consider taking action in respect of perpetrators by applying for the new anti-social behaviour order in the Crime and Disorder Bill, or other civil remedies such as under the Housing Act 1996, or to action under the Protection from Harassment Act 1997.

Measures to assist witnesses

7. The witness should be provided with information about intimidation and what action they should take if confronted by such circumstances. Some forces issue a small booklet to all police officers outlining measures for witness support. Others use a pre-printed tear off sheet as part of the statement form, this is given to the witness. ACPO should disseminate this as good practice.

8. The witness will also need to be given information about any court bail conditions imposed on the defendant, what to do if these are breached and details of the civil orders that are available. However, the Working Group recognises that it is important to provide balanced information to witnesses and to avoid the risk of frightening them unnecessarily when intimidation is unlikely.

9. In appropriate circumstances, the police should consider installing panic alarms. This will avoid the need for the witness to have to dial 999 and allows the witness to wear the alarm around their neck.

10. There should be one police contact point for witnesses, when an immediate response is not required.

11. Consideration should be given by the police, in appropriate cases, to installing outside security lighting or home-based CCTV (currently on trial in Darlington).

12. The police should also consider operating a mobile closed circuit television system. For example, the London Borough of Hillingdon own and operate the systems, but their deployment is managed jointly with the local police who help to decide priorities.

13. Consideration should be given by local housing authorities to offer the witness a transfer to alternative accommodation, either permanent or temporary for the duration of the trial.

14. Consideration should be given by the police and local authorities to utilising the support offered by Neighbourhood Watch, residents' groups or other community-based schemes, for example, the CAPE scheme in Northumbria and the 'Cocoon Group' in Leicester City.

15. In accordance with paragraph 3.1 of the Statement of National Standards of Witness Care in the Criminal Justice System, priority should be given to cases in which witnesses are at risk of being intimidated.

16. The use of witness forms or witness support packages, which may include a selection of leaflets from varying agencies including the police, Court Service, and Victim Support should be encouraged.

Measures to decrease the fear of intimidation (Tier 3)

4.38 The reporting rate of crime is lower than the estimated number of crimes actually committed. One of the factors which deter people from reporting crime is fear of intimidation, even though, in reality, this is not the norm. Warwick Maynard's Witness Intimidation study suggested that 6% of crime not reported by victims and

22% of crime not reported by witnesses goes unreported due to fear of intimidation.

4.39 The factors influencing people's fear of intimidation may include the following:-

- Fear of reporting
- Previous experience leading to lack of trust in the police and the Criminal Justice System generally
- The nature of the offence, repeat victimisation, relationship with the defendant, including those in institutions
- Living in proximity to the perpetrator or his associates
- Fear of the court process
- Poor communication between the criminal justice agencies
- Press coverage /Media image of the courts
- Membership of a minority group
- Isolation from the community
- Low income/poverty leading to weariness

Recommendation 9

4.40 At a national level the Working group recommends that consideration is given by the Home Office to a national publicity campaign, including education about the criminal justice process and the support measures available to witnesses.

Community Based Schemes

4.41 The Working Group has recommended that where witness intimidation is identified as a potential problem, witnesses should be provided with a variety of information and support to tackle both actual intimidation and also provide reassurance to reduce fear of intimidation. The Working Group considers that this is best delivered, where possible, through inter-agency arrangements. In areas where witness intimidation is recognised as being a problem, such an inter-agency approach may be community based.

4.42 Various schemes have been developed in different parts of the country. Some involve co-operation between the police and local residents' associations; some involve the local authority housing department and the police and others involve a very broad inter-agency approach, involving organisations such as Victim Support.

4.43 The CAPE (Community and Police Enforcement) Scheme in Newcastle's West End has developed as a result of co-operation between a local resident's association and the police. This involves members of the scheme making commitments to report crime and give evidence in court if necessary, in return for a police undertaking to visit and provide support and information for the potential witness. In the first eighteen months of the scheme's operation this has resulted in 36 arrests and 25 convictions. Further details of the scheme may be found at Annex D.

4.44 Salford Witness Support Service is an example of a scheme involving inter-agency co-operation between the courts, the City Council (Housing Department), Community and Social Services (Education Welfare), police, CPS, probation, NHS Trusts, Victim Support and the local Citizen's Advice Bureaux. This has been developed by the Salford Partnership. Details of the inter-agency agreement are set out in Annex E.

4.45 The Working Group considers that such schemes provide a positive example of the way to tackle neighbourhood crime, including witness intimidation. The need for and the nature of such a scheme will depend very much upon the characteristics of the area concerned and the problems being experienced, but the involvement of members of the community can be an important factor in the success of such arrangements.

Recommendation 10

4.46 When, in a particular area, the crime and disorder audit points to the need to develop strategies to tackle witness intimidation which might involve the development of a community based scheme, the Working Group recommends that the following factors are taken into account:

1 Key indicators of a Witness Intimidation Problem

- Housing problems, such as large numbers of requests from tenants to move away from particular housing estates.
- Local knowledge (from existing community police officers and housing officers).
- Information obtained from local authority/police crime and disorder audits.
- Residents experiencing difficulties in getting insurance cover.
- Groups have been subject to particular harassment such as ethnic minorities.

2 Establishing a scheme

- There should be a multi-agency co-operative approach.

Methods of involving the local community will vary from one area to another but it is important to ensure that a few self-appointed people who may not represent all the residents do not dominate any scheme.

Professional Witnesses

4.47 When in opposition, the Labour Party proposed several measures to tackle the growing problem of witness intimidation. This included an expansion of the use of "professional witnesses" which might typically involve council officials or private detectives posing as tenants on an estate to log evidence of harassment or intimidation.

4.48 The Working Group has obtained information about the use of professional witnesses from the Local Government Association. Local authorities employ private investigators to conduct surveillance to gather evidence primarily of anti-social behaviour which can then be used in evidence in civil proceedings for eviction. However, some authorities, such as the Manchester Nuisance Response Team also use professional witnesses to gather evidence in respect of criminal activity.

4.49 There is no objection in principle to the use of professional witnesses to provide evidence in criminal proceedings, provided that they have directly observed the events at issue. However, one of the main disadvantages is the cost. For example, in Manchester the upper limit of costs of using private inquiry agents is about £2,000 per week (covering salaries, use of a property, setting up costs, equipment etc.). Such an operation is more likely to be used in serious cases such as severe intimidation or drug dealing. Local authority employees may be used for such purposes if the nuisance being monitored occurs within office hours, but in general, surveillance is regarded as specialist work and housing authority staff do not normally have the right background. In addition, local authority employees are more likely to be recognised by those being observed and so there are risks to their health and safety in using them for surveillance purposes.

4.50 Local authorities regard professional witnesses as one of a range of potential tools available to deal with anti-social behaviour and criminal activity but with decisions on their use needing to be taken on a case by case basis.

Recommendation 11

4.51 The Working Group recommends that good practice guidelines for the use of "professional witnesses" in criminal cases should also be developed by the Local Government Association in conjunction with ACPO.

Civil Proceedings

4.52 The Working Group recognises that many of those involved in acts of witness intimidation related to criminal proceedings are also often the subject of civil proceedings, for example, for eviction for anti-social behaviour under Housing Act legislation. However, while general witness support measures are available in Crown Courts, similar provisions do not exist in the County Courts. In addition, the Working Group noted that the offence of witness intimidation and harassment in Section 51 of the Criminal Justice and Public Order Act 1994 does not apply to civil proceedings.

Recommendation 12

4.53 Notwithstanding the terms of reference of this review, the Working Group considers that the measures recommended above to protect witnesses from intimidation in criminal proceedings should be considered for potential use for proceedings in the civil courts.

Recommendation 13

4.54 In addition, the Working Group recommends that the offence of witness intimidation in Section 51 of the Criminal Justice and Public Order Act 1994 should be amended to apply it to intimidation in civil proceedings.

Trial Preparation for Vulnerable or Intimidated Witnesses

4.55 One of the principles underlying the Statement of National Standards of Witness Care is that special arrangements will be made for witnesses at risk of being intimidated and the National Standards state that where witnesses are at risk of being intimidated in the court precinct, the police should contact a nominated court official to indicate the arrangement the police intend to take to protect the witnesses at court. Also, all courts are required to agree a contingency plan with the police for dealing with disorder or intimidation within the precincts of the courts. As indicated in Chapter 1 (paragraph 1.15) these National Standards are being implemented through local inter-agency groups drawing up Local Service Level Agreements (LSLAs).

Recommendation 14

4.56 The Working Group recommends that when developing LSLAs, any arrangement for dealing with intimidated witnesses should complement and dovetail with arrangements put in place for protection both before and after the trial.

Harassment by defendants in custody

4.57 The Working Group is aware of cases where a witness has continued to be harassed by the defendant both before and after the trial is over even though he may be either remanded in custody or is serving a custodial sentence. Such contacts have been made by telephone from the prison and understandably caused the witness great distress.

4.58 The Prison Service accepts that it has a responsibility to take all reasonable steps to prevent prisoners making unwanted contact with members of the public, particularly those who are the victims of crime. Rules are in place which govern the use of telephones by prisoners (both on remand and convicted). These include the following:

- prisoners may not telephone victims of their offence or the family of a victim without permission, which will be withheld if it is considered that the approach would cause additional distress;

- prisoners may not communicate by telephone material which is indecent or obscene or which contains threats; and

- where prisoners are believed to have broken the rules on telephone calls they may face criminal or disciplinary proceedings.

4.59 Where a witness has received unwelcome contact from a prisoner, they may contact the Prison Service Victims' Helpline, the police, probation service or the prison direct. Appropriate action will then be taken to prevent further unwanted contact.

4.60 In addition, there are specific rules governing the access of exceptional and high risk Category A prisoners to the telephone. All calls made by these prisoners are simultaneously monitored and recorded. Monitoring of other prisoners' phone calls takes place on a selective basis where there is a justifiable suspicion of abuse. Prisoners convicted of stalking offences would fall into this category. Where a prisoner is found, or suspected, to have infringed the rules on telephone calls, all his/her calls are routinely monitored thereafter.

4.61 Additional measures are available to assist victims of crime. The Prison Service Helpline was set up in 1994 to enable victims to contact a central point to voice any concerns they may have about prisoners. This could include complaints about unwanted contact from prisoners, and concerns about temporary release or parole. Helpline staff then pass on the information to the relevant prison governor who will take appropriate action. Victims' views are taken into account when decisions about temporary release or parole are being taken. Information about the Victim Helpline is provided in the Victims' Charter.

4.62 "Smart" telephone technology is to replace prisoner cardphones throughout the prison estate.

This is being installed on a rolling programme and will be in place in all prisons by July 1999. The new technology has a number of features which will minimise the risk of victims, including those harassed by stalkers, being contacted by telephone. These include:

- limiting prisoners' access to telephone numbers to pre-approved numbers only;

- a voice loop which will notify the recipient before actual contact is made that the call is from a named prisoner and prison, providing the opportunity for the recipient to refuse to accept the call;

- a facility for the call recipient to enter a sequence of numbers which will delete their number from the prisoner's directory;

- automatic termination of an unauthorised number dialled; and

- the facility to record all conversations and provide details of which prisoner made any call.

Chapter 5: **Vulnerable witnesses**

Introduction

5.1 This chapter considers the measures needed to assist vulnerable witnesses at the investigation stage.

5.2 Several studies, including that of Andrew Sanders on Witnesses with Learning Disabilities suggest that a large proportion of sexual crimes against people with intellectual disabilities are unreported to the police and it is likely that this also applies to property offences and to some people with physical disabilities or mental illness. This is discussed in more detail in Section 3 of the Literature Review. The Working Group considers that there are four areas in which improvements need to be made.

(i) Recognising that an offence has occurred

5.3 The victim themselves may not recognise that a crime has occurred and, in the case of those in institutional care, a number of studies have noted that there is a tendency for social services to decriminalise incidents by describing offences of violence as "abuse", or calling rape or sexual assault "sexual abuse" and categorising theft as "financial abuse".

Recommendation 15

5.4 The Working Group recommends that consideration should be given to providing better education for professionals, carers and service users involved in the care of those who are potentially vulnerable or intimidated witnesses about recognising the symptoms of victimisation to enable them to be better able to recognise acts that may be criminal. The Group proposes that this should be taken forward by the Department of Health, in consultation with the Association of Directors of Social Services, Local Government Association and relevant professional bodies.

(ii) Reporting Crime

5.5 Several studies have shown that a crime against someone in institutional care is very often reported to a carer rather than the police and that a non-reporting ethos within institutions means that many offences are not reported to the police at all, with the emphasis being on internal investigation and disciplinary procedures. Local Authority Social Service Departments and Health Authorities have developed their own reporting policies but in at least one case drawn to the attention of the Working Group, this involved a long chain of internal reporting without one mention of the need to consult the client and the need to consider reporting the matter to the police.

5.6 The Association of Directors of Social Service (ADSS) passed the following motion at their annual conference in April 1997:

> "Responding to the Abuse of Vulnerable Adults ADSS will take the lead in developing a coherent and comprehensive national policy in relation to the abuse of vulnerable adults. The response to the abuse of vulnerable adults should cover all adult client groups, those living in residential and community settings, and be of an inter-agency nature. This work should be pursued with other key national bodies, including the Department of Health.
>
> The Association urges each member to develop local policies and services that respond to the abuse (and potential abuse) of vulnerable adults in conjunction with other agencies."

5.7 This proposal is supported by the Local Government Association and at present the ADSS offer to take the lead on the issue is currently under consideration by the Department of Health following a seminar in November 1997 involving organisations concerned with elder abuse, including the ADSS.

5.8 In parallel, following the work of the Law Commission, including their report on Mental Incapacity, the Lord Chancellor's Department issued a consultation paper in December 1997 seeking views on the Law Commission's proposals. These include a recommendation that social services authorities should have a new duty to investigate cases of possible neglect or abuse. The

Government is seeking views on the practical implications of this proposal.

Recommendation 16

5.9 The Working Group commends the ADSS proposals in relation to the abuse of vulnerable adults and recommends that when taking this work forward:

(a) the inter-agency consultation should include representatives from the police and NHS;

(b) that national guidelines should include a recognition that when abuse occurs a crime may have been committed and that there should be clear policies about reporting such incidents to the police as soon as practicable and in consultation with the victim;

(c) that crime reporting policies should include the following components:

- clear definitions of abuse and types of mistreatment and criminal offences,
- indicators of abuse,
- what should be reported to the police and at what stage and assisting the client to do so,
- outline of the purpose and conduct of any internal investigation and arrangements for assisting a police investigation,
- clear policies and procedures for reporting and dealing with allegations of abuse/ offences by a member of staff.

(iii) Identification of Vulnerable Witnesses by the Police

5.10 The Working Group considers that the early identification that a witness requires special measures to assist them give information both to the investigating officer and later on to the court, will assist the investigation process and improve the process of evidence gathering. It is also likely to improve the prospects of a successful prosecution.

Recommendation 17

5.11 The Working Group recommends that the police should aim to identify a vulnerable witness as early as possible in the investigation process.

5.12 Practical workable ways of achieving this will need to be developed. As indicated in Section 3 of the Literature Review, studies of police contacts with people with learning disabilities suggests that the police performance in identifying such cases has been poor and that police officers received virtually no training in the recognition and management of mental disorder.[9] The Working Group has therefore considered ways of implementing this recommendation.

5.13 While it is important that all police officers have a general awareness of the different forms of vulnerability that might be experienced by a witness, the Working Group recognises that the task of making the identification might best be made by an officer who has received suitable training. Training is discussed in Chapter 12 below.

Recommendation 18

5.14 The Working Group recommends that police forces should identify individuals who would have responsibility for either making the identification of a vulnerable witness and/or seeking assistance in doing so e.g. Kent Constabulary has specialist officers for dealing with vulnerable witnesses.

5.15 The Working Group recognises that the task of identification is not an easy one. While some disabilities may be obvious, in many cases the police will need assistance in making such identification.

5.16 Witnesses may have disabilities which affect the following:

- communication skills - as a result of both physical or mental disabilities;
- response to perceived aggression;
- memory; and
- comprehension.

[9] *Walker, J (1992) Police Contact with the mentally disabled Police Research Award Scheme Report. London: Home Office Police Research Group*

Recommendation 19

5.17 To assist the police in identifying a potentially vulnerable witness, the Working Group recommends that a series of prompts should be developed by ACPO in consultation with the Department of Health, and the Disability Policy Division at the Department for Education and Employment. These should not be used as questions to be put to the witness but be regarded as a guide only and should be considered in conjunction with the series of prompts proposed for the identification of intimidated witnesses. The prompts should be used as an aid in making an overall assessment of an individual witness' needs.

5.18 Some examples of the prompts which might be used to assist the police identify a witness with learning disabilities are set out below but the Working Group recognises that these may need to be expanded to cover other types of disability and mental illness:

(1) Difficulty in communicating without assistance/interpretation

(2) Difficulty in understanding questions and instructions

(3) Responding inappropriately or inconsistently to questions

(4) Difficulty in recalling information

(5) Short attention span

(6) Inability to read

(7) Appearing over-excited (manic depressive)

(8) Appearing uninterested/lethargic (depressive)

(9) Abnormal and uncontrollable muscular movements in the face e.g. chewing and sucking (tardive dyskinesia).

5.19 The following might also provide some guidance but, only as part of an assessment and again should not be used as questions:

(10) Receipt of a disability benefit

(11) Residence at a group home or institution or employment in a sheltered workshop

(12) Education at a special school or a special education class at a mainstream school.

(iv) Advice for the police and prosecution

5.20 When faced with a witness who may need special assistance, the investigator will need to seek advice, for example, on the best method of communication and way of recording the evidence. Members of the witness' family or friends or carer are likely to be those with the most knowledge of the witness' needs.

Recommendation 20

5.21 In the first instance, the Working Group recommends that police should consult the vulnerable witness and those who know the witness best to seek advice on communicating with him/her - provided that they are not party to the crime under investigation.

5.22 Having made initial enquiries, the investigator may feel the need to seek further expert advice so that he is able to determine the following:-

- appropriate interview techniques,
- whether the witness requires any assistance in communication and if so, where this assistance can be found,
- what support measures might be provided for the witness while being questioned,
- in what form the statement might best be taken e.g. written or by video (decisions to be taken in consultation with witness),
- what pre-trial support measures are needed,
- what measures might be needed to assist the witness give evidence at trial.

Recommendation 21

5.23 The Working Group recommends that the Trials Issues Group, Witness Care Sub-group in consultation with the Department of Health, the Local Government Association, the legal profession, the CPS and other organisations with relevant knowledge and expertise, should determine the best mechanism for delivering such advice and assistance.

Chapter 6: **Further investigative and pre-trial measures**

Introduction

6.1 This Chapter considers the next stages of the process once the witness has been identified as either intimidated or vulnerable (discussed in Chapters 4 and 5 respectively) and advice has been obtained, where necessary on the best method of communication (paragraphs 5.20 - 5.23 above). It covers the interview and pre-trial arrangements and court preparation. Those recommendations which relate to the Crown Prosecution Service need to be understood in the context of the role of the CPS which is set out in Annex F to this report.

Interview

(a) Recording Method

6.2 In the light of the advice and guidance obtained about the particular witness as discussed in Chapter 5 (paragraphs 5.20-5.23 - Recommendations 20 and 21), the investigating officer will need to decide, after consulting where appropriate with the prosecutor, the best method of recording the evidence of the witness i.e. in the form of a written statement or a video-recorded interview. The use of a video-recorded interview is considered in more detail below in Chapter 8 (paragraphs 8.33 - 8.49).

(b) Assistance with Communication

6.3 In cases where the witness has difficulties in communicating, the investigating officer will need to decide whether assistance is required for the purposes of conducting the interview. Following from Recommendation 20 (paragraph 5.21), this may involve the use of any communication aids the witness is already using or possibly the use of an interpreter who, as recognised in Recommendation 20, should not be a party to the crime under investigation.

(c) Presence of a supporter

6.4 Under Code C of the Police and Criminal Evidence Act 1984, when the police are interviewing a suspect they must arrange for an "appropriate adult" to accompany any person who they believe may have a mental illness or handicap. Paragraph 11.14 of the Code provides that a person who is mentally disordered or handicapped, whether suspected or not, must not be interviewed or asked to provide or sign a written statement in the absence of the appropriate adult unless an urgent interview is necessary in order to avoid interference with or harm to evidence connected with an offence or it would alert other suspects or hinder the recovery of property.

6.5 The role of the appropriate adult under this scheme, which can be carried out by a parent or guardian; other carer or someone with experience in mental health (e.g. an approved social worker), is:

- to protect the interests of the suspect
- to assist communication with the suspect; and
- to ensure that the interview can be carried out fairly.

6.6 It has been suggested by the Law Society sub-committee on Mental Health and Disability that the scheme should be extended to mentally vulnerable witnesses. But there are concerns that appropriate adults do not gain enough experience to develop real expertise and there may be problems of delay in finding an appropriate adult; parents and guardians are not always willing to perform that role and other carers and social workers may have other commitments on their time. Therefore, while some vulnerable witnesses will receive assistance from this scheme, the Working Group was reluctant to suggest its extension. However, the Working Group did consider that a vulnerable witness, particularly one with learning disabilities, would benefit from being accompanied by someone familiar to them while being interviewed.

Recommendation 22

6.7 The Working Group recommends that while being interviewed a vulnerable witness, particularly someone with learning disabilities, should be able to benefit from being accompanied by someone, preferably someone familiar to them. This "supporter", whose role would need to be clearly defined, would need to be independent of the police and not a party to the case being investigated. The police should be responsible for ensuring that a support person is present.

(d) Location:

6.8 In the case of children, the Memorandum of Good Practice on video recorded interviews, issued in 1992 by the Home Office and the Department of Health states, in paragraph 1.12, that careful consideration needs to be given to the selection of a suitable and sympathetic setting for the interview and the Group understands that this has been adopted to a significant degree as police policy. The location where interviews are conducted can be just as important for both mentally and physically vulnerable witnesses, particularly with regard to accessibility and comfort. The Literature Review was unable to uncover any assessment of police practices or policy in this area.

Recommendation 23

6.9 The Working Group recommends that when deciding where interviews with vulnerable or intimidated witnesses should take place account should be taken of the needs and wishes of the individual.

Obtaining the Views of the Witness

6.10 The police and the prosecutor will require information about the needs of the witness for the purposes of pre-trial preparation and for making an application to the court for measures to be available during the trial. As well as obtaining advice and guidance from the witness' relatives, friends, carers or other agencies, the Working Group recognised in Chapter 3 (paragraph 3.29) that it was important to take into account the views of the witness. Therefore the witness, together with their supporter, where relevant, should be asked by the police to give details of any difficulties they might have in giving evidence in court, together with their views on what measures might assist them to give evidence. This might be done at the time of the interview, although other means of doing so might be considered. For example, the witness might be asked to complete a form but not all vulnerable witnesses would necessarily be able to do so.

6.11 In the case of defence witnesses, it would be the responsibility of the defence to make their own enquiries about the needs of the witness.

Recommendation 24

6.12 The Working Group recommends that the witness' own views on pre-trial and trial measures should be obtained from the witness, with the assistance of their supporter, where relevant, and that the best means of doing so should be considered by ACPO in consultation with interested parties.

Liaison Between Police and Prosecution

6.13 Once information about the witness' needs and views has been obtained, it is important that this is passed by the police to the prosecutor.

6.14 The current procedure is that the police give the CPS the case file containing the evidence and other information needed to take decisions about the case at the outset. Guidance on the content of case files and the timetables for preparing them is contained in the Manual of Guidance for the preparation, processing and submission of case files agreed between the CPS and ACPO and issued by the Trials Issues Group. The Manual already reflects the need for information about vulnerable witnesses. A timely case file containing the right information and evidence is the foundation of the prosecution case.

6.15 Current advice allows for information about witnesses to be passed on to the prosecution by means of the MG 6 form, which protects the confidential nature of the information. This is important as other agencies also rely on parts of the case file. For example, defence lawyers need the evidence disclosed to advise their clients and the Probation Service needs the evidence for pre-sentence reports.

6.16 Because of the need to work closely with the police, current pilot schemes allow prosecutors to

go to police stations or police administrative support units and give early face to face advice aimed at improving case files and saving resources. The scheme is designed for complex cases and cases with legal or evidential difficulties. This opportunity for early liaison with the police could be particularly beneficial in cases involving vulnerable or intimidated witnesses.

6.17 Pilot studies are currently being conducted to determine ways in which information can be gathered from victims about the effect a crime has had on them. This is a key Victim's Charter Standard. In the pilots, victims of certain categories of serious offences are given the option to make a statement about how they have been affected by the offence. The statement is passed on to the prosecutor who will consider its content in making prosecution decisions. Where the prosecutor decides to use the information contained in the statement in relation to the effect of the crime upon the victim as part of the sentencing process then the relevant part of the statement will need to be disclosed to the defence. Bristol University has recently completed research on the pilot studies. Further research by the Home Office is due to be completed later in the year.

Recommendation 25

6.18 Information about the needs of the witness and the witness's own views on their requirements for assistance in court should always be passed on by the police to the CPS. Confidential form MG 6 might be a suitable vehicle for achieving this.

Recommendation 26

6.19 The Working Group recommends that, while recognising the distinction between the role of the police, who have responsibilities as the investigator and the CPS, there should be an early strategy meeting between the investigating officer and the CPS to discuss and agree the form in which the statement should be taken and what measures might be needed to assist the witness before and during the trial, taking into account the witness' own views and preferences.

6.20 The Statement of National Standards of Witness Care recognises that all witnesses, including those who may be vulnerable or intimidated require support before the trial. Such measures cover several different aspects of a witnesses' needs and some have particular relevance to vulnerable or intimidated witnesses.

Keeping the Witness Informed

6.21 The 1990 Victim's Charter established the principle that victims should be kept informed of significant developments in their case. Because it was recognised that there were gaps in provision and that the consistency of service could be improved, subsequent consideration has focused on the provision of a more uniform, better quality service.

6.22 Pilot schemes have been running to determine the best way to keep victims informed. Known as the "One Stop Shop" they provide a single police point to gather and pass on the information. If a victim in a particular category of case opts into the scheme, the police will ensure that they are kept informed of all significant developments in the progress of the case. This involves passing on information provided by other agencies.

6.23 Since the pilot projects started, Sir Iain Glidewell has begun his review of the CPS and he has been asked to examine, inter alia, how the CPS can be more pro-active in contacting victims direct in order to keep victims informed of developments and decisions on prosecutions whilst taking into account their needs.

Meeting between Prosecutor and Prosecution Witnesses

6.24 Currently, information about witnesses is generally passed on to CPS as part of the case file from the police. It has been suggested that there may be benefits in early consultations between the prosecutor and vulnerable or intimidated witnesses. The Working Group understands that such meetings already take place in Northern Ireland and Scotland.

6.25 Comparison with the practice in Scotland, however, must acknowledge certain fundamental differences in the role and powers of the Procurator Fiscal in Scotland and Crown Prosecutors in England and Wales. The Procurator Fiscal can instruct that further investigations be carried out and can, in petition cases, conduct his own investigation and interview witnesses. In England and Wales, the police have

responsibility for investigating criminal cases, collecting the evidence and preparing the case file. This means that, although the police may seek advice from the CPS about the likely prospect of conviction in specific cases, the CPS can only advise on the evidential implications of police actions and not on investigative strategy.

6.26 Similarly, there are important differences in the position in Northern Ireland where it is in common practice for the prosecution to consult with some witnesses in advance of trial. The consultation may cover a range of issues but includes the content of the witness' statement of evidence. Current professional rules of conduct governing the Bar in England and Wales prevent discussion with non-expert witnesses. The development of caselaw in England and Wales has also highlighted the risks attached to pre-trial discussions with witnesses.

6.27 The Working Group considers, however, that there may be advantages in some contact between the prosecution and certain vulnerable or intimidated witnesses. These could include:

- better prospects of evaluating the likely performance of the witness;
- allowing the witness direct access to the prosecution team;
- increasing witness confidence in the criminal justice system;
- reassurance for the victim that all aspects of the case will be fully examined and that their interests will be properly taken into account;
- an opportunity for the victim or witness to raise any concerns they may have in relation to the trial.

Recommendation 27

6.28 The Working Group believes that meetings between the prosecutor and certain vulnerable or intimidated witnesses could benefit the conduct of the case and provide reassurance to the witness. It recommends that, subject to any recommendations of the Glidewell Review, further detailed consideration is given to this issue by the CPS in consultation with other relevant parties.

Pre-trial Therapy

6.29 There is concern that some witnesses are denied therapy pending the outcome of a criminal trial for fear that their evidence could be considered tainted and the prosecution lost. This is in direct conflict with ensuring that a witness is able to have immediate and effective treatment to assist recovery and delay in seeking treatment may worsen the prognosis.

6.30 Many victims express a wish to see the person responsible convicted and punished. It follows that both forensic investigators and those responsible for the victim's welfare have a mutual interest in ensuring, wherever possible, that witnesses who receive pre-trial therapy are regarded as witnesses able to give reliable testimony.

6.31 The CPS view is that decisions about the provision of therapy are not appropriate to be taken by prosecutors but can only be taken by those responsible for the welfare of the witness. Because some forms of therapy, but not automatically all, may impact on the criminal case, the CPS suggest that, when pre-trial therapy is being considered, advice is sought from them about the likely effect of the proposed therapy on the evidence of the witness in the circumstances of the case. If the conclusion is that the proposed therapy may prejudice the criminal case, those responsible for the welfare of the witness, in consultation with the witness, should take this into account when deciding on whether the therapy should be undertaken. It may still be in the best interests of the witness to proceed with the therapy.

6.32 Maintaining trust is central to the provision of therapy. However, confidentiality may not be assured at the outset because of the operation of the duties of disclosure in relation to the criminal process. It is very important that an understanding is reached between the therapist and the witness about the circumstances under which material obtained during treatment may need to be disclosed.

6.33 The Working Group understands that draft Good Practice Guidance relating to pre-trial therapy for child witnesses will shortly be the subject of a wide consultation exercise. This document is the result of examination of the

issues by a multi-disciplinary group led by the CPS. It seeks to:

- improve understanding of the difficulties associated with the provision of pre-trial therapy;
- clarify the roles of those involved in making decisions about the pre-trial therapy provisions and its impact on the criminal case;
- explain the use of terminology and provide advice on the appropriateness of different therapeutic techniques;
- set out a framework for good practice which highlights some of the important issues.

6.34 The guidance will provide a useful basis for addressing issues relating to the provision of pre-trial therapy for adult vulnerable witnesses.

Recommendation 28

6.35 The Working Group considers that vulnerable or intimidated witnesses should not be denied the emotional support and counselling they may need both before and after the trial. Therefore, it endorses the approach being adopted by the CPS.

Early Notification of Trial Dates

6.36 The Statement of National Standards of Witness Care states, in paragraph 8.2 that once a trial date has been arranged, the defence solicitor and the police should provide defence and prosecution witnesses respectively with as much notice as possible of the trial date and the time they are required to attend court - at least within 4 working days of receipt of the list of witnesses to attend court. If it becomes apparent that the trial will not proceed on the fixed date, the witness should be told as soon as possible.

Court Preparation

6.37 All witnesses in the Crown Court, including vulnerable or intimidated witnesses are able to receive assistance from the Crown Court Witness Service provided through Victim Support. Details of a typical scheme are outlined in Annex G to this report. Some magistrates' courts also have a witness service provided through Victim Support and other agencies. Details of a scheme provided by Victim Support is outlined in Annex H. Particular features of these schemes are likely to benefit vulnerable or intimidated witnesses.

(a) Court Familiarisation Visits

6.38 A vulnerable or intimidated witness is likely to benefit considerably from a pre-trial court familiarisation visit. This will enable witnesses to familiarise themselves with the layout of the court (including who sits where); stand in the witness box; run through basic court procedure and the facilities available in the court; discuss any particular fears or concerns; have explained to them the roles of the different court personnel and what can be expected and, in the case of the Crown Court, outline the services offered by the Witness Service on the day of the trial. Such a visit can also enable the witness to go over any special measures that are to be used to assist him give evidence e.g. the CCTV facilities. Again, the Statement of National Standards of Witness Care, at paragraph 11.1 - 11.3 refer to the need to consider this in the case of vulnerable witnesses.

(b) Information about the Trial Process

6.39 Material is available to provide witnesses with information about the court process and advice and guidance can be provided by the Witness Service in the Crown Court and in some magistrates' courts. However, the information may not always be in a format which is readily accessible to some vulnerable witnesses. In the case of child witnesses, a Witness Pack was produced in 1993 by the NSPCC/Childline, with support from various Government Departments. A revised pack is due to be published shortly. A Witness Pack for those with learning disabilities has been produced by VOICE with funding assistance provided by the Home Office and the Department of Health. However, the Working Group considers that where appropriate material does not already exist, this should be developed to assist vulnerable or intimidated witnesses. This might draw on the extensive work which has already been undertaken for child witnesses.

Recommendation 29

6.40 The Working Group recommends that the Home Office should develop further material to assist vulnerable or intimidated witnesses prepare for their attendance at court.

(c) Responsibility for Pre-trial Preparation

6.41 Practical experience of the pre-trial preparation for child witnesses suggests there may be confusion about which agency is responsible for making the arrangements. Sanders also identified this issue.[10]

6.42 There are a range of people who would be suitable to fulfil this function. Victim Support's 1996 report "Children in Court" highlighted the diverse backgrounds of the individuals who are currently involved in the preparation of child witnesses. The skills required include an ability to prepare the witness to give their evidence without coaching them in any way, familiarity with court procedures, an ability to work with vulnerable witnesses and communication skills.

6.43 The Working Group took the view such preparation for court might be undertaken either by individuals from an agency which has experience of court procedures, who would then receive specialist training to work with vulnerable or intimidated witnesses; or by individuals from an agency which has experience or working with vulnerable or intimidated individuals who would then need to receive specialist training in court procedures. Agreement would need to be reached on a local basis on who should be responsible for preparing the vulnerable or intimidated witness for court.

6.44 Agreement would also need to be reached on who should fulfil a co-ordinating role of checking that the necessary preparation has been or is being undertaken.

Recommendation 30

6.45 The Working Group recommends that the TIG Witness Care Sub-Group should consider the issue of the preparation of the vulnerable or intimidated witness for court, including both the provider(s) of the service and the co-ordination role, with a view to developing national guidance which would be taken forward on the basis of Local Service Level Agreements.

(d) Responsibility for Court Arrangements

6.46 It is also important to ensure that suitable arrangements are in place to assist the vulnerable or intimidated witness when they attend court. The Statement of National Standards of Witness care states that, where appropriate, courts should consider the order and timing of the attendance of witnesses, so as to minimise the inconvenience to the witness (paragraph 1.3.2-4). Such an approach will benefit vulnerable or intimidated witnesses.

6.47 In the case of child witnesses, all Crown Courts have appointed a Child Witness Officer (CWO) who has responsibility for producing a high level of service on behalf of the court in each case involving a child witness. This involves co-ordinating the provision of facilities and providing a focal point for liaison with other agencies. Duties include pre-trial familiarisation visits, liaising with the judge to ensure that the cases progress speedily and undertaking the practical arrangements on the day of the trial e.g. ensuring that the video and TV link equipment is set up and working effectively, meeting the child and arranging separate waiting areas where possible. The Working Group considers that a similar service is necessary for vulnerable or intimidated adults.

Recommendation 31

6.48 The Working Group recommends that Court Service should appoint a liaison officer to ensure that measures ordered by the court to assist vulnerable or intimidated witnesses at court are in place on the day of the trial.

6.49 The Working Group also considered that those involved in assisting vulnerable or intimidated witnesses (police, CPS, courts, witness service etc.) would benefit from working within a national framework of guidance on good practice, which could then be developed locally to fit the needs of a particular area.

Recommendation 32

6.50 The Working Group recommends that consideration is given by the Home Office to developing a memorandum of good practice for adult vulnerable or intimidated witnesses, to provide a national framework of guidance.

[10] *Op Cit footnote 2*

Chapter 7: **Court procedures**

Introduction

7.1 The Working Group proposes that a range of measures should be available to assist vulnerable or intimidated witnesses both before and during the trial. The measures applied in the case of a particular witness would depend upon the needs of that particular witness and it may be that more than one measure is necessary. This chapter considers the procedures that might be adopted and the different measures are discussed in Chapters 8 and 9.

7.2 The previous chapters have highlighted the importance of identifying, as early as possible, the measures that are needed to assist a particular witness.

7.3 An important way to provide assurance to vulnerable witnesses is to provide certainty at an early stage in the process about the method by which the witness will give evidence at any subsequent trial. In practice, this is difficult to do at a very early stage such as the investigation because the court is not involved until after a decision to proceed with a prosecution has been taken and proceedings have been initiated. Therefore it would be difficult to provide a mechanism whereby decisions can be taken before the Plea and Directions Hearing (PDH) in the Crown Court or a pre-trial hearing in the magistrates' court. However, it should be possible, on the basis of consultation between the police and CPS, to agree on the necessary measures at an early point and ensure, as far as possible, that these are confirmed by the court at the PDH or pre-trial hearing and not over-turned later without good reason.

Procedures

Recommendation 33

7.4 The Working Group recommends that the following procedures should be used by the courts for considering applications to apply these measures:

(a) Applications

7.5 In cases where the prosecution or defence consider that a witness is vulnerable or intimidated and meets the criteria for the scheme set out in the definition (i.e. Recommendation 1, (paragraph 3.29)) they would make an application in writing to the court for that witness to be allowed to use special measures. The application would give details of the measures that they considered should be adopted at the trial together with the reasons for the application and set out details of any measures already being applied by the police or local authority and the witness' own views and preferences.

7.6 Such an application might need to be supported by medical evidence or appropriate expert evidence. The Working Group recognises the need for the whole process to be sensitive to the feelings of the vulnerable or intimidated witness who may not wish their personal circumstances to be aired in public in open court.

(b) Venue

7.7 Applications would be considered at a Plea and Directions Hearing (PDH) (or pre-trial hearing in a magistrates' court) or at a separate hearing following shortly afterwards, with the opportunity for representations from the other party to be heard. The court would have discretion as to what, if any, material contained in the application (e.g. of a confidential nature, such as in cases of witness intimidation) should be withheld from the other party.

(c) Decisions

7.8

(i) The court would make its ruling after taking into account the circumstances of the case and the criteria of the scheme.

(ii) The court could also invoke the scheme itself (i.e. of its own motion) but would not make a ruling without the prosecution and defence being given the opportunity to make representations and have them heard.

(iii) Any decision taken should be binding on the trial judge (in a similar way to the binding rulings provisions in Section 40 of the Criminal Procedure and Investigations Act 1996).

(iv) As at present (in the Crown Court), the court would be required to give reasons in writing for its decision after ruling on an application for special measures to be made available. This would include a decision not to accept any or part of an application. Reasons would also be given in writing for decisions on any application for a subsequent variation in the measures to be used and for any refusal of the whole or part of any application for variation. An order granting an application for the use of specific measures may need to be varied in cases where a vulnerable witness' needs may vary over time, such as in cases of mental illness or witness intimidation.

(d) Jury Warning

7.9 When any special measures are ordered by the court, the judge should be required to consider the need for, and the nature of, a warning to the jury to ensure that there is no prejudice to the defendant.

(e) Appeals

7.10 There would be no right of appeal against the judge's decision but in some circumstances (e.g. in cases of applications to prohibit cross-examination of a witness by the accused) this could form part of an appeal against conviction. The scheme would need to be sufficiently flexible to respond to changes in a witness' or the defendant's circumstances before and during the trial.

Monitoring Arrangements

7.11 As recognised in paragraph 7.8 above, some witness' needs may vary between the pre-trial hearing and the trial, thus requiring changes to be made to the measures originally ordered at that stage. The Working Group considers that arrangements should be made to monitor the circumstances of the witness during this period. This will enable applications to be submitted where appropriate for re-evaluation of the decision on measures taken at the PDH or pre-trial hearing.

Recommendation 34

7.12 The Working Group recommends that the needs of the witness should be kept under review by the prosecution or defence, as appropriate between the pre-trial hearing and the trial.

Which court?

7.13 The Working Group's terms of reference refer to measures to enable vulnerable or intimidated witnesses to give best evidence in court, without distinguishing between different types of court. The existing child evidence provisions for CCTV and videoed evidence-in-chief only apply in the Crown Courts and youth courts - as well as only being available in respect of a specified list of offences (violence, cruelty and sexual offences). However, the Working Group's view is that it is the needs of the witness that should be the determining factor, rather than the venue of the proceedings or the nature of the offence.

7.14 It can be argued that appearing as a witness in a magistrates' court is likely to be a less daunting experience than that in the Crown Court. But some vulnerable or intimidated witnesses may still find it traumatic. Therefore, the Working Group considers that, in principle the measures to assist vulnerable or intimidated witnesses should be available in the Crown Court, magistrates' courts and youth courts. However, the Group recognises that because of the time needed to provide some of the measures e.g. CCTV link and video equipment, consideration might need to be given to staged implementation of some of the measures. Although account needs to be taken of the provisions in the Crime and Disorder Bill for the introduction of live CCTV links between the prison and magistrates' courts for remand hearings.

Recommendation 35

7.15 While, for the reasons set out in paragraph 7.14, the Working Group recognises that staged implementation may be necessary, it recommends that these measures should be available to assist vulnerable or intimidated witnesses in cases tried in the Crown Court, youth courts, and magistrates' courts except where the recommendation is that the measure should apply only to specified offences. e.g. mandatory prohibition on defendant cross - examination (recommendation 58 paragraph 9.39 below.)

Chapter 8: **Court measures**

Introduction

8.1 The Working Group has considered several different kinds of measures which could be made available to assist vulnerable or intimidated witnesses give their best evidence in criminal proceedings. At present some measures are available to assist child witnesses only; others can be ordered at the discretion of the court in limited circumstances as provided by case law; and others have been recommended to assist child witnesses, but have not been introduced.

8.2 The Working Group started from the premis that, in general, all the measures should be available on the same basis, from a menu of options (although the court should not necessarily be confined to them), and that the decision about which measures were appropriate would be determined by the needs of the individual witness. However, the Group recognised that some measures might be more appropriate for some groups of witnesses compared with others and that others might be regarded as infringing the rights of the defendant more than others. In these circumstances, it considered whether specific measures should be made available in more limited circumstances.

1. Live CCTV Links

8.3 Section 32 of the Criminal Justice Act 1988 permits a witness, at the discretion of the court, to give evidence via a live CCTV link if that witness is either, outside the United Kingdom or is a child under the age of 14 and the offence is one of violence, cruelty, neglect or, in the case of a child under 17 years, a sexual offence. In the case of a child witness, they usually sit in a separate room in the court building which is linked by live CCTV to the court room where the judge, prosecution and defence counsel see the witness on the TV monitor and the witness only sees the person asking the questions on their own monitor.

8.4 The advantage of this measure is that the witness avoids the trauma of sitting in the court room facing the defendant and being overlooked by the defendant's supporters who may be in the public gallery. At the same time, the defendant's right to see the witness' demeanour (on a TV screen) and to test the evidence by cross-examination are not infringed.

8.5 There are provisions in the Crime and Disorder Bill, currently being considered by Parliament which will enable remand hearings in magistrates courts to take place using live CCTV links from the prison. This will avoid the need to escort high security prisoners to court for such hearings.

8.6 The Working Group considers that CCTV could greatly assist some vulnerable or intimidated witnesses give best evidence in court.

Recommendation 36

8.7 The Working Group recommends that live CCTV links should be available to enable vulnerable or intimidated witnesses give evidence to the court, either from another room within the court building or from a suitable location outside the court.

8.8 Although outside its terms of reference the Working Group also took the view that consideration should be given to making CCTV links available from remote locations to assist the giving of evidence by expert witnesses, with the aim of saving the witness time and reducing delays to court proceedings.

2. Supporter in TV Link Room

8.9 The 1996 Victim's Charter advises that "if you have to give evidence you can ask to have a friend or supporter in the court. Someone from the Witness Service can accompany you if you wish." The Working Group has previously recommended in Chapter 6 that a vulnerable witness should have someone to accompany them and provide support when being interviewed by the police (paragraph 6.7 Recommendation 22). The

Working Group also considers that some vulnerable or intimidated witnesses would derive considerable emotional support from the presence of a support person, who is not a party to the case, rather than a court usher while they are giving evidence from a CCTV link room. This may also improve the accuracy of the evidence because of a reduction in the witness' anxiety. The Group recognises that there may be concerns that the supporter may in some way influence the evidence being given by the witness but considers that this is best addressed through the development of guidance on the role of the support person, including the conduct of the supporter; the extent of the supporter's permitted communication with the witness; whether the supporter is permitted to comfort the witness if they become distressed and arrangements for enabling the supporter to alert the judge in the event of any problem arising while the witness is giving evidence.

Recommendation 37

8.10 The Working Group recommends that a vulnerable or intimidated witness should have the option, if they wish, of being accompanied in the CCTV link room by a supporter.

3. Screens

8.11 Screens round the witness box are an alternative method of shielding the witness from viewing the defendant, while s/he remains in the court room to give their evidence. At present, screens can only be used at the discretion of the court and case law limits their use to assist child witnesses and security cases.

8.12 In the case of *R v X and others*[11] the Court of Appeal approved the erection of a screen in a courtroom to prevent young children seeing, or being seen by, the defendants. At the outset of the trial, the judge had told the jury not to allow the mere presence of the screen in any way to prejudice them against the defendants.

8.13 In *R v Schaub and Cooper (Joey)*[12] the Court of Appeal held that the use of screens was prejudicial to the defendant and that adult witnesses should only be afforded the use of screens in the most exceptional circumstances, if it was otherwise impossible to do justice. By no means every prosecution for a sexual offence should involve the use of a screen. However, in *R v Foster*[13] , a differently constituted Court of Appeal held that the legal test to be applied is the duty to endeavour to see that justice is done, and, provided that the judge warns the jury not to draw adverse inferences from the use of the screen, there is no real risk of prejudice to a defendant.

8.14 As *Sanders*[14] points out, the main advantages of using a screen are that both the witnesses and the defendant can remain in the court, and screens are very easy to use. They are also flexible.

8.15 When screens are used the witness can see and be seen by counsel, the judge and jury. The witness cannot see the defendant but arrangements vary between courts as to whether the defendant can see the witness, for example via a CCTV link.

8.16 The use of screens has been criticised on the ground that generally they prevent the defendant from seeing the witness. It has been argued that the defendant should, as a hallowed principle of our legal system, in fairness, be able to see the accuser. However, while the demeanour of the witness goes to credibility, it is not always necessary for the defendant to see the witness, as opposed to his legal representative and the jury. In the ECHR case of *X v United Kingdom*,[15] the Commission took the view that as the screened witness could be seen by the defendant's representatives who could cross examine, this practice did not contravene Article 6 of the Convention. This difficulty might be overcome by the use of a one way screen so that while the witness cannot see the defendant, the defendant can see the witness.

[11] *R v DJX, S.C.Y. and GC Z,91 CR App R 36 [1990] Crim I.R. 515 CA.*
[12] *R v Cooper and Shaub [1994] Crim L.R. 531.*
[13] *R v Foster [1995] Crim L.R. 333*
[14] *Op Cit. footnote 2.*
[15] *X v UK D&R 126 8386/78 (p 131 - 132)*

Recommendation 38

8.17 The Working Group recommends that screens should be available on a statutory basis to be used as measure to assist vulnerable or intimidated witnesses.

4. Restrictions on Press Reporting

8.18 The Working Party is aware of concerns about press reporting of criminal cases where the publication of details of a witness' identity can result in harassment and intimidation.

8.19 Open justice is, of course, a very important principle. It has long been established that criminal trials should take place in open court and be freely reported. The principle of open justice was considered by Lord Diplock in the case of Attorney General v Leveller Magazine Ltd in 1979[16]. He held that this principle had three aspects: first that the courts should be open to the public; secondly that evidence communicated to the court should be communicated publicly; and thirdly that the media should not be impeded from reporting what has taken place publicly in court.

8.20 The Working Group would not wish to inhibit the general reporting of any case or bar the press from attending the trial. There are precedents, however, for imposing restrictions on publishing details likely to lead to the identification of witnesses. In the case of juveniles, Section 49 of the Children and Young Persons Act 1933 prohibits the publication of details likely to identify any child or young person involved in proceedings in the youth court (including both witnesses and defendants). This particular restriction only applies once proceedings are in force but not at an earlier stage in the investigation. This provision was recently modified by the Crime (Sentences) Act 1997 which gives discretion to a court to dispense with these provisions, if satisfied that that it is in the public interest to do so in relation to a child or young person who has been convicted of an offence. Under section 39 of the Children and Young Persons Act 1933, in relation to any proceedings in any court, the court may prohibit the publication of details likely to identify a child or young person concerned in the proceedings. Both sections 39 and 49 of the 1933 Act were extended by section 57 of the 1963 Children and Young Persons Act to prohibit the reporting of English and Welsh proceedings in Scotland, but neither extends to reporting in Northern Ireland.

8.21 In the case of adults, under the provisions of the Sexual Offences (Amendment) Acts of 1976 and 1992, a complainant in a rape case and other serious sexual offences is entitled to anonymity and the press may not publish anything which is likely to lead the public to identify the alleged victim, even if that identity is revealed in open court. The prohibition on publicity may be lifted, by order of the court if, either publicity is required by the accused so that witnesses will come forward and the conduct of the defence is likely to be so seriously prejudiced if the direction is not given, or if at the trial the judge is satisfied that the imposition of the prohibition would unreasonably and substantially restrict reporting of the proceedings. This particular restriction takes effect from the point of complaint but applies in England and Wales only.

8.22 The Working Group consider that a similar provision would be a useful measure in cases where press reporting is likely to exacerbate witness intimidation. The Attorney General has, however, recently highlighted anomalies in the various existing provisions which impose reporting restrictions in respect of different aspects of criminal proceedings in that these measures take effect at different points in the criminal justice process and are not enforceable consistently throughout the United Kingdom. The Working Group has taken these concerns into account when developing its proposals.

8.23 The Working Group considers that in cases of witness intimidation (or potential intimidation) for any restriction on press reporting of proceedings in England and Wales to be effective it would need to apply to the reporting of these proceedings in Scotland and Northern Ireland as well as in England and Wales. Also, it will be necessary to provide procedures to enable an application to be made to the court for a restriction to be imposed at at any time in the process, starting from the point of complaint through to the trial itself, rather than just at the PDH or pre-trial hearing when the Group has recommended that applications for measures will

[16] *Attorney General V Leveller Magazine Ltd [1979] AC 440 [1979] 2 WLR 247, [1979] 1 All ER 745, 68 Cr App R 342.*

be determined (Recommendation 33 in Chapter 7), when the press would have the opportunity to make representations against the application. Also, to improve the effectiveness of the existing provisions and to ensure consistency of approach, the Group considered that the existing law should be amended to provide that restriction on reporting the identity of complainants in cases of rape and other serious sexual offences should be extended to apply to the reporting of English and Welsh proceedings in Scotland and Northern Ireland and the provisions relating to the reporting of the identity of juveniles should apply from the point of complaint and should apply to the reporting of English and Welsh proceedings in Northern Ireland.

Recommendation 39

8.24 The Working Group recommends that the court should have power to order that the press and media should not report details likely to lead to the identification of a witness in cases where press reporting is likely to exacerbate witness intimidation. These restrictions should apply to English and Welsh criminal proceedings reported in England, Wales, Scotland and Northern Ireland and procedures should enable an application for such a restriction to be made to the court at any time from the point of complaint through to the trial.

Recommendation 40

8.25 The Working Group also recommends that the existing provisions imposing reporting restrictions should be amended as follows:

(a) the restrictions on reporting the identity of complainants in cases of rape and other serious sexual offences which are the subject of proceedings in England and Wales should be extended to apply to the reporting of such proceedings in Scotland and Northern Ireland

(b) the restrictions on reporting the identity of juveniles should make it clear that these apply from the point of complaint and should be extended to apply to the reporting of English and Welsh proceedings in Northern Ireland.

5. Anonymity

8.26 It has been suggested that in order to protect intimidated witnesses, such witnesses should be permitted to give their evidence anonymously.

8.27 It has recently become the practice for the **address** of a witness to be removed from his or her statement(s) prior to prosecution disclosure to the defence. Moreover, unless it is necessary for evidential purposes, defence and prosecution witnesses are not normally required to disclose their addresses in open court. However, the name of the witness will naturally be known to the defendant, either because of the circumstances of the offence itself, or as a result of disclosure to the defence of the prosecution case and unused prosecution material, as part of the pre-trial process.

8.28 At the trial itself the requirement that evidence be communicated **publicly** (the second of the aspects of the principle of open justice to which Lord Diplock drew attention in the Leveller Magazine case mentioned in paragraph 8.19 above) may be waived if not to do so would frustrate or render impracticable the administration of justice. Since allowing a particular piece of evidence or other material to be communicated privately to the tribunal is a less drastic interference with open justice than conducting the whole process in camera, it is correspondingly more likely to occur in practice.

8.29 A private witness at the beginning of his or her evidence will normally be required to **state his or her full name**. The trial judge, in the exercise of his inherent jurisdiction to control the proceedings, may however permit a departure from this practice in appropriate cases.

8.30 Probably the commonest example of evidence being communicated privately - i.e. **anonymously** - during the course of the trial is where the victim of an offence of blackmail called as a witness for the prosecution is allowed to write down his name and address for the court's eyes only and thereafter be referred to by a pseudonym. The nature of this offence means that the defendant will be aware of the witness' identity.

8.31 Blackmail aside, departures from the usual practice are rare but may be used for example in terrorist cases where informers or under-cover operatives give evidence. In exceptional

circumstances the judge may permit a witness to conceal his identity entirely from the accused; whether such circumstances exist is for the discretion of the judge. In the case of *R v Taylor (Gary) [1994]*[17] the Court of Appeal held that the following factors are relevant:

a) There must be real grounds for fear of the consequences if the identity of the witness were revealed. It might not be necessary for the witness himself to be fearful, or to be fearful for himself alone.

b) The evidence must be sufficiently important to make it unfair to make the Crown proceed without it. A distinction could be drawn between cases where the creditworthiness of the witness was in question rather than his accuracy.

c) The Crown must satisfy the court that the creditworthiness of the witness had been fully investigated and disclosed.

d) The court must be satisfied that there would be no undue prejudice to the accused. There might be factors pointing the other way, for example, the use of a video screen to enable the accused to see the witness, as in the instant case, where a screen protected the witness from being seen directly from the dock.

e) The court could balance the need for the protection of the witness, including the extent of that protection, against unfairness or the appearance of unfairness.

8.32 The Working Group takes the view that the present law is working satisfactorily. It believes that in view of the importance of the right of the defendant to know who is giving evidence against him to ensure a fair trial anonymity should only be granted to witnesses in exceptional circumstances as at present. Therefore the Group decided to make no recommendation to modify the existing law in this respect.

6. Video - recorded Evidence in Chief

8.33 The Advisory Group on Video Evidence chaired by Judge Pigot was asked to examine the idea that video recordings with child victims should be readily admissible as evidence in criminal trials. In its report[18] the Advisory Group indicated that it was satisfied that the majority of children are already affected by giving evidence at trials and saw video technology as a means of enabling the courts to treat children in a humane and acceptable way. That Group took the view that two principles should be followed. First that the proceedings in which a child witness is involved should be disposed of as rapidly as is consonant with the interests of justice. Secondly, the children should give evidence in surroundings and circumstances which do not intimidate or overawe them and there should be the smallest number of people present.

8.34 The Advisory Group also recorded that they had received evidence from practitioners, psychiatrists, social workers and the police which suggest that "if an interview takes place shortly after the child's first allegation or disclosure it would usually provide the freshest account least tainted by subsequent disclosure and questioning. The Group noted that it had been established beyond dispute that children generally recall past events most accurately when subject to the least stress. It went on to comment that the "formality and solemnity of the courtroom context which are often thought to promote truthfulness by witnesses may actually have a deterious effect on the fullness and accuracy of children's testimony".

8.35 The Advisory Group concluded that "admitting video-recordings of fairly conducted interviews with child witnesses made early as possible in informal surroundings will give the courts access to an important and often crucial source of evidence".

8.36 The report recommended that child witnesses should, in cases involving violence, cruelty, neglect and sexual offence, be able to give their evidence in chief in the form of a pre-recorded interview. The report also recommended that is should be for the court to determine, at a pre-trial hearing whether a particular video-recorded

[17] *The Times, August 17, 1994 CA*

18 Op Cit. footnote 1

interview should be admitted in whole or in part. (Pigot recommendations 1 and 2).

8.37 This proposal was enacted by the Criminal Justice Act 1991 and was implemented in October 1992 in respect of the offences recommended by Pigot. A memorandum of Good Practice on the video recording of interviews with child witnesses was issued as guidance by the Home Office and the Department of Health.

8.38 As *Sanders*[19] points out the use of video-tapes evidence has the **advantage** of enabling the witness to give evidence without having to appear in open court. It also enables the statement to be taken closer to the time of the offence, when the witness' recollection is likely to be "more complete and untainted by questioning or repeated accounts of the incident". He also notes that the video enables the court to see the demeanour of the witness at the time of the interview and see gestures that were made. It can also resolve disputes over allegations of inappropriate questioning.

8.39 The **disadvantages** are that there is still a need for the witness to undergo cross-examination, either in the court itself or via a live CCTV link. *Sanders* refers to some prosecutors who take the view that using a video-tape for the evidence in chief can make the ordeal of cross-examination more difficult as the witness has not been "warmed-up" by a friendly prosecution barrister before being cross-examined on their testimony.

8.40 An evaluation of the measures for child witnesses was undertaken on behalf of the Home Office by Graham Davies and a team from Leicester University between October 1992 and June 1994. The report[20] showed that judges, barristers, police officers and social workers all believed that the main benefit of allowing video-taped evidence in court was the reduced stress on child witnesses. During the period of the research 1199 trials took place in England and Wales involving child witnesses. From these, there were 640 applications to show video-tapes interviews. 470 applications were granted, but only 202 videos were known to have resulted in the video being shown in court.

8.41 In the sample of cases considered by *Sanders*, video evidence was disallowed in all three cases involving child witnesses; one because of technical problems on the day of the trial; the second because the court was not prepared to admit the video tape without a transcript (which was not forthcoming) - the tape was of insufficient quality without one, and the third was rejected because the interviewer had asked leading questions in breach of the Memorandum of Good Practice.

8.42 The Crown Prosecution Inspectorate published a report[21] in January 1998 on its thematic review of cases involving child witnesses. This states that the quality of video evidence has steadily improved, both technically and in terms of interviewing skills. However, despite this, the Inspectors found that video interviews regularly require editing. This occurred in 54.3% of cases on file samples which were listed for trial and were invariably instigated by the defence or the court. This resulted in some child witnesses not benefiting from the measures available to them.

8.43 The Home Office has commissioned further research into the admissibility and sufficiency of evidence in child abuse prosecutions, including the need for legislative reform. This work is being undertaken by a team from Bristol University and is due to be completed in the summer of 1998. This should provide useful data on how the existing child evidence provisions can be improved.

8.44 While recognising that there may be room for improvement in the way interviews are conducted, the Working Group considers that video taped evidence in chief would be a useful measure to assist those adult vulnerable witnesses who would be particularly distressed by having to give evidence in the formal court setting and who may have memory difficulties or suffer from communication problems, such as those with learning disabilities.

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[19] *Op Cit. footnote 2*

[20] *Davies G, Williams C, Mitchell R and Milson J (1995) Video Taping Children's Evidence: An Evaluation. London: Home Office*

[21] *Crown Prosecution Service Inspectorate (1998): The Inspectorate's Report on Cases Involving Child Witnesses - Thematic Report 1/98 London: Crown Prosecution Service Inspectorate*

8.45 The Working Group acknowledges that it could be argued that those who are vulnerable for other reasons may also benefit from the videoing of their statement but considered it necessary to take account of several factors.

8.46 The use of video-taped evidence in criminal proceedings is both time consuming and costly. Time is needed to arrange and tape the interview and all those involved in the process at a later stage (the CPS, defence and the judge) need time to watch the video. Time and resources are also needed to edit the video when necessary and to provide transcripts. The witness will need an opportunity to watch the video before being cross-examined and the jury will need time to watch the video, in place of the examination in chief.

8.47 Since a video-recorded interview would not be necessary to assist all vulnerable witnesses, the Working Group concluded that the investigation would need clear guidance on which group of witnesses should be given priority and therefore it should only be available, in the first instance, for use in the case of witnesses falling within category (a), and particularly those who demonstrate the needs discussed in paragraph 8.44 above. However, the Group considered that it was desirable to leave open the possibility, at some time in future and in the light of experiences of extending the availability of this measure to witnesses who meet the criteria for category (b) in the definition.

Recommendation 41

8.48 Video recorded interviews conducted by police officers, social workers or those involved in the investigation of crime and/or appropriate defence representative should be available in the first instance for those vulnerable or intimidated witnesses that meet the criteria for category (a) in the definition in Recommendation 1 (paragraph 3.29) and should be admissible as evidence. Videos should be recorded in accordance with an updated memorandum of good practice. Such evidence should be admitted as the witness' evidence in chief.

Recommendation 42

8.49 Once this measure is in place, consideration should be given by the Government to extending its availability to vulnerable or intimidated witnesses who meet the criteria for category (b) in the definition in Recommendation 1.

7. Cross-Examination

8.50 There are concerns that witnesses feel intimidated by cross-examination by defence counsel, particularly when the manner of questioning is perceived to be aggressive. Some people with learning disabilities are caused particular problems by adversarial examination which can result in unreliable testimony. This can be exacerbated in cases involving multiple defendants who are separately represented.

8.51 The trial judges have a common law duty to restrain unnecessary or improper or oppressive questions. In the case of *Mechanical and General Inventions Co. Ltd. v Austin* [1938] AC346, the Court held that cross-examination should be conducted with restraint and a measure of courtesy and consideration. The Bar's Code of Conduct also regulates the conduct of cross-examination. This states that a barrister "must not make statements or ask questions which are merely scandalous or intended or calculated only to vilify insult or annoy either a witness or some other person" (para 610(e)).

8.52 In Annex H, paragraph 13.5 the Code states "A more difficult question is within what limits may counsel attack the evidence for the prosecution either by cross-examination or in his speech to the tribunal charged with the decision of the facts. No clearer rule can be laid down than this, that he is entitled to test the evidence given by each individual witness and to argue that the evidence taken as a whole is insufficient to amount to proof that the defendant is guilty of the offence charged. Further than this he ought not to go".

Recommendation 43

8.53 The Working Group takes the view that witnesses are performing a public duty and should be treated with dignity and respect when giving evidence in court. While recognising the need to ensure that defence counsel is able adequately to test the evidence against their client, the Group recommends that the Lord Chief Justice should be invited to consider issuing a Practice Direction giving guidance to barristers and judges on the need to disallow unnecessarily aggressive and/or inappropriate cross-examination.

Recommendation 44

8.54 In the case of multi-defendant cases, in order to reduce the trauma of repeated examination on the same points, the Working Group recommends that, once a particular point has been made during cross-examination counsel for the co-accused should be encouraged to consider saying "I adopt the challenge of previous counsel on point x but wish to question you on additional point y.

