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Identifying Vulnerable and Intimidated Witnesses

1.1 Introduction

Burton *et al* (2006) estimate that 54 per cent of all witnesses could be classified as vulnerable or intimidated and that 'on a very conservative estimate' some 24 per cent might be eligible for special measures. In contrast to this statistic, the police only explicitly identified 3–5 per cent of all witnesses as vulnerable or intimidated during the course of Burton *et al's* research, a figure that rose to 9 per cent when the researchers examined the case files. It would, therefore, seem that the police explicitly identify only a tenth of the witnesses who might be classified as vulnerable or intimidated and less than a fifth of those who could be eligible for special measures, leaving most vulnerable and intimidated witnesses to be identified as such by the Court Service and many of them without the benefits of special measures (such benefits were reported by Hamlyn *et al* (2004)). So what is going wrong? Perhaps an exploration of the history of the classification and treatment of vulnerable and intimidated witnesses, and the way in which the police are made aware of it, might help to shed some light on this issue.

1.2 Background

The fact that the criminal justice system regards certain groups of people as 'vulnerable' is not new. What has changed over the years is how the concept of vulnerability has been operationally defined and addressed. The Administrative Guidance to the Judge's Rules included an early attempt to standardize the way in which children (under 17) and anybody with a language difficulty were treated. Mental ability was not addressed at this time but it later became an issue for the Fisher Inquiry (1977) which, together with the Judge's Rules, influenced the Royal Commission on Criminal Procedure (1978 to 1981). The Royal Commission subsequently influenced the Police and Criminal Evidence Act 1984 and the Codes of Practice that accompany it, resulting in provision being made for appropriate adults to ensure the fair treatment of witnesses and suspected offenders defined as 'vulnerable' with reference to youth, language, or mental ability.

Increasing public concern about the high number of cases involving child witnesses which were not successfully prosecuted subsequently led to provision being made for those under 14 in cases of violence and those under 17 in cases involving sexual offences to give their evidence via live closed-circuit television link (s 32 of the Criminal Justice Act 1988). The intention behind such a provision was that it would go some way to reducing the stress experienced by the witness while giving evidence, resulting in an improvement in the quality of their testimony. In this sense, the Criminal Justice Act made the definition of vulnerability more complicated by linking the age of a child witness to particular types of offence. At the same time, the Government set up the Advisory Group on Video Evidence, chaired by Judge Thomas Pigot QC, to consider ways

in which more cases involving child witnesses might be prosecuted. All this happened in parallel with several government inquiries into cases of child abuse, notably in Cleveland (published in 1987) where both the police and social services had been severely criticized for making use of inappropriate investigative techniques, including the use of leading questions in interviews.

The Home Office published what has become known as the Pigot Report in 1989. The report made a number of important recommendations that included provision being made for video-recorded evidence-in-chief and video-recorded cross-examination for child witnesses. It went on to suggest that these provisions be extended to other vulnerable witnesses in the fullness of time and that the definition of vulnerability be further developed to this end.

The first high-profile recommendation in the Pigot Report to be acted upon was the insertion of s 32A into the Criminal Justice Act 1988 by the Criminal Justice Act 1991, allowing those child witnesses who were already eligible to give their evidence via live closed-circuit television link to give their evidence-in-chief on a pre-recorded video. Guidance governing the conduct of these interviews was duly published in the form of the *Memorandum of Good Practice on Video Recorded Interviews with Child Witnesses for Criminal Proceedings* (Home Office, 1992). While the provisions set out in ss 32 and 32A of the Criminal Justice Act were applicable to child witnesses to any sexual and violent offence, the social context of the Cleveland Inquiry Report and the Orkney Inquiry Report (1992), still fresh in the minds of policy-makers, meant that in practice the emphasis was very much on joint working between police and social services in child protection cases.

The effect of ss 32 and 32A of the Criminal Justice Act and its operational emphasis on joint investigations in child protection cases was to create a two-tier system of the way in which child witnesses were treated. Children who were victims of or witnesses to child abuse perpetrated by a carer were usually interviewed on video. Such a video was subsequently played as evidence-in-chief and the child cross-examined by way of live television link. The same provision was in principle available to child witnesses in sexual or violent cases where the perpetrator was not a carer, but it was often confined to the more serious offences involving homicide or sexual assault perpetrated by a 'stranger' because those trained to interview child witnesses were predominantly child protection investigators and they were a limited resource. For other child witnesses, the provisions of Code C of the Codes of Practice to the Police and Criminal Evidence Act 1984 (PACE) still applied. Such provisions effectively meant that child witnesses deemed by the police as capable of making a written statement (with or without a declaration under s 9 of the Criminal Justice Act 1967) were interviewed in the presence of an appropriate adult.

