

CAJ's submission no. 259

**CAJ's Response to Special
Measures Consultation – Dept of Justice**

May 2010

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What is the CAJ?

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

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

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

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

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

Special Measures Consultation

Delivery Improvement Unit

Criminal Justice Delivery Division

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20 May 2010

Re: Consultation on the statutory special measures to assist vulnerable and intimidated witnesses give their best evidence in criminal proceedings

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

The Special Measures provisions are designed to enhance delivery of justice within the criminal justice system and a vital component of this incorporates the need for victims or witnesses to give the best evidence possible. In recognising that the experience of giving evidence in court may be particularly intimidating for most witnesses, it is acknowledged that vulnerable and intimidated witnesses may require additional assistance to enable them to give their best evidence and to ensure that their evidence is not lacking in quality due to their vulnerable or intimidated status. CAJ is very pleased to see that many of the recommendations made to the NIO during the special measures pre-policy consultation last year have been taken on board in this DOJ consultation document.

I. Proposals arising from the special measures pre-policy consultation

We strongly agree with the proposal to bring the *Criminal Evidence (NI) Order 1999* in line with other aspects of the national law which acknowledge that a 'child' includes all young people under the age of 18. The United Nations *Convention on the Rights of the Child* (CRC) (Article 1) defines the 'child' as a person below the age of 18 and recalls the *Declaration of the Rights of the Child* which states that 'by reason of his physical and mental immaturity' the child requires 'special safeguards and care, including appropriate legal

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protection'. By extending the Special Measures provisions to apply all witnesses under the age of 18, Northern Ireland will concur with international standards (section 1).

We also agree with the proposal to permit young people to have a say in how they give evidence and whether they want to avail of special measures (section 2). The child has been identified as needing particular protection when giving evidence in criminal proceedings due to their inherent vulnerable characteristics. Specifically, the *UN Guidelines of Justice in Matters involving Child Victims and Witnesses of Crime* ('*UN Guidelines*') acknowledge that children are 'vulnerable and require special protection appropriate to their age, level of maturity and individual special needs'. The CRC is explicit in stating that the 'best interest' of a child shall be the primary consideration for all public and private institutions when making any decisions regarding a child (Article 3) and by recognising the child's 'evolving capacities' (Article 5) the CRC accepts the increasing competence of the child to determine what is in their own 'best interests'. This is further acknowledged in that 'due weight' must be given to a child's views in accordance with the child's 'age and maturity' (Article 12). This is particularly relevant given that the CRC further provides the right to for a child to be 'heard in any judicial and administrative proceedings' (Article 12) which affect the child and where s/he displays adequate maturity and understanding. The proposals will further the compliance of the government of Northern Ireland with the CRC which effectively guarantees a child's right to participate in any judicial or administrative proceedings affecting him/her (article 12).

The right of the child to be treated with dignity and compassion throughout criminal proceedings is outlined under the *UN Guidelines* (Article V) and determines that throughout the criminal justice process, taking into account their personal situation, age, level of maturity, child witnesses should be treated in a caring and sensitive manner. Furthermore the *UN Guidelines* (Article IX) suggest that child witnesses should be provided with assistance to enable them to partake effectively at all stages of the justice process.

Considering such standards and recommendations, it would thus follow that where the court deems it to be in the best interests of the child and where accompaniment would enable young witnesses and other vulnerable witnesses to participate more effectively in the criminal proceedings, CAJ agrees with the proposal (section 3) to amend the Criminal Evidence (Northern Ireland) Order 1999 (Article 12) in order to enable a supporter to accompany a witness when giving evidence *via* live link room.

The consultation document asks 'Do you agree that the court should have powers to direct that a supporter can accompany a witness when they are giving evidence in the live link room?' However, the previous supporting paragraph speaks only in reference to 'young witnesses'. As a result it is not

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clear whether the amendment to Article 12 of the Criminal Evidence (Northern Ireland) Order 1999 would be specific to ‘young witnesses’ or all vulnerable witnesses. Clarification on this is needed.