8. Video recorded pre-trial Cross Examination

8.55 *Pigot* recommended, in the case of children, that a video-recorded preliminary hearing should be held in informal surroundings out of court, as soon as practicable after the video interview had been admitted as evidence. The child witness would be shown the video and asked to adopt the account which it contains and expand upon any aspects which the prosecution wishes to explore. The defence should then have the opportunity to cross-examine the child, but with the accused observing only by CCTV or two way mirror. (Pigot Recommendation 4). The jury would be shown both the video interview and the video and cross-examination. Any further cross-examination of the child would take place under the same conditions.

8.56 This recommendation has not been implemented. It has been argued that pre-trial cross-examination would not remove the need for further cross-examination by the defence at the trial and might add to the child's distress in having to go through the cross-examination on more than on occasion. However, the recently published Utting Report[22] recommends its implementation in respect of children.

8.57 *Sanders* argues that the introduction of videoed pre-trial cross-examination in combination with videoed evidence in chief would enable the questioning of the victim to take place at an early stage, while the evidence is still fresh in their mind and reduce the stress of waiting for a court appearance. This measure avoids the need for the witness to appear in court and "avoid the difficult and sometimes humiliating process of being questioned and cross-examined in open court". But *Sanders* does recognise the problem of the risk of recall for further cross-examination which would add to the distress of the witness. For example this could result in the witness being cross-examined about inconsistencies between the evidence given on the videoed-evidence in chief and the videoed cross-examination. In addition, new disclosure provisions introduced in April 1997 by the Criminal Procedures and Investigations Act 1996 might result in the defence waiting until it has reviewed material disclosed by the prosecution under both primary and secondary disclosure, viewed the original video recording, and taken instructions before being able to come back for cross-examination. This might result in the defence only being in a position to cross-examine shortly before the trial. Also as with the listing of that there may be problems in finding suitable times for all parties to come together for the pre-trial cross-examination.

Conclusion

8.58 Of the two possible benefits arising from introducing videoed pre-trial cross-examination, the Working Group considered that the main one was enabling the witness to give evidence away from the court room. The Group recognised that it might not be possible to arrange for the cross-examination to take place early in the process, thus benefiting from freshness of memory. While recognising the difficulties, the Working Group considered that there may be some adult vulnerable witnesses who would be assisted by such a measure. To limit the possibility of further cross-examination after a videoed pre-trial cross-examination, the Working Group proposes that

[22] *Utting, Sir William (1997) "People Like Us" The Report of the Review of the Safeguards For Children Living Away From Home. London: Department of Health and The Welsh Office*

the law should be amended to provide that there should be a rebuttable presumption that there will be no further cross-examination unless certain criteria are met.

Recommendation 45

8.59 The Working Group recommends that video recorded pre-trial cross-examination should be available for use in appropriate cases where the witness has had their statement recorded on video and could particularly benefit from cross-examination outside the court room. In such cases, any further cross-examination should also be conducted on video away from the court room.

Recommendation 46

8.60 Once video recorded pre-trial cross-examination has taken place, there should be a rebuttable presumption that no further cross-examination will be permitted unless:

> new material comes to light after the initial cross-examination, which could not have been ascertained with reasonable diligence by the party seeking to re-open cross-examination and which is likely to be material to the overall evidence given by the witness.

9. Communication

Interpreters and Communication Aids

8.61 In order to give best evidence some witnesses may need assistance in communication during their examination and cross-examination. In the case of language problems, common law allows the use of **interpreters** for witnesses with a poor or no understanding of English. The TIG witness care sub-group is currently preparing guidance on the use of interpreters in criminal investigations and proceedings which will provide a standardised procedure for arranging interpreters for defendants and witnesses in England and Wales. A national register of suitable trained and qualified public service interpreters has been set up following work by the Nuffield Foundation with Home Office/LCD assistance, and is administered by the Institute of Linguists. The aim is that by 2001 all interpreters working in the courts and police stations will be selected from the register. Interpreters may also be provided for deaf witnesses, or those suffering from illnesses which limit their ability to communicate.

8.62 Apart from these well recognised uses of interpreters, the general public, including the police, legal profession, judiciary and the courts have very little knowledge and awareness of the different types of communication problems experienced by vulnerable or intimidated witnesses and the methods that can be used to overcome these.

8.63 So far as the criminal justice process is concerned, the Working Group has been advised that when a witness has a communication problem, it would not be appropriate to introduce them suddenly to a new communication technique or aid of some kind. This is because the witness will need to be trained to use the technique and experienced in using it.

8.64 Therefore, the police and the courts will need to use the means of communication currently being used by the witness. This may involve the use of a particular form of sign language; the assistance of an interpreter or carer, and/or a communication device or aid. It is important that information about the needs of the witness or assistance in communication is passed by the police to the prosecutor and that the court is made aware of what means will be needed in the court room to enable the witness to give their best evidence.

Intermediary/Communicators

8.65 *Pigot* recommended, by a majority, that in the case of child witnesses the court should have discretion to order exceptionally that questions advocates wish to put to a child should be relayed through a person approved by the court who enjoys the child's confidence. (Pigot recommendation 6).

8.66 Paragraph 2.32 of *Pigot* makes it clear that this measure was considered in the context of special arrangements being made for the examination of very young or disturbed children at a preliminary hearing, if the judge considered it appropriate. The report suggests that the questions are relayed through a paediatrician, child psychiatrist, social worker or person who enjoys the child's confidence. " In these circumstances nobody except for the trusted party would be visible to the child, although everyone with an interest would be able to communicate, indirectly, through the interlocutor."

8.67 Thus the objective behind this recommendation was to assist very young or disturbed children not only avoid the experience of attending court (through the use of the preliminary hearing) but also to shield them from direct contact with anyone participating in the trial, including the judge. Presumably the aim was also to assist in communicating with the child by translating words and phrases used by counsel into simpler language and concepts that the child would find easier to understand.

The Western Australian Experience

8.68 In Western Australia, the legislation gives the court discretion to appoint a person to act as a communicator for a child under 16 years to explain to the child, put evidence to the child, and explain to the court the evidence given by the child. An evaluation of the Western Australian legislation by Celia O'Grady[23] showed that during the period of the study a child communicator had been used only once. The study indicates that the use of the child communicator was intended for use with very young witnesses, or for witnesses with intellectual disabilities which limit their ability to understand or answer questions. The intention behind the legislation was that the communicator would assist the witness to understand the questions asked by the court, and assist the court to understand the witness' answers.

8.69 Judges were asked their views on the use of this provision and their responses were divided. Four of the eight interviewed were strongly opposed because of the risk of evidence being distorted by the process. Three of these four judges thought it was the responsibility of the judge and/or counsel to make sure that the witness understood the questions and the court understood the answers. Even those judges who supported the use of child communicators were aware that the role was still unexplored and needed to be approached with caution.

8.70 The research confirmed earlier studies on the complexity of some of the language used in court and its effect on young witnesses. Some counsel, particularly defence counsel, were perceived by observers in trials to have made little effort to adjust their language to the developmental level of the child witness. Witnesses found it especially difficult when they were cross-examined on discrepancies between their statement to the police and the evidence they gave at the trial. The distinction between "memory of the event" and "memory of what you said to the police" was very confusing for them, particularly with the time delay between event, statement, and trial.

8.71 The report goes on to comment that the adverse effects of the using language which is too difficult for witnesses extend past the immediate problems of taking up trial time and having witnesses misunderstand questions. It was considered that in the longer term, difficult language leaves many young witnesses with a sense of having been treated unfairly by the justice system.

8.72 The report recommended that information should be provided to judges and counsel, to assist their understanding of the role of the child communicator.

8.73 The proposed function or role of a communicator or intermediary to assist children in criminal proceedings can be compared with that of an interpreter for those who do not speak English or those who are disabled in some way such as the deaf or those with speech problems. The intermediary could explain questions which are put to the witness by counsel who use complex language. The **advantages** of such a measure are that an intermediary who has empathy with the witness may help to improve the quality of the evidence given, save court time and diffuse the pressure of cross-examination on the witness. The **disadvantage** is that the intermediary/communicator would need to be skilled in relaying questions in a precise way so as not misrepresent counsel and avoid any suggestion of bias. However, the court would hear the original answers and could disregard any attempt by the intermediary to present the answer in a different way.

8.74 It could be argued that barristers and judges should be trained to communicate better with such witnesses but the Working Group considers that this should be regarded as an additional measure, not as an alternative to the use of an intermediary. Training of the profession and the judiciary is considered in Chapter 12 below.

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[23] *O'Grady, C (1996) Child Witnesses and Jury Trials - An Evaluation of the Use of Closed Circuit Television and Removable Screens in Western Australia, Ministry of Justice*

8.75 The Working Group considers that there may be adult vulnerable witnesses with language and comprehension difficulties who could also benefit from the assistance of an intermediary in relaying questions to the witness. However, the Working Group had reservations about the role of an intermediary in interpreting the witness's reply to the court i.e. explaining to the court concepts used by the witness which is similar to the role of an expert witness. Although the court would have the benefit of also hearing the witness's own answers. The **advantage** of this role would be to ensure that the court did not misunderstand the witnesses' answers by enabling it to take into account the witnesses' thought processes and understanding of the world. However, this might possibly involve the intermediary/ communicator putting supplementary questions to the witness, of their own volition, in order to clarify the reply. The **disadvantage** of this aspect of the role is that highlighted by the judges questioned in the Australian research i.e. the risk of evidence being distorted- the fine line between the witness giving the evidence and only being assisted to do so on the one hand and, on the other, the intermediary/communicator giving the evidence or at least their interpretation of the witnesses' evidence.

Conclusion

8.76 The Working Group considers that where it is necessary to enable a witness give their best evidence, assistance in communication should be provided by the court. This may involve the use of an interpreter or a communicator or intermediary, provided that the means of communication can be independently verified. In the case of a communicator or intermediary, in view of the novel nature of the role, it will be necessary to develop a scheme for accrediting on the basis of agreed criteria.

Recommendation 47

8.77 The Working Group recommends that the courts should have statutory power to require the use of means to assist the witness communicate; whether through an interpreter, a communication aid or technique, or communicator or intermediary where this would assist the witness to give their best evidence at both any pre-trial hearing and the trial itself, provided that the evidence communicated can be independently verified.

Recommendation 48

8.78 The Working Group recommends that the Trials Issues Group, Witness Care Sub-group should take forward the development of a scheme for the accreditation of communication/ intermediary, including drawing up appropriate criteria.

10. Removal of Wigs and Gowns

8.79 The presence of counsel and judges in their wigs and gowns can be, although not always, an intimidating element of court proceedings. The court has discretion to order that wigs and gowns should be removed and this has often been exercised in cases involving child witnesses. The Working Group considers that this would be a useful measure to assist vulnerable adult witnesses provided that the witness' views are taken into account. It may be that the witness, having seen wigs and gowns worn in courtroom scenes on TV, may expect these to be worn and prefer them to remain.

Recommendation 49

8.80 The Working Group recommends that the court should have statutory power to require the removal of wigs and gowns when the court considers that this will assist a vulnerable witness give their best evidence.

11. Escorts

8.81 Paragraph 9.2 of the Statement of National Standards of Witness Care require the prosecution, at the time of the first review of the file to inform the court of any special needs that the witness may have, including the presence of a support worker in court.

Recommendation 50

8.82 The Working Group recommends that in addition consideration is also given to the need to provide an escort for the witness to and from the court.

12. Separation of Prosecution Witness from the Defendant

8.83 One source of intimidation in the court building can be the proximity of prosecution witnesses to the defendant and his supporters when both are waiting to go into the court room itself. Paragraph 16.1 of the Statement of National Standards of Witness Care states that "Courts should, where possible, have separate waiting accommodation for defence and prosecution witnesses. Where this is not possible, the defence or the prosecution, in cases where witnesses are at risk of being intimidated, should make an application to the unit for special separate accommodation arrangements for the witnesses, for example, the temporary use of court office space and the use of entrances and exits that are not usually available to the public".

8.84 The Working Group endorses this approach, but recognises that the physical layout of the building may make it impossible to provide such separation, and that alternative approaches to the problem may need to be adopted, such as the use of pagers.

Recommendation 51

8.85 The Working Group recommends that consideration is given to the use of pagers so that witnesses can wait outside the court building and be called only when they are needed to give evidence.

13. Witness Box

8.86 In the court room, witnesses may be intimidated by the presence of the defendant's supporters in the public gallery.

Recommendation 52

8.87 The Working Group recommends that further consideration is given by courts to re-locating the witness box so that the witness cannot be directly observed from the public gallery.

Chapter 9: **Further measures in relation to rape and other serious offences**

Introduction

9.1 As suggested in Section 4 of the Literature Review, there are certain offences where the victim or witness may be regarded as vulnerable. This applies particularly to serious sexual offences, including the offence of rape. The offence itself is often a traumatic experience for the victim who is likely to need to be treated with care and sensitivity both at the investigation stage as well as at the trial itself. Indeed, the giving of evidence of an intimate nature in a public court room, and being subjected to cross-examination is likely to be an intimidating experience for the majority of such victims.

9.2 As the Literature Review records, sexual offences account for a very small proportion (less than 1%) of all alleged offences recorded in England and Wales. The number of sexual offences recorded has risen at a similar rate to recorded crime as a whole (about 3% a year since 1986) but the number of rapes recorded by the police has increased almost three times. At the same time, the conviction rate for rape has fallen from 24% in 1985 to 9% in 1996. Research commissioned by the Home Office into the reasons for the increasing attrition rate for rape is due to be completed later this year but initial findings suggest that this might be related to a large proportion of rapes involving intimates (date rape) being reported and these offences tend to be more difficult to prove than those involving strangers.

9.3 Most sexual offences are committed by men against women - in 1996 over 11,000 men were prosecuted for such crimes whereas in the same year about 100 women were prosecuted for such offences. However, there has been increasing recognition of men as victims with the creation of the offence of male rape in the Criminal Justice and Public Order Act 1994.

9.4 The definition of vulnerable or intimidated witnesses proposed by the Working Group includes a rebuttable presumption that a victim who is a witness for the prosecution for offences of rape and other serious sexual offences should have special measures made available to them (Recommendation 1, paragraph 3.29 above). Many of the measures already recommended by the Working Group in Chapter 8 to assist vulnerable or intimidated witnesses in general will assist victims of rape and sexual abuse, for example, live CCTV links, screens, curbs on aggressive cross-examination and cross-examination in multiple defendant cases. But the need for further measures particularly to assist such witnesses was put to the Working Group by organisations such as Rape Crisis Centres and Victim Support.

Investigation Stage

9.5 In 1996, the Home Office issued guidance to the Police in the form of a Circular (HOC 69/1986) on the treatment of victims of rape and domestic violence. This is attached at Appendix A to this Chapter. The Circular was issued in response to a report on violence against women by the National Women's Commission and covers issues such as facilities for examining victims, information for victims and police training.

Examination facilities

9.6 The Circular states that Chief Officers may wish to consider whether the provision of special victim examination suites is justified in their area. If it is not justified, the Circular suggests that Chief Officers may wish to consider approaching local health authorities to discuss the scope for making arrangements in hospitals for the medical examination of complainants; or alternatively making arrangements with local GPs. Where dedicated victim examination suites are provided, the Police Buildings Design Guide includes guidance on the facilities to be provided. Victim Support state in their survey that not all women were offered such facilities. The Working Group has no comparable information on the position of male rape victims.

9.7 While the Working Group understands that every police force has access to a victim

examination suite, there may be travel difficulties in some areas. Also, there may be benefits in developing the provision of such facilities in local hospitals.

9.8 The Working Group also understands that the minimum standards of accommodation set out in the Design Guide are not always met, because of practical considerations such as shortage of accommodation and that sometimes the same facilities are used to examine both suspects and victims. This issue is currently being considered by the Home Office led Working Group on Police Surgeons, but this Working Group considers that it is important that separate examination facilities should be available for suspects and victims and that child victims of sexual offences should also be provided with separate examination rooms.

Recommendation 53

9.9 The Working Group recommends that Chief Officers of Police, in consultation with the NHS and relevant local voluntary organisations should review the provision of examination facilities in their force area in respect of both female and male complainants in relation to both the availability and standard of facilities and with a view to providing separate facilities for the examination of suspects and victims.

Victim examination

9.10 It has been put to the Working Group by some organisations that, in the case of women victims, there can be problems in securing an examination by a female doctor. While a female doctor can be made available, the Group has been told that there may be a delay in securing the attendance. This means that a female victim may be told that she has the choice of seeing a male doctor immediately or await several hours to be examined by a female doctor. This is not regarded as a reasonable choice. The Working Group is not aware of the views of victims of male rape on this point.

9.11 The Working Group on Police Surgeons has also been considering this issue. This Working Group understands that their provisional views are that the gender of the doctor carrying out the examination should be a matter of choice for the victim but that this should not preclude the victim being offered a more experienced doctor of the opposite sex.

Recommendation 54

9.12 The Working Group recommends that victims (both male and female) of rape or serious sexual offences should have a realistic choice of being examined by a female doctor.

9.13 A Rape Crisis Centre suggested that in the case of female victims, specialist women's groups should be able to collect medical evidence. However, the Working Group concluded that this would raise significant issues for disclosure of information to the defence and risks of contamination of the evidence.

Police Reception Areas

9.14 It was also suggested to the Working Group that, in the case of female rape victims, women only reception areas should be provided at police stations and that women officers should conduct the interview. However, the Working Group understands from ACPO that most rape cases come to the police as a referral from another agency, rather than the victim attending the police station in the first instance.

Support for Victims of Rape and Serious Sexual Offences

9.15 Various suggestions have been made to the Working Group to improve the support provided for victims of rape and sexual assault offences.

Contact

9.16 To assist the victim obtain advice and support, it has been proposed that a single contact point should be provided. At present Victim Support and the police fulfil this function but Victim Support believe that there is potential for conflict between their role and that of the police who have an investigative function.

9.17 The Working Group considers that there should be a clear boundary between the roles of the police and other organisations and agencies. The police are best placed to provide information to the victim about the progress of the case and a single contact point would be helpful for this purpose. The provision of information to victims in general is discussed in Chapter 6 above. However, as a rape victim may require long term support once the criminal proceedings are over, the provision of such advice and support both before and after the trial might best be carried out by the same agency and the Working Group

considers that this should be undertaken by an organisation other than the police.

Recommendation 55

9.18 The Working Group recommends that in the case of victims of rape or serious sexual offences pre and post-trial support should be provided by an agency other than the police, such as Victim Support.

The Trial

Severing of Indictments

9.19 In cases involving defendants who are charged with more than one rape offence, where all the charges are found in one indictment, the defence will often seek to have each charge tried separately. It is argued that a jury presented with the evidence of one rape charge is likely to take a different view of the defendant's credibility if they were aware that he had been charged with several offences. There is concern that some defendants are securing acquittals for a series of offences, which, if tried together, might result in a different verdict.

The legal position

9.20 The indictment is the document containing the charges against the accused when he is tried in a Crown Court. An indictment may contain one charge or several charges, provided these conform to the rules governing the joining of counts. Rule 9 of the Indictment Rules 1971 states that: "Charges for any offences may be joined in the same indictment if those charges are founded on the same facts, or form or are part of a series of offences of the same or similar character."

9.21 Where an indictment contains several charges under section 5(3) of the Indictments Act 1915, the court has discretion to order a separate trial and thus sever the indictment in certain circumstances "where, before trial, or at any stage of a trial the court is of the opinion that a person accused may be prejudiced or embarrassed in his defence by reasons of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such an indictment."

9.22 The Working Group recognised the concerns which have led to this practice being criticised in serial rape cases. However, the rule on severing indictments applies to all offences, not just rape. The Group noted that there was criticism of this rule in the context of serious and complex fraud trials. Also Chapter 20 of the Utting Report "People Like Us"[24] recommends that in cases of child abuse, severance of cases should only be allowed if requested by the prosecution.

9.23 The Working Group has concluded that the rule on severing indictments should be examined but that this should involve consideration of the issue as a whole and not just in respect of rape offences. Since this is beyond the review's terms of reference, the Working Group considers that such a review should be undertaken separately.

Recommendation 56

9.24 The Working Group recommends that the present rule on severing indictments should be reviewed as a whole, taking into account concerns about the effects of severing indictments in the case of multiple allegations of rape and sexual offences against children.

Clearing the Court

9.25 While the court room as a whole can be perceived as an intimidating place, the presence of the defendant's supporters in the public gallery and other members of the public can make the experience of the witness giving evidence more difficult. This especially arises in cases involving rape, or serious sexual assault where evidence of an intimate nature is being given in public.

9.26 In England and Wales, courts have discretion to order that all or some of the evidence be given *in camera* without the press being present but this is rarely exercised in view of the principle of open justice. In Scotland, clearing the public gallery routinely takes place in rape trials. The Crown Office view is that Scottish legislation does not breach Article 6 of the European Convention on Human Rights. The Working Group believes that the measure should also be available on a more routine basis in England and Wales.

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24 Op Cit. footnote 22.

Recommendation 57

9.27 The Working Group recommends that the courts should have the power on a statutory basis to clear the public gallery in cases where the victim is giving evidence in a trial for an offence of rape, serious sexual offences and cases involving Tier 1 witness intimidation. While the press should normally be permitted to remain, the court would be able to accompany this order with a reporting restriction (Recommendation 39, paragraph 8.24).

Personal cross-examination by the defendant

9.28 As indicated in Chapter 1, one of the concerns which prompted the review was the Ralston Edwards rape case in 1996 when the defendant, who was not legally represented, cross-examined the victim for several days. This caused her great distress, forcing her to relive the ordeal a second time. The Working Group was asked to consider ways of preventing this from happening in the future.

9.29 The Working Group noted that the evidence suggests that only a small number of defendants are unrepresented in the Crown Court but a number of recent cases which have been given publicity are a cause for concern and it may be that such publicity may be influencing other defendants to seek to cross-examine in person.

9.30 The Working Group considered that the trauma caused to a complainant being cross-examined in a rape case by a defendant arose from two factors. First the manner and nature of the questioning and secondly, the fact that the defendant was asking the questions.

9.31 In the case of the first factor, cross-examination in general is considered in Chapter 8 (paragraph 8.38 - 8.42). As indicated in that Chapter, under common law, the trial judge has discretion to prevent any cross-examination which, in his opinion, is unnecessary, improper or oppressive. In the case of *R v Kalia and others*[25] the Court of Appeal held that a judge should do his utmost to restrain unnecessary cross-examination. Although counsel should not be deterred from doing his duty, counsel for the defence should exercise a proper discretion not to prolong the case unnecessarily. It is not part of his duty to embark on lengthy cross-examination on matters which are not really in issue.

9.32 Where a defendant is unrepresented, the court will, as a matter of practice, seek to give him appropriate assistance in conducting his defence. The court has inherent power to prevent its process being abused by the defendant, but in the 1988 case of *R v Morley*,[26] the Court of Appeal held that, that power is to be exercised exceedingly sparingly and only in an obvious case. Thus, in practice, where a defendant is unrepresented, the trial judge will usually allow more latitude in cross-examination to avoid providing grounds for a successful appeal on the basis that the defendant was not permitted to defend himself adequately.

9.33 The Working Group considered that while further guidance to judges might assist in curbing, to some extent, the manner of questioning by an unrepresented defendant, the real problem is caused by the very fact that the alleged perpetrator is asking the questions, and seeking to re-live the experience. For example, in the Ralston Edwards case, he wore the same clothes in court that he wore at the time of the rape. In these circumstances, the Working Group examined ways of preventing an unrepresented defendant from engaging in cross-examination.

Basic rights of the defendant

9.34 Since this particular measure is likely to have a considerable impact on the defendant, the Working Group took account of the rights of the defendant to a fair trial and to test the evidence against him, through cross-examination of prosecution witnesses or calling his own witnesses. He also has the right to choose to defend himself either in person or through legal assistance of his choosing. There are also basic rights under Article 6.3 of the European Convention for the Protection of Human Rights to a fair and public trial including the right of an accused, "to defend himself in person or through legal assistance of his own choosing ....., to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;...." However, in the ECHR judgement in the case of *Croissant v Germany*[27] the

[25] *R v Kalia and Others, [1974] 60 Cr App. R 200 CA*

[26] *R v Morley [1988] Q.B 601, 87 Cr App R 218. CA*

[27] *Croissant v Germany judgement of the court dated 25 September 1992, Series A Volume 237.*

court held that a requirement of German law that a defendant must be legally represented was compatible within Article 6.

Cross-examination of child witnesses

9.35 An exception to the right of a defendant to personally cross-examine witnesses is provided by section 34A of the Criminal Justice Act 1988 (as amended by Criminal Justice Act 1991) which automatically prohibits the defendant from personally cross-examining child witnesses where he has been charged with offences involving sex, violence or cruelty. However, there is at present no legislation clarifying procedures to be invoked where a defendant refuses to accept legal representation in these cases and little information on how this problem has been addressed. The Working Group was aware of one case[28] in which the judge put the questions to the witness on behalf of the defendant and another where no cross-examination took place as the defendant refused the judge's help.

Options

9.36 The Working Group considered several different approaches to the problem:-

1. A mandatory prohibition on defendant cross-examination, as in the case of child witnesses.

2. A presumption that the defendant cannot personally cross-examine a witness, unless the witness agrees to the cross-examination.

3. A rebuttable presumption that cross-examination by an unrepresented defendant should be prohibited, but with the judge having discretion to permit this to proceed, after taking into account certain factors.

4. It should be left to the Judge's discretion to determine whether an unrepresented defendant should be permitted to cross-examine a witness, subject to guidance, e.g., an overriding interest of justice criterion.

5. A combination of options.

9.37 The Working Group considered that while the views of the victim were very important, option 2 might increase their vulnerability and liability to intimidation if the decision on whether defendant cross-examination should be permitted was vested in them alone. The difficulties with option 3 and 4 were that giving the court's discretion in every case could lead to inconsistencies in decisions. Therefore, the Group favoured the first option, a mandatory ban, since this would provide the greatest reassurance and certainty to the witness and be consistent with the approach adopted in respect of child witnesses.

9.38 However, the Group also concluded that in recognition of the impact such a measure would have on the defendant's rights, the mandatory ban should be limited to cases which are the cause of most concern. That is those that are likely to involve cross-examination of a personal and intimate nature which, if conducted by the defendant is likely to be traumatic and distressing for the victim. Thus the Group propose that this complete ban should be confined to the cross-examination of witnesses who are **victims** in trials of rape and serious sexual assault.

Recommendation 58

9.39 The Working Group recommends that there should be a mandatory prohibition on unrepresented defendants personally cross-examining the complainant in cases of rape and serious sexual assault.

9.40 The Working Group also accepted that there may be other witnesses to these particular offences and also complainants and witnesses in respect of other offences who might also be intimidated and distressed by defendant cross-examination. The Group did not consider that a mandatory prohibition on defendant cross-examination was warranted, as circumstances could vary considerably from case to case (such as in prosecutions under the Protection from Harassment Act 1997). However, the Group concluded that the courts should have discretion to impose a ban in respect of witnesses and in relation to other offences on receiving an application and after taking into account various factors, including the interests of justice and the views of the witness.

[28] *R.v.De Oliveira (CLR 1997).*

Recommendation 59

9.41 In the case of other witnesses and other offences, especially those where intimidation is an important factor such as stalking, the Court should have discretion to impose a prohibition on defendant cross-examination. When considering an application from the prosecution the Court should take into account the following factors:

- the consent of the witness
- the interests of justice
- the questions to be asked/ facts at issue/ line of defence
- the conduct of the accused
- the relationship between the witness and the accused.

9.42 The Working Group went on to consider what procedures should be put in place where an unrepresented defendant is prohibited from conducting cross-examination.

9.43 The Working Group took the view that ideally all defendants should be legally represented and that in his own interests an unrepresented defendant should be encouraged to seek representation for the whole of his trial when facing serious criminal charges. But, if the defendant refuses to be represented for the whole of his trial, the victim has a right not to be traumatised by the cross-examination process. Therefore, as a pre-requisite for any prohibition on defendant cross-examination, the defendant should be able to obtain legal representation for cross-examination purposes only, without having to contribute financially. The defendant would be free to conduct the remainder of his case himself.

Recommendation 60

9.44 The Working Group recommends that where an unrepresented defendant is prohibited from personal cross-examination he should be granted legal aid, without means testing, to obtain legal representation for cross-examination purposes only.

9.45 The Working Group recognised that in view of a barrister's professional duty to put the case on behalf of his client, there may be difficulties for counsel in conducting cross-examination only. However, information about the general line of defence should be available from the defence statement which is required to be produced in indictable cases under the provisions of section 5 of the Criminal Procedure and Investigations Act 1996.

Recommendation 61

9.46 Consideration also should be given to including in legislation a provision which indicates that in these circumstances a barrister appointed to conduct cross-examination only, would be expected to proceed regardless of his professional duty to put the whole case.

9.47 The Working Group went on to consider the options for approaching the situation where a defendant refuses legal representation both for the conduct of his case as a whole and for cross-examination purposes only.

9.48 The Working Group accepts that, as a matter of principle, it is highly desirable that the defendant's case should be put to the complainant; otherwise it will be difficult for a jury properly to evaluate the evidence. The defendant should not be able prevent his case being put as the proceedings do not 'belong' to him. Failure to provide the judge with discretion to assess whether it is necessary in the interests of justice for the defendant's case to be put in such circumstances may breach Article 6 of the European Convention on Human Rights.

9.49 Having accepted this principle, the Working Group considered various ways in which the cross-examination of the complainant might take place where a defendant refuses legal representation.

9.50 The Working Group considered whether judges should be expected to carry out the role of testing the evidence on behalf of the defendant by cross-examining the witness. This is the current position in the case of unrepresented defendants in child witness cases. However, the judge's role is an impartial one, to ensure that there is a fair trial and essentially to "hold the ring" between the prosecution and defence. The Working Group was reluctant to suggest that a judge should step down from the role and "enter the affray" in this way. This may not be acceptable to the defendant and it may have an adverse effect on the jury.

9.51 The use of a 'Mackenzie Friend' or a lay adviser to cross-examine the witness was considered but the Group concluded that this might cause further problems. For example, the defendant might choose someone who was more likely to hamper his case, than help him with it. At worst, the defendant might choose someone who was even less suitable than himself, such as convicted rapist who might subject the victim or witness to a worse ordeal than the defendant himself might have done.

9.52 The Working Group has also considered the possibility of the court approving an "amicus curiae" to conduct the cross-examination on behalf of the defence. However, this was rejected by the Court of Appeal in the unreported case of *R v Brett Mark Miller* in a judgement dated 21 March 1997. In that case involving an unrepresented defendant in a child witness case, the trial judge had rejected the suggestion that an amicus should be appointed. The Court of Appeal, in supporting the judge stated "... we do not consider that it would have been appropriate in this case for an Amicus Curiae to have been appointed at the trial. It must be borne in mind that an Amicus is there to assist the court, usually on points of law, and is not counsel for the defendant. He would not take instructions from the defendant and would not cross-examine the witness on his behalf."

9.53 The Criminal Procedure (Insanity) Act 1964, however, provides a precedent for the court to appoint someone to put the defendant's case where he is unrepresented. Where it has been determined by a jury that someone is under a disability and is unrepresented section 4A of the 1964 Act (as inserted in 1991) empowers the court to appoint a person to put the case for the defence. The Working Group takes the view that someone who wilfully refuses legal representation either for the conduct of his whole case, or for cross-examination purposes only, has placed himself under a disability and considers that a similar procedure to that in the 1964 Act should be available in a scheme to prohibit defendant cross-examination.

Recommendation 62

9.54 The Working Group recommends that where a prohibition on defendant cross-examination applies automatically, or has been imposed at the discretion of the court and the defendant refuses legal representation either for the conduct of his whole case or for cross-examination purposes only, the court should have discretion to assess whether it is necessary in the interests of justice for the defendant's case to be put and, if so, have power to appoint a person to undertake this task.

Procedures

9.55 The Working Group considers that ideally, an application for an unrepresented defendant should be considered at the PDH in accordance with the procedures recommended in Chapter 7. However, the Group recognises that while a defendant may begin the criminal proceedings with legal representation, he may become unrepresented at any stage in the process, including the trial itself. Therefore, any procedures for either dealing with the implications of a mandatory ban, or for making and considering an application for a discretionary prohibition on cross-examination would need to be sufficiently flexible to permit this to take place shortly before the trial or even during the trial itself. Any such procedures would need to ensure that any delay to the proceedings were minimised, as far as possible.

Cross-examination of Rape Victims on Previous Sexual History

9.56 Concerns have been expressed for some time about the practice of the courts in permitting complainants in rape cases to be cross-examined on their previous sexual history. The Working Group has considered this issue against the background of evidence of a high attrition rate in rape cases.

9.57 A research study on this subject is currently being conducted on behalf of the Home Office. An interim report published in November 1997 shows that while women seem to be more confident now in reporting rapes, there is a very high drop out rate at early stages in the criminal justice process. The emerging findings from this study by Jessica Harris[29] of 500 rape cases show that 2 out of 3 cases were not even referred to the Crown Prosecution Service. The withdrawal of complaints was a significant factor in the failure of cases to be taken further, although there were other reasons for the failure of the case to proceed,

[29] *Harris, J (1997) The Processing of Rape Cases by the Criminal Justice System: Interim Report. Unpublished, London: Home Office.*

including insufficient evidence. However, the victim's reluctance to proceed seems to be a highly significant factor in the high attrition rate. It is possible that one of the reasons for withdrawing of complaint is that women are deterred by the prospect of cross-examination in public on their previous sexual history.

9.58 In evidence to the Working Group, the Rape Crisis Centres quote a statement from the Northumberland police that aggressive, humiliating and irrelevant questioning in court was the largest single factor in making women withdraw. Certainly the public accounts of some rape victims of their time in court would add to fear of the process. If this is so, then reforming the cross-examination of rape victims, in a way that retains the fairness of the trial for both defendant and victim, could provide a potent improvement in the way in which rape victims are treated by the criminal justice system.

Legal Background

9.59 The present law is based on the assumption that the sexual history of the victim should only be introduced into court, and she be cross-examined on it, if it has direct relevance to the case. For example, if she has a history of making false allegations of rape against those within whom she has a relationship.

9.60 Under Section 2 of the Sexual Offences (Amendment) Act 1976, at rape trials "except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant." This enshrines the recommendation of the Heilbron Report of the Advisory Group on the Law of Rape. The Advisory Group was aware that if evidence of the complainant's sexual history was freely admitted, a rape case sometimes in effect put the woman on trial, and could unduly influence the jury. They pointed out the danger that "this may result in the jury feeling that she is the type of person who should either not be believed, or else deserves no protection from the law, or was likely to have consented anyway." The Advisory Group therefore argued for restrictions on its admission. But they also recognised that there may be occasions, albeit infrequently, when the admission of such evidence would be crucial to the jury's deliberations, in particular where there was a striking similarity between the sexual behaviour of the complainant on a previous occasion and her alleged behaviour on the occasion in question.

9.61 The Advisory Group's intention to restrict the admissibility of such evidence was accepted by Parliament and enshrined in Section 2 of the 1976 Act. In particular, the court must be satisfied before admitting sexual history evidence, that the evidence is both relevant and of such importance to the case for the defence that to exclude it would be unfair. The circumstances in which this may be exercised are not specified in the Act, although the law's expectation is that the circumstances that justify cross-examination on sexual history will be rare, and that complainants in such cases should receive the best protection the court can provide without unfairness to the defendant. The Court of Appeal has also given guidance about how these provisions should be applied *(Brown, 89 Cr App R 97)*.

9.62 Thus the legislation was intended to prevent the introduction of evidence that would lead the jury to believe that the victim was promiscuous and readily consented, or that her evidence was less likely to be sound. In many rape trials the key issue is that of consent. Section 1(2)(b) of the Sexual Offences Act 1956 requires that the defendant "at the time knew that the person does not consent to the intercourse or was reckless as to as to whether or not the person consents to it". The introduction of evidence of previous sexual history that relates to the credit of the victim, particularly her sexual behaviour, can be claimed to have relevance to a defendant's belief in consent. However while there may be circumstances where this is relevant, a common defence ploy is to besmirch the victim's character *in a way that does not relate to the issue of consent in the alleged rape*. Under the 1976 Act the judge has to decide whether questions on sexual history are relevant to the defence (i.e. that they go to consent not credit). Archbold[30] makes clear that the judge does not have discretion: if a judge decides that it would be unfair not to allow the evidence it must be allowed.

9.63 However, there is some research evidence that the practice of the courts in interpreting the provision is widely variable and that it frequently is at variance with the intention of section 2.

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[30] *Ed Richardson P J (1997) Archbold, Criminal Pleading Evidence and Practice London: Sweet & Maxwell*

There is also research evidence that indicates that sexual history evidence is introduced in up to 75% of applications for the admission of sexual history evidence in rape trials.[31] The extent of the use of such evidence seems to go far beyond that demanded in the interests of relevance to the issues in the trial and suggests that it is used, contrary to section 2, in an attempt to discredit the victim's character in the eyes of the jury. This goes beyond the need for fairness to the defendant, who is protected from exposure to questioning on his own previous misconduct.

9.64 The Working Group has concluded that there is overwhelming evidence that the present practice in the courts is unsatisfactory and that the existing law is not achieving its purpose. The Group then went on to consider possible options to improve the situation to maintain the Helbron report's objectives.

(a) Improving the working of the existing law

9.65 Current practice might be improved by further guidance being issued to the courts, either in the form of a Court of Appeal judgement or a Practice Direction. This could seek to bring judicial practice more closely in line with the present law. This would have the advantage of immediacy and would not require legislative change. However, given the experience of the last 20 years in operating section 2, the Working Group was not convinced that this option would provide an effective solution.

(b) Changing the law

9.66 The law could be changed, either to remove altogether the judge's discretion to admit evidence on previous sexual history, or to define the circumstances in which a judge may exercise his discretion.

9.67 The first approach would be contrary to the principles laid down by the Heilbron report. In particular, there may be instances, albeit infrequent in which a complainant's previous sexual history may be relevant to the case, and excluding this evidence might not only be unfair, but could lead to the wrongful conviction of innocent defendants.

9.68 The second approach is the solution which has been adopted in other jurisdictions such as Scotland, Canada and Australia. The relevant Scottish provisions are set out in Appendix B to this Chapter, and an opposition amendment tabled during the passage of the Criminal Procedure and Investigations Act 1996, based on New South Wales legislation is set out at Appendix C. In both cases, the legislation sets out when it would be permissible to allow questioning on previous sexual history.

9.69 The Working Group understands that the New South Wales legislation has been criticised as being ineffective on the grounds that while there is a broad definition of consent then it will still be possible to introduce evidence of previous sexual history on the basis that it is relevant to the belief in consent. Apparently other Australian jurisdictions have opted to create a statutory definition of consent, with accompanying guidelines. However, a review of the offence of rape is outside the terms of reference of the Working Group and so it has confined its considerations to measures relating to evidence and procedure which could improve the present position.

Conclusion

9.70 The Working Group has concluded that the law should be amended to provide a more structured approach to decision taking and to set out more clearly when evidence of previous sexual history can be admitted in cases of rape.

9.71 The present law in England and Wales applies only to the offence of rape but the Scottish legislation covers a wide range of sexual offences and the Working Group considers that any amendment to the legislation should extend its application to serious sexual offences.

Recommendation 63

9.72 The Working Group recommends that in cases of rape and other serious sexual offences the law should be amended to set out clearly when evidence on a complainant's previous sexual history may be admitted in evidence. The Working Group considers that possible models may be found in Sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995, or the New South Wales legislation. The Working Group favours the Scottish approach but considers that precise formulation should be the subject of consultation.

[31] *Adler Z (1989) Rape on Trial London: Routledge and Regan Paul*

Chapter 9: **Appendix A: Home Office Circular 69/1986**

HOME OFFICE

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Our reference

Your reference

To the Chief Officer of Police 15 October 1986
cc Clerk to the Police Authority
Director of Social Services
Director of Housing

Dear Chief Officer

HOME OFFICE CIRCULAR 69/1986
VIOLENCE AGAINST Women

Treatment of Victims of Rape and Domestic Violence

Home Office Circular 25/1983 offered advice to chief officers on the handling of investigations into offences of rape, and the treatment of victims. This resulted in a positive response and the Home Secretary wishes to record his recognition of the police's work. In December 1985 he and all chief officers received a report on violence against women published by the Women's National Commission. The Home Secretary welcomed the constructive approach adopted by the report and indicated his wish to take what steps were open to him to reduce the risks to which women were exposed and to ensure that victims were treated with proper consideration. The recommendations made in the report which touch on police procedures have been considered with the Association of Chief Police Officers, and annexed to this circular is a note of the responses which have been agreed with them. (The response to recommendations touching on the law and court procedures is also included for information.) The attention of chief officers is drawn in particular to the following issues.

Facilities for the examination of victims

In cases of rape and other serious sexual assaults it may be necessary for the victim to undergo a medical examination. Circular 26/1983 drew attention to the need for an early examination to obtain evidence and information on which to base the future conduct of the case, and to allow the complainant to wash and to change clothes as soon as possible after any medical and forensic science examination. It is important for the police to ensure that the arrangements for this due regard to the need to protect the complainant's privacy. The location of the medical and toilet facilities will clearly depend upon the resources which are available to the police. Chief officers may wish to consider whether the provision of special victim examination suites will be justified in their area, having regard to the prevalence of those type of offences where medical, toilet and interview facilities may be provided for victims away from the charge room and detention cells. Where the provision of special facilities such as these would not be justified, chief officers may wish to consider approaching local health authorities to discuss with them the scope for making arrangements in hospitals for the medical examination of complainants. Alternatively it may be desirable to arrange for the use of local doctor's surgeries. Where it is unavoidable to conduct examinations at a police station which does not have a special suite for the purpose,, chief officers will wish to ensure that these are carried out in appropriate facilities which provide an atmosphere that reduces stress and fosters care and concern, and protects the privacy of the victim. Chief Officers may also wish to consider, when proposals for a new police station are being prepared, whether to propose the inclusion of a special victim examination suite.

Information for Victims

It will normally be desirable for victims to be given information about issues such as the availability of pregnancy advice, treatment for infections and for injuries, victim support organisations, the possible need for photographs, and the criminal injuries compensation scheme. It may be appropriate for the police surgeon to offer advice about contraception and treatment for infections and to discuss with the victim the possibility of injuries such as bruising taking time to appear (and the possible need for the police to photograph them when they do appear), and chief officers of police will wish to consider making arrangements with local hospitals to provide victims with priority appointments at clinics which provide treatment for venereal disease. Where this can be arranged, the police may wish to offer to make such an appointment for the complainant, who might otherwise fail to consider the desirability of seeking such medical advice or might be reluctant to do so out of embarrassment. It is likely that, immediately following an attack and during the examination and interview stage, a victim may be too confused or withdrawn to be able to absorb the advice and assistance she is offered. Where resources permit, it may be desirable for the police to maintain contact with victims through follow-up visits or put them in touch with support organisations and it may be helpful for the police to offer the victim a leaflet providing information about these matters so that she can take it home and consult it later. A copy of the leaflet produced by the Metropolitan Police is attached for information.

Training

Effective training can play an important part in fostering a greater understanding of the needs of victims, and in developing the skills and sensitivities necessary to encourage the confidence and co-operation of victims. To some extent, the recommendations in the report relating to training are already being acted upon, but all the recommendations are being drawn to the attention of those conducting and co-ordinating the various national reviews of training which are currently under way.

Training courses designed by and conducted at Bramshill and the Central Planning Unit will take full account of the various recommendations, and there is already considerable emphasis in these courses on the development of the sorts of inter-personal skills advocated in the report. However, much of training in the areas covered by the report is the responsibility of chief officers, whose attention is drawn to the need to ensure that the special needs of victims of rape and serious sexual assault are given due weight during appropriate in-force training. In particular, there is a need for investigating officers to understand the different way in which victims may react and for those officers not to appear to the victims as suspicious, or hostile or sceptical.

Chief officers are invited to review their training policies and practice in the light of this report, and in particular to consider (a) whether more use could be made of in force training of medical expertise and those with knowledge of victims' needs (including those active in rape crisis centres and victim support schemes, and victims themselves); and (b) whether selected officers need more specialised training in these fields.

Domestic Violence

The Home Secretary recognises the difficult and sensitive issues which may be raised for the family and for the police in cases of domestic violence, and that opportunities for intervention by the police may in some circumstances be restricted by the reluctance of victims to provide evidence. He believes, however, that there must be an overriding concern to ensure the safety of victims of domestic violence and to reduce the risk of further violence both to the spouse and to any children who may be present, after the departure of the police from the scene of any incident. Police officers will be aware of the powers of arrest which are provided in sections 24 and 25 of the Police and Criminal Evidence Act 1984, and of section 80 of the 1964 Act, which provides for circumstances in which an accused person's spouse may be a competent and compellable witness.

Chief officers may also wish to consider the need to ensure their officers are in a position to provide assistance to victims of domestic violence by advising them on how to contact victim support organisations and local authority agencies, such as social work and housing departments, which may be in a position to offer aid to victims. Such advice should be offered in private and might

helpfully to contained in a leaflet which could be given to the victim.

Conclusion

The Home Secretary recognises that the police have shown themselves sensitive to the needs of women who have been the victims of violent assault and have taken steps to ensure a sympathetic and helpful approach. He welcomes these initiatives and hopes that chief officers will continue to keep these needs and the appropriate police response under review to meet changing social circumstances. He hopes they will find helpful the advice in this Circular and will consider the extent to which the recommendations of the Women's National Commission report may appropriately be implemented in their areas. Enquiries about this Circular should be addressed to Ms T Shew (01-213-7269).

Eric Soden

F2 Division

Chapter 9: **Appendix B: Extract from Criminal Procedure (Scotland) Act 1995**

Evidence relating to sexual offences

Restrictions on evidence relating to sexual offences

274.-(1) In any trial of a person on any charge to which this section applies, subject to section 275 of this Act, the court shall not admit, or allow questioning designed to elicit, evidence which shows or tends to show that the complainer -

(a) is not of good character in relation to sexual matters:

(b) is a prostitute or an associate of prostitutes: or

(c) has at any time engaged with any person in sexual behaviour not forming part of the subject matter of the charge.

(2) This section applies to a charge of committing or attempting to commit any of the following offences, that is to say -

(a) rape;

(b) sodomy;

(c) clandestine injury to women;

(d) assault with intent to rape;

(e) indecent assault;

(f) indecent behaviour (including any lewd, indecent or libidinous practice or behaviour);

(g) an offence under section 106(1)(a) or 107 of the Mental Health (Scotland) Act 1984 (unlawful sexual intercourse with mentally handicapped female or with patient); or

(h) an offence under any of the following provisions of the Criminal Law (Consolidation) (Scotland) Act 1995 -

(i) sections 1 to 3 (incest and related offences);

(ii) section 5 (unlawful sexual intercourse with girl under 13 or 16);

(iii) section 6 (indecent behaviour toward girl between 12 and 16);

(iv) section 7(2) and (3) (procuring by threats etc.);

(v) section 8 (abduction and unlawful detention);

(vi) section 13(5) (homosexual offences).

(3) In this section "complainer" means the person against whom the offence referred to in subsection (2) above is alleged to have been committed.

(4) This section does not apply to questioning, or evidence being adduced by the Crown.

Exceptions to restrictions under section 274

275.-(1) Notwithstanding section 274 of this Act, in any trial of an accused or any charge to which that section applies, where the court is satisfied on an application by the accused -

(a) that the questioning or evidence referred to in subsection (1) of that section is designed to explain or rebut evidence adduced, or to be adduced, otherwise than by or on behalf of the accused;

(b) that the questioning or evidence referred to in paragraph (c) of that subsection -

(i) is questioning or evidence as to sexual behaviour which took place on the same occasion as the sexual behaviour forming the subject matter of the charge; or

(ii) is relevant to the defence of incrimination; or

(c) that it would be contrary to the interests of justice to exclude the questioning or evidence referred to in that subsection,

the court shall allow the questioning or, as the case may be, admit the evidence.

(2) Where questioning or evidence is or has been allowed or admitted under this section, the court may at any time limit as it thinks fit the extent of that questioning or evidence.

(3) Any application under this section shall be made in the course of the trial but in the absence of the jury, the complainer, an person cited as a witness and the public.

Chapter 9: **Appendix C: Opposition amendment during passage of the Criminal Procedure and Investigations Act 1996**

New clause 12 - *Irrelevant questioning about the victim's past sexual history* -

- In section 2 of the Sexual Offences (Amendment) Act 1976 the following subsections shall be substituted for subsections (1) and (2) -

"(1) If at a trial any person is for the time being charged with a sexual offence to which he pleads not guilty, then except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience or a complainant with a person other than that defendant.

(2) The judge shall not give leave in pursuance of the preceding subsection for any evidence or question except on an application to him made in the absence of the jury by or on behalf of a defendant; and on such an application the judge shall give leave if and only if his is satisfied that -

(a) it is evidence -

(i) of sexual experience or sexual activity taken part in by the complainant at or about the time of the time of the commission of the alleged sexual offence; and

(ii) of events which are alleged to form part of a connected series of circumstances in which the alleged sexual offence was committed: or

(b) (i) the accused person is alleged to have had sexual intercourse with the complainant and the accused person does not concede the sexual intercourse alleged; and

(ii) it is evidence relevant to whether the presence of semen, pregnancy, disease or injury is attributable to the sexual intercourse alleged; or

(c) it is evidence relevant to whether at the time of the alleged sexual offence there was present in the complainant a disease which at any relevant time was absent in the accused person; or

(d) it is evidence relevant to whether the allegation that the sexual offence was committed by the accused person was first made following a realisation or discovery of the presence of pregnancy or disease in the complainant (being a realisation or discovery which took place after the commission of the alleged sexual offence); or

(e) it is evidence tending to show that the complainant has, at a different time, made another allegation of a sexual offence which the complainant has subsequently withdrawn, admitted was false or which was unsubstantiated; or

(f) where it has been disclosed or implied in the case for the prosecution against the accused person that the complainant has or may have -

(i) had sexual experience, or lack of sexual experience of a general or specified nature; or

(ii) taken part or not taken part in sexual activity or a general or specified nature; and

(iii) the accused person might be unfairly prejudiced if the complainant could not be cross-examined by or on behalf of the accused person in relation to the disclosure or implication.

(2A) The judge shall not give leave under paragraphs (a) to (f) of subsection (2) above unless he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question or questions to be asked.

(2B) Where a judge has given leave in accordance

with this section for evidence to be adduced or for a question or questions to be asked he shall record or cause to be recorded in writing the nature and scope of the evidence which may be adduced and the question or questions which may be asked and he shall further record or cause to be recorded in writing his reasons for giving leave.

(2C) In considering the nature and scope of the evidence which may be adduced and the question or questions which may be asked the judge shall take into account any distress, humiliation or embarrassment which the complainant might suffer as a result."

Chapter 10: **Child witnesses**

Introduction

10.1 Child witnesses are a particular group of vulnerable witnesses which the law has already recognised are in need of special protection. Section 44 of the Children and Young Person's Act 1933 states that "every court in dealing with a child or young person who is brought before it, either as an offender or otherwise, shall have regard to the welfare of the child or young person, ...". As recognised in Chapter 1, measures are already in place to assist child witnesses - primarily CCTV links and videoed evidence in chief. Details of the action currently being taken by the Government in relation to child evidence issues are set out in Annex J to this report. The Working Group has considered in Chapter 8 the application of these particular measures to adult vulnerable witnesses who meet the definition in Chapter 3, and has also recommended in Chapters 8 and 9 that a range of additional measures be available to adults, including the unimplemented Pigot recommendations (videoed pre-trial cross-examination, and use of an intermediary). The Working Group, with the assistance of the Steering Group on Child Evidence[32] has considered the implications for child witnesses of these earlier recommendations for vulnerable or intimidated witnesses.

10.2 The Working Group took account of the Utting Report "People Like Us"[33] which recommended, in Chapter 20, that all the *Pigot* recommendations not yet implemented should be introduced to assist child witnesses. The Utting report endorses the Pigot view that "no child witness to whom our proposals apply should be required to appear in open court during a trial unless he or she wishes to do so".

10.3 As mentioned in paragraph 8.43 above, in the light of concerns about the effectiveness of the existing child evidence provisions, the Home Office has commissioned research into the admissibility and sufficiency of evidence in child abuse prosecutions. The research, which is currently in progress, is being carried out by the team from Bristol University led by Professor Gwyn Davis. The researchers have been asked to examine whether prosecutions fail or do not proceed on evidential grounds, to develop practical recommendations to improve investigations within the current legal framework and, if evidential problems are found to impede successful prosecutions, to consider whether further legislative reform is needed. The work is to be completed in the Summer and the Working Group recognised that the Government may wish to make further proposals for changing the law in relation to both child witnesses and vulnerable adults in the light of the research findings.

Present Law

10.4 Under Sections 32 and 32A of the Criminal Justice Act 1988, in the Crown Court or in the youth courts a child may, at the discretion of the court, give evidence in chief by means of a video and/or be questioned during the trial via a live CCTV link. These provisions apply to child witnesses under the age of 14 years in the case of offences of violence or cruelty and to child witnesses under 17 years of age in the case of sex offences. The provisions apply to any child witness (both prosecution and defence), other than the accused if, s/he is a child. Unrepresented defendants are also prohibited, under Section 34A of the 1988 Act, from cross-examining child witnesses, or a witness who is to be cross-examined following the admission of video evidence. Other measures, such as the use of screens or the removal of wigs and gowns, can be used at the court's discretion on a non-statutory basis.

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[32] *A Home Office chaired Interdepartmental Working Group whose primary function is to monitor and evaluate the child evidence provisions.*
[33] *Op Cit footnote 22.*

Definition

10.5 The Working Group took the view that, as a general principle, child witnesses should have measures made available to assist them give their best evidence, on the same basis as vulnerable adults, and on an automatic basis, because of their vulnerability but that some measures should be made available more readily to children compared with adults, because of their particular vulnerability.

Recommendation 64

10.6 The Working Group recommends that child witnesses (both prosecution and defence but excluding the defendant) should be treated in the same way as adult vulnerable witnesses who meet the criteria for category (a) of the definition set out in paragraph 3.29 (Recommendation 1) and thus automatically attract the provision of special measures.

Age Limit

10.7 The Working Group went on to consider the appropriate age limit for applications of measures to witnesses who are children or young persons. Under criminal legislation a child is someone aged between 10 and 13 years, while a young person is aged between 14 and 17. Under the Children Act 1989, however, a child is someone under 18 years of age. As indicated in paragraph 10.4 the existing child evidence provisions apply to children under 14 and 17 years depending upon the nature of the offences. *Pigot* took the view that the general age limit for child evidence provisions should coincide with the legally accepted point at which a child becomes a young person and so set the age limit as 14 for violent offences. However, because there were "obvious different and special considerations" in respect of proceedings involving sexual offences, the age limit of 17 years was recommended for these.

10.8 If these two age limits were retained it would mean that witnesses who are children or young persons would move from category (a) - automatically attracting provisions - to category (b) for vulnerable adults - attracting discretionary provisions - at different ages according to the offence. It is difficult to see why a young person under 17 should be regarded as less vulnerable in the case of offences of violence, compared with a sexual offence. Therefore the Working Group considers that a uniform age limit should be applied to the definition of a child for the purposes of attracting special measures and that rather than lower the limit for sexual offences, this uniform limit should be 17 years.

Recommendation 65

10.9 The Working Group recommends that the definition of a child for the purposes of automatically attracting special measures should be under 17 years, as is presently the case for child witnesses in sexual offence cases.

Offences

10.10 As indicated above, the present child evidence provisions are limited to offences of violence, sex, cruelty and neglect, as specified in Section 32(2) of the Criminal Justice Act 1988. However, except in the case of measures specifically applying to rape and serious sexual offences, the Working Group has rejected the concept of an offence gateway in respect of vulnerable adults (paragraph 3.25 above). In these circumstances, the Working Group does not consider that there should be an offence gateway in respect of child witnesses in the case of those proposed measures which are not restricted to particular offences in the case of adult vulnerable witnesses. The Working Group recognises that not all child witnesses in all criminal proceedings will need the assistance of all the special measures that the Group has recommended should be available but, as in the case of vulnerable or intimidated adult witnesses, the particular measure provided would depend upon the circumstances of the particular case after taking into account the views of the child (as recommended in the CPS Inspectorate's report on child witnesses).[34]

Procedures

10.11 Chapter 7 (recommendation 33) set out the Working Group's proposals that applications for the provision of special measures should be determined in advance of the trial at the PDH or pre-trial hearing and that the decisions should be binding. These recommendations also apply to

[34] *Op Cit. footnote 21.*

child evidence provisions. In fact this procedure is already operating in respect of the existing child evidence provisions and, when implemented, Section 62 of the Criminal Procedure and Investigations Act 1996, will make such decisions binding.

Which Court?

10.12 As indicated in paragraph 10.4 above, the existing child evidence provisions apply only to cases tried in the Crown Court and youth courts. Pigot recommended that the application of his report's general proposals to magistrates' courts should be reviewed at an early stage after their introduction in the Crown Court (Pigot recommendation 21). However, the introduction of the transfer provisions in Section 53 of the Criminal Justice Act 1991 (implementing Pigot recommendations 22 and 23) means that committal proceedings are by-passed in serious cases but that lesser charges for offences of sex, violence, cruelty and neglect are tried summarily in magistrates' courts where there is no special protection.

10.13 The CPS Inspectorate's report[35] suggests that decisions taken by the prosecution on mode of trial may be influenced by whether the child's evidence is on video or if the TV link might be used. The report observes, in paragraph 7.41 that, " If the lawyer transfers the case [to the Crown Court], in order to use the video and/or the TV link, the case may be delayed. This is not in the best interests of the child. The decision to transfer the case to the Crown Court may also breach the mode of trial guidelines. On the other hand, if the guidelines are adhered to, the child will not be entitled to the protection in the magistrates' courts which would be available in the Crown Court."

10.14 Rather than distort the mode of trial decision, the Working Group believes that in accordance with its recommendations in respect of adult vulnerable or intimidated witnesses, all the measures (both existing and new) to assist child witnesses should be available in magistrates' courts in addition to the Crown Court and youth courts. If is necessary to stage the implementation of provisions in the magistrates' courts, priority should be given to introducing measures to assist child witnesses.

Recommendation 66

10.15 The Working Group recommends that all the measures to assist child witnesses (both existing and those proposed by the Working Group) should be available in magistrates' courts in addition to the Crown Court and youth courts.

Measures

10.16 The Working Group went on to consider which measures should be available to child witnesses and on what basis. It concluded that as a general principle, all those proposed for adults should also be available for children but that certain measures required further comment.

Video Recorded Evidence in Chief

10.17 In the case of video-recorded evidence in chief, the CPS Inspectorate 's report[36] noted, in paragraph 8.37, that there was inconsistency in police practice in deciding whether or not to conduct a video-recorded interview of a child witness in all cases where such evidence is currently admissible, with the leave of the court. This suggests the need for the development of criteria to guide the police when making such decisions. The Group took the view that such evidence might not be appropriate for all child witnesses in all cases (for example a child witness to a road traffic accident) and so, as at present, discretion would have to be exercised at the investigation stage as to the suitability of videoing the evidence of the child witness. As in the case of vulnerable adults, there would need to be consultation at an early stage between the police and CPS on the most appropriate method of taking the child's statement (Recommendation 21 - paragraph 5.23). The Working Group considered that criteria for deciding whether to video-record an interview with a child might be developed by the Home Office in consultation with ACPO and other relevant Departments, in the light of the findings of the Bristol research.

[35] *Op Cit. footnote 21.*

[36] *Op Cit. footnote 21.*

Recommendation 67

10.18 The Working Group recommends that the Home Office, in consultation with ACPO and other relevant Departments develops criteria to assist the police decide whether to video-record an interview with a child.

Video recorded Pre-trial Cross-examination

10.19 The advantages and disadvantages of videoed pre-trial cross-examination are outlined in paragraphs 8.55-60 above and the Working Group believes that, in appropriate cases, this measure would also assist child witnesses.

10.20 It might also help child witnesses in those cases tried in a youth court, where there is an appeal to the Crown Court. Young offenders are generally tried summarily in youth courts and in contested cases there is an unfettered right of appeal against conviction and sentence to the Crown Court. However, an appeal heard by the Crown Court involves a complete re-hearing of the case with the witnesses being required to give their evidence again and the parties are not limited to the evidence called at the summary trial. This can be extremely traumatic for children and in order to avoid a child witness having to give evidence in court on two occasions (both at the trial and the appeal), videoed-evidence in chief could be used to present the child's evidence in chief on both occasions. Where the defence still wish to cross-examine the child witness further at the appeal hearing this could be carried out in the same conditions as the pre-trial cross-examination for the original trial and so avoid the need for the child witness to attend the appeal hearing at the Crown Court.

Live CCTV Links

10.21 The Working Group considers that, where the child is required to give oral evidence to court, the use of live CCTV links is an effective way of ensuring that the child does not have to be present in the court room when being questioned. The Working Group proposes that there should be a presumption that this measure should be used in all cases involving child witnesses, unless pre-trial video recorded evidence in chief is used in conjunction with videoed pre-trial cross-examination so that the child does not attend court at all.

Supporter in the TV Link Room

10.22 The Working Group has recommended in Chapter 8 that, in the case of adult vulnerable witnesses, they should be given the option of being accompanied by a supporter when giving evidence in the TV link room (Recommendation 37, paragraph 8.10). The Working Group considers that this is also an important means of providing reassurance to child witnesses. This particular issue is best taken forward by the Steering Group on Child Evidence but the Working Group would welcome any moves by the Lord Chief Justice to review existing guidelines to judges on the identity of the independent adult in the TV link room.

Reporting Restrictions

10.23 The Working Group has already examined in Chapter 8 (paragraph 8.20), the existing law which prohibits the publication of details likely to identify juvenile witnesses and defendants and has recommended that the law be clarified to provide that these restrictions apply from the point of complaint through to the trial and prohibit the reporting of English and Welsh proceedings throughout the whole of the United Kingdom (Recommendation 40(b), paragraph 8.25).

Communication including questioning by an intermediary

10.24 Chapter 8 in paragraphs 8.61 - 78 discusses means of assisting vulnerable or intimidated adults when the witness has communication difficulties, including the use of an intermediary, which was recommended by *Pigot* in respect of children but was not implemented. The Working Group considers that an intermediary or communicator could provide great assistance to child witnesses and the court, particularly in the case of very young or disturbed children or where the child has learning difficulties.

Recommendation 68

10.25 The Working Group recommends that all the measures proposed in Chapter 8 (Recommendations 36 - 52) should be available to child witnesses on the same basis as adult vulnerable witnesses who meet the criteria for category (a) of the definition in Recommendation 1.

Recommendation 69

10.26 In addition, the Working Group recommends that CCTV links should be available for child witnesses on the basis of a rebuttable presumption that this measure should be provided in cases where the child is required to give oral evidence to the court.

Prohibition on Defendant Cross-examination

10.27 In Chapter 9 the Working Group has previously recommended that a prohibition on defendant cross-examination should be applied to adult vulnerable complainants in the form of a mandatory ban in respect of rape and serious sexual assault (Recommendation 58, paragraph 9.39). In the case of other offences the court should have discretion to impose such a prohibition after taking into account certain factors (Recommendation 59, paragraph 9.41.) Defendants are, of course, already prohibited from cross-examining child witnesses in respect of offences of sex, violence, cruelty and neglect (Section 32(2) of the Criminal Justice Act 1988). The Working Group has considered representations that the existing mandatory ban in respect of children should also be extended to include offences of false imprisonment, kidnapping and child abduction because such offences are often included on the same indictment as rape and agrees that these offences should be added to the existing list.