By the mid 1990s, the treatment by the courts of another group of vulnerable witnesses, victims of sexual assault, had also become a cause for concern. Cross-examination by unrepresented defendants in person and the reluctance of the judges to afford these witnesses protection from the disclosure of their

previous sexual history was a particular source of anxiety. These concerns, combined with a desire to further progress the recommendations made in the Pigot Report, were fuelled by research demonstrating the disproportionate extent to which vulnerable groups such as people with learning disabilities are victims of crime (see Westcott (1991) for a review of the literature). Such concerns were translated into manifesto commitments by the main political parties prior to the General Election 1997. The Labour Government set up an interdepartmental working group within a month of coming to power and the Home Office published the fruit of their endeavours in the form of the *Speaking Up for Justice* Report in June 1998. *Speaking Up for Justice* made 78 recommendations intended to help vulnerable and intimidated witnesses to give evidence. The first of these recommendations proposed a definition of vulnerability that was based on two categories: those vulnerable 'as a result of personal characteristics' such as a disorder or disability (referred to as 'category [a]' witnesses) and those 'whose vulnerabilities depend on circumstances' such as witnesses suffering emotional trauma or intimidation (referred to as 'category [b]' witnesses). While this categorization of vulnerability has undergone some refinement since 1998, it still underpins the definitions that investigators coming into contact with witnesses work with today.

The recommendations requiring legislation in *Speaking Up for Justice* were enacted in Pt II of the Youth Justice and Criminal Evidence Act 1999. This legislation defines 'vulnerable' and 'intimidated' witnesses (ss 16 and 17) and focuses on a number of provisions (eg restrictions on personal cross-examination by a defendant in sexual assault cases) and 'special measures' (eg the use of screens to prevent the witness seeing the defendant and vice versa) that are intended to help witnesses to give best evidence. Chapters I to V of Pt II of the Youth Justice and Criminal Evidence Act 1999 are reproduced in Appendix A for reference. In 2002, the Home Office published *Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable and Intimidated Witnesses* (referred to as 'ABE' hereafter), a document that replaced and extended the Memorandum of Good Practice to take account of the new legislation and the developments in research and practice that had taken place during the course of the previous 10 years. A number of related Action for Justice programme publications, including *Vulnerable Witnesses: A Police Service Guide* (Home Office, 2002), were published at the same time. *Vulnerable Witnesses: A Police Service Guide* is of particular significance to this chapter because it sets out a number of prompts intended to assist the police in identifying vulnerable and intimidated witnesses.

1.3 Witnesses

Before considering how 'vulnerable' and 'intimidated' witnesses are defined in the Youth Justice and Criminal Evidence Act (YJCEA), it might be helpful to consider who witnesses are in a general sense. Witnesses are defined in s 63 of

the YJCEA as: '... any person called, or proposed to be called, to give evidence in the proceedings'.

For practical policing purposes this means anybody, except a suspected offender, who is likely to give evidence in a trial. The implications of this are that people simply providing antecedent background information about the victim of a crime will not usually be regarded as witnesses unless they are in possession of some evidence about the offence (for example, a threat or a confession). On the other hand, the definition is clearly not restricted to direct eye or ear witnesses to the incident itself. The effect of this is that people in a position to provide circumstantial evidence that implicates a suspected offender will be witnesses (for example, people who witness the disposal of a weapon or other property associated with the offence).

The *Code of Practice for Victims of Crime* (Office for Criminal Justice Reform, 2005) adds further clarity to this definition when it draws a distinction between vulnerable victims and vulnerable witnesses. The Code does this by providing for an enhanced 'service' for vulnerable victims (paras 4.2 and 4.6) and enhanced 'support' for those victims who are likely to give evidence in court, ie witnesses (paras 1.6 and 5.8). From this point of view, the Code effectively defines victims as people who have suffered the effects of crime and witnesses as people who give evidence in court; not all victims are witnesses, not all witnesses are victims.

1.3.1 **Vulnerable witnesses**

The fact that legislation and Home Office guidance uses the term 'vulnerable' in relation to witnesses in at least two different ways is testimony to the complexity of defining the term. While the YJCEA, the Code of Practice for Victims, and the recent consultation draft Witness Charter (Office for Criminal Justice Reform, 2005) draw a distinction between 'vulnerable' and 'intimidated' witnesses, 'intimidated' witnesses are treated as a category of 'vulnerable' witness in *Speaking Up for Justice* (para 3.29), by *Vulnerable Witnesses: A Police Service Guide* (para 2.1), and the current edition of ABE (paras 1.3 and 3.1). When reading government publications it is, therefore, important to understand whether the term 'vulnerable' includes 'intimidated' witnesses or whether intimidated witnesses are regarded as a separate category.