In the Council of Ministers *Position of Victims in the Framework of Criminal Law and Procedure (Recommendation No. R(85)11)*, the Council of Europe highlights the importance of enhancing the confidence of a victim ‘especially in his capacity as a witness’ and further advocates that when possible and appropriate, ‘children and the mentally ill or [disabled] should be questioned in the presence of their parents or guardians or other persons qualified to assist them’. This principle and the *UN Guidelines* noted above to provide the necessary assistance to facilitate the effective participation of witnesses in judicial proceedings apply to the proposal (section 5) to amend the Criminal Evidence (Northern Ireland) Order 1999 (Article 17) so as to allow those with communication difficulties to have the assistance of an intermediary. As a result, commencement of Article 17 should clearly be a priority.

However, as we noted last year in our response to the evaluation and review of Special Measures, Article 17 states that the examination of the witness may be conducted through an intermediary who is described as an ‘interpreter or other person approved by the court’. However, no information is given as regards who can qualify as an ‘intermediary’. Moreover, the present consultation refers to ‘communication difficulties’ but does not give an indication of how this is defined, or when, how and by whom a witness will be assessed as having a communication difficulty. Clarification on this is needed.

As we pointed out one year ago, the section of the CJSNI website which aims to inform witnesses in relation to ‘going to court’ does not use the term ‘intermediary’ but speaks of a ‘communicator or interpreter’. Whilst this may seem to be a detail, it is important to recognise that for the criminal justice system to be more accessible and easier to understand for stakeholders, it is necessary, for example, that consistent terminology is used.

The provisions provided for in Article 16 of the Criminal Evidence (Northern Ireland) Order 1999 permit video recorded cross-examination or re-examination raises serious questions regarding the rights of victims (and witnesses) versus the rights of defendants (section 4). Application of this special measure, once commenced, would clearly need to weigh these conflicting rights. In addition to the fundamental right to a fair trial, common law provides for right of the defendant to cross-examine. CAJ would support that this special measure be used only in exceptional circumstances, in cases with the most vulnerable of witnesses such as the very young, those with certain mental incapacity or those who have a terminal or degenerative illness, as noted in the consultation document. However, at some stage post-implementation CAJ believes that the DOJ should assess whether the pre-

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recording of cross-examination or re-examination impacts on the right to a fair trial.

CAJ agrees that there are significant ‘practical actions’ and ‘implementation issues’ which need to be addressed (many of which were highlighted in the pre-policy consultation process last year) but we question how successful a multi-agency sub-group of the Victim and Witness Task Force (VWTF) may be in addressing the operational effectiveness of special measures (section 6). Given that there is confusion as to the VWTF in relation to the Victims, Vulnerable and Intimidated Witnesses (VVIW) Steering Group, it may be a better approach to appoint an individual (with the help of a designated team, if necessary) to take the lead in relation to this issue. Additionally, as we noted in the pre-policy consultation effective and consistent application of the special measures in a manner which serves witnesses and furthers justice requires that clear procedures are understood and embraced by all stakeholders.

CAJ supports the proposal for the Criminal Justice Inspection to review (section 7) the operation of special measures by the relevant agencies. However, we would also suggest that the DOJ tender for a longer-term research project to be undertaken by a local academic or research institution to further assess the impact of special measures from the point of view of witnesses and defendants. Given the ramifications that an accusation of rape may have on an individual and his family, such a review should include an assessment of how the automatic eligibility of special measures for witnesses (who are complainants) in cases of sexual offences impacts on defendants and the resulting judgement.

II. Additional proposals for amendments to special measures legislation

As noted above, if witness in proceedings related to offences involving firearms, knives and offensive weapons are granted automatic eligibility (section 1), the rights of the witness appear to precede those of the defendant and it is noted that it is not explicitly stated that the witness need be the complainant (as is the case in relation to automatic eligibility in respect of sexual offences). CAJ requests that, similar to our suggestion in the previous statement, the DOJ should undertake to ascertain if the automatic eligibility results in unexpected ramifications on the right to a fair trial for the defendant.

It is important to consider that the application of some special measures may have a negative effect on the proceedings. The (automatic) application of special measures in cases of rape, given the possible resulting impact on an innocent defendant (and his family) may infringe upon the right to a fair trial. Because of this it is asserted that special measures should only apply in exceptional circumstances where as in Article 5 of the Criminal Evidence (Northern Ireland) Order 1999, the quality of a witness’ evidence would be

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reduced. If eligibility is automatically established by reference to the type of offence (as where the offence involves the use of firearms, knives or offensive weapons) under consideration, the court will not need to consider whether fear or distress will diminish the quality of an individual's evidence, but only whether any of the special measures would be likely to improve the quality of evidence given.