10.28 The Working Group considered whether an automatic ban on defendant cross-examination should apply in cases where the child witness is a dependant of the defendant i.e. where there is a power relationship. The Group decided to retain the proposed limited approach for the mandatory ban and so opted for a discretionary approach in these circumstances; while recognising that such a relationship was a powerful factor in favour of a ban on defendant cross-examination being imposed.

10.29 The Working Group also considered that, as in the case of adult vulnerable witnesses, the court should have discretion to impose a prohibition on defendant cross-examination of a child witness in respect of other offences in accordance with recommendation 59 paragraph 9.41. The procedural arrangements proposed in respect of the prohibition on cross-examining vulnerable or intimidated adults (Recommendations 60 - 62) would also need to apply in respect of the existing child witness provisions for banning defendant cross-examination.

Recommendation 70

10.30 The Working Group recommends that the existing mandatory prohibition on the defendant personally questioning child witnesses should be extended to include the offences of false imprisonment, kidnapping and child abduction and that the proposals for a discretionary prohibition in the case of other offences (Recommendation 59, paragraph 9.41), as well as the procedural arrangements (Recommendations 60 - 62 paragraphs 9.44, 9.46 and 9.54), should also apply in respect of children.

Recommendation 71

10.31 The other recommendations in Chapter 9 should apply to children as well as to vulnerable or intimidated adults (Recommendations 53 -57 and 63)

Chapter 11: **Admissibility of evidence and alternative forms of evidence**

Introduction

11.1 This Chapter examines two issues relating to the admissibility of evidence from vulnerable or intimidated witnesses, competency and the hearsay rule, together with the use of alternative forms of evidence, other than oral evidence from witnesses.

COMPETENCY OF WITNESSES

11.2 While *Sanders* only found one case in his sample where a witness was declared incompetent, it seems likely that those cases where the competency of a witness is in doubt are filtered out of the system long before the trial stage. The investigating police officer is likely to make a judgement that a witness is unlikely to be regarded as competent and so does not proceed with the investigation. Even if the vulnerable witness passes this first hurdle the case could be filtered out by the senior police officer in the case, or by the CPS, at a later stage.

11.3 The modern law recognises that any person is a competent witness in any proceedings provided that he or she is capable of coherent communication.[37] The modern rules of competence are now regulated by statute.

Principles of Evidence

11.4 In considering the issue of competency it is necessary to take account of the legal principles governing the inclusion and exclusion of evidence. First, evidence is admissible if it is sufficiently relevant to the facts in issue between the parties to be capable of assisting a tribunal of fact to determine those issues. Evidence is not admissible if its reception is contrary to the public interest. The exception to the general rule includes, for example, hearsay evidence and evidence of previous misconduct by the defendant.

11.5 Another overriding principle is that once admitted, the weight to be given to evidence and any decision as to the credibility of the witness is solely a matter for the tribunal of fact.[38]

11.6 In this chapter competence will generally refer to a witness who is competent to give evidence on behalf of the prosecution. In general, the principles also apply to witnesses called on the behalf of the defence, save the defendant or his spouse. Those exceptions are not considered here.

Oaths

11.7 The general common law rule is that the testimony of a witness to be examined viva voce in a criminal trial is not admissible unless he or she has previously been sworn to speak the truth. The Oaths Act 1978[39] sets out how the oaths can be lawfully administered for the various religions. A person who objects to being sworn may provide a solemn affirmation instead of taking an oath[40]. The term `sworn' covers both oath and affirmation.

Challenges on Competency

11.8 Notwithstanding that a witness is aware or otherwise possesses the relevant intelligence, he or she may be incompetent to give evidence if he or she is prevented by reason of mental illness, drunkenness and the like, from understanding the nature of an oath and giving rational testimony.

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[37] *It was the case under the common law that certain people within society were not competent, by reason of their membership of a certain group, such as atheists, convicts, the spouse of the accused and persons of unsound mind or those otherwise incapacitated*

[38] *In the Crown Court the jury, in magistrates' courts the Magistrate.*

[39] *Sections 1 to 4.*

[40] *Sections 5 and 6.*

11.9 If it is alleged a witness is incompetent it is for the Judge to ascertain whether he or she is of competent understanding to give evidence and is aware of the nature and obligation of an oath.[41] It should be noted that although reference is made to the understanding of the oath, it is proper for the Judge to investigate whether or not the witness is competent in the sense of being able to understand the *nature of the proceedings*. Provided the witness has a sufficient appreciation of the seriousness of the occasion and a realisation that taking the oath involves something more than the duty to tell the truth in ordinary day to day life, he or she should be sworn.

11.10 Although no adults can give unsworn testimony,[42] a child can. Historically at common law a child of tender years could be sworn in any proceedings provided that he or she understood both the nature of the oath and the obligation of telling the truth. This was developed further by the Children and Young Persons Act 1933[43] which permitted unsworn evidence to be given provided that, in the opinion of the court, the child was possessed of sufficient intelligence to justify the reception of the evidence and understand the duty of speaking the truth. Although the courts could hear evidence of children under the age of 14 years, in practice they would not.

11.11 *Pigot*[44] criticised this approach of the court, founded on an archaic belief in the inability of young children to give honest and clear evidence. Following recommendations of the Report, the Criminal Justice Act 1991[45] allowed children over 14 to be treated as adults and, therefore, give sworn evidence. Children under 14 must give their evidence unsworn.

Determination of Competency

11.12 Because the evidence of children under 14 is unsworn the court cannot conduct a competency examination based on a challenge. The court may exclude the witness' testimony if the child appears incapable of giving intelligible evidence. Children over 14 and all those giving sworn evidence can only have their competency examined if an objection is taken.

11.13 The Judge will determine the competency of a witness after he or she has conducted an enquiry and heard evidence from the witness and/or from others. It was only recently[46] that it was decided that the investigation should be conducted in the absence of a jury.

11.14 If the competence of a prosecution witness is called into question, the burden of proof is on the prosecution to prove beyond reasonable doubt that the witness is competent. The Judge, in making his or her enquiry, may take account of expert testimony and also his or her subjective impression of the witness.

11.15 As discussed above, the modern emphasis is on whether a witness is competent in broad terms rather than on whether he or she is aware of the divine sanction of the oath.[47]

Criticisms of the present Rules

11.16 Although the precursor of giving testimony in criminal proceedings for those over 14 is the ability to swear an oath or to affirm and to understand the nature of the importance of telling the truth in criminal proceedings, there appears little guidance to courts on what amounts to the ability to give rational testimony. *Sanders*[48] refers to two unreported judgments[49] which formulate the test in two different but related ways. First, whether the witness is capable of giving coherent and rational answers to questions which may be asked about the subject matter of the evidence and, secondly, whether the witness is capable of giving an intelligible account of recent events.

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[41] Although there is no rule of law, it is desirable that any objection to the competency of a witness should be taken before he or she is sworn or commences to give evidence. However, if the incompetency of the witness becomes apparent after he or she has begun to give evidence, then the Judge may stop the examination.
[42] i.e. without providing an oath or affirmation
[43] Section 38(1).
[44] Op Cit. footnote 1
[45] Sections 52 to 55, which came into force in 1992.
[46] See R V Deakin [1995] 1 Cr. App. R. 471.
[47] See R v Bellamy [1985] 82 Cr. App. R. 222. Here, the complainant in a rape case - who was aged 33 - had a mental age of 10. The Court of Appeal held that it was no longer necessary that a witness should have an appreciation of the divine sanction of the oath. Accordingly, once the Judge had found that she was competent to give evidence, she should have been sworn.
[48] Op Cit footnote 2
[49] Paragraph 5.11.

11.17 *Sanders* criticises the emphasis on intelligibility because it is superfluous. He points to the ability of the Judge to exclude the evidence of someone whose evidence becomes unintelligible during the course of giving evidence. Further, intelligibility may also be enhanced by other methods such as the provision of an interpreter or some other method of signifying the meaning of the testimony to the tribunal of fact. Accordingly, emphasis returns to the ability to give coherent and rational answers to questions.

11.18 However, the Working Group considers that coherence and rationality may not be adequate tests and could lead to the exclusion of relevant evidence for the wrong reasons. First, it is for the Judge to be satisfied that the witness is coherent and rational. With the best will in the world, he or she may bring to bear certain common sense but ill defined preconceptions to that judgement. Even if expert evidence is provided for the enquiry into competence this may not be definitive on the matter in hand. Accordingly, with little guidance to judges, this area of the law is ripe for inconsistencies in approach.

11.19 *Sanders* points to the idiosyncratic nature of the enquiry undertaken by certain Judges. Whilst some Judges enquire in a sensitive and understanding manner, the nature of the competency examination lies entirely within his or her discretion. He states that the outcome of the competency examination may depend as much on the questioner's ability to ask the right question as in the witness ability to answer.[50]

11.20 Although *Sanders* in his case studies only found evidence of one case[51] where a victim was declared to be incompetent,[52] he points to the inability to identify the number of cases in which concerns about the competence of the witness influenced pre-trial decision making by the Crown Prosecution Service and the police.

Options for Reform

11.21 The Working Group considered three options for reforming the law on competency, including two proposed by *Sanders*.

Option 1

11.22 The first option suggested by *Sanders* was to allow adults with learning disabilities to give unsworn evidence and therefore for the courts to hear their testimony unless it appears to the court that they are unable to give it intelligibly. This would prevent the inconsistent exercise of judicial discretion and remove a degree of uncertainty from the decision to prosecute. The Working Group considers that the **disadvantage** of this option is that the appropriate group to be covered is not easily identified, making it difficult to define in legislation.

Option 2

11.23 A second option is to enable a witness to give unsworn testimony if he or she is unable to understand the nature of the oath unless it becomes apparent to the court that he or she is also unable to give intelligible testimony. This, however, would retain a competency examination.

Option 3

11.24 The Working Group went on to consider a third option: to reconsider the basic principles of competency. The emphasis of the present test is based on the ability of the witness to give evidence to the court rather than the courts' ability to receive it. In short, if the witness does not conform to the standards of court behaviour then he or she can be excluded from giving evidence and the jury does not hear it and cannot assess its relevance or weight.

11.25 If the basic principles of evidence are that relevant evidence is included and that it is for the tribunal of fact to weigh it, it could be argued that public policy should allow for its inclusion in all but the most exceptional of cases. This would involve reviewing both the present system of exclusions by category[53] based on what we now consider to be outdated assumptions of human nature as well as the assumptions on the jury's ability to understand, weigh, and consider evidence where the manner of its expression may be difficult or unusual.

[50] *Paragraph 5.3.*
[51] *Paragraph 5.2.*
[52] *It appears that this was based on an expert report which contradicted a previous assessment by the same expert*

[53] *Op Cit footnote 36*

11.26 This approach would retain the right of the jury or tribunal of fact to test the credibility and weight of the evidence. It would also be right to allow the jury to hear expert evidence as to the ability of the witness to give reliable evidence based on the witness's faculties while not usurping the jury's function by testing the evidence. However, unless incoherency is such that it renders the witness' evidence without appropriate aid wholly unintelligible, the option would be based on a presumption that in the case of all witnesses over the age of 14 years evidence will be called to be tested by the jury as best it can. The oath can be dispensed with in such cases but the need to tell the truth will be explained to the witness, who will be required to provide some form of acknowledgement.

11.27 The Working Group considers that the law on competency should be changed and favours option 3 but considers that views should be canvassed more widely on the merits of each of the three options before reaching any final conclusions.

Recommendation 72

11.28 The Working Group recommends that the law on competency should be changed along the lines of one of the following 3 options:

(1) Unsworn evidence should be admitted in respect of all adults with learning disabilities

(2) Unsworn evidence should be admitted if the witness is unable to understand the oath

(3) In the case of all witnesses over the age of 14 years, there should be a presumption that all evidence would be called to be tested by the jury. The evidence could be given unsworn if necessary, but the need to tell the truth would be explained to the witness who would need to acknowledge this.

The Working Group commends Option 3 but considers that views on the proposals should be canvassed more widely as part of a consultation exercise before a decision is reached on which option to adopt.

Recommendation 73

11.29 The Working Group also recommends that such a consultation exercise should also canvas views on whether there is a need to retain the existing law on competency relating to children under 14 years on the grounds that a uniform law applying to all witnesses would be simpler to operate.

HEARSAY EVIDENCE

Introduction

11.30 One means of assisting vulnerable or intimidated witnesses who are unable to give evidence orally in court, is the admission of their statement as documentary evidence, which is a form of hearsay evidence.

Legal Background

The Hearsay Rule

11.31 Hearsay is defined as 'an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted'. This means that, in general, only a statement given by a witness orally in court proceedings is admissible as evidence of the facts represented.

11.32 The general rule is that hearsay is not admissible, although there are exceptions to the rule. These cover a wide range of different kinds of statements, such as business documents, public records, written statements of people who have since died or who cannot come to court because of their physical or mental health, because they are abroad or because they have disappeared. The essence of the hearsay rule is that a witness may not rely on a written or oral statement made by someone else out of court. That other person must give the evidence him or herself.

11.33 It is generally accepted that the current law on hearsay is very complex. The main principle underlying the reasons for its existence has been described as ' the fear that juries might give undue weight to evidence the truth of which could not be tested by cross-examination, and possibly also the risk of an account becoming distorted as it is passed from one person to another'.

11.34 The main implications of the general rule on hearsay are as follows;

- Witnesses must give oral evidence,
- Witnesses must give evidence from first-hand knowledge, and may not repeat what other people have told them,
- Records are inadmissible evidence of the matters they contain (this includes video recordings) and,
- Where a witness gives oral evidence, only the oral evidence counts: previous statements by the witness generally do not.

11.35 There are several exceptions to the general rule, some of which are found in common law and some in statute. In the case of documentary hearsay, Section 23 (subject to Sections 25 and 26) of the Criminal Justice Act 1988 gives discretion to the judge to admit a witness statement made to a police officer instead of the witness giving oral evidence, inter alia, where the witness 'does not give oral evidence through fear' or is unfit to attend court due to a bodily or mental condition. It is believed that this provision is rarely used, with police forces being generally unaware of it and the prosecution making few applications.

11.36 The Criminal Procedure and Investigations Act 1996 provides that statements and depositions admitted in committal proceedings are admissible at trial in the Crown Court, subject to the right of an opposing party to object. The court may override an objection if it considers it to be in the interests of justice.

Law Commission Report

11.37 Following recommendations by the Royal Commission on Criminal Justice, in April 1991, the then Home Secretary referred the law on hearsay evidence for review by the Law Commission who published a 300-page consultation paper in 1995. The Law Commission's final report was presented to Parliament by the Lord Chancellor in June 1997.[54]

[54] *Law Commission (1997): Evidence in Criminal Proceedings: Hearsay and Related Topics (Law Com No 245) London; The Stationery Office.*

11.38 The recommendations of the Law Commission cover the hearsay rule and also related matters including the admission of previous statements of witnesses and computer evidence. Those that relate most closely to the work of the review of vulnerable or intimidated witnesses are ;

- the admissibility of written statements made by a witness who through fear does not give, or does not continue to give, oral evidence (LC Rec.14);
- the admissibility of previous consistent statements to rebut suggestions that oral evidence has been fabricated (LC Rec 34);
- the automatic admission of certain types of hearsay where the witness is unfit to give oral evidence because of his or her bodily or mental condition (LC Rec 11);
- the admissibility of previous statements if the witness does not and cannot reasonably be expected to remember the matter well enough to be able to give oral evidence (LC Rec 38);
- statements given at the original trial to be admissible in a retrial (LC Rec 20).

11.39 To assist the Working Group's consideration of this difficult topic, the Working Group had the benefit of a very helpful presentation from Stephen Silber QC, Law Commissioner.

11.40 The Working Group has considered those aspects of the Law Commission's hearsay report which relate to vulnerable or intimidated witnesses. The Group welcomes the general approach of the Law Commission to reform of the law in this area, particularly in respect of the Commission's proposals to simplify the current law which is complex and difficult to understand. The Group offers the following preliminary comments on the proposals.

Fear

11.41 The Law Commission proposes that written statements by a witness should be admissible, at the discretion of the court if the witness does not give, or does not continue to give evidence

through fear. The Commission's proposals do not define fear, but say that it should be widely construed. The Working Group considers that courts would value guidance to help determine whether hearsay evidence should be admitted.

11.42 In its proposed definition of a vulnerable or intimidated witness, the Working Group has proposed, in Recommendation 1(category (b)), that the court should have discretion to make available one or more of a range of measures, " if the court was satisfied that the person :.....-. would be likely to be so intimidated or distressed as to be unable to give best evidence without the assistance of one or more of the measures available/listed in the legislation..... In reaching a decision the court would be required to take into account:

(1) a person's age, culture/ethnic background, or relationship to any party to the proceedings;

(2) the nature of the offence;

(3) the dangerousness of the defendant or his family or associates in relation to the witness.

(4) any other relevant factor"

11.43. The Working Group believes that the admission of a written statement, without the opportunity for the witness to be cross-examined, should be regarded as a last resort. The Group hopes that the other measures it has recommended to assist vulnerable or intimidated witnesses, including pre-trial support measures and the use of live CCTV links and screens in court will encourage intimidated witnesses to give evidence in court. However, should a witness refuse to testify through fear (but does not withdraw their statement) or refuse to continue to testify, the Working Group considers that the admission of the statement should be governed by similar criteria to that proposed by the Working Group for the use of other measures i.e. that there should be an objective test, that the fear has to be shown to have had a real effect on the witness and that the fear would not be overcome by using any of the other measures proposed by the Working Group. This should reduce the possibility of a witness refusing to give evidence, which might lead to them being punished by the court, including being imprisoned.

Recommendation 74

11.44 The Working Group recommends that where a witness refuses to testify through fear, the admission of their written statement should be governed by similar criteria to that proposed by the Working Group for the use of other measures i.e. that the court must be satisfied that the person would be likely to be so intimidated or distressed as to be unable to give best evidence and that the fear could not be overcome by using any of the other measures the Working Group has recommended should be made available.

Admissibility

11.45 As mentioned earlier, the Law Commission's review was prompted by The Royal Commission on Criminal Justice which considered the law on hearsay and concluded that

> "in general, the fact that a statement is hearsay should mean that the court places rather less weight on it, but not that it should be inadmissible in the first place. We believe that the probative value of relevant evidence should in principle be decided by the jury for themselves, and we therefore recommend that hearsay evidence should be admitted to a greater extent than at present...."

11.46 The Law Commission have submitted that their proposed reforms will lead to more evidence being deemed admissible than is currently the case under the present law. The basis of their recommendations is that hearsay will continue to be an exclusionary rule, to which there would be specified exceptions, plus a discretion to admit hearsay evidence which would otherwise be inadmissible where this is in the interests of justice.

11.47 The Working Group has proposed that video recorded evidence in chief should be admissible as evidence. While this is a form of hearsay, the Working Group proposes that the witness should be subject to cross-examination (either pre-trial or in court) and so has concluded that this measure should be treated separately from the Law Commission's proposals.

11.48 The Working Group considered that the other Law Commission proposals listed in

paragraph 11.36 above would assist vulnerable or intimidated witnesses. However, it concluded that as the Law Commission's report covers wider issues than those affecting vulnerable or intimidated witnesses these proposals need to be assessed in the light of the recommendations in this report and taken forward separately.

Recommendation 75

11.49 The Working Group recommends that the Law Commission's Report on the law on hearsay should be considered in the broader context and taken forward by a separate working group. This group should take account of the proposals in this report and the comments offered on the Law Commission's proposals and Recommendation 74 (paragraph 11.44 above).

ALTERNATIVE FORMS OF EVIDENCE

11.50 The Working Group acknowledged that to ensure the fair operation of the criminal justice system, it is right to assist those who have witnessed crime to speak out without fear or trauma and thus the thrust of this report is to provide appropriate assistance to enable vulnerable or intimidated witnesses to give their evidence more effectively. However, the Working Group also considered whether other types of evidence might be made available in court which would make the presence of the witness superfluous and thus make it unnecessary for those most vulnerable to go through the criminal justice process at all. The Group recognises that very many different types of evidence may be addressed but have focused, for illustrative purposes, on forensic evidence and the use of CCTV in public places.

Forensic Evidence

11.51 Forensic science can be used to assist police investigations in three main ways: to substantiate whether a crime has been committed; provide corroborative evidence which links suspects to scenes of crimes, or eliminates them from the inquiry; and to provide intelligence through databases.

11.52 In addition to the long established use of fingerprint identification, forensic analysis can identify and compare the materials commonly involved or transferred in crime such as:

- blood and body fluids;
- fibres and hairs;
- glass, paint and other building materials;
- marks and physical features;
- drugs;
- firearms and ammunition; and
- documents, computers and handwriting.

This evidence can be used to link particular suspects to scenes of crime, or alternatively eliminate them from enquiries.

11.53 There are two national data bases that will be available to the police for intelligence purposes; the national DNA database which allows 'cold' identifications from body fluids thus enabling the police to screen existing suspects or suggest suspects and the National Automated Fingerprint Identification Scheme (NAFIS).

(1) National DNA Database

11.54 This holds DNA profiles obtained from samples of those suspected, cautioned or convicted of a recordable offence and also profiles obtained from crime stains left at the scenes of crime. The legislation enables but does not require the police to take samples in these circumstances. To date ACPO has advised police forces to take samples where the offence being investigated or the suspect convicted, charged or reported, is one of burglary, sexual or violence against the person.

11.55 The Database is managed and operated on behalf of the police by the Forensic Science Service. It became operational in April 1995 in respect of England and Wales from December 1996 it was extended to cover all UK forces. As at 27 January 1997, the database held 110,278 suspect sample profiles and 8,942 crime scene stain profiles and since it began in April 1995 there have been more than 3,269 matches - a rate of about 1 in 6.

11.56 DNA results are presented in court in the form of a witness statement and the scientist may be called to give evidence of his/her findings and be cross-examined by the defence.

(2) NAFIS

11.57 The National Automated Fingerprint Identification System is being implemented by the Police Information Technology Organisation (PITO). In future, police forces could capture 10 fingerprint impressions and marks from scenes of crime and submit them electronically to a national database. Fingerprint impressions can then be compared automatically against each other by an automated identification system, and possible matches returned in seconds or minutes. The system will become fully operational in 1998, with a capability of searching and comparing fingerprints at a rate of more than one million comparisons per second. More than 9 forces will be directly using NAFIS, and NAFIS operating a bureau on behalf of all other forces until they also receive force systems by 2001.

Limitations

11.58 While the use of forensic evidence, such as DNA profiles, can be a valuable tool in a police investigation, and provide important evidence in support of a case, the Working Group accepted that it is never likely to provide the full story and so be able to replace the witness giving oral evidence in court. For example, in a prosecution for rape, DNA evidence may substantiate the allegation that a particular suspect had sexual intercourse with a victim, thus denying him the use of the defence that "it wasn't me" or "it didn't happen". But the alternative defence likely to be used is that the victim consented to the act. Forensic evidence or injuries suffered by the victim might provide some corroboration of a rape allegation but the witnesses' own testimony will be needed on the issue of consent, and on how such injuries occurred.

CCTV in Public Places

11.59 Public space CCTV systems have spread enormously over the past 10 years. Areas covered by such systems include town and city centres, high streets, shopping centres and parades, villages, car parks, bus and railway stations, commercial centres, industrial estates, schools, hospitals, leisure centres and increasingly, residential neighbourhoods.

11.60 Apart from the crime prevention benefits which many areas report flow from such installations, CCTV is useful in obtaining reliable - and sometimes incontrovertible- evidence. A CCTV tape can graphically demonstrate to a court the nature and seriousness of crimes such as assault. It can provide identification or confirm or refute alibi evidence. It can show suspects' behaviour which may fall short of crime, but may confirm their intention or other relevant facts. All these functions may have an effect on witness or victim vulnerability.

11.61 Anecdotal evidence also reveals that those charged with offences are much more likely to enter guilty pleas when faced with video-taped evidence caught by CCTV cameras. Cases which alleged offenders might have contested without such evidence are thus concluded without the need for witnesses - or victims- to appear in court. The consequent savings in court and police time and in witness and victim trauma, can be considerable.

11.62 Public opinion surveys in areas where CCTV operates also reveal much greater public confidence and reductions in the fear of crime. In particular, vulnerable groups such as the elderly, the disabled or women feel considerably less intimidated in using town centres if they know that CCTV cameras are watching them. This results in increased public use of town centres and high streets and consequent increased natural surveillance - more people means a safer environment generally and less chance for opportunist crimes like robbery or mugging to take place. People report that they feel safer with CCTV.

Recommendation 76

11.63 In the case of vulnerable or intimidated witnesses the police should pay particular attention to obtaining alternative forms of evidence with a view to reducing the need for such witnesses to attend court to give evidence.

Chapter 12: **Training**

Introduction

12.1 In the previous chapters the Working Group has made recommendations about the law and procedures affecting vulnerable or intimidated witnesses in the criminal justice system. A common theme throughout the review has been the need to raise the awareness of all people who work in the criminal justice system to the needs of vulnerable or intimidated witnesses. Those who administer the criminal justice system are all highly trained and generally have access to in-house training. However the Working Group recognised that there were gaps in their knowledge in respect of vulnerable or intimidated witness issues. Bridging these gaps should be an important part of the strategy to improve the way vulnerable or intimidated witnesses are treated in the criminal justice system. Additionally, there would be a need to provide training and guidance on any new laws or procedures.

12.2 This chapter discusses how to raise the general awareness of vulnerable or intimidated witnesses and makes recommendations designed to ensure the effective and strategic implementation through training of the Working Group's proposals. Generally, most agencies already have mechanisms for delivering training and guidance on new initiatives and it is essential to any strategy to improve the treatment of vulnerable and intimidated witnesses. The Working Group felt that those working in the criminal justice system should able to identify such witnesses and have a knowledge of , or whom to ask about, the measures available to assist them. This can be achieved by bridging the existing gaps in awareness/knowledge and by the delivery of training/guidance on an new measures introduced to assist this group of witnesses.

Existing training

12.3 The various agencies which make up the criminal justice system already have systems in place to deliver training and the principle arrangements are set out below.

Police

12.4 The Police are often the witnesses first point of contact with the criminal justice system. They make critical decisions that can affect the future conduct of an investigation and whether or not to prosecute. The provision of police training is shared between a number of different providers:

- National Police Training provides core training programmes. It designs a number of programmes but is not responsible for the delivery of them all.
- Each force has its own training function. About 20% of the training delivered is national and the rest locally designed and delivered.

The main committees for managing police training nationally are:

- **The Police Training Council** has executive responsibility for all nationally approved training programmes. Its membership includes the Home Office, ACPO, Local Authorities, Staff Associations and the CPS.
- **ACPO Personnel and Training** has responsibility for implementing Police Training Council strategy and for the approval of national training programmes.
- **Joint Police/CPS Training** sets the framework for the development of local Steering Group joint Police/CPS training projects and approves national joint training initiatives.

CPS

12.5 The CPS as a national organisation meets its guidance and training needs arising from new legislation on a national basis through its Casework Services. They now work closely with the police at national and local level and have recently delivered the first ever national programme of joint training with the Police on the Criminal Procedure and Investigations Act. In addition to a wide range of other initiatives they

are also working with Victim Support on developing a programme of training on victim/witness care.

Judiciary
12.6 Judges and Magistrates are supported by the Judicial Studies Board but they are also expected to keep themselves informed of new legislative developments. **The Equal Treatment Advisory Committee (ETAC):**

- advise the Judicial Studies Board on the training necessary for judges, magistrates and Chairmen and members of Tribunals to ensure that all who appear before courts or tribunals on a basis of equality.
- advise the Judicial Studies Board on any issues relating to ethnic minorities or other groups who may be, or may be thought to be, disadvantaged before courts or tribunals.
- provide or commission training materials on equal treatment where a clear need exists or where requested by the Judicial Studies Board.

The bulk of the training provided by the Judicial Studies Board is delivered by way of residential and non-residential courses. Before sitting in any of the three main areas of jurisdiction (criminal, civil and family) a judge must attend a course relevant to that subject. After this initial training, judges are expected to attend regular "continuation" training courses. There are also a number of periodicals which provide updates on new legislation, caselaw and practice.

Solicitors
12.7 The Law Society has a Practice Advice Service which sends out briefings about new legislation and other developments on request. There is also a newsletter that has a circulation of some 4,200 practitioners. Other than requiring solicitors to collect points each year for attending training courses there is no central training mechanism.

The Bar
12.8 The Bar Council runs a compulsory course for young practitioners. The Criminal Bar Association runs monthly lectures at the Old Bailey which are videoed and circulated to other circuits and there are magazines for counsel.

The Court Service
12.9 The Court Service is an executive agency of the Lord Chancellors Department and is responsible for staff in the Crown Courts throughout England and Wales. The Personnel and Training Division have responsibility for devising national training programmes. Training schemes are also designed and delivered locally. Responsibility for staff in Magistrates Courts rests with Local Authorities

Victim Support
12.10 Victim Support require all staff and volunteers in both local schemes and witness services to be trained in accordance with national standards. Basic and specialist training materials are updated regularly and training is provided for trainers in order to maintain consistent standards. Victim Support also provides training for many other agencies and professions who come into contact with victims and witnesses.

Other agencies
12.11 Other agencies outside the criminal justice system also come into direct or indirect contact with witnesses. Local Authority Social Service Departments and Health Authorities, for example, may be the first to whom a crime is reported. The need for clear national guidelines to deal with such situations is recommended earlier in this report (Recommendation 15,paragraph 5.4).

Training delivery

12.12 Some commentators have proposed that specialist rape prosecution teams should be established by the CPS and that the CPS and prosecuting counsel should receive training in rape issues. However the Working group understands from the CPS that this particular suggestion raises issues about the way cases are handled generally by the CPS and that it is considered important to ensure that CPS staff are well rounded as prosecutors. Therefore their preference was for a knowledge/skills based approach rather than the development of specialist teams.

12.13 Training programmes need to be devised to suit the specific roles of the agencies involved but the Working Group have noted several areas where joint agency training initiatives have already been conducted successfully. As previously

mentioned (paragraph 12.5) the Police and the CPS undertook joint training on the introduction of the Criminal Procedure and Investigations Act. There is now a joint Police/CPS Training committee (paragraph 12.4) and the CPS are also working with Victim Support on victim/witness care training package. The potential benefits of such joint approaches to training are that they help promote better working relationships between agencies, assist in achieving a more consistent approach by the agencies involved and can offer certain economies of scale.

Recommendation 77

12.14 The Working Group recommend that where practicable the agencies working in the criminal justice system undertake joint training programmes to raise the awareness and, where relevant, provide specialist knowledge of vulnerable and intimidated witness issues.

12.15 Practitioners in the criminal justice system will require training and guidance on any new measures flowing from the recommendations of the Working Group. A varying degree of knowledge and expertise of vulnerable and intimidated witness issues already exists within the criminal justice system and any new training programmes or guidance notes would benefit from harnessing that existing expertise. The Group believe it would be desirable for all practitioners in the criminal justice system to have at least a minimum level of awareness of vulnerable and intimidated witness issues which should include advice on contact points to obtain further information. The National Crime Faculty at Bramshill, for instance, possess a database of experts which they have indicated to the Group could be extended to include experts on a wide range of subjects relating to vulnerable or intimidated witnesses. The Communications Forum, who have contributed to the Group's work, is an umbrella group representing the interests of charities whose sole purpose is to support those with a communication impairment and some of their membership are already involved in providing information to professionals in the criminal justice system about people with communication impairment. The Mental After Care Association also offer similar assistance to those with mental health needs who are in contact with the criminal justice system.

12.16 Any guidance or training should aim, so far as justice permits, to achieve some uniformity and at the same time ensure the most efficient use is made of the measures available. It should assist practitioners in identifying vulnerable or intimidated witnesses and enable them thereafter to deal with those witnesses appropriately, pass them on to a colleague with more expertise or seek advice from an appropriate outside organisation.

Recommendation 78

12.17 The Working Group recommend the establishment by the Home Office of a Steering Group to carry out a costed training needs analysis of the working groups recommendations and for this Steering Group to develop co-ordinated guidance and training templates for those working in the criminal justice system. The group should include training professionals from the agencies referred to in paragraphs 12.3 - 12.11.

12.18 The Steering Group is likely to need at least 12 months to carry out the costed training needs analysis and begin to develop core training programmes and guidance. The purpose of these core programmes should be to assist those in the individual agencies, responsible for the preparation and delivery of training, to tailor an appropriate package of programmes to meet their own needs taking into account the templates prepared by the Steering Group.

12.19 The Steering Group should be encouraged to draw on the expertise and knowledge of the wide range of organisations who help and represent vulnerable or intimidated people, a considerable number of whom have already offered their support and assistance to the Working Group. To be effective, the content and format of training programmes must be appropriate to the needs of those people it is designed to assist (i.e. vulnerable or intimidated witnesses) and this is best achieved by consulting with expert organisations and training professionals.

Chapter 13: **Costs of recommendations**

Introduction

13.1 This purpose of this chapter is to cost the implications of the recommendations of the working group on Vulnerable or Intimidated Witnesses.

13.2 The chapter examines:

- the assumptions as to the number of witnesses who will be affected
- the costs of individual measures including both the start-up and running costs; and

Assumptions

13.3 Survey data and CPS statistics suggest that there may be the following numbers of civilian adult witnesses asked to attend court per annum:

	Crown Court	Magistrates' courts
Prosecution:	100,000	60,000
Defence:	25,000	25,000

Or, in round numbers, a total of 160,000 prosecution witnesses and 50,000 defence witnesses. Perhaps 5 to 10 times as many witnesses might be involved in police interviews.

13.4 Drawing on a survey of disability in the general population we estimate that 3-5% of all witnesses might be vulnerable on account of their mental or physical disability. A further 2% of prosecution witnesses might be vulnerable because they were the victims of certain types of offences (sexual, racial and domestic violence).

13.5 So in total 5-7% of prosecution witnesses and 3-5% of defence witnesses might be vulnerable. This gives estimates of:

- 9,500 to 13,700 vulnerable witnesses at court;
- 47,500 to 137,000 vulnerable witnesses involved in police interviews.

13.6 Intimidated witnesses might account for a further 2-3% of prosecution witnesses. Intimidation is less likely for defence witnesses - perhaps 1-2%.

This gives estimates of:

- 3,700 to 5,800 intimidated witnesses at court;
- 18,500 to 58,000 intimidated witnesses involved in police interviews.

Individual measures

13.7 The costs of these individual measures are as follows:

Recom No.	Description	Costs Existing cases	Assumed Extra cases	TOTAL
8(2)	Extended bail apps	£ 95,000	£ 29,600	£ 124,600
8(5)	Breaches of bail	£ 9,700	£ 3,000	£ 12,700
26	Strategy meeting	£ 635,600	£ 198,250	£ 833,850
27	Prosecution meet witness	£ 635,600	£ 198,250	£ 833,850
33	Preparing apps	£ 352,600	£ 101,300	£ 453,900
36	Live CCTV link	£ 3,736,900	£ 575,800	£ 4,312,700
39	Reporting restrictions	£ 68,900	£ 21,500	£ 90,400
41	Video Evidence in chief	£ 531,400	£	£ 531,400
45	Video cross-exam	£ 344,600	£ 50,500	£ 395,100
50	Witness escorts	£ 319,000	£ 99,500	£ 418,500
51	Pagers	£ 1,900	£ 0	£ 1,900
52	Re-locate witness box	£ 61,800	£ 0	£ 61,800
Others	Others	£ 1,015,000	£ 0	£ 1,015,000
Total		£ 7,808,000	£ 1,277,700	£ 9,085,700

Note 1: The capital costs have been converted into equivalent annual costs using an assumed lifetime of 60 years for alterations to court building (including witness box) and an assumed lifetime of 10 years for CCTV and video equipment.

Note 2: Above other costs include £1,000,000 for publicity (Rec 9) which might arise in the first year only. The £1,000,000 for publicity costs is flexible and depends entirely on the required level of coverage and method of delivery, which have yet to be determined.

VULNERABLE AND INTIMIDATED WITNESSES: A REVIEW OF THE LITERATURE

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The views expressed in this report are not necessarily the views of the Review Group or the Home Office.

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Summary

Defining vulnerable and intimidated witnesses will be an important factor in influencing whether those in most need of special assistance receive it. This is not straightforward, but some jurisdictions have legislation enabling extra help to be given to "special witnesses" which suggest possible criteria. These include:

- the witness's personal characteristics (such as physical or mental condition, age and cultural background);
- the nature of the offence;
- the relationship between the witness and defendant;
- the nature of the evidence the witness is required to give; and
- the defendant's characteristics (particularly dangerousness).

The literature review focuses on three main groups: intimidated witnesses, those with disabilities and illnesses, and victims of special offences.

Intimidated witnesses

Several authors have suggested there are different types of intimidation. For example, case-specific intimidation involves threats or violence intended to discourage a particular person from helping a particular investigation. Community-wide intimidation covers acts intended to create a general atmosphere of fear and non-cooperation with the criminal justice system, within a particular area or community. These categorisations are useful because they suggest different approaches may be needed to tackle different types of intimidation.

However, information on the scale and nature of the problem is very limited, partly because of the nature of the problem. Despite this, there is some evidence suggesting:

- victim intimidation is more common than non-victim witness intimidation;
- women are at greater risk than men;
- risk of intimidation seems to vary according to the nature of the initial offence;
- intimidation is more likely when the offender is known to the witness; and
- in most cases, intimidation seems to be perpetrated by the initial offender.

Six tasks for the criminal justice system are:

- minimising risks of intimidation associated with involvement in the criminal justice system (including reporting intimidation);
- preparing for the possibility of intimidation;
- recognising intimidation;
- dealing with intimidation where it occurs;
- preventing further intimidation; and
- mounting a case when no witnesses come forward.

Measures can be identified to assist each task: for example surveillance operations and professional witnesses may be used to mount cases where witnesses will not come forward. Such approaches have limitations though: it seems preferable therefore that more attention is given to the other tasks listed above.

Witnesses with disabilities and illnesses

More literature was found on the experiences of witnesses with learning disabilities in the criminal justice system than for those with physical disabilities or mental illness. However it appears

that at least five areas of personal functioning may be affected by disabilities and illnesses:

- memory;
- communication skills;
- emotional resilience (including response to perceived aggression);
- mobility; and
- social skills.

Some means of distinguishing those who are vulnerable is needed. Three approaches are discussed:

- drawing up a list of groups who qualify as vulnerable;
- detailing one or more tests to determine whether a particular witness qualifies; and
- leaving the decision to the discretion of the various criminal justice agencies: expert assessments could be used to this end.

Seven themes to improve responses to witnesses with disabilities or illnesses can be identified:

- encouraging reporting;
- identifying vulnerability;
- facilitating communication;
- recognising that a crime has occurred;
- increasing understanding;
- providing support; and
- preventing future offences.

A thread which runs through many of these concerns is the role of carers.

Victims of special offences

Victims of special offences and possibly others who have suffered repeat victimisation may be seen as vulnerable witnesses. Four main groups are considered: victims of sexual offences, domestic violence, racial incidents and hate crimes against sexual minorities.

It is difficult to estimate the scale of these crimes, for various reasons including under-reporting (particularly in sexual and domestic violence) and the way these offences are recorded by the criminal justice system (particularly domestic violence and racial incidents). Nevertheless, the evidence suggests that these offences are relatively rare. Sexual offences and domestic violence appear to be much less common than property crime for example, and racially motivated crimes much less common than crimes where there was no apparent racial motive.

Against this, the recorded rates of all three offences have increased in recent years and incidents of domestic violence reported to the British Crime Survey have increased. However, increased reporting could at least partly account for this.

A number of areas were found where the literature suggests the criminal justice response to witnesses of special offences could be improved. Some of these are particular to one offence: for example, having a choice of a female doctor to conduct medical examinations for female sex offence complainants. Other concerns were common. For example one common concern is that seeing the alleged offender in court may be upsetting: screens are one possible response. Some efforts have been made to improve the criminal justice response. However, very little research was found evaluating the effect of these changes. Nevertheless it appears that although some improvements may have been made, there is still concern about how these groups fare.

Conclusions

Numerous possible measures to improve the situation of vulnerable witnesses are identified within the report, requiring varying levels of intervention. Some are specific to a particular type of vulnerable witnesses, but many could be applied to more than one group. A number of practical issues about using special measures for vulnerable witnesses are identified, such as whether measures should be granted as a right, and who should have responsibility for providing them. More fundamentally, the use of special measures to protect vulnerable witnesses has implications for justice.

Section 1: **Introduction**

Background

This report summarises the findings of a literature review on vulnerable and intimidated witnesses. The literature review was commissioned by the Home Office to feed into and inform an inter-departmental government review of this area (hereafter referred to as "the review"). The review's terms of reference were as follows:

> "Having regard to the interests of justice: the importance of preventing and detecting crime, the needs of witnesses and cost effectiveness,
>
> and taking into account the National Standards of Witness Care in England and Wales,
>
> - to identify measures at all stages of the criminal justice process which will improve the treatment of vulnerable witnesses, including those likely to be subject to intimidation;
> - to encourage such witnesses to give evidence of crime and enabling them to give best evidence in court;
> - to consider which witnesses should be classified as vulnerable;
> - to identify effective procedures for applying appropriate measures in individual cases;
> - and to make costed recommendations."

Definitions

The definition of a vulnerable or intimidated witness is a key concern for the review. Deciding who should be classified as a vulnerable witness has important practical implications. In particular, where special assistance is available to vulnerable witnesses generally, it will be an important factor in determining whether those most in need of assistance receive it. Clearly there are dangers in drawing the definition too broadly or too narrowly: in both cases, the cost effectiveness of providing any such special measures would be reduced.

Despite the importance of carefully defining vulnerable witnesses, there is little literature on this subject. This is at least partly because most of the literature examines how individual groups of people experience the criminal justice process, rather than considering vulnerable witnesses as whole. This neglect could also perhaps be related to a concern (noted by the Western Australian Law Reform Commission 1990: 64) that singling out certain groups as vulnerable may be experienced as patronizing or discriminatory.

However, failure to recognise and compensate for inequalities between witnesses seems both inhumane (when this results in stress or trauma for the witness) and unjust. There are other problems: although a group of people may be potentially vulnerable, in practice not all members of the group will actually be vulnerable.

Those authors who have looked at vulnerable witnesses as a whole have generally tackled these problems in the same way:

- first, by suggesting certain conditions where a witness may be vulnerable; and
- secondly, by recommending that the courts be given the discretion to decide whether those conditions are met in the individual case.

Some examples of the definitions which have been suggested are given overleaf.

Example 1: Queensland Evidence Act 1977 s.21A (quoted in Law Reform Commission of Western Australia Discussion Paper,1990: 65-6).

Vulnerable witnesses are described as "special" witnesses. These are defined as a child under 12 years, or:

"a person, who in the court's opinion -

(i) would, as a result of intellectual impairment or cultural differences, be likely to be disadvantaged as a witness;

(ii) would be likely to suffer severe emotional trauma; or

(iii) would be likely to be so intimidated as to be disadvantaged as a witness,

if required to give evidence in accordance with the usual rules and practice of the court".

Example 2: Western Australia Law Reform Commission Report (1991:11)

The Commission begins by defining a vulnerable witness as: "any competent witness (either for the prosecution or for the defence) for whom the giving of evidence is likely to be especially traumatic or even impossible". However, it then goes on to develop the more detailed definition given in Example 3.

There are a number of similarities between these definitions, suggesting some consensus that certain groups of people may be particularly vulnerable. Most commonly, the witness's **personal characteristics** are identified as a potential source of vulnerability, namely:

- *physical or mental handicaps or illness*
- *age (the elderly and children); and*
- *cultural background.*

The **nature of the offence, nature of the evidence the witness is to give and the relationship between the witness and the defendant** have also been suggested as possible causes of vulnerability.

Example 3: Western Australia Law Reform Commission Report (1991: 116, 121).

The Commission recommends a dual approach, in which some groups face more strenuous tests than others.

For witnesses with an "intellectual handicap or other mental or psychological disorder or physical handicap" the test suggested is whether the witness "is likely to be unable to give evidence in accordance with the traditional rules and practice of the court".

In other cases, "the court should be able to declare any witness a special witness if, taking into account:

(1) a person's age, cultural background, or relationship to any other party in the proceedings,

(2) in a criminal case, the nature of the offence, or

(3) any other relevant factor.

the court is satisfied that the person

a) *would be likely to suffer unusual emotional trauma, or*

b) *would be likely to be so intimidated or stressed as to be unable to give evidence*

if required to give evidence in accordance with the traditional rules and practice of the court" (emphasis added)[1].

These definitions have a number of limitations:

- Most fail to specify whether they apply to both victim and non-victim witnesses (the exception here is example 2, which refers to both prosecution and defence witnesses). It seems likely that most vulnerable witnesses will be victims of crime, but it is possible that other witnesses could be vulnerable.

[1] *A virtually identical definition was subsequently adopted in the Western Australian Acts Amendment (Evidence of Children and Others) Act 1992 (section 106R).*

- Intimidated witnesses are not usually specified, but seem to be covered in most cases by references to the trauma suffered by vulnerable witnesses, and those concerning ability to give evidence. This accords with the review's terms of reference (see above, bullet point one), which treats intimidated witnesses as just one class of vulnerable witnesses.

- None of the definitions encountered suggested the witness's *sex* or *sexual disposition* could be a source of vulnerability. Yet there is some literature suggesting that both female witnesses and lesbian and gay witnesses may encounter prejudice in their contacts with the criminal justice system. The same is also true of *race*, although "cultural background" (examples 1 & 3) does touch on this. (See section 4 for further discussion of the evidence regarding sex, sexual disposition and race).

- Nor have any of the definitions considered **offender characteristics:** in some cases witnesses may be vulnerable because the offender is dangerous.

Example 4: Scottish Law Commission (1990).

The Scottish Law Commission suggested the following issues should be considered when granting the special measures it recommends for vulnerable adult witnesses (video-taping pre-trial depositions, screens and live closed circuit television links):

- the age of the witness;
- their physical/mental capacity;
- the nature of the offence;
- the relationship between the witness and the defendant;
- the possible effect on the witness if required to give evidence in open court; and
- the probability that the witness would give better evidence if not required to do so in open court.

- Only one (example 5) allows the witness's views to be taken into account. None of the literature found considered whether witnesses' views should be considered. This is a difficult issue. Witnesses may be best placed to judge whether they would benefit from special measures, so their advice could be useful for the court. However, it is also possible that some witnesses might reject measures which could help them, for example to avoid being labelled as vulnerable.

In addition to these criticisms concerning the groups covered, there are some limitations worth noting about how vulnerability is defined. First, most of the definitions are restricted to vulnerability arising from giving evidence at court. As the review's terms of reference suggest, witnesses may experience trauma at other stages in the criminal justice system. Trauma can arise as early as the initial report or at any time until after the case is heard in court (if it ever is). This indicates that a broader criteria of vulnerability is needed than having difficulty in giving effective evidence at court.

Example 5: Crime and Punishment (Scotland) Act 1997 s29

The definition adopted in Scotland is much more narrow that the Scottish Law Commission recommended (see Example 4). Under the Act, special arrangements for child witnesses (such as screens, live television links and video-recordings) are extended to adult vulnerable witnesses. Vulnerable adult witnesses are defined as people who:

- are sixteen years or older; and
- are subject to a court order under the Mental Health Acts on the grounds of suffering from a mental disorder; and
- appear to the court to have a "significant impairment of intelligence and social functioning" (emphasis added).

The Act also details three issues for the court to take into account when assessing an application for special treatment:

- "the *possible* effect on the vulnerable person if required to give evidence, no such application having been granted;
- whether it is *likely* that the vulnerable person wold be better able to give evidence if such an application were granted; and
- *the views of the vulnerable person*" (emphasis added).

Example 6: Report of the Advisory Group on Video Evidence 1989 (The "Pigot Report").

The Group suggested a "test of vulnerability" whereby the courts can declare a witness is vulnerable if they are:

> "likely to suffer an unusual and unreasonable degree of mental stress if required to give evidence in open court, having regard to:
>
> - the witness's age;
> - their physical and mental condition;
> - the nature and seriousness of the offence; and
> - the nature and seriousness of the evidence they are to give".

For all victims of serious sexual offences, the Group recommended that there should a rebuttable assumption that they were vulnerable witnesses (1989: 3.5).

The examples given also tend to associate vulnerability with trauma. It could be argued that vulnerability should encompass practical problems in dealing with the crime, or contacts with criminal justice system or both. Another form of vulnerability is the possible risk of future victimisation. There is evidence that past victimisation increases the risk of victimisation in the future (see for example, Farrell & Pease 1993, and Lloyd Farrell and Pease 1994), suggesting that victim-witnesses may be more vulnerable than non-victim witnesses .

In practice of course, a witness may experience more than one form of vulnerability. Different forms may be mutually reinforcing: practical problems may add to trauma already felt by contacts with the criminal justice system. It may therefore, be worthwhile defining "vulnerability" more loosely.

Definition used for the literature review

To avoid unduly restricting the scope of this literature review, the definition used in this report is a broad one (see example 7). This definition is not proposed for the review in considering any future legislation: it is however intended to avoid excluding any potential groups of vulnerable witnesses the review team might wish to consider.

Example 7: Literature review definition

For the purpose of the literature review, a vulnerable witness is any witness (whether a victim or not) who is likely to find:

- witnessing a crime;
- any subsequent contact with the criminal justice system;

unusually stressful, upsetting or problematic, because of:

- their personal characteristics;
- the nature of the offence;
- the nature of any evidence they are called upon to give at any stage to assist the justice process;
- the offender's characteristics;
- any relationship between them and the defendant; or
- intimidation.

Report Scope and Structure

Scope

The scope of the report has inevitably been limited by practical constraints. The focus of the report has been restricted in two main ways. Firstly, *child witnesses* were excluded because this sizeable area of literature would have been impractical to include given time constraints. This is, however, an area the Review has examined separately.

Secondly, by necessity the report covers only those groups whose experiences of witnessing have been documented. This means that some groups, for whom there is very little or no relevant literature cannot be considered in detail although certain characteristics specific to them will be covered:

- ***The elderly***

No literature was found examining the experiences of elderly witnesses. It seems reasonable to assume that, where elderly witnesses are vulnerable, at least in some cases this may stem from mental or physical disabilities/illnesses which become more common in old age (covered by section 3).

- ***Repeat victims***

Again it is not clear whether repeat victims tend to find witnessing more upsetting or problematic than other groups. It is possible that they may have special difficulties, for example in receiving an inappropriate police response because they have not been identified as repeat victims. However, there is now significant awareness of this issue, and efforts are being made to give repeat victims special assistance (tackling repeat victimisation is one of the police's key performance indicators). Repeat victims are discussed in section 2 in relation to witness intimidation, and in section 4 regarding some special offences such as domestic violence, where repeat victimisation is common.

- ***Lesbian and gay witnesses***

There is a small body of literature examining the law (primarily in relation to the age of sexual consent) and police attitudes to and treatment of this group. This suggests that witnessing may be upsetting or problematic for these groups. Lesbian and gay witnesses are considered under section 4 on special offences, which also discusses issues of sex and race.

Finally, it is worth drawing attention to the possibility of multiple membership of the various groups of vulnerable witnesses (for example, a black disabled rape victim). It is likely that membership of more than one group of vulnerable witness may compound the negative experiences and perceptions involved in witnessing.

Structure

The report is divided into five sections. Sections 2 - 4 each examine a different group of vulnerable witness. Section 2 examines intimidated witnesses; section 3 looks at those who are vulnerable because of physical and mental disabilities and illnesses; and section 4 cases where the nature of the offence can make a witness vulnerable. Each of these sections begins by examining the nature of vulnerability associated with the group in question, and then discusses possible measures to ameliorate the problem. Finally, section 5 draws some conclusions.

Section 2: **Witness Intimidation**

The Problem

Witness intimidation can discourage some witnesses from reporting crime or coming forward with other evidence, and could cause cases that do go ahead to be lost or abandoned. At a more general level, it is thought to undermine both public confidence in the criminal justice system and its effectiveness. Until recently witness intimidation could only be prosecuted under the common law offence of perverting the course of justice, which also covers other acts such as making false allegations of crime. The 1994 Criminal Justice and Public Order Act created two new offences:

- intimidating a witness; and
- harming or threatening to harm a witness.

Legal Definition

The legal definitions of witness intimidation and harming or threatening to harm a witness under the Act both cover:

- threats to harm someone and acts to harm them;
- physical and financial harm to the person or the property; and
- acts or threats against a third party (for example a relative of the person they want to intimidate).

In addition:

- The act or threat must be intended to intimidate: so for example, a casual remark that someone should not bother going to the police, intended merely as comment or persuasion would not be counted. In practice of course, it may be difficult to distinguish at what point an effort to persuade becomes intimidation.
- The perpetrator must know or believe that the other person is helping or has helped an investigation, is a witness or potential witness, juror or potential juror[1].
- The perpetrator must have acted or threatened the person because they believed this, and with the intention of obstructing the course of justice. In many cases it may be difficult to prove that the perpetrator intended to pervert the course of justice. Consequently, the Act says that this intention will be presumed unless the contrary is proven.

The difference between the two offences is that witness intimidation applies to current investigations, but harming or threatening to harm a witness applies only after the trial has ended. So for example, if the intimidation occurred because the perpetrator believed the witness had helped with the investigation of an offence at some point *in the past*, the offence would be harming or threatening to harm a witness[2].

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[1] *Juror intimidation is not specifically examined by this report, but it is worth noting that some of the measures reported in relation to witness intimidation may also be applicable to juror intimidation.*

[2] *No time limits have been set for the prosecution to bring such a case. There are however time limits on the presumption of intent, meaning that intent cannot be presumed in cases where the alleged harm or threat occurred outside the relevant period (usually within a year of the act or within a year of conclusion or the trial or appeal when intimidation occurred during the trial).*

Types of intimidation

Several authors have identified different types of witness intimidation (see examples 1 to 3 below).

Example 1: Case-specific and community-wide intimidation (Healey 1995:1)

Healey (1995:1) distinguishes two types of intimidation:

- *Case-specific* intimidation involves threats or violence intended to discourage a particular person from helping a particular investigation; whereas
- *Community-wide* intimidation covers acts intended to create a general atmosphere of fear and non-cooperation with the criminal justice system, within a particular area or community.

Two points are worth noting. First, Healey emphasises that community-wide intimidation is potentially as harmful to the criminal justice system as case-specific intimidation. Secondly, the two forms are interrelated: each example of case-specific intimidation reinforces community-wide intimidation.

Example 2: Traditional, cultural and perceived intimidation (ABA 1981:1)

Another classification has been suggested by the American Bar Association (1981:1):

- *Traditional* intimidation occurs when threats or acts are made against a witness, their property or a member of their family;
- *Cultural* intimidation occurs when friends or family of the witness try to dissuade them from assisting an investigation; and
- *Perceived* intimidation occurs when fear of possible intimidation or retribution is felt by a witness.

It should be noted that neither cultural nor perceived intimidation are covered by the English legal definition of witness intimidation (see above). Most cases of cultural intimidation would also be excluded by the English definition, probably consisting of attempts to persuade rather than attempts to intimidate. At least some community-wide intimidation, where the behaviour is not be directed towards individual witnesses, may also be excluded. These categories are worth considering however, given that they may all produce the same effect in undermining the criminal justice process.

Example 3: Three tiers: small core, middle ring and outer ring (Maynard 1994:1)

Maynard (1994: 1) takes a slightly different approach, identifying three tiers:

- The *small inner core* consists of the most serious cases, where intimidation is life-threatening. These witnesses need high level protection such as changes of identity and relocation;
- The *middle ring* comprises those witnesses who have experienced non life-threatening intimidation; and
- The *outer ring* covers people who are discouraged from reporting by the perceived risk of threats or harm, even where they themselves are victims of crime. (There is some overlap between this outer ring and both personal and community-wide intimidation).

There are some similarities between the categories. For example:

- case-specific intimidation (example 1) is much the same as traditional intimidation (example 2);
- community-wide intimidation (example 1) is similar to perceived intimidation (example 2). (The main difference is that the former is deliberately fostered by offenders, whereas the latter is not necessarily intentional); and
- perceived intimidation (example 2) is similar to Maynard's outer ring (example 3).

These categorisations are useful because they suggest that different approaches may be needed to tackle different types of intimidation. For example, Maynard observes that of the three tiers he identifies, the inner core has been given most

attention. However, the high-level protection schemes designed for them are not suitable for most witnesses:

- the schemes are expensive;
- they require major life changes (such as moving to a new area and severing all contacts from the past) by witnesses, which could be viewed as penalising them; and
- most witnesses would not be willing to make such drastic changes to their lives.

This suggests that alternate measures need to be examined for the middle and outer rings (Maynard 1994: 2-3). Other measures would also be desirable for the inner core witnesses who are not prepared to take part in high-level protection schemes. As Maynard notes, this needs to be based on a strong understanding of the problem of witness intimidation affecting these groups, but at present very little is known.

Research on the scale and nature of the problem

The literature review found very little published research on the size and nature of the witness intimidation problem:

1. Criminal Statistics

In 1996, there were almost 370 convictions for witness intimidation and harming or threatening to harm a witness in England and Wales (internal note, 31/10/97). A further 2,000 offenders were found guilty or cautioned for perverting the course of justice (Criminal Statistics England and Wales 1996).

Of course, not all the convictions for perverting the course of justice will have involved witness intimidation. Other forms of interference with justice will have been included, such as bribery and supplying false information to a police officer. Unfortunately it is impossible to say what proportion of these cases were for witness intimidation on the information available[3].

Even when convictions for perverting the course of justice are included, less than 1% of offenders convicted in 1996 were convicted for witness intimidation. This probably greatly underestimates the scale of the problem: intimidation may mean that the initial offence is never reported, let alone the offence of witness intimidation.

2. Crown Prosecution Service Survey

Another source of data is the Crown Prosecution Service, which takes decisions on whether to prosecute cases in consultation with the police. Maynard reports the findings of an unpublished survey by the CPS. Crown Prosecutors completed a questionnaire whenever a case was discontinued in the Magistrates' Courts during one month in 1993. In three quarters of cases where the prosecution was unable to proceed, the reason given was that a key witness was missing or refused to give evidence. According to Maynard (1994: 4-6) this accounts for over 1% of the cases dealt with by the CPS each year, although not all these will have been the result of intimidation.

3. Police Research Group Study

The Home Office Police Research Group (PRG) did some research in 1993 to provide more information about the scale of the problem. Insufficient resources were available to conduct a large scale survey to obtain a representative sample. Instead, the upper limits of the problem were measured using a house-to-house survey in five high crime housing estates. This found that 13% of crimes reported by victims and 9% by other witnesses were followed by intimidation. Six per cent of crimes experienced by victims and 22% of those mentioned by other witnesses were not reported to the police because of intimidation (Maynard 1994: 12-14).

These findings should be treated with caution. While it is reasonable to believe that the rates of intimidation found were higher than that in the general population, the research highlighted a potential problem in using small sample surveys to measure crime: sometimes witnesses perceive intimidation where none exists. For example, Maynard found that some of those respondents reporting intimidation were actually repeat victims. In some crimes it can be difficult to decide whether intimidation is real or perceived as the result of repeat victimisation (1994: 17). Occasions where

[3] *It seems likely that bribery of witnesses is less common than intimidation: bribery inevitably costs the perpetrator something, whereas intimidation can be achieved free. However, it is impossible to estimate how common other forms of interference with justice (for example supplying the police with false information) are in comparison.*

acts are intended to intimidate but are not perceived as such by the victim are probably fewer, suggesting that this approach may tend to overestimate the extent of witness intimidation.

4. British Crime Survey

Finally, the British Crime Survey asks people about their experience of crime over the previous year and whether they made a report. The survey does not routinely ask people about their experience of witness intimidation, but does examine victims' reasons for failing to report offences to the police. One of the strengths of this survey is its size: the core sample for the 1996 survey covered 15,000 people. Another advantage is the survey's high response rate (83% in 1996)[4]. Both factors give confidence that the survey findings are likely to be typical of the general population.

The 1996 survey found that:

- The most common reasons given were that the offence was too trivial (40%) or that the police could not do anything (29%).

- Fear of reprisals accounted for only 4% of all cases not reported, but 11% for both assault and robbery cases (Mirrlees-Black, Mayhew & Percy 1996; 23).

Maynard (1994:8, discussing the 1992 survey) suggests the high rate for non-reported assault is probably because the victim and defendant are more likely to know each other, so the opportunities for intimidation are greater. Similarly, in robbery the victim is more likely to be able to identify the offender than in other property offences.

Special questions were included on witness intimidation in the 1994 survey (Dowds & Budd 1997: i). These included the extent of intimidation, who was responsible for it, and the nature of the crime witnessed. The main findings were:

- Victim intimidation was much more common than non-victim witness intimidation.

  Seventeen percent of victims and 4% of other witnesses reported intimidation (Dowds and Budd 1997: i & ii). This would be expected, given that victims are more likely to know the offender than non-victim witnesses. However, this probably overestimates the size of the difference. The figure for victims is probably higher than in the general population of victims, because the victim sample was restricted to people who had some knowledge of the offender. Dowds and Budd (1997: 5) estimate that at minimum 6% of all crimes reported in the 1994 survey were followed by intimidation of victims.

- Most intimidation involved verbal abuse and then threats, with physical assaults and damage to property less common.

  Incidents often involved more than one type of harassment (Figure 1). For victims, 71% of intimidatory incidents involved verbal abuse, 41% involved threats, 16% physical assault and 9% damage to property. A very similar pattern was found for other witnesses (73% reporting verbal abuse, 34% threats, 12% physical assault, and 9% damage to property).

- In most cases the original offenders were thought to have been responsible for the intimidation.

  Questions about the identity of harassers were only asked of respondents who had information about the offender, so - as the researchers state - this finding is not surprising. The relationship between the victim and victimizer is more interesting. Female victims were more likely than men to be intimidated by ex-partners or partners. Men were more likely to be harassed by other relatives or household members, and by work contacts. Similar proportions of men and women were intimidated by friends or neighbours (Dowds & Budd 1997: 7).

- Intimidation was more common if the witness reported the initial offence to the police, but failure to report did not guarantee immunity.