While the inclusion of intimidated witnesses as part of a wider vulnerable category stems from the focus on circumstances that forms part of the definition in the original *Speaking Up for Justice* report, practitioners from the criminal justice agencies, notably the police and the Crown Prosecution Service (CPS), tend to use the term 'vulnerable' to refer only to those witnesses defined as such under s 16 of the YJCEA. 'Intimidated' witnesses (as defined in s 17 of the YJCEA) tend to be thought of as forming a separate category. This is probably the case because of the differences between vulnerable and intimidated witnesses in their eligibility for the 'special measures' (eg 'intimidated' witnesses are not eligible for aids

to communication) and variations in the implementation timetable (eg video-recorded evidence-in-chief was not available to 'intimidated' witnesses at the time of writing).

'Vulnerable' witnesses are essentially those defined as such by virtue of their personal characteristics, as recommended in *Speaking Up for Justice*, plus those defined as vulnerable as a result of their youth. This definition is set out in s 16 of the YJCEA, as follows:

- All child witnesses (under 17); and
- Any witness whose quality of evidence is likely to be diminished because they:
  - Are suffering from a mental disorder (as defined by the Mental Health Act 1983); or
  - Have a significant impairment of intelligence and social functioning; or
  - Have a physical disability or are suffering from a physical disorder.

1.3.2 **Child witnesses**

Child witnesses are automatically 'vulnerable', although the extent to which they qualify for special measures as a result of this categorization varies according to the nature of the offence. Section 21 of the YJCEA effectively creates a sub-category of child witnesses 'in need of special protection' with reference to those who are witnesses in cases of 'sexual' or 'violent' offences. This focus on sexual or violent offences is similar to that in ss 32 and 32A of the Criminal Justice Act 1988, except that the upper age limit is set at 17 for both types of offence.

In the case of offences committed on or after 1 May 2004, 'sexual offence' means any offence contrary to:

- Part 1 of the Sexual Offences Act 2003; or
- The Protection of Children Act 1978 (as amended by s 45 of the Sexual Offences Act 2003).

In the case of offences committed before 1 May 2004, 'sexual offence' means any offence contrary to:

- The Sexual Offences Act 1956;
- The Indecency with Children Act 1960;
- The Sexual Offences Act 1967;
- Section 54 of the Criminal Law Act 1977; or
- The Protection of Children Act 1978.

'Violent offence' means:

- Any offence of kidnapping, false imprisonment, or an offence under ss 1 or 2 of the Child Abduction Act 1984;
- Any offence under s 1 of the Children and Young Persons Act 1933; or

- Any other offence involving:
  - Assault on;
  - Injury to; or
  - A threat of injury to a person.

The sub-category of child witnesses 'in need of special protection' is important because it has implications for the admissibility of their video-recorded interviews as evidence-in-chief in terms of the legislative provision and the implementation timetable.

1.3.3 **Witnesses vulnerable by virtue of a disorder or disability**

The court must take account of the views of the witness in determining whether a witness is vulnerable by virtue of disorder or disability (s 16(4)). In addition to this, when determining whether the quality of the witness's evidence is likely to be diminished in these circumstances, the court has to consider the likely completeness, coherence, and accuracy of that evidence (s 16(5)).

The legislation makes no distinction between:

- Those experiencing the effects of a life-long disorder or disability (eg Autistic Spectrum Disorder and Down's Syndrome) and those who experience such effects as a result of illness or injury in later life (eg the effects of a stroke or an injury sustained as a result of an assault or a road collision); or
- Disorders and disabilities that might fluctuate in their effects over a period of time (eg schizophrenia and other forms of psychosis) and according to the degree of stress arising from the social context.

In these circumstances, while the court will take account of the likely condition of the witness at the time of any trial, investigators should keep their options open at the time of the investigation by classifying the witness as vulnerable and, with the necessary consent, conducting the interview on video so that the possibility of video-recorded evidence-in-chief can at least be considered at a later stage.

Vulnerable Witnesses: A Police Service Guide (Home Office, 2002) sets out a number of prompts that are intended to help the police to identify vulnerable witnesses. These prompts fall into two groups: behavioural characteristics and physical characteristics. Behavioural characteristics include apparent difficulties in communicating or understanding, having a short attention span, being in an extreme emotional state (eg violent or withdrawn), and expressing strange ideas. Physical characteristics include unusual, uncontrollable, or hesitant movement of the body, head, or eyes. These prompts are not intended to be diagnostic of a disorder or disability. The Guide acknowledges that these characteristics might equally be accounted for by the effects of drugs or alcohol or that they could be due to external pressures arising from a stressful situation. In this sense, the prompts are intended to be used as a set of indicators that might

merit further investigation when the circumstances of the witness and the case have been taken into account.