CAJ notes that the consultation document (section 2) speaks of 'serious' sexual offences. However, the term 'serious' is not used in the Criminal Evidence (Northern Ireland) Order 1999. Clarification as to whether there is an intended differentiation is requested.

The proposal (section 2) to admit video recorded statements as evidence in chief may lead to fewer withdrawals of complainants in cases of sexual offences, but must be monitored for having unanticipated consequences for defendants. Although we commend the Department of Justice for aiming to provide certainty to complainants in case of sexual offences, it is vital that the rights of the victim do not undermine the rights of the defendant.

At the same time, it is important that complainants are made aware of their rights. That the consultation document explicitly states that it is the complainant's responsibility to initiate the entitlement to give video recorded evidence ('the requirement to admit the video recorded evidence in chief would only apply if a party to the proceedings makes an application requesting that it should be admitted') appears to be at odds with the strategic mission statement of the Criminal Justice System Northern Ireland (CJSNI) *Bridging the Gap between needs and service delivery 2007 – 2012* policy document, which is:

We are committed to enhancing our responsiveness to the needs of victims and witnesses of crime. We seek to do this by delivering quality services in a coordinated manner, which both improves their experience of engagement with the criminal justice system, and delivers better outcomes for the individual and the justice process.

We support the specific reference in the policy document (section 3) to the proposal which, although relaxing the restrictions on a witness giving additional evidence in chief, will require that the court give permission for Prosecution Counsel to ask questions further to the video recorded statement. The proposal to amend Article 15 appears to increase the safeguards in relation to the defendant's right to a fair trial (specifically the right to cross-examination) while balancing the protection of vulnerable witnesses.

III. Vulnerable defendants

CAJ strongly believes that the vulnerable defendants have the right to special

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measures and therefore support the proposals to extend provision of the intermediaries and live link to vulnerable defendants. We commend the DOJ for proposing to provide this assistance to vulnerable defendants.

Bearing in mind the UN *Convention on the Rights of Persons with Disabilities*, which affirms that states should ensure ‘effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages’ (article 13), CAJ supports the proposal to extend the definition of vulnerable defendant (accused) found in the Criminal Justice (Northern Ireland) Order 2008 (article 82) to include physical disability and thus mirror the wordage found in Article 4 of the Criminal Evidence (Northern Ireland) 1999 which outlines those who may be considered a vulnerable witnesses.

Although not proposed in the consultation document, we would support a legislative amendment which would provide the court with the power to direct that a supporter can accompany a vulnerable defendant when they are giving evidence by live link.

Various presentations at the June 2009 conference ‘*Locked Up and Locked Out: Communication is the key*’ (hosted by the Royal College of Speech and Language (RCLST) and Youth Justice Agency) noted that there are significant and the detrimental gaps in the current provisions for offenders who have speech, language and communication needs (SLCN) and yet approximately 60% of offenders have significant communication disabilities or speech, language and communication needs (SLCN).¹ This suggests that more needs to be done in relation to understanding these needs and the impact that they may have on the judicial process and the implications on the defendant’s right to a fair trial as guaranteed under the ECHR (Article 6).

As noted previously, clarification regarding how ‘communication difficulty’ is defined and identified is required.

Again, although we support the proposals made in relation to vulnerable defendants, from a human rights perspective, they fall short: the age of criminal responsibility in Northern Ireland is one of the lowest in Europe and as a result children from the age of 10 can be charged and brought before a criminal court. This low age disregards the principle of *doli incapax* (incapable of crime) and has left child defendants in a particularly vulnerable situation with regard to being held criminally responsible.

¹ Presentations by Jane Mackenzie, Policy Officer, Royal College of Speech and Language Therapists and Professor Karen Bryan, University of Surrey at ‘*Locked Up and Locked Out: Communication is the key*’ conference. University of Ulster, Jordanstown. 23 June 2009.

Thank you again for permitting us to partake in this consultation process and we look forward to your subsequent response.

Sincerely,

Jacqueline Monahan, PhD
Criminal Justice Programme Office