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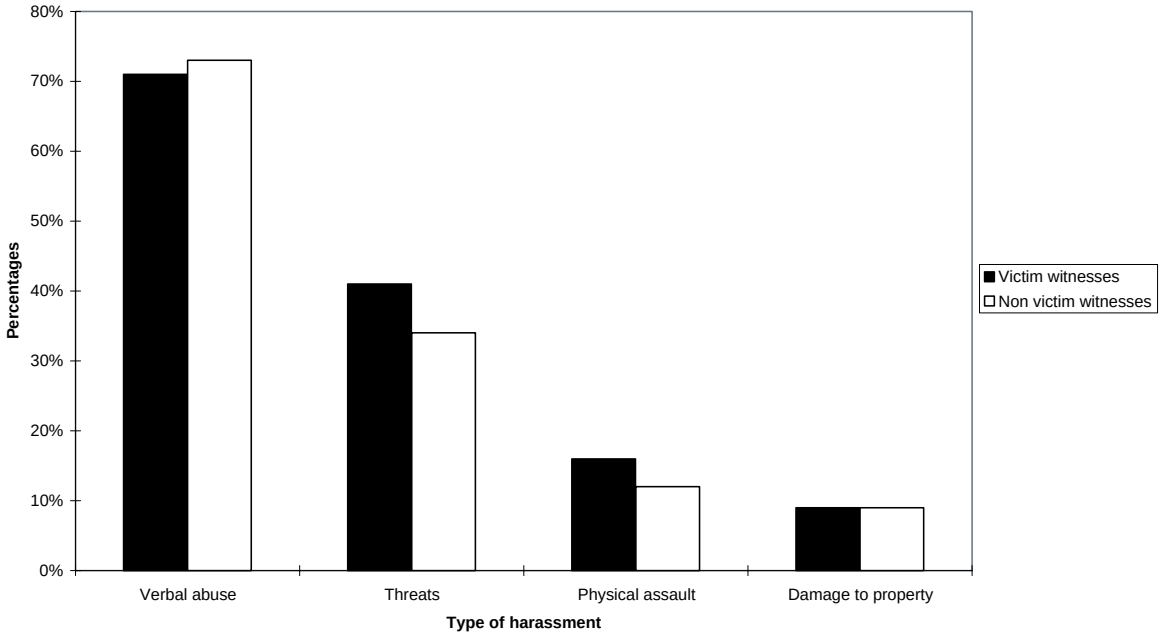
[4] *Figures taken from the 1996 British Crime Survey Technical Report by J.Hales & N. Stratford, available from Social and Community Planning Research, London.*

Figure 1: Types of harassment experienced by witnesses
Source: Dowds, L and Budd, T (1997: From Tables 4 and 10)



Note:
1. Percentages do not add up to 100 as witnesses can experience more than one type of harassment

Harassment was almost twice as likely where the initial incident was reported to the police: 20% of those victims who reported were intimidated compared to 14% of those who did not report. The original offence was twice as likely to be reported as intimidation, and the likelihood of reporting intimidation was tied to reporting patterns for the initial offence. Those who had not reported the initial offence were much less likely to report harassment (3%) than those who had reported the initial offence (19%). Non-victim witnesses were more likely to report intimidation (39%) than victims (23%) (Dowds & Budd 1997: 8-9 & 13-14).

- Women were more at risk than men.

  Female victims were more likely to be intimidated than men (19% as against 14% of men). This difference applied whether or not the initial offence was reported and even though a higher proportion of cases against women were not reported because of fear of reprisals (Dowds & Budd 1997: 4 & 9). This could have been at least partly because women were more likely to know the offender than men.

- Risk of intimidation varied according to the nature of the initial offence.

  Victims reported higher rates of intimidation following sexual offences, vandalism and assaults than for other crimes. Similarly, non-victim witnesses were more likely to be intimidated following assaults and vandalism. A possible explanation is that intimidation might be greater in "expressive" offences (directed against a particular victim) than "instrumental" offences (motivated by personal gain). (Dowds & Budd 1997: Tables 2 & 9).

These findings are useful, but the representativeness of the victim sample (as opposed to the witness sample) is questionable. The sample was restricted to victims who knew something about the offender's identity. Intimidation is less likely in cases where victims do not know the offender's identity, but the prerequisite for intimidation is that the *offender* can identify the victim in some way. The offender may fear the possibility of a police investigation uncovering his/her identity, not just what the victim could tell the police.

The BCS also reinforced Maynard's finding that repeat victimisation and intimidation are bound up with each other. In repeat victimisation, harassing the victim may be part of the motive and effect of both the initial and subsequent offences. Viewing only second and subsequent victimisations as intimidation may be inappropriate. Dowds and Budd acknowledge that this depends though on what we want to measure. If the concern is to measure intimidation as defined by the law (in other words where the intent is to obstruct the criminal justice system) it is necessary to separate victimisations intended to dissuade the victim from cooperating with the justice system (Dowds and Budd, 1997: 10-11).

From this point of view, including all repeat victims as victims of intimidation may inflate the 'real' level of intimidation as defined by the law. Excluding them may underestimate the problem. This suggests further information is required: Dowds and Budd suggest one measure might be whether victim-witnesses felt the aim was to discourage them from the criminal justice system (1997: 11). However, complicating matters further the law says that intent to obstruct the course of justice can be assumed if the offender believed that the victim was a witness or a potential witness. If intent can be assumed by the courts, a question is raised about whether researchers need to examine intent when trying to measure intimidation. Deciding on the best way to measure intimidation is clearly far from simple.

Outstanding questions

The paucity of information means little or nothing is known on several important questions:

1. What is the trend in the rate of witness intimidation?

Several authors have claimed that the problem of witness intimidation is rising (see for example Clarke 1994, 12; Palmer 1994, 10; Reville 1995, 1775) but hard evidence is lacking. The two most recent sweeps of the British Crime Survey (1994 and 1996) have found that increasing numbers of people attribute their failure to report crimes to the police to fear of reprisals. However, the increase (from 2 to 4%) may not reflect a real rise in fear of reprisals but may simply be due to chance. For example some offences are more likely to be reported than others, so differences in the types of offences reported could explain this. Sampling error could also account for the apparent increase.

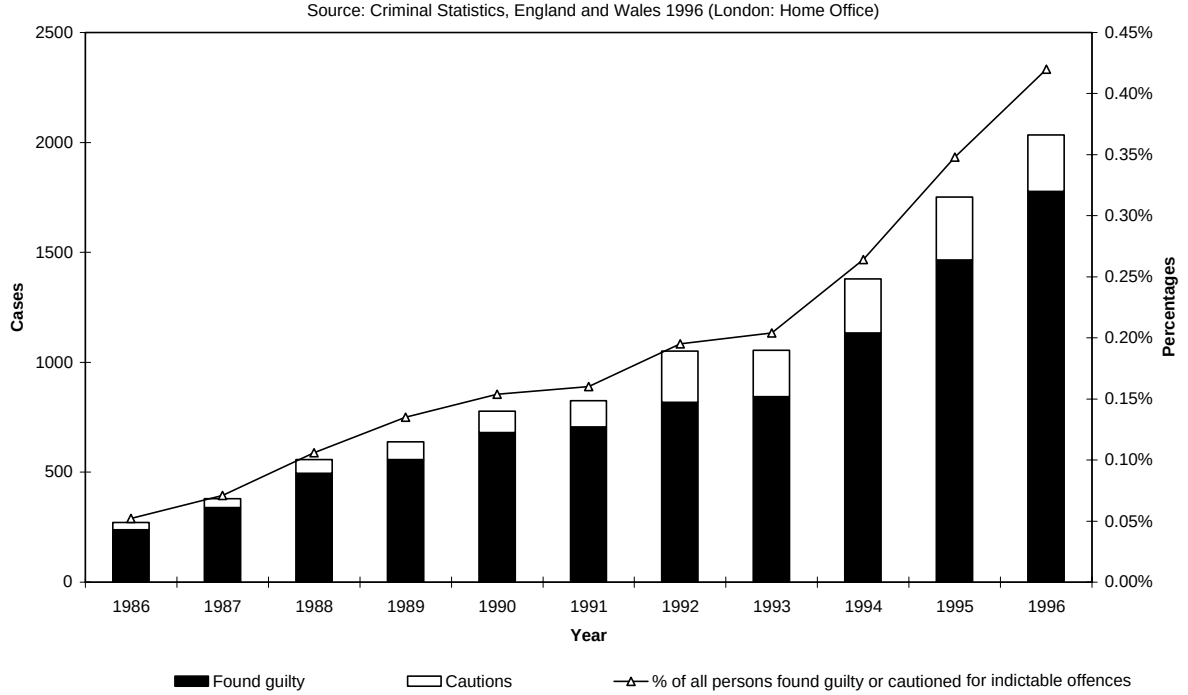
Similarly, the number of convictions for witness intimidation rose more than threefold from almost a hundred convictions in 1995 (internal note, 18/9/97). This may well have been related to increased awareness of the new measures. The number of offenders found guilty or cautioned for perverting the course of justice has also increased sharply, from 275 cases in 1985 to over 2,000 in 1996 (Figure 2). This may indicate that witness intimidation is growing, but it is not certain that cases of intimidation accounted for the increase. Even if cases of intimidation do account for this, the increase may not reflect an increase in witness intimidation in general. Greater convictions might be related to growing awareness of, and harsher attitudes towards, witness intimidation within the criminal justice system. More specifically, police officers and Crown Prosecutors may be more willing to pursue a case of perverting the course of justice now that greater support (from specialised police units) is available to intimidated witnesses.

Perhaps less plausibly, reporting rates may also have increased. Rape reporting is said to have increased as police treatment of rape victims improved (through setting up rape suites for example): the creation of specialist units in some forces to deal with witness intimidation might have had a similar effect.

2. How does the scale of the problem in England and Wales compare with other countries?

The lack of research on the scale of witness intimidation exists in other countries. It is likely that some countries have a greater problem with witness intimidation than others, just as crime rates in general vary. For example, it has been suggested that we have a greater problem than the rest of Europe (Clarke, 1994: 12), although no firm evidence was given to support this. Similarly, witness intimidation may be greater in America, where it has been acknowledged as a common problem. Suggestions that the problem is rising have also been made in America. For example Healey (1995: 1) interviewed a number of criminal justice professionals from 20 jurisdictions, and found that most agreed that intimidation was rising. However, she also observed that:

Figure 2: Offenders found guilty of or cautioned for perverting the course of justice, 1986 - 1996
Source: Criminal Statistics, England and Wales 1996 (London: Home Office)



> "A decade ago, commentators noted that only unsuccessful intimidation attempts ever came to the attention of the police and prosecutors. Today, prosecutors report that extremely violent intimidation attempts - which are almost always successful - are coming to their attention with increasing frequency" (Healey, 1995: 2).

This suggests that witness intimidation may be becoming more serious in America, but it is also plausible that increased reporting is a factor.

3. Who is at greatest risk of intimidation?

In theory any witness might be a victim of witness intimidation. The possibility of obtaining a criminal record and being punished may lead to witness intimidation however trivial the initial offence. In practice, there is some support for the idea that the risk of intimidation is not equally distributed:

a. Intimidation is more prevalent in some types of crime than others.

The types of crime involved may help decide what the most appropriate response is. The BCS and PRG data suggests that intimidation is more likely for witnesses of assault than some other crimes: Healey goes further and suggests that a violent initial crime generally increases the chance that a victim or witness will be intimidated. More information could be collected. It seems plausible that intimidation may also be prevalent where the stakes are highest, such as in organised crime where large sums of money are involved. In America, drug crime is thought to be strongly associated with witness intimidation, although again no firm evidence of this was found by the literature review (Healey 1995, 1: Los Angeles Times 14/1/97: Reuters News Service 12/1/97).

b. Some groups of witnesses are at greater risk of intimidation than others.

The BCS report suggested that victims were more vulnerable than non-victim witnesses, and female victims (particularly those aged between 31 and 60) were more vulnerable than men. Victims who knew the offender were also more likely to be intimidated, although this may be due to bias towards this group in the survey design. Again further information would be useful. It seems plausible that witnesses who are vulnerable for other reasons (such as

learning disabilities) may make easier targets and therefore be more prone to intimidation than "ordinary" witnesses (Healey 1995:3).

c. Intimidation will be more common when the offender is known to the witness.

The BCS findings give some support to this idea, although (as noted above) the survey design was restricted to victims who knew the offender. For intimidation to occur, the harasser must be able to locate the witness: this is obviously more likely when they were previously known to each other.

It does not follow, however that the victim must know the offenders' identity. Nor does it follow that the original offender necessarily intimidates the witness him/herself. Relatives or friends of the original offender may be the harassers, having learnt the witness's identity from the original offender. For example, a Victim Support study (1996: 12) found that a third of Victim Support schemes reported intimidation of rape victims by family or friends of the defendant, against about a quarter who reported intimidation by the defendant (see below for more discussion of this study).

A related consideration (not examined by the BCS report because the sample size was too small to draw firm conclusions) is whether people who are intimidated by partners, ex-partners or other relations are less likely to report than those intimidated by others. There may be particular pressure when relatives are involved, where there may be concerns about bring shame on the family and about how other relations would react. Against this, it could be argued that threats or intimidation from people who are known to the victim might be perceived as less real or serious than when strangers are involved.

d. Geographical proximity to the offender increases risk of intimidation.

Healey (1995: 3) also suggests that risk of intimidation will be greatest when the witness lives, works or studies near to the offender. It is likely that opportunities for intimidation will be higher if the witness and offender live or work near each other than if they spend their lives miles apart. This does not however, appear to have been covered by any of the research to date.

Sometimes these factors will be interlinked. For example:

- victims of violent and sexual crimes are more likely to be acquainted with the offender than victims of property crime; and
- geographical proximity to the offender may be more common where the witness and offender know each other.

This will clearly increase the risk of intimidation. In addition, victim witnesses of some sexual crimes such as rape may be vulnerable for other reasons. The difficulty of proving rape, and prospects of an internal medical examination, public examination of intimate sexual behaviour in the courtroom and media reporting may all make rape victims particularly vulnerable (see chapter 4).

4. When are witnesses at greatest risk of intimidation?

Research on repeat victimisation has found that risk of subsequent victimisations is greatest immediately after an offence. This has been very useful in deciding when to intervene: preventive efforts will be most effective when implemented as quickly as possible following an offence. Information on when the risk of intimidation is greatest might also have important implications in determining what the most effective response from the criminal justice system might be. Only the PRG study examined this, but little information was given, just that intimidation occurred at two main points: either "soon after the initial crime" or "at the time of the court appearance".

5. How do intimidated witnesses view the criminal justice process and (where relevant) what are their experiences of it?

Only two pieces of research were found that examined intimidated witnesses perceptions and experiences of the criminal justice process, and how it could be improved. One was the PRG study which found some dissatisfaction with the police response, including the information and

advice given at the time and as the case proceeded (Maynard 1994: 23). Some of these concerns, such as not being told whether a suspect had been given bail, may be common to other witnesses although they take on special importance in relation to intimidation. (Maynard's findings on this subject are discussed further below).

The second was research on rape victims' experiences of the criminal justice system, based on questionnaires sent to Victim Support schemes. Of those schemes reporting contacts with victims who had been re-assaulted or harassed since the original attack, almost half felt police protection was insufficient. About half of witness services reported rape victims generally were frightened of facing the defendant(s) and supporters in court. Some of this may have been about bringing back bad memories rather than concern about their own safety though. The survey has two main weaknesses: a low response rate (25%) common to this kind of research, and the fact that women's experiences were reported secondhand through Victim Support staff rather than from the women themselves (Victim Support 1996: 13, 16). Further research on how intimidated witnesses view and experience the justice system is clearly needed.

6. What is the extent and nature of community-wide and perceived intimidation?

It should be noted that all of the existing research focuses on case-specific intimidation: that is intimidation against a particular person. Nothing is known about the scale and characteristics of community wide intimidation - intended to create a general atmosphere of intimidation - nor of perceived intimidation, where the possibility of intimidation suffices. This is perhaps partly because these forms of intimidation will be more difficult to measure.

2. The Response

The literature review found that very little material has been published on how witness intimidation is being tackled, either here or abroad. This may partly be explained by the need for security, and fear that details of the approaches used to counter the problem could be used by the perpetrators. It may also be related to the neglect of the issue of witness intimidation more generally, which is only now beginning to be rectified. Nevertheless, it is possible to identify a number of areas where measures could be implemented to enhance the prevention, detection and prosecution of witness intimidation.

a. Reporting

As noted earlier, it seems likely that most cases of witness intimidation and many of the initial crimes witnessed are not reported. This suggests that measures are required at an early stage both to prevent witness intimidation, and where it occurs to encourage and support witnesses in reporting. In practice, the earliest point for which measures have been proposed is when a witness reports an offence to the police. These can be divided into:

- minimising the risk of intimidation associated with reporting:
- recognising intimidation; and
- preventing further intimidation.

Minimising the risks of intimidation

Reporting arrangements can provide opportunities for witness intimidation. For example, Maynard (1994: 18-19) details one case where a witness's identity was inadvertently revealed to the offenders after the crime was reported. In this case, offenders were listening to police radio frequencies to know how quickly they had to escape, when the witness was identified over the radio to officers being dispatched to the scene. The recommendation here was to ensure that as little information as possible be given over the radio to enable officers to respond.

Another case is reported where a witness, who reported a burglary and was visited by police to take a statement, received a brick through her window shortly afterwards. To avoid similar occurrences, Maynard (1994: 19-20) recommends several alternatives be considered:

- delaying visits to take statements and use of plain clothes officers where possible;
- conducting house-to-house calls on neighbouring properties to avoid picking out the witness; and

- inviting the witness by telephone to visit a police station to make the statement.

Maynard recommends that the choice is left to the witness wherever possible, but clearly views the third option as the most viable. He notes that the first option runs contrary to the Audit Commission's recommendation that only one visit should be required, and could be ineffective if offenders can identify plain clothes police officers as such. The second option would increase demands on patrol officers, but the third option would reduce them. However, asking witnesses to visit a police station to make a statement would require more effort for the witness and for the police: some planning would be required by the latter to ensure that suspects are not being interviewed or held at the station at the same time. To avoid witnesses and suspects meeting, the custody officer and investigating officer will need to liaise.

Recognising intimidation

As well as measures designed to avoid intimidation resulting inadvertently from reporting procedures, other measures might be considered to help identify intimidation at this stage. No suggestions were found in the literature on this, but several possibilities can be proposed:

- profile raising: increasing police awareness of the problem through police training, force newspapers, posters and the local policing plan;
- guidance: issuing guidance on how to spot signs of intimidation;
- statement taking and interviewing: requiring officers to ask witnesses if they have received any threats or harm to dissuade them from assisting the police.

Of the three suggestions the first seems the most practical. The second option may be hindered by the limited state of knowledge of witness intimidation at this stage. The third would require some system of checks to ensure that the requirement was adhered to. It also seems plausible that officers will be unwilling to ask witnesses if they are being intimidated without being certain that back-up support was available for those who respond positively. However, the Victim's Charter (1996: 3) does state that victims can expect the police to ask about their fears of further victimisation and suggests they should have an opportunity to explain how the crime has affected them. Pilot projects looking at how this might work are currently being evaluated by the Home Office.

Preventing further intimidation

Once intimidation has come to police attention, various measures can be implemented to prevent further harassment. The traditional approach has been to offer some form of police protection (Maynard 1994: 1) such as:

- increasing police patrols in the witnesses neighbourhood;
- police transport to take the witness to and from work, school, shops and so on;
- 24 hour police presence;
- emergency relocation;
- long-term relocation, which may be accompanied by a change of identity; or
- protective custody.

All are expensive, and some might be viewed as penalising the victim. Unsurprisingly, Maynard's (1994: 1) research suggests that such measures are only used in the most serious cases.

Only one suggestion was found for assisting the larger number of witnesses subject to non-life threatening, but potential deeply upsetting intimidation. Farrell, Jones and Pease (1993: 131-132) suggest that witnesses could be loaned personal alarms, which will notify police if they need help and generate a rapid response. This would have several advantages:

- It would be less expensive than the traditional approaches, removing the need for a constant police presence while still offering protection round the clock.
- Some police forces are already accustomed to using these alarms to protect other vulnerable witnesses, particularly repeat victims.
- As well as reassuring victims and ensuring that further intimidation will receive a fast

and informed response, there is some (albeit limited) evidence that they may deter offenders (Lloyd, Farrell and Pease 1994: 10-20).

- Following on from this, if those witnesses who are most risk of intimidation can be identified, alarms might also be used to prevent it occurring in the first place.

At present our limited knowledge of witness intimidation could make it difficult to identify who should benefit from such measures. Despite this it may be possible to identify some cases where pre-emptive action would be warranted, for example where:

- the suspect has a record of witness intimidation;
- the witness has a previous relationship with the offender;
- the witness is vulnerable in some other way;
- no other witnesses have come forward, and the witness's testimony is essential in an important case.

b. The Investigation

Three areas are discussed below concerning investigation:

- reducing opportunities for intimidation;
- preparing for the possibility of intimidation; and
- mounting a case when no witnesses will come forward.

Reducing opportunities for intimidation

The manner in which an investigation is conducted can place witnesses at risk, in particular by revealing the witness's identity to a suspect. One point where witnesses can be placed in a vulnerable position is at an identification parade. Maynard (1994:20) reports such two cases. In the first, the police asked a witness to identify the suspects at the scene, following a rapid response to the witness's telephone call. The witness was asked to walk past a bus queue where the suspects were standing along with other members of the public. A few days after the positive identification the witness's bicycle was damaged and the witness verbally abused. In another case, the suspects were caught trying to get away with stolen goods. The two witnesses were asked to look in the van where the suspects were held in order to identify them: in this case they refused to do so for fear of reprisals.

It is difficult to say whether these were isolated incidents. Recent enquiries by the Home Office found that all police forces in England and Wales now either have their own screens or access to screens for identification parades, some of which are one-way mirrors (internal note, July 1997). An unknown number of forces also have purpose built identification suites or use video-identification. However, the mere existence of these facilities is not enough: they obviously need to be used routinely. It is not known how much use is made of these approaches at present, nor whether there are any obstacles to their use.

Clearly interviews with suspects may also present another occasion when officers can place witnesses at risk by revealing witness's identities. Even if the suspect is held in custody there is no guarantee of the witness's safety: the Victim Support study referred to earlier suggests the suspect's friends or family may decide to act on their behalf (Victim Support 1996: 12). Nevertheless, it seems likely that some officers feel justified in telling suspects the witness's identity on the grounds that it may reveal that a witness has some motive for fabricating claims. In some cases, the suspect may ask officers this question outright. In others, they may declare strong suspicions about the witness's identity, which if left unanswered could be taken as a tacit admission that their suspicions are well founded.

Some possible measures to discourage the practice are:

- raising police awareness of witness intimidation (see section a above on reporting);
- guidance on when it is appropriate to reveal a witnesses' identities;
- requirements not to reveal witnesses' identities in certain circumstances.

Against this, it should be noted that pressure to identify witnesses before interviews may come

from solicitors. The solicitors' argument is that without knowing all the evidence against their clients, they are unable to give adequate advice. Failure by police to disclose the evidence they have may mean that solicitors advise their clients not to answer questions, frustrating the purpose of the interview[5]. This is based on the idea that suspects may need to know the identity of their accusers to defend themselves (for example, so that they can say if the accuser might have some reason for falsely accusing them). The question of whether police officers should disclose all the evidence against a suspect prior to an interview, including the witnesses identity, is therefore a complicated issue. (The issue of anonymity will be considered again later on).

Preparing for the possibility of intimidation

Measures can also be taken at the investigation stage in case a witness is subsequently successfully intimidated from testifying, or into changing their evidence (known as "flipping"). Admitting other evidence, such as signed statements and taped or video-recorded interviews, is one option. In the past this has been problematic: there is a general ban on admitting "hearsay" evidence because the defence has no opportunity to cross-examine to test the evidence. The 1988 Criminal Justice Act moved some way to rectify this: under section 23 of the Act written statements are now admissible if:

- the statement was made to a police officer; and
- the person who gave it is not giving oral evidence "through fear or because he is kept out of the way".

Figures on the use of this provision are lacking, but anecdotal evidence suggests that little use has been made of it. Two main explanations have been suggested:

- concerns about the validity of statements prepared by the police; and
- concern that defence counsel will not have an opportunity to cross-examine

The second point is addressed in relation to admission of evidence in section c - "the trial" (below). Of most relevance at the investigation stage is the second point, which refers to claims that witness statements are not a very exact record. Statements are prepared by the police, condensing information obtained from interviews into legal jargon which the witnesses may not recognise as their own words. Unlike interviews with suspects, interviews with victims do not have to be tape recorded or written down verbatim. There is therefore, some potential for distortion.

Taping or video-recording interviews might increase the credibility of this evidence (Wolchover & Heaton Armstrong 1997: 855-857). Of the two, tape recording seems more viable. The police are used to taping other interviews, and already have much of the equipment required. Video-recording would require additional equipment which the police are not used to operating, and also raise greater problems in storing tapes.

Mounting a case when no witnesses come forward

Of course in some cases, no witnesses are prepared to come forward. In these situations, there are at least two options:

1. Surveillance operations

The traditional approach has been for the police to mount surveillance operations. This however, depends on the police having some other source of information about likely suspects. It also requires cooperation from certain members of the public, such as those who allow the police to use their premises. Clearly those people who do assist the police in this way may be at risk of intimidation if their identity or the fact that a surveillance operation is being conducted is revealed. The former may be a particular problem if a home or shop is used for just a few minutes without prior planning.

2. Professional witnesses

A more recent idea has been to employ professional witnesses. At present, their use appears to have been limited to housing authorities wishing to evict problem tenants. The

[5] *Preliminary findings from research currently being conducted for the Home Office suggest that this practice of pressuring police officers to reveal evidence before interview has increased since the right to silence provisions were introduced (internal note, 28/10/97).*

professional witness is employed to move into a nearby property under the guise of being a normal tenant. They then record anti-social behaviour by the subject until sufficient evidence has been amassed.

The literature review did not reveal any published material on this practice, but was able to draw on information submitted to the review. According to the Department of the Environment (submission June 1997), the service is usually provided by the authority's own housing officers, environmental health officers or a private company. The Local Government Association (submission August 1997) also suggests police officers may be used. Together they identify a total of seven authorities thought to have used professional witnesses. Both highlight a number of drawbacks:

- Certain conditions will need to be met for the use of professional witnesses to be feasible. For example, the behaviour causing concern must take place in a restricted geographical area. The area has to be sufficiently open and well-lit for offenders to be identified, and an empty property has to be available nearby. There are unlikely to many cases meeting all these conditions.

- The courts have, on occasion, been reluctant to make a repossession order without testimony from the victim. As a consequence, the 1996 Housing Act included a provision intended to validate evidence from non-victim witnesses. However this only came into effect in February 1997, so it is too soon to determine whether or not this has had the intended effect.

- Expense: many of the cases involve a number of small incidents spread over a long period. To convince a court of the gravity of the situation evidence will need to be collected over a long period.

- According to the Local Government Association, a "destructive cycle" may develop "in which complainants' expectations are raised by the use of professional witnesses, only to be dashed by the response of the court" (LGA submission, Aug 1997).

These criticisms suggest that there is very limited potential for extending the use of professional witnesses.

c. The trial...

By far the greatest number of measures proposed concern the court. Most are intended to reduce the potential for intimidation at court, or following a court appearance. Others concern how intimidation is dealt with by the courts when it occurs.

Preventing intimidation in court

Opportunities for intimidation occur as soon as the witness gets to court. Measures for preventing intimidation within the court buildings include:

1. Structural changes to court design

Some opportunities for intimidation at court arise from the physical layout of the court and court buildings. In most courts, there are common entrances, common waiting and common refreshment areas for defence and prosecution witnesses and ordinary members of the public. The Lord Chancellor's Department recommends in its 1993 design guide that separate waiting facilities be provided in all new and refurbished Crown Courts. The process of refurbishment will however be lengthy, and does not apply to magistrates' courts where the vast majority of criminal cases are heard[6]. In many cases it may be difficult and expensive to adapt existing buildings.

2. Keeping witnesses on "standby"

An alternative and less expensive measure than changing the physical layout of all courts would be to keep witnesses on "standby". Instead of calling all witnesses to the court for the duration of the case, witnesses can be asked to stay close to the court and given pagers to notify them when they are needed. This was experimented with in one area in the PRG study: as Maynard observes, although it would require some initial expenditure, it would be relatively inexpensive.

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[6] *All cases currently go through magistrate's courts: a small proportion (the more serious ones with a greater chance of having witnesses) are committed to the Crown Court for trial.*

Whilst it might be impractical to call all witnesses in this manner, it would be appropriate where a witness is particularly vulnerable or has suffered intimidation.

3. Screens, cctv and voice distorters

Once the witness is in the court, another raft of measures serve to prevent intimidation by obscuring the witness by screens, closed circuit television (cctv) and voice distorters. The former measures allow judge, jury and counsel vision of the witness, but obscure that of other people present. These measures serve a dual purpose. On one hand, they enable direct confrontation between witnesses and the defendant and the defendants' supporters in the courtroom to be avoided. On the other, they can enable the witness to maintain some anonymity to prevent intimidation outside the courtroom.

Figures are lacking on how commonly these measures are used, but anecdotal evidence suggests they are rarely employed[7]. This may in part be due to the preparation needed for such measures: in the case of cctv and voice distorters the equipment needed is not available in every court. In addition, the use of voice distorters for this purpose (as opposed to terrorism cases) is very new: trepidation on the part of the courts is understandable in these circumstances. The Law Commission (1997: 3.35) suggests that there is also a perception that "it is more difficult to tell a lie about a person "to his face" than "behind his back". The Law Commission agrees that it is desirable that the witness can see the defendant, if only because of this perception. However, they also suggest that other factors (such as the likely effect on the witness's ability to give the best evidence they can) can outweigh this.

4. Protecting the witnesses' anonymity

Protecting the witnesses anonymity may take two forms:

- Reporting restrictions (such as banning publication of the witnesses name, address, photograph or any other identifying detail)

Reporting restrictions are already available in certain circumstances, such as when the crime is a particularly serious one (eg. murder) or involves a young person. This provision could perhaps be extended to enable reporting restrictions concerning any witness who may be vulnerable to intimidation (The Scotsman 3/1/97).

- Identifying witnesses in court

Under the Statement of National Standards of Witness Care in the Criminal Justice System (1996: para 17.1), witnesses should not be required to state their address in open court unless this is necessary as evidence. Applications can also be made in exceptional circumstances (such as terrorist cases) to avoid the witness's name being used in open court, providing certain guidelines are adhered to. However no research was found examining how frequently such exceptions are granted. The idea of removing this requirement in some cases (in conjunction with using other measures such as screens) runs against the idea that justice should be conducted without secrecy to enable public scrutiny. However, perhaps more fundamentally, it contravenes the principle that the defendant should know the identity of his/her accusers because this may effect his/her ability to defend him/herself. This is a concern for many of the measures discussed, and is considered in greater detail at the end of the chapter.

5. Reforming the defendant's right to cross-examine

It has been suggested that the defendant's right to cross-examine witnesses be reconsidered in relation to rape. This followed media reporting of a case where a defendant was allowed to cross-examine a rape victim over several days and in a manner that, allegedly would not have been deemed acceptable in prosecuting counsel (see chapter 4). Cross-examination of a witness in such a manner might constitute intimidation, and could be just as upsetting for a witness who has been subjected to serious intimidation. There may be grounds then for considering amending this right regarding other vulnerable witnesses such as intimidated witnesses as well as victims of serious sexual offences.

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[7] *Plotnikoff and Woolfson (1995: 51) have examined the use of these measures for child witnesses. They found that tv links were used for about two-thirds of the child witnesses in their study and about one in ten had screens. However, a large proportion of applications were unsucessful: for example applications were made for cctv in 63 cases but used in only 15.*

6. "Friend in court" schemes

Finally, as well as measures to discourage and deal with intimidation when it occurs, some authors have suggested "friend in court" schemes. These involve volunteers accompanying witnesses throughout their attendance in court, from sitting in waiting areas with them to sitting in the court itself. The witness service run by Victim Support and other organisations already provides this but exists mainly in the Crown Court rather than in magistrates' courts, where the majority of prosecutions are dealt with.

Dealing with intimidation

Intimidation can be dealt with by the courts in a number of ways:

1. Admission of evidence

It was suggested earlier that one approach at the investigation stage might be to prepare for the possibility of intimidation, for example in tape-recording interviews and witness statements. This strategy will only be effective however if such evidence is admitted in court. Written statements should now be admissible in some circumstances, but it does not appear that much use is being made of this provision. One reason could be concern about the validity of written witness statements: approaches could include improving witness statements, routine tape recording, and extending the provision to cover other forms of evidence such as video-recordings.

Despite this, perhaps a more important explanation is that admitting written evidence in the absence of the witness denies the defendant the opportunity for cross-examination. This appears to contravene the European Convention on Human Rights (ECHR), which states that "[e]veryone charged with a criminal offence has the minimum right to examine or have examined the witnesses against them" (quoted by Wolchover & Heaton-Armstrong 1997: see also Spencer 1995: 114).

In some jurisdictions such as Holland (Clarke, 1994) this problem is avoided by allowing oral testimony from intimidated witnesses at a pre-trial hearing, where the defence has opportunity to cross-examine. There are some circumstances in which this can already be done in England and Wales, for example, for a child whose life or health would be seriously endangered by a court appearance (Spencer 1995: 114)[8]. In addition, until recently it was possible for a magistrate to receive a deposition from a dangerously ill adult[9]. The Pigot Committee (Advisory Group on Video Evidence, 1989: 3.9) recommended that pre-trial hearings should be extended to both child and vulnerable adult witnesses, from which the defence should be excluded. As yet this has not been implemented.

However, the Law Commission (1997: 194-203) has recently recommended that the law on hearsay should be reformed. Automatic admission of evidence from frightened witnesses was considered, but rejected on the grounds that this might lead to some witnesses feigning fear to avoid cross-examination (1997: para 8.58). Instead, the Commission proposed that although the general ban on hearsay evidence should stay, exceptions to this rule (such as the admission of evidence from frightened witnesses) should be changed. Recommendations included that (1997: 1.40-1.41):

- statements should not have to be made to a police officer or equivalent to be admissible;
- the definition of fear should be clarified, to include fear of injury to others and fear of financial loss: in the past fear has been interpreted more narrowly;
- the courts should have discretion to admit evidence from any frightened witness: at present, evidence can only be admitted from those witnesses who fail to come to court, and not from those who attend court but change their minds about testifying, or change their testimony on the stand; and finally
- the courts should be given discretion to admit evidence which is otherwise inadmissible but where it would be in the interests of justice to allow it.

The Law Commission argues that if implemented, these proposals would enable the

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[8] *Under s42 and 43 of the Children and Young Persons Act 1933.*

[9] *Under s105 of the Magistrates' Courts Act 1980. According to Spencer (1995: 114) this was repealed by the Criminal Justice and Public Order Act 1994 "for no apparent reason".*

evidence of frightened witnesses to be admitted more frequently. The Commission maintains that this does not contravene the European Convention for the Protection of Human Rights (ECHR), which allows evidence to be admitted where the witness is unavailable for cross-examination. According to this argument, cross-examination is not always necessary although it should still be possible to challenge hearsay evidence. Consequently frightened witnesses would still have to be identified. In addition, judges would have a duty to warn juries of the dangers of convicting on hearsay evidence alone. However, it is debateable whether judges would use their increased discretion to allow more such evidence to be admitted.

2. Intervention by judge/magistrates eg. to clear public gallery, warnings

Once a trial is underway, intervention by the judge or magistrate may be needed in response to intimidation such as the defendant's supporters staring at, gesturing or calling out to the witness. Judges and magistrates have powers:

- to issue warnings about the penalties for witness intimidation;
- to exclude poorly behaved members of the public from the courtroom.

Again figures are not available on how frequently these measures are used. One limitation is that judges and magistrates may not always be aware that intimidation is occurring. For example, Healey (1995:4) suggests that intimidation could involve a large number of gang members attending court wearing black (to symbolise death) and using coded hand gestures. Some jurisdictions in America use video-cameras taping people coming into the court to discourage this (Healey 1995: 8). However it is not clear how widespread nor how effective this is.

In addition, the courts have powers:

- to clear the court entirely in cases where a child has to give evidence of behaviour "contrary to decency or morality"[10].

However, the English courts do not have equivalent powers to exclude the public when adult witnesses are called. In Scotland the courts do have this power in relation to alleged rape victims (Spencer 1995: 114). This could perhaps be extended to other vulnerable witnesses in England and Wales.

3. Penalties for witness intimidation

Under the 1994 Act, the maximum penalty is five years imprisonment and/or a fine on indictment, and six months imprisonment and/or a fine summarily. In practice, in 1996 of those convicted for either of the two offences, 48% received immediate custody, 32% community sentences and 12% discharges. It is too early to say whether this pattern is set to continue. In 1995, 61% of those convicted received immediate custody and 20% community sentences, but the number convicted the following year was more than three times higher (internal note, 4/3/98). However, it may be worth monitoring sentencing patterns in future. Further research on the characteristics of these offenders and how sentencers view witness intimidation might also be useful.

4. Penalties for intimidated witnesses

At present judges can and do imprison some witnesses who come to court and then refuse to give evidence for fear of reprisals. Failure to attend court is punishable by up to three months imprisonment. Attending court and then refusing to answer questions can attract up to two years. Evidence of intimidation has to be taken into account, but does not preclude such penalties. This is justified on the grounds that they are necessary to maintain the authority of the courts.

This reasoning is questionable however when applied to intimidated witnesses. It can be argued that cases where scared witnesses are imprisoned and offenders walk free produce the reverse effect: undermining the authority of the courts and public faith in the whole criminal justice system. No figures were found on how frequently these powers are used, but such events appear to be rare. However, the publicity surrounding these cases may discourage some witnesses both from reporting crimes and coming forward to assist police in their enquiries.

Improving prevention, recognition and support to witnesses throughout the criminal justice process

[10] *Children and Young Persons Act 1933, s37, quoted by Spencer (1995: 114).*

may help reduce the number of cases when witnesses are too scared to attend or answer questions. Despite this, the continued existence and use of such penalties sends out negative messages about the criminal justice system's approach to witness intimidation. Possible responses to this dilemma could include:

- reducing the maximum penalty available for failure to attend court and refusing to answer questions; and

- making both offences non-imprisonable where there is evidence of intimidation.

d. ... and beyond

Often the criminal justice system's role is seen to have ended after a trial. However, the potential for intimidation does not end there. Even if the offender is convicted and imprisoned, there may be a risk of retaliation by friends and family or by the offender upon release. The risk to the witness may be even greater than before, with an angry offender seeking retribution. This stage has however, been neglected by the literature. Only three approaches to deal with post-trial intimidation have been suggested:

- New identities & relocation: some of the "high level" police protection measures discussed earlier (such as new identities and relocation) may be initiated at this stage, particularly if the witness has not been allowed anonymity within the criminal justice process. However, such measures may not be appropriate for the majority of intimidated witnesses.

- Imprisoned offenders' use of telephones: concern has recently been expressed in the media that offenders can telephone victims and harass them from prison (Guardian, 4/9/97). This suggests that monitoring of outgoing telephone calls from prisons might be tightened.

- Information about offender's release: intimidated witnesses or those at risk of intimidation may find information about offender's release arrangements valuable, especially if this is backed up with other support.

Conclusion

At present, very little is known about witness intimidation. However, awareness of the problem is growing, fuelled partly no doubt about concerns that the problem maybe increasing. Further information is important if we are to identify cost-effective measures to prevent intimidation and support those who suffer from it.

Despite the paucity of literature on the subject, a number of possible measures can be identified. These measures are summarised in Table 1. It seems unlikely that any one measure would suffice: different measures are needed at different stages of the justice system. To achieve maximum benefit, a package of complementary measures tackling witness intimidation at all stages of the criminal justice process may be needed. In addition, responsibility for dealing with witness intimidation could be clarified. Some police forces already have specialist units or officers to perform this function. This approach could perhaps be taken further, by giving one agency responsibility for coordinating measures throughout the criminal justice process.

In deciding the response, consideration will have to be given to the common concern running throughout the above examples: the preservation of witnesses anonymity. In some cases the witness's identity is known to the offender before the offence, and fewer protections will be available. However, in many cases, the witness's identity only becomes known to the offender through contacts with the criminal justice system.

The issue of anonymity raises a dilemma: denying witnesses anonymity can place witnesses in danger, but granting anonymity may also make it more difficult for defendants to prove their innocence. There are at least two possible responses to this dilemma:

- Option 1: accept the dilemma and identify ways to cope with it

  The first approach is to ask at what point should the witness's identity be revealed. The aim here is to delay the revelation until as late as possible to minimise the risks to the witness but still allow the defendant to use the information to assist their defence.

- Option 2: seek to resolve the dilemma

The second approach is to agree that the defendant has the right to know the evidence against them, but to deny that it is always in the interests of justice that the witness's identity be revealed. In some cases the witness's identity may be important to the defence, if, for example, it can be shown that they have a grudge against the defendant and might therefore have reason to perjure themselves. The argument is that if a witness is intimidated against testifying, or changes their testimony because of intimidation, then justice has also failed to be done. There may then, be grounds for creating exceptions to allow witness's anonymity to be preserved throughout.

This is a difficult area. It is worth therefore evaluating the importance of the issue of anonymity. This clearly depends on how many cases of intimidation involve witnesses who are not known to the offender. If this group is in the minority then focusing on protecting anonymity may not be the most effective way of tackling the problem. Although existing research supports this, the evidence is limited: further information is needed to ensure that any resources devoted to witness intimidation are used as effectively as possible.

It seems likely that whatever measures are implemented to encourage reporting and identification of witness intimidation, some cases will always fall through the net. Nevertheless, efforts can be made to ensure that the holes in the net are as small as possible.

Table 1: Possible measures to prevent and deal with witness intimidation					
Measures	**Stage of Criminal Justice System**				
	Reporting	**Investigation**	**Decision to Prosecute**	**Trial**	**Beyond**
Minimising information given over radio identifying witnesses	✓				
House-to-house calls on neighbours	✓				
Inviting witness by phone to attend station to make statement	✓				
Requiring officers to ask witnesses if they have been intimidated	✓	✓			
Taping/videoing interviews	✓	✓			
Screens/mirrors/video for identification parade		✓			
Surveillance operations		✓			
Employing professional witnesses		✓			
Guidance on spotting signs of intimidation	✓	✓	✓	✓	
Raising awareness of witness intimidation	✓	✓	✓	✓	
Protective custody	✓	✓	✓	✓	
Keeping witness on standby for appearance				✓	
Screens, CCTV and voice distorters				✓	
Press reporting restrictions				✓	
Not identifying the witness in court				✓	
Clearing the public gallery/issuing warnings to public in gallery				✓	
Friend in court schemes				✓	
Structural changes to court design, eg separate waiting facilities				✓	
Reforming defendant's right to cross-examine				✓	
Reviewing admissibility of evidence of frightened witnesses				✓	
Reviewing penalties for witness intimidation				✓	✓
Reviewing penalties for frightened witnesses				✓	✓
Loan of a personal alarm	✓	✓	✓	✓	✓
Emergency relocation	✓	✓	✓	✓	✓
Increasing police patrols in witness's area	✓	✓	✓	✓	✓
Providing transport to and from work, shops etc.	✓	✓	✓	✓	✓
24 hour police protection (Reporting to Beyond)	✓	✓	✓	✓	✓
Long-term relocation and possibly changing identity	✓	✓	✓	✓	✓

Section 3: **Disabilities and Illnesses**

The Problem

It is widely agreed that a person's physical and mental health and abilities may influence their experience as a witness. The literature encountered focuses almost exclusively on *intellectual disabilities*[1], and the discussion below reflects this. However, *mental illness* and *physical disabilities* may also make some people particularly vulnerable witnesses, and are considered wherever possible. Many of the issues discussed are relevant to all three groups, whereas others are distinct. In addition, it is worth noting that they are not mutually exclusive. Physical and intellectual disabilities can be associated, although they do not always accompany each other. Less commonly recognised, intellectual disabilities and physical disabilities may at some point be accompanied by mental illness. When a witness has more than one of these conditions, they may be especially vulnerable.

Definitions

The definition used for the literature review was a broad one: any physical or mental condition that could render a witness particularly vulnerable. Both disabilities (normally permanent) and illnesses (usually temporary and treatable) fall within this definition.

Box 1: The number of mentally and physically vulnerable people in the UK

Learning disabilities: according to Mencap, there are over a million people with learning disabilities in the UK, of whom about a fifth have severe learning disability (submission to Review, 27/8/97).

Physical disabilities: according to the 1988 OPCS (Office of Population Censuses and Surveys) Survey of Disability, there are 6.2 million people in England and Wales with physical disabilities.

Mental illnesses: according to the Psychiatric Morbidity Survey (Report 1 1995, Table 6.1), about one in five of the population living in private households reported suffering some psychiatric disorder. These included phobias and depressive episodes, and drug and alcohol dependence[2].

The definition that the Review and any subsequent legislation adopts will be important in influencing which groups receive special assistance. There are several possible approaches:

1. Listing the conditions eligible for special treatment.

This would have the advantage of clarity: criminal justice practitioners would be left in no doubt about whether a particular witness qualified under these terms as vulnerable. It might also be possible to say which measures would be helpful for each group. However, diagnoses may differ between practitioners and change over time. Listing all eligible conditions could also be cumbersome. A very long list of eligible conditions could be envisaged, and it would need occasional updating to reflect developments in medical science (such

[1] *The term intellectual disability are used loosely. There are numerous names for such conditions, including mental handicap and retardation, learning disability, developmental disability, and intellectual impairment (which may be used to cover both mental disability and illness). A variety of names are used throughout the report. However, the terms used can carry political connotations: mental handicap and retardation are both very old-fashioned and now seen as stigmatising: these are therefore avoided. Mental disability is similarly a little old-fashioned, but is used here to enable discussion of "mental disabilities and illnesses" as opposed to the more long-winded "intellectual disability and mental illness". It should also be noted that although some of the terms may imply more serious conditions than other. For example learning disability might be thought to cover dyslexia, whereas mental handicap may conjure up images of much more serious handicap. They are used here broadly and are not intended to refer simply to one end of the scale.*

[2] *About 16% reported "neurotic disorders" such as depressive episodes within the past week. A further 2% reported "functional psychoses" such as drug or alcohol dependence within the past year. (OPCS Psychiatric Morbidity Survey Table 6.1).*

as the identification of new conditions, or improvements in understanding that might alter what is considered an appropriate response). It addition, some criteria would be needed to decide which conditions to include and which to exclude.

2. Detailing one or more tests to determine whether witnesses qualify.

An alternate approach is to specify one or more tests to decide a particular witness's eligibility for special treatment, such as tests of mental age, memory, and reliability. Assessing individuals could be fairer than deciding eligibility on the basis of group membership: individuals with the same disability or illness may be very different in terms of memory skills and the like. This approach has been recommended by the New South Wales Law Reform Commission (1996) in relation to intellectual disability - see Box 2.

Box 2: New South Wales Law Reform Commission (1996, paras 3.2 & 3.20)

" 'Intellectual disability' means a significantly below average intellectual functioning, existing concurrently with two or more deficits in adaptive behaviour".

Three possible "adaptive deficits" are listed:

- level of communication;
- social skills; and
- ability to live independently.

This does have the advantage of being concise. The Commission also claims it is specific enough to prevent someone feigning a disability to gain an advantage (although it does not provide any evidence that this actually occurs with other definitions). There are however, some problems with such an approach. For example, the cut-off point where functioning becomes "significantly below average" is vague and can be drawn differently by different people. The inclusion of two or more deficits in adaptive behaviour also seems problematic: the number seems arbitrary, and the definition of an adaptive deficit also seems to suffer from the cut-off point problem.

3. Assessment of individual needs.

The third approach also involves assessing individual cases, but leaves the criteria of vulnerability open. For example, Sanders et al suggest that the individual's needs should be assessed, preferably by experts. This approach again recognises that the impact of disabilities and illnesses varies greatly between individuals, but it would be more useful for identifying appropriate measures for each case. It would also enable witnesses with disabilities/illnesses to be assisted without singling them out from other groups needing special help. It is not without problems though. If the assessment is not based on clear, common criteria or guidance, people with similar needs could be treated very differently. (This approach is discussed further in part 2 - "the response").

A final consideration is what definitions have been used by past legislation. There is an argument for consistency: however, it may also be argued that different areas of social policy and different contexts can require different approaches.

The impact of disabilities and illness

Disabilities and illnesses can create two kinds of vulnerability:

- first, vulnerability to crime as victims; and
- secondly, vulnerability as witnesses assisting the criminal justice process.

1. Vulnerability to crime.

The precise extent of these groups' vulnerability to crime is not known. Official statistics on criminal proceedings and convictions do not contain details of whether witnesses (or for that matter suspects and defendants) have disabilities or illnesses. Even the British Crime Survey, which covers unreported crime, does not cover people in residential homes, psychiatric wards or care.

However there is some Australian evidence (Wilson 1990, cited by NSW Law Reform Commission 1996 para 2.23) that people with an intellectual disability are twice as likely to be victims of a personal crime (eg. assault), and one and a half times more likely to experience a property offence. It seems reasonable to assume that this greater vulnerability to crime exists here as well as in

Australia. Similarly Sayce (1995: 141) suggests that mentally ill people in this country are particularly vulnerable. Temkin (1994: 402-403) lists a number of reasons why people with disabilities may be particularly vulnerable. Although she focuses on disabled (both physically and mentally) *children* some of these factors will also apply to disabled *adults* and some people with mental illnesses:

- Unable to run away, easy to overpower.

  People with physical disabilities may be physically less able to resist and fight off an attacker, making them easier targets than the able-bodied.

- The numbers of those involved in care.

  Temkin argues that the sheer numbers of people involved in caring for the disabled increases the risk of abuse, whether they live with their family or in a residential home.

- Dependence.

  People with disabilities may depend on other people more than usual, creating "learned helplessness" which makes it more difficult to resist psychologically.

- Recognition of abuse as such by the victim.

  When people are physically dependent on others, ideas about bodily integrity (for example that other people do not have the right to touch them) may be alien to them. Similarly, Temkin suggests that disabled people are sometimes poorly informed about sexual matters and are not aware of ideas of sexual choice.

- Difficulties communicating offence to carers and/or the police.

  Physical problems, language problems and lack of knowledge of where to complain or how to report may hinder communicating victimisation to others. In addition, some (eg deaf children) may lack self confidence and self esteem, and may therefore be more open to efforts to dissuade them from reporting.

- Recognition of abuse as such by carers and the police.

  Even if an offence is reported to carers and/or the police, it may be met with scepticism or may not be perceived as criminal. Temkin argues there are several myths which contribute to this. For example:

  – that "no adult would be so callous as to abuse a disabled child";
  – that abuse is committed by strangers and not carers;
  – that they may have misunderstood or invited the offence;
  – that they couldn't be the object of sexual attention; and
  – that people with learning disabilities commonly tell lies or fabricate stories.

  Sayce (1995: 143) says that people with mental illness may have their allegations explained away as delusions.

- Societal attitudes.

  Finally, Temkin argues that disabled people are treated as second-class citizens by society, and may be singled out as soft targets as a result. Sayce (1995: 141) argues that the same problem afflicts psychiatric patients. On the former, it has been suggested that such prejudices tend not be challenged because the people who hold them rarely meet those with disabilities (see Cohen 1994: 21).

It has also been suggested that deinstitutionalisation under the "care in the community" policy has led to over-representation of mentally ill people among the homeless, thus increasing their vulnerability to crime. Walker (1992: 177-200, 124-135) supplies some evidence that deinstitutionalisation has increased the numbers of mentally ill people among the homeless in America, and some limited evidence that police contact with mentally ill people in England may have increased in recent years (see also Palmer 1996: 635). However more research is needed to ascertain whether mentally ill people really have become more vulnerable to crime as a result of deinstitutionalisation.

2. Vulnerability as witnesses assisting the criminal justice process.

Health and abilities also affect people's experience of contacts with criminal justice process and their

performance as witnesses. Sanders et al (1996a: 2; 1996b: 7-9) identify three main areas of personal functioning which can be affected by learning disabilities:

i. *Memory* - some people with learning disabilities can take longer to absorb, comprehend and recall information. Recall of details may be particularly effected. Greater time and patience than usual will help.

ii. *Communication skills* - they may have a limited vocabulary and remember things in pictures rather than words, leading to difficulties in understanding and answering questions. They may also find it difficult to explain things in a way other people find easy to follow.

iii. *Response to perceived aggression* - Sanders et al suggest some people with learning disabilities are especially sensitive to negative emotion, and may be suggestible. They may respond to tough questioning by trying to please the questioner. For responses to be reliable questions should be kept simple and non-threatening.

Sanders et al (1996a, 2; 1996b, 9) observed that few learning disabled people have all these problems, and some may be advantaged in some respects. For example although many people with autism have communication problems, they may also have better than average memories.

The third of these areas could be expanded to cover *emotional resilience* more generally. Sanders et al (1996a: 9) suggest that witnesses with learning disabilities can find being a victim of a crime and contact with the criminal justice system particularly stressful, and that one reason for this could be learned helplessness (see above). It seems plausible that this may be exacerbated by lack of confidence, and low self-esteem coupled with problems with the three areas listed by Sanders et al which may cause frustration. This suggests that it is particularly important that the criminal justice system responds sensitively and appropriately to their needs.

No similar research was found by the literature review for people with mental illnesses or physical disabilities. Despite this, it seems plausible that some similar problems may affect people with mental illnesses such as clinical depression. These areas of personal functioning may also be an issue for people with physical disadvantages. For example, people who lack or have partial hearing, speech, or sight may suffer communication problems. Even people whose physical disabilities are not an obvious impediment to the four areas of personal functioning identified may be affected by medication or pain. In addition, some people with physical disabilities may be affected in a fourth area: *mobility*.

A fifth and final area which can be identified is *social skills*. People with learning disabilities may have more limited life experiences: for example some may lack experience of paid employment, or of financial responsibility. They may not therefore have the same level of social skills as other people. On the other hand, social skills may be more developed than other areas of personal functioning which may lead strangers to over-estimate their other capabilities.

Of the five areas, communication skills are probably the most important in a legal culture which "takes oral communication for granted and relies heavily upon it" (Temkin, 1994: 402). Temkin distinguishes two categories of (both physically and mentally) disabled people according to their communication skills (see box 3).

Box 3: Categorisation of disabled children (Temkin 1994: 405)

Category 1:

- "those able to communicate orally, albeit with some difficulty",
- "those who can do so with assistance from other complementary systems", and
- "those who may be described as alternative communicators who can communicate effectively using some system other than oral communication".

Examples given include: those with spina bifida and with learning disability, deaf people fluent in sign language, and the partially deaf who are able to speak.

Category 2:

- "those who are unable to communicate effectively, either orally or by using some alternative system".

Examples given include: most deaf blind, some with language disorders, and some with cerebral palsy who cannot speak, use computers or communication boards.

Although her focus is on children, the categories seem equally applicable to disabled and mentally ill adults. As Temkin comments, whatever changes are introduced, the criminal justice system is unlikely to be able to offer much to those in the second category. She suggests that the best way to help these people is to improve alternative communication systems, for example by teaching British Sign Language more widely. However, there is also a small group for whom "effective communication will never be a realistic possibility" (Temkin 1994: 406). Equally it seems likely that there are some sufferers of mental illness who may never be able to give effective testimony, either because of communication problems or because of deficits in some other area of personal functioning.

In the discussion that follows the focus is on the first of Temkin's two categories. Although Temkin focuses on communication difficulties, disadvantages in any of the five areas of personal functioning (memory, communication, emotional resilience, mobility and social skills) can affect the criminal justice process. These problems are discussed for each stage of the criminal justice process in the next section.

The Response

a. Reporting

Several studies suggest that a large proportion of sexual crimes against people with intellectual disabilities are unreported to the police (see Sanders et al 1996: 15). It seems plausible that this also applies to property offences, and to some people with physical disabilities or mental illness. Four issues are discussed below:

- recognising that an offence has occurred;
- encouraging reporting;
- facilitating reporting; and
- identifying vulnerability.

Recognising that an offence has occurred

Clearly before a crime is reported it has to be recognised as such by the victim or witness. It was noted earlier that this may be problematic for people in positions of physical or emotional dependence, or if they have not been educated about such matters. This suggests several possible measures:

- improved "crime education" to cover reporting crime as well as teaching right from wrong[3];
- informing service professionals about basic law: for example that staff confining people to their rooms against their will may be guilty of false imprisonment, and that unwanted touching may be assault[4]; and
- writing formal policies for professional carers and care institutions to respect the

[3] *Williams (1995a: 2) quotes a victim of racial harassment who had learning disabilities: "At special school I was taught not to pinch other children's sweets and money. I was not taught, if I am in trouble, to tell the police".*
[4] *See Williams (1995b: 2) for further examples.*

bodily integrity of the people they have care of, for example by asking permission before moving or touching someone.

These are not measures that the criminal justice system can institute alone: to gain the cooperation of other agencies, for example in encouraging disabled/ill people to report, it may be necessary to convince them that they will be treated sympathetically and their special needs catered for. Nor are all these measures straightforward in themselves: sex education for example may be controversial for some people with severe intellectual disabilities.

The perceptions of carers (who may be the first contact) and the police, particularly scepticism that the incident occurred or was criminal, also need to be tackled. Williams (1995a, 1995b) conducted a two-year study of victims with learning disabilities, involving interviews with victims, carers and police officers. He suggests that the language used by social service professionals can disguise the criminal nature of incidents:

> "Women with learning disabilities are more likely to be described as being 'sexually abused' than raped; men with learning difficulties are 'physically abused' not assaulted; stealing something from someone with learning difficulties is 'financial abuse', not theft. Offenders against the general community are criminals, those who victimise people with learning disabilities are 'abusers'; victims with learning difficulties are 'survivors' and 'sufferers'; 'sufferers' do not report crimes to the police, they 'disclose abuse' to professionals." (Williams, 1995:2).

Again, this might be dealt with through education to raise awareness of the increased vulnerability of these groups and to tackle the myths discussed earlier: this could be approached in the through training, guidance, newsletters, leaflets and posters.

Encouraging reporting

It was noted above that when people in institutional care do report a crime, in the first instance many may make the report to a carer rather than to the police. Wilson and Brewer (1992) found that 56% of personal crimes and 63% of property crimes against people with learning disabilities were reported by a third party (cited by Sanders et al 1996b: 17). Sanders et al (1996b: 17) found figures of 78% for personal crimes and 66% for property crimes. The decision of the carer (or other third party) on whether to report to the police is therefore extremely important.

However it has been suggested that a non-reporting ethos exists in Britain (see for example Williams 1995b: 55). There are numerous reasons why offences may not be reported to the police. Some of these concern the perceptions and beliefs held by the person who initially learns of the offence:

- failure to define an incident as criminal/scepticism that it occurred;
- the ethos that all discussions with clients should be treated confidentially;
- belief that the victim does not want the offence to be reported to the police;
- belief that the offence is too trivial or that the police could do little;
- concern that the police and the rest of the criminal justice system will be unsympathetic, not meet the victims/witnesses needs for special care and not produce a conviction (ie that it wouldn't be worth the trouble); and
- concern about the offender: in some cases the offender may be a colleague or another client, creating (misplaced) conflicts of loyalties.

Other reasons for not reporting concern the organisation:

- lack of formal reporting procedures, creating uncertainty about whose responsibility this is;
- complex reporting procedures: Williams (1995b: 66) found that there are often long linear reporting chains, whereby one person refers the matter to his/her superior, who refers it to his/her superior and so on, each person perhaps consulting others along the way. This may deter or delay reporting, and if one link fails the case may fall by the wayside; and

- internal investigative procedures: in some organisations, an internal review may be carried out to determine whether a criminal or (if a staff member is involved) disciplinary offence has occurred before reporting to police. This may hinder collection of vital evidence, as well as increasing the number of occasions on which victims and other witnesses will be required to tell their stories.

Some of these reasons may be legitimate. For example if the victim was aware that the incident was criminal, that recourse could be available through the criminal justice system and that the person they reported to (or someone else) could report this to the police on their behalf, but did not want to pursue the matter. Sanders et al (1996b: 23) quote the policy of Cumbria social services: "In most situations the rights of the individual would be respected but there will be situations in which agency staff will be bound by their professional ethics or agency contract to disregard the individual's wishes". Deciding whether to report may not always be a simple matter.

Some measures were discussed above concerning the definition of incidents as criminal. Possible approaches to combat the other problems listed include:

- Creating/reviewing formal policies for investigating and reporting incidents.

  Ideally, an internal investigation should not delay reporting an offence to the police. A policy of joint investigation by the police and the organisation concerned might overcome such problems and also limit the number of times the victim and other witnesses have to be questioned. Formal polices could also contain a presumption in favour of reporting and specify what might constitute a legitimate reason not to report. This could perhaps be backed up by disciplinary sanctions. Responsibility for reporting should be clearly defined. In addition, MENCAP (1997: 3) recommends that "web-like" structures be used instead of linear structures to maximise opportunities for offences to be reported.

  There are advantages in drafting formal policies for the organisation as well as for the victim and the criminal justice system:

  > "policy guidelines are useful for reassuring clients and their carers that claims of ill-treatment will be taken seriously, and for establishing a base-line of good practice against which complaints or allegations of negligence by staff can be measured" (Sanders et al: 1996, 21).

  Although such an approach cannot guarantee good practice it might encourage it.

- Creating a legal requirement on service professionals to report all alleged cases of sexual abuse.

  A legal requirement on professionals to report all alleged cases of sexual abuse has been suggested by Cervi (1992: 15). This could perhaps be extended to cover other offences such as crimes of violence and property crime, framed to take into account the victim's wishes. The key question is whether such a requirement would work. Some system of monitoring reporting practices and sanctions to impose for failing to observe the requirement would be needed to ensure adherence. However, it is difficult to envisage an effective monitoring system: service professionals would hardly have an incentive to keep records of disclosed crimes they did not report. It might be necessary to ask the people in their care whether they had been victims of crime over a set period and whether they disclosed this to staff, and then to check that it was reported.

- National guidelines for professional carers and care agencies on reporting.

  A less radical alternative would be to create non-statutory national guidelines on institutional reporting. This might encourage consistency in reporting policies, and would not require the monitoring and enforcement arrangements of a non-statutory system.

Finally, there is some evidence that even minor crime can be traumatic for some vulnerable victims (Sanders et al 1996b: 9). Sanders et al

found that this can create a disjunction between the expectations and perceptions of the victim (who sees the crime as serious and expects the police response to reflect this) and those of the police (who see the offence as minor and treat it as such). People with learning disabilities are taught to trust people in authority to act in their best interests: if they find this trust misplaced, they may be deeply upset. Sanders et al argue that this disjunction in attitudes undermines confidence in the police, and discourages future reporting. This suggests that sympathetic treatment (in which time is taken to acknowledge the victim's feelings and to explain the processes) may be particularly important not only by the police but *throughout the criminal justice system.*

Facilitating reporting

Even if people with disabilities/illness want to report an offence, there may be obstacles which prevent or deter them from doing so, or mean that they have to rely on third-parties to report for them. Crimes are usually reported to the police by telephone or in person at a police station. In some cases the obstacles are physical. For example people with impaired mobility and wheelchair users may find physical access to some police stations difficult. These kind of obstacles may be remedied by changes in the physical design of police stations (such as the installation of ramps and lifts) and provision of suitable transport to and from stations where necessary.

Other problems are less straightforward. Some disabled people (such as many people with cerebral palsy) may have no or limited speech (Temkin 1994: 404), which could make reporting by telephone impossible and reporting in person at a police station difficult. Various alternative communication methods have been developed to deal with some of these problems of communication. The most well-known are probably sign language[5] and lip reading and are used by some deaf people. Other methods include picture cards, communication boards (which contain pictures and symbols the person can point to) and computers.

However, even when they do attend a police station to report, the police may not have equivalent skills to enable communication. There are two ways of tacking this:

- using interpreters, either volunteers or paid for by the police; and
- training police officers in alternative communication systems.