1.3.4 **Intimidated Witnesses**

'Intimidated' witnesses are those that are classified in *Speaking Up for Justice* as being vulnerable as a result of the circumstances. This classification has been developed by s 17 of the YJCEA where intimidated witnesses are defined as those whose quality of testimony is likely to be diminished by reason of fear or distress.

In determining whether a witness falls into this category, the court is obliged to take account of:

- The nature and alleged circumstances of the offence;
- The age of the witness;
- Where relevant:
  - The social and cultural background and ethnic origins of the witness;
  - The domestic and employment circumstances of the witness; and
  - Any religious beliefs or political opinions of the witness.
- Any behaviour towards the witness by:
  - The accused;
  - Members of the accused person's family or associates;
  - Any other person who is likely to be either an accused person or a witness in the proceedings.

Complainants in cases of sexual assault are defined as falling into this category per se by s 17(4) of the Act.

Vulnerable Witnesses: A Police Service Guide also lists a number of prompts aimed at helping the police to identify witnesses who are, potentially, intimidated. Given that intimidated witnesses are by virtue of the definition originally set out in *Speaking Up for Justice* those vulnerable by circumstance, these prompts focus on the:

- Nature of the offence (sexual offences, domestic violence, racially motivated crime, and repeat victimization);
- Relationship between the witness and the alleged offender (eg a carer);
- Living conditions of the witness (living in a place where there is a history of hostility towards the police or living in close proximity to the alleged offender or his or her associates);
- Background of the alleged offender (notably, where he or she has a history of violence or intimidation).

The Guide also suggests that elderly and frail witnesses should be regarded as intimidated when the court takes account of their age, as required by s 17 of the Act.

Since the publication of the Guide, the *Code of Practice for Victims of Crime* (Office for Criminal Justice Reform, 2005) has extended these prompts a little further by including the families of homicide victims in the intimidated category.

1.4 Problems with Identification

That relatively few vulnerable and intimidated witnesses are identified by the police and the CPS as such is, perhaps, not surprising for three reasons.

1.4.1 Changing definitions

The complex nature of vulnerability is such that the definition of vulnerability has changed over the years: from children under 17 and those with language difficulty to a more mature definition that also encompasses people with a disorder or disability and those in fear or distress of giving evidence. Such a definition has not simply developed in a cumulative fashion with the addition of new groups of witnesses. Its development has instead been rather messy at times with more restrictive definitions overlapping broader definitions, such as was the case when the limited provisions of the Criminal Justice Act 1988 stood in some contrast to the broader approach adopted in the PACE Codes of Practice, and such as is the case today where some definitions of vulnerability include intimidated witnesses while others treat intimidated witnesses as a separate category.

1.4.2 Visibility

The evaluation by Burton *et al* (2006) suggests that the police are more likely to identify vulnerable witnesses who might be considered highly visible (eg children and victims of sexual assault) than those who are not necessarily so visible (eg some witnesses with mental illness or learning disability). Such a lack of visibility is likely to be compounded by a societal stigma towards disability that motivates those able to do so to conceal any disorder or disability that they might have.

1.4.3 Method of training

Burton *et al* found that, with a few exceptions, most of the training aimed at improving the ability of the police to identify vulnerable and intimidated witnesses was done by means of distance learning, with no follow up classroom-based training. They found that this had little effect on police understanding and, thus, performance.

While it is accepted that the police will never be able to identify all vulnerable and intimidated witnesses, a position in which only a fraction of these witnesses are identified is untenable because:

- A failure to identify a witness as vulnerable or intimidated, where it is possible to do so, is unethical because it could increase the stress experienced by the witness in court as a result of denying them access to special measures;
- The criminal justice system is likely to be less effective because it is unlikely to consider the special measures and provisions that are intended to give the witness fair and equal access to justice;
- A failure to 'take all reasonable steps' to identify a vulnerable or intimidated victim as such might result in adverse comments being made by the court and disciplinary proceedings by virtue of the *Code of Practice for Victims of Crime* (such a provision might be extended in the future with the inception of a witness's charter).

The importance of adequate police training in the identification of vulnerable and intimidated witnesses cannot, therefore, be overstated.

1.5 Chapter Summary

The definition of 'vulnerability' is a complex one that has evolved over time and will undoubtedly continue to do so. The current definitions of 'vulnerable' and 'intimidated' witness are as follows:

- 'Vulnerable' witnesses are those under 17 and anybody of any age with a disorder or disability that is likely to diminish the quality of their evidence. These witnesses are vulnerable by virtue of their 'personal characteristics'.
- 'Intimidated' witnesses are those likely to be in fear or distress over testifying as a result of their circumstances or those of the offence (including the behaviour of the suspected offender).

Research suggests that police are poor at identifying vulnerable and intimidated witnesses. This situation must change for reasons associated with ethics, effectiveness, and policy.