The first option would appear to be the easiest. However, it may be difficult to find interpreters for even the most common alternative communication methods. Temkin's research (1994: 407) suggested that there were only:

- 12 lip-speakers in England trained to appropriate level for this type of interviewing, 1 in Wales, 1 in Scotland, and none in Northern Ireland; and
- 39 fully-qualified sign freelance language interpreters in England, four in Wales, 1 in Scotland, and 1 in Northern Ireland.

As a consequence of the scarcity of interpreters, it could take some time to arrange one. They may then need specialist advice about the person's particular disability/illness, and might also need specialist equipment. No figures were found on the use of interpreters and lip-speakers by the police or any other part of the criminal justice system. It seems likely that these additional requirements may discourage the recording and investigation of cases involving disabled victims, and also discourage the use of disabled witnesses.

The second option would help overcome these availability problems, even if only a handful of officers were trained in alternative communication systems. Again, this would need to be backed up by information about how to interview people with disabilities/illnesses.

Identifying vulnerability

Of course, to communicate effectively with the witness, the police may need to identify that the witness has a disability or illness that might be relevant. This can be a difficult task. Physical disability can be immediately obvious, but this is not always the case: for example arthritis can be severely disabling, but is not usually apparent from the sufferer's appearance. Similarly the New South Wales Law Commission (1996: 55) states, intellectual disability is "not.. necessarily obvious

[5] *There is more than one type - for example British Sign Language and Sign Supported Language are quite different (Temkin 1994: 404).*

from a person's appearance", and the same is true of mental illness. However with mental illness there are some additional complications. The illness could develop during the criminal justice process. In addition, treatment could mean that the witness is fine when the crime is first reported, but that their condition deteriorates later on.

Studies of police contacts with learning disabled suspects suggest that police are not very good at identifying them as such. As Sanders et al argue, it seems likely that the same is true of victims and non-victim witnesses. However, Walker studied police reported contacts with mentally disordered people, and suggests "police officers in the United Kingdom receive virtually no training in the recognition and management of mental disorder" (1992: 226).

Under the Police and Criminal Evidence Act 1984, the police have to call a police surgeon if they think a *suspect* may have a mental illness (although officers may call one out when the suspect has a learning disability because of difficulties in distinguishing symptoms). One measure might be to extend this requirement to witnesses, but there are also problems with this approach:

- police surgeons are not always easily available, which may cause delay (Deloitte and Touche 1996: 3.3; 4.1);
- according to Palmer (1996: 637) not all will have experience in mental health and they may only have had basic training in the area during their medical qualification; and finally
- most police surgeons see their primary role as deciding whether the suspect is fit to be detained or charged.

Walker (1992: 201) found some evidence that the police, the medical profession and people with mental disorders believe improved training is needed. He argues that improved training should be given to all new and serving police officers, but recognises that a more practical approach would be to start by targeting supervisors (usually sergeants). Similarly, MENCAP (1997: 4-5) have suggested there is some desire among the police for greater training. They recommend that training should be introduced for all new recruits, with compulsory refresher courses, and that contacts between the police and groups involving the learning disabled should be increased.

Another approach is suggested by Sanders et al (1996b: 25-27). Their study included a survey of police forces and found that none of those who responded had guidelines to help officers tell whether victims had learning disabilities. Some referred to guidelines on the treatment of mentally disordered offenders (under the Police and Criminal Evidence Act 1981), but as Sanders et al point out, these only outline what should be done once the disability has been identified and not how to identify this in the first place. Some efforts have been made to resolve this problem in other countries such as America and Australia. However, Sanders et al argue that (as Gudjonsson et al 1993 observed regarding suspects), whatever tests are used there will always be some people who are not identified. They argue that some people with learning disabilities can cope with the criminal justice system as it is. Instead of trying to identify people with learning disabilities, they suggest:

> "the aim should be to identify those characteristics which tend to be associated with learning disability (poor memory, communication, increased trauma etc.), but which may be present in other people too. This would enable criminal justice agencies to focus on the identification of these characteristics, rather than to allocate people to categories...It is the communication problem that should be identified and addressed. Identification should be seen as an end in itself" (Sanders et al. 1997: 16).

Hence instead of focusing on recognition of particular disabilities, they advocate that guidance and training should focus on identifying characteristics associated with vulnerability and how to handle them. This approach is supported by the Law Society's Sub-Committee on Mental Health and Disability (submission to the Review, 11/9/97).

b. Investigation

Once a complaint has been reported officers have to decide whether to investigate. Sanders et al (1997, 17) suggest that communication difficulties can be used as a reason not to pursue the case further. In their study many of the cases reported to the police were either "no crimed" (ie

not recorded as crimes) or led to no further action (Sanders et al 1997: 6). This research was based on case studies, so it is important to note that it might not be representative. However it does accord with William's (1995a: 3) research in this area. Some ways of overcoming communication problems were considered earlier in relation to reporting, but apply equally here.

When complaints are investigated important considerations include:

- the location;
- who else should be present; and
- how the interview should be conducted (including responsibility for interviewing and whether the interview should be recorded).

1. The location

The location where interviews are conducted is important for both mentally and physically vulnerable witnesses. There are two main issues: accessibility and comfort.

- *accessibility:* the location for the interview needs to be accessible for people with mobility problems. This needs to be built into the design of police buildings, including special interview suites built in some police forces for children and victims of sexual offences such as rape. Regarding the latter, Temkin (1994: 416) claims that "all too often they are situated in locations where access for the disabled is hard or impossible".

- *comfort:* one of the aims of special interview suites is to help put certain groups of vulnerable witness at ease in a stressful situation. Of course, providing similar facilities or adapting existing facilities for mentally vulnerable witnesses may be expensive and time-consuming. One means of bridging the gap may be to interview learning disabled witnesses in their own homes or (if the offence happened there) in another similarly familiar and comfortable environment. However, any cost-savings accrued by such an approach would have to be balanced against problems in identifying suitable locations and a greater likelihood of interruptions.

The literature review did not uncover any information on police practices or policy in this area.

2. Who else should be present

An associated issue is whether mentally vulnerable witnesses should be accompanied during an interview. Under the Police and Criminal Evidence Act 1984, police must arrange an "appropriate adult" to accompany any *suspect*[6] who they believe may have a mental illness or handicap. The role of the appropriate adult under this scheme is threefold:

- to advise the suspect;
- to assist communication with the suspect; and
- to ensure that interview is carried out fairly.

This can be carried out by a parent, guardian, other carer or someone with experience in mental health (eg. an approved social worker). Under the revised Codes of Practice issued in 1995, this excludes a solicitor representing the suspect.

It has been suggested that this scheme should be extended to mentally vulnerable witnesses (for example by the Law Society Sub-Committee on Mental Health and Disability op cit, para 10). However, there are problems with the current scheme. First, it relies on officers to identify vulnerability. As observed earlier, this may be a difficult task. Adults with learning disabilities or mental illness may be reluctant to make this known to the police, and symptoms of mental disability/illness may be lacking or attributed to consumption of alcohol or drugs. To encourage the use of appropriate adults in cases where there is some uncertainty about the suspects' vulnerability, and as a safeguard, any confession made without the presence of an appropriate adult may be excluded from court. Nevertheless, there is some evidence that appropriate adults

[6] *Juveniles are also covered by this provision. In this case, the appropriate adult can be a parent, guardian or social worker. If none of these are available, a responsible adult aged 18 or over who is not employed by the police may perform the role.*

are not always called for mentally vulnerable adults, even in cases where custody officers are aware of the disability/illness (Palmer 1996: 640-641).

In addition it has been argued that appropriate adults do not gain enough experience to develop real expertise (Sandell 1992: 18). There is also concern about the confidentiality of any comments made by the suspect to the appropriate adult. It is unclear whether an appropriate adult has a duty to inform police of any potentially useful or important information the suspect tells them or whether they should keep this confidential (Littlechild 1993: 15-16). Finally, it may be difficult to find an appropriate adult, causing delay. Parents and guardians may not be willing to perform the role, and other carers and social workers may have other commitments for their time (Palmer 1996: 641).

If the appropriate adult scheme is extended to mentally vulnerable witnesses, these problems need to be taken into account. Palmer (1996: 635) suggests several measures to improve the scheme for suspects, which might equally be of benefit if extended to witnesses:

- specifically asking the witness if they need help;
- asking the witness which school they attended (to help determine whether they have special needs);
- familiarity with common medication and the conditions they are used for;
- greater use of civilian custody officers or regular custody officers to improve experience;
- basic training for all police officers in identifying special needs.

These measures all apply to the first problem - identification. The expertise and role of appropriate adults are also important considerations. For example, appropriate adults for witnesses could perhaps have an additional role in giving the witness emotional support.

3. Responsibility for interviewing

There is some evidence that special interviewing skills may be needed for some mentally vulnerable witnesses. The importance of treating witnesses sympathetically was mentioned earlier, particularly of recognising the potential importance of apparently minor incidents to vulnerable witnesses. Repetitive questioning may give mentally vulnerable witnesses the impression that they are not believed by the investigating officers, or that they are not listened to properly and given the attention they deserve.

The use of props (such as toys) is well established in interviewing child witnesses, particularly suspected victims of sexual abuse. Using leading questions and prompting carefully have also been raised as a possible interview technique for child witnesses. Such approaches may be appropriate in interviews with some mentally vulnerable witnesses, but could be a source of problems in court. The need for special interview approaches may also be difficult to reconcile with the need to gather evidence. For example, although a single interview might limit the stress the witness undergoes, it might also fail to reveal evidence that will only be fully disclosed over a period of time (Temkin 1994: 416).

Despite the apparent need for specialist skills, the evidence suggests interviewing officers usually lack them. Sanders et al (1997: 20) found that interviews for sex offences were usually conducted by officers from force family/child protection units: these officers will not necessarily have appropriate skills for interviewing mentally vulnerable adults. Non-sex offences were usually dealt with by officers without specialist training in working with any vulnerable witnesses. Set against this, social workers who have expertise in working with these groups tend not to have investigative skills.

The Law Society (submission op cit para 16) recommends that interviews should always be conducted by officers with appropriate training who should have access to communication aids and specialist advice and support. To meet this recommendation, specialist training will be needed for some officers, and consideration will have to be given to how specialist support can best be organised.

Another approach would be to conduct joint investigations, using a team of both police officers and others with expertise in mental health. To be effective, such an approach would need to be supported by information about the advice and support available from other organisations: for example, lists of qualified sign language interpreters (Temkin 1994: 407).

Special skills are also needed in taking witness statements. Statements are usually drawn up by the police once the interview has been conducted and signed by the witness. Statements are useful both:

- to help witnesses refresh their memories at a later date (they are usually given to witnesses outside the courtroom), and
- to check consistency with oral testimony at trial, as evidence of the witness's reliability.

However, it was noted in chapter 2 that the statement is not a verbatim record of an interview. The information included is selected by the investigating officer who may inadvertently omit information that subsequently proves important or introduce errors or distortions (Wolchover & Armstrong Jones 1997: 855-856). If it is difficult for ordinary adults to recognise the account created as their own, this may be an even greater problem for witnesses with disabilities or mental illness. Furthermore, some people with disabilities or illnesses may have communication problems: some people with learning disability may have limited or no literacy skills (Mencap submission to the Review 27/8/97). This may make it difficult or impossible for them to read and check the witness statement or use it in court, but this may not always be drawn to the officer's attention.

Several measures can be envisaged to help overcome such problems, in particular increased tape-recording or video-recording of interviews with mentally or physically vulnerable witnesses (the latter is recommended by Law Society, op cit). These measures were discussed in chapter 2 on witness intimidation, but the main arguments apply equally here. Nevertheless, additional issues are raised by video-recording for people with disabilities. Special techniques may be needed where alternative communication methods are used: for example split screen filming to show simultaneously the interviewee's face and the communication board the interviewer is pointing to (Temkin 1994: 408). Temkin suggests that special guidance on video-techniques for interviews with disabled people is needed. In addition, it might be useful to improve training and guidance on writing statements, perhaps incorporating advice from experts on learning disabilities.

c. The decision to prosecute

It has been suggested that an excessive number of cases involving witnesses with disabilities are lost at this stage. This is given some support by research in one health region by Hillary Brown (cited by Cervi, 1992:14: Cohen 1994: 167). Of 167 cases of alleged sexual abuse against people with learning disabilities reported between 1989-90 only 10-15% resulted in a court appearance despite three-quarters being accompanied by corroborative evidence. One factor may have been that half were allegedly carried out by people with learning disabilities. Williams (1995a:2) suggests that the CPS is discouraged from prosecuting offenders with learning disabilities, whose victims are often people with learning disabilities.

Other reasons for deciding not to prosecute include:

- lack of evidence following delayed reporting or internal investigations by care organisations (a number of measures to tackle these problems have been considered above);
- credibility: similarly, people with disabilities may not be seen as credible witnesses (several myths which may contribute to this were discussed earlier: training and guidance may help tackle them.); and
- competence: it has been suggested that people with learning disabilities are automatically regarded as incompetent.

Sanders et al (1997: 35-36) found that although the police often liaised with the CPS before this stage, the CPS and the police rarely consulted experts about learning disabilities. This also seems to apply to illness. Most cases do not reach the prosecution stage, particularly when it may not be in the public interest to prosecute cases involving vulnerable witnesses (for example, because the proceedings would be too traumatic).

Another issue is what evidence the decision to prosecute is based on. Williams (1995b: 72) reports that the CPS can take this decision without meeting the witness. However the validity of witness statements as the witness's own account is questionable. The problems of using witness statements as an indication of the ability to stand up in court, were and the suggestion that video-recordings, audio-taping or verbatim transcripts be used instead. This is supported by MENCAP (1997: 7) who recommend compulsory video-taping of all interviews with learning disabled people.

Other possible measures include:

- a requirement for prosecutors to meet victim before they make a decision (perhaps accompanied by changes to police statement writing);
- guidelines or information for prosecutors to assist their decision-making: the Law Commission reports that the CPS has an internal memorandum providing such guidance that the Law Commission has argued should be published (para 19);
- CPS training (MENCAP 1997: 7). A variation on this theme would be to have designated and trained Crown Prosecutors in each CPS office to deal with these cases (Law Commission op cit para 20);
- use of expert advice to identify ways of overcoming problems, to assess reliability and to assess the effect of the decision whether or not to prosecute on the victim (Law Commission op cit para 20);
- pursuing civil cases: parents whose disabled children's cases have not been prosecuted have been encouraged to launch a civil case where the burden of proof is lower (Cervi 1992: 15).

d. The trial

Measures at trial appear to have two main aims. The first is to reduce the fear and trauma of attending court. The second is to ensure that the quality of evidence suffers as little as possible because of the witness's particular vulnerabilities. In practice, the two aims can be related.

A number of measures originally designed or proposed for other vulnerable witnesses (such as children and victims of sexual offences) may be appropriate for witnesses with disabilities/illnesses. For example:

- pre-trial preparation (a pre-court witness pack has been produced by the campaign group Voice for the Home Office);
- friend in court schemes;
- the removal of wigs and gowns;
- design changes in the architecture of court buildings (for example to make them more accessible wheel-chair users and people with mobility problems);
- screens and cctv;
- pre-trial hearings and admission of written depositions; and
- clearing the public gallery.

Some of these measures (such as pre-trial information, removing wigs/gowns, screens and cctv) have been recommended by MENCAP (1997: 9). They also suggest some people with learning disabilities may require more frequent breaks during court hearings.

Several points are worth noting:

- These measures will not always be appropriate. Individuals needs vary. For example Sanders et al (1997: 64) report that some witnesses with learning difficulties were disappointed not to see wigs and gowns having seen them on TV. Different witnesses can require different types and amounts of support.
- The content of these measures and/or the way they are used is also important. Sanders et al argue that not all pre-trial preparation is effective. They argue that although effective preparation can contribute towards success for the victim, success is not simply a conviction or removing all stress - both are setting the aims for pre-trial preparation too high. They define success as any case where the witness gave evidence considered by the jury. However they later suggest that the

most successful preparation identified and acted on the witnesses particular concerns/weaknesses which helped the witness give better evidence or face giving evidence in court more confidently.

- Ineffective preparation is not necessarily the fault of the agencies involved. Sanders et al (1997: 51) identified one case where a person with a mild learning disability refused offers of assistance but found the trial difficult. Support cannot be forced on people, even when it is felt to be in their best interests.

- Even the best preparation does not guarantee that the witness will not find the trial traumatic. Unforeseen events such as adjournments or a change to another court can arise: it is impossible to prepare for every possible eventuality (Sanders et al 1997: 52).

Just as many of the measures discussed in relation to other groups of vulnerable witnesses may be applicable to people with disabilities/illnesses, so many of the issues raised are common, albeit with some distinct connotations. For example admission of evidence was discussed in chapter 2 concerning witness intimidation. Pre-trial hearings and, perhaps to a lesser extent, written depositions may also be helpful for people with disabilities/illnesses. Pre-trial hearings could for example, be used for learning disabled witnesses who are likely to find cross-examination in the formality of the courtroom particularly stressful, to help them give more effective evidence. Written depositions could be useful for people with physical disabilities or mental illness who may find it difficult to attend court.

Many of these measures are currently matters at the judges' discretion. However as noted in chapter 2, it is not clear that these measures are routinely considered. Cervi (1992:15) supplies some anecdotal evidence that such measures rarely used for people with learning disabilities. Reducing judicial discretion by creating a legal assumption in favour of such measures might be one means of overcoming this apparent obstacle. This would not however sit comfortably with the idea that measures should be based on an assessment of individuals needs.

In addition, Sanders et al (1997: 53-54) suggest that the problem is not lack of support for such measures - they found widespread support for this pre-trial preparation for example. Instead they suggest the problem is confusion about which agency is responsible for arranging it. If this is correct, a more appropriate response may be to define responsibility for organising needs assessment and appropriate measures more clearly, perhaps through legislation. There are several agencies/organisations who might take on this responsibility:

- the police: at present, the National Standards for Witness Care suggest that the police should organise some of these arrangements (eg court visits).

- the CPS: this has been recommended by the Law Society (submission op cit), although they acknowledge this may not be ideal.

- Victim Support/court witness services: these schemes also provide some assistance: for example, all court witness services arrange court familiarisation visits. However, as noted in chapter 2 they are largely restricted to the Crown Court.

Sanders et al (1997:54) question whether lawyers have the skills to perform this task effectively, and this may apply to the police. However, Victim Support schemes or court witness services are not yet available in all courts. They suggest that assessment of needs of *all* vulnerable witnesses should be assessed by experts.

As well as those measures which have also been suggested for other groups of vulnerable witnesses, there are some distinct to witnesses with disabilities and illnesses. One example is the provision of interpreters: this was discussed earlier in relation to reporting. Three main areas are considered below:

- cross-examination;

- expert evidence; and

- summing up.

1. Cross-examination

Competency and credibility are particularly important issues for learning disabled and

mentally ill witnesses who may display an element of suggestibility.

Judges can intervene to assist mentally or physically vulnerable witnesses in two ways. First, by calling for breaks so that witnesses can rest, and secondly to prevent inappropriate questioning. No research was found on the use of breaks to help mentally or physically vulnerable witness adults, but some was found on intervention to prevent inappropriate questioning. Sanders et al (1997: 78) found that many of the learning-disabled witnesses they interviewed felt bullied or pressured, and some felt that their testimony had suffered as a result. However judges had rarely intervened, and some found it difficult to adapt their own language. In some cases the judges themselves were perceived as bullying by the witnesses. Sanders et al observe that this may be the unintentional result of failure to understand the level of learning disability and its relevance.

This suggests that training for the judiciary and magistracy on learning disabilities, as well as for the legal profession more generally, would be useful. MENCAP (1997: 9) recommends training for all those called to the bar as well as the magistracy and judiciary. It also seems likely that equivalent training about other disabilities and mental illnesses could also be of benefit. This could cover the nature and implications of disabilities and illnesses. It could also look at how to question people with intellectual disabilities (for example to slow the pace of questioning and use more appropriate language) and encourage intervention by judges and magistrates to curb inappropriate questioning.

Some efforts have already been made in this direction: for example the Bar Council has set up a network of barristers who have some experience/knowledge of cases involving learning disabled (Cervi 1992: 15). It is not known how much use is being made of this, nor how effective it is. If it is successful it might be worth considering inviting some members of the judiciary and magistracy in each Petty Sessional Division/Crown court area to specialise to some extent in cases involving mentally disabled/ill witnesses. Such an approach would of course rely on cases involving people with learning disabilities/illnesses being flagged in some way, and appropriate court scheduling.

In addition, Sanders et al (1997: 78) argue for greater use of expert evidence (discussed further below) and advocate the creation of rules on when judges can intervene to prevent questioning which is unfair or, because of the witness's vulnerability, likely to produce unreliable evidence. More radically, they suggest a neutral examiner might be considered. The idea for this comes from Israel, where neutral examiners are used for child witnesses, and provisions based on this idea have been introduced in New Zealand and Ireland. The role of the "child interpreter" in these two jurisdictions is to sit next to the child and translate questions put to them into language that the child can understand. A similar idea was also suggested by the Pigot Committee (Ref to be added).

2. Expert evidence

It has been suggested that expert evidence could be used more commonly to help inform the court (including the jury) about the witness's particular learning disability (Sanders et al 1997: 77). This might equally apply to mentally ill witnesses, and to people with physical disabilities: for example sight impairments may prove problematic if the legal profession give less credence to such testimony than is actually warranted. This may however, be easier to tackle (for example through expert advice and training) than prejudice or misconceptions held by juries.

Sanders et al (1997:77) argue that expert evidence may be useful to help deflect attacks on the witnesses credibility, if it addresses specific issues raised by the case. However, they also see that the admissibility of expert evidence under current provisions may need to be reviewed to enable more widespread use.

3. Summing up

Finally, in cases which reach the Crown Court, before the jury retire to consider their verdict, the judge usually sums up the case. A careful and sensitive summing up is important. However, at this stage the judge may issue a corroboration warning. There is no general requirement that a witness's testimony has to be corroborated by other evidence. Nevertheless, when a witness's evidence is thought unreliable corroboration is usually desirable, and judges may use their discretion to warn the juries of this.

No figures were found on the use of corroboration warnings in cases involving witnesses with physical or mental disabilities. However Sanders et al (1997: 60) report that only one of the cases they studied involving learning disabled witnesses came to court on the witness's evidence alone. They suggest that the police and CPS may currently filter such cases out. It seems plausible though that if responses to witnesses with learning disabilities improve, the numbers of cases involving uncorroborated evidence from witnesses with learning disabilities will improve. Sanders et al (1997: 60) argue that judges here, as in other jurisdictions, should be prohibited from issuing corroboration warnings when this is based solely on the fact that the witness has a learning disability.

e. ...and beyond

After the trial there are two further areas for consideration. The first is that of therapy, and the second of future crime prevention.

Therapy

Although therapy may help witnesses perform in court, at present it may be delayed until after the trial because of fears that their testimony will be undermined by the charge that the witness has been "contaminated" or "coached". Counselling may have very limited value if the incident is not discussed, but discussion might distort the witness's memory of the event. Evidence from a witness who has received therapy is admissible but only if they have not been contaminated (Sanders et al 1997: 52). The problem then becomes proving whether or not the witness has been contaminated. To assist this, counsellors may be required to disclose notes and other records which would normally be treated confidentially and would not have been written with this purpose in mind: comments taken out of context might then be used to undermine the witness's credibility[7].

Proving that contamination did not occur can be difficult. According to Sanders et al (1997: 52) the CPS and police usually discourage therapy until after the trial. The slow nature of the criminal justice process means that victims are sometimes denied counselling until long after the offence. Therapists are not usually trained to deal with the learning disabled, complicating matters further.

It is difficult to identify measures to overcome these problems. Some possibilities include:

- further investigation of whether and to what extent therapy can contaminate witnesses, and how this weighs against any improvements in performance at court;
- reducing the length of time the criminal justice process takes: the recent Narey review on delay in the criminal justice system made a number of recommendations with this aim. Some of these are to be introduced in the forthcoming Crime and Disorder Bill;
- reviewing police and CPS perspectives and policies on therapy: although the decision may affect the strength of the prosecution case, advice needs to be balanced: the decision about therapy should ultimately rest with the witness and his/her family; and
- training for therapists in working with people with learning disabilities: they could then be listed in a national register available to all interested agencies, with some system of referral to learning disabled people and their carers.

Prevention

In the longer term, improvements in the criminal justice system's treatment of mentally ill or disabled witnesses may reduce their vulnerability to crime by making them less of an easy target. However, some aspects of their increased vulnerability (such as dependence on carers) cannot be addressed by the criminal justice system except through crime prevention efforts.

- Statutory police checks on all professional carers working with disabled or mentally ill people.

John Newing, then chief constable of Derbyshire has called for statutory police checks on carers of vulnerable adults (Cervi 1992: 15), but there seems no reason why such a measure should not also apply to those working with vulnerable

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[7] *The rules governing third-party disclosure have been changed under the Criminal Procedures and Investigations Act 1996, and are due to be implemented in January. One of the intentions of the changes is to make it more difficult for defence barristers to use third-party disclosure for "fishing expeditions" in which possible lines of defence are sought, rather than support for existing lines of defence.*

children. The main problem with this proposal is that it might give a false sense of security: given that a large proportion of crime against people with disabilities/ illnesses is probably unreported, the police may only know of a small number of offenders against this group. Against this it can be argued that any protection possible would be desirable. In addition, if this was implemented as part of a general package of measures improving confidence in the criminal justice system, the number of offenders known to the police (and hence the effectiveness of this particular measure) might increase.

Conclusion

The literature review found a paucity of literature on physical disabilities and mental illnesses, as well as on the impact of multiple health problems. This may partly be a reflection of societal attitudes generally, of the invisibility of some of these constituencies (for example residential care, separate education facilities and discrimination in industry may all serve to hide these groups) and their powerlessness (associated with dependence on others). Whatever the reason, this needs to be addressed: by not adequately meeting the needs of these groups in the criminal justice system, we may be increasing their vulnerability to crime.

Williams' (1995a: 4) conclusion is worth quoting almost in full (see box 4).

Box 4: Williams' conclusion (1995a:4)

> "redressing the stereotyped view of people with learning difficulties, in relation to crime, is the key element in changing the present situation. Justice is frustrated not only because of the response of the separate agencies, but of the effect they have on each other. The police do not record crimes because they believe the CPS will not prosecute, staff do not report to the police because they 'do nothing' and victims do not tell staff because 'they say the police won't help'. Consequently the courts are unpractised at dealing with vulnerable witnesses, and perpetrators see people with learning disabilities as safe targets. Positive action...could break this spiral."

Numerous measures are possible: many of these could also be applied to other groups of vulnerable witnesses. Table 2 summarises the measures discussed. As with witness intimidation, some cases will always fall through the net. The task currently facing the criminal justice system, is to ensure that there is a net which will catch as many of those witnesses who are physically or mentally vulnerable as possible.

Table 2: Possible measures to assist witnesses with disabilities and illnesses					
Measures	**Stage of Criminal Justice System**				
	Reporting	**Investigation**	**Decision to Prosecute**	**Trial**	**Beyond**
Improved education to increase reporting (of both witnesses and serviceprofessionals)	✓				
Creating/reviewing policies for care institutions to encourage identification of incidents as criminal, encourage reporting and set our referral process	✓				
Raising awareness of increased vulnerability and tackling myths	✓				
Creating a legal requirement on service professionals to report allegations of crime	✓				
National guidelines for professional carers and care agencies on reporting	✓				
Consideration of accessibility and comfort in deciding location of interviews	✓	✓			
Structural changes to police stations	✓	✓			
Taping or video-recording interviews	✓	✓			
Provision of communication aids - both technical such as induction loops and human such as interpreters	✓	✓	✓	✓	
Improved training to identify communication problems	✓	✓	✓	✓	
Guidelines to assist identification of people with disabilities/illnesses	✓	✓	✓	✓	
Presence of support person	✓	✓	✓	✓	
Use of specialist skills for interviewing/cross-examination, supplied by experts or through training, perhaps involving specialist officers	✓	✓	✓	✓	
Requirement for prosecutors to meet witness before deciding on theircompetence			✓		
Guidelines or information to assist prosecutors			✓		
Pre-trial preparation				✓	
Pre-trial hearings or written depositions to avoid/reduce time in court				✓	
CCTV and Screens				✓	
Removal of wigs and gowns				✓	
Clearing the public gallery				✓	
Structural changes to courts				✓	

Table 2: Possible measures to assist witnesses with disabilities and illnesses *(continued)*					
Measures	**Stage of Criminal Justice System**				
	Reporting	**Investigation**	**Decision to Prosecute**	**Trial**	**Beyond**
Use of expert evidence				✓	
Prohibition on issuing corroboration warnings simply on basis that witness has a learning disability				✓	
Reviewing policies on therapy before trial, further investigation of the contamination issue etc.	✓	✓	✓	✓	✓

Section 4: **Special Offences**

The Problem

Definition of "special offences"

Some of the definitions discussed in section 1 suggest there are certain special offences where witnesses may be vulnerable. The only offences specified by any of these are sexual offences1. This is supported by a large literature that suggests that sexual offences are particularly upsetting for the victim. Nevertheless, other possible "special offences" can be identified, including *domestic violence, racially motivated crime and hate crimes against sexual minorities:* all of these are considered below. However, the literature review found more information on some of these subjects than others. In particular, very little information was found on hate crime against sexual minorities: the discussion below reflects this.

Other offences

The selection used has some limitations. It could be argued that witnesses of other violent offences should be covered, but it seems inappropriate to label all witnesses of violent crime as vulnerable. For example, much violent crime involves pub brawls or other assaults committed in public between young males, not all of whom will necessarily view themselves as victims of crime. However, it could be argued that witnesses of some specific offences (such as the family of a murder victim) could be seen as vulnerable too.

Against this is can be argued that their vulnerability stems from bereavement, which may affect witnesses of other crimes, suggesting that bereavement should be another criterion of vulnerability. Due to time constraints this issue is not examined further here, although the Review may consider it when finalising their definition of vulnerable witnesses.

Repeat victimisation

Another question is whether repeat victimisation It may also be argued that some particular offences such as stalking should be covered. This raises the question of whether repeat victimisation generally should be covered. Repeat victimisation is known to be common in domestic violence and racial attacks, but can also occur for victims who would not otherwise be considered vulnerable, such as burglary victims (for a discussion of the distinction between repeat victimisation and intimidation see section 2). The finding that crime is concentrated on a small proportion of the population (see for example Farrell and Pease 1993: 5-15) suggests that repeat victims' experiences of the criminal justice system will be more frequent and different in nature to other victims of crime. However research in this area is relatively new, and has focused on measuring repeat victimisation and identifying ways to prevent revictimisation, rather than on how this affects the victim's emotional vulnerability. Repeat victims are not considered separately below, although many of the measures discussed may be relevant for them.

Source of vulnerability

The suggestion that repeat victims should be considered raises another issue: by drawing attention to particular offences the real source of the witness's vulnerability may be obscured. Vulnerability may not stem simply from the qualities of the offence itself. Just as the repeated nature of victimisation may be important, so too may the personal characteristics (such as sex, race or sexual orientation) of the witness and perpetrator(s) and the relationship between them. The significance of these factors may in turn derive at least partly from public attitudes, both outside and reflected within the criminal justice system. More detailed examples are given below.

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1. It can be argued some victims of sexual offences, such as those who are raped abroad, are especially vulnerable (Jill Seward (submission to the Review, 29/8/97). This is not considered here because no relevant literature was found, although the Review may wish to consider that some witnesses are vulnerable because the offence was committed in a foreign county.
2. See the Victim Support report by Brown, Christie, & Morris (1990) "Families of Murder Victims Project" for a discussion of the needs of this group.

Example 1: Sex

It can be argued that power relations between the sexes causes vulnerability for victims of sexual offences and domestic violence. According to this argument, their vulnerability cases stems not from the sexual or violent nature of the offence. Rather, it derives from the fact that most of these cases involve female victims and male defendants, in a society which has traditionally privileged the male over the female, and reflected this in its institutions.

Of course some such offences may involve male victims who may also have unusually negative experiences and perceptions of the criminal justice system. One explanation for the problems that these witnesses experience is that the challenge the victims pose to sexist stereotypes (such as those characterising males as strong, powerful and assertive) and homophobic attitudes.

Thus, instead of labelling witnesses of special offences as vulnerable, other characteristics such as sex, race and sexual orientation could be used as criteria of vulnerability. One difficulty with this approach is that it would label a very large proportion of witnesses as vulnerable. In addition, there is little research examining whether these factors make witnesses vulnerable across the full range of crimes.

Example 2: Race

It can be argued that vulnerability in racially motivated crimes is just one of a number of vulnerabilities associated with race, in a society which has traditionally privileged whites. Consequently, it may be more useful to examine how witnesses from ethnic minorities fare in general, rather than just those who fall victim to racially motivated crime. Cultural and language barriers can be seen as examples of problems that may apply equally in offences which are not racially motivated. However, such problems may not apply to all people from ethnic minorities.

Example 3: Sexual orientation

Vulnerability may be associated with sexual orientation: both because public attitudes to sexual minorities may increase their vulnerability to crime (for example, "queer bashing") and because of possible discrimination in the criminal justice system (both in the law and on the part of some criminal justice professionals). The subject has been largely overlooked. This may be because studying discrimination against sexual minorities can be difficult (information about sexual orientation may not be offered as freely as information about racial origin) but may also reflect lack of awareness.

Further points

Each of the four special offences identified above (sexual offences, domestic violence, racially motivated crime and hate crimes against sexual minorities) are discussed below in turn. Three final points should be noted about this selection:

- The concern here is primarily about victims: few non-victim witnesses will be vulnerable because of the nature of the offence (as opposed to other factors such as intellectual disabilities).
- The categories of special offences discussed below are not mutually exclusive. For example, sexual offences may be racially motivated, or may be inter-linked with domestic violence.
- The Review may decide that a different selection would be more appropriate (or indeed to employ different criteria of vulnerability than the nature of the offence).

For each "special offence", definitions are examined first, followed by evidence (where applicable) from "Criminal Statistics", the "British Crime Survey", and other studies on the scale and nature of the problem. The one exception to this pattern is hate crime against sexual minorities, where research is much more limited.

1. Sexual offences

Definitions

The range of sexual offences is wide, including both keeping a brothel and rape. The most

common factor defining sexual behaviour as criminal is lack of consent. Where the victim is young, this translates into whether the victim was above or below the age of consent. However, legal definitions include some behaviour between consenting male (but not sexual behaviour between consenting female) partners. This may be addressed following a ruling European Commission on Human Rights, which rejected the idea that the homosexual age of consent should differ from that for heterosexuals. A free vote is now planned on the homosexual age of consent in the House of Commons. However, this will still leave anomalies to the general rule that lack of consent defines sexual behaviour as criminal (eg. soliciting).

Table 3 lists the main offences and the maximum penalty for each: it should be noted that under the Crime (Sentences) Act 1997 a life sentence is now required after a second serious offence such as rape and attempted rape (unless there are exceptional circumstances).

Scale and nature of the problem

i. Criminal Statistics

Sexual offences account for a very small proportion (less than 1%) of all alleged offences recorded by the police in England and Wales. Most sexual offences appear to be committed by men. In 1996 over eleven thousand men were prosecuted for such crimes and about two-fifths found guilty: about a hundred women were prosecuted for such offences, and less than a third convicted (Criminal Statistics England and Wales 1996 Supplementary Vols 1 & 2, Tables S1.1 & S2.1).

The number of sexual offences recorded has risen at a similar rate to recorded crime as a whole (about 3% a year since 1986). Nevertheless, in recent years, the total number of *rapes* recorded by the police has increased almost threefold (Criminal Statistics England and Wales 1996 Table 2.16). There are several possible reasons for this increase, including various changes in the law over this period (Harris, 1997: 1). Examples include:

- legal recognition of marital rape (in 1991 in the case of R v R, the House of Lords upheld a Court of Appeal ruling on this);
- the widening of the law to include male rape (under the Criminal Justice and Public Order Act 1994); and
- legal recognition that boys under fourteen can commit rape (under the 1993 Sexual Offences Act).

Another explanation for this increase is that more victims are reporting rape. It is widely thought that public attitudes to rape and the way rape victims have been treated by the criminal justice system in the past, discouraged many from reporting. It is also generally accepted that changes in public attitudes and police treatment of rape complainants may have contributed to the increase in reported rapes. However, it is also possible that the actual number of rapes committed might have increased (Lees 1996: 24).

The conviction rate for recorded rapes fell from 24% in 1985 to 9% in 1996 (see Figure 3)[3]. Given that many rapes are likely to go unrecorded (either because they are not reported, "no-crimed" or recorded as a lessor offence), and some convictions will be quashed on appeal, the real conviction rate must be even lower. There is some evidence that conviction rates for rape are also low elsewhere in Europe and in America (Lees 1996: xii). Research for the Home Office into the reasons for the increasing attrition rate for rape is due to be completed in June 1998. However, initial findings suggest that this might be related to a larger proportion of rapes involving intimates being reported, where the likelihood of a conviction may be lower (Harris, 1997: 3).

For those convicted of sexual offences, on the face of it sentences seem to have become more severe over the past decade. The proportion of sex offenders given immediate custody rose from 35% in 1986 to 55% in 1996. This apparent increase in severity was encouraged by new sentencing guidelines issued in 1986. Changes were also introduced so that only senior members of the judiciary could hear rape cases. Despite this, the proportion of convicted rapists sentenced to immediate custody fell from 95% to 89% (see figures 4 and 5). Some sentencers do not always

[3]. *The number of convictions and cautions for sexual offences as a whole has tended to remain steady, at less than 2% of all convictions/cautions.*

Table 3 Sentencing maxima for Sexual offences.

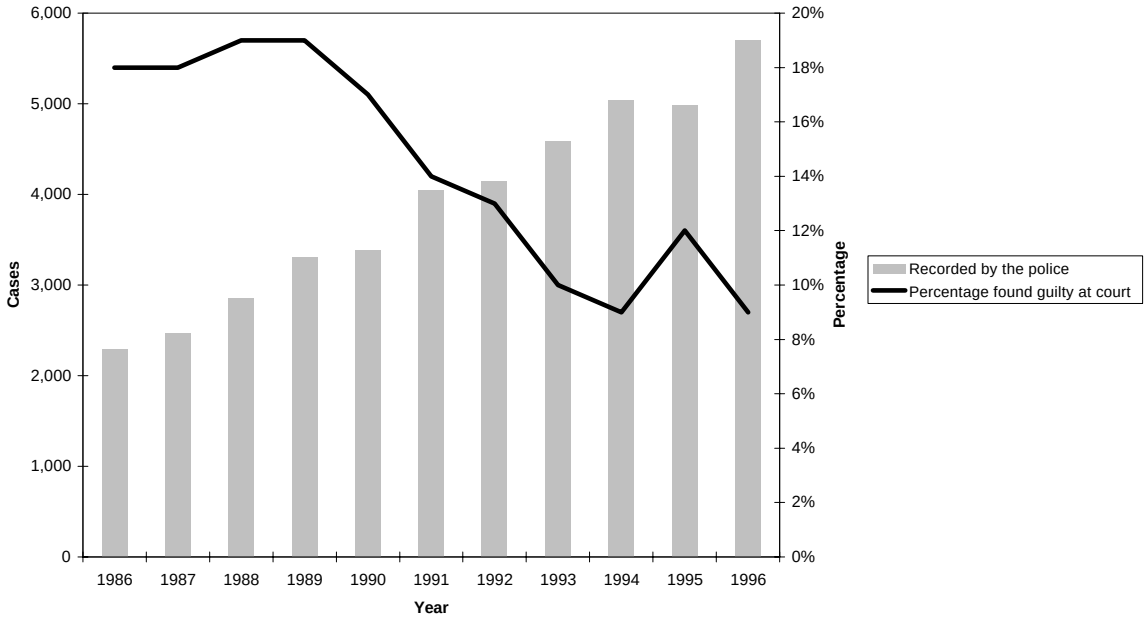
Offence	Maximum sentence at magistrates' court	Maximum sentence at the Crown Court
Rape/ attempted rape	n/a	Life
Conspiracy to commit a listed sexual offence	n/a	Life
Incest with a girl under 13	n/a	Life
Other incest	n/a	7 years
Sexual intercourse with a girl under 13	n/a	Life
Sexual intercourse with a girl under 16	"6 months or £5,000 " fine or both	2 years
Householder permitting girl under 13 years to use premises for intercourse	n/a	Life
Householder permitting girl under 16 years to use premises for intercourse	"6 months or £5,000" fine or both	2 years
Abduction of female	n/a	14 years
Abduction of unmarried girl or femaled efective	n/a	2 years
Indecent assault	"6 months or £5,000 " fine or both	10 years
Man having unlawful sexual intercourse with a woman who is a defective	n/a	2 years
Man living on earnings of prostitution or exercising control over prostitute	"6 months or £5,000" fine or both	7 years
"Woman for purpose of gain, exercising" control over prostitute	"6 months or £5,000" fine or both	7 years
Man or woman living wholly or in part on the earnings of male prostitution	"6 months or £5,000" fine or both	7 years
Man soliciting or importuning in a public place for immoral purposes	"6 months or £5,000" fine or both	2 years
"Procuring, permitting or causing the" prostitution of a female under 16 years or a female defective	n/a	2 years
Procuring a female for immoral purposes or using drugs to obtain or facilitate intercourse	n/a	2 years
Detention of female in brothel or other premises	n/a	2 years
"Keeping a brothel, letting premises for" use or tenant permitting use of premises as brothel for heterosexual/ homosexual practices	"3 months or £1,000" fine or both	n/a
Kerb-crawling or persistent soliciting of women for the purpose of prostitution	" £1,000 fine"	n/a
Buggery/attempted buggary with boy under 16 or with a woman or animal	n/a	Life
Buggery/attempted buggery by man with male aged 16 or over without consent	n/a	10 years
Buggery/attempted buggery by man aged 21 or over with male under 21 with consent	n/a	5 years
Other buggery/attempted buggery	n/a	2 years
Man procuring an act of buggery by two other men	"6 months or £5,000" fine or both	2 years

Table 3 Sentencing maxima for Sexual offences *(continued)*

Offence	Maximum sentence at magistrates' court	Maximum sentence at the Crown Court
Gross indecency by a man aged 21 or over with a male aged under 18	"6 months or £5,000" fine or both	5 years
Gross indecency by a man	"6 months or £5,000" fine or both	2 years
Male of or over the age of 21 procuring or attempting to procure or being party to the commission by a male under 18 of an act of Gross Indecency	"6 months or £5,000" fine or both	5 years
Male procuring or attempting to procure or being party to the commission by a male of an act of Gross Indecency	"6 months or £5,000" fine or both	2 years
Unlawful possession of protected material/ giving or showing protected material to someone when not supposed to.	"6 months or £5,000" fine or both	2 years or fine or both

Figure 3: Number of cases recorded as rape and conviction rate, 1986-1996

Source: Based on figures taken from J. Harris (1997)



adhere to the guidelines (Robertshaw 1994: 343-345). The new measures requiring a life sentence after a second serious offence such as rape and attempted rape may increase sentencing severity. It has yet to be seen how frequently judges will use their discretion in "exceptional circumstances" to impose sentences other than life.

Figure 4 Sentencing for sex offences and rape, 1986 & 1996
Source:Criminal Statistics

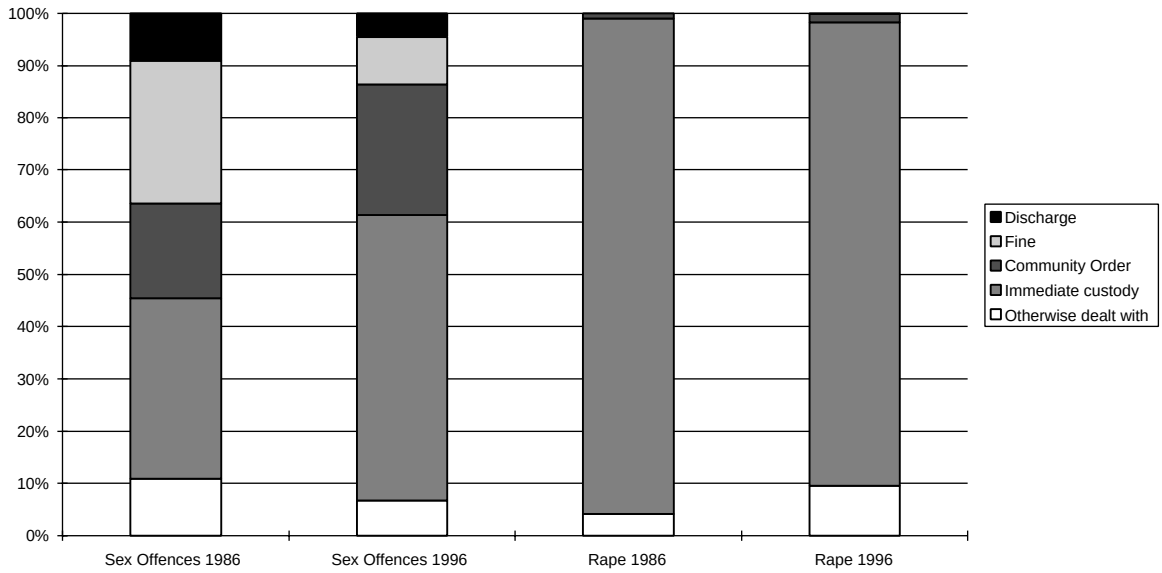
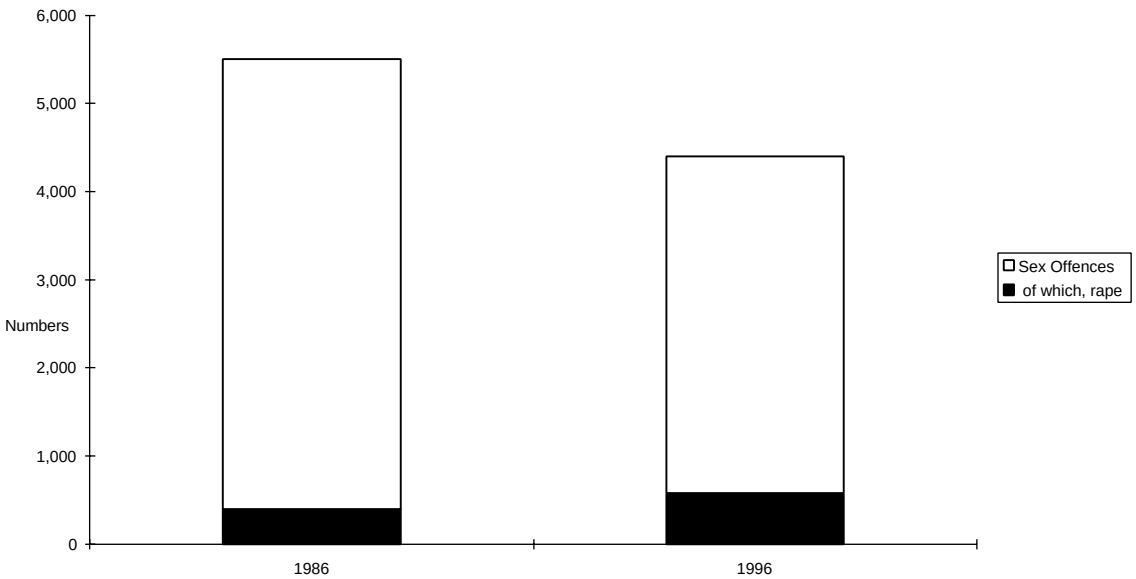


Figure 5 Total number sentenced for sex offences, including rape, 1986 & 1996
Source: Criminal Statistics



ii. British Crime Survey

The BCS provides an indication of the amount of crime not reported to the police. However, in practice survey methods have not proven a strong measure of sexual offences. There are several problems:

- people may find answering questions about sexual offences embarrassing;
- some respondents may be reluctant to disclose sexual victimisation because of lack of privacy (concern that someone might overhear, or in some cases fear of retribution if the perpetrator should learn of the disclosure);
- public definitions may not be the same as legal definitions: for example, legally rape does not include penetration by bottles, fingers etc; and
- a respondent may come to label an incident differently over time.

It is difficult to judge what effect these problems have overall, but the "embarrassment factor" and concerns about privacy suggest a bias towards under counting. Although the BCS collects data on sexual offences, this has not been published recently because of doubts about its reliability. To try to improve the 1994 survey (Percy & Mayhew 1997: 6-7) respondents were asked to read and answer questions on a computer, to try to reduce the embarrassment and privacy problems.

More offences were reported with the self-keying method. From the conventional sexual victimisation question asked towards the beginning of the interview, fewer than 1% of women said they had been the victim of one or more sexual incidents in the last year. However, with the self-keying method about 8% admitted sexual victimisation. Similarly, fewer than 1% initially said they had experienced one or more sexual offences since age 16. After follow-up questions in the self-keyed component, up to 22% reported sexual incidents of some sort from age 16.

These findings are difficult to interpret. It is plausible that after further prompting the women remembered more crimes, suggesting that the second measure is more reliable. Another possible explanation is that whereas initially they only mentioned those incidents they viewed as crimes, further questions revealed some sexual incidents which respondents did not perceive as crimes. For example, 6% of women reported having been forced into sex at least once from age 16, but only 2% described the most serious sexual incident they had experienced as rape. This complicates matters. If only those incidents viewed as crimes by the victims are taken, the second measure over counts, but the first measure may still under-count. Despite these limitations, this method does seem more reliable than previous approaches.

Other findings were that (Percy & Mayhew 1997: 10-15, tables 2, 8, 9 & 10):

- Thirty-nine per cent of those reporting some sexual incident viewed them as crimes.
- The proportion of incidents regarded as crimes was highest for rape (74%).
- Incidents were more likely to be considered crimes when the offender was a stranger (49% compared to 23% when the victim knew the offender by name).
- Of all those incidents viewed as crimes, 39% were reported to the police. Only 5% of those incidents viewed differently (for example "wrong but not a crime", "just something that happens", or "not sure") were reported.
- There was strong evidence that rape victims were more reluctant to report to the police than victims of other sexual offences. Only 26% of rapes viewed as crime by the victim were reported to the police, against 47% of attempted rapes and 45% of indecent assaults.

iii. Other studies

There have been a number of other surveys of victims concerning sexual offences. One of the criticisms of the BCS is that national figures mask local differences in risk. One well-known example of a local survey is the Islington Crime Survey (ICS), in which over one and a half thousand questionnaires were completed (a response rate of over 75%). The survey found 4% of respondents reported some level of sexual assault in the previous year, although three-quarters described it

as low-level pestering rather than assault. Women were more likely than men to describe this experience as assault. About 8% of women reported sexual harassment or assault during the previous year. Eight percent of women and 12% of men reported sexual abuse before aged 16 (Crawford et al 1990: 8, 19-20).

However, comparing crime survey findings is problematic: methodological differences can lead to great variation in results. For example, the BCS suggested offenders were known to 60% of victims 60%, against 23% in the ICS. One explanation for the difference might be that Islington is a high crime area whereas the BCS is a national survey, but there were also major methodological differences between the two. For example, in the ICS male respondents were also asked about women in the household: the BCS excludes male respondents from questions on sexual victimisation, following tests suggesting men were unwilling to answer questions on sexual victimisation or take them seriously (Percy and Mayhew (1997: 21, 5).

Another more recent example is the 1996 International Crime Victimisation Survey, which involved mainly telephone interviews of nationally representative samples of between one and two thousand people in each of eleven countries. The 1996 survey found some similarity in risks of sexual assault between the eleven countries. On average, 2.5% of respondents reported one or more sexual incidents over the last year. The highest rates was recorded for Switzerland (4.6%) and Austria (3.8%), with the lowest in France (0.9%). England and Wales fell in the bottom half of the range at 2%: Scotland and Northern Ireland were lower at 1.3% and 1.2% respectively (Mayhew & van Dijk, 1997: Table 1).

Again, these apparent differences should be treated cautiously. The study found evidence of consistency between the countries in how seriously they viewed different behaviours, from which the authors inferred a large degree of consistency between countries in defining certain actions as crimes. However, willingness to report sexual offences to researchers may have differed: although this is partly related to perceptions of seriousness, other factors (such as the "embarrassment" factor) may have affected response differently in different countries. It has also been suggested that the wording of the initial question was problematic (van Dijk and Mayhew 1992, Travis et al 1995 and Koss 1996 cited by Percy and Mayhew 1997: 23).

Outstanding questions

The number of sexual offences reported is affected by the research methodology used, and caution has to be exercised in interpreting the results. However, the literature found on sexual offences focuses on offences involving female victims and male offenders.

2. Domestic violence

Definitions

The Home Affairs Select Committee in 1993 defined domestic violence as "any form of physical, sexual or emotional abuse that takes place in the context of a close relationship". This definition was adopted by the Home Office in an inter-agency circular in 1995. This said that domestic violence can take a number of forms, not only physical violence but also sexual abuse, rape, and mental and verbal abuse such as threats and systematic criticism (cited in Home Office 1996). The Home Affairs Committee definition is also used by the CPS policy statement on domestic violence which observes that in most cases, the relationship will be between partners (married, cohabiting, or otherwise) or ex-partners". It further elaborates that although in most cases the offender is male and the victim female, domestic violence can also involve male victims and female offenders, and partners/ex-partners of the same sex (CPS 1995: 2.1-2.2).

This definition is very wide: most studies encountered in the literature review focused more narrowly on physical violence (usually by male offenders against female victims). This appears to be the approach used by the police. However, the CPS definition is useful in highlighting that other incidents can occur in close relationships, and that these relationships affect the nature of the incidents.

Another definition is provided by the British Crime Survey, which focuses on violent incidents "involving partners, ex-partners, household members and other relatives, irrespective of location". The inclusion of non-partners means the definition is quite broad, but has the advantage of matching police measures of

domestic violence (Mirrlees Black, Mayhew & Percy 1996: 27). However, almost all cases reported to the 1992 survey took place in or just outside the victim's home: some occurred at the home of a friend or the offender when the victim and offender were not currently cohabiting (Mayhew, Aye Maung & Mirrlees Black 1993: 82).

Scale and nature of the problem

i. Criminal Statistics

In law, there is no such offence as domestic violence. Instead domestic violence is prosecuted under a number of different offences, such as assaults and breach of the peace (a public order offence). Nor do Official statistics identify the relationship between the victim and offender. Consequently, it is impossible to examine domestic violence using Criminal Statistics, because it is not separable from, for example, stranger assaults. Some forces keep domestic violence registers, in which such offences are supposed to be recorded, but there are concerns about recording practices (particularly the rate of "no-criming") and statistics from these registers are not published. This makes criminal justice responses to domestic violence difficult to monitor. Both the National Inter-Agency Working Party on Domestic Violence set up by Victim Support in 1990 (Victim Support 1992: 2.8) and Grace (1995: 53-54) recommended improved recording of domestic violence to assist monitoring.

ii. British Crime Survey

The BCS provides much more information about domestic violence. The 1992 survey found that 10% of women experienced domestic violence at some point in their lives (Mirrlees Black 1994 cited by Grace 1995). The latest survey (Mirrlees Black, Mayhew & Percy 1996: 5, 28-35) found domestic violence increased 242% between 1981 and 1995. Other evidence from the survey suggests that more domestic violence is being reported to the police, so one reason for this rise may be that respondents are also more willing to disclose domestic violence to interviewers. Domestic incidents accounted for about a quarter of all violent offences reported: the authors suggest that "if domestic violence could be measured better, the proportion might be higher".

On the nature of domestic violence, it was found:

- Approaching half (44%) of all violence reported against women was domestic: men more frequently reported being victims of stranger and acquaintance violence.
- Younger people (those aged between 16 and 29) were at greatest risk.
- Weapons were less likely to be used than in other violent crimes, but victims of domestic violence were most likely to be injured. This suggests they only reported the more serious incidents.
- A third of victims were victimised more than once.
- Women found domestic violence more upsetting than men: common reactions included anger, fear, crying and difficulty with sleeping.

These findings should be treated with caution: the BCS probably under counts violent crime, especially domestic violence. It seems plausible that violence between people who know each other is less likely to be perceived as crime. There may also be other reasons for not mentioning domestic violence: as with sexual offences, embarrassment and concerns about privacy and retribution may be important.

iii. Other studies

One of the earliest studies on domestic violence (Dobash & Dobash 1979: 164) found that a quarter of all violence is domestic, and only 2% was reported to the police. Other surveys have also suggested that between 10% and 25% of women have been the victim of violence by a male partner at some time in their lives. This seems to fit with the findings of some forthcoming research for the Home Office (Phillips & Brown 1998: 39) on entry into the criminal justice system: domestic incidents accounted for just over a quarter of all violence against the person arrests[4]. According to Dobash et al (1996: 2) similar figures have been found in other countries.

4. Six per cent of all suspects were arrested for domestic violence related offences (including public order offences and property offences such as criminal damage, not just violence against the person).

The literature reviewed has tended to focus on male on female violence, but it seems plausible that some domestic violence may be female on male or occur in a same-sex relationship. Despite this, there have been a few studies of female on male violence recently. These suggest this is far less common than male on female violence. For example, Phillips and Brown (1998: 91) found that 10% of those charged with domestic violence offences were female. Other research in this area suggests that violence committed by women against men is usually against a background of a history of violence by the male: that it tends to be less systematic, and less serious (Dobash et al 1992: 71-91: Dobash et al 1996). However, no studies were found examining domestic violence within same sex relationships.

Outstanding questions

At least two outstanding questions can be identified:

- to what extent sexual abuse accompanies physical violence; and
- the extent of domestic violence in same-sex relationships.

3. Racially motivated crime

Definitions

A wide range of legislation may be used to prosecute racially motivated crime. For example, racial harassment and racial verbal abuse can be prosecuted under the Criminal Justice and Public Order Act 1994[5] and Public Order Act 1986. However, at present only a few offences with an explicit racial element exist. For example:

- racial discrimination: the Race Relations Act 1968 first made it unlawful to discriminate on the grounds of ethnic origins in the provision of goods, facilities or services.
- stirring up racial hatred: five offences of this type were created under the Public Order Act 1986, s27(3), including distributing written material. The maximum penalty is currently two years imprisonment on indictment (that is at the Crown Court), a fine up to the statutory maximum or both. For cases tried summarily (in the magistrates courts) the maximum penalty is six months imprisonment, a fine or both.
- possessing racially inflammatory materials: this was also created under the Public Order Act 1986, and carries the same maximum penalties as stirring up racial hatred.

The Association of Chief Police Officer's (ACPO) definition of a racial incident is any incident where:

a. the reporting or investigating officer perceives some racial motivation, or

b. any other person alleges racial intimidation (Home Office 1997b: 31)

Scale and nature of the problem

The literature review found little published research on hate crimes against ethnic minorities.

i. Criminal statistics

Criminal statistics on racial incidents are limited. Where racial motivation is not reflected by the offence type, it is not possible to separate it from non-racially motivated offences. Like domestic violence, police forces do record racially motivated incidents, but this has only occurred since 1988.

The number of racial incidents recorded by the police has risen each year, from about 4,400 recorded cases in 1988 to 13,150 for the year ending March 1997 (see Figure 6). This increase is greater than that for recorded crime generally, but it is not clear whether or to what extent this reflects an increase in the real rate of racially motivated crime. It is possible that the increase in recorded racial incidents is partly due to changes in recording: until the early 1980's officers were not required to consider other people's views on whether an incident was racially motivated. Against this, Sibbit (1997: 25) found that in practice most racial incidents recorded by the police were cases where the victim had claimed racial motivation.

Another factor could have been increases in reporting rates. The BCS provides some evidence

[5]. For example, this created a new offence of intentionally causing harassment, alarm or distress to deal with racial harassment, although it can be used for other forms of harassment.

that reporting rates increased between 1987 and 1991, but the ethnic minority samples were too small for the increase to be statistically significant: it may have been due to sampling error. A more important factor may have been greater willingness by the police to record offences as racially motivated when racial motivation is alleged even in the absences of other evidence of racial motivation (Aye Maung & Mirrlees Black 1994: 20).

Statistics on convictions and sentences are not readily available. However, there is some further information from the CPS racial incident monitoring scheme which began in 1995 (CPS 1997: 3-7). For the year ending March 1997 over 1,300 completed cases were recorded. Although the ACPO definition of racial incidents was used, more were identified as such by the CPS than the police (63% identified by CPS against 37% by the police)[6]. This adds weight to the argument that despite the growth in the police figures, they still under count the number of crimes which are racially motivated. Concerns about the police figures have been expressed by HMIC, who have suggested some police officers may not be clear about the definition of a racial incident (1997: 2.66).

The CPS (1997: 7-9) records also show the charges put by police and some details of the outcomes of those cases which are prosecuted:

- The most common were public order offences (48%) followed by assaults (27%) and criminal damage (14%).
- In two-thirds of cases the charges were unaltered by the CPS. Less than 2% were increased: the remainder were either reduced (11%) or dropped (21%).
- Of those prosecuted, most (79%) pleaded guilty, although some (21%) were initially contested.

Details of conviction rates and sentences were not supplied. However, Government plans (Home Office 1997c: 7-9) for new measures to be included in the Crime and Disorder Bill should assist assessment of the scale of the problem. The proposals include new offences of *racial violence* (including racial common assault, racial assault occasioning actual bodily harm, and malicious wounding). This would enable racially motivated violence to be treated more seriously than other violence. Both the Commission for Racial Equality and the Home Affairs Select Committee have supported such a measure.

A new offence of *racial harassment* has also been proposed. As mentioned above, although there are existing provisions dealing with harassment, racial harassment has not been dealt with separately. There are also concerns about the adequacy of the provisions for dealing with low-level harassment. At the same time, the new offence would enable the courts to treat racial harassment more seriously than other harassment. The effectiveness of these measures may depend on how easily racial motivation can be proved. In some cases, racial motivation may be obvious: for example, when racist slogans are painted on the property of ethnic minorities. In other cases, proving racial motivation may be more difficult.

ii. British Crime Survey

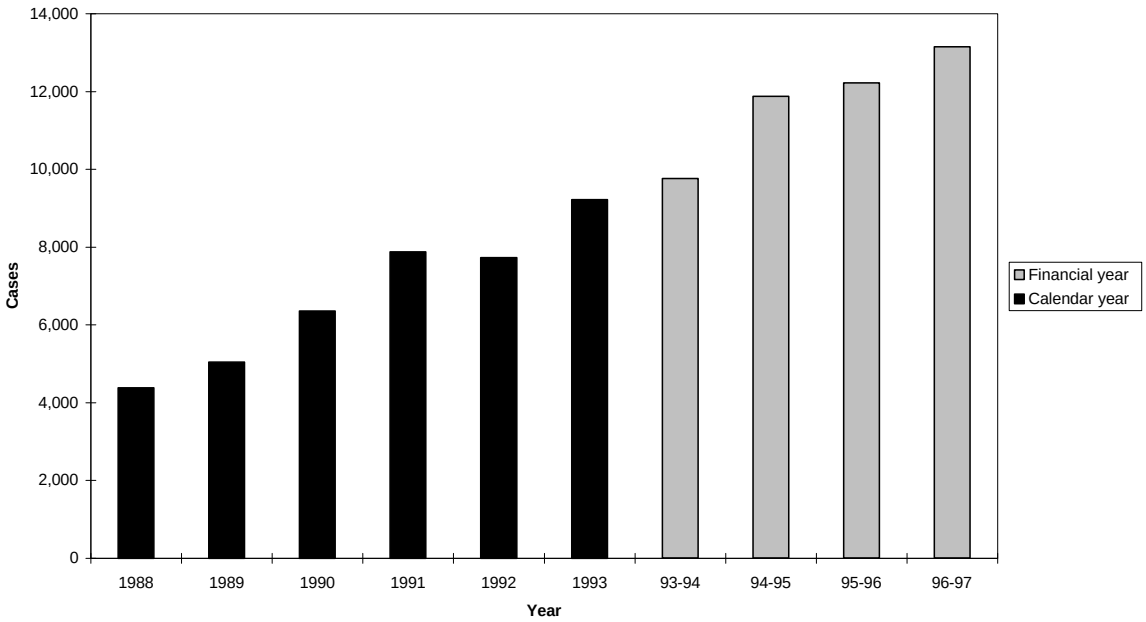
The BCS is broader in approach than the police figures, in that it looks at unreported as well as reported crimes. Against this, the BCS only looks at those crimes where the victim perceived racial motivation: it does not cover any where the police detect racial motivation but none is reported by the victim.

A key findings from the 1996 and previous surveys (Percy 1998: 5-6) was that higher rates of victimisation were found among ethnic minorities. This is partly explained by demographic factors. For example, ethnic minorities tend to be younger, of lower socio-economic status and to live in rented or public housing, all factors associated with greater risk of crime. Smith (1994:1106) suggests high victimisation rates among Afro-Caribbeans may also be related to their higher recorded offending rates: a large proportion of offences against Afro-Caribbean are committed by Afro-Caribbeans. This fails to explain though why Asians (who have relatively low recorded offending rates given their numbers in the general population) have the highest risk of victimisation.

[6] *Although there were variations between areas, only two forces identified more racial incidents than CPS and even then the margin was negligible (Anglia 53% and Midlands 52%).*

Figure 6 Racial incidents reported to the police in England and Wales

Source: Home Office (1997b & c)



Note: Year basis changes from calendar to financial in 1993.

However, most crimes against minorities were not perceived by the victim as racially motivated. About 4% of Afro-Caribbeans, 5% of Indians and 8% of Pakistanis reported racially motivated offences, representing about 15% of all crimes committed against them. The number of racially motivated crimes reported was similar to that reported in previous years. Racial motivation was perceived in more personal crimes than property crimes. A larger proportion of those where racial motivation was perceived involved white offenders, more of these crimes involved groups, and the perpetrator was less likely to be known to victim. Racial incidents were more likely to be part of a series, suggesting repeat victimisation is a particular feature of racially motivated crime (Percy 1998: 15-20).

Measuring racially motivated crime is not a simple task though. The box below suggests three categories of racially motivated crime. Victim surveys depend on the victim's awareness of racial motivation, but racial motivation may not always be perceived when it is present. On the other hand it is possible that racial motivation can be perceived when it is not actually the main motivation for the offence. Victim surveys may therefore under-count racially motivated crime, but it is not known how big the problem is.

However, the perception of racial motivation alone may increase the impact that crimes have on the victim: victims who perceive racial motivation even when it did not exist may still be vulnerable.

Three-fold categorisation of racially motivated crime (Fitzgerald and Hale, 1996: 57)

1. Offences which are solely motivated by racism.

2. Offences which have a racial element, either in motivating the offence or arising during the incident, but which are not entirely racially motivated.

3. Offences which are racially motivated (wholly or partly) but where this motivation is not perceived.

iii. Other studies

There are a few other studies on racially motivated crime. For example, Maynard and Read (1997: 2-4) conducted a postal survey of all police forces asking for figures on recorded racially motivated incidents for 1996/7. They received returns from thirty four of the forty-two forces: the remaining

eight were able to supply data other data (for example, five gave details for the calender year 1996). In total over thirteen thousand racially motivated incidents were recorded. The highest numbers were found in the Metropolitan Police (the "Met"), at over five and a half thousand offences[7].

One explanation for the large proportion of racial incidents recorded for the Met might be the concentration of ethnic minorities in the area, rather than a high rate of (recorded) racial victimisation. Maynard and Read (1997: 5) looked at the number of recorded racial incidents per thousand of the ethnic minority population. According to their figures, the rate in the Met is under four recorded offences per thousand, against an average figure of just under seven. The highest rate was in Northumbria, at almost twenty-three offences per thousand. However, this could at least partly reflect differences in recording practices between police forces.

Maynard and Read (1997: 7) also looked at the nature of the problem. They found verbal harassment was most common (38%), followed by assault (21%) and damage to property (20%). Figures varied between police forces: this could be explained both by differences in the nature of crime in different areas, and by differences in reporting rates. However, the overall pattern is supported by Sibbit (1997: 27-28), who looked at 140 racial incident reports in one area and identified three main types:

- *contact assaults*, where direct contact is made by the perpetrator intended to cause physical injury or pain, were the most rare;
- *indirect assaults*, where contact is indirect, eg. where objects are thrown at the victim, a gun is used or spitting, and
- *intimidatory behaviour*, which included racist verbal abuse, damage to property and threats, was the most common.

There was some overlap between these categories: for example both contact and indirect assaults could be accompanied by intimidatory behaviour.

Other research conducted by Love and Kirby (1994: 1-12) looked at racial incidents in council housing. Self-completion questionnaires were sent to all local housing authorities, and a high proportion (82%) responded. However about a third of those responding said that they had very few or no ethnic minority tenants, and three-fifths said that racial violence and harassment was not a problem. The other respondents were asked to provide more detailed information about racial incidents. The responses show an increase in the average number of racial incidents recorded by housing authorities from 35 in 1987/8 to 56 offences recorded in 1989/90. There was great variation between authorities, with some reporting much higher numbers each year: nine authorities reported more than a hundred incidents in 1989/90.

However, most respondents thought their figures underestimated the problem. This is supported by Sampson and Phillips (1992: 4-5) study of racial incidents on an East London estate. During a six-month period over twice as many incidents were reported to the housing authority as to the police, but more than twice as many again were reported to the homeless families campaign/law centre. Although this was a small study, it does suggest that housing authority figures should also be treated with caution. In particular Sibbit (1997: 63) observes the types of offences reported to the police and housing departments differ: only those occurring in or near council housing are likely to be reported to housing authorities.

Outstanding questions

Clearly, our evidence of the scale and nature of racially motivated crime is only partial. There are significant limitations to both the official figures and victim surveys. More information on reporting rates would be particularly useful in explaining why recorded racial incidents have increased so dramatically. It is however difficult to survey enough people from ethnic minorities to draw firm conclusions on this. Other potentially useful information would be evidence of the scale of the problem in other countries. Finally, and perhaps most importantly for the Review, little research was found on how victims of racially motivated crime experience the criminal justice system. The literature that was found on this primarily concerns the police. These issues are explored in the following section on "the response".

7. Home Office figures for 1996/7 published since the research show about 5,600 offences in the Met and 13,150 in England and Wales as a whole (1997: 31).

4. Hate crimes against sexual minorities

Very little literature was found on hate crimes against sexual minorities.

Scale and nature of the problem

Hate crimes against sexual minorities are not examined separately from other offences in either Criminal Statistics or the BCS. Contrastingly in America there has been a legal requirement on the Department of Justice to collect and publish annual statistics "on crimes that manifest prejudice based on race, religion, sexual orientation, and ethnic origin" under the Hate Crime Statistics Act since 1990 (Conyers in Herek & Berrill [Eds] 1992: xiv).

Recording systems within the criminal justice system in England and Wales have not traditionally collected such data separately. This is beginning to change in some police forces. For example, the Met now separate such offences on their computerised crime recording system, which logged almost 250 such offences in the first 9 months. HMIC has called for all forces to follow this lead (1997: 3.19).

At the same time though HMIC have acknowledged that perceptions of the pervasiveness of homophobia in the police are likely to discourage sexual minorities from reporting crime generally. Concerns about confidentiality are also important: examples have been reported of officers informing family, employers or neighbours about the individual's sexuality. Similarly, there is some anecdotal evidence that reporting may be met with accusations of wasting police time or even violence (Galloway 1983: 106-107). In Manchester anonymous self-report forms are being used to help gauge the extent of homophobic crime (HMIC 1997; 3.24; 3.27), but it is not known how effective this approach is.

Despite these problems, official statistics on prosecutions for sexual offences such as indecency between males can nevertheless provide an indication of attitudes towards sexual minorities within the criminal justice system. "Nationally, prosecutions for gay sex offences have declined year on year throughout the 1990s, and are currently running at less than half the level of 10 years ago" (The Guardian, 26/11/97). Nevertheless, it could be argued that the fact that such offences are still prosecuted indicates that there is still some room for improvement. In addition, Mason and Palmer (1996: 3) argue that increased tolerance has led to increased visibility of sexual minorities, which may increase opportunities for hate crime against them.

Other sources

Few alternate sources of information were found:

1. Commission on Discrimination survey

This three year survey (1977-1980) is now very old. By examining newspapers (including gay papers), evidence of 250 attacks against people thought by their attackers to be gay were found in Great Britain and Northern Ireland. Of these 15% reportedly led to the death or disablement of the victim. However, "it is clear that the cases making the news are only a small and biased sample of what goes on" (Meldrum, 1980: 1).

2. Lewisham survey

More recent research was carried out (in 1992) as part of the Lewisham Safer Cities project to help address lack of research in this area. There were two main elements (Safe Neighbourhood Unit 1992: 1) :

- a self completion survey covering gay men only who lived or worked in the borough or were regular visitors; and
- interviews with gay men and key agencies (including the local police).

Key findings from the study (1992: 35, 40-41) were that:

- The vast majority (81%) reported experience of verbal abuse.
- Approaching half (45%) reported being physically attacked because of their sexual orientation, two-fifths of whom required medical attention as a result.
- Multiple victimisation was common.
- Property offences were less common: 13% reported being robbed, 17% damage to property.

- Vulnerability appeared to be lower for those who were in regular relationships, perhaps because less time would be spent in public places frequented by gay men.

Harassers were most commonly reported as unknown groups or individuals, but in a third of cases verbal abuse came from people in close contact with the respondents such as neighbours, colleagues or relatives (1992: 42-43).

The report suggests there is a perception that sexual minorities are targeted because they are thought less likely to report crime. Reporting rates to the police (and to advice agencies - both gay and straight) were low. The highest reporting rate to the police was 16% for violence, followed by 13% for verbal abuse. Attackers were interviewed in only seven cases, and five charged. Most victims (66%) were very dissatisfied with the police response: common complaints including insufficient or no action and not treating complaints seriously. These seems unsurprising given that 21% reported verbal abuse from police officers and 3% being violently assaulted by them (1992: 43-45).

Contact with the police was more likely to come from police surveillance of "cottages" and "cruising areas" than reporting crime. About a third of respondents reported being asked to move on, and a quarter being charged. Most respondents thought a more sympathetic police response to attacks and prosecution of perpetrators would have the greatest impact on the safety of gay men. Action by the council (for example by using tenancy agreements) and improved liaison between the police and gay clubs were also strongly supported (1992: 46 & 49). Interviews with the police suggested they had little knowledge of attacks on gay men and did not see it as a priority. However, they also reported difficulty for officers in identifying the motive for an attack as anti-gay. There were particular problems in asking a victim directly whether he was gay (1992: 52).

3. Stonewall survey[8]

Stonewall is a national pressure group which campaigns for the civil rights of lesbians, gay men and bisexuals. They distributed fifty thousand questionnaires through gay publications and gay mailing lists and received over four thousand completed forms. Although the sample was large and the authors suggest the response rate was high for this type of survey, there is a danger that the sample may not have been representative. In particular those who had been victimised might be over-represented. To try to minimise this risk it was stated at the top of the questionnaire "whether you have experienced violence or not, we need YOU to fill in this questionnaire".

Almost all respondents reported using some kind of avoidance tactic, such as not kissing or holding hands in public or telling people they were gay. Mason and Palmer (1996: 68-72) argue that such strategies reduce the visibility of sexual minorities, helping reinforce the idea that they are a tiny minority or even that they don't exist in some areas. Yet it was found that there was little correlation between these strategies and risks of victimisation. Other key findings (Mason and Palmer 1996: 1-2, 45) were that:

- Just over a third of men and about a quarter of women reported experiencing violence in the last five years because of their sexuality;
- About a third of all respondents reported being harassed (including threats, blackmail, vandalism and hate mail);
- Three quarters reported verbal abuse on at least one occasion: more than a quarter (29%) reported six or more occasions.

The researchers also found that some groups had greater risk of victimisation than others: in particular black, asian and disabled respondents were more likely to report violence than average. Problems were also greater for young people: almost half of those under 18 reported violence, approaching two-thirds reported harassment, and nine out of ten reported verbal abuse within the past five years. Some respondents reported that it was easier to move house than to involve the police: it was commonly reported that most agencies were either indifferent to their problems or sympathetic but took no action (Mason and Palmer 1996: 8, 54, 27).

[8]. The Stonewall report also cites a small but representative survey by Snade, Thomson and Chetwynd (1995), and another small study by Truman et al (1994) in Manchester: regrettably there was not time to include these in the literature review.

4. American research

There appears to be more literature on hate crimes against sexual minorities in America. For example, a survey of over 2,000 gay men and lesbians across eight American cities found that almost all had suffered some form of victimisation. More specifically a fifth reported suffering physical violence at least once, and almost half had been threatened with physical violence. Many reported repeat victimisation: 92% of those who reporting verbal abuse, and 47% of those who said they had been physically assaulted (National Gay and Lesbian Task Force cited by Berrill 1992: 19-20). Berrill summarises the findings of a further twenty-three studies. The median figures (Berrill 1992: 20) were:

- Four fifths reported verbally harassment;
- A third reported being chased or followed;
- A quarter reported having objects thrown at them;
- Just under a fifth reported vandalism;
- Seventeen percent reported physical assaults; and
- Thirteen percent reported being spat upon.

There is also some evidence suggesting hate crime against sexual minorities is growing.

Outstanding questions

Further research would be useful on all aspects of hate crime against sexual minorities in this country. This needs to cover both male and female victims. The Lewisham study did not look at women because it was commissioned by the Lewisham gay Alliance, which had little contact with lesbians in the area. It is also questionable how representative it was of homosexual men in the area. The self-report approach generally has a poor response rate (28% in this case as a proportion of questionnaires sent out). The manner in which the questionnaire was circulated (through gay bars, clubs and networks) may also have meant that the survey did not reach all sections of the local gay population. This is a very difficult area to research though, and the shortcomings of the Lewisham study were recognised in the report. In particular, it suggested that there may have been a bias towards those with experience of violence: those with negative experiences may have been more inclined to respond.

The Response

1. Sexual offences

a. Reporting

Failure to report

It was noted earlier that there is some evidence that reporting of sexual offences has increased, which has been attributed to improvements in police responses to sexual offences. Nevertheless, the reporting rate is still low compared to that for other offences. There are various possible reasons for failure to report sexual offences including (see for example, Williams 1984):

- shock, in particular Post Traumatic Stress Disorder (PTSD) which covers a variety of symptoms including repressing thoughts, feelings and memories about the offence (see Parkinson 1993; Peterson, Prout and Schwarz 1991 for further discussion of PSTD; Resick 1993 considers PSTD in rape victims);
- fear that the media would publicise their case and blame them;
- fear that family, friends or colleagues would not be sympathetic, that they might be disbelieved or even ostracized;
- a desire to protect family and friends from the knowledge and possible media attention;
- intimidation or fear of reprisals;
- concern about the response from the criminal justice system: for example, that complaints will not be believed, treated sympathetically or as seriously as the victim feels is justified, and lack of confidence n the ability of the system to convict the perpetrator.

Williams (1984: 461-465) looked at 246 rape cases in Seattle and found reporting is more likely

if the rape corresponded to the "classic rape situation", that is if:

- the victim was raped in public, abducted from a public place or raped by an assailant who entered her home by force or without her consent;
- the assailant was a stranger to the victim;
- the victim was threatened with, or subjected to, a high degree of force;
- the victim was seriously injured.

The relationship between the victim and offender was the most important factor.

Anecdotal evidence also suggests that the cases most likely to result in a conviction and be treated most sympathetically by the criminal justice system are those which most closely fit this "classic rape situation". Concerns about the criminal justice response to rape victims were highlighted in the 1970s and 1980s, when it was suggested that criminal justice responses tend to be based on a number of rape myths which inform the concept of the "classic rape situation" (see box).

Rape myths (London Rape Crisis 1984: 1-7)

The London Rape Crisis Centre identifies a number of rape myths: widely held but misconceived ideas about rape, including:

- women enjoy rape;
- rape is committed by mad strangers (most rapists are known to the victim and few are found to be mentally ill);
- women provoke rape (for example through the way they dress);
- men cannot control their sexual urges (most rapes appear to be wholly or partly planned in advance);
- false and malicious allegations are common (the evidence suggests the rate of false allegations is the same as for other crimes);
- only certain types of women get raped (women from all age groups, classes and races are raped).

Encouraging reporting

Changes in the treatment of vulnerable witnesses throughout the criminal justice system may encourage reporting, but this starts with improving experiences at the first point of contact. It is especially important that when an offence is reported the response is sympathetic and supportive. Some measures have already been taken to improve the police response to sexual offences, and to encourage reporting. For example Lees observes that training for officers dealing with rape complainants is now more common "although this is often pretty minimal". Some forces also have a chaperone system where one female officer is assigned to the complainant throughout the investigation (1996: 23).

As discussed in relation to witnesses with disabilities and illnesses in section 3, developing inter-agency cooperation may be another way forward. Other agencies such as Rape Crisis may be the victim's first point of contact and influence decisions about reporting to the police. In addition, they can provide support which may assist complainant's through the criminal justice process. However, Rape Crisis schemes coverage is patchy, limited to a few hours a day in some areas: it has been argued that there is a need for more funds to provide nationwide 24 hour support (Lees 1996: 5). Other approaches include a pilot scheme recently announced in Merseyside enabling rape victims visiting hospital to report to the police at the same time. Reporting can be anonymous if the complainant prefers: a unique reference number can be used on records instead of their name until they feel ready to proceed with the case. They need not even see a police officer: forms are supplied and faxed to the police station (Jenkins, 1997: 10).

b. Investigation

Attrition (the number of offences which are lost, either because they are not reported or because they are dropped at some stage between reporting and conviction) is a particular concern in sexual offences. Attrition before reporting is discussed above. However, less attention has been given to attrition after reporting. Grace, Lloyd and Smith (1992: 7, 25-27) found that of about 300 alleged rapes police recorded in 1985, a quarter were no-crimed and only half the original sample were prosecuted or cautioned. Thirty-five percent resulted in a conviction of some kind but only a

quarter were for rape or attempted rape. The three most important attrition points were where:

- the police decided whether to "no-crime" an incident;
- the police decided whether to prosecute (the study was conducted before the introduction of the CPS); and
- the jury decided whether or not to convict the defendant of rape.

Those cases where there was some acquaintance between the complainant and defendant were more likely to be dropped at each stage than those involving strangers.

The finding that some offences were downgraded is supported by Lees and Gregory's examination of police records for rape, attempted rape, buggery and indecent assault at two London police stations between 1988 and 1990. This found that rape and attempted rapes are sometimes downgraded to indecent assault, but more surprisingly in some cases the sexual nature of the offence was removed (for example an indecent assault classed as robbery). As Lees states, it may be in the interests of the complainant to reduce charges where there is not enough evidence for the higher charge. In some cases it may also be difficult to decide where the dividing line between offences lie, for example in deciding whether intention to rape existed. Nevertheless the frequency and nature of some downgrading may be cause for concern. Ironically, one reason for recording a rape as an indecent assault may be to make it easier to no-crime (Lees 1996: 99-101).

Home Office circular 1986/69 advised complaints should only be no-crimed if proven false. If the complaint is withdrawn or corroboration lacking, it should still be recorded as a crime. However, Lees and Gregory found over a third of cases were no-crimed: reasons included the complainant deciding not to continue and police perception of lack of corroboration, contrary to the official guidance. In addition, Lees and Gregory (1996: 95-96) found that there were now *four* key attrition points, where:

- the police decide whether to no-crime an incident;
- the police decide whether to refer a case to the CPS;
- the CPS decide whether to proceed or reduce the charge; and
- the jury (or magistrates) decide whether to convict the defendant of rape.

The impact of the CPS on the attrition process, both in making decisions and influencing police decisions, will be one of the areas covered in a new Home Office study on attrition in rape cases due to report in June 1998. However, initial findings from Harris's study suggest that "cases were more often no-crimed for other reasons" than evidence that the complaint was false (1997: 3).

In some cases of course, the complainant may decide not to proceed with the case during the investigation. The manner and content of interviews may be one contributory factor. Although police questioning is now believed less brutal than in the past, Lees suggests interviews may still be more upsetting than necessary, and actually undermine the prosecution case. She argues that "police unwittingly assist" attacks on complainant's reputation in court by "anticipating the defence's line of questioning in interviews". For example, questions on the complainant's medical history (eg abortions) may be especially damaging in court. The defence are given records of police interviews, and then use this as ammunition in court. Thus although the police may complain that low conviction rates frustrate their efforts to treat sexual offences more seriously, Lees suggests that they sow the seeds for this poor success rate. In contrast such records are confidential in the US (Lees 1996: 102, 239).

Identification parades may also be upsetting for the victim of a sexual offence coming face to face with the offender. Various measures can be used to minimise this, including the use of screens, mirrored glass (submission from North Staffs & South Cheshire Rape Crisis 11/9/97) or video-identification parades (submission from Jill Saward 29/8/97). The first two options were discussed in section 2 regarding witness intimidation. The third carries the advantage that the victim can progress at his/her own speed thus minimising the possibility of trauma, but may be more expensive.

At the investigation stage much criticism has also been levied at medical examinations. Medicals are routine when the victim has reported within sufficient time for some physical evidence to be collected. Past criticisms have included that examinations have been carried out badly, losing vital evidence: this may be partly due to lack of collaboration between the investigating officers and doctor. It may also be related to another complaint, that police surgeons have formed their own views about the complainant's veracity. One consequence is that doctors have been reported as making insensitive comments to the complainant. Lack of sympathy and even hostility have been reported. Finally concerns were expressed that victims were not being given important advice on pregnancy and sexually transmitted diseases (STDs), or other follow-up support.

These criticisms have been backed up by research with rape victims. In each case, the comments received were mainly negative. For example, in one Scottish study (reported by Temkin), forty-five sexual assault victims who had medicals were interviewed. This yielded 47 negative comments, 15 neutral and 12 positive. The negative comments mostly concerned procedures being painful and unpleasant: others concerned the police surgeons' manner and conduct. Temkin also reports another study (Clare Corbett 1987) with 22 rape victims which confirmed some of these findings. Other concerns raised included that:

- many victims were not asked if they would prefer a female doctor, but being touched by a man so soon after the rape often added to their trauma;
- some were examined in a police cell/ or office;
- in some cases officers walked into room during examination, or even that the door was left ajar; and finally
- no washing facilities were available afterwards.

These complaints led to a number of responses, including a Home Office Circular being issued in 1983 (1983/23) which emphasised the importance of allowing complainants to was and change as soon as possible. The Metropolitan police set up a Working Party, which led to special arrangements for screening victims for STDs, recruitment of more female doctors to conduct the examinations, and the creation of examination suites. Another Home Office Circular followed in 1986 (1986/69), highlighting the need to recruit more female police surgeons, the value of special victim examination suites and need to provide complainants with more information.

Since these developments there are some indications that matters have improved. One is the number of rapes reported to the police (see above). Another example is the widespread creation of rape examination suites, although it is not known how many of these suites exist. A survey by Victim Support of victim support schemes (1996: 12-13) found that 75% thought victims were always or usually seen in a rape suite, 11% "sometimes" and only 1% "never" (the rest were "don't knows"). Many schemes also suggested there was little contact from the police after reporting and little information about progress. However, it is not known how representative these findings are.

One of the few studies evaluating progress was undertaken by Temkin (1996: 1-20), who interviewed fourteen women about their experience of medical examinations from 1991 to 1993. This small sample demonstrates the difficulties of finding sufficiently large samples of rape victims to draw reliable generalisations. Originally Temkin aimed to interview between twenty and thirty of the 149 women who had reported rape to the Sussex police in 1992 and 1993. However, most were ruled out, because cases were still pending, or the victims could not be contacted for example. To boost the sample additional cases from 1991 were included. Temkin found no clear distinction between those who agreed to be interviewed and those who did not. Nevertheless, there is no way of knowing whether the experiences of the women interviewed were representative of rape victims across the country.

Temkin found that most victims were more positive about their treatment by the police than by doctors. "The medical examination appears to be experienced by some as a further sexual assault and an ordeal in its own right" (Temkin 1996: 14). More specific findings included that:

- There are still problems in the provision of female doctors. Provision is patchy but this is at least partly because there is a dearth of

female doctors willing to do such work. Police may face a difficult balancing act, between difficulties finding a female doctor and the time added to the complainant's wait.

- Most complainants were still negative about doctors' attitudes, particularly that they were perceived to have formed their own beliefs about the complainant's honesty. Being believed is very important to victims. However, there was some evidence that the women felt less negative than in some previous studies.

- Overall, the study suggested that there had been some improvements. For example, none of the women were examined in a police cell or office, most were examined by female doctors, and in most cases a leaflet on pregnancy and STDs was provided. However, the vast majority still made negative comments.

Based on these findings, Temkin made a number of recommendations:

- More female doctors should be recruited. Female doctors may not always handle a medical sensitively, but victims should have a choice about who conducts the medical. This may require reconsidering the way such work is funded. At present in most forces, fees are only paid for each examination conducted: paying an additional fee for doctors to be exclusively available over a set period might improve availability of doctors.

- Doctors' training should cover rape trauma syndrome and counselling techniques. Questioning by doctors should also be minimised by greater collaboration with investigating officer. This will help the victim avoid being upset by having to retell their story, and also avoid possible problems at trial presented by having too many accounts of the same events.

- Some procedures could be eliminated. For example routine plucking of pubic hair for DNA tests is unnecessary and upsetting for victims (DNA can be obtained from blood and if a hair sample is needed it could be taken at a later date). There is a precedent for this kind of change: for example, the Metropolitan police abandoned taking routine samples of head hair in 1990. In addition, recent Home Office research indicates the police routinely take non-intimate samples such as mouth swabs from suspects, and that intimate samples such as blood and pubic hair are rarely needed (Bucke and Brown, 1997: 41-47).

A submission to the review from London Rape Crisis (LRC, 11/9/97) goes even further. They argue that not just doctors but all officers who are likely to come into contact with a survivor, from the reporting stage onwards, should be female. The only exception would be if the victim states that they would prefer a male officer. In addition, LRC argue that all these officers should undergo rape awareness training. These measures could however, present some organisational problems: considerations include whether there would be sufficient female officers willing to do this work, how it would be renumerated and how it would fit into current career structures. Similar issues are raised by the recommendation that victims should be provided with trained chaperones throughout the criminal justice process (ie. with the same person assigned to a particular victim throughout). In addition, it is not clear who would take on this responsibility.

Other suggested measures have included medical follow-ups for victims and providing victim packs as soon as possible after the report (submission from Jill Saward, 29/8/97). The pack could include toiletries, a booklet on legal processes and other sources of support, and other information. Separate packs could be provided for male and female victims.

Finally, Lees argues that HIV raises a number of issues yet to be addressed, such as whether a complainant should be able to demand a suspect is tested for the virus. There are also questions about whether there should be a duty on the police and other agencies to inform the complainant when they know the suspect is HIV-positive. Lees describes a case where the complainant was not informed by the police that the suspect was HIV-positive, even though they knew this for some months (1996: 17-18). Government plans have recently been announced to introduce new laws targeting people who deliberately spread life-threatening infectious diseases such as the AIDS virus (The Independent 8/2/98). However, Lees argues that the various

justice agencies need formal guidelines and procedures to help deal with the special issues that HIV raises (1996: 256).

c. The decision to prosecute

The literature found research on the decision to prosecute is lacking. However, the main problem in deciding whether to prosecute sexual offences appears to be proving consent. This is complicated further by the idea of undeserving (acquaintance or date rape) and deserving ("real"; stranger and virgin) victims. Changes in the legal definition lie outside the Review's terms of reference, and are not considered further here. However, it is worth noting that it has been suggested that the standard of proof in rape cases should be altered for different types of rapes. For example, that date rape should be distinguished in law from stranger attacks (Jill Saward submission to the Review, 29/8/97).

Other measures which have been suggested include:

- establishing a separate unit in the CPS to deal with all cases of sexual violence (submissions from London Rape Crisis and North Staffs and South Cheshire Rape Crisis 11/9/97);
- notification of the victim if the case is dropped, explaining why (Cleveland Rape and Sexual Abuse Counselling Service submission 10/9/97); and
- a right of appeal against CPS decisions (CRSACS submission op cit).

d. The trial

The trial has widely been described as equally bad an experience as the original offence for victims of sexual offences. Lees (1996: 36) found that eight out of ten rape complainants felt that they were on trial rather than the defendant. In some respects the trial was actually seen as worse than the rape itself: "more deliberate and systematic, more subtle and dishonest, masquerading under the name of justice". Five areas are discussed below:

- pre-trial preparation;
- anonymity;
- consent;
- cross-examination; and
- corroboration warnings.

Pre-trial preparation

A number of measures have been discussed in previous chapters which might also be considered for victims of sexual offences, including:

- court familiarisation visits;
- access to statements in good time before attending court,[9]
- separate waiting facilities; and
- friend in court schemes.

Other measures which have been suggested specifically regarding sexual offences include meeting with defence/prosecution before trial (see for example Lees 1996: 253). The scheduling of the court case may also be important. Concerns include that this should take into account how well a witness feels able to face court (London Rape Crisis submission 11/9/97), and also the need for faster court dates to avoid prolonging the victims suffering and aid their recovery (Cleveland Rape and Sexual Abuse Counselling Service submission 10/9/97). The latter is particularly a concern when counselling is postponed until after the trial to avoid possible witness contamination (see chapter 3): this is discussed further in the next section.

Anonymity

Protection of anonymity is also an issue in these cases. The extent to which anonymity can be provided is a complex issue. As noted in earlier chapters, a balance must be struck between protecting the complainant, but also being even handed. Simple measures discussed in more detail elsewhere include:

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[9]. *It was noted in chapter 3 that the fact that statements are not written by the complainant may cause problems for people with disabilities or illnesses. Lees (1996: 107) found that some rape complainants also complained about this, particularly the assumption in court that the statement was their own words.*

- reporting restrictions and clearing the court;
- not having address or other identifying information read out in court;
- use of screens, cctv and the like to avoid the victim having to see the accused.

However additional issues have been raised concerning sexual offences. For example, it has been argued that even when defendants are acquitted, suspicion may remain among work colleagues, family, friends, and other local people (the "no smoke without fire" factor). To avoid penalising people who may in fact be innocent, it has been suggested that defendants should also be given anonymity in the media until and unless they are convicted. Denying them anonymity conflicts with the principle that a defendant is innocent until proven guilty, which stems from the idea that it is preferable for ten guilty people to go free than for an innocent person to be convicted.

Against this it can be argued that the conviction rate for rape is so low that an acquittal should not necessarily be regarded as proving the defendant's innocence (see for example Lees 1996: 132). According to this line of reasoning, allowing defendants' anonymity could do more harm than good. The balance has swung too far in favour of the guilty: the number of guilty people walking free must now be so great that the assumption of innocence needs to be reconsidered regarding rape. The argument is that although a few innocent men might suffer by having their identities made known, the far greater number of guilty men who are acquitted would pose a greater danger if granted anonymity.

Consent

It was noted earlier that most sexual offences hinge on consent. Given that the opportunity for consent (or failure to consent) tends to occur in private, this is a very difficult matter to prove beyond a reasonable doubt. Lees (1996: xvii) argues that the onus is usually on the complainant to prove she (or he) did not consent rather than on the defendant to prove she (or he) did consent. This stands in contrast to other offences such as burglary where it is usually assumed that the complainant is telling the truth (Temkin 1997: 116).

One response could be to require defendants to prove that they obtained proper consent, rather than that they did not (CRSACS submission 11/9/97). Again it could be argued that this would conflict with the principle that a defendant is innocent until proven guilty. Another approach would be to change the burden of proof by requiring that a reasonable person should have known the victim was not consenting (Lees 1996: 256).

Other possible measures relate to the doctrine of recent complaint and the admission of sexual history evidence, which both address consent:

i. The doctrine of recent complaint

The common law doctrine of recent complaint originated in the middle ages. Under this rule, the fact the alleged victim complained shortly after the offence is admissible as evidence for the prosecution to enhance the complainant's credibility. The details of what was said are also admissible. This doctrine is based on two assumptions:

- that a normal woman would naturally complain quickly after being raped (or sexually assaulted in some way); and
- that women are prone to making up false allegations of rape.

Both of these ideas have been proven false, but judges may continue to warn juries of the danger of convicting when a complaint has been delayed[10]. A recent judgement on this doctrine in New Zealand called this a "perverted survival" (The Queen v H, 1996). Lees (1996: 252) suggests that juries should instead be warned that absence of recent complaint should not be seen as evidence that the complainant is lying, and that there may be good reasons not to complain. This approach is followed in New South Wales, Australia.

Another measure would be to admit evidence on the effect of the offence on the victim. This could be in the form of a victim impact statement. Lees (1996: 31) found victims commonly complained they were not allowed to explain fully what had

[10]. Preliminary findings from research currently being conducted for the Home Office suggests that similar issues also arise in child abuse cases (Davis 1997: 7).

happened to them. Alternatively (or in addition) expert evidence could be admitted, in particular on Rape Trauma Syndrome (RTS). Expert evidence on RTS has been used in some American jurisdictions in two main ways: to prove lack of consent and to explain behaviour the jury might otherwise view as evidence that rape did not happen.

In practice, there is some disagreement over whether evidence of RTS should be admissible to prove lack of consent. Where it is admitted, its role is limited. For example, in West Virgina in the case of the *State v McCoy* (1988), it was stated "[t]he expert may testify that the alleged victim exhibits behaviour consistent with rape trauma syndrome, but the expert may not give an opinion, expressly or implicitly, as to whether or not the alleged victim was raped" (quoted by Myers & Paxson 1992: 3). However, Myers & Paxson suggest that most courts in America allow evidence of RTS to explain the complainants' behaviour where the jury might misunderstand it (eg. delayed reporting). No research was found on admission of RTS evidence by the courts in this country, but it appears that admitting this evidence may be problematic. Once the prosecution admits such evidence, the defence may find their own expert witnesses to contradict them.

ii. Sexual history evidence

The Sexual Offences (Amendment) Act 1976 was intended to restrict admission of sexual history evidence in rape cases where this (according to the Heilbron Report upon which the Act was based) "does not advance the cause of justice but effectively puts the woman on trial" (cited by Temkin 1993: 3). The concern was that evidence of past sexual relationships with other partners was used to determine consent to the defendant. This seemed particularly unfair given that evidence of defendant's past convictions is not admitted for fear of prejudicing the jury. It was proposed that evidence of past sexual history should only be admissible when it involved the defendant. The one exception would be if there was a strong similarity between the complainant's sexual behaviour on a previous occasion and that on the occasion when the offence was alleged.

However, the wording of the Act was vague, suggesting that evidence should only be admitted it if was unfair to the defendant not to admit. In the Court of Appeal case Viola (1982), it was ruled that if evidence of past sexual history was relevant to the issue of consent, it was admissible. Deciding relevance has proven problematic though: "there are certain areas of enquiry where experience, common sense and logic are informed by stereotype and myth" (Supreme Court of Canada ruling cited by Temkin 1993:5). In practice, it is widely acknowledged that such evidence is frequently allowed, even where this appears to be in contradiction of the spirit of the legislation (for example where it is used to blacken the complainant's character rather than relating to consent). This is supported by some research: for example Adler (1989: 73) found that applications for admission of sexual history evidence were made in 40% of the rape trials she studied, and 75% of these were allowed[11]. More recently, Lees (1996: 31) found that over half of all female acquaintance rape complainants in her study were questioned about their sexual history with men other than the defendant. She found that in some cases questions on sexual history are asked without even requesting the judge's permission (1996: 160).

Similar problems with sexual history evidence have been experienced in other jurisdictions (Temkin 1993: McDonald 1994). Some such as New South Wales, Canada[12] and Scotland have attempted to tighten up the rules, and the Labour Party made a commitment while in opposition to do the same here (cited by Temkin 1993: 20). When in opposition the Labour Party did try to introduce further restrictions on sexual history evidence through an amendment to the Criminal Procedure and Investigations Bill in 1996 based on the New South Wales model (Hansard 12 June 1996: 356-368). This approach has it's critics who argue that a more narrow definition of consent is needed to avoid the possibility of sexual history evidence creeping in through the back door. This raises issues about the definition of rape, which are beyond the Review's remit (discussion paper 17 prepared for the Review group).

The problem is how to restrict the use of sexual history evidence effectively. Temkin (1993: 3-20)

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[11]. Adler randomly selected 50 rape trials, representing 85% of all rape trials heard in the Old Bailey in one year. Of these 5 did not go ahead "usually because the victim was unable to give evidence" (Adler 1989: 39, 73).

[12]. See Temkin (1993: 17-20) for a description of the Canadian reforms.

argues that judges' use of discretion has undermined previous efforts to restrict the use of sexual history evidence in this country, suggesting that any new reform would have to curtail this discretion. Similarly, Lees (1996: 251) recommends that judges discretion should be reduced. She argues that if the defence raise the complainant's sexual history or criminal record, the defendant's sexual history or criminal record should be introduced.

Unfortunately the literature review found research on the effectiveness of reforms in other jurisdictions is lacking. Only one such research study was found. This examined changes introduced in Scotland in 1986, which listed certain forms of evidence which should not be admitted and specified those which could. The researchers used information from court records, interviews, observation and forms completed by Court Clerks to collect details of the use of sexual history evidence. They found that the reforms seems have had some success, but there were still three main problems which would need to be addressed if this model is followed in England and Wales (Brown, Burman and Jamieson 1992: 60-78):

- in some cases the rules on sexual history evidence are not being followed;
- the rules are sometimes followed without achieving the aims behind them; and
- the rules failed to address subtle character attacks, which continue to be employed.

Cross-examination

There have been two main concerns about cross-examination in sexual offences: first, that victims of sexual offences are cross-examined more severely than for other crimes, and secondly, that defendants have the right to cross-examine complainants personally.

i. Severity of cross-examination

According to this argument, the focus on the issue of consent and the fact that most sexual offences occur in private, results in greater emphasis and closer examination of the complainant's words, character and motives. Defence cross-examination seeks to show that the complainant did not behave as a real victim would, for example in delaying reporting the offence. However, evidence has tended to be anecdotal, and trial lawyers have argued that the rules on cross-examination are basically the same for sexual offences as other offences.

To redress this Brereton (1997: 242-261) conducted a study of trial transcripts in forty rape cases and forty-four serious assault cases. There are important differences between the two offences, including that there are more likely to be other witnesses of assaults. Despite this, rape has more in common with assault than other offences such as robbery or burglary: for example, in both cases the offender is often known to the victim. Brereton found some significant differences in questioning rape and assault complainants, such as:

- sexual history evidence: sexual history (with the defendant or people other than the defendant) was raised in about a third of the rape cases, but only two of the assault cases.[13]
- the amount of time spent on the witness stand: "on average it took about twice as long to cross-examine complainants in the rape trials as it did in the assault trials" (1997: 257).

However, Brereton argues there were also some strong similarities in the strategies used in cross-examination:

- Assault victims were just as likely to have their character and credibility attacked (for example through questions about drinking and mental stability).
- Attempts were made to exploit inconsistencies in the complainants' statements in both cases.
- If assault complainants did not behave as expected (eg. reporting soon after the offence), this was raised in cross-examination, as happened in the rape cases.

Brereton acknowledges that, because of the more intimate subject matter in rape trials, the length of time spent under cross-examination and the

[13]. *This was before changes to rules on the admission of sexual history evidence in Australia in 1991.*

nature of the offence itself, rape trials are generally more traumatic for the complainant than assault trials. Brereton concludes that too much attention has been given to improving rape trials in particular, and that more attention should be given to the weaknesses of the trial process generally. It should be noted that the study was conducted in Australia, and it is possible that cross-examination of rape victims there is not typical of that in England and Wales.

Other qualitative differences have also been observed by Lees (1996: xxi), who argues that although both the complainant and defendant's reputations are attacked in rape trials, it is the complainant's sexual reputation but the defendant's *occupation* that are examined. This is of particular concern given that other research suggests *sexual* reputation may not be based actual sexual activity but on dress, linking independence and having a number of male friendships for example (Lees 1993 cited by Lees 1996: 86). Possessing previous convictions is seen as relevant to the complainant's reputation, but rarely allowed as evidence of the defendant's credibility. Likewise, if the complainant does not have a criminal record this will not count in her (or his) favour, although it may be seen as relevant to the defendant's credibility.

Of course, it is possible for the judge to intervene to halt inappropriate questioning. However, this has to be set against comments made by some members of judiciary in sex cases which suggest at best lack of sympathy (see Adler 1987 for some examples). Although such comments may not be representative of attitudes among the judiciary, media reports of insensitive remarks may discourage people from reporting. Possible measures might include:

- training for the judiciary (and perhaps also other court staff and the legal profession more broadly) about rape;
- setting up a complaints procedure for complainants who suffer inappropriate cross-examination, which would include penalties for the barristers concerned;
- appointing more women to (currently) male dominated judiciary;
- increasing accountability, for example by instituting a performance appraisal system for the judiciary as recommended by the Royal Commission and revoking the rule that a judge cannot be sued (Lees 1996: 247-50, 253).

ii. The defendant's right to cross-examine personally

Concerns about the defendants' right to cross-examine the complainant personally have been highlighted by a couple of recent rape cases which were taken up in media. In one case the defendant cross-examined the complainant for six days wearing the same clothes as when he committed the offences. In another example where there were a number of co-defendants, a Japanese student was cross-examined for twelve days (see for example The Guardian, The Daily Telegraph & The Mirror 23/8/96). Such cases are rare. At present almost all defendants receive legal aid, and only 4% are either privately represented or unrepresented (Home Office discussion paper for the Review). Nevertheless, allowing the defendant to cross-examine personally may be extremely upsetting for the victim. In addition, it has been suggested that defendants are allowed to pursue lines of questioning that would not usually be accepted, raising additional questions about whether justice is served in these cases.

The obvious implication is that the right to cross-examine personally should be removed. However, this raises some complex legal issues. The right of the accused to defend him/herself either personally or through a legal representative is protected by the European Convention for the Protection of Human Rights. The only exception to this rule under English law is an automatic prohibition from personally cross-examining child witnesses when the defendant has been charged with an offence involving sex, violence or cruelty. So there is a precedent under English law for limiting the defendant's right to cross-examine personally, and this has not been challenged under the European Convention.

If it is accepted that the defendant's rights should be further curtailed in this area, another issue is what should happen when a defendant refuses legal representation. There is no legislation or guidance governing what should happen if a defendant refuses legal representation in cases involving child witnesses. There is also little information on what actually does happen. In at least one case the judge has conducted cross-

examination for the defendant, but this could call the judge's impartiality into doubt. In another case no cross-examination was conducted (Home Office discussion paper for the Review). This again is problematic: it seems questionable whether it should be possible to convict in the absence of cross-examination. At the same time though, abandoning such cases could encourage more defendants to reject legal representation.

One option might be to impose legal representation on defendants in these cases (David Pannick, The Times 10 Sept 1996). This is followed in some other jurisdictions such as Italy. In *Croissant v Germany*, this approach was ruled as compatible with the European Convention on Human Rights. This raises the issue of whether defendants should have to contribute towards the costs of such representation in the usual manner under the legal aid scheme. To impose this on them seems unfair, but at the same time, it can be argued that not requiring defendants to contribute in these circumstances might encourage others to refuse legal representation. Although prohibiting personal cross-examination by defendants in rape cases seems desirable to protect vulnerable victims, conceiving a scheme to accomplish this is a challenging task.

Defendants' access to victim statements raises similar concerns. The CRSACS submission (Cleveland Rape and Sexual Abuse Counselling Service 10/9/97) suggests there is evidence that these have been given to accused and used as pornography in custody. This again suggests a conflict between providing the accused with all the information they might need to defend themselves, and protecting the witness.

Corroboration warnings

Until 1995, the law required judges to warn juries about the danger of convicting on uncorroborated evidence in sexual offences (Adler 1987: 161-2; Lees 1996, 109). This was again based on misconceptions about the prevalence of false accusations of rape. Although this requirement has been abolished, it is still possible for such warnings to be made. It is not known how frequently this happens. However Lees' research suggests that where the warning is given judges often add comments claiming that allegations are easy to make but difficult to disprove, "when in practice it involves a long, arduous process lasting several days, medical examinations, days of police questioning and often attending identification parades" (1996: 110-111).

Lees argues that judges's discretion to give a corroboration warning should be removed, which would follow the precedent set in Australia (1996: 251-252). Adler (1987: 161) similarly argues that there are plenty of other safeguards both against false allegations generally (such as police questioning, cross-examination) but also for rape in particular (such as medical examinations). As well as being upsetting for the victim, the comments made may reinforce rape myths in the jurors' minds.

e. ...and beyond

Beyond the trial, a number of other issues are raised, including:

- therapy;
- compensation; and
- information.

Therapy

The issue of when therapy should it be allowed was discussed in chapter 3 on disabilities and illnesses. Therapy is a particularly pertinent issue in sexual offences. It should not always be assumed that therapy will be beneficial: for example, Lees (1996: 18 & 20) details two cases in which responses were unsympathetic and argues that counsellors need special training, which should cover HIV/AIDS. However, there is concern that victims who could have benefitted from therapy are discouraged from obtaining it for fear of damaging the prosecution case. It has been argued that therapy should not be discouraged prior to court (South Essex Rape & Incest Crisis Centre submission, 29/8/97). However, to ensure that this happens some reassurance will be needed that this would not be used against the complainant in court.

Compensation

After the trial, victims can apply to the Criminal Injuries Compensation Authority for compensation for the harm done by the offence. It has been suggested that the current system should be reviewed. Specific proposals include:

- extension of compensation to include emotional trauma; and
- increasing tariffs for victims of sex offences;
- clearer definitions of sexual assault (South Essex Rape and Incest Crisis Centre submission, 29/8/97).

Information

Finally, providing witnesses with information about the progress of their cases throughout system is important. This includes notification of trial dates in good time: lack of notice has been criticised for adding to victims' anxiety about the trial (Adler 1987: 165). After the trial, and following a custodial sentence, witnesses need information about the release of the offender. Under the Victim's Charter (Home Office 1996d: 12) the Probation Service should notify victims of the offender's release from custody, but this only applies to those given life imprisonment or convicted of serious sexual or violent crime. One option would be to extend this to other victims. However there are concerns that the existing scheme does not always work properly, suggesting that the existing arrangements (including the requirement on victims to opt in) should be reviewed.

2. Domestic violence

a. Reporting

Failure to report

It is generally accepted that most domestic violence is not reported to the police. The BCS suggests reporting to the police has increased in recent years: 30% of respondents said they had reported domestic violence in 1995 against 20% in 1981 (Mirrlees-Black, Mayhew & Percy 1996: 29). Despite this, it was found that domestic violence is half as likely to be reported to the police as muggings (60%), although the gap was narrower for stranger and acquaintance violence (39% and 37% reported respectively). The 1992 survey suggested that within this, male victims were twice as likely to report as women (40% against 21%, Mayhew, Aye Maung & Mirrlees Black 1993: 96).

However, the victims who disclosed domestic violence to interviewers may have been more likely to report to the police than those who did not. "The 'real' reporting rate, then, may be much lower" (Mayhew, Aye Maung & Mirrlees Black 1993: 96). This suggestion is supported by other research evidence (Dobash & Dobash 1979: 164), suggesting that women may experience many attacks by their partner before calling the police. It is difficult to measure the exact number of incidents which have gone unreported: when a large number of incidents have occurred, the victim may lose count. This finding does suggest though that when a victim of domestic violence contacts the police the response they receive is all the more important.

Against this, Victim Support (1992: 1.5) argue that: "there is a brutal but common misconception that if women do not leave, the violence they are enduring cannot be all that intolerable" and that this may colour reactions to them. There are numerous reasons why victims of domestic violence may stay. One is the economic effect: if they are not thrown out of the shared home victims may feel they have to move out to avoid retribution from the offender. The victim may have to face moving to a new area, leaving many of their belongings, uprooting children and having to find a new home, schools and possibly work. Other possible reasons include fear of being pursued by the attacker and post traumatic stress disorder. Ethnic minority victims may face additional hurdles such as language barriers, concerns about immigration status and cultural pressures against reporting (for example see Choudry 1996: 1-4).

Another factor influencing reporting decisions may be negative experiences when the police were contacted in the past. Numerous criticisms of police responses to domestic violence have been made in the past, including (Buzawa & Buzawa 1996: 37-38; Grace 1995: 1):

- failure to attend or, when they do attend, that they are slow to respond;
- viewing the problem as civil not criminal (reflected in "no-criming" or treating offences as public order offences rather than as violence);
- reluctance to get involved and lack of sympathy for the victim, sometimes reflected in attempts to reconcile the victim and perpetrator or to side with the assailant;

- low arrest rates, even when the victim has been seriously injured;

- failure to recognise that the incident is usually just one in a series. Different officers may respond each time a call is made from any one property, and will often not be aware of previous visits by the police.

To some extent the reasons for this poor response have been historical. For example, in some jurisdictions physically punishing your wife was not illegal as long as the rod used was no thicker than the husband's thumb. This was reinforced with ideas of the police function as enforcing public order and the sanctity and privacy of the home, which continue today to some extent. In modern times, this has been translated into views about domestic violence not being "real police work" in a culture which does not value social work, instead focusing on crime fighting. In domestic violence cases, the offender is known, so relatively little or no detection or investigative skills are necessary. Consequently Buzawa and Buzawa (1996: 37-40) suggest that arrests for domestic violence are not seen as counting: results are equated with arrests and prosecutions. Added to this is a perception that victims of domestic violence are likely to drop charges. Finally, Buzawa and Buzawa (1996: 40-43) suggest that domestic calls are viewed as dangerous by officers, who fear offenders may turn their aggression on them. This risk, is they argue, probably overestimated.

Encouraging reporting

In response to these criticisms, a number of efforts have been made to improve police responses to domestic violence. For example, two circulars were issued by the Home Office (69/1986 & 60/1990), which made a number of recommendations. At the reporting stage, these included that:

- procedures used for victims of sexual assault should be applied to domestic violence victims;

- protecting the victim from future risk of violence should be prioritised over attempting reconciliation;

- forces should liaise with other statutory and voluntary bodies to ensure a common approach; and that

- there should be a presumption in favour of arrest (Grace 1995: 1).

Grace (1995: 53) looked at the impact of this guidance. She found almost all forces had changed their policies in response. There was also evidence of improvements: for example, in increased understanding and sympathy for the victims, and more positive responses including advice and support for the victims. Nevertheless there appeared to be a gap between policy and practice. Despite managers confidence that the new policies had been successfully filtered down to frontline officers, many operational officers were unaware of the new policies. Few had received any specific training on domestic violence, although other agencies interviewed (such as women's refuges) were willing to help with such training.

One example of the discrepancy between policy and practice is arrest. Although pro-arrest and even mandatory policies have been used in other countries (such as America) to increase arrest rates, past evidence has suggested that the police may be reluctant to arrest even if the complainant asks them to (Smith 1989: 57). One reason given has been the perception that domestic violence victims are likely to withdraw their complaints, and that the work in processing the case will have been wasted. Coupled with this perception was a lack of understanding by the police of victim's reasons for withdrawing complaints, such as fear of retaliation by the offender (Edwards 1989: 100-103). Other research suggests that this becomes a self-fulfilling prophecy: the police may actually discourage complainants from proceeding by repeatedly asking them whether they wish to continue and allowing a cooling off period to think things over (Chambers and Miller 1983 cited by Smith 1989: 57, and Farragher in Pahl [Ed] 1985: 110-124). Grace's (1995: 20-21) research suggests reluctance to arrest still continues. Few operational officers and managers saw arrest as paramount: instead it was typically seen as the third or fourth priority.

There are problems with pro-arrest policies. For example, the National Inter-Agency Working Party on Domestic Violence convened by Victim Support in 1990 (hereafter referred to as "the Victim Support Working Party") was against *automatic*

arrest on the grounds that domestic violence should be treated like other violent crimes. Greater numbers of arrests do not automatically translate into tougher approaches in the rest of the criminal justice system, nor do they necessarily deter re-offending (Polsby 1992: 250-253; Sherman et al 1992: 680-690). Arrest is not therefore a panacea. However, it does send a message to offenders and victims about the seriousness of such incidents. The Victim Support Working Party (1992: 2.15) suggested that pro-arrest guidelines could be useful, and recommended that this be a matter for national policy.

Grace's (1995: 47) interviews with refuge staff suggested one reason for low arrest rates could be lack of knowledge of law in this area, particularly civil law. Possible measures to tackle this again include training. Less than a quarter of the operational officers in Grace's study said they had received specific training on domestic violence, although two-thirds of managers thought that special training was needed. However less than half of the operational officers thought this would help. It is not clear why this difference of opinion existed, but it might perhaps reflect greater awareness of policy changes among management. Another measure would be to issue officers with flash cards about their powers and victims' rights. Less than a third of operational officers in Grace's study had these cards, and only seven managers thought their officers had been given one (Grace 1995: 25).

Part of domestic violence officers work (where they exist) is to refer victims of domestic violence to Victim Support, refuges and other possible sources of advice. This has two advantages. First, it helps provide victims with support and advice. Secondly, many victims may contact these agencies initially rather than the police. Developing relationships with other statutory and voluntary bodies may encourage referrals from these agencies to the police. For example, the Victim Support Working Party report (1992: 6.28-6.32) highlights the importance of health professionals such as Accident and Emergency Department staff in identifying domestic violence. The report stresses the value of guidelines and training covering issues such as identifying victims of domestic violence and careful documentation of injuries. Similarly local housing authorities have a part to play in assisting victims find accommodation. It may be argued though that unless liaison with other agencies is accompanied by improved responses to reports, referrals to the police from other agencies will be minimal.

In the past the police have been criticised for rarely referring complainants to other agencies, despite evidence that complainants would appreciate this assistance (Smith 1989: 53). There was some evidence in Grace's study that forces were giving information to victims about other sources of support. For example, some forces had (or were preparing) leaflets, which included contact details for Victim Support and other sources of help and advice. The Victim Support Working Party recommended that all officers should carry a small card or leaflet giving contact details for local support groups, to pass to victims when the attacker is not present. The Victim Support Working Party also recommended that victims should be reminded subsequently that they could contact such agencies or that the police could do this for them, and that posters and leaflets should be available in police stations (1992: 2.11-2.12).

Victim Support has police representatives on all it's local management committees. However, Grace (1995: 47-48) also interviewed representatives of some organisations (such as women's refuges) who suggested that they had very limited contacts with the police. One consequence of this may be that police misperceptions about the support available to victims of domestic violence are not challenged. For example, one respondent suggested that the police tend to think women's refuges only provide emergency accommodation.

More recently, Hague Malos and Dear surveyed multi-agency work on domestic violence in all local authority areas. Their findings suggest that police involvement in inter-agency groups has improved since Grace's study. Police involvement was much higher than that of the probation service, and particularly the CPS and courts. In addition, police representatives tended to be from senior ranks, which may have assisted policy change and signified to other officers the importance of treating domestic violence seriously. The researchers suggested this work could be built into job specifications for some staff and that commitment from senior staff in these organisations might assist. However, they also say that in some areas the police tend to dominate multi-agency groups and in some areas concerns persisted about the policing of domestic

violence (Hague, Malos and Dear 1996: 17.1-23.3; 52). The research did not examine the reasons for this, but possible explanations might include insufficient feedback to frontline officers and insufficient contacts between frontline officers and the support agencies.

b. Investigation

Other recommendations in the Home Office Circulars mentioned above were that:

- forces should establish specialist domestic violence units or officers; and
- domestic violence should be recorded and investigated in the same way as other violent offences.

Specialist domestic violence units/officers

On the first point, Grace (1995: 5) found just over half of all forces had specialist units dealing with domestic violence, but only 5 were dedicated Domestic Violence Units (DVU's): others were Family or Child Protection Units. This runs contrary to the advice of the Victim Support Working Party, which suggested that "in joint units child abuse tends to consume all the available resources because dealing with it is a statutory responsibility". Although there may be benefits in working with Child Protection Units where children are involved in domestic violence, the Working Party recommended that domestic violence units should be separate from family or child protection units (1992: 2.21-2.23).

A number of problems were found in those areas where domestic violence officers did exist. For example, the role of domestic violence officers includes keeping victims and uniformed officers of case progress. However, Grace found formal procedures to facilitate information exchange tended to be lacking. Other problems included that officers working alone felt their work was not given appropriate priority. Excess workloads were also complained about. In some cases, there was just one specialist officer, meaning that there was no cover if the officer was not on shift, took leave or was sick. To combat these problems, Grace (1995: 55) recommended that domestic violence officers should work in pairs.

Establishing specialist units or officers does carry a danger that other officers will compartmentalise domestic violence as solely the problem of that unit or those officers. However there are ways of combatting this. For example, in one force in Grace's study, uniformed officers were attached to the DVU for between three and six months.

Recording and investigating as for other violent crime

On the second point, research by Phillips and Brown (1998: 80, 91) found the charging rate for those arrested for domestic violence (58%) was higher than for all offences (52%). Cautioning and NFA ("no further action") rates were similar to the average for all offences (13% cautioned and 20% NFAed, against an average of 17% and 20%). However, for domestic cases of violence against the person, the charging rate was even higher (71% compared to 67% for all violence against the person). By contrast, Grace (1995: 12-13) found a 81% charging rate, but because of poor recording practices suggests caution when considering this finding. The results from another data collection exercise within the same study suggested a rate of 60%, but the sample size was smaller.

As well as the frequency of charges, the nature of the charge is important. Although Phillips and Brown did not examine downcharging, previous research (see for example Edwards 1989: 73, and others - Smith 1989: 43-44) has suggested domestic violence is commonly downgraded to less serious or non-violent offences such as breach of the peace. It was observed above regarding sexual offences that there may be legitimate reasons for downgrading some offences, but the concern is that on many occasions such justification is lacking. More recently Home Office circular 60/1990 has reminded officers of the range of powers they can use for domestic violence. However Grace's interviews with police officers suggest domestic violence was dealt with as breach of the peace in the vast majority of cases, even in some very violent cases. About two-thirds of officers saw policing domestic violent as different to policing other violence, although most other interviewees did not draw any distinction (1995: 19).

Phillips and Brown also examined what happened after charges were laid regarding police bail. In 60% of cases bail was refused, substantially higher than the 22% rate for charged suspects generally, probably because of the potential risk to their

partners if released on bail (internal note, 1997). More research is needed on the use of bail conditions in domestic violence and the extent of enforcement in the light of evidence of police unwillingness to enforce civil injunctions[14].

c. The decision to prosecute

The second phase of Phillips and Brown's (1998: 132, 141-142) research has examined case progress following forwarding to the CPS. Preliminary findings are currently restricted to termination by the CPS. These suggest domestic violence cases were much more likely than cases generally and more likely than other violence to be terminated by the CPS (a termination rate of 37% for domestic violence, against 14% for all offences and 29% for violence).

The main reasons for ending domestic violence cases tended to be different to those for terminating other offences: in half of domestic violence cases refusal of a key witness to give evidence was given as a reason for not proceeding (internal note 1997). The prosecution system relies heavily on the complainant's evidence in domestic violence cases, where there are often no other witnesses. It is possible to proceed without the victim's agreement, by compelling the reluctant witness to give evidence. However, it is questionable whether they would be effective witnesses in such cases, and this approach is difficult to reconcile with the idea that the law should empower victims rather than add to their vulnerability. Consequently it seems that there is some reluctance to use this power. However there is very little research on the role of the CPS in prosecuting domestic violence. As the Victim Support Working Party (1992: 2.44) has suggested more research is needed.

The Victim Support Working Party recommended where witnesses are compelled to give evidence support (such as housing) should be provided to protect them (Victim Support 1992: 2.31). In addition, CPS respondents in Grace's (1995: 46) study said it was now standard to require formal written retraction before dropping a case of domestic violence. In the long-run it may be necessary to reduce the emphasis on the victim's evidence. A pilot scheme (The Observer 8/2/98) is planned which would attempt to do just that: this will involve developing other forms of evidence such as taping emergency calls and taking photographs of the scene, and retraining police officers and CPS staff to consider new forms of evidence.

d. The trial

i. Civil measures

Although the civil courts are beyond the remit of the Working Group, some discussion of civil measures may be useful for several reasons. First, civil measures may be taken before or in conjunction with criminal measures and therefore colour the complainant's experiences of the criminal justice process. Similarly, findings about personnel in the civil system (such as the police and legal profession) may be informative about how they behave in the criminal justice context. Another reason is that disillusionment with the criminal justice system has led to suggestions that the civil system has more to offer victims of domestic violence. Important differences are that in the civil system the victim has to initiate proceedings, the civil courts have a lower standard of proof, and civil measures tend to be aimed at protecting and compensating the victim more than punishing the offender. Finally, the Protection from Harassment Act 1997 introduces new measures against harassment that blur the boundaries between civil and criminal measures.

<u>The measures</u>

At present there are three main forms of civil measures (Barron 1990: 14):

- undertakings by the alleged offender not to further assault his/her partner and/or to leave the shared home by a particular date;
- protection (non-molestation) orders aimed at preventing further violence or harassment in an emergency; and
- exclusion (occupation or ouster) orders to remove the offender from the house or to require him (or her) to keep away, usually for a specified period.

Undertakings can be made at county courts and are signed in court. The advantage for the accused

[14]. *The literature review also failed to find any research on the use of bail in sexual offences and hate crimes against ethnic and sexual minorities.*

is that no evidence is heard, no admission of guilt is required and the application for an injunction is usually withdrawn or adjourned. This may allow faster action for the abused partner, but no powers of arrest can be attached. In principle undertakings have the same force as court orders, but Barron argues that this does not occur in practice (Barron 1990: 22).

Protection and exclusion orders are available at both the county court and magistrates' courts, whether or not the partners are (or have been) married. Until recently, at the magistrates' courts applicants had to be married to the partner they are applying for an order against. Other differences included that magistrates' courts could not order a partner to keep away from an area around the home. This has been changed under the Family Law Act 1996, so both courts have the same levels of powers (Lord Chancellor's Department 1997: 57-58).

Powers of arrest can be attached to protection and exclusion orders in certain circumstances (eg if the court is satisfied actual bodily harm was caused and it is likely the applicant will reoffend). However, the Victim Support Working Party report on domestic violence (1992: 3.16) suggests powers of arrest are not usually applied for. In addition, Barron argues that courts are reluctant to attach this power (1990: 54). In 1996, 31% of injunctions made had powers of arrest attached (calculated from Lord Chancellor's Department 1997: Table 5.9).

The Victim Support Working Party recommended that powers of arrest should be the norm, and cover all clauses of the injunction rather than just some as at present (1992: 3.18). The change in the Family Law Act 1997 requiring powers of arrest to be attached where there has been violence or threats of violence, may go some way to address this. However, the Act does include a caveat allowing exceptions where the court is satisfied that the applicant will be adequately protected without it (Lord Chancellor's Department 1997: 58). As Conway (1998: 142) concludes:

> "the full potential of the Act will only be fulfilled if magistrates make it their business to fully acquaint themselves with the true nature and effects of domestic violence and take every opportunity to protect vulnerable victims".

Deterrents to legal action

Barron interviewed female victims of domestic violence, solicitors dealing with these cases and representatives of the police, probation service, women's refuges, Victim Support and the magistracy in Bristol and Cumbria. Key findings included that solicitors and the courts often expressed the view that women take out injunctions for trivial reasons and have not tried hard enough to make the relationship work. This is obviously at odds with evidence that victims have often experienced numerous acts of violence over a long period before they take legal action. Many solicitors were reportedly reluctant to begin proceedings without also starting divorce proceedings - despite the intention that protection orders should be an emergency measure. This further ensures that those victims who do proceed with legal action tend to be those who have decided that the relationship is over (Barron 1990: 31-34).

A number of other deterrents to legal action were also identified. Some women were dissuade by fear of the cost. This was partly attributable to lack of knowledge of the legal aid system. However, there was evidence that some women who were eligible for legal aid on the basis of their income had problems getting it for other reasons. In some cases, solicitors failed to apply for it. In others, applications for legal aid were rejected: some solicitors questioned suggested a lack of consistency in these decisions. The length of time taken in assessing income was also a factor. Some women had to wait several days or weeks for supposedly emergency action. For those who were not eligible for legal aid, the costs of pursuing a case could be prohibitive (Barron 1990: 34-35). Other reasons included cultural and language barriers. For example, one Sikh woman said that women who used the legal process were stigmatised by her culture. Consequently it could be difficult to find a family member or friend willing to translate for a complainant possessing limited English (Barron 1990: 48).

Seeing a solicitor

Having decided to see a solicitor, Barron reported many women found them intimidating. Although there was recognition that the legal process may be slow, complaints were made that solicitors were slow to start the legal ball rolling. Other problems included lack of explanation about the legal

remedies available: although many victims had heard of injunctions, they were not always aware of the different kinds available. In addition, there were discrepancies between the women's perceptions of the effectiveness of injunctions and those of the legal profession. Some women had applied for injunctions in the past, and complained of a lack of awareness of the ineffectiveness of injunctions among the legal profession. One reason for this may be that injunctions are rarely enforced, and consequently that breaches rarely go to court. This lack of awareness meant some women were misinformed about the effectiveness of such measures (1990: 36-41,; 89-102,; 112-114). To counteract this, the Victim Support Working Party (1992: 3.40) recommended that all solicitors wishing to take on this work should be offered some training, although it is not clear who would provide this training. The report also suggests there is a need for more comprehensive emergency out of hours service, which might be met by a rota system (1992: 3.50).

Attending court

At court, there were numerous concerns. Lack of separate waiting areas and lack of special areas in which complainants can consult their legal advisers were highlighted. Scheduling was also a matter of complaint: Barron suggests that the domestic violence cases were given a low priority, so that court dates and times were more likely to be changed. In court, most victims felt that they had a fair hearing, although some were upset their story was not given enough weight. In some cases, women who had begun new relationships since the break-up of their marriages were blamed for provoking the violence (1990: 42-51).

In addition, Barron observed that although almost all were able to obtain a non-molestation order or undertaking, "anything more than that could be difficult to obtain" (1990: 50). She argued that the courts appeared overly concerned with not removing a man from his home:

> "Even in cases where there has been a long history of violence, many lawyers appeared to believe it would be perfectly possible and safe for the woman to return home once she had an order or an undertaking that her partner would not molest her" (1990: 50).

Where orders were made, they were not always satisfactory: for example, excessive time (several weeks) was given to vacate the home. The criteria for deciding whether to exclude a spouse from the marital home include the financial situation of each partner and the needs of any children. No single criteria is supposed to take precedence. In practice though, Barron suggests there is reluctance to impose injunctions if a custody hearing is planned (1990: 52-53). The Victim Support Working Party recommended that courts should be made aware of the dangers posed to victims of domestic violence, and must take a tougher approach (1992: 3.8, 3.63). In addition, according to the report orders are usually only made for a fixed period, typically three months: the complainant then has to reapply for an extension. The Working Party recommended longer orders or indefinite orders until further notice (1992: 3.10-3.11).

Enforcement

Finally, when orders were made Barron found that police were unwilling to enforce them even when they were informed of the injunction and powers of arrest were attached. Despite the fact that the orders were made by a court, they persisted in viewing violence as private matter (Barron 1990: 16). Barron also found some solicitors were reluctant to pursue action when orders were breached (1990:112-114). These findings should be treated cautiously because the samples of people interviewed were very small. Nevertheless there are some other (albeit small) studies which provide further support. For example, Farragher (in Pahl [Ed] 1985: 110-124) observed twenty-six domestic calls to the police and found reluctance by the police to intervene even when an injunction had been breached. The Victim Support Working Party recommended that arrest for breach should be the norm (1992: 3.18).

ii. Criminal measures

It was noted above that the Protection from Harassment Act 1997 creates some new measures that blur the boundaries between civil and legal measures. For example restraining orders, similar to injunctions, will be available in the criminal courts to prohibit any further harassment. Where injunctions are granted and then breached, the plaintiff will be able to apply for a warrant for the offender's arrest. Breach of an injunction will be a criminal offence, punishable by a maximum of

five years imprisonment tried on indictment and six months tried summarily. This means it will be an arrestable offence: in other words the police will be able to arrest the offender if they know about the injunction and suspect it has been breached without requiring the victim to apply for an arrest warrant.

Two criminal offences of harassment are also created. The first, where the behaviour is so threatening the victim fears violence, is punishable by a maximum of five years imprisonment. The second does not require the fear of violence and is punishable by a maximum of six months imprisonment. In the past harassment has been prosecuted using other criminal laws such as assault occasioning actual bodily harm, but has been difficult because the law requires proof of intent. The new provisions have a lower standard of proof, requiring instead that the conduct must have occurred at least twice and that a reasonable person would have realised their actions would cause a fear of violence or sense of harassment (for further discussion see Jason-Lloyd, L 1995: 787-790; Wells, C 1997: 463-470).

Leniency

It has yet to be seen whether these measures will address concerns about lenient sentences for domestic violence. For example Craig (1992: 568) found that of 500 incident reports studied in 1991, half were no-crimed, half again were prosecuted, and half of those dealt with by a bind over. However, Craig suggests that this apparent leniency was partly explained by the victims wishes. She suggests there is anecdotal evidence that the younger often unmarried women are more likely to report, support charges and want a custodial sentence. In contrast the older, more dependent and less socially mobile women with children, are more likely to want to maintain ties with the offender and to resume cohabiting, and to therefore want less serious sentences.

This presents something of a contradiction though. If sentencing reflects victims wishes and younger women are more likely to report and want harsher sentences, this would suggest more severe sentences should be imposed than appears to be the case. Other possible factors which Craig highlights include the principle that the offender should only be sentenced for the present crime rather than for past record. This has to balanced however, with the risk posed to the victim by a non-custodial sentence. It seems plausible that lack of knowledge about domestic violence and ideas about the sanctity of the home continue to have some impact. However, further research is needed both to examine sentencing of domestic violence to see if it is really treated so leniently, and if this is so, to examine to what extent non-legal factors influence sentencers.

Implications of sentence for victims

A final concern is the impact of the sentence on the victim. Edwards (1989: 153) describes one case where the offender refused to pay the fine levied: faced with the threat of losing her furniture, the victim paid the fine herself. This suggests that sentencers need to be alert to the possible impact of sentences on victims: financial ties or dependence (such as shared property, maintenance contributions or child support) may continue even where partners split up. The Victim Support Working Party (1992:2.51-253 citing Smith 1989) suggested probation officers' social work training, with emphasis on keeping families together, may lead them to send out wrong messages to offenders. It is important to ensure that safety of women is paramount and the seriousness of offence is not underplayed. This is clearly something training might address: the Victim Support report also suggests that Probation Service management should encourage good practice.

e. ...and beyond

Beyond the trial, there are numerous other issues of concern to victims of domestic violence. Not all are of direct concern to the criminal justice system, although they will be very important to the victims of domestic violence. Examples include formally ending the relationship with the abusive partner through divorce, access to an adequate income, and negotiating contact with any children (see Victim Support 1992 5.5-5.20 for a discussion of these issues). Two longer-term issues involving the criminal justice system are briefly considered below: places of safety and information.

Places of safety

Securing the victim's safety is a particular concern in domestic violence, when continuing to share a home with the offender could endanger both the victim and the prosecution case. This may also be

a concern in sexual offences where the defendant is or was the victim's partner or another close relative living in the same home, and also in some racially motivated crimes where the victim's safety is threatened. However, provision of places of safety is patchy, and usually met by the voluntary sector (for example women's refuges)[15]. In chapter 2 it was explained that accommodation may be provided for intimidated witnesses to assist prosecutions against their harassers: it could be argued that there is a need for equivalent assistance for victims of domestic violence.

Information

Despite the emphasis in Home Office Circular 60/1990 on keeping victims informed about the offenders' whereabouts, Grace (1995: 24-25) found only 15 police forces had developed some means of obtaining an offenders' release date from prisons in their areas. This was usually the attending officer or domestic violence officer's responsibility. This raises a couple of questions: first, whether this responsibility should be placed on the police, and secondly whether formal procedures or policy could be used to improve information. If the responsibility for informing witnesses rests with any agency other than the Prison Service, procedures will have to be agreed with them.

3. Racially motivated crime

a. Reporting and investigation

Failure to report

Numerous studies have shown that Afro-Caribbeans and to a lesser extent Asians tend to have more negative attitudes towards the police than whites. For example, BCS data suggests a large proportion of Afro-Caribbeans believe the police do not treat everyone fairly, and in particular that they do not treat minorities equally (Fitzgerald and Hale 1996: 29).

This has been explained by ethnic minorities wider experiences of policing, particularly evidence that Afro-Caribbeans are stopped and arrested by the police more often than whites. For example, Phillips and Brown (1998: xii-xiv) found Afro-Caribbeans were over-represented among those arrested compared to their representation in the local population. They were more likely than expected to have been arrested following a stop/search, and (along with Asians) to have no further action taken against them. This suggests the arrests of Afro-Caribbeans may have been based on less evidence than that of white suspects. However, it might also be related to differences in offence patterns. Phillips and Brown (1998: 29) suggest Afro-Caribbeans tended to be arrested for some more serious crimes (such as robbery and fraud) which might have been more difficult to prove than those white suspects were charged with (such as public order offences).

It would therefore, be reasonable to assume that more negative attitudes would be translated into a greater tendency to under-report, particularly for racially motivated crime. However, the BCS suggests ethnic minorities appear more willing to report household offences to the police than whites. The pattern is more complex regarding personal crimes, where racial motivation seems more likely. The BCS suggests only Indians are more likely to report personal crimes than whites, and that under-reporting is particularly marked for Pakistanis. The survey did find that Afro-Caribbeans and Pakistanis were less likely to report racially motivated crimes than other crimes, but also found that Indians were more likely to report racially motivated crimes (Fitzgerald and Hale 1996: 27-35).

According to the BCS the most common reasons for not reporting crime generally are that the police could have done nothing, the police would not have been interested and that the incident was too trivial. These were particularly salient for racial incidents, but dislike or fear of the police was not a strong concern for any victims (Fitzgerald and Hale 1996: 35-36). The latter finding is surprising: as Smith (1994: 1090) observes, it has been well-established that racial prejudice within the police is common, and not simply confined to the junior ranks (see for example Graef 1990: 117-144: Reiner 1991: 204-210).

However racial prejudice is not the only influence on police behaviour. Although allegations are made about individual cases of misconduct, research is needed on whether prejudice routinely influences police treatment of ethnic minority

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[15]. Places of safety for victims of racially motivated crimes and male victims appear less common than refuges for female victims of domestic and sexual violence.

complainants. Certainly the BCS suggests that minority victims are less satisfied with police response than whites, particularly regarding racially motivated crime (Fitzgerald and Hale 1996: 37-38). More specifically, Hesse & McGilchrist, reporting on a council inquiry in London argue there are six main complaints about police investigations (in Hesse, Rai, Bennett & McGilchrist Eds 1992: 70):

- "The police do not treat racial harassment seriously (ie as a crime).
- Where the police do respond there is no follow-up.
- The police do not take action against perpetrators.
- The response of the police is not encouraging.
- The police do not provide support.
- The police treat the victims as the problem".

This is given some support by Sampson and Phillip's (1998: 129-132) research on racial incidents on an East London estate. They report that the police and other agencies viewed racial incidents as non-criminal, and were disinclined to intervene:

> "Despite the presentation of detailed data on repeat racial victimisation...there was a consistent denial or undermining of the extent of the problem..Attempts were made to challenge victims' accounts of racial incidents, either by suggesting that the incident was not racial, or by shifting the emphasis to blaming the victim for not reporting immediately..Sometimes accusations were made about families fabricating incidents so they could be rehoused quickly."

Sibbit (1997: 25-27) similarly suggests that the police categorised racial harassment and violence reported by victims into as neighbour disputes, "not really racial" incidents, verbal abuse and nuisance behaviour. None were seen as worthy of police attention. Serious attacks where victims perceived racial motivation were forwarded to CID and seen as serious crimes such as attempted murder rather than as racial incidents, and recorded them accordingly. Instead:

> "the police perceived another category of incidents as the real racial incidents, even though they were rarely reported (or recorded) as such. These were inter-racial incidents where the victim and the suspect were from different ethnic groups...'blacks on Asians and Asians on blacks' was seen as the main racial problem".

Sampson and Phillips (1998: 129-132) observed a catch-22 situation. What the police and other agencies viewed as minor incidents had a cumulative effect on the victims. Harassment was experienced as a continuous process, and no distinction was made by victims between repeated harassment and "criminal" incidents. This difference in perceptions (and a lack of language interpreting facilities) meant victims were dissatisfied with the police response when they reported. As a result many racial incidents were unreported or not reported immediately afterwards. However, the police in turn complained there was little or nothing they could do unless the incident was reported immediately. Another disincentive to action suggested by some other respondents was the fear of a backlash by the white people on the estate if racial harassment was given a higher profile.

Further research is necessary to show how typical these findings are. Other factors which may discourage reporting in racially motivated crimes (or indeed any crimes where ethnic minorities are involved) include cultural barriers, and concern that their immigration status will be questioned (see Chigwada-Bailey 1997: 37 for an example of a case in which this occurred). This raises a related question of whether the greater risk of victimisation among ethnic minorities is partly due to offenders playing on such fears, but no research was found on this subject.

<u>Improving responses and relations</u>

Measures to address some of these problems may be relatively simple, for example in ensuring that a network of interpreters is available to overcome language barriers. Dealing with cultural barriers, for example, in encouraging reporting by Asian women, and challenging racism within the police are more difficult. Six areas are discussed below: pro-arrest policies, investigation, recruitment from ethnic minorities, retention, public consultation and multi-agency cooperation.

- Pro-arrest policies.

As with domestic violence, arrest policies could be considered. There are two aspects to consider: arrest in racially motivated crime, and arrest (as well as stop and searches) of ethnic minorities. Although the latter is beyond the scope of this report, it seems likely that will contribute to ethnic minority perceptions of policing. On the former, Sampson & Phillips' study of racial attacks on an East London Estate suggested arrest in racially motivated crime is low: only about thirty arrests were made for the almost four hundred racial incidents that came to police attention in the borough in 1990 (1992: 12). Phillips & Brown (1998: 38) found only 14 suspects in their sample of over 4,000 detainees were arrested for incidents officers said were perceived as racially motivated. This suggests that pro-arrest policies might be an option for racially motivated crime.

Nevertheless the limitations of this approach in domestic violence cases were noted above. In addition, there may be some problems particular to racial harassment and violence where the identity of the perpetrator may be less obvious. Sibbit (1997: 92, 95-96) found little effort was made to identify suspects in either of the areas she studied. She attributed this in part to lack of information/intelligence and a failure to make effective use of the information that did exist: for example cases were filed by victim rather than perpetrator and information on perpetrators was not collated or linked to other reports. A more general factors was officers' sense that racial harassment was not really a criminal matter. This in turn appeared to be associated with the involvement of a large number of children under the age of criminal responsibility[16]. Sibbit comments "the police appear to be disempowered by the notion the that only action they can take is prosecution". The emphasis on prosecutions in performance targets may contribute towards this.

- Investigation

When arrests are made, it has been suggested that police investigations are sometimes less thorough than when white complainants are involved. The Home Affairs Committee (1989: 13) has suggested the clear-up rate for racial incidents is low. However more recently Maynard and Read (1997: 7, emphasis added) found "racially motivated incidents are rather more likely to be cleared up than non-racially motivated incidents, but are rather less likely to result in charge or caution". The introduction of ethnic monitoring in police forces from 1996 should provide much more information about how suspects and offenders are treated according to race. Fitzgerald and Sibbit (1997: xiii) suggest monitoring may improve relations between the police and ethnic minorities generally: both by increasing police awareness of how they treat ethnic minorities and by encouraging greater dialogue between them. Nevertheless more information is needed about complainants' and victim's experiences.

- Recruitment

It has also been suggested that increased recruitment of police officers from ethnic minorities would help improve relations. Yet despite a number of national recruitment campaigns since the mid 1970s and various recommendations on improving recruitment in the 1980s, the number of ethnic minority recruits remains low. In 1996/7 just 2% of new recruits appointed in England and Wales were from ethnic minorities, compared to 3.7% in 1994/5. This compares to 6% of the general population[17] (HMIC 1997, Appendices 7 & 8).

Research has suggested various reasons for ethnic minorities reluctance to join, including racism from the public, abuse from colleagues and perceptions that to do so would be joining the enemy (see Smith 1994: 1096). Holdaway (1991 cited by Smith 1994: 1096) has suggested that positive action by individual forces to recruit ethnic minorities has actually been limited, and failed to make good use of community or race relations staff. However, he argues the major reason for lack of success in recruiting ethnic minorities has been failure by police management to tackle racism within the police.

- Retention

One reflection of this is that retention of ethnic minority recruits is also a problem. Both the

[16]. This is not to suggest that children were the only perpetrators identified. Most were between 11 and 18, but ages ranged from 5 to 80 years old (Sibbit 1997: 63).

[17]. This excludes the Metropolitan Police, where 7.4% of those appointed were from ethnic minorities in 96/7 and 5.4% in 1994/5, compared to an ethnic minority population of 20.2%.

Home Affairs Committee in 1989, and more recently HMIC have emphasised the importance of retention. In one force inspected, the wastage rate for ethnic minority officers was 10% against less than 3% for whites. Reasons suggested for poor retention included feeling unsupported by management, demonstrated by lack of intervention following racist behaviour or language (1997: 2.72-2.75). "Police officers ...cannot be expected to behave in ways which will enhance relations with minority populations in the public at large if they fail to treat colleagues from the same groups equitably" (1997: 3.73).

HMIC has made a number of recommendations to assist police forces in over-coming these problems, including (1997: 4.1-4.20):

- monitoring recruitment, retention and career development of staff from minority backgrounds;
- considering sensitivity to race (and community) relations in recruitment, promotion, staff appraisal and staff deployment;
- inclusion of race and community relations in training, focusing on dealing real-life situations; and
- ensuring that policies and practices make clear that any expression of racial (or other) prejudice is completely unacceptable.

If racism is as deeply embedded within the police as suggested, it seems questionable whether increasing ethnic minority representation in the police will be sufficient to change police culture and relations with members of the public. Tackling racism needs to be a central part of any efforts to improve relations with ethnic minorities.

- Improved public consultation.

Other possible measures to improve relations between the police and ethnic minorities include improved public consultation. The importance of consulting the public generally but particularly with ethnic minorities was recognised in the Scarman report which followed inner-city riots in the early 1980s. This led to the creation of a statutory duty on police authorities to consult the public on local policing. Consultation with minorities (both ethnic and sexual) may help improve relations with them. However, the approach most areas have adopted (Police Community Consultative Groups or PCCGs, which have open meetings at least quarterly) has tended to be poor at reaching these groups. There are alternative ways of trying to reach these groups though. Examples include special consultative groups for minorities, or holding normal PCCG meetings in different locations such as temples or mosques (Elliott & Nicholls 1996: 9-11 & 42-55)[18]. HMIC (1997: 38) has recommended the creation of procedures to ensure all decision-making routinely considers the implications for race and community relations: improved public consultation could perhaps be a part of this process.

- Multi-agency cooperation.

Finally, multi-agency cooperation may assist in a number of ways such as encouraging referrals, increasing support to victims and improving responses to prevent further victimisation. Sibbit (1997: 98) found schools could have a greater role to play in preventing and addressing harassment. Housing authorities also have a particular interest in tackling racial harassment. Love and Kirby (1994: 17-20, 25-28) found they used various approaches, included inserting clauses in tenancy agreements forbidding racial harassment and violence (reported by 61% of respondents) and interviewing and warning known perpetrators (80%). Some also reported initiating repossession proceedings and arranging a priority transfer for victims (54% and 75%). Just over half (55%) were involved in multi-agency groups, and almost all of these involved the police.

The main role reported of these multi-agency groups was coordination, with less than half involved in providing support to victims or prevention. A number of benefits were recorded: for example almost all reported increased understanding between agencies. Two-fifths thought cases were being dealt with more effectively and more than a third though that more cases were coming to light as a result of the group. However, problems such as lack of cooperation of some agencies, lack of resources

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[18]. *There are a number of possible objections to special consultation fora for minorities. Both these and the counter-arguments are explored in Elliott & Nicholls (1997: Table 8.1).*

and agreeing the roles of each agency were reported (40%). A fifth also reported problems in agreeing a definition of racial harassment.

Sibbit (1997: 100) also looked at multi-agency groups in the two areas she studied. A number of problems were observed. In the first group, these included a tendency for discussions to focus on the truthfulness of allegations, failure to identify the perpetrators and a lack of police action. In the second, victim's dissatisfaction with the police and the heavy representation of the police contributed to a strained atmosphere: "it was felt, certainly where the police were present, members of the public would feel reluctant to attend, let alone voice their views". Overcoming such obstacles may be a slow and lengthy process.

b. The decision to prosecute and the trial

Even less literature was found on the experiences of racial harassment (and other ethnic minority) victims of the subsequent stages in the criminal justice system. Nevertheless two possible areas for action can be identified.

- Highlighting racial motivation as an aggravating factor

At present, guidance issued to the courts recommends that racial motivation should be treated as an aggravating factor (Home Office 1997c: 7-9). However Ruddick (1993: 5) suggests that prosecutors do not always highlight racial motivation as an aggravating factor. This is supported by CPS figures which suggest that this is so in about 15%. The CPS report also suggests that racial motivation does not always result in longer sentences upon conviction. The court stated that sentence had been increased as a result in only a fifth of those cases where prosecutors drew attention to racial motivation. It seems plausible that in some cases the sentence was increased but the court omitted to state this fact or it was not recorded. Nevertheless this suggests racial motivation is not always seen as an aggravating factor in sentencing.

Government plans (Home Office 1997c: 7-9) to require the courts to view evidence of racial motivation as an aggravating factor may address this. Up to an extra two years could be imposed for some offences where there is evidence of racial motivation. For example, malicious wounding usually carries a maximum penalty of five years imprisonment - under the new provisions this would rise to seven years where there was some racial motive. Under the proposals the standard of proof of racial motivation would be lower in these cases than for the new offences of racial harassment and racial violence.

- Recruiting and retaining ethnic minorities, especially among the judiciary and magistracy

As with the police, there is concern that under-representation of ethnic minorities continues elsewhere in the justice system. For example, there are no ethnic minority Lords of Appeal, Lords Justices of Appeal, High Court judges or Deputy High Court judges. Ethnic minorities are under-represented at every level of the judiciary and magistracy, accounting for less than 1% of circuit judges, less than 2% of recorders, district judges, stipendiary magistrates, and less than 4% of acting stipendiary magistrates for example (The Guardian 25/2/98). Interestingly Home Office figures (1997b: 31-33) suggest that under-representation is not a problem affecting solicitors (6%), barristers (8%), the CPS (8%) or the probation service (8%). However, this does not mean that these groups have no problems. Concerns about career prospects and about bias in pre-sentence reports written by the probation service (see Chigwada-Bailey 1997: 49-61) are two cases in point[19].

The dominance of whites in the judiciary might be one reason for the apparent failure to routinely treat racial motivation as an aggravating factor. Whether or not this the case, the recruiting more people from ethnic minorities to the bar and appointing more judges from ethnic minorities might help reassure both witnesses and defendants from ethnic minorities about the fairness of the courts. At the same time, though, it has to be acknowledged that some people from ethnic minorities may themselves resent suggestions of positive discrimination. The experience of the police also suggests that retaining people from ethnic minorities is just as important: training could be one element of this (see for example

[19] *Sibbit (1997: 43) says that probation officers have a responsibility to challenge racial motivation, but found that this opportunity was rarely grasped in either of the two areas she studied.*

Chigwada-Bailey 1997: 63, Maynard and Read 1997: 25-27).

4. Hate crimes against sexual minorities

Again, very little literature was found on sexual minorities experiences of the criminal justice system despite anecdotal evidence of discriminatory treatment. Certainly, formal policies on treating sexual minorities equally appear much less common than those for other groups such as ethnic minorities. As noted above, some behaviour by sexual minorities is criminalised and hostility towards sexual minorities has been dubbed "the last acceptable prejudice". Galloway (1983: 102-124) suggests seduction theory, that young men are seduced by older homosexuals, encourages homosexuality itself to be seen as corrupt. Galloway argues that this contributes towards discrimination in the courts, in six further areas:

- leniency towards queer-bashers (which may sometimes be linked to the gay panic defence, see box);

The gay panic defence (Toolis 1997: 36-41).

Toolis describes the "gay panic" defence, whereby people accused of (often very brutal) killings claim that they were victims of unwanted sexual advance. He gives several examples of how the defence has been used successfully, and suggests that some lawyers have tried to establish "homosexual panic" as a medical condition, although the medical profession had not previously identified it as such.

Mason and Palmer (1996: 95-7) report than Colin Richardson, from the publication Gay Times, has collected information on gay murders from newspapers and information passed to him. These records suggest that the homosexual panic defence was used in 15 of the 137 cases recorded between 1986 and 1996. However the outcome of these cases is not reported, and it is questionable whether this sample is representative.

- discounting homosexual testimony (eg in agent provocateur cases, where the prosecution evidence is based on police testimony);
- denial of anonymity (suggested sensationalist media reporting sometimes encouraged by judges expressions of disgust);
- interpretation of the law - for example, extending the idea implicit in the Sexual Offences Act that homosexuality is unlawful;
- differential sentencing: Galloway argues that prosecution rates, convictions and sentences are all higher for homosexuals than for equivalent offences by heterosexuals. According to Galloway, under half of those convicted of sexual intercourse with a girl of 12, but more than 90% of men convicted for sex with 15 year old boys are imprisoned.
- civil law: for example, Galloway argues that adopting, getting child custody or having access to their children are all more difficult for homosexuals.

Galloway recommends three main approaches to combat discrimination:

1. Educating

Galloway argues that both initial training and refresher courses should be used to combat prejudice, particularly for operational officers in Vice Squads. Refresher training may be particularly important: Galloway's observes that studies on race relations training have suggested racial prejudice initially falls but soon returns to a similar level. More specifically Mason and Palmer (1996: 95-99) recommend training for crown prosecutors and judges to tackle homophobia and encourage them to challenge gay panic defences. They argue homophobia should be treated as an aggravating factor not a mitigating one. At a broader level, they recommend that the Department for Education and Employment should issue guidance on the needs of gay, lesbian and bisexual pupils for example on homophobic bullying in schools and colleges[20].

[20]. They also argue that s28 of the Local Government Act, which prohibits local authorities from intentionally promoting homosexuality be repealed.

2. Monitoring and protesting

Galloway suggests monitoring police action, reporting abuses of police power and lodging formal complaints will be more effective than education in the short-term. Although some groups already do this, Galloway suggests this could be extended further.

3. Legislating to end legal discrimination and change policing.

Recent proposals to change the homosexual age of consent were noted above. Mason and Palmer (1996: 99) argue the offence of gross indecency should be reviewed and possibly replaced with a public sex offence for both heterosexuals and homosexuals. They also suggest consideration should be given to creating a test of proportionality requiring a reasonable relationship between the level of provocation and retaliation[21], and requiring judges to direct juries to consider this. In addition to legislation, Galloway recommends community policing, in which greater contact is made with people being policed, and consultation with local gay groups (see above).

Requiring police forces to follow community policing through legislation seems problematic. At present the *style* of local policing is seen as an operational matter decided by chief constables, and community policing is just one of a number of competing approaches (such as problem oriented policing and zero tolerance policing).

Nevertheless, greater consultation and contacts between the police and sexual minorities could perhaps be encouraged either through guidance, or through the national policing objectives set annually by the Home Secretary (on the latter see Mason and Palmer 1996: 99). There is some evidence of efforts to improve consultation, such as lesbian and gay consultative groups (see Elliott & Nicholls 1997: 42-47), national conferences on policing lesbian and gay communities and the creation of a Lesbian and Gay Police Association.

Some forces have also attempted to attract recruits from sexual minorities by placing advertisements in the gay press (The Guardian 26/11/97).

However, this is not common practice and as with recruiting ethnic minority officers, there may be problems with retention. There has been some research on the experiences of sexual minorities who join the police. For example, Burke (1994a, 219-227) interviewed approaching forty police officers from sexual minorities. The sample was quite small and self-selected, so it the representativeness of Burke's findings is open to question. Nevertheless, they are interesting:

- None of those interviewed had mentioned their sexual orientation during the selection process even those the vast majority knew they were gay, lesbian or bisexual when they joined;
- Most (approaching nine out of ten) believed they would not have been selected if they had done so;
- About two-thirds believed that the police were either slightly or much more homophobic than the rest of society;
- Approaching four-fifths believed an openly homosexual officer would not have the same career prospects as a heterosexual officer;
- A quarter felt they had been discriminated against in some way.

One step towards improving police attitudes towards sexual minorities might then be to start with equal opportunities policies within the police. Burke (1994a: 227) found less than half of all forces in England and Wales had extended their equal opportunities policies to cover sexual minorities, although the number may have increased since then.

Establishing gay liaison officers or specialist units is another approach. For example in one division in Northamptonshire, a specialist unit has been set up to cover homphobic incidents as well as domestic violence and racial incidents (HMIC 1997: 3.25). Although the research on domestic violence suggests there may be problems with specialist units, this development does suggest that more importance is beginning to be attached to protecting sexual minorities from homophobic attacks.

Finally, the creation of force policies on policing homophobic incidents (recommended by HMIC

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[21]. According to Mason and Palmer there was a precedent for this before the 1957 Homicide Act.

1997: 4.19) and disseminating good practice could also be considered. The endorsement of a national charter for good practice and consultation to rid the police of anti-gay prejudice by the Association of Chief Police Officers (The Guardian 26/11/97) may assist this process: Mason and Palmer (1996: 99) recommend that all forces adopt the charter. Similarly, Mason and Palmer (1996: 100) argue that local authorities and housing associations should develop policies on hate crimes against sexual minorities, covering tenancy agreements, injunctions and repossessions.

Conclusion

Since the 1970's the rise of feminist criminology has made a major contribution in highlighting problems in criminal justice responses to sexual offences and domestic violence. Efforts have been made to improve responses to both offences as a result, with some effect. For example, police treatment of rape is widely acknowledged to have improved, and has been attributed with contributing to the rise in the number of rapes reported to the police. Despite this, the literature reviewed suggests there is still evidence of room for improvement.

Victims of hate crimes against ethnic and sexual minorities have not received as much attention, although anecdotal evidence suggests criminal justice responses could be improved. Research is needed both to measure the extent of these forms of victimisation and to chart the experiences of these groups when they come into contact with the criminal justice system. Although complaints have led to some efforts to improve responses (eg.widening the definition of racial incidents, and ethnic and sexual minority recruitment drives), concerns continue.

A number of possible measures to improve the position of all four groups have been highlighted by the literature review (summarised in Table 4). In choosing between them their relative costs will need to be considered. It should also be borne in mind that to be confident that any new measures have had the desired results some evaluation of their effectiveness will be needed.

However, rather than simply responding to crime the longer-term aim must be to prevent crime. In recent years crime prevention has begun to focus on repeat victimisation. The risk of victimisation tends to be highest after an initial offence, so intervention immediately after the initial offence may help reduce the risk of repeat victimisation (see for example Farrell and Pease 1993). A couple of points are worth noting about the impact of this finding to date.

First, although all parts of the criminal justice system have a role to play in repeat crime prevention, the impact has been felt most by the police. Tackling repeat victimisation has been made a priority for the police nationally through the national objectives set annually by the Home Secretary. Systems are being developed to help the police identify repeat victimisation and respond more appropriately. In some areas for example, attending officers will be provided with details about previous calls from the same address. Historically police command and control systems have not been designed to include such features, so progress varies. Since the police are usually the first point of contact with the criminal justice system and the research indicates quick intervention is needed, their contribution is particularly important. However, repeat victims experiences and contacts with the rest of the criminal justice system have generally been neglected. Topics for further consideration include the recognition of repeat victimisation and whether responses should vary accordingly.

Secondly, most repeat crime prevention programmes have focused on burglary, with the aim of reducing opportunities ("situational" crime prevention as opposed to "social" crime prevention, which seeks to reduce propensities to commit crime through education for example). A few have targeted other crimes such as domestic violence and racial incidents. For example, one of the measures used in domestic violence has been the loan of attack alarms, to notify police if help is needed and enable a rapid response (Lloyd, Farrell & Pease 1994). It seems strange that programmes have not been more common for victims of those offences most commonly associated with repeat victimisation, such as domestic violence. Targeting such vulnerable groups might help maximise the value of such programmes. The implications of repeat victimisation for the criminal justice system may have yet to be fully realised.

Table 4: Possible measures to assist victims of special offences or repeat crimes

Measures	Stage of Criminal Justice System				
	Reporting	Investigation	Decision to Prosecute	Trial	Beyond
Improving availability of female police surgeons	✓				
Training police surgeons eg. on Rape Trauma Syndrome	✓				
Provision of washing facilities	✓				
Removal of some unnecessary procedures eg, routine plucking of pubic hair	✓				
Routine medical follow-ups	✓				
Provision of victim packs giving toiletries, details of support available etc.	✓				
Screens/mirrors/videos for identification parades	✓				
Improving speed of police response to domestic violence calls	✓				
Situational crime prevention	✓				
Training of operational officers on domestic violence, eg. pro-arrest guidance, support available from other sources such as refuges	✓	✓			
Issue police officers with aide memoirs about their powers and victims' rights	✓	✓			
Establishing specialist domestic violence units/officers	✓	✓			
Improving staffing of existing specialist units, improving status/ understanding by short-term attachments of uniformed officers to units	✓	✓			
Provision of support person/'chaperone'	✓	✓	✓	✓	
Interpreters/translating advice etc. into minority languages	✓	✓	✓	✓	
Increased recruitment of ethnic minorities	✓	✓	✓	✓	
Training to counter discrimination, for eg. covering cultural differences	✓	✓	✓	✓	
Improved public consultation with minority groups	✓	✓	✓	✓	
Creation of formal policies on discrimination against sexual minorities	✓	✓	✓	✓	
Reforming laws relating to sexual minorities, eg. homosexual age of consent.	✓	✓	✓	✓	
Training on interview/cross-examination technique, Rape Trauma Syndrome etc. for all cjs personnel or some specialist personnel at all stages	✓	✓	✓	✓	
Creating a right of appeal against CPS decisions			✓		
Pre-trial preparation eg. court familiarisation visits, witness packs				✓	
Structural changes to courts eg. separate waiting facilities				✓	
Meetings between victims and prosecution before trial				✓	
Press reporting restrictions				✓	
Clearing public gallery				✓	
CCTV and screens to enable victim to avoid having to see the accused				✓	
Use of expert evidence for example on Rape Trauma Syndrome				✓	
Prohibition on issuing corroboration warnings based on the doctrine of recent complaint				✓	
Reviewing law on rape, eg re. sexual history evidence and types of rape				✓	
Reforming defendant's right to cross-examine personally				✓	
Reviewing policies on therapy before trial, further investigation of the contamination issue etc.	✓	✓	✓	✓	✓
Reviewing policies on compensation					✓
Improving enforcement of civil sanctions (eg. injunctions)					✓
Improving information given to victims	✓	✓	✓	✓	✓

Section 5: **Conclusion**

The definition of vulnerable and intimidated witnesses adopted will be important in determining whether those in most need of special assistance and support receive it. The literature review focused on three main groups: intimidated witnesses, those with mental and physical disabilities and illnesses, and victims of special offences. These groups were chosen because there seemed to be some consensus that these three groups should be considered vulnerable. Some others who might also be seen as vulnerable were excluded. For example, child witnesses were not examined because covering this sizeable literature would have been impractical given the time available. The exclusion of some other groups (for example, the elderly) was due to the lack of literature found on their experiences as witnesses. Of course, the Review may identify different groups of vulnerable witnesses to those considered within this report.

Witness intimidation, examined in section 2, undermines both public confidence in the criminal justice system and its effectiveness. To recognise how serious it is, witness intimidation became a criminal offence in its own right in 1994. However, very little material was found on how witness intimidation is being tackled, both here and abroad. One reason may be the need for security (that is, to stay one step ahead of the offenders). Another reason may be general neglect of the issue of witness intimidation, which is now beginning to be redressed.

There is some evidence that witnesses with *disabilities and illnesses*, examined in section 3, may be more vulnerable to crime than other witnesses, for example because of greater dependence on others. They may also be vulnerable in relation to the criminal justice system. For example, people with disabilities or illnesses may find acting as a witness particularly upsetting or difficult.

Some of the definitions of vulnerable witnesses discussed in section 1 mention *special offences*, but only sex offences have been specified. Other possible special offences were examined in section 4. These included domestic violence and racially motivated crime. Hate crimes against sexual minorities could also be included: however, due to the lack of literature on this subject they were not considered in detail.

Numerous possible measures to improve the situation of vulnerable witnesses were identified within the report. These require varying levels of intervention: from simply providing witnesses with leaflets providing useful information to changing the law and redefining the responsibilities of the various criminal justice agencies.

It is also apparent that the different groups of vulnerable witnesses discussed have varying needs. Therefore some measures are specific to particular groups, such as the provision of female doctors for rape victims. Despite this there are also some areas of common ground, so some measures may be of value for more than one category of vulnerable witnesses. For example, pre-trial preparation has been raised for all three groups examined. Table 5 summarises the measures detailed and the groups who might benefit from them.

The cost implications of the various measures discussed will vary greatly. Some measures will be relatively cost neutral, such as clearing the court's public gallery to prevent witness intimidation. In addition, those cases where measures can be used for more than one group may be more cost-effective. However, the costs of special measures may increase over time. If the measures are effective, it seems plausible that reporting rates will increase. This may increase the total costs of the special measures, as more witnesses take advantage of them. It would also increase the workload of the various criminal justice agencies concerned. Nevertheless there may be economies of scale at some point.

A number of other considerations can be identified concerning the use of special measures for vulnerable witnesses. Many of these are largely practical concerns:

- how easy it is to determine vulnerability using the definition;
- whether all witnesses or just some (eg victims) should count as vulnerable;
- who should decide whether the witness meets the definition of vulnerability;
- whether and how the witness's views should be taken into account in defining vulnerability;
- whether particular measures should be granted as a right, whether there should be an assumption in favour of their provision, or whether they should be provided completely at the discretion of the various agencies;
- who should have responsibility for providing each of the measures. This might be given to specialist officers or units in each part of the criminal justice system, building on the specialist units that already exist in police forces for example[1];
- whether one agency should be given the task of coordinating the various measures; and
- whether use of the measures recommended will be monitored or evaluated.

Other considerations concern the implications of particular measures for justice. For example, granting witness anonymity has been considered for all three groups examined by the report. The arguments in favour of this approach are that it would reduce trauma for the witness and help prevent intimidation. However, this raises issues about the defendant's ability to defend him/herself, and whether juries might draw adverse inferences.

Similar concerns are raised by the idea that the defendant's right to cross-examine witnesses personally (in the absence of legal representation) should be curtailed in certain cases (eg. in rape cases).

Finally, it has been observed that some of the measures discussed may improve a witnesses performance in court. This raises the issue of whether witnesses should have a right of appeal against decisions about whether they are vulnerable, or concerning the provision of particular measures.

[1] *Kent County Constabulary already has a Vulnerable Victim Coordinator (Law Society Mental Health and Disability Sub-Committee submission to the Review, 11/9/97).*

Table 5: Summary of potential measures

Measures	Category of Vulnerable Witness		
	Intimidated witnesses	Witnesses with disabilities /illnesses	Victims of special offences
Minimising information given over radio identifying witnesses	✓		
House-to-house calls on neighbours	✓		
Inviting witness by phone to attend station to make statement	✓		
Surveillance operations	✓		
Employing professional witnesses	✓		
Raising awareness of witness intimidation	✓		
Protective custody	✓		
Reviewing admissibility of evidence of frightened witnesses	✓		
Reviewing penalties for witness intimidation	✓		
Reviewing penalties for frightened witnesses	✓		
Providing transport to and from work, shops etc.	✓		
24 hour police protection	✓		
Long-term relocation and possibly changing of identity	✓		
Improved education to increase reporting (of both witnesses and service professionals		✓	
Creating/reviewing formal policies for professional care institutions to encourage identification of incidents as criminal, encourage reporting and set out referral process		✓	
Raising awareness of increased vulnerability and tackling myths		✓	
Creating a legal requirement on service professionals to report allegations of crime		✓	
National guidelines for professional carers and care agencies on reporting		✓	
Structural changes to police stations		✓	
Provision of communication aids - both technical such as induction loops and human such as interpreters		✓	
Improved training to identify communication problems		✓	
Guidelines to assist identification of people with disabilities/illnesses		✓	
Guidelines or information to assist prosecutors		✓	
Removal of wigs and gowns		✓	
Prohibition on issuing corroboration warnings simply on basis that witness has a learning disability		✓	
Prohibition on issuing corroboration warnings based on the doctrine of recent complaint	✓ (sex)		
Reviewing law on rape			✓ (sex)
Reviewing policies on compensation			✓ (sex)
Improving availability of female police surgeons			✓ (sex)
Training police surgeons eg. on Rape Trauma Syndrome			✓ (sex)
Provision of washing facilities			✓ (sex)
Removal of some unnecessary procedures eg. routine plucking of pubic hair			✓ (sex)
Routine medical follow-ups			✓(sex)
Prohibition on use of corroboration warnings based on doctrine of recent complaint			✓ (sex)

Table 5: Summary of potential measures *(continued)*

Measures	Category of Vulnerable Witness		
	Intimidated witnesses	**Witnesses with disabilities /illnesses**	**Victims of special offences**
Improving speed of police response to domestic violence calls			✓ (dom violence)
Training of operational officers on domestic violence, eg. pro-arrest guidance, support available from other sources such as refuges			✓ (dom violence)
Issue police officers with aide memoirs about their powers and victims' rights			✓ (dom violence)
Establishing specialist units/officers			✓ (dom violence)
Improving staffing of existing specialist units, improving status/understanding by short-term attachments of uniformed officers to units			✓ (dom violence)
Improving enforcement of civil measures			✓ (dom violence)
Interpreters/translating advice etc. into minority languages			✓ (eth minorities)
Increased recruitment of ethnic minorities			✓ (eth minorities)
Training to counter discrimination, for eg. covering cultural differences			✓ (eth minorities)
Improving public consultation			✓ (sex & eth minorities)
Creating formal anti-discrimination policies			✓ (sex minorities)
Reforming laws relating to sexual minorities			✓ (sex minorities)
Situational crime prevention			✓ (repeat esp)
Use of expert evidence		✓	✓
Use of specialist skills for interviewing/cross-examination, supplied by experts or through training, perhaps involving specialist officers etc.		✓	✓
Requirement for prosecutors to meet witness before deciding on their competence		✓	✓
Reviewing policies on therapy before trial, further investigation of the contamination issue etc.			✓
Training on interview/cross-examination technique, Rape Trauma Syndrome etc. for all cjs personnel or some specialist personnel at all stages		✓	✓
Creating a right of appeal against CPS decisions		✓	✓
Meetings between victims and prosecution before trial		✓	✓
Loan of a personal alarm	✓		✓
Increasing police patrols in witness's area	✓		✓ (repeat vics)
Requiring officers to ask witnesses if they have been intimidated/are vulnerable for some reason	✓	✓	✓
Consideration of accessibility and comfort in deciding location of interview	✓	✓	✓
Taping/videoing interviews	✓	✓	✓
Screens/mirrors/video for identification parade	✓	✓	✓
Guidance on spotting signs of intimidation/vulnerability	✓	✓	✓
Pre-trial preparation	✓	✓	✓
Pre-trial hearings or written depositions to avoid/reduce time in court	✓	✓	✓
Keeping witness on standby for appearance	✓	✓	✓
Screens, CCTV and voice distorters	✓	✓	✓
Press reporting restrictions	✓	✓	✓

Table 5: Summary of potential measures *(continued)*			
Measures	**Category of Vulnerable Witness**		
	Intimidated witnesses	**Witnesses with disabilities /illnesses**	**Victims of special offences**
Not identifying the witness in court	✓	✓	✓
Clearing the public gallery/issuing warnings to public in gallery	✓	✓	✓
Friend in court schemes	✓	✓	✓
Structural changes to court design, eg. separate waiting facilities	✓	✓	✓
Reforming defendant's right to cross-examine	✓	✓	✓
Emergency relocation	✓	✓	✓
Improving information given to witnesses	✓	✓	✓
Provision of witness packs giving details of support available etc.	✓	✓	✓

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SUMMARY OF REPRESENTATIONS MADE TO THE WORKING PARTY

Annex B: **Summary of representations made to the working party**

1. CLASSIFICATION OF VULNERABLE OR INTIMIDATED WITNESSES

CLASSIFICATION	COMMENTS	ORGANISATION
	Scheme should cover: all children; adults with learning impairments; adults with physical impairments; some adults from ethnic minority groups (e.g. those who have suffered racism or where English is not their first language); adults with mental health problems; and the elderly.	Dr Helen Wescott (Open University) and Professor Graham Davies (Leicester University).
	Should be defined as : those suffering from mental illness or severe stress, though competent to give evidence ; very young or old; alleged victims of violent relationships; former partners of violent criminals (especially drugs offenders); victims of sexual offences (both male and female); and persons giving evidence about violent or anti-social neighbours.	British Association of Women Police
	Any witness is potentially vulnerable but most at risk are: those living alone; disabled; elderly; children; and those living near the defendant.	League of Jewish Women (LJW)
	Should include: characteristics of victim; potential for intimidation; and the offence or civil wrong.	Manchester Housing
	Main groups are: women; children; elderly; those living alone; mentally disordered or ill; domestic violence victims; those involved in drugs trade, smuggling or terrorism.	Magistrates' Association
	The following groups apply: witnesses who are or may be subject to any form of physical, verbal or other intimidation; children; disabled (where the disability makes it difficult to give evidence); people who do not have English as a first language; people from communities who do not have good relations with the police who may experience peer pressure if they co-operate with police enquiries.	MSF

	Vulnerable should cover: those intimidated by defendant; children; some disabled; victims of sexual or violent crimes especially the elderly; possibly hearing impaired and those who do not have English as a first language.	National Council of Women.
	Victims of domestic violence clearly fall within the definition.	Women's Aid Foundation (WAF)
	Lack of information about domestic violence is a problem in civil family proceedings and this may impact on criminal proceedings.	Ditto.
	Two dimensions: - the type of offence (victims of interpersonal violence e.g. child abuse, domestic violence, sexual offences); and - characteristics of witness (children, people with disabilities or whose first language is not English, elderly). Also, victims who are vulnerable to having their credibility found wanting.	Dr Liz Kelly, Director of Child and Woman Abuse Studies, University of North London.
	Increased access to justice for victims of child abuse.	Sunderland Echo
	Classification should be replaced by the principles of non-discrimination .i.e. equitable access to justice should not be denied to people with disabilities unless they cannot, given all possible support, communicate an accurate account of events.	Dr Christopher Williams, University of Birmingham: Invisible Victims
	Review should bear in mind the Law Commission's definition of vulnerable people in its 1995 report on Mental Incapacity.	Mental After Care Association. (MACA)
	Identification of vulnerability should focus on the witness' individual needs and specific problems (e.g. communication) rather than by applying definitions of psychological categories or clinical conditions; this avoids stereotyping.	Law Society

2. ALL VULNERABLE WITNESSES

STAGE	COMMENTS	ORGANISATION
ALL	There should be multi-agency support for vulnerable and intimidated witnesses 24 hours a day. Police will be aware of vulnerability first and should declare them as vulnerable and report to other relevant agencies	British Association of Women Police. Magistrates' Association; Justices' Clerks' Society; LJW
	POLICE/ CPS to keep witness informed of progress of cases and outcome.	British Association of Women Police; LJW; National Council of Women; Magistrates' Association; CPSA; CRE; Women Against Rape (WAR).
	There should be national standards and detailed guidance covering the treatment of vulnerable witnesses at all stages.	Law Society
	All agencies dealing with witnesses should develop and publish codes of practice which contain clear written standards of service which witnesses can expect	JUSTICE
	There should be access to language interpreters throughout the process, including for defence witnesses. Costs to be met by the court, CPS or legal aid.	NACRO
	Promote the *National Standards of Witness Care* and local witness charters.	National Council of Women.
	The *National Standards of Witness Care* to be revised to make it clear that: • they apply to all witnesses including ethnic minorities; • where difficulties arise with language, the problems lie with police understanding and not with the witness (it should stress the need to provide interpreters as soon as possible); • the police response to racial incidents should be the same as any other reported crime i.e. to take the appropriate action in relation to the information provided; • the Witness in Court leaflet is available in ethnic minority languages [it is printed in Bengali, Gujarati, Punjabi, Mandarin & Urdu]; and	CRE.

	• there should be training for the police and other agencies who will be involved with ethnic minority witnesses and racial incidents.	Last point also supported by NACRO
	Vulnerable witnesses should be allowed to have a supporter with them at all stages.	JUSTICE
	There should be a statutory Commission for Victims of Crime which would deal with victims and witnesses in all aspects of criminal and civil justice by: • acting as a reference point for complaints; • reviewing the experience of victims and witnesses and making recommendations; • examining legislation, codes of practice or standards relating to victims or witnesses and making recommendations.	JUSTICE
	Information should be provided on alternative courses of action which may be taken if the CPS decide not to pursue a prosecution.	Recommendation from the 1995 Law Society/MENCAP seminar.
INVESTIGATION/ PRE-TRIAL	Earlier and better identification of vulnerable witnesses; all agencies to be informed as soon as possible.	Magistrates' Association.
	Counselling or other treatment should never be withheld for victims pending their possible future involvement in the criminal justice system.	JUSTICE
	Victims of domestic violence have been discouraged by lack of interest by police officers - unless they make contact with an informed person who can refer them to local domestic violence units.	WAF
	Bail conditions should be set to protect witnesses and the witness consulted and informed of them.	CRE; JUSTICE;WAF
	Witness information sent out by the court should seek details of any difficulties or needs which the witness may have in giving evidence.	JUSTICE
	Greater emphasis should be placed on evidence independent of the victim's statement in cases of domestic violence	WAF
	There should be adequate consultation and notice over hearing dates.	CPSA

	Provide information about the criminal justice system at an early stage, and updates on progress.	Justices' Clerks' Society; Magistrates' Association.
	A pre-visit to the court should be offered and arranged.	National Council of Women; Magistrates' Association; MENCAP; JUSTICE.
	The vulnerable witness should meet the prosecution team beforehand.	Kelly; CRE; JUSTICE.
	There should be a basic information pack about what the witness should expect at trial, including what they should do if they are intimidated.	CPSA
	Information should be provided in the main ethnic minority community languages. Also consider greater use of audio and video tapes with information.	NACRO
	There should be a reduction in the time vulnerable witnesses must wait before the trial.	LJW; WAF
	Better use should be made of plea and directions hearings to ensure the judge is aware of the needs of vulnerable witnesses e.g. the need for screens, informal dress, expert evidence, fast-tracking the case, or fixing the trial date.	1995 Law Society/ MENCAP seminar.
AT COURT	There should be further funding for the Crown Court Witness Service.	CPSA
	Witness Service to be extended to all courts.	National Council of Women; Justices' Clerks' Society; Magistrates' Association; JUSTICE
	If the family needs to accompany the vulnerable witness, their expenses should be paid.	CRE
	Child care should be an element of witness expenses.	JUSTICE
	There should be separate waiting areas for prosecution witnesses.	JUSTICE;WAF

	Review intimidating cross-examination to see how this could be regulated, and at what point the judge should intervene (likely that practice directions will be required).	JUSTICE
	There should be protection from aggressive or oppressive questioning in court.	National Council of Women. MSF Union.
	All courts should have live TV links.	JUSTICE
	Witness should be allowed to take their statements into the courtroom with them.	Magistrates' Association.
	Witnesses should be given a choice to sit at a table in a relaxed manner to give their evidence [as in the Youth and Family Courts].	Magistrates' Association.
	The judges' rules in relation to defendants should be extended to cover witnesses. [N.B. The Codes of Practice under the Police and Criminal Evidence Act 1984 replaced earlier judges' rules relating to defendants.]	Disabled Peoples' International
	Court to be given a report of the effect of the crime on the victim.	National Council of Women.
AFTER TRIAL	Where a compensation order is made by the court, the money should be paid immediately by the court and recovered from the offender later.	JUSTICE

3. WITNESS INTIMIDATION

STAGE	COMMENTS	ORGANISATION
ALL	CPS should be placed under a duty to prosecute if they have any evidence to sustain a conviction under section 51 of the Criminal Justice and Public Order Act 1994.	Magistrates' Association
	CPS should vigorously prosecute all offenders who attempt intimidation.	British Association of Women Police
	Need to recognise that it is not just prosecution witnesses who may be intimidated.	Justices' Clerks' Society.
	Police should be required by law to provide appropriate protection.	Magistrates' Association

	The operation of witness protection schemes should be closely monitored by an independent agency to ensure even handed treatment.	MSF Union.
	Civil justice process should be reviewed as well: - civil courts should have similar facilities and procedures to tackle intimidation; - amend s152 of Housing Act 1996 to cover witness intimidation; - amend s51 of the Criminal Justice and Public Order Act 1994 to cover civil proceedings; and - anti-social behaviour orders should cover witness intimidation in civil proceedings	Manchester Housing
	Witness intimidation is often buttressed by a general feeling of community intimidation and a perception that the legal system is not strong enough to protect them from reprisals. Improved police/community relations would help.	CPSA
	Alarm schemes are insufficient for local needs - they should be the rule rather than the exception.	Kelly (North London University).
INVESTIGATION/ PRE-TRIAL	More one way mirrors at identity parades at police stations.	CPSA
	Police need to win confidence of witnesses by listening and reacting at speed to possible intimidation.	Justices' Clerks' Society
	Greater consideration of bail conditions on defendant's release from police custody.	Magistrates' Association; National Council of Women.
	Bail conditions to be reviewed immediately intimidation is reported.	National Council of Women.
	There should be a tick box on police/CPS forms to indicate that there is reason to fear intimidation.	Magistrates' Association
	The imposition of a non contact bail condition should be communicated to the witness so that s/he can report any breach immediately.	Magistrates' Association
	Bail conditions should not be seen as a substitute for other legal remedies: e.g. protection order under Part IV of the Family Law Act.	WAF

	It should be mandatory for the CPS to inform the magistrates of intimidation when bail is addressed in court.	Magistrates' Association
	Addresses of prosecution witnesses should not be available to the defence.	Magistrates' Association; National Council of Women
	Witness details should not be given to defence unless it is necessary, and only to the defence solicitor, not the defendant.	Ba'hais
	Victims of domestic violence should be given full support and referrals to suitable refuges and shelters.	NACRO
	Fast-track methods should be available to deal with cases of domestic violence.	Magistrates' Association
	Automatic issue of civil protection orders relating to vulnerable witness when defendant is charged: many witnesses are having to pay up to £2,000 for civil protection orders.	Kelly (North London University).
AT COURT	Separate secure areas for witness and their families/friends.	NACRO; Ba'hais; CPSA, WAF;WAR; Magistrates' Association.
	There should be court staff on duty at the entrance and in the waiting areas open to the public.	JUSTICE
	All courts to review staff provision (including use of uniformed police officers when necessary) to ensure this is adequate to deal with intimidation.	JUSTICE
	Guidelines for judges on balancing needs of open justice with controlling intimidation in court.	CPSA
	Proper witness care facilities at all courts.	British Association of Women Police
	Trained person who knows court procedures to stay with vulnerable witness during proceedings.	CPSA

	Different arrival times at court for prosecution and defence witnesses	Ba'hais
	Every court to have separate entrances for defence and prosecution witnesses.	Magistrates' Association
	Every court to have one court room fitted with a screen to provide physical/visual protection for witnesses.	Magistrates' Association
	Evidence should be admissible by video or TV links.	Magistrates Association; NACRO; National Council for Women.
	Consider whether there needs to be protection to and from court, and during lunch times.	Magistrates' Association.
	In domestic violence cases, the court should be cleared of the defendant's supporter and the press but a victim advocate should be present to support victim.	WAF
	Site witness box to prevent intimidation from defendant and/or his family and friends.	Magistrates' Association; JUSTICE
	Witness should not state address in open court.	JUSTICE;WAR
	Court should have power to order that the witnesses preserve anonymity, and be given police protection for a specified period.	Magistrates' Association.
AFTER TRIAL	Witness to be informed about arrangements for release and the offer of support.	JUSTICE

4. WITNESSES WITH MENTAL HEALTH PROBLEMS

STAGE	COMMENTS	ORGANISATION
ALL	CPS should not drop cases as a result of psychiatric reports prepared by psychologists who have never seen the victim and report on the basis of medical records.	MIND
	Victims of violence must no longer be labelled as unreliable witnesses and prosecutions dropped on the grounds of their medical history.	WAR
	The review should bear in mind the fluctuating nature of many mental health problems i.e. a person may be well and articulate one day and unwell and out of touch another, support which is offered to someone with learning disabilities cannot just be transferred to someone with mental health needs.	MACA

5. WITNESSES WITH PHYSICAL DISABILITIES

STAGE	COMMENTS	ORGANISATION
ALL	Disabled witnesses should be given a free choice as to whether they want a communication facilitator, and who it is.	Disabled Peoples' International (DPI)
	All members of the criminal justice system to undergo training in disability equality.	DPI; British Deaf Association (BDA)
	There should be adequate funding for training for qualified sign language interpreters.	BDA
	Ensure that a deaf witness is always addressed directly.	BDA
	Speech therapists can provide reports, act as expert witnesses and have been taken on as facilitators or interpreters. But there is resistance in some NHS Trusts to their involvement.	Action For Dysphasic Adults. (AFDA)
	There should be enforceable guidelines for the treatment of witnesses with disabilities, drawn up with the involvement of qualified disabled people.	DPI

	Witnesses who are deaf should be regarded as vulnerable, and this should include the deafened, hard of hearing, deafblind etc.	DPI
	If a deaf witness does not understand British Sign language, ensure that a worker trained to work with the deaf is in attendance.	BDA
	Skilled help is available to help a witness with multiple sclerosis including speech therapists, occupational therapist and neurologists. Seeking skilled advice is essential.	Multiple Sclerosis Society (MS)
	There should be a code of ethics for communication facilitators.	DPI
	It should never be assumed that the communication facilitator should be a family member.	DPI
INVESTIGATION PRE-TRIAL	Public areas in police stations should be fully accessible to people with disabilities.	Disabled Peoples' Association
	During the police interview, ensure that a deaf witness can see everyone in the room and has understood their roles.	BDA
	CPS to inform courts of special needs of witnesses.	Law Society
	Some cases fail because there is insufficient time to brief on the problems and ways of overcoming them.	AFDA
	Information about going to court as a witness should be provided in Braille, tape and large print.	Disabled Peoples' Association
AT COURT	A designated person should ensure that a blind or visually impaired person is fully orientated when in court.	Disabled Peoples' Association
	Witnesses with disabilities to be accompanied outside court.	DPI
	There should be clear guidance on the trial judge's discretion to use special arrangements.	Law Society
	Witnesses with disabilities must be given sufficient time to express themselves.	DPI

	Responsibility for providing all sign language interpreters used in proceedings and the payments of fees should rest with the court.	BDA
	Should be greater use of other communication techniques in cross-examination e.g. use of pictures, maps or notebooks.	AFDA
	Consideration should be given to the swearing-in of sign language interpreters etc.	DPI
	Video evidence should be admissible; as should evidence on audiotape from the blind and visually impaired.	DPI

6. PEOPLE WITH LEARNING DISABILITIES

STAGE	COMMENTS	ORGANISATION
ALL STAGES	There should be training for police, CPS, solicitors, barristers and judges on issues relating to witnesses with learning disabilities etc.	National Association for the Protection from Sexual Abuse of Adults and Children with learning Difficulties (NAPSAC) ;VOICE UK
	People with learning disabilities should be treated according to their individual needs rather than as a homogeneous group.	VOICE UK
	Service providers need to be prepared to provide high levels of support or sanctuary in cases where the witness with learning disabilities is giving evidence against close family or carers.	MENCAP
	Working Group should be aware of Signalong - a sign supporting system for those with learning disabilities and communications difficulties.	The Signalong Group
	An independent advocate should be appointed for witnesses with learning disabilities (similar to the role of the guardian a*d litem* in civil proceedings).	NAPSAC
	Ensure that they give evidence in the least threatening atmosphere possible at all stages.	VOICE UK

	Witness should receive consistent support from a lay advocate or appropriate adult throughout the case.	Williams *Invisible Victims*
INVESTIGATION/ PRE-TRIAL	Both care services and the police should encourage reporting of crimes and respond positively to all allegations of abuse. It should be mandatory that incidents which occur in care are reported to the police.	Williams *Invisible Victims*
	All social services and relevant ages should develop policies which ensure police investigations are not impeded.	VOICE UK
	Staff caring for those with learning disabilities need to know who to contact at the police station: there should be a named liaison officer.	Williams *Invisible Victims*
	Training for the police should cover sources of expert help and advice to which they can look.	Law Society
	Early identification of people with learning difficulties is important so that properly trained people can deal with them.	MENCAP
	Interviews should always be carried out by police officers trained in relevant interviewing techniques and in recognising the effects of learning disability.	Law Society
	Clear guidance to the police on dealing with victims with learning disabilities.	VOICE UK
	Appropriate adults should attend interviews.	Law Society, MACA
	Early involvement of those who have the skills to assist with communication e.g. advocates, family members and professionals.	MENCAP
	Greater use of professionals who are used to working with vulnerable witnesses to provide psychotherapeutic support and a credible report on the level of trauma suffered.	RESPOND
	Guidance is needed on standards of pre-trial counselling.	VOICE UK

	There needs to be a formal process to assess the impact which any learning disability may have on the ability of the witness to give evidence. This should be done by a professional, possibly through a series of interviews.	RESPOND
	Interviews with those with learning disabilities should be video-recorded and the CPS should be involved at an early stage to advise on evidential requirements.	Law Society
	There should be less emphasis placed on the oral testimony of the witness and more (inc. resources) on traditional policing methods (e.g. forensic science).	Wescott and Davies
	A decision not to pursue an inquiry on the grounds that a witness has learning disabilities should not be taken by individual 'front line' officers.	Williams
	Police should pursue a case even when the victim cannot make a formal complaint.	Williams.
	There should be an early assessment of the degree of difficulty the witness may experience in giving evidence (with appropriate adult present) covering speech, hearing, sight, other physical difficulties as well as understanding.	NAPSAC
	Assessments of IQ should not, alone, be used to determine competence.	Williams
	There should be detailed guidance on assessing competence e.g. the Law Society and the BMA have produced joint guidance for doctors and lawyers setting out the legal test of capacity and how these relate to medical assessment and diagnosis: The Assessment of Mental Capacity.	Law Society.
	There should be an assessment of the ability of the witness to deal with questions before any decision is taken to subject them to cross-examination.	RESPOND
	We would counsel a degree of caution when considering whether an individual with learning difficulties should face a court room: some of our clients have been further traumatised by their experiences at court.	RESPOND

	Judges should have the benefit of specialist guidance to enable witnesses to give best evidence.	VOICE UK
	Should be a pre-court visit and clear explanation of procedures, with an opportunity to meet prosecution barrister beforehand.	RADAR; VOICE UK
	CPS should seek expert advice on ways of overcoming the effects of learning disabilities.	Law Society
	Greater use of 'Books beyond Words'.	VOICE UK
	CPS to ensure, if the competence of a witness is in doubt, expert evidence is available for consideration by the judge.	Law Society
	Barristers instructed by the CPS should meet the witness beforehand to explain their role.	Law Society
	Strict application of the CPS Code for Crown Prosecutors often results in cases being dropped, further guidance is required on the way the code is applied to avoid discrimination against people with learning disabilities.	Law Society
	Delays in bringing a case to court may prevent some witnesses with learning disabilities from giving best evidence; reduce waiting times.	Williams; VOICE UK
	Judge should call, at the plea and directions hearing, for a written report from relevant experts to advise on any special difficulties the witness may face in giving evidence and how this may be addressed.	JUSTICE
	Refresh witness' memory with statement or tapes.	VOICE UK
AT COURT	Witnesses with learning disabilities should have support from people experienced with learning difficulties throughout trial process.	NAPSAC
	Improved waiting/separate facilities at courts.	Wescott and Davies; VOICE UK.
	There is a role for the appropriate adult in supporting the witness in the witness box.	VOICE UK

	People with learning disabilities should be presumed to be able to give evidence unless it is shown they cannot. This may involve changing the way in which evidence can be given e.g. by allowing leading questions.	Law Society and MENCAP seminar report. RESPOND also supported greater scope for leading questions.
	There should be a presumption that witnesses with learning difficulties are competent (both in law and practice) and the burden of proof for determining otherwise should rest with the party challenging competence.	Williams
	The oath is an archaic, illogical aspect of court practice which works against the interests of people with learning difficulties. Recent Appeal Court rulings suggest that such witnesses could make a personal affirmation written in simple language which they can understand. This point should be clarified and appended to JSB guidelines.	Williams
	Admit unsworn evidence.	VOICE UK
	Evidence on the benefits of removing wigs is mixed. Some people with learning difficulties, having seen court room dramas, expect wigs and are thrown by their absence.	MENCAP
	Removal of wigs and gowns, if viewed as helpful by the witness.	VOICE UK
	Judges should give directions to barristers on cross examination which aims to confuse rather than to clarify.	NAPSAC, MENCAP, VOICE UK
	Adults should be able to give a statement by video, with TV links in the court for cross-examination.	NAPSAC, MENCAP, VOICE UK
	In some cases, video evidence , or a report written by a professional will be the only way in which evidence can be given without re-traumatising the witness.	RESPOND
	Greater use of evidence in camera.	VOICE UK
	Greater use of screens.	VOICE UK

	Reducing levels of intimidation experienced in court is preferable to the widespread use of video links.	Williams
	Re-consider Pigot: rules for judges on unfair cross examination, also neutral examiner.	VOICE UK
	Implement full Pigot.	Justice Family Law Panel
	Psychological assessments of the reliability of a witnesses evidence can be problematic, not least because the decision about whom to assess is arbitrary, and can itself cast doubt about the reliability of an individual in the mind of the jury. Careful summing up of the evidence by the judge is preferable. [N.B. Case law provides that expert evidence on the ability of the proposed witness to tell the truth must be taken in the absence of the jury (Deakin [1994] 4 All ER 769)].	Williams
AFTER TRIAL	The practice of deducting CICA or court compensation from benefits should be reviewed.	Williams

6. RAPE VICTIMS

STAGE	COMMENTS	ORGANISATIONS
ALL STAGES	Witnesses in rape and sexual assault cases should be categorised as vulnerable.	Cleveland Rape and Sexual Counselling Service; First Net; Rape Crisis Federation.
	Greater jurisdiction to deal with victims raped by British citizens overseas.	Sawardstone Media
	Further funding for Rape Crisis Centres.	Rape Crisis Federation; London Rape Crisis; South Essex RC; First Net; Doncaster RC
	Good practice should apply to the male victims of serious sexual offences.	London Rape Crisis

	A contact should be nominated who can advise and support the witness throughout the case.	Cleveland Rape and Sexual Counselling Service; London Rape Crisis; First Net
	Greater use of panic alarms to police stations.	Cleveland Rape and Sexual Counselling Service
	Improved monitoring of CPS attrition rates.	South Essex RC.
	Create Victims pack.	Sawardstone Media
INVESTIGATION/ PRE-TRIAL	Immediate expertise should be available when a rape is reported.	Rape Crisis Federation
	All police stations should have properly furnished examination suites.	London Rape Crisis
	Women only reception centres at police stations; women only officers at interview examination to be carried out by women police doctors.	Rape Crisis Federation; London Rape Crisis; Cleveland; Milton Keynes Rape Crisis; South Essex
	Police doctor's role should be extended to provide health care for victim at the time of the examination.	South Essex RC
	Victim to be offered legal representation (who is experienced in rape cases).	Rape Crisis Federation; Cleveland, Milton Keynes, and London RCCs.
	Offer referral to local Rape Crisis Centre (Victim Support not necessarily experienced in rape cases).	Rape Crisis Federation
	All women police officers and doctors to receive training in rape crisis.	Sawardstone Media; London RC, First Net

	Police should be able to take statement in victim's home.	London RC
	If women report cases to specialist women's groups, they should be able to collect evidence, including medical evidence (which should be admissible).	London and Milton Keynes RC
	Identity parades should be held behind mirrored glass or by video identification.	Sawardstone Media; London, and North Staffs and South Cheshire RCC,
	There should be adequate medical follow-up.	Sawardstone Media
	Pre-trial counselling should not prejudice the victim's case.	South Essex RCC
	Police should stop the practice of "no-criming".	Doncaster Rape and Sexual Abuse Counselling Centre; WAR
	Progress reports by the same officer.	London RCC
	No bail if the defendant has previously been accused of sexual offence.	South Essex RCC
	Establish a specialist rape prosecutions team in the CPS.	Rape Crisis Federation; Doncaster, North Staffs, Tyneside, London and South Essex RCCs
	CPS to improve linking of reported sexual offences.	South Essex RC
	CPS and prosecuting counsel should receive training in rape issues.	Leicester RC
	Pre-trial Court visit and meetings with prosecution team.	Sawardstone Media; First Net; Rape Crisis Federation; Leicester and North Staffs RCCs
	Reduced waiting time to trial.	Leicester, Tyneside, Cleveland and South Essex RCCs
	CPS to explain why a case has been dropped.	Cleveland

	Right to appeal against CPS decision to drop case.	Cleveland
	Listing of court dates to reflect needs of witness for counselling and support.	London RCC
AT COURT	Training for judiciary in rape crisis.	Doncaster, Leicester, Milton Keynes and South Essex RCCs, First Net
	Judges should need a 'licence' to hear a rape case.	First Net; Milton Keynes RCC
	Training for courtroom personnel in rape issues.	RCCs
	Named person at court to meet witness.	South Essex RCC
	Separate waiting areas.	First Net; London, Cleveland, South Essex and Tyneside RCCs
	Victim's address and other identifying details should not be given out in court.	Cleveland and South Essex RCCs
	Advocate to sit near witness when she is giving evidence.	South Essex RCC
	Use of screens or possible use of one-way glass to shield witness from defendant.	Sawardstone Media; First Net; Rape Crisis Federation; Tyneside, North Staffs and Milton Keynes RCC
	Video, live TV links should be available.	Rape Crisis Federation; First Net; London, Cleveland and South Essex RCCs
	Adult victims should be present at the trial.	WAR

	Written statement taken under oath should be admissible.	Sawardstone Media; Rape Crisis Federation; London RCC
	No recording should be used in court as juries do not understand rape trauma.	Sawardstone Media
	No evidence of complainants previous sexual history to be admissible.	Rape Crisis Federation; Cleveland, Milton Keynes and South Essex RCCs; Sawardstone; WAR
	No cross examination on previous sexual history.	Doncaster and Cleveland RCCs; First Net
	No cross examination by the defendant.	All RCCs who responded; Sawardstone Media; Townswomen's Guild.
	In cases of unrepresented defendants, trial judge should put questions to witness.	London RCC
	Multiple cross examination should be curtailed.	North Staffs RCC
	Greater recognition of rape trauma syndrome.	Milton Keynes RCC
	The time gap between incident and reporting should not be seen as detrimental to the prosecution's case.	Milton Keynes RCC
	Defendant's previous misconduct should be admissible, including charges and acquittals.	Cleveland and South Essex RCCs
	Six year rule on limitations should not apply.	South Essex RCC
	Victims of serious indecent assault should have anonymity in the press.	London RCC
	Greater emphasis on how the victim has been affected.	First Net
AFTER TRIAL	Recognition that the victim may have difficulty returning to work (greater flexibility in benefits).	Sawardstone Media

	On-going support for victim.	All RCCs.
	Support for victim's family.	RCCs.
	Victim to be notified if convicted offender is released from custody.	South Essex RCC
	Criminal injuries compensation for rape victims is too low.	South Essex RCC; WAR

SUMMARY OF RECOMMENDED LOCAL SERVICE LEVEL AGREEMENTS, INTER-AGENCY WORKING AND GUIDANCE

Annex C: Summary of recommended local service level agreements, inter-agency working and guidance

Recommendation 2 (paragraph 4.18)

As part of their new community safety responsibilities, the police and local authorities should take account of the need to develop measures to tackle the problem of witness intimidation, if this is identified as an issue of concern in the local crime and disorder audits.

Recommendation 3 (paragraph 4.21)

The Trials Issues Group should develop a national framework for inter-agency protocols for dealing both with witness intimidation and vulnerable witnesses. This could then be developed through Local Service Level Agreements.

Recommendation 6 (paragraph 4.33)

Good practice guidance should be developed by ACPO and the Local Government Association in relation to the arrangements needed to provide formal witness protection.

Recommendation 11 (paragraph 4.51)

Good practice guidelines for the use of "professional witnesses" in criminal cases should be developed by the Local Government Association in conjunction with ACPO.

Recommendation 14 (paragraph 4.56)

When developing LSLAs, under the TIG Statement of National Standards of Witness Care, any arrangements for dealing with intimidated witnesses should complement and dovetail with arrangements for such protection before and after the trial.

Recommendation 15 (paragraph 5.4)

Consideration should be given to providing better education for professionals, carers and service users in the case of those who are potentially vulnerable or intimidated witnesses about recognising the symptoms of victimisation to enable them to be better able to recognise acts that may be criminal. The Group proposes that this should be taken forward by the Department of Health, in consultation with the Association of Directors of Social Services, the Local Government Association and relevant professional bodies.

Recommendation 16 (paragraph 5.9)

The ADSS proposals in relation to the abuse of vulnerable adults should be implemented taking into account the following factors:

(a) the inter-agency consultation should include representatives from the police and NHS

(b) that national guidelines should include a recognition that when abuse occurs a crime may have been committed and that there should be clear policies about reporting such incidents to the police as soon as practicable and in consultation with the victims.

(c) that crime reporting policies should include the following components:

- clear definitions of abuse and types of mistreatment and criminal offences
- indicators of abuse
- what should be reported to the police and at what stage and assisting the client to do so
- outline of the purpose and conduct of any internal investigation and arrangements for assisting a police investigation
- clear policies and procedures for reporting and dealing with allegations of abuse/offences by a member of staff.

Recommendation 21 (paragraph 5.23)

The Trials Issues Group, Witness Care Sub Group, in consultation with the Department of Health, the Local Government Association, the legal profession, the CPS and other organisations with relevant knowledge and expertise, should determine the best mechanism for delivering advice and assistance on the most appropriate means of interviewing and providing support for the witness.

Recommendation 30 (paragraph 6.45)

The TIG Witness Care Sub Group should consider the issue of the preparation of the vulnerable or intimidated witness for the court, including both the provider(s) of the service and the co-ordination role, with a view to developing national guidance which would be taken forward on the basis of Local Service Level Agreements.

Recommendation 32 (paragraph 6.50)

Consideration should be given by the Home Office to developing a memorandum of good practice for adult vulnerable witnesses, similar to that for child witnesses, to provide a national framework of guidance.

Recommendation 77 (paragraph 12.14)

Where practicable the agencies working in the criminal justice system should undertake joint training programmes to raise the awareness and, where relevant, to provide specialist knowledge of vulnerable and intimidated witness issues.

Recommendation 78 (paragraph 12.17)

A Steering Group should be established by the Home Office to carry out a costed training needs analysis of the Working Group's recommendations and this Steering Group should develop co-ordinated guidance and training templates for those working in the criminal justice systems. The group should include training professionals from the relevant agencies.

CAPE SCHEME

INFORMATION

Once you are involved in the Scheme further contact will be made with you and maintained throughout your involvement in CAPE.

Shown below is a list of useful telephone numbers with further space for details of other CAPE members to be added.

NORTHUMBRIA

If you see anything that needs urgent police attention, please phone 999.
For all other matters phone 214 6555.

INFORMATION CONTACT NUMBERS

Initiative Fenham 01426 211007

West End Police Beat Officers
0191 214 6555 ext 62359

My local CAPE members are

1 .....

2 .....

3 .....

4 .....

NORTHUMBRIA POLICE NEWCASTLE WEST

CAPE SCHEME

COMMUNITY AND POLICE ENFORCEMENT

INTRODUCTION

The CAPE scheme is designed to encourage witnesses to report incidents to the police and to make written statements which will result in the arrest and prosecution of the offenders.

This is a community based scheme which will involve you being actively supported by the police, Initiative Fenham, and local CAPE members.

This support will start from the moment you make a statement and join the scheme. There will be continuous support throughout your involvement in the case, which will continue even after the case has been to court.

This is a pilot scheme which has been initiated by officers from Newcastle City West Police Station in association with Initiative Fenham, a local community group.

CAPE

THE ROLE OF THE CAPE MEMBER

1. To provide written statements to the police in respect of witnessing a crime or the harassment of another scheme member and to give evidence in court if required.
2. To actively and positively support other scheme members by regular contact.
3. To maintain contact with the beat officers, Initiative Fenham and other members.
4. To actively encourage other residents in the area to participate in the CAPE scheme in order to increase membership.

Community
And
Police
Enforcement

THE ROLE OF THE POLICE

1. To respond to your telephone call and to obtain a written statement from you.
2. To inform you of the CAPE scheme and invite you to complete an application form.
3. Inform Initiative Fenham of your involvement in the scheme.
4. You will receive a personal visit from our local beat officer within 3 days.
5. We will provide you with direct link telephones, personal alarms and other equipment as and when it is required.
6. You will be advised of the progress of any case in which you have an involvement.
7. A police officer or special constable will accompany you from your home address to court. The officer will remain with you during your involvement with the case after which he or she will accompany you back to your home address.
8. We will maintain regular contact with you throughout your participation in the scheme.
9. We will provide you with information regarding a criminal activity in the CAPE scheme area.

THE ROLE OF INITIATIVE FENHAM

1. To contact the member within 24 hours by means of a personal visit or telephone call and thereafter by daily visits or contact as required.
2. To inform the witness of the details of other CAPE members nearby who will provide positive support at all times.
3. To circulate to members information and crime bulletins via the telephone or through the CAPE network
4. To maintain an up to date list of CAPE scheme members.
5. To recruit further members into the scheme.
6. To liaise closely with the police and other groups who are involved in the scheme.

CAPE

SALFORD WITNESS SUPPORT SCHEME

WHAT WE CANNOT DO:

- It is not possible for us to give you any legal advice
- We cannot, under any circumstances discuss your evidence, or that of anyone else involved in the case, prior to the hearing.

The Salford Witness Support Service is designed to ensure that witnesses are accorded the courtesy, respect and support that their active citizenship deserves.

Witness Services are also available at Crown Courts

PLEASE ASK FOR DETAILS

SALFORD WITNESS SUPPORT VOLUNTEERS

- **Trained volunteers are available and can offer practical/emotional support.**

If you require assistance from the Salford Witness Support Service prior to the court case, do not hesitate to contact me

Please ring or write to the address below:

Sue Forster

Witness Support Co-ordinator
c/o Safer Salford
Swinton High School
Sefton Road Swinton
M27 2DU

Telephone No. 0161 793 7333
OR
0161 839 0544.

Salford Witness Support Service

A Service provided by
The Salford Partnership

SALFORD WITNESS SUPPORT SERVICE

A HELPING HAND FOR WITNESSES

Safer Salford

Foreword

For justice to be achieved, help and support needs to be readily available to encourage witnesses to attend courts and give evidence. Unfortunately nowadays many are reluctant to become involved and this is often as the result of a bad experience either to themselves or to someone they know. I am therefore delighted that in the City of Salford this new initiative is being launched to provide practical support to witnesses both before and also when they need to attend court. The Salford Witness Support Service is intended to send out a message that witnesses will not be taken for granted and will receive good support when it is most needed. This service will complement the private accommodation now available at the Salford Magistrate's Court, by ensuring that the concerns of witnesses are kept to an absolute minimum. My police officers will do all they can to promote this new scheme and to keep witnesses aware of the progress of cases with which they are involved. This new service will, hopefully, improve what is seen by many witnesses as a harrowing experience and I, therefore, give it my total backing.

Chief Superintendant JOHN POTTS

Introduction

Some 4 years ago I had the unforgettable experience of being a main prosecution witness in a Crown Court trial. The lessons I learned from that experience have stayed with me to this day.

I received a letter requiring my attendance. I arrived in court somewhat hesitant and nervous. I had to sit opposite the defendant in the case, in a main waiting area. I received no contact from anybody until I was called into court I was given no support or preparation for what the proceedings would entail, nor contact after the case was finalised.

I found the whole experience impersonal, distressing and quite threatening, despite having some 20 years experience in the court service! I asked myself if I felt like that, how would someone who was a complete stranger to the judicial system feel?

Since then I have supported all initiatives which seek to ease the trauma involved for witnesses.

The package of support which the Salford Witness Support Service will deliver is unique not only in its content, but perhaps more importantly in its recognition of the important contribution that ordinary members of the public make to the judicial process.

Members of the public who are prepared to come forward to give evidence, have a right to expect courtesy, support, understanding and protection from the system which benefits from this act of public service.

In my view, the Salford Witness Support Service can provide a blueprint for similar projects nationally. As far as the Management Committee, of which I am a member, are concerned this is just the beginning, we intend to constantly strive to improve the service we offer to witnesses in Salford.

Terry McNeill
Clerk to the Justices Salford Magistrates Court

Chairman of the Management Committee

The Salford Partnership which includes Safer Salford (the successor body to the Home Office Safer Cities Project), Salford Police. Salford Magistrate's Courts and the City Council, have put together a package aimed at providing support to those people who wish to perform what is a public duty but are reluctant due to the threat or fear of intimidation.

In November 1994 a safe secure waiting room for vulnerable witnesses/ victims was opened at Salford Magistrates Court, this was initiated by Detective Inspector Michael Fisher of Salford CID with Terry McNeill, Clerk to the justices at Salford Magistrate's Court providing a room away from public areas and this was refurbished using grant funding from the then Salford Safer Cities Project

Within Salford's successful bid to the Single Regeneration Budget, funding has been secured to appoint a Witness Support Co-ordinator. Sue Forster was appointed and is responsible for raising awareness amongst those agencies who are in a position to support witnesses and to co-ordinate services available. Thus ensuring a structural support network is put in place which should increase community confidence.

I was born and raised in Salford and during my school years was exposed to the 'No Grassing' culture, where young people followed a code of honour which stated that if you were caught committing a crime you did not 'Grass' on your accomplices. This culture appears to have changed over the last few years and the term 'Grass' is now used to describe anyone who reports a crime and this includes victims, to the authorities and creates a feeling of fear.

I believe that any person who witnesses an offence being committed should feel confident in performing what is a public duty by reporting the incident to the correct authorities. These people should be accorded the respect they deserve and given support throughout the whole judicial process.

ANN WEIR
Assistant Co-ordinator Safer Salford

Chief Executive City of Salford

John Willis, Chief Executive of Salford City Council has commented that the City of Salford see the Salford Witness Support Service as a central feature in our work on Community Safety. The good practice' we are developing will help stabilise communities and strengthen the extensive work we are doing on a wide range of issues right across the City.

Salford is also leading the City Pride initiative to provide and implement a Witness Charter which has been instigated to further reflect the vital role of witnesses within the Criminal Justice System. The Witness Charter will ensure that witnesses are given the courtesy, respect and support that their active citizenship deserves. With the support of the community these 2 vital initiatives will contribute towards making Salford a safer city and in the process improve the quality of life of people who have invested a lot of time and effort in maintaining a vibrant community spirit

Introduction to Service

Sue Forster, *Witness support Co-Ordinator*

Witness intimidation

Witness intimidation is an issue which has received local and national publicity, however this typically focuses upon the violence or threats of violence against those individuals or their families who have entered the Criminal Justice System as witnesses in the more serious cases, whether this be murder, armed robbery, drug dealing or the like. Greater Manchester Police has a specialised Witness Protection Unit dedicated to the care of these people.

The above scenario is however the tip of the iceberg. Arguably a more serious problem, and one which undermines the whole Criminal Justice System, is the intimidation of entire communities, and the creation of an atmosphere which inhibits members of the public from doing their 'public duty' and giving evidence against the very people whose criminal activities so often make their lives a misery. It is indeed a fact that many people will not even phone the police when a crime is in progress, let alone give evidence. It is against this backdrop, particularly in some of our inner city estates, which allows young men in particular, to colonise areas and commit crime at will, very often in broad daylight and in full view of the public, with absolute confidence that no one will intervene.

The Salford Partnership is dedicated to fulfilling its role, in what must be a multi-agency approach, to providing a package of measures, to ensure a proper support network for witnesses. It is not acceptable that public spirited members of our community be kept ill-informed, be subjected to over-bureaucratic and impersonal systems, lack suitable contact points, and for those who get as far as court, to be expected to sit in the same room as the accused and his or her cronies.

Our aim is to build upon the success which we are now having in some areas. Not only should witnesses be properly cared for at court, but by ensuring that this is the case, many peoples' damaging experiences and perceptions will cease to be aired. It is presently the case that any 'bad experiences' which witnesses have, and which are subsequently reported back to the community, only serve to re-enforce the perceptions of other potential witnesses and their communities. Positive and impactive actions and publicity are needed to reverse this cycle.

As with all social problems witness intimidation cannot be dealt with in isolation and in turn, proper support for witnesses cannot be provided by one agency. As we have learned in other areas, the pooling of resources and working in partnership is the most realistic means of success.

The Salford Partnership has the will, enthusiasm, and determination to provide our citizens with a better deal than they have had in the past and take yet another step along the route of changing the bias and giving the vast majority of Salford people, the support and confidence they need in order to stand up against what is after all a small minority of criminals who believe they have the right to exert their power and control and intimidation over communities, thereby ruin peoples' quality of life.

Information re work of volunteers and lounge

The role of the Salford Partnership's witness support programme, is to create an atmosphere in which people are confident to report crime attend and give evidence in court (in any capacity) knowing that the necessary support is available and with restored feeling of public duty. Witnesses underpin the whole Criminal Justice System.

A Witness Suite is now available at Salford Magistrate's Court. This room. which provides privacy from the alleged offenders and his or her cronies, is staffed by volunteers, whose role it is to provide practical information and advice, and emotional support whilst at court.

More volunteers are currently being recruited to work in 'the field' with witnesses awaiting court, during prolonged trials, and importantly after court.

"Volunteers offer the most precious commodity in our society today, their time"

The Salford Partnership acknowledges that without our team of volunteers the service provided could not operate as effectively and efficiently as it does at the present time.

Statistics show that between October 95 and January 1996, 243 witnesses utilised the service. It is anticipated that this number will increase in the near future.

It should be noted that this support package is in no way restricted to witnesses within the CRIMINAL justice system. The Salford Partnership is aware of the importance of those people who are needed to give evidence in the Civil Courts, whether it be in order to obtain an eviction order in respect of a nuisance neighbour, or an injunction in the case of a victim of Domestic Violence.

Lyn Savage, Chief Clerk, Salford County Court

I have had a lot of experience of the operation of the Witness (Victim) Support Scheme at Manchester Crown Court and have seen at first hand the real benefits this brings, not only to those who are vulnerable and anxious. but also to the Court Service in terms of cases which would otherwise never reach court.

I am certain that the witnesses who attend this court will be offered a professional and supportive service which will do a great deal to make attendance at court far less traumatic. No witness who feels vulnerable or at risk need ever feel alone if they contact Salford Witness Support Service.

I am very pleased that the scheme will be operating at this court and endorse and support this excellent service.

Aims

To support witnesses before, during and shortly after court appearance, to include:

- Arrange pre-court familiarisation visits on day of trial or preferably beforehand.
- Assist witnesses on day of trial by liaising with Crown Prosecution Service if necessary, and obtain likely time when a support witness will be called.
- Give reassurance on particular fears and anxieties. Provide practical information/advice including emotional support.
- Provide a presence in the courtroom while a supported witness is giving evidence.
- Provide an opportunity for the witness to talk through their experience after their appearance at court.
- If necessary assist with expense/ compensation form:
- Inform witnesses of outcome of case, to include letter of appreciation.
- The provision of improved witness interview facilities at Police Stations.
- The provision of facilities at courts to ensure the security and sense of well being of witnesses.
- Introduction of 'Quality of Service' surveys to all witnesses.
- To provide witnesses with details of the progress of cases. Information of outcome of case.
- Witnesses to be accorded the courtesy, respect and support that their active citizenship deserves.

Delivery plan

Pre court

I. Ensure contact with all potential witnesses within one week of giving statement-referral. On information of potential witnesses being received from police, local authority or other agencies. details will be fed into computer which will automatically generate a letter, stating details of Witness Support Service.

2. On being contacted by a witness, the Co-ordinator will assess level of support required and liaise with relevant agencies. If ongoing support is required a volunteer will be assigned to the case, to provide practical information, advice and emotional support.

3. The Police Witness Liaison Officer will send date of court hearing to all prosecution witnesses, enclosing Salford Witness Support leaflet to reiterate support available.

4. To arrange pre-court familiarisation visits the Co-ordinator will liaise with the Chief Usher at Salford Magistrates Court.

5. To provide escort for vulnerable witnesses to and from Salford Courts, if necessary. A volunteer will be assigned to escort the witness, if this is not practicable other avenues will be explored.

During court

1. A list of prosecution witnesses will be provided to the Witness Support volunteers and Commissionaires by the Crown Prosecution Service. This will provide a safety measure ensuring that only the relevant witnesses gain entry to the Secure Witness Room.

2. The Court Ushers will escort witnesses from the Secure Witness Room to the court room. The volunteer will offer to be present in the court room whilst a witness is giving evidence, where possible.

3. Separate waiting rooms can be made available at County Court. The Co-Ordinator will liaise with the Chief Clerk prior to a witness attending to ensure that a secure room is available. If required a volunteer will provide a presence in the court room if allowed.

Post court

1. The Co-ordinator will ensure that all witnesses receive information on the final result of a case as soon as practicable. This will be accompanied by a computerised automatically generated letter, which will include acknowledgement of the public duty that they have performed. Attached will be a Quality of Service' questionnaire and freepost envelopes.

2. A week after the case, the assigned volunteer will ensure that where possible a follow-up contact is made with the witness, via telephone or second letter. This is to assess if there are any ongoing problems, or if further assistance is required. A contact list will be produced by the computer.

3. If a case is committed to Crown Court the Co-ordinator will refer the witness to the Crown Court Witness Support Service.

Salford Witness Support Service

Proposed Corporate Response Policy

Magistrates' Court (agreed)

The Salford Magistrates Courts will provide a safe, secure environment for prosecution witnesses attending court.

The Salford Witness Support Service will liaise with relevant court personnel in order to ensure a high standard of care and support is available to prosecution witnesses:

1. Commissionaires will receive a witness list daily and direct witnesses to the witness lounge.

2. Ushers will liaise with Salford Witness Support Service staff to arrange for witnesses to be escorted from the witness lounge to the courtroom.

3. The Salford Witness Support Service will liaise with the Chief Usher to arrange pre-court familiarisation visits.

4. Court personnel within the family section will refer witnesses to the Salford Witness Support Service.

5. Court personnel will provide the Salford Witness Support Service with information in respect of progress of cases, bail conditions where appropriate and case results.

6. Where a witness has special religious, ethnic or cultural needs, they will be identified by the court, and provision made.

7. Where there is a delay in the witness being called, or where the case is adjourned, the court will, at all times, keep the witnesses informed.

8. When listing cases, the court will always ensure that if the case involves sexual abuse or intimidation of witnesses, priority in listing the case will be given.

The Court will ensure all personnel are aware of the responsibilities and functions of the Salford Witness Support Service.

The courts will at all times promote the Salford Witness Support Service.

County Court (agreed)

Salford County Court will provide a safe, secure environment for witnesses attending court.

The Salford Witness Support Service will liaise with relevant court personnel in order to ensure a high standard of care and support is available to witnesses:

1. Security personnel will receive a witness list daily and direct witnesses to the safe witness room.

2. Ushers will liaise with Salford Witness Support Service staff to arrange for witnesses to be escorted from the safe waiting room to the courtroom.

3. The Salford Witness Support Service will liaise with the Court Manager to arrange pre-court familiarisation visits.

4. Court personnel within the family or civil section will refer witnesses to the Salford Witness Support Service.

5. Court personnel will provide the Salford Witness Support Service with information in respect of progress of cases and case results.

6. Where a witness has special religious, ethnic or cultural needs, they will be identified by the court, and provision made.

7. Where there is a delay in the witness being called, or where the case is adjourned, the

court will, at all times, keep the witnesses informed.

8. When listing cases, the court will always ensure that if the case involves sexual abuse or intimidation of witnesses, priority in listing the case will be given.

The Court will ensure all personnel are aware of the responsibilities and functions of the Salford Witness Support Service.

The Court will at all times promote the Salford Witness Support Service.

Police

The Salford Witness Support Service will liaise with the relevant police personnel, in order to ensure a high standard of care and support is available to prosecution witnesses:

1. The Police Witness Liaison Officer will refer all prosecution witness details to the Salford Witness Support Service as soon as practicable.

2. Individual police officers will identify, to the Salford Witness Support Service, witnesses they believe are particularly vulnerable.

3. Police officers involved in cases, will provide relevant background information in respect of actual or potential intimidation.

4. Where there is particular concern identified, police officers will liaise with the Salford Witness Support Service as to the appropriate use of Home Link Alarms in the homes of those witnesses.

5. The police, where possible, will provide improved witness interview facilities at police stations, to ensure a relaxing environment.

6. In cases where the Salford Witness Support Service identifies a serious risk to a witness attending court, police will, where possible, provide escort to and/or added security at court.

7. The police will provide evidence/ notification of criminal conviction in order to facilitate civil actions for Local Authority Housing to secure evictions. The Police will liaise with Salford Witness Support Service in all cases.

The police will ensure all personnel are aware of the responsibilities and functions of the Salford Witness Support Service.

The police will at all times promote the Salford Witness Support Service.

Crown Prosecution Service

The Salford Witness Support Service will liaise wit the relevant CPS personnel, in order to ensure a high standard of care and support is available to prosecution witnesses:

1. The CPS will provide a daily witness list to the Salford Witness Support Service.

2. CPS solicitors will ensure contact is made with all prosecution witnesses on the day of court appearance

3. CPS solicitors will provide an empathetic approach to prosecution witnesses.

4. Individual CPS solicitors will identify, to the Salford Witness Support Service, witnesses they believe are particularly vulnerable.

5. The CPS will provide relevant information in respect of cases, where appropriate, to the Salford Witness Support Service.

The CPS will ensure all personnel are aware of the responsibilities and functions of the Salford Witness Support Service.

The CPS will at all times promote the Salford Witness Support Service.

Housing

The Salford Witness Support Service will liaise with the relevant Housing personnel, in order to ensure a high standard of care and support is available to prosecution witnesses:

1. Housing personnel will refer all vulnerable witness details to the Salford Witness Support Service as soon as practicable.

2. Housing department solicitors will liaise with the Salford Witness Support Service regarding meetings of witnesses/potential witnesses taking place.

3. Housing personnel will provide relevant information in respect of cases, where appropriate, to the Salford Witness Support Service.

4. In cases where the Police and Salford Witness Support Service identifies a serious risk to a tenant who is a witness, they will be assessed for priority rehousing and agree a strategy of action against the perpetrator.

5. Where a tenant who is a witness has his/her property damaged due to intimidation the repairs to the property will be prioritised.

6. The Housing Department will provide evidence of a criminal behaviour to the Police, gathered during use of professional witnesses, when seeking evidence for civil action to secure evictions. The Housing Department will liaise with Salford Witness Support Service in all these cases. Similarly the Housing Department will expect information from the Police to assist civil action.

7. In order to ensure police response to alarms installed within the homes of vulnerable witnesses, the Housing Department will liaise with Salford Witness Support Service to co-ordinate their use.

8. The Housing Department will liaise with Salford Witness Support Service where it is considered appropriate to fit remote alarms.

The Housing Department will ensure all personnel are aware of the responsibilities and functions of the Salford Witness Support Service.

The Housing Department will at all times promote the Salford Witness Support Service.

Probation (agreed)

The Salford Witness Support Service will liaise with the relevant Probation personnel, in order to ensure a high standard of care and support is available to prosecution witnesses:

1. Probation officers will refer all vulnerable witness details to the Salford Witness Support Service as soon as practicable.

2. Probation personnel will, when they see fit, provide relevant information in respect of cases to the Salford Witness Support Service.

3. Where there is particular concern identified, the Probation Service, where possible, will inform the Salford Witness Support Service of any change in circumstances.

The Probation Service wild ensue all personnel are aware of the responsibilities and functions of the Salford Witness Support Service.

The Probation Service will at all times promote the Salford Witness Support Service.

Social Services

The Salford Witness Support Service will liaise with the relevant Social Services personnel, in order to ensue a high standard of care and support is available to prosecution witnesses:

1. Social Services will refer all vulnerable witness details to the Salford Witness Support Service as soon as practicable.

2. Social Services will provide relevant information in respect of cases, where appropriate, to the Salford Witness Support Service.

3. Where there is particular concern identified social workers will liaise with the Salford Witness Support Service as to the appropriate course of action.

4. Where appropriate, Social Workers will support witnesses and accompany them to Court.

Social Services will ensure all personnel are aware of the responsibilities and functions of the Salford Witness Support Service.

Social Services will at all times promote the Salford Witness Support Service

Crown Court (agreed)

The Salford Witness Support Service will liaise with the Crown Court Witness Service in order to ensure a high standard of care and support is available to prosecution witnesses.

1. When Salford Witness Support Service refer witnesses to the Crown Court Service, staff will when necessary, provide pre-court familiarisation visits and ensure safe secure facilities are available.

The Crown Court will ensure all personnel are aware of the responsibilities and functions of the Salford Witness Support Service.

N.H.S. Trusts (agreed)

1. The Salford Witness Support Service will work closely with relevant Trust staff, in order to ensure a high standard of care and support is available to prosecution witnesses known to the Trust, whether as staff or patients.

2. The Trust will ensure that all its staff are aware of the responsibilities and functions of the Salford Witness Support Service.

3. The Trust will, at all times, promote knowledge and understanding of the role of the Salford Witness Support Service.

4. Trust personnel will, if the individual agrees, refer details of all vulnerable witnesses to the Salford Witness Support Service as soon as practicable.

5. Where there is particular concern identified, Trust personnel will liaise with the Salford Witness Support Service to ensure that the appropriate level of support is given.

Victim Support (agreed)

The Salford Witness Support Service will liaise with the relevant Victim Support personnel, in order to ensure a high standard of care and support is available to prosecution witnesses:

1. Victim Support personnel will refer all vulnerable witness details to the Salford Witness Support Service as soon as practicable.

2. Where there is particular concern identified, Victim Support personnel will liaise with the Salford Witness Support Service as to the appropriate course of action.

3. Victim Support workers will continue to work with their clients and when necessary liaise with Salford Witness Support Service for information and advice.

Victim Support will ensure all personnel are aware of the responsibilities and functions of the Salford Witness Support Service.

Victim Support will at all times promote the Salford Witness Support Service

Education Welfare (agreed)

The Salford Witness Support Service will liaise with the relevant Education Welfare Officer, where appropriate in order to ensure a high standard of care and support is available to prosecution witnesses:

1. Education Welfare Officers will refer all vulnerable witness details to the Salford Witness Support Service as soon as practicable.

2. Where there is particular concern identified, Education Welfare personnel will liaise with the Salford Witness Support Service as appropriate.

Education Welfare will ensure all officers are aware of the responsibilities and functions of the Salford Witness Support Service.

The Education Welfare Service, as and when appropriate, will promote the Salford Witness Support Service

Citizens Advice Bureau (agreed)

The Salford Witness Support Service will liaise with the relevant C.A.B. personnel, in order to ensure a high standard of care and support is available to prosecution witnesses:

1. C.A.B. personnel will advise appropriate clients of the Salford Witness Support Service as soon as practicable.	The C.A.B will ensure all personnel are aware of the responsibilities and functions of the Salford Witness Support Service.
2. Where there is particular concern identified, C.A.B. personnel will, with the client's authority, liaise with the Salford Witness Support Service as to the appropriate course of action.	The C.A.B. will promote the Salford Witness Support Service when appropriate.

THE ROLE OF THE CROWN PROSECUTION SERVICE

Annex F: **The role of The Crown Prosecution Service**

Introduction

1. The Working Group has made various recommendations which have implications for the work of the Crown Prosecution Service. These include:

   - the need for inter-agency protocols to deal with witness intimidation and vulnerable witnesses (Recommendation 3, paragraph 4.21)

   - information about witness intimidation should be provided to courts dealing with bail applications (Recommendation 8.2, paragraph 4.37)

   - the need to keep witnesses informed about the defendant's bail application and conditions imposed (Recommendation 8.8, paragraph 4.37)

   - the need for vulnerable witnesses to be identified as early as possible in the investigation process (Recommendation 17, paragraph 5.11)

   - that further work should be undertaken with the relevant agencies, including the CPS to determine the best method of delivery of advice and assistance for vulnerable witnesses (Recommendation 21, paragraph 5.23)

   - that information about the needs of the witness and the witness' own views should always be passed on by the police to the CPS (Recommendation 25, paragraph 6.18)

   - need for an early strategy meeting between the police and CPS (Recommendation 26, paragraph 6.19)

   - need for a meeting between the witness and the prosecution (Recommendation 27, paragraph 6.28)

   - need for a national framework of guidance (Recommendation 32, paragraph 6.50)

   - that the CPS should apply to the Court for special measures to be made available to vulnerable intimidated prosecution witnesses who meet the definition in Recommendation 1 (paragraph 3.29). (Recommendation 33, paragraphs 7.4-7.10).

2. These recommendations need to be understood in the context of the role of the Crown Prosecution Service in the Criminal Justice System as a whole and the tests that the CPS is required to apply when reaching a decision to prosecute in a particular case.

3. In addition, the Working Group's proposals will need to take account of any recommendations arising from the independent review of the CPS, announced on 12 June 1997 by the Attorney General. The review is being carried out by Sir Iain Glidewell, a retired Lord Justice of Appeal.

The Role of the CPS

4. The CPS is the independent prosecuting authority for England and Wales. The Service is headed by the Director of Public Prosecution (DPP) who is politically independent but answerable to Parliament through the Attorney General. The Attorney General is responsible for appointing the DPP and superintends the DPP's work.

5. The main role of the CPS are:

   - to give advice about cases to the police (when asked)

   - to review every case passed to CPS by the police to ensure that the right defendants are prosecuted on the right charges;

   - to prepare cases for court

- to present cases in court and instruct advocates (usually counsel) in Crown Court cases;

- to work with others in the criminal justice system to meet the needs of victims, witnesses, other court users and the general public whilst maintaining fairness to the defendant.

6. The CPS is a national service with a focus on local delivery through a current framework of 93 branches and in the year 1996/97 the CPS dealt with more than 1.3 million cases in the magistrates' courts and around 120,000 cases in the Crown Court.

7. The police have sole responsibility for investigating criminal cases, collecting the evidence and preparing the case file. This means that, although the police may seek advice from the CPS about the likely prospect of conviction in specific cases, the CPS can only advise on the evidential implications of police actions and not on investigative strategy.

8. The CPS takes over almost every case in which the police charge a suspect. The exceptions are a limited number of road traffic offences known as "specified offences" and these cease to be "specified" if the defendant pleads not guilty.

9. Section 10 of the Prosecution of Offences Act 1985 requires a Code for Crown Prosecutors (the Code) to be published as a public document setting out the general guiding principles on which CPS decisions about prosecution are made. The Code ensures a consistent approach to decision making.

10. Each case submitted to the CPS by the police is reviewed. This involves examining the evidence and other information in the case file and making a decision about which, if any, charges it is appropriate to prosecute the accused for. The review process is continuous and a change to the case at any stage can mean that this decision to prosecute has to be reconsidered. In the light of the review a decision will be made to:

- continue with the original police charges;

- amend the charges; or

- sometimes stop the proceedings.

11. The review process is guided by the code which sets out two tests. The first is the evidential test. This is an objective test which provides that there must be enough evidence to secure a realistic prospect of conviction against each defendant on each charge. Evidence must be admissible and reliable. Issues relevant to the assessment of evidence as admissible and reliable, which are factors for all cases but could be particularly relevant to the evidence of vulnerable or intimidated witnesses, include competency and ability to provide an account to the court and to be cross examined.

12. "Realistic prospect of conviction" means that a jury or bench magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged. Only if the case passes this first test is the second test of "public interest" applied.

13. The public interest test recognises that breaches of the law should not automatically be prosecuted although, in cases of any seriousness, a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour.

14. Public interest factors in favour of a prosecution include:

- the seriousness of the offence (likely penalty);

- the effect of the crime on the victim;

- any radical motivation or other form of discrimination.

15. Relevant factors where there are vulnerable or intimidated witnesses include:

- the defendant being in a position of authority or trust;

- the victim is vulnerable, put in considerable fear, or suffered personal attack, damage or disturbance;

- where there is a marked difference in age - chronological or stage of development - between the victim and the defendant, or if there is any element of corruption.

16. Public interest factors against prosecution include:

- the health of the defendant (e.g. seriously or terminally ill);

- the likely effect of the prosecution on the victim's health.

17. The application of the public interest test is not an arithmetical exercise. Crown Prosecutors must decide in each individual case how important each factor is. Information on which to base this decision is therefore vital to the Prosecutor.

The Application of the Code in Cases Involving Vulnerable or Intimidated Witnesses

18. Factors relevant to cases involving vulnerable and intimidated witnesses are capable of affecting both the evidential and public interest considerations.

19. Although the CPS is an independent authority it works in close partnership with the police, the courts and others in the criminal justice system. The way in which cases involving vulnerable or intimidated witnesses are treated by other parts of the criminal justice system influences prosecution decision making.

Evidence

20. The decision to prosecute is closely connected to investigative decisions and cannot be seen in isolation. If the investigation results in little or no evidence to support a prosecution clearly this influences the prosecution decision.

21. Many cases involving vulnerable or intimidated witnesses which are not prosecuted for insufficiency of evidence will fail for reasons which have no relevance to the status of the witness e.g. where the suspect cannot be located. In other cases there may be difficulties affecting the strength of the evidence which could be influenced by earlier recommendations made by the Working Group. If these proposals are successful they should improve the availability and quality of the evidence given by vulnerable or intimidated witnesses. This should provide enhanced prospects for cases involving such witnesses to pass the evidential test of the Code for Crown Prosecutors.

Public Interest

22. Public interest factors relevant to cases with vulnerable or intimidated witnesses have been outlined above. These are likely to provide a balance in favour of prosecution in terms of public interest. However, cases which do not pass the evidential test cannot be prosecuted no matter how serious the offence is or how overwhelming in favour of prosecution in the public interest factors are. (In fact the Sanders research relating to witnesses with learning disabilities found that CPS pursued many cases where they knew that conviction was less than probable because they believed that this was in the public interest and because of a variety of pressures exerted on them by parents, social workers, families etc. This led to many cases being withdrawn as the trial was about to start or immediately after the victim gave evidence). By increasing prospects of witnesses being able to give their best evidence, more cases should properly qualify for consideration in respect of this second test, which is the public interest test, and not be in danger of failing later due to some foreseeable event.

VICTIM SUPPORT'S CROWN COURT WITNESS SERVICE

Annex G: **Victim support**

Introduction to the Crown Court Witness Service

What is a Crown Court Witness Service?

For many victims/witnesses, going to court can be a frightening and bewildering experience. Common problems may include:

- Not understanding the Witness Order and often being given very little notice about the date of the court appearance.
- Inadequate information about court procedures, court layout and the role of various court personnel.
- Having to wait, often for long periods, in the same area as the defendant and his/her supporters.
- Not being prepared for, or understanding, the process of cross-examination and often feeling that they themselves are on trial.

Victims Support's role is to enable the victim/witness to deal with the experience of attending court and giving evidence. In practice this means support is provided in the following ways:

Before the trial all victims and prosecution witnesses who are due to attend court are informed that the service is available through a standard letter.

This offers victims/witnesses the opportunity to make **an advance visit** to the court so that they can familiarise themselves with the layout of the courtroom, stand in the witness box, rehearse the oath or affirmation and discuss any particular fears or concerns. The volunteer will be able to explain the role of the different court personnel, the process of a trial and what can be expected when giving evidence.

On the day of the trial, the volunteer will address the practical requirements of the victim/ witness as well as being sensitive to their anxieties and to the likelihood of emotional upset, caused by the impending court appearance.

The practical needs may include **re-familiarisation with the courtroom layout** and of the different participants in the trial. Some (but not all) victims/witnesses will want to go to a quiet room away from the main waiting area. Most will prefer to wait in an area away from the defendant and his/her supporters.

Witnesses may wish to **look over their statements** and volunteers may help in obtaining this from the Crown Prosecution Service (CPS) law clerk, though they must not discuss the evidence or coach the witness in any way.

The volunteer should also be able **to find out the chronological progress of the trial** and the likely time when the supported witness will be called into court, though he or she will be careful not to discuss anything that has been said in court before the supported witnesses has given their evidence. The volunteer may need to contact other agencies such as the CPS law clerk if the victim/witness has any particular questions that cannot be answered by Victim Support.

Volunteers will help to reassure the victim/witness about the particular anxieties and fears that a court case will bring up. However, care is take to ensure that this support does not stray into a discussion of the evidence. Volunteers may find they are supporting victims/ witnesses for considerable periods of time, this, of course, being dictated by how long the victim has to wait to give evidence. The volunteer should also be conscious that the victim/ witness may need some privacy during the waiting period, perhaps to talk with family and friends, or maybe just to read or think over their evidence.

When called to give evidence, the volunteer will offer to **accompany the victim/witness into court**, though the victim's wishes should be respected if this offer is declined. The scope for support within the courtroom is limited: the

volunteer should not communicate with the victim/witness in any way, even by eye contact, as this may be prejudicial to the trial. The volunteer will sit in the public gallery.

However, although direct support work will not be appropriate or feasible within the courtroom, accompanying a victim/witness into court is important for two reasons: firstly, the victim knows that there is at least one person in the room who is "on their side" and this is often of comfort in its own right. Secondly, once they have given evidence, the victim/ witness will want to discuss their experiences with somebody who was present and aware of what happened in court. The volunteer may also need to explain any legal jargon or decisions that took place.

Some victims, particularly of rape or indecent assault, may prefer a Victim Support volunteer to go into court rather than a relative, as the victim may be unwilling for the full details of the incident to be heard by somebody close to them. Often a volunteer will also need to reassure the family/friend that it is important for the victim to make his/her own decisions.

After giving evidence, apart from allowing the victim/witness **to talk through their experience, the volunteer will assist with other practical matters** such as expense claim forms, or arranging for the victim/witness to find out the result of the case, particularly if they are unable to remain in court.

The Crown Court Witness Service aims to support victims/witnesses in advance, during and shortly after their court appearance. If the victim/witness needs further support, he or she should be **referred to their local Victim Support Scheme** or another appropriate agency.

Who is supported by the Crown Court Witness Service?

The Crown Court Witness Service supports:

- victims who are called as witnesses
- victims who may not be called as witnesses
- witnesses
- families/friends of victims

When the Witness Service was first set up, it was anticipated that the majority of witnesses supported would be those for the prosecution. Defence witnesses often benefit from being able to talk to the defendant's solicitor or barrister whereas witnesses for the prosecution do not have this relationship with the Crown Prosecution Service or prosecuting counsel and are thus more isolated arriving at court. In addition, it was felt that there could be inherent dangers in supporting defence and prosecution witnesses in the same case. Nevertheless, in practice, each Witness Service has supported defence witnesses on an occasional basis, when this has been appropriate.

Consequently whilst only prosecution witnesses are contacted in advance, the service offered when witnesses attend court is available to both parties, although the majority of those supported are associated with the prosecution.

The role of the volunteer in the court

In supporting a victim/witness in court, volunteers need to be clear about their role and the boundaries and limitations within which they are expected to operate.

A court-based volunteer should:

- provide basic information on court procedure and layout
- undertake a pre-court familiarisation visit
- prepare the victim/witness for possible verdicts and sentences
- be able to listen to and empathise with victim's concerns and anxieties
- accompany a victim/witness into court if requested, sitting in the public gallery
- be available after the victim/witness has given evidence and explain any legal jargon or decisions
- refer the victim/witness to their local Victim Support Scheme or other agency, if appropriate.

A volunteer will never:

- discuss the giving of evidence

- give an opinion on the likely outcome of the case
- comment in court on the effect of the crime on the victim

The Crown Court Witness Service operates according to national standards and criteria. These criteria ensure that best practice is adopted, and, in addition, ensure that neither staff or volunteers are ever likely to put themselves in a position that would prejudice the course of a trial.

VICTIM SUPPORT'S WITNESS SERVICE IN THE MAGISTRATES' COURTS

Annex H: Victim Support's Witness Service in the Magistrates' Courts

Introduction

In 1990, Victim Support began work developing a Witness Service for the Crown Court, and since 1996 they have provided a service at every Crown Court centre in England and Wales. Witnesses, particularly those with special needs, have benefited greatly from the services which have enabled them to fulfil their role as witnesses more effectively.

As a result of the success of the services in the Crown Courts, Victim Support started to receive requests from magistrates' courts to provide similar services to meet the needs of their witnesses. At present, dedicated Witness Services are run by Victim Support in approximately 130 magistrates' courts. Funding comes from a variety of sources, but in the absence of secure national funding, grants are for time limited periods only. New services continue to be developed while some have already closed down after funding has come to an end.

In addition to the dedicated Witness Services, all Victim Support Schemes provide a limited service to magistrates' courts by accompanying witnesses who are already known to them or who are referred prior to the day of the trial.

The following description of the work undertaken by the Witness Service at the Northampton Magistrates' Court and the leaflet used by the Witness Service at Blackpool, Fylde and Wyre are included to illustrate the services provided. The service in Northampton is provided directly from within the magistrates' court, while the service in Blackpool, Fylde and Wyre is operated from the local Victim Support Scheme.

• The Northampton Magistrates' Court Witness Service

A service provided by Northamptonshire Victim Support

This service, which is managed by Northamptonshire Victim Support Scheme, has been operational since October 1994. Day to day supervision is provided by a part-time (20 hours a week) co-ordinator who has an office within the court building. A waiting room is provided for witnesses and the service is free and confidential.

The service has been provided by the Scheme at the request of the Magistrates' Court Committee who, following the success of the Victim Support Crown court Witness Service, were also willing to fund it. The service uses national policies, guidelines, training programmes and local service agreements with the main criminal justice agencies. A team of trained volunteer workers deliver the service under the supervision of the co-ordinator.

Every prosecution witness attending the court receives a letter advising him or her of the service and what it can offer, including the opportunity to contact the co-ordinator before the trial and have an advance visit to the court. The service aims to meet every prosecution witness on the trial day to offer basic information about the facilities and court procedure. Emotional support, including accompanying the witness whilst they give evidence, is also offered, depending on need and resources. To optimise resources the co-ordinator receives regular updated information about trials and prosecution weeks from the court and Crown Prosecution Service (CPS).

The service is available to any witness, including defence witnesses, although this will be dependant on referrals. If an advance request for support is received it will be met.

Our experience over the past three and a half years is that the need for a Witness Service is as great in the magistrates' court as in the Crown Court. Although less 'serious' cases are heard there, nevertheless most witnesses have never been to court before and experience nervousness and anxiety. Apparently 'minor' crimes can hide a history of harassment, neighbour and racial, and domestic violence. The Witness Service in the magistrates' court regularly deals with those victims who require emotional support and referral. Referrals are made both from and to Victim Support and other agencies. Additionally, because

of the local nature of the magistrates' court, witnesses can be known defendants and to their associates, giving rise to fears of intimidation.

The service has the full confidence of the police, the court, the CPS and other court user agencies, including the Law Society. It has built up contracts with specialist units within the police, with agencies such as Women's aid and refuges, and with Child Protection Units and social and psychiatric services, with the aim of identifying vulnerable and sensitive witnesses at an early stage. Victim Support and the Witness Service have worked closely with other agencies in forums such as the Trials Issues Group to establish service agreements covering the treatment of witnesses, especially those with special needs, and the Scheme is well placed to monitor them and feed in information.

The Scheme's aim is to provide a comprehensive and seamless service to victims and witnesses, with continuity of service from crime to trial, and post-trial support if required. By working together the Victim Support Branch and the Witness Services in both courts can provide information, advice and support at every stage.

In the twelve months prior to 31 March 1997, the Northamptonshire Magistrates' Court Witness Service supported 772 people at court. Of this total number: 30% were victims of crime; 11% were children; 31% were crimes of violence; and, 10% requested support in court whilst they were giving their evidence.

The Magistrates' Court Committee would like to see a Victim Support Witness Service in every magistrates' court in the country. At present, through packages of short term funding, a service is provided in three of the six court centres.

VICTIM SUPPORT

VICTIM SUPPORT WITNESS SERVICE

BLACKPOOL FYLDE AND WYRE MAGISTRATES COURT

The Witness Service

- Exists to support victim/witness attending Blackpool, Fylde & Wyre Magistrates Court.
- Offers free and confidential help, and is independent of the courts & the police.
- Has trained volunteers who will be glad to offer you friendly guidance and support.
- Is part of Fylde Victim Support

We Can

- Show you round a courtroom before your case comes to court.
- Give you some information about what happens in court.
- Possibly provide a private place for you to wait before the trial and during any breaks.
- Provide a sympathetic volunteer to discuss any worries you may have about the process.
- Accompany you into court if you wish.
- Provide information about ongoing support after the trial, if you need it.

What we cannot do

It is not possible for us to give you any legal advice.

We cannot, under any circumstances discuss your evidence, or that of anyone else involved in the case.

For many witnesses, giving evidence in court can be a confusing and anxious time.

If you would like to contact Victim Support prior to the case, please ring or write to the address below.

Fylde Victim Support
Nat West Bank Chambers
6 Orchard Road
Lytham St Annes
FY8 1RY

Telephone number 01253 712995

This leaflet is sponsored by British Aerospace for the Witness Service
A service provided by Fylde Victim Support

CHILD EVIDENCE ISSUES

Annex J: **Child Evidence Issues**

Introduction

This annex outlines the action currently being taken by the Government in relation to various child evidence issues.

Prosecutions

2. The CPS Inspectorate reported in January on cases involving child witnesses. In addition to identifying issues of concern such as not all cases qualifying for special treatment are being identified and the low levels of background information available about the child which is needed to assist in making prosecution decisions, this report revealed some positive messages about progress:

   - motivated and committed staff and good working relationships between criminal justice agencies;
   - improved processing periods and timeliness of relevant applications;
   - increased use of provisions designed to assist children e.g. transfer proceedings;
   - increased availability of good practice guidance on child witness cases.

3. The CPS Inspectorate report makes a number of recommendations to improve the identification of child witnesses, the provision of appropriate advice and reviewing, preparing and presenting child witness cases in court. In addition, HMIC are in the process of conducting a thematic inspection of police forces on wider child protection issues, which will include an examination of the way video recorded interviews with children are conducted and also pre-trial handling of child witnesses. This report is due to be published later in the year.

4. There are concerns about the discontinuance of child abuse prosecutions. The CPS Inspectorate examined 53 cases which were stopped in the magistrates' courts. Of these, 73% were terminated on evidential grounds and 19.3% in the public interest. Just fewer than 60% of these cases were terminated by discontinuance by the CPS under Section 23 of the Prosecution of Offences Act 1985. The remainder were either withdrawn at court, or concluded by the prosecutor offering no evidence. The wish of the child not to give evidence was the most common reason for termination. The Inspectorate were told by lawyers that it would be exceptional to discontinue a case on the ground that to do so was in the best interests of the child, where the child was willing to give evidence. The Inspectors were told by representatives of Social Services that there was not enough consultation with the child, family or carer in deciding what was in the child's best interests. The Inspectorate's report recommends that before the discontinuance of a case on the ground that it is in the best interests of the child for it not to proceed, full and appropriate consultation should take place and that a full explanation should be provided to the police where the case is to be discontinued.

5. A number of relevant research projects are currently in progress; two of which aim to identify the reasons for discontinuance and, together with other projects, are looking at ways to improve the investigation and prosecution of offences against children.

Current research

(a) Police operations against child sex abusers

6. The Home Office has commissioned researchers from Birmingham University to identify and develop effective police strategies for the prevention and detection of

child sexual abuse. This project is due to be completed in late Spring.

(b) Attrition of child abuse cases

7. Bernard Gallagher from the University of Manchester has recently begun a two year study to measure the rate of attrition; the characteristics of terminated cases at each stage of the criminal justice system; the reasons for termination and to determine the implications for policy and practice.

(c) Attrition in rape cases

8. The conviction rate for rape has dropped from 24% in 1985 to 10% in 1996, while the number of rapes recorded by the police has increased three times in the same period. A research study on attrition in rape cases is currently being conducted by the Home Office with the aim of discovering what factors influence whether or not recorded rape leads to a conviction for rape and whether such factors have changed over the period 1985 to the present day. This project is due to be completed towards the end of this year.

(d) Audit of training in police interviewing of child witnesses in child sexual abuse prosecutions

9. Professor Graham Davies of Leicester University has recently completed an audit of training in interviewing child witnesses together with proposals for a national curriculum for police training. This will be published shortly.

(e) Memorandum of good practice

10. Professor Davies is also conducting a literature review on the memorandum of good practice on video-recorded interviews with child witnesses. This is due to be completed in June.

(f) Admissibility and sufficiency of evidence in child abuse prosecutions

11. As mentioned in paragraph 10.3 of the Report, a team from Bristol University is examining whether child abuse prosecutions fail or do not proceed on evidential grounds.

(g) Evaluation of the Sex Offender Register

12. The Home Office will shortly be commissioning research to evaluate the operation of the sex offender register introduced by the Sex Offenders Act 1997. It is envisaged that this will take 9 months with findings published in mid 1999.

Child Evidence and the Court Process

(a) The existing provisions

13. The existing child evidence provisions enable the use of live CCTV links, video recorded evidence - in - chief and prohibition on cross- examination by the defendant in person in proceedings for offences of violence, sex, cruelty and neglect.

14. The Steering Group on Child Evidence (SGCE) was established in 1994 and its primary functions are to monitor the implementation of the child evidence provisions, oversee their evaluation and to take forward and resolve any issues arising. The Group is chaired by the Home Office and reports to Home Office Ministers. It comprises representatives from interested Government Departments and Agencies (CPS, HMIC, LCD, JSB, DH, ACPO, ADSS) and since last year arrangements have been made for NGOs who work with child witnesses to participate in regular meetings with the Steering Group.

15. Issues with which the SGCE has previously been involved include the good practice video, "A Case for Balance" for the judiciary and the legal profession which was produced in 1997 by the NSPCC and part funded by the Home Office and other Government Departments.

16. The SGCE has been taking forward a number of issues relating to child witnesses.

    (i) Fast tracking of child abuse cases: An initiative to fast track cases involving children was promulgated by the Criminal Justice Consultative Committee (CJCC) to Area Committees. Most Area Committees have such a scheme in place or alternative arrangements have been

made to ensure that these cases are dealt with as speedily as is consistent with the interests of justice. In January 1998 the CJCC endorsed proposals from the Lord Chancellor's Department (LCD), following the piloting of a form designed to monitor fast track schemes. The aim is to start collecting data from 1 July. This will involve the monitoring of all children's cases which fall within the agreed definition, not just those cases within the fast track scheme.

(ii) Preparing the child for court: The Crown Prosecution Service (CPS) has developed a table showing the preparation required by a child who is to attend court, covering magistrates' courts, the Crown Court and the Youth Court. It identifies clearly the action required and who amongst the criminal justice agencies is responsible for carrying out the preparation, and sets this out within time scales. This will inform the discussion and future action in taking forward this issue.

(iii) Revision of the Child Witness Pack: A sub-group of the Steering Group on Child Evidence has overseen the revision and expansion of the Child Witness Pack - now renamed the Young Witness Pack. On 19 June a national launch of the Pack will take place in London - organised by NSPCC and ChildLine, who have been instrumental in bringing together the government departments who have assisted with and helped fund the work. The Pack contains a number of leaflets and booklets for young witnesses (aged from 5 to 17) designed to help them understand the court process and thereby help them give best evidence, together with a booklet for their parents/carers and (for the first time) a detailed Handbook for practitioners.

(iv) The supporter in the TV link room: The SGCE is taking this issue forward in consultation with appropriate agencies.

(v) Provision of transcripts of video evidence: The CPS has taken responsibility for this, and established a new unit to carry out the work on 1 December 1997. Current throughput indicates that there will be 6,000 tapes of (on average) 40 minutes duration for transcription each year.

(vi) Quality of playback of video evidence: Following approval by the Court Service Management Board, "boxes" have been installed in selected courts which are capable of improving the quality of playback.

(vii) Pre-trial therapy: Following detailed consideration of the issues relating to the provision of pre-trial therapy by a multi-disciplinary group led by the CPS, good practice guidance has been drafted on which (shortly) there will be wide consultation. Subject to the outcome, the guidance is due to be published jointly by the Department of Health and the CPS later this